COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2009-SC-000043

COMMONWEALTH OF KENTUCKY,
ex rel. J. MICHAEL BROWN, SECRETARY
JUSTICE AND PUBLIC SAFETY CABINET — APPELLANT

v.

INTERACTIVE MEDIA ENTERTAINMENT
& GAMING ASSOCIATION, INC., et al. — APPELLEES

ON APPEAL FROM
KENTUCKY COURT OF APPEALS
NOS. 2008-CA-002000; 2008-CA-002019; 2008-CA-002036

ORIGINAL ACTIONS ARISING FROM
FRANKLIN CIRCUIT COURT, DIVISION II
CASE NO. 08-CI-1049
HON. THOMAS D. WINGATE, JUDGE

BRIEF FOR APPELLEE INTERACTIVE MEDIA ENTERTAINMENT & GAMING ASSOCIATION, INC.

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STATEMENT CONCERNING ORAL ARGUMENT

Appellee agrees that oral argument would assist the Court, but for reasons other than those stated by Appellant. The actions of the Commonwealth and the trial court raise an unusual number of complicated issues with potentially far-reaching effect. The threshold issue, whether an Internet domain name falls within the meaning of "gambling device" as defined by KRS 528.010, is straightforward. Beyond that, this case raises issues that include, but are by no means limited to, the absence of any statutory authority for a forfeiture action such as that brought by the Commonwealth under the Kentucky Penal Code; the constitutionality of the trial court's secret, *ex parte* hearing and its sealing of court records; the trial court's seizure of Internet domain names in secret without statutory basis and without jurisdiction over the domain names; the legislature's intent with regard to gambling in general and Internet gambling in particular; the standing of associations to represent their members' interests; and, the right of a state to shut down part of the Internet worldwide.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellee Interactive Media Entertainment and Gaming Association, Inc. ("iMEGA") does not accept the Appellant's Statement of the Case and offers this Counterstatement.

This is an appeal as a matter of right by Appellant Commonwealth of Kentucky, *ex rel.* J. Michael Brown, the Secretary of the Kentucky Justice and Public Safety Cabinet (the "Commonwealth"), from the Order Granting Petition for Writ of Prohibition entered January 20, 2009 by the Kentucky Court of Appeals. (R. 550-65.)[1] In the underlying civil action brought by the Commonwealth, Franklin Circuit Court found that certain Internet domain names are "gambling devices" within the meaning of the Kentucky Penal Code and that there was "probable cause" to believe that they were used in violation of Kentucky's criminal statutes prohibiting promotion of gambling. Upon that finding, the circuit court ordered seizure of the domain names. It also scheduled a forfeiture hearing under procedures set out within the Penal Code at KRS 500.090. The Court of Appeals, however, held that domain names do not fall within the statutory definition of "gambling device," and therefore the Penal Code "simply does not give the circuit court jurisdiction over them," and that a writ should issue because the circuit court lacked jurisdiction. (R. 558-59.) Judge Taylor added in his concurring opinion that Kentucky statutes provide no authority for the underlying civil action filed by the Commonwealth. (R. 559-63.) For these reasons, and for others set out herein, the Order of the Court of Appeals should be affirmed.

[1] All record citations are to the Certified Record of File No. 2008-CA-002000-OA unless otherwise specified.

This case arose because of an audacious attempt by the Commonwealth to reach far beyond Kentucky's state line to seize the domain names[2] of Internet gambling Web sites and then to shut down part of the Internet.[3] To do so, the Commonwealth stretched Kentucky statutes far beyond their permissible applications and the legislature's intent, and far beyond the limits of the Due Process Clause of the Fourteenth Amendment. The Commonwealth first declared Internet gambling to be "illegal" under Kentucky statutes when it is not. Then, it declared Internet domain names to be "gambling devices" within the meaning of KRS 528.010(4) when they are not, and invented an "*in rem* civil" forfeiture proceeding which has no basis in Kentucky statutes. In short, the Commonwealth filed a civil action, without process, under the supposed authority of a Kentucky criminal statute, KRS 528.100, and persuaded the circuit court to order the civil forfeiture of the domain names as "gambling devices" possessed or used in violation of the Penal Code. No such procedure is authorized anywhere in Kentucky statutes. From beginning to end, the Commonwealth's entire scheme is without foundation and is an abuse of the legal process in Kentucky.

This action was filed in the trial court as an "*in rem*" action seeking the forfeiture of 141 Internet domain names. No real defendants were named, no process was issued, and no owner of any domain names was notified. In short, this was an action by the Commonwealth to seize property without the slightest pretext of complying with the fundamental dictates of due process.

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[2] An Internet "domain name" is commonly called a "URL" or "Internet address," such as, "http://courts.ky.gov."

[3] *See, e.g.*, Tape of Hearing of September 18, 2008, hereafter referenced as Tape, Appellee's App. A, at 2:13:25 to 2:13:30 p.m. Counsel for the Commonwealth told the trial court that if a domain name registrant failed to communicate with the Commonwealth following issuance of the seizure order, "In a week or so, we are going to actually take the domain name and shut it down worldwide."

The Commonwealth alleged that each of the 141 Internet domain names is a "gambling device" as defined in KRS 528.010(4) and therefore subject to forfeiture pursuant to KRS 528.100. (R. 85, 88.) KRS 528.100 in relevant part states that "[a]ny gambling device or gambling record possessed or used in violation of this chapter is forfeited to the state, and shall be disposed of in accordance with KRS 500.090 . . . ." Therefore, two conditions must exist in order for forfeiture to occur: (1) There must be a "gambling device or gambling record," and (2) there must be a "violation of this chapter."

The Commonwealth's action was accompanied by a Motion to Seal Case File. (R. 81-82.) In it, the Commonwealth alleged that the secrecy was warranted because "upon notice of the Commonwealth's action, the owners will take actions to remove the property beyond the Court's jurisdiction." (R. 81.)[4]

The trial court granted the motion, sealed the record, issued no process, and conducted a secret, *ex parte* hearing lasting one hour and 18 minutes on September 18, 2008. (*See generally* Tape, Appellee's App. A.) Prior to the hearing there was no notice to any operators or owners of the domain names or to the public of the motions to seal the records or close the hearing, and the court granted the motion without actually holding a public hearing.

The same day, the Commonwealth filed in the sealed record its Second Amended Complaint (R. 84-97), its Motion for Seizure of Domain Names (R. 99-100), and supporting memorandum (R. 102-72). Count I of the Second Amended Complaint sought forfeiture of the domain names under KRS 528.100. (R. 94-96, ¶¶ 42-48.) Count II alleged that the domain names "are integral and necessary devices" in "illegal online

[4] The claim that registrants will take actions to remove domain names beyond Kentucky was and is baseless given the fact that the names have never been in Kentucky.

gambling operations" that "constitute a public nuisance." (R. 96, ¶¶ 52-53.) The complaint sought injunctive relief "to abate the nuisance and prevent illegal internet gambling transactions." (*Id.* ¶ 54.)

The trial court issued its Order of Seizure of Domain Names ("the Seizure Order") the same day, September 18, 2008, with the record still under seal. (R. 65-67.)[5] The trial court found that probable cause existed to believe that the domain names "were and are being used in connection with illegal gambling activity" in Kentucky but failed to make a specific finding as to what constituted the illegal activity. (R. 65.) It ordered that the domain names "shall be immediately transferred" by registrars[6] (who were not parties to the litigation and had neither notice nor an opportunity to participate prior to the entry of the order) to the Commonwealth. (R. 66.) The trial court also ordered that notice of the court's order (but not of the material submitted under seal) be sent to registrars and registrants. (*Id.*) The trial court set a hearing "to determine if any party has asserted rights as an owner of the seized property pursuant to KRS 500.090." (*Id.*)

Appellee iMEGA subsequently appeared at such hearing, on September 26, 2008, for the purpose of asserting the rights of its members. (R. 331-34.) The trial court granted iMEGA permissive intervention pursuant to CR 24.02 in an order entered October 2, 2008, and iMEGA appeared at another hearing on October 7, 2008. As a trade association with members that are registrants of some of the 141 subject domain names, iMEGA

[5] The Order unsealing the record was entered September 23, five days after the seizure order. (R. 328.)

[6] A domain name is issued by a company known as a "registrar" and is utilized under a contractual arrangement by a "registrant." iMEGA has members who are registrants, or users, of domain names, under such contracts. "Seizure" of a domain name does not amount to seizure of a website, any more than "seizure" of a telephone number would result in seizure of the telephone. However, in the same way that the commandeering and disabling of a telephone number could result in blocking calls to the telephone, the commandeering and disabling of a domain name can block prospective users from reaching a website through the avenue of the domain name seized.

asserted associational standing pursuant to *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977) (copy at R. 335-59.) *See also Interactive Media Entm't & Gaming Ass'n v. Gonzales*, No. 07-2625 MLC, 2008 U.S. Dist. LEXIS 16903 (D.N.J. Mar. 4, 2008) (copy at R. 70-79).

iMEGA on September 26 also filed a Motion to Dismiss on the ground that domain names do not fall within the meaning of "gambling device" as set out in KRS 528.010(4) and that therefore the Commonwealth's action "is without foundation, without precedent, and without basis in Kentucky law." (Motion to Dismiss, Appellee's App. B at 1.) In a Memorandum in support of its Motion to Dismiss filed October 3, 2008, iMEGA argued that, in addition to its erroneous assertion that domain names fit the statutory definition of "gambling device," (1) *in rem* subject matter jurisdiction was lacking because the domain names were not located within Kentucky; (2) seizure of domain names unconstitutionally burdened interstate commerce, violating the Dormant Commerce Clause of the U.S. Constitution; and (3) the elements of a public nuisance claim cannot be met and a domain name is not a proper defendant to such an action. (*See* iMEGA's Memorandum In Support of Motion to Dismiss, Appellee's App. C.)

In its Opinion and Order entered October 16, 2008 (R. 174-217), the trial court held that it had jurisdiction to proceed and that the prior seizure order was proper, denied motions to dismiss, and scheduled a forfeiture hearing for November 17, 2008 pursuant to KRS 500.090. (R. 213.) The trial court, despite its earlier grant of permissive intervention, held that iMEGA did not have standing and dismissed it as a party. (R. 210-11.) This rendered the interests of iMEGA's members unrepresented.

On October 22, 2008, iMEGA filed a Petition for Original Proceeding Pursuant to CR 76.36 with the Court of Appeals. (R. 7-259.) On October 28, 2008, iMEGA also filed a motion for intermediate relief staying orders of the trial court entered September 18 and October 16, and suspending a forfeiture hearing the trial court had scheduled for December 3, 2008. (R. 261-66.) The Court of Appeals granted this motion for intermediate relief on November 14, 2008. (R. 523-26.) The same day, the Court of Appeals consolidated the iMEGA petition, 2008-CA-002000, with two others: one by Playersonly.com, Linesmaker.com, Mysportsbook.com, Sportsbook.com and Sportsinteraction.com, 2008-CA-002019; and one by Vicsbingo.com and Interactive Gaming Council, 2008-CA-002036. (R. 525.)

Following oral argument, the Court of Appeals granted the writ January 20, 2009. (R. 550-65.) The Commonwealth filed notice of appeal the following day.[7] (R. 566-86.)

ARGUMENT

I. DOMAIN NAMES ARE NOT "GAMBLING DEVICES" UNDER KRS 528.010(4).

As the Court of Appeals recognized, the trial court lacked subject matter jurisdiction because domain names do not fit the "gambling device" definition in KRS 528.010(4). "[I]t stretches credulity to conclude that a series of numbers, or Internet address, can be said to constitute a 'machine or any mechanical or other device . . . designed and manufactured primarily for use in connection with gambling.'" (R. 557.)

[7] The Commonwealth erroneously claims in its brief that the filing of this appeal has the effect of "staying the Order of the Court of Appeals and leaving Judge Wingate's Order of Seizure in effect." Appellant's Br. at 13-14. This is not so. Civil Rule 65.08 "is the exclusive authority under which a stay may be had after a final judgment granting or denying injunctive relief has been appealed." *Bella Gardens Apartments, Ltd. v. Johnson*, 642 S.W.2d 898, 900 (Ky. 1982). *See also* CR 62.02. Absent a motion under CR 65.08, there can be no stay. The Court of Appeals ordered that Franklin Circuit Court is "[prohibited] from enforcing its order seizing the 141 domain names and from conducting a scheduled forfeiture hearing." (R. 552.) There has been no CR 65.08 motion.

If Kentucky wants to criminalize Internet gambling, the General Assembly can pass a law. No less than eight other states have passed statutes specifically criminalizing Internet gambling. *See, e.g.*, 720 Ill. Comp. Stat. 5/28-1 (Illinois); IC 35-45-5-1 (Indiana); RCW 9.46.240 (Washington); LRS 14:90.3 (Louisiana); ORS 167.109 (Oregon); NRS Chapter 463 (Nevada); MC 23-5-112 (Montana); SDCL 22-25A-7 (South Dakota). Such statutes raise constitutional questions to the extent that they purport to regulate gambling that is legal where bets are placed, and the Kentucky legislature has enacted no similar legislation. Although the Commonwealth alleges, and the circuit court found, "illegal" gambling on the Internet, neither the Commonwealth nor the circuit court cited a statute criminalizing gambling.

Gambling devices that are subject to forfeiture under Kentucky law are:

> (a) Any so-called slot machine or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and which when operated may deliver, as a result of the application of an element of chance, any money or property, or by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
> (b) Any other machine or any mechanical or other device, including but not limited to roulette wheels, gambling tables and similar devices, designed and manufactured primarily for use in connection with gambling and which when operated may deliver, as the result of the application of an element of chance, any money or property, or by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

KRS 528.010(4) (emphases added).

A. This Court should give words their "common and approved" meaning.

The Commonwealth argues that this Court should ignore the definition of "gambling device" and instead look to the "intent" of the General Assembly. However,

the question before this Court is not whether a domain name falls within the "intent" of KRS 528.010(4); it is whether it falls within the statute's plain meaning.

Statutes are to be construed according to "the common and approved usage of language." KRS 446.080(4). The first principle of statutory construction is to look at the plain meaning of the words used. *See Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815 (Ky. 2005). "[S]tatutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required." *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). "A court may not interpret a statute at variance with its stated language." *SmithKline Beecham Corp. v. Revenue Cabinet*, 40 S.W.3d 883, 885 (Ky. App. 2001).

The plain language of KRS 528.010(4) shows that a "domain name" is simply not a "gambling device." Domain names are distinct from Web sites. Only the domain names, not Web sites themselves, were seized by the circuit court. The Internet Corporation for Assignment of Names and Numbers ("ICANN"), the quasi-governmental authority that assigns domain names and regulates Internet traffic, defines domain names as mere "mnemonic devices" or memory aids. The Domain Name System ("DNS")

> helps users to find their way around the Internet. Every computer on the Internet has a unique address—just like a telephone number—which is a rather complicated string of numbers. It is called its "IP address" (IP stands for "Internet Protocol"). IP Addresses are hard to remember. The DNS makes using the Internet easier by allowing a familiar string of letters (the "domain name") to be used instead of the arcane IP address. So instead of typing 207.151.159.3, you can type www.internic.net. It is a "mnemonic" device that makes addresses easier to remember.

ICANN Glossary—Domain Name System, *available at* http://www.icann.org/en/general/glossary.htm#D (last visited May 19, 2009); *see also Am. Girl, LLC v. Nameview, Inc.*, 381 F. Supp. 2d 876, 879 (E.D. Wis. 2005) (similarly defining domain names).

Basically, calling a domain name a gambling device under the definition of 528.010(4) is as illogical as calling a telephone number a gambling device. Suppose, for example, that a sports gambling book operating legally in England or Australia were to accept wagers and credit card payments over the telephone from Kentucky. Applying the Commonwealth's logic as applied in this case, without ever moving against the sports betting operation, Kentucky could proceed *in rem* under KRS 528.100 to seize and seek forfeiture of the operation's telephone number as a "gambling device." Even more absurd is the notion that if an individual in England or Australia named John Smith were receiving wagers that were lawful in the country in which he resided, the Commonwealth of Kentucky could proceed *in rem* to take the name "John Smith" as a gambling device.

Such a result clearly was not the intent of the General Assembly. Under KRS 528.010(4)(b), a "gambling device" is "any other machine or any mechanical or other device, including but not limited to roulette wheels, gambling tables and similar devices, designed and manufactured primarily for use in gambling." The General Assembly envisioned its definition encompassing tangible gambling equipment, not words or numbers. "The definition of 'gambling device' in subsection (4) limits the application of the term to mechanical items used only for the purpose of gambling such as slot machines and roulette wheels." Kentucky Crime Commission/Legislative Research Commission ("LRC") Commentary to KRS 528.010(4) (1974) (emphasis added).

A domain name is not a "device" at all, and is not "manufactured." Moreover, when a domain name is "operated," the only thing that happens is that a user's Web browser connects with an IP address. Domain names, as mere connectors, are not operable, as software and Web sites are. While Kentucky cases have held that such

machinery as slot machines[8] and pinball machines[9] were "contrivances" under a repealed statute, there are no Kentucky cases finding anything so remote, intangible and insubstantial as "domain names" to fit within the definition of KRS 528.010(4).

Importantly, the Commonwealth's brief is silent as to how a domain name is or can be "manufactured." The plain meaning of "manufactured" is a tangible object, such as a roulette wheel or a craps table, not a series of letters and numbers.[10] KRS 528.010(4)(b) expressly requires that the "device" be "designed and manufactured." This is not an either/or proposition. If a "device" is not "designed and manufactured," it simply does not meet the statutory definition. The Commonwealth does not address this issue, because, in the words of the Court of Appeals, it would "stretch[] credulity" if it attempted to do so. (R. 557.)

Instead, the Commonwealth bases its "gambling device" argument on antiquated Kentucky cases interpreting a gambling statute, KRS 436.280, repealed 35 years ago, and on its unsupportable assertion that the General Assembly has intended a "strong public policy prohibiting unregulated gambling operations." (Appellant's Br. at 7.)

Hoping to shoehorn "domain name" into the modern statutory definition of gambling device, the Commonwealth cites *Gilley v. Commonwealth*, 229 S.W.2d 60 (Ky. 1950); *Meader v. Commonwealth*, 363 S.W.2d 219 (Ky. 1963); and *Three One-Ball Pinball Machines v. Commonwealth*, 249 S.W.2d 144 (Ky. 1952).

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[8] *See, e.g., 14 Console Type Slot Machines v. Commonwealth*, 273 S.W.2d 582 (Ky. 1954); *Pace Mfg. Co. v. Milliken*, 70 F. Supp. 740 (W.D. Ky. 1947).

[9] *See, e.g., Three One-Ball Pinball Machines v. Commonwealth*, 249 S.W.2d 144 (Ky. 1952); *A.B. Long Music Co. v. Commonwealth*, 429 S.W.2d 391 (Ky. 1968).

[10] *See, e.g.,* Webster's New World Dictionary 2d College Ed. (1968). "Manufacture" is defined as "1. the making of goods and articles by hand or, esp., by machinery, often on a large scale and with division of labor 2. anything so made; manufactured product 3. the making of something in any way, esp. when regarded as merely mechanical."

Each of these cases was decided under the now-repealed KRS 436.280. Each found that various objects were "contrivances" under the old statute, not "gambling devices" under the current one. The *Gilley* court, for example, did not find that "number slips" were "gambling devices"; it found that they were "contrivances," a term not defined in the old statute and absent from the current statute.

However, "gambling device" is given a specific definition in KRS 528.010(4). As the LRC commentary states, the definition limits, not expands, the scope of the statute. The Commonwealth's assertion that the two terms are interchangeable is erroneous. In essence, without any support under current law, the Commonwealth attempts to vastly expand state law into a realm the legislature did not authorize.

Additionally, the Commonwealth cites *Gilley*'s assertion that the General Assembly's intent was to "stop all forms of gambling." 229 S.W.2d at 63. However, this was not the General Assembly's intent when it enacted Chapter 528 in 1974. *Gilley* was decided twenty-four years earlier. The new statutory scheme adopted in 1974 narrowed the scope of the anti-gambling statutes, inserted statutory defenses and exemptions, and limited the scope of a "gambling device" by giving it a specific statutory definition. The General Assembly's intent, then, was to make subject to forfeiture only those "gambling devices" as defined by the plain language of KRS 528.010(4).

The United States District Court for the Western District of Kentucky recently addressed a similar question of legislative intent regarding statutory definition.[11] The case presented the question of whether a hotel and motel room tax levied by local ordinance against "motor courts, motels, hotels, inns or like or similar accommodations

[11] *See Louisville/Jefferson County Metro Government and Lexington-Fayette Urban County Government v. Hotels.com, LP, et al*, Case No. 3:06-CV-480-R at R. 219-228 and attached hereto at Appellee's App. D.

businesses" could be assessed against amounts collected by companies that market hotel rooms on the Internet. The Louisville ordinance was promulgated under KRS 91A.350, *et seq.* The court held that Internet companies facilitating the renting of rooms could not fall within the meaning of "accommodations businesses." Internet room-rental businesses

> were truly creatures of the future at the time the statute and ordinance originally were enacted. Such businesses have long since made the leap from a capitalist's imagination to reality, however, and both pieces of legislation have been amended more than once since then. The Court will not now step in to do what the state and local legislative bodies—both of whom can be expected to be fully aware of the intent of their legislative forbears—either failed or chose not to do.

Hotels.com, R. 227, Appellee's App. D at 9 (emphasis added). That is precisely the case here. When KRS 528.010(4) was enacted 35 years ago, the Internet was unknown in American life. The legislature could not have intended such a vastly expansive application of the definition as the Commonwealth puts forth.

Kentucky courts have long recognized that courts are not permitted to "breathe into a statute that which the legislature has not put there." *Commonwealth v. Gaitherwright*, 70 S.W.3d 411, 413 (Ky. 2002) (citing *Gateway Const. Co. v. Wallbaum*, 356 S.W.2d 247 (Ky. 1962)). The General Assembly has had numerous opportunities to re-define "gambling device" to encompass domain names. This Court should "not now step in to do what the state and local legislative bodies . . . either failed or chose not to do." *Hotels.com*, R. 227, Appellee's App. D at 9. In short, this Court should decline to rewrite a statute. *Cf. Commonwealth v. Lundergan*, 847 S.W. 2d 729, 731 (Ky. 1993); *Roney v. Commonwealth*, 695 S.W.2d 863, 864 (Ky. 1985).

> The judiciary is but one of three component parts of our form of government. Its duty is to interpret and construe laws, not to enact them, and if a plainly warranted construction of a statute should result in a failure to accomplish in the fullest measure that which the Legislature had in view, the remedy is a legislative action, and not judicial construction.

Western & Southern Life Ins. Co. v. Weber, 208 S.W. 716, 718 (Ky. 1919).

An Internet domain name simply does not meet the statutory definition of "gambling device." Therefore, the circuit court lacked subject matter jurisdiction.

B. The statute should be strictly construed against the Commonwealth.

Where forfeiture is involved, Kentucky has a policy of strict interpretation. *Bratcher v. Ashley*, 243 S.W.2d 1011, 1013 (Ky. 1951). Such statutes are to be read "in favor of the person whose property rights are to be affected." *Id.* The courts are "not at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used." *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000). The Commonwealth's brief relies exclusively on KRS 446.080(1) for its proclamation that "all statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature." (Appellant's Br. at 23.) However, where forfeiture is involved, strict construction still applies. *Bratcher*, 243 S.W.2d at 1013.

Furthermore, the prohibition of "gambling devices," the definition of "gambling devices" and the statutory provision providing for forfeiture of "gambling devices" all appear in the Penal Code, which makes operating "gambling devices" in violation of statute a Class D felony punishable by up to five years in prison. Because these are criminal statutes, a court must strictly construe these statutes.

Strict construction of criminal statutes dates at least to Chief Justice John Marshall. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820). As a principle of fundamental fairness, citizens must be advised what conduct is considered criminal:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.

McBoyle v. United States, 283 U.S. 25, 27 (1931). Holding that an airplane was not a "motor vehicle" for purposes of the National Motor Vehicle Theft Act, Justice Holmes held that "close enough" or "they would have included it had they thought of it" was not good enough in criminal statutes:

> When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies or upon the speculation that if the legislature had thought of it, very likely broader words would have been used.

Id. Citizens should not be required to guess at whether their actions may have penal consequences. *Winters v. New York*, 333 U.S. 507, 515 (1947). Strict construction of criminal statutes serves to "protect the individual against arbitrary discretion by officials and judges." 3 N. Singer, *Statutory Construction* § 59.03 at 12-13 (1986). Since the state makes the laws, the laws should be construed strongly against it. *Id.* at 13. This case is a prime example of the reason for this policy: it is intended to prevent the state from arbitrarily declaring an activity illegal when it is not defined as such by statute.

Although Appellee argues that the plain language of KRS 528.010(4) is not ambiguous and cannot include Internet domain names, were this Court to find some ambiguity, the rule of lenity would require that ambiguity to be resolved in Appellee's favor. *White v. Commonwealth*, 178 S.W.3d 470, 484 (Ky. 2005); *see also Haymon v.*

Commonwealth, 657 S.W.2d 239, 240 (Ky. 1983) (If "[i]t is not possible to determine which meaning the General Assembly intended . . . the movant is entitled to the benefit of the ambiguity."); *Commonwealth v. Colonial Stores, Inc.*, 350 S.W.2d 465, 467 (Ky. 1961) ("Doubts in the construction of a penal statute will be resolved in favor of lenity.").

Therefore, for multiple reasons that include the principles of strict construction and lenity, domain names are not "gambling devices" and the circuit court was without jurisdiction to act otherwise.[12]

II. THE TRIAL COURT LACKED JURISDICTION WITHOUT A CONVICTION.

All forfeiture must be authorized by statute. The General Assembly has not authorized forfeiture of a gambling device under KRS 528.100 without a criminal conviction. Therefore, the Commonwealth's action is baseless, improper, and invalid, and the circuit court lacked jurisdiction to act as it did.

The legislative history and structure of KRS Chapter 528 show that its forfeiture provision presumes a conviction before it is triggered. No Kentucky case has held that KRS 528.100 and KRS 500.090 are civil in nature, and the Commonwealth's brief misleads this Court by asserting otherwise. The Commonwealth's view of the statute misinterprets the plain language and legislative history of the gambling forfeiture provisions, mocks due process, and defies basic logic.

The Commonwealth argues that an action under KRS 528.100 and KRS 500.090 is civil and that no conviction is required. This argument rests on four erroneous

[12] In an amicus filing, the Poker Players Alliance argues that poker is a game of skill, not a game of chance, and does not qualify as gambling. Although iMEGA does not make this argument, the principles of strict construction and lenity would counsel in favor of a holding that poker is not gambling so long as the question is close. *See generally* Br. of *Amicus Curiae* Poker Players Alliance, *Interactive Media Ent'mt & Gaming Ass'n, Inc. v. Wingate*, 2009 WL 142995, 2008-CA-2036, January 20, 2009 (R. 284-300 in record of companion petition 2008-CA-2036).

premises: (1) that cases decided under the pre-1974 gambling device forfeiture statute, KRS 436.280, support the idea that forfeiture proceedings for gambling devices today are civil in nature; (2) that the legislative intent of the General Assembly when enacting 528.100 and 500.090 in 1974 was to punish all forms of gambling; (3) that cases decided under KRS 218A.410, the controlled substances statute, are analogous; and (4) that *United States v. Ursery*, 518 U.S. 267 (1996), provides support for allowing civil forfeiture under KRS 528.100 and KRS 500.090. (Appellant's Br. at 47-50.) These premises are either inapplicable or flatly untrue. As Judge Taylor's well-reasoned concurrence set forth, the General Assembly withdrew a civil remedy for forfeiture of gambling devices when it repealed KRS 436.280 and enacted KRS 528.100 and KRS 500.090 in 1974.

A. There is no statute authorizing this civil forfeiture proceeding.

The General Assembly extinguished the civil forfeiture provision for gambling devices in 1974 when it enacted KRS 528.100 and KRS 500.090 making conviction a requirement prior to forfeiture. Absent statutory authorization, the Commonwealth has no ability to bring a civil action like the one in this case.

At English common law, only criminal forfeiture existed, and the right of forfeiture did not attach "until the offending person had been convicted and the record of conviction produced." *Ursery*, 518 U.S. at 275. In this country, however, forfeiture exists only by statute. *See id.* at 276. "A forfeiture proceeding is a special one existing only by act of the Legislature." *Bratcher*, 243 S.W.2d at 1015; *see also* OAG 77-734 ("Forfeiture is not a part of the common law. It exists only by statute."). Because forfeitures are not favored in the law, Kentucky courts must "construe forfeiture statutes

strictly against a forfeiture and liberally in favor of the person whose property rights are to be affected." *Bratcher*, 243 S.W.2d at 1013. Absent an explicit statute, property cannot be forfeited without a conviction under Chapter 528.

The forfeiture statute repealed in 1974, KRS 436.280, stated in its entirety:

> Any bank, table, contrivance, machine or article used for carrying on a game prohibited by KRS 436.230, together with all money or other things staked or exhibited to allure persons to wager, may be seized by any justice of the peace, sheriff, constable or police officer of a city, with or without a warrant, and upon conviction of the person setting up or keeping the machine or contrivance, the money or other articles shall be forfeited for the use of the state, and the machine or contrivance and other articles shall be burned or destroyed. Though no person is convicted as the setterup or keeper of the machine or contrivance, yet, if a jury, in summary proceedings, finds that the money, machine or contrivance or other articles were used or intended to be used for the purpose of gambling, they shall be condemned and forfeited.[13]

(Emphasis added). Thus, prior to 1974, gambling devices were subject to forfeiture under two scenarios: (1) upon conviction of any person using the gambling device as prohibited by statute; or (2) upon a finding by a jury that the device was used for gambling. The statute at that time explicitly authorized seizure and forfeiture of gambling property absent a conviction. In turn, the Kentucky courts appropriately and explicitly relied on this provision when holding that KRS 436.280 contemplated a civil forfeiture proceeding. *See, e.g.*, *Hickerson v. Commonwealth*, 140 S.W.2d 841, 842 (Ky. 1940); *Sterling Novelty Co. v. Commonwealth*, 271 S.W.2d 366, 368 (Ky. 1954); *14 Console Type Slot Machines v. Commonwealth*, 273 S.W.2d 582, 583 (Ky. 1954). Even under this statute, however, there would be a jury trial, presumably open to the public—unlike the procedure applied by the trial court in this case. Each and every reported case

[13] Notably, the Commonwealth's brief fails to lay out the language of either KRS 528.100 or the now-defunct KRS 436.280.

concerning civil forfeiture of gambling property in Kentucky was decided under the prior statute.[14]

Under that repealed statute, "possession" of a gambling device was not a criminal offense. Only "use" of a gambling device was prohibited. However, the General Assembly had concerns that the civil forfeiture proceeding "resulted in a forfeiture of gambling devices possessed although possession was previously not an offense." Kentucky Crime Commission/LRC Commentary to KRS 528.100 (1974). To remedy this problem, the General Assembly eliminated the civil, *in rem* procedure in 1974 when it enacted KRS 528.100 and repealed KRS 436.280.

As such, it is simply incorrect to call KRS 436.280 a "predecessor" statute to KRS 528.100, as the Commonwealth does. The entire pre-1974 anti-gambling scheme, KRS 436.200-436.330, was repealed, and KRS Chapter 528 was adopted, eliminating the civil forfeiture provision. KRS 528.100 now provides:

> Any gambling device or gambling record possessed or used in violation of this chapter is forfeited to the state, and shall be disposed of in accordance with KRS 500.090, except that the provision of this section shall not apply to charitable gaming activity as defined by KRS 528.010(10).

(Emphasis added). As Judge Taylor recognized in his concurring opinion below, "Considering the legislative history of KRS 528.100 and the unambiguous language of the current statute, it is clear that the General Assembly intended to extinguish the civil *in rem* forfeiture proceeding as to gambling devices." (R. 562) Without a finding that (1) a "gambling device or record" exists, and (2) that it was "possessed or used in violation" of

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[14] The Commonwealth's brief attempts to mislead this Court with its statement that: "As Kentucky courts have recognized for nearly seventy years, KRS 528.100 and its predecessor are civil forfeiture statutes, and the forfeiture action is a civil, *in rem* proceeding." (Appellant's Br. at 49-50.) This assertion is flatly untrue. No Kentucky court has recognized that KRS 528.100 is a civil forfeiture statute. Only the long-repealed KRS 436.280, with its unambiguous authorization of a civil forfeiture proceeding, has been recognized as such.

Chapter 528, forfeiture cannot go forward under the current statute. There can be no finding of a violation of Chapter 528 until there is a criminal charge and a conviction. Until there is a conviction, it is impossible to know whether any property is possessed or used in violation of Chapter 528.

This intent is further elucidated by the legislature's decision to tie forfeiture to KRS 500.090. KRS 528.100 mandates that forfeited gambling property be disposed of in accordance with KRS 500.090. KRS 500.090(1)(a) provides that "property other than firearms which is forfeited under any section of this code may, upon order of the trial court, be destroyed by the sheriff of the county in which the conviction was obtained." (Emphasis added).

KRS 500.090, the general statute governing disposal of any property subject to forfeiture under the Penal Code, assumes that a conviction under the Penal Code has occurred, and is not triggered until there is such a finding. Since a conviction by a trial court is a prerequisite, KRS 500.090 gives no further due process protection; it assumes due process was afforded prior to conviction. Instead, once KRS 500.090 is triggered, the ability of parties to retain their property is sharply circumscribed. The initial finding of illegality cannot be challenged (since this was determined by the conviction), and the scope of any forfeiture hearing is limited to the following "innocent" or "unaware" owner exception:

> (4) The trial court shall remit the forfeiture of property when the lawful claimant:
>
> (a) Asserts his or her claim before disposition of the property pursuant to this section;
> (b) Establishes his or her legal interest in the property; and
> (c) Establishes that the unlawful use of the property was without his or her knowledge and consent . . . .

KRS 500.090(4).[15]

Thus, the statutory scheme is logical and the Penal Code forfeiture provisions are internally consistent. Once a person is indicted and convicted for an activity prohibited by the Penal Code, if property has been forfeited pursuant to statute, KRS 500.090 is triggered. Due process is protected by the conviction requirement, and, absent the assertion of a claim by an "unaware owner," forfeiture is mandatory. *Commonwealth v. Fint*, 940 S.W.2d 896, 897 (Ky. 1997).

The Commonwealth's construction of Chapter 528, by contrast, is incoherent when analyzed within the Penal Code's statutory scheme. The Commonwealth's position and actions in this case can be summarized as follows: It can declare an activity "illegal," obtain a generalized "probable cause" finding from a circuit court judge in a secret, *ex parte* hearing held without notice to affected parties, seize property, and proceed straight to a forfeiture hearing under KRS 500.090(4), where the owner of the property is limited to arguing that it was an "unaware owner" of the property in question. This all happens with no indictment, no conviction, no trial, or even the naming of any defendant.[16]

The Commonwealth's position is deeply flawed. Chapter 528 provides a number of defenses to prosecution under the gambling statutes. KRS 528.010(7) states that any party meeting the status of "player" shall have a defense to any prosecution under the

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[15] The Commonwealth in its brief, without citation to authority, asserts that "KRS 500.090 provides the owner of any Domain Defendant the opportunity to introduce evidence, to rebut and refute the Commonwealth's evidence, and to assert any defense that it chooses to assert." (Appellate Br. at 20.) This is demonstrably false and again misleads this Court. In fact, the Commonwealth itself argues in his brief that the hearing under KRS 500.090(4) is the only hearing required prior to forfeiture of gambling property. (Appellant's Br. at 8.) KRS 500.090(4)(c) requires that an owner "[e]stablish that the unlawful use of the property was without his or her knowledge or consent." Thus, lack of knowledge and consent is the only argument that can be brought during this hearing.

[16] Indeed, the Commonwealth has charged no one with any criminal wrongdoing in this action. In fact, it has not specified any activity occurring within the Commonwealth that is illegal.

chapter, and KRS 528.100 exempts property used in "charitable gaming activity" from forfeiture. However, under the Commonwealth's position, these defenses can never be asserted and these statutory provisions become superfluous.

Moreover, the offenses alleged by the Commonwealth require a finding that the party "advanced," "profited from," or "intended to advance or profit from" gambling activity, KRS 528.020-528.030, a finding that is not made under the Commonwealth's approach to the statute. Under the Commonwealth's approach, it need never prove beyond a reasonable doubt that any individual or entity over whom it can assert proper jurisdiction engaged in a criminal act.

Instead, the Commonwealth's position is that once it shows "probable cause" in a closed, *ex parte* hearing, and finds a judge to issue a seizure order, then the initial allegation of criminality cannot be challenged and none of its evidence can be tested.[17] It need never prove beyond a reasonable doubt that the owner of property was more than a player; an activity was not charitable; a party advanced, profited from or intended to advance or profit from gambling activity; or even that an activity like poker qualified as gambling activity.

For example, an issue raised in this case is the question of whether poker is a game of chance or skill. This is a possible defense to a criminal charge of promoting gambling. However, under the Commonwealth's scheme, a person can be deprived of property under the Penal Code without ever having opportunity to make that argument.

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[17] This concern is only amplified by review of the Commonwealth's closed, *ex parte* "probable cause" hearing on September 18, 2008. In the seventy-eight minute proceeding, counsel made numerous unchallenged, unsubstantiated assertions. The Commonwealth's key fact witness, Officer Gregory Howard, needed three tries to identify the purported "device" used to gamble in the Commonwealth. He first identified "software" as the device used to gamble. Asked again, he identified "the website." Only after that did he identify the "domain name" as the alleged gambling device. (Tape, Appellee's App. A at 03:15:09 to 3:15:44 p.m.)

The Commonwealth argues that it may file a civil, *in rem* action under KRS 528.100 against property where poker is promoted and advanced. It argues that it can institute a secret, *ex parte* hearing on that action and persuade a court to find "probable cause" that KRS Chapter 528 was violated. The court in secret could order seizure of any equipment used or possessed in the poker operation. The poker operation then would be left to seek its relief in KRS 500.090. There, however, it could not challenge the probable cause finding or assert the "game of skill" defense.[18] KRS 500.090 provides for remission only where a violation was found and the owner shows he was unaware of the violation.

Finally, the Commonwealth makes a series of unsubstantiated assertions regarding the legislative intent underlying KRS 528.100.[19] It is clear, however, that the General Assembly did not determine "to punish all forms of gambling," as the circuit court asserted, when it enacted Chapter 528. (Appellant's Br. at 47.) Prior to 1974, gambling, other than on horse racing at a licensed track, was strictly prohibited in all forms. The General Assembly expressly limited the reach of the anti-gambling statutes when it enacted Chapter 528:

> Under the Kentucky Penal Code, no criminal sanctions are imposed against the player. The controversial proposition, not peculiar to Kentucky, making every person who gambles in any manner whatsoever subject to a criminal penalty, unless he gambles within the confines of a licensed racetrack, is eliminated. Previously, KRS 436.270 imposed criminal sanctions against the card or dice player as well as the player of other gambling devices, and KRS 436.200 made it a crime for a person to engage "in any hazard or game on which money or property is bet, won or lost . . . ." Thus, players at a church or charitable bingo game and players

[18] *See generally* Br. of *Amicus Curiae* Poker Players Alliance, *Interactive Media Ent'mt & Gaming Ass'n, Inc. v. Wingate*, 2009 WL 142995, 2008-CA-2036, January 20, 2009 (R. 284-300 in record of companion petition 2008-CA-2036).

[19] It first quotes the trial court's opinion that "[i]t would be absurd for our General Assembly to emphasize the pernicious nature of gambling within the state and ... to punish all forms of gambling, yet restrict the remedial measures made available to its law enforcement agents." (Appellant's Br. at 47.) Second, it claims that "[h]ad the General Assembly wished to change the nature of the proceeding, it could have clearly expressed its contrary intent when it enacted KRS 528.100." (Appellant's Br. at 49.)

> of wheels at a social picnic or county fair are subject to criminal penalties. Such activity is commonplace and there is in actuality no widespread condemnation of the conduct. Recognition of these facts is the principal reason for excluding the player from criminal liability.

Kentucky Crime Commission/LRC Commentary to KRS Chapter 528 (1974).

Therefore, in 1974, the General Assembly actually acknowledged that gambling is commonplace. Consistent with this, KRS 528.010(7) expressly allows the defense of "player" to any prosecution under Chapter 528. The General Assembly actually decriminalized some gaming activities. It makes sense that the General Assembly would contemporaneously choose to extinguish the civil forfeiture procedure about which it expressed concern. The General Assembly expressed its intent quite clearly in 1974, and that intent is contrary to the assertions of the Commonwealth.

The Commonwealth made up, and persuaded the circuit court to adopt, an unauthorized civil forfeiture procedure that flouts the language, legislative history, and expressed intent of the General Assembly. This secret "process" offers no notice to a property owner of the nature of the specific allegations, no opportunity to contest the Commonwealth's assertions of criminality, no opportunity to test the Commonwealth's evidence, nor any opportunity to allow the property owner to assert defenses for a charge under Chapter 528. The circuit court simply had no jurisdiction to act as it did, and the order of the Court of Appeals granting the writ must be affirmed.

B. Chapter 218A's forfeiture process is irrelevant to the Penal Code.

The Commonwealth inappropriately cites two cases interpreting the statute authorizing forfeiture of controlled substances under KRS 218A.410. (Appellant's Br. at 47-48) (citing *Osborne v. Commonwealth*, 839 S.W.2d 281 (Ky. 1992) and *Smith v. Commonwealth*, 205 S.W.3d 217 (Ky. App. 2006)). These cases are not analogous,

however, because Chapter 528 is located within the Kentucky Penal Code and KRS 500.090 is applicable only to violations of the Penal Code, while Chapter 218A is not part of the Penal Code and contains separate forfeiture provisions. The Attorney General saw this distinction over thirty years ago:

> KRS 500.090 sets out the forfeiture provisions applicable to the Kentucky Penal Code. Each reference under this provision specifically limits itself to the Penal Code. The scope of this section is therefore only applicable to the forfeiture of property used or possessed in violation of the Code. . . . [I]t is clear that Chapter 218A, dealing with controlled substances, is not considered a part of the code.

OAG 77-734.

Chapter 218A sets out a procedure for a civil action. The Penal Code does not.

KRS Chapter 218A outlines a detailed procedure for seizure and forfeiture of controlled substances and property used to manufacture and distribute them. KRS 218A.410-218A.415. Controlled substances themselves can be "seized and summarily forfeited to the state," even if the owner is unknown. KRS 218A.410(1)(b). Other property, however, is subject to civil standards of preponderance of the evidence to show it was not traceable to the controlled substances. *Harbin v. Commonwealth*, 121 S.W.3d 191, 195-96 (Ky. 2003). "[I]t is clear from the language contained in 218A.410, that the Legislature intended for an individual to be afforded the basic constitutional protections of due process prior to forfeiture of otherwise legal property." *Olden v. Commonwealth*, 203 S.W.3d 672, 678 (Ky. 2006).

The "statutorily-mandated burdens of proof, and presumptions favoring the Commonwealth, render these forfeiture actions more akin to a civil proceeding that to a criminal trial . . . ." *Smith v. Commonwealth*, 205 S.W.3d 217, 222 (Ky. App. 2006). Moreover, KRS 218A.410, unlike forfeiture provisions under the Penal Code, allows for

judicial discretion in determining whether the property is traceable to a controlled substances transaction. *Olden*, 203 S.W.3d at 678 ("[T]he trial court had discretion in finding whether Appellant has indeed met his burden in rebuttal and ultimately ordering the forfeiture . . . .").

This makes sense. The statute allows seizure and immediate forfeiture of controlled substances, because they are illegal *per se*. However, for "otherwise legal property"—a car allegedly used to transport illegal drugs, for example—it requires the Commonwealth to make a showing that the property was traceable to the drug transaction, then gives the owner an opportunity to prove otherwise. The trial court, after a public hearing or trial, has discretion whether to order forfeiture of the property. In short, Chapter 218A provides a due process procedure for the Commonwealth to seek forfeiture of property using civil burdens of proof. It is, therefore, a civil forfeiture proceeding.

The forfeiture provisions within the Penal Code are very different from those found in Chapter 218A. A "device" is only illegal and subject to forfeiture if it: (1) meets the statutory definition of "gambling device" under KRS 528.010(4); and (2) is possessed or used in violation of Chapter 528. In turn, the offenses the Commonwealth has alleged requires a finding that the party "advanced," "profited from," or "intended to advance or profit from" gambling activity. KRS 528.020-528.030. Upon such a showing beyond a reasonable doubt, the gambling device "is forfeited."

The Commonwealth's protestations notwithstanding, a deck of cards is not analogous to cocaine, because a deck of cards by itself is not illegal in the Commonwealth. (*See* Appellant's Br. at 17, 29) (comparing iMEGA to fictitious

"Narcotics Trafficking Association," and comparing Internet gaming websites to "drug cartels"). Cards become subject to forfeiture only when used to advance or profit from gambling activity. *See* KRS 528.020(1); KRS 528.030(1). This is the key distinguishing characteristic between offenses triggering KRS 500.090 under the Penal Code and controlled substance offenses under Chapter 218A. The Commonwealth, under the Penal Code, has the burden of proving this element of intent and the rest of its case under criminal burdens of proof. Due process is provided prior to forfeiture by the criminal trial process under the Penal Code.

C. These forfeiture proceedings are criminal, not civil, proceedings.

This Court has answered the question of whether the Penal Code forfeiture provisions are punitive. In *Commonwealth v. Fint*, a defendant entered a guilty plea to four counts of felony theft, and the Commonwealth moved for forfeiture of a truck used in the theft. 940 S.W.2d at 896. The theft chapter in the Penal Code has a forfeiture provision similar to KRS 528.100 mandating that property "used in commission or furtherance" of a theft offense "shall be forfeited as provided in KRS 500.090." *Id.* at 897; KRS 514.130(1). The trial judge denied the Commonwealth's motion to forfeit the truck, and the Court of Appeals affirmed. *Id.*

This Court reversed, noting that the forfeiture statute gave the trial judge no discretion; forfeiture was mandatory. *Id.* "When a statute mandates forfeiture of property used in a criminal offense, the forfeiture amounts to an additional penalty for the offense." *Id.* (citing *Austin v. United States*, 509 U.S. 602 (1993)) (emphasis added). The forfeiture provisions under the Penal Code are punitive and criminal in nature.

The Commonwealth ignores the law of Kentucky and instead cites *United States v. Ursery*, 518 U.S. 267 (1996). However, *Ursery* simply stands for the proposition that the key distinction between a criminal and civil forfeiture is whether it was intended to be punitive or remedial in nature. Since this Court held that the mandatory forfeiture provisions under the Penal Code are punitive, *see Fint, supra*, it stands to reason that a punishment under the Penal Code would require a conviction before it is enforced. Therefore, even under *Ursery*, KRS 528.100 and KRS 500.090 are criminal in nature, requiring a criminal proceeding and a conviction prior to forfeiture.

III. iMEGA PROPERLY ASSERTS ASSOCIATIONAL STANDING.

This case presents a perfect example of the proper exercise of associational standing. The trial court erred in its order of October 16, 2008 when it denied Appellant iMEGA associational standing and intervenor status. The Commonwealth uses a red herring when it argues that "[a]ssociational standing is barred by the clear language of KRS 500.090." (Appellant's Br. at 17.) In fact, the Commonwealth's argument confirms that this is the kind of action for which associational standing was designed.

In its order granting the writ on January 20, 2009, the Court of Appeals stated that

> [a]lthough the trial court concluded in its October 16th order that the associations had no standing to advance the interests of their members, the fact remains that they were initially granted leave to intervene to assert those very interests. Having participated in the proceedings below, and given the adverse ruling on their claims of lack of jurisdiction, we find no basis for denying those same participants the right to seek relief in this proceeding.

(R. 556.)

In *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977), the United States Supreme Court set out a three-part test for associational standing.

> An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose and (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit.

Hunt, 432 U.S. at 334.

This Court has held that such standing is established when a party has "a judicially recognizable interest in the subject matter of the suit." *Ashland v. Ashland F.O.P No. 3, Inc.*, 888 S.W.2d 667, 668 (Ky. 1994). In *Ashland F.O.P.*, this Court recognized that the non-profit F.O.P lodge had standing on the ground that its members had "a real and substantial interest" in a dispute over a city ordinance requiring new city employees to live inside the city limits. 888 S.W.2d at 668. Similarly, in *Warren County Citizens for Managed Growth, Inc. v. Board of Com'rs of City of Bowling Green*, 207 S.W.3d 7 (Ky. App. 2006), the Kentucky Court of Appeals recognized standing of the non-profit Warren County Citizens group on the ground that members living four miles from the proposed development at issue would "be directly affected." 207 S.W.3d at 13. Beyond doubt iMEGA's members have "a real and substantial interest" in the dispute and would "be directly affected" by it.

As to the three *Hunt* criteria, associational standing for iMEGA is clearly appropriate. First, iMEGA's members are registrants of the subject domain names. They unquestionably would have standing in the Commonwealth's action "in their own right." Second, iMEGA is a not-for-profit corporation organized in the state of New Jersey for the purpose of collecting and disseminating information regarding electronic and Internet-based gaming, and of representing its members' interests. These are entities directly affected by the trial court's orders with interests germane to iMEGA's purpose.

Finally, the participation of individual members is not required in this action. This case is here as an appeal of an order of the Court of Appeals in an original action seeking to stop a circuit court's improper exercise of jurisdiction affecting iMEGA members. Similarly, in the trial court, iMEGA stepped in to attempt to stop the abusive effort by the Commonwealth's executive branch to bring about a legally unauthorized forfeiture of those domain names. These issues are not particular to any individual owner of a domain name; rather, this action deals with statutory and constitutional issues that apply in all cases involving an effort to seize any domain name under Chapter 528. The individual participation of iMEGA members obviously is not required. In short, before the trial court, the Court of Appeals, and now here, iMEGA has asserted associational standing precisely for its intended purpose.

The Commonwealth wants to avoid the entire issue of the proper application of Chapter 528 by saying no person or business entity could ever have standing to deal with these issues since the only issue is whether such a person or entity is an "innocent" or "unaware" owner. The Commonwealth argues that KRS 500.090 "does not provide for associational standing" (Appellant's Br. at 17), but that argument totally misses the point. If, *supra*, the entire forfeiture scheme devised by the Commonwealth and relied upon by the circuit court is invalid, KRS 500.090 is inapplicable in this matter. KRS 500.090 provides only an "unaware owner" objection to forfeiture. KRS 500.090(4) does not provide a constitutional due process mechanism wherein a claimant may challenge a finding of criminality. Therefore, KRS 500.090 is irrelevant to associational standing under the standards of *Ashland F.O.P.*, *Warren County Citizens*, or *Hunt.*

The Commonwealth agrees with the appropriateness of associational standing here when it states that such standing may be allowed "in respect to injunctive or declaratory relief." (Appellant's Br. at 16.) That is precisely the case here. A petition seeking a writ of prohibition is an original injunctive action in the Court of Appeals. Similarly, in the trial court, all parties on both sides sought injunctive or declaratory relief. Associational standing for iMEGA is proper, and the trial court erred when it held that it is not. The Court of Appeals properly found that there is no basis for denying iMEGA "the right to seek relief in this proceeding."

IV. THE STANDARD FOR ISSUANCE OF A WRIT WAS MET.

The Court of Appeals correctly held that the standard for issuance of a writ under Kentucky law was met completely in this case upon the finding that the trial court was proceeding without jurisdiction.

> If domain names cannot be considered gambling devices, Chapter 528 simply does not give the circuit court jurisdiction over them. Accordingly, petitioners have satisfied the criteria for obtaining a writ prohibiting enforcement of the circuit court's previous orders and the conduct of the scheduled forfeiture hearing. No showing of irreparable injury is required.

(R. 558-59.) This Court has held that a

> writ of prohibition may be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

Hoskins v. Maricle, 150 S.W.3d 1 (Ky. 2004). Because the trial court "clearly erred in concluding that the domain names can be construed to be gambling devices subject to forfeiture under KRS 528.100," (R. 557), the *Hoskins* standard is met.

Even if a showing of great injustice and irreparable injury were required, Appellee would meet the requirement readily. The fact that the Commonwealth and the circuit court have moved unconstitutionally under an unauthorized forfeiture proceeding constitutes great injustice. Violation of constitutional rights constitutes irreparable harm. *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 578 (6th Cir. 2002). A writ is appropriate to prevent a trial court from violating fundamental constitutional rights. *James v. Hines*, 63 S.W.3d 602, 608 (Ky. App. 1998).

Additionally, "'[g]reat and irreparable injury' means 'something of a ruinous nature.'" *Newell Enterprises, Inc. v. Bowling*, 158 S.W.3d 750, 754 (Ky. 2005), citing *Bender v. Eaton,* 343 S.W.2d 799, 800 (Ky. 1961). Ruin is exactly what the Commonwealth said it wants to inflict upon iMEGA's members.[20] Such intent, coupled with the trial court's unconstitutional seizure order, satisfies any possible requirement of a showing of injustice and harm, were one to be applied.

In addition, there is no adequate remedy at law for what is occurring here. As set forth above (p. 29), under the Commonwealth's theory there can be no appeal of the probable cause determination and subsequent seizure and forfeiture because no person or entity is involved in the initial, secret hearing and the only issue which can be contested thereafter is the "unaware owner" issue. There is no appeal right from the circuit court's finding of "probable cause" of criminality.

The Commonwealth argues that "Kentucky courts have refused to issue a writ for the benefit of an absconding property owner in similar circumstances." (Appellant's Br. at 22.) The Commonwealth further argues, again in a circular fashion, that "[t]his Court should likewise not employ a writ to allow the property or its owners to avoid the

[20] *See, e.g.*, n. 2, *supra.*

statutory procedures of the *in rem* forfeitures." *Id.* This circular argument again assumed that the procedure sanctioned by the circuit court is proper. If, however, these procedures are improper, then a writ is the appropriate remedy.

The Commonwealth cites two cases decided in 1950, *Blackerby v. Adams*, 232 S.W.2d 79 (Ky. 1950), and *Linn v. Bryan*, 226 S.W.2d 959 (Ky. 1950). Both cases, however, turned on grounds irrelevant here. In *Blackerby*, this Court held that "great loss" was not shown, and that the order the petitioner sought to overturn was interlocutory. 232 S.W.2d at 80. In *Linn*, this Court held that a writ would contravene legislative intent regarding a condemner's right of entry and possession of condemned property. 226 S.W.2d at 960. By contrast, in its petition, iMEGA sought relief from a trial court that was exercising jurisdiction erroneously in an unauthorized forfeiture procedure. iMEGA is not seeking to avoid statutory procedures; it is seeking to stop the executive branch from inventing procedures that the legislature has not approved.

The petition was properly granted under this Court's standards for a writ.

V. INTERNET GAMBLING DOES NOT VIOLATE KENTUCKY STATUTES.

The Commonwealth is incorrect in its unceasing assertions in its brief that the 141 Internet domain names are devices that enable "illegality." The Commonwealth has not shown that any element of any Kentucky gambling offense has been committed within the Commonwealth.[21] The General Assembly in 1974 decriminalized gambling by gamblers, and it has never prohibited any form of Internet gambling, as other states have.

[21] Remarkably, the Commonwealth's investigators did not even gamble on all Web sites they visited by using the 141 Internet domain names. During the secret, *ex parte* hearing on September 18, 2008, the trial court asked counsel for the Commonwealth if investigators employed by the Commonwealth placed bets on all sites. Counsel answered, "Just about." (Tape, Appellee's App. A at 2:18:00 p.m.) Counsel stated that investigators were not able to gamble on sites reached through some of the 141 domain names. (*Id.* at 2:17:50 to 2:20:40 p.m.) However, the trial court did not compel counsel to specify those sites on which gambling occurred and those on which it did not occur. This raises additional, serious questions as to how

A Kentucky circuit court lacks subject matter jurisdiction to adjudicate alleged criminal acts unless they are committed in Kentucky. *Commonwealth v. Cheeks*, 698 S.W.2nd 832, 834 (Ky. 1985). "In simple terms, the commission of a statutory offense in Kentucky gives rise to the authority i.e. 'jurisdiction' of the courts of this state to preside over the prosecution of the case." *Id.* (emphasis added). The Penal Code sets this out:

> Except as otherwise provided in this section, a person may be convicted under the law of this state of an offense committed by his own conduct or the conduct of another for which he is legally accountable when:
> (a) Either the conduct or the result which is an element of the offense occurs within this state; ...

KRS 500.060. (emphasis added).

To determine whether any alleged illegal conduct occurred in Kentucky, it is necessary to analyze statutory elements. The trial court appeared to operate under the misconception that gambling constituted the illegal act. In the secret, *ex parte* hearing, the Commonwealth stated that it "created a team which engaged in at least 500 man-hours on-line, randomly accessing various internet gambling websites available in Kentucky." (R. 178.) The circuit court concluded that domain names "are being used in connection with illegal gambling activity within the Commonwealth." (R. 180.) Nothing in the opinion elaborates or specifies how elements of statutory violations were shown.

However, there is nothing illegal in Kentucky in "accessing various internet gambling websites." KRS 528.010(7) defines "player" as "a person who engages in any

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the trial court reached its "probable cause" finding as to any specific domain name, and how venue could have been proper for a showing of criminal conduct as to any name. Furthermore, Counsel for the Commonwealth argued that the offense of promoting gambling occurred even on those sites where investigators were unable to gamble because such sites advertised gambling. (*Id.* at 2:18:25 to 2:18:32 p.m.) There is no prohibition in Kentucky statutes upon advertising, and such commercial speech is protected by the First Amendment. Therefore, this is a patently absurd interpretation of law. It also illustrates the unfairness and due process violations of the secret, *ex parte* hearing process from which there is no appeal. The trial court did not question counsel's assertion that advertising gambling on Web sites constitutes a criminal offense in Kentucky. (*Id.*) These unchallenged assertions illustrate the fundamental unfairness of the process invented by the Commonwealth.

form of gambling solely as a contestant or bettor," without receiving profit "other than personal gambling winnings" and without "otherwise rendering any material assistance to" operating the gambling activity. "The status of a 'player' shall be a defense to any prosecution under this chapter." KRS 528.010(7). Gambling, therefore, is not prohibited. The secret testimony did not establish that any players violated Chapter 528.

Rather, the Commonwealth alleges violations of KRS 528.020, "Promoting gambling in the first degree," and KRS 528.030, "Promoting gambling in the second degree." (R. 92-93.) A person may be guilty of those offenses "when he knowingly advances or profits from unlawful gambling activity." (R. 92.) A person commits first-degree promoting by also "setting up or operating a gambling device." (*Id.*) A person advances gambling activity when, "acting other than as a player, he engages in conduct that materially aids any form of gambling activity." KRS 528.010(1). (R. 93.)

Promoting gambling is not a "result" offense such as homicide or assault, in which the result of death or bodily injury is an element of the crime. *Commonwealth* v. *Hager*, 41 S.W.3d 828, 831 (Ky. 2001). The elements of promoting gambling all entail conduct of those who allegedly committed crimes. Accordingly, under KRS 500.060, the relevant jurisdictional inquiry is whether such conduct occurred "within this state."

Under KRS 528.100, to successfully seek forfeiture of a domain name, the Commonwealth must show that someone within this state possessed or used it to advance or profit from gambling. But, the Commonwealth admits that "owners of the Domain Defendants are purposely located outside the United States." (R. 81.) (emphasis added). The Commonwealth admits that all alleged acts that constitute a possible crime in fact occurred outside Kentucky. The Commonwealth does not allege that any person while

in Kentucky profited from gambling activity. The Commonwealth does not allege that anyone while in Kentucky committed any act advancing gambling.

The forfeiture provision of KRS 528.100 simply cannot be triggered where there was no possession or use of a gambling device "in violation of this chapter." Therefore, there is no construction of facts in this case under which the trial court could have jurisdiction over any conduct alleged by the Commonwealth.

VI. THE DOMAIN NAMES ARE NOT SUBJECT TO JURISDICTION IN KENTUCKY.

A. The Trial Court Violated The Due Process Clause.

The Internet domain names are not subject to *in rem* jurisdiction in Kentucky. Any action by a Kentucky court with regard to the domain names is void under the Due Process Clause of the Fourteenth Amendment because the names are not located within the jurisdiction of Kentucky courts.

It is well settled that *in rem* jurisdiction is valid within a state only if the property is within that state. "The basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State." *Hanson v. Denckla*, 357 U.S. 235, 246 (1958). *See also Durfee v. Duke*, 375 U.S. 106, 107-08 (1963) ("The Nebraska court had jurisdiction over the subject matter of the controversy only if the land in question was in Nebraska."). A state's attempt to exert *in rem* jurisdiction over property outside the state violates due process and is presumptively invalid. *Hanson*, 357 U.S. at 246-50.[22]

Kentucky recognizes that this fundamental principle applies to forfeiture laws. *Hickerson v. Commonwealth*, 140 S.W.2d 841, 843 (Ky. 1940) (holding that a court may

[22] The Commonwealth cites four federal cases addressing extra-territorial jurisdiction of federal courts. (Appellant's Br. at 35-38.) Authority for such jurisdiction is found in the Due Process Clause of the Fifth Amendment, together with the federal government's power to regulate both interstate and foreign commerce and the Necessary and Proper Clause. This is not relevant to the constitutional limitation on state authority over property not within its territory.

consider whether property has been forfeited "provided the property is found within its jurisdiction"). The trial court here simply has no jurisdiction over the domain names.

The trial court flatly misstated the holding of *Shaffer v. Heitner*, 433 U.S. 186 (1977). It erroneously cited *Shaffer* for the proposition that *in rem* actions only require "minimum contacts" between the forum state and the property (R. 191) and it erroneously held that *Shaffer* somehow abrogated the basic requirement that only property located within the jurisdiction of the court is subject to an *in rem* action. (R. 192.) *Shaffer* actually held that in addition to the fundamental requirement that property subject to *in rem* jurisdiction be located in the state, the state must have an interest in the persons who own the property, as analyzed through *International Shoe*'s "minimum contacts" prism. 433 U.S. at 205-12. Thus, *Shaffer* in fact limited *in rem* jurisdiction by holding that physical presence of the property alone does not give the state a *per se* right to seize it.

In *Shaffer*, the state of Delaware attempted to seize non-resident defendants' stock located in Delaware in order to force their consent to personal jurisdiction. *Id.* at 189-92. In finding the action unconstitutional, the Court reasoned, "[I]f a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible." *Id.* Thus *Shaffer* repudiated the very tactic being employed by the Commonwealth in this case.

B. Domain Name *Situs* Is In The District Of The Registrar.

The *situs* of intangible property is one of two locations: (1) the domicile of the property owner; or (2) the location of the intangible instrument (i.e., a stock or bond certificate), if there is one. *Commonwealth v. Bingham's Adm'r*, 223 S.W. 999, 1000 (Ky. 1920); *see also, e.g., In re De Lano's Estate*, 315 P.2d 611 (Kan. 1957) (holding that

Kansas courts had no jurisdiction to adjudicate dispute over stock and bond certificates located in Missouri). Congress applied this principle in the Federal Anticybersquatting Consumer Protection Act ("ACPA"), 15 U.S.C. § 1125(d), *et seq.*, as to domain names.

To regulate Internet traffic, the Internet Corporation for Assigned Names and Numbers ("ICANN") was established in 1998. *See* http://www.icann.org/tr/english.html (last visited May 19, 2009). An international, quasi-governmental partnership, ICANN allocates Internet space and oversees the Domain Name System ("DNS"). Internet users may reach Web sites by entering Internet Protocol ("IP") numbers, which might appear as something resembling "192.0.34.163," into their Web browsers, or by entering domain names instead, e.g., "www.icann.org." ICANN licenses domain name "registrars," which in turn grant domain names to applicants, or "registrants." *Mattel, Inc. v. Barbie-club.com*, 310 F.3d 293, 296 n.2 (2d Cir. 2002). For a fee, the registrant obtains the exclusive right to use a domain name for a specified time. The registrar holds, and holds title to, a certificate, which the ACPA establishes is a "document sufficient to establish [a court's] control and authority regarding" the name's use. 15 U.S.C. § 1125(d)(2)(C)(ii).

No Kentucky case or statute addresses domain name *situs*. However, the ACPA allows *in rem* jurisdiction over a domain name only "in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located." *Id.* § 1125(d)(2)(A). Such district is the *situs* of a domain name in an *in rem* action. *Id.* § 1125(d)(2)(C).

In *Mattel*, the trial court dismissed an action brought by Mattel against several domain names under the ACPA in the Southern District of New York. The trial court found lack of *in rem* jurisdiction on the ground that the defendants' registrar was in

Maryland. *See Mattel*, 310 F.3d at 294. The Second Circuit affirmed, stating that allowing an *in rem* action in any federal court against a domain name accessible in every state may offend due process or international comity. *See Mattel*, 310 F.3d at 302. Requiring a "nexus" between the registrar and the court "satisfies due process." *Mattel*, 310 F.3d at 302. This analysis has been followed in nearly all litigation under the ACPA. *See, e.g., Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214 (4th Cir. 2002) (holding Virginia had *in rem* jurisdiction consistent with due process when domain name was registered there). At least one court has adopted this reasoning in a non-ACPA case. *See Office Depot, Inc. v. Zuccarini*, No. C 06-mc-80356 SI, 2007 WL 2688460, at *4 (N.D. Cal. Sept. 10, 2007) ("[T]his Court will follow Congress' suggestion in ACPA that a domain name exists in the location of both the registrar and the registry.").

Permitting any court anywhere in the U.S. to claim *in rem* jurisdiction over a domain name, and thus requiring any party that registers a domain name to defend itself in any jurisdiction, would surely "offend traditional notions of fair play and substantial justice" that anchor the due process requirement. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Here, the trial court was without *in rem* jurisdiction.

C. Domain Names Have Not Consented To Jurisdiction In Kentucky

The Commonwealth argues that the trial court has jurisdiction over Defendants by virtue of the *ICANN Uniform Domain Name Dispute Resolution Policy* ("UDRP"). (Appellant's Br. at 44-46.) It argues that all domain name holders must comply with the UDRP, and that the UDRP requires they consent to jurisdiction "through any court . . .

that may be available." *Id.*; *see also* ICANN UDRP § 5.[23] However, this is not the case. The UDRP does not require registrants to submit to jurisdiction in Kentucky.

The UDRP was adopted by ICANN in January, 2000, specifically to "permit the owner of a [trade]mark to initiate an administrative complaint against an alleged cybersquatter." 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 25:74.75 (4th ed. 2008). Cybersquatting is the act of a person who "registers, traffics in, or uses a domain name that—in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark . . . ." 15 U.S.C. § 1125(d)(1)(A)(ii). Cybersquatting typically occurs when a person registers an unused domain name of a famous person or corporation and attempts to sell the rights to it for substantially more than the standard price.[24]

The UDRP requires all domain name registrants to submit to a mandatory administrative proceeding if a third party alleges that a name infringes upon rights in a trademark or service mark, if the registrant has no "legitimate interests" in the name, and if the registrant's registration and use of the name were in bad faith. UDRP § 4. The UDRP as a whole is concerned only with cybersquatting. It is irrelevant to a state's attempt to seek forfeiture of a domain name for an alleged criminal violation.

Additionally, the Commonwealth does not cite any case or UDRP decision supporting the idea that domain names have assented to jurisdiction in Kentucky. Section 5 states in its entirety that "[a]ll other disputes between you and any party other

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[23] Available at http://www.icann.org/en/dndr/udrp/policy.htm (last visited May 19, 2009).

[24] The UDRP and ACPA were specific responses to cybersquatting. For example, in *Charo Rasten v. URLPro*, NAF FA0412000384835 (Feb. 2, 2005), decided under the UDRP, the defendant registered over 900 domain names of famous names and marks and registered *charo.com* shortly after the performer celebrity known as "Charo" inadvertently allowed her own registration of the same domain name to lapse. Defendant's action was a bad faith attempt to prevent "Charo" from re-registering her name.

than us regarding your domain name registration that are not brought pursuant to the mandatory administrative proceeding provisions of Paragraph 4 shall be resolved between you and such other party through any court, arbitration or other proceeding that may be available." UDRP § 5 (emphases added). The ICANN Staff Report[25] stated:

> [T]he basic two-part approach of the posted documents is fair to all parties (in the case of accredited registrars, domain-name holders have themselves submitted to jurisdiction in the location of the registrar), but that an additional option should be added so that in all cases the submission to jurisdiction can, at complainant's option, be at the location of the domain-name holder . . . .

ICANN—Second Staff Report on Implementation Documents for the UDRP § 4.9 (emphases added). This makes clear that the intent of the policy is that, when a covered dispute arises, the holder should submit either in the location of the registrar or that of the domain name holder. This provides only two jurisdictional options, and neither one is the Kentucky courts. Thus, if a woman in Frankfort, Kentucky registers a domain name to share pictures with family in other states, it is not plausible that ICANN intends that she submit to jurisdiction in Asia should a dispute emerge there regarding the registration.

Additionally, by its plain language section 5 applies to all other disputes regarding domain name registration. This case does not concern registration; at issue is use. Therefore, the UDRP does not give Kentucky courts a basis for exerting jurisdiction in this action. There is no dispute regarding the domain registrations, and the domain names have not consented to jurisdiction regarding this dispute.

VII. THE TRIAL COURT'S CLOSINGS VIOLATED THE FIRST AMENDMENT.

The trial court unconstitutionally closed the case file and the proceedings in this action between August 26, 2008 and the issuance of an order unsealing the record on

[25] *See* http://www.icann.org/udrp/udrp-second-staff-report-24oct99.htm (last visited May 19, 2009.)

September 23, 2008, all in violation of the First Amendment. This rendered the secret, *ex parte* hearing conducted September 18 invalid, and it rendered the trial court's orders of September 18 and October 16 invalid because of their reliance upon the invalid hearing.

The First Amendment right of access is most commonly asserted by representatives of the press. However, the right is one held by any member of the public, with the press commonly exerting the right merely as "the public's representative." *Courier-Journal and Louisville Times Co. v. Peers*, 747 S.W.2d 125, 128 (Ky. 1988). In this case, iMEGA is asserting this right of access as a member of the public.

The United States Supreme Court has made clear that the First Amendment to the United States Constitution mandates a strong presumption of open judicial proceedings and records. *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 14-15 (1986) ("*Press-Enterprise II*"). "Openness . . . enhances both the basis fairness of the . . . trial and the appearance of fairness so essential to the public confidence in the system." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-71 (1980).

This Court has reiterated the strong presumption of openness in courts throughout the years and has imposed an extraordinary burden on those who would seek closure. *See Lexington Herald-Leader Co., Inc. v. Meigs*, 660 S.W.2d 658 (Ky. 1983); *Peers*, 747 S.W.2d 125. The presumption is overcome only in the face of an overriding interest. So strong is the presumption of public access to court proceedings and records that this Court in *Meigs* mandated that, before any closure, there must be a public hearing at which the "trial judge should consider the utility of other reasonable methods available to protect the rights of the [party] short of closure." 660 S.W.2d at 663.

If a trial court decides that closure is essential to protect the interest alleged by the party seeking closure, it must make specific written findings as to why the records should be sealed. *See id.* Second, the "burden of proof is on those who would infringe the First Amendment right of access, not on those who assert it." *Id.* (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558-59, 569-70 (1976)). Third, the burden is stringent, requiring:

(a) specifically identify a fundamental right that so outweighs the public's constitutional and common law rights of access to court records that "in no other way can justice be served" but to seal them, *Lexington Herald-Leader Co., Inc. v. Tackett*, 601 S.W.2d 905, 906 (Ky. 1980);

(b) "show that the asserted right or interest probably cannot be adequately protected by less restrictive alternatives to closure," *Meigs,* 660 S.W.2d at 663; and

(c) "show that the right or interest he seeks to protect . . . will be protected by" closure.

Id. The U.S. Supreme Court has further held that findings must be "specific enough that a reviewing court can determine whether the closure order" was proper. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*").

Here, the trial court sealed the file by issuance of a perfunctory order signed August 26, 2008. (R. 244-45.) It said simply that the record "shall be kept under seal . . . until further orders of this Court. The Clerk shall allow the record to be reviewed only by parties and counsel of record." (R. 244.) It made no other findings. (*Id.*)

Beyond doubt, the trial court violated the requirements of *Meigs* and related Kentucky cases. The trial court failed to make specific written findings as to why the records should be sealed. It failed to specifically identify any fundamental right that so outweighed the public's constitutional and common law rights of access to court records that "in no other way can justice be served" but to seal them, as set out in *Lexington*

Herald-Leader Co., Inc. v. Tackett. It failed to "show that the asserted right or interest probably cannot be adequately protected by less restrictive alternatives to closure," as *Meigs* requires. It also failed to show how the state's interest would be protected by closure, or whether the court considered the utility of other reasonable methods available to protect the rights of the state's claimed interest, as set out in *Meigs*. Nor was the Order of August 26 "specific enough that a reviewing court can determine whether the closure order was properly entered," as *Press Enterprise II* requires.[26]

Therefore, the August 26 order sealing the records was invalid and a violation of the First Amendment and due process rights of the registrants.

Likewise, the closure of the hearing on September 18 was unconstitutional and invalid. The trial court issued no order authorizing the closing or indicating that it had conducted a hearing on any of the related First Amendment issues.

Therefore, both the seizure order issued September 18 and the trial court's order of October 16, 2008 based upon evidence put forth *ex parte* and in secret on September 18 violated the First Amendment and due process rights of the registrants.

VIII. THE TRIAL COURT'S SEIZURE VIOLATED THE DORMANT COMMERCE CLAUSE.

The trial court's seizure order violated the dormant Commerce Clause. Because a state trial court has no authority to seize Internet domain names used in worldwide commerce, the seizure order represents an ongoing and continuing violation of the Constitution of the United States. iMEGA's members continue to be irreparably harmed by the fact that its domain names continue to be subjected to the unconstitutional order.

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[26] At the secret, *ex parte* hearing on September 18, 2008, the trial court made only one statement regarding the closing of the record. The court asked counsel for the Commonwealth, "Do you still want the record sealed in this?" (Tape, Appellee's App. A at 3:18:40 to 3:18:44 p.m.) The trial court made no inquiry into, and took no testimony regarding, the First Amendment implications of the closing.

A. The Seizure Order Was *Per Se* Invalid.

Article 1, Section 8 of the Constitution empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The dormant Commerce Clause cases decided by the United States Supreme Court generally involve state attempts to regulate interstate commerce. It is also clear that no state can regulate commerce with foreign nations.

The Supreme Court has made clear that the dormant Commerce Clause prohibits states from discriminating against interstate commerce in order to favor in-state economic interests over out-of-state economic interests. *See Am. Trucking Ass'n v. Mich. Pub. Service Comm'n*, 545 U.S. 429, 433 (2003); *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). Since *Gibbons v. Ogden*, 9 Wheat. 1, 188, 6 L. Ed. 23 (1824), the Court has recognized the implied power of the Commerce Clause to strike down regulations interfering with interstate commerce, especially a state's practice of economic protectionism. In addition, foreign commerce is afforded even broader protection than is interstate commerce. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 435-36 (1979). States are restrained from excessive interference in foreign affairs. *Id.* at 448-51.

As the Supreme Court recently explained in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 127 S. Ct. 1786, 1792 (2007), a state law or action motivated by economic protectionism is subject to a "virtually *per se* rule of invalidity" that can "only be overcome by a showing that the state has no other means to advance a legitimate local purpose." *See also Brown-Forman Distillers v. New York State Liquor Authority*, 476 U.S. 573 (1986). Thus, a state action motivated by protectionism is subject to the "strictest scrutiny" that is "so heavy that 'facial

discrimination' by itself may be a fatal defect." *See Camps Newfoundland/Owatonna, Inc. v. Harrison, Me.*, 520 U.S. 564, 581-82 (1997).

Accordingly, "in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm v. Heald*, 544 U.S. 460, 472 (2005), (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994)). In *Granholm*, the Supreme Court struck down under the "virtually *per se* rule of invalidity" statues enacted by Michigan and New York that allowed in-state wineries to sell their wares directly to those state's consumers but—by mandating separate licensure and distribution networks for out-of-state producers—deliberately made it economically difficult for out-of-state wine producers to do so.

Here the Commonwealth's own pronouncements in press conferences and to the media have made it clear that the Governor's motivation for this seizure action is to protect Kentucky's own gaming operations, both now and in the future, while at the same time collecting tax revenues. Governor Beshear, when referring to Internet gambling websites, has called them "leeches on our communities." (Stephenie Steitzer, *Beshear Wins Web Site Round*, Courier-Journal (Louisville, Ky.), Oct. 17, 2008, at B1.) (R. 239-240.) But the real reason for attempting to seize the domain names is to "protect the signature industry," namely horse racing. (*Id.* at R. 239.) Reacting to the trial court's ruling, Beshear stated, "Closer to home, we know they siphon off ten of millions of dollars from legal gaming efforts in Kentucky, such as horse racing, the lottery, and charitable gaming . . . ." (Governor Steve Beshear, "About Kentucky" Radio

Commentary (Oct. 17, 2008).)[27] The motive behind this action is to shore up the state's economic interests. The Commonwealth's action amounts to economic protectionism.

If the Commonwealth were truly worried about the dangers of gambling, an easier way would be simply to outlaw gambling among its citizens, including pari-mutuel betting and the lottery, which it has chosen not to do. Moreover, Governor Beshear is supportive—by his own admission—of expanding gambling within the Commonwealth.

State action of this sort constitutes a *per se* violation of the Commerce Clause if done to protect private sector in-state economic interests. Where, as here, the Commonwealth itself is or plans to be an industry actor on its own behalf, this *per se* violation only becomes even more aggravated. The Court of Appeals order granting the writ properly enjoined the trial court.

B. The Order's Burdens On Commerce Outweigh Local Benefits.

Even if the trial court's seizure were not a *per se* violation of the dormant Commerce Clause by virtue of economic protectionism, it would be invalid under the *Pike v. Bruce Church* balancing test because of burdens it places on interstate commerce.

Where a statute regulates evenhandedly "to effectuate a legitimate local public interest," Courts may still find a constitutional violation where "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). "In balancing the burden versus benefit, 'the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact

[27] *Available at* http://governor.ky.gov/media/commentary.htm ("Internet Gaming" link) (last visited May 19, 2009). A transcript of the speech is at R. 242.

on interstate activities.'" *Id.* In *American Libraries Association v. Pataki,* 969 F. Supp. 160 (S.D.N.Y. 1997),

> the court invalidated a New York statute criminalizing the dissemination of material harmful to minors, ruling that the statute violated the Commerce Clause in three particulars: (1) it sought to regulate conduct occurring wholly outside New York state, (2) its burden on interstate commerce far exceeded the benefits of the statute and (3) any regulation of the Internet by the states exposed users to inconsistent regulations.

Am. Booksellers Found. for Free Expression v. Strickland, 512 F. Supp. 2d 1082, 1102 (S.D. Ohio 2007) (quoting *Pataki*, 969 F. Supp. at 169). In other words, state regulation has been deemed violative of the dormant Commerce Clause where it "reached to all Internet communications." *Am. Booksellers,* 512 F. Supp. 2d at 1103.

The application by the trial court of KRS 528.100 to Internet domain names falls well within the *Pataki* test, and in turn the *Pike* test. If this action succeeds, 141 Internet domain names will be forfeited to the Commonwealth. It is unlikely that the Commonwealth plans to proceed against every gaming domain name created on the Internet around the world.[28] It has neither the time, money, nor manpower to do so. If the General Assembly were to outlaw all gambling within the state, it would have a finite population to regulate, and would likely be more effective in achieving its purported objective. It could then police actions in Kentucky instead of attempting to police the entire world. Through the seizure of domain names, the court beyond question has reached to, and has blocked, Internet communications entirely outside of Kentucky and throughout the world. The burden on those affected communications is absolute, and excessive, far exceeding the benefit of the application of the statute. The chilling effect on interstate commerce is quite real. Subjecting Internet "business transactions to

[28] The Commonwealth asserts that there are 2,500 such Web sites. (Appellant's Br. at 2.)

restrictive state regulation threaten[s] its continued development as a means of interstate commerce." Kenneth D. Bassinger, *Note: Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 Ga. L. Rev. 889 (1998). Clearly the burdens of this action on interstate commerce outweigh any potential benefits to the state, and the application of KRS 528.100 in this manner fails the test under *Pike*.

IX. THE TRIAL COURT WRONGLY RESTRAINED COMMERCIAL SPEECH.

Domain names are commercial speech protected by the First Amendment. The trial court thus has imposed an unconstitutional prior restraint upon protected speech.

The First Amendment protects commercial speech from unwarranted governmental regulation. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York,* 447 U.S. 557, 561 (1980) (citing *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976)). "If the communication is neither misleading nor related to unlawful activity," restrictions by a state are subjected to intermediate scrutiny. *Central Hudson*, 447 U.S. at 564. The state must (1) assert "a substantial interest to be achieved by" any restriction on commercial speech; (2) assure that the regulation is "in proportion to that interest," and (3) assure that "the limitation on expression must be designed carefully to achieve the State's goal." *Id.* The restriction on commercial speech "must directly advance the state interest involved," and "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Id.*

Domain names constitute commercial speech. "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Id.* at 561-62. "The

rooftops of our past have evolved into the internet domain names of our present. We find that the domain name is a type of public expression, no different in scope than a billboard or a pulpit . . . ." *Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003). Domain names "could be used for 'an expressive purpose such as commentary, parody, news reporting or criticism,' comprising communicative messages by the author and/or operator of the website in order to influence the public's decision to visit that website, or even to disseminate a particular point of view." *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 586 (2d Cir. 2000); *see also Sunlight Saunas, Inc., v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1032, 1057 (D. Kan. 2006).

Domain names are protected commercial speech if they are "part of a communicative message" and do not infringe on trademark rights. *Planned Parenthood Federation of America, Inc. v. Bucci*, 1997 WL 133313, 10-11 (S.D.N.Y. 1997);[29] *Yankee Publishing, Inc. v. News America Publishing, Inc.*, 809 F. Supp. 267 (S.D.N.Y. 1992).

A state may not "bar a citizen of another State from disseminating information about an activity that is legal in that State." *Bigelow v. Virginia,* 421 U.S. 809, 825 (1975). Billboards that advertise casinos in Indiana and Illinois, for example, are commonly seen in Kentucky, even though casino gambling is illegal in Kentucky.

Domain names serve an expressive purpose, make clear communicative statements about the websites they advertise, and seek to persuade people to visit them. They enjoy First Amendment protection. The trial court seized the names without conducting the intermediate scrutiny analysis required by *Central Hudson.* The government interest is not sufficiently substantial, the restriction is not in proportion to that interest, and the limitation is not properly drawn.

[29] Attached hereto as Appellee's App. E.

CONCLUSION

The trial court acted without jurisdiction because Internet domain names cannot be "gambling devices" as defined in KRS 528.010. It acted without jurisdiction because an "*in rem* civil" action cannot be brought under the Kentucky Penal Code, and no forfeiture can occur absent a conviction. It acted without jurisdiction because the Commonwealth has not shown that any elements of the Kentucky statutory offenses of promoting gambling have occurred, and because domain names are not located within the territorial jurisdiction of the trial court.

Despite all of that, the Commonwealth persists in asking this Court to legitimize what it has done. It is asking this Court to legislate a new definition of "gambling device," to legislate a new, civil forfeiture procedure lacking due process protections, and to legislate a prohibition on Internet gambling in Kentucky. The Commonwealth excuses its lack of legal authority. It declares, in so many words, that Internet gambling is a massive social blight, and therefore the ends justify the means. However, the ends are not proper and the means are not authorized.

The Order of the Court of Appeals granting the petition for a writ of prohibition should be affirmed and the Commonwealth's action should be dismissed, with prejudice.

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