

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES AND FEDERAL COMMUNICATION
COMMISSION v. EDGE BROAD CASTING COMPANY,
t/a POWER 94

CASE NO: 92-486

PLACE: Washington, D.C.

DATE: Wednesday, April 21, 1993

PAGES: 1-52

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES AND FEDERAL :
COMMUNICATIONS COMMISSION, :
Petitioners :
v. : No. 92-486
EDGE BROADCASTING COMPANY, :
t/a POWER 94 :
- - - - - x

Washington, D.C.
Wednesday, April 21, 1993

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:11 a.m.

APPEARANCES:

PAUL J. LARKIN, JR., ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Petitioners.

CONRAD MOSS SHUMADINE, ESQ., Norfolk, Virginia; on behalf
of the Respondent.

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C O N T E N T S

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ORAL ARGUMENT OF	
PAUL J. LARKIN, JR., ESQ.	
On behalf of the Petitioners	
CONRAD MOSS SHUMADINE, ESQ.	
On behalf of the Respondent	
REBUTTAL ARGUMENT OF	
PAUL J. LARKIN, JR., ESQ.	
On behalf of the Petitioners	

1 PROCEEDINGS

2 (11:11 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 92-486, United States and Federal
5 Communications Commission v. the Edge Broadcasting
6 Company.

7 Mr. Larkin.

8 ORAL ARGUMENT OF PAUL J. LARKIN, JR.

9 ON BEHALF OF THE PETITIONERS

10 MR. LARKIN: Thank you, Mr. Chief Justice, and
11 may it please the Court:

12 This case involves a First Amendment challenge
13 by a radio station to Congress' regulatory program for
14 broadcast lottery advertising. Sections 1304 and 1307 of
15 title 18 create a simple bright line geographically based
16 rule under which a station's right to broadcast lottery
17 advertising hinges on the state to which that radio
18 station is licensed.

19 A radio station licensed to a state like
20 Virginia that runs a state lottery can broadcast lottery
21 advertising about that state's lottery or any other state
22 lottery. By contrast, a radio station licensed to a state
23 like North Carolina without a state lottery cannot
24 broadcast lottery advertising about any state lottery. It
25 is the validity of that bright line rule that is at issue

3

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1 as applied to respondent in this case.

2 The district court in a divided panel of the
3 Fourth Circuit held this regulatory program
4 unconstitutional under the commercial speech standard this
5 Court adopted in the Central Hudson case. Those courts
6 reasoned that Congress had legitimate and substantial
7 interests involved in helping the states pursue their
8 policies towards gambling. Those courts also concluded
9 that this regulatory program was narrowly tailored to
10 achieve that end.

11 Nonetheless, those courts held these statutes
12 unconstitutional as applied to respondent on the ground
13 that in that circumstance it did not directly advance
14 Congress' goals.

15 QUESTION: Mr. Larkin, under a First Amendment
16 analysis in commercial speech cases when we apply Central
17 Hudson do we look case-by-case at an as-applied challenge
18 or do we simply look to whether the Central Hudson test is
19 met and it's a reasonable response to the overall problem?
20 Is there such a thing as an as-applied case-by-case look
21 in the analysis?

22 MR. LARKIN: Your Honor, the as-applied type of
23 challenge that I think the court contemplated under the
24 commercial speech basis is a challenge that would go to
25 show that a particular broadcast in this case should not

1 properly be treated as commercial speech. That type of
2 as-applied challenge can always be brought.

3 We don't believe that these statutes should be
4 construed to apply to editorials and news stories. In
5 fact the decree entered by the district court in this case
6 so construed the statutes. We did not challenge that
7 aspect of the decree in the court of appeals.

8 QUESTION: But as applied here insofar as it
9 addresses the problem of a commercial advertisement, do we
10 look at some case-by-case approach and say well, look, in
11 this case it's so close to the border it's ridiculous as
12 applied to Edge?

13 MR. LARKIN: No, Your Honor, you don't. Both
14 precedent from this Court and reason indicate to the
15 contrary. First the precedent. In the case of --

16 QUESTION: I'm not sure the precedent is all
17 that clear, so I'm interested to hear your response.

18 MR. LARKIN: In the case of Ward v. Rock Against
19 Racism this Court addressed a similar argument. In that
20 case people were using the band shell in New York City
21 Central Park. The city had a regulation that was treated
22 as a time, place, and manner regulation of the speech. It
23 required people using the band shell to use city equipment
24 and have a city employee run it.

25 The city had this regulation in place to serve

1 two competing goals, competing goals much like the
2 competing goals at issue here. It was to insure that the
3 concerts were loud enough so that they could be heard by
4 concert goers but not so loud that they would disrupt the
5 surrounding communities.

6 The argument that was made on behalf of Rock
7 Against Racism is that regulation doesn't serve its
8 purposes as applied to us because we're loud enough so
9 that everybody hears us. There is no need to worry about
10 whether or not that goal is served.

11 This Court rejected that argument. The Court
12 said that the validity of a time, place, and manner
13 regulation serves on the general purposes that the
14 Government seeks to serve through the regulation and not
15 on how it's applied in an individual case.

16 One week later in the case of SUNY v. Fox this
17 Court said that the analysis under a time, place, and
18 manner regulation is substantially similar to the analysis
19 that is applied in the commercial speech area.

20 We think the combination of those two cases as a
21 matter of precedent indicates that you don't look at a
22 station-by-station approach, you don't undertake that type
23 of analysis to decide in this case whether Congress'
24 regulation of the broadcast spectrum is permissible.

25 QUESTION: So we just apply Central Hudson?

1 MR. LARKIN: Correct. You look in this case to
2 see whether the legislative judgment is reasonable. That
3 is what this Court said in Central Hudson.

4 QUESTION: Well, do we have to ask for instance
5 whether there is a substantial Government interest in, in
6 what? In protecting North Carolina citizens from knowing
7 about what goes on in Virginia?

8 MR. LARKIN: I wouldn't say it's from knowing
9 about what goes on in Virginia. We're not seeking to
10 suppress general information. What Congress has sought to
11 do here is accommodate the conflicting goals of Virginia
12 and North Carolina. Virginia believes --

13 QUESTION: What is North Carolina's goal insofar
14 as it deals with commercial speech about something going
15 on lawfully in Virginia?

16 MR. LARKIN: North Carolina's interest in not
17 having its citizens participate in gambling. North
18 Carolina doesn't permit private lotteries on a large scale
19 basis, it doesn't run a state lottery, because it's
20 interest is in not having North Carolinians gamble. That
21 is the interest they have --

22 QUESTION: Even in another state where it's
23 lawful?

24 MR. LARKIN: Even in another state where it's
25 lawful because they bring the problems back home. If

1 someone goes to another state and impoverishes himself he
2 comes back and then can become a burden on the citizens
3 who don't gamble. So North Carolina has an interest in
4 protecting the citizenry of the State of North Carolina
5 both against the harms that gambling can cause to
6 participants as well as the harms that gambling can cause
7 to third parties.

8 That is an entirely legitimate interest and we
9 think Congress can reasonably attempt to accommodate the
10 interests of Virginia and North Carolina and that the
11 Central Hudson test is sufficiently flexible to allow --

12 QUESTION: But certainly the people in North
13 Carolina can hear ads in a Virginia licensed station,
14 can't they?

15 MR. LARKIN: If they are in a community that is
16 close to the border and if the border state has a lottery,
17 as it does here, and the broadcast airwaves cross state
18 lines, as they do, that can happen. But it is nonetheless
19 reasonable for Congress to focus its statutes on the
20 geographic lines separating lottery from non-lottery
21 states. After all, stations like respondent's stations
22 are licensed to serve a community, and unless they serve
23 that community they will not hold onto their license.

24 QUESTION: Do we know how far these licenses
25 typically allow, I mean how large a geographic area the

1 broadcast reaches typically?

2 MR. LARKIN: Well, I'm told by the FCC that on
3 average there is a 50-mile radius for broadcast lottery,
4 for broadcasters. So you have that situation which
5 therefore can repeat itself along the border in various
6 circumstances.

7 QUESTION: Was it a condition of licensure that
8 the transmitter be located in North Carolina?

9 MR. LARKIN: No, it was not a condition, and in
10 fact you can have your transmitter located in a different
11 state. The license requires you to serve a community, in
12 this case the community is the Elizabeth City community.

13 QUESTION: Why do we know that this is a North
14 Carolina station, because of where its principal office is
15 located or where its transmitter is located?

16 MR. LARKIN: That's where it's licensed to. As
17 a matter of fact there is no dispute about that. There's
18 an argument made by one of the amici that you can treat
19 this station as having been licensed to Virginia and North
20 Carolina, and there is utterly no factual support for that
21 at all. The complaint filed by the respondent, the
22 stipulation of facts, the district court decision, the
23 court of appeals decision, and even their own brief in
24 this Court all concede that they are licensed to North
25 Carolina. The reason is under the broadcast regulations

1 that are in effect you are licensed to serve a community.
2 Here the community is Elizabeth City, North Carolina. So
3 that they are not licensed to serve Virginia.

4 And the way the FCC looks at it is this. You
5 are licensed to serve that community and it is your
6 responsibility to do so. If you do so you are satisfying
7 the concerns that the FCC has when it licenses you. If by
8 chance your broadcasts go into another state, that is not
9 a problem because that's just physically what happens, but
10 it is not a bonus. You are required to serve your
11 community, and here the community is in a state that has a
12 state policy against lotteries. It has a state policy
13 against lotteries because it wants to dissuade its
14 citizens from gambling.

15 QUESTION: Just one more question of a
16 preliminary nature. Does the FCC ever license for an
17 inter-state community, say the Washington metropolitan
18 area or something?

19 MR. LARKIN: You can be licensed to serve an
20 area that includes more than one state.

21 QUESTION: I'm a little puzzled by that, Mr.
22 Larkin. They are licensed to serve Elizabeth City, North
23 Carolina, but isn't it something like 90 percent of their
24 listening audience is outside of Elizabeth City?

25 MR. LARKIN: Well, they have set up their

1 transmitter north of Elizabeth City so that it is close,
2 it is about, you could say midway on a map between
3 Norfolk, Virginia Beach and Elizabeth City. What they are
4 doing in essence is trying to serve Elizabeth City as they
5 are required to do but also serve the interests of the
6 State of Virginia so that they can hopefully sell lottery
7 ads.

8 QUESTION: But is it not true that -- how much
9 magic is there in the words licensed to Elizabeth City
10 when, as I understand it, Elizabeth City represents only 4
11 or 5 percent of their total audience, of the total market?

12 MR. LARKIN: I think the actual number is 8
13 percent, but I'm not going to quibble about the numbers.

14 QUESTION: 8 percent, whatever.

15 MR. LARKIN: If that --

16 QUESTION: Are they unlicensed to serve the 92
17 other percent of their audience?

18 MR. LARKIN: Well, if you want to put it that
19 way it's fine because the way the scheme works is to focus
20 on where you license the service. The statute, for
21 example, requires that licenses be allocated so that
22 communities are served, and the FCC --

23 QUESTION: In other words they are mandated to
24 serve that Elizabeth City. They have a duty, I guess, to
25 serve that community. But they also are permitted under

1 their license, are they not, to broadcast to a much larger
2 audience? And is this larger audience totally irrelevant
3 to the problem that we have to confront?

4 MR. LARKIN: Yes.

5 QUESTION: It is totally irrelevant?

6 MR. LARKIN: Yes.

7 QUESTION: Even though they have, I guess they
8 have a First Amendment right to transmit it as long as
9 there's no statutory objection to an audience that, you
10 could pose to a lot of people who want to buy lottery
11 tickets in Virginia.

12 MR. LARKIN: Well, that's what we're here to
13 decide. Since they are in North Carolina, since Congress
14 has adopted a bright line rule, and since it's an
15 unavoidable law of physics that the broadcast waves will
16 cross into Virginia, it is our position that while that
17 happens --

18 QUESTION: Well, that's not an unavoidable -- I
19 suppose the license restriction could say your signal
20 shall be no stronger than is necessary to serve the area
21 for which you're specifically licensed. I guess they
22 could limit them to the North Carolina area, and then this
23 thing might make some sense. But as I understand it
24 they're authorized to broadcast, and if they conflicted
25 with other stations there would be a problem, I gather,

1 when you have scarce frequencies. But they are
2 authorized, as I understand it, not merely to license, to
3 broadcast to the small community but to a larger audience
4 that mostly includes Virginia residents.

5 MR. LARKIN: Your Honor, the reason I disagree
6 is you use the term authorized. That's not the way the
7 scheme works. It's not as if they are given the authority
8 to go ahead and broadcast into Virginia. They are
9 licensed and authorized to serve Elizabeth City.

10 QUESTION: But is it not true that if their
11 broadcasting into Virginia interfered with the signals of
12 other, of Virginia stations in Virginia they would then be
13 subject to some kind of restriction from the FCC?

14 MR. LARKIN: Yes. If their broadcast --

15 QUESTION: So they are, they are authorized in
16 the sense that the license allows them to do that without
17 any Federal objection.

18 MR. LARKIN: Well, for different purposes. In
19 other words they are authorized in the sense that there is
20 a different Federal law that governs licensing and it
21 doesn't forbid them from conducting the broadcasts in the
22 way they do here. They are not authorized in the sense
23 that the statutes that they have challenged here as
24 applied to them permits them to engage in this type of
25 activity.

1 QUESTION: Is the licensee, is the license
2 conditioned on obeying governing Federal statutes relating
3 to, such as the one we've got before us?

4 MR. LARKIN: Absolutely. If they --

5 QUESTION: So this station clearly is not
6 authorized to broadcast gambling information to, from
7 where it is.

8 MR. LARKIN: That's right. And if they violate
9 this law they can not only be criminally prosecuted under
10 title 18, they can have, when their license comes up for
11 renewal they can have their license taken away from them.

12 QUESTION: Mr. Larkin, I didn't, I guess I knew
13 but I had forgotten that you didn't have to have your
14 transmitter located within the community that you're
15 licensed to serve. I suppose -- and I had thought that
16 one of the things that supported your position or the
17 Government's position is that it, the Government certainly
18 might think it unreasonable to permit the state law to be
19 violated on the very ground of the state by transmitting
20 from its own soil advertisements that are against its
21 public policy.

22 But as I understand the way things can work, if
23 you had a transmitter, if you had a station licensed to a
24 community which permitted gambling you could have your
25 transmitter located across the border in a state that bans

1 gambling and you could broadcast from that state gambling
2 announcements which would go to the community to which
3 you're licensed since that community permits it, and would
4 also go to the people within that state that you're
5 broadcasting from, which is not the community you are
6 licensed to serve. Am I correct about that?

7 MR. LARKIN: Yes, that's my understanding, that
8 you could have a situation in the way you posit it. But
9 the reason it's a reasonable scheme here is that different
10 states have adopted their policies and you are licensed to
11 serve a community within that state. If you are violating
12 the laws of that state by broadcasting the advertisements,
13 regardless of physically where they actually happen to
14 emanate from, you are disserving the policies of the state
15 that you are licensed by the FCC to serve. That is one of
16 the key ingredients of the licensing scheme.

17 QUESTION: Is it often true that you're licensed
18 to a community that contains only 4 to 5 percent of your
19 listening audience? That seems very strange to me.

20 MR. LARKIN: Often? I wouldn't say it's often,
21 but what I would say is this. If you are in a community
22 that is rather sparsely populated it probably becomes
23 easier to obtain a license to serve that community than it
24 would be if you are trying to seek a new license in New
25 York City, for example, where there are numerous stations.

1 If there aren't very many stations in the area, or perhaps
2 if there are none, that you are trying to serve, it
3 becomes that much easier to show that you will be able to
4 meet a need in that community that is not now being met.

5 Now, what you can have in a situation then is
6 somebody come in and try to serve the interests of that
7 community and, if you will, also try to serve perhaps the
8 surrounding community.

9 QUESTION: Or vice versa. I expect it happens
10 all the time, Mr. Larkin, that in fact whoever got the
11 license expected to make more money in the Norfolk area
12 than in Elizabeth City. Have you ever been to Elizabeth
13 City? It's very nice. It's on the way to the outer
14 banks, but there ain't much there.

15 (Laughter.)

16 MR. LARKIN: I think I have been through it but
17 I haven't stopped off. What we were talking about is the
18 second point that I hope to make today, which is that what
19 we have here is a reasonable scheme, and the Central
20 Hudson test reasonably accommodates that.

21 I would also, however, like to say just a few
22 words about the first point we have made in our brief
23 which is that for purposes of the commercial speech
24 doctrine lawful gambling should not be treated differently
25 from illegal gambling. And the reason is gambling is one

1 of a small category of unique products or activities.
2 This Court in Posadas referred to these sorts of
3 activities, such as the consumption of alcohol and
4 gambling and the like.

5 What you have is a situation where they are
6 activities that have traditionally been deemed harmful to
7 participants and to third parties and for which there
8 always seems to have been a black market available.
9 Because they are deemed harmful to individuals in society
10 the society has always attempted to regulate them heavily
11 and sometimes flatly to ban them altogether, as most
12 states do in connection with casino gambling.

13 In some instances, however, society can
14 rationally conclude that the costs of a flat prohibition
15 are too injurious for society to bear, and as the result
16 the appropriate approach to undertake is the one that
17 Professor Epstein has called damage control, legalization
18 and regulation where the regulation includes a ban on the
19 advertising of that activity. That is the sort of
20 approach that has been undertaken for example with respect
21 to gambling, with respect to alcohol, and other similar
22 matters.

23 It's where you have that type of narrow
24 activity, not the broad range of activities that can
25 potentially be regulated by the Congress, by the state

1 legislatures, and by the municipalities, that we think the
2 rationale that was expressed in Posadas of greater
3 includes the lesser is a reasonable rationale to apply.

4 QUESTION: You don't even need to reach Central
5 Hudson?

6 MR. LARKIN: Correct. Under the first point we
7 have made in our brief you would -- well, you could read
8 Central Hudson but wouldn't get very far. You would stop
9 at step 1.

10 QUESTION: Yes.

11 MR. LARKIN: You would say that this activity
12 should be treated in the same way as illegal activity, and
13 we know from the Pittsburgh Press case and Central Hudson
14 that that wouldn't be protected. If --

15 QUESTION: So, even if we didn't disagree with
16 you on that, even if we didn't agree with you on that you
17 would say Central Hudson is satisfied?

18 MR. LARKIN: Correct. We would then go on and
19 say that what the courts did in this case was misapply the
20 Central Hudson test.

21 QUESTION: May I ask you about this lesser
22 includes the, or greater includes the lesser? Can North
23 Carolina prohibit its citizens from going over to Virginia
24 and buying lottery tickets?

25 MR. LARKIN: No, I don't think they can prohibit

1 interstate travel in this region. They can prohibit --

2 QUESTION: Just can they prohibit them from
3 buying lottery tickets? They are their own citizens, they
4 have rights to tell them what they can do. You don't
5 think they could prohibit them from buying lottery
6 tickets?

7 MR. LARKIN: Well, it depends whether they
8 brought them back to North Carolina. I mean, for example,
9 if a state decriminalized possession of marijuana, an
10 adjacent state could certainly say you can't travel across
11 the border and bring it back simply because it's legal in
12 that state. But a state, State A can't regulate what
13 happens in State B.

14 QUESTION: Even by its own citizens?

15 MR. LARKIN: By its own citizens.

16 QUESTION: But then how does it get the
17 authority to prevent its own citizens to hear about the
18 lottery that's available in Virginia?

19 MR. LARKIN: Well, because they bring the harm
20 back with them. If State A --

21 QUESTION: No.

22 MR. LARKIN: If State A makes it a crime to
23 drink alcohol and State B doesn't --

24 QUESTION: But I'm just -- let's talk about
25 lotteries only.

1 MR. LARKIN: Okay.

2 QUESTION: What, how can North Carolina prevent
3 its citizens from buying lottery tickets in Virginia?
4 Maybe they cash them in down there too. And if it --
5 first question is can they prevent their own citizens from
6 buying lottery tickets in Virginia? If the answer is no,
7 how then do you justify a restriction on advertising
8 directed at North Carolina citizens who might want to buy
9 the Virginia lottery tickets?

10 MR. LARKIN: They can't prohibit them from
11 travelling to North Carolina to purchase a ticket, excuse
12 me, to Virginia to purchase a ticket --

13 QUESTION: But then how can they prohibit
14 advertising designed to encourage them to travel to
15 Virginia and buy them?

16 MR. LARKIN: Because North Carolina and Congress
17 together can prohibit interstate transportation of lottery
18 tickets and other items that would --

19 QUESTION: No, no, I'm not -- my example doesn't
20 involve any interstate transportation of lottery tickets.
21 It only involves interstate transportation of North
22 Carolina citizens who want to buy the lottery tickets in
23 Virginia, and therefore would like to know about the
24 lottery through the channels of communication that the
25 First Amendment sometimes protects?

20

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1 MR. LARKIN: Well, but Congress can prohibit the
2 Virginia lottery from operating if it believes that the
3 interests of a state like North --

4 QUESTION: But it hasn't.

5 MR. LARKIN: But it can, and that's our
6 argument. Until the mid-seventies, 1974, there were no --

7 QUESTION: But can Congress prohibit North
8 Carolina citizens from patronizing the Virginia lottery or
9 say only Virginia citizens may patronize the Virginia
10 lottery?

11 MR. LARKIN: Well, I don't think Congress can
12 achieve the greater in that way, but they can achieve the
13 greater by prohibiting Virginia from having a lottery.
14 And in that way they would satisfy the interests of North
15 Carolina in making sure that North Carolinians can't
16 participate in what is now an illegal lottery.

17 QUESTION: And by the way, North Carolina
18 doesn't purport to forbid its citizens from listening to
19 lottery ads from Virginia stations. They don't --

20 MR. LARKIN: They couldn't.

21 QUESTION: No, they couldn't. And so they --

22 MR. LARKIN: They don't have that power.

23 QUESTION: Its citizens can listen to lottery
24 ads from Virginia stations all they want to.

25 MR. LARKIN: Well, that -- North Carolina lacks

1 that power. Congress could do that.

2 QUESTION: Well, I know, but North Carolina
3 doesn't purport to keep its citizens from --

4 MR. LARKIN: That's right. My greater includes
5 the lesser point relies on the combined power of the State
6 of North Carolina and Congress, and as we have tried to
7 lay out in our brief, we think that narrowly can be
8 applied to a case like this one.

9 QUESTION: And under your submission, I take it,
10 the Congress of the United States could forbid a North
11 Carolina newspaper from running a Virginia lottery ad?

12 MR. LARKIN: If it were sent through the mails.

13 QUESTION: No, no. My hypothetical is that just
14 no newspaper that buys its newsprint in interstate
15 commerce and that is located in a state which prohibits
16 the lottery can advertise some other state's lottery.

17 MR. LARKIN: Well, I'm not sure that if you
18 simply had a distribution that didn't affect interstate
19 commerce in anyway --

20 QUESTION: Just accept my hypo -- I'm trying to
21 explore whether or not your position is based on your
22 powers over an FCC licensee as opposed to any other media
23 of communication.

24 MR. LARKIN: Well, what I'm -- my argument from
25 Congress' power is based on its combined powers to

1 regulate interstate commerce dealing with the broadcast
2 spectrum as well as the use of the mails.

3 QUESTION: All right. What about regulating the
4 newspaper? What's the difference from a First Amendment
5 standpoint?

6 QUESTION: Because you don't license newspapers.

7 MR. LARKIN: Well, the newspaper would not be in
8 a different position than someone who just printed up his
9 own handbill, and Congress wouldn't have the authority
10 simply to say that you can't print up a handbill at --

11 QUESTION: This is an interstate paper that buys
12 its paper in interstate commerce.

13 MR. LARKIN: Well, I don't think that you could
14 prohibit someone from running general stories about what
15 is a legal activity in another state.

16 QUESTION: My question was advertisements.

17 MR. LARKIN: Well, I'm not sure. I'm not sure
18 that you couldn't --

19 QUESTION: You're not sure whether a state that
20 prohibits prostitution, for example, can ban advertising
21 of houses of prostitution across the border in another
22 state? Or a state that bans cocaine use can ban
23 advertising of cocaine use available across the border?

24 MR. LARKIN: Well, Congress certainly can. I'm
25 not sure that a state would be in the same position as

1 Congress is.

2 QUESTION: Oh, I see. I see. You're concerned
3 about just Commerce Clause objections, not First Amendment
4 objections.

5 MR. LARKIN: That's what I've been thinking
6 about and trying to focus on.

7 QUESTION: I see.

8 MR. LARKIN: But turning to the First Amendment
9 part of it, we think that the Central Hudson test, as I
10 said, is sufficiently flexible that it allows this sort of
11 approach that we have here to be undertaken. The
12 essential objection raised --

13 QUESTION: Mr. Larkin, may I just pursue Justice
14 Kennedy's point one step further to get it sharp? It
15 seems to me the question should be whether the State of
16 North Carolina, to follow up on Justice Scalia's notion,
17 could prohibit gambling advertising of the lotteries in
18 Virginia in its own newspapers in the state.

19 MR. LARKIN: I think if it's illegal in North
20 Carolina --

21 QUESTION: It's illegal in North Carolina, but
22 it's not illegal for the citizens, as I understand you, to
23 go across the border and buy the tickets. But can
24 therefore the Virginia lottery people run ads, do they
25 have a constitutional right to advertise their lotteries

1 in North Carolina newspapers?

2 MR. LARKIN: No. North Carolina can prohibit
3 that type of activity because it is illegal in that state.

4 QUESTION: But it's advertising activity that's
5 legal where it's performed.

6 MR. LARKIN: That's right.

7 QUESTION: And you think they can --

8 MR. LARKIN: Yes. There are certain counties in
9 Nevada, for example, that have legalized prostitution. I
10 don't think Virginia or North Carolina has to say that its
11 newspapers can advertise legalized prostitution in Nevada.
12 The First Amendment doesn't prohibit them from undertaking
13 that type of activity. It is sufficiently flexible that
14 we think they can engage in the type of regulation that we
15 have discussed, and that the Government can engage in this
16 type of regulation here.

17 QUESTION: Why? Because of clear and present
18 danger? What's the rationale for that?

19 MR. LARKIN: It's an activity that in a perfect
20 world would not be conducted at all. In a less perfect
21 world Congress or the legislature could flatly prohibit
22 it. But in the type of world that we have the costs
23 sometimes of prohibiting this activity are too great
24 because of all the harms associated with the black market
25 to allow this activity to be undertaken. As the result,

1 society has to regulate it rather than prohibit it.
2 That's the way we think that the types of instances that
3 are discussed in Posadas can reasonably be tied together.

4 Let me say just a few brief words about the
5 Central Hudson test. We think that essentially the theory
6 adopted by the lower courts and urged by respondents is
7 one of under-inclusiveness, and we think that under-
8 inclusiveness theory is not materially different from the
9 one that was rejected in the Metromedia case and that was
10 rejected in Posadas itself. What Congress has sought to
11 do here is accommodate competing interests, the interests
12 of Virginia and North Carolina. The fact that the fit is
13 not perfect is not fatal to this scheme. It doesn't have
14 to be, it only has to be reasonable. And it does, the
15 reasonableness of it doesn't have to be defended on a
16 station-by-station basis.

17 Since this fit is reasonable as a general
18 matter, we believe that it is reasonably --

19 QUESTION: Mr. Larkin, how do we know it's
20 reasonable as a general matter? Is there any evidence in
21 the record that shows that this is not a typical station?
22 I mean, I know of a lot of stations that broadcast across
23 state lines.

24 MR. LARKIN: It is reasonable because you are
25 licensed to serve a community. If you are serving that

1 community you are broadcasting to them.

2 QUESTION: So we may assume that this is a
3 typical station, and you would still defend it?

4 MR. LARKIN: Well, if it were --

5 QUESTION: Is that right?

6 MR. LARKIN: Yes. If it were a typical station
7 we would still defend it.

8 QUESTION: So this is characteristic of the
9 program, and we can justify --

10 MR. LARKIN: No, no, that's not true. It's
11 not -- it's not in the record --

12 QUESTION: Why, how -- you have not proved that
13 it's not characteristic of a program.

14 MR. LARKIN: Nor have they. I don't think
15 that --

16 QUESTION: And who -- then the question comes
17 who has the burden of showing this is or is not typical?

18 MR. LARKIN: Well, that question I don't think
19 arises under Central Hudson. What arises under Central
20 Hudson is whether it is reasonable, and we believe this is
21 a reasonable scheme.

22 I'd like to reserve the --

23 QUESTION: Well, all statutes are presumed to be
24 constitutional. The person challenging them has the
25 burden of proof to show they're not.

1 QUESTION: Is that true when the only basis for
2 regulation is the content of the speech that's being
3 prohibited? Is that true the burden is -- how does the
4 burden rest in that kind of case?

5 MR. LARKIN: It is their burden to show that
6 this is protected speech. After that we have a burden of
7 showing that this is reasonable. We believe we satisfied
8 that. Thank you.

9 QUESTION: Very well, Mr. Larkin.

10 Mr. Shumadine.

11 ORAL ARGUMENT OF CONRAD MOSS SHUMADINE

12 ON BEHALF OF THE RESPONDENT

13 MR. SHUMADINE: Mr. Chief Justice, and may it
14 please the Court:

15 I'd like to start off by noting that the
16 question presented in this case is whether a ban on
17 commercial speech that is wholly ineffective in promoting
18 any governmental interest when applied to a particular
19 speaker violates the First Amendment to the United States
20 Constitution, and we begin with the notion that in this
21 record we believe we have established that as applied to
22 this litigant this statute is wholly ineffective to
23 promote, encourage, foster any governmental interest of
24 any kind, any interest in federalism, or promote any
25 purpose. And the question for this Court is whether a

1 statute that as applied accomplishes nothing can still
2 restrict our liberties.

3 QUESTION: Well, I take it that as applied to
4 some other stations in North Carolina you wouldn't have
5 any objection?

6 MR. SHUMADINE: We have not, we have challenged
7 this statute only as applied to Edge. We have followed
8 the well established --

9 QUESTION: I suppose that there are probably
10 people who listen most of the time to the Edge station.

11 MR. SHUMADINE: Your Honor, the record does not
12 establish that.

13 QUESTION: Well, I would suppose it wouldn't be
14 in business if it didn't have an audience, and if that, if
15 the audience that listens to Edge stations, the station,
16 can't hear lottery ads on that station, why it certainly
17 to that extent serves the interest that the statute has in
18 mind.

19 MR. SHUMADINE: I would respectfully differ and
20 note that what we established in the brief was that the
21 dominant medium was television. We pointed out the amount
22 of time that people listen to television, the saturation
23 of advertisements through television. We proved that
24 people switch radio stations. We proved the other radio
25 stations that saturated this area --

1 QUESTION: Yes, but as long as somebody is
2 listening to Edge, and if Edge is forbidden from carrying
3 lottery ads, as long as somebody is listening to Edge
4 station it is not going to hear lottery ads, and that
5 would go for all stations in North Carolina. If the
6 people who listen to North Carolina stations can't hear
7 lottery ads on those stations it certainly serves the
8 purpose of the statute.

9 MR. SHUMADINE: I would respectfully differ by
10 saying that it doesn't serve the purpose of the statute if
11 they're getting the same advertisements every day
12 overwhelmingly through other dominant medium.

13 QUESTION: Well, not if they don't listen to the
14 Virginia stations, they won't get it.

15 MR. SHUMADINE: Well, that would be indeed a
16 factual question. But what we proved in this record, and
17 we went though -- in a very fact-specific inquiry we
18 proved they were listening to Virginia t.v. stations, they
19 were getting Virginia newspapers, and that we were
20 overlapped by the other Virginia radio stations that were
21 running the lottery advertisements. There is --

22 QUESTION: Nevertheless, as long as they're
23 listening to North Carolina stations they're not going to
24 be listening to ads.

25 MR. SHUMADINE: Justice White, your point is

1 well taken that as long as someone listens only to our
2 station they would get no lottery --

3 QUESTION: Or even while they're listening to
4 those stations they are not listening to ads.

5 MR. SHUMADINE: Well, that would certainly be
6 true. But whether that marginal, and I respectfully
7 submit the term marginal, furthering of any interest, I
8 respectfully suggest that is not enough of a furthering of
9 any governmental interest to justify a total regulation of
10 speech. Because what we proved was that every other
11 medium that was carrying lottery advertisements was
12 overlapping us, that the people in North Carolina were, in
13 the words of the Fourth Circuit, saturated with lottery
14 advertising, advertisements, and that it did not further
15 any governmental purpose to say that one speaker, my
16 client, could not say what every other single speaker that
17 we were competing with was saying --

18 QUESTION: Well, but by hypothesis, Mr.
19 Shumadine, if lotteries are willing to advertise on the
20 Edge station they must think they're going to get some
21 added patronage from so advertising.

22 MR. SHUMADINE: Your Honor, I don't know that
23 there is any, that that --

24 QUESTION: Well, why would they want to
25 advertise otherwise?

1 MR. SHUMADINE: Generally -- they certainly
2 would want to spread their advertising over as many media
3 as possible with the view that that gives them possibly
4 some type of larger audience. But there is no
5 demonstration in this record that there would be a greater
6 quantity of advertisements, a greater effectiveness of
7 advertisements, and the only --

8 QUESTION: Almost by fourth grade addition, I
9 would think, you could prove there would be a greater
10 quantity of advertisements if one additional station is
11 now permitted to carry advertisements that wasn't before.

12 MR. SHUMADINE: That I would respectfully submit
13 is not correct, Your Honor, because advertising budgets
14 are traditionally fixed. What happened here and would
15 almost always happen is that the Virginia lottery merely
16 redistributed their budget. They didn't buy additional
17 advertisements. Most people select advertising based on
18 formulas as to effectiveness. They don't increase
19 advertising payments because there are more advertising
20 mediums.

21 QUESTION: So if they, if they decide to
22 advertise on the Edge broadcast because of effectiveness,
23 obviously they are reaching some people that they wouldn't
24 otherwise.

25 MR. SHUMADINE: Whether they're reaching people

1 they would not --

2 QUESTION: Well, you say that's what they set
3 out to do. The budget is based on --

4 MR. SHUMADINE: They would like to.

5 QUESTION: Wait a minute. Please don't
6 interrupt me while I'm asking.

7 MR. SHUMADINE: Yes, sir.

8 QUESTION: I think you said a moment ago that
9 advertisers budget on the basis of effectiveness. And
10 what I put to you is if they do that, as you say they do,
11 surely they must think they're getting something for their
12 money if they were to advertise on the Edge station.

13 MR. SHUMADINE: Your Honor, I think it's true
14 they think they are getting something for their money.
15 They are getting something for their money. Whether they
16 are getting additional coverage of additional people is
17 open to question and was certainly not established --

18 QUESTION: Well why would they pay for it then?

19 MR. SHUMADINE: Well, the fact that they want to
20 have as many stations as possible carry the message does
21 not necessarily mean that more people are going to get the
22 message in any real sense. And certainly it is
23 hypothetically possible that there are people in North
24 Carolina who listen only to our station and do not view
25 the dominant media, which is television, or read the

1 newspapers.

2 QUESTION: It's also not hard to imagine that
3 there are a lot of law abiding citizens in North Carolina
4 who don't believe in gambling. And I don't know why Edge
5 should have the right to carry lottery ads advertising
6 something that's against the law in North Carolina. I've
7 been a big fan of the Edge station, but now I can't listen
8 anymore, they're bombarding me with lottery ads. I don't
9 believe in lotteries. What's wrong with that?

10 MR. SHUMADINE: Well, Your Honor, what's wrong
11 with it is the fact that every other station is carrying
12 exactly the same message.

13 QUESTION: But they are not licensed to that
14 community. Your station comes into the FCC and says we
15 want to be licensed to this Elizabeth City community in
16 North Carolina. We want to meet their local community
17 needs, one of which is that they say we don't want
18 gambling. We think gambling is bad for our society. And
19 you want to meet their needs by advertising into that
20 community against the law. Why is it unreasonable to say
21 that's not right?

22 MR. SHUMADINE: Well, it's unreasonable because
23 it does not, it's not effective in promoting any
24 governmental interest if you just shut one person up.
25 Furthermore, if you --

1 QUESTION: It meets the interest of making a
2 licensee who is licensed to serve the particular needs of
3 that community, as others are not, serve those needs. You
4 stand in a different position from these other advertisers
5 because you have been licensed to that community, to serve
6 the particular needs of that community. Doesn't that make
7 any difference?

8 MR. SHUMADINE: Your Honor, I do not believe
9 that simply by accepting an FCC license that we leave our
10 First Amendment rights at the door or that we are
11 prohibited from broadcasting that which everyone else is
12 hearing and everyone else is carrying simply because we
13 are licensed, especially where the economic effect is to
14 deprive the station of the ability to really provide
15 effective service.

16 QUESTION: Well, Mr. Shumadine --

17 MR. SHUMADINE: Yes, ma'am.

18 QUESTION: What test do we apply here? Central
19 Hudson?

20 MR. SHUMADINE: Yes, ma'am.

21 QUESTION: And if we apply Central Hudson why do
22 we care whether this particular community may broadcast to
23 a lot of folks in Virginia? Why do we care? Don't we
24 look at the overall effect of the statute on the nation as
25 a whole? Do we really get into a case-by-case, as-applied

1 look, or do we just apply Central Hudson and look at it
2 overall?

3 MR. SHUMADINE: Justice O'Connor, I believe that
4 you look at it to directly advance -- Central Hudson uses
5 the term directly advance, which in my mind is an
6 empirically-based test that does not relate to the nation.

7 QUESTION: Well, I would think maybe it is. I
8 mean, what case of ours do you rely on in the commercial
9 speech context to give it the kind of individual focus
10 that you say is appropriate here?

11 MR. SHUMADINE: There would be two. In the
12 Linmark case you specifically looked at the facts in that
13 case distinguishing a Sixth Circuit case based upon a
14 different fact. In the SUNY case this Court specifically
15 said, and I am quoting from pages 475 and 476 of that
16 opinion, the court of appeals did not decide however
17 whether the law directly advances these interests and
18 whether the regulation it imposes is more extensive than
19 is necessary for that purpose. As noted earlier, it
20 remanded to the district court for those determinations.
21 We think the remand was correct since further factual
22 findings had to be made.

23 Now I would suggest to the Court that the only
24 way you could make factual findings on a specific record
25 is to deal with the individual case and not the nation as

1 a whole.

2 QUESTION: How do you distinguish the
3 Government's citation of Ward v. Rock Against Racism and
4 its argument that the validity of the statute depends on
5 the relation it bears to the overall problem the
6 Government seeks to correct?

7 MR. SHUMADINE: That was dealing with the fourth
8 prong of the Central Hudson test which does have, where
9 the Ward v. Rock Against Racism analysis has some meaning.
10 Ward obviously was a time, place, and manner case. In
11 time, place, and manner cases they are almost always
12 effective. You really don't reach the third prong of the
13 Central Hudson test.

14 In dealing with the fourth prong this Court can
15 always examine to see whether there are many other easier
16 alternatives. If you see there are many other easier
17 alternatives that more rationally meet any governmental
18 interest you can then reject the statute. You can also
19 take evidence to see, as was done in the Discovery
20 Network, whether in fact the statute is narrowly tailored.

21 But in regard to dealing with the third prong of
22 the Central Hudson test, I don't think this Court has ever
23 said we totally ignore the facts of the individual case,
24 we don't care about the individual speaker, because this
25 Court has wisely recognized that speakers do have First

1 Amendment rights.

2 QUESTION: Well, Mr. Shumadine, in SUNY wasn't
3 that a dormitory regulation? So we're not talking about
4 any world scope of it. We're talking just about factual
5 findings that would look into the effect of the regulation
6 throughout its scope, because it just wasn't a broad
7 thing. I don't see that as authority for the proposition
8 when you're talking about an act of Congress you focus
9 just on one particular incidence rather than the
10 nationwide effect.

11 MR. SHUMADINE: Well, Your Honor, it would seem
12 to me plain that in reading SUNY, and that was what the
13 district judge did because it came out immediately prior
14 to our decision, he read it very carefully. It would seem
15 very difficult to say we're going to have factual findings
16 in this context about the nation as a whole. And I would
17 note that it is the Government that bears the burden of
18 justifying its restraint on speech.

19 And if that, even if that were the test it would
20 be the Government's burden to come forward with some
21 evidence that suggested that in the nation as a whole this
22 was an effective program. The Government really submitted
23 no evidence in this record of any kind that I can find
24 suggesting that this statutory scheme is really effective,
25 and what the --

1 QUESTION: You think the burden is on the
2 Government to show that the scheme is effective?

3 MR. SHUMADINE: It seems to me if the, as this
4 Court has said, the test is directly advanced. This Court
5 has placed, I believe in Zauderer, in Fox, and in other
6 cases, the burden on the Government to show that the
7 regulation does directly advance a governmental interest.
8 Now it seems to me that places a burden on the Government
9 to show something, and that something I would suggest
10 according to SUNY must be in the empirical real world --

11 QUESTION: Then you're saying that the
12 Government in every case where something is challenged on
13 a First Amendment basis must offer empirical evidence that
14 the statute is effective for its purpose?

15 MR. SHUMADINE: Yes, sir, I would believe that
16 once you established that the speech is protected, that it
17 is lawful, and that it --

18 QUESTION: What case do you think supports the
19 proposition that the Government must offer empirical
20 evidence so that you have an actual factual determination?

21 MR. SHUMADINE: Well, Your Honor, I would
22 believe that if SUNY was sent back for factual findings,
23 and it would seem to me that that is plainly a direction
24 to the trial court to take evidence and to make the type
25 of record we have in this case.

1 QUESTION: You would say SUNY then supports the
2 proposition?

3 MR. SHUMADINE: Yes, sir. I would also say
4 Linmark would support that proposition when you looked at
5 the specific facts. I submit to you that empiricism in
6 constitutional analysis is very important.

7 QUESTION: Mr. Shumadine, empiricism meaning if
8 I'm doing no more harm than other people are doing you
9 can't really discern my contribution to the harm being
10 done, therefore you can't stop me? Suppose Elizabeth City
11 has a law against prostitution and it could be shown that
12 in fact it's easy to obtain prostitutes in Elizabeth City
13 if you're of a mind to, that there are a lot of other
14 avenues for advertising the availability of houses of
15 prostitution in Elizabeth City. Would you then come up
16 here and argue well, therefore you cannot stop my station
17 from advertising of prostitution because it would have no
18 significant effect? You wouldn't be making that argument,
19 would you?

20 MR. SHUMADINE: Well, it -- I would not, I do
21 not think I would be making that argument under those
22 circumstances.

23 QUESTION: Why? Why?

24 MR. SHUMADINE: If you, let me just -- the
25 reason is, the difference is if you said everyone in

1 Elizabeth City except one could advertise prostitution I
2 would be here making the very same argument today, and
3 especially if I demonstrated that by everybody but one
4 advertising that the effect, that there was going to be no
5 incremental effect to banning one speaker from saying that
6 which every other speaker in the world was saying. I
7 regard that as an important constitutional principle, that
8 the Government cannot say who is going to speak about
9 things that when they, the speech and the carriage of
10 speech is already in the public domain. I think it is --

11 QUESTION: So you would say the same thing if
12 this case involved prostitution or drug use or anything
13 else, so long as there were stations outside of North
14 Carolina that can get that same message to the
15 individuals? Your station is entitled to do that even
16 though you're licensed to the community?

17 MR. SHUMADINE: I would say that if in the area
18 where the message was being received we were overlapped by
19 every other station carrying the same message that there
20 would be no constitutional interest in suppressing our
21 station's speech because the governmental interest would
22 not be directly advanced by shutting up one speaker. It
23 simply has no direct advancement for any constitutional
24 purpose. It simply becomes, in my opinion, a naked and
25 arbitrary abuse of power on the facts of that case.

1 Now I think those cases are very, very unlikely,
2 but if, if the Government is going to license everyone
3 else but one, then I think that raises an important and
4 indeed significant constitutional issue. And I think if
5 it is established that by taking that one out of
6 circulation as an advertiser that you do not accomplish
7 anything in terms of preventing the transmission or
8 dissemination of the message, then I think it is plainly
9 unconstitutional --

10 QUESTION: Why do you say everybody else except
11 one? Aren't there, are there not other North Carolina
12 stations that reach Elizabeth City? Is yours the only
13 station licensed to North Carolina that reaches Elizabeth
14 City?

15 MR. SHUMADINE: I'm not aware of any other
16 station that would have the type of overlap that we do,
17 Your Honor. There may be such a station, but I'm not
18 aware of any other station having such an overlap where --

19 QUESTION: Elizabeth City gets no other North
20 Carolina station?

21 MR. SHUMADINE: I'm sure they may -- the other
22 North Carolina stations may well cover areas that we do
23 not cover --

24 QUESTION: No, I understand that. I'm saying
25 don't you think that there are likely a number of other

1 North Carolina stations that come into Elizabeth City,
2 that can be received in Elizabeth City?

3 MR. SHUMADINE: I would think so, although my
4 expectation is in thinking about the market as I know it
5 is these markets generally run around the big metropolitan
6 areas, so that the Norfolk-Portsmouth-Virginia Beach
7 market, which includes Edge, covers that area of North
8 Carolina. There are other stations that are further away
9 that also cover them, but they don't reach any part of
10 Virginia.

11 QUESTION: But you're not really saying that you
12 are the only, the only broadcast station that is in
13 operation reaching Elizabeth City that cannot advertise
14 lotteries?

15 MR. SHUMADINE: No, sir, I did not intend to say
16 that.

17 QUESTION: Mr. Shumadine, let me go back to
18 Central Hudson if I may and make sure I understand your
19 argument. At one point earlier I thought you were
20 suggesting that there was an effectiveness component under
21 the fourth Central Hudson prong. I take it that is not
22 your argument?

23 MR. SHUMADINE: We have not submitted based on
24 the fourth prong, even though we have raised the fourth
25 prong. Our position has been essentially that the third

1 prong is an empirical test, that it requires proof that it
2 directly advances the governmental interest in an
3 individual case, and that we assume the burden of proving
4 it did not. We respectfully suggest to the Court we met
5 the burden of showing that as applied to Edge the
6 statute --

7 QUESTION: Yes, I think I understand you. What
8 is your argument to the effect that the fourth prong is
9 not satisfied, the fourth prong being that the regulation
10 must not be more extensive than necessary to serve the
11 substantial purpose? Why isn't that satisfied here?

12 MR. SHUMADINE: Well, Your Honor, if I were
13 going to argue that my position would be that any bright
14 line test has a great deal of difficulty with being
15 narrowly tailored, and that if you really were going to do
16 it in a narrow tailoring fashion --

17 QUESTION: We'll resume there at 1 o'clock, Mr.
18 Shumadine.

19 (Whereupon, at 12:00 p.m., oral argument in the
20 above-entitled matter was recessed, to reconvene at 1:00
21 p.m. this same day.)

22
23
24
25

1 AFTERNOON SESSION

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: Mr. Shumadine, you may
4 resume.

5 MR. SHUMADINE: Justice Souter, as I remember
6 your question it was asking about the fourth prong of the
7 Central Hudson test, and I was starting to reply to say
8 that it would obviously be more rational and more
9 effective to utilize the audience served as opposed to the
10 station of license. If you wanted to prevent North
11 Carolinians from receiving advertisements the Government
12 obviously could prohibit the advertisements being
13 broadcast to stations with audiences in North Carolina.
14 As you are aware, the FCC license has a filing that
15 demonstrates both the strength of the signal and the area
16 covered, and you can determine the audience from that if
17 you wanted to with some degree of precision.

18 QUESTION: Well, that's true, but the fourth
19 prong simply requires that the regulation not be more
20 extensive. This isn't more extensive, is it?

21 MR. SHUMADINE: I think it is to the extent that
22 it picks up stations like Edge where it has no effect or
23 it doesn't accomplish any governmental purpose.

24 QUESTION: Well, I think this gets back to
25 Justice White's colloquy. Whether there might be ways in

1 which the Government could accomplish that purpose more
2 effectively is a different question. It accomplishes
3 something. Assuming that there are people listening to
4 the station at all, those people are not going to be
5 listening to advertising about the lottery. And it seems
6 to me that given the fact that there will be some effect
7 it's difficult to argue under the fourth prong that the
8 regulation in the Central Hudson words is more extensive
9 than is necessary. It may not pick up much, but I'm not
10 sure that it's more extensive than is necessary. It just
11 is, it is not -- your argument is that it's ineffective,
12 which it seems to me is a different concept.

13 MR. SHUMADINE: I have conceded that my primary
14 argument is that it is ineffective, but if you were to, as
15 I read the Discovery Network case that just came down 2
16 weeks ago, I believe even there that statute was effective
17 as to about 100 out of the 3,000, or 169 out of the 3,000
18 new racks, and that still was a poor fit. So the fact
19 that it has some marginal effect, I don't know if that
20 saves it.

21 QUESTION: Yes, but it's only marginal because
22 you're just talking about Edge, and if you talk about all
23 the stations in North Carolina that are not permitted to
24 carry these ads, why surely there's quite a direct service
25 to the Government interest in protecting the interests of

1 North Carolina.

2 MR. SHUMADINE: Your Honor, we have not
3 challenged the application of the statute as it applies in
4 other areas where you do not have the particular type of
5 overlap that we are talking about here. We limited our
6 challenge to an as-applied as opposed to a facial
7 challenge.

8 QUESTION: Well, that gets you back to Justice
9 O'Connor's earlier question. Is that the way you approach
10 commercial speech cases?

11 MR. SHUMADINE: I believe it is, Your Honor, and
12 it's certainly the way that this Court has always
13 approached constitutional questions. There are any number
14 of cases where this Court has said that you look at the
15 statute as it is applied to a particular litigant to
16 determine its constitutionality as to that litigant.
17 There are cases that say that's a wise and beneficent
18 policy because it allows this Court not to overturn more
19 of the statute than is necessary. There are any number of
20 cases we cited in the brief where this Court has
21 overturned the application of a statute as applied to a
22 particular litigant while it has allowed the statute to be
23 applicable as to other litigants.

24 The fact that a statute may in general serve a
25 governmental purpose does not mean that on specific facts

1 and on a specific record the statute cannot have
2 unconstitutional applications.

3 QUESTION: But haven't we said, Mr. Shumadine,
4 that when we're talking about commercial speech the
5 legislature can enact a prophylactic rule which it
6 couldn't in connection with straight First Amendment
7 speech that may reach out a little more broadly than you
8 could in First Amendment orthodox?

9 MR. SHUMADINE: In a facial challenge this Court
10 has said that it defers to a legislative judgment. What I
11 don't think this Court has ever said is that if a litigant
12 proves that in a specific case the legislative judgment
13 does not apply and the statute is really ineffective on a
14 real record with real evidence that the statute can be
15 applied to that case.

16 QUESTION: Do you think in a commercial speech
17 case that if a plaintiff can show that there is one in his
18 particular example, the thing does not satisfy the four
19 prongs, even though it does in 99 percent of the other
20 cases, that litigant can have that statute struck down as
21 to him?

22 MR. SHUMADINE: That would be my belief, yes.
23 That is the teaching that I believe this Court has said
24 when you struck down filing fees for indigents you did so
25 not because filing fees are unconstitutional in 99.9

1 percent of the cases but because as applied to that
2 individual class of litigants it was unconstitutional.
3 When you struck down the solicitation rules in NAACP v.
4 Button you did not strike the lawyer solicitation rules
5 down in general.

6 It is a well established, I suggest, rule of
7 this Court that you can look at a specific record and look
8 at the application of a statute to a specific litigant and
9 protect that litigant's constitutional rights --

10 QUESTION: So we can ban billboards on the
11 grounds that we want to improve the looks of a city, but
12 then a billboard company comes in and says look, we're in
13 a very shabby part of the city, the place is a mess
14 anyway, it doesn't really make that much difference. They
15 would be exempt?

16 MR. SHUMADINE: Your Honor, I don't know whether
17 that type of test would work. I would have to look at the
18 specific facts. But if --

19 QUESTION: Well, I thought your submission was
20 that if the statute does not serve the interest in the
21 particular case, that that particular litigant can
22 challenge it.

23 MR. SHUMADINE: I did make that submission, and
24 the only reason I did not endorse that example is that I
25 think you would have to look at all of the facts in a

1 record to see whether it was effective. If it was totally
2 ineffective, if you said everyone can have billboards
3 except one person, and if you were going to have 10,000
4 billboards anyway and you were banning 20 additional ones,
5 then I think there would be a real problem.

6 I think it's very important in an as-applied
7 challenge, and we tried very carefully to say this, to
8 stick to the record as made.

9 QUESTION: Mr. Shumadine, it seems to me
10 although you emphasize in answering Justice Kennedy's
11 question the particularity of the exception that you're
12 arguing for, at least in the context of FCC licensing if
13 we accepted your argument it would be a very broad
14 exception because you in effect would be saying that only,
15 that this particular regulation would be enforceable only
16 with respect to broadcasters over a geographical area
17 which do not receive, as it were, the forbidden broadcasts
18 from outside and which do not in turn broadcast to a
19 substantial audience outside the area in which the
20 activity is forbidden. So that I suppose on your theory
21 there might be some kind of enclave in the center of large
22 states in which the regulation would be enforceable, but
23 I'm not sure that it would be enforceable anywhere else.

24 MR. SHUMADINE: That is not our submission, Your
25 Honor. What we submitted and proved to the trial court

1 was if we could assume the burden of proving complete
2 ineffectiveness, that is we were totally overlapped by
3 virtually every dominant information source, then --

4 QUESTION: Well, let's assume you've got 92
5 percent effectiveness. That's as far as you've gotten,
6 haven't you? You concede 8 percent, don't you?

7 MR. SHUMADINE: No, Your Honor, I don't concede
8 8 percent. The fact that you reach some North Carolina
9 people --

10 QUESTION: I think you have answered the
11 question, Mr. Shumadine. Thank you.

12 Mr. Larkin, you have 3 minutes remaining.

13 REBUTTAL ARGUMENT OF PAUL J. LARKIN, JR.

14 ON BEHALF OF THE PETITIONERS

15 MR. LARKIN: Your Honor, I have nothing further
16 to add unless the Court has any further questions.

17 QUESTION: Is part of your submission, Mr.
18 Larkin, that there is a waiver, an estoppel aspect to this
19 case, to speak in loose terms, that this licensee really
20 submitted itself to the jurisdiction of North Carolina and
21 is stuck by its license, or does that drop out of the case
22 and this is simply a case in which you win under Central
23 Hudson?

24 MR. LARKIN: We don't make an estoppel or a
25 waiver type of argument. We do think we win under Central

1 Hudson, as well as the other arguments in our brief.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Larkin.

3 The case is submitted.

4 (Whereupon, at 1:08 p.m., the case in the above-
5 entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION Petitioners

v. EDGE BROADCASTING COMPANY t/a POWER 94 CASE NO. 92-486

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)