

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: GREATER NEW ORLEANS BROADCASTING
ASSOCIATION, INC., ETC., ET AL., Petitioners v.
UNITED STATES, ET AL.

CASE NO: 98-387 c.1

PLACE: Washington, D.C.

DATE: Tuesday, April 27, 1999

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GREATER NEW ORLEANS BROADCASTING :
4 ASSOCIATION, INC., ETC., ET AL., :
5 Petitioners :
6 v. : No. 98-387
7 UNITED STATES, ET AL. :
8 - - - - - X

9 Washington, D.C.

10 Tuesday, April 27, 1999

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:10 a.m.

14 APPEARANCES:

15 BRUCE J. ENNIS, JR., ESQ., Washington, D.C.; on behalf of
16 the Petitioners.

17 BARBARA D. UNDERWOOD, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the Respondents.

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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 98-387, Greater Mew Orleans Broadcasting
5 Association v United States.

6 Mr. Ennis.

7 ORAL ARGUMENT OF BRUCE J. ENNIS

8 ON BEHALF OF THE PETITIONERS

9 MR. ENNIS: Mr. Chief Justice, and may it please
10 the Court:

11 The Federal scheme at issue here is so riddled
12 with exceptions that it cannot materially advance the
13 Government's asserted interests, and it is insufficiently
14 tailored, because those interests could be advanced more
15 effectively by regulating the underlying conduct. The
16 asserted interests are helping States that want to protect
17 their residents from exposure to advertising for gambling
18 activities and reducing the social costs of gambling, but
19 Federal law now permits advertising promoting Government
20 casinos, Indian casinos, race track and off-track betting
21 to be broadcast from within even States that have not
22 authorized those forms of gambling.

23 QUESTION: Make the assumption, and it's an
24 assumption I'm sure you would disagree with, that Congress
25 could prohibit advertising for casino gambling, that

1 that's a stable category. You can tax based on casinos.
2 assume it's a stable category and you could pass a
3 regulation prohibiting all advertising for casino
4 gambling. Why does the calculus change when Indian casino
5 gambling is exempted? What's the theoretical and the
6 jurisprudential reason for your objecting to the statute
7 if it has that exemption in it?

8 MR. ENNIS: Well, first, Justice Kennedy, this
9 statute doesn't even prohibit all advertising for private
10 casinos. It permits private casinos to broadcast --

11 QUESTION: This is a hypothetical case. No
12 casino gambling advertising except for Indian. This is
13 not that case. Just --

14 MR. ENNIS: The reason --

15 QUESTION: I just want to test the reason for
16 the exception.

17 MR. ENNIS: The reason, Justice Kennedy, is that
18 the Government doesn't assert, and it's certainly not
19 obvious that there is any difference in the social costs
20 between gambling at Government and Indian casinos and
21 gambling at private casinos, particularly when the Federal
22 law allows the Government and Indian casinos to provide
23 the same game operated by the very same private companies.

24 QUESTION: But can't the Government weigh on the
25 other side of that equation the fact that casino gambling

1 may be essential to the well-being of Indian tribes as a
2 source of income, whereas it doesn't have to weigh that
3 and say that's very desirable that private casino owners
4 have a similar source of income?

5 MR. ENNIS: I think not, Chief Justice
6 Rehnquist, for two reason. First, here, as in discovery,
7 the fact that there may be social benefits associated with
8 Indian and Government casino gambling has absolutely
9 nothing to do with whether the Federal scheme materially
10 advances the Government's interest in reducing the social
11 costs.

12 Second, even if there were such benefits, those
13 benefits would not satisfy the Central Hudson test under
14 the fourth prong, because the very same benefits could be
15 obtained by taxing private casinos and giving those
16 revenues to State governments or Indian tribes.

17 QUESTION: Is there a more basic --

18 QUESTION: Not if you don't have any private
19 casinos in the States where the Indians are located. I
20 don't know what kind of a scheme you're envisioning.

21 MR. ENNIS: Well, Justice Scalia, if the private
22 casinos are not in those States, those States are not
23 going to be that concerned about them, but if they are
24 there, they could be taxed by the Federal Government and
25 the proceeds distributed, so the social benefits argument

1 here, as in discovery, isn't sufficient.

2 In discovery, the Government made a very similar
3 argument. They argued that it was okay to allow
4 distribution of newspapers but not of commercial handbills
5 because the newspapers had greater benefits, greater
6 social value, and the court rejected --

7 QUESTION: Is there a more basic First Amendment
8 argument, and that is that Congress cannot grant or
9 withhold the ability to speak based on the identity of the
10 speaker, or are you foreclosed from making that argument
11 because this is a commercial speech case?

12 MR. ENNIS: Justice Kennedy --

13 QUESTION: That's what I wanted to explore.

14 MR. ENNIS: Justice Kennedy, I don't think
15 we're foreclosed from making that argument because it's a
16 commercial speech case, but I think this case can be
17 decided on much easier and more straightforward grounds,
18 the basic prong three and prong four of Central Hudson.
19 This --

20 QUESTION: Well, it's not really the identity of
21 the speaker involved here anyway. They wouldn't allow
22 anybody to advertise gambling on behalf of the private
23 casinos, whether it's the private casinos themselves or
24 just some public interest group that's interested in
25 promoting gambling.

1 MR. ENNIS: That's correct, Justice Scalia. the
2 ban is a ban on broadcasters, not on the private casinos
3 themselves, but I took Justice Kennedy's question to be
4 that effectively they're banning the private casinos
5 themselves.

6 QUESTION: Mr. Ennis, could -- I didn't mean to
7 interrupt you, if you're going on with him.

8 MR. ENNIS: Well --

9 QUESTION: I've a question when you're done.

10 MR. ENNIS: Justice Souter.

11 QUESTION: It's a nuts and bolts question.
12 Would you explain to me what the, just the legal
13 mechanism, the text, the regulation that results in the
14 scheme that you described in the yellow brief in which the
15 private casinos can advertise but there are certain
16 subjects they cannot advertise. I understand they can't
17 advertise payout ratios. I guess they can't give
18 photographs of games in progress. How does that come
19 about? What's the scheme?

20 MR. ENNIS: Just Souter, the answer to that is,
21 is that the statute itself does not prohibit all broadcast
22 advertising even of gambling activities. It only
23 prohibits broadcast advertising of, quote, games of lot or
24 chance, and the FCC, the implementing agency has
25 interpreted that for more than 12 years as if the

1 advertising does not directly advertise gambling
2 activities, then it's permitted under this Federal scheme.

3 Now, under that interpretation the FCC has
4 repeatedly ruled that even private casinos can broadcast
5 advertising in every State saying that they are a casino,
6 and that the odds for fun, winning a vacation and Vegas-
7 style excitement are high, but they cannot advertise --

8 QUESTION: It's only if they have the name
9 casino.

10 MR. ENNIS: Only if they have the name casino,
11 Justice Stevens.

12 QUESTION: Yes.

13 MR. ENNIS: But virtually 98 percent of all
14 casinos have the name casino, and they could easily change
15 their name to come within that requirement.

16 But what they can't advertise is advertisements
17 showing or depicting the actual, specific games they
18 offer, or their payout percentages. In that respect they
19 are treated differently from Government and Indian
20 casinos, which can advertise everything.

21 QUESTION: So casinos are okay. Games of chance
22 are not.

23 MR. ENNIS: Yes, although the FCC itself has
24 acknowledged that even the word casino is itself, quote,
25 promotional of casino games.

1 QUESTION: If it's not in quotes, yes. Yes.

2 QUESTION: Do you know just as a fact, there are
3 about 36 or 37 States that allow casino gambling?

4 MR. ENNIS: No, Justice Breyer.

5 QUESTION: How many?

6 MR. ENNIS: There are about 38 States that allow
7 State lotteries. There are about 12 States that now
8 authorize private casino gaming, and there are -- there's
9 casino gaming authorized by Indian tribes in approximately
10 31 States. I might --

11 QUESTION: So do the 12 that allow private, are
12 there Indian tribes in each of those, do you know?

13 MR. ENNIS: I don't know. There are Indian
14 tribes in many of those States for certain. We don't know
15 the exact number, but there's -- the Government's own
16 lodging indicates that as of 1996 there were 240 separate
17 Indian gaming facilities in this country, and that number
18 is growing rapidly.

19 QUESTION: Mr. Ennis, is casino gaming different
20 from casino gambling?

21 MR. ENNIS: No.

22 QUESTION: I noticed in your brief you never
23 used the word gambling. It was always except --

24 (Laughter.)

25 QUESTION: -- except that you assured us that

1 this law would not reduce compulsive gambling. I gather
2 there is compulsive gambling and everything else is
3 gaming, is that it?

4 (Laughter.)

5 MR. ENNIS: No, Justice Scalia. There's no
6 distinction between gaming and gambling.

7 QUESTION: Well, why don't we use the real word
8 and call it gambling.

9 MR. ENNIS: I'm happy to use the real word,
10 gambling.

11 QUESTION: Mr. Ennis, isn't it the case that
12 in -- statutes or regulation they do use the word gaming?

13 MR. ENNIS: Some statutes use gaming, and some
14 use gambling, but there's no material distinction, and I'm
15 not trying to --

16 QUESTION: Because I remember the first time I
17 came across it in a regulation I thought, oh, they're
18 regulating hunting.

19 (Laughter.)

20 QUESTION: I think Congress doesn't really like
21 to authorize gambling, and the Indian Gaming Act has a
22 much better ring to it.

23 MR. ENNIS: Well, Justice Scalia, that used to
24 be the case, but today Congress not only authorizes an
25 enormous amount of broadcast advertising for gambling

1 activities, but even requires States to permit the
2 gambling itself by Indian tribes. Federal law not only
3 allows broadcast advertising for Indian casinos in every
4 State, in most States it requires the States to allow the
5 underlying Indian gambling itself. In fact, Florida is
6 suing the Government right now because of that.

7 QUESTION: Mr. Ennis, I take it that part of the
8 Government's submission is that the bulk of gambling
9 occurs in private casinos if you view the problem Nation-
10 wide, and that the exceptions are only a small part of the
11 overall effect and therefore they say that the limited
12 prohibition of advertising in private casinos does
13 accordingly address the bulk of the problem.

14 MR. ENNIS: Justice O'Connor, I think that's not
15 quite an accurate description of the Government's
16 position. As I understand the Government's position, the
17 Government has not asserted a general interest in reducing
18 consumption of gambling or even of all private casino
19 gambling. The Government doesn't care if the
20 psychologically stable middle class gambler wants to spend
21 his or her money on that form of entertainment. The
22 Government's concern is with reducing the social costs of
23 gambling, particularly by compulsive gamblers.

24 QUESTION: Right, but they say that the social
25 costs are really achieved in the private sector, and

1 that's why they have this limited thing.

2 MR. ENNIS: Well, Justice O'Connor, there is
3 really no reason to believe, and no evidence that
4 compulsive gamblers are more likely to gamble compulsively
5 in private casinos than they are to gamble compulsively
6 in --

7 QUESTION: Well, I think you miss the point.
8 They say the bulk of the gambling is in private casinos,
9 so we're hitting the bulk of the problem by this ban.

10 QUESTION: They gave a percentage in their
11 brief, I forget, it was -- it was a surprisingly high
12 percentage. Was it 80 percent is in private casinos?

13 MR. ENNIS: Well, no, I understand --

14 QUESTION: I thought it was 40 percent.

15 MR. ENNIS: Now I understand what you're talking
16 about. The Government cites one study that suggests that
17 private casinos in 1996 may have accounted for 40 percent
18 of all gambling revenues, but if you look --

19 QUESTION: Well, not just casino, but all
20 gambling.

21 MR. ENNIS: Of all gambling revenues.

22 QUESTION: Which would include State lotteries
23 and everything else.

24 MR. ENNIS: That's correct, but if you look at
25 that study -- it's page 39 of the Christiansen study --

1 the study itself makes clear that casino there was
2 described very broadly, not just the land-based casinos
3 we're talking about, but riverboat cruises, and overseas
4 fantasy boat cruises, all sorts of things.

5 Moreover, that same study shows that in the
6 previous year --

7 QUESTION: I'm just curious on that point, do
8 you count the, quote, cruises in the Mississippi River and
9 in the Calumet River outside Chicago, are they -- which
10 are they? Are they counted or not in that study?

11 MR. ENNIS: They are counted. Every conceivable
12 kind of --

13 QUESTION: Some of these cruises, you know, the
14 boats never get 2 feet from the shore.

15 MR. ENNIS: Every conceivable kind that you
16 could think of --

17 QUESTION: So you would exclude the riverboats
18 on the Mississippi?

19 MR. ENNIS: No, I'm not trying to exclude them,
20 Justice Stevens. I'm just trying to point out that that's
21 a very inclusive definition of casino, but the important
22 point is --

23 QUESTION: I don't understand. Aren't
24 Mississippi riverboat cruise casinos covered by this
25 statute?

1 MR. ENNIS: Yes, they are.

2 QUESTION: Well then, so why shouldn't they
3 include it. I don't --

4 MR. ENNIS: They -- I'm not arguing that they
5 should include it, Justice Scalia. I simply want to point
6 out that same study shows that in the previous year --
7 this is from '95 to '96 -- there was a 3.3 percent
8 increase in all of that broadly defined private casino
9 gambling, whereas there was a 13.3 percent increase in
10 Indian casino gambling because in 1988 Congress authorized
11 and made Indian casino gambling legal, Indians have now
12 started to build and operate Indian casinos, and rapidly
13 Indian casino gambling is taking over the market.

14 QUESTION: Suppose private casino gambling,
15 which is the target of the Federal regulation, accounts
16 for 90 percent of the gambling in the United States,
17 hypothetical case. What would your argument be before us?

18 MR. ENNIS: Well, my argument would still be the
19 same. It wouldn't be as dramatic an argument, but it
20 certainly would be the same, because this scheme, since it
21 permits so much other stimulation of gambling activity,
22 cannot materially advance the Government's interests. We
23 have to look at what the scheme permits, not just the
24 current empirical reality of what's happening under the
25 scheme.

1 Second, under the fourth prong of Central
2 Hudson, if private casino gambling is such a problem, the
3 Government can easily regulate private casino gambling
4 rather than ban certain kinds of advertising about private
5 casino gambling.

6 QUESTION: But if we have a 40-percent figure
7 that we're working with hypothetically, it seems to me
8 that that's close enough for the Government's interest to
9 comply with Edge.

10 MR. ENNIS: Your Honor, I think that Edge is
11 really quite different in two important respects. First,
12 the prohibition on lottery advertising in Edge was
13 completely consistent with the quite different federalism
14 interests that the Government there asserted, evenhandedly
15 supporting both lottery and antilottery States, and any
16 ineffectiveness of the restriction was the result of
17 geographical happenstance, that the station happened to be
18 close to the State border, not of the conflicting
19 provisions of the scheme itself.

20 That's not this case. Here, the Government is
21 not asserting that kind of federalism interest. Its
22 scheme overrides the federalism interests of States and
23 forces every State to permit broadcast advertising of
24 Government casinos, Indian casinos, and even promotional
25 advertising of private casinos.

1 Second, Edge involved broadcasting of an
2 activity that would have been illegal in the State where
3 the broadcast originated, thus arguably did not even come
4 within the protections of the commercial speech doctrine
5 to begin with. That is not this case. We're only talking
6 here about advertising of lawful activities.

7 QUESTION: Well -- no, no. They're lawful where
8 they're conducted. They're not lawful in every State
9 where they're advertised, necessarily.

10 MR. ENNIS: But, Justice Scalia --

11 QUESTION: I mean, you say most of the States,
12 what --

13 MR. ENNIS: -- 12 States have authorized private
14 casino gambling. It's lawful in those 12 States.

15 QUESTION: Yes, but if 38 have it --

16 MR. ENNIS: But there cannot be any broadcast
17 advertising within those 12 States.

18 QUESTION: But there are 38 States that have it,
19 and in those States at least this ban does indeed ban
20 something that is unlawful in those States.

21 MR. ENNIS: On the second point of my
22 distinction of Edge, in those 38 States, that's correct.
23 It's not correct in the --

24 QUESTION: May I ask --

25 QUESTION: What happens in States --

1 QUESTION: -- Mr. Ennis, one question first.
2 We've been talking so much about the exceptions, is it
3 your assumption that as a predicate for the whole argument
4 that the statute would be constitutional if it had no
5 exceptions?

6 MR. ENNIS: Not at all, Justice Stevens. The
7 statute at issue in 44 Liquormart did not have a great
8 many exceptions, and it was found unconstitutional under
9 44 -- under the Central Hudson test. Here's why. The 44
10 Liquormart involved a prohibition of price advertising,
11 and this Court found -- no member of this Court thought it
12 was axiomatic that eliminating a prohibition on price
13 advertising would materially reduce the consumption of
14 alcohol.

15 The Government tries to distinguish 44
16 Liquormart on the ground that case involved a restriction
17 on price advertising, not promotional advertising, but
18 both distinctions are correct. This case does involve a
19 prohibition on price advertising.

20 QUESTION: But there was something else going on
21 in that case. I mean, I think it had the smell of giving
22 existing, maybe mom and pop stores a monopoly, of
23 protecting against fair competition in order that existing
24 sellers could have high prices and not be fiercely
25 competed against by price-cutters, and there's not that

1 problem here. I can't think of any other reason that the
2 Government would be enacting this prohibition except
3 genuinely to stop -- you know, to stop a rush to the
4 gaming tables.

5 MR. ENNIS: Well, Justice Scalia, let me respond
6 by saying that I don't know what was in the minds of all
7 the justices in 44 Liquormart, but the opinion does
8 indicate two problems with that statute that are equally
9 present here.

10 QUESTION: What opinion are you talking about?

11 MR. ENNIS: I'm talking about the plurality
12 opinion and the concurring opinion of Justice O'Connor,
13 particularly Justice O'Connor's concurring opinion makes
14 the point, which the plurality also makes, that even if
15 the restriction in 44 Liquormart would have materially
16 advanced the Government's interests, those interests could
17 be achieved more effectively by regulating the underlying
18 conduct, and therefore the scheme violated the fourth
19 prong of Central Hudson. That's certainly true here.

20 Look at the possible regulations of conduct.
21 The Government could regulate private casino gambling by
22 imposing the same Federal regulations it now imposes and
23 considers adequate for Indian casino gambling, or it could
24 impose betting limits in order to reduce the problem of
25 compulsive betters, absolute limits. It could prohibit

1 gambling on credit, which would address the compulsive
2 gambler problem. In fact, the Government could even
3 prohibit private casino gambling entirely.

4 QUESTION: What would you do if two States
5 legalized marijuana and Congress prohibits the advertising
6 of marijuana in any -- by any broadcaster in any State?

7 MR. ENNIS: Your Honor, I think that
8 prohibitions of marijuana and other things would have to
9 be judged under the same statutory framework of the
10 Central Hudson test. Whether they would survive or not
11 would depend on precisely what the Government's interests
12 are, how many exceptions there are, whether the Government
13 has tried regulating the underlying conduct in other
14 States and can't effectively do so --

15 QUESTION: Who decides what the Government's
16 interests are? I mean, is it up to the court to decide
17 what the Government's interests are, or can we take the
18 word of the Government as to what its interests are, so
19 long as they're not discriminatory in some way?

20 MR. ENNIS: Chief Justice Rehnquist, this
21 Court's commercial speech cases make clear that not only
22 can the court take the Government's word, it must take the
23 Government's word precisely, and cannot think up other
24 interests that might be stronger interests.

25 Here, the Government asserts an interest not in

1 reducing the gambling itself, even casino gambling, but in
2 preventing the social harms caused by compulsive gambling.

3 QUESTION: So if the Government in its brief had
4 asserted that broad an interest, the case might come out
5 differently, it depends on what the Government says in its
6 brief?

7 MR. ENNIS: Unfortunately, Chief Justice
8 Rehnquist, I think it does make a difference in how
9 different cases might come out, depending on the precise
10 interest the Government puts forward.

11 QUESTION: Then it's the Solicitor General who
12 decides what the Government's interests are, rather than
13 Congress?

14 MR. ENNIS: Unless Congress has itself specified
15 an interest, that would be so. In Coors, this Court said
16 that the Government litigation counsel can even posit an
17 interest that is completely different from the interests
18 that Congress initially posited, but whichever it is, the
19 Court must take the interest as the Government has posited
20 it.

21 QUESTION: Well, Mr. Ennis, the Court has got to
22 take the interest within the limits that the Government
23 posits it, but the Court does not have to take the
24 interests uncritically, does it?

25 For example, if this case were being argued on

1 the question of interest rather than on prongs three and
2 four, wouldn't it be open to the court to assess the --
3 let's say the realistic character of the asserted interest
4 by reference to the very exceptions that you're arguing
5 here? Wouldn't we, in other words, be free to say, it's
6 not plausible to say that the Government's interest is
7 what it is when it allows all these exceptions and in fact
8 go so far as to promote some of them?

9 MR. ENNIS: Absolutely, Justice Souter.

10 QUESTION: Okay.

11 MR. ENNIS: I didn't mean to suggest this Court
12 can't review the asserted interest. It just has to start
13 with whatever the asserted interest is.

14 QUESTION: Mr. Ennis, do I understand that your
15 argument essentially is, we can take as conceded, or that
16 you demur to -- first to the Central Hudson factors that
17 your case rests on the third and fourth, and because you
18 think you have a secure case under those, you don't have
19 to get into what some of the amici urge, that we depart
20 from Central Hudson and elevate commercial speech to a
21 higher notch?

22 MR. ENNIS: Well, Justice Ginsburg, it is our
23 principal argument that this restriction fails prongs
24 three and four of the Central Hudson test, and that's so
25 plain that the case could and should be decided on that

1 ground.

2 But we also argue that this would be an
3 appropriate vehicle to resolve the issue that's been a
4 continuing issue among members of the Court. In our view,
5 this is an appropriate vehicle for the Court to say
6 unambiguously what it ruled in Virginia Pharmacy Board,
7 and that is that the First Amendment makes for us the
8 choice between paternalistic approaches and opening the
9 channels of communication when we're talking about
10 truthful speech.

11 QUESTION: What would that mean, for example, if
12 we were to take that broad a ground for advertising of
13 cigarettes and control of that?

14 MR. ENNIS: Well, Justice O'Connor, under that
15 approach -- excuse me, Justice Ginsburg, under that
16 approach, advertising of cigarettes would be viewed under
17 the same scheme, which it basically be a, this regulation
18 is presumptively unconstitutional, and the Government
19 cannot survive scrutiny unless it meets something
20 equivalent to strict scrutiny.

21 But there may be compelling justifications for
22 regulating cigarette smoking, and it may be that is the
23 least restrictive way, given the fact that the Government
24 has tried alternative forms of regulating the underlying
25 conduct, and there might be a much more significant

1 underground problem by completely banning cigarette
2 smoking, whereas there's no such underground problem from
3 banning private casinos.

4 QUESTION: Mr. Ennis, why is it that the
5 Government has to go all out, or else not at all? I mean,
6 in Liquormart, I frankly couldn't see how the Government's
7 scheme was going to do any good at all.

8 In this case, your argument is quite different.
9 In this case, your argument is, this, the Government
10 scheme here may protect only 60 percent of the country
11 from gambling, casino gambling advertising. It will
12 certainly protect those people who are too far away from
13 Government-owned casinos and Indian-owned casinos, but
14 very close to private casinos.

15 MR. ENNIS: Justice Scalia --

16 QUESTION: And in New Jersey, maybe, so -- I
17 don't know. Are there Indian casinos in New Jersey?

18 MR. ENNIS: Our argument is different from that.
19 Our argument is, there's no reason to believe this scheme
20 protects anyone from broadcast advertising for private
21 casinos because in every State Federal law allows private
22 casinos to promote the fact that they are casinos.

23 QUESTION: No, but I --

24 MR. ENNIS: I'd like to reserve the remainder of
25 my time.

1 QUESTION: I want you to have your time, but I
2 share Justice Scalia's -- in your answer to the marijuana
3 hypothetical you say, well, the Government has to do
4 something else first, and I don't understand it. Why
5 can't it attack advertising first?

6 MR. ENNIS: It can't attack advertising first
7 when the basis for the attack is not that the advertising
8 is false or misleading, or overreaching. That's what this
9 Court basically held in 44 Liquormart. It must regulate
10 the underlying conduct first, and that's an easy thing to
11 do in this case. It might be harder in the case of
12 cigarettes.

13 QUESTION: If a State allows prostitution it has
14 to allow advertising of houses of prostitution, is that
15 the position you're espousing?

16 MR. ENNIS: The question would be whether --

17 QUESTION: I think the answer's yes.

18 MR. ENNIS: The question would be -- no, we're
19 not talking about the State. We're talking about the
20 Federal Government --

21 QUESTION: Well, make it the Federal Government.

22 MR. ENNIS: -- and the Federal Government's not
23 authorized --

24 QUESTION: Make it the Federal Government.

25 MR. ENNIS: The Federal Government -- the

1 Federal Government -- if the Federal Government wants to
2 authorize prostitution Nation-wide --

3 QUESTION: It has to --

4 MR. ENNIS: -- then the Federal Government could
5 not constitutionally restrict advertising for prostitution
6 Nation-wide.

7 QUESTION: I don't see why --

8 MR. ENNIS: But the Federal Government is
9 certainly not going to take that position, and it doesn't
10 need to.

11 Thank you.

12 QUESTION: Very well, Mr. Ennis. Ms. Underwood,
13 we'll hear from you.

14 ORAL ARGUMENT OF BARBARA D. UNDERWOOD

15 ON BEHALF OF THE RESPONDENTS

16 MS. UNDERWOOD: Private -- Mr. Chief Justice,
17 and may it please the Court:

18 Private casino gambling operations are illegal
19 in 38 States. Congress supports the policy of those
20 States by prohibiting the casinos that operate legally in
21 the other 12 States from using radio and TV commercials to
22 reach into the homes of people in all 50 States.

23 QUESTION: Well, Mr. Ennis says that's not so.
24 He says they can use those means, but there are just
25 certain details that they can't advertise about. Do you

1 have a basic dispute about the facts of the way the law is
2 applied?

3 MS. UNDERWOOD: I'm not sure whether the dispute
4 is about the facts or about the way of characterizing
5 those facts. The FCC and the statute prohibit broadcast
6 advertising of gambling activities. When casinos operate
7 also as they claim to do, when institutions operate as
8 hotels and restaurants and nightclubs, the FCC has
9 reasonably taken the position that their advertising of
10 those activities is not covered by the ban.

11 Now, there are cases that are close to the line,
12 because an enterprise that runs many different sorts of
13 activities and is prohibited from advertising its gambling
14 activities may well try, through its advertising of other
15 activities, to promote --

16 QUESTION: Well, but it isn't even trying, is
17 it? If the advertising advertises a casino in Las Vegas,
18 which I guess is legal, there isn't any mystery about the
19 fact that's a gambling casino, is it, is there?

20 MS. UNDERWOOD: Well, it can't actually
21 advertise that it's a casino, although it can avoid that
22 problem by putting the word casino into its name.

23 QUESTION: Which most of them do.

24 MS. UNDERWOOD: Which many of them do, yes.

25 The FCC has attempted to draw a line between the

1 advertising of nongambling activities and gambling
2 activities, and that's the way the line has been drawn.
3 If the word casino is used in connection with too many of
4 these, you know, you have a good chance -- too many words
5 connoting chance and luck activities, the FCC has said
6 that in fact constitutes an advertisement for casino
7 gambling, but of course, there are anomalies close to the
8 line.

9 QUESTION: Couldn't one argue that it's somewhat
10 perverse to give free reign to the Las Vegas casinos to
11 advertise the fact that they are casinos, with the implied
12 message that it's gambling, but to prohibit them from
13 giving truthful information about what games are played,
14 what the odds are in their slot machines and all that sort
15 of stuff, which might actually be totally consistent with
16 the Government interest at stake here?

17 MS. UNDERWOOD: Well, I think this is quite
18 unlike the Liquormart and Coors problem, which is I think
19 the analogy that you are drawing, when advertising is
20 generally allowed and particular items are taken out in
21 order -- and the result is to make the market in
22 advertising less accurate, or less honest.

23 This is a situation where what Congress and the
24 FCC has tried to do is eliminate the broadcast advertising
25 market in gambling activities altogether, and the problem

1 that we're talking about arises because enterprises engage
2 in other activities as well and seek to market those
3 activities, and seek to smuggle in their advertising of
4 casino gambling.

5 QUESTION: There is one analogy with 44
6 Liquormart even on your description. That is, as Justice
7 Stevens pointed out, as long as the word casino is in the
8 title of the establishment that's doing the advertising,
9 everybody knows that it's casino activity which is being
10 advertised, but one of the things that advertiser cannot
11 do, as I understand it, is advertise his payout ratio.

12 He can't say, you have better odds, because the
13 payout ratio here is such-and-such, than you do in the
14 Indian casino up the road or across the State border, and
15 in that respect there is an analogy to the price
16 advertising in Liquormart. This is value advertising
17 which is prohibited. In Liquormart it was price
18 advertising.

19 MS. UNDERWOOD: The anomaly only arises, as I
20 said, because there is the ability to connote, to evade
21 the prohibition on advertising, the existence of the
22 gambling enterprise.

23 QUESTION: Yes, but that's a fact, and we have
24 to deal with it and, I suppose, if the Government were
25 going to be consistent in its own theory the Government

1 would take the position, the FCC would have taken the
2 position that an establishment that has the word casino in
3 its name may not advertise, because it can't advertise
4 without advertising casinos and everything that connotes,
5 but the Government doesn't take that position.

6 MS. UNDERWOOD: That would be an even more
7 effective way of serving the Government's interest. It
8 cannot advertise that it has slot machines, games of
9 chance. It can attempt to connote that, and that's what
10 creates the problem you're discussing.

11 QUESTION: Would you respond to one other point
12 that was raised by Justice Scalia, actually, in the
13 question that he put to Mr. Ennis, and he said there's
14 another feature of 44 Liquormart that's not present here,
15 and that is, there was quite clearly there an advertising
16 ban which put the mom and pop shops and so on at a
17 disadvantage. It interfered with the competition within
18 the market for that kind of liquor.

19 And isn't something very much like that present
20 here, because in fact the way the scheme works, all
21 noncasino forms of gambling that are authorized by States
22 and charities can say what they want to say, the Indian
23 casinos which are promoted by the Government can
24 apparently say what they want to say, so that the onus
25 falls entirely on the privately owned casinos, and isn't

1 that, in effect, an interference with competition in the
2 gambling market?

3 MS. UNDERWOOD: No. It is principally a
4 decision by Congress to -- Congress identified a
5 particular problem, the problem of private casino
6 gambling, which is partly a Federal interest because the
7 States have independently, 38 of the States have
8 identified that as a form of gambling.

9 QUESTION: Why is the problem in private casinos
10 different from the problem in Indian casinos? I mean, the
11 only argument that I heard in the Government's brief was,
12 well, the Indian casinos tend to be off in the boondocks
13 somewhere, and people can't get to them easily, and so
14 compulsive gamblers don't resort to them that well.

15 Well, they may be out in the boondocks, but I
16 don't see that goes to the Government's interest. I don't
17 see why that suggests that compulsive gambling isn't going
18 on in the casinos that the Government promotes and allows
19 to advertise as readily as those which are subject to
20 restriction.

21 MS. UNDERWOOD: A more important distinction,
22 Justice Souter, is that the --

23 QUESTION: Well, is that -- before you get to
24 the more important distinction, how about the one that I
25 was --

1 (Laughter.)

2 QUESTION: -- attacking? Is my criticism fair?

3 MS. UNDERWOOD: I don't know that there's any
4 evidence about the different incidence of compulsive
5 gambling at the different casinos. Congress chose to
6 promote Indian casinos. It was a -- it's a controversial
7 policy. It was a decision to try and promote the economic
8 development of Indian tribes, which had been -- which is
9 and has been quite an intractable problem.

10 QUESTION: Do you know how many of the 12 States
11 there are Indian casinos, say, either in the State or near
12 the State so it might attract a lot of customers? Is it
13 fair to assume that most of them --

14 MS. UNDERWOOD: No, it is not fair to assume
15 that most of them -- it's very variable. The 12 --

16 QUESTION: Well, there are 240 across the
17 country, or something, so I've been assuming that probably
18 a lot of these are in these States, and if you say it's
19 not so, you'd better --

20 MS. UNDERWOOD: It's not so to the best of my --
21 it's not so in New Jersey, Indiana, Illinois, Missouri --

22 QUESTION: In how many States do we find Indian
23 gambling casinos today?

24 MS. UNDERWOOD: A large number of States have
25 Indian gambling.

1 QUESTION: Well, anyway, the point would be, I
2 guess --

3 MS. UNDERWOOD: 21.

4 QUESTION: 21.

5 QUESTION: I mean, this is sort of -- I mean,
6 suppose, for example, the Government were to say
7 marshmallows are bad for your health, we don't want
8 anybody advertising them but for the Scouts. I mean, the
9 object there, I guess, would be to get revenue to the
10 Scouts. That's a good purpose.

11 But I mean, is because we'd like money to go to
12 the Indian tribes a justification for stopping them from
13 advertising what is a lawful activity in those States? I
14 mean, they -- the consumers get the advertising. The
15 consumers read all about it. Go to the casino, win a
16 million.

17 MS. UNDERWOOD: There is also with respect to
18 Indians not just that they are a worthy recipient of
19 economic -- of charity, but -- or of economic development,
20 but that they are -- they have a special relationship to
21 the Federal Government, like the States themselves --

22 QUESTION: But the --

23 MS. UNDERWOOD: -- as sovereigns, whose choices
24 are -- yes.

25 QUESTION: Yes, of course, that's true, but my

1 point would be, is it a justification to stop the
2 advertising of a lawful activity where in fact the people
3 in the State will get the message, go gamble, so your only
4 justification is, you'd like the money to go to a group
5 that's a very worthy group.

6 MS. UNDERWOOD: Well, it's not the only
7 justification, Justice Breyer. In fact, private casino
8 gambling, we've been talking about numbers here, it
9 represents 40 percent of the total gambling market. It
10 represents more than 70 percent of the casino gambling
11 market. That is to say, the Indian tribe gambling is, and
12 the charitable gambling, and the State gambling, is a very
13 small part of the market, and Congress --

14 QUESTION: Well --

15 QUESTION: Ms. Underwood --

16 QUESTION: -- but if we could just stay with
17 Justice Breyer's question for 1 minute, is it permissible
18 for Congress to favor a particular interest, a particular
19 segment of the population, a particular group by its
20 speech statutes? I mean, of course Congress can give
21 subventions to Indian tribes in many ways and support
22 their gambling. Can it use speech as an element of
23 political largesse? Can it use speech as a reward to one
24 group and not to another? Isn't that what Mr. Ennis is
25 arguing here that Congress can't do, or am I missing the

1 theory?

2 MS. UNDERWOOD: Well, that would be one of the
3 things he's arguing here, and I wouldn't want to assent to
4 that position as a general matter. The distinction that's
5 being drawn here, though, is between governmental entities
6 on the one hand and private enterprise on the other.
7 Congress has decided to permit Indian tribes, which are
8 sovereigns and which are in need of economic development
9 both, to engage in an activity which it has otherwise
10 chosen to discourage both --

11 QUESTION: May I ask --

12 QUESTION: I suppose --

13 QUESTION: -- on your distinction between
14 governmental and private on these, supposing we had a
15 State statute instead of a Federal statute, and a State
16 wanted to prohibit advertising of privately owned casinos
17 but allow advertising of its own casinos -- say Illinois
18 had operated such a casino and they wouldn't allow
19 advertising -- would a state statute prohibiting all
20 advertising, newspaper, handbills and everything, a
21 private casino's protecting its own -- be constitutional
22 in your view?

23 MS. UNDERWOOD: Well, there would be a -- I'm
24 not sure that it would. You're now interjecting a ban on
25 all advertising --

1 QUESTION: Right.

2 MS. UNDERWOOD: -- and I would like to point out
3 that this is a limited prohibition. It doesn't prohibit
4 all advertising. It prohibits the most intrusive kind.
5 It prohibits radio and TV advertising, and that is
6 narrowly tailored to these interests, to the interests of
7 the State --

8 QUESTION: But it allows newspaper, magazine and
9 all the other kinds of advertising without any limitation.
10 Is that not right?

11 MS. UNDERWOOD: No. Related statutes here
12 prohibit interstate transportation and mailing of
13 advertisements. What's left open to the private casinos
14 is to advertise by billboards and handbills and circulars
15 and local newspaper supplements and matters that don't
16 travel --

17 QUESTION: Go through the mails, I see.

18 QUESTION: Ms. Underwood, is it the case that
19 all Indian casinos are remote?

20 MS. UNDERWOOD: No. It's the case that most of
21 them are. Well, I'm not sure of the answer to that.

22 QUESTION: Certainly in my home State of Arizona
23 the casinos are right there in the largest urban center of
24 the State, are they not?

25 MS. UNDERWOOD: Yes, but I would like to --

1 QUESTION: See, if they had been remote, I was
2 going to ask you whether you've noted any difference in
3 the class of customers at Las Vegas and Atlantic City. I
4 mean, I don't know that buses of elderly people from --

5 (Laughter.)

6 QUESTION: -- retirement homes travel out to Las
7 Vegas, and they certainly do to Atlantic City, and that
8 might have been a justification, but if you think the
9 Indians are in Atlantic City as well, then I guess we
10 can't use that, can we?

11 MS. UNDERWOOD: There is no Indian gambling in
12 New Jersey, if that was --

13 QUESTION: No, but there is some in Connecticut.

14 (Laughter.)

15 QUESTION: I mean, don't they take buses up to
16 Connecticut? I mean, is it any further from northern New
17 Jersey to go to Atlantic City than it is to get on the
18 bus, and they go across Long Island, take the ferry, go to
19 the big casino that I think there's near -- isn't there
20 one near New London somewhere?

21 MS. UNDERWOOD: I think it would be surprising
22 if Congress could not decide to promote a limited amount
23 of casino gambling for the benefit of Indian tribes, and
24 that decision barred it from otherwise pursuing its two
25 substantial State interests here, that is to say,

1 furthering the policies of those States, and there are
2 numerous States that have no Indian gambling and no
3 private casino gambling.

4 QUESTION: What I -- as I read the statute, the
5 statute itself doesn't refer to casinos. You said
6 Congress was concerned with casinos, but the statute
7 doesn't even refer to casinos.

8 MS. UNDERWOOD: Well, there's an interesting --
9 the hole in the middle of the donut can be found in the
10 legislative history. What happened in 1988 was that
11 Congress was told that private -- that charities and local
12 fire departments who wanted to hold raffles, and car
13 dealers and travel agencies who wanted to hold the
14 occasional raffle, were being hurt by their inability to
15 use local radio and TV.

16 The first bill to solve that problem was to lift
17 the ban on broadcast advertising for all lawful gambling.
18 the House refused to pass that bill, and what it did was,
19 it added an amendment expressly prohibiting broadcast
20 advertising by private casinos, and it defined them as the
21 profit businesses that engage in roulette, black jack, it
22 listed slot machines and so forth. That's the definition
23 that Congress -- that the House chose.

24 It went to the Senate, and the Senate flipped
25 the statute to have hat everyone agrees is the same

1 effect, but instead of having just a ban for private
2 casinos, what it has is a general ban and a list of
3 exceptions for everything except private casinos, but it's
4 understood by all here that it has precisely the same
5 effect, that in 1988 Congress did target private casino
6 gambling as the object of this broadcast ban.

7 QUESTION: Ms. Underwood, am I right in thinking
8 that if a State wishes to ban gambling entirely, then no
9 Indian casino can be set up in that State?

10 MS. UNDERWOOD: That's correct. The authority
11 of the Indians to gamble depends on a compact. The
12 obligation to negotiate for a compact depends on the
13 State's permitting some forms of gambling. However --

14 QUESTION: But that form of gambling could
15 include charitable organizations that have gambling as
16 fundraisers.

17 MS. UNDERWOOD: That's correct, and have
18 occasional gambling and therefore do not pose nearly the
19 same sort of hazards as the standing operations that
20 private casino gambling is.

21 On the broadcast advertising point, because this
22 Court has previously recognized that broadcast, the
23 broadcast medium poses especial problems --

24 QUESTION: Excuse me, before you get off that
25 last point, don't you find that poses sort of a problem

1 for Congress? I mean, Congress could have met the problem
2 it was concerned with by simply not requiring States, in
3 order to keep out Indian gambling, in order to, you know,
4 to prevent bingo games, but Congress says unless you go
5 after bingo games -- what about, you know, Monday night
6 poker? Is that -- do you have to ban that too in order to
7 keep out casinos?

8 MS. UNDERWOOD: I'm not familiar with the
9 details.

10 QUESTION: Well, that's pretty extreme. I
11 mean --

12 MS. UNDERWOOD: What the Indians said --

13 QUESTION: -- if Congress is really concerned
14 about casino gambling, I mean, to put such a strict
15 limitation on the States, the only way you can keep it out
16 of your State is to ban all forms of games of chance --

17 MS. UNDERWOOD: It's not Monday night poker. In
18 fact, the statute -- the Indian gaming statute divides
19 gaming into three categories, and it's -- the class 3
20 gambling, which encompasses casino gambling, it also
21 encompasses, though, the occasional casino night as well
22 as the standing casino, and that's where this has it.

23 QUESTION: I see. Okay.

24 QUESTION: What else besides casinos are in that
25 class 3?

1 MS. UNDERWOOD: It's slot machines. It's --

2 QUESTION: But not bingo, and you're saying it's
3 just roulette wheels, and --

4 MS. UNDERWOOD: Roulette wheels, yes. Bingo is
5 class 2 gaming.

6 QUESTION: I would think so.

7 QUESTION: How about race tracks?

8 MS. UNDERWOOD: That's separately regulated
9 altogether. That's not --

10 QUESTION: Not in any of these classes.

11 MS. UNDERWOOD: That's correct.

12 QUESTION: There's no ban on advertising for
13 race tracks, is there?

14 MS. UNDERWOOD: Ban on advertising for the race
15 tracks. No.

16 QUESTION: Or jai lai, or dog races?

17 MS. UNDERWOOD: Those activities have been
18 taken -- actually, have been for a long time regarded as
19 not games of chance because there's said to be some skill
20 involved in assessing the --

21 (Laughter.)

22 QUESTION: Well, you can only lose, what, 12
23 times a night, as opposed --

24 (Laughter.)

25 QUESTION: As opposed to roulette.

1 MS. UNDERWOOD: Well, I think that's an
2 important distinction. Both the harm to compulsive or
3 pathological gamblers, the appeal to them, and the
4 devastating social costs that are afflicted are incident
5 to the continuous play feature of --

6 QUESTION: Well, of course they're worse, but it
7 is also a serious problem in lotteries, isn't it? There
8 are a lot of compulsive people who gamble with the
9 lotteries.

10 MS. UNDERWOOD: That has been a problem with
11 lotteries. It is not -- Congress was entitled, as the
12 States themselves decided that it wasn't the same order of
13 problem as private casino gambling with slot machines.

14 QUESTION: Mr. Ennis argued, I think it's a fair
15 characterization of his argument, that Congress has to
16 attack the root of the problem before it prohibits speech.
17 If that's a fair characterization of his argument, is
18 there authority for or against that proposition in our
19 cases?

20 MS. UNDERWOOD: Well, some justices, some
21 opinions have said so. I don't believe the Court has so
22 held, and I would say that Edge is the best authority for
23 the proposition that, particularly where the different
24 choices of different States are involved and are to be
25 respected, Congress is peculiarly unable to attack the

1 problem by a Nation-wide regulations -- it would, for
2 instance, ban private casinos or regulate it -- when one
3 of its objectives is in fact to permit the States, the
4 minority States to make a different choice.

5 But its effort is to protect the choice of the
6 38 States that prohibit this activity as well as to pursue
7 its own overarching concern about the social costs of
8 gambling, and Edge did not require Congress to seek some
9 other way of serving that objective before passing the
10 statute that it passed there, which is related to this
11 one, but involves different treatment of State lottery
12 advertising as distinguished from private casino gambling.

13 QUESTION: I suppose if the rule were expanded
14 to prohibit casinos from even saying their name, or to
15 prohibit casinos from advertising their entertainment --
16 although I guess what they say is, Las Vegas-type
17 entertainment. That gets the message across.

18 But if it were expanded that way to be more
19 effective, as Mr. Ennis would like, I suppose you'd be up
20 here defending against a different attack, namely that the
21 prohibition was overbroad, broader than was necessary to
22 achieve the objective that the Government desired.

23 MS. UNDERWOOD: Well, that's correct. The
24 statute is -- has consistently been attacked in this
25 litigation from both directions on the ground that it's

1 too broad to be constitutional, or too narrow to be
2 constitutional, and --

3 QUESTION: Ms. Underwood, would you just explain
4 the linkage between the Government's purpose, to get a
5 handle on the addictive gambler, and this prohibition,
6 because do we -- it seemed to me that this prohibition is
7 effective against the casual gambler, the person who's
8 going to be entertained, but the true drunk is going to
9 find the bottle, and if the bottle is there, whether it's
10 the Indian reservation or whatever, so I don't see the
11 connection between this kind of prohibition of some
12 advertising but not other, and the addict.

13 MS. UNDERWOOD: Well, that involves a lot of
14 assumptions. I mean, any attempt to deal with this
15 problem involves some assumptions about human behavior.
16 If broadcast advertising is intrusive, which seems to
17 be -- and reaches very widely, if it -- it has a
18 particular ability to stimulate demand, to remind people
19 that this is what they want to do, to induce in them the
20 desire to do it, to create, to help create the addiction,
21 then it's a reasonable way of attacking the problem. A TV
22 commercial --

23 QUESTION: So you're saying luring the newcomer,
24 the one that is not yet addicted but may be.

25 MS. UNDERWOOD: Yes. A TV commercial showing a

1 slot machine pouring out money with lots of people
2 rejoicing and saying they don't have to work any more is a
3 lot more seductive --

4 QUESTION: Well, TV commercials reach a much
5 broader kind of audience than newspaper advertisements
6 just because many fewer people read newspapers than watch
7 TV, isn't that so?

8 MS. UNDERWOOD: That's so, yes, and, of course,
9 broadcast advertising, which has this broad interstate
10 reach, is completely beyond the regulatory power of the
11 States, so to the extent this is an effort in cooperative
12 federalism, the Federal Government has attacked this
13 problem where it has the unique authority, without
14 intruding excessively on the choices of the States that
15 have made a different choice.

16 There is no reason to interpret the Constitution
17 to require Congress to outlaw this controversial practice
18 altogether rather than seeking to keep it off the airways
19 and to reduce demand, and especially to reduce demand
20 among those impulse buyers who respond to broadcast
21 advertising.

22 QUESTION: Senator Kennedy suggests that maybe
23 you cannot favor one minority group -- I'm sorry, Justice
24 Kennedy.

25 (Laughter.)

1 QUESTION: I have a lifetime job.

2 (Laughter.)

3 QUESTION: It's a long time ago. I -- he
4 suggests that maybe you can't favor a minority group by
5 restricting speech, and that is in a way what's going on
6 here, exempting them from a prohibition otherwise, namely
7 the State -- Indian, Indian casinos. Is that proposition
8 correct? I'm trying to think of any other area where one
9 minority is permitted to speak and others aren't.

10 MS. UNDERWOOD: Well, it seems to me the
11 question should be no different from the question whether
12 Congress could decide to outlaw private casino gambling
13 altogether but permit Indian tribes to engage in it.

14 QUESTION: Well, I don't know why the question
15 should be no different. I mean, speech is different.

16 MS. UNDERWOOD: Yes, but this is commercial
17 speech. This is speech that is very close to an act.
18 This is like an offer to sell services, and --

19 QUESTION: But your argument is commercial
20 speech is not different from nonspeech Commerce Clause
21 regulation, and that's -- that clearly is not so.

22 MS. UNDERWOOD: No, I'm not -- I didn't mean to
23 argue that. What I meant to argue is that it has
24 something in common with. The reason it doesn't have --
25 the reason it has been treated by this Court as a separate

1 category is that it partakes of some of the qualities
2 of --

3 QUESTION: Is there some record evidence in this
4 case or in the companion, the other cases that would
5 suggest that if you're in a State with nearby Indian
6 casinos, and gambling is legal, and you're hit with a
7 number of advertisements, come to our Indian casino but
8 not come to our private casino, that makes some difference
9 in respect to compulsive gamblers?

10 I mean, why doesn't Indian casino gambling
11 advertising have precisely the same effect --

12 MS. UNDERWOOD: Even if --

13 QUESTION: -- as private casino advertising in
14 respect to the compulsive gambler rationale?

15 MS. UNDERWOOD: It may. It may, but --

16 QUESTION: Well, once it does, then you're
17 really back to the only justification being that it's
18 better to have the money go to the Indians than it is to
19 have it go to private people, and that's why it seems to
20 me to the same, it's better to have the money go to the
21 Boy Scouts than it is to have it go to the grocery
22 stores --

23 MS. UNDERWOOD: Well, except that the --

24 QUESTION: -- and that's bothering me.

25 MS. UNDERWOOD: The Indians I think stand on a

1 different footing of this discussion from grocery stores
2 or Boy Scouts.

3 QUESTION: Of course, in respect to economic
4 regulation the answer would be all the things you
5 mentioned, but this is speech regulation, and it is at
6 least have to be proportionate.

7 MS. UNDERWOOD: Well, it --

8 QUESTION: So proportionality in respect to the
9 restriction, well, is this a justification in -- on that
10 kind of a test?

11 MS. UNDERWOOD: Well, it is a restriction, a
12 speech restriction that follows a conduct restriction.
13 That is to say, just as those States which conduct
14 lotteries may advertise them, so may those Indian tribes
15 which conduct lotteries may advertise them, and Congress
16 was entitled to distinguish those activities of --

17 QUESTION: And of course --

18 QUESTION: And maybe that --

19 QUESTION: -- aren't some of the Indian gambling
20 casinos in fact being operated by private casino interests
21 such as Harrah's, or something like that, that just pay
22 over a percentage to the tribe? Isn't that the situation?

23 MS. UNDERWOOD: Yes, that is the situation in
24 some cases.

25 QUESTION: But the money goes to the tribe.

1 MS. UNDERWOOD: Yes it does.

2 QUESTION: Maybe the answer to Justice Kennedy's
3 question is that a minority is not being favored in
4 allowing them to say things which others cannot say. As I
5 understand this law, nobody can advertise private casinos,
6 right?

7 MS. UNDERWOOD: That's correct, and that --

8 QUESTION: I'm not allowed to, Indians aren't
9 allowed to, nobody is allowed to advertise private
10 casinos.

11 MS. UNDERWOOD: That's correct.

12 QUESTION: And everybody is allowed to advertise
13 Indian casinos. If the private casinos want to help out
14 the Indians --

15 (Laughter.)

16 QUESTION: -- they can advertise Indian casinos,
17 right?

18 MS. UNDERWOOD: That's right, and that's why
19 this is really --

20 QUESTION: It's a substantive restriction --

21 MS. UNDERWOOD: -- a substantive --

22 QUESTION: -- rather than a speech --

23 QUESTION: And rich and poor can sleep under the
24 bridges.

25 MS. UNDERWOOD: That's true.

1 (Laughter.)

2 QUESTION: Nobody can advertise marshmallows.
3 Anybody can advertise Boy Scout marshmallows.

4 MS. UNDERWOOD: Well, the question there would
5 be whether that --

6 (Laughter.)

7 MS. UNDERWOOD: -- distinction is permissible or
8 not.

9 QUESTION: But it's a question of whether the
10 substantive distinction is permissible. It's not that
11 you're allowing some people to say things which other
12 people can't say.

13 MS. UNDERWOOD: That's correct.

14 There's nothing inconsistent about the fact
15 that Congress permits churches, civic groups, and fire
16 departments to use the airwaves to promote the bingo games
17 and raffles they use for fundraising. That simply doesn't
18 pose the same kind of problem that the standing private
19 casino poses.

20 QUESTION: Let me ask you one last question, if
21 you're -- you've just about run out of your argument.
22 Supposing a State prohibits the sale of liquor on Sundays.
23 Could it prohibit advertising of the fact that a
24 neighboring State has liquor stores open on Sundays?

25 MS. UNDERWOOD: Could the State do that?

1 QUESTION: Say Illinois prohibits the sale of
2 liquor on Sunday, but Indiana does not, could Illinois
3 prohibit Indiana advertise -- from advertising in the
4 Chicago radio stations and Chicago newspapers that their
5 stores are open?

6 MS. UNDERWOOD: I think probably not,
7 particularly if you're talking about all advertising, but
8 if there were wide variation among the States on this
9 issue and Congress chose to enforce that variation through
10 a ban on broadcast advertising that left newspapers and
11 other methods open, I think it could do that.

12 QUESTION: Thank you, Ms. Underwood.

13 Mr. Ennis, you have 3 minutes remaining.

14 REBUTTAL ARGUMENT OF BRUCE J. ENNIS, JR.

15 ON BEHALF OF THE PETITIONERS

16 MR. ENNIS: Mr. Chief Justice, I hope I have
17 time to make three brief points. The first is in response
18 to a question raised by Justice Ginsburg, and that is that
19 the word casino clearly signals to compulsive gamblers and
20 noncompulsive gamblers alike that gambling activity takes
21 place. This is remarkably like the Coors case in which
22 the Federal scheme prohibited the hosting of alcohol
23 content on labels but permitted --

24 QUESTION: Yes, but Mr. Ennis, you're not going
25 to convince me that you'd like the statute better if it

1 did not allow the use of the word casino.

2 MR. ENNIS: Not that I'd like it better, Justice
3 Stevens, but that --

4 QUESTION: Would it be okay? Would it be
5 constitutional if they didn't allow them to use the word
6 casino --

7 MR. ENNIS: No, for other reasons, but
8 because --

9 QUESTION: There's no way out of this box.

10 MR. ENNIS: But because this --

11 (Laughter.)

12 MR. ENNIS: Not under this scheme. Because in
13 Coors the Court said, allowing the use of malt liquor
14 signals high alcohol content, and that means it cannot
15 materially advance the Government's interest, that's
16 equally true with respect to the word casino.

17 Second, many -- many Indian casinos, and a
18 growing number, are located close to population centers.
19 Harrah's operates an Indian casino in North Carolina, the
20 Edge state, which it advertises is within a day's drive of
21 half the population of this country. Foxwood's, in
22 Connecticut, is within 2 hours from both New York City and
23 Boston, closer than Atlantic City. There are at least 22
24 Indian casinos near Sacramento, 13 near Phoenix, 6 near
25 Portland, Oregon, and growing every day.

1 Third, this scheme cannot be justified on the
2 basis of the special characteristics of broadcast because
3 the scheme permits broadcast advertising in every State of
4 Government casinos, Indian casinos, and even private
5 casinos when they say, I'm a casino.

6 Furthermore, this scheme does prohibit print
7 advertising that uses U.S. mails, and Congress clearly
8 didn't think that broadcast was worse than print, because
9 violations of the print advertising ban, you go to jail
10 for 2 years for each offense, violation of the broadcast
11 ban, you go to jail for 1 year for each offense.

12 QUESTION: Mr. Ennis, how many States have
13 Government casinos?

14 MR. ENNIS: Four, as of this moment, Justice
15 Scalia, but that's a very recent trend, just in the last
16 year or so, and that's growing as well.

17 Justice Scalia, let me also point out, your off-
18 track betting, this scheme permits broadcast advertising
19 not just for race track betting but for off-track
20 simulcast betting, so that people can gamble every day,
21 day-long, and broadcast advertising is unlimited.

22 Finally, I just want to answer one question that
23 was asked, and that is, in both Coors and 44 Liquormart
24 this Court ruled that the availability of nonspeech
25 regulations meant that the scheme could not pass the

1 Central Hudson test. That's this case.

2 Thank you.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ennis.

4 The case is submitted.

5 (Whereupon, at 11:10 a.m., the case in the
6 above-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:

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., ETC., ET AL.,
Petitioners v. UNITED STATES, ET AL.

CASE NO: 98-387

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