SUPREME COURT OF THE UNITED STATES

No. 92–486

UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS *v.* EDGE BROADCASTING COMPANY, T/A POWER 94

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 25, 1993]

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

Three months ago this Court reaffirmed that the proponents of a restriction on commercial speech bear the burden of demonstrating a "reasonable fit" between the legislature's goals and the means chosen to effectuate those goals. See *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. ___ (1993 (slip op., at 6). While the "`fit'" between means and ends need not be perfect, an infringement on constitutionally protected speech must be "`in proportion to the interest served.'" *Id.*, at 6, n. 12 (quoting *Board of Trustees of State Univ. of New York* v. *Fox*, 492 U. S. 469, 480 (1989)). In my opinion, the Federal Government's selective ban on lottery advertising unquestionably flunks that test; for the means chosen by the Government, a ban on speech imposed for the purpose of manipulating public behavior, is in no way proportionate to the Federal Government's asserted interest in protecting the antilottery policies of nonlottery States. Accordingly, I respectfully dissent.

As the Court acknowledges, the United States does not assert a general interest in restricting state-run lotteries. Indeed, it could not, as it has affirmatively removed restrictions on use of the airwaves and mails for the promotion of such lotteries. See *ante*, at 2–3. Rather, the federal interest in this case is entirely derivative. By tying the right to broadcast advertising regarding a state-run lottery to whether

the State in which the broadcaster is located itself sponsors a lottery, Congress sought to support nonlottery States in their efforts to "discourag[e] public participation in lotteries." *Ante*, at 3, 14.[1]

[1]At one point in its opinion, the Court identifies the relevant federal interest as "supporting North Carolina's laws making lotteries illegal." *Ante*, at 10. Of course, North Carolina law does not, nor, presumably, could not, bar its citizens from traveling across the state line and participating in the Virginia lottery. North Carolina law does not make the Virginia lottery illegal. I take the Court to mean that North Carolina's decision not to institute a state-run lottery reflects its policy judgment that participation in such lotteries, even those conducted by another State, is detrimental to the public welfare, and that 18 U. S. C. §1307 (1988 ed. and Supp. III) represents a federal effort to respect that policy judgment.

Even assuming that nonlottery States desire such assistance from the Federal Government—an assumption that must be made without any supporting evidence—I would hold that suppressing truthful advertising regarding a neighboring State's lottery, an activity which is, of course, perfectly legal, is a patently unconstitutional means of effectuating the Government's asserted interest in protecting the policies of nonlottery States. Indeed, I had thought that we had so held almost two decades ago.

In *Bigelow* v. *Virginia*, 421 U. S. 809 (1975), this Court recognized that a State had a legitimate interest in protecting the welfare of its citizens as they ventured outside the State's borders. *Id.*, at 824. We flatly rejected the notion, however, that a State could effectuate that interest by suppressing truthful, nonmisleading information regarding a legal activity in another State. We held that a State "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State." *Id.*, at 824–825. To be sure, the advertising in *Bigelow* related to abortion, a constitutionally protected right, and the Court in *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U. S. 328 (1986), relied on that fact in dismissing the force of our holding in that case, see *id.*, at 345. But even a casual reading of *Bigelow* demonstrates that the case cannot fairly be read so narrowly. The fact that the information in the advertisement related to abortion was only one factor informing the Court's determination that there were substantial First Amendment interests at stake in the State's attempt to suppress truthful advertising about a legal activity in another State:

> "Viewed in its entirety, the advertisement conveyed information of potential value to a diverse audience—not only to readers possibly in need of the services offered, but also to those

> with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. The mere existence of the [organization advertising abortion-related services] in New York City, with the possibility of its being typical of other organizations there, and the availability of the services offered, were not unnewsworthy. Also the activity advertised pertained to constitutional interests." *Bigelow*, *supra*, at 822.[2]

Bigelow is not about a woman's constitutionally protected right to terminate a pregnancy.[3] It is about paternalism, and informational protectionism. It is about one State's interference with its citizens' fundamental constitutional right to travel in a state of

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[2]The analogy to *Bigelow* and this case is even closer than one might think. The North Carolina General Assembly is currently considering whether to institute a state-operated lottery. See 1993 N. C. S. Bill No. 11, 140th Gen. Assembly. As with the advertising at issue in *Bigelow*, then, advertising relating to the Virginia lottery may be of interest to those in North Carolina who are currently debating whether that State should join the ranks of the growing number of States that sponsor a lottery. See *infra*, at 6.

[3]If anything, the fact that underlying conduct is not constitutionally protected increases, not decreases, the value of unfettered exchange of information across state lines. When a State has proscribed a certain product or service, its citizens are all the more dependent on truthful information regarding the policies and practices of other States. Cf. *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. ___ (1993) (slip op., at 26–27, n. 31) (STEVENS, J., dissenting). The alternative is to view individuals as more in the nature of captives of their respective States than as free citizens of a larger polity.

enlightenment, not government-induced ignorance. Cf. *Shapiro* v. *Thompson,* 394 U. S. 618, 629–631 (1969).[4] I would reaffirm this basic First Amendment principle. In seeking to assist nonlottery States in their efforts to shield their citizens from the perceived dangers emanating from a neighboring State's lottery, the Federal Government has not regulated the content of such advertisements, to ensure that they are not misleading, nor has it provided for the distribution of more speech, such as warnings or educational information about gambling. Rather, the United States has selected the most intrusive, and dangerous, form of regulation possible—a ban on truthful information regarding a lawful activity imposed for the purpose of manipulating, through ignorance, the consumer choices of some of its citizens. Unless justified by a truly substantial governmental interest, this extreme, and extremely paternalistic, measure surely cannot withstand scrutiny under the First Amendment.

No such interest is asserted in this case. With barely a whisper of analysis, the Court concludes that a State's interest in discouraging lottery participation by its citizens is surely "substantial"—a necessary prerequisite to sustain a restriction on commercial speech, see *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 557, 566 (1980)—because gambling "falls into a category of `vice' activity that could be, and frequently has been, banned altogether," *ante*, at 7.

I disagree. While a State may indeed have *an*

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[4]"For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." *Passenger Cases*, 7 How. 283, 492 (1849).

interest in discouraging its citizens from participating in state-run lotteries,[5] it does not necessarily follow that its interest is "substantial" enough to justify an infringement on constitutionally protected speech,[6] especially one as draconian as the regulation at issue in this case. In my view, the sea change in public attitudes toward state-run lotteries that this country has witnessed in recent years undermines any claim that a State's interest in discouraging its citizens from participating in state-run lotteries is so substantial as to outweigh respondent's First Amendment right to distribute, and the public's right to receive, truthful, nonmisleading information about a perfectly legal activity conducted in a neighboring State.

While the Court begins its opinion with a discussion of the federal and state efforts in the 19th century to restrict lotteries, it largely ignores the fact that today hostility to state-run lotteries is the exception rather than the norm. Thirty-four States and the District of Columbia now sponsor a lottery.[7] Three more States will initiate lotteries this year.[8] Of the remaining 13 States, at least 5 States have recently considered or

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[5]A State might reasonably conclude, for example, that lotteries play on the hopes of those least able to afford to purchase lottery tickets, and that its citizens would be better served by spending their money on more promising investments. The fact that I happen to share these concerns regarding state-sponsored lotteries is, of course, irrelevant to the proper analysis of the legal issue.

[6]See, *e.g.*, *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. ___, ___, n. 13 (slip op., at 7, n. 13) (noting that restrictions on commercial speech are subject to more searching scrutiny than mere "rational basis" review).

[7]Selinger, Special Report: Marketing State Lotteries, City and State 14 (May 24, 1993).

[8]*Ibid.*

are currently considering establishing a lottery.[9] In fact, even the State of North Carolina, whose anti-lottery policies the Federal Government's advertising ban are purportedly buttressing in this case, is considering establishing a lottery. See 1993 N. C. S. Bill No. 11, 140th Gen. Assembly. According to one estimate, by the end of this decade all but two States (Utah and Nevada) will have state-run lotteries.[10]

The fact that the vast majority of the States currently sponsor a lottery, and that soon virtually all of them will do so, does not, of course, preclude an outlier State from following a different course and attempting to discourage its citizens from partaking of such activities. But just as the fact that "the vast majority of the 50 States . . . prohibit[ed] casino gambling" purported to inform the Court's conclusion in *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U. S., at 341, that Puerto Rico had a "substantial" interest in discouraging such gambling, the national trend in the opposite direction in this case surely undermines the United States' contention that non-lottery States have a "substantial" interest in discouraging their citizens from traveling across state lines and participating in a neighboring State's lottery. The Federal Government and the States simply do not have an overriding or "substantial" interest in seeking to discourage what virtually the entire country is embracing, and certainly not an interest that can justify a restriction on constitutionally protected speech as sweeping as

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[9]See, *e.g.*, 1993 Ala. H. Bill No. 75, 165th Legislature—Regular Sess.; 1993 Miss. S. Concurrent Res. No. 566, 162d Legislature—Regular Sess.; 1993 N. M. S. Bill No. 141, 41st Legislature—First Regular Sess.; 1993 N. C. S. Bill No. 11, 140th Gen. Assembly; 1993 Okla. H. Bill No. 1348, 44th Legislature—First Regular Sess.

[10]City and State, *supra*, n. 7.

the one the Court today sustains.

I respectfully dissent.