No. 05-30403

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASINO CITY, INC.
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Defendant-Appellee.

Appeal from the United States District Court
For the Middle District of Louisiana

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

CASINO CITY, INC.,
Plaintiff-Appellant No. 05-30403

v.

UNITED STATES DEPARTMENT OF JUSTICE
Defendant-Appellee

The undersigned counsel of record certifies that the following listed persons and entities as described in 5th Cir. Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

This case concerns a decision dismissing Appellant's action requesting a declaratory judgment regarding its First Amendment constitutional rights with regard to the advertising of online gambling. Because the appeal addresses a significant question regarding a developing area of First Amendment law and commercial speech, and because of the gravity of the constitutional questions, oral argument would be appropriate.

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STATEMENT OF JURISDICTION

This is a direct appeal from a final decision of the United States District Court for the Middle District of Louisiana. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Final judgment was entered on February 15, 2005, and a timely notice of appeal was filed on April 12, 2005 pursuant to Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

I. Whether Casino City's complaint presents an actual case or controversy and whether Casino City has standing to bring this action.

II. Whether Casino City has stated a claim for a violation of its First Amendment rights under the United States Constitution.

STATEMENT OF THE CASE

A. The Course of Proceedings and Disposition in the Court Below

This matter was initiated with the filing of a complaint on August 9, 2004, by Casino City, Inc. ("Casino City") against the United States Department of Justice (the "DOJ"). (R:6-10). The complaint sought, pursuant to 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act), a declaration that: (i) the application of 18 U.S.C. §§ 1084,[1] 1952[2] and/or 1955[3] to Casino City and others

[1] 18 U.S.C. § 1084 (the "Wire Act"), prohibits anyone "engaged in the business of betting and 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

similarly situated violates the First Amendment of the United States Constitution; (ii) the application of 18 U.S.C. § 2[4] to Casino City and others similarly situated, as aiding and abetting a violator of 18 U.S.C. §§ 1084, 1952 and/or 1955, violates the First Amendment; and (iii) that actions of the DOJ in threatening Casino City and others similarly situated with criminal prosecution as detailed above, violate the First Amendment. (R:9-10).

On October 29, 2004, the DOJ filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction), or in the

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> 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 . . . .

[2] 18 U.S.C. § 1952 (the "Travel Act"), prohibits traveling or using the mail or any facilities in interstate and 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. . . ."

[3] 18 U.S.C. § 1955 (the "Illegal Gambling Business Act"), prohibits the ownership, management, and/or supervision of an "illegal gambling business." The statue defines an "illegal gambling business" as one which:

> (i) is a violation of the law of a State or political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

[4] 18 U.S.C. § 2 provides that anyone who aids and abets the commission of any "offense against the United States" is punishable as a principal.

alternative Federal Rule of Civil Procedure 12(b)(6) (failure to state a claim upon which relief can be granted). (R:36). On February 15, 2005, without hearing, the district court granted the DOJ's motion finding that it lacked subject matter jurisdiction because (i) Casino City failed to present a case or controversy; (ii) Casino City does not have standing to maintain this action; and also finding that (iii) Casino City does not have a claim for a First Amendment violation. (R:161-177).

B. Statement of the Facts

Casino City and its Business

Casino City is a United States company that operates the Casino City Network, a collection of Internet sites, including www.CasinoCity.com and http://Online.CasinoCity.com, which disseminate information about land based and online casinos, casino style games and sports betting. (R:6). Information disseminated on the Internet sites includes interviews with professional gamblers, advice and expert columns, directories, playing strategies and tips, weekly news publications and news clips. (R:8).

Casino City derives a portion of its revenue from the placement of advertisements on its informational Internet sites for lawful overseas companies that offer online casino or sportsbook gambling and which legally operate in the jurisdictions in which they are located. (R:8). The sale and placement of the

advertisements is not contrary to the law of Louisiana. (R:8). The advertisements concern lawful activity and provide accurate, non-misleading information. (R:8). The advertisements placed on Casino City's sites are available for viewing by tens of millions of persons making up the worldwide audience of the Internet, many of whom are located in jurisdictions in which engaging in the conduct that is advertised is legal. (R:94-95). Casino City does not conduct or participate in online gambling activities. (R:8).

The DOJ's Threatening Actions

In June 2003, the DOJ sent a letter to the National Association of Broadcasters (the "NAB"), and other similar advertising associations, wherein the DOJ warned that entities and individuals placing advertisements for online gambling may be violating various state and federal laws, including 18 U.S.C. §§ 1084, 1952 and 1955. (R:7, 11-12). The DOJ's letter further warned that the entities or individuals that accept and run such advertisements may be aiding and abetting illegal activities, a Class E felony, pursuant to 18 U.S.C. § 2. (R:7, 11). In its letter, the DOJ requested that the associations forward the letter to all of their members "which may be running such advertisements, so that they may consult with their counsel or take whatever other actions they deem appropriate." (R:12).

The DOJ followed its letter several months later with a series of subpoenas issued to media outlets, Internet portals, public relations companies and technology

companies seeking commercial and financial information in relation to advertisements purchased and placed by online gambling companies. (R:7) As a direct result of the DOJ's public warnings and issuance of initial subpoenas, a number of major Internet advertising portals, such as Yahoo and Google, ceased taking advertisements for online gambling. (R:8, 102-03).

Chilling Effect upon the Exercise of Free Speech
and other Damage to Casino City

Prior to the DOJ's public warnings and issuance of subpoenas, Casino City's parent company, Information Technology Systems, Inc. ("ITS"), was in negotiations with A&E television network to include national promotion spots on the History Channel naming Casino City as a sponsor and identifying Casino City on the History Channel's website as a sponsor with a link to Casino City websites. (R:102-03). Because of the exposure on national television and also on the History Channel website, it was anticipated that the partnership with A&E would increase Casino City's name awareness, increase traffic on its websites, and generate revenue through additional business. (R:103). However, A&E received knowledge of the DOJ letter and became concerned that engaging in business with ITS would lead to A&E being accused of aiding and abetting online gaming. (R:103). Once A&E learned of the DOJ's letter, it was no longer interested in engaging in business with ITS. (R:103).

Casino City's network of Internet sites is one of the largest and most heavily trafficked gaming information website networks based in the United States that accepts advertisements from online gambling companies. (R:103). The advertisements that Casino City sells and runs are of the same content and nature as those that the DOJ warned may constitute the offense of aiding and abetting a violation of 18 U.S.C. §§ 1084, 1952 and/or 1955. (R:9). If Casino City refrains from the placement of advertisements for online gambling, it will lose a substantial amount of its income, suffer severe economic injury and likely go out of business. (R:104).

C. Standard or Scope of Review

This Court reviews de novo a district court's rulings granting motions to dismiss for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted. *Montez v. Department of the Navy*, 392 F.3d 147 (5th Cir. 2004); *Zephyr Aviation, L.L.C. v. Dailey*, 247 F.3d 565 (5th Cir. 2001).

SUMMARY OF THE ARGUMENT

The DOJ in a well orchestrated plan unabashedly set out to stifle free speech of an entire sector of the advertising industry contrary to the United States Constitution. Indeed, the DOJ's orchestrated plan to silence an industry has succeeded. The DOJ's warnings have chilled free expression. As a direct result of its public warnings and issuance of subpoenas, a number of Internet advertising

portals, similar to Casino City, have ceased to accept advertising of online gambling and a television network has declined to place promotion spots for Casino City or its affiliated companies.

The district court's decision that Casino City failed to present a case or controversy and that it lacks standing is erroneous. When analyzed under *First Amendment case law*, which is missing from the district court's opinion, it becomes clear that the district court utilized the wrong standard and that Casino City has adequately alleged a case or controversy and has standing. For a case or controversy to exist and for standing to exist in a First Amendment action, it is only necessary that a plaintiff be objectively chilled from exercising free speech. Casino City meets this standard. Not only does Casino City have an objectively reasonable fear of enforcement consequences of continuing to accept and place online gambling advertisements, but it has already suffered a substantial economic injury as a direct result of the DOJ's conduct. While the DOJ asserts that Casino City has not properly alleged that it is aiding and abetting illegal activities, the advertisements accepted and run by Casino City fall squarely within the category of advertising the DOJ states "may be aiding and abetting illegal activities." And the DOJ has not disavowed its intention to prosecute Casino City or others similarly situated.

Furthermore, if in fact the DOJ does not intend to effectuate such prosecutions, its actions are particularly troublesome from a constitutional standpoint. If the district court's decision is upheld, the DOJ will have succeeded in effectively immunizing itself from judicial review of a course of conduct designed to stifle free speech.

Casino City has stated a claim for a violation of its First Amendment rights. The DOJ's blanket restriction on the advertising of online gambling which is legal in many jurisdictions, impermissibly restrains protected commercial speech. At such an early stage in the proceedings, the DOJ most certainly has not shown that its restriction on this protected speech passes constitutional muster.

ARGUMENT

I. CASINO CITY'S COMPLAINT PRESENTS AN ACTUAL CASE OR CONTROVERSY AND CASINO CITY HAS STANDING TO BRING THIS ACTION.

Standard for First Amendment Case or Controversy

Declaratory judgment actions are justiciable if there is an "actual controversy." 28 U.S.C. § 2201(a). The "actual controversy" requirement is analyzed in the same manner as the "case or controversy" standard under Article III of the United States Constitution. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937). There is no precise test for determining whether a claim presents a case or controversy. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289,

297 (1979). "The basic inquiry is whether the conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Id.* at 298.

To satisfy Article III's case or controversy requirement, a plaintiff challenging a criminal statute must establish a realistic danger of sustaining a direct injury as a result of a statute's enforcement, but need not await criminal prosecution before seeking relief. *Id.* at 302 (Supreme Court finding that plaintiff demonstrated a realistic danger of sustaining a direct injury sufficient to present a case or controversy where, although the state had maintained that the criminal penalty at issue had never been applied and may never be applied, the plaintiff's fear of prosecution under the alleged unconstitutional statute was not wholly speculative as the state had not disavowed any intention of invoking the criminal penalty). In First Amendment challenges seeking a declaratory judgment, the threshold is even lower. An actual controversy is found to exist and pre-enforcement review of a law may be granted if the challenged conduct is likely to have an objectively chilling effect upon protected First Amendment activity. *National Rifle Ass'n v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997) (pre-enforcement review is usually granted under the Declaratory Judgment Act if First Amendment activity is chilled); *American Civil Liberties Union v. The Florida Bar*, 999 F.2d 1486, 1494 (11th Cir. 1993) (judicial candidate challenged canon of state's code of

judicial conduct on First Amendment grounds because he was concerned that his proposed speech might violate the canon; court held that the candidate reasonably feared disciplinary action and suffered objective chill of his First Amendment rights for purposes of determining whether a live controversy existed between the candidate and the state bar and judicial qualifications committee where an advisory opinion stated that proposed speech would violate the canon); *Penny Saver Publications, Inc. v. Village of Hazel Crest*, 905 F.2d 150, 154 (7th Cir. 1990) (where, because of an ordinance, the board of realtors suggested that real estate advertisers refrain from advertising in a certain newspaper, speech was objectively chilled and newspaper had sufficient injury in fact to satisfy case or controversy requirement).

Standard for Standing in First Amendment Actions

Similarly, to have standing to raise a claim, a plaintiff must demonstrate that (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) fairly traceable to the challenged action of the defendant and (3) likely, as opposed to merely speculative, to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In actions involving criminal statutes, a plaintiff has suffered an injury in fact and has standing to bring a challenge if there is a threat of criminal prosecution. *Babbitt*, 442 U.S. at 298; *Diamond v. Charles*, 476 U.S. 54, 65

(1986). In actions involving First Amendment challenges, the standard for injury in fact is relaxed even more and an actual injury can exist for standing purposes for either of two reasons. *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 56-57 (1st Cir. 2003); *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d. 8, 13-14 (1st Cir. 1996); *Stenson v. McLaughlin*, 2001 WL 1033614 at *2 (D.N.H. 2001).

First, a plaintiff in a First Amendment challenge generally has standing if he or she alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but claimed to be proscribed by statute, and there exists a credible threat of prosecution. *Id.* Second, a plaintiff has an injury in the First Amendment context where he or she is chilled from exercising the right to free expression or foregoes free expression in order to avoid enforcement consequences. *Id*.; *Penny Saver Publications*, 905 F.2d at 153-54; *Allen, Allen, Allen & Allen, v. Williams*, 254 F. Supp.2d 614, 623 (E.D. Va. 2003). Of course, the fear of enforcement consequences must be objectively reasonable. *E.g., New Hampshire Right to Life,* 99 F.3d at 14 (*citing Laird v. Tatum*, 408 U.S. 1, 13-14 1988)). Thus, standing exists where the danger is one of self-censorship. *Id.* (*citing Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988)); *American Civil Liberties Union of Ga. v. Miller*, 977 F. Supp 1228, 1231 (N.D. Ga. 1997).

The DOJ's Warnings Constitute an Objective Chill of Speech-Related Activity

Notifications or warnings from a public officer or an enforcement authority suggesting that First Amendment activity is objectionable or illegal, or suggesting that certain speech-related activity might be prosecuted, have consistently been held to objectively chill protected speech. *E.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Drive In Theatres, Inc. v. Huskey*, 435 F.2d 228 (4th Cir. 1970); *American Civil Liberties Union v. City of Pittsburgh*, 586 F. Supp. 417 (W.D. Pa. 1984); *Pittman v. Cole*, 267 F.3d 1269 (11th Cir. 2001); *The Florida Bar*, 999 F.3d at 1486; *Allen*, 254 F. Supp.2d at 614; *Stenson*, 2001 WL 1033614; *Skyywalker Records v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990), *rev'd on other grounds sub nom., Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992), *cert. den.*, 506 U.S. 1022 (1992). This is so even if the notification or warning has not been given directly to the plaintiff. *E.g., Bantam Books*, 372 U.S. at 58; *Huskey*, 435 F.2d at 228, *City of Pittsburgh*, 586 F. Supp. at 417; *Pittman*, 267 F.3d at 1269; *Allen*, 254 F. Supp.2d at 614; *Skyywalker Records*, 739 F. Supp. at 578.

In *Bantam Books*, the Supreme Court reviewed acts and practices of the Rhode Island Commission to Encourage Morality in Youth which were challenged by plaintiffs who were publishers of paperback books. 372 U.S. at 59-61. The

commission's practice was to notify book distributors, including the major distributor of plaintiffs' books, on official commission stationery that it deemed certain designated books and magazines to be "objectionable" for sale, distribution, or display to youths under 18 years of age. *Id.* at 61-62. The typical commission letter thanked distributors in advance for their "cooperation" and reminded them of the commission's duty to recommend to the attorney general prosecution of purveyors of obscenity. *Id.* The Court found that it would be naïve to credit the state's assertion that the notices were mere legal advice, when they plainly served as instruments of regulation independent of the statutes. *Id.* at 68-69. In finding that the notices unconstitutionally chilled the distributors' protected speech the Court stated:

> It is true that [plaintiffs'] books have not been seized or banned by the State, and that no one has been prosecuted for their possession or sale. But . . . the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim. We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief . . . [t]hese acts and practices directly and designedly stopped the circulation of publications in many parts of [the state].

Id. at 66-67. The Court found that although the distributors were "free" to ignore the commission's notices in the sense that the failure to cooperate would have violated no law, compliance with the commission's directives was not voluntary. *Id.* at 68 ("[P]eople do not lightly disregard public officers' thinly veiled threats to

institute criminal proceedings against them if they do not come around . . . "). *See also Huskey*, 435 F.2d at 228 (holding that sheriff's statements in newspapers and on the radio that it was his opinion that certain films were obscene and that persons exhibiting such films might be prosecuted were unconstitutional prior restraints in violation of the First Amendment).

Likewise, in *City of Pittsburgh*, a mayor issued an open letter in the local media addressed to all magazine and news dealers expressing personal distaste for a particular issue of *Hustler* magazine and urging businesses to immediately remove the magazine from their shelves to "eliminate the need for the city to engage in a massive sweep of all news stands and stores and the initiation of criminal proceedings." 586 F. Supp. at 419. Subsequently, police were dispatched to newsstands and they failed to find a single copy of the magazine. *Id.* at 420. The American Civil Liberties Union (ACLU) and several named plaintiffs filed suit seeking declaratory and injunctive relief contending that the mayor's conduct amounted to an unconstitutional prior restraint on First Amendment freedoms because it chilled protected speech. *Id.* Because no vendors were named as plaintiffs, the defendant city contended that the ACLU had no standing to bring the action. *Id.* The city also argued that there was no prior restraint because the conduct at issue only called for voluntary compliance with laws; no newsstands were raided, nor were any publications seized. *Id.* The court found that to accept

the city's position -- that since no seizure was involved no constitutional violation occurred -- would require the court to ignore the substance and effect of the actions taken by the mayor. *Id.* at 421. The court stated that "[t]he record in this case amply demonstrates that the Mayor deliberately set about to achieve the suppression of a publication . . . and succeeded in his aim." *Id.* at 421-22. The court also held that constitutional protections were not limited to the vendors. *Id.* at 421. The court granted standing to the ACLU and the other plaintiffs. *Id.* at 421. *See also Pittman*, 267 F.3d at 1269, 1284 (for purposes of standing, objectively reasonable chilling effect on speech of judicial candidates and political organization was traceable to an advisory opinion of the Alabama Judicial Inquiry Commission indicating that it would be unethical for candidates to respond to a questionnaire circulated by an organization for the purpose of preparing a voter guide, and was redressable by relief sought, i.e., declaratory judgment and injunction ensuring that enforcement authority would not enforce ethical canons in a manner inconsistent with First Amendment); *The Florida Bar*, 999 F.2d at 1486, 1494 (judicial candidate reasonably feared disciplinary action as a result of an advisory opinion and suffered objective chill of his First Amendment rights); *Allen*, 254 F. Supp.2d at 614, 624-25 (even though bar had not officially taken position that a certain type of attorney advertisement was unethical, bar issued a series of advisory opinions leaving the question unclear which chilled attorneys'

right to free speech and was sufficient to confer standing on them); *Skyywalker Records,* 739 F. Supp. at 600 (holding that warning by sheriff to record stores that certain record was obscene and that the sale of such record would result in arrest was prior restraint on free speech and observing that without judicial intervention, the "rights to publish presumptively protected speech were left twisting in the chilling wind of censorship").

Here, Casino City has alleged that it accepts and runs advertising on its Internet sites for online gambling. The letter to the NAB and other organizations by the DOJ, the enforcement authority of the United States government, clearly stated that such "entities and individuals that accept and run such advertisements may be aiding and abetting these illegal activities. . . . any person who aids and abets in the commission of any of the above-listed offenses is punishable as a principal violator . . . ." (R:11). The DOJ's letter warning that accepting and running such advertisements might violate federal statutes, although couched as a "public service announcement," is a less than subtle threat that the placement of such advertisements might lead to prosecution. The DOJ followed up its letter with subpoenas clearly intended to obtain evidence of the conduct about which the DOJ had issued its warnings. (R:7). *See Valley Broadcasting Co. v. United States,* 107 F.3d 1328, 1330 n. 2 (9th Cir. 1997) (where broadcasters alleged the nature and content of the advertisements they wished to broadcast and the FCC had found

similar advertisements in violation of the law, broadcasters demonstrated a "reasonable threat of prosecution" and had standing to assert their challenge), *cert. denied*, 522 U.S. 1115 (1998).

The DOJ has implied that no person or entity has yet been prosecuted for the acceptance and running of Internet advertisements for online gambling. (R:40, 44, 51). However, the DOJ's letter and subpoenas create a reasonable, objective fear of prosecution and the DOJ has declined to disavow an intent to prosecute. As a direct result of the DOJ's conduct, a number of Internet advertising portals, including Yahoo and Google, have ceased to accept and run advertising of online gambling. (R:8, 102-03). Like these other Internet portals, Casino City feels the chill on its protected speech as well and has objectively reasonable fears of enforcement consequences of continuing to accept and place such advertisements. Casino City is faced with the choice of self-censorship, or continuing to accept and run the advertisements at the risk of future prosecution.

The circumstances of the case at bar are directly analogous to those in *Bantam Books* where although no one had been prosecuted, and the defendant argued that it was merely advising distributors of their legal rights, the thinly veiled threats by a public officer to institute criminal proceedings acted as an instrument of regulation independent of the law. Here, as in *Bantam Books*, *Huskey*, *City of Pittsburgh,* and *Skyywalker Records*, public officers, without

actually prosecuting anyone, set out to achieve suppression of a particular kind of speech deemed objectionable and succeeded in their aim. The circumstances of the instant case are also comparable to those in *Pittman*, *The Florida Bar*, and *Allen*, where advisory opinions invoked reasonable fears of disciplinary action and thereby objectively chilled First Amendment rights.

The DOJ's letters and subpoenas have chilled the advertising of online gambling by Internet portals, including Casino City. Therefore, pursuant to the pertinent First Amendment case law set forth above, Casino City has demonstrated both a case and controversy as well as a sufficient injury in fact to entitle it to standing in this First Amendment action.

It is of no Significance that Casino City did not Receive Warnings Directly from the DOJ

The district court concluded that Casino City has no standing because it has not been directly contacted by the DOJ, by letter or subpoena. (R:172). The district court's contention misapprehends First Amendment precedent. Casino City is within the class of entities threatened by the DOJ's warnings and is similarly situated to those receiving the DOJ's subpoenas. Casino City's fear of prosecution therefore meets the objective standard test. As established by the case law discussed above, when a public officer or enforcement authority issues notices and warnings that First Amendment activity of a type in which the plaintiff is engaged may be illegal or may be subject to prosecution, or is objectionable to the

public officer or enforcement authority, a plaintiff has standing to bring a First Amendment claim. That is because any such conduct on behalf of the public officer or enforcement authority chills the exercise of free speech. *City of Pittsburgh,* 586 F. Supp. at 417; *Pittman,* 267 F.2d at 1269; *The Florida Bar,* 999 F.2d at 1486; *Allen,* 254 F. Supp.2d at 614; *Skyywalker Records,* 739 F. Supp. at 578. Such notices and warnings can objectively chill speech of entities other than those to whom the notices and warnings are directly given. *Bantam Books,* 372 U.S. at 58; *Huskey,* 435 F.2d at 228; *City of Pittsburgh,* 586 F. Supp. at 417; *Pittman,* 267 F.2d at 1269; *Allen,* 254 F. Supp.2d at 614; *Skyywalker Records,* 739 F. Supp. at 578.

Casino City does not have to Actually Engage in Unlawful Activity to Experience a Chill of Protected Speech

The district court also held that Casino City lacks standing because it has not shown that it intends to engage in an activity prohibited by statute. (R:171-72). On this issue, *Ward,* 321 F.3d at 1263, is to the point. In *Ward,* the plaintiff challenged the constitutionality of hate crimes. 321 F.3d at 1264. As in the case at bar, the government contended that because the plaintiff intended to engage in lawful activity, there was no credible threat of prosecution and thus no standing. *Id.* at 1267. The court rejected the government's argument that the plaintiff's plan to engage in lawful activity automatically immunized him from being charged under the hate crimes statute. *Id.* at 1268. The court pointed out that the plaintiff

need not violate the law to be charged with violation of the law. *Id.* The court also pointed out that the plaintiff had been given no assurance that he would not be charged if he engaged in the future in the same activity which the government had previously deemed unlawful. *Id.* The court found that the plaintiff faced a credible threat of future prosecution and suffered from an injury in the form of a "chilling effect" on his desire to engage in First Amendment activities. *Id.* at 1269. The court reversed the district court's dismissal for lack of standing. *Id.* at 1270. *See also Bantam Books*, 372 U.S. at 68 (vendors would have violated no law if they had refused to cooperate with mayor's directives; rejecting defendant's argument that vendors were free to ignore notices and warnings and finding that compliance with directive was not voluntary; warnings were an unconstitutional chill of speech); *City of Pittsburgh*, 586 F. Supp at 422 (although mayor's letter called for voluntary compliance, it could reasonably be interpreted as conveying to vendors that some form of punishment would follow; letter amounted to an informal system of prior restraint and chill of protected speech).

As the plaintiff in *Ward*, Casino City does not have to actually engage in unlawful activity to be entitled to standing. While the DOJ asserts that Casino City has not properly alleged that it is aiding and abetting legal activities (R:47-49), the advertisements accepted and run by Casino City fall squarely within the category of advertisements that the DOJ has expressly stated "may be aiding and abetting

illegal activities." (R:11). The fact that the DOJ has issued a warning that such advertisements may lead to prosecution is objectively sufficient to chill Casino City's right to free expression. Furthermore, Casino City has been given no assurance that it will not be charged in the future if it engages in the same activity which the DOJ has defined as unlawful.[5] Hence, as the plaintiff in *Ward*, Casino City faces a credible threat of future prosecution and suffers from an injury in the form of a "chilling effect" on its desire to engage in First Amendment activities.

Casino City has Suffered a Direct Injury in Fact

Moreover, aside from the fear of prosecution and the chill placed on its exercise of free speech, Casino City has alleged a direct injury in fact. (R:75, 103). As a direct result of the DOJ's letter and subpoenas, Casino City lost a valuable contractual opportunity with A&E television network to have exposure on national television via the History Channel and also on the History Channel website. (R:103). The contract would have meant an increase in Casino City's name

[5] *See also Stenson*, 2001 WL 1033614 (in light of advisory opinion from attorney general notifying plaintiffs that political advertisements must comply with statute, although plaintiffs had not been prosecuted previously for violating statute, for standing purposes it appeared that attorney general had not abandoned the possibility of future enforcement); *American Booksellers Foundation for Free Expression v. Dean*, 202 F. Supp.2d 300 (D. Vt. 2002) (government's statement that it would not prosecute operators of Internet websites did not preclude standing of operators to maintain First Amendment action), *aff'd in part, modified in part*, 342 F.3d 96 (2d Cir. 2003); *Deida v. City of Milwaukee*, 176 F. Supp.2d 859, 863 (E.D. Wis. 2001) (standing existed in First Amendment context where government failed to indicate affirmatively that it would not enforce statute).

awareness, increase in traffic on its websites, and increased revenue through additional business. (R:103). Hence, because of the DOJ's conduct in employing its coercive authority to stifle speech, Casino City has suffered a loss of income and significant economic damage. Casino City has met the injury in fact prong of the test for standing in First Amendment actions.[6]

Judicial Intervention is Appropriate Under These Circumstances

The DOJ deliberately set out to achieve suppression of Internet advertising of online gambling. Without judicial intervention, Casino City's right to advertise presumptively protected speech will be "left twisting in the chilling wind of censorship." *See Skyywalker Records*, 739 F. Supp. at 600. If the district court's decision is upheld, the DOJ will have succeeded in using its coercive authority to stifle free speech without prosecution, and will have effectively immunized itself from judicial review of its course of unconstitutional conduct.

II. CASINO CITY HAS STATED A CLAIM FOR VIOLATION OF ITS FIRST AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION

Where the issues of fact are central to the subject matter jurisdiction and the merits of the case, as they are here, a resolution of the jurisdictional issue under

[6] The other prongs of the test for standing, while not at issue in this appeal, have also been met. The warnings which unconstitutionally chilled Casino City's speech are traceable to the DOJ. *See Lujan*, 504 U.S. at 560-61. It is also likely that Casino City's injury, i.e. chilling of speech, fear of prosecution, and further loss of business opportunities, would be redressed by a favorable decision. *Id.*

Rule 12(b)(1) is improper. *Montez,* 392 F.3d at 150. Rather, a district court should assume jurisdiction and deal with the jurisdictional objection as an attack on the merits of plaintiff's case under Rule 12(b)(6). *Id.* A motion to dismiss under Rule 12(b)(6) is "viewed with disfavor and rarely granted." *Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 498 (5th Cir. 2000). "[A] district court may not dismiss a complaint under Rule 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [plaintiff's] claim." *Id.* (*quoting Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)). Here, Casino City has sufficiently pled the merits of its case, i.e., a violation of its First Amendment rights, and Casino City's claim does not lack any allegations regarding a required element necessary for relief. *See Blackburn v. City of Marshall,* 42 F.3d 925, 931 (5th Cir. 1995).

Constitutional Standards.

More than thirty years of United States Supreme Court jurisprudence leaves no doubt that truthful, non-misleading commercial speech receives a significant level of protection under the First Amendment. *E.g., Bigelow v. Virginia,* 421 U.S. 809 (1975); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976). This includes paid commercial advertisements. *E.g., Bigelow,* 421 U.S. at 818 (newspaper advertisement did not lose its First Amendment protection merely because it "had commercial aspects or reflected the advertiser's commercial interests"); *Virginia State Bd. of Pharmacy,* 425 U.S. at

762 (the First Amendment applies to "speech which does no more than propose a commercial transaction"). In *Virginia State Bd. of Pharmacy*, the Supreme Court explained that:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end the free flow of commercial information is indispensable.

425 U.S. at 765.

Subsequently, in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), the Court formulated a test for determining constitutional protection for commercial speech, including advertising. The Court held that (1) commercial speech that is not misleading nor related to unlawful activity comes within the First Amendment and may only be regulated if: (2) the regulation promotes a substantial governmental interest; (3) the regulation directly advances the interest asserted; and (4) the regulation is not more extensive than necessary to serve that interest. 447 U.S. at 564. Contrary to the district court's ruling, the DOJ's "regulation" of the advertising of online gambling does not pass three of the four parts of the *Central Hudson* test.

Part One of the *Central Hudson* test

In analyzing the advertisements run by Casino City under the first part of the *Central Hudson* test, the district court found that "[t]he government's interest is specifically directed towards the advertising of illegal activity, namely Internet gambling." (R:174). The district court's finding in this regard is overreaching and ignores principles established by the United States Supreme Court for the review of multi-jurisdictional advertising under the First Amendment.

The online gambling entities advertised on Casino City websites are legal in the jurisdictions in which they operate (R:8), and online gambling is expressly legal in certain other jurisdictions.[7] Furthermore, many states have not made various forms of online gambling illegal and online casino gambling is not illegal pursuant to federal law.[8]

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[7] The World Trade Organization ("WTO") dispute settlement panel recently ruled in favor of Antigua in a challenge to the United States policies regarding online gambling. While this ruling is not controlling, it is informative in that it reflects the sentiment of other nations, i.e., that online gambling is not illegal. The United States was found to be in violation of the terms of the General Agreement on Trade Services with regard to its trade commitments to the WTO. The panel's report urged the United States to bring its measures into conformity with its WTO obligations. *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Report of the Panel,* World Trade Organization, Doc. No. 04-2651, WT/DS285/R (Nov. 10, 2004).

[8] This Court has held that online casino gambling is not prohibited by 18 U.S.C. § 1084 ("the Wire Act"). *In re MasterCard International Inc.*, 313 F.3d 257, 263

It is well-established that an advertiser may not be prohibited from disseminating truthful information about an activity that is legal in another jurisdiction. *Bigelow*, 421 U.S. at 809. In *Bigelow*, the Supreme Court reviewed whether a newspaper publisher's First Amendment rights were unconstitutionally abridged by a Virginia state statute prohibiting the advertisement of abortion services. 421 U.S. at 811. The advertisement in question pertained to abortion services provided by a facility in New York. *Id.* at 812. The Court observed that:

> The Virginia Legislature could not have regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that State. Neither could Virginia prevent its residents from traveling to New York to obtain those services or . . . prosecute them from going there. Virginia possessed no authority to regulate the services provided in New York – the skills and credentials of the New York physicians and of the New York professionals who assisted them, the standards of the New York hospitals and clinics to which patients were referred, or the practices and charges of the New York referral services.
>
> * * *

(5th Cir. 2002). *See also In re MasterCard International, Inc. Internet Gambling Litigation*, 132 F. Supp.2d 468, 480-81 (E.D. La. 2001), *aff'd*, 313 F.2d 257 (5th Cir. 2002) (reviewing case law, statutory language, and legislative history pertaining to the Wire Act). There is also an absence of federal case law applying 18 U.S.C. § 1952 ("the Travel Act") and 18 U.S.C. § 1955 ("the Illegal Gambling Business Act") to online gambling, and there are currently no federal statutes that pertain to online gambling. *See MasterCard*, 132 F. Supp.2d at 478. Also, certain types of sports betting are permitted in the United States. *See* 28 U.S.C. § 3704(a); *see also Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 180 (1999) (discussing the exemptions to 28 U.S.C. § 3702 pertaining to sports betting and the uncertainty of the statute's scope).

> A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State. It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State.

Id. at 823-26 (internal citations omitted).

The Court found that the newspaper publisher had a legitimate First Amendment interest and that the advertisement was entitled to First Amendment protection. *Id.* at 826. While the Court recognized that the State had a legitimate interest in maintaining the quality of medical care provided within its borders, it did not justify the regulation of what Virginians may hear or read about with regard to the services provided in New York. *Id.* at 827. The Court concluded that the state was improperly advancing an interest in shielding its citizens from information about activities outside the state's borders, such activities of which the state's police powers did not reach. *Id.* at 827-828. The Court also found that the record did not support that the advertisement about the legal activity was deceptive or fraudulent. *Id.* at 828.

In the case at bar, like the newspaper publisher in *Bigelow,* Casino City is accepting and running advertisements about activities which are completely legal in the jurisdictions where they take place. As the state of Virginia in *Bigelow,* the DOJ cannot proscribe or regulate these activities in such other jurisdictions, nor

can it prevent citizens from traveling to these other jurisdictions to participate in such activities or prosecute them for going there. As the state in *Bigelow,* the DOJ may not, under the guise of exercising its authority, bar anyone from disseminating information about an activity that is legal in another jurisdiction. The DOJ may not act to shield citizens from information about legal activities in other jurisdictions where its powers do not reach. Furthermore, like the record in *Bigelow,* the record in the instant case does not support that the information disseminated by Casino City is deceptive or fraudulent. Hence, pursuant to *Bigelow,* the advertisements in question in the case at bar are protected under the First Amendment. *See also Swedenburg v. Kelly,* 358 F.3d 223, 241 (2d Cir. 2003) (New York law prohibiting out-of-state wineries not licensed in New York from causing any publication of advertising to enter New York violated First Amendment; court noting that if wineries which are legal in other states advertise on the Internet, such advertisements reaching New Yorkers would be unjustly illegal and the prohibition of such advertising would abridge the freedom of speech embodied in the First Amendment), *reversed on other grounds sub nom., Granholm v. Heald,* 125 S. Ct. 1885 (2005).

Furthermore, as the court in *Swedenburg* recognized, because Internet advertisers disseminate information across many borders, it creates unique effects on a First Amendment analysis. Likewise, the Supreme Court has recognized the

implications of the Internet on First Amendment challenges. *Ashcroft v. American Civil Liberties Union*, 124 S. Ct. 2783 (2004) (holding that Internet content providers were likely to prevail on claim that Child Online Protection Act violated the First Amendment by burdening adults' access to some protected speech); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (finding provisions of the Communications Decency Act violated the First Amendment where it would prevent individuals over the age of 18 from accessing protected information).

The Court in *Reno* explained that the Internet is a "vast platform" from which publishers, advertisers and the like can address and hear from a "worldwide audience" consisting of tens of millions of "readers, viewers, researchers and buyers." 521 U.S. at 852. "Once a provider posts its content on the Internet, it cannot prevent that content from entering any community . . . ." *Id.* at 853. [W]e agree . . . that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id.* at 870. *Reno* is instructive in the instant case because it stands for the proposition that speech communicated via the Internet cannot be deemed illegal in blanket fashion if such speech is protected speech by many of the Internet's users.[9] Advertising for online gambling is available for viewing by tens of millions of people making up the

[9] At the present time, there is no technology available to block certain communities from receiving information transmitted over the Internet. *See Ashcroft*, 124 S. Ct. at 2792.

worldwide audience of the Internet, many of whom are located in countries where engaging in the conduct that is advertised is expressly legal. Casino City accurately informs the public about this legal activity.

Part Three of the *Central Hudson* test

At this juncture of the case, the DOJ has also not passed part three of the *Central Hudson* test. The third part of the *Central Hudson* test requires that the restriction on speech directly and materially advance the asserted governmental interest. "This burden is not satisfied by mere speculation or conjecture" and "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). Rather, the government must demonstrate that "its restriction will in fact alleviate [the asserted harms] to a material degree." *Id.*

Here, to support its contention that the restriction directly and materially advances the purported interest the DOJ states, "[b]y punishing and deterring advertising for such operations, the challenged application 'directly advance[s]' the statute by reducing the ability of such operations to solicit customers." (R:60). The statute the DOJ refers to is a Louisiana state statute which provides that the legislature is "charged with the responsibility of protecting and assisting its citizens who suffer from compulsive or problem gambling behavior which can result from the increased availability of legalized gambling activities." (R:59); La. Rev. Stat. §

14:90.3.[10] The DOJ maintains that online gambling poses a "unique threat of vastly increasing the pervasiveness and easy accessibility of various types of gambling." (R:60).

The Supreme Court's reasoning in *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173 (1999) requires that the DOJ's argument on this point be rejected. In *Greater New Orleans*, the government stated that its restrictions on advertisement broadcasting directly advanced its interest in alleviating casino gambling because broadcast advertising concerning casino gambling increases demand for such gambling, which in turn increases the amount of casino gambling. 527 U.S. at 189. The government also maintained that compulsive gamblers were especially susceptible to the pervasiveness and potency of broadcast advertising. *Id*. The Supreme Court rejected this argument finding that the government had failed to "connect casino gambling and compulsive gambling with broadcast advertising for casinos . . . . " *Id.* The Court concluded that the regulation of the broadcast advertisements would not materially further the asserted interest because the gambling regulatory scheme had too many exemptions and inconsistencies:

> While it is no doubt fair to assume that more advertising would have some impact on overall demand for gambling, it is also reasonable to assume that much of that advertising would merely channel gamblers

[10] This statute also specifically states that providing advertising or other site related services does not constitute "gambling by computer." La. Rev. Stat. § 12:90.3(I).

> to one casino rather than another. More important, any measure of the effectiveness of the Government's attempt to minimize the social costs of gambling cannot ignore Congress' simultaneous encouragement of tribal casino gambling, which may well be growing at a rate exceeding any increase in gambling or compulsive gambling that private casino advertising could produce.

Id. The Court found that the government had presented no convincing reason for "pegging" its restrictions on the identity of the owners or operators of the advertised casinos. *Id.* at 191.

In the instant matter, at least at this point in the proceedings, the DOJ has failed to make the connection between compulsive gambling with Internet advertising for online gambling. *See Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 535 S.E.2d 642 (S.C. 2000) (government did not meet the third part of the *Central Hudson* test because it did not show that its ban on the advertising of video gaming promoted its goal of decreased gambling or that it prevented gambling and gambling addictions). Also, as the Supreme Court pointed out in *Greater New Orleans,* because of the many other avenues for gambling that are not the target of restrictions, the DOJ has presented no convincing reason for pegging its speech ban on advertisers of online gambling. The speech restrictions pertaining to gambling are so replete with exemptions and inconsistencies that, like the government in *Greater New Orleans,* the DOJ cannot show that its restrictions on speech in this area of gambling will alleviate the speculative harms to any material degree.

Furthermore, even if Casino City ceases to place advertisements for online gambling, persons and entities located outside the United States can place the same type of advertisements which are equally as accessible as those currently placed by Casino City. *See Ashcroft,* 124 S. Ct. at 2793 and *Reno*, 521 U.S. at 850 (finding that 40% or more of the content on the Internet originates from outside the United States). Banning United States Internet providers from carrying Internet gaming advertisements does little if anything to remove the advertisements from the Internet because foreign companies will continue to carry them unabated. *See Id.* at 853 (there is no "single centralized point from which individual Web sites or services can be blocked from the Web"). Such banning will do nothing to alleviate the alleged harm asserted by the DOJ. In short, the DOJ has certainly not demonstrated that its restraint will in fact alleviate the asserted harms to a "material" degree.

Part Four of the *Central Hudson* test

The fourth part of *Central Hudson* requires that the speech restriction be no more extensive than necessary to serve the interests that support it. The DOJ must demonstrate that the restriction is narrowly tailored to the asserted interest and is a "reasonable fit" and one whose scope is in proportion to the interest served. *E.g., 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 486 (1996).

According to its letter, the DOJ seeks a blanket ban on the advertising of online gambling. However, such advertising pertains to activity which is legal in many jurisdictions and the DOJ should not be allowed to place an outright ban to shield citizens from the dissemination of accurate information about commercial activity which is legal is some jurisdictions. *See id.* at 501-502 (complete speech bans, unlike content-neutral restrictions on time, place, or manner of expression, foreclose alternative means of disseminating certain information and, thus, are particularly dangerous and warrant more careful consideration); *Bigelow*, 421 U.S. at 809. Also, as previously discussed, the DOJ's restriction includes advertising that is placed on the Internet, and thus the DOJ has prohibited publication of the advertisements in jurisdictions where the gambling advertised is entirely legal. *Contra Bigelow*, 421 U.S. at 809; *Swedenburg*, 358 F.3d at 223; *Ashcroft*, 124 S. Ct. at 2783; *Reno*, 521 U.S. at 844. The DOJ's restriction cannot be so broad where, as here, it impedes the advertising of gambling in places where it is legal. Such restriction abridges the right of free and protected speech.

Furthermore, the district court found that the DOJ was justified in its method of restriction because of its accessibility by the general public, which includes children and compulsive gamblers. (R:175) However, The Supreme Court has historically been very reluctant to restrict commercial speech, even when it pertains to a vulnerable group. *E.g.*, *Ashcroft*, 124 S. Ct. at 2783 (holding that

Internet content providers were likely to prevail on claim that Child Online Protection Act violated the First Amendment by burdening adults' access to material deemed harmful to minors); *Reno*, 521 U.S. at 875 (finding provisions of the Communications Decency Act violated the First Amendment where it would prevent adults from accessing material deemed harmful to minors; finding that the "governmental interest in protecting children from harmful materials . . . does not justify an unnecessary broad suppression of speech addressed to adults. As we have explained, the Government may not "reduc[e] the adult population . . . to . . . only what is fit for children").

Moreover, the Supreme Court's opinion in *Greater New Orleans* dictates that the root of a perceived problem be addressed before considering the restriction of speech to be a viable alternative. 527 U.S. at 192 (suggesting that there were practical and nonspeech related forms of regulation – including a prohibition or supervision of gambling on credit – that would more directly and effectively alleviate concerns pertaining to casino gambling). In the case at bar, just as in *Greater New Orleans*, the regulation of extension of credit for online gambling by banks and credit card companies would more effectively alleviate any problem with illegal online gambling without imposing on free speech.[11] *See Rubin v.*

[11] Other alternatives to effectively alleviate any problem with illegal online gambling may also exist which would not impose on free speech. For example, legislation has been introduced in Congress to establish a commission to study the

Coors Brewing Co., 574 U.S. 476, 491 (1995) (Court agreed that the availability of other alternatives offered by the plaintiff, "all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights," indicated that the challenged restriction was more extensive than necessary). *See also Association of Charitable Games of Mo. v. Missouri Gaming Comm'n,* 1998 WL 602050 (W.D. Mo. 1998) (in reviewing a state statute prohibiting the advertising of bingo games, court found that the state did not meet the fourth part of the *Central Hudson* test because the state had the ability to enact other non-speech restrictions); *Video Gaming Consultants,* 535 S.E.2d at 648 (in reviewing a prohibition on the advertising of video gaming, the state supreme court found that the government did not meet the fourth part of the *Central Hudson* test because alternate forms of non-speech regulation and educational campaigns regarding the effects of gambling might prove effective).

At this point in the proceedings, there has been no showing of what, if any, efforts the DOJ has made to address the root of the asserted harms. All that has been shown is that the DOJ has chosen, contrary to United States Supreme Court precedent, to address the issue by regulating speech, rather that the underlying activity.

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online gambling issue and whether and to what extent online gambling should be prohibited or regulated. H.R. 1223, 108th Cong., 1st Sess. (2003). Recently, in the United Kingdom the Gambling Act of 2005 was enacted which establishes a mechanism for licensing and regulating online gambling.

CONCLUSION

For the foregoing reasons, Appellant respectfully urges that the decision of the district court be reversed.

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CERTIFICATE OF SERVICE

I certify that on June 10th, 2005, a copy of the foregoing brief and the official record in this case, consisting of 1 volume of the pleadings, were served by United States certified mail upon: Eric D. Miller and Scott R. McIntosh, U.S. Department of Justice, Civil Division, Appellate Staff, Room 7256, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and with 5TH Cir. R. 32.1 and R. 32.2. This brief is printed in a proportionally spaced typeface using Times New Roman 14 point font, and contains 9,022 words.

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