PETER D. KEISLER
Assistant Attorney General
Civil Division

PAUL K. CHARLTON
United States Attorney
District of Arizona

MICHAEL JOHNS
(AZ Bar No. 3803)
Assistant U.S. Attorney
Civil Chief
Two Renaissance Square
40 N. Central Avenue, Suite 1200
Phoenix, AZ 85004-4408
Tel: (602) 514-7500

VINCENT M. GARVEY
Deputy Branch Director

JACQUELINE E. COLEMAN
Trial Attorney
Federal Programs Branch, Civil Division
U.S. Department of Justice
20 Massachusetts Avenue, N.W. Rm 7214
Washington, DC 20530
Tel: (202) 514-3418

Attorneys for the Defendant.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

MICHAEL T. ROSSIDES,

Plaintiff,

v.

JOHN ASHCROFT,

Defendant.

CIV-03 2527PHXJAT

DEFENDANT'S MOTION TO DISMISS

Defendant Attorney General John Ashcroft (the "Attorney General"), by and through undersigned counsel, respectfully moves to dismiss this action pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. As set forth in the accompanying Memorandum of Points and Authorities, this Court does not have jurisdiction over Plaintiff Michael Rossides's claim challenging the constitutionality of 18 U.S.C. § 1084 ("Wire Act") because he lacks standing and his claim is not ripe. Alternatively, this Court should dismiss this action because Plaintiff has failed to state a claim that the Wire Act, as applied to

internet gambling, violates the First Amendment. In support of this motion, the Attorney General relies on the accompanying Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss.

For the above-stated reasons and those explained more fully in the accompanying Memorandum of Points and Authorities, the Attorney General respectfully requests that the Court grant his motion and dismiss this action.

Respectfully submitted this 28th day of June 2004.

PETER D. KEISLER
Assistant Attorney General
Civil Division

PAUL K. CHARLTON
United States Attorney
District of Arizona

MICHAEL JOHNS
Assistant U.S. Attorney
Civil Chief

VINCENT M. GARVEY
Deputy Branch Director

JACQUELINE E. COLEMAN
(D.C. Bar No. 459548)
Trial Attorney
Federal Programs Branch, Civil Division
U.S. Department of Justice
20 Massachusetts Avenue, N.W. Rm. 7214
Washington, DC 20530
Tel: (202) 514-3418

Attorneys for Defendant Attorney General John Ashcroft

Original filed and copy of the foregoing mailed this 28th day of June 2004 to:

MICHAEL T. ROSSIDES
10401 McDowell Mountain Ranch Road
#2166
Scottsdale, AZ 85255

PETER D. KEISLER
Assistant Attorney General
Civil Division

PAUL K. CHARLTON
United States Attorney
District of Arizona

MICHAEL JOHNS
(AZ Bar No. 3803)
Assistant U.S. Attorney
Civil Chief
Two Renaissance Square
40 N. Central Avenue, Suite 1200
Phoenix, AZ 85004-4408
Tel: (602) 514-7500

VINCENT M. GARVEY
Deputy Branch Director

JACQUELINE E. COLEMAN
Trial Attorney
Federal Programs Branch, Civil Division
U.S. Department of Justice
20 Massachusetts Avenue, N.W. Rm 7214
Washington, DC 20530
Tel: (202) 514-3418

Attorneys for the Defendant.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

MICHAEL T. ROSSIDES,

Plaintiff,

v.

JOHN ASHCROFT,

Defendant.

CIV-03 2527PHXJAT

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Plaintiff Michael Rossides seeks to cloak internet gambling prohibited by 18 U.S.C. §1084 ("Wire Act") in the protections of the First Amendment by bringing this as-applied constitutional challenge. Specifically, he contends that probability bets ("P-bets") placed

over the internet are a form of speech and cannot, consistent with the protections of the First Amendment, be prohibited by the Wire Act, which subjects to criminal liability anyone "engaged in the business of betting or wagering" who "knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers" or "transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or information assisting in the placing of bets or wagers." 18 U.S.C. § 1084(a). That contention is wrong as a matter of law.

However, without reaching that issue, this Court should dismiss this case on jurisdictional grounds. Plaintiff does not have standing to bring this challenge to the Wire Act because he has neither been prosecuted nor threatened with prosecution under the Wire Act. In addition, Plaintiff has alleged only a non-specific intention to engage in conduct violative of the Act at some point in the future. Thus, even if he has standing, his case is not ripe for review. This case is nothing but an obvious effort to obtain an advisory opinion from this Court concerning the First Amendment protections, if any, afforded P-bets. Such a determination, however, should await the Wire Act's application to an individual in actual controversy with government authorities.

Alternatively, this Court should dismiss this action for failure to state a claim upon which relief can be granted. Plaintiff's purported constitutional challenge to the Wire Act does not actually implicate First Amendment analysis because that Act regulates conduct not speech. Specifically, the Wire Act proscribes certain uses of interstate wire communication facilities by an individual engaged in the business of betting or wagering. *See* 18 U.S.C. § 1084(a). The Act is not directed at speech or expression and therefore should not be subjected to First Amendment scrutiny.

But even if such scrutiny is warranted, the Wire Act is a constitutional restriction on conduct under *United States v. O'Brien*, 391 U.S. 367 (1968). The *O'Brien* Court established a four-part test for determining whether a statute that regulates conduct and incidentally restricts expression is constitutional: (1) the statute must be within the

constitutional power of the government; (2) the statute must further an important governmental interest; (3) the governmental interest must be unrelated to the suppression of free speech; and (4) the incidental infringement on alleged First Amendment freedoms must be no greater than essential to further that interest.

The Wire Act easily satisfies the *O'Brien* test. Congress has the power under the Commerce Clause to facilitate the enforcement of states' gambling laws by prohibiting the transmission through interstate or foreign commerce of bets, wagers, or information assisting in their placement over a wire communication facility. Preventing the frustration of states' laws is an important governmental interest that is unrelated to the suppression of free expression. Any restriction on speech is incidental and no greater than necessary to further that interest. Accordingly, the Wire Act should be upheld against the instant challenge under *O'Brien*.

Alternatively, Plaintiff's challenge should fail because P-bets – if speech at all – are commercial speech that is not protected by the First Amendment because they concern unlawful activity. The transmission in interstate or foreign commerce of bets, wagers, or information assisting in their placement over a wire communication facility by an individual engaged in the business of wagering constitutes unlawful activity. *See* 18 U.S.C.A. § 1084; 18 U.S.C.A. § 1952; 18 U.S.C.A. § 1955. Thus, any speech in furtherance of such activity is not protected by the First Amendment.

Accordingly, the Wire Act should be upheld against Plaintiff's constitutional challenge and this action dismissed for failure to state a claim upon which relief can be granted.

STATUTORY PROVISION

The Wire Act was originally enacted in 1961 pursuant to Congress's power under the Commerce Clause "to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of wire

communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce." H.R. Rep. No. 87-967 at 1-2 (1961); S. Rep. No. 87-1956 (1961) (same).

The Wire Act provides in relevant part that

> (a) 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. § 1084(a).

STATEMENT OF FACTS [1/]

Plaintiff has established a website at www.betpress.com ("Bet Press") as a planned on-line forum for posting and transacting P-bets. Complaint ("Compl.") ¶ 1. P-bets consist of (1) a statement whose veracity the bettor wishes to test; (2) a statement of the odds that the bettor is willing to risk on either the outcome True or False; and (3) a statement of the amount of money the bettor is willing to bet on that outcome. Compl. ¶ 13. For example, "It will rain tomorrow. I will risk $25,000 at 1-9 odds (90% chance) on True." Compl. ¶ 22(d). Plaintiff contends that P-bets are a "form of speech for expressing opinions." Compl. ¶ 5. In addition, "a P-bet that has not been accepted is an *offer*[a]nd, a P-bet that is accepted is an *agreement*." Compl. ¶ 13.

If and when Bet Press becomes operational for business, it will enable individuals to transact in P-bets by actually risking money on their preferred outcome. *See* Compl. ¶ 31. At present, Bet Press is "only an informational site." Compl. ¶ 38. Plaintiff has not

---

[1/] For purposes of this motion only, the Attorney General and the Court "must accept all well-pleaded factual allegations [in the Complaint] as true," *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), but are "not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged," *Caron v. Maxwell*, 48 F. Supp. 2d 932, 934 (D. Ariz. 1999) (internal quotations omitted).

consummated any P-bet transactions allegedly because of "fear of prosecution under the Wire Act." Compl. ¶ 8.

Because Plaintiff contends that the Wire Act prevents him from posting any P-bets as actual offers or consummating any P-bet agreements or providing a forum for others to do so, he claims that the Act "denies him his freedom of speech." Compl. ¶¶ 31, 37. Plaintiff therefore asks this Court to declare the Act "unconstitutional with regard to P-bets used for the purpose of speech," (Compl. ¶ 47), and to "enjoin[the Attorney General] . . . from enforcing 18 U.S.C. § 1084[] against persons who use bets as speech," (Compl. at 15).

ARGUMENT

I. THIS ACTION SHOULD BE DISMISSED BECAUSE THE COURT DOES NOT HAVE SUBJECT-MATTER JURISDICTION OVER PLAINTIFF'S CLAIM.

This Court should refrain from reaching the constitutional question presented in this case and instead dismiss this action because the conditions precedent to this Court's jurisdiction are absent. "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984). In the absence of an actual case or controversy, the Court is without jurisdiction to decide the case. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also Poe v. Ullman*, 367 U.S. 497, 502 (1961). Thus, a court must ensure that its authority is invoked where there is "a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity" (*id.* at 503) – a requirement "founded in concern about the proper – and properly limited – role of the courts in a democratic society," (*Warth*, 422 U.S. at 498). Otherwise, "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Id.* at 500. These considerations "press with special urgency in cases challenging legislative action . . . as repugnant to the Constitution" where the Supreme

Court has admonished courts "not to entertain constitutional questions in advance of the strictest necessity." *Poe*, 367 U.S. at 503. Such necessity is clearly not present here.

A. Plaintiff Does Not Have Standing to Challenge the Wire Act.

As part of the "case or controversy" requirement, the plaintiff must have standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The standing inquiry is "especially rigorous when reaching the merits of the dispute would force [courts] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). The "irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."' Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61 (citations omitted). The absence of any one of these elements is sufficient to dismiss a claim on standing grounds. *See San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1131 (9th Cir. 1996).

Dismissal is required here because Plaintiff has not established that he has suffered an "injury in fact." [2/] *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 n.16 (1974) ("Until a judicially cognizable injury is shown no other inquiry is relevant to consideration of [] standing."). His only asserted injury is fear of prosecution under the Wire Act (*see* Compl. ¶¶ 4-10), which is insufficient to confer standing on Plaintiff. To assert standing on that basis, Plaintiff "must show a '*genuine* threat of *imminent* prosecution' under the [challenged] Act." *Gun Rights Committee*, 98 F.3d at 1126. In evaluating the "genuineness of a claimed threat of prosecution," courts have "look[ed] to whether the

---

[2/] Because Plaintiff cannot establish an injury in fact, he also cannot establish the second and third factors of the standing inquiry, respectively, a causal connection between the alleged injury and governmental conduct and redressability of the injury by a favorable decision here.

plaintiff[] ha[s] articulate[d] 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." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000). None of these factors demonstrates that Plaintiff's feared prosecution is imminent.

1. Plaintiff has not alleged a specific future intent to violate the Wire Act.

"A general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan." *Id.* Courts consistently have found standing lacking when based on "[s]uch 'some day' intentions." *See, e.g., Lujan*, 504 U.S. at 564 ("Such 'some day' intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require."); *Thomas*, 220 F.3d at 1140 (holding that plaintiffs' "'intent' to violate the law on some uncertain day in the future . . . can hardly qualify as a concrete plan"); *Gun Rights Committee*, 98 F.3d at 1127 (holding that plaintiffs' "mere[] assert[ions] that they 'wish and intend to engage in activities prohibited by Section 922(v)(1)'" were insufficient). Plaintiff's allegations are similarly deficient.

The Complaint is replete with allegations reflecting Plaintiff's wishes to engage in conduct allegedly violative of the Wire Act but nowhere does he allege an actual plan for carrying out his wishes. *See, e.g.,* Compl. ¶ 6 ("Rossides would like to offer a variety of P-bets . . . ."); Compl. ¶ 7 ("Rossides would like to license his U.S. patents . . . ."); Compl. ¶ 8 ("Rossides would like to engage in the business of providing an electronic forum in which people can express their views through bets . . . ."); Compl. ¶ 32 ("Rossides would like to show the public that an attack in 2000 on John McCain by the Campaign for George Bush was misleading."). To the contrary, Plaintiff alleges that "he will not do so for fear of prosecution under the Wire Act," (Compl. ¶ 6), "that he will not enable people to offer bets through Bet Press for fear of prosecution under the Wire Act," (Compl. ¶ 8), and that "Bet

Press will not solicit or enable real P-bets to be posted on its site because [t]he Wire Act makes the threat of imminent prosecution virtually certain," (Compl. ¶ 39). On these facts, Plaintiff's claimed fear of prosecution under the Act is hardly imminent and thus insufficient to confer standing.

2. Plaintiff nowhere alleges that any governmental authority has threatened him with prosecution under the Wire Act.

The specific threat of prosecution factor is completely absent from this case and thus is another indication that Plaintiff's claimed threat of prosecution is not genuine. *See Thomas*, 220 F.3d at 1139 ("In evaluating the genuineness of a claimed threat of prosecution, we look to . . . whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings . . . ."). While "[a] specific warning of an intent to prosecute under a criminal statute *may suffice* to show imminent injury and confer standing," "a general threat of prosecution" is not sufficient and the mere possibility of eventual prosecution "is *clearly insufficient* to establish a 'case or controversy.'" *Gun Rights Committee*, 98 F.3d at 1127-28 (emphases added); *see, e.g., Western Mining Council v. Watt*, 643 F.2d 618, 626 (9th Cir. 1981) (holding that Secretary's advising plaintiffs that they "cannot dig in the ground" was not a sufficiently specific threat of prosecution).

Plaintiff has not identified a single government actor that has threatened him with prosecution. At best, his allegations suggest that if he engaged in the activities he "would like to," he could be prosecuted under the Wire Act. *See, e.g.,* Compl. ¶¶ 37, 39, 41. Such a flimsy basis for standing, however, is not sufficient in this Circuit. *See, e.g., Gun Rights Committee*, 98 F.3d at 1128; *see also Darring v. Kincheloe*, 783 F.2d 874, 877 (9th Cir. 1986).

3. The history of enforcement under the Wire Act does not indicate that Plaintiff's fear of imminent prosecution is reasonable.

Since its enactment in 1961, the government has prosecuted numerous cases under the Wire Act. *See* 5 A.L.R. Fed. 166 (West 2004) (collecting cases brought under 18 U.S.C.A. §1084). However, the majority of the reported cases of such prosecutions are not from the

District of Arizona. While nothing precludes governmental authorities in this District from prosecuting more violations in the future, certainly the history of enforcement to date does not support Plaintiff's claim that the threat of prosecution is imminent. Accordingly, this third factor is neutral at best.

Thus, on this record, the prosecution of Plaintiff under the Wire Act – although theoretically possible – is plainly not imminent. Accordingly, this Court should dismiss Plaintiff's claim for lack of standing because he has not established injury in fact. [3/]

B. Plaintiff's Constitutional Challenge Is Not Ripe.

Alternatively, this Court should dismiss this action on ripeness grounds. "[T]he ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong." *Thomas*, 220 F.3d at 1138. Ripeness, however, is "peculiarly a question of timing." *Gun Rights Committee*, 98 F.3d at 1132. The Court's inquiry focuses on "(1) whether the issues are fit for judicial decision, and (2) whether the parties will suffer hardship if [the court] decline[s] to consider the issues." *Id.* Neither question can be resolved in Plaintiff's favor.

1. Plaintiff's claim is not fit for judicial decision because the factual record is not developed.

In cases involving an as-applied constitutional challenge, as here, the "problem presented by the lack of a factual context is particularly acute." *Id.* Such challenges are "not purely legal" and generally require a "concrete factual situation" to "delineate the boundaries of what conduct the government may or may not regulate [consistent with the Constitution]." *Id.* ("pure legal questions that require little factual development are more likely to be ripe"). This requirement is "designed to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Thomas*, 220 F.3d at

---

[3/] Even if this Court finds that Plaintiff has sufficiently pled an injury in fact, he has not and cannot demonstrate that a favorable decision here will enable him to transmit P-bet offers and transactions through interstate wire communication facilities. In addition to violating the Wire Act, such conduct at a minimum would expose Plaintiff to liability under 18 U.S.C.A. § 1952 and 18 U.S.C.A. § 1955 – neither of which he challenges here.

1138. The Court's role "is neither to issue advisory opinions nor to declare rights in hypothetical cases[,]" but that is precisely what Plaintiff urges the Court to do here. *Id.*

Plaintiff's constitutional challenge is devoid of a factual context because Plaintiff does not even allege that he has actually engaged in any conduct allegedly violative of the Wire Act. *See, e.g.,* Compl. ¶ 6 ("Rossides would like to offer a variety of P-bets . . . but he will not do so for fear of prosecution under the Wire Act."); Compl. ¶ 8 ("Rossides . . . will not enable people to offer bets through Bet Press for fear of prosecution under the Wire Act."). The Complaint instead describes activities in which Plaintiff would like to participate, (*see, e.g.,* Compl. ¶ 7 ("Rossides would like to license his U.S. patents . . . ."); Compl. ¶ 31 ("Bet Press now seeks to enable anyone to post and transact bets publicly . . . .")), and as to which Plaintiff seeks a ruling from this Court that he can do so without risk of prosecution under the Wire Act. This Court, however, is not authorized to issue such an advisory opinion and thus should conclude that the issues here are not fit for judicial determination.

2. Plaintiff will not suffer hardship if his claim is not decided at this time.

The hardship inquiry is often indistinguishable from the injury inquiry of the standing test because "threat of criminal penalty" is deemed a hardship. *Gun Rights Committee*, 98 F.3d at 1132; *see also Thomas*, 220 F.3d at 1139 ("in 'measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing'"). Courts have held that delay in resolution of a plaintiff's claim does not justify the exercise of jurisdiction where the plaintiff has not been charged under a particular statute and the threat of prosecution is not credible. *See Gun Rights Committee*, 98 F.3d at 1132. Under those circumstances, courts have concluded that such plaintiffs "will have the opportunity to raise their constitutional objections . . . if and when the government initiates a criminal prosecution against them under the statute." *Id.* at 1133. That same conclusion is warranted here.

As discussed earlier, Plaintiff has not established that the threat of prosecution under the Wire Act is imminent. He has not been charged with violating the Act and has not alleged that any governmental authorities responsible for enforcing that Act have threatened him with prosecution. Thus, Plaintiff will not suffer hardship if this Court does not decide his claim. Accordingly, this action should be dismissed because it is not ripe.

II. THIS ACTION SHOULD BE DISMISSED ALTERNATIVELY BECAUSE PLAINTIFF HAS FAILED TO STATE A FIRST AMENDMENT CLAIM.

Numerous courts – often after little analysis – have upheld the Wire Act against similar First Amendment challenges. *See, e.g., Truchinski v. United States*, 393 F.2d 627, 634 (8th Cir. 1968) ("the provisions of Section 1084 do not trespass on the first amendment guarantee of free speech"); *United States v. Kelley*, 254 F. Supp. 9, 14-15 (S.D.N.Y. 1966) (same), *rev'd in part on other grounds*, 395 F.2d 727 (2d Cir. 1968); *United States v. Borgese*, 235 F. Supp. 286, 296 (S.D.N.Y. 1964) (upholding the Wire Act against a constitutional challenge because "[t]he First Amendment is not applicable where criminal conduct is involved"); *United States v. Smith*, 209 F. Supp. 907, 918 (E.D. Ill. 1962) (the Wire Act "do[es] not restrict freedom of speech; [it] merely prohibit[s] the use of interstate facilities to certain conduct which the Congress has declared to be illegal."). That same result is required in this as-applied challenge.

A. This Action Does Not Implicate the First Amendment Because the Wire Act Is 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 "express[es] his own opinions on a variety of subjects." Compl ¶ 32; *see also* Compl. ¶¶ 6, 31. "It 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). Indeed, courts have rejected "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."

United States v. O'Brien, 391 U.S. 367, 376 (1968). First Amendment protections cannot be invoked against generally applicable regulations that are not directed specifically at expression and do not impose a disproportionate burden on those engaged in expressive conduct. *See Arcara v. Cloud Books*, 478 U.S. 697, 707 (1986) (concluding that "the First Amendment is not implicated by the enforcement of a public health regulation of general application against [an adult bookstore]"); *Talk of the Town v. Department of Fin. & Bus. Servs.*, 343 F.3d 1063, 1069 (9th Cir. 2003) ("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"); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991) (Scalia, J., concurring in the judgment) ("a general law regulating conduct and not specifically directed at expression, [] is not subject to First Amendment scrutiny at all").

The Wire Act is such a regulation. By its terms, the Wire Act regulates conduct, specifically, certain transmissions through interstate or foreign commerce over a wire communication facility by anyone engaged in the business of betting or wagering. *See* 18 U.S.C.A. § 1084(a). Such conduct is not significantly expressive; rather, at best, it involves the type of "kernel of expression" that courts have held is insufficient to bring the conduct within the protections of the First Amendment. The Wire Act also does not burden disproportionately those engaged in expressive conduct (e.g. newspapers). Indeed, the Wire Act expressly excludes from its prohibitions "the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests." 18 U.S.C.A. § 1084(b). Thus, under *Arcara*, the First Amendment is not even implicated by the Wire Act, and accordingly Plaintiff's claim must fail.

B. The Wire Act Is a Constitutional Regulation of Conduct Under *O'Brien*.

Even if this Court concludes that placing P-bet offers and consummating P-bet transactions over the internet constitutes significantly expressive conduct, this action should be dismissed because the Wire Act is a constitutional regulation of such conduct. *See Nordyke v. King*, 319 F.3d 1185, 1189 (9th Cir. 2003) ("conduct . . . *sufficiently imbued with*

expressive elements of communication [may fall] within the scope of the First . . . Amendment[]" (emphasis added)). First Amendment challenges to statutes regulating such conduct are evaluated under "the less stringent standard announced in *United States v. O'Brien*." *Id.* In *O'Brien*, the Court recognized that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 1678-79. Under the *O'Brien* test, a statute must be upheld against an as-applied First Amendment challenge if "(1) it is within the constitutional power of the government; (2) it furthers an important or substantial government interest; (3) the government interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Vlasak v. Superior Court of California*, 329 F.3d 683, 691 (9th Cir. 2003).

The Wire Act easily satisfies the *O'Brien* test. Congress has authority under the Commerce Clause to regulate the "channels of interstate commerce" or "things in interstate commerce." *United States v. McCoy*, 323 F.3d 1114, 1118 (9th Cir. 2003) (internal quotations omitted). Specifically, "[t]he use of interstate facilities to further the commission of illegal activities, whether those activities be federal or purely state in nature, is within the regulatory power of Congress." *Truchinski*, 393 F.2d at 634; *see also Borgese*, 235 F. Supp. at 296 ("Congress has undoubted authority respecting interstate commerce and the manner of its exercise to meet an obvious evil is a legislative, not a judicial, determination."). The Wire Act, which "merely prohibit[s] the use of interstate facilities to certain conduct which the Congress has declared to be illegal," is squarely within that regulatory power. *Smith*, 209 F. Supp. at 918; *see also Champion v. Ames*, 188 U.S. 321, 357 (1903) (recognizing Congress's authority under the Commerce Clause to regulate interstate gambling).

In satisfaction of the second *O'Brien* factor, Congress has a significant interest in ensuring that states' gambling laws are not violated through facilities of interstate commerce

and in suppressing organized gambling activities. *See Truchinski*, 393 F.2d at 634 (concluding that the "'substantive evil' sought to be curtailed [under the Wire Act] is the use of a federally controlled means of communication to violate state penal statutes"); H.R. Rep. No. 87-967 at 1-2 (1961) ("The purpose of the bill is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce."); S. Rep. No. 87-1956 (1961) (same). Because that interest clearly is not related to free expression, the third *O'Brien* factor is met.

Finally, the Wire Act imposes no greater burden on any expressive aspects of P-bets than necessary to achieve its purpose. Nothing in the Act precludes individuals from merely expressing an opinion as a probability statement, such as "'I think the probability is 80% that the Federal deficit in 2004 will be greater than $200 billion,'" as Plaintiff effectively concedes. *See* Compl. ¶ 12 ("This complaint concerns . . . [Plaintiff's] ability to enable P-bets"); *see also* Compl. ¶ 15 (defining "bet offer" as "statement [that] adds financial risk to form a bet offer"). Thus, the application of the Wire Act to P-bet offers and P-bet transactions does not violate the First Amendment.

C. Dismissal of This Action Is Warranted Alternatively Because P-Bets – if Speech at All – Are Commercial Speech That Is Not Protected by the First Amendment.

The Court's First Amendment analysis must "begin[] with an evaluation of the type of speech threatened by the challenged [Act]." *Washington Mercantile Assoc. v. Williams*, 733 F.2d 687, 689 (9th Cir. 1984). "A distinction is drawn between commercial speech and other varieties of speech." *Id.* Commercial speech is "speech proposing a commercial transaction." *Id.* (internal quotations omitted); *see also Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2000) ("the 'core notion of commercial speech' is that it 'does no more than propose a commercial transaction'"); *e.g., Nordyke v. Santa Clara County*, 110

F.3d 707, 710 (9th Cir. 1997) ("An offer to sell firearms or ammunition is speech that 'does no more than propose a commercial transaction.' Such an offer is, therefore, commercial speech within the meaning of the First Amendment."). Plaintiff does not complain that the Wire Act prevents him from expressing an opinion as a plain probability statement. *See, e.g.*, Compl. ¶ 14 (illustrating a "plain probability statement" as "I think the probability is 80% that the Federal deficit in 2004 will be greater than $200 billion"). Rather, he alleges that, in violation of the First Amendment, the Wire Act prohibits him from making P-bet offers and entering P-bet transactions. *See* Compl. ¶ 12 ("This complaint concerns Rossides's ability to use probability bets (P-bets) and Bet Press's ability to enable P-bets."); Compl. ¶ 15 (contending that "[i]f a speaker of a probability statement adds financial risk to form a bet offer, the statement remains an opinion"). Thus, such offers and transactions – if speech at all – should be analyzed as commercial speech.

The First Amendment "does not protect all proposals to engage in commercial transactions." *Nordyke*, 110 F.3d at 710; *see also Evenson v. Ortega*, 605 F. Supp. 1115, 1118 (D. Ariz. 1985) ("The First Amendment does not provide absolute protection for commercial speech."). For example, "An offer to pay a 'hit man' one million dollars to murder my neighbor proposes a commercial transaction. Similarly, an offer to pay a government official to provide unauthorized copies of classified documents also proposes a commercial transaction." *Nordyke*, 110 F.3d at 710. It is well-settled, however, that commercial speech that "concerns unlawful activity" is not within the protections of the First Amendment. *See id.* ("these proposals to engage in commercial transactions are not accorded First Amendment protection because the underlying transaction is illegal"); *see also Western States Med. Ctr. v. Shalala*, 238 F.3d 1090, 1093 (9th Cir. 2001); *Levi Strauss & Co. v. Shilon*, 121 F.3d 1309, 1312 (9th Cir. 1997); *Grolier Inc. v. Federal Trade Comm'n*, 699

F.2d 983, 988 (9th Cir. 1983); *Evenson*, 605 F. Supp. at 1119. Thus, fatal to Plaintiff's First Amendment claim is that P-bet offers and transactions concern unlawful activity. [4/]

Plaintiff's proposed business, Bet Press, contemplates transmitting over the internet his own and his customers' P-bet offers in an effort to consummate P-bet transactions. Although Plaintiff would like to dress up this activity as "expressive conduct," (*see* Compl. ¶¶ 5, 15, 30-32), his contemplated business would be nothing more than an illegal gambling operation in violation of, at a minimum, 18 U.S.C.A. § 1084, 18 U.S.C.A. § 1952, [5/] 18 U.S.C.A. § 1955. [6/] Since a P-bet offer thus would concern an underlying transaction that is illegal, the offer is not protected speech. Plaintiff's claim thus fails on this alternative and independent basis.

CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that the Court dismiss this action on jurisdictional grounds or, alternatively, for failure to state a claim upon which relief can be granted.

[4/] "Moreover, it has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (internal citations omitted).

[5/] Section 1952 provides in relevant part

> 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 . . . (3) shall be fined under this title, imprisoned not more than 5 years, or both . . . .

18 U.S.C.A. § 1952(a).

[6/] Section 1955 provides in relevant part

> Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C.A. § 1955(a).

Respectfully submitted this 28th day of June 2004.

PETER D. KEISLER
Assistant Attorney General
Civil Division

PAUL K. CHARLTON
United States Attorney
District of Arizona

MICHAEL JOHNS
(AZ Bar No. 3803)
Assistant U.S. Attorney
Civil Chief

VINCENT M. GARVEY
Deputy Branch Director

JACQUELINE E. COLEMAN
(D.C. Bar No. 459548)
Trial Attorney
Federal Programs Branch, Civil Division
U.S. Department of Justice
20 Massachusetts Avenue, N.W. Rm. 7214
Washington, DC 20530
Tel: (202) 514-3418

Attorneys for Defendant Attorney General John Ashcroft

Original filed and copy of the foregoing mailed this 28th day of June 2004 to:

MICHAEL T. ROSSIDES
10401 McDowell Mountain Ranch Road
#2166
Scottsdale, AZ 85255

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

MICHAEL T. ROSSIDES,

Plaintiff,

v.

JOHN ASHCROFT,

Defendant.

CIV-03 2527PHXJAT

ORDER

Upon consideration of Defendant's Motion to Dismiss [and the opposition thereto], it is hereby

ORDERED that Defendant's Motion to Dismiss is GRANTED, and this action is hereby dismissed.

SO ORDERED.

Dated: _____

HON. JAMES A. TEILBORG
UNITED STATES DISTRICT
COURT JUDGE