No. 05-16238

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL T. ROSSIDES,
Plaintiff-Appellant,

v.

ALBERTO R. GONZALES, Attorney General,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLEE

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STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331. Plaintiff has appealed from a final judgment, so this Court has jurisdiction under 28 U.S.C. § 1291. The district court entered judgment on May 26, 2005, *see* Excerpts of Record ("E.R.") 58, and plaintiff filed a notice of appeal on June 22, 2005, *see* E.R. 59, which was timely under Federal Rule of Appellate Procedure 4(A)(1)(B).

STATEMENT OF THE ISSUES

1. Whether a plaintiff has standing to bring a constitutional challenge to a federal criminal statute when he does not allege that he has been prosecuted or received any specific threat or warning of prosecution or that the statute has been enforced against similarly situated individuals.

2. Whether a constitutional challenge to a criminal statute is ripe when the plaintiff does not allege that he has been prosecuted or received any specific threat or warning of prosecution or that the statute has been enforced against similarly situated individuals.

3. Whether, consistent with the First Amendment, Congress may prohibit internet gambling.

STATEMENT OF THE CASE

Plaintiff Michael Rossides wishes to operate a commercial web site on which people may place bets. He asserts that such betting is protected by the First Amendment when bets are placed on matters of public interest. He brought this action seeking a declaration that the application to him of 18 U.S.C. §§ 1084, 1952, and 1953—statutes that prohibit internet gambling—would be unconstitutional. In his complaint, he did not allege that any government official

had threatened him with prosecution. The government moved to dismiss for lack of standing. The district court granted the motion to dismiss, and Rossides appealed.

STATEMENT OF FACTS

A. Statutory Background

This case involves three federal criminal statutes that relate to gambling. First, 18 U.S.C. § 1084(a) prohibits anyone "engaged in the business of betting or wagering" from

> knowingly us[ing] 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.

Second, 18 U.S.C. § 1952 prohibits using the mail or any facilities in interstate or foreign commerce to

> promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on of . . . any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed or of the United States.

Third, 18 U.S.C. § 1953(a) makes it unlawful, with certain exceptions, for anyone other than "a common carrier in the usual course of its business" to

> knowingly carr[y] or sen[d] 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.

B. Facts and Prior Proceedings

1. Plaintiff Michael Rossides operates a web site, www.betpress.com. *See* E.R. 2. According to his complaint, he wishes to use this web site "to enable anyone to post and transact bets publicly." E.R. 9. Specifically, he wishes to provide a venue for customers to make what he calls "probability bets" or "P-bets." E.R. 4. To place a "P-bet," a bettor "[m]akes a statement that can be found true or false," "[s]tates the odds," "[m]akes a choice of TRUE or FALSE," and "[o]ffers to risk an amount of money—a stake—to be given to an opposing bettor if the opposing bettor's choice of TRUE or FALSE turns out to be correct." *Ibid.* For example, a bettor might say, "'It will rain tomorrow.' I will risk $25,000[at] 1-9 odds (90% chance) [on] TRUE." E.R. 7. Rossides explains that a person placing a P-bet makes an offer, and the acceptance of a P-bet by another bettor creates an agreement. *See* E.R. 5.

According to the complaint, Rossides "will not solicit or enable real P-bets to be posted" on his web site because he fears prosecution under 18 U.S.C.

§ 1084(a). E.R. 11. Rossides therefore sought a declaratory judgment "that 18 U.S.C. § 1084 is unconstitutional with regard to bets used as speech" and an injunction preventing the government from enforcing the statute "against persons who use bets as speech and who provide a forum for using bets as speech." E.R. 14.

2. The government moved to dismiss for lack of jurisdiction, and the district court granted the motion. The court cited *Thomas* v. *Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (*en banc*), for the proposition that a fear of prosecution does not establish standing unless the plaintiff "prove[s] that he 1) has a concrete plan to engage in proscribed conduct; 2) has been the recipient of a specific threat of prosecution; and 3) that the statute has an enforcement history." E.R. 18. Applying this test, the court identified several deficiencies in Rossides's complaint. For example, the complaint did not allege that Rossides had "a concrete plan to engage in activity" that violates 18 U.S.C. § 1084. *See ibid.* It also did not allege that Rossides "has been threatened with prosecution by a government agent," nor did it present any evidence of the statute's enforcement history. E.R. 19. The court noted that "[w]hile the Act has been diligently enforced the Court cannot determine that it has ever been used to prosecute a case involving only Internet gambling." *Ibid.* Finally, the complaint failed to allege

that the intended conduct would violate the statute. Section 1084 applies only to those "engaged in the business of betting or wagering," so "[t]o violate the Act Plaintiff would have to collect a fee from those who placed bets on his website," but the complaint did not allege that Rossides would charge a fee. *Ibid.*

The district court identified another line of cases under which 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.'" E.R. 21 (quoting *LSO, Ltd.* v. *Stroh*, 205 F.3d 1146, 1154-55 (9th Cir. 2000)). However, "[b]ased on the minimal allegations in the complaint," the district court concluded that "the prospect of standing is too remote to warrant standing under this analysis." E.R. 21.

Additionally, the district court found Rossides's claim unripe because it lacked "'a concrete factual situation.'" E.R. 22 (quoting *San Diego County Gun Rights Comm.* v. *Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996)). In the absence of a more specific factual context, the issues raised by Rossides "are not fit for judicial decision and can be dismissed for lack of ripeness." E.R. 22.

3. The district court granted Rossides leave to amend his complaint. In the amended complaint, Rossides sought injunctive and declaratory relief against the enforcement not only of 18 U.S.C. § 1084, but also of 18 U.S.C. §§ 1952 and 1953. E.R. 53. He alleged that he "would like to offer a variety of P-bets for the purpose of communicating his opinions," that he "would like to license his U.S. patents (numbers 5,575,474 and 6,443,841) entitled *Communications System Using Bets*, but is unable to do so because potential licensees fear a credible threat of prosecution," and that he "would like to engage in the for-profit business of providing an electronic forum in which people can express their opinions through bets." E.R. 25. He also alleged that his web site "is ready to post, match, and settle bets." *Ibid.*

More specifically, Rossides stated that, if declaratory relief were granted, he would "contact dozens of companies, including media companies and financial companies in an effort to license his existing patents and his patents pending." E.R. 38. He further alleged that the betpress.com web site was "ready to do business immediately—receiving P-bet offers, posting P-bet offers, matching P-bet offers and settling P-bet contracts." E.R. 40. He stated that the web site would operate interstate, that most of the bettors who would use it would reside outside

of his home State, that bettors would be charged a fee for posting bets, and that they would pay the fee by sending a check through the mail. *Ibid.* Bettors would be prohibited from placing bets "concerning sporting events, sporting contests, and pseudo-random number generator games (such as casino games and lotteries)." E.R. 42. According to the complaint, "over 20 prospective customers" had already "expressed a desire to place P-bet offers for the purpose of communicating their opinions on betpress.com." *Ibid.*

4. On a motion by the government, the district court dismissed the amended complaint. The court held that the amended complaint "failed to cure the standing problems noted in detail in the court's previous order." E.R. 55. In particular, Rossides "has still not established a credible threat of prosecution against him, as is necessary for standing under any applicable theory of jurisdiction." *Ibid.* The court explained that although Rossides had "solidified the details of his plan," he still had not "alleged a specific threat of prosecution." And the "fact that the conduct in which he hopes to engage is proscribed by statute" is insufficient by itself to establish "an actual and well founded fear" of enforcement. E.R. 56.

Nor had Rossides shown that his conduct was "'arguably affected with a constitutional interest.'" E.R. 56 (quoting *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). As the district court explained, "[p]lacing bets in a commercial setting" is not protected by the First Amendment, "even if the bets are made on matters of public interest." E.R. 56. For this reason, Rossides had failed "to raise a colorable claim of constitutional right that would warrant pre-enforcement adjudication to avoid burdening Plaintiff with an enforcement action." *Ibid*. Rossides appealed.

SUMMARY OF ARGUMENT

1. The district court correctly dismissed the complaint for lack of standing. To determine whether a plaintiff has standing to challenge a criminal statute, this Court examines whether the plaintiff has a "concrete plan" to violate the statute, whether prosecuting authorities have made any "specific warning or threat to initiate proceedings," and "the history of past prosecution or enforcement under the statute." *Thomas* v. *Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (*en banc*). Even assuming that Rossides has articulated a concrete plan, he has received no specific warning or threat, and he has identified no

history of enforcement of the statute against others engaging in conduct similar to his.

2. The district court's judgment may also be affirmed on the alternative ground that Rossides's claims are unripe. Rossides has shown no threat of immediate injury, nor has he demonstrated that he would suffer hardship from deferring consideration of his claims.

3. If this Court determines that Rossides has satisfied the standing and ripeness requirements, it should affirm the district court's judgment on the alternative ground that Rossides's claims fail on the merits. Indeed, in this case, the Court may consider the merits *before* addressing standing and ripeness, since Rossides's First Amendment claims are so wholly insubstantial that they do not raise a genuine federal question.

Rossides does not argue that the First Amendment protects *advertising* for gambling. Rather, he asserts that gambling *itself* constitutes speech protected by the First Amendment. Controlling circuit precedent forecloses this argument. In *United States* v. *Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990), this Court upheld 18 U.S.C. § 1953 against a First Amendment challenge. In that case, the defendants argued that a computer program designed for running a bookmaking business was

protected speech. The Court's rejection of that claim necessarily entailed the rejection of the proposition that the bookmaking operation itself might constitute speech. The *Mendelsohn* Court's analysis is fully applicable to the other statutes at issue here, and it bars Rossides's claims.

Apart from *Mendelsohn*, Rossides's First Amendment claim fails because the statutes he is challenging regulate conduct, not speech. Gambling has been regulated or prohibited by States and the Federal Government since the earliest days of the Republic. Even if gambling might in some circumstances have an expressive purpose or effect, the statutes here still would be valid as generally applicable regulations of conduct under *United States* v. *O'Brien*, 391 U.S. 367 (1968). And even if gambling were speech, the statutes that Rossides challenges would be constitutional as regulations of commercial speech that concerns unlawful activity.

STANDARD OF REVIEW

This Court reviews the district court's grant of a motion to dismiss *de novo*. *See ONRC Action* v. *Bureau of Land Mgmt.*, 150 F.3d 1132, 1135 (9th Cir. 1998).

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT FOR LACK OF STANDING.

A party who invokes the jurisdiction of a federal court must meet the "case or controversy" requirement of Article III of the Constitution. To satisfy "the irreducible constitutional minimum of standing," a party must establish three elements: (1) "an 'injury in fact'—an invasion of a legally protected interest" that is "concrete and particularized" and "'actual or imminent,' not 'conjectural' or 'hypothetical;'" (2) "a causal connection between the injury and the conduct complained of;" and (3) redressability of the injury by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). The plaintiff bears the burden of establishing that he has standing. *See Table Bluff Reservation (Wiyot Tribe)* v. *Philip Morris, Inc.*, 256 F.3d 879, 882 (9th Cir. 2001). Because Rossides failed to meet this burden, the district court properly dismissed the complaint.

Rossides has not shown that the statutes he challenges have injured him. A litigant may not assert the unconstitutionality of a criminal statute "merely because he desires to wipe it off the books." *KVUE, Inc.* v. *Austin Broad. Corp.*, 709 F.2d 922, 928 (5th Cir. 1983). As this Court has explained, "[t]he mere

existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III." *Stoianoff* v. *Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983).

To have standing to challenge a criminal statute, a plaintiff must establish a "genuine threat of imminent prosecution." *Thomas* v. *Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (*en banc*) (quoting *San Diego County Gun Rights Comm.* v. *Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996)). To determine whether such a threat exists, this Court examines three factors: "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute." *Ibid* (quoting *San Diego County*, 98 F.3d at 1127).

In this case, these factors demonstrate that Rossides does not face a genuine threat of prosecution. Even assuming that Rossides has adequately articulated a "concrete plan" to violate the statutes he challenges, he has received no specific warning or threat from prosecuting authorities. In his complaint, he mentions a letter sent by a Department of Justice official to media outlets that have accepted

advertisements for online casinos. E.R. 48. The letter observed that internet gambling violates Section 1084. *Ibid*. But Rossides does not allege that this letter—or any warning at all—was sent to *him*. *See Casino City, Inc.* v. *Department of Justice*, No. 04-557-B-M3 (M.D. La. Feb. 15, 2005), *appeal pending*, No. 05-30403 (5th Cir.) (holding that the letter was insufficient to confer standing on Casino City, which had not been sent a copy by the government). In his brief, Rossides notes that the government and the district court have both stated, in the course of this litigation, that his proposed conduct is not protected by the First Amendment. *See* Rossides Br. 59-60. But the fact that conduct is not constitutionally protected does not mean that it necessarily would result in criminal prosecution. More fundamentally, a plaintiff may not create standing where it otherwise would not exist simply by bringing a lawsuit and forcing the government to defend the constitutionality of a statute.

Nor does the history of enforcement under the statute suggest that Rossides faces a threat of prosecution. The only example of enforcement that 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." E.R. 46.

Although the requirement of a threat of prosecution may be interpreted more leniently in the First Amendment context, *see California Pro-Life Council, Inc.* v. *Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003), that does not help Rossides, for two reasons. First, even in the First Amendment context, a plaintiff still must establish a "reasonable" fear of prosecution, and as we have explained, Rossides has failed to do so. *Id.* at 1095; *see also ibid* ("We do not mean to suggest that any plaintiff may challenge the constitutionality of a statute on First Amendment grounds by nakedly asserting that his or her speech was chilled by the statute."). Second, a plaintiff must show that he "intends to engage in 'a course of conduct arguably affected with a constitutional interest.'" *LSO, Ltd.* v. *Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) (quoting *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). As we show in more detail below, the statutes that Rossides challenges are generally applicable regulations of conduct, not speech, and they do not raise even an arguable First Amendment issue.

II. ROSSIDES'S CONSTITUTIONAL CLAIMS ARE UNRIPE.

The district court lacked jurisdiction for the additional reason that Rossides's challenge is unripe. The ripeness doctrine reflects both "Article III limitations on judicial power" and "prudential reasons for refusing to exercise jurisdiction." *Reno* v. *Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). Constitutional ripeness involves an analysis similar to the Article III standing inquiry, and it requires a plaintiff to show that he faces a threat of imminent injury. *See Thomas* v. *Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-39 (9th Cir. 2000) (*en banc*). Prudential ripeness depends upon "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 808 (2003). Here, both sets of principles suggest that the issues raised by Rossides are not ripe for review, for essentially the same reasons that Rossides lacks standing.

Ripeness in the constitutional sense is lacking because, as we have explained, Rossides has made no allegations that would suggest that he faces the prospect of an immediate injury. As to prudential ripeness, even assuming that the issues are currently fit for review, withholding review would not cause any

hardship to Rossides. Because Rossides has not alleged a credible and immediate threat of prosecution, the "effects" of the statutes he challenges have not been "felt in a concrete way." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967). Moreover, if Rossides were to be prosecuted at some point in the future, he would be free to raise his constitutional claims as a defense to that prosecution.

III. ROSSIDES'S CLAIMS FAIL ON THE MERITS BECAUSE THE FIRST AMENDMENT DOES NOT PROTECT GAMBLING.

If this Court determines that Rossides does have standing and that the issues he raises are ripe for review, it nevertheless may affirm the district court's judgment on the ground that Rossides's claims fail on the merits. The district court has already considered the merits—in the course of evaluating the standing issue, it concluded that "Plaintiff's proposed business . . . could clearly be regulated without violating Plaintiff's First Amendment rights." E.R. 56. And even if the district court had not reached the merits, the issue was briefed below and therefore may be considered here as an alternative ground for affirmance. *See Maldonado* v. *Harris*, 370 F.3d 945, 949 (9th Cir. 2004).

Moreover, in this case, the Court may address the merits *before* considering Rossides's standing. To be sure, the general rule is that courts must consider jurisdictional questions before addressing merits issues. *See Steel Co.* v. *Citizens for*

a Better Env't, 523 U.S. 83, 93-95 (1998). But the Supreme Court has recognized that a claim may be "'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Id.* at 89 (quoting *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 666 (1974)). In such a case, the failure of the claim is itself a jurisdictional defect, because it means that the case presents no substantial federal question under 28 U.S.C. § 1331. *See Bell* v. *Hood*, 327 U.S. 678, 682-83 (1946) (An action may be "dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes . . . is wholly insubstantial and frivolous."); *see also Center for Reprod. Law and Policy* v. *Bush*, 304 F.3d 183, 195 (2d Cir. 2002) (When "a controlling decision of this Court has already entertained an rejected the same constitutional challenge . . . the Court may dispose of the case on the merits without addressing a novel question of jurisdiction."). As we demonstrate below, Rossides's First Amendment claims are entirely insubstantial and foreclosed by circuit precedent.

At the outset, it is important to be precise about the specific First Amendment right that Rossides asserts in this case. He does not claim that the First Amendment protects *advertising* for gambling; rather, he claims that it

protects the gambling *itself*. *See* E.R. 1 ("Plaintiff seeks declaratory judgment that bets used as speech are protected by the First Amendment and, therefore, cannot be prohibited by statute."). This assertion is contrary to controlling precedent and is inconsistent with the larger body of First Amendment law.

A. This Court has already rejected a First Amendment challenge to 18 U.S.C. § 1953. In *United States* v. *Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990), the Court affirmed a conviction for conspiracy to engage in the interstate transportation of wagering paraphernalia. The defendants had mailed a computer disk containing a program to aid in bookmaking, and they argued that the program was speech protected by the First Amendment. *See id.* at 1185. This Court rejected that argument, explaining that the computer program was "too instrumental in and intertwined with the performance of criminal activity to retain first amendment protection." *Id.* at 1186. This reasoning would make little sense if the underlying "criminal activity"—*i.e.*, the bookmaking operation that the defendants' computer program was designed to facilitate—were itself constitutionally protected. *Mendelsohn* therefore rests on the premise that the activity of gambling itself is not protected by the First Amendment. And although

the Court considered only Section 1953, its reasoning is fully applicable to Sections 1084 and 1952, and it compels the rejection of all of Rossides's claims.

Mendelsohn is consistent with the decisions of other circuits. 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).

Rossides has identified no authority suggesting that the First Amendment protects gambling, and we are aware of none. On the contrary, States have regulated or prohibited gambling from the earliest days of the Republic. *See*, *e.g.*, *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821). And over a century ago, the Supreme Court upheld the power of Congress to prohibit the transmission of lottery tickets in interstate commerce. *See Champion* v. *Ames*, 188 U.S. 321 (1903). More recently, in upholding a Puerto Rico statute that restricted *advertising* for gambling, the Supreme Court observed that "the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether." *Posadas de Puerto Rico Assocs.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 345 (1986).

Rossides seeks to distinguish all of these cases by arguing that the defendants "did not have bona fide speech intent," Rossides Br. 34 n.3, whereas his web site will allow only bets involving matters of "public interest," Rossides Br. 31. As we explain below, a generally applicable regulation of conduct may be applied without regard to the putative "speech intent" of those subject to the law. In any case, the asserted distinction is undermined by Rossides's admission that "[t]here is no mechanical rule for distinguishing between sport/casino/lottery P-bets and public interest P-bets." *Ibid*; *cf. Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 146 (1967) (recognizing "the public interest . . . in the conduct of the athletic affairs of educational institutions" as a basis for concluding that the First Amendment restricted the ability of the University of Georgia's athletic director to bring a libel action).

B. The statutes at issue in this case raise no First Amendment issue because they regulate conduct, not speech. As the Supreme Court has recognized, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Dallas* v. *Stanglin*, 490 U.S. 19, 25 (1989); *see also United States* v. *O'Brien*, 391 U.S. 367, 376 (1968) (rejecting "the view that an apparently limitless variety of conduct can be labeled

'speech' whenever the person engaging in the conduct intends thereby to express an idea"). For this reason, "a sanction imposed pursuant to a generally applicable law does not trigger First Amendment scrutiny, even where the sanction results in a burden on expression." *Talk of the Town* v. *Department of Fin. & Bus. Servs.*, 343 F.3d 1063, 1069 (9th Cir. 2003).

The statutes that Rossides challenges in this case are generally applicable regulations of conduct and therefore do not implicate the First Amendment. Section 1084 governs only those "engaged in the business of betting or wagering," and it prohibits the sending of "bets or wagers" in interstate or foreign commerce. Section 1952 prohibits the use of the mail or facilities of interstate or foreign commerce to conduct a business enterprise involving gambling that violates state or federal law. And Section 1953 prohibits the "carrying or sending in interstate or foreign commerce" of gambling paraphernalia.

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, 410-11 (1974)); *see also Clark* v. *Community for Creative*

Non-Violence, 468 U.S. 288, 294 (1984) ("[A] message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative."). Here, the conduct that is prohibited by the challenged statutes is conduct associated with the operation of a gambling business. Rossides does not argue that the act of operating betpress.com—as opposed to the acts of his customers in placing specific bets—will convey any "particularized message." Nor is it likely that any viewer of the website would understand it to be conveying a message.

Even if the proper level of analysis were the bets themselves, bets do not qualify for First Amendment protection as expressive conduct. 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. Rossides claims that he wishes to use gambling "for the purpose of expressing facts and opinions about questions of public interest." Rossides Br. 44. That may be true, but the implication of his argument is that essentially all bets—which, like Rossides's "P-bets," involve a prediction about some future event, a statement of probability or odds, and an offer to wager a particular amount of money at those odds—are constitutionally protected. Thus, Rossides's theory would apply not only to bets on issues of public importance, but also to bets on the weather, bets

on sporting events, and bets on card games, dice games, and roulette wheels. Most of these bets are intended not to convey an idea, but to make money or provide entertainment. For this reason, there is not a great likelihood that the viewers of P-bets would understand them to be conveying any "particularized message."

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 still would be valid. In *United States* v. *O'Brien*, 391 U.S. at 377, the Supreme Court held that "a government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Here, all four elements of the *O'Brien* test are satisfied.

First, the statutes at issue here are within the constitutional power of the federal government because they regulate the use of the instrumentalities of interstate and foreign commerce. *See United States* v. *Morrison*, 529 U.S. 598, 609 (2000). Second, the statutes promote an important governmental interest. "No

one seriously doubts that the Federal Government may assert a legitimate and substantial interest in alleviating the societal ills" caused by gambling, "or in assisting likeminded States to do the same." *Greater New Orleans Broad. Ass'n, Inc.* v. *United States*, 527 U.S. 173, 186 (1999). Third, the government's interest in enforcing its criminal laws relating to gambling is plainly unrelated to the suppression of free expression. 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. What triggers liability under the statutes is the agreement between the bettors that the loser will pay money to the winner. The First Amendment does not prevent Congress from regulating or prohibiting such a transaction.

C. Even if the bets that Rossides wishes to allow on his web site were speech, they would be entitled only to the lesser constitutional protection afforded 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 *Central Hudson Gas & Electric Corp.* v. *Public Serv. Commission of New York*, 447 U.S. 557, 562 (1980)). And proposing a commercial transaction is exactly what a person would do in placing a P-bet on the Rossides

web site. *See* E.R. 5 ("[A] P-bet that has not been accepted is an *offer*. And, a P-bet that is accepted is an *agreement*."). The fact that the offer may also involve an issue of public interest does not affect its status as commercial speech. The Supreme Court has held that "communications can 'constitute commercial speech notwithstanding the fact that they contain discussions of important public issues.'" *Board of Trustees* v. *Fox*, 492 U.S. 469, 475 (1989) (quoting *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 (1983)). For example, "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech.'" *Bolger*, 463 U.S. at 68 (quoting *Central Hudson*, 447 U.S. at 563 n.5).

The First Amendment does not protect commercial speech that concerns unlawful activity. Under *Central Hudson Gas & Electric Corp.* v. *Public Serv. Commission of New York*, 447 U.S. at 566, for commercial speech to be protected by the First Amendment at all, "it at least must concern lawful activity and not be misleading." Here, the alleged speech is not protected by the First Amendment because it concerns unlawful activity. *See id.* at 563-64 ("The government may ban . . . commercial speech related to illegal activity."); *see also Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973). Indeed, even those Justices who have criticized *Central Hudson* as being insufficiently protective

of speech have acknowledged this principle. *See*, *e.g.*, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 497 n.7 (1996) (opinion of Stevens, J., joined by Kennedy, Souter, and Ginsburg, JJ.) ("[T]he First Amendment does not protect commercial speech about unlawful activities."); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 579 (2001) (Thomas, J., concurring in part and concurring in the judgment) ("A direct solicitation of unlawful activity may of course be proscribed, whether or not it is commercial in nature."). So even if Rossides's P-bets were considered speech, they would not be entitled to First Amendment protection.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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OCTOBER 2005

CERTIFICATE OF SERVICE

I certify that on October 11, 2005, I filed and served this brief by causing an original and fifteen copies to be sent by Federal Express to the Clerk of the Court, and by causing two copies to be sent by Federal Express to:

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CERTIFICATE OF RELATED CASES

Counsel is aware of no related cases pending in this Court.

_____
Eric D. Miller