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

REPLY BRIEF FOR APPELLANT

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

The Department of Justice ("DOJ") sets forth the first issue as "[w]hether a party has standing to bring a constitutional challenge to a federal criminal statute when it does not allege that it has engaged in conduct prohibited by the statute, that it plans to engage in such conduct in the future, or that it has been threatened with prosecution." Answer Brief (AB) at 2. However, Casino City, Inc. ("Casino City") has alleged the following facts which are undisputed in the record:

1. Casino City places advertisements on its informational internet sites for overseas companies that offer online gambling and which legally operate in the jurisdictions in which they are located. (R:8).

2. The DOJ issued a letter to the National Association of Broadcasters ("NAB"), and other similar advertising associations, wherein the DOJ warned that "entities and individuals that accept and run [advertisements for online gambling] may be aiding and abetting illegal activity," specifically violations of 18 U.S.C. §§ 1084, 1952, and 1955, and that "any person or entity who aids and abets in the commission of any of [those statutes] is punishable as a principal violator of those statutes." (R:7, 11). The DOJ's letter went on to state that it "is responsible for enforcing these statutes, and we reserve the right to prosecute violators of the law."

(R:11). 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). 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 violator of 18 U.S.C. §§ 1084, 1955, and 1952. (R:9). The record reflects that the DOJ has not disavowed its intention to prosecute Casino City or others similarly situated.

3. The DOJ's letter and subpoenas have created a fear of prosecution within the advertising community, of which Casino City is a part, for continuing to sell and run advertisements for online gambling. (R:8, 9). As a direct result of the DOJ's letter and subpoenas, a number of Internet portals based in the United States similar to Casino City have ceased to accept advertising of online gambling. (R:8). Also as a direct result of the DOJ's public warnings, Casino City lost a valuable contractual opportunity resulting in a loss of income and economic injury. (R:75, 103).[1]

[1] To the extent the complaint is technically insufficient on this point, such insufficiency was corrected by the affidavit attached to Casino City's response to the DOJ's motion to dismiss. (R:102-04).

Based on these allegations, Casino City has stated a cause of action for a violation of its First Amendment rights sufficient to withstand a challenge based on Rule 12(b)(1). Casino City has satisfied the standard for First Amendment case or controversy and also has satisfied the standard for standing in a First Amendment context. *See* Initial Brief (IB) at 8-11.

The DOJ's argument is fundamentally flawed at its inception. Casino City is not challenging the constitutionality of any statute. Hence, it is not necessary that Casino City allege that it has, or will, violate a statute. This is an "as-applied" challenge and Casino City is challenging the conduct of the DOJ. The DOJ has taken the position in its public warnings that individuals and entities who sell and run advertisements of the same content and nature as those sold and run by Casino City are engaged in activity that may violate federal statutes, and that it has the right to prosecute such violations. The focus of this challenge is whether the statutes are being interpreted by the DOJ, and threatened to be applied to Casino City and others similarly situated, in an unconstitutional manner. The issue here is whether the DOJ's threatened application of criminal statutes has objectively chilled Casino City's First Amendment rights.[2] It is Casino City's position that the DOJ has used its authority to stifle free and protected speech and has engaged in

[2] Although the DOJ couched its warning in language stating that advertisers of online gambling "may" be violating federal law, the whole tenor of the letter was designed to instill in such advertisers the fear of prosecution. The use of the word "may" does not overcome the chilling effect of the letter.

conduct that is unconstitutional. To bring such a challenge it is not necessary for Casino City to allege that it has broken the law. *See, e.g., Mangual v. Rotger-Sabat,* 317 F.3d 45, 60 (1st Cir. 2003) (holding that in First Amendment cases the purpose of allowing the chilling effect on free speech rights as a grounds for standing is "so that plaintiffs need not break the law in order to challenge it"); *Ward v. Utah,* 321 F.3d 1263, 1267 (10th Cir. 2003) (even though plaintiff intended to engage in legal activity, the credible threat of prosecution existed so as to create an injury in the form of a chilling effect on the desire to engage in First Amendment activities); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 68 (1963) (while vendors would have violated no law if they had refused to heed mayor's warnings and cooperate with his directives, warnings were an unconstitutional chill of speech). To mandate that a plaintiff must always allege that they are violating the law in a First Amendment action based on chill of free and protected speech would be to ignore the very crux of such a First Amendment claim.

The DOJ also faults Casino City for not alleging that the DOJ's subpoenas resulted in any prosecutions and for not alleging that Casino City directly received one of the DOJ's subpoenas. AB at 7, 8, 19. As set forth in the Initial Brief, it is of no constitutional significance in a chilled speech context that Casino City was not the direct recipient of the DOJ's warnings. IB at 18-19. Also, the status of the DOJ's prosecutions is of no constitutional significance in such a chilled speech

context. In fact, it is particularly troublesome from a constitutional standpoint if the DOJ does not intend to effectuate prosecutions. If successful with this posture, the DOJ would be able to effectively immunize itself from judicial review of a course of conduct designed to stifle free speech. Such a course of conduct goes to the very core of the chilling doctrine.

The DOJ criticizes the time frame within which Casino City filed its complaint, and quotes the trial court's finding that there was an "elapsed time of one year between Casino City's receipt of the DOJ letter and alleged subpoenas." (R:173); AB at 8, 10, 20, 21. However, the record does not support the DOJ's assertion that there was a gap of more than one year between Casino City's receipt of the DOJ letter and Casino City's lawsuit, nor does it support the district court's finding that there was a gap of one year between Casino City's receipt of the DOJ letter and the subpoenas. The record is simply not developed pertaining to the timing of Casino City's receipt of the DOJ letter. Neither is the record developed regarding the timing of the DOJ's initial subpoenas or whether the DOJ has issued more subpoenas subsequent to the initial subpoenas or conducted follow-up investigations or interviews of those subpoened. Moreover, while the record does not yet reflect the circumstances of this particular case, there are many reasons for the particular timing of the filing of a lawsuit. Often times a lawsuit is not filed until a threat is perceived, or until a direct injury occurs. Casino City's First

Amendment rights are ongoing and it has not waived such rights because of the time at which it believed it necessary to file an action.[3]

II. CASINO CITY'S COMPLAINT PRESENTS A MATTER THAT IS RIPE FOR JUDICIAL CONSIDERATION

The second issue the DOJ asserts is that the case should be dismissed for lack of ripeness. AB at 2. The district court's decision was not based on the issue of ripeness, and the court did not otherwise mention or refer to this issue in its ruling. Nonetheless, the matter at hand is ripe for judicial resolution.

The basic rationale of the ripeness doctrine is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148 (1967). The key considerations for ripeness are "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. Fitness

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[3] The DOJ's discussion of *Navegar, Inc. v. United States,* 103 F.3d 994 (D.C. Cir. 1997) is incomplete. In *Navegar,* firearm manufacturers raised two pre-enforcement challenges to the Violent Crime Control and Law Enforcement Act. Regarding the first challenge, the court found that the trial court erred in overlooking the fact that the Act had in effect singled out plaintiffs as the intended targets because it prohibited weapons that only they made. Thus, the court found that a threat of prosecution existed and the plaintiffs had standing for this claim. The second challenge was to the vagueness of generic portions of the Act which referred generally to weapons and accessories sharing certain features. The court found that these portions of the Act were not specific enough to present a genuine threat of enforcement so as to establish standing for the second claim. The matter at hand is most similar to the first challenge raised in *Navegar.* Here, the DOJ specifically singled out media outlets which carry advertisements for online gambling and threatened to prosecute them under specific statutes. Casino City and others similarly situated are indisputably a target for prosecution by the DOJ.

means that the issues to be considered are "purely legal" and further factual development will not aid the court in its resolution. *Id.* A case is generally ripe where any remaining questions are purely legal ones. *Groome Resources Ltd, L.L.C. v. Parish of Jefferson,* 234 F.3d 192, 199 (5th Cir. 2000); *Chevron U.S.A., Inc. v. Traillour Oil Co.,* 987 F.2d 1138, 1153 (5th Cir. 1993). Hardship is analyzed by ascertaining the injury or harm that deferring review will cause the plaintiffs. *See Groome,* 234 F.3d at 200. To this end, in pre-enforcement challenges involving statutes with criminal penalties, plaintiffs generally must show an imminent prosecution or threat of prosecution. *Poe v. Ullman,* 367 U.S. 497, 506-07 (1961); *New York State Bar Ass'n v. Reno,* 999 F. Supp. 710, 715 (N.D. N.Y. 1998).

However, in a First Amendment context, the ripeness requirements are lessened. *National Rifle Ass'n of America v. Magaw,* 132 F.3d 272, 284-85 (6th Cir. 1997); *Mangual*, 317 F.3d at 60; *Planned Parenthood Ass'n of Chicago Area v. Kempiners,* 700 F.2d 1115, 1122 (7th Cir. 1983); *Allen, Allen, Allen & Allen v. Williams,* 254 F. Supp.2d 614, 626 (E.D. Va. 2003); *Deida v. City of Milwaukee,* 176 F. Supp.2d 859, 863 (E.D. Wis. 2001); *New York State Bar Ass'n,* 999 F. Supp. at 715-16; *Brownsburg Area Patrons Affecting Change v. Baldwin,* 943 F. Supp. 975, 984 (S.D. Ind. 1996). That is because a chilling effect on the

constitutionally protected right to free expression and self-censorship is a harm that can be realized even without an actual prosecution. *Id.*

> First Amendment rights of free expression and association are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. In a wide variety of settings, courts have found First Amendment claims ripe, often commingling directly on the special need to protect against any inhibiting chill.

New York State Bar Ass'n, 999 F. Supp. at 715-16 (holding that the potential for self-censorship was irreparable harm sufficient to establish ripeness and quoting 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure, § 3532.3 at 159).

In *Allen,* the state bar association issued a series of advisory opinions that certain types of lawyer advertisements were unethical, but because the bar maintained that "it ha[d] not yet taken the position" that such advertisements were unethical, the question was left unclear. 254 F. Supp. 2d at 621-22. Although the bar had not initiated any disciplinary proceedings and maintained that its opinions were "advisory," the court noted that the bar had not agreed to forego instituting disciplinary proceedings against the plaintiffs for the advertisements of the type in question. *Id.* at 623, 625. In reviewing the issue of ripeness, the court found that "[t]he possibility that the agency's actions might run afoul of the first amendment demands prompt judicial scrutiny." *Id.* at 626. The court found that the issue before it was purely legal and additional factual development was not necessary to

the court's decision on the merits and therefore the claim was fit for review. *Id.* The court also found that because the plaintiffs had alleged a legitimate claim that their speech had been chilled by the actions of the bar, the hardship prong of the ripeness analysis had also been satisfied. *Id.* The court stated that such an infringement of First Amendment freedoms is considered irreparable injury. *Id.*

The case at bar is analogous to *Allen.* Here, as in *Allen,* an enforcement authority has issued a notification and warning suggesting that First Amendment activity is illegal thereby creating a fear that the continuance of such activity might result in prosecution. Also as the enforcement authority in *Allen,* the DOJ has not agreed to forego the institution of prosecution for the particular activity. Thus, as the plaintiffs in *Allen,* Casino City faces a credible threat of prosecution. Furthermore, as the plaintiffs in *Allen*, Casino City has alleged a legitimate claim that its speech has been chilled by the actions of the DOJ. Likewise, as in *Allen,* the issues here are purely legal and the facts are developed -- there need not be any further factual development for the court to make a decision of the merits. Therefore, as in *Allen,* both the fitness and hardship prongs of the ripeness analysis have been satisfied. The case at bar is ripe for judicial resolution.

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

The DOJ frames its third issue as "[w]hether, consistent with the First Amendment, Congress may prohibit advertising for illegal gambling." AB at 2. That is a distorted characterization of the issue. Casino City agrees that Congress can prohibit advertising for illegal gambling. Again, Casino City is not challenging the validity of any statute. It challenges the DOJ's interpretation and application of federal statutes to Casino City and others similarly situated.

The DOJ further states in its Answer Brief that the only speech prohibited by the statutes at issue here is advertising for unlawful activity (AB at 27) and that 18 U.S.C. §§ 1084, 1952, and 1955 raise no First Amendment issue with respect to advertisers like Casino City. AB at 29. Also, the DOJ points out that the district court held that if Casino City were to be prosecuted "it would be for illegal gambling activities." AB at 8.

The DOJ's assertions in its Answer Brief are at odds with what it threatened in the letter to NAB. In the letter, the DOJ made no distinction between legal or illegal online gambling and pronounced all forms of online gambling to be illegal, stating that individuals and entities that accept and run advertisements for such gambling may be "aiding and abetting these illegal activities." (R:11). Also, the

district court found that "[t]he government's interest is specifically directed towards the advertising of illegal activity, namely Internet gambling." (R:174).

Such a blanket posture regarding the legality of online gambling is erroneous. This Court has held that online casino gambling is not prohibited by 18 U.S.C. § 1084 ("the Wire Act"). *In re MasterCard Int'l, Inc.*, 313 F.3d 257, 263 (5th Cir. 2002). *See also In Re MasterCard Int'l, Inc. Internet Gambling Litigation,* 132 F. Supp.2d 468, 480-81 (E.D. La. 2001), *aff'd,* 313 F.3d 257 (2002) (reviewing case law, statutory language, and legislative history pertaining to the Wire Act). And there is an absence of case law applying 18 U.S.C. §§ 1952 and 1955 to online gambling. Moreover, 18 U.S.C. § 1952 is only applicable to gambling that is a violation of state law or another federal law and 18 U.S.C. § 1955 is only applicable to gambling which is a violation of the law of a state or other political subdivision in which it is conducted. To this end, while a handful of states may have enacted legislation prohibiting certain aspects of online gambling, most states legally permit one or more forms of online gambling.[4] Thus, the conclusion by the DOJ and by the district court that online gambling is per se illegal is overreaching to say the least.

Not only is such a posture overreaching, but it also ignores principles established by the United States Supreme Court for the review of multi-

[4] In this regard, surely the most restrictive states do not set the standard for all other states.

jurisdictional advertising under the First Amendment. *Bigelow v. Virginia,* 421 U.S. 809 (1975); *see* IB at 26-28. The online gambling entities advertised on Casino City websites are legal in the jurisdictions in which they operate (R:8) and online gambling is legal in certain other jurisdictions. *See* IB at 25. Pursuant to United States Supreme Court precedent, an advertiser may not be prohibited from disseminating truthful information about an activity that is legal in another jurisdiction and the DOJ makes no effective argument, and cites to no authority, to show otherwise.

Nor does the DOJ make any effective argument or cite to any authority to show that the DOJ's restriction on speech directly and materially advances its asserted governmental interest of protecting compulsive gambling. Most significantly, the DOJ does nothing to effectively distinguish the case at bar from the one considered in *Greater New Orleans Broadcasting Association, Inc. v. United States,* 527 U.S. 173 (1999) where the United States Supreme Court found that the government had failed to "connect casino gambling and compulsive gambling with broadcast advertising for casinos . . . . " 527 U.S. at 189. Likewise, the DOJ makes no effective attempt to show how the speech restrictions in the instant case are less replete with exemptions and inconsistencies than the ones reviewed in *Greater New Orleans.* Also, the DOJ does not even address the fact that banning United States Internet providers from carrying Internet gaming

advertisements would do little if anything to remove the advertisements from the Internet.

Furthermore, the DOJ fails to effectively explain why a blanket ban on the advertising of online gambling, which is legal in some jurisdictions, is the least restrictive means to serve its interests. To the extent that the DOJ criticizes Casino City for not presenting lesser restrictive means alternatives to the district court (AB at 40), Casino City points out that the record in this case is not yet developed. Moreover, if there is any pertinent omission pertaining to this point, it is that the DOJ has failed to show why it has chosen, contrary to United States Supreme Court precedent, to address the asserted harms by regulating speech rather than the underlying activity. *See Greater New Orleans*, 527 U.S. at 192; *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 490-91 (1995).

Submitted this 27th day of July, 2005.

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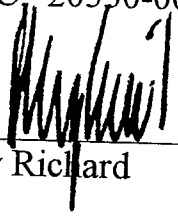
CERTIFICATE OF SERVICE

I certify that on July 27th, 2005, the foregoing brief was filed and served by sending seven paper copies and an electronic copy by Federal Express to Charles R. Fulbruge, III, Clerk, United States Court of Appeal for the Fifth Circuit, 600 Camp Street, New Orleans, LA 70130, and by sending two paper copies and an electronic copy by United States certified mail to 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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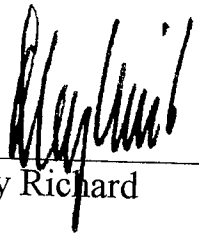

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