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'S
PETITION for REHEARING & PETITION for REHEARING EN BANC

This Proceeding Involves the Exceptionally Important Question of
Whether the First Amendment Protects a Medium and Forum for Bet Speech

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Rossides Petitions for Rehearing by Panel that Heard His Appeal and Petitions for Rehearing En Banc

Rossides sought a declaratory judgment in district court that U.S.C. 18 §§ 1084, 1952 and 1953 are unconstitutional when applied to his betpress.com (Betpress), a for-profit, interstate press that enables individuals, businesses, and organizations to use probability bets (P-bets) – bets with odds – for the bona fide purpose of expressing facts and opinions of public interest. The district court dismissed for lack of standing. The appeals court panel affirmed. Rossides hereby petitions for rehearing by the panel under FRAP 40 because the panel ruling contains a critical error of fact, and because the ruling conflicts with precedent. Rossides also petitions for rehearing en banc under FRAP 35 because this proceeding involves a question of exceptional importance.

Experts Who Can Verify Rossides's Assertions Regarding Bet Speech

Because Rossides is an unknown pro se plaintiff, it is possible that the panel that heard his appeal may not have believed the factual assertions in his briefs regarding the nature of bet speech. The following experts can verify those facts: **Michael Spence** (650-724-5444), Nobelist in Economics (for signaling theory), **Hal Varian** (510-643-4757), Prof. in the School of Information, Haas School of Business, and **Cass Sunstein** (773-702-9498), Prof., U. of Chicago Law School.

I. This Proceeding Involves Questions of Exceptional Importance

The Most Important First Amendment Case this Court Has Ever Heard?

You, judge or clerk, have in your hands an extraordinarily rare and important case, for you have in your hands the only case this court has ever heard that is about whether a whole form of press shall be banned in the United States.

Our country has developed many revolutionary new media – the penny press, the photograph, the telegraph, the telephone, movies, radio, television, the Xerox machine, the World Wide Web – but it has never completely outlawed a new form of press or a new medium of expression.

Exceptionally Important Questions

This proceeding involves a set of exceptionally important questions:

1. Can people use bets with odds to express facts and opinions?
2. Will U.S. citizens be allowed to express facts and opinions with bets?

Bets expressing facts and opinions are most useful when they are shown and reacted to in a public forum. So, the next question is:

3. Is a forum for bona fide bet speech a medium of expression, a press?

And, finally:

4. Does the First Amendment protect this medium, this press?

5. Does the threat of prosecution effectively ban this medium, this press?

A Unique Tool for Expressing Opinions

As explained in Rossides's Opening Brief, a P-bet can be a uniquely effective tool for expressing and revealing a speaker's honest probability estimate about a statement. Therefore, it can be a uniquely credible form of speech. It follows that Betpress can be a uniquely credible medium. And so, this case is exceptionally important.

Case Would Be a "No-Brainer" If It Were About the Existence of Posters, Magazines, the Movies, or Any Now Ordinary Medium of Expression

Imagine that Congress passed a law that banned posters *everywhere* in public. And imagine that the Department of Justice claimed the right to enforce this law, and did not disavow this law. Imagine, further, that a poster company asked the district court for constitutional protection against enforcement of this law. And, finally, imagine the court said that putting posters up in public was "obviously outside the ambient of constitutional protection."

It is absurd.

Betpress.com is as much of a medium of expression as the poster, and as much of a press as any dynamic online collection of facts and opinions – like Wikipedia, for instance. And yet, so far, Betpress is effectively banned in the United States, with this court's tacit assent.

Why such treatment for Betpress and online forums for bet speech in general, by this court? One reason is that the appeals panel made a central error of fact.

II. Error of Fact: Panel Ruling Doubts that Betpress Is a Press

In its ruling the panel stated,

> "Michael T. Rossides appeals pro se from the district court's judgment dismissing his action seeking declaratory judgment that his proposed for-profit online 'press' for enabling bets on matters of alleged public interest…"

By putting the term *press* in quotation marks, the panel is saying that it finds it dubious[1] that Betpress is a press.

That is an error of fact – the most basic fact of this case, for if the court accepts that Betpress is a press, then "the inquiry tilts dramatically toward a finding of standing." (*LSO v. Stroh,* 11).

[1] "Another important use of quotation marks is to indicate or call attention to ironic or apologetic words. Ironic quotes can also be called scare, sneer, shock, or distance quotes." – *Wikipedia*, article on Quotation Marks.

To physically see this error, one can look at www.LongBets.org (mentioned in Rossides's Opening Brief), a live website that is almost identical to Betpress. At LongBets, people (often public figures) place P-bets with money about questions of public interest. The only important difference between LongBets and Betpress is that LongBets avoids anti-gambling laws by giving all winnings to charity. Take a look at www.longbets.org. Is it a press? Is it a medium of expression? Of course, it is. And so is Betpress.

Let us explain the panel's error.

We begin with an incontrovertible fact: A person can use a P-bet to express a fact or opinion about a question of public interest.

It follows as a fact that people can express facts and opinions about questions of public interest in Betpress (as Betpress is planned[2]).

So, it is a fact that Betpress is a medium that enables speakers to post, view and react to bet facts and bet opinions regarding questions of public interest; it is a dynamic, public collection of bet facts and bet opinions.

[2] At this stage in the proceeding, the court must assume Rossides's allegations are **true** concerning his plans to enable speakers to place bets on questions of public interest.

Now, if one does not like the apt term *press* for this medium one could instead use the term *medium of expression*. In other words, it is a fact that Betpress, as planned, is a medium of expression.

Saying that Betpress is a "press" or a "medium of expression" is like saying 2+2 = "4" or clouds are made of "water." It is like saying, *It is uncertain whether 2+2 = 4* or *It is uncertain whether clouds are made of water*. These are false statements.

To be more explicit, there are three logical possibilities:

1. Betpress *is* a medium of expression
2. *It is uncertain* whether Betpress is a medium of expression
3. Betpress *is not* a medium of expression.

In its ruling, the panel chose the second statement, which is FALSE.

III. Possible Error of Law: Panel Appears to Have Reached Its Decision by Judging the Value of Bet Speech and Betpress

As noted, the panel ruling said, "his proposed for-profit online 'press' for enabling bets on matters of alleged public interest…" This phrase expresses skepticism that speakers can use P-bets and Betpress for *useful* speech.

It seems that the panel made a negative value judgment about bet speech. If it did, the panel made an error of law, for the panel is only supposed to rule on whether Rossides has a speech interest, not on the value of that speech.

If the panel indeed made a value judgment, it also committed the mistake of pretending to know the value of a new invention. The panel should not have made this mistake. As Rossides's Opening Brief discussed, active research and experiments have recently shown bet speech can be very useful. If this court disbelieves Rossides's Opening Brief, it should do a web search on the terms *prediction markets*, *decision markets*, and *betting markets as policy tools*.

More importantly, this court should look at American History, replete with "crackpot" innovations, such as the telephone, the cash register, the cow town, fixed (no haggle) pricing, the mail order catalogue, the coeducational college, display advertising, drilling for oil, RFD postal service, radio broadcasting, and the Xerox process – all thought to be wishful long shots or nutty schemes (according to D. Boorstin in The Americans, the Democratic Experience).

Consider HTML, a small programming language for enabling people to write text pages with addresses, and to link one page to another other. If someone in 1990 asked the court to evaluate HTML, would the court have said, "Ah, there is a tool that a billion people will use to create a world wide web of content!"? No.

> Surely for something more self-evident, like the microprocessor, the potential would have been obvious. After all, didn't the "computer on a chip" start the second industrial revolution?
>
> Well, I can tell you that wasn't the case at all…Marketing decided there was a very small market... Finally, engineering announced it was fed up and was going to introduce the product itself…
>
> Anyone who has been around high-tech for a long time will have a collection of these stories. I have probably talked to half a dozen companies that turned down the original Haloid patents, the basis for Xerox machines, because carbon copies were so much cheaper. GE had the first transistorized computer but did not sell it on the open market, because the company management was convinced that the computer was a special purpose device useful only for banks. – *William Davidow*, Marketing High Technology

This court errs when it judges of the value of Betpress, a new medium.

> Almost every new information technology has been opposed as an intellectual and moral step backwards by those with an investment in the status quo. The production of cheap chromolithographs to hang on living room walls caused intellectuals to work about the decline of American art. First picture books, then movies, and then television, it was feared, would corrupt American youth. Calculators would ruin children's math skills. The same fears are heard again and again.
>
> – *Steven Lubar*, InfoCulture, The Smithsonian Book of Information Age Inventions

IV. Panel Ruling Conflicts with the Corpus of Supreme Court's First Amendment Decisions

The First Amendment is an impossible prescription. It says that, "Congress shall make *no* law…abridging the freedom of speech, or of the press…" (emphasis added). That is, of course, impossible. We must pass laws that

abridge speech and how we use our tools of speech – our media of expression. We can't let people put posters everywhere, use bullhorns at all hours, or broadcast whatever shows they want.

The corpus of the Supreme Court's First Amendment decisions tells us how government may abridge our speech and our various tools of speech. To oversimplify, government may restrict speech and any tool of speech if the restriction is narrow and serves a governmental purpose. This rule is spelled out in variations in decisions like *United States v. O'Brien*, *Central Hudson* v. *Public Serv. Commission of New York*, and *Buckley v. Valeo.*

Yet in the entire corpus of Supreme Court decisions one will not find a case in which *all* uses of a tool of speech have been banned. We have never had a tool of speech that we consider so dangerous that we ban all its uses. Pick any tool of speech – any medium of expression – something as abstract as money, as concrete as the pen, as low tech as the pamphlet, as inherent as the human voice, and you will find laws that abridge its speech uses. But you will not find that *every* use is banned.

There is an exception. P-bets that use real money for speech purposes are *completely* banned by the vague, overbroad statues, U.S.C. 18 §§ 1084, 1952 and 1953, by the government's threat of prosecution, by this court's tacit assent

in its Memorandum Ruling, and by the district court's ruling against Rossides that gave explicit assent to this blanket ban.

To conform to the corpus of the Supreme Court's First Amendment decisions, this court's ruling should have reversed the district court's ruling, which, without any supporting evidence or even discussion, condemned bet speech and every bet press: "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." (district court Ruling, Doc. #34, pgs. 2-3)

V. Panel Overlooks the Key Fact that 100% of Online Bookmakers that the Government Has Identified, on U.S. Soil, Have Been Prosecuted

The panel decision stated that Rossides had not demonstrated a realistic threat of injury because "he has cited only a single instance of prosecution under section 1084…." The panel failed to point out that this one prosecution means that the government has prosecuted 100% of U.S. citizens, on U.S. soil, who have operated public online systems that violate U.S.C. 18 §1084. No one else has dared to operate such a business while on U.S. soil. The person prosecuted, Cohen, ran an offshore sportsbook and returned to the U.S. thinking he could

win his case. (The government has now started arresting British citizen operators who step in the U.S.[3].)

What reason can the court give for the absence of *public interest* bet operations in the United States. There is a multi-million-dollar incentive for companies to engage in this business (such operations are running profitably in the U.K.)? The lack attempts to start such businesses here is overwhelming circumstantial evidence of a credible and *chilling* threat of prosecution.

VI. Panel Ruling Conflicts with *Virginia v. American Booksellers Ass'n, Inc.* and *LSO v. Stroh*

The thrust of *LSO v. Stroh* and *Virginia v. American Booksellers Assn, Inc.*, the Supreme Court decision *LSO* is based upon, is that a plaintiff suffers injury if his speech is chilled: "the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without actual

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[3] "The prosecutors' efforts have already taken a toll in the last two years on offshore casinos, most notably with the arrest last year of David Carruthers, the chief executive of an Internet sports book, BetonSports…Mr. Carruthers was detained at the Dallas airport while traveling through the United States.

"'It appears that the Department of Justice is waging a war of intimidation against Internet gambling,' said I. Nelson Rose, a professor of law at Whittier Law School in Costa Mesa, Calif., who is an expert on Internet gambling law." – *NY Times*, 1/22/07

prosecution" (*Virginia v. American Booksellers Ass'n, Inc.,* 484 U.S. 383, 386, 392-93 (1988)) The panel ruling conflicts with this test.

The panel ruling relied on the fact that Rossides has not received a warning letter from the government. Yet, as *LSO* makes explicit, a warning letter from prosecutors is not necessary to demonstrate self-censorship (note, the panel ruling ignored that Rossides stated that he has received implicit warnings in the papers that the government has filed in this case).

The ruling also pointed out that Rossides cited no prosecutions of online bookmaking operations under U.S.C. 18 §1952 and §1953, which is true. But, Rossides sought protection from the enforcement of these statutes because the government brought them into play. In his initial complaint, Rossides asked for protection from U.S.C. 18 §1084. The government replied that Rossides's complaint should fail because "Plaintiff has not and cannot demonstrate that a favorable decision will allow him to enable P-bets on www.betpress.com because such a business, at minimum, exposes him to criminal exposure under U.S.C.A 18 §1952 and U.S.C.A §1955" (*Ashcroft Reply Memorandum*, p. 6). Rossides then filed an amended complaint, adding 1952 and 1953 (1955 did not appear to be relevant because Rossides's business is a sole proprietorship).

Finally, the panel relied upon the fact that Rossides concedes that his Betpress differs in "at least one significant respect" from Cohen's prosecuted bookmaking operation. However, the panel failed to point out that the government does not recognize this difference, that the district court does not recognize this difference, and further, that this appeals court, so far, has not recognized this difference.

In *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." What reason does this court see for assuming Rossides will not be prosecuted?

VII. Conclusion

It is ironic that the question *Is there a credible threat of prosecution?* is ideally suited to a P-bet. In a P-bet, this question becomes concrete and specific, i.e., *What odds will you give that Rossides will be arrested and how much money are you willing to risk that he will not be?*

A speaker can then set her odds, the side she takes, and the amount of money she will risk, as in, "I say the odds of arrest are 4-1 against (20%), and I'll risk

$2,000 the he will not be arrested." For many people this type of expression is more informative and credible than a vague statement that uses a vague standard, as in, "I think there is no *credible threat* of prosecution."

Rossides asks this appeals court to reconsider its Memorandum Ruling, and asks this court to reverse the district court's finding of lack of standing, and asks this court to remand the case to the district court.

Respectfully submitted this 25th day of January 2007,

_____

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CERTIFICATE of COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc is in compliance with Fed. R. App. 32 (c) and does not exceed 15 pages, is proportionally spaced, is double-spaced, has a typeface of 14 points.

_____

Michael T. Rossides, Pro Se

CERTIFICATE of SERVICE

COPY of the foregoing mailed this 25th day of February 2020 to:

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