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NO. 680404

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

NICHOLAS G. JENKINS,

Appellant

v.

THE STATE OF WASHINGTON,

Respondent

APPELLATE BRIEF

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I. Introduction

This appeal comes to this court on appeal from King County Superior Court Judge Mary Yu. In October 2011, Judge Yu denied my motion for summary judgment on my claims brought under the Declaratory Judgment Act – and granted the State’s cross motion – on the grounds that I failed to raise a “justiciable controversy” and that I was seeking an “advisory opinion.”

Given the almost hard-to-believe facts and the law, Judge Yu couldn’t have been more wrong. The State and I have been in a now five-year long dispute about the legality of a business I’m trying to launch, a person-to-person betting platform called Betcha.com. (Think Ebay meets Facebook in Las Vegas.) It has now spanned two declaratory judgment actions, the first one of which was decided against me – albeit in a decision that would better fit in a *Saturday Night Live* skit than the *Washington Reports*. (CP 535, 540 fn.8, 541 fn.9, 543 fn. 11 [discussing how the Washington State Supreme Court [the “WSSC”] *literally* rewrote a provision of the Gambling Act to cover Betcha.com.) In the course of this dispute I have lost: my business; my property; a considerable amount of money to a parish in Louisiana that the State brought in to shoot at me; and, on three separate occasions, *my freedom*. All this because the State – and in particular two state officials, one of whom is counsel on this case – don’t want Betcha.com to see the light of day. My dream of Betcha.com has been on life support for five years now no doubt – but only because of

a State-administered beating. **To give the State's actions against Betcha.com credence now, as Judge Yu did, is akin to accepting the accused murderer's argument that, while he may have killed his parents, he deserves the court's mercy because he's an orphan.** (*Infra* p.18.)

I brought this declaratory judgment action to clarify my rights under the Gambling Act – which I believe violates the Washington State Constitution given the WSSC's remarkable interpretation thereof -- without losing anything more or living the aforementioned nightmare again. Enabling citizens to clarify their rights vis-à-vis the government is one of *very reasons* the declaratory judgment remedy exists. For these reasons this Court should remand this case to Judge Yu for her ruling on the merits.

II. Assignment of Error

Superior Court Judge Mary Yu abused her discretion when she declined to reach the merits of my claims on the grounds that I did not raise a justiciable controversy.

III. Statement of Facts

A. My Idea for Betcha.com

In 2004 I came up with an idea I thought held (and *still* think holds) great promise. (CP 131.) The idea was a person-to-person betting platform – think Ebay meets Facebook in Las Vegas. Users from all over

the world would offer and accept bet propositions on everything and anything they could think of – from the over/under on Matt Hasselbeck’s interceptions next season to the amount of snowfall in Boston next winter. *Internet Corp. v. Gambling Comm’n*, 169 Wn.2d 687, 689 (2010). To comply with the state’s gambling laws, which I researched extensively prior to moving forward (CP 42-60, 124, 131-32), I removed the essence of gambling from the platform. That is, The Site’s Terms of Service gave bettors the right to opt out *even after they lost* (CP 131-32, 135.); if they exercised that right, however, they risked receiving negative feedback from their betting opponent, feedback that would (in theory) make them less attractive opponents to future would-be partners. *Id.* In other words, a probability- rather than promise-based betting market. We would make money by charging users to: list bet propositions (“Listing Fees”); accept bet propositions (“Matching Fees”) (CP 32-33, 104); and enhance the listing of their propositions, *a la* Ebay (“Enhancement Fees”). (*Internet Corp.* at 689.) We would also charge users a fee when they asked for – and did not receive -- a break in betting odds that were greater than listing bettors were willing to give – in effect a penalty for being greedy called a counteroffer fee. (“Counteroffer Fees”)(CP 32.) (For a general discussion of Betcha’s fee structure, please see *Internet Community & Entertainment Corp. v. State of Washington*, 148 Wn. App. 795, 801 (Div.2 2009) and *Internet Corp.*, 169 Wn.2d at 689.)

Not everyone thought this probability-based system would work. (CP 136, 386.¹) I did, however, and so did the friends of mine who invested in Internet Community & Entertainment Corp. (“ICE”), the Washington corporation that would run Betcha.com (“The Site”) and an accompanying libertarian issues site called – ironically enough as you’ll soon read -- BoilingFrog.com. (CP 133.)(Think *Huffington Post* for libertarians.) Over the next year I raised investor capital, opened an office in Green Lake and hired a team of programmers and content writers to build The Site. (CP 90, 132-33.) After almost a year of work we launched The Site in June 2007. (CP 90, 136.)

B. The State Shuts Us Down – and Then Some

The Site was short lived. Less than a month after we launched, enforcement officials from the Washington State Gambling Commission (the “Commission”) showed up at our Green Lake office and ordered me to shut The Site down. (CP 136-37, 142-43.) Instead I hired a prominent Seattle law firm to defend ICE in its dealings with the Commission. (CP 137.) Worthless. The Commission again ordered Betcha shut down (CP 137-38, 143), this time with a formal cease and desist order. (CP 390-91.) We responded by filing a declaratory judgment action (“Dec Action I”)(148 Wn. App. at 802), to which the Commission responded by calling their colleagues at the Louisiana State Police Gaming Enforcement

¹ CP 386 is an e-mail from a friend of a Betcha employee predicting that market would not accept platform where bettors had right to opt out of their losses.

Division (the “LSPGED”) to give them the heads up on The Site before the Commission shut it down. (CP 403-05.) Thereafter a single LSPGED official made four bets on The Site for a total of \$35 (CP 92, 406-07); ICE grossed seventy cents (\$.70)(CP 92, 145), the only revenue it ever made from Louisiana users. (CP 144-45.) Back in Washington, Commission enforcers raided Betcha’s offices the next business day (CP 91, 143-44), taking with it valuable business records and equipment (CP 91, 410-11); and initiated a forfeiture action against its loot the following Friday (the “Forfeiture Action”) (CP 144.) They did not, however, shut The Site down: I hosted The Site in Canada (CP 127) so the State was unable to seize and destroy the actual software.

I shut the betting portion of The Site down that following Wednesday (CP 91, 208) lest we face yet another office raid, but the damage was done. In August 2007, two twenty-something Betcha employees and I were taken into custody at King County Jail (“KCJ”) for – go figure -- allegedly violating *Louisiana’s* online gambling law. (CP 144.) After I was released of my own recognizance (CP 144), I was *again* incarcerated in KCJ (CP 93), *this* time on a complaint from a King County prosecutor that I was in some place called Ascension Parish, Louisiana “on or about July 23, 2007” and had “thereafter fled” the Bayou State after a criminal warrant was issued for my arrest. (CP 413-14) This was a ~~bald-~~ ~~face-~~ ~~lie~~ fiction, as even Louisiana’s then-governor would later admit. (CP 416)(admitting that I was never “physically present in (Louisiana),”

making my flight therefrom impossible) I was *again* released, this time -- as an alleged fugitive (CP 413) -- on \$50,000 bail.

C. More Time?!

At the same time, the assistant attorney general (“AAG”) who had consulted with the Commission to make sure the Louisiana charges would stick (CP 420) -- and who is, perhaps not coincidentally, lead counsel in *this* action (“Dec Action II”)(CP 38) – moved to strike ICE’s by-then filed motion for summary judgment. (CP 84-87) His stated reason: he needed more time to better understand The Site and the very law I allegedly violated. (CP 86.) (Apparently he didn’t need more time to conclude I violated *Louisiana* law. [See CP 420.]) Superior Court Judge Gary Tabor granted that request. Several weeks later, despite near unanimous outpouring from the public that she at least wait until I’d had my day in court here before being extradited to Louisiana over seventy cents (\$.70)(CP 424-35), Washington Governor Christine Gregoire signed my extradition papers. (CP 437.) Thereafter I fled *to* Ascension Parish, Louisiana – the very place I’d allegedly fled *from* -- to avoid yet another stint in KCJ. (CP 145.) I was released yet again. (CP 145.) I eventually agreed to plea bargain -- \$20,000 to Ascension Parish in exchange for a deferred prosecution. (CP 440.) All this because one Louisiana police officer bet on a website he’d never heard of until State enforcers brought it to his attention. (CP 403.)

D. The Courts Rule

In November 2007, after the State deposed me to get a better understanding of the company it had already shut down (CP 122), Superior Court Judge Gary Tabor ruled against ICE on all grounds. He ruled that Site users were “gambling” (RCW 9.46.0237) and that Betcha (and thus me) were engaged in “bookmaking.” (RCW 9.46.0213, or “.0213.”) In February 2009 Division Two reversed – and in fairly emphatic terms. *Internet Community & Entertainment Corp. v. State of Washington*, 148 Wn. App. 794, 809 (2009)(holding that there was “no logical basis” to believe Site users were “gambling” and that betting on The Site lacked gambling’s “essence.”) Thereafter the Commission pushed *three* separate bills in the legislature that would have amended the definition of “gambling” (RCW 9.46.0237) to cover Betcha.com (CP 445-60.). Lawmakers declined the Commission’s invitation each time, including one invitation from the Commission’s chief to amend the definition of “gambling” through – I wish I was making this up -- the state budget. (CP 462.)

Not that what the legislature did mattered: the WSSC amended the Act to cover The Site anyway. In reversing the Court of Appeals, the WSSC held that “gambling” did not matter for purposes of the Gambling Act. 169 Wn.2d at 693, 695 (concluding that I had engaged in “professional gambling” while deeming the question of whether Betcha’s bettors were “gambling” (RCW 9.46.0237) irrelevant). That conclusion

was odd, but the way it got there – and why I feel comfortable using the term “amended” in the previous sentence -- was jaw dropping. The WSSC changed the definition of “bookmaking” (RCW 9.46.0213) to prohibit not just “accepting bets ... in which the bettor is charged a fee or vigorish for the opportunity to place a bet” as .0213 says, but the very different (CP 547 fn.15) “charging fees ... for the opportunity to place bets” *per se*. 169 Wn. 2d at 694-95. (I use the phrase “changed the definition” literally: the WSSC did not address the meaning of the word “accepting” at all, let alone how ICE (read “I”) “accepted” bets, and it wrote the active verb “charging” in its opinion, which is not in .0213, at least twice. (Id. at 694-95.)) In other words, whereas there are two elements to the crime of bookmaking in the plain text of .0213 – “accepting bets” and charging fees – the WSSC amended the law to make it one – “charging fees” *per se*. (Put differently, it changed a statute with two dependent clauses to one with two *independent* ones.) That change of text enabled the WSSC to bypass the question of whether ICE (and me) “accepted” bets, our principal defense on the bookmaking charge (CP 351-52) and the one on which ICE had prevailed in Division Two. 148 Wn. App. at 809-10.² Unfortunately, the WSSC did not go the final step of

² The State is lucky the WSSC made “accepting bets” an unnecessary element of the bookmaking cause of action. At least two State lawyers, including the one who wrote the State’s brief in this action (CP 15-38) have described Betcha’s bettors, not Betcha, as the ones who “accept” bets (See CP 17 (line 17), 257) -- just as ICE and I have insisted all along. (CP 352.)

analyzing the individual fees (Listing-, Matching-, Upsell- and Counteroffer) to determine which of them constituted “bookmaking.”

E. *This Dec Action*

In September 2011, I filed this Dec Action (“Dec Action II”) seeking, *inter alia*, a judgment that RCW 9.46.0213, which the WSSC held I violated and which triggered the other violations it found, was unconstitutional given the WSSC’s remarkable interpretation thereof (CP 9, argument at CP 537-546 and CP 555-557) an interpretation that not even the State had urged. I asked the court to go the yard the WSSC didn’t – that is, to determine which the fees at issue constituted “bookmaking.” (CP 10-11.) And I asked the court to decide whether charging a flat subscription fee would constitute “bookmaking.” (CP 10.) On October 28, King County Superior Court Judge Mary Yu denied my motion for summary judgment and granted the State’s cross-motion for summary judgment. According to Judge Yu, I had failed to raise a “justiciable controversy” and, accordingly, she declined to issue an “advisory opinion” and thus did not reach the merits. (CP 563.)

IV. STANDARD OF REVIEW

An appeal court reviews a trial court’s refusal to consider a declaratory judgment action for abuse of discretion. *Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99 (Div.I 2002). A trial court abuses its discretion when

its decision is manifestly unreasonable or based on untenable grounds. *Id.* at 99.

V. ARGUMENT

A. Judge Yu Abused Her Discretion in Declining to Address the Merits of This Declaratory Judgment Action. My Dispute With the State is Real, Ripe, Needs No Further Factual Development and According to No Less Authority Than the Washington State Supreme Court Presents Important Public Policy Issues.

On summary judgment, the State argued (CP 27) (and Judge Yu agreed (CP 563) that I did not have standing to bring this declaratory judgment action and that it was not ripe for review. They are incorrect.

The Uniform Declaratory Judgments Act is designed “to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.” RCW 7.24.120. Under the UDJA, “standing and justicability requirements tend to overlap.” *Amalgamated Transit Union Local 587 v. State*, 142 Wash.2d 183 (2000) A declaratory judgment is appropriate where the plaintiff can establish: (1) an actual, present, and existing dispute, or the mature seeds of one; (2) between parties having genuine and opposing interests; (3) which involves interests that must be direct and substantial rather than potential, theoretical, abstract or academic; and (4) a judicial determination of which will be final and conclusive. *Osborn v. Grant County*, 130 Wn.2d 615, 631 (1996)(citations omitted).; *Deputy Sheriff's Guild v. Commr's*, 92 Wn.2d

844, 848-49 (1979). “(D)eciding whether a case presents a cause of action ripe for judicial determination requires an evaluation of ‘the fitness of the issues for judicial decision and the hardship to the parties of withholding consideration.’ *Methodist Church v. Hearing Examiner*, 129 Wn.2d 238 (1996)(citation omitted).

At the risk of overstatement, I can scarcely imagine a case that presents a more ripe and justiciable dispute than this one.

An actual, present and existing dispute. The parties are not seeking some abstract clarification of a law that may or may not apply to me. On the contrary, the State and I have an actual, present and existing dispute. I want to operate The Site in my home state. (CP 38.) I can’t because one provision of the law that the Commission is required to enforce (RCW 9.46.0213) and that the WSSC has already held applies to me is unconstitutional – at least given the WSSC’s remarkable interpretation thereof, one which *not even the State* had urged.³ (CP 165-68, 264-75, 367-380.) Even without the constitutional issues, I cannot operate it without a court ruling as to which of the fees I charged on Betcha I constitute “accepting bets ... in which the bettor is charged a fee or vigorish for the opportunity to place a bet” (RCW 9.46.0213) or “charging fees for the opportunity to place a bet” (the same statute as amended by

³ To be clear, that remarkable interpretation is that one (me) can be engaged in “professional gambling” as defined by the *Gambling Act* even if there is not so much as *intended* gambling anywhere in the proverbial neighborhood. The State did not urge that reading and I did not conceive of it, so the constitutional questions weren’t at issue in Dec Action I.

the WSSC⁴). In its haste to throw the book at ICE lest it get away with “skirting” the law (Chief Justice Madsen’s term [CP 38]), the WSSC did not analyze the individual fees at issue. Had it done so even *it* would have been hard pressed to parse together an argument that charging a bettor a fee to *not* bet (a Counteroffer Fee) would violate .0213, no matter how many words it omitted or re-arranged.⁵ If anything, the would-be bettor is

⁴ I understand the use the term “amend” will set some readers off. After all, judges do not amend laws, they interpret them. In this case, however, “amend” is the appropriate term. The statute at issue, RCW 9.46.0213, first and foremost required a showing that the person “accept” bets. Without “accepting bets,” RCW 9.46.0269(1)(d), which incorporates RCW 9.46.0213 by virtue of the term “bookmaking,” contains two “in’s” in a row:

A person is engaged in "professional gambling" for the purposes of this chapter when (t)he person engages in (in which the bettor is charged a fee, or vigorish, for the opportunity to place a bet.

(CP 543 fn.11.) The WSSC did not opine on the meaning of the word “accepting,” the term on which the Court of Appeals decided the case. 148 Wn. App. at 809-10. Instead it amended .0213 to not just bar the charging of fees where one also “accepts bets” but “charging fees” *per se* – and lest there be any suggestion that this was done for editorial expediency, it didn’t address “accepting” at all and wrote the word “charging” twice! 169 Wn.2d at 694-95. That change eliminated ICE’s main defense that it didn’t “accept” bets: no one disputed it charged fees, least of all me, who designed ICE’s fee structure.

⁵ To illustrate what the WSSC did in Dec Action I, consider the plain text of RCW 9.46.0213, the definition of bookmaking that the WSSC held was “unambiguously” met:

"Bookmaking," as used in this chapter, means accepting bets, upon the outcome of future contingent events, as a business or in which the bettor is charged a fee or "vigorish" for the opportunity to place a bet.

The WSSC simply omitted a few words and changed another:

"Bookmaking," as used in this chapter, means accepting bets, upon the outcome of future contingent events, as a business or ~~in which the~~

charged a fee for being greedy. Same with Upsell Fees: I suspect even the State's lawyers would be hard-pressed to construct an argument how charging someone a fee to highlight the listing of a bet offer which may never be accepted constitutes "accepting bets ... in which the bettor is charged a fee ... for the opportunity to place a bet" (the actual RCW 9.46.0213) or "charging fees for the opportunity to *place* a bet" (RCW 9.46.0213 after the WSSC amended it). In any case, finishing what the WSSC started is at least part of the reason I'm here.

In its trial court brief, the State placed great import on the fact that I have not re-launched The Site. Because I have not yet done so, the State insists that, notwithstanding our news-making history together (e.g., CP 93, 139, 382), this case is based on a "hypothetical set of facts" (CP 27 at line 17) that requires "further factual development." (CP 28.) Judge Yu

~~bet~~tor is charged ~~ing~~ a fee or "vigorish" for the opportunity to place a bet.

This enabled it to bypass the question of whether ICE "accept(ed)" bets, and created a completely different statute where a showing of "accepting" bets was no longer necessary:

"Bookmaking," as used in this chapter, means accepting bets, upon the outcome of future contingent events, as a business or charging a fee or "vigorish" for the opportunity to place a bet.

169 Wn.2d at 694-95. (Underlined portion in opinion at 169 Wn.2d at 694.) That change was meaningful. If one can accept bets in which a bettor is charged a fee, then one can accept bets in which the bettor is not charged a fee which, as a matter of logic, means that "accepting bets" has a meaning independent of the charging of fees. (See CP 547 fn.15 for full argument and an example.) If "in which the bettor is charged a fee" is changed to "charging a fee," then "accepting bets" – which the Court of Appeals held ICE did not do – is an unnecessary part of the cause of action. ICE's principle defense was – voila – gone.

concluded, stating that I “failed to raise a justiciable controversy.” (CP 563.)

Speaking of the State, “chutzpah” is not a strong enough term. And while I have nothing but the utmost respect for Judge Yu, her conclusion that there is no justiciable controversy here is jaw-dropping.

Apparently the State’s lawyers’ memories are short. With my kids’ college funds now the property of some place called Ascension Parish, Louisiana, mine’s not. I launched a website in 2007 – the State shut it down, raided our offices and initiated a forfeiture action on its loot from the raid (loot which I *lost* after the WSSC’s ruling (CP 492). It called in the State of Louisiana for good measure. *After that*, the AAG on that case (and this one) insisted the State didn’t understand The Site sufficiently to respond to ICE’s summary judgment motion (CP 86); his former boss, Governor Gregoire, understood it enough to sign my Louisiana extradition papers before Superior Court Judge Gary Tabor ever heard that motion. The State’s lawyers *then* conducted extensive discovery – much of which was on the record for Judge Yu to review. (E.g. CP 122-29 [pages from my 2007 deposition]). Three courts have ruled on the merits and, as the State noted in its trial court brief (CP 15-16), both Division Two and the WSSC recited the relevant facts in their published opinions. *Internet Community & Entertainment Corp. v. State of Washington*, 148 Wn. App. 795, 798-802 (Div.2 2009), *rev’d by Internet Corp. v. Gambling Comm’n*, 169 Wn.2d 687, 688-91(2010). The AAG on this case (Jerry Ackerman)

cannot credibly claim he needs to develop the facts further: he litigated Dec Action I, argued it before the WSSC and consulted with the Commission to make sure the charges against me in Louisiana stuck (CP 420) while he was simultaneously litigated Dec Action I. What more does the State need to know -- our thoughts about font styles? In short, there are no more facts to develop, they were developed by the AAG *on this case*, and they were on the record and in the pages of both the *Washington Appellate Reports* and the *Washington Reports* for Judge Yu to read. The only thing that will be different between Betcha I and Betcha II is the fees (Listing-, Matching-, Upselling- or Counteroffer-) I'll have to omit, if any -- that's why I call the latter "functionally identical" to the former. (CP 536.) That determination *can only be made* after Judge Yu and the appellate courts rule on the merits. If the courts agree with my constitutional arguments and agrees that none of the fees, all of which are discussed in the previous courts' opinions and in my Declaration, violate the new definition of "bookmaking," then I won't need to make any changes. If it does not agree then I'll have to omit some of them. *Which ones* only a court can tell me.

Genuine and opposing interests. The State and I have opposing interests. I want to run The Site here and build an iconoclastic American brand called Betcha.com. The State – in particular two state officials in Olympia (AAG Ackerman and Commission Director Rick Day, colleagues on the Commission (*see* CP 498) – *really* don't want me to. The latter is willing

to just about anything – including amending the state budget (CP 462) – to kill my dream of Betcha.com.

Final and conclusive judicial determination. A judicial determination will be final and conclusive. If I prevail I will be able to operate Betcha.com out of Washington until the Commission is successful in convincing the legislature to amend the law to cover it – or sneaking a bill to cover it into the state budget. To date it's been unsuccessful.

Direct and substantial rather than potential or theoretical interests.

The argument that carried the day for the State was that, since Betcha.com is not live at this time (go figure), this dispute is based on “a hypothetical set of facts.” (CP 27) Remarkably, Judge Yu bought the argument, hence the phrase “advisory opinion” in her order. That argument is both remarkable and wrong. Neither Judge Yu nor the State can dispute that I still have The Site software; indeed, the State made great fuss of the fact (CP 16, 256) that I hosted it in Canada to keep years of man-work beyond its reach (CP 127)⁶ – fuss which, remarkably, was enough for one appellate judge to rule in its favor. 148 Wn. App. at 812 (Judge Elaine Houghton ruling that ICE violated the Gambling Act because, *inter alia*, it hosted its servers abroad). Nor can they dispute I want to re-launch The Site (CP 38, 40); they cannot read my mind, and I did not file this Dec Action for my health. The problem is that I'm stuck. If I re-launch The

⁶ Given the way the State reacted to Betcha.com (*supra*), I can hardly be blamed.

Site, the State – specifically the Commission -- will shut it down faster than you can spell “Louisiana”: given the long, news-making history between the Commission and me (e.g., CP 93, 382), not even the most polyanish reader can doubt that. Heck, the State continues to describe Betcha users as “gambling” (CP 16 lines 6, 9, 13, 17) – this, after the last court to rule on the subject (Division Two) held there was “no logical basis” to believe gambling occurred and that The Site lacked gambling’s “essence.” 148 Wn. App. at 809, *rev’d on other grounds*, 169 Wn.2d 687. The prosecution that the Commission sought (CP 422, 443) in 2008 and the AAG here (Mr. Ackerman) suggested in 2009 (CP 474) will be back on the table. Surely I need not go that far. As the United States Supreme Court has repeatedly held in the context of the *federal* Declaratory Judgments Act (“DJA”), a citizen need not expose himself to the possibility of criminal prosecution in order to avail himself of a declaratory judgment remedy. *See Medimmune v. Genetech*, 549 US 118, 128-29 (2007)(discussing numerous cases decided under federal DJA and lower standard of justiciability in cases, like this one, involving threat of government action against citizen). Indeed, avoiding that position is the very purpose of having a declaratory judgment remedy. *Id.* at 129 (*citing Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967)) I can see no reason why the rule should be different here, especially given the state DJA’s liberal administration language (RCW 7.24.120) and that I would be making the innocent people of Washington the victims of my criminal

conduct, if only for the few minutes it would take the Commission to shut me down.

There are, I suppose, other steps I could take short of re-launching The Site. I could form a corporation, open an office, hire employees, put an employee benefits system in place, etc. There are two problems with Judge Yu's implicit requirement that I waste that time and money before she'll address my claims. First: I already did all that!! As explained in the record and in the court opinions, I *used to have* a real company, real employees and a real, live website! I haven't had all that since 2007 because the State shut us down and then called in their buddies from Louisiana for good measure. **Boiled to its essence, therefore, the State's position is no different than the guy who kills his parents and then begs for the jury's mercy as an orphan. The State essentially insists that it all but killed Betcha.com, and because our road to recovery is so long, it should not be required to defend this action. Remarkably, Judge Yu bought it. If that's not manifestly unreasonable, nothing is.**

Second, rebuilding another company just so the State can shut it down would be a complete waste of time, money and careers, both mine and the employees I would hire to fire, exposing them to the possibility of their own personal Louisianas along the way. (CP 144.) I am aware of no cases, and the State has cited none, where a citizen has been required to go through the motions to avail himself of the DJA's benefits. As per the "hardship" language of *United Methodist* (129 Wn.2d at 245) and the

liberal administration language of RCW 7.24.120, this Court should not make me do so here.

As a final legal note, the WSSC has acknowledged that the existence of an issue of “major public importance” is in and of itself sufficient for a declaratory judgment remedy to attach. *Deputy Sheriff’s Guild*, 92 Wn.2d at 848-49. Such is the case here, by the State’s own admission. First, the State insisted that the questions of statutory interpretation presented in Dec Action I was a “matter of significant public interest” and presented a “significant question” for the WSSC. <http://templeofjustice.org/data/courts/wasc/cases/2010/82845-8/briefs/828458%20brief.pdf> (State’s Petition for Review). The WSSC evidently agreed: it accepted the State’s petition. That case presented substantially the same questions of statutory interpretation as this one although the statutory prohibition at issue will be different if the courts strike .0213 on constitutional grounds. (CP 546-47). This case *also* includes constitutional claims. Thus, the *Deputy Sheriff’s Guild’s* “major public importance” threshold for DJA justiciability is met here – by the State’s and WSSC’s own reasoning. Second, and the State’s protestations notwithstanding, the WSSC ruled that the legislature, through a bill titled “an ACT related to gambling,” banned conduct where no one was even *thinking* about gambling – it just denominated that profiting as a form of

“professional gambling.”⁷ If the legislature can do that, then Article II, Section 19’s promise that legislators and the public be on notice of a bill’s contents is illusory. Like Congress, the legislature could pass whatever substantive prohibitions it wants under the guise of a phrase somewhat related to a bill’s title and then straighten things out later -- essentially what the Commission asked the legislature to do in 2009 when, to stop Betcha.com, it sought to amend the definition of “gambling” through the

⁷ The State insists that it did not lose on “gambling” (RCW 9.46.0237) because the WSSC never addressed the question. CP 18 fn.4.) The State is wrong. The Court of Appeals ruled in ICE’s favor on “gambling” 148 Wn. App. at 809: the WSSC left that part of Division Two’s ruling alone. Therefore, ICE (read: “I”) won on “gambling,” as I stated in my summary judgment brief (CP 537); the State lost.

The State also insists that my characterization of the Gambling Act as including a provision that criminalizes conduct where there is no gambling in sight is also wrong. (CP 18 fn.4.) It is the State, not me, that is wrong. The important part of the WSSC’s decision for purposes of the constitutional issue was the very fact that it considered “gambling” irrelevant – “moot” as the State described it. (CP 18 fn.4.) If the presence of gambling is irrelevant for purposes of someone (me) being a “professional gambler,” it logically follows that one can be a professional gambler if someone is gambling or someone is *not* gambling. (This was a reading of the statute that *not even the State* had advocated. (CP 165-68, 264-75, 367-380.) The State’s answer to all this is that citizens know a person can be a professional gambler without there being gambling around because “bookmaking,” which after the WSSC’s opinion includes charging fees to *not* gamble, is, well, *defined as a form of professional gambling*. (CP 24.) In other words, the argument goes, there is always “gambling” present with a professional gambler because the professional gambler is necessarily gambling – after all, he’s called a professional “gambler.” CP 23-24. That’s about as circular as logic gets. Finally, the WSSC *did* speak to gambling somewhat. It ruled that the term “bets” in .0213 covered betting done in *and out of* the context of gambling. 169 Wn.2d at 695. Therefore, and as I have characterized it, the WSSC explicitly ruled that, through a bill entitled “an ACT related to gambling,” the legislature passed a bill that criminalized the profiting from people *not gambling*.

state budget. (For a bar exam-type example of how this might work, please see CP 542.) Clearly, the nature of such an important constitutional provision is of significant public importance and is, therefore, reason alone for a declaratory judgment to lie.

B. None of the Extra-Legal Sentiments to Which I Am Vulnerable Ought to Preclude a Remand.

Although I'm reluctant to say it in a brief that's supposed to be read by judges, I understand reality -- the law is oft-times of little relevance in deciding the winner of a legal dispute: some judges simply pick the side they want to win and then reason backwards. My cynicism was born out of Judge Elaine Houghton's amazing dissent in Dec Action I⁸, in which she held that ICE violated the Gambling Act because, *inter alia*, it hosted its servers abroad. 148 Wn. App. at 812. (Q: How does the location of servers bear on the meaning of words in a criminal statute, let alone their application? A: It doesn't.). It took firm hold after reading the WSSC's opinion: after Chief Justice Madsen openly accused ICE of trying to "skirt" the law (CP38) at oral argument, the WSSC *literally* changed words in .0213 to fit Betcha.com (CP 535) and, when that wasn't enough, gave the State a point it had effectively *conceded* to get it over the finish line,⁹ crediting ICE with positions it either never

⁸ See JenkinsFamilyBlog.Wordpress.com, *Betcha.com: Dissecting the Dissent*, April 2, 2009 (on record at CP 321-26 and discussing the no fewer than five errors Judge Houghton made in her three-paragraph opinion).

⁹ See CP 535-36 (noting that State did not dispute ICE's argument that the term "bet" could only refer to the bets that fell within the subset of

took or rejected along the way. (CP 540 fn.8, second paragraph.) No doubt I'll be the object of extra-legal sentiments here, which are that I: (1) just refuse to accept the WSSC's decision (CP 23); (2) am trying to re-litigate questions the WSSC already decided (CP 31-32); (3) should have made the arguments I'm making now in Dec Action I (CP 31-32) – essentially a *res judicata* argument that Judge Yu did not reach; (4) must not be serious about re-launching Betcha.com because I'd be represented by counsel if I was; and (5) am, at bottom, trying to “skirt” the law anyway (to borrow from Chief Justice Madsen [CP 38]) and thus deserve no benefit of the doubt.

These positions, some of which tread close to the merits that Judge Yu did not reach, ought not preclude her eventual ruling on them:

- The notion that I refuse to accept the WSSC's decision is well divorced from reality. On the contrary, the WSSC's opinion was written in about the only way it could have been to give me any hope of re-launching Betcha.com. The WSSC breathed on the statutory glass to reveal a statute *not even the State* saw (“professional gambling” even if no one is even *thinking about* gambling??? [*supra* fn.7]) -- one which, after the broad interpretation it received, violates the state constitution. (CP 537-

gambling bets lest the Gambling Act be read to cover transactions where there was no gambling in sight). Insofar as the Court wishes to verify my description of the State's position, the relevant sections of its Dec Action I briefs are on this record at CP 165-68, 264-75 and 367-380.

46, 555-57.) Had the WSSC ruled that Betcha users were “gambling,” on the other hand, I would have been dead to rights. But it didn’t.

- The notion I am trying to re-litigate questions the WSSC already decided is also clearly wrong. If I am successful on the merits and .0213 as it is currently written is unconstitutional, then the statute at issue will be new (CP 546-48, 559): the WSSC can hardly have analyzed a statute that doesn’t yet exist.
- The notion that ICE (read: “I” [CP 16]) should have made the arguments I am making now in Dec Action I also lacks merit. The principle question presented in this Dec Action is whether the legislature can criminalize the profiting from certain activity where no one is even thinking about gambling in a bill entitled “an ACT related to gambling” without violating the Single Subject Rule. The *res judicata* question is whether ICE *should have* argued that point in Dec Action I. (CP 31-32). ICE didn’t argue it because it didn’t think the Act was that broad – *neither did the State!* ((CP 165-68, 264-75, 367-380.)) Put simply, there was no reason for ICE to argue that the Gambling Act was unconstitutional because neither side read it as broadly as the WSSC did. That’s no small point; the State read the Gambling Act *extremely* broadly, and not always correctly. Division Two rejected one of its arguments on purely textual grounds (148 Wn. App. at 809 [rejecting State’s

contention that the liberal construction language of RCW 9.46.010 applied to Dec Action I)).¹⁰

- The fact that I have chosen to represent myself rather than hire an attorney should be of no matter. As explained above, ICE paid attorneys in Dec Action I for almost three years – not an insignificant expenditure for a start-up company. If the WSSC’s performance at oral argument¹¹ and its opinion are any indication, the state’s top judges did no more than skim one of our briefs *at most*.¹² If judges are not going to read my briefs, there is no reason for me to pay a lawyer to write them.
- Finally, the idea that I am ultimately trying to “skirt” the law is irrelevant. As I explained in my trial court brief, both the United States- and Washington State Supreme Courts have expressly recognized that citizens have the right to sit down with the law and

¹⁰ The WSSC concurred with Division Two because it, too, said the rule of strict construction applied to Dec Action I. 169 Wn.2d at 691-92. It just replaced the rule of strict construction with its own rule of *reconstruction*.

¹¹ See CP 477-78 (discussing the numerous questions the justices asked that were answered at length in ICE’s briefs, about which the justices seemed unaware) In hindsight, it’s clear the justices did not read ICE’s supplemental brief; if I didn’t have a “received” stamp on my copy (CP 328), I’d question whether they even received it.

¹² Chief Justice Barbara Madsen appears to have not even done that. At oral argument, the state’s top judge asked what it was that people did on The Site other than gamble. (CP 38.) The answer, of course, was “bet”: the question presented was whether the breed of betting that I developed for The Site – betting with a built-in opt-out provision -- constituted “gambling” as defined by RCW 9.46.0237. Virtually every page of the Argument sections in each of ICE’s five briefs (on the record here) was devoted to a discussion of that issue. Put simply, Chief Justice Madsen not only didn’t understand the issue -- she didn’t understand there *was* an issue.

dictate their lives accordingly (CP 543 fn.10) – the WSSC did so to the benefit of a convicted rapist. (*Id.*) That right is the reason the vagueness doctrine exists. (*Id.*) That is exactly what I did when I conceived of The Site – and I didn't do it in an afternoon at Starbucks. (CP 42-60, 124, 131-32) For my exercise of that right to be used *against* me would make it an illusory one.

Respectfully submitted this 9 day of February 2012.

NICHOLAS G. JENKINS

A handwritten signature in black ink, appearing to read 'N. G. Jenkins', is written over a horizontal line.

Appearing Pro Se