No. 05-30403

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASINO CITY, INC.,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

BRIEF FOR APPELLEE

PETER D. KEISLER
Assistant Attorney General

DAVID R. DUGAS
United States Attorney

SCOTT R. McINTOSH
(202) 514-4052
ERIC D. MILLER
(202) 514-5735
Attorneys, Appellate Staff
Civil Division, Room 7256
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

CERTIFICATE OF INTERESTED PERSONS

CASINO CITY, INC.,
Plaintiff-Appellant,

v. No. 05-30403

UNITED STATES DEPARTMENT OF JUSTICE,
Defendant-Appellee.

The undersigned counsel of record certifies that the following listed persons and entities as described in Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Casino City, Inc.
2. Information Technology Systems, Inc.
3. Barry S. Richard
4. Frederick R. Tulley
5. Erick Y. Miyagi
6. Laureen E. Galeoto
7. Lloyd J. Lunceford
8. Patrick O'Brien
9. M. Hope Keating

10. Taylor, Porter, Brooks & Phillips, LLP

11. Greenberg Traurig, PA

12. Peter D. Keisler

13. David R. Dugas

14. John J. Gaupp

15. Vincent M. Garvey

16. Samuel C. Kaplan

17. Scott R. McIntosh

18. Eric D. Miller

_____

Eric D. Miller
Counsel for Appellee

STATEMENT REGARDING ORAL ARGUMENT

The appellee believes that the judgment of the district court can be affirmed without argument on the basis of the briefs and the decision below. We are prepared to present oral argument if the Court would find argument to be of assistance in its deliberations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes, and Rules

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-30403

CASINO CITY, INC.,
Petitioner-Appellee,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

BRIEF FOR APPELLEE

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court entered a final judgment on February 15, 2005 (R. 177), and plaintiff filed a notice of appeal on April 12, 2005 (R. 178), which was timely under Federal Rule of Appellate Procedure 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether a party has standing to bring a constitutional challenge to a federal criminal statute when it does not allege that it has engaged in conduct prohibited by the statute, that it plans to engage in such conduct in the future, or that it has been threatened with prosecution.

2. Whether a constitutional challenge to a criminal statute is ripe when the plaintiff does not allege that it has engaged in conduct prohibited by the statute, that it plans to engage in such conduct in the future, or that it has been threatened with prosecution.

3. Whether, consistent with the First Amendment, Congress may prohibit advertising for illegal gambling.

STATEMENT OF THE CASE

Plaintiff Casino City operates web sites that carry advertisements for internet gambling enterprises. It brought this action seeking a declaration that the application to it of 18 U.S.C. §§ 2, 1084, 1952, or 1955—statutes that prohibit internet gambling—would violate the First Amendment. According to its complaint, Casino City had not engaged in conduct that violated these statutes, and it had no intention of doing so. Casino City

also did not allege that it had been investigated by the government or threatened with prosecution. The government moved to dismiss for lack of standing. The district court granted the motion to dismiss, and Casino City appealed.

STATEMENT OF THE FACTS

A. Statutory Background

This case involves three federal criminal statutes that relate to gambling. First, 18 U.S.C. § 1084(a) prohibits anyone "engaged in the business of betting or wagering" from

> knowingly us[ing] a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers.

Second, 18 U.S.C. § 1952 prohibits using the mail or any facilities in interstate or foreign commerce to

> promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on of . . . any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed or of the United States.

Third, 18 U.S.C. § 1955 prohibits the ownership, management, or

supervision of an "illegal gambling business," which is defined as

> a gambling business which — (i) is a violation of the law of a State or political subdivision where it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

In addition, 18 U.S.C. § 2 provides that anyone who "commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

B. Facts and Prior Proceedings

1. In June 2003, a Deputy Assistant Attorney General in the Criminal Division of the Department of Justice sent a letter to the National Association of Broadcasters ("NAB") discussing some of the laws pertaining to gambling. (R. 11). The letter observed that "advertisements for Internet gambling and offshore sportsbook operations are ubiquitous on the Internet, in print ads, and over the radio and television," and it expressed concern that the "sheer volume" of such advertisements might "mislea[d] the public in the United States into believing that such gambling is legal, when in fact, it is not." *Ibid*. In particular, it noted that "Internet

gambling and offshore sportsbook operations that accept bets from customers in the United States violate Sections 1084, 1952, and 1955 of Title 18." *Ibid*. It also explained that 18 U.S.C. § 2 extends liability to "any person or entity who aids or abets" the commission of any of those offenses. *Ibid*.

The letter went on to state that "[t]he Department of Justice is responsible for enforcing these statutes, and we reserve the right to prosecute violators of the law." *Ibid*. It concluded:

> Broadcasters and other media outlets should know of the illegality of offshore sportsbook and Internet gambling operations . . . . We'd appreciate it if you would forward this public service message to all of your member organizations which may be running such advertisements, so that they may consult with their counsel or take whatever other actions they deem appropriate.

(R. 12).

2. Plaintiff Casino City, Inc., is a Louisiana corporation that operates web sites on which it displays advertisements for overseas businesses that offer online casino or sportsbook gambling. (R. 6-8). In August 2004, over a year after the Justice Department's letter to the NAB, Casino City brought this action seeking a declaration that application of 18 U.S.C. §§ 2, 1084,

1952, or 1955 to it would violate the First Amendment. (R. 9).

According to the complaint, the advertisers on Casino City's web sites are "lawful overseas companies" that "legally operate in the jurisdictions in which they are located." (R. 8). Casino City itself "does not conduct or participate in online casino or sports book activities," and it "does not knowingly accept, in payment for running online casino or sports book advertisements, proceeds that come from illegal bets, deposits or wagers." *Ibid*.

The complaint stated that the Department of Justice letter to the NAB had "been the subject matter of numerous media reports." *Ibid*. It did not allege that Casino City is a member of the NAB or that the Department of Justice had sent Casino City a copy of the letter. The complaint also did not allege that the Department of Justice—or any other government agency—had investigated Casino City or threatened to prosecute it for violating any of the criminal statutes mentioned in the letter. According to the complaint, "numerous subpoenas were issued by the [Department of Justice] to media outlets, internet portals, public relations companies and technology companies seeking commercial and financial information in

relation to advertisements purchased and placed by online casinos and sports book companies," (R. 7), but Casino City did not allege that it had been the target of such a subpoena.

3. The government moved to dismiss for lack of jurisdiction, and the district court granted the motion. Specifically, the court held that Casino City lacked standing to challenge any of the statutes at issue in the case because it had not demonstrated "a 'realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" (R. 169, quoting *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). As the court explained, "Casino City has failed to allege its intended activities constitute those which are prohibited by statute." (R. 171). On the contrary, it alleged that its activities are legal.

Nor had Casino City shown "that it will be subject to a credible threat of prosecution." (R. 172). While the complaint alleged that subpoenas "were sent to various entities and individuals," Casino City "has not been served with a subpoena" or "in any other way been contacted by the [Department of Justice] regarding a criminal complaint." *Ibid*. In addition, the court found that "the elapsed time of one year between Casino City's

receipt of the [Department of Justice] letter and alleged subpoenas" suggested that Casino City was not "in any danger of imminent prosecution." (R. 173).

The district court went on to hold that even if Casino City did have standing, it had failed to demonstrate any violation of the First Amendment. If Casino City were to be prosecuted, the court reasoned, "it would be for illegal gambling activities." *Ibid*. Applying the test set out in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557 (1980), for evaluating commercial-speech claims, the court determined that the First Amendment did not protect the speech addressed by the statutes at issue because that speech was misleading and concerned illegal activity. (R. 173-74). In addition, the court explained that the government "has a significant interest in regulating the activity" in question because of internet gambling's "accessibility by the general public, which includes children and compulsive gamblers." (R. 175). By restricting advertising for internet gambling, "the government reaches its goal of deterring this illegal activity." *Ibid*.

Casino City appealed.

SUMMARY OF ARGUMENT

1. The district court properly dismissed the complaint for lack of standing. In order to have standing to challenge a criminal statute, a plaintiff must allege both that it has "an intention to engage in a course of conduct . . . proscribed by a statute" and that "there exists a credible threat of prosecution thereunder." *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). In this case, Casino City has failed to carry either part of its burden.

First, Casino City has not alleged that its conduct violates any of the statutes that it has challenged in this case. Those statutes prohibit engaging in—or aiding and abetting—online gambling. But Casino City does not itself conduct gambling, and while it does operate web sites that carry advertisements for gambling, it repeatedly insists that the forms of gambling it advertises are lawful. Accepting as true the allegations in the complaint, Casino City has not violated any federal statute.

Second, Casino City has not shown that it faces a credible threat of prosecution. While it notes that other businesses have been investigated by the government, Casino City does not allege that it has been investigated or

threatened in any way. It points out that an official at the Department of Justice wrote a letter about the statutes relating to online gambling. But that letter was not sent to Casino City, nor did it mention Casino City or discuss its conduct. And the letter was sent over a year before Casino City filed its complaint; during that time, Casino City apparently did not alter its conduct in any way. Any threat of prosecution Casino City might face is hardly imminent.

2. The district court's judgment may also be affirmed on the alternative ground that Casino City's claims are unripe. Casino City has shown no threat of immediate injury, nor has it demonstrated that it would suffer any hardship from deferring consideration of its claims.

3. If this Court does reach the merits, it should affirm the judgment of the district court. Casino City argues that restrictions on advertising for internet gambling violate the First Amendment. Because this claim involves commercial speech, it must be evaluated under the test set out in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557 (1980). Under *Central Hudson*, the First Amendment does not even apply unless the speech in question "concern[s] lawful activity." *Id.* at

566. This suffices to dispose of Casino City's claims, for the only speech that could possibly be restricted by the statutes under review is advertising for *illegal* gambling. In any event, even if the remaining elements of *Central Hudson* were relevant here, the statutes at issue should be upheld because they directly advance the substantial government interest in reducing illegal online gambling, and they are not more extensive than necessary to promote that interest.

STANDARD OF REVIEW

This Court reviews the district court's grant of a motion to dismiss *de novo*. *See Zephyr Aviation, L.L.C.* v. *Dailey*, 247 F.3d 565, 570 (5th Cir. 2001).

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT FOR LACK OF STANDING.

A party who invokes the jurisdiction of a federal court must meet the "case or controversy" requirement of Article III of the Constitution. To satisfy "the irreducible constitutional minimum of standing," a party must

establish three elements: (1) "an 'injury in fact'—an invasion of a legally protected interest" that is "concrete and particularized" and "'actual or imminent,' not 'conjectural' or 'hypothetical;'" (2) "a causal connection between the injury and the conduct complained of;" and (3) redressability of the injury by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). "[T]he burden is on the plaintiff to allege facts sufficient to support standing." *Ward* v. *Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 607 (5th Cir. 2004). Because Casino City failed to meet this burden, the district court properly dismissed the complaint.

Casino City has not shown that the statutes it challenges have injured it in any way. A litigant may not assert the unconstitutionality of a criminal statute "merely because he desires to wipe it off the books." *KVUE, Inc.* v. *Austin Broad. Corp.*, 709 F.2d 922, 928 (5th Cir. 1983). Instead, this Court has recognized that in order to establish standing to challenge a criminal statute, "a litigant 'must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" *Peyote Way Church of God* v. *Smith*, 742 F.2d 193, 198 (5th Cir. 1984) (quoting *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289,

298 (1979)). Such a danger exists when "the plaintiff has alleged an intention to engage in a course of conduct . . . proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt*, 442 U.S. at 298. In this case, Casino City has not shown that either part of this test is satisfied.

A. Casino City has not alleged that it intends to engage in conduct prohibited by statute.

Far from alleging an intention to engage in conduct proscribed by statute, Casino City insists that its activities are entirely lawful. According to its complaint, Casino City does not itself "conduct or participate in online casino or sports book activities." (R. 8). Taking that allegation as true, Casino City has not violated 18 U.S.C. § 1084(a), which applies only to those "engaged in the business of betting or wagering," or section 1955, which prohibits the ownership, management, or supervision of an "illegal gambling business." And although Casino City displays advertisements for other gambling enterprises—which might be thought to be "promot[ion]" of those enterprises, 18 U.S.C. § 1952, or perhaps aiding and abetting them, *see id.* § 2—its complaint states that its advertisements "concern *lawful* activity"(R.8) (emphasis added), in which case these

statutes do not apply. Section 1952 proscribes only the promotion of an "enterprise involving gambling . . . in violation" of state or federal law, while section 2 requires an intent to aid in the commission of a crime. *See United States* v. *Hinojosa*, 958 F.2d 624, 629 (5th Cir. 1992). So according to the complaint, Casino City has not violated any of the statutes at issue in this case. Nor does the complaint contain any allegation that Casino City intends to violate any criminal statute in the future, for Casino City has not suggested that it has any plans to alter its conduct.

It may well be that Casino City is overly sanguine about the legal status of the overseas companies for which it advertises. In particular, it is possible that some of its advertisers, which it describes as "lawful overseas companies" (R. 8), may be violating federal law by accepting bets from persons in the United States. But this possibility cannot establish Casino City's standing. The plaintiff is "master of his complaint," *Becker* v. *Tidewater, Inc.*, 405 F.3d 257, 259 (5th Cir. 2005), and it is the plaintiff's burden to allege facts that establish standing. Here, Casino City has stated that the advertisements it displays concern only lawful activity. Even if this assertion is viewed as a legal conclusion rather than a factual

allegation, Casino City has not pleaded any facts that would show it to be false. For example, the complaint does not allege that Casino City's advertisers have accepted bets from persons in the United States. Thus, Casino City has not alleged facts sufficient to show that it has engaged in conduct that violates any federal statute.

Casino City cites *Ward* v. *Utah*, 321 F.3d 1263 (10th Cir. 2003), for the proposition that it "does not have to actually engage in unlawful activity" to have standing. Br. 20. Its reliance on that case is misplaced. In *Ward*, the Tenth Circuit held that an animal-rights protestor had standing to challenge a hate-crimes statute under which he had previously faced charges, even though he asserted that he planned to engage only in lawful activity in the future. *See* 321 F.3d at 1267-68. The court emphasized that the hate-crimes statute could apply to the plaintiff if he was merely charged with a crime, so that his "plan to engage in lawful activity [did not] automatically immuniz[e] him" from the effects of the statute. *Id.* at 1268. It also explained that the plaintiff "desires to engage in the same activity that precipitated the hate-crime charge in the past." *Ibid*. Casino City, in contrast, plans only to continue to engage in conduct that has *not*

resulted in criminal charges. *Ward* therefore does not support Casino City's theory of standing.

B. Casino City has not alleged an immediate threat of prosecution.

Casino City's complaint is deficient in a second respect: it contains no allegation of a "credible threat of prosecution." *Babbitt*, 442 U.S. at 298; *see also Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (To establish standing, plaintiffs must allege "an actual and well-founded fear that the law will be enforced against them."). To be sure, the complaint contains the conclusory statement that "a reasonable and imminent threat of prosecution exists" (R. 9), but the facts alleged in the complaint do not support this claim. Only two actions by the government are described in the complaint, and neither suggests a credible threat of prosecution.

First, the Department of Justice sent a letter to the National Association of Broadcasters. (R. 7). Casino City does not allege that it is a member of the National Association of Broadcasters, or that the government otherwise sent it a copy of this letter. The letter itself does not refer to Casino City in any way. (R. 11-12). Instead, it contains only a general description of the federal statutes that apply to internet gambling

and advertisements promoting it. The letter's only reference to prosecution of anyone is the generic statement that "we reserve the right to prosecute violators of the law." (R. 11). Nothing in the letter suggests that the Department of Justice has any plans to prosecute Casino City.

Casino City relies (Br. 12) on a number of cases that, in its view, establish that "[n]otifications or warnings from a public officer or an enforcement authority" can give rise to standing. The cited cases are inapposite, because every one of them involved an official statement directed to the specific conduct engaged in by the plaintiff. For example, in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963), a government commission notified a distributor of plaintiff's books that "certain designated books" published by the plaintiff "had been reviewed by the Commission and had been declared by a majority of its members to be objectionable." *Id.* at 61.

Likewise, in *ACLU* v. *Florida Bar*, 999 F.2d 1486 (11th Cir. 1993), a candidate for judicial office obtained an advisory opinion from a committee of the state bar informing him that a campaign speech he proposed to make would violate state ethics rules. *See id.* at 1489; *see also Pittman* v. *Cole*, 267 F.3d 1269, 1274-75 (11th Cir. 2001) (organization wished to send a

questionnaire to judicial candidates, and a state commission opined that candidates could not answer the questionnaire without violating ethics rules); *Allen, Allen, Allen & Allen* v. *Williams*, 254 F. Supp. 2d 614, 621 (E.D. Va. 2003) (state bar issued advisory opinion that plaintiff's proposed advertisement violated ethics rules). And in *Drive In Theatres, Inc.* v. *Huskey*, 435 F.2d 228 (4th Cir. 1970), a county sheriff threatened to arrest and prosecute anyone showing films "except those rated for general audiences." *Id.* at 229; *see also ACLU* v. *City of Pittsburgh*, 586 F. Supp. 417, 419 (W.D. Pa. 1984) (Pittsburgh mayor urged magazine vendors to stop selling *Hustler* magazine so as to "eliminate the need for . . . the initiation of criminal proceedings").

As we have explained, the Justice Department's letter is very different from the official statements at issue in those cases. It was not directed at Casino City's specific conduct but was simply a general description of the statutes on the books. For this reason, it provides no reason to believe that Casino City faces a threat of prosecution.

Second, Casino City alleged that "numerous subpoenas were issued . . . to media outlets, internet portals, public relations companies and

technology companies seeking commercial and financial information in relation to advertisements purchased and placed by online casinos and sports book companies." (R. 7). Casino City does not allege that these subpoenas resulted in any prosecutions. More importantly, Casino City does not allege that *it* received a subpoena. And the fact that *other* businesses in the same industry were investigated, but Casino City was not, only diminishes whatever threat of prosecution Casino City might be thought to face. In that respect, this case is similar to *Navegar, Inc.* v. *United States*, 103 F.3d 994, 1001 (D.C. Cir. 1997), in which the D.C. Circuit held that a firearms manufacturer lacked standing to challenge a statute banning certain weapons because the relevant "portions of the Act could be enforced against a great number of weapon manufacturers or distributors, and although the government has demonstrated its interest in enforcing the Act generally, nothing in these portions indicates any special priority placed upon preventing these parties from engaging in specified conduct."

Even if the government's actions—sending a letter to someone other than the plaintiff, and conducting investigations of other businesses—could be said to have given rise to a threat of prosecution, that threat is hardly

"imminent," *Lujan*, 504 U.S. at 560; *see also Doe* v. *Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986) ("[O]ne must show a threat of prosecution that is both real and *immediate*, before a federal court may examine the validity of a criminal statute.") (citation omitted) (emphasis added). The letter to the National Association of Broadcasters was sent in June 2003, over a year before Casino City filed its complaint. During the intervening months, Casino City apparently did not feel a need to change its conduct, suggesting that it did not perceive an imminent threat of prosecution.

Casino City argues (Br. 18) that the government has "chilled the advertising of online gambling by Internet portals, including Casino City." This claim is insufficient to support standing, for two reasons. First, as we have observed, there is no suggestion in Casino City's complaint that it has felt compelled to change its activities in any way as a result of the Justice Department's letter or its investigations of other businesses. In other words, its speech has apparently not been "chilled." *Cf. Bordell* v. *General Elec. Co.*, 922 F.2d 1057, 1061 (2d Cir. 1991) (holding that an employee at a nuclear laboratory lacked standing to challenge a policy purportedly barring employees from speaking publicly, since his "assertion that he has

been deterred from freely speaking on matters related to KAPL is wholly unsubstantiated, and is controverted by evidence in the record that he has, in fact, spoken on matters relating to KAPL on numerous occasions"). Second, and more importantly, the Supreme Court has held that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird* v. *Tatum*, 408 U.S. 1, 13-14 (1972).

C. Casino City's alleged loss of a business opportunity does not establish its standing in this case.

In its brief, Casino City advances another theory of how it has been injured. It contends (Br. 21) that it "lost a valuable contractual opportunity with A&E television network to have exposure on national television via the History Channel." While this economic harm might satisfy the injury-in-fact requirement, the other two elements of standing—causation and redressability—are lacking. First, Casino City has not demonstrated "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. The declaration that Casino City submitted to the district court asserts that the "A&E network had knowledge of letters from the [Department of Justice] such as" the one sent to the National

Association of Broadcasters, and that the network "was no longer interested in engaging in business" with Casino City. (R. 103). But it provides no basis for concluding that A&E's loss of interest was *caused by* the Justice Department's letter, as opposed to economic or other considerations.

Second, even assuming that A&E's decision was caused by fear of prosecution under the statutes at issue in this case, Casino City has not shown that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Casino City's declaration states that A&E "was concerned with the views espoused by the [Department of Justice] . . . and concerned that *it may be accused* of aiding and abetting online gambling." (R. 103) (emphasis added). In other words, A&E apparently feared that it might be prosecuted. But that fear would not be eliminated by a favorable judgment in this case, since Casino City sought only a declaration that application of the gambling statutes "to Casino City and others similarly situated" violates the First Amendment. (R. 9). It is doubtful that the A&E television network is similarly situated,

in any relevant sense, to Casino City, so it is unlikely that a judgment in favor of Casino City would apply to it. More importantly, the declaration contains no suggestion that A&E, having chosen not to do business with Casino City, would change its mind in the future even if its legal concerns were resolved. *See Lujan*, 504 U.S. at 562 (A plaintiff seeking to establish standing based on the effects of regulation on a third party must "adduce facts showing that" the third party's "choices have been made or will be made in such manner as to produce causation and permit redressability of injury.").

II. CASINO CITY'S CONSTITUTIONAL CLAIMS ARE UNRIPE.

The district court lacked jurisdiction for the additional reason that Casino City's challenge is unripe. Although the district court had no occasion to consider this issue, it was briefed below and therefore may be considered here as an alternative ground for affirmance. *See General Universal Sys., Inc.* v. *Lee*, 379 F.3d 131, 141 (5th Cir. 2004). In any event, because the issue is jurisdictional, it may be raised at any time. *See Sample* v. *Morrison*, 406 F.3d 310, 312 (5th Cir. 2005).

Casino City's claims are unripe for essentially the same reasons that

Casino City lacks standing. The ripeness doctrine reflects both "Article III limitations on judicial power" and "prudential reasons for refusing to exercise jurisdiction." *Reno* v. *Catholic Social Servs., Inc.*, 509 U.S. 42, 57 n.18 (1993). Constitutional ripeness requires a plaintiff to show that it "'will sustain immediate injury' and 'that such injury would be redressed by the relief requested.'" *Cinel* v. *Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994) (quoting *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 81 (1978)). Prudential ripeness depends upon "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 808 (2003). Here, both sets of principles suggest that the issues raised by Casino City are not ripe for review.

Ripeness in the constitutional sense is lacking because, as we have explained, Casino City has made no allegations that would suggest that it faces the prospect of an "immediate" injury. As to prudential ripeness, even assuming that the issues are currently fit for review, withholding review would not cause any hardship to Casino City. Because Casino City has not alleged a credible and immediate threat of prosecution, the

"effects" of the statutes it challenges have not been "felt in a concrete way." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967). Moreover, if Casino City were to be prosecuted at some point in the future, it would be free to raise its constitutional claims as a defense to that prosecution. And although it argues that its speech has been "chilled" in the interim, it does not allege that the "chill" has been sufficient to induce it to alter its conduct in any way. These considerations suggest that Casino City will suffer no hardship from deferring review.

III. THE FIRST AMENDMENT DOES NOT PROTECT ADVERTISING FOR ILLEGAL GAMBLING.

If this Court concludes that Casino City does have standing and has presented claims that are ripe for review, it should affirm the judgment on the alternative ground invoked by the district court: that Casino City's First Amendment claims fail on the merits. As the district court held (R. 173), and as plaintiffs concede (Br. 24), claims of First Amendment protection for commercial speech are governed by the test set out by the Supreme Court in *Central Hudson Gas & Electric Corp.* v. *Public Serv. Commission of New York*, 447 U.S. 557 (1980). Under *Central Hudson*, for commercial speech to be protected by the First Amendment at all, "it at least must concern lawful

activity and not be misleading." *Id.* at 566. If so, a court must ask "whether the asserted governmental interest is substantial," "whether the regulation directly advances" the interest, and whether the regulation "is not more extensive than is necessary to serve that interest." *Ibid*.

Applying the *Central Hudson* test, this Court should affirm the judgment of district court. To the extent that they may be prohibited by the statutes at issue in this case, Casino City's advertisements do not qualify for First Amendment protection because they do not "concern lawful activity." In addition, the statutes that Casino City challenges can easily satisfy the other elements of the *Central Hudson* test.

A. The only speech prohibited by the statutes at issue here is advertising for unlawful activity.

To the extent that Casino City's advertising may be restricted by the statutes that it has challenged in this case, that advertising is not protected by the First Amendment because it concerns unlawful activity. As *Central Hudson* makes clear, for "commercial speech to come within" the scope of the First Amendment's protection, "it at least must concern lawful activity." 447 U.S. at 566; *accord id.* at 563-64 ("The government may ban . . . commercial speech related to illegal activity."). That is because "[a]ny First

Amendment interest which might be served by advertising an ordinary commercial proposal . . . is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973) . Indeed, even those Justices who have criticized *Central Hudson* as being insufficiently protective of speech have acknowledged this principle. *See, e.g.*, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 497 n.7 (1996) (opinion of Stevens, J., joined by Kennedy, Souter, and Ginsburg, JJ.) ("[T]he First Amendment does not protect commercial speech about unlawful activities."); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 579 (2001) (Thomas, J., concurring in part and concurring in the judgment) ("A direct solicitation of unlawful activity may of course be proscribed, whether or not it is commercial in nature.").

The only commercial speech that could be restricted by the statutes that Casino City has challenged would be advertising directly promoting unlawful activity. To begin, two of the statutes challenged by Casino City do not regulate advertisers' speech at all. Title 18 U.S.C. § 1084(a) applies to those "engaged in the business of betting or wagering," while section

1955 prohibits the ownership, management, or supervision of an "illegal gambling business." These statutes apply only to those who actually engage in gambling, not to those who merely advertise it. They therefore raise no First Amendment issue with respect to advertisers like Casino City.

The two statutes that might apply to advertising do so only when the advertising in question is for illegal activity. Title 18 U.S.C. § 2, the aiding-and-abetting statute, applies only when a party "aids, abets, counsels, commands, induces or procures" an "offense against the United States." This statute could apply to advertising only if the product or service advertised were unlawful. Likewise, section 1952 restricts the "promot[ion]" of any "business enterprise involving gambling," but only if it is "in violation of the laws of the State . . . or of the United States." This statute, too, could restrict gambling advertising only if the gambling being advertised were unlawful. Under *Central Hudson*, these statutes do not implicate the First Amendment, and the district court properly dismissed Casino City's claim.

Casino City insists (Br. 25) that the kinds of gambling it promotes are

lawful. If this claim were true, it would mean that none of the challenged statutes even applies to the advertisements on Casino City's web sites, and that would hardly be a basis for declaring the statutes unconstitutional. In any event, Casino City's description of the laws governing internet gambling is inaccurate in several respects.

For example, Casino City errs in asserting (Br. 25 n.8) that "there are currently no federal statutes that pertain to online gambling." Though there are no statutes that refer *specifically* to online gambling, all of the statutes at issue in this case are fully applicable to gambling on the internet. Likewise, Casino City is incorrect when it states (Br. 25) that "online casino gambling is not illegal pursuant to federal law." To be sure, this Court held in *In re Mastercard International Inc.*, 313 F.3d 257, 263 (5th Cir. 2002), that 18 U.S.C. § 1084 "does not prohibit non-sports internet gambling." While we respectfully disagree with that decision, we recognize that it is binding in this Circuit. But how *Mastercard* helps Casino City is mysterious, since its clients include "companies that offer . . . sports book gambling." (R. 8). And *Mastercard* does not address 18 U.S.C. §§ 1952 and 1955, which prohibit both sportsbook and non-sports gambling that takes

place in violation of state law.

Casino City observes (Br. 25 n.7) that a World Trade Organization ("WTO") panel found that federal laws relating to gambling may be inconsistent with the obligations of the United States under the WTO General Agreement on Trade in Services. But after an appeal by the United States, the WTO Appellate Body reversed the panel's ruling in most respects. *See* United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services—AB2005-1—Report of the Appellate Body, WT/DS285/AB/R (Apr. 7, 2005). More importantly, as Casino City acknowledges (Br. 25 n.7), a WTO ruling "is not controlling" in this case. On the contrary, 19 U.S.C. § 3512(a)(1) provides that "[n]o provision" of the trade agreement addressed by the WTO panel "that is inconsistent with any law of the United States shall have effect." *See also* 19 U.S.C. § 3512(c)(1)(B) ("No person other than the United States . . . may challenge, in any action brought under any provision of law, any action or inaction by . . . the United States . . . on the ground that such action or inaction is inconsistent with such agreement.").

Casino City asserts (Br. 26) that "an advertiser may not be prohibited

from disseminating truthful information about an activity that is legal in another jurisdiction." That principle might be relevant if Casino City were promoting travel to destinations in which gambling is legal. But that is not what Casino City is doing. Instead, if Casino City's activities contravene the statutes at issue in this case, they do so because people in the United States respond to its advertisements and participate in online gambling, thereby engaging in transactions that are not legal. This case therefore differs from *Swedenburg* v. *Kelly*, 358 F.3d 223 (2d. Cir. 2004), *rev'd on other grounds sub nom. Granholm* v. *Heald*, 125 S. Ct. 1885 (2005), on which Casino City relies. In *Swedenburg*, the court's concern was that the New York statute at issue would have prohibited advertisements for wine distributors that operated legally in other jurisdictions and did not violate New York law, because they did not accept orders from New York customers. *See* 358 F.3d at 241. Casino City does not allege that its advertisers take any steps to prevent the violations of law that their gambling businesses appear to entail.

Finally, Casino City suggests (Br. 29-30) that restrictions on advertising for internet gambling are improper because many people in

"the worldwide audience of the Internet" may be "located in countries where engaging in the conduct that is advertised is expressly legal." By this logic, Congress could never restrict commercial speech relating to unlawful activity as long as there were some other country where the activity was lawful. That is inconsistent with *Central Hudson* and *Pittsburgh Press*.

At most, Casino City's argument shows that the challenged statutes might be overbroad. But the overbreadth doctrine does not apply to commercial speech, *see Waters* v. *Churchill*, 511 U.S. 661, 670 (1994), and even where it does apply, it requires that "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). Since online gambling is illegal throughout the United States, a prohibition on advertising online gambling businesses that accept bets from the United States cannot possibly be *substantially* overbroad.

B. The statutes at issue in this case directly advance a substantial government interest, and they are no more extensive than necessary.

Because any speech that is prohibited by the statutes at issue in this case is commercial speech related to unlawful activity, the First Amendment does not apply, and there is no need to consider the remaining elements of the *Central Hudson* test. But even applying those elements of the test, the statutes at issue should be upheld.

1. Casino City does not dispute that the government interest at issue is substantial, nor could it plausibly do so. The government has a substantial interest in the enforcement of its criminal laws, including those relating to gambling. *See, e.g.*, *Greater New Orleans Broad. Ass'n, Inc.* v. *United States*, 527 U.S. 173, 186 (1999) ("No one seriously doubts that the Federal Government may assert a legitimate and substantial interest in alleviating the societal ills" caused by gambling, "or in assisting likeminded States to do the same."). And as the district court explained, "[i]nternet gambling is of significant interest to the government because of its accessibility by the general public, which includes children and compulsive gamblers." (R. 175). As compared to other forms of gambling,

it also offers greater potential for fraud and money laundering. The interest in protecting against these harms is plainly substantial.

2. Casino City argues that restrictions on advertising for internet gambling do not advance the government's interest in restricting internet gambling itself. But it is obvious that promotional advertising for an activity will promote the incidence of that activity; that is of course the entire purpose of advertising. It follows that prohibiting advertising for an activity will help to reduce its incidence. And the Supreme Court has made clear that this type of commonsense inference is sufficient to uphold a statute under the intermediate scrutiny that applies to regulations of commercial speech. *See Florida Bar* v. *Went for It, Inc.*, 515 U.S. 618, 628 (1995) (explaining that restrictions on commercial speech may be justified based on "history, consensus, and 'simple common sense'"); *see also Central Hudson*, 447 U.S. at 569 (noting "an immediate connection between advertising and demand"). As the Supreme Court has stressed in a closely analogous context, the government "may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *City*

of Los Angeles v. *Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality opinion) (quoting *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986)).

This conclusion is in no way undermined by *44 Liquormart*, in which the Supreme Court considered a Rhode Island law prohibiting *price* advertising for liquor. Rhode Island argued that price advertising would lead to price competition, which would lead to lower prices and higher consumption. *See* 517 U.S. at 505. A majority of the Court found it unnecessary to determine whether the prohibition directly advanced the interest asserted by the State, but Justice Stevens and three other Justices concluded that it did not. In the absence of "any evidentiary support whatsoever," *id.*, this series of inferences was insufficient to establish that the advertising ban would reduce liquor consumption. Justice Stevens's opinion does not suggest that a comparable evidentiary showing is required to confirm the more direct link between *promotional* advertising and consumption. On the contrary, Justice Stevens approvingly quoted *Central Hudson*'s reliance on the "'immediate connection'" between "promotional advertising" and demand. *Id.* at 500 (quoting *Central Hudson*, 447 U.S. at 569). *44 Liquormart* therefore provides no basis for questioning

the "commonsense" link between promotional advertising and demand. *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993); *see also id.* at 434 ("If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced.").

Relying on *Greater New Orleans*, a case that involved *lawful* gambling, Casino City asserts (Br. 32) that "because of the many other avenues for gambling that are not the target of restrictions," the prohibition on advertising for internet gambling does not advance a substantial interest. In *Greater New Orleans*, the Supreme Court struck down a statute prohibiting broadcast advertisements of legal casino gambling. After detailing the many exceptions that the statute permitted, *see* 527 U.S. at 178-80, the Court concluded that the statute was "so pierced by exemption and inconsistencies" that it did not directly advance the interest in reducing the social costs of gambling, *id.* at 190. The statutes at issue here are very different. To the extent it applies to advertising at all, 18 U.S.C. § 2 applies to advertising for *all* forms of unlawful gambling. Likewise, sections 1952

and 1955 apply to *all* forms of gambling that violate state law. And while section 1084 applies only to forms of gambling that use "a wire communication facility," this reflects Congress's judgment that those forms of gambling give rise to particularly serious harms. Casino City has not shown that this determination was in any way improper.

More fundamentally, the First Amendment does not mean that Congress may not begin to deal with a problem unless it solves the entire problem at once. On the contrary, the Supreme Court has repeatedly emphasized that government may "address some offensive instances and leave other, equally offensive, instances alone." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 390 (1992). As the Court explained in *R.A.V.*, "the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation upon a State's prohibition of proscribable speech." 505 U.S. at 387. In other words, the First Amendment does not "require that the Government make progress on every front before it can make progress on any front." *Edge Broadcasting*, 509 U.S. at 434.

3. Casino City contends that the restrictions on advertising for internet gambling are more extensive than necessary to advance the

government's interest. In large part, this argument rests on an attempt to apply a more exacting standard of review than that called for by the Supreme Court. Under the intermediate scrutiny that applies to regulations of commercial speech, a regulation need only "'promot[e] a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989) (quoting *United States* v. *Albertini*, 472 U.S. 675, 689 (1985)). The Court has made clear that this test is "substantially similar" to the test for time, place, and manner restrictions, and requires "something short of a least-restrictive-means standard." *Board of Trustees* v. *Fox*, 492 U.S. 469, 477 (1989); *accord Lorillard Tobacco Co.*, 533 U.S. at 556. The fit between the regulation and Congress's interests need only be "reasonable," so that the scope of the speech restrictions is not "substantially excessive" in comparison to the interests served. *Fox*, 492 U.S. at 479. Far from being "substantially excessive," the statutes at issue here could not be more narrowly tailored to Congress's interests, since they prohibit only the advertising of illegal gambling services.

Casino City suggests that regulating credit card companies (Br. 35) or

licensing and regulating online gambling (Br. 35 n.11) might be alternative ways for Congress to address the problems created by internet gambling. Casino City did not present these alternatives to the district court, and it has made no effort to show that they would be as effective as the challenged statutes in furthering Congress's objectives. More importantly, the Constitution does not preclude Congress from enacting a restriction on commercial speech directly related to its regulatory goal even if alternative means, preferred by certain advertisers, would also be available. *See Fox*, 492 U.S. at 479-80. Intermediate scrutiny simply does not require the government to disprove the efficacy of all alternative methods of regulation. On the contrary, the Supreme Court has repeatedly rejected the notion that the government must "provide evidence that not only supports the claim that its [regulation] serves an important government interest, but also does not provide support for any other approach to serve that interest." *Alameda Books*, 535 U.S. at 438 (plurality opinion); *see also id.* at 451-52 (Kennedy, J., concurring in the judgment).

Casino City relies (Br. 35-36) on *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), which invalidated a statute that prohibited beer labels from

displaying information about alcohol content. But cases such as *Rubin*—or *44 Liquormart*, which involved a statute prohibiting liquor price advertising—are inapplicable here. In those cases, the government was attempting to use a restriction on speech to influence demand for a lawful product. In contrast, the statutes at issue in this case restrict advertising for services that is unlawful. A restriction on advertising for such services is an appropriate and narrowly tailored measure to help enforce the underlying prohibition.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

DAVID R. DUGAS
United States Attorney

SCOTT R. McINTOSH
(202) 514-4052
ERIC D. MILLER
(202) 514-5735
Attorneys, Appellate Staff
Civil Division, Room 7256
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

JULY 2005

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). It is proportionally spaced, has a typeface of 14 points, and contains 7,835 words.

_____

Eric D. Miller

CERTIFICATE OF SERVICE

I certify that on July 13, 2005, I filed and served this brief by sending seven paper copies and one electronic copy by Federal Express to the Clerk of the Court and by sending two paper copies and one electronic copy to the following counsel:

Frederick R. Tulley
Erick Y. Miyagi
Taylor, Porter, Brooks & Phillips, LLP
P.O. Box 2471
Baton Rouge, LA 70821
(225) 387-3221
(by First-Class Mail)

Barry Richard
M. Hope Keating
Greenberg Traurig, P.A.
101 E. College Ave.
Tallahassee, FL 32301
(850) 222-6891
(by Federal Express)

Patrick T. O'Brien
Greenberg Traurig, P.A.
401 E. Las Olas Blvd., Suite 2000
Fort Lauderdale, FL 33301
(954) 765-0500
(by Federal Express)

_____

Eric D. Miller