

APPEAL NO. 05-16238

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL T. ROSSIDES

Plaintiff - Appellant,

v.

ALBERTO R. GONZALES,

In his official capacity as Attorney General of the United States,

Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
MICHAEL T. ROSSIDES v. ALBERTO GONZALES
Case No. CV-03-02527-NVW

**APPELLANT MICHAEL T. ROSSIDES'
REPLACEMENT OPENING BRIEF**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Michael Rossides makes the following disclosure: No publicly held company owns 10% or more of betpress.com.

TABLE of CONTENTS

	<u>page</u>
I. JURISDICTIONAL STATEMENT.....	6
II. ISSUES/QUESTIONS PRESENTED on APPEAL.....	7
III. STATEMENT of the CASE.....	9
IV. STATEMENT of FACTS.....	13
A. Probability Bets (P-bets) Defined.....	13
B. P-bets Can Be Used as a Form of Speech to Express Facts and Opinions.....	14
C. No Recognized Theory of Physics, Logic, Invention, or Psychology Bars the Speech Uses of P-bets.....	16
D. P-bets Can Be Used as a <u>Beneficial</u> Form of Speech.....	17
E. Rossides Authored and Obtained Patents for an Online Press for P-bets.....	22

F. Rossides Created Specialized P-bets to Solve Specific Problems of Public Communication.....	22
G. Rossides Created Betpress.com, a New Form of Press.....	26
H. Rossides' Concrete Plan of Action for Betpress.com.....	26
I. Procedure for Distinguishing P-bets About Questions of Public Interest from P-bets About the Outcomes of Sports, Casino, and Lottery Events.....	30
J. A Probability Bet Press Enables the <i>Community</i> to Communicate in a Novel and Beneficial Way.....	31
K. Using P-Bets as Protected, Beneficial Speech Is a Recent Idea.....	34
L. Title 18, Sections 1084, 1952 and 1953.....	35
M. Evidence of the Threat of Prosecution of Rossides Under 1084, 1952 and/or 1953 for Operating Betpress.com.....	38
N. The First Amendment to the United States Constitution.....	42
O. Threat of Prosecution Bans Betpress.com, Injures Rossides.....	42
P. Existing Advertising Media are Forums for Bets and Bet Speech.....	42
V. SUMMARY of the ARGUMENT.....	44
VI. ARGUMENT.....	51
VII. CONCLUSION.....	64

TABLE of AUTHORITIES

page

Cases

<i>Abrams v. United States</i> , 250 U.S. 616 (1919).....	57-58
<i>Babbitt v. United Farm Workers National Union</i> , 442 U.S. 289.....	61
<i>Bernhardt v. County of Los Angeles</i> , 279 F.3d 862, 867 (9 th Cir. 2002).....	50
<i>Carroll v. Nakatani</i> , 342 F.3d 934, 940 (9 th Cir. 2003).....	50
<i>Conley v. Gibson</i> , 355 U.S. (1957).....	49, 61
<i>LSO v. Stroh</i> , 205 F.3d 1146 (9 th Cir. 2000).....	46, 49, 54, 62
<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974).....	61
<i>United States v. Cohen</i> , 260 F.3d 68 (2 nd Cir. 2001).....	38
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968).....	47, 53

Statutes

U.S.C. 18 §1084.....	36-37 and <i>passim</i>
U.S.C. 18 §1952.....	37 and <i>passim</i>
U.S.C. 18 §1953.....	37-38 and <i>passim</i>
First Amendment to the Constitution.....	42 and <i>passim</i>

TABLE of AUTHORITIES

Cont.

page

Other

Am. Heritage Dictionary, 4 th Edition.....	15
H.C. von Baeyer, <u>Information: The New Language of Science</u> , Harvard University Press, 2004.....	16-17
Robin Hanson, Ph.D., <i>Policy Markets Should Be Free Speech</i> (http://hanson.gmu.edu/iffreespeech.html).....	17, 34
<i>The Economist</i> , <i>Guessing Games</i> , 11/18/2004.....	17
Robert Hahn, <i>Using Information Markets to Improve Policy</i> , (www.aei-brookings.org/admin/authorpdfs/page.php?id=1020 , 11/2004).....	18
Justin Wolfers and Eric Zitzewitz, <i>Prediction Markets</i> , Journal of Economic Perspectives, 2004, 18:2, 108 (http://bpp.wharton.upenn.edu/jwolfers/Papers/Predictionmarkets.pdf).....	18
Cass Sunstein, <i>Group Judgments: Deliberations, Statistical Means and Information Markets</i> (www.aei-brookings.org/admin/authorpdfs/page.php?id=1026 , 9/2004).....	18
Peter Drucker, <u>Managing for Results</u> , Harper and Row, 1964.....	18
Michael Rossides, <i>Questions and Actions Caused by the Bet</i> (www.betpress.com/why_bet_is_powerful/question_action.html).....	20
George Orwell, <i>Politics and the English Language</i>	20
Richard Feynman, <i>The Role of Scientific Culture in Modern Society</i> , Galileo Symposium, Pisa, Italy, 1964, in <u>The Pleasure of Finding Things Out</u> , Perseus Publishing, 1999.....	21

Michael Rossides, <i>A Shield Against False Accusation and Unjust Compulsion</i> (www.betpress.com/why_bet_is_powerful/shield.html).....	22
<i>Communications System Using Bets</i> , U.S. Patents 5,575,474 and 6,443,841.....	22
Michael Rossides, <i>Cargo Cult Bets: A Tool for Debunking</i> (http://www.betpress.com/cargo_cult/main_idea.html).....	23-24
Michael Rossides, <i>The General Purpose of Product/Service Bets</i> (http://www.betpress.com/product_and_service/general_purpose.html).....	24-25
Michael Rossides, <i>Using Bets to Encourage Honest Financial Disclosure</i> (http://www.betpress.com/financial_disclosure/main_idea.html).....	25
John G. Malcolm, <i>Special Briefing: Money Laundering and Payment Systems in Online Gambling</i> , http://www.cybercrime.gov/JGM_Intgambling.htm	39, 59
John G. Malcolm, Testimony Before the Senate, Hearing on Proposals to Regulate Illegal Internet Gambling http://banking.senate.gov/03_03hr/031803/malcolm.htm	39-40

I. JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1361 and 2201, because this declaratory judgment action challenges the constitutionality of a federal statute.

This Court has jurisdiction under 28 U.S.C. § 1291 because this appeal is from a final judgment that disposes of all parties' claims.

The district court issued an Order dismissing Appellant's Amended Complaint for lack of standing and granting Appellee's Motion to Dismiss on May 25, 2005 and entered Judgment for Defendant on May 26, 2005.

The notice of appeal was filed on June 22, 2005, within 60 days of the district court's decision. Fed. R. App. P. 4(a)(1)(B).

II. ISSUES/QUESTIONS PRESENTED on APPEAL

Appellant filed an Amended Complaint in district court asking the court to grant declaratory relief enjoining Defendant Gonzales from enforcing U.S.C. 18 §§ 1084, 1952 and 1953 against Appellant's betpress.com, which Appellant claims is protected by the First Amendment. The district court dismissed Appellant's Amended Complaint for lack of standing.

So, the question to be decided by this Court is:

1) Does Appellant have standing to ask for pre-enforcement declaratory relief?

Two sub-questions, the two key tests of standing in this type of case, are thus also presented on appeal:

1a) Does the First Amendment arguably protect Appellant's betpress.com – a for-profit, interstate press that enables individuals, businesses and organizations to post and transact probability bets for the purpose of expressing facts and opinions about questions of public interest – from enforcement under U.S.C. 18 §§ 1084, 1952 and 1953?

1b) Does Appellant face a credible threat of prosecution under U.S.C. 18 §§ 1084, 1952 and/or 1953 if he operates betpress.com?

In this type of case, the standard for *credible threat* depends, in part, on whether an *arguable* First Amendment right is asserted. So, the First Amendment question comes first.

In order to answer this First Amendment question, Appellant believes this Court also needs to answer the following foundational questions:

- Can people use probability bets – bets with odds – to express facts and opinions about questions of public interest?
- Can individuals, businesses and organizations use probability bets for the *primary, genuine* purpose of expressing facts and opinions about questions of public interest?
- At this time, can any one judge or predict the value of probability bet speech?

III. STATEMENT of the CASE

Nature of Case

This is an action for a declaratory judgment that U.S.C. 18 §§ 1084, 1952 and 1953 are unconstitutional when applied to betpress.com, a for-profit, interstate press that enables individuals, businesses and organizations to use probability bets for the bona fide purpose of expressing facts and opinions of public interest, and it is an action for preliminary and permanent injunctions enjoining enforcement of U.S.C. 18 §§ 1084, 1952 and 1953 against Appellant and Appellant's betpress.com.

Appellant Michael Rossides is an individual who invented, and obtained U.S. patents 5,575,474 and 6,443,841 for, a *Communications System Using Bets*. These patents disclose online press methods and systems for enabling people to use probability bets as a form of speech¹.

Rossides immediately seeks to practice the methods of the patents and to provide an online, interstate press to enable people to use probability bets to communicate facts and opinions.

¹ The patents don't mention bets on sports, except when discussing prior art and once when showing how a P-bet can force an honest probability estimate.

Rossides has secured the web domain, www.betpress.com, has built a website posted at that address, has attracted investor interest, has a small group of prospective customers, and is ready to operate betpress.com.

But, Rossides is blocked by the threat of prosecution under federal anti-gambling laws.

Therefore Rossides seeks a declaratory judgment that his for-profit press is protected by the First Amendment and, hence, cannot be prohibited by statute. Rossides seeks preliminary and permanent injunctive relief against the criminal enforcement of the Federal Interstate Wire Wager Act, 18 U.S.C. § 1084 (1084), the Interstate Transportation in Aid of Racketeering Act, 18 U.S.C. § 1952 (1952), and the Interstate Transportation of Wagering Paraphernalia Act 18 U.S.C. § 1953 (1953) with respect to his for-profit, interstate press for enabling probability bets to be used as speech.

Thus Rossides is an individual who has been affected by 1084, 1952, and 1953. Defendant Alberto Gonzales is Attorney General of the United States charged, among other things, with enforcing 1084, 1952, and 1953. These statutes impose penalties upon persons who operate interstate gambling businesses that enable people to transact bets of various kinds.

Course of Proceedings

On December 22, 2003, Rossides filed his Initial Complaint challenging the constitutionality of U.S.C. 18 § 1084 (the “Wire Act”). The Complaint alleged that 1084 infringed on his First Amendment right to operate a press that enables people to use probability bets for the purpose of speech.

On June 28, 2004, the government filed a Motion to Dismiss with a supporting memorandum alleging that Rossides lacked standing.

On December 9, 2004, the district court granted the Motion to Dismiss saying that Rossides lacked standing for several reasons, especially because his Complaint had not articulated a concrete enough business plan.

On January 7, 2005, Rossides filed an Amended Complaint alleging that 1084, 1952, and 1953 infringed on his First Amendment right to operate a press that enables people to use probability bets for the purpose of speech about questions of public interest.

On February 24, 2005, the government filed a Motion to Dismiss with a supporting memorandum alleging that Rossides lacked standing.

Disposition Below

On May 26, 2005, the district court entered an Order (Doc. #34, pgs. 2-3) granting the government's motion and dismissing Rossides' Complaint and terminating the case. The district court held that plaintiff lacked standing:

“Placing bets in a commercial setting is obviously outside the ambient of speech protected by the Constitution, even if the bets are made on matters of public interest. Plaintiff’s Amended Complaint simply fails to raise a colorable claim of constitutional right that would warrant pre-enforcement adjudication to avoid burdening Plaintiff with an enforcement action. Thus, Plaintiff fails to meet this alternate theory of standing.” (Doc. #34, pgs. 2-3)

The district court did not explain why placing bets on matters of public interest “is obviously outside the ambient of speech protected by the Constitution.”

IV. STATEMENT of FACTS

Q. Probability Bets (P-bets) Defined

Appellant's dismissed complaint concerns his right to operate an online press that enables individuals, businesses, and organizations to post, offer, accept, and settle probability bets (P-bets) for the purpose of speech – that is, for the purpose of expressing and eliciting facts and opinions.

A P-bet is a *composite statement* in which a person called a first speaker:

- (a) Makes a statement that can be found true or false.
- (b) States the odds – a ratio that specifies the number of dollars a speaker picking TRUE has to risk for each dollar that an opposing speaker picking FALSE has to risk. *The odds can be considered an estimate of the probability that the statement is true.*
- (c) Chooses TRUE or FALSE.
- (d) Offers to risk an amount of money – a stake – to be given to an opposing speaker if the opposing speaker's choice of TRUE or FALSE turns out to be correct.

(e) The opposing speaker accepts the offer by choosing the side (TRUE or FALSE) opposite the choice of the first speaker, and risking an amount of money – the opposing speaker’s stake – specified by the odds, to be given to the first speaker if the first speaker’s choice turns out to be correct.

Thus, in addition to being a statement, a P-bet that has not been accepted is an *offer*. And, a P-bet that is accepted is a *contract*.

B. P-bets Can Be Used as a Form of Speech to Express Facts and Opinions

A plain probability statement is speech, for it is an opinion, as in, “I think the probability is over 80% that the federal deficit in 2006 will exceed \$200 billion.” If the speaker of a probability statement adds financial risk to form a P-bet offer, the statement remains an opinion, as in, “I think the probability is over 80% that the federal deficit in 2006 will exceed \$200 billion *and* I’m willing to risk \$1,000 at 1-4 odds that it will be over.”

The addition of financial risk by the speaker cannot turn a probability statement into meaningless static – into non-speech. That is, no known process exists that transforms a meaningful statement of opinion into a meaningless

statement by the addition of financial risk to the speaker. Therefore, by simple logic a P-bet offer can be speech.

It is common knowledge that bets can be statements of opinion. This idea can be found in dictionary definitions of the term *bet*. “Informal. A view or opinion, especially about something that cannot be known at the present time.” (Am. Heritage Dictionary, 4th Edition.)

A person can use a P-bet to express a fact as well via odds that correspond to near certainty. For example, one might offer 1-999 odds (offer to put up \$999 dollars for every \$1 an opposing speaker puts up) that the statement, “George Washington was President of the United States,” is true.

Actually, in a P-bet there is no dividing line between a fact and an opinion². There is a spectrum of probability from near 0 to near 1.0. The closer the odds approach certainty, the higher they become, until they become impractical – e.g., one cannot offer 1-9,999,999,999 odds against someone betting a single dollar unless one has billions of dollars. One cannot express absolute certainty in a P-bet (a probability of 1.0) because it corresponds to undefined/infinite odds.

² The terms *fact* and *opinion* are not defined in this brief.

P-bets require conduct, as do many forms of public communication, e.g., acting in a commercial, walking in a march, and distributing pamphlets.

Settled P-bets require the expenditure of money by a speaker, as do most forms of public communication, e.g., buying TV time, organizing a march, and printing pamphlets.

P-bets satisfy any reasonable definition of speech that Appellant knows of.

C. No Recognized Theory of Physics, Logic, Invention, or Psychology Bars the Speech Uses of P-bets

No recognized theory of physics, logic, or invention bars people from using P-bets for the *primary* purpose of expressing facts or opinions.

No recognized theory of psychology bars individuals from using P-bets with the *genuine* motive of expressing facts or opinions.

No recognized theory of psychology bars businesses and organizations from using P-bets with the *genuine* motive of expressing facts or opinions.

No recognized theory of information or epistemology bars P-bets from having meaning:

“‘What makes meaning?’ refers to the thorny philosophical problem of defining the concept of meaning. At the same time it recalls the frustration

of engineers who have at their disposal a variety of methods for measuring the amount of information in a message, but none to deal with its meaning.” (H.C. von Baeyer, Information: The New Language of Science, p. xi, Harvard, 2004)

By a mysterious process of mind, which we call *common sense*, people are able to judge the meaning, intent, and expressiveness of messages.

D. P-bets Can Be Used as a Beneficial Form of Speech

The idea that bets can be powerful statements is expressed in the saying, “Put your money where your mouth is.”

Dr. Robin Hanson, a pioneer in the field of information markets, has written an essay, *Policy Markets Should Be Free Speech*, pointing out that useful “policy markets” where people wager on political questions are forums for speech. (<http://hanson.gmu.edu/iffreespeech.html>)

Academics have begun exploring how betting markets that use P-bets or similar types of bets can provide useful information to policymakers:

“Economists and policymakers are just beginning to understand the use of information markets. Talk is cheap, but money speaks the truth. That might be the credo behind the recent, rapid rise in the use of novel markets to forecast everything from political events to business successes and failures.” (*The Economist, Guessing Games*, 11/18/2004)

Recent papers, to name just three, are *Using Information Markets to Improve Policy* by Robert Hahn, Director, AEI-Brookings Joint Center for Regulatory Studies (www.aei-brookings.org/admin/authorpdfs/page.php?id=1020, 11/2004), *Prediction Markets* by Wolfers and Zitzewitz, *Journal of Economic Perspectives*, 2004, 18:2, 108 (<http://bpp.wharton.upenn.edu/jwolfers/Papers/Predictionmarkets.pdf>), and *Group Judgments: Deliberations, Statistical Means and Information Markets* by Cass Sunstein, Professor of Law and Political Science at the University of Chicago (www.aei-brookings.org/admin/authorpdfs/page.php?id=1026, 9/2004).

An example of speech that contains a type of bet (not a P-bet) is the money back guarantee, which increases sales, on average, when included in an advertisement. As Peter Drucker has pointed out, the money back guarantee was an important innovation:

“Sears built its business on the innovation of a “money-back-and-no-questions-asked” guarantee to the farm customers. All the ingredients of a successful mail-order business existed. What was lacking was the simple element of confidence in the customer.” (Managing for Results)

A related tool is *earnest* money, which a speaker uses to convert a promise, e.g., “I will buy your house in 90 days,” into a kind of bet, as in, “I will buy your house in 90 days or else pay you \$10,000.” Earnest money usually creates a

more credible signal than a plain promise; otherwise, earnest money would not be used.

People can publicly post P-bet *offers* that are NOT likely to be accepted and, therefore, likely do not require the speaker to spend money (aside, perhaps, from a small posting fee). The purpose of such a P-bet offer is to make a *credible statement* that demonstrates the speaker's belief and, further, demonstrates that informed people also believe the opinion expressed in the P-bet offer. For example, the President of a company could post a P-bet offer such as:

Statement:	My company will not default on any bond by 12/31/2010.
Odds:	1-19 (95%)
Stake:	\$1,000,000
Side:	TRUE.

By making such an offer, she provides a demonstration that she believes with a confidence of 95% or more that her company will not default on its bonds.

Moreover, if no one accepts her offer, she further demonstrates that the market, made of knowledgeable profit-seeking people, agrees with her opinion (her probability estimate).

A P-bet is a form of expression that forces a speaker to:

- a. Convert a vague statement or idea into a verifiable, specific statement,

- b. State a probability estimate expressing his uncertainty about his verifiable specific statement,
- c. Suffer a financial penalty, on average, if he is falsely over-optimistic in his probability estimate, and
- d. Acknowledge what others may know about his vague statement or idea and about his verifiable, specific statement. (*Questions and Actions Caused by the Bet*,
www.betpress.com/why_bet_is_powerful/question_action.html)

By forcing verifiable, specific language upon a speaker, the use of P-bets can prevent faking in politics and commerce:

“In our time, political speech and writing are largely the defence of the indefensible. Things like the continuation of British rule in India, the Russian purges and deportations, the dropping of atom bombs on Japan can indeed be defended, but only by arguments which are too brutal for most people to face, and which do not square with the professed aims of political parties. Thus political language has to consist largely of euphemism, question-begging and sheer cloudy vagueness. Defenceless villages are bombarded from the air, the inhabitants driven out into the countryside, the cattle machine-gunned, the huts set on fire with incendiary bullets: this is called *pacification*... Such phraseology is needed if one wants to name things without calling up mental pictures of them.

...The great enemy of clear language is insincerity. When there is a gap between one's real aims and one's declared aims, one turns as it were instinctively to long words and exhausted idioms.” (George Orwell, *Politics and the English Language*)

As discussed, a P-bet offer includes odds, a numerical expression of uncertainty, a form of probability estimate. A statement that includes a probability estimate can provide more information than one that does not because uncertainty is fundamental to what we know and how we act.

“[T]he last main subject that I want to talk about is the one I really consider the most important and the most serious. And that has to do with the question of uncertainty and doubt. A scientist is never certain. We all know that. We all know that all our statements are approximate statements with different degrees of certainty; that when a statement is made, the question is not whether it is true or false but how likely it is to be true or false.” (R. Feynman, *The Role of Scientific Culture in Modern Society*)

For example, we usually think that the statement, *There is a 65% chance that your spine operation will fail*, provides more information than the statement, *Your spine operation may fail*, and that the statement, *The missile defense system has a 10% chance of working*, provides more information than the statement, *The missile defense system may work*. Thus a P-bet can be more informative than a statement that lacks a probability estimate.

A P-bet also contains a financial incentive that penalizes dishonestly optimistic probability estimates (e.g., one would lose money on average in a P-bet by stating that a doomed company has a 50% chance of making long-term profits). Consequently, a P-bet may often be more credible than an ordinary statement, which does not contain such a penalty.

Rossides has posted essays at betpress.com explaining some of the beneficial speech uses of P-bets. One such essay is *A Shield Against False Accusation and Unjust Compulsion*. (www.betpress.com/why_bet_is_powerful/shield.html)

E. Rossides Authored and Obtained Patents for an Online Press for P-bets

Pursuing the conception of P-bets sketched above, Rossides authored patent applications disclosing methods for creating an online press system that enables P-bets to be posted and transacted without a bookmaker for the purpose of speech. Rossides obtained U.S. patents 5,575,474 (filed on 9/21/1994) and 6,443,841 (filed on 5/11/1998), entitled *Communications System Using Bets*.

“Abstract. A computer system that allows people to place, accept and settle bets for the purpose of communicating. The system cuts out the middleman, sometimes referred to as the bookmaker, allowing bettors to bet with each other directly.” (U.S. Patent 5,575,474)

U.S. patent 5,575,474 is the pioneering patent in the field of peer-to-peer betting for the purpose of communication.

F. Rossides Created Specialized P-bets to Solve Specific Problems of Public Communication

Rossides later filed additional U.S. applications:

1. *Betting Method and System for Debunking and Validating Statements*

2. *Betting Method and System for Comparing Products and Services*

3. *Method and Medium for Financial Disclosure*

Accordingly, on betpress.com Rossides discusses and provides a solution to the problem of How to Debunk Misleading Statements and Deceptive Speakers:

One fundamental problem of public speech is that it is easy to make a misleading statement, but usually hard to debunk one.

A second fundamental problem is that it is difficult to demonstrate that a person is intentionally making a misleading statement.

Consider, for example, how to show the public that (a) the statements below are misleading, and (b) the speakers are intentionally being deceptive.

Political Attack: *"McCain opposes local cancer research programs right here in New York."* - Geri Barish, TV ad by Campaign for G. W. Bush for President

Health Claim: *"GARLIQUE tablets are so convenient - you take only one tablet per day to support cardiovascular health."* - From an ad for a garlic supplement

Ad Slogan: *"The more you play, the more you win!"* - D.C. Lottery...

Our solution to the two problems above is to create a standard, even-odds bet in which an independent expert is asked to judge whether a specified public statement is Very Misleading, Misleading, Fair, or Very Fair. People bet on what the expert will say.

For example, assume a person or group offers to bet \$100,000 at even odds that a neutral expert will say, "The more you play, the more you win," is Very Misleading. Then, the executives of lotteries that use this tag line have the opportunity to accept this bet. If they decline to bet, they show that they think the statement is probably very misleading in the opinion of most independent experts.

...Richard Feynman, the famed physicist, coined the term Cargo Cult Science to refer to misleading pseudoscience. A Cargo Cult Bet is so-named because its purpose is to repel misleading - "Cargo Cult" - statements while recognizing fair ones.”
(http://www.betpress.com/cargo_cult/main_idea.html)

On betpress.com, Rossides also discusses and provides a solution to the problem of How to Demonstrate that One Product Is Better than Another:

“Assume that a company has a product that is better than a competing product. Then, a basic problem for that company is how to communicate convincingly that its product is better.

...consider a new restaurant, Patrice, which offers better food at a lower price than The Cheesecake Factory, a popular chain. How is Patrice to ‘prove’ it offers a better value?

The fundamental problem is how to prove a subjective assertion – ‘my product is better than that product.’ This is the central, unsolved problem of advertising...

... if you really have a product that is better in some significant way than a competing product, it should be possible, *without spending a large amount of money*, to demonstrate that fact/opinion to interested prospects so that the fact/opinion is believed, regardless of how much money or "branding" the competing product has behind it.

A solution is needed.”
(http://www.betpress.com/product_and_service/general_purpose.html)

Rossides’ solution is to create and introduce a specialized P-bet called a Product and Service Bet, with specialized rules, for use on betpress.com:

“Our solution to the problems above is to enable people and companies to make public bets about competing products, i.e., to publicly bet that product X is better than product Y...The bet opinions of the betting market, and of the sellers themselves, will usually be more believable than conventional ads and testimonials.”

(http://www.betpress.com/product_and_service/general_purpose.html)

On betpress.com, also Rossides discusses and provides a solution to the problem of How to Ensure Honest Financial Disclosure by Public Companies:

“Ensuring honest disclosure by public companies is an important, unsolved problem for capital markets. Most observers think this problem arises partly because managers often have large financial incentives to give overly optimistic assessments of their companies...

Not well appreciated is that betting tools, such as specialized probability bets, can be created that provide incentives for people to make more honest, more conservative assessments.

A probability bet is a form of speech that financially penalizes overly optimistic statements. So, this kind of bet can be used to elicit assessments from managers that are not overly optimistic...”

(http://www.betpress.com/financial_disclosure/main_idea.html)

Rossides’ solution is a specialized P-bet called a Financial Disclosure Bet:

“Initially, Bet Press is presenting one standard bet, which asks the question, *What is the probability that a given corporation will default on a loan within 3 years?*

By having insiders make bet offers on key financial questions, the public gets the **bet opinions** of the people in the best position to know about the financial condition of a company.”

(http://www.betpress.com/financial_disclosure/main_idea.html)

Given their political and commercial speech purposes, Cargo Cults Bets, Product and Service Bets, and Financial Disclosure Bets are forms of speech.

G. Rossides Created Betpress.com, a New Form of Press

On December 22, 2003, Rossides created betpress.com on the Internet to enable individuals, businesses, and organizations to use P-bets, including the specialized P-bets described above, as a new, more credible form of speech.

Betpress.com is a sole proprietorship with no employees beyond Rossides (Rossides plans to hire employees if he is permitted to operate betpress.com).

Betpress.com is a planned press for posting, matching and settling P-bets for the purpose of speech, the purpose of expressing facts and opinions, that is.

Betpress.com includes rules telling users how they can place P-bet offers on betpress.com, *if* the Defendant-Appellee is enjoined from enforcing federal anti-gambling laws against Rossides for First Amendment reasons.

H. Rossides' Concrete Plan of Action for Betpress.com

Rossides, DBA betpress.com, is ready to do business within 24 hours – receiving P-bet offers, posting P-bet offers, matching P-bet offers and settling P-

bet contracts – and plans to do business immediately upon a favorable decision enjoining the Defendant from enforcing federal anti-gambling laws against Rossides for First Amendment reasons.

The Internet and betpress.com are interstate media.

Rossides will operate betpress.com interstate.

Most speakers who will use betpress.com reside outside Rossides' state of Arizona.

Rossides has opened a business bank account for holding in escrow funds risked in P-bets posted on betpress.com.

Rossides has established an email address for receiving P-bet offers.

Speakers will be able to submit P-bets offers via email.

Rossides has a U.S. Mail address for receiving funds from speakers.

As shown on betpress.com, speakers will pay, and betpress.com will collect, a \$25 posting fee per Cargo Cult bet offer and per Product and Service bet offer, along with a \$200 deposit per offer. Other fees apply to other kinds of P-bets.

In brief, the procedure for posting and transacting a P-bet is as follows:

- a. a speaker will submit a P-bet offer via email,
- b. a speaker will submit a posting fee and deposit via U.S. Mail,
- c. once the fee and deposit are received, the editors of betpress.com will review the P-bet offer for content to verify that it meets the rules set forth at betpress.com, especially that the P-bet offer does not concern the outcome of a sports event, casino-type game, or lottery,
- d. the editors of betpress.com will confirm the P-bet offer by phone,
- e. upon a successful review, the editors of betpress.com will post the P-bet offer for users to see and respond to with acceptances or counter-offers,
- f. if a P-bet offer is received that accepts (matches) an existing offer then the editors will declare that a P-bet contract has been struck and will post both of the P-bets in a “struck bets” section,
- g. the editors will request the full stakes from the opposing speakers, to be placed in escrow, until the P-bet contract is settled,
- h. a speaker whose stake is not submitted will forfeit his deposit and his P-bet offer will be posted in a section for retracted P-bet offers,
- i. if the stakes are submitted by both opposing speakers, then betpress.com will hold the stakes until betpress.com declares that the question the P-bet is about is resolved, and the P-bet is settled,

- j. betpress.com will then transfer the combined stakes to the winning speaker and post the result of the P-bet,
- k. if the P-bet question cannot be decided, betpress.com will return the stakes to the speakers,
- l. regardless of the outcome, betpress.com will keep the posting fees.

Rossides will prohibit all P-bets concerning sports events, sports contests and pseudo-random number generator games (casino games and lotteries).

As explained above, Betpress.com will use a wire facility in the form of the phone in that, initially, all P-bet offers will be confirmed with speakers by phone. Betpress.com will use a wire facility in the form of the Internet cables that connect its servers to the Internet. Betpress.com will use the U.S. Mail to transfer funds to and from speakers.

Betpress.com requires no more than twenty-four hours to begin posting bets.

Betpress.com will not take any side of any bet, but will only match the P-bet offers of opposing speakers who will be betting against each other.

Rossides has over 20 prospective customers, U.S. citizens, in five states, who have expressed a desire to place P-bet offers on betpress.com for the purpose of communicating their opinions, but only upon a favorable decision enjoining the

Defendant from enforcing federal anti-gambling laws against Rossides for First Amendment reasons.

One of these prospective speakers is Dr. Robin Hanson, an architect of the defunct Policy Analysis (Betting) Market, which was partly funded by the Defense Advance Research Projects Agency.

Rossides has attracted investors who will only invest upon a favorable decision enjoining the Defendant from enforcing federal anti-gambling laws against Rossides for First Amendment reasons. Potential investors are not willing to invest in an operation that will likely be prosecuted.

I. Procedure for Distinguishing P-bets About Questions of Public Interest from P-bets About the Outcomes of Sports, Casino, and Lottery Events

How will Betpress.com reject P-bet offers about the outcomes of sports, casino, and lottery events? Betpress.com will use the same procedure that prosecutors and courts use to interpret terms, to distinguish between anatomical drawings and pornography, between solicited email and spam, between honest criticisms and hate speech, between commercial billboards and political ones, and so forth. The procedure is mysterious, formed from many sub-processes whose mechanics are unknown.

The procedure is called common sense.

There is no mechanical rule for distinguishing between sport/casino/lottery P-bets and public interest P-bets. Thus common sense must be used. Of course, common sense leads, at times, to differences of opinion. In practice, though, it is almost always straightforward to distinguish between a P-bet about the outcome of a sports (or casino or lottery) event – Which team will make it to the Superbowl? Which will win? By how many points? – from a P-bet *genuinely* about a *genuine* question of public interest – What will the federal deficit be in 2010? Will the missile defense system work by 2010? Is an attack ad very misleading according to the editors of the *Columbia Journalism Review*?

J. A Probability Bet Press Enables the *Community* to Communicate in a Novel and Beneficial Way

This brief has discussed beneficial uses of P-bet speech. Let it also point out a very important property that emerges from a P-bet *press*. Through a public P-bet press, such as betpress.com, the *community* of readers can communicate facts and opinions in a novel and beneficial way. The process is mentioned in examples above. To be more explicit here, it works in the following way.

Assume that Joe posts a P-bet that expresses a fact. For instance:

Statement: Hearst School is located at 3950 37th St., NW Wash., DC
Odds: 1-99 (99%)
Stake: \$9,900
Side: TRUE.

Now, any person who wants to accept the P-bet offer must put up \$100. So, \$9,900 is there for the taking, for the mere cost of \$100, provided that the statement is FALSE.

If the statement is TRUE, as Joe asserts by choosing TRUE and offering high odds, then any acceptor will lose the \$100.

Now, assume that Joe's P-bet is seen by hundreds of people, including people that live in the neighborhood of Hearst School. Assume, further, that no one accepts Joe's P-bet offer.

Then the *community* will have spoken – it will have stated that it agrees with Joe, that Hearst School is indeed located at 3950 37th St. NW Washington, DC.

Any person who sees that the P-bet offer has not been accepted can have confidence that it expresses a fact, or at least, can have greater confidence than if Joe had simply posted an address. Here is an address that includes an expression of the community's confidence in a numerical, persuasive way.

Debunking would work the same way, except that numerous people would attempt to accept Joe's offer (a P-bet press will have rules for handling and displaying multiple acceptances of a P-bet offer).

The same principle applies to validating or debunking *opinions*. For example, assume that Joe is the investor relations officer for Pinnacle Holdings, Inc. and that he, personally, makes the following P-bet offer:

Statement: Pinnacle Holdings will *not* go bankrupt by January 2008.
Odds: 1-9 (90%)
Stake: \$10,000
Side: TRUE.

This P-bet offer expresses the idea that there is a 90% probability or greater that Pinnacle Holdings will NOT go bankrupt by January 2007, which is an opinion.

Now, assume that 200 people attempt to accept this P-bet offer, choosing FALSE. And, assume that only 5 people offer to take the same side as Joe, choosing TRUE.

And assume the P-bet press where the P-bet is posted displays how many people have attempted to take each side of the P-bet. The count will be 200 on FALSE to 5 on TRUE; the community will have spoken, in effect, saying that Joe's opinion is hogwash. The community's opinion may turn out to be

incorrect, but that is not the point. The point is that a public P-bet press provides a general and new way for a community to speak.

K. Using P-Bets as Protected, Beneficial Speech Is a Recent Idea

Although the idea of “putting your money where your mouth is” very old, the idea of seriously treating P-bets as forms of speech is quite new. To Appellant’s knowledge, the idea of genuinely³ using bets as protected forms of speech date from Dr. Robin Hanson’s post, *Policy Markets Should Be Free Speech* (<http://hanson.gmu.edu/iffreespeech.html>), of February 7, 1996, and from Rossides’ patent application filed in September of 1994.

As *The Economist* has noted (see page 17), people have only recently begun to study and appreciate information markets⁴, which are related to a P-bet press.

The United States Patent Office (USPTO), an agency of the U.S. government, evaluated Rossides’ invention, *Communications System Using Bets*, and in

³ Court cases exist in which Defendants have attempted to avoid conviction for violating the Wire Act by claiming a First Amendment right to express their opinion on horse races and sporting events, but these claims were not genuine. The Defendants in these cases did not have bona fide speech intent.

⁴ Robert J. Shiller, the noted economist at Yale, provides a list of *nascent* and innovative markets at: <http://www.newfinancialorder.com/weblinks.htm>. Many of these are hedging markets, but some are specifically designed information markets, *the oldest* being the Iowa Electronic Markets, *established in 1988*.

granting a patent found that it was novel as of September 1994, when it was filed. Although the patent library contains thousands of gambling inventions, and systems for placing wagers, the USPTO found no inventions that concerned placing P-bets for the purpose of speech. When a patent is published, the USPTO lists the closest inventions it can find, the references it has used in its finding of novelty. The closest references the USPTO could find to a *Communications System Using Bets* were online and telephone systems for playing the lottery, for playing in card games, for participating in contests, and for playing progressive-pot casino games. None of the references mentions using P-bets for the purpose of speech or communicating messages.

It is a strange historical fact that people have only recently taken seriously the idea that P-bets can be forms of speech that have beneficial uses. It is a strange fact that P-bet speech has only recently been the subject of academic study and invention, but it is a fact.

L. Title 18, Sections 1084, 1952 and 1953

18 U.S.C. § 1084 is a statute that prohibits the transmission of “betting” and “wagering” information, reading in relevant part:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1952 is a statute that prohibits the use of the mail or any facility with intent to operate a “gambling” activity reading in relevant part:

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to...

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform -

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or...

(b) As used in this section (i) "unlawful activity" means

(1) any business enterprise involving gambling...

18 U.S.C. § 1953 is a statute that prohibits the use of any records for the purpose of conducting a “bookmaking” operation reading in relevant part:

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in

(a) bookmaking; or

(b) wagering pools with respect to a sporting event; or

(c) in a numbers, policy, bolita, or similar game

shall be fined under this title or imprisoned for not more than five years or both.

1084, 1952 and 1953 do not prohibit all gambling, betting, wagering or, bookmaking businesses because that is impossible. Any conscious act where resources are risked is a gamble. As Jerry Seinfeld once remarked, “Fruit is a gamble.” Our society depends upon a variety of gambling/betting/wagering instruments, including stocks, bonds, options (“derivatives”), and insurance, all of which are mediated by forms of bookmakers and bookmaking systems.

1084, 1952 and 1953 do not even prohibit all P-bet businesses regarding sporting events or numbers games. P-bets *in all but name* are found in many kinds of insurance policies, such as term life policies, and including policies in which companies gamble on whether a person will hit a hole-in-one or whether a person will win a \$1 billion sweepstakes (see, e.g., www.scapromotions.com⁵).

⁵ “His business is risk management — meaning that for a cut, SCA insures payout on games of luck or skill for promotional contest sponsors such as Coca-Cola or Frito-Lay. This is something like being a bookie, except it's a \$35 million insurance business that's all legal and aboveboard. No legs get broken.”

The creators of the 1084, 1952 and 1953 did not address the question:

Should a press be allowed that enables people to use of P-bets as speech? This question is not in the legislative record because the idea that P-bets can be used as bona fide speech was not appreciated when these Acts were passed.

M. Evidence of the Threat of Prosecution of Rossides Under 1084, 1952 and/or 1953 for Operating Betpress.com

In 1998, federal prosecutors charged Jay Cohen, Steve Schillinger and Hayden Ware, of the World Sports Exchange, with violating the Wire Act (1084) by operating an online sports book offshore. Cohen returned to the United States, was arrested, convicted and sentenced to 21 months in prison. See *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001).

Rossides' concrete, planned actions for betpress.com differ from Cohen's business in only one significant respect regarding the threat of prosecution: Rossides seeks to enable the posting and transacting of P-bets for the primary purpose of enabling people to express facts and opinions about political and commercial questions but not about sporting events, whereas Cohen's business enables bets mainly on sporting events⁶.

⁶ The World Sports Exchange takes sides in bets, like a traditional sports bookmaker. It also offers betting markets in which it does not take a side in a bet. Betpress.com will not take a side in *any* bet.

On November 20, 2002, Mr. John G. Malcolm, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice, said:

“Let me state at the outset that when I refer to on-line gambling, I am including within that definition gambling and gaming of all types, be it casino-type games or sporting events...

In the United Kingdom, as you know, many forms of on-line gambling are permitted...The United States has taken a different approach, opting instead to prohibit on-line gambling....

...there are numerous federal gambling statutes that the Department of Justice has employed against large-scale gambling businesses that operate interstate or internationally.

One such statute is the so-called Wire Act...It is the Department of Justice’s position that this prohibition applies to both sporting events *and other forms of gambling* [emphasis added]...

Other statutes which the Department of Justice has employed against illegal on-line gambling operations would include...Section 1952 of Title 18, United States Code...There is also Section 1953, which prohibits the transmission of wagering paraphernalia, as well as other criminal and civil statutes that can be applied in this context.”

(Special Briefing: Money Laundering and Payment Systems in Online Gambling
Sponsored by World Online Gambling Law Report, London, England,
http://www.cybercrime.gov/JGM_Intgambling.htm)

On March 18, 2003, Mr. Malcolm testified before the Senate Committee on Banking, Housing and Urban Affairs:

“In addition to on-line casino-style gambling sites, there are also numerous off-shore sports books operating telephone betting services. These developments are of great concern to the United States Department

of Justice, particularly because many of these operations are currently accepting bets from United States citizens, when we believe that it is illegal to do so.”

Hearing on Proposals to Regulate Illegal Internet Gambling
http://banking.senate.gov/03_03hr/031803/malcolm.htm

Defendant, in his memorandum supporting his Motion to Dismiss Rossides’ Amended Complaint (submitted 2/24/05), asserted that Rossides’ planned activities are illegal:

“Plaintiff concedes that www.betpress.com is a planned ‘business operation, that is ready to post, match and settle bets.’ That is precisely the type of conduct that 18 U.S.C. §1084, 18 U.S.C. §1952, and 18 U.S.C. §1953 were intended to reach. Thus, the alleged novelty of Plaintiff’s contemplated gambling business does not take it outside the reach of these statutes.

B. This Action Does Not Implicate the First Amendment Because the Challenged Statutes Are Not Directed at Speech or Expression

Plaintiff here attempts to cloak conduct, specifically, the transmission of bets over an interstate wire communication facility, in the protections of the First Amendment by claiming that such conduct is ‘for the purpose of speech – that is, for the purpose of expressing and eliciting opinions’ Am. Complaint ¶ 11” (Mem. p. 10, lines 8-18)

...“Such activity constitutes a violation of the Arizona Criminal Code....P-bets, because they are in furtherance of criminal activity, are therefore afforded no First Amendment protections.” (Mem. p. 13, lines 21-24, cont. p. 14, lines 1-5)

In the course of this case, the government has never disavowed the intention to prosecute Rossides if he operates [betpress.com](http://www.betpress.com). Further, Defendant-Appellee never said there was no credible threat of prosecution.

Several businesses in the U.S. enable people to bet on questions of public interest using play or philanthropic money, but none dare use real money. The Longbets Foundation (www.longbets.org) enables people to make P-bets on questions of public interest⁷, but avoids prosecution by giving the proceeds of the bets to charity. MIT's *Technology Review* offers a play betting market on technology ideas at <http://www.innovationfutures.com/bk/index.html>. The Hollywood Stock Exchange, owned by the bond dealer, Cantor Fitzgerald, enables play money bets in the U.S. and *real* money bets in England. Despite the lucrative possibilities, no business in the U.S. to date will risk the threat of prosecution for facilitating P-bets regarding political and commercial questions.

Rossides has consulted attorneys, including experts in gaming law. All these attorneys indicated that there was a good chance that federal prosecutors would attack Plaintiff's planned activities.

The district court, in dismissing Rossides's Amended Complaint, stated:

“Assuming Plaintiff's proposed business would violate 18 U.S.C. §§ 1084, 1952, or 1953 – an assumption that is not hard to make – it could clearly be regulated without violating Plaintiff's First Amendment rights. Placing bets in a commercial setting is obviously outside the ambient of speech

⁷ “The purpose of the Long Bets Foundation is to improve long-term thinking. Long Bets is a public arena for enjoyably competitive predictions, of interest to society, with philanthropic money at stake. Example: Martin Rees [, the esteemed astronomer,] predicts: **‘By 2020, bioterror or bioerror will lead to one million casualties in a single event.’**” (www.longbets.org)

protected by the Constitution, even if the bets are made on matters of public interest.” (Doc. #34, pgs. 2-3)

N. The First Amendment to the United States Constitution

The First Amendment to the United States Constitution states: “Congress shall make no law...abridging the freedom of speech, or of the press...”

O. Threat of Prosecution Bans Betpress.com, Injures Rossides

Rossides is not willing to commence betpress.com operations and, thereby, risk being arrested, convicted and jailed, as Jay Cohen was, under 1084.

Rossides, likewise, is not willing to commence betpress.com operations because of the credible threat of prosecution under 1952 and 1953.

This threat of prosecution under 1084, 1952 and 1953 effectively bans betpress.com, violates Rossides’ First Amendment right to operate a press, and thereby causes him immediate and ongoing injuries.

P. Existing Advertising Media are Forums for Bets and Bet Speech

Conventional ads are bets because they involve risking money. And, they are speech. Advertising media are the forums where advertisers, political and

commercial, place these speech bets. Sometimes, the ads simply attempt to get a political or sales message across. Other times, the ads seek an immediate sale or contribution, e.g., the Democratic Party might risk \$100,000 on an ad in the *New York Times*, betting the ad will yield contributions exceeding its \$100,000 cost.

When organizations and businesses post P-bets on betpress.com, those P-bets will be usually be political or commercial ads.

By banning a P-bet press, government is telling individuals, businesses, and organizations how to risk their communications budgets. Government is in the position of, for example, telling a restaurant owner that he can risk \$10,000 on a *display ad* about his food, but not on a *P-bet ad* about his food, or telling Proctor & Gamble that it can risk \$1,000,000 on a *plain TV ad* comparing Tide detergent to All detergent, but not on a *P-bet ad* comparing Tide to All.

Thus, the threat of prosecution of betpress.com under 1084, 1952 and 1953 also discriminates against betpress.com in favor of existing presses that enable speech bets that are different from the speech bets enabled by betpress.com. This discrimination also abridges Rossides' freedom of the press.

V. SUMMARY of the ARGUMENT

Appellant's planned business is betpress.com, a press for enabling individuals, businesses and organizations to post and transact P-bets, as defined above, for the purpose of expressing facts and opinions about questions of public interest.

Appellant contends (1) that the First Amendment protects betpress.com from being outlawed by 1084, 1952 and 1953, (2) that he faces a credible threat of prosecution under 1084, 1952 and/or 1953 if he operates betpress.com, and (3) that he has standing to ask the district court for declaratory relief from this prosecution.

First Amendment Protects Probability Bet Speech and Press

A P-bet is a tool that people can use to express facts and opinions. In other words, a P-bet can be used as a form of speech.

Accordingly, when genuinely used for this purpose, a P-bet, and a press that publishes it, should enjoy First Amendment protection.

Now, if one could maintain that P-bets can never be *genuinely* used as speech regarding questions of public interest, then one could maintain that the First Amendment cannot protect P-bet speech or a P-bet press. But, no recognized

scientific or legal theory explains why people can never genuinely use P-bets to express facts and opinions about questions of public interest.

It might be possible to deny First Amendment protection for P-bet speech if one could maintain that this type of speech was “not significantly expressive.” Yet, common sense and abundant evidence (provided throughout the Statement of Facts above) tells us that P-bets *can be* significantly expressive.

The editors of betpress.com will inspect every P-bet offer submitted to see if it concerns sports/casino/lottery events. Editors will use common sense to reject P-bet offers about the outcomes of sports/casino/lottery events. So, betpress.com will operate within the restrictions of 1084, 1952 and 1953.

Common sense enables people – including prosecutors and the courts – to detect many kinds of illegal speech. Common sense, likewise, enables people to detect and reject P-bets about the outcomes of sports/casino/lottery events. If betpress.com fails at this task, it will be prosecuted.

For this reason, betpress.com, and any P-bet press, will have an incentive to avoid even a gray area of enabling people to bet on sports/casino/lottery events.

It should also be noted that, in terms of dollars risked, the biggest users of P-bet speech will likely be organizations and businesses that have no reason to

engage in betting on sports/casino/lottery events, but will have political and commercial reasons to engage in P-bet speech.

Still, P-bets are fraught with financial and addiction risks for certain *individuals*. And, if one knew with a very high degree of confidence that P-bet speech would, on balance, severely damage society as, say, crystal methamphetamine does, then one could perhaps maintain that the First Amendment should never protect P-bet speech. But, the idea of using of P-bets for the purpose of speech is very recent (conceived after 1084, 1952 and 1953 were passed), so society – including academia, legislatures, and the courts – has not developed a body of evidence to judge the value of this form of speech. Any value judgment or prediction at this time is premature.

Given the current state of knowledge, Appellant has, at least, an arguable First Amendment claim. That is, he is “arguably affected with a constitutional interest,” which is critical for standing. See LSO, 205 F.3d at 1154-1155

In the United States, a law not designed to restrict speech can still affect speech. “A governmental regulation is sufficiently justified if it is within the constitutional power of the Government and furthers an important or substantial governmental interest unrelated to the suppression of free expression, and if the

incidental restriction on alleged First Amendment freedom is no greater than is essential to that interest.” *United States v. O’Brien*, 391 U.S. 367, 377 (1968)

1084, 1952, and 1953 are vaguely worded bans on ill-defined, interstate “gambling,” “wagering,” “betting,” and “bookmaking” businesses. 1084, 1952, and 1953 could be worded far more carefully to accomplish their purposes, while protecting the speech use of P-bets.

The enforcement of these statutes against betpress.com, a P-bet press, is an absolute ban of that form of press, and an absolute ban against P-bet speech.

Therefore these statutes burden substantially more speech than is essential to the government’s anti-gambling interests.

In the United States, we do not ban entire forms of speech or press that have beneficial uses. We regulate them, be they magazines, marches, movies, radio stations, or campaign contributions, but we don’t ban them. Accordingly, 1084, 1952, and 1953 should not be enforced against betpress.com because that enforcement would ban an entire form of speech that has beneficial uses and ban an entire form of press that has beneficial uses, thereby violating the First Amendment, and contradicting the court decisions that ensure this freedom.

Credible Threat of Prosecution

Many pieces of evidence lead one to believe that if Rossides operates betpress.com he faces a credible threat of prosecution:

- Jay Cohen was prosecuted and imprisoned for operating an online system that publishes and transacts P-bets on sports events. Betpress.com is a planned online system that will publish and transact P-bets on questions of public interest but not on sports events.
- In his memorandum supporting his Motion to Dismiss Plaintiff's Amended Complaint, the Defendant-Appellee asserted that Plaintiff would clearly violate the law by operating betpress.com.
- In the proceedings, the government never disavowed the threat of prosecution.
- Why have no companies that enable bets on questions of the public interest in England dared operate in the U.S.? A credible threat of prosecution against such businesses appears to be the most reasonable assumption, since opening their websites in the U.S. would cost little.
- The district court stated that, "Assuming Plaintiff's proposed business would violate 18 U.S.C. §§ 1084, 1952, or 1953 – an assumption that is not hard to make – it could clearly be regulated without violating Plaintiff's First

Amendment rights. Placing bets in a commercial setting is obviously outside the ambient of speech protected by the Constitution, even if the bets are made on matters of public interest.” (Doc. #34, pgs. 2-3)

According to Precedent Rossides Should Have Standing

Conley v. Gibson, 355 U.S. 41, 45-46 (1957) provides a test for standing:

"In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

The Ninth Circuit gave specific guidance regarding a complaint in which declaratory relief is sought based upon a First Amendment claim: “Finally, when the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing.” LSO, 205 F.3d at [6]

Given Rossides’ legitimate, arguable First Amendment claim and the credible threat of prosecution against him, these tests for standing mean that Rossides should have standing to ask the district court for declaratory relief.

STANDARD OF REVIEW

Whether the district court properly dismissed Appellant's Amended Complaint, granted Appellee's Motion to Dismiss, and entered judgment on the pleadings in favor of Appellee is a question of law, which this Court reviews de novo. The sub-issues presented – whether a First Amendment claim and a credible threat of prosecution exist – the tests of standing, are questions of law, which this Court reviews de novo (standing is as question of law reviewed de novo). *Carroll v. Nakatani*, 342 F.3d 934, 940 (9th Cir. 2003). *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002).

VI. ARGUMENT

To address the issue of whether Appellant has a First Amendment claim, this Court should answer three foundational questions:

- A. Can people use P-bets to express facts and opinions on questions of public interest?
- B. Can people use P-bets for the *primary* and *genuine* purpose of expressing facts or opinions on questions of public interest?
- C. At this time, can any one judge or predict the value of P-bet speech?

Can People Use P-bets to Express Facts and Opinions on Questions of Public Interest?

The answer to this question is yes. It is a fact, which has been shown in various ways in the Statement of Facts above.

Can People Use P-bets for the *Primary* and *Genuine* Purpose of Expressing a Facts or Opinions on Questions of Public Interest?

This second question may be critical to a First Amendment inquiry because the government has alleged in its Motion to Dismiss Appellant's Amended Complaint that facilitating P-bets can only be "conduct." (Mem. p. 10, 14-18)

As discussed in the Statement of Facts, no recognized theory explains why a P-bet could not be used for the primary and genuine purpose of expressing a fact or opinion. If there is no bar, then it *is* possible to use a P-bet for the primary and genuine purpose of expressing a fact or opinion on a question of public interest.

A hypothetical example will demonstrate. Assume that a non-profit group and publisher, *The Bulletin of the Atomic Scientists*⁸, wants to offer a P-bet on the question of whether the Pentagon's Missile Defense System will work. Could the *Bulletin* make such a P-bet offer for the primary and genuine purpose of expressing its opinion on this question?

Now, assume that a Pentagon official wants to make a P-bet offer on the same question. Could the official make such a P-bet offer for the primary purpose of expressing its opinion on this question?

Yes, the *Bulletin*, the official, and any person or organization could.

Rossides is so sure of this fact that he is willing to make the following P-bet offer:

⁸ The mission of the *Bulletin* is to educate citizens about global security issues, especially the continuing dangers posed by nuclear and other weapons of mass destruction, and the appropriate roles of nuclear technology.

Statement: If H.C. von Baeyer, Robert Lucky, and Steven Pinker⁹ were asked, “Can P-bets be used for the primary and genuine purpose of expressing facts or opinions?,” all three would say, “Yes.”

Side: TRUE

Odds: 1-99

Stake: \$10,000

Appellant asks this Court, if only for demonstration purposes, to seriously consider betting that the statement above is *false*. What odds would this Court give that the statement is false and what stake would this Court risk on FALSE?

Appellant Has an Arguable First Amendment Claim

If one accepts the fact that P-bets can be used to express facts and opinions on matters of public interest, then it seems one should accept that the First Amendment protects P-bet speech.

Yet, it is well established that speech can be restricted if the restriction does not burden more speech than necessary to achieve a legitimate governmental interest. This test is set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).

⁹ Lucky was formerly Executive Director of the Communications Sciences Research Div. at Bell Labs. Baeyer is a physicist and author, most recently of Information: The New Language of Science. Pinker is a professor of psychology at Harvard. Until 2003, he taught in the Dept. of Brain and Cognitive Sciences at MIT. He is the author of The Language Instinct, How the Mind Works, and Words and Rules. Rossides has not communicated with these individuals.

So, one might try to say that *O'Brien* allows the government to ban P-bet speech and a P-bet press (betpress.com).

At this stage in Appellant's case, though, an in-depth "O'Brien analysis" is not warranted. At this stage, the overriding question is whether or not the Appellant has standing.

Therefore the district court and this Court should only be looking at whether Appellant has an *arguable* First Amendment claim, whether he is "arguably affected with a constitutional interest." See LSO, 205 F.3d at 1154-1155

The facts presented above state an arguable First Amendment claim.

Enforcement of the Challenged Statutes Against Bet Press Amounts to an Absolute Ban Against Probability Bet Speech and a Probability Bet Press

If one delves into the O'Brien tests one can ask: Do the challenged statutes restrict P-bet speech?

The answer is plainly yes.

Then one can ask: Does the restriction burden more speech than necessary?

The answer is yes because 1084, 1952, and 1953 are vague and broadly worded. Consequently, their enforcement against betpress.com amounts to an

absolute ban of an entire form of speech, P-bet speech, and an entire form of press, a P-bet press.

These statutes could be worded more narrowly to both accomplish the government's anti-gambling goals and avoid this ban.

One might assert that these statutes cannot be significantly narrowed. But, evidence for such an assertion has not been provided in the record.

At this Time, Can Any One Judge or Predict the Value of P-bet Speech?

Over the years, Rossides has consulted with attorneys informally about whether the First Amendment can protect P-bets used for the purpose of speech. The first attorney was a First Amendment expert. His response was typical. He said (quoting and compressing from unreliable memory), "That's a very interesting idea, Michael, but I don't think it will fly. It sounds like it would drive a Mack Truck through anti-gambling laws."

And so, it may be that one influence that will guide a decision in this case is an unstated, vague prediction, a value judgment. The prediction/judgment is that if P-bet speech is given First Amendment protection, this speech will damage society on balance and wreck anti-gambling laws across the nation.

Yet, if the First Amendment protects P-bet speech on matters of public interest, the nation's anti-gambling laws will still stand; they will still forbid bets on the outcomes of sports, casino, and lottery events. Common sense will enable editors of any P-bet press, and prosecutors, and the courts to distinguish between sports/casino/lottery P-bets and genuine public interest P-bets.

If uneasiness about P-bets speech is an influence on this Court, this Court should confront a third foundational question, namely: At this time, can *any one* judge or predict the value of P-bet speech?

The answer is no.

It is understandable that the government and the courts would be skeptical of allowing P-bets to be used for speech purposes. But, skepticism is not evidence.

As described in the Statement of Facts (sub-section K), the idea of seriously using P-bets for speech purposes is recent, predating the passage of 1084, 1952, and 1953. The invention of a *Communications System Using Bets* is likewise recent. Hence, academia, legislatures, and the courts have not developed a body of evidence to evaluate P-bet speech.

People are only beginning to study the utility of P-bet speech, a P-bet press, and related information markets, as noted in *The Economist* (see page 17).

Rossides and scholars such as Hanson and Sunstein (see pages 17, 18) have put forth plausible reasons why P-bets can, in many applications, provide more useful, more credible, and more accurate information than conventional speech.

Of course, unpredictable, negative consequences will result from a P-bet press as with any speech or communications innovation. But, our nation has shown a capacity to adapt to and benefit from speech and communications innovations, despite the dangers they can bring. It is reasonable to guess that it will adapt to and benefit from a P-bet press as well.

To deny that a First Amendment claim exists for betpress.com, then, one must know for a near certainty that P-bet speech and a P-bet press will be harmful to the society. At this time, such a conclusion requires assumptions outside the bounds of current knowledge – a personal prediction and value judgment not supported by citable evidence.

In this country we do not ban a form of speech based upon personal predictions and value judgments. Substituting imagined dangers for evidence, thereby banning a form of speech is contrary to the theory of our Constitution:

That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be

eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Oliver Wendell Holmes, Jr. (*Abrams v. United States*, 250 U.S. 616 (1919))

This Court should focus on the central, foundational fact it does know for certain: P-bets can be used for the primary, genuine purpose of expressing facts and opinions on questions of public interest.

Given this fact, P-bet speech and a P-bet press should enjoy First Amendment protection, until such time as society finds that protection to be undeserved.

Rossides Faces a Credible Threat of Prosecution

Evidence presented in the Statement of Facts (sub-section M) demonstrates that Rossides faces a credible threat of prosecution if he operates betpress.com. This evidence is summarized below.

Jay Cohen was prosecuted and imprisoned for operating an online system that publishes and transacts P-bets on sports events. Betpress.com is a planned online system that will publish and transact P-bets on subjects and events of public interest but not on sports events.

John G. Malcolm, Deputy Assistant Attorney General has stated, “It is the Department of Justice’s position that this prohibition [1084] applies to both sporting events and other forms of gambling.” (See page 39.)

In its memorandum supporting its Motion to Dismiss Plaintiff’s Amended Complaint, the Defendant, the nation’s top law enforcement officer, asserted that Plaintiff would clearly violate the law by operating betpress.com. For example, Defendant stated that “Plaintiff attempts to cloak conduct, specifically transmission of bets over an interstate wire communications facility, in the protections of the First Amendment...” For another example, Defendant stated that, “P-bets, because they are in furtherance of criminal activity, are therefore afforded no First Amendment protections.” (See page 40.)

At no time has the government disavowed the threat of prosecution.

Companies such as Betfair and Tradesports currently enable bets, including P-bets, on questions of the public interest in England. Despite the possibilities for great profit in the U.S., none of these companies has dared to operate officially in the U.S. A probable prosecution against such businesses is the most reasonable explanation, since opening their websites officially in the U.S. would cost little.

Indeed, why would Rossides not open up shop? It would cost him virtually nothing. It would require far less effort than this court action. Why? He feels that it is virtually certain that he will be prosecuted.

Rossides has inquired of attorney's with expertise in gaming law and none have advised that federal prosecutors would allow betpress.com to operate.

The district court stated in this case that, "Assuming Plaintiff's proposed business would violate 18 U.S.C. §§ 1084, 1952, or 1953 – an assumption that is not hard to make – it could clearly be regulated without violating Plaintiff's First Amendment rights. Placing bets in a commercial setting is obviously outside the ambient of speech protected by the Constitution, even if the bets are made on matters of public interest."

In their totality, these facts and common sense demonstrate that a credible threat of prosecution exists if Rossides proceeds to operate betpress.com.

Indeed, what odds would this Court give that the statement below is true?

Statement: If Rossides operates betpress.com, he will be prosecuted.

According to Precedent Rossides Should Have Standing

Scheuer v. Rhodes, 416 U.S. 232 (1974) supplies the general test of standing:

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

"In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)

In *Babbitt v. Farm Workers*, 442 U.S. 289 (1979), the Supreme Court gave further guidance on standing for cases involving pre-enforcement declaratory relief, where a constitutional claim has been made:

When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

In *LSO v. Stroh*, the Ninth Circuit gave guidance regarding a complaint seeking declaratory relief based upon a First Amendment claim:

[1]...LSO bears the burden of establishing its standing. See *San Diego Gun Rights Comm.v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). To do so, it "must demonstrate three elements constituting the 'irreducible constitutional minimum' of Article III standing." *Id.* First, LSO must show that it has suffered an " 'injury-in-fact' to a legally protected interest that is both 'concrete and particularized' and 'actual and imminent,' as opposed to 'conjectural' or 'hypothetical.' " *Id.* Second, it must show a causal connection between the injury and the conduct complained of. Third, it must be "likely" -- not merely speculative -- that its injury will be "redressed by a favorable decision." See *id.*

[6]...It is sufficient for standing purposes that the plaintiff intends to engage in "a course of conduct arguably affected with a constitutional interest" and that there is a credible threat that the challenged provision will be invoked against the plaintiff. See *Farm Workers*, 442 U.S. at 298

...Finally, when the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing. Thus, when the State of Virginia passed a law banning the display of certain sexually-explicit material where juveniles could examine it, the Supreme Court found that booksellers had standing to object, even though the law had not yet been enforced. See *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 386, 392-93 (1988). The Court explained:

We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without actual prosecution.

Id. at 393. Accordingly, we have noted that the tendency to find standing absent actual, impending enforcement against the plaintiff is stronger "in First Amendment cases, '[f]or free expression--of transcendent value to all society, and not merely to those exercising their rights--might be the loser." *Bland*, 88 F.3d at 736-37 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

Rossides satisfies these tests of standing. He has suffered particularized injuries – he has a concrete plan of action for his betpress.com which, if put into effect, will cause him to face a credible threat of prosecution by the Defendant-Appellee under the challenged statutes, and this threat also violates his freedom of the press. These injuries will be redressed by a favorable decision in the district court.

The district court disagreed on one point, saying that Rossides, “fails to raise a colorable claim of constitutional right.” (Doc. #34, p. 2) However, the district court supplied no explanation for this judgment.

Rossides re-alleges the Facts above and re-affirms the Arguments above. He has a legitimate First Amendment claim and he faces a credible threat of prosecution. Therefore this Court should find that Rossides has standing to bring his request for declaratory relief in district court.

VII. CONCLUSION

Rossides has a First Amendment right to operate betpress.com.

Rossides faces a credible threat of prosecution by the Appellee Gonzales, the United States Attorney General, if he operates betpress.com.

Rossides is injured by this threat of prosecution, which prevents him from operating betpress.com and which abridges his freedom of the press.

Therefore Rossides should have standing to plead his case in district court.

Rossides asks this Appeals Court to reverse the district court's finding of lack of standing and remand the case to the district court for hearing.

Respectfully submitted this 9th day of September 2005,

Michael T. Rossides, Pro Se
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CERTIFICATE of COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the forgoing Appellant Rossides' Opening Brief is proportionally spaced, is double-spaced, has a typeface of 14 points, and is 11,393 words long.

STATEMENT of RELATED CASES

The case on review has not previously been before this Court or any other court. Appellant is unaware of any other related cases currently pending in this Court or in any other court.

CERTIFICATE of SERVICE

COPY of the foregoing mailed this 9th day of February 2020 to:

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