

Betting on Addiction Money: Can Sports Betting Advertising be Restricted on Broadcast Media in an Age of Heightened Commercial Speech Protection?

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ABSTRACT

Over half a decade ago, the Supreme Court opened a world of state-sanctioned sports betting after it invalidated a federal statute that prohibited the practice. Since its ruling in *Murphy v. NCAA*, about three dozen states have legalized sports gambling, creating regulatory schemes to allow licensed betting firms to operate in their states. These companies have engaged in heavy advertising and promotions in all forms of media to attract potential bettors. As a result, billions of dollars have been wagered. At the same time, evidence of an increase in problem gambling and gambling addiction has been reported. While most states have enacted some modest advertising restrictions prohibiting “false” advertising, requiring warnings, and disclosing contact information for problem bettors, these attempts are inadequate to prevent the rise in problem betting and gambling addiction. I argue that a broader ban is needed. This article will discuss the constitutional challenges of regulating gambling advertising and promotions, focusing on the broadcast media. It will also compare approaches to regulate sports gambling advertising in other countries. I conclude that a complete media ban on such advertising would likely violate First Amendment protection of commercial

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speech under the *Central Hudson* standard crafted by the Supreme Court over four decades ago. However, reasonable alternatives exist. This article will propose broader restrictions that could pass constitutional muster under *Central Hudson* and, also could be upheld based on the government's power to regulate content under the broadcast laws and Federal Communications Commission's ("FCC") regulations. It will discuss restrictions that are national in scope, such as limiting advertising, sponsorship notice, and betting odds during time periods when underage viewers are watching.

INTRODUCTION

In 2018, the U.S. Supreme Court invalidated the Professional and Amateur Sports Protection Act ("PASPA")¹ which prohibited states from enacting sports betting laws.² After this ruling, states were permitted to enact legalized sports betting laws, and, as of the fall of 2023, over three dozen states have done so.³ These laws and regulations vary: individual states have legalized various types of betting, including mobile betting. Some states created new administrative commissions⁴ to issue rules and regulations, while

¹ See Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 et seq.

² See *Murphy v. NCAA*, 138 S. Ct. 1461 (2018). The court invalidated the statute on the grounds that it prohibited state authorization of sports gambling and therefore "violated the anticommandeering rule" as it improperly issued a "direct order" to the governments of the States forbidding them to enact sports betting laws." *Id.* at 1478.

³ See Matthew Waters, *Legislative Tracker: Sports Betting*, LEGAL SPORTS REPORT (Nov. 3, 2023), <https://www.legalsportsreport.com/sportsbetting-bill-tracker/> [<https://perma.cc/ZW9J-MTXP>]. As of May 2023, 33 states and the District of Columbia have some form of legalized sports betting. They include Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Virginia, Washington, D.C., Washington, West Virginia, Wyoming. And to a more limited extent, North Carolina, New Mexico and Wisconsin. Kentucky joined that list in September 2023. See Rob Fletcher, *Kentucky to Launch Legal Sports Betting*, IGB (July 11, 2023), <https://www.igbnorthamerica.com/kentucky-to-launch-legal-sports-betting-on-september-7> [<https://perma.cc/RWG6-MM8U>].

⁴ See, e.g., OHIO REV. CODE § 3772.02(A) ("There is hereby created the Ohio casino control commission described in Section 6(C)(4) of Article XV, Ohio Constitution."); see also 2013 N.Y. LAWS 174 (creating a state Gaming Commission).

others expanded existing agencies.⁵ These bodies have since crafted standards for the licensing of sports betting companies, costs of a license, taxes to be paid by winners, and rules regarding advertising.⁶

Not surprisingly, sports gambling companies (known as “sportsbooks”) aggressively began to advertise and promote their services after legalization. In larger states such as New York, which permitted sports gambling as of January 2022, such advertising and promotions have been particularly ubiquitous,⁷ and it may well be worth the cost. The advertising has been found on traditional linear media (radio, broadcast television, and cable) as well as online sites and social media.⁸ It is estimated that these companies spent over \$2 billion on various advertisements in 2022.⁹

Commercial sports betting revenue hit a new all-time high of \$7.5 billion in 2022. According to the American Gaming Association, the trade organization for the industry, this is a 72.7 percent increase from the year before.¹⁰ Legal sportsbooks handled \$93.2 billion in bets that year—another record and a 61.1 percent increase over 2021’s amount, known as the “handle” (in 2023, that amount increased by an additional 30 percent to just over \$120 billion).¹¹ The largest sports betting companies also had banner years,

⁵ For example, New Jersey added powers to regulate sports betting to its previously-established Casino Control Commission. *See, e.g.*, N.J. Sports Wagering Law, P.L. 2018, c. 33 [<https://perma.cc/X4DH-LHBZ>], C.5:12A-10.

⁶ *See* N.Y. COMP. CODES R. & REGS. Tit. 9 § 5325.6 (“Advertisements shall contain a problem gambling assistance message.”).

⁷ *See* Christopher Dale, *New York’s Gambling Trap: Ads are Luring People with Highly Diced Promises*, N.Y. DAILY NEWS (May 6, 2021), <https://www.nydailynews.com/opinion/ny-oped-new-yorks-gambling-trap-20210506-f3d72m6qvve4fm-kz6qtdocmre-story.html> [<https://perma.cc/8FYP-M74Z>].

⁸ *See* Joe Hernandez, *Sports Betting Ads Are Everywhere. Some Worry Gamblers Will Pay a Steep Price*, NPR (June 18, 2022), <https://www.npr.org/2022/06/18/1104952410/sports-betting-ads-sports-gambling> [<https://perma.cc/9MTU-3GK5>].

⁹ Sports betting companies spent \$1.2 billion on acquiring new U.S. customers in 2021. With more states and leagues expanding sports betting capabilities, that figure is expected to reach \$2.1 billion in 2022. *See* Owen Poindexter, *Sports Betting Companies Spending Billions on U.S. Market*, FRONT OFFICE SPORTS (Dec. 27, 2021), <https://frontofficesports.com/sports-betting-companies-spending-billions-on-u-s-market/> [<https://perma.cc/GE5C-3JE5>].

¹⁰ *See* Doug Greenberg, *Expanded Legal Betting Access Leads to Record Year*, FRONT OFFICE SPORTS (Feb. 16, 2023), <https://frontofficesports.com/sports-betting-industry-record-7-5b-2022-revenue> [<https://perma.cc/V72M-SFLX>]. The 2022 amount shattered the prior record of \$4.3 billion in 2021.

¹¹ *Id.* Since PASPA was struck down in May 2018, American bettors have placed \$190.3 billion in wagers, creating \$14.6 billion in sports betting revenue and

with FanDuel and DraftKings garnering about sixty percent of the total nationwide handle.¹² All told, in the five years since the Supreme Court's invalidation of PASPA, the total betting handle has topped \$220 billion.¹³

While a traditional casino-based betting structure exists, the bulk of sports betting has been digital, resulting in ninety percent of bets being placed on mobile devices since 2022.¹⁴ According to the President of Sportradar North America, a leading sportsbook data analysis company, in five years, the integration of betting widgets into mobile streams and a maturing sports betting marketplace will normalize in-play, wherever-you-watch, on-the-go betting—accelerating growth and increasing the resulting handle.¹⁵

While sports leagues have traditionally opposed gambling because of the fear (based on past history) that games could be compromised, they have recently changed their attitude and have profited as well. In 2022, the NFL sports betting revenue increased forty percent from a year earlier.¹⁶ Sports betting sponsorships between sports leagues, teams, and betting companies have quadrupled from 2019 to 2022. As of February 2023, more than twenty-five NFL teams now have at least one sports betting sponsor, including notable

\$3 billion in state and federal taxes. *See also* Bill King, *SBJ Betting: U.S. Handle Jumped 30% in 2023*, SPORTS BUS. J. (Mar. 1, 2024), <https://www.sportsbusinessjournal.com/SB-Blogs/Newsletter-Betting/2024/03/01.aspx#:~:text=Handle%20in%20the%2030%20legalized,2023%2C%20handle%20rose%208%25> [https://perma.cc/8AES-598P] (2023 statistics).

¹² In 2022, the breakdown was as follows: FanDuel's handle was \$18,893,174,716 or 34 percent of the total; DraftKings was \$15,820,234,899 or 29 percent; BetMGM was \$5,671,094,176 (10 percent); Caesar's was \$5,638,602,485 (10 percent); BetRivers, \$2,928,698,955 (5 percent); PointsBet, \$1,695,293,573 (3 percent); and Barstool, \$2,355,264,509 (4 percent). *See* Bill King, *SPJ Betting: MLB Adds New Pitches to its Arsenal*, SPORTS BUS. J. (Mar. 31, 2023), <https://www.sportsbusinessjournal.com/SB-Blogs/Newsletter-Betting/2023/03/31> [https://perma.cc/4YZ6-QFF9].

¹³ *See Americans Have Bet \$220 Billion on Sports in 5 Years Since Legalization*, INDIANAPOLIS BUS. J. (May 8, 2023), <https://www.ibj.com/articles/americans-have-bet-220b-on-sports-in-5-years-since-legalization> [https://perma.cc/Z25F-A98A].

¹⁴ *See* Andrew Bimson, *Sports Betting's Next Five Years Offers a Tech-Driven Boom*, SPORTICO (May 11, 2023), https://www.sportico.com/business/sports-betting/2023/sports-betting-next-five-years-tech-boom-1234721976/?cx_testId=9&cx_testVariant=cx_1&cx_artPos=1&cx_experienceId=EXAKGDTXOYL0#cxrecs_s [https://perma.cc/QKA8-VX82].

¹⁵ *Id.*

¹⁶ *See NFL Sports Betting Revenue Skyrocketed 40% from 2022*, CISION PR NEWSWIRE (Feb. 7, 2023), <https://www.prnewswire.com/news-releases/nfl-sports-betting-revenue-skyrocketed-40-in-2022-301739994.html> [https://perma.cc/XN8Y-8DMN].

brands like FanDuel, BetMGM, Bally's, Betfred, and Bet365.¹⁷ Additionally, sports broadcasts often post gambling information,¹⁸ including point spreads, prop bets, and even secondary screen broadcasts (often on mobile devices) catering to betters with more detailed information.¹⁹ Of the major leagues, the NFL is the most restrictive as it requires its broadcast partners to limit advertising and information during its broadcasts.²⁰

To a considerable degree, this strategy has worked: one in five Americans placed sports bets in 2022.²¹ Digital betting has been spearheading this growth, as 86 percent of bets were online or on mobile the year before.²²

Because of the heavy promotions and the ease of betting, some public health experts have pointed to a rise in problem gambling, which could lead to gambling addiction.²³ The definition of the term “problem gambling”

¹⁷ *Id.*

¹⁸ See Hernandez, *supra* note 8, at 2 (“And in some cases, made their own sports books, which are promoted during broadcasts. In the fall of 2023, ESPN signed a 10-year, \$2 billion deal with the gaming company Penn Entertainment to launch its own digital sportsbook, ESPN Bet.”); see also Amanda Mull, *Sports Betting Won*, THE ATLANTIC (Aug. 9, 2023), <https://www.theatlantic.com/technology/archive/2023/08/espn-sports-betting-mobile-gambling/674967/> [<https://perma.cc/W3NJ-UT5C>].

¹⁹ See Cole Rush, *On Screen Action: How Broadcasting and Betting Intersect*, IGB (Jan. 12, 2022), <https://igamingbusiness.com/marketing-affiliates/onscreen-action-how-broadcasting-and-betting-intersect/> [<https://perma.cc/EAK8-WEQN>].

²⁰ See Adam Kilgore, *Inside the NFL's Careful, Complicated, Embrace of Sports Gambling*, WASH. POST (Oct. 4, 2023), <https://www.washingtonpost.com/sports/2023/10/04/gambling-las-vegas-super-bowl/> [<https://perma.cc/GAL8-LV5J>].

²¹ See Rebecca Ruiz, *Betting Apps Can Make Anyone a Sports Fan: Even Me*, N.Y. TIMES (Dec. 26, 2022), <https://www.nytimes.com/2022/12/24/business/sports-betting-apps.html> [<https://perma.cc/ZZ7B-EEM4>].

²² See Mike Reynolds, *Online Wagering, Engaged Fans, Key to Sports Betting Growth*, S&P GLOB. MKT. INTEL. (Oct. 20, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/online-wagering-engaged-fans-key-to-sports-betting-growth-66575074> [<https://perma.cc/B3PC-VWEU>].

²³ See 60 Minutes, *Sports Betting Fuels Concerns Over Problem Gambling | 60 Minutes*, YOUTUBE (Feb. 5, 2024), <https://www.youtube.com/watch?v=vDsLu0CWcgk> [<https://perma.cc/E9KC-SFMP>]; Katherine Sayre, *A Psychiatrist Tried to Quit Gambling. Betting Apps Kept Her Hooked.*, WALL ST. J. (Feb. 18, 2024), https://www.wsj.com/business/hospitality/gambling-addiction-sports-betting-apps-4463cde0?mod=hp_lead_pos7 [<https://perma.cc/6ZLT-48GS>]. Problem Gambling—or gambling addiction—includes all gambling behavior patterns that compromise, disrupt or damage personal, family or vocational pursuits. According to the DSM-5, an individual must have four of more of the following symptoms within the last year: needs to gamble with increasing amounts of money in order to achieve the desired excitement; is restless or irritable when attempting to cut down or stop gambling; has made repeated unsuccessful efforts

“includes all gambling behavior patterns that compromise, disrupt, or damage personal, family or vocational pursuits.”²⁴ “In extreme cases, problem gambling can result in financial ruin, legal problems, loss of career and family, or even suicide.”²⁵ In other words, it is an addiction to gambling.²⁶ Warning signs and symptoms of problem gambling include denying or minimizing

to control, cut back, or stop gambling; is often preoccupied with gambling (e.g., having persistent thoughts of reliving past gambling experiences, handicapping or planning the next venture, thinking of ways to get money with which to gamble); often gambles when feeling distressed (e.g., helpless, guilty, anxious, depressed); after losing money gambling, often returns another day to get even (“chasing” one’s losses); lies to conceal the extent of involvement with gambling; has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling; relies on others to provide money to relieve desperate financial situations caused by gambling, *see What is Problem Gambling*, VIRGINIA COUNCIL ON PROBLEM GAMBLING, <https://vcp.org/about/what-is-problem-gambling/> [<https://perma.cc/RL6Z-6TKM>] (last retrieved June 9, 2023); *see also* Daryn Austin, *The Legalization of Sports Wagering and the Increase in Problem Gambling*, DESERET NEWS (July 19, 2022), <https://www.deseret.com/sports/2022/7/19/23195839/the-legalization-of-sports-wagering-and-the-increase-in-problem-gambling> [<https://perma.cc/24V5-WKXJ>]

²⁴ *Id.*; *see also* FAQs: *What is Problem Gambling? National Council on Problem Gambling*, NAT’L COUNCIL ON PROBLEM GAMBLING, <https://www.ncpgambling.org/help-treatment/faq/> [<https://perma.cc/QVB8-3Y8P>] (last retrieved June 9, 2023). The symptoms include increasing preoccupation with gambling, a need to bet more money more frequently, restlessness or irritability when attempting to stop, “chasing” losses, and loss of control manifested by continuation of the gambling behavior in spite of mounting, serious, negative consequences. The Virginia Council on Problem Gambling agrees with this definition. *See* VIRGINIA COUNCIL ON PROBLEM GAMBLING, *supra* note 23, at 4.

²⁵ *Id.*

²⁶ *See Diagnostic Criteria: Gambling Disorder*, AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 312.31, at 585–89 (5th ed. 2013), [https://repository.poltekkes-kaltim.ac.id/657/1/Diagnostic%20and%20statistical%20manual%20of%20mental%20disorders%20_%20DSM-5%20\(%20PDFDrive.com%20\).pdf](https://repository.poltekkes-kaltim.ac.id/657/1/Diagnostic%20and%20statistical%20manual%20of%20mental%20disorders%20_%20DSM-5%20(%20PDFDrive.com%20).pdf) [<https://perma.cc/LQW2-U6BG>]. The definition of problem gambling is somewhat elastic. According to the New York Council on Problem Gambling, “The term problem gambling has been used in different ways by the research community, ranging from individuals who fall short of the diagnostic criteria for pathological gambling to persons whose gambling behavior compromises, disrupts or damages personal, family or vocational pursuits. According to the National Council on Problem Gambling, this term is also used as a more inclusive category that encompasses a continuum of gambling difficulties, with pathological gambling at one end of the spectrum. A problem gambler dedicates more time, thought and money towards gambling.” *See What is Problem Gambling?*, N.Y. COUNCIL ON PROBLEM GAMBLING, <https://nyproblemgambling.org/resources/what-is-problem-gambling/> [<https://perma.cc/YPG8-3BPJ>] (last retrieved June 9, 2023).

the problem, betting “in secret” or lying about gambling, feeling others will not understand or that the gambler will surprise them with a big win, having difficulty controlling the urge to gamble, continuing to gamble even if one lacks the funds to do so, and borrowing, selling, or even stealing for gambling money.²⁷ The American Psychiatric Association lists “gambling disorder” as a recognized diagnosis in its Diagnostic and Statistical Manual of Mental Disorders (“DSM”).²⁸

Early research shows that those who bet using mobile devices have higher rates of problem gambling.²⁹ In addition, the live “In-Play” betting options—which give today’s sports gamblers the ability to bet on many more outcomes than just the winner of a game—are additional contributing

²⁷ See *Gambling Addiction and Problem Gambling*, HELPGUIDE.ORG, <https://www.helpguide.org/articles/addictions/gambling-addiction-and-problem-gambling.htm> [<https://perma.cc/3C5G-XSDE>] (last retrieved June 10, 2023).

²⁸ See *Diagnostic Criteria: Gambling Disorder*, *supra* note 26, at 4 (“A. Persistent and recurrent problematic gambling behavior leading to clinically significant impairment or distress, as indicated by the individual exhibiting four (or more) of the following in a 12 month period: a. Needs to gamble with increasing amounts of money in order to achieve the desired excitement[;] b. Is restless or irritable when attempting to cut down or stop gambling[;] c. Has made repeated unsuccessful efforts to control, cut back, or stop gambling[;] d. Is often preoccupied with gambling (e.g., having persistent thoughts of reliving past gambling experiences, handicapping or planning the next venture, thinking of ways to get money with which to gamble)[;] e. Often gambles when feeling distressed (e.g., helpless, guilty, anxious, depressed)[;] f. After losing money gambling, often returns another day to get even (“chasing” one’s losses) [;] g. Lies to conceal the extent of involvement with gambling[;] h. Has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling[;] i. Relies on others to provide money to relieve desperate financial situations caused by gambling. B. The gambling behavior is not better explained by a manic episode. *Specify* if: **Episodic**: Meeting diagnostic criteria at more than one time point, with symptoms subsiding between periods of gambling disorder for at least several months[;] **Persistent**: Experiencing continuous symptoms, to meet diagnostic criteria for multiple years. *Specify* if: **In early remission**: After full criteria for gambling disorder were previously met, none of the criteria for gambling disorder have been met for at least 3 months but for less than 12 months. In sustained remission: After full criteria for gambling disorder were previously met, none of the criteria for gambling disorder have been met during a period of 12 months or longer. *Specify* current severity: **Mild**: 4–5 criteria met[;] **Moderate**: 6–7 criteria met[;] **Severe**: 8–9 criteria met.”) (emphasis in original).

²⁹ See Ken C. Winters & Jeffrey L. Derevensky, *A Review of Sports Wagering: Prevalence, Characteristics of Sports Bettors, and Association with Problem Gambling*, 43 J. OF GAMBLING ISSUES 102, 109–10 (2019), https://www.ncpgambling.org/wp-content/uploads/2020/01/sports-gambling_NCPGLitRvw.pdf [<https://perma.cc/H7MB-HLMX>].

factors. Examples are “prop bets,” or side wagers on components other than the outcome of a game, like a player’s total assists in basketball.³⁰ In addition, “parlay bets” have allowed gamblers to bet not just on the result of one game, but on several different games or on several variables within a single contest and tie them together in a single bet. This permits betting at almost any time during a match on hundreds and potentially thousands of discrete events. This shortens the lag between bet and reward, increasing the speed and frequency of gambling, which increases the risk of problematic behavior.³¹

In an attempt to prevent excessive or problem gambling, most states have enacted some regulations involving sports betting advertising. However, they tend to be quite limited—focusing on restricting “false and deceptive” ads, mandating information about helpful websites and phone numbers for problem bettors, and implementing some limitations on ads presented to children.³² But these regulations are inadequate to curb the potential for more gambling addictions or children being enticed to bet. Therefore, a broader approach is needed to restrict advertising, preferably on the national level and centering on the broadcast media, to complement the state-by-state patchwork found in the current legal regimen. However, any broader advertising regulations must comport with the increasing sympathy for commercial speech protection granted by the courts over the last three decades.

This article posits that greater restrictions on sports betting promotions and advertising are needed and these restrictions can pass constitutional muster. The article (I) outlines the issue of problem gambling; (II) surveys restrictions that other countries enacted to limit betting advertising; (III) discusses the approaches for advertising regulation in the states where sports betting has been legalized; (IV) analyzes the constitutional basis for commercial speech protection of “sin product advertising” in the United States; (V) compares the *Central Hudson* standard with the approach in other countries; (VI) relates why present industry recommendations are inadequate to address the problem gambling issues; (VII) proposes broader government regulations in the broadcast media based on the regulatory power of the Federal Communications Commission (“FCC”) and justifiable under First Amendment Commercial Speech.

³⁰ *Id.* at 110–11.

³¹ See Randall Smith, *Online Sports Bettors Lose Money as Parlays Gain Popularity*, WALL ST. J. (May 7, 2023), <https://www.wsj.com/articles/sports-better-win-lose-ddcaae24> [<https://perma.cc/2973-NCR9>]; see also Winters & Derevensky, *supra* note 29, at 109–10.

³² See *infra* Section III.

The article concludes that, based on precedents in the regulation of indecent speech, restrictions that limit advertising to hours where children are less likely to watch can pass constitutional muster from either a commercial speech and or broadcast law standard. Other restriction proposals are also examined, from a total ban on sports betting to mandatory counter-advertising. It also examines voluntary advertising standards promulgated by industry associations and why they are inadequate to successfully limit exposure for problem gamblers. A more federalized system of regulation—especially involving broadcasting and other electronic media—is the best way to regulate advertisements while remaining sensitive to the constitutional rights of advertisers.³³

I. THE ISSUE OF ‘PROBLEM GAMBLING’ AND ADDICTION

It is estimated that eight million U.S. adults are problem gamblers.³⁴ With the advent of sports betting, especially online and mobile betting, the

³³ Except for a short general discussion, this article will not detail the enforcement of bans on “false and deceptive advertising,” as that could well be the subject of a future article or articles. It also will not delve into print media, which is not subject to the same free speech limitations as broadcast. Given that sports betting will likely be adopted in an increasing number of states the issue of potentially banning or severely restricting advertisements will be of greater concern. For an update on the number of states that legalized sports gambling, see Chris Bengel & Shanna McCarriston, *U.S. Sports Betting: Here’s Where All 50 States Stand on Legalizing Sports Gambling, Player Sites*, CBS SPORTS (Oct. 13, 2023, 2:13 PM), <https://www.cbssports.com/general/news/u-s-sports-betting-heres-where-all-50-states-stand-on-legalizing-sports-gambling-player-sites/> [https://perma.cc/9S54-VMBS]. As of this writing, major states like Texas, Florida, and California have not legalized sports betting, although there are proposals to do so in Texas. In California, there were two major propositions on the November 2022 ballot that could have legalized sports betting in California, one to legalize in-person sports betting and the other to legalize online sports betting. Both were heavily voted down by Californians. It is not known at this time if the topic of legal California sports betting will be reconsidered in 2024. *Id.* More recently, North Carolina and Vermont legalized sports betting and should begin offering sportsbooks in 2024. See Rob Fletcher, *Vermont Governor Signs Sports Betting Bill into Law*, IGB NORTH AMERICA (June 15, 1023), https://www.igbnorthamerica.com/vermont-governor-signs-sports-betting-bill-into-law/?utm_source=feedotter&utm_medium=email&utm_campaign=igbna_weekly&utm_content=httpswwwigbnorthamericacomvermontgovernorsignssportsbettingbillintolaw [https://perma.cc/V52M-B4PJ].

³⁴ See *Diagnostic Criteria*, *supra* note 28. See also *FAQs: What is Problem Gambling?* National Council on Problem Gambling, NAT’L COUNCIL ON PROBLEM GAMBLING,

problem may well be more acute. In a 2019 study, the National Council of Problem Gambling reported that the rate of problem gambling among sports bettors is at least twice as high as among gamblers in general.³⁵ Even before sports betting was legalized and gambling was centered on live, in-casino environments, studies have shown that exposure to advertising was a “precipitator for relapse” and could counteract educational anti-gambling messages.³⁶

Indeed, there is evidence of increases in helpline calls nationwide since sports betting was legalized. For example, in the first year that sports betting was legalized in Colorado, the number of calls and texts to Colorado’s Gambling addiction helpline increased by 45 percent.³⁷ There is also evidence of increased betting by those under the legal age. One survey, conducted by

<https://www.ncpgambling.org/help-treatment/faq/> [https://perma.cc/QVB8-3Y8P] (last retrieved June 9, 2023) (“One percent of U.S. adults are estimated to meet the criteria for severe gambling problems in a given year. . . Two to three percent would be considered to have mild or moderate gambling problems; that is, they do not meet the full diagnostic criteria for gambling addiction but meet one or more of the criteria and are experiencing problems due to their gambling behavior. Research also indicates that most adults who choose to gamble are able to do it responsibly.”).

³⁵ See *A Review of Sports Wagering & Gambling Addiction Studies, Executive Summary*, NAT’L COUNCIL ON PROBLEM GAMBLING, https://www.ncpgambling.org/wp-content/uploads/2020/01/Sports-gambling_NCPGLitRvwExecSummary.pdf [https://perma.cc/4JXP-4NFY] (last retrieved June 2, 2023).

³⁶ See Per Binde, *Exploring the Impact of Gambling Advertising: An Interview Study of Problem Gamblers*, 7 INT’L J. OF MENTAL HEALTH & ADDICTION, 541, 552 (2009); Per Binde, *Gambling Advertising: A Critical Research Review*, RESPONSIBLE GAMBLING TRUST (2014); see also Adrian Parke, Andrew Harris, Jonathan Parke, Jane Rigbye, & Alex Blaszczynski, *Responsible Marketing and Advertising in Gambling: A Critical Review*, 8 J. OF GAMBLING BUS. & ECON., 21, 23–24 (2014); Simon Planzer & Heather Wardle, *The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling*, RESPONSIBLE GAMBLING FUND (2011) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045052 [https://perma.cc/5Y3J-5679]. These studies were the basis for recommendations of advertising restrictions on casino gambling in Massachusetts. See ROBERT J. WILLIAMS, RACHEL A. VOLBERG, MARTHA ZORN, EDWARD J. STANEK, & VALERIE EVANS, A SIX-YEAR LONGITUDINAL STUDY OF GAMBLING AND PROBLEM GAMBLING IN MASSACHUSETTS 71–72 (2021), https://massgaming.com/wp-content/uploads/MAGIC-Six-Year-Longitudinal-Study-of-Gambling-and-Problem-Gambling-in-Massachusetts_Report-4.16.21.pdf [https://perma.cc/RJ4P-TFAA]

³⁷ See Wayne Parry, *As Legal Gambling Surges, Some States Want to Teach Teens about the Risks*, ASSOCIATED PRESS, (June 2, 2023), <https://apnews.com/article/underage-gambling-education-schools-sports-betting-addiction-a0fe6ccb32119a3021e-273af5356ea28> [https://perma.cc/4EXT-NUWU?type=standard].

the National Council on Problem Gambling, concluded that between 60 to 80 percent of high school students have gambled for money.³⁸

In 2021, calls to the helpline run by the National Council on Problem Gambling, a gaming industry-supported group, rose 43 percent, while texts increased 59 percent and chats jumped 84 percent.³⁹ In Connecticut, helpline calls jumped 91 percent in the first year after legalization.⁴⁰ In Ohio, which also legalized sports betting in early 2023, calls to the state's problem gambling hotline tripled in the first month alone compared to the same period the year before.⁴¹ In the first year after Virginia legalized sports gambling, calls to the hotline climbed 387 percent.⁴² In Illinois, calls rose 425 percent between 2020 and 2022.⁴³

There is evidence that the problem is growing. Calls to the National Council of Problem Gambling helpline increased by 124 percent to over 30,000 between March 2020 and March 2023.⁴⁴ When sports gambling is conducted online, the rate of addiction is even higher, with one study of online sports gamblers indicating that 16 percent met clinical criteria for gambling disorder and another 13 percent showed some signs of gambling problems.⁴⁵ The study noted that those under 18 are at an even higher risk of addiction. Data from 2018 showed that more than 75 percent of students gambled and more than 13 percent of adolescents wagered money on sports teams.⁴⁶ Being male and young are considered risk factors for problem gambling.⁴⁷

Despite the overwhelming evidence of increased helpline calls, some have questioned a causal connection between advertising and problem betting. One U.K. common paper indicated skepticism of any causal connection

³⁸ *Id.*

³⁹ See Meghan Gunn, *These Are the Real Dangers of the Sports Betting Boom for Young Men*, NEWSWEEK (Mar. 22, 2023), <https://www.newsweek.com/2023/04/07/sports-betting-boom-linked-rising-gambling-addiction-anxiety-suicide-1789055.html> [<https://perma.cc/2JT5-24XM>].

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See Daniel Kaplan, *Sports Gambling Ads are Everywhere. Should They Be Restricted or Even Banned?*, THE ATHLETIC (May 12, 2023), https://theathletic.com/4496847/2023/05/12/sports-gambling-ads-restrictions/?source=targeted_email&campaign=6978149 [<https://perma.cc/L4EN-2BC9>].

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Winters & Derevensky, *supra* note 29, at 107.

between advertising and greater problem betting despite concluding that more advertising regulations should be adopted.⁴⁸ Nonetheless, the paper did note that advertising, regardless of form, can have “much stronger, and adverse, impacts on those who are already experiencing problems with gambling.”⁴⁹

II. LAWS RESTRICTING SPORTS BETTING ADVERTISING IN OTHER COUNTRIES

Before discussing the question of regulating advertising in the U.S., it is worth discussing various approaches taken in other countries. Presently, over twenty countries have legalized sports betting in different forms.⁵⁰ Many, if not most of these countries, regulate advertising through statutory, regulatory, or voluntary industry standards and some restrict such content more broadly than currently found in state regulations.⁵¹ While freedom of speech is guaranteed in many countries, the scope of freedom for commercial speech has generally been more limited outside the United States.⁵² As such, some

⁴⁸ See Lucy Frazer, *Policy Paper: High Stakes: Gambling Reform for the Digital Age*, DEP'T FOR CULTURE, MEDIA & SPORT (Apr. 27, 2023), <https://www.gov.uk/government/publications/high-stakes-gambling-reform-for-the-digital-age/high-stakes-gambling-reform-for-the-digital-age#chap2> [<https://perma.cc/93TU-Q28M>] (“Overall, the call for evidence submissions showed a lack of conclusive evidence on the relationship between advertising and harm. The limited high-quality evidence we received shows a link between exposure to advertising and gambling participation, but there was little evidence of a causal link with gambling harms or the development of gambling disorder. . . . We want customers to have further protections quickly. We will work with industry and all stakeholders in the sector to create an ombudsman that is fully operationally independent and is credible with customers.”).

⁴⁹ *Id.* (citing study by Per Binde & Ulla Romild, *Self-Reported Negative Influence of Gambling Advertising in a Swedish Population-Based Sample*, 35 J. OF GAMBLING STUD. 709 (2018)).

⁵⁰ See *Global Online Betting Regulations*, ONLINE BETTING, <https://onlinebetting.com/countries> [<https://perma.cc/TXH7-V3CM>] (last visited June 19, 2023).

⁵¹ *Id.* See also Winter & Derevensky, *supra* note 29; Frazer, *supra* note 48; Otis, *infra* note 60; BETTING & GAMING COUNCIL, *infra* note 64; Thomas-Akoo, *infra* note 76; Strauss, *infra* note 79, Ruedas, *infra* note 93.

⁵² See, e.g., Canadian Charter on Rights and Freedoms, Part I of the Constitution Act, 1982, § 2(b) (“2. Everyone has the following fundamental freedoms: . . . freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”); The Constitutional Act of 1853, § 77 (Den.) https://www.thedanishparliament.dk/-/media/sites/ft/pdf/publikationer/engelske-publikationer-pdf/the_constitutional_act_of_denmark_2018_uk_web.pdf [<https://perma.cc/8RUJ-3RUB>] (“Any person shall be at liberty to publish his ideas in print, in writing, and in speech, subject to his being held responsible in a court of law.

regulations enacted in those nations would likely be unconstitutional in the United States.⁵³

A. Canada

Federal legislation allowing sports betting was enacted in Canada in 2021, allowing provinces to operate “single game” betting operations.⁵⁴ Since this legalization, Ontario has been the only province to license sports books operated by third parties (like in the United States), while the other provinces have operated lottery-run platforms for their single-game betting.⁵⁵

In Ontario, sports betting falls under the jurisdiction of its Alcohol and Gaming Commission of Ontario (AGCO), which in 2022 enacted a series of regulations that include restricting advertising and sponsorship.⁵⁶ Most

Censorship and other preventive measures shall never again be introduced”); THE CONSTITUTION OF THE ITALIAN REPUBLIC, art. 21, https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf [<https://perma.cc/GT4T-TWAX>] (“Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication”).

⁵³ See *United States v. Wenger*, 427 F.3d 840, 847 (10th Cir. 2005) (holding commercial speech is protected by the First Amendment, requiring state regulations to pass a form of intermediate scrutiny).

⁵⁴ See Pat Evans, *Single-Game Sports Betting in Canada Will Launch in Just Two Weeks*, LEGAL SPORTS REP. <https://www.legalsportsreport.com/55410/launch-date-canada-sports-betting> [<https://perma.cc/FRH2-FFFH>] (last updated Aug. 12, 2021).

⁵⁵ See Jeff Watters, *Legal Online Sports Betting in 2023*, COVERS (June 1, 2023), <https://www.covers.com/betting/canada/legal-sports-betting> [<https://perma.cc/E88D-3UTF>]. Note that as of early 2023, Ontario is the only province with dedicated retail sportsbooks. *Id.*

⁵⁶ See *Marketing and Advertising*, ALCOHOL & GAMING COMM’N OF ONTARIO, <https://www.agco.ca/marketing-and-advertising> [<https://perma.cc/WR6C-VHK2>] (last visited June 7, 2023) [hereinafter Ontario Marketing and Advertising Regulations] (indicating sports betting advertising cannot be directed at children or young people, advertising must not make false or misleading claims about the odds of winning, and sports betting companies must comply with social media guidelines, which require disclosure of the risks of gambling and the age restrictions); see also *Know Your Limit, Play Within It*, MISSISSAUGA NEWS (Mar. 21, 2015), https://www.mississauga.com/life/know-your-limit-play-within-it/article_334c4cd3-7ba5-5af5-9b1a-a2cf978dd7fb.html [<https://perma.cc/7Q2X-WSFA>] (explaining advertising must promote responsible gambling practices and provide resources for individuals who may have gambling addictions with prescriptive messages such as such as “Know Your Limit, Play Within It”); *Sport and Event Betting in Ontario—Player Information*, ALCOHOL & GAMING COMM’N OF ONTARIO, <https://www.agco.ca/sport-and-event-betting-ontario-player-information> [<https://perma.cc/A2ZY-A5J8>] (providing

relevant are advertising restrictions or prohibitions in certain locations, such as near schools or places of worship and the restrictions on certain types of sponsorships.⁵⁷ One example is the prohibition of sponsorships between a betting firm and a sports team if the team's primary audience is under the age of 18.⁵⁸ In addition, the AGCO announced a strengthening of these regulations that takes effect in 2024. This will prohibit celebrity and athlete endorsements of sports betting firms.⁵⁹ In the other provinces, advertising restrictions are minimal, possibly because the lottery schemes are provincial and not funded or sponsored by private companies.⁶⁰

B. United Kingdom

Laws and regulations for sports betting advertising are established and enforced by the U.K. Gambling Commission, the Advertising Standards Authority ("ASA"), and the Committee of Advertising Practice ("CAP").⁶¹ More specifically, there are separate regulations for "non-broadcast" and "broadcast" advertising of gambling (not just limited to sports), both of which are geared towards protecting those under the age of 18.⁶² Advertising that is "likely to be of strong appeal to children or young persons, especially

specific "safe sites" for sports and event betting as well as regulations to protect the integrity of the game itself).

⁵⁷ See Ontario Marketing and Advertising Regulations, *supra* note 56, § 2.03.

⁵⁸ *Id.*

⁵⁹ See AGCO to Ban Athletes in Ontario's iGaming Advertising to Protect Minors, ALCOHOL & GAMING COMM'N OF ONTARIO (Aug. 29, 2023) <https://www.agco.ca/blog/lottery-and-gaming/aug-2023/agco-ban-athletes-ontarios-igaming-advertising-protect-minors> [<https://perma.cc/W788-ZU7D>].

⁶⁰ See generally Daniel Otis, *Are Sports Betting Ads Getting Out of Control in Canada? Experts Weigh In*, CTV NEWS, <https://www.ctvnews.ca/sports/are-sports-betting-ads-getting-out-of-control-in-canada-experts-weigh-in-1.6399493> [<https://perma.cc/AGU4-8GGZ>] (last updated May 15, 2023, 6:01 PM); *Gambling Ads are Ruining Sports*, BAN ADS FOR GAMBLING, <https://www.banadsforgambling.ca/> [<https://perma.cc/8CGX-XXSR>].

⁶¹ See CAP Code, art. 16.3.12 (2010), <https://www.asa.org.uk/static/b324a7dd-94d6-4fb2-979365d66acb2e36/8ae8e940-6cb2-4445-a7c595ae48d4702d/The-CAP-Code-Gambling.pdf> [<https://perma.cc/WH8J-SKYE>].

⁶² See ADVERT. STANDARDS AUTH., COMMS. OF ADVERT. PRAC., UK CODE OF NON-BROADCAST ADVERTISING AND DIRECT & PROMOTIONAL MARKETING, art. 16 (non-broadcast advertising), <https://www.asa.org.uk/static/699c12ab-3a81-4175-9a22f8b900997394/99342a83-3b3e-4ce2-a36606bc80904e4d/The-BCAP-Code-Gambling.pdf> [<https://perma.cc/R7P5-YGTC>].

by reflecting or being associated with youth culture” are restricted.⁶³ With regard to broadcasting, the rules were stricter in part because U.K industry associations have pushed for a prohibition of advertising before 9:00 P.M., which has significantly reduced the number of ads in live sports events.⁶⁴

Early in 2023, the U.K.’s department of Culture, Media & Sport issued a white paper regarding the status of gambling in the country.⁶⁵ Despite the report’s admission that “[t]here is good evidence that [advertising] can have a disproportionate impact on those who are already experiencing problems with their gambling,” and “some forms of online advertising have a strong appeal to children (under 18) and young adults (aged 18 to 24),”⁶⁶ the white paper does not recommend new regulations that directly restrict advertising. Rather, it calls on the Gambling Commission and gambling operators to “make the advertisements safer” through tougher rules on marketing and direct advertising⁶⁷ and asks that sports organizations engage in more voluntary measures.⁶⁸

Despite the conclusion by the country’s Gambling Commission that gambling advertising and marketing “does lead to some people starting gambling who weren’t gambling before,” there was criticism about the lack of a

⁶³ See *id.* at art. 16.3.12. That section also prohibits gambling ads that “include a person or character whose example is likely to be followed by those aged under 18 years or who has a strong appeal to those aged under 18,” but exempts advertising of gambling products associated with activities that are themselves of strong appeal to under-18s (for instance, certain sports or playing video games). *Id.* at 4.

⁶⁴ See BETTING & GAMING COUNCIL, *Children Unable to See Betting Ads Before 9pm Watershed as New English Football Season Kicks Off*, POLITICSHOME (Sept. 11, 2020), <https://www.politicshome.com/members/article/children-unable-to-see-tv-betting-ads-before-9pm-watershed-as-new-english-football-season-kicks-off> [https://perma.cc/CS6L-X9CP] (“overall, the amount of gambling ads viewed by youngsters has fallen by 70 per cent over the full duration of live sport programmes”).

⁶⁵ See Frazer, *supra* note 48.

⁶⁶ *Id.* § 2 (marketing and advertising).

⁶⁷ *Id.*

⁶⁸ *Id.* For example, the Premier League followed that recommendation and banned gambling ads on the front of team jerseys, some that has been done by other European soccer leagues. See David Steele, *Premiere League will Boot Gambling Ads from Jersey Fronts*, LAW360 (Apr. 13, 2023), https://www.law360.com/sports-and-betting/articles/1596638?nl_pk=6ada3079-4db3-4c29-8042-be5ea277a863&utm_source=newsletter&utm_medium=email&utm_campaign=sports-and-betting&utm_content=2023-04-14&read_more=1&nlsidx=0&nlaidx=4 [https://perma.cc/9X46-UJBW].

broader proposal to restrict the terms or amount of gambling advertising permitted.⁶⁹

C. *The European Union*

The regulatory approaches of individual E.U. nations vary considerably. Most have enacted significant restrictions on advertising, because commercial speech has a lesser scope of protection under the European Convention on Human Rights.⁷⁰ It permits restrictions on objective and truthful advertisements “in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions.”⁷¹ As can be seen in the examples described below, most of the restrictions center on broadcasting.

In 2019, the Italian government fully banned commercial gambling advertising via television, radio, and the Internet.⁷² The rules also prohibit betting companies from sponsoring sports events or clubs.⁷³

⁶⁹ See Zak Thomas-Akoo, *Concerns Remain Over a Lack of Action on Ads in Gambling White Paper*, iGB (Apr. 27, 2023), <https://igamingbusiness.com/legal-compliance/politicians-critise-gambling-white-paper/> [<https://perma.cc/SHT8-6W43>] (One Member of Parliament criticized the proposal as lacking in restrictions in the amount of gambling advertising. Another argued that the white paper did not “contain enough measures sufficiently to tackle advertising.”).

⁷⁰ See Council of Europe, *Guide on Article 10 of the European Convention on Human Rights*, EUROPEAN COURT OF HUMAN RIGHTS (last updated Aug. 31, 2022), https://www.echr.coe.int/documents/d/echr/guide_art_10_eng [<https://perma.cc/LPY5-5SL9>]. Like the multi-part *Central Hudson* test, discussed *infra* Section IV, the standard of protection for commercial speech in the EU is also a multi-part test, but with more deference to government’s justifications. The EU Convention sets out a four-part analysis for whether a State under the EU is authorized to restrict commercial speech under Article 10: (1) whether there was an interference by a public authority; (2) whether the restriction is prescribed by law; (3) whether the aim of the restriction is legitimate; and (4) whether the restriction is necessary in a democratic society.

⁷¹ See *Casado Coca v. Spain*, 18 Eur. Ct. H.R. (ser. A), 15–16 (1994); *Barthold v. Germany*, 90 Eur. Ct. H.R. (ser. A), 19 (1985).

⁷² See Erik Gibbs, *Gambling Advertising in Italy Officially Dead*, CALVIN AYRE (Aug. 10, 2018), <https://calvinayre.com/2018/08/10/business/gambling-advertising-italy-officially-dead/> [<https://perma.cc/R4PA-HFWT>].

⁷³ See Raffaello Rossi, Agnees Nairn, Ben Ford, & Jamie Wheaton, *Online Gambling Ads Need to be Regulated. The European Union is Showing How to Do It*. SCROLL.IN (Feb. 18, 2023), <https://scroll.in/article/1043956/>

In France, time restrictions on sports betting advertising also exist, but are not as encompassing. Such advertisements are not allowed during broadcasts of live sports events or in the 30 minutes before and after these broadcasts.⁷⁴ This rule aims to reduce the exposure of minors to sports betting advertising. Spain has similar restrictions regarding live events, and its gambling authority also enacted rules to prohibit ads on television, radio, and online media outside of 1:00 A.M. to 5:00 A.M.⁷⁵ In the Netherlands, gambling ads through most media channels—including on television, in radio, and in print—were banned in the summer of 2023.⁷⁶ The new rules also prohibit advertising in public places, which extends to billboards, bus shelters and cafes, as well as within gaming venues themselves such as casinos and slot parlors.⁷⁷ In Germany, ads are also banned, but sponsorships are permitted.⁷⁸

In 2023, Belgium banned gambling advertising across multiple platforms to crack down on “addiction and debt,” with a further prohibition on ads in stadiums and sports sponsorships coming at a future date.⁷⁹ As this

online-gambling-ads-need-to-be-regulated-the-european-union-is-showing-how-to-do-it [https://perma.cc/4V7D-PM3Z].

⁷⁴ See Nick Mwangi, *France: Successful Betting Ad Restrictions for ANJ*, NAIROBI WIRE (Feb. 22, 2023), <https://nairobiwire.com/2023/02/ireac-successful-betting-ad-restrictions-by-anj.html> [https://perma.cc/8U2M-YGWB] (The ANJ is responsible for regulating all forms of gambling in France, including sports betting. “This includes banning gambling ads during live sports broadcasts and curtailing the amount of advertising that can be broadcast during certain time intervals on any TV channel.”).

⁷⁵ See Albert Agustinoy, Alicia Costas & Clara Sánchez, *Royal Decree on Gambling Advertising Published in the Official State Gazette*, CAUTRECASAS (Nov. 5, 2020), <https://www.cuatrecasas.com/en/global/art/royal-decree-on-gambling-advertising-published-in-the-official-state-gazette-1> [https://perma.cc/BGW5-N9XP] (detailing Royal Decree 958/2020).

⁷⁶ See Zak Thomas-Akoo, *Netherlands Bans Gambling Ads*, IGB (July 3, 2023), <https://igamingbusiness.com/marketing-affiliates/marketing/netherlands-ban-gambling-ads/> [https://perma.cc/9SNF-WDHA].

⁷⁷ See Robert Fletcher, *Dutch Government Confirms 1 July Start for Gambling Ad Ban*, IGB (Apr. 23, 2023), https://igamingbusiness.com/marketing-affiliates/dutch-gambling-ad-ban/?utm_source=feedotter&utm_medium=email&utm_campaign=igb_daily&utm_content=httpsigamingbusinesscommarketingaffiliatesdu [https://perma.cc/9FLL-KFVS].

⁷⁸ *Id.*

⁷⁹ See Marine Strauss, *Belgium Bans Gambling Advertising from July 1*, REUTERS (Mar. 9, 2023), <https://www.reuters.com/world/europe/belgium-bans-gambling-advertising-july-1-2023-03-09/> [https://perma.cc/8JHZ-ECP8].

article is being written, Ireland is considering a ban on advertising between 5:30 A.M. and 9:00 P.M.⁸⁰

D. Africa

A number of African countries have legalized sports betting and have employed some general restrictions on advertising. In Ghana, for example, regulations stipulate that ads cannot be false or misleading and bar the use of celebrities.⁸¹ Warnings are required that must take up a stipulated percentage of the ads or run as “crawls” on television or radio.⁸² Additionally, betting ads cannot be aired on radio and television during “prime time.”⁸³

E. Australia

In Australia, the Interactive Gaming Act makes it an offense to offer or advertise “real money” online interactive gambling services to Australian residents.⁸⁴ Ads for betting products in certain areas of Australia are not

⁸⁰ See IRISH PARLIAMENT, Gambling Regulation Bill 2022, § 141.(1), at 109, <https://data.oireachtas.ie/ie/oireachtas/bill/2022/114/eng/initiated/b11422d.pdf> [<https://perma.cc/ZZ9D-SWSG>]. (“A person shall not knowingly advertise, or cause another person to advertise, a relevant gambling activity on television, radio or an on-demand audio-visual media service between the hours of 5:30 a.m. and 9:00 p.m.”)

⁸¹ See GAMING COMM’N OF GHANA, *Guidelines on Advertisement, General and Specific Guidelines*, https://gamingcommission.gov.gh/images/images/pdf/ADVERTISING_percent20GUIDELINES_percent20OF_percent20THE_percent20GAMING_percent20COMMISSION.pdf [<https://perma.cc/SQR9-AZYK>] (retrieved June 9, 2023). The power of the Gaming Commission derives from § 3(2)(g) of the Gaming Act of 2006 (Act 721), https://www.bcp.gov.gh/new/reg_details.php?id=MTc=-::-text=AN_percent20ACT_percent20to_percent20revise_percent20and,matters_percent20concerning_percent20the_percent20gaming_percent20industry [<https://perma.cc/XK45-86DX>] (retrieved June 9, 2023).

⁸² *Guidelines on Advertisement*, § 3(2)(g) of The Gaming Act 2006 (Act 271) (Austl.), at 2 (“Warnings and acknowledgements must be placed at the bottom of the advertisement and must not be less than thirty percent (30%) of the biggest font size in case of billboards or flyers. Run as crawls for Television and Social Media advertisements. Run for the entire duration of the TV and Social Media advertisements. Where warnings are read on TV and Radio, it shall be clear, audible and well-paced. All operators’ premises shall display warnings on its premises.”) (emphasis omitted).

⁸³ *Id.*

⁸⁴ See *Interactive Gambling Act 2001*, No. 84 (Austl.), <https://www.legislation.gov.au/Details/C2022C00063> [<https://perma.cc/FLZ4-SYXB>] (last visited, Jun. 9, 2023).

permitted during TV programs during certain periods of the day, in programs directed at children, and during broadcasts of live sporting events.⁸⁵ Gambling ads during live sport on TV, radio, and online are not allowed to contain content that targets children, makes exaggerated claims, suggests that gambling is a way to achieve success, or makes a connection between betting or gambling and alcohol.⁸⁶ However, a recent report issued by the committee from the Australian Parliament advocated more “phased restrictions” leading to a total ban on broadcast and online advertising.⁸⁷

III. THE UNITED STATES: PRESENT REGULATIONS ON ADVERTISING

In the United States, the over three dozen states that have legalized sports betting have enacted rules and regulations restricting “false and deceptive advertising”⁸⁸ and advertising directed at venues and times where significant numbers of children are viewing.⁸⁹ Regulations are geared towards preventing those under the legal age (under 21 in the majority of states)⁹⁰ from being

⁸⁵ See *Gambling Ads During Children’s Programs*, AUSTRALIAN COMM’NS & MEDIA AUTH., <https://www.acma.gov.au/gambling-ads-during-childrens-programs> [https://perma.cc/2WQB-QYUJ]; see also PARLIAMENT OF AUSTRALIA HOUSE OF REPRESENTATIVES, STANDING COMMITTEE ON SOCIAL POLICY AND LEGAL AFFAIRS, *YOU WIN SOME, YOU LOSE MORE: INQUIRY INTO ONLINE GAMBLING AND ITS IMPACTS ON THOSE EXPERIENCING HARM* §§ 5.35, 5.36 (2023), https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Onlinegamblingimpacts/Report/Chapter_5_-_Gambling_advertising#_ftnref16 (retrieved June 29, 2023) [https://perma.cc/FD7C-EJ6S] (hereinafter AUSTRALIA HOUSE REPORT).

⁸⁶ See *Misleading or Socially Irresponsible Gambling Ads*, AUSTRALIAN COMM’NS & MEDIA AUTH. (June 9, 2023, 5:30 AM), <https://www.acma.gov.au/misleading-or-socially-irresponsible-gambling-ads> [https://perma.cc/2FKK-KVDD].

⁸⁷ See AUSTRALIA HOUSE REPORT, *supra* note 85, §§ 5.139–5.147.

⁸⁸ See, e.g., 58 Pa. Code § 1401a.9(e) (2021) (“A sports wagering certificate holder or sports wagering operator shall include signage in the sports wagering area that displays ‘If you or someone you know has a gambling problem, call 1-800-GAMBLER,’ or comparable language approved by the Board, including in print advertisements or other media advertising the sports wagering operations of the sports wagering certificate holder or sports wagering operator.”).

⁸⁹ See Marcia Mercer, *States Tackle Teenage Problem Gambling as Sports Betting Grows*, EDUC. WK. (July 13, 2022), <https://www.edweek.org/leadership/states-tackle-teenage-gambling-as-sports-betting-grows/2022/07> [https://perma.cc/LY8G-SZ8T].

⁹⁰ The following states allowed adults 18 and older to bet in the following formats: Kentucky (Online/Mobile/In-Person); Montana (Mobile/Online); New Hampshire

enticed to gamble and legal gamblers from becoming problem or addicted gamblers.⁹¹ At this time, there has not been any enforcement action by the Federal Trade Commission, the agency in charge prohibiting advertisers from disseminating false, unfair, or deceptive advertising in interstate commerce.⁹² However, many states have adopted standards similar to the FTC's standards for "false or materially misleading" advertising.⁹³

In addition, state regulations also mandate the posting of phone numbers and websites directed to help problem gamblers. For example, New York's regulations require the posting of a phone hotline⁹⁴ and also prescribes font size requirements for signs, direct mail, billboards, and in the case of television, two percent of any image presented. For websites, these warnings should be the same size of the "majority of the text" used in the webpage.⁹⁵

The question then becomes whether these limited regulations are effective in averting children from gambling or warning gamblers about the harm of addiction and where to go for help. Based on the reports of increased numbers of those identified as problem gamblers,⁹⁶ should regulations go further? The answer should be yes. As will be discussed, a more comprehensive series of broadcast restrictions could be more effective in stemming the increase in problem gambling.

After a one-year investigation, the *New York Times* concluded that states have required few protections for consumers, dedicated minimal funds to combating addiction, and often turned to the gambling industry to help shape regulations and police its own compliance with them.⁹⁷

(Online/Mobile/In-Person); New Mexico (In-Person); Rhode Island (Online/Mobile/In-Person); Tennessee (Online/Mobile); Washington, D.C. (Online/Mobile/In-Person); Wyoming (Online/Mobile). See *Legal Sports Betting Age by State in 2023*, <https://sportsbetting.legal/states/age/> [<https://perma.cc/58FY-4GGD>] (last accessed Oct. 7, 2023).

⁹¹ See Mercer, *supra* note 89.

⁹² See 15 U.S.C.A. § 52(a).

⁹³ See Serena T. Ruedas, *Sports Betting Blitz: Advertising Inundation in the U.S. Market Post-PASPA and Steps Operators Can Take to Avoid Further Regulation and Legislation*, 13 UNLV GAMING L.J. 79, 97 nn.167–68. (citing Nev. Gaming Comm. § 5.011(1)(d) (2019); N.J. Admin. Code § 13:69C-14.2(d)).

⁹⁴ See N.Y. COMP. CODES, *supra* note 6.

⁹⁵ *Id.*

⁹⁶ See Winters & Derevensky, *supra* note 29.

⁹⁷ See Rebecca R. Ruiz, Kenneth P. Vogel & Joe Drapt, *Why States Were Unprepared for the Sports-Betting Onslaught*, N.Y. TIMES (Nov. 20, 2022), <https://www.nytimes.com/2022/11/20/business/sports-betting-laws-states.html?searchResultPosition=5> [<https://perma.cc/KB4N-L8QG>].

A series of articles noted the intense lobbying by the gaming industry to legalize sports betting, including selling potential tax revenues for states once the practice is legalized. “[States] collect taxes on gambling, and the more people bet, the more governments get. One result is that states have, in many ways, given gambling companies free rein.”⁹⁸ Even pro-gambling legislators questioned the lack of greater regulation to prevent addiction.⁹⁹ However, more recently, certain states have begun to ramp up enforcement and the media has become more focused on the perils of legalized betting regimens.¹⁰⁰ But the enforcement is based on the regulations in place. More extensive restrictions—and bans—would face constitutional attack, making it more challenging to craft rules that would pass constitutional muster. The following sections explain why.

IV. THE CONSTITUTIONAL BASIS FOR COMMERCIAL SPEECH PROTECTION OF “SIN PRODUCT ADVERTISING” IN THE UNITED STATES

There is no exact definition of commercial speech,¹⁰¹ but many courts (including the U.S. Supreme Court) have interpreted commercial speech as “the ‘common-sense’ distinction between speech proposing a commercial transaction and other varieties of speech.”¹⁰² Admittedly, the task of finding the right balance between free speech protection and regulation of commercial speech (which certainly includes sports betting advertising) is not an easy one. Part of the problem stems from the fact that for much of the 20th century, commercial speech was not given any constitutional protection because courts did not consider it within the scope of First Amendment rights.¹⁰³ The

⁹⁸ *Id.*

⁹⁹ *Id.* (“‘The issue of addiction really got lost,’ said Ralph Caputo, a former casino executive and New Jersey legislator who was instrumental in legalizing sports betting admitted. ‘We didn’t think very seriously about it.’”).

¹⁰⁰ See Eric Lipton & Kevin Draper, *First Came the Sports Betting Boom. Now Comes the Backlash*, N.Y. TIMES (May 12, 2023), <https://www.nytimes.com/2023/05/13/sports/online-sports-gambling-regulations.html> [<https://perma.cc/K668-FTCK>].

¹⁰¹ See Tamara R. Piety, *Against Freedom of Commercial Expression*, 2 CARDOZO L. REV. 2583, 2591–92 (2008).

¹⁰² See *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 637 (1985) (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455–56). For a more detailed discussion, see Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. OF HEALTH CARE & POL. 159 (2009).

¹⁰³ See *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (upholding a New York City law which prohibited the distribution of handbills for commercial business and advertising).

Supreme Court dismissed any idea of protection for commercial speech in a 1942 ruling.¹⁰⁴ In later years, the Court would gradually take steps to include more advertising within the First Amendment sphere until formally accepting it over 30 years later.¹⁰⁵

This exclusion was not a fluke—commercial speech was often restricted without much constitutional debate in various jurisdictions.¹⁰⁶ Justifications for restrictions or bans involved the need to protect the public from aggressive solicitation.¹⁰⁷ Courts rationalized restrictions on commercial speech as part of the state's power to regulate economic interests and therefore utilized the far easier constitutional standard of requiring only a "rational connection between the remedy provided and the evil to be curbed," or rational-basis review.¹⁰⁸

Suffice it to say, cases that involved sin product advertising, such as restrictions on tobacco advertising, were upheld as part of the power to regulate health and safety.¹⁰⁹ In *Packer Corp. v. Utah*,¹¹⁰ the Supreme Court upheld a state ban on cigarette advertisements on billboards.¹¹¹ In upholding this

¹⁰⁴ *Id.*

¹⁰⁵ See *infra* notes 117–19 and accompanying text.

¹⁰⁶ See, e.g., *Schneider v. State of New Jersey*, 308 U.S. 147, 165 (1939) (while the Court rejected ordinances against commercial handbill and leaflet distribution in Los Angeles, Milwaukee, Worcester, M.A., and Irvington, N.J. as unconstitutionally broad, the opinion noted: "We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires.").

¹⁰⁷ *Id.*

¹⁰⁸ See *Thomas v. Collins*, 323 U.S. 516, 530 (1945). For a thorough discussion, see Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 206, n. 22 (1975).

¹⁰⁹ See D. Kirk Davidson, *Selling Sin: The Marketing of Socially Unacceptable Products*, QUORUM BOOKS (1996) ("Sin Product Advertising involves advertising and marketing of social unacceptable products, such as cigarettes, alcoholic beverages, firearms, gambling and pornography").

¹¹⁰ 285 U.S. 105 (1932).

¹¹¹ *Id.* at 107. The Packer Corporation, a Delaware corporation engaged in billboard advertising and authorized to do business in Utah, was prosecuted under this statute for displaying a large poster advertising Chesterfield cigarettes on a billboard owned by it and located in Salt Lake City, thereby violating a Utah statute. The statute provided: "It shall be a misdemeanor for any person, company, or corporation, to display on any bill board, street car sign, street car, placard, or on any other object or place of display, any advertisement of cigarettes, cigarette papers, cigars, chewing tobacco, or smoking tobacco, or any disguise or substitute of either, except that a dealer in cigarettes, cigarette papers, tobacco, or cigars or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such

ban, which was violated by the petitioner (an advertising agency engaged in billboard advertising), the Court's view of commercial speech restrictions as part of a state's police power was definitive to the point that a First Amendment claim was not even alleged.¹¹² Other courts echoed this approach¹¹³ and even when these laws were nullified, courts focused on property rights more than free speech rights.¹¹⁴

This approach similarly found academic support. Limited protection of commercial speech was advocated by several prominent commentators and scholars¹¹⁵ who thought that the First Amendment should focus on speech that is not for commercial gain. One commentator summarized the basis of regulating commercial speech regulations because of its connection with

articles, provided that nothing herein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco, smoking tobacco, or any disguise or substitute of either in any newspaper, magazine or periodical printed or circulating in the State of Utah." *Id.*

¹¹² *Id.* at 108 ("It is not denied that the state may, under the police power, regulate the business of selling tobacco products, [citations omitted] and the advertising connected therewith [citations omitted.>"). The Court's swift disposal of the First Amendment argument was so complete that the Court focused more on other constitutional claims (which were also ultimately rejected). Those arguments included alleged Equal Protection (because the law did not apply to newspapers and magazines), liberty of contract, and Commerce Clause violations. *Id.* at 108–10.

¹¹³ *See, e.g.,* *Ry. Exp. Agency v. People of State of New York*, 336 U.S. 106, 110–11 (1949) (ban on advertising on trucks survives Equal Protection challenge).

¹¹⁴ *See, e.g.,* *People v. Green*, 83 N.Y.S 460, 463–64 (N.Y. App. Div. 1903) (law authorizing the park department of a city to regulate and control the exhibition of advertising, structures intended for advertisements, and the exhibition of advertisements upon any lands fronting upon public parks, squares, and places in a city was held unconstitutional as violating the federal constitution's provision against the taking of property for public use without compensation); *see also* *Haller Sign Works v. Physical Culture Training Sch.*, 249 Ill. 436 (1911) (holding that the right to the use of property was unconstitutionally interfered with by a statute forbidding the erection and maintenance of any structure for advertising purposes within 500 feet of a public park or boulevard) (cited in *Constitutional Power to Regulate Outdoor and Street Car Advertising*, 79 A.L.R. 551 (1932)).

¹¹⁵ *See generally* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985) (arguing that protecting commercial speech ultimately depreciates the true purpose of the First Amendment); C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 98 (2009) (presenting three arguments against protecting commercial speech); GEORGE WRIGHT, *SELLING WORDS: FREE SPEECH IN A COMMERCIAL CULTURE* (1997) (warning against dangers of affording commercial speech First Amendment rights).

“a separate sector of social activity involving the system of property rights rather than free expression.”¹¹⁶

Beginning in the 1960s, the Supreme Court began to expand the constitutional protection of certain forms of commercial speech, if such speech included political, non-commercial elements.¹¹⁷ While purely commercial speech was not yet constitutionalized,¹¹⁸ the Court further narrowed the scope of the prior Supreme Court rulings, noting that any non-commercial information in an advertisement may constitutionalize the speech.¹¹⁹ In 1975, commercial speech was given First Amendment protection, and since 1980, the guideline for constitutional justification must satisfy a four-part test to pass constitutional muster. This standard—known as the *Central Hudson* test¹²⁰—has been subject to considerable interpretation because of its intricacy¹²¹ and elasticity. For the purposes of this paper, we will focus on

¹¹⁶ See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 949 n.93 (1963); see also Note, *supra* note 108, at 208.

¹¹⁷ See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (detailing a libel action involving a paid advertisement by a number of civil rights leaders denouncing repressive police conduct against black Americans in Alabama, *id.* at 256–57). The Court held that a communication which conveyed “information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern” is not deemed to be commercial in nature. *Id.* at 266. The Court ultimately concluded that defamation involving public officials was privileged, unless the plaintiff shows actual malice and reckless disregard for the truth on the part of the defendant. *Id.* at 280.). For more detail, see Mark Conrad, *Board of Trustees of the State University of New York v. Fox – the Dawn of a New Age of Commercial Speech Regulation*, 9 CARDOZO. ARTS & ENT. L.J. 61 (1990).

¹¹⁸ See *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424 (1963) (affirming an injunction against newspapers and radio stations carrying optometrists’ advertising in violation of a state statute prohibiting such action); see also *SEC v. Wall St. Transcript Corp.*, 422 F.2d 1371 (2d Cir. 1970), cert. denied, 398 U.S. 958 (1970) (application of First Amendment to Investment Advisers Act of 1940, ch. 686, 54 Stat. 847), cited in Conrad, *supra* note 117, at 63.

¹¹⁹ See *Bigelow v. Virginia*, 421 U.S. 809, 825–26 (1975) (Virginia statute making it a misdemeanor to encourage abortions ruled unconstitutional. The court ruled that the “commercial aspects” of the advertisement promoting abortions did not negate its first amendment protection since it did more than propose a commercial transaction, and that the Virginia court therefore erred in failing to balance the constitutional interests with the state’s interest in regulating such speech).

¹²⁰ See generally *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980) (showing where test was first conceived).

¹²¹ See Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech*, 76 VA. L. REV. 627, 631 (1990) (“[J]udges and Justices have filled quite a bit of space in

the application of *Central Hudson* to gambling, alcohol and tobacco, the “sin product” industries.

Central Hudson allows restrictions against false and deceptive advertising, concluding that such advertising is outside the scope of *any* constitutional protection.¹²² Based on that requirement, many states have already implemented that guideline in their regulations of sports betting advertising.¹²³ However, if ads are “truthful,” a state’s burden becomes more onerous, as *Central Hudson* imposes the following standards to justify the restriction: the government must show that the restriction had a substantial government interest; the restriction directly advances the state’s interest; and the restriction is not “more restrictive than necessary” to advance that interest.¹²⁴ On its face, it seems like an intermediate scrutiny test found in content-neutral restrictions on general speech, but it is knottier, especially when it comes to “sin product” advertising. Some scholars have posited that it is really an “intermediate-plus” scrutiny standard.¹²⁵

Difficulties in applying this intricate test is evidenced by the fact that, since 1980, the Supreme Court has heard about two dozen cases where *Central Hudson* was applied to laws that restrict or limit advertising.¹²⁶ Some of

the case reporters trying to figure out precisely what forms of regulation the [*Central Hudson*] test permits. . . . [T]he cases have been able to shed little light on *Central Hudson*, aside from standing as ad hoc subject-specific examples of what is permissible and what is not.”); see also Lora E. Barnhart Driscoll, *Citizens United v. Central Hudson: A Rationale for Simplifying and Clarifying the First Amendment’s Protections for Nonpolitical Advertisements*, 19 GEO. MASON L. REV. 213 (2011).

¹²² See *Cent. Hudson*, 447 U.S. at 563 (“there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity”).

¹²³ See CONN. GEN. STAT. § 12-862(b)(5) (2023).

¹²⁴ See *Cent. Hudson*, 447 U.S. at 563.

¹²⁵ See Daniel J. Croxall, *Cheers to Central Hudson: How Traditional Intermediate Scrutiny Helps Keep Independent Craft Beer Viable*, 13 NW. L. REV. ONLINE 1 (2016).

¹²⁶ See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367–68 (2002) (holding that the Food and Drug Administration Modernization Act’s (FDAMA) provisions were unconstitutional restrictions of commercial speech); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553–56 (2001) (Massachusetts regulations of promoting cigarettes and other tobacco products violated manufacturers’ and sellers’ First Amendment rights); *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 183–93 (1999) (holding that a prohibition on broadcasting lottery information was not applicable to the advertisements of lawful private casinos where such gambling was legal); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499–500 (1996) (Rhode Island statutes prohibiting the advertisement of liquor prices abridged speech in violation of the First Amendment); *Fla. Bar v. Went For*

the most significant cases involved restrictions on sin product advertising such as liquor, tobacco, and gambling.¹²⁷ And for the last 30 years, the Court has been increasingly skeptical of government rationales for state restrictions of such advertising.¹²⁸

After its ruling in *Central Hudson*, the Supreme Court initially was sympathetic to government restrictions on sin product advertising. In one early case, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,¹²⁹ the Court upheld a Puerto Rican statute prohibiting gambling casino advertisements aimed at residents of Puerto Rico,¹³⁰ even though gambling has been legal on the island since 1948. In its 5-4 ruling, the *Posadas* court applied the *Central Hudson* test in a highly deferential manner, affording great weight to the Commonwealth's justifications: that gambling by residents "would

It, Inc., 515 U.S. 618, 623-35 (1995) (Florida Bar rules prohibiting lawyers from using direct mail to solicit personal injury or wrongful death clients within 30 days of accident withstood First Amendment scrutiny); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 483-87 (1995) (holding the Federal Alcohol Administration Act (FAAA) labeling ban on displaying alcohol content on beer labels violated the First Amendment); *United States v. Edge Broad. Co.*, 509 U.S. 418, 424-30 (1993) (holding federal statutes prohibiting radio broadcasting of lottery advertisements in states where it is illegal did not violate the First Amendment); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993) (there was not a legitimate interest for the city to prohibit the distribution of commercial handbills on public property, nor were there valid time, place, and manner restrictions for the prohibition); *Edenfield v. Fane*, 507 U.S. 761, 767-72 (1993) (Florida's ban on in-person solicitation by CPAs violated the First Amendment); *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 475-79 (1989) (universities and officials could not prevent corporations to conduct product demonstrations in campus dormitory rooms); *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340-45 (1986) (Puerto Rican statute restricting casino gambling advertisements to residents of the territory was facially constitutional); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68-69 (1983) (federal statute prohibiting the unsolicited mailing of contraceptive advertisements was an unconstitutional restriction of commercial speech); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-12 (1981) (San Diego's enforcement of billboard ordinances were substantial government goals and facially constitutional); *In re R.M.J.*, 455 U.S. 191, 203-07 (1982) (holding that provisions in the Missouri Supreme Court rule regulating attorney advertising violated the First Amendment); *Ibanez v. Fla. Dep't of Bus. & Pro. Regul., Bd. of Acct.*, 512 U.S. 136, 142-43 (1994) (Florida Board of Accountancy's decision censuring an attorney was incompatible with First Amendment restraints on official action).

¹²⁷ See text accompanying *infra* notes 128-53.

¹²⁸ See *44 Liquormart*, 517 U.S. at 484.

¹²⁹ See 478 U.S. 328 (1986).

¹³⁰ See P.R. LAWS ANN. tit. 15, § 77 (1972), quoted in *Posadas*, 478 U.S. at 332-33.

produce serious harmful effects on the health, safety and welfare” of the citizenry including “the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.”¹³¹ Therefore, the governmental interests at stake were “substantial, and directly advanced the government’s interest in reducing gambling among residents.”¹³²

More recently, however, the Court has applied the three elements of the test in a more exacting manner, thereby exercising greater skepticism about the constitutionality of governmental restrictions on sin product advertising, especially liquor. In *Rubin v. Coors Brewing Co.*, the Court nullified a federal ban on listing the alcohol level of beer, because the restriction failed to “directly advance” the government’s interest in preventing the advertising of the potency of the beer to avoid “strength wars” by the industry.¹³³ One year later, in *44 Liquormart v. Rhode Island*, the Court unanimously concluded that a state ban on liquor price advertising was an unconstitutional infringement of the liquor sellers’ First Amendment speech rights.¹³⁴ In that case, a plurality of the justices expressed particular skepticism about a “vice exception” to the constitutional protection of advertising of a legal product.¹³⁵ In that plurality opinion, Justice Stevens specifically rejected any notion of deference to restrictions on “vice advertising” and would have overruled *Posadas*.¹³⁶

During the 1990s, the Supreme Court also addressed the issue of gambling advertising, producing two seemingly conflicting rulings. The first, *United States v. Edge Broadcasting Co.*,¹³⁷ upheld a federal law prohibiting

¹³¹ See *Posadas*, 478 U.S. at 332, cited in Conrad, *supra* note 117, at 80.

¹³² *Posadas*, 478 U.S. at 342.

¹³³ *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486–91 (1995).

¹³⁴ See *44 Liquormart*, 517 U.S. 484, 516 (1996).

¹³⁵ See *id.* at 514 (“. . . [T]he scope of any ‘vice’ exception to the protection afforded by the First Amendment would be difficult, if not impossible, to define. Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to ‘vice activity.’ Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market. The recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the ‘vice’ label on selected lawful activities. . . . For these reasons, a ‘vice’ label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity.”).

¹³⁶ *Id.* at 509 (“We are now persuaded that *Posadas* erroneously performed the First Amendment analysis”).

¹³⁷ 509 U.S. 418 (1993).

the broadcasting of advertisements for state-run lotteries by broadcasters in non-lottery states,¹³⁸ concluding that it satisfied the final two requirements of the *Central Hudson* test.¹³⁹ *Edge Broadcasting* could be considered the last in the line of cases that gave deference to the government's interests under the *Central Hudson* test and noted that the "regulation need not be perfect, only reasonable" to accomplish the state's goals of protecting non-lottery states.¹⁴⁰ In a throwback to a pre-*Virginia Pharmacy* time, Justice White noted that gambling advertising did not implicate a "constitutionally protected right; rather it falls into a category of 'vice' activity that could be, and frequently has been banned altogether."¹⁴¹ After finding that the restriction "directly advanced" the state's interest, the Court, citing *Posadas*, concluded that the law passed was not more restrictive than necessary.¹⁴² Notably, *Edge Broadcasting* was decided before *44 Liquormart*.

The reliance on the older generation of post-*Central Hudson* cases—deferring to the government restriction in vice advertising—essentially ended with the second "gambling" case, *Greater New Orleans Broadcasting Association v. United States*,¹⁴³ decided six years after *Edge Broadcasting* and three years after *44 Liquormart*. Here, the Court concluded that a federal statute prohibiting radio and TV broadcasters from advertising privately operated commercial casino gambling—even in areas where casinos are legal, just because these ads could be seen and heard by some viewers in states (such as neighboring Texas) where such gambling is illegal—was unconstitutional.¹⁴⁴

Utilizing a higher degree of scrutiny, the Court in *Greater New Orleans Broadcasting* concluded that the government's claims were far less than convincing. In particular, the Court was skeptical of the argument that restricting

¹³⁸ The statute, 18 U.S.C. § 1304 ("Broadcasting lottery information"), prohibits radio and television broadcasting, by any station for which a license is required, of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes."

¹³⁹ See *Edge Broad. Co.*, 509 U.S. at 418–19.

¹⁴⁰ *Id.* at 428–29.

¹⁴¹ *Id.* at 426. For more analysis, see Steven G. Brody & Bruce E.H. Johnson, *Advertising and Commercial Speech – A First Amendment Guide*, 14-175 (2d Ed), PRACTICING LAW INST. 2004, 2023.

¹⁴² *Edge Broad. Co.*, 509 U.S. at 426.

¹⁴³ *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999).

¹⁴⁴ *Id.* at 195. In so deciding, the court invalidated the statute, 18 U.S.C. § 1304.

advertising undercuts demand.¹⁴⁵ Just as damning, the Court, in concluding that the final requirement of *Central Hudson* failed, noted that there were non-speech methods to control problem gambling.¹⁴⁶ The ruling was a resounding affirmation of the approach began in *Rubin* and *44 Liquormart*.

What could be an even more restrictive reading of *Central Hudson* came in 2001. The Court, in *Lorillard Tobacco v. Reilly*,¹⁴⁷ addressed a series of Massachusetts tobacco advertising regulations that banned outdoor advertising for tobacco products within a 1,000-foot radius of a public playground, elementary school or secondary school.¹⁴⁸ The Court concluded that the state's prohibitions on outdoor tobacco advertising were overbroad under the last prong of *Central Hudson*.¹⁴⁹ The Court considered but did not address the issue of whether *Central Hudson* should be replaced by a strict scrutiny standard,¹⁵⁰ because the regulations failed the last prong of the test regarding the billboard restrictions as a de facto ban on such advertising in large cities.¹⁵¹

The majority in *Lorillard* concluded that the government did present scientific studies to support its argument that limiting such advertising would reduce demand for tobacco products.¹⁵² As demonstrated in *Lorillard*, under

¹⁴⁵ *Id.* at 189 (“While it is no doubt fair to assume that more advertising would have some impact on overall demand for gambling, it is also reasonable to assume that much of that advertising would merely channel gamblers to one casino rather than another. . . . And, . . . the Government fails to ‘connect casino gambling and compulsive gambling with broadcast advertising for casinos’ – let alone broadcast advertising for non-Indian commercial casinos.”).

¹⁴⁶ *Id.* at 192 (“There are surely practical and nonspeech-related forms of regulation – including a prohibition or supervision of gambling on credit, controls on admissions; pot or betting limits; location restrictions; and licensing requirements – that could more directly and effectively alleviate some of the social costs of casino gambling.”).

¹⁴⁷ 533 U.S. 525 (2001).

¹⁴⁸ See 940 MASS. CODE REGS. §§ 21.01–21.07, 22.01–22.09 (2000). The restrictions also included point-of-sale regulations that required indoor advertising to be placed no lower than five feet from the floor of a retail establishment. There, the Court found that those regulations failed the third and fourth prongs of *Central Hudson* as they did not directly advance the government's interest because not all children are less than five feet tall and those who can look up above the five-foot limit. See *Lorillard Tobacco Co.*, 533 U.S. at 565.

¹⁴⁹ See *Lorillard Tobacco Co.*, 533 U.S. at 528 (noting the 1,000-foot regulation would have effectively banned all outdoor advertising in major cities in the state).

¹⁵⁰ See *id.* at 554–55; However, Justice Thomas, in a concurring opinion, stated that he was in favor of replacing *Central Hudson* with a strict scrutiny test. See *id.* at 525, 572–74 (Thomas, J., concurring).

¹⁵¹ See *id.* at 528.

¹⁵² See *id.* at 558–59.

the *Central Hudson* standard, the Court has looked sympathetically at the causal connection between advertising and increased betting among vulnerable populations to justify restrictions. In so ruling, the majority “acknowledged the theory that product advertising stimulates demand for products, while suppressed advertising may have the opposite effect.”¹⁵³ It added that children (a vulnerable population) smoke fewer brands of cigarettes than adults, and those choices directly track the most heavily advertised brands, unlike adult choices, which are more dispersed and related to pricing.¹⁵⁴

Federal appeals courts have also weighed in on sin product advertising. One noteworthy case that could be an outlier is *Coyote Publishing Co., Inc. v. Miller*.¹⁵⁵ The case involved a challenge to Nevada’s considerable restrictions on the advertisement of brothels, which are legal in certain counties of the state.¹⁵⁶ In reversing the lower court rulings, the Ninth Circuit concluded that these restrictions satisfied all the requirements of the *Central Hudson* test, noting that the scope was not broader than necessary to accomplish the strong state interest in limiting the “commodification of sex.”¹⁵⁷

Other cases are more in line with the increasingly prevailing view that broad restrictions may be of questionable constitutionality. The Eighth

¹⁵³ See *id.* at 557 (citing *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995); *United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993); *Central Hudson Gas & Elec. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 568–69 (1980)).

¹⁵⁴ See *id.* at 558 (citing *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents*, 60 Fed. Reg. 41314, 41332 (1995)). It noted that after the introduction of “Joe Camel,” a cartoon figure used in advertisements, Camel cigarettes’ share of the youth market rose from 4 percent to 13 percent. See *id.* at 41330).

¹⁵⁵ *Coyote Pub., Inc. v. Miller*, 598 F.3d 592 (9th Cir. 2010).

¹⁵⁶ NEV. REV. STAT. § 201.430(1)(1995) (“Unlawful advertising of prostitution; penalties. 1. It is unlawful for any person engaged in conduct which is unlawful pursuant to paragraph (b) of subsection 1 of NRS 207.030 [prohibiting prostitution solicited on the street], or any owner, operator, agent or employee of a house of prostitution, or anyone acting on behalf of any such person, to advertise the unlawful conduct or any house of prostitution: (a) In any public theater, on the public streets of any city or town, or on any public highway; . . .”).

¹⁵⁷ See *Coyote Pub., Inc.*, 598 F.3d at 603 (“By keeping brothel advertising out of public places, . . . where it would reach residents who do not seek it out but permitting other forms of advertising likely to reach those already interested in patronizing the brothels, Nevada strikes a balance between its interest in maintaining economically viable, legal, regulated brothels and its interest in severely limiting the commodification of sex.”).

Circuit, in *Missouri Broadcasters Association v. Schmitt*,¹⁵⁸ concluded that a series of liquor advertising restrictions violated *Central Hudson's* last two prongs.¹⁵⁹ These restrictions, which prohibited retail advertising by liquor producers and distributors and barred alcohol retailers from advertising discounted prices for “intoxicating liquor” outside of their establishments were “riddled with exceptions,” thus making the law more difficult to sustain.¹⁶⁰ Similarly, a blanket advertising ban on alcoholic beverages under a town ordinance was addressed by the Georgia Supreme Court in *Folsom v. City of Jasper*.¹⁶¹ Not surprisingly, the court invalidated it as failing both the last two requirements of the standard. The decision noted that not only did the ordinance fail to directly advance the government’s interest of temperance, but it also was overbroad, as more limited approaches, such as educational programs, could accomplish this result.¹⁶²

In a challenge to a state law banning advertisements for machine video gambling, the South Carolina Supreme Court in *Video Gaming Consultants, Inc. v. South Carolina Department of Revenue*,¹⁶³ concluded that the ban was unconstitutional.¹⁶⁴ In holding that the regulation failed the final two

¹⁵⁸ *Mo. Broads. Ass’n v. Schmitt*, 946 F.3d 453 (8th Cir. 2020). The state also barred retailers from taking out advertisements in a newspaper that stated “\$5 Margarita Mondays,” “Buy One, Get One Free,” “Half Price,” or “Free Drinks for Ladies.” *Id.* at 457–58.

¹⁵⁹ *See id.* at 462. The case involved a successful First Amendment challenge to the advertising restrictions by a state broadcasting group. The court concluded that “Missouri fails to show how the Statute, as applied, alleviates to a significant degree the harm of undue influence. . . . Missouri provides no evidence that the Statute as applied is not more extensive than necessary to further its alleged interest of preventing undue influence. Instead, Missouri argues that the Statute does not target speech at all, but instead ‘preserves all avenues of speech’ and simply ‘regulates what activities licensed manufacturers and distributors can engage in with a retail licensee.’ *Id.* at 460.

¹⁶⁰ *Id.* at 457–58 (explaining various prohibitions on advertising while also noting two different exceptions).

¹⁶¹ *Folsom v. City of Jasper*, 612 S.E.2d 287 (Ga. 2005).

¹⁶² *See id.*; see also Brody & Johnson, *supra* note 141, §§ 14–42.

¹⁶³ *Video Gaming Consultants, Inc. v. South Carolina Dep’t of Revenue*, 342 S.C. 34, 535 S.E.2d 642 (S.C. 2000).

¹⁶⁴ *Id.* at 644 (The state’s Department of Revenue (DOR) issued citations to Video Gaming for violating §12-21-2804(b) of the South Carolina Code, which stated: “No person who maintains a place or premises for the operation of machines licensed under Section 12-21-2720(A)(3) may advertise in any manner for the playing of the machines.” Video Gaming had displayed a large sign reading: “STOP HERE TRY OUR POKER VIDEO GAMES” and two signs stating “JACKPOT VIDEO GAMES.” *Id.*).

requirements of *Central Hudson*, the opinion noted that the agency “presented no evidence that the advertising ban would significantly reduce gambling.”¹⁶⁵

While this ruling reflects the caution that courts express over complete bans, its facts are distinct from issues involving sports betting, especially online or mobile sports betting. The dispute in *Video Gaming* involved machine betting in casinos, not a broader and more encompassing sports betting law. Still, the difficulty to scale the final two prongs of *Central Hudson* is apparent.

In sum, in the years since *Central Hudson*, courts have become increasingly skeptical of advertising bans, and an attempt to enact an industry-wide prohibition on sports betting companies is likely to suffer a constitutional defeat. The courts have put governments on notice that they will look at the constitutionality of bans with a considerable degree of skepticism. As noted earlier, this differs from the standards in other countries, which, in most cases, have utilized standards to limit or even ban gambling advertising that would likely be unconstitutional in the United States.

V. COMMERCIAL SPEECH RIGHTS AND RESTRICTIONS ON GAMBLING ADVERTISING IN OTHER COUNTRIES

As noted in Part II, commercial speech rights are more limited in other common law countries than in the United States. Therefore, significant restrictions on sports gambling advertising are easier to justify. For example, the Supreme Court of Canada has established that commercial speech is protected under the Canadian Charter of Rights and Freedoms¹⁶⁶ (in effect, the country’s bill of rights), but their standard is more of a balancing approach between the right to advertise and the government’s interest in restricting it when the interest is to protect the public from exploitation.¹⁶⁷ A key difference is that the balancing test employed applies to other types of speech,

¹⁶⁵ *Id.* at 642.

¹⁶⁶ See The Canadian Charter of Rights and Freedom, § 2(b) (“Everyone has the following fundamental freedoms: a) freedom of conscience and religion; b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; c) freedom of peaceful assembly; and d) freedom of association.”).

¹⁶⁷ See Margherita M. Cinà & Francesca E. Nardi, *Balancing the Scales: The Role of the Canadian Supreme Court in Weighing Commercial Speech and Public Health*, 50 J.L., MED. & ETHICS 276 (2022), <https://www.cambridge.org/core/journals/journal-of-law-medicine-and-ethics/article/balancing-the-scales-the-role-of-the-canadian-supreme-court-in-weighing-commercial-speech-and-public-health/AD-18CA55BFBB9FEDC71CB78E31CDB586> [<https://perma.cc/EE5C-8K3U>].

not just commercial speech, influenced by an earlier section of the Charter which permits limitations of speech based on “proportionality.”¹⁶⁸ For example, restrictions in advertising in English were upheld in Quebec, with the court looking at a provincial exception to the Charter.¹⁶⁹ Yet that opinion did recognize that such speech has validity as it provides consumers with information necessary to make “informed economic choices, an important aspect of individual self-fulfillment and personal autonomy.”¹⁷⁰

The United Kingdom treats commercial speech in a similar vein, giving the government some level of discretion in crafting advertising restrictions to courts. Specifically, the Advertising Standards Authority (“ASA”) and the Committees of Advertising Practice (“CAP”) have expanded their reach on commercial speech through the lens of protecting the public’s health and safety interests.¹⁷¹ Looking at “sin product” advertising, the U.K. has upheld commercial speech restrictions concerning serious or widespread offenses against generally accepted moral, social, or cultural standards.¹⁷² One

¹⁶⁸ To uphold limits under Section 1 of the Charter, the government must demonstrate that the objective of the rights-infringing measure is “pressing and substantial,” and that it meets all prongs of the proportionality test, which include (1) a rational connection between the infringement and the objectives being sought, (2) the infringement minimally impairs the right in question, and (3) the effects of the infringement are proportional to the purpose of the objectives. Additionally, Parliament is given a certain amount of deference depending on the complexity of the social issue in question. Lastly, when there is a vulnerable group involved (i.e. people under 18), the court gives Parliament an even wider margin of deference. The proportionality analysis presents a model where the fundamental tension between commercial expression rights and public policy regulation of commerce can be addressed by recognizing the pivotal importance of seeking balanced outcomes. For more information, see Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 383 (2007) (“It is true that some of the language in [R. v.] Oakes resembles the U.S. Supreme Court opinion in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, a commercial speech case decided in 1980. But *Central Hudson* was not a trend-setting decision that gained much influence outside commercial speech problems. . .”).

¹⁶⁹ See *Ford v. Quebec (Attorney General)*, [1988] 2 SCR 712.

¹⁷⁰ *Id.* at 59.

¹⁷¹ J.R. Shackleton, *AD BREAK: Why Curbs on Advertising Harm Free Speech*, INST. ECON. AFFS. 19–32 (2021) (“A ban on gambling sponsorship, currently worth hundreds of millions of pounds to UK sports organisations, is under consideration. The list of potential ‘harms’ which could be claimed to justify advertising restrictions can be extended indefinitely,” *id.* at 23–24.).

¹⁷² *Id.* at 24–29.

commentator called the British standards “inherently more subjective” than commercial speech restrictions in the United States and Canada.¹⁷³

Other countries have also utilized this “proportionality” system for balancing commercial speech rights and the rights of government to protect society. Proportionality has been incorporated into the constitutional doctrine of courts in continental Europe, the United Kingdom, Canada, New Zealand, Israel, and South Africa, as well as the jurisprudence of treaty-based legal systems such as the European Court of Human Rights. Such popularity gives rise to claims of a global model, a received approach, or simply the best-practice standard of rights adjudication.¹⁷⁴ All these countries use a proportionality basis¹⁷⁵ as opposed to the intermediate scrutiny and four-part test used in the United States for commercial speech.¹⁷⁶

The European Convention on Human Rights has not categorized commercial speech as a unique category with a specific test, like *Central Hudson*, but rather has included it in the general standard of speech protection under Article 10.¹⁷⁷ Significantly, that provision states that the freedom of expression is subject to restrictions to further “public safety, [...] the protection of health or morals.”¹⁷⁸ While commercial speech is subject to considerable protection and one could argue that the proportionality standard is akin to *Central Hudson*, the trend of greater protections in the U.S. since the 1990s indicates that protections for commercial speech have become stronger in the U.S. than in Europe.

VI. PRIVATE INDUSTRY ALTERNATIVES TO GOVERNMENT REGULATION

One alternative to addressing the problems associated with contemporary sports betting is the creation of voluntary advertising standards through

¹⁷³ See Cinà & Nardi, *supra* note 167, at 278–81.

¹⁷⁴ See Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, AM. J. COMP. L. 463, 464–67 (2011).

¹⁷⁵ *Id.* at 464–74.

¹⁷⁶ See Richard Cullen & Kevin Tso, *Commercial Free Speech – A Critical Reconsideration*, 17 AUSTL. J. ASIAN L. 237, 242–43 (2016). See also *supra* notes 84–87 (outlining the contours of the standard).

¹⁷⁷ See Bruce E.H. Johnson & Kyu Ho Youm, *Commercial Speech and Free Expression: The United States and Europe Compared*, 2 J. INT’L MEDIA & ENT. L. 159, 180 (2009).

¹⁷⁸ See COUNCIL OF EUROPE, *Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 10(2) (1950) <https://rm.coe.int/1680a2353d> [<https://perma.cc/9LHA-XPKR>].

private industry groups or trade associations. While not the central focus of this paper, it is worth examining attempts by these associations to control sports betting advertising. The American Gaming Association (“AGA”) has recommended certain standards which are found in the AGA’s Responsible Marketing Code for Sports Wagering (“Code”).¹⁷⁹ The Code recommends that sports wagering advertising and marketing should be placed in broadcast, cable, radio, print, or digital communications only where at least 73.6 percent of the audience is reasonably expected to be of legal gambling age (determined by using reliable, up-to-date audience composition data).¹⁸⁰ That standard is based on data from the 2020 Census, but still hard to quantify based on location, broadcast market, and online usage. The recommendations also support a ban on promotions and advertising for sports betting on college campuses or on college-owned news organizations.¹⁸¹

To encourage “responsible betting,” advertisements should include a “responsible gaming message,” along with a toll-free help line number “where practical” (though what is “practical” goes undefined) and “messages should adhere to contemporary standards of good taste that apply to all commercial messaging, as suits the medium or context of the message.”¹⁸² The AGA standards regarding digital media cover websites, e-mails, and social media.¹⁸³ These platforms must contain a link to a website that provides information about responsible gaming. Additionally, responsible gaming services must be provided, along with a reminder of the legal age to bet, geolocation mechanisms to show where people can bet, and disclosure of privacy practices.¹⁸⁴

All members of the AGA must adhere to the code, and there is a compliance review process and a board established to hear complaints from individuals.¹⁸⁵ There are no fines or penalties for the entity that has violated these standards except a requirement to withdraw the ad.¹⁸⁶

¹⁷⁹ See *Responsible Marketing Code for Sports Wagering*, AM. GAMING ASS’N (Mar. 28, 2023), <https://www.americangaming.org/responsible-marketing-code-for-sports-wagering/> [<https://perma.cc/5TT3-5KVQ>] (hereinafter *Responsible Marketing Code*).

¹⁸⁰ See *id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* (Digital media includes “third party internet and mobile sites, commercial marketing emails or text messages, social media sites, and downloadable content”).

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

While these guidelines establish a certain minimum level of responsibility for the content of advertising and promotional material, this approach suffers from two inherent problems: (1) the standards are not a legal requirement and (2) the penalties are minimal.

Although the NFL has capped the number of gambling ads during its games in 2021, two years later, a group representing the NFL, Major League Baseball, MLS, NASCAR, NBA, WNBA, NHL, NBCUniversal, and FOX¹⁸⁷ sought voluntary standards to “protect consumers” from false and deceptive advertising based on six underlying principles, which include: marketing sports betting only to adults of legal betting age; not promoting “irresponsible or excessive gambling;” ensuring ads are in “good taste;” and publishers conducting “appropriate internal reviews of sports betting advertising.”¹⁸⁸

¹⁸⁷ See Jenny Vrentas, *NFL's Rapid Embrace of Gambling Creates Mixed Signals*, N.Y. TIMES (Feb. 4, 2024), <https://www.nytimes.com/2024/02/04/business/nfl-gambling-super-bowl.html> [<https://perma.cc/N6R5-93EA>]; David Purdom, *Sports Leagues Form Coalition to Promote Limits on Betting Ads*, ESPN (April 19, 2023, 8:05 AM), https://www.espn.com/chalk/story/_/id/36232587/sports-league-form-coalition-promote-limits-betting-ads [<https://perma.cc/AS7Z-5BT7>].

¹⁸⁸ See *Formation of Coalition for Responsible Sports Betting Advertising Announced*, NFL COMM'NS (April 19, 2023), <https://nflcommunications.com/Pages/FORMATION-OF-COALITION-FOR-RESPONSIBLE-SPORTS-BETTING-ADVERTISING-ANNOUNCED.aspx> [<https://perma.cc/346G-6SV7>]. The six goals are: **1. Sports Betting Should be Marketed Only to Adults of Legal Betting Age.** The content of sports betting advertising, marketing and promotion should primarily appeal to individuals of legal betting age, and sports betting should never be endorsed or otherwise promoted by any person who is, or appears to be, below such legal age. Sports betting promotional materials should (i) only appear in media where a significant majority of the audience is reasonably expected to be of legal betting age and (ii) never primarily appeal to children in content or theme[;] **2. Sports Betting Advertising Should Not Promote Irresponsible or Excessive Gambling or Degrade the Consumer Experience.** Sports betting advertisements should always contain a clear, prominent responsible gaming message, including information on responsible gambling resources, and never be directed to individuals known by the advertiser to be self-excluded. Gambling advertising, promotion and other integrations that encourage irresponsible gambling or degrade the consumer experience (e.g., by appearing excessively) should also be avoided[;] **3. Sports Betting Advertisements Should Not Be Misleading.** Sports betting advertisements should never be false, deceptive or misleading. For example, sports betting advertisements and marketing should not promote unrealistic expectations of financial gain, or suggest that social, financial or personal success is guaranteed by engaging in sports betting. Nor should any such messaging state or imply that a bet is without risk if the customer must incur any loss, or risk the customer's own money, to use or withdraw winnings from such bet[;] **4. Sports Betting Advertisements Should Be In Good Taste.** Sports betting advertisements should (i) adhere to contemporary standards of good taste applicable to all

Although lofty, these recommendations mirror many of the state regulations already in place. They do not address the broader questions of exposure to ads that are broadcast, and, while not targeted at children, are, for example, played during NFL games on Sunday afternoons when it is likely that a fair number of those underage would be watching. While voluntary regulations may be helpful, their scope and enforcement (or lack thereof) would not be an adequate substitute for legislative or administrative-based regulation.

VII. THE NEED FOR ADVERTISING RESTRICTIONS THROUGH GOVERNMENT REGULATION: WHAT CAN BE DONE?

As an alternative, governments could consider a variety of proposals to regulate online sports betting. In this section, a number of proposals for restrictions will be examined and discussed. As will be seen, some are more likely to be constitutionally justified and those will be highlighted.

A. *Banning False and Deceptive Advertising and Practices – The Dominant Approach in Sports Gambling-Friendly States*

Betting companies have utilized various promotions to entice potential bettors. For example, at various points, DraftKings has offered promotions for “Deposit Bonuses,” “Bonus Bets,” referrals, “no-sweat bets,” Super Bowl deals, “profit boosts,” and “hole in one prop bets.”¹⁸⁹

commercial messaging, taking into consideration the applicable medium and advertising context and (ii) never undermine public perception of sports or their integrity[;]

5. Publishers Should Have Appropriate Internal Reviews of Sports Betting Advertising. Publishers showing sports betting advertising should (i) provide appropriate training to their relevant employees regarding responsible sports betting advertising policies and (ii) implement internal processes to ensure compliance with such policies. To the extent possible, such processes should include a separate review of advertising and marketing materials by company employees outside the marketing and sponsorship departments[;]

6. Publishers Should Review Consumer Complaints Pertaining to Sports Betting Advertising. Publishers showing sports betting advertising should develop and implement a process to review consumer complaints pertaining to that advertising” (emphasis in original).

¹⁸⁹ See DRAFTKINGS SPORTSBOOKS, https://sportsbook.draftkings.com/promos?referrer=singular_click_id_percent3d5a190160-d65d-4a10-9f78-538e1de c4665&wpcid=255175&wpcn=FrontOfficeSports&wpcrid=xx&wpcrn=Static&wpscid=Bet5Get200Instantly&wpscn=Email&wpsrc=2198 [https://perma.cc/6JGJ-HKQC] (last retrieved Feb. 8, 2023); see also DraftKings Super Bowl Promos, THE

As noted earlier, the *Central Hudson* opinion concluded that false, misleading, and deceptive ads are not subject to the intermediate scrutiny standards of *Central Hudson*.¹⁹⁰ States should, and have, increasingly sanctioned firms engaged in such advertising, but the challenge will be defining what “false, misleading and deceptive” means in the online sports betting context. For example, Ohio, the thirty-second state to legalize sports betting, issued regulations that clarify the use of the terms “free, risk-free or any variant thereof”¹⁹¹ in an advertisement, for example, and explicitly prohibits the use of the phrase “\$100 free bet once you bet \$100” in a promotion.¹⁹² These results show that the \$100 bet is not “free,” but can result in significant losses.¹⁹³

GAME DAY, <https://thegameday.com/news/draftkings-super-bowl-promos/> [<https://perma.cc/T4DS-9AWK?type=image>] (last retrieved Dec. 2, 2023); DRAFTKINGS SPORTSBOOKS, *How Do I Place a ‘No Sweat’ Bet?*, DRAFTKINGS HELP CTR., <https://help.draftkings.com/hc/en-us/articles/18020647261587-How-do-I-place-a-No-Sweat-bet-US-#01H7JQS6SY0PE78474QE3B14N6> [<https://perma.cc/9QQU-MEQX>] (last accessed Jan. 13, 2024); Grace McDermott, *Best Hole-in-One Prop Bets for 2023 Masters Tournament*, DRAFTKINGS NETWORK (Apr. 4, 2023), <https://dknetwork.draftkings.com/2023/4/4/23668717/masters-2023-predictions-picks-hole-in-one-odds-chances-prop-bets-justin-thomas-brooks-koepka> [<https://perma.cc/5AQC-49TL>]; *Refer-a-Friend*, DRAFTKINGS, <https://www.draftkings.com/draftkings-refer-a-friend?wpsrc=Organic%20Search&wpaffn=Google&wpkw=https%3A%2F%2Fwww.draftkings.com%2Fdraftkings-refer-a-friend&wpcn=draftkings-refer-a-friend> [<https://perma.cc/S3LG-LQX4>] (last accessed Jan. 13, 2024).

¹⁹⁰ See *Central Hudson Gas & Elec. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 563–64 (1980).

¹⁹¹ See OHIO ADMIN. CODE § 3775-16-09(C) (“Promotions or bonuses described as free or risk-free must not require the patron to incur any loss or risk their own money to use or withdraw winnings from the free wager.”).

¹⁹² See *Sports Gaming License Overview, Frequency Asked Questions, Advertising, Marketing and User Recruitment*, OHIO CASINO CONTROL COMM’N, <https://casino-control.ohio.gov/licensing-renewal/02-sports-gaming/01-licensing-overview/01-licensing-overview> [<https://perma.cc/T9A6-E8KK>] (last updated July 31, 2023) (“**Q: Can my advertisement or user recruitment campaign include terms such as ‘\$100 free bet once you bet \$100?’** A: No. This is false, misleading, and explicitly against Ohio Adm. Code 3775-16-09(C). The \$100 ‘free’ bet described above would not be free, as it would have cost the patron \$100 to obtain. Proprietors or services providers may offer promotions that require betting activity by a patron, but they may not describe them as free, risk-free or any variant thereof. Instead, any promotion or bonus described as free or risk-free must not require the patron to incur any loss or risk their own money to be used or to withdraw winnings. To be clear, operators can continue to promote using terms like ‘bet \$100, get \$100,’ so long as these are not described as the \$100 ‘get’ being free.”) (emphasis in original).

¹⁹³ See Danny Funt, *Sportsbooks Call Them Risk-Free Bets. Just Don’t Read the Fine Print*, WASH. POST (Dec. 26, 2022), <https://www.washingtonpost.com/>

Ohio's Casino Control Commission has sought fines against BetMGM, Caesars and DraftKings for violating the regulations against "risk-free" bets and not having a message about problem gambling.¹⁹⁴ However, such promotions have been allowed in other states, like Michigan. These are often presented as can't-miss cash giveaways by betting companies to entice new bettors. Some sports books, sensing that state regulators may find this "risk free" bet approach questionable, have altered the language of the promotions. Two firms use the term "no sweat" betting to describe this promotion,¹⁹⁵ but

sports/2022/12/26/risk-free-bets-mgm-draft-kings-fanduel-caesars/ [https://perma.cc/48SR-ARM2] ("BetMGM offers Michigan customers a 'risk-free first bet' of up to \$1,000. Barstool promises Maryland bettors a \$1,000 'bonus' for wagering their first buck. In many states, Caesars offers the most generous-sounding deal: a 'free bet' worth up to \$1,250 if a customer's first bet loses. When legal sports betting launched in Colorado last year, the operator affiliated with Sports Illustrated briefly advertised a \$7,500 'risk-free' first bet."). According to Rutgers University statistics professor Harry Crane it works like this: "Say someone places a \$1,000 'risk-free' first bet at a sportsbook, which requires depositing and wagering \$1,000 in real dollars. If the bet is successful, the winnings are paid out as usual, with no additional bonus. If it loses, the customer is credited with five \$200 'free bets,' which expire after a week. The stake of a free bet isn't paid out with any winnings, meaning a successful \$200 free bet at even odds returns roughly \$190, accounting for the sportsbook's built-in advantage, or vigorish. In other words, a new customer who loses his "risk-free" bet but then manages to win all five free bets at even odds, a 1-in-32 feat, would fail to break even. Lose them all, and that customer comes away down \$1,000. . . . By nobody's definition, that is risk free." *Id.* And by no state's definition, it should be allowed. Crane is Professor of Statistics and Affiliated Faculty in the Graduate Program in Philosophy at Rutgers University. See *Harry Crane*, <http://www.harrycrane.com/> [https://perma.cc/PW3A-L42G] (last retrieved Dec. 26, 2022).

¹⁹⁴ See Katarina Vojvodic, *BetMGM, Caesars and DraftKings Could Face Fines for Ohio Sports Betting Ads*, PLAYUSA (Jan. 6, 2023), <https://www.playusa.com/betmgm-caesars-draftkings-ohio-sports-betting-fines/> [https://perma.cc/FGM4-HUDG]. The Commission noted that this action came after "repeated warnings" and proposed fines of at least \$150,00 against each of the firms for violating the aforementioned regulations. It also proposed sanctions against one firm for sending out ads promoting its app to people under 21 (who are not legally allowed to gamble in that state).

¹⁹⁵ See sources cited *supra* note 189. Specifically, sports betting websites FanDuel and DraftKings have used the term. For example, see *How do I place a 'No-Sweat' Bet (US)*, DRAFTKINGS, <https://help.draftkings.com/hc/en-us/articles/18020647261587-How-do-I-place-a-No-Sweat-bet-US#01H7JQRF3H6VH5GGFN3YTDPRHT> [https://perma.cc/63Z2-2CAW] (last accessed Jan. 13, 2024); see also *FanDuel No Sweat Bet Promo*, THE GAME DAY, <https://thegameday.com/news/fanduel-no-sweat-bet-promo/> [https://perma.cc/3CGR-LJY4] (last accessed Jan. 13, 2024); *Top Michigan Sports Betting Sign-Up Bonuses, Jan. 2024*, PROPS, <https://props.com/7-best-michigan-sportsbook-bonus-offers/> [https://perma.cc/2Q9Y-B6CL] (last visited

query whether this is another way of saying “risk-free” and whether this kind of enticement should be banned as well.

Another type of problematic promotion is the “deposit bonus,” which could suggest that the bet is risk-free. As described in an article in the *Washington Post*, it works like this:

DraftKings advertises a 20 percent deposit bonus for new customers, worth up to \$1,000. On its face, that suggests a \$5,000 deposit will earn a \$1,000 bonus. But the fine print clarifies that after depositing \$5,000, each dollar of bonus money can only be accessed by betting \$25 on odds longer than -300. Factoring in the vigorish, (a surcharge for taking and processing the bet),¹⁹⁶ a bettor who wagers \$25,000 at even odds within the required 90 days would be expected to come away down about \$135, even after claiming the \$1,000 bonus.¹⁹⁷

The above example does not pose significant constitutional issues. The far bigger question occurs if a state or federal government decides to take broader actions to restrict or ban certain types of betting advertisements. Analyzing these attempts is the crux of this article.

In 2023, New Jersey’s attorney general adopted what may become a template for “best practices” standards in betting advertising. They include requiring that New Jersey’s 1-800-GAMBLER hotline be prominently displayed in their ads, prohibiting promises of “guaranteed wins” or “risk-free” bets if the patron will not be fully compensated for the loss of their funds and requiring the use of “responsible gaming” language. Out-of-state ads “targeting New Jersey consumers” must comply with these requirements including banning “unrealistic promotions,” providing opt-outs for customers to stop direct advertising and barring advertisements placements where the primary demographic is underage viewers.¹⁹⁸

Feb. 4, 2024) (Michigan example) (“Many MI sportsbooks offer a bonus type that’s sometimes called a ‘risk-free bet.’ The term ‘losing bet rebate’ is more accurate, however, as you do have to incur some risk to take advantage of the bonus.”).

¹⁹⁶ The concept is also known as “Vig.” or “Juice” and that surcharge is how the sports book makes money. See Cole Rush and Brian Pempus, *What is the Vig in Betting?*, FORBES (Oct. 31, 2023), [https://www.forbes.com/betting/guide/vig/#:~:text=The%20vig%20\(short%20for%20vigorish,how%20a%20sports-book%20makes%20money](https://www.forbes.com/betting/guide/vig/#:~:text=The%20vig%20(short%20for%20vigorish,how%20a%20sports-book%20makes%20money) [https://perma.cc/P4MT-CAET].

¹⁹⁷ See Funt, *supra* note 193.

¹⁹⁸ See *Advertising Standards*, N.J. DIV. OF GAMING ENF’T, <https://www.nj.gov/oag/ge/docs/BestPractices/AdvertisingBestPractices.pdf> [https://perma.cc/VZ2X-K9Z3] (last retrieved June 24, 2023); see also Wayne Parry, *New Jersey Acts to Help Problem Gamblers, Sets Ad Standards*, ASSOCIATED PRESS (Apr. 23, 2023), <https://>

B. Requiring Mandatory Warnings—Make Them More Ubiquitous

Laws mandating or requiring content-based speech are presumed to be unconstitutional in a non-commercial setting, because the right to refrain from “coerced speech” is within the scope of the First Amendment.¹⁹⁹ However, when it comes to commercial speech, the government’s power to mandate speech is broader. In fact, the Supreme Court crafted a relaxed standard of constitutional review for such compelled speech in *Zauderer v. Office of Disciplinary Counsel*.²⁰⁰ Professor Adler described it as a less rigorous test than *Central Hudson*.²⁰¹ And the opinion clearly distinguishes these commercial requirements from the standards in non-commercial cases.²⁰² At first glance, the issue of “compelled” speech—speech that is required in advertisements by law or regulation, such as health warnings for tobacco products and calorie counts for soft drinks—²⁰³ can be a legally straightforward one. Many of the

apnews.com/article/new-jersey-gambling-sports-betting-advertising-5ee7504cd-263c1596a011d53db51dd7f [https://perma.cc/PP8Z-QJJ8].

¹⁹⁹ See *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) (state law requiring public school children to participate in a compulsory flag salute and pledge of allegiance unconstitutional); see also *Wooley v. Maynard*, 430 U.S. 705 (1977) (court struck down N.H. law requiring license plates to have to state motto “Live Free or Die.”)

²⁰⁰ 471 U.S. 626 (1985).

²⁰¹ See Jonathan H. Adler, *Compelled Commercial Speech and the Consumer “Right to Know,”* 58 ARIZ. L. REV. 421, 435–36 (2016), <https://arizonalawreview.org/pdf/58-2/58arizrev421.pdf> [https://perma.cc/ZE4Q-XCGU] (“Some courts and commentators have read *Zauderer* to establish that the compelled disclosure of factual information is subject to a lesser degree of scrutiny than is provided by *Central Hudson*.”).

²⁰² According to the opinion in *Zauderer*: “The interests at stake in this case are not of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*. Ohio has not attempted to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.’ The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available.” 471 U.S. at 651.

²⁰³ See e.g., David Hammond, *Health Warning Messages on Tobacco Products: A Review*, 20 TOBACCO CONTROL 327 (2011) (concluding that “whereas obscure text-only warnings appear to have little impact, prominent health warnings on the face of packages serve as a prominent source of health information for smokers and non-smokers, can increase health knowledge and perceptions of risk and can promote smoking cessation” as cited in Micah Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. U. J. L. & POL’Y 53 (2016)).

present state regulations mandate certain requirements in gambling ads, like phone numbers to call for problem gamblers.²⁰⁴

Most states have enacted such regulations for gambling. Although these requirements are modest at best, and are not as common as found with tobacco products, they do exist. For example, Connecticut's regulations require a message that lists a phone number or website to contact if one is or one knows of another who has a "gambling problem."²⁰⁵ Similar requirements are found in the laws and regulations in Pennsylvania as well as a number of other states.²⁰⁶ As noted earlier, evidence shows that these limited warnings and information are not sufficient to limit the growing issue of problem gambling.²⁰⁷

A simple way to improve the visibility of these warnings would be to enact stiffer requirements for sports betting ads in all types of media. At the very least, states should consider warnings and contact information to take up maybe 25–50 percent of the space of these print and online ads and a certain percentage of the time of a broadcast ad. For example, for a 30-second television spot, 10 seconds should be devoted to the problem gambling warnings and organizations to contact, rather than a quick, end-of-ad announcement that will not attract much attention. The FCC could assert jurisdiction for broadcasts, giving national uniformity to regulations as opposed to a state-by-state approach. Alternatively, industry associations like the AGA could enact voluntary codes that could suffice.

However, the most interesting question is what kinds of restrictions may be enacted under the current interpretation of *Central Hudson* when the advertising is not misleading. Here, we can look to tobacco regulation cases for guidance. Since the mid-1960s, warnings, often graphic, have been

²⁰⁴ See Austin, *supra* note 23; Kevin Simpson, *Colorado's Problem Gamblers Could Find Help on the Way after Decades of Indifference*, COLORADO SUN (May 4, 2022), <https://coloradosun.com/2022/05/04/colorado-gambling-problem-grant-funds/> [https://perma.cc/BGZ8-M89K?type=image].

²⁰⁵ See CONN. AGENCIES REGS. § 12-865-25(e)(1) (2023) ("Marketing and Advertising Standards").

²⁰⁶ See 58 PA. CODE § 1401a.9(e) (2023) ("A sports wagering certificate holder or sports wagering operator shall include signage in the sports wagering area that displays 'If you or someone you know has a gambling problem, call 1-800-GAMBLER,' or comparable language approved by the Board, including in print advertisements or other media advertising the sports wagering operations of the sports wagering certificate holder or sports wagering operator.").

²⁰⁷ See sources accompanying *supra* notes 29–31, 34, 48–49.

required on all cigarette products²⁰⁸ and there have been no judicial challenges to those warnings under the compelled speech doctrine. Yet, there is a question about the scope of *Zauderer*.²⁰⁹ The decision's lenient standard for compelled speech (such as tobacco product warnings) focused on an ambiguous and confusing standard: a government interest in "preventing deception" and that the disclosures be factual and uncontroversial (added later),²¹⁰ which seemed to be outdated given the generally greater level of protection for commercial speech given by the Court in the last two decades. However, this has led courts to debate the applicability of the case to particular types of compelled warnings. In fact, it set up a circuit split on proposals for more explicit warnings made after passage of the Family Smoking Prevention and Tobacco Control Act (the "Act") of 2009, the first comprehensive national legislation regulating tobacco.²¹¹ Challenges were made to the proposals for "graphic warnings" on tobacco.²¹² A divided ruling from the Sixth Circuit concluded that required warnings on tobacco products were "factual" subject

²⁰⁸ See Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89–92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331–40) (mandating warning labels on cigarettes). Subsequent updates to these laws made the warnings more direct. See Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91–222, 84 Stat. 87, 88 (1970), which, in addition to banning television and radio ads of tobacco products, strengthened the standard warning to read: "Warning: The Surgeon General Has Determined That Smoking Is Dangerous to Your Health." In 1984, Congress again modified tobacco warning labels pursuant to the Comprehensive Smoking Education Act, Pub. L. No. 98–474, 98 Stat. 2200 (1984). For a general overview, see generally Nathan Cortez, *Do Graphic Tobacco Warnings Violate the First Amendment?*, 64 HASTINGS L. REV. 1467 (2013).

²⁰⁹ For recent examples of the invocation of *Zauderer* by the Court, see, e.g., *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 48 (2017) ("whether the law can be upheld as a valid disclosure requirement under *Zauderer*"); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249–50 (2010); *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001); *Ibanez v. Fla. Dep't of Bus. & Pro. Regul., Bd. of Acct.*, 512 U.S. 136, 146–47 (1994); *Peel v. Att'y Registration & Disciplinary Comm'n*, 496 U.S. 91, 116–17 (1990) (Marshall, J., concurring in judgment), as cited in Note, *Repackaging Zauderer*, 130 HARV. L. REV. 972, 973 n.10 (2017).

²¹⁰ *Zauderer*, 471 U.S. at 650.

²¹¹ See Pub. L. No. 111–31, 123 Stat. 1776 (2009) (codified at 21 U.S.C. §§ 387–87u (2009)).

²¹² See Cigarette Package and Advertising Warnings, 21 C.F.R. § 1141 (2012). One of those warnings consisted of the statement "Cigarettes are addictive" (showing a man holding a cigarette and exhaling smoke from a tracheostomy hole in his throat).

to the lenient *Zauderer* standard.²¹³ However, a panel of the D.C. Circuit concluded that the rules are unconstitutional and did not apply *Zauderer*. Two years later, however, an en banc panel of that court upheld the government's regulation in a separate case.²¹⁴

This doctrinal inconsistency about what is factual and what is not could temper the broader concern of addressing gambling addiction if it could be conclusively proven that these advertisements exacerbate problem gambling or addiction. Even if so, if the advertisements are “creative” or “imaginative,” they may not render the lenient *Zauderer* standard applicable and be subject to a higher level of scrutiny.

C. *The Broadcast Sphere—A Unique Constitutional Marketplace and the Best Way to Reconcile Constitutional Protection*

While compelled speech issues in commercial settings pose interpretation issues, a saving grace for sports gambling regulation comes from the broadcast sector. Radio and television broadcasters are licensed by the Federal Communications Commission (“FCC”), a federal agency, and as a condition of that license, they are subject to greater content oversight than other media.²¹⁵ As a requirement of receiving a license to broadcast in a specified frequency range, these over-the-air broadcasts must operate “in the public interest, convenience and necessity” under the 1934 Communications Act.²¹⁶

²¹³ *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559, 569 (6th Cir. 2012) (invoking *Zauderer*). The appeals court upheld the bans on event sponsorship, branding non-tobacco merchandise and free sampling; and the requirement that tobacco manufacturers reserve significant packaging space for textual health warnings. However, the panel declared unconstitutional the statute's restrictions on color text. *Id.* at 548.

²¹⁴ *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012). The court noted that the image of a man exhaling smoke through the tracheostomy hole in his throat portrays a “common consequence of smoking,” but it may not symbolize “the addictive nature.” *Id.* at 1216, which was overruled in *Am. Meat Inst. v. USDA*, 760 F.3d 18, 22–23 (D.C. Cir. 2014).

²¹⁵ *See, e.g., Red Lion Broad. v. FCC*, 378 U.S. 391, 400 (1969) (FCC had the right to regulate broadcast content “[i]n view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views.”); *see also* Note, *The Awareness Doctrine*, 135 HARV. L. REV. 1907 (2022).

²¹⁶ *See* 47 U.S.C. § 309(a) (broadcast licensees must operate in the “public interest”).

As part of that mandate, the courts have upheld the FCC's powers to regulate content on the airwaves.²¹⁷

Although changes in technology and market dominance have resulted in more deregulatory policies,²¹⁸ the FCC has retained certain powers involving content and ownership limitations. For example, there are rules involving "Equal Time" requirements for candidates for public office,²¹⁹ the amounts broadcasters can charge for political advertisements,²²⁰ and the numbers of radio stations owned by a single entity in a given market.²²¹ Significantly, the

²¹⁷ See Mark Conrad, *The Demise of the Fairness Doctrine – A Blow for Citizen Access*, 41. FED. COMM. L.J. 61 (1989).

²¹⁸ See Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html> [<https://perma.cc/HGF5-ARMW>]; Robert D. Hershey Jr., *F.C.C. Votes Down Fairness Doctrine In a 4-0 Decision*, N.Y. TIMES (Aug. 5, 1987), <https://www.nytimes.com/1987/08/05/arts/fcc-votes-down-fairness-doctrine-in-a-4-0-decision.html> [<https://perma.cc/9WAX-VV9K>]; *FCC v. Prometheus Radio Project* ("Prometheus IV"), 592 U.S. 414, 427–28 (2021) (justifying FCC's attempts to deregulating certain broadcast ownership rules).

²¹⁹ See 47 U.S.C. § 315; see also *FACT SHEET: FCC Political Programming Rules*, FCC (Aug. 18, 2022), https://www.fcc.gov/sites/default/files/political_programming_fact_sheet.pdf [<https://perma.cc/5UG6-J5R9>] ("FCC rules seek to ensure that no legally qualified candidate for office is unfairly given less access to the airwaves – outside of bona fide news exemptions – than their opponent. Equal opportunities generally means providing comparable time and placement to opposing candidates; it does not require a station to provide opposing candidates with programs identical to the initiating candidate. Equal opportunities and other political-related benefits are available only to individuals who have attained the status of 'legally qualified candidate.' These rules do not apply to cable channels or web-based video or audio such as streamed video content, podcasts, or social media.").

²²⁰ See 47 U.S.C. § 312(a)(7); see also *FACT SHEET*, *supra* note 219 ("Timeframe – During the 45-day period preceding a primary, caucus or runoff election; and the 60-day period preceding a general or special election (commonly referred to as 'lowest unit charge windows'), broadcast stations and other regulates may not charge legally qualified federal, state and local candidates who purchase time for campaign ads more than the lowest unit amount that their best commercial customer has paid for ads that are of the same class, length, and time of day.").

²²¹ See 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Second Report and Order, 31 FCC Rcd. 9864 (2016) ("2016 Order") (retaining the bulk of the media ownership rules and reinstating decision to consider television JSAs "attributable"), *vacated in part*, *Prometheus Radio Project v. F.C.C.*, 939 F.3d 567, 587, 589 (3d Cir. 2019). The caps establish varying limits on the number of co-located radio stations a single entity may own, based on market size. In markets with 45 or more radio stations, a company may own

FCC also has the power to limit broadcasts deemed “indecent” to certain hours of the day.²²²

Traditionally, the courts have upheld the FCC’s power to regulate content, based on a standard of “scarcity” and, in the case of broadcast indecency, “pervasiveness” of the medium, making it difficult for parents to limit exposure to youngsters.²²³ The scarcity basis for restricting broadcasting has been criticized²²⁴ and at least one member of the Supreme Court has called for a

eight stations, only five of which may be in one class—AM or FM; in markets with 30–44 radio stations, a company may own seven stations, only four of which may be in one class—AM or FM; in markets with 15–29 radio stations, a company may own six stations, only four of which may be in one class—AM or FM; and in markets with 14 or fewer radio stations, a company may own five stations, only three of which may be in one class—AM or FM.

²²² 18 U.S.C. § 1464 (1948) provides that “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . or imprisoned not more than two years, or both.” The F.C.C. has been instructed by Congress to enforce § 1464 between the hours of 6 a.m. and 10 p.m.” Although the Commission has had the authority to regulate indecent broadcasts under §1464 since 1948 . . . it did not begin to enforce § 1464 until the 1970’s. See Angel J. Campbell, *Pacifica Reconsidered: Implications for the Current Controversy over Broadcast Indecency*, 63 FED. COM. L.J. 195, 198 (2010), cited in *FCC v. Fox Television Stations*, 567 U.S. 239, 243 (2012). Presently, FCC regulations prohibits indecent broadcasts, defined as one that includes language or “material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.” Deciding whether material is “patently offensive” requires a further three-pronged inquiry. To make this determination, the Commission weighs: (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander, is used to titillate, or seems to have been presented for its shock value. Violators can be fined up to \$325,000 per infraction. See *In re Industry Guidance on Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999 (2001), cited in *Fox*, 567 U.S. at 246.

²²³ See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”).

²²⁴ See e.g., Thomas W. Hazlet, Sarah Oh, & Drew Clark, *The Overly Active Corpse of Red Lion*, 9 NW. J. TECH. & INTEL. PROP. 50, 94 (2010) (“The logic . . . was never valid and was merely a thinly veiled political excuse to regulate communications while skirting the First Amendment. There is no basis for distinguishing media content by the roads it travels. Today that exercise has become a fool’s errand.”).

reexamination of this approach.²²⁵ The *Red Lion* ruling—a case involving a right of reply by a person attacked in a broadcast—affirmed the principle that broadcasting is inherently scarce due to limited wavelength and is therefore subject to more content regulation than print media.²²⁶ It remains good law, despite the major technological changes in the broadcast media since the ruling. The same applies to the restrictions on certain programming to protect children. This could be an important basis in legally justifying the proposals that follow.

D. Banning or Severing Restricting Sports Betting Advertising on Broadcast Media—Far More Difficult, but is it Possible?

1. The Case for a Total Ban on Sports Betting Advertising on Radio and Television, the Tobacco Ad Ban as a Precedent

In early 2023, a bill introduced by Representative Paul Tonko (NY–20) would ban all electronic advertising of sportsbooks “on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.”²²⁷ It would, in effect, replicate the half-century ban on tobacco advertising in the broadcast media.²²⁸

The greater constitutional protection of sin product advertising, based on the Court’s rulings in *44 Liquormart*, *Greater New Orleans Broadcasting*, and *Lorillard* will undoubtedly make the constitutional prospects of a total ban

²²⁵ See *Fox*, 567 U.S. at 259 (Ginsburg, J., concurring) (“In my view, the Court’s decision in *FCC v. Pacifica Foundation* . . . was wrong when it issued. Time, technological advances, and the Commission’s untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration”); cf. *FCC v. Fox Television Stations*, 556 U.S. 502, 532–35 (2009) (Thomas, J., concurring).

²²⁶ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400–01 (1969) (“[I]n view of the scarcity of broadcast frequencies, the Government’s role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.”).

²²⁷ See *Betting on Our Future Act*, H.R. 967, 118th Cong. (2023).

²²⁸ The representative who sponsored this bill argued that a similar ban on tobacco advertising, enacted over half a century ago, would be a precedent for a similar ban on sports gambling. See Press Release, *Tonko Introduces Legislation to Ban Predatory Sports Betting Advertising* (Feb. 9, 2023), <https://tonko.house.gov/news/document-single.aspx?DocumentID=3800> [<https://perma.cc/5M9H-CNPQ>].

difficult to say the least under the current constitutional regime.²²⁹ Assuming that such a law could be justified under the “substantial governmental interest” requirement of *Central Hudson* (a standard I believe could be done with relative ease) and could be determined to “directly advance” that interest (which, though more difficult, I think would pass muster as well), it would be the last prong (the regulation being “not more restrictive than necessary”) that would be exceedingly difficult to uphold based on the rationale of *44 Liquormart*. First, there would have to be more a conclusive causal connection between the rise of problem gambling and the exposure to advertisements. While the studies note the rise of problem betting since the legalization of sports betting, a direct connection would have to be shown to convince a court. That may well be possible. However, the potential overbreadth of a total ban and the precedent of *44 Liquormart* eschews total bans of legal products. Representative Tonko’s bill fails to take these issues into account.

It is true that a ban on the advertising of tobacco products on broadcast radio and television has existed since 1971.²³⁰ However, the rationale for doing so would not pass muster today due to the constitutionalization and expansion of the commercial speech right since that time.

The background of how the ban came into effect is peculiar. In 1967, the FCC, in an aggressive application of the Fairness Doctrine (a rule that required opposing viewpoints to be aired on issues of public importance) mandated that a broadcast station carrying cigarette commercials had to provide “a significant amount of time for the other viewpoint” (meaning anti-smoking educational ads).²³¹ Could the FCC enact such a requirement today regarding betting advertisements? It certainly would raise interesting legal questions of access and First Amendment rights. Two issues would be in play: the first is the constitutionality of the counter-speech requirement at a time when the FCC’s rationale for broadcast regulation has come under more

²²⁹ The Court’s plurality opinion in *44 Liquormart*, in particular, sounded a note of caution: “special care” should attend the review of such blanket bans, and it pointedly remarked that “in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity.” *44 Liquormart v. Rhode Island*, 517 U.S. 484, 507 (1996) (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 565–66 (1980)).

²³⁰ See Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331–1338 (1969).

²³¹ See *In re Complaint Directed to Station WCBS-TV, New York, N.Y., Concerning Fairness Doctrine*, 8 F.C.C.2d 381, 381–82 (1967) (interpreting the Fairness Doctrine to apply to cigarette advertising).

criticism,²³² and the second is whether such a requirement would pass muster under *Central Hudson*.²³³

Ironically, in response to the FCC's counter-ad requirement, the tobacco industry stopped opposing a bill in Congress to ban all cigarette ads on radio and television, reasoning that it would free up money for advertising in other media and would eliminate or at least reduce the anti-smoking public service advertisements.²³⁴ That withdrawal of opposition, along with the stronger support of public health advocates, helped persuade Congress to pass the broadcast ban and President Richard Nixon to sign the bill.²³⁵

While the tobacco industry supported the ban, broadcasters did not. The ban was challenged by a broadcast group on constitutional grounds. However, the Court upheld a lower court's judgment on the ban,²³⁶ which noted that there were no First Amendment rights at issue, but rather the loss of an ability to collect revenue.²³⁷ This ruling is inconsistent with the Court's current approach to commercial speech, because it was handed down four years before commercial speech was constitutionalized.²³⁸ Using what was in effect a rationality standard, the majority upheld the ban due to the ease in which the broadcast media can reach a large audience, including young people.²³⁹ Courts upheld the law, noting that "[t]he unique characteristics of

²³² See notes 217–218. In its 1987 report, the FCC concluded that the Fairness Doctrine violated the First Amendment, effectively rejecting a right of reply requirement. See *In re Complaint of Syracuse Peace Council*, 2 FCC Rcd. 5043 (1987).

²³³ See *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 643–44, 652–53 (1985) (failure to disclose mandatory information on attorney advertisement could render it false, hence subject to the mere rationality test as it failed the first part of the *Central Hudson* standard).

²³⁴ See Andrew Glass, *Congress Bans Cigarette Ads on the Air, April 1, 1970*, POLITICO (April 1, 2009), <https://www.politico.com/story/2009/04/congress-bans-cigarette-ads-on-the-air-april-1-1970-020715> [<https://perma.cc/A6ES-T5PU>].

²³⁵ *Id.*

²³⁶ See *Capitol Broad. Co. v. Mitchell*, 333 F. Supp. 582, 585–86 (D.D.C. 1971), *aff'd sub nom* *Cap. Broad Co. v. Kleindienst*, 405 U.S. 1000 (1972), and *aff'd sub nom* *Nat'l Ass'n of Broads. V. Kleindienst*, 405 U.S. 1000 (1972).

²³⁷ *Id.* at 584 (“Even assuming that loss of revenue from cigarette advertisements affects petitioners with sufficient First Amendment interest, petitioners, themselves, have lost no right to speak; they have only lost an ability to collect revenue from others for broadcasting their commercial messages.”).

²³⁸ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (constitutionalized commercial speech by concluding that a state ban on listing prices for prescriptions drugs violated the First Amendment).

²³⁹ See n. 236.

electronic communication make it especially subject to regulation in the public interest” (emphasis added).²⁴⁰

While issuing a total ban may not be a viable solution, however, there are other ways that advertising restrictions would pass constitutional muster under broadcast law’s content standards, such as limiting the time of the advertisements to reflect the make-up of the audience.

2. A Better Bet: Restricting Ads to ‘Safe Harbor’ Periods Where Few Underage Viewers are Watching or Hearing such Content

Many states have enacted restrictions on gambling ads aimed at minors. An example of such restrictions is found in Massachusetts’ Gaming Commission regulations, which limit ads aimed at those under twenty-one, prohibit the use of images and endorsements or language appealing primarily to those under that age, and limit ads in various media outlets where 25 percent of the audience is “reasonably expected” to be under twenty-one. The regulations also bar ads in primary and secondary schools and on college radio and television broadcasts aimed at a college audience.²⁴¹

²⁴⁰ See *Mitchell*, 333 F. Supp. at 584.

²⁴¹ See *Sports Wagering Advertising*, 205 MASS. REG. § 256.05, <https://massgaming.com/wp-content/uploads/205-CMR-256-3.27.23-clean-copy.pdf> [<https://perma.cc/RHE6-V3DL>] (retrieved June 14, 2023). The complete regulation is as follows:

- (1) Advertising, marketing, branding, and other promotional materials published, aired, displayed, disseminated, or distributed by or on behalf of any Sports Wagering Operator shall state that patrons must be twenty-one years of age or older to participate.
- (2) No Sports Wagering Operator shall allow, conduct, or participate in any advertising, marketing, or branding for Sports Wagering that is aimed at individuals under twenty-one years of age.
- (3) No advertising, marketing, branding, and other promotional materials published, aired, displayed, disseminated, or distributed by or on behalf of any Sports Wagering Operator for Sports Wagering shall contain images, symbols, celebrity or entertainer endorsements or language designed to appeal primarily to individuals younger than twenty-one years of age.
- (4) No advertising, marketing, branding, and other promotional materials published, aired, displayed, disseminated, or distributed by or on behalf of any Sports Wagering Operator for Sports Wagering shall be published, aired, displayed, disseminated, or distributed:
 - (a) in media outlets, including social media, video and television platforms, where 25 percent of the audience is reasonably expected to be under twenty-one years of age, unless adequate controls are in place to prevent the display,

In New York, the state's gambling commission approved similar rules which would bar sports betting marketing to underage individuals and prevent ads from being shown "where there is a reasonably foreseeable percentage of the composition of the audience that is persons under the minimum wagering age."²⁴² Of course, an operator might not specifically gear an advertisement toward children, but it could still be seen by a significant number of minors. The New York regulations attempt to address this problem by stating that an ad cannot be shown in outlets "where there is a reasonably foreseeable

dissemination or distribution of such advertising, marketing, branding or other promotional materials to individuals under twenty-one years of age including by use of age category exclusions and similar mechanisms;

- (b) in other media outlets, including social media, video and television platforms, unless the Operator utilizes all available targeted controls to exclude all individuals under twenty-one years of age from viewing such advertising, marketing, branding, and other promotional materials
 - (c) at events aimed at minors or where 25 percent or more of the audience is reasonably expected to be under twenty-one years of age;
 - (d) at any elementary, middle, and high school, or at any sports venue exclusively used for such schools;
 - (e) on any college or university campus, or in college or university news outlets such as school newspapers and college or university radio or television broadcasts, except for advertising, including television, radio, and digital advertising that is generally available, and primarily directed at an audience, outside of college and university campuses as well; or
 - (f) to any other audience where 25 percent or more of the audience is presumed to be under twenty-one years of age.
- (5) No Sports Wagering advertisements, including logos, trademarks, or brands, shall be used, or licensed for use, on products, clothing, toys, games, or game equipment designed or intended for persons under twenty-one years of age.
 - (6) No advertising, marketing, branding, and other promotional materials published, aired, displayed, disseminated, or distributed by or on behalf of any Sports Wagering Operator for Sports Wagering shall depict an individual who is, or appears to be, under twenty-one years of age, except live footage or images of professional athletes during sporting events on which sports wagering is permitted. Any individual under the age of twenty-one may not be depicted in any way that may be construed as the underage individual participating in or endorsing sports gaming.
 - (7) No advertising, marketing, branding, and other promotional materials published, aired, displayed, disseminated, or distributed by or on behalf of any Sports Wagering Operator for Sports Wagering shall depict students, schools or colleges, or school or college settings.

²⁴² See Dan Katz, *New York Regulator Approves Rules Restricting Sports Betting Advertising*, POKER NEWS DAILY (Feb. 28, 2023), <https://www.pokernewsdaily.com/new-york-regulator-approves-rules-restricting-sports-betting-advertising-38022/> [<https://perma.cc/LG6M-BVCK>].

percentage of the composition of the audience that is persons under the minimum wagering age.”²⁴³

Maine went one step further by adopting legislation that restricts operators from using celebrities and entertainers to appeal to those under twenty-one years of age in their television advertising. Restricting celebrities from endorsing sports betting advertising, it is argued, would prevent influencing the younger generation when they become of age. The rules also require sports wagering operators to keep records of their advertising and marketing materials for a five-year period.²⁴⁴

As of the writing of this article, there have not been any constitutional challenges to these or other regulations addressing restrictions to minors. Given that sports betting remains illegal for minors, it is unlikely that there would be any constitutional infirmities. But this basis can and should be expanded to restrictions in the broadcast media that include: channeling advertising to certain times of the day or night to limit viewership by minors (as presently used to regulate broadcast indecency), limiting gambling promotions to the same times for the same reasons, and utilizing a gradual series of limitations of advertising—a more imaginative but less constitutionally secure idea. Of the three, the first two should pass constitutional muster under broadcast content standards and possibly under *Central Hudson*.

²⁴³ *Id.*

²⁴⁴ See Maine Department of Public Safety Gambling Control Unit, Rules for Advertising and Promotion, 16-634-64 ME. CODE R. § 3(D) (2024), <https://www.maine.gov/dps/sites/maine.gov.dps/files/inline-files/Chapter%2064%20Advertising.pdf> [<https://perma.cc/V72R-BDKJ>] (“All advertising and promotions by a sports wagering operators shall comply with the following standards: . . . D. The use of . . . , celebrities, entertainers . . . designed to appeal specifically to those under 21 years old is prohibited”). The Maine regulations also feature several record-keeping and disclosure requirements surrounding advertising:

Each Sports Wagering Operator shall retain a copy of all advertising, marketing, branding and other promotional materials promoting or intended to promote any Sports Wagering, including a log of when, how, and with whom, those materials have been published, aired, displayed, or disseminated, for five (5) years. Each Sports Wagering Operator shall provide a complete copy of any sports wagering advertising or marketing materials to the Director, or their designee, upon request. Sports Wagering Operators shall disclose to the Director all social media platforms on which they advertise, or market sports wagering and will provide clear identification of every account the Operator, or someone on the Operator’s behalf, uses to advertise or market sports wagering on each social media platform. For all directed or targeted advertising and marketing, a Sports Wagering Operator shall maintain records sufficient to describe all targeting parameters used.

Id. § 1.

i. Limiting Gambling Advertising to Certain Times of the Day or Night on Broadcast or Cable Television Using the Indecency Standards as a Guide

To protect younger viewers, the FCC restricts “indecent” broadcast content to late-night hours.²⁴⁵ Similar restrictions could ban ads during the times when children are likely to view programs in relatively large numbers, such as between 6:00 A.M. and 10:00 P.M. A ban on gambling ads during those hours would be within the FCC’s established powers, and the courts have upheld the indecency ban due to the enhanced regulation of broadcasting and the fact that broadcasting is uniquely accessible to children in the audience.²⁴⁶ While the FCC’s powers are distinctive due to the unique nature of broadcasting, I would also argue that time restrictions on gambling ads would also satisfy the *Central Hudson* test given the strong governmental interest in avoiding those under legal age to bet. This “channeling” would directly advance the government’s interest to avoid youngsters from being enticed to bet, and it is not more restrictive than necessary to accomplish that goal.

As noted earlier, there has been criticism of the “scarcity” rationale as a basis to regulate broadcast content more than in other media.²⁴⁷ So, a court may eschew the *Red Lion* and *Pacifica* approaches and prefer to utilize a *Central Hudson* analysis. Hence, it may be possible to argue that a time limitation would pass the *Central Hudson* test if it takes place in the daytime and early evening hours. If the restrictions limited ads from, say, 6:00 A.M. to 10:00 P.M., based on the broadcast indecency law or *Central Hudson*, they could pass constitutional muster, but for differing reasons.

Such a restriction would be met with considerable resistance from industry groups because it would mean that there would be no advertising during most NFL games (played on Sunday afternoons) and other sports, such as baseball, which often has day games. However, such a restriction may pass constitutional muster based on the Supreme Court’s 1978 ruling

²⁴⁵ See 18 U.S.C. § 1464 (unlawful to utter “any obscene, indecent, or profane language by means of radio communication”); Enforcement of 18 U.S.C. § 1464 (restrictions on the transmission of obscene and indecent material), 47 C.F.R. 73.3999(b) (1995); see also Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 10 F.C.C. Rcd. 10558 (1995).

²⁴⁶ See *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 749 (1978); see also *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 258–59 (2012) (Court declined to reconsider *Pacifica*).

²⁴⁷ See, e.g., *Hazlet, Oh, & Clark*, *supra* note 224.

in *F.C.C. v. Pacifica Foundation*, which upheld indecency restrictions during the daytime hours on radio and television due to their “pervasive presence.”²⁴⁸

However, *Red Lion’s* “scarcity” rationale, which serves as the basis for radio and television licensing and content regulation, does not extend to cable television, which (as a medium) lacks the “scarcity” of radio and television technology. Nor does the *Red Lion* rationale apply to the Internet, because the Supreme Court has ruled that the online universe is entitled to the same high level of First Amendment protection as the print media.²⁴⁹ However, cable television is subject to some forms of content regulation. For example, cable programmers have been subject to state and FCC regulations that required the airing of certain public interest programming²⁵⁰ and also required over-the-air channels to be aired under what was known as “must-carry” rules.²⁵¹ But a content-based advertising restriction on cable programming would not have the same kind of judicial deference, so a more straightforward *Central Hudson* analysis would likely be employed. Consequently, such an approach would require, in effect, an intermediate-plus scrutiny standard that requires the regulation to not be broader than necessary.

ii. *Limiting Betting Promotions and Listing of Betting Odds during Certain Times of the Day or Night on Broadcast or Cable Television*

Sponsorship agreements between betting companies and sports leagues have become ubiquitous. All the major sports leagues in the United States now have partnerships with multiple sportsbooks and technology companies,²⁵² and these leagues, coupled with other sports organizations, allow for sports

²⁴⁸ See *Pacifica Found.*, 438 U.S. at 748–50.

²⁴⁹ See *Reno v. A.C.L.U.*, 521 U.S. 844, 885 (1997) (concluding that Internet speech was distinguishable from broadcast speech).

²⁵⁰ See Cable Communications Policy Act of 1984, 47 U.S.C. § 531(b) (“A franchising authority . . . may require as part of a cable operator’s proposal for a franchise renewal . . . that channel capacity be designated for public, educational, or governmental use.”) (emphasis added).

²⁵¹ See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172–73 (1968); see also 47 U.S.C. § 534; *Cable Carriage of Broadcast Stations*, FED. COMM’NS COMM’N, <https://www.fcc.gov/media/cable-carriage-broadcast-stations> [https://perma.cc/D93J-723C].

²⁵² See Kyle Hightower, *As NFL Cracks Down on Players Gambling, What Events are Pro Athletes Allowed to Bet On?*, ASSOCIATED PRESS (June 29, 2023), <https://apnews.com/article/nfl-gambling-suspensions-nba-mlb-nhl-a46958a64d87086a0c37118bd457f72f> [https://perma.cc/6A8E-K5FW].

betting advertisements during their broadcasts.²⁵³ In addition, they often show betting odds during the actual broadcasts. Besides communicating betting information from analysts, ESPN and ABC list money line, over/under, prop bets, and live lines on the “score bug” on the bottom of the television screen throughout the sporting event.²⁵⁴ Fox Sports also includes betting lines, although they are typically shown during lead-ins and outros after teams score.²⁵⁵ In addition, networks have partnered with betting companies to supply information during the course of a game in an attempt to “retain and engage their audience.”²⁵⁶

²⁵³ See Doug Greenberg, *NFL, NBA Among Pro Leagues Uniting to Limit Betting Ads*, FRONT OFF. SPORTS (Apr. 19, 2023), <https://frontofficesports.com/nfl-nba-pro-leagues-uniting-limit-sports-betting-ads-coalition/> [https://perma.cc/UE3G-J9M4] (NASCAR, WNBA, MLS, and the PGA Tour allow for sports betting advertisements).

²⁵⁴ See Chris Bumbaca, *XFL Broadcasts will Include Betting Lines, With Announcers Allowed to Discuss Gambling*, USA TODAY (Feb. 6, 2020), <https://www.usatoday.com/story/sports/xfl/2020/02/06/xfl-odds-espn-fox-show-betting-lines-gambling-broadcast/4676998002/> [https://perma.cc/X8AE-JCRR]. See also Andrew Cohen, *DraftKings Partners With NHL and Turner Sports for Betting Integrations Across TNT, Bleacher Report*, SPORTS BUS. J. (Oct. 13, 2021), <https://www.sportsbusinessjournal.com/Daily/Issues/2021/10/13/Technology/draftkings-partners-with-nhl-and-turner-sports-for-betting-integrations-across-tnt-bleacher-report.aspx> [https://perma.cc/N4W3-CAM9] (last accessed Jan. 15, 2024); *NBA Game Betting Broadcasts to Debut on ESPN+, ESPN2*, SPORTS BUS. J. (Apr. 3, 2021), <https://www.sportsbusinessjournal.com/Daily/Issues/2021/04/13/Technology/nba-game-betting-broadcasts-to-debut-on-espn-espn2.aspx> [https://perma.cc/24QW-CWGH].

²⁵⁵ *Id.*

²⁵⁶ For example, until recently, ESPN had partnered with Caesars Sports and Sportradar to format tickers and graphics that promote betting information. ESPN also has dedicated certain shows to speaking about sports betting predictions and takes, such as *Get Up* and *First Take*, which also feature tickers and graphics throughout their broadcasts. *Daily Wager* is an ESPN show specifically targeted towards sports gambling, giving insights into each game and the analysts’ predictions. ESPN has publicly said they believe sports gambling information allows them to retain and engage their audience, and this betting spans even to college sports and league drafts. NBC has a partnership with PointsBet, which produces streaming content that spans from cable coverage to NBC apps. Fox Sports bought a 4.9 percent stake in Stars Group for \$236 million to create their own gambling platform called Fox Bet. Additionally, like the cable networks above, they promote gambling lines before and during games through tickers and graphics to engage their fan base. More recently, ESPN announced it will partner with Penn National to rebrand its *Barstool Sportsbook* as *ESPN Bet*, which will launch in the 16 states where Penn is licensed later in 2023. See Eben Novy-Williams & Jacob Feldman, *ESPN to Launch Branded Sports Book as Penn Unloads Barstool*, SPORTICO (Aug. 8, 2023), <https://www.sportico.com>.

To avoid exposure to younger viewers, these activities should either be banned outright or limited to sports events taking place after certain times of the evening. A complete ban would be difficult to justify under *Central Hudson* and may be beyond the scope of the FCC's power. However, limiting the time of such activities to later night hours would be justified for the same reasons as other time-based restrictions.

There is precedent for restricting sponsorships of a legal product, even in the non-broadcast media. The Family Smoking Prevention and Tobacco Control Act in 2009 ("Tobacco Act of 2009"), expands the ability of both the state and federal government to regulate tobacco product advertisements in non-broadcast media.²⁵⁷ It places restrictions on marketing tobacco products to children and gives the FDA authority to take further action in the future to protect public health. For example, the FDA can limit vending machine sales, ban tobacco-brand sponsorships of sports and entertainment events or other social or cultural events, and ban free giveaways of sample cigarettes and brand-name non-tobacco promotional items.²⁵⁸

The statute was challenged on constitutional grounds, and both the federal trial and appeals court upheld most of the provisions of the statute, which included the graphic warning requirement and the limitation on promotions.²⁵⁹ This outcome gives proposed limitations of sports betting sponsorships a strong chance of passing constitutional muster. The appeals court applied commercial speech standards and found that most of the statute passed muster under the *Central Hudson* standard. The reasoning and justifications for the tobacco restrictions on sponsorships and samples bode well for substantial regulation of advertising for sports betting.

With these tobacco statutes and cases in mind, a number of restrictions on sports betting advertising and promotions can be enacted, either on the federal or state level. A total ban on tobacco brand sponsorship of tobacco products in sports and entertainment found in the Family Smoking

com/business/sports-betting/2023/espn-sportsbook-espn-bet-penn-1234733621/[https://perma.cc/M4K5-VNK6].

²⁵⁷ Pub. L. No. 111-31, 123 Stat. 1776 (codified, in relevant part, at 15 U.S.C.A. §§ 1333-34 and 21 U.S.C.A. § 301 et seq. (2010)).

²⁵⁸ See *Family Smoking Prevention and Tobacco Control Act – An Overview*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/tobacco-products/rules-regulations-and-guidance/family-smoking-prevention-and-tobacco-control-act-overview> [https://perma.cc/J5SC-GUWC] (last retrieved December 6, 2022).

²⁵⁹ See *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

Prevention and Tobacco Control Act²⁶⁰ would be difficult to sustain under the final “more extensive than necessary” requirement of the *Central Hudson* test. However, restrictions on broadcasting the promotions during sporting events, especially during the daytime hours, based on broadcast indecency standards would not only be a reasonable step in limiting exposure to the betting companies, but also restrictions on posting odds could be effective in preventing more enticement for problem gamblers. The use of the broadcast indecency rules could serve as a guide.

As noted earlier, the bill introduced in Congress in 2023 that would essentially ban betting advertising on the airways is constitutionally deficient because it takes a policy enacted before the advent of commercial speech rights and transports it to a world of strong, if not increasing, commercial speech protection under the First Amendment. Anti-gambling advocates would have to settle with a more incremental approach, but one that could work.

iii. A Slow-Go Approach: Australia’s Proposed “Phased Ban” on Legalized Online Betting—Could It Work in the United States?

A novel and intriguing idea to regulate sports betting advertisements in the broadcast media comes from a recent proposal mentioned in a report from the Australian Parliament’s report noted in Section II(E).²⁶¹ The adaptation of a phased plan leading to a comprehensive or near comprehensive ban on broadcast advertising can be viable in the United States.

The Australian report proposes a four-step sequence leading to a “comprehensive ban” on all forms of broadcast and online advertising for online gambling over a three-year period.²⁶² The first phase would bar advertisements in news and current affairs broadcasts and in commercial radio between 8:30–9:00 A.M. and 3:30–4:00 P.M.²⁶³ In the beginning of 2025, phase two would give “major sports and broadcasters appropriate time to begin making alternative sponsorship deals and find replacements for the revenue they

²⁶⁰ See Israel T. Agaku, Satomi Odani, Stephanie Sturgis, Charles Harless, & Rebecca Glover-Kudon, *Tobacco Advertising and Promotional Expenditures in Sports and Sporting Events – United States, 1992-2013*, 65 MORBIDITY & MORTALITY WEEKLY REP. 821 (Aug. 19, 2016); see also Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111–31, § 102(a)(2) (codified, in relevant part, at 21 U.S.C. § 387a–1).

²⁶¹ See AUSTRALIA HOUSE REPORT, *supra* note 85.

²⁶² *Id.* § 5.140.

²⁶³ *Id.* § 5.141 (noting that these times “have the highest risk of harm and influence on children and should be banned immediately”).

receive from gambling advertising.”²⁶⁴ In addition, online gambling advertising would be banned an hour before to an hour after the broadcast of a live sports event. In-stadium gambling advertising and logos on player uniforms would be prohibited.²⁶⁵

The third phase takes place by the end of 2025, and at that point, on-line gambling advertising would be banned on broadcasts between the hours of 6:00 A.M. and 10:00 P.M.²⁶⁶ Finally, in phase four, all online gambling advertising should cease by the end of 2026.²⁶⁷ The restrictions for such advertising on social media and online platforms would mirror the approach for broadcasters.²⁶⁸

Instead of the broadcast ban proposed in Congress,²⁶⁹ which is of dubious constitutionality, the first three phases of this approach could reflect the more nuanced “safe harbor” restrictions found in the broadcast indecency rules, but with a twist. Each phase may be dependent on whether there are reports of increased numbers of problem gambling or gambling addiction. In many ways, this phased approach serves as a useful social experiment. It uses a gradually tightened series of regulations to achieve results, but can be stopped if either the regulations adopted do not work well or work too well. For example, a database of calls and treatment of problem gamblers could be created where all queries and enrollees in treatment programs would be tracked. If, after the first phase, calls and treatments decrease, the legislation could give the FCC the option to table subsequent regulations. The FCC could launch an administrative rulemaking outlining its specific standards.

²⁶⁴ *Id.* § 5.142.

²⁶⁵ *Id.*

²⁶⁶ *Id.* § 5.143

²⁶⁷ *Id.* § 5.144

²⁶⁸ *See id.* § 5.148 (outlining the four phases, with the following requirements:

- Phase One: prohibition of all online gambling inducements and inducement advertising, and all advertising of online gambling on social media and online platforms. Removal of the exemption for advertising online gambling during news and current affairs broadcasts. Prohibition of advertising online gambling on commercial radio between 8.30-9.00am and 3.30-4.00pm (school drop off and pick up).
- Phase Two: prohibition of all online gambling advertising and commentary on odds, during and an hour either side of a sports broadcast. Prohibition on all in-stadia advertising, including logos on players’ uniforms.
- Phase Three: prohibition of all broadcast online gambling advertising between the hours of 6.00am and 10.00pm.
- Phase Four: by the end of year three, prohibition on all online gambling advertising and sponsorship.)

²⁶⁹ Betting on Our Future Act, *supra* note 227, and accompanying text.

With the exception of the final phase, such a policy could be constitutionally palatable under both *Central Hudson* and the FCC broadcast powers. The incremental approach may ensure a degree of fairness to the industry and to broadcasters that have already signed sponsorship agreements, providing them with time to modify or discharge said agreements due to operation of law.

VIII. CONCLUSION

Legalized sports betting is a fact of life in many U.S. states. It has spawned a dynamic industry which has appealed to various stakeholders—leagues, teams, fans, betting companies, broadcasters, and, not insignificantly, state governments. Sports leagues and teams—which traditionally objected to legalized betting—now reap millions in sponsorship agreements.²⁷⁰ States receive up to hundreds of millions of dollars annually in tax revenues.²⁷¹ Billions of dollars are wagered by bettors,²⁷² and billions are spent on advertising.

Reports of problem betting and gambling addiction are increasing. While states have issued some regulations curbing “false and deceptive” sports betting advertising, little has been done to halt “truthful” advertisements. While excessive betting warnings, hotlines, and websites to help problem gamblers are found, these requirements are too curt, too scattershot, and too diffused to prevent increases in problem gambling.

While an outright advertising ban is of dubious constitutionality, curtailment of advertising and promotions on the broadcast media may be a more

²⁷⁰ See generally *US Sportsbook and Casino Team Sponsorship Tracker*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sports-betting-deals/> (last visited Aug. 7, 2023); see also *NFL Sports Betting Revenue Skyrocketed 40 percent In 2022*, CISION (Feb. 7, 2023, 10:00 AM), <https://www.prnewswire.com/news-releases/nfl-sports-betting-revenue-skyrocketed-40-in-2022-301739994.html> [<https://perma.cc/C5PZ-PSXX>]. Sponsorship revenue totaled \$2.05 billion across the 32 NFL teams in the 2022-2023 season—a new league record, and a 14 percent increase year-over-year. When combined with the league as a whole, total sponsorship revenue was \$2.7 billion. See Jabari Young, *Tech, Gambling and Alcohol Helped the NFL Earn Almost \$2 Billion in Sponsorships This Season*, CNBC (Jan. 26, 2022, 5:00 AM), <https://www.cnn.com/2022/01/26/tech-gambling-alcohol-helped-nfl-earn-almost-2-billion-in-sponsorships.html> [<https://perma.cc/JW2C-WY8J>].

²⁷¹ See Eric Ramsey, *U.S. Sports Betting Revenue & Handle*, LEGAL SPORTS REP. (Aug. 2, 2023), <https://www.legalsportsreport.com/sports-betting/revenue/> [<https://perma.cc/Z8E7-8ZST>].

²⁷² *Id.*

effective way to control problem gambling and gambling addiction. Because the United States, unlike other countries, has an increasingly robust First Amendment protection for commercial speech, outright bans will likely be unconstitutional. However, due to the unique constitutional position found in broadcast law, approaches—such as channeling ads to the nighttime hours and limiting sponsorship notices and betting lines to hours where children are not in the audience—will make these marketing methods less ubiquitous (even for adults with gambling issues) given the times of most sports events. These restrictions make legal and public health sense and are coherent with restrictions found in many other countries. They should also be implemented in the United States.