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' REPLY BRIEF

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INTRODUCTION

In his Opening Brief Gonzales asks this court to dismiss this case for a variety of reasons. This Reply Brief will analyze several of these reasons, however, for brevity's sake, it will not address all the reasons Rossides disagrees with. As an example, Rossides disagrees with Gonzales' assertions regarding ripeness, but Rossides has nothing to add on this subject to his Opening Brief.

This Reply will state the foundational facts that this Court should consider when making its decision.

This Reply will then ask this Court to ignore untested speculations about the possible harms of a probability bet press.

Note: the term *challenged statutes* will be used throughout this Reply to refer to U.S.C. 18 §§1084, 1952, and 1953.

ARGUMENT

A. ANALYSIS of GONZALES' REASONS to DISMISS

1. Is it reasonable to believe that Gonzales considers Rossides similarly situated to Cohen (or to Mendelsohn, Truchinski, Villano, or Cerone)?

Gonzales states that the first issue of the case is "Whether a plaintiff has standing to bring a constitutional challenge to a federal criminal statute when he does not allege…that the statute has been enforced against similarly situated individuals." (G. Br. 2) Rossides, he says, "has identified no history of enforcement of the statute against others engaging in conduct similar to his" (G. Br. 9-10) and he adds,

> "Nor does the history of enforcement of this statute suggest that Rossides faces the threat of prosecution. The only example Rossides gives is the prosecution of Jay Cohen and others under Section 1084 for 'operating an online sports book,' but he disavows any similarity between his proposed conduct and Cohen's when he explains that 'the P-bets on betpress.com will not involve sports events.'" (G. Br. 14-15)

That is inaccurate. Rossides did not disavow any similarity; he alleged that he was very similarly situated to Cohen:

> 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…on sporting events[1]. (R. Br. 38)

It's true that Rossides views this difference as a crucial, constitutionally protected difference.

But, what matters for a credible threat of prosecution is not Rossides' view any more than the view of a random person on the street. What matters is the view of Gonzales, the government's chief law enforcement officer. The question is: Does Gonzales consider Rossides similarly situated to Cohen?

This question then boils down to: Does Gonzales consider Cohen's enabling of sports P-bets to be constitutionally different from Rossides' proposed enabling of public interest P-bets for speech purposes?

Common sense indicates that it is reasonable to believe that Gonzales would hold that there is no difference.

Beyond common sense, there are specific pieces of evidence described in Rossides' Amended Complaint and Opening Brief (see R. Br. 38-42).

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[1] Mirroring language in his Amended Complaint in the district court, "81. Plaintiff's concrete, planned actions for betpress.com are *very* similar to Cohen's activities…" (Am. Compl. 24) and in his Responsive Memorandum, "Plaintiff's planned actions for betpress.com differ from Cohen's business in only one significant respect regarding the threat of prosecution…" (Mem. 3)

And beyond this evidence, Gonzales himself in his Opening Brief says there is no constitutional difference, stating, "Rossides's First Amendment claims are so wholly insubstantial that they do not raise a genuine federal question" (G. Br. 10) and elaborating, "As we demonstrate below, Rossides's First Amendment claims are entirely insubstantial." (G. Br. 18) In addition, the Attorney General, in his Memorandum supporting his Motion to Dismiss Plaintiff's Amended Complaint, stated, "Plaintiff attempts to cloak conduct…in the protections of the First Amendment…" (Mem. 10, lines 14-16)

Thus, it appears the Attorney General considers Cohen and Rossides to be *identically* situated because he recognizes no constitutional difference, believing that Rossides' claims of a constitutional difference are a cloak, a smokescreen.

Furthermore, in his brief Gonzales goes on to cite precedents that he says apply to this case. He lists *United States* v. *Mendelsohn*, *Truchinski* v. *United States*, *United States* v. *Villano*, and *United States* v. *Cerone* (G. Br. 19-20).

Now, if he maintains that these decisions are precedents, then by the definition of precedent[2] he must believe Rossides' issue and scenario are similar to those of the defendants in those cases. (The scenarios of the defendants in

[2] "To serve as a precedent for a current case, a prior decision must have a similar legal issue and a similar factual scenario." (*Harvard Law School Online Dictionary for New Students*).

those cases were actually somewhat less similar to Rossides' scenario than was Cohen's scenario, which is why Rossides' Amended Complaint and Opening Brief focused on the Cohen prosecution and conviction).

Moreover, in the district court the Attorney General used the word *similar*, stating, "Numerous courts…have upheld the criminal statutes at issue here against similar First Amendment challenges." (Mem. 8, lines 22-24)

Finally, let us note that at no time has the Attorney General disavowed the similarity or the threat of prosecution. He has merely maintained that Rossides' allegations of similarity and the threat of prosecution were defective.

So, common sense, the evidence presented by Rossides in this case, and the government's own statements and arguments in this case show that it is reasonable to believe that Rossides *in the eyes of the government* is similarly situated to Cohen and to a slew of other people who were prosecuted and convicted[3] for enabling interstate gambling on the outcome of sports events. Therefore, Rossides faces a credible threat of prosecution.

[3] Separately, let us also note that the district court's terse statement in its decision in this case – "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) – is evidence that Rossides also faces the *probable* threat of *conviction* if prosecuted.

Apparently, according to the government, the only way Rossides can have standing is to enable P-bets and invite criminal prosecution.

Given the government's position that Rossides' betpress.com is equivalent to an online sports book operation, it is reasonable to believe that the probability of prosecution is extremely high (Rossides believes it is above 90%).

And, flouting the challenged statutes is not like picketing on a sidewalk illegally where one might face an afternoon in jail. The government is zealous in enforcing its laws against interstate bookmaking on U.S. soil and the penalties are *severe*: Cohen, for instance, spent 21 months in prison.

As Gonzales knows, under these circumstances, it would be extremely foolish for Rossides to enable bets on betpress.com.

Thus the government's standing argument should fail. It is an attempt to preemptively shut down Rossides' press business and to preemptively immunize the challenged statutes from Rossides' legitimate First Amendment claims.

2. Precedents cited by Gonzales concern enabling betting on sports events.

Gonzales cites *United States* v. *Mendelsohn*, 896 F.2d 1183 (9th Circuit 1990) as the controlling precedent. And, according to Gonzales, Mendelsohn "rests on the premise that the activity of gambling itself is not protected by the First Amendment." (G. Br. 19). Gonzales continues,

> "Indeed, every court of appeals to have considered the question has upheld the specific statutes at issue here against First Amendment challenge. See, e.g., *Truchinski v. United States*, 393 F.2d 627, 634 (8th Cir. 1968) (Section 1084); *United States v. Villano* 529 F.2d 1046, 1055 (10th Cir.) 1976 (Section 1952); *United States v. Cerone*, 452 F. 2d 274, 286 (7th Cir. 1971) (Section 1952)." (G. Br. 19)

In fact, the cited decisions do not concern gambling enablement in general, but instead concern a highly specific, very narrow type of gambling enablement – the enablement of betting on the outcomes of sports events:

- "Mendelsohn and Bentsen mailed a computer floppy disk from Las Vegas, Nevada to California, to one Michael Felix, an undercover policeman posing as a bookmaker. The disk was encoded with a computer program called SOAP (Sports Office Accounting Program)." (*United States* v. *Mendelsohn*, Background section)

- "Tommy Truchinski was found guilty…on two counts of an indictment charging him with violation of 18 U.S.C. § 1084(a), n1 using the telephone…to transmit information assisting in the placing of bets on sporting events." (*Truchinski* v. *United States*, Introduction)

- "Villano handled substantial betting on football and basketball games…" (*United States* v. *Villano*, Sufficiency of the Evidence section)

- "Angelini's first amendment argument is, in essence, that, since newspapers and other media frequently report predictions as to the outcomes of various athletic events…Angelini's telephonic communication of such information is similarly protected..." (*United States* v. *Cerone*, Section II second paragraph)

It is true that the defendants in these cases, sports bookmakers or sports bookmaker enablers, tried to cloak themselves in the protections of the First Amendment. But, the courts saw through to the subject and purpose of the betting that was being enabled. And, their decisions validated the idea that enabling betting on the outcomes of sports events was and is illegal.

Not one of these decisions mentions political speech. (Nor did the defendants claim that they were attempting to communicate political opinions or enable the communication of political opinions.)

The question before this Court differs from the questions before the courts in the decisions Gonzales cited. It is whether or not the First Amendment protects Rossides' betpress.com enabling of people and organizations to use P-bets for the *bona fide* purpose of communicating facts and opinions to the public on issues of political and commercial interest. To repeat, the cited decisions do not discuss these bona fide speech uses of P-bets.

3. Gonzales supports the contention that a probability bet press is novel.

Gonzales pursues his view on precedent by saying, "Rossides has identified no authority suggesting that the First Amendment protects gambling, and we are aware of none." (G. Br. 20) He cites more decisions, including one from 1821 to show a history of the regulation of certain kinds of gambling, pointing out that "over a century ago, the Supreme Court upheld the power of Congress to prohibit the transmission of lottery tickets in interstate commerce." (G. Br. 20)

But none of his citations concern the use of P-bets or of a P-bet press for bona fide speech purposes, such as political speech purposes.

If Gonzales could have found a decision that was really on point – one that described or even mentioned P-bets used for political speech – he would have cited that decision.

Thus, Gonzales simply confirms a major contention in Rossides' Opening Brief: that the idea that P-bets and a P-bet press can be used for beneficial speech purposes is recent, and further, that this idea has not been contemplated by Congress or the courts. (R. Br. 34-35)

Rossides challenges Gonzales to produce a decision or any piece of the legislative record that discusses the bona fide political speech uses of P-bets.

4. With no supporting evidence, Gonzales makes a crucial empirical claim about the efficacy of the speech uses of bets.

Gonzales maintains that the "statutes at issue in this case raise no First Amendment issue because they regulate conduct, not speech." Gonzales appears to believe that P-bets can be used *solely* as tools of conduct[4]. He further believes that P-bet conduct cannot involve First Amendment issues. He begins with the Supreme Court's guidance concerning whether conduct constitutes speech:

> "To decide 'whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play,' the Supreme Court has asked 'whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it'' *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence* v. *Washington*, 418 U.S. 405, 410-411 (1974); see also *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984)" (G. Br 23).

Then, he makes a broad empirical assertion: "It is doubtful that those making a bet intend for their conduct to be communicative in any meaningful sense, or that it would be so perceived by those viewing it." (G. Br 23)

We will analyze this assertion at some length because it is the core belief of Gonzales' argument that P-bets cannot be used as vehicles of communication.

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[4] Rossides does not accept Gonzales' position that P-bets can only be used for "conduct." Rossides believes they can be used as forms of speech, which, like most forms of speech, require some kind of conduct. However, here this Reply Brief follows Gonzales' position in order to analyze Gonzales' reasoning.

What is the source of this empirical assertion? What text on information theory, psychology, decision theory, or economics provides support? What experiments have been conducted to confirm or falsify this broad statement?

If one is going to assert such a novel and broad empirical theory, one should cite evidence of confirming experiments or at least pose experiments that can confirm or falsify the theory. Gonzales provides none of these.

His assertion is flawed for reasons in addition to the absence of supporting evidence. First, it is vague and sweeping with no factual context – no particular speakers or audiences, or topics of the bets. Second, it is equivalent to positing a new theory of individual and group psychology, to wit, that human beings, and organizations of human beings, cannot intentionally make P-bet offers for the purpose of communicating. Third, it is equivalent to positing a new theory of information, to wit, that "it is doubtful" human readers would divine the speaker's message in a P-bet offer.

Moreover, the phrase "it is doubtful" covers a wide range of probabilities, anywhere from "the probability is virtually zero" to "the probability is near 50%." What probability figure would Gonzales substitute for "it is doubtful"? And on what basis?

In reality, Gonzales' core assertion is a pseudo-theory, which a hypothetical example can expose. Assume the Sierra Club makes a P-bet offer on betpress.com about whether the average temperature at the surface of the oceans will be higher in 2006 than in 2005. Assume the Sierra Club offers to bet $1,000,000 at even odds on TRUE that temperatures will be higher in 2006, and challenges only[5] members of Congress to accept this offer.

Now, would Gonzales maintain that he somehow knows the Sierra Club's *intent* in making such a P-bet offer? And would Gonzales maintain that he knows how readers of betpress.com would interpret this offer – an offer *not* intended for them, but only for members of Congress?

If Gonzales has a mind reading machine, let him show it.

Let us note, as well, that Gonzales' assertion contradicts a decades old pillar of economics, decision science, and philosophy: that the way a person bets in a probability bet reflects that person's subjective probability estimate on the topic of the bet. This idea is old; no one can say how old, but it was formalized beginning in 1926 in the classic *Truth and Probability* by Frank Ramsey:

[5] As disclosed in Rossides' *Communications System Using Bets* patents, speakers using such a system will be able to direct P-bets to specific individuals such that only those individuals will be allowed to accept the bets. A speaker might want to make this kind of P-bet offer to challenge another specific person to reveal his honest opinion by accepting or refusing the bet offer.

- "Ramsey's main achievement in 'Truth and Probability' is his probability measure of the strength (degree) of a belief. This starts from 'the old-established way of measuring a person's belief, [that is,] to propose a bet, and see what are the lowest odds which he will accept' (1990a: 68)…. Ramsey derives measures…of beliefs (subjective probabilities), thereby founding the now standard use of these concepts (see Decision and game theory)." (D. H. Mellor, *Probability and Knowledge*, Routledge Encycl. of Philosophy, www.rep.routledge.com/article/DD056SECT2)

- "The subjective nature of probability assignments can be made clearer by thinking of situations like a horse race…The basic idea behind the Ramsey-de Finetti derivation is that by *observing* the bets people make, one can presume this reflects their *personal beliefs* on the outcome of the race." (Gonçalo L. Fonseca, History of Economic Thought Website, http://cepa.newschool.edu/het/essays/uncert/subjective.htm)

- "Finally, the idea of analyzing rational degrees of belief in terms of rational betting behavior led to the 20th century development of a new kind of decision theory, *Bayesian decision theory*, which is now the dominant theoretical model for the both the descriptive and normative analysis of decisions." (*Bayesian Epistemology*, Stanford Encyclopeida of Philosophy, http://plato.stanford.edu/entries/epistemology-bayesian/)

The theory that a person's bet offers and acceptances reflect a person's beliefs is one inspiration for the recent innovation of information markets in which people trade securities whose prices reflect the traders' subjective probabilities that events will occur. Google is a recent company to try these markets:

> "Google has created a predictive market system, basically a way for its employees to bet on the likelihood of possible events....
>
> To help develop the system, Google consulted Hal R. Varian, an economist at the University of California, Berkeley…

> 'I was a little surprised,' Professor Varian said. 'I expected this to be accurate because there's a lot of literature and experience with these systems. But this has been even better than I expected.'
>
> …The market is based on the idea that a price established for an event will reflect bettors' consensus of the likelihood that it will happen. Thus, something priced at 20 cents should happen 20 percent of the time. The system accepts bets in 10-cent increments up to a dollar (no actual money is involved)." (Ian Austen, *At Google, Workers Are Placing Their Bets*, *New York Times*, 9/26/05)

So, not only can P-bets theoretically be used to provide useful information, but they also *do* provide that information in real world applications[6].

[6] Betpress.com will not operate as an information market that uses virtual securities to create P-bets. Instead, betpress.com will enable more direct P-bets in which people make statements and then state odds that those statements are true or false. Although there are very significant operational differences between betpress.com and information markets, fundamentally both enable P-bets.

5. Gonzales provides no evidence for his key O'Brien test assertion. O'Brien analysis is arguable; hence Rossides has an arguable constitutional claim.

Gonzales says, "[of] course, even if the conduct regulated by these statutes did have enough of an expressive component to make the First Amendment applicable, the statutes would still be valid" (G. Br. 24) because they satisfy all four elements of the *O'Brien* test.

The key element of this test is the fourth one which states that "a government regulation is sufficiently justified if…the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (*United States* v. *O'Brien*, 391 U.S. at 377)

So, Gonzales says, regarding P-bet speech and a P-bet press (betpress.com), "Fourth, any restriction on expression is no broader than necessary to achieve the government's interest. Nothing in the statutes precludes individuals from expressing their opinions on any subject even if they do so in the form of a probability statement." (G. Br. 25)

This assertion is a *personal opinion* saying that it is okay to ban one form of speech, P-bet speech, because another form, ordinary probability statements, exists. That's like saying that it's okay to ban posters because pamphlets exist. In this country, we don't ban a form of speech because others exist.

Gonzales' personal opinion is fundamentally flawed for other reasons:

(a) It has no support. He says, "any restriction on [P-bet] expression is no broader than necessary to achieve the government's interest," but how does he know? Where did he find this fact? He cites no evidence, no legal doctrine, and no scientific theory to back up his opinion.

(b) It assumes knowledge of the future of P-bet speech and a P-bet press. At this time, these are nascent innovations. How, then, can Gonzales or anyone even guess at the future[7] amount or value of speech being restricted, especially when P-bets can be used to make statements about virtually any subject? Indeed, this is an empirical matter that should be answered by experimentation, by permitting a P-bet press to operate and then seeing how it, perhaps, needs to be regulated. However, if one is unwilling to practice the scientific method, then, one is left only with argumentation. And, in this event, as to the question, how broad is the speech restriction? This is an arguable matter.

[7] According to legend, when the prime minister visited Faraday's lab to witness magnetic induction – the basic means by which electricity is generated today – he asked, "But of what use is it?" Faraday replied, "I don't know sir, but I am sure you will find a way to put a tax on it." (D. Goodstein, *Out of Gas*, 63-64)

(c) It assumes a universally agreed upon meaning of the *government's interests* in the challenged statutes. Gonzales' opinion assumes that he knows with some precision what the government's interests are. But, these interests have been the subjects of much debate[8]. How should the interests of these statutes be *interpreted*? This is an arguable matter.

(d) It just assumes that the challenged statutes are "no broader than necessary" – that they cannot be more narrowly *written* to describe their aims more clearly. How does he know that the statutes cannot be *written* with more specific language, e.g., with a list of the specific[9] gambling, wagering, and betting businesses that the government seeks to prohibit? Can the statutes be drafted more narrowly? This is an arguable matter.

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[8] For instance, the district court, in its decision dismissing Rossides' Initial Complaint in this case, discussed the vagueness of the Wire Act. "Plaintiff may also have to facilitate bets or wagers on a 'sporting event or contest' to violate the act (U.S.C. §1084(a))…Neither 'sporting event' nor 'contest' are defined in the statute…See, e.g., Jonathan Gottfried, *The Federal Framework for Internet Gambling*, 10 Rich. J.L. & Tech 26, 46 (2004)….Thus, the illegality of Plaintiff's activities may turn on the nature of the bets, which the Complaint does not clearly identify…Plaintiff will be given leave to amend his Complaint so he can plead with more specificity. If Defendant moves to dismiss an Amended Complaint, it would be helpful for Defendant to address the substantive reach of the Wire Act."

[9] An example of a narrower act is the Controlled Substances Act that names specific controlled substances. One could likewise name specified gambling games and specified uses of gambling games that are prohibited.

Thus, whether the challenged statutes, in this case, satisfy the fourth element of the O'Brien test is certainly not a settled matter. It is an *arguable* matter.

Therefore, Rossides has an *arguable* constitutional claim.

And, therefore, he satisfies that requirement for standing.

6. Gonzales says that bets, if speech, can only be commercial speech.

Gonzales then argues that even if some uses of P-bets can be considered speech, they can only be considered commercial speech.

To prove his assertion, he proposes a definition of commercial speech. "Commercial speech includes any 'speech proposing a commercial transaction.' *Washington Mercantile Ass'n* v. *Williams*, 733 F.2d 687, 689 (9th Cir. 1984) (quoting[10] *Central Hudson Gas & Electric Corp.* v. *Public Serv. Commission of New York*, 447 U.S. 557, 562) (1980)." (G. Br. 25)

Then he points out, "For commercial speech to be protected, 'it at least must concern lawful activity.'" (ibid. at 563-64) (G. Br. 26)

Then he concludes, "Here, the alleged speech is not protected by the First Amendment because it concerns unlawful activity." (G. Br. 26).

There are two of problems with this reasoning.

First, it is circular. It really begins and ends with Gonzales' controversial assumption that a P-bet press's activities are unlawful. Gonzales assumes that using a P-bet press is unlawful under the challenged statutes. And, he says that

[10] This definition originates in *Ohralik* v. *Ohio State Bar Assn*., 436 U.S. 447, 455.

according to *Central Hudson* the First Amendment does not protect a P-bet press because this press's activities are unlawful. That is circular reasoning.

If he is going to assume illegality, citing *Central Hudson* adds nothing.

The second problem with Gonzales' reasoning is that its initial definition of commercial speech purports to be comprehensive, but it is not so.

In fact, *Central Hudson* contains another definition[11] of commercial speech – "commercial speech, that is, expression related *solely* to the economic interests of the speaker and its audience." (*ibid.* at Section II, first paragraph.)

P-bets about questions of public interest are usually not related solely to the economic interests of the speaker and its audience. Hence, according to this other definition, P-bets are *not* always commercial speech.

Whether a P-bet is commercial speech will depend upon its subject matter – what it is related to – and upon its purpose.

Political speech is speech that aims to inform the public about political matters, that aims to shape public opinions, that aims to influence elections, and so forth. P-bets certainly can be used for political speech purposes, as various examples in Rossides' Opening Brief, this Reply Brief, and betpress.com show.

[11] Any short definition of a complex idea like commercial speech will be flawed.

Returning to the question of commercial speech, let us consider a concrete, example that shows that P-bets can be about commercial matters – marketplace issues – but at the same time *not be* advertising from a company to prospects.

Assume an individual wants to offer the following P-bet to debunk the fraudulent notion that taking garlic supplements decreases ones chances of getting a heart attack. Assume the speaker wants to say in betpress.com:

Statement:	If one asks a randomly picked cardiologist at Johns Hopkins Hospital or Massachusetts General Hospital whether taking Garlique tablets will decrease ones chances of a heart attack or stroke, she will say, "no."
Odds:	1-9 (90%)
Side picked:	TRUE
Stake risked:	$90,000
Directed to:	CEO of Chattem Corp.

The speaker demonstrates that he believes the probability is greater than 90% that a randomly selected cardiologist from a respected hospital will debunk Garlique. Now, if the CEO of Chattem, maker of Garlique, refuses to accept this offer – picking the side of FALSE and grabbing an easy $90,000 while putting only $10,000 at risk – then the CEO will reveal *to the public* that he believes the benefits of own product are bogus and that his own advertising is bogus.

This particular P-bet, then, is a debunking ad[12] penned by an individual, and published in betpress, but it is not advertising by a vendor to a prospect.

Note, too, that this kind of attack ad, where the speaker is expressing a truth, poses no financial risk to the speaker. That is because, *in a P-bet, if the speaker is betting on the side of a truth, then the speaker has no risk of a loss.*

This example shows that a P-bet press can be used for beneficial commercial speech that can improve the flow of information in the marketplace. A P-bet press used for this purpose deserves First Amendment protection.

[12] One rarely sees ads by individuals attacking misleading product pitches because such ads currently cost a lot and offer no financial reward for individuals. With a P-bet press, such ads would cost little and thus could become common, thereby improving the quality of information in the marketplace.

7. Money enables credibility in probability bet speech.

Gonzales does touch on the issue of the role of money in speech. Let us, then, briefly explore the role of money *in P-bet speech*.

One can argue whether P-bet speech is "expressive conduct," or whether it is a form of "speech that requires money." Either formulation is acceptable, for there is no law of nature or logic that makes a distinction. Both formulations lead to the conclusion that P-bet speech and a P-bet press deserve First Amendment protection because P-bets – regardless of how we describe them – can be used as potent vehicles of information and communication.

Still, Rossides feels that thinking of P-bet speech as "speech that requires money" tells us more about how P-bets can be used to inform and communicate.

What, then, is the role of money in P-bet speech? In certain circumstances, the amount of money a speaker is willing to risk in a P-bet *enables credibility*. Credibility in turn enables the speech in the P-bet, that is, enables the speech to be believed by recipients, enables the speech to be heard.

This reality is analogous to the role money plays in many kinds of public speech, a reality recognized in *Buckley* v. *Valeo* 424 U.S. 1. and related cases:

Buckley's General Principles (A) states:

> "Even if the categorization of the expenditure of money as conduct were accepted, the limitations challenged here would not meet the O'Brien test because the governmental interests advanced in support of the Act involve 'suppressing communication.'…
>
> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money…"

As Justice Stephen Breyer put it, commenting on decisions regarding campaign finance reform,

> "Money is not speech, it is money. But the expenditure of money enables speech, and that expenditure of money is often necessary to communicate a message, particularly in a political context. A law that forbade the expenditure of money to communicate could effectively suppress the message." (S. Breyer, *Active Liberty*, p. 46, Knopf, 2005)

So, if one wants to connect the controversy in this case to past decisions, the best place to start seems to be decisions about campaign finance reform that directly address the role of money in public speech.

There are no laws of information or psychology that can tell us exactly when and where and how much credibility will be provided by an amount of money risked in a P-bet, but we intuitively feel that when a person or group risks a substantial sum, then, on average, the speaker is not being dishonestly optimistic

in stating the odds in the bet, because over-optimism in the odds costs the speaker money in the long run (see R. Br. 21).

Separately, we also know that if a P-bet offer is published in a P-bet press, the public can then validate or debunk the information expressed in the offer (see R. Br. 31-34).

Thus the money in P-bets can enable the messages in P-bets to be more believable and more informative than ordinary probability statements. Banning a P-bet press would utterly suppress those messages.

B. WHAT WE KNOW with 99.999+% CERTAINTY – the FOUNDATIONS

Let us step back from all the point-counterpoint and look through to the foundations of this case. We know four fundamental facts to a virtual certainty:

Fact 1. We know that a probability bet is a multi-purpose[13] tool.

Fact 2. We know that a person can use a probability bet as a tool of speech for the genuine purpose of communicating a fact or opinion to the public through the medium of an enabling system (a P-bet press).

Fact 3. We know that the First Amendment states, "Congress shall make no law…abridging the freedom of speech, or of the press…"

Fact 4. We know that we cannot, at this time, judge or estimate the social value of using probability bets as tools for publicly communicating facts and opinions.

These facts are the foundation truths of this case. This Court should keep them in mind as it makes its decision.

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[13] A P-bet is a general set of rules that can be adapted for very different purposes. For instance, it can be used for entertainment, as it is in sports books and casino games. And, it can be used to protect against risk of loss, as it is in insurance. (See R. Br. 37 and Am. Compl. 23, line 18, and Resp. Mem. 7, lines 1-6.) The insurance use of P-bets, considered socially beneficial, dwarfs all other uses.

C. PANDORA'S BOX PROBLEM

Despite the facts above, this Court may be reluctant to grant standing to Rossides because of the fear that doing so may eventually open a Pandora's box, unleashing an epidemic of betting, or some other imagined ill, upon the country.

Needless to say, a decision in this case should not be based upon guesses about the negative consequences of a speech innovation.

Perhaps it will give this Court comfort to recall that the U.K. has, for decades, allowed P-bets between adults on virtually any topic, via a bookmaker. The U.K. is healthy and, not surprisingly, has become the world leader in the nascent field of information markets, with companies like Betfair and Intrade.

Rossides' Opening Brief stated, "In the United States, we do not ban entire forms of speech or press that have beneficial uses." (R. Br. 47)

If this Court accepts the government's standing argument, this Court will accept that the government can ban the beneficial uses of P-bet speech and a P-bet press under laws that were written to prevent interstate sports betting and lottery ticket selling operations.

That would be a sad outcome for this free speech nation.

CONCLUSION

For the reasons given above and in Appellant's Opening Brief, Rossides has a legitimate First Amendment claim and he faces a credible threat of prosecution. He is presently injured by this threat of prosecution, which prevents him from operating betpress.com and which abridges his freedom of the press. Therefore this Court should find that Rossides has standing to bring his request for declaratory relief in district court.

Respectfully submitted this 26th day of October 2005,

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CERTIFICATE of COMPLIANCE

I certify that the foregoing Appellant Rossides' Reply Brief is proportionally spaced, is double-spaced, has a typeface of 14 points, and is 4,673 words long.

CERTIFICATE of SERVICE

COPY of the foregoing mailed this 26th day of February 2020 to:

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