**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>NATIONAL COUNCIL ON PROBLEM GAMBLING, INC.,<br><br>Defendant. | Civil Action No. 1:03CV01278<br><br>Before: Judge Henry H. Kennedy |

**PUBLIC COMMENTS OF**
**THE CENTER FOR THE ADVANCEMENT OF CAPITALISM**

Pursuant to the United States' publication of a Proposed Final Judgment (PFJ) in the above-captioned action[1], the Center for the Advancement of Capitalism (CAC)[2] files the following comments.

## 1. Material Facts

On June 13, 2003, the United States filed a complaint against the National Council on Problem Gambling, Inc. (NCPG), a nonprofit corporation headquartered in Washington, DC. According to NCPG, its mission is to "public awareness of pathological gambling, ensure the widespread availability of treatment for problem gamblers and their families, and to encourage research and programs for prevention and education."[3] NCPG only provides limited services through its national office, and instead relies on 34 state affiliates to produce and provide "problem gambling services" to customers. NCPG's customers include state governments.[4] NCPG's members adopted, through its board of directors, a series of internal agreements to coordinate the affiliates' work. Among these agreements, according to the United States, was a "territorial allocation" scheme that the Government considered a violation of section one of the Sherman Act, 15 U.S.C. §1.

[1] 68 Fed. Reg. 38,090-38,098 (June 23, 2003).

[2] CAC is a District of Columbia nonprofit corporation which regularly files public comments in Tunney Act proceedings. *See, i.e., United States v. Mountain Health Care*, 68 Fed. Reg. at 44,591 (July 29, 2003), *United States v. The MathWorks, Inc., et al.*, 68 Fed. Reg. at 3,270-3,272 (January 23, 2003).

[3] http://www.ncpgambling.org/about.htm

[4] *See* Competitive Impact Statement at 8-9 (NCPG affiliates contracted with the State of Nebraska and the Arizona lottery.)

The United States alleges that from 1995 to 2001, NCPG enforced a policy restricting individual state affiliates from offering problem gambling services—such as counseling and educational programs—in a state served by another NCPG affiliate. For example, the United States alleges NCPG "asked" its Minnesota affiliate to cease efforts to contract with the State of Nebraska, and instead support that state's NCPG affiliate.[5] The Government charges acts such as this violate the Sherman Act violation because customers are denied the "benefits of free and open competition" and that "innovations in problem gambling products and services [are] stifled."[6]

The Untied States further claims NCPG maintained ethical guidelines designed to support the organization's illegal anticompetitive conduct. In 1996 and 1999, for instance, NCPG's directors and affiliates adopted an "ethics resolution" which codified the non-competition policy. According to the Government, NCPG could sanction a member internally, with "fines or revocation of NCPG membership," for offering services in a state served by another affiliate without the incumbent affiliate's permission.[7]

The PFJ now before the Court resolves the Government's concerns by restricting NCPG's future conduct. The PFJ prevents NCPG from "prohibiting or restraining" any state affiliate from selling problem gambling services to any customer in any state. The PFJ further prohibits NCPG from declaring such competition "unethical, unprofessional, or contrary to the policy of the NCPG." The PFJ will expire 10 years from the date of entry by the Court.

**2. NCPG's Actions and Barriers to Entry.**

The major flaw in the Government's case is their complete failure to demonstrate, or even allege, that NCPG's actions created a barrier to competition in the market for "problem gambling services." The United States typically alleges in antitrust cases that the defendant's actions create a *de facto* barrier to entry because of the relative difficulty in entering the marketplace. Here there is no such allegation. All the United States argues is that NCPG restrained competition *among its own membership*. This is not a sufficient basis to find entry of the PFJ is in the public interest.

In the first place, the "problem gambling services" market does not possess any substantial natural barriers to entry. The United States itself defines the market in very general terms:

> "Problem gambling services" means all services relating to the treatment or prevention of problem or compulsive gambling, including dissemination of information regarding problem gambling, telephonic hot-line or help-line services, training of problem gambling counselors, certification of various problem

[5] Id.

[6] Complaint at 5.

[7] Competitive Impact Statement at 7.

> gambling training programs, and provision of any product or service aimed at assisting problem gamblers.[8]

It is unclear from the Government's definition how many or much of these services one must offer to be considered part of the market, but it is fairly clear that entry itself is not difficult. Any individual or organization could disseminate information on compulsive gambling and operate a hotline for gambling addicts. NCPG is not a monopolist in this market, but rather a successful group of experienced problem gambling service providers.

The United States presents no evidence that NCPG created, or attempted to create, any barriers to prevent any interested party from entering the market. From all accounts, NCPG's policies and actions were limited to governing the *voluntary* association among its own affiliates. Furthermore, NCPG and its affiliates are all nonprofit organizations. They are not organized to compete with each other, but rather to provide beneficial services to the public without regard for maximizing profit or paying dividends to stockholders. For the United States to hold NCPG to the same antitrust standards as a for-profit corporation or association both misconstrues the intent of antitrust laws, and imposes an unreasonable burden on NCPG's operations.[9]

**3. Free Speech and Free Assembly.**

The most disturbing aspect of the PFJ is the shackling of NCPG's future speech and assembly. Section IV(B) of the PFJ prohibits NCPG from adopting or making any statement that "states or implies" intrastate competition of the type at issue in this case is "unethical, unprofessional, or contrary to the policy of NCPG." This requirement does nothing to enhance competition, and in fact is overt censorship by the United States. The Government is not content to simply restrict NCPG's commercial conduct; they also seek to prevent NCPG from expressing, or even holding, ethical views that contrast those of the United States.

The First Amendment forbids the federal government from "abridging the freedom of speech." The PFJ's restrictions on NCPG's future speech plainly violate this constitutional commandment. The United States possesses no authority, under either the Constitution or the Sherman Act, to prevent private associations from declaring conduct "unethical" or "unprofessional". Indeed, if the Government had such power, it could easily prohibit *individuals*, under color of antitrust enforcement, from making such statements as well. Had the United States chosen to name NCPG's officers individually, they could have extended the Section IV(B) speech restrictions to them.

The First Amendment also protects the right of individuals to "peaceably" assemble and "petition the Government for a redress of grievances". The PFJ imposes restraints on these rights. By forbidding NCPG from expressing views that disagree with the United States'

[8] Proposed Final Judgment at 3.

[9] The United States argues that NCPG's policies did not "enhance economic efficiency" (Complaint at 5). Once again, nonprofit organizations are not generally designed to maximize economically efficiency. And even if this were the case, there's no evidence that lack of "efficiency" is itself anticompetitive. Under this standard, for example, one could hold an amateur sports association in violation of the Sherman Act for limiting the number of games member teams may schedule in a season.

position on competition, NCPG is arguably prohibited from lobbying other branches of the government, such as Congress, to alter or abolish the policy set forth by the Department of Justice in this matter. The United States is trying to prevent any future dissent or discussion of the merits of NCPG's policies with respect to competition among its affiliates. This not only violates the plain meaning of the First Amendment, but it usurps the potential role of Congress and the judiciary in making future assessments arising from this case. Such drastic measures bear no relation to the stated objectives of the PFJ, namely to prevent allegedly anticompetitive *conduct*. The Constitution makes a clear distinction between punishing speech and punishing actual illegal conduct. The United States failed to make this distinction in formulating the PFJ.

Finally, the entire PFJ unreasonably interferes with the free association and assembly rights of NCPG and its members. For all the Government's complaining over alleged restraints of trade, this case arises *solely* from the voluntary actions of NCPG's members. The state affiliates agreed to participate in, and abide by, NCPG's collective decision-making process. They agreed to restrict their competitive conduct, as was their *right*. A key element of contract law is that a party may agree *not* to do something in exchange for consideration, which in this case was continued membership in NCPG. These rights should not be impugned upon by the United States for no better reason than certain consumers might be temporarily inconvenienced. Consumers, in this context, have no right to demand NCPG act a certain way or promulgate certain rules. There is a right to contract; there is no corresponding right to *demand* a service from certain producers, as the United States erroneously argues.

**4. Availability of Other Remedies.**

The United States does not identify any specific "private" customers that were allegedly injured by NCPG's policies, only a few state governments. It is odd for the United States to contend state governments are powerless to direct the procurement of particular services as the result of a private association's "anticompetitive" actions. For instance, the United States contends Nebraska was denied the benefits of competition when the Minnesota NCPG affiliate was barred under the organization's rules from bidding for Nebraska's business. If this were the case, and Nebraska was unhappy with the options presented, why then didn't Nebraska simply create another option? If NCPG is getting in the way, a state could easily create its own agency to provide problem gambling services. Alternatively, the state could impose licensing or other professional requirements to ensure problem gambling services are provided on terms deemed acceptable to the state's interests.[10] In any case, there appears to be little practical justification for wielding a blunt federal remedy like this PFJ to dispose of a matter than could be dealt with better by the states.

[10] CAC does not support any governmental use of force to affect economic outcomes. Nor do we consider "problem gambling services" the proper domain of the state. This case, however, involves only the alleged restraint of competition in the marketplace, and to that end, our suggestion is merely that state customers can remedy their situation without resorting to federal antitrust intervention.

**5. Conclusion.**

For the numerous independent grounds discussed above, the Court should reject the PFJ as inconsistent with the public interest under the Tunney Act. The Government has not alleged facts sufficient to warrant any antitrust relief, and the remedies contained in the PFJ unreasonably restrain NCPG's First Amendment rights, as well as the right of NCPG members to voluntarily contract.

Respectfully Submitted,
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