001435

No. 82845-8

SUPREME COURT
OF THE STATE OF WASHINGTON

INTERNET COMMUNITY & ENTERTAINMENT CORP.,
dba BETCHA.COM,

Respondent,

v.

THE STATE OF WASHINGTON, a government entity,
and the WASHINGTON STATE GAMBLING COMMISSION,
a Commission of the State of Washington,

Petitioner.

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# RESPONDENT'S SUPPLEMENTAL BRIEF

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## INTRODUCTION

This case asks whether it is reasonable to conclude that:

1. a person was not "gambling" (RCW 9.46.0237[1]) when the terms of the website on which she bet -- and to which she agreed -- gave bettors the right to opt out, even *after* they lost, on pain of possibly receiving "not-quite-a-kneecap-break" dings to their website feedback scores;

2. a website did not "accept bets" (.0213) when it allowed bet offers to be posted for others to accept.

Division Two thought both were reasonable – as to (1), it said there was "no logical basis" to conclude otherwise. 148 Wn. App. 795, 809 (2009). Division Two was correct – but not as much as it should have been.

## ASSIGNMENTS OF ERROR

Division Two erred in not considering Betcha's argument that wagers made on Betcha were not "bets" for purposes of .0213[2]; and in calling the Commission's contention that Betcha "accepted" bets reasonable (albeit, because of the rule of lenity, not determinative).

## SUPPLEMENTAL STATEMENT OF THE CASE

Betcha briefed the facts in its lower court briefs (Bet. SJ Br. 4-8, Bet. App. Br. 5-8). There are new developments. Soon after Division Two released its decision, Senator Margarita Prentice, an ex-officio Commission member, tried to push two bills through the legislature to

[1] Sections in RCW 9.46 will be referred to by subsection number – ".0213" etc.
[2] Betcha raised this argument in both its summary judgment- (Bet SJ Br. 19-21) and appellate court (Bet. App. Br. 5, 36 fn.8) briefs and asked this Court to address it in its Answer. Bet. Ans. Pet. Rev. 10 fn. 10.

overturn it.[3] Despite virtually unanimous public support for Betcha (CP 52, 120-21) and the likelihood that Congress will soon *liberalize* online gambling laws[4], Prentice sought to make Washington's law more *restrictive* – just to cover Betcha.com. The Commission supported SB's 6103[5] and 6152, both of which would have added the word "may" next to "will" in .0237, but they failed in committee.[6] It now asks the Court to *read* into the law what lawmakers refused to *write* into it – language sufficiently broad to reach Betcha.com.

**SUPPLEMENTAL ARGUMENT**

This case turns on the meaning of "gambling" (.0237) and, to a lesser extent[7], "bookmaking" (.0213). Betcha cannot have broken the law unless what happened on The Site constituted one of them.[8] As the Court considers this matter, we ask that it recall: the sliding scale rule of strict

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[3] *See* SB 6103 (view at leg.wa.gov>Bill Information>Search by Bill Number: 6103>click: "view original bill.")

[4] *See, e.g.*, Gambling911.com, "Barney Frank Unveils Online Gambling Bill." (http://www.gambling911.com/gambling-news/barney-frank-unveils-online-gambling-bill-050609.html).

[5] See wsgc.wa.gov > Public Meetings > March 2009 > Minutes at p. 8 (also acknowledging .0237 might have been ambiguous). Links to video of the hearing on SB 6103 are available at JenkinsFamilyBlog.wordpress.com > Categories: Betcha.com > "Mr. Jenkins (and Friends) Go to Olympia — and Get a Hearing," March 26, 2009. The bill's lone supporter was a Commission employee.

[6] See leg.wa.gov > Bill Information > Search by Bill Number: 6103 or 6152 > click: "view original bill."

[7] "To a lesser extent" because without "gambling" there is no "bets" for purposes of .0213. *Infra* pp.20.

[8] 148 Wn. App. at 805-06, 810-11; Bet. App. Br. 20-21. Betcha rebutted the Commission's argument that it can prevail *even without* those common denominators (see Comm. App. Br. 26-28) at Bet. App. Rep. Br. 20-23.

construction that applies to criminal statutes, which this Court has called a matter of due process[9]; the tie-breaking rule of lenity[10]; and the rule against strained results. Bet App. Br. 11, 14-15, Bet. App. Rep. Br. 19-20; 148 Wn. App. at 803. Given these, it isn't enough that the Commission's reading is reasonable (although Betcha should win on the Commission's reading, *infra* pp.7-8): Betcha's reading must be so *unreasonable* that the Court would be comfortable affirming long-term prison sentences for its founder (Bet SJ Br. 10-11; *see* Bet. App. Br. 17), investors, former employees and customers.[11] We also ask that the Court recall the recent courts which have refused to read gambling laws broadly (citations at Bet. SJ Rep. Br. 9-10 (CP495-96[12])) in light of gambling's ubiquity and government's *encouragement* of it – so long as government gets a take.

**1. In re: RCW 9.46.0237.**

RCW 9.46.0237 defines "gambling" as:

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[9] Bet SJ Br. 10-11 (*citing, inter alia, State v. Shipp*, 93 Wn.2d 510, 515-16 (1980); Bet App. Br. 10-18.) Division Three has stated this right is not subject to abrogation by statute. Bet. App. Br. 16.

[10] 148 Wn. App. at 810; Bet. App. Br. 12 fn.4 (explaining difference between rules of strict construction and lenity); id 33-34 (also explaining difference between gambling and breed of bets indigenous to Betcha.com).

[11] If betting on Betcha was gambling, then the former employees of the Ebay for (nonbinding) bets were all professional gamblers and its customers gambled online, a Class C felony under RCW 9.46.240. It is by no means certain that the Commission would not seek their prosecutions. *See infra* Note 20. Whether it would or not is irrelevant: the sliding scale rule of strict construction does not include a probability factor.

[12] *See also United States v. Santos and Diaz*, 128 S.Ct. 2020, 2025-26 (2008)(ideological cross section of justices applying rule of lenity in money-laundering/gambling case, even though doing so resulted in law being narrower than government urged and might hinder enforcement of law.)

staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome.

Betcha analyzed .0237 previously (Bet SJ Br. 12-18, Bet App. Br. 20-26[13]), but to summarize: a person "risks" something of value "upon" an "understanding" that he "will" receive something of value when "an agreement" isn't practical – say, when using a slot machine. Bet SJ Br. 15 fn.9, Bet. App. Br. 21. He "risks" something of value "upon" an "agreement" that he "will" receive something of value if he wins when, for example, he bets against his bookmaker on a pre-funded account.

"Staking" simply means the thing of value is not in the opponent's control. A person "stakes" something of value "upon" an "agreement" that he "will" receive something of value when he bets with a second party, but gives his wager to a third party to hold (Bet SJ Br. 13-14); when he backs a third party's gambling, i.e., "I'll stake $1,000 for you to play in the upcoming poker tournament"[14]; or when he bets on credit (i.e., because losses are not enforceable, there is technically no "risking"). He "stakes"

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[13] *See also* Bet. App. Rep. Br. 19-20 (arguing Betcha can prevail even if plain language of statutes met.)

[14] This reading breathes life into .0237's "or someone else" language. The person "staking" is not himself gambling – he is, nonetheless, participating in what the Act calls "gambling activity" by backing someone else. And, indeed, Dictionary.com lists "back" as "staking's" first synonym. Whatever the case, "staking" does not mean "not risking": if it did, the legislature would have used one verb instead of two (e.g., "wagering") and defined it appropriately.

something "upon an understanding" that he "will" receive something of value if he wins when he bets while retaining domain over his money and where "an agreement" isn't practical – say, playing blackjack.

None of these happened on The Site. Bettors "wagered"[15] money pursuant to rules that allowed them to opt out -- even after they lost.[16] The Terms of Service, to which bettors agreed to use The Site, cannot have been clearer: "(B)ettors are not obligated to pay when they lose …(B)ets made on Betcha contain no term, express or implied, that winning bettors will be paid when they win." CP 86; *see also* CP 48-49. Users were reminded of that right *ad nauseum.*[17] Bettors "wagered" pursuant to an "understanding" that they "may not" receive something of value if they won. CP 25-28; Bet. App. Br. 18-23. That's not how .0237 reads.

Betcha illustrated how it worked on "may not" rather than "will" in earlier briefing.[18] To illustrate further, consider a hypothetical card room where, to operate beyond the Commission's reach, the proprietor adopts a rule that players are not required to pay if/when they lose – provided that other players have the right to ask non-paying players to leave the table. To offset that feature – one some persons may not like -- the card room allows its customers to play any game that comes to mind, with any rules,

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[15] "Wagered" does not mean "risked" or "staked." *See* Bet SJ Br. 12-15; infra fn.14.
[16] Bet SJ Br. 6, 12-18; Bet. App. Br. 18-20; Bet. App. Rep. Br. 8-13.
[17] See Bet. App. Br. 6-7, 22-23.
[18] Bet SJ Br. 17; Bet App. Br. 23-27; Bet App. Rep. Br. 9-11.

and on any terms -- not something permitted at other card rooms. "Betcha" the following would happen: some would-be customers will be unwilling to assume the risk of nonpayment and will take their business to guarantee-pay card rooms (gambling). Others will remain if they like the idea of a card room where anything can be played or the safety valve of the opt-out feature. They will bet in amounts such that the cost of playing does not exceed the value they place upon the perceived risk of nonpayment. Many players will pay their losses because they would want their opponents to do the same. When players lose more than they were willing to lose, some will inevitably not pay. Those players will likely be asked to leave the tables and, eventually, the room will be crowded with idle players standing around. In time, the people standing will start *their own* games. They may rebuild their reputations and may be welcomed back by players who once shunned them. And the cycle continues.

That card room is analogous to Betcha, with game types analogous to bet subjects; the rules to bet odds and terms; the threat of being asked to leave a table to the threat of negative feedback; and players who wouldn't assume the risk of nonpayment to the guy who wrote CP 100.[19] That the

[19] CP100, quoted in relevant part at Bet. App. Br. 6-7, is an e-mail from a friend of a former Betcha employee stating he would not become a customer because people are not required to pay if they lose. *See also* CP 49 (Jenkins explaining his best friend would not be customer for same reason). CP 49 and CP 100 demonstrate the market "under(stood)" winners "may not" be paid by losers. "May not" is not "will."

average bet was just 20% of industry-leader Betfair (CP 52-53) suggests bettors placed a high value on the risk of nonpayment. Betting? No doubt. An innovative application of The Golden Rule? We thought so. Bet SJ Br. 7, CP 49. A good idea? We thought so, not everyone agreed. *Supra* fn. 19. Different from "gambling"? You betcha. *See* 148 Wn. App. at 809 (Betcha lacked gambling's "essence."). And unless the Court is certain the legislature wanted the hypothetical card room owner in prison – roughly the question presented in this appeal -- it must affirm.

**2. The Detractors' Arguments on .0237 are Unpersuasive.**

Betcha rebutted the arguments leveled against it below: they are worth supplementing given the life-shattering consequences of reversal to Betcha's founder (certain), investors (probable), former employees (possible), and customers (we hope unlikely).[20]

**A. "'Will' means 'simple futurity'."** Rejecting Betcha's position that "will" in .0237 implies mandatory/shall/obligation,[21] the Commission insists "will" means "simple futurity." Comm. App. Br. 20. Although it

[20] Those consequences, which are not unlikely given the Commission's jaw-dropping reaction to Betcha to date (see SB's 6103 and 6152, CP 502-05 [detailing the Commission's enlistment of Louisiana to get Jenkins as an alleged fugitive]), include: an almost-certain long-term prison stint for Jenkins, no doubt negotiated by a Commission-induced prosecutor in exchange for not prosecuting everyone ever associated with Betcha; and the demand of two-plus years' worth of legal fees by the Commission from Jenkins, who it continues to insist *is* Betcha. Comm. App. Br. 4 fn.2. A state agency seeking to make a public example could ask for nothing more.

[21] Bet. SJ. Br. 15-17, Bet. App. Br. 22-26; *see also infra* fn 50 at p.20 (explaining how gamblers assume obligations).

never explained what that means, it apparently means enough that the Commission should win. We think otherwise. Betcha reads "simple futurity" to mean either a future inevitability, i.e., "the sun *will* come up tomorrow" (Bet. App. Rep. Br. 8-9); or an if/then future result – "If I pull three 7's, then this slot machine *will* discharge $50 in quarters"; "If I draw 21, then the dealer *will* pay me 1.5x my bet." Neither was present on Betcha. To quote Judge Bridgewater and as illustrated by the Larry/Willie hypothetical (Bet. App. Rep. Br. 10-11), there was "no logical basis" for a Betcha bettor to have said "I understand that if I win this bet, then my opponent *will* pay me $10." *See* 148 Wn. App. at 809.

For the Commission to win, "will" in .0237 must already include "may," SB's 6103 and 6152 notwithstanding. That's not how gambling works. When a person plays slots, he doesn't think there's *a decent shot* the machine will discharge forty quarters on three cherries – he "understands," based on the rules of slots, that it *will*. When he bets against his bookie, they don't tell each other "if you win, I might just pay you" – they "agree" they *will*. But *decent shots* or *I might just pay you's* is *exactly* what they bet "upon" when the rules to which they agreed as a condition of playing allowed bettors to opt out, even after they lost. *See* Bet. App. Br. 23-24, Bet. App. Rep. Br. 8-11 (examples). They looked at bettor feedback to assess just *how* decent that shot was (Bet. App. Br. 29) -

- that can't suffice for .0237.[22] That wasn't enough for everyone (*supra* fn. 19) but Betcha thought for enough people, it would have been.

**B. "A Betcha win eviscerates the Gambling Act."** The Commission has suggested that Betcha's interpretation would eviscerate the Act: a bad guy could put up a sign that losers were not required to pay winners and operate with impunity. That is not this case (*infra* fn.39), but the Commission need not worry. In player-pay games (e.g., poker) where the sign was legitimate, the hypo begs the question. It is questionable that a legislature worried about the mafia (.010) wanted the operator of risk-free games in prison for up to 25 years (*see* fns. 33, 44): the Court should require a more definitive indicia of intent (SB's 6103, 6152) before making that leap. *Cf. United States v. Napier*, 861 F.2d 547, 548-49 (9th Cir.1988) (rejecting similar "eviscerates" argument). If the sign was a sham it would be gambling: the truth would be known once a player tried unsuccessfully to pull his chips back (read: "understanding" of "will").

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[22] *See* Bet. SJ Br. 17-18 (no uniform principle of assessing "will" other than Site's rules, to which bettors agreed as condition of using Site, 148 Wn. App. at 807); Bet. SJ Rep. Br. 4 fn.6 (if feedback analysis created "upon an understanding" of "will," it also created "will not," which would lead to absurd result that one bettor is gambling while identically-situated bettor is not); Bet. App. Br. 23-25 (illustrating argument with example). We'd add: rational bettors would have taken "fliers" (i.e., bets where they did *not* expect to be paid) so long as the cost of betting did not exceed the amount to be won times the perceived chance of winning times the perceived likelihood of being paid. If "with an expectation" equals "upon an understanding," then flier-takers are not gambling, but other, identically-situated bettors *are*.

Situations were the house is in peril (e.g., bookmaking, blackjack) are another matter. If the sign was true the operation would not be gambling -- it would also not be in business long unless it could (1) overcome its sizable competitive disadvantages against gambling houses and Vegas bookmakers, and (2) fairly project its own revenues given losers could pull their losses (not easy). If the sign was a sham it would likely be gambling: unlike Betcha (*infra* p.10), people would only choose a non-guaranteed payment game over a guaranteed-payment (gambling) one if they knew the rule was a sham (read: "understanding" of "will").

**C. "The opt out right is a sham."** Citing the infrequency in which bettors hit the "I wanna welch" button during Betcha's very short life (CP 214-15), the Commission has opined that the opt-out right was a wink to avoid the law. The Commission may have thought it was a wink, but the market thought it was quite meaningful. *Supra* fn 19. That some persons chose to register meant that, for them, The Site's pros[23] (Bet. App. Br. 7, 23-24, 26-27) outweighed its cons. Bet. App. Br. 7, 26-27. As for the few people who hit "I wanna welch," the Commission overstates. Like Ebay, Betcha was a self-service platform – bettors made claims on their own. *See* CP 500. Bettors could avoid paying a loss other than by hitting "I

[23] They are: (1) a forum to bet on *any* subject on any terms (compare Ebay v. a retail store); (2) a worldwide community of potential opponents (Ebay v. local classifieds); and (3) a community of like-minded enthusiasts.

wanna welch" – say, by claiming a clear bet was ambiguous. Short of going through every bet individually, we cannot know how many bettors declined to pay bets they, in fact, lost. Thus, the number of bettors who hit the "I wanna welch" button may be misleading: given the average wager was $11 (CP 52), we wouldn't expect it to be high in any case. We can envision a wink scenario -- "you have the right not to pay, but if you don't we break your kneecaps" – but the possibility of receiving negative feedback on a website does not rise to the kneecap level. Bet. App. Br. 32.

The Commission's cynicism aside, Betcha could have prospered without bettors believing pretext. Bettors decided whether to pay losses: unlike the house-pays operations in Section 2(B), a nonpaying bettor did not worry about the capital loss that comes with going out of business. Thus, a would-be opponent could believe an opt-out might happen – but so long as the numbers made sense (*supra* fn 22), accept a bet anyway.

**D. "The statute clearly prohibits Betcha."** The Commission insists there is no reason to strictly construe .0237 because it clearly covers Betcha. *E.g., Comm. App. Br. 15.* We agree that the statute need not be construed – it is a plain language case, and Betcha falls outside it. (*Supra*; Bet. SJ Br. 12-18.) *At worst* it should be strictly construed, as *everyone* who has considered this case has either expressly stated or tacitly admitted that (1) Betcha's position is reasonable (if not correct), (2) .0237 is

ambiguous, and/or (3) the Commission's reading is unreasonable. The Commission's enforcers did (CP 50); they just thought it was a matter of interpretation – theirs. Judge Tabor thought .0237 was ambiguous; if he had not, he would not have needed to distinguish away (albeit incorrectly[24]) the rule of lenity, which only breaks the tie between reasonable readings. Bet. App. Br. 12-13. The Commission's lawyers *twice*[25] implied it was a tough call and with criminal statutes, individuals win tough calls. Bet. App. Br. 10-18, 33. Judges Bridgewater and Armstrong not only thought the Commission's read of .0237 was *unreasonable*,[26] but the opinion's strong language (*supra* Note 26) suggests they agreed with Betcha that this is a plain language case[27] – *in Betcha's favor*. Judge Houghton did – she just thought the possibility of bettors using "unlawful means"[28] meant Betcha should lose. Even *a member of the Commission* has said that .0237 is less than clear.[29]

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[24] Bet. App. Br. 33 (criminal statue must be strictly construed in civil setting); 148 Wn. App. at 807-09 (same).

[25] *See* Affidavit of George Telquist at Exh. A p.1,2 (Commission's lawyers describing state's gambling laws as "factually complex" and legal issues as "complex"); *id.* at Exh. C p.2 (describing Betcha's claim as "unusual and complex"). The Telquist Affidavit was filed with this Court on October 1, 2009 in connection with the Commission's request for additional time to file its brief. *See also* Bet App. Rep. Br. 23.

[26] 148 Wn. App. at 809 ("no logical basis" to believe .0237 was met; "essence" of gambling missing).

[27] *See* Bet SJ Br. 12-19 (arguing that .0237 is not met on plain language analysis); Bet. App. Br. 34 (same).

[28] Judge Houghton's concern was curious. The Site displayed identities by username – "gcat10," "GL83" etc. (See CP91.) If "gcat10" wanted to use "unlawful means" to collect from "GL83," he'd be searching for some time. Her other argument, that .0237 is met

**E. "All betting is gambling."** The Commission insists .0237 can be inferred from the existence of a bet. *See* Comm. App. Br. 22 fn.11. The Commission is incorrect. First, the legislature did not make all betting "gambling." It would have been easy to do: Kansas's legislature had no problem.[30] Had it written the law to clearly make all betting of money "gambling," Betcha's former-lawyer founder would have seen it in his pre-launch research (CP 44-45) and we wouldn't be here. Second, the Commission's inference is improper: bettors who bet on Betcha knowingly assumed the risk their opponents "may not" pay them on a win as per The Site's Terms of Service (148 Wn. App. at 807) but decided the risk was worth taking.[31] The legislature may change .0237, but this Court should not follow Judge Houghton's lead in guessing that 1973 legislators would have wanted Betcha covered[32] – questionable in any case.[33]

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because Betcha hosts its servers in Canada, was also strange. There is no reason why the location of servers should have any bearing on statutory interpretation.

[29] See wsgc.wa.gov > Public Meetings > March 2009 > Minutes at p.8 (Commissioners were left "scratching their heads" and "wondering if maybe the language (of .0237) was ambiguous").

[30] Kansas Stat. 21-4303(a)("Gambling is making a bet").

[31] *Cf. State v. Fitzpartick*, 5 Wn. App. 661, 667 (1971)(*citing State v. Davis*, 73 Wn.2d 271, 289 (1968) for proposition that criminal intent cannot be inferred from equivocal act).

[32] Bet. App. Br. 16-17; *Santos*, 128 S.Ct. at 2026 (probability has no place in interpreting criminal statutes.)

[33] "Questionable" because the legislature was not hostile to gambling *per se* – it recognized gambling's value in society in the Act's preamble (.010) and exempted players up to certain levels (.0269, .220, .221). Legislators may have favored Betcha had they thought of it, either because of the safety valve its opt-out system offered or because, as a betting exchange, it competed against bookmakers. (CP 82-84.)

That betting is not *per se* gambling is also supported by .0265, which defines a "player" as a person who engages in gambling activity in which they "receive or become entitled to receive" their gambling winnings. Whereas "eligible to" might cover betting regardless of terms, "entitle(d) to"[34] suggests an obligation – precisely what we maintain "will receive" contemplates. *Supra* Note 21.[35]

Absent clear statutory language, calling all betting "gambling" is dubious. Unlike kicking your dog, the act of betting is not intrinsically evil – Governor Gregoire bets quite publicly (CP 532-34). Gambling is troublesome because the promise of big money ("will receive") causes people to lose more than they can afford. Where a bet contains neither a requirement of payment ("risking" or "staking"[36]) nor a guaranteed prize ("will receive"), however, it is a stretch to call it gambling.[37] 148 Wn. App. at 809 (Betcha lacked gambling's "essence"[38]).

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[34] "Eligible" and "entitled" are not synonymous. *See DCRA v. Sisters of Providence in Wash.*, 752 P.2d 1012, 1017 (Alaska 1998).

[35] Of course, a person is not "gambling" because he receives winnings, as the Commission initially maintained. CP 50. As .0237's "future" "events" language suggests, either a person is gambling *before the fact* or he is not – receipt of winnings after the fact is irrelevant. Winnings do not become *gambling* winnings simply because they are received. *See* Bet. App. Br. 13.

[36] The difference between the two verbs is explained in Section 1.

[37] .0237 contemplates two other forms of betting that are not gambling: (1) "gentleman's bets," i.e., bets for nothing (no "thing of value"); and (2) bets where the bettors control or influence the outcome, i.e., two guys betting on their own 50-yard dash. Our position: where betting lacks risk, either hard ("risking") or soft ("staking")(*supra* Section 1), gambling's "essence" is missing. 148 Wn. App. at 809.

[38] *See also* Bet. BJ Br. 13 (betting on Betcha analogous to "no-risk" trial).

**F. "Bettors expect to be paid."** Judge Tabor concluded that bettors bet "upon" "an understanding" that they "will" be paid if they win because they *expect* to be paid. *RP 9-10.* This argument misses the logic upon which Betcha was built: *All agreements and understandings create expectations, but not all expectations are the result of agreements or understandings.* For example, several coffee shops have opened recently that allow customers to pay what they want for coffee – including nothing at all. *See The Seattle Times*, "A Kirkland café with no prices," February 6, 2007. No doubt the proprietor *expects* many of its customers to pay: we would not say, however, he serves Joe "upon an agreement or understanding" that customers "will" pay for it. The rock band Radiohead made headlines when it allowed fans to pay whatever they wanted to download its new album, including nothing. TIME, *Radiohead Says: Pay What You Want*, October 1, 2007. No doubt the band *expected* its fans to pay – we would not say they downloaded music "upon an agreement or understanding" that they "will."

Betcha.com was similar. No doubt its potential success was largely dependent on many of its customers paying, and it would not have succeeded if no one *ever* reached for their wallet. Bettors would likely not bet unless they *expected* the opponent to her to pay her losses. It does not

and cannot[39] follow, however, that because she *expects* something "will" happen, she "risked" or "staked" her money "upon an agreement or understanding" that it "will."

Betcha hoped bettors would pay their losses and that they would *expect* to be paid if they won. But there is nothing criminal about allowing bettors to arrive at an *expectation* they "will" be paid so long as they don't use mutual[40] "agreement(s) or understanding(s)" to do it. In Betcha's case, bettors reached *expectations* by individually assessing potential betting opponents' feedback scores to gage the likelihood of payment. Those assessments created "expectations," which gave The Site its liquidity.[41] And those assessments cannot be the "understanding" "upon" which wagering was done. *Supra* fns 22, 39. At bottom, the Commission wants bettors' subjective hopes to trump The Site's plain language, abundant reminders, and the very rules bettors agreed to (Bet. App. Br. 6-7, 148 Wn. App. at 807) -- thereby forfeiting Betcha's property to the Commission[42] and effectively issuing the arrest warrant for Betcha's

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[39] *See supra* fn. 22 (explaining that using expectations to suffice for "agreement" or "understanding" would lead to absurd possibility that some Betcha bettors were gambling while others were not); 148 Wn. App. 807 (noting that, unlike sign hypothetical (supra pp. 8-9), bettors must affirmatively agree to rules before using Site).

[40] See Bet. App. Br. 21, Bet. App. Rep. Br. 10 (explaining that .0237's use of word "upon" suggests agreement or understanding must be (1) mutual and (2) objectively ascertainable and not merely subjective belief).

[41] Bookies and casinos get *their* liquidity through "agreements" and "understandings." *Supra* pp. 3-4, 8.

[42] See Bet. App. Br. 14 fn.6.

founder, who all but jumped over fire to make sure The Site complied with the law.[43] *Cf. United States v. Truesdale*, 152 F.3d 443, 448 (5th Cir.1998)(reversing conviction on gambling charges in part based on efforts of accused to comply with law). That should give this Court great pause. Bet. SJ Br. 17-18; Bet. App. Br. 27-28.

**G. "Betcha is just reminding people that gambling debts are not enforceable."** The Commission characterizes a person's right to refuse to pay his loss on Betcha as merely a reminder that gambling debts are not legally enforceable in most states. *See, e.g., Comm. Pet. Rev. 1.* The Commission mischaracterizes. The patent-pending opt-out system was Betcha's – it had nothing to do with the enforceability of a gambling debt. *See* Bet. App. Br. 30. To illustrate, consider the case-encapsulating Larry-Willie hypo (Bet. App. Rep. Br. 10-11) and assume Larry is from Las Vegas and Willie from Reno. Gambling debts *are* enforceable in Nevada. *See Harrah's Club v. Van Blitter*, 902 F.2d 774, 775 (9th Cir.1990). If Willie sued Larry over his lost Betcha bet, he would come away empty handed -- not because gambling debts aren't enforceable but because there was no promise to pay. *Cf.* Bet. SJ Br. 13-14, 16; *infra* fns. 48, 50.

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[43] CP 62-80 (pre-launch legal analysis); Bet. App. Br. 6-8 (citing numerous reminders to Betcha users of Golden Rule nature of Betcha betting, including an unprecedented "Why Not Betcha" page [CP 88]); CP 45 (explaining Jenkins consulted with author of textbook on gambling law before launching The Site).

**H. "Bettors wouldn't leave negative feedback unless they bet 'upon' an 'understanding' they 'will' be paid."** The Commission suggests bettors would not have left negative feedback if they didn't bet "upon an agreement or understanding" that they "will" be paid. *Pet. Rev. 11.* The Commission still does not get how The Site worked. Betcha was a prediction- rather than promise-based model – "expectation" yes, "upon an agreement or understanding" no. Bettors bet after agreeing that both *they* and their opponent had the ability and *the right* to opt out of their losses (148 Wn. App. at 807) -- a reality that right away means the "upon" portion of .0237 was not met. (*Supra* fn. 40.) They would hopefully leave feedback to give *future* bettors something to gage a would-be betting partner's willingness to pay future losses. Bet. App. Br. 7, 29-30. It was *that* legally-innocuous analysis (*supra* fns. 22, 39), along with the Terms of Service, "upon" which betting was done. Bet. App. Br. 1, 7, 29.

**I. The Rest.** Betcha's detractors have raised several other arguments in re: .0237, all of which we rebutted in briefing cited in footnotes 44-53: the public policy against gambling is so strong that Betcha must lose[44];

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[44] Bet. App. Rep. Br. 3 (questioning characterization of policy and its invocation to read .0237 broadly); Bet. SJ Br. 29 fn.18; *see also Napier*, 861 F.2d at 548-49 (refusing government's invitation to read criminal statute broadly on grounds of its "general statutory purpose"), *State v. American Holiday Ass'n*, 727 P.2d 807, 811-812 (Ariz.1986)(same, in gambling case). The policy against gambling is overstated. To wit: the law only deems criminals those who gamble heavily. (RCW 9.46.220-221). If the state's policy against gambling were so strong, *all* gamblers would be criminals. The State does not give murderers five free kills -- *all* murder is illegal because the State *has* a

.010's liberal construction provision applies[45]; the listing- and matching fees a person paid to use The Site constituted "things of value" "risk(ed)" or "staked"[46]; a person's Honor Rating constituted a "thing of value" "risked" or "staked"[47]; Betcha bettors were no different than gamblers because the latter can always refuse to pay[48]; the designation of the opt-out right as "a welch" was an internal inconsistency[49]; Betcha bets were no different than gambling bets as neither is legally enforceable[50]; Betcha

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strong policy against murder. The State has since criminalized online gambling, *see* RCW 9.46.240, but, given that online gamblers harm no one, it's hard to take seriously the idea that 2006 law evidences a strong policy against *anything* other than Washingtonians losing money to offshore gambling firms rather than state-licensed casinos. The state may have an interest in protecting its citizens from fraudulent operations afar, but we'd suggest turning the victims of the fraud *themselves* into Class C felons demonstrates our cynicism is well founded. In any case, the state's policy against gambling is not so substantial as to trump other interests: (1) that the legislature write criminal laws unmistakably clear so law-abiding citizens can govern their lives accordingly (Bet. App. Br. 14); and (2) that citizens not be imprisoned for conduct that was not in the legislature's mind when it wrote the law. (*Id.* 15)

[45] Bet. SJ Rep. Br. 2 fn.1 (provision does not apply on its face); Bet. App. Br. 11 fn.2; *see* Bet. App. Rep. Br. 3.

[46] Bet SJ Br. 14-15 and Bet. SJ Rep. Br. 2-3 (payment of fees does not turn non-gambling into gambling)

[47] Bet. SJ Rep. Br. 3 (neither "thing of value" nor "will" met)

[48] Bet. SJ Rep. Br. 4-5, Bet. App. Rep. Br. 3-5, 9-11 (nonpaying gamblers breach "agreements"; nonpaying Betcha bettors exercise expressly-reserved right not to pay an obligation they never had). *See also* fn. 48. Equating the two is like saying "a party to a contract can always refuse to perform his contractual obligation; illusory promises do not require performance; therefore, a contract is no different than an illusory promise."

[49] Bet. App. Rep. Br. 7-8 (Commission may not impose its definition of "welch" onto act Site permits)

[50] Bet. App. Br. 30 and Bet App. Rep. Br. 5. The availability of the courthouse to settle gambling debts should have no bearing on analyzing .0237. If it did, then Larry and Willie (*supra* p. 17) would potentially not meet .0237 even if persons in other states did, for the identical activity -- just because they happen to be in Nevada, where gambling debts *are* enforceable. (*Supra.*) Willie could travel to Seattle, accept a bet on Betcha, and be gambling, even though he wasn't gambling when he did the exact same thing in Reno. This absurd result supports our view that .0237 turns on the terms of a transaction, and nothing else.

would not have "prevailed" unless .0237 was met (Bet. App. Br. 19)[51]; the threat of negative feedback provided the "understanding" that bettors "will" be paid[52]; and the Commission can win even without "gambling" or "bookmaking." [53] We invite the Court to consider our earlier rebuttals.

**3. In re: RCW 9.46.0213 ("bookmaking").**

.0213 defines "bookmaking" as "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." Our position: (1) wagers made on Betcha were not "bets" for purposes of .0213 because that term assumes "gambling"[54] (Bet SJ Br. 19-21); and (2) Betcha, whose operation did not *resemble* a bookmaker's[55] and which was at a competitive disadvantage to bookmakers precisely because it did *not* do

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Gamblers are obligated to pay their losses – that's why they're called "debts." *See* Dictionary.com (defining "debt" as "a liability or obligation to pay or render something.") That the legislature made the courthouse unavailable to settle illegal ones means the legislature did not want the courthouse jammed with people trying to collect them. Conversely, like the coffee drinker at the aforementioned coffee shop (p.14), Betcha bettors do *not* bet pursuant to an obligation: "(B)ettors are not obligated to pay when they lose ...(B)ets made on Betcha contain no term, express or implied, that winning bettors will be paid when they win." CP 86. And while at the end of the day both unpaid gamblers and unpaid Betcha bettors may be in the same boat – outta luck -- it is the *beginning* of the day, not the end, that matters. *See* .0237 ("*future* contingent events").

[51] Bet. App. Br. 27-28 (commercial success [or not] has no bearing on statutory construction); Bet SJ Br. 7, Bet App. Br. 5-7, 26-27 (The Site would have "prevailed" so long as enough people thought its "pros" outweighed its cons); *supra* pp. 13-15 ("with an expectation" does not mean "upon an agreement or understanding").

[52] Bet. App. Br. 32 (negative feedback not such severe consequence that persons deprived of choice not to pay).

[53] *Supra* fn. 8 (*citing, inter alia*, Bet. App. Rep. Br. 20-23 [rebutting Commission's arguments].)

[54] This issue is properly before the Court. *Supra* fn. 2.

[55] *Compare* Bet. SJ Rep. Br. 22 fn.13 with CP 46-48, 498-99; *see* Bet. SJ Br. 22-23).

what they do[56], did not "accept" bets because it did not take active positions in them. Bet SJ Br. 31-33; Bet App. Br. 35-36.

Division Two said the Commission's equating of "accepting" with "receiving" in .0213 was reasonable. 148 Wn. App. at 809-10; Comm. App. Br. 26 fn.12. It isn't. We supplement our earlier rebuttals (Bet. App. Rep. Br. 15-20) with the following:

(1) The Act distinguishes between "receiving" and "accepting."[57] Betcha "received" money as a pre-condition to bettors offering and accepting bets (thereby arguably "accepting" *bettors*); "recorded" and "allowed" non-statutory bet offers to be posted (neither are "accept"); and "allowed" bettors to "accept" them in a non-bookmaking way (*see* Bet SJ Rep. Br. 5-6 fn8). It is a stretch of law and language[58], however, to say *Betcha* "accept(ed)" "*bets.*" Query: if Betcha "accept(ed)" bets, what did bettors who took positions in them do? *Super-accept* them?

(2) That "accepting" contemplates an active position is supported by .0265, which defines a "player" in relevant part as someone who "who *engages*, on equal terms with *the other participants*" forms of gambling under specified conditions. (Emphasis added.) The last two sentences of

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[56] *See* Bet. App. Rep. Br. 17-18.
[57] See .0269(c)(defining "professional gambling" as, *inter alia*, "(a)cting other than as a player or in the manner authorized by this chapter, the person knowingly *accepts or receives* money . . . ")
[58] Bet.App.Rep.Br. 17-18 esp fn. 13-15 (rebutting Commission's arguments); Bet. SJ Br. 21-23, Bet.App.Br. 35.

.0265 exclude people "who engage in bookmaking" and their customers, meaning .0269(1)(a)'s player exception is unavailable to bookies and their customers. These carve-outs suggests a person who "accept(s) bets" (.0213) would otherwise be "a player" (read: participant) in the bet, just as we've maintained .0213 means all along (read: not Betcha).[59]

(3) Equating "accepting" in .0213 with anything *other than* taking an active position makes .0269(1)(a) and (d) redundant. The better view: .0213 was, like the federal Wire Act (Bet SJ Br. 22, CP 75-76), originally written to cover gamblers who made betting their profession. It was amended in 1987 to cover *any* gamblers who charged fees. .0269(1)*(a)* covers persons those that (1)(d) misses – those who aid gambling but do not partake. (Betcha would have met (1)(a), but no one was gambling.)

Respectfully submitted this 23 day of October 2009.

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[59] These sentences are carve outs, not clarifiers. The last sentence speaks to those who "participate" so it is clearly a carve out of the first sentence's "participants." The bookmaker sentence is structured the same as the participant sentence ("...is not a player"), so it is difficult to imagine how it, too, is not also a carve out.