COMMONWEALTH OF KENTUCKY
SUPREME COURT
2009-SC-43-MR

Commonwealth of Kentucky, *ex. rel.*
J. Michael Brown, Secretary, Justice and
Public Safety Cabinet — APPELLANT

v.

APPEAL FROM KENTUCKY COURT OF APPEALS
ORIGINAL ACTION NOS. 2008-CA-2000, 2008-CA-2019, 2008-CA-2036

Interactive Media Entertainment & Gaming
Association, *et al.* — APPELLEES

BRIEF FOR APPELLEES VICSBINGO.COM AND INTERACTIVE GAMING COUNCIL

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INTRODUCTION

Parties affected by unlawful and extra-jurisdictional orders issued by Franklin Circuit Court petitioned for and were granted an extraordinary writ halting the trial court's proceedings. The Justice and Public Safety Cabinet appeals the issuance of that writ, but the Court of Appeals acted properly and issued the writ on lawful grounds. Compelling legal and constitutional reasons support affirming the Court of Appeals' action.

STATEMENT CONCERNING ORAL ARGUMENT

The issues presented by the Cabinet's appeal can be easily decided—and the appeal denied—without oral argument. If, however, this Court believes that oral argument would be beneficial, Appellees would gladly participate.

STATEMENT OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

This case arises from Appellant's seizure and attempt to forfeit 141 internet domain names associated with gambling-related web sites that Appellant believes should not be accessible to the citizens of Kentucky. In its prior pleadings and in its brief to this Court, Appellant has had plenty to say about the supposed evils of online gaming, but precious little to offer about the law. Stripped of its hyperbole and rhetoric—none of which has any bearing on the legal issues before this Court—Appellant's brief offers no credible basis for overturning the reasoned judgment of the Court of Appeals.

That court undoubtedly was correct in granting a writ of prohibition to block the seizure and forfeiture of the domain names, holding that an internet domain name is not a "gambling device" subject to forfeiture under KRS 528.100. Indeed, a domain name—which is merely an alphanumeric "address" directing computer users to a particular web site—is not a "device" at all as that term is used in the statute. Thus, as the Court of Appeals correctly ruled, the domain names were not subject to seizure or forfeiture, meaning the Franklin Circuit Court was acting beyond its jurisdiction.

Unable to offer a plausible reading of the statutory text, Appellant relies on cases interpreting a Kentucky statute that was *repealed* in 1974 and on federal statutes that neither support Appellant's position nor bear on the meaning of the Kentucky statute at issue here. Appellant's naked policy arguments fare no better; Appellant's beliefs about what ought to be subject to forfeiture are no substitute for the plain text of a statute enacted by the Kentucky legislature. Nor is Appellant's claim that one or more Appellees lack standing remotely plausible. For starters, this is an original action for a writ of prohibition, *not* a forfeiture action. Moreover, any debate over the availability of associational standing was settled decades ago, and such standing is proper where a

plaintiff unabashedly seeks to coerce individuals and entities to submit to personal jurisdiction by extraterritorially seizing their property.

Even if a domain name were somehow a "gambling device" under KRS 528.100, the decision below must still be affirmed for three independent reasons. First, as Judge Taylor explained in his concurring opinion, KRS 528.100 allows for the forfeiture of a gambling device only upon a *criminal conviction*. Appellant, however, has styled this a civil *in rem* action because it is undisputed that he lacks the authority to initiate a criminal proceeding. Second, it would violate the federal Due Process Clause for a state court to exercise *in rem* jurisdiction over property located beyond the state's borders. The United States Supreme Court has squarely held that *in rem* jurisdiction requires *both* that the property be present in the state *and* that there are sufficient "minimum contacts" with the forum. Neither exist in this case. With regard to the former requirement, it is undisputed that none of the domain names are registered in Kentucky; with regard to the latter, numerous courts have rejected attempts to manufacture minimum contacts, and the record shows unequivocally that the sites were viewed in Kentucky only because hired consultants of Appellant's counsel deliberately searched for and accessed them. Finally, upholding the authority of a state court to seize domain names associated with web sites one state deems undesirable would violate the federal Commerce Clause, which prohibits one state from taking action that has the practical effect of regulating conduct in another state or in foreign countries.

STATEMENT OF THE CASE

Appellee vicsbingo.com is one of the 141 Domain Names seized by Franklin Circuit Court on September 18, 2008, and one domain name allegedly submitted to the "dominion and control" of Franklin Circuit Court effective September 25, 2008.

Appellee Interactive Gaming Council (IGC) is a trade association representing 61 of the 141 Domain Names seized on September 18, 2008. Appellant, the Commonwealth of Kentucky, is acting *ex rel.* through J. Michael Brown, Secretary of the Justice and Public Safety Cabinet, who, through a civil lawsuit, seized and now seeks forfeiture of 141 internet domain names pursuant to Kentucky Penal Code Sections 528.100 and 500.090.

1. Cabinet's misstatements and exaggerations.

Characterizing the Court of Appeals' decision as "condoning [an] illegal scheme," the Cabinet seeks to vacate the writ that stopped Franklin Circuit Court from going forward with proceedings to forfeit 141 Domain Names to the Commonwealth. Cab. Bf at 50. Although chock-full of moralistic pronouncements about gambling, the Cabinet's brief is devoid of legal specifics about jurisdiction and statutory authority. Indeed, the first thirteen pages of the Cabinet's brief—fairly characterized as a screed against the alleged scourge of international internet gaming—provides no legal substance at all.

The opening sentence of the Cabinet's Statement of the Case embodies many of the misleading misstatements that characterize the Cabinet's approach to this litigation:

> *After an investigation into illegal gambling, the Commonwealth concluded, as have other state and federal authorities, that unregulated internet gambling is particularly* harmful because, unlike legal and regulated gaming, it is extraordinarily easy, available and anonymous.

"After an investigation . . ."

With this opening, the Cabinet implies that Kentucky law enforcement undertook an investigation, acting through its police powers, into criminal activity. In reality, no such inquiry occurred.

As the Cabinet acknowledged during oral argument in the Court of Appeals, "we do not have the authority to—to bring any criminal actions. That would rest with the—

with the Attorney General." This admission reflects the fact that the Secretary is represented by private attorneys retained under a contingency-fee contract,[1] and it was those private attorneys who employed consultants to search for internet gambling sites. As the trial court record and analysis that follows make clear, the actual purpose of the alleged "investigation" was to manufacture jurisdiction for this lawsuit.

Here's what happened.

A consultant, Gregory Howard, was hired in June 2008 by counsel for the Cabinet, who asked that he "perform a project." R. 10 at Appx. 4, p. 34. Howard's task was to determine whether "illegal internet gambling was occurring in the State of Kentucky." *Id.* Howard possessed no knowledge or experience qualifying him for this job (*id.* at 35); he knew only that "Mr. Lycan and Mr. Foote—the attorneys from Illinois—supplied the money." *Id.* at 35-36. Other civilians employed along with Howard included Adam Cox, from the lawyers' office (the "technology guy"); Joe Presbey, a young man "about to graduate from MIT" who helped "decipher all of this stuff that was going on in the internet"; a retired New York city police officer; and, a retired Lexington police officer. *Id.* at 14, 36. These men used computers set up in a Fayette County law office[2] and were paid to surf the internet a couple of days per week from June to September 2008. *Id.* at 37.

". . . into illegal gambling . . ."

The Cabinet's repeated use of the phrase "illegal gambling" is intended to convince the Court that the Cabinet has evidence of illegal activity. But the consultants

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[1] *See* R. 10 at Appx. 20. All record citations are to the Certified Record in Case No. 2008-CA-2036 unless otherwise specified.

[2] The gaming operation took place at 1010 Monarch Street, Suite 250, Lexington, Kentucky 40513, which is listed by the Kentucky Secretary of State as the principal office of the Lycan Law Firm PLLC.

hired by the Cabinet's attorneys did not engage in *illegal* gambling because any Kentuckian can gamble legally—online or otherwise.

No Kentucky statute makes a criminal out of an individual who bets on horse races, dog races, card games, roulette wheels, or NCAA tournament games. No one who bets on black jack, bingo, backgammon, or any other game—either in-person or on-line—is committing an illegal act under Kentucky law. No Kentucky statute even mentions—let alone criminalizes—internet gambling. In short, if a Kentucky resident chooses to gamble, he or she is not breaking state law. *See* KRS 528.010(7).

Even if the domain names accessed by the Cabinet's paid gamblers can be called "gambling establishments"—and Appellees do not concede this to be so—they are not located in Kentucky. The gambling sites found and used by the Cabinet might as well be in Indiana or any other sister state with legalized casinos. All 141 Domain Names "sued" by the Cabinet are registered and located outside of Kentucky, and none of the servers hosting gambling websites are located in the Commonwealth. [3]

"... the Commonwealth concluded, as have other state and federal authorities ..."

In response to this claim, it suffices to say that neither Kentucky's Attorney General nor any Commonwealth's Attorney nor the Kentucky State Police nor any other law enforcement authority participated in or approved any alleged "investigation" into internet gambling. Accordingly, no law enforcement authority reached *any*

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[3] The Cabinet misrepresents the statements of an attorney for goldencasinos.com (not a party to the writ proceedings or this appeal) to imply that the respondents admit to an "illegal gambling scheme." Cab. Bf at 21-22. Counsel's actual statement was: "Those attorneys [attorneys for the Cabinet], however, if you look to the statutes, are provided with authority to pursue actions related to the Treasury, not ex rel actions, as what Your Honor has before him, which are attempting to enforce the penal code, not just here in Kentucky, but, Your Honor, a concept I think -- I hope this Court has gotten today, is that what you are affecting is not something just here in Kentucky, which we all agree is illegal, but something that is worldwide, that is operating in jurisdictions where it is indeed legal." R. 10 at Appx. 14, p. 58.

"conclusions" about gambling as a prelude to private attorneys filing this action.

On the contrary, one of the petitioners below made an effort to join Kentucky's Attorney General in the writ proceedings before the Court of Appeals, but Attorney General Conway firmly declined to become involved: "[W]hile this office clearly has the authority to litigate this type of case pursuant to KRS 15.020, . . . the Secretary has inserted himself as the representative of the Commonwealth by filing this lawsuit." R. 516, 521 in Case No. 2008-CA-2000. The Attorney General even suggested that, if the Court of Appeals agreed that the Secretary lacks standing to bring this action, then the Court could grant appropriate relief upon motion. *Id.* at 521.

The Cabinet's invocation of "federal authorities" is significantly overblown. While it is true that a federal government web site boldly proclaims "If you've ever thought about visiting a cyber casino, here's something you should know: it's illegal to gamble online in the United States," the statement elides a crucial point: online *poker*, is not "gambling" at all. As discussed in the petition by IGC and vicsbingo.com and the *amicus* brief of the Poker Players Alliance below, poker is a game of skill, not a game of chance. Indeed, some of the world's most successful players employ sophisticated game theory to design the optimal playing strategy. As persuasively presented by the Poker Players Alliance, significant expert as well as objective statistical evidence overwhelmingly supports the fact that skill predominates over chance in poker.[4] While the luck of the draw may influence who wins a particular hand (or even a series of

[4] Whether a particular game is one of skill or chance is crucial in deciding whether it runs afoul of Kentucky's gambling laws. *See, e.g.*, OAG 79-215 (opining that a foosball tournament would not violate gambling laws, as it was a game of skill, in contrast to games in which chance determines the outcome). Below, the trial court and the Cabinet relied on the *Fall* case for the proposition that the role of skill is not dispositive. *Fall*, however, involved a wager on the outcome of an event. The Fourth Circuit Court of Appeals, interpreting Virginia law, recently noted the distinction between placing a wager on one's own skills, like in poker, versus placing a wager on the outcome of an event. *U.S. v. Kingrea*, 2009 U.S. App. LEXIS 11505 (4th Cir. 5/28/09).

hands), the vast majority of hands are resolved *without* the players actually comparing their cards – *i.e.*, the "show-down" – when all players who have not folded compare their cards, and where luck may play a part – only occurs in a minority of the hands that are dealt . It is the skill of the particular players in betting, checking, raising, calling, and otherwise employing various strategies that resolve these hands. The presence of luck that exists in virtually any endeavor does not alter the fact that the more skillful poker player wins the hand far more often than not.[5]

". . . that unregulated gambling is particularly harmful."

With these words and many like them, the Cabinet mounts the proverbial soap box to rage about retirees gambling away their retirement savings and the ravages that gambling can inflict on Kentucky's youth.

But the studies cited in the Cabinet's brief (Exhibits D & E) and unsupported assertions regarding the supposed hazards of gambling are not in the record and were not seen or relied upon by the courts below. Most importantly, none of the sociological positions staked out by the Cabinet help this Court understand legal issues central to this appeal. Indeed, the Cabinet's diatribe against gambling is an odd position for an executive branch elected in part on a platform of legalizing casinos.

2. Cabinet's improper procedure.

On August 26, 2008, under color of KRS 528.100 and KRS 500.090,[6] the Cabinet covertly instituted proceedings in Franklin Circuit Court seeking forfeiture of 141

[5] A recent *New Yorker* article observed that "many legal scholars" view the assertion that online poker is illegal under federal law as "disingenuous—[it] is, in fact, a bluff. It is not clear that any law governs online poker. . . ." *The New Yorker*, March 30, 2009, 30-35, 33.

[6] KRS 528.100 provides that, subject to limited exceptions, "[a]ny gambling device or gambling record possessed or used in violation of [KRS Chapter 528] is forfeited to the state, and shall be disposed of in accordance with KRS 500.090." KRS 500.090, another provision of the Kentucky Penal Code, provides the procedure by which property forfeited pursuant to the Kentucky Penal Code is disposed of following conviction and a determination of forfeiture.

internet "Domain Names." R. 10 at Appx. 1–2. A domain name is a verbal nickname for a numerical internet address, and, according to the Cabinet's complaint, these intangible names constitute illegal "gambling devices" used to promote, conduct, and/or advance illegal activities in violation of the Kentucky Penal Code. *See id.*; KRS 528.020 and 528.030. Their alleged status as "gambling devices" supposedly makes the domain names subject to seizure and forfeiture pursuant to KRS 528.100.

The Cabinet's private attorneys deliberately chose to proceed in an action *in rem*, styling their action a civil case with only domain names identified as "defendants." R. 10 at Appx. 1-2. No one filed any criminal charges against any domain names—much less the registrars or owners of those names—and no warrants were issued. Surprisingly, the Cabinet did not serve the civil complaint on anyone, nor did the Cabinet appoint a warning order attorney to effect constructive service as required by CR 4. Instead, after filing the complaint, on August 26, 2008, the Cabinet persuaded the trial court judge to issue an *ex parte* order sealing the record specifically to prevent the domain name owners from learning of the action. *Id.* at Appx. 3. The Cabinet also secretly filed a motion for the trial court to enter an order seizing the domain names. *Id.* at Appx. 2.

At the Cabinet's request, the trial court convened a secret hearing on September 18, 2008, to consider the Cabinet's motion to seize the domain names. *Id.* at Appx. 4. Neither the domain names nor their registrars nor owners received notice of the September 18 hearing, at which the Cabinet relied on the criminal "probable cause" standard to justify seizure of the domain names. *Id.* at pp. 4–8.

3. Cabinet's "evidence" of gambling.

Evidence offered by the Cabinet at the *ex parte* seizure hearing consisted of testimony from Gregory Howard and one other witness, Derrick Paulson, an Associate

Professor of Criminal Justice and Police Studies at Eastern Kentucky University. R.10, Appx. 4 at 12. This testimony is extremely revealing.

Howard testified to the details of his gambling "investigation." First, Howard and his fellow consultants turned on their computers. *Id.* at 46. After opening Internet Explorer, the consultants used it to access "the main Google website," where they typed in the search term "Casino City." Google's search engine responded with a list of "casino" names. *Id.* The consultants chose random casino websites from the list (vegasvilla was the example used by Howard), so he clicked on the chosen casino link and was connected to that web site. *Id.* In other words, for at least the one example utilized at the seizure hearing, Howard did not even type the vegasvilla.com domain name the Cabinet was subsequently allowed to seize.

Simply locating a website was not enough, however. Every computer used by the consultants had to be equipped with gambling software, so Howard and his team chose to download the software enabling them to move within with the gambling sites. *Id.* at 52. Next, a consultant was required to accept a user agreement tendered by the web site. *Id.* at 53. Conditioned upon agreement to the web site's terms, and only by using the downloaded software, the consultant still had to decide between playing for "fun" or playing for "real money." *Id.* To gamble with real money, the computer user was required to open an account with the web site. Howard testified that he did so with a fictitious name. *Id.* at 53, 56. Finally, to deposit "real money" in his account, Howard used a Visa gift card—not an actual credit or checking card. *Id.* at 56. The pre-paid gift cards were supplied by the Cabinet's private attorneys.[7] *Id.*

[7] Ironically, under the Cabinet's theory, its private attorneys violated KRS 528.030 by engaging in "unlawful gambling activity," *i.e.*, providing third parties with the Visa gift cards to gamble.

When asked during the hearing what "device" he "needed to use in order to internet gamble," Howard answered candidly: "software." *Id.* at 70–71. After prompting by the Cabinet, Howard testified that the "other" device that he needed to use was "the website, the domain name." "Website" and "domain name" are not, of course, interchangeable terms, but neither Howard nor the Cabinet tried to distinguish between the two. *Id.* And, it bears repeating that Appellees and the other domain name owners were kept unaware of the hearing and thus had no opportunity to cross-examine Howard on this pivotal distinction.

Professor Paulson also testified. Paulson was asked how a person in Kentucky "ends up internet gambling," and he also answered candidly: "The easiest way is just do a search. Go to Google, type in a search, find your fair share of—pick any one of the internet gaming sites, and click and go away. And then you are moving right on to the gaming site." *Id.* at 28. Eventually, Paulson was asked "what is the method of transportation, or device that is used, universally, in order to internet gamble from the Commonwealth of Kentucky," and he replied: "Domain name," further adding that there is no other way to gamble on the Internet except by using a domain name. *Id.*[8] The Cabinet never asked and Paulson never testified that a domain name meets the statutory definition of a "gambling device."[9]

The Cabinet did not present specifics on the frequency of gambling site contacts and the amounts of money gambled during the Cabinet's "investigation" at the probable

[8] Not only is this assertion contradicted by the testimony of both Paulson and Howard that one can find gambling websites without ever using a domain name simply by performing Google searches, but, as discussed herein, it is demonstrably false, as anyone who knows the IP address of a particular gambling website can access it simply by entering that address.

[9] The Cabinet complains that the Court of Appeals made its decision without considering "proof or testimony, including that of . . . Paulson that a domain name is a device within the statutory definition." Cab. Bf at 13. A thorough search of the record reveals that no such testimony exists.

cause hearing. Nothing in the record supports the claim that millions of dollars flow out of Kentucky due to internet gambling. Cab. Bf at 3.[10] The record below is clear, however, that contact with the Domain Name Appellee "vicsbingo.com"—like contact with "vegasvilla"—was established at the consultant's initiative using the Google search engine. No evidence exists that vicsbingo.com ever solicited or actively targeted Kentucky gamblers. *See* R. 10 at Appx. 4.

4. Cabinet's attempt to manufacture jurisdiction.

The Cabinet repeatedly claims that the 141 domain names—which supposedly cannot be represented by attorneys—"purposefully" availed themselves of this forum and or "solicited" or "actively targeted" Kentuckians.[11] *See, e.g.,* Brief at i, 2, 4, 31-43. But not a shred of evidence can be found to support the alleged targeting, soliciting, or purposeful availment. No such evidence was presented at the *ex parte* seizure hearing, though the Cabinet could have produced such evidence—if it existed—without fear of cross-examination or contradiction. Rather, as demonstrated by the Franklin Circuit Court's hearing record, the only facts available to support jurisdiction of any kind—*in rem* or *in personam*—were manufactured by the hired consultants of the Cabinet's private attorneys for the sole purpose of pursuing this case.

Based on the testimony in the trial court, a domain name like "vegasvilla.com," listed as one of 141 Domain Names in the Cabinet's complaint, was *searched for, identified, and visited at the consultants' initiative*. Based on the testimony, the domain

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[10] Although the Cabinet said at the covert seizure hearing that "we're here because, of our estimates $170 million a year leaves Kentucky" and Howard said that Professor Paulson said that "millions and millions of dollars" flow out of Kentucky due to internet gambling, R. 10, Appx. 4 at 9, 72, Paulson did not testify on this subject. Nor was any testimony or evidence offered as to how these hearsay "estimates" were reached or, importantly, how these estimates relate to the domain names at issue.

[11] The Cabinet's brief uses variants of the word "purposeful" nearly 40 times.

names identified in the Cabinet's complaint were entirely passive participants—the names themselves were unknown to the consultants until found by a Google search.

Franklin Circuit Court therefore did not have colorable jurisdiction over the 141 domain names—until, perhaps, after the trial court ordered the names transferred to the Commonwealth. The Cabinet admitted as much in the secret proceedings: "What we are seeking is an order of seizure that directs the internet registrars to lock, and transfer of control to the Commonwealth of Kentucky, the rights to these domain names, so they cannot be moved or absconded from the jurisdiction of this Court." R.10, Appx. 4 at 4. The Cabinet suggested that the 141 domain names might be deemed "within the constructive possession of the Commonwealth," but the Franklin Circuit Court really needed to issue an order directing each domain name registrar to transfer registration to the Commonwealth. *Id.* at 8. This scheme was designed to "freeze the domain names," so if "these folks [don't] stop what they were doing" the Cabinet would "actually take the domain name and shut it down worldwide." *Id.* at 12.

5. Trial court's unlawful seizure of Domain Names.

Franklin Circuit Court granted the Cabinet's seizure motion at the conclusion of the seizure hearing, R. 10, Appx. 5, and signed Findings of Fact and Conclusions of Law tendered by the Cabinet. R. 10, Appx. 6.

Although the trial court's September 18 order required the Cabinet to give advance notice to the owners of the domain names, that did not happen. Instead, a letter transmitted by email went only to registrars of the domain names, such as GoDaddy.com, Inc., the registrar for vicsbingo.com. Letters accompanying the court's seizure order directed the regstrars to transfer the domain names to an account held by the Commonwealth. R. 10, Appx. 7. The mailing addresses for these registrars show them

to be located internationally in India, Germany, Canada, Australia, France, the United Kingdom, and New Zealand, and nationally in Washington, Louisiana, Virginia, New York, California, and Arizona. *Id.*

GoDaddy.com, Inc., in Scottsdale, Arizona, responded to the seizure order in an extreme way—by supposedly transferring vicsbingo.com and sixteen other Domain Names to the "dominion and control of the Court." R.10, Appx 8.

6. Challenge to the Cabinet's actions.

IGC and its members first learned of the trial court's seizure from media reports. Representing the registrants for 61 of the 141 Domain Names, IGC filed a motion for leave to intervene. IGC identified all 61 domain names it represents, and the association moved to dismiss the action on jurisdictional and constitutional grounds. R. 10, Appx. 9 and 13. IGC also moved the trial court to withdraw the earlier Findings of Fact and Conclusions of Law, and that motion was temporarily granted. R. 10, Appx. 10, 11.

On September 26, 2008, the trial court elected not to conduct the forfeiture proceeding. Instead, the court permitted IGC and other affected parties represented by counsel to intervene and submit briefs on jurisdictional and constitutional issues. R. 10, Appx. 12. On October 7, 2008, following briefing, the trial court heard more than three hours of oral argument on procedural, jurisdictional, and constitutional questions. R. 10, Appx. 14.

During that hearing, the Cabinet argued that no one could appear and argue on behalf of the seized names until a future forfeiture hearing, at which time only an "owner" could appear to contest the forfeiture. R.10, Appx. 14 at p. 103. In other words, counsel for the Cabinet believed that suing just the domain names could prevent them from taking action in their own defense, such as challenging the Cabinet's standing, the

court's jurisdiction, or the "evidence" presented at the seizure hearing. Unless and until the registrants or owners appeared at a forfeiture hearing—and, not incidentally, subjected themselves to the jurisdiction of Franklin Circuit Court—the Cabinet's lawyers believed they could act with impunity until someone paid the proverbial piper—or, at least, a substantial contingency fee.

7. Trial court's rulings.

On October 16, 2008, the trial court entered a lengthy Opinion and Order that denied all parties' motions to dismiss and re-scheduled the forfeiture hearing for November 17, 2008. R. 10, Appx. 15. The opinion contemplated that all 141 Domain Name owners or registrants would appear in Franklin Circuit Court and present evidence to establish that their domain names could no longer be accessed by any internet user in Kentucky. Failure to appear or failure to produce this evidence would result in permanent forfeiture of the domain names to the Commonwealth. *See id.*

The opinion also addressed, in a somewhat confusing way, IGC's right to continue representing its members in Franklin Circuit Court. In the exact words of the trial court: "Neither IGC nor IMEGA [another trade association] has shown that the individual participation of their members, whose rights over any of the Defendants 141 Doman Names will be determined at the forfeiture proceeding, is not indispensable for the complete and proper resolution." *Id.* at 37. Based on this reasoning, the trial court said that IGC has "no claim to bring before the court for adjudication." *Id.*

On October 16, 2008, anticipating the filing of a petition for a writ in the Court of Appeals, IGC and five domain name defendants moved to stay the trial court proceedings. The stay motion was heard on October 22, 2008. R. 10, Appx. 16, 18. The Cabinet opposed delay of the forfeiture proceedings in part because the Cabinet needed

"leverage" against the domain-name owners. R. 10, Appx. 17 at 32. The Cabinet also confirmed that any domain name owner who appeared at the forfeiture hearing would be considered subject to the court's *in personam* jurisdiction. *Id.* The trial court postponed the forfeiture hearing from November to December.

8. Petition for a writ.

IGC, visbingo.com, and several other parties then filed writ petitions with the Court of Appeals to stop Franklin Circuit Court from proceeding with forfeiture of the improperly seized domain names. The petitions were consolidated, briefs were filed by all parties, and the Court of Appeals heard oral argument. The Court of Appeals issued the requested writ, holding that the domain names could not be considered gambling devices under KRS 528.100, so the Franklin Circuit Court was acting without jurisdiction. Judge Taylor's separate concurrence also held that the Cabinet could not pursue a civil, *in rem* forfeiture of property without a criminal conviction. Judge Caperton dissented, believing that a domain name should be considered a gambling device because it is a component of a "gambling device" consisting of the computer network and software employed to allow gambling to occur. The Cabinet appealed.

ARGUMENT

I. The Court of Appeals' writ is proper.

A writ is appropriate in two situations: (1) when the trial court is acting without jurisdiction, *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004), and (2) when the trial court is acting within its jurisdiction, but erroneously, and (a) there is no adequate remedy by appeal, and great injustice and irreparable injury will occur in the absence of a writ, *id.*; or (b) the erroneous action would produce a substantial miscarriage of justice, and correction of the error is necessary and appropriate for orderly judicial administration.

See Indep. Ord. of Foresters v. Chauvin, 175 S.W.3d 610, 616 (Ky. 2005).

The Court of Appeals granted the writ on the first basis, concluding that "domain names cannot be considered gambling devices, [and] Chapter 528 simply does not give the circuit court jurisdiction over them." Ky. Ct. App. Op. at 9. Judge Taylor's concurrence endorsed issuing a writ for the additional reason that KRS 528.100 does not allow for a civil, *in rem* forfeiture proceeding. *Id.* at 10.

The discussion that follows focuses first on the Court of Appeals' reasons for issuing a writ and halting proceedings in the trial court, as these reasons are sufficient to uphold the writ. Additional, equally compelling grounds are evident in the record, and the legal rationale underlying those grounds appears in later sections.

A. A Domain Name is not a "gambling device."

KRS 528.100 provides that "[a]ny gambling device or gambling record possessed or used in violation of this chapter is forfeited to the state." KRS 528.010(4) defines a "gambling device" subject to forfeiture as:

> (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.
>
> (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. (Emphasis added.)

The Cabinet argues that a "gambling device" is "any other machine or any

mechanical or other device" under KRS 528.010(4)(b).[12] Cab. Bf at 23. As discussed below, this strained reading of the statute fails for numerous reasons. Under the statute, a device must be a physical thing—a domain name is not. It is not a mechanical thing even remotely similar to the specifically enumerated gambling devices identified in the statute, nor can it be possessed like other tangible devices. As much as the Cabinet would like the argue otherwise, it is the province of the General Assembly, not a contrived reading by the courts, to expand the application of the statute if it so desires.

The Cabinet points to the "other device" language to suggest that the statute has a broad scope. *Id.* But the statutory term, "other device," is still expressly limited to a "device." The statutory language does not read "other non-device" or "other, non-physical thing." Plainly, anything covered by the statute must still be a "device." The language of KRS 528.010(4)(b) and the rules of statutory construction confirm that "gambling devices" are physical devices "designed and manufactured primarily for use in connection with gambling" as recited in the statute. Immediately preceding and after the term, "other device," the statute gives examples of devices: "machine," "any mechanical," and "roulette wheels, gambling tables." The rule of *ejusdem generis* ("of the same kind") requires that when general words follow or precede a designation of particular subjects or classes of persons, the meaning of the general words will be presumed to be restricted by the particular designation, and to include only things or persons *of the same kind, class, or nature as those specifically enumerated* unless there is a clear manifestation of a contrary purpose. *Steinfeld v. Jefferson County Fiscal Court*, 229 S.W.2d 319, 320 (Ky. 1950) (internal citations omitted).

[12] Sub-paragraph (a), which is directed to "slot machine[s]" with "a drum or reel with an insignia thereon," is clearly inapplicable. Domain names do not have "drums or reels."

KRS 528.010(4) enumerates specific physical objects ("slot machines," "roulette wheels," and "gambling tables") known to be "gambling devices." The rule of *ejusdem generis* restricts extension of the enumerated list to objects of "the same kind, class, or nature as those specifically enumerated." *Steinfeld, supra*. Accordingly, KRS 528.010(4)(b) is necessarily limited to gambling devices that, like slot machines and roulette wheels, are physical objects.

The Kentucky Crime Commission's 1974 Legislative Research Commission Commentary confirms that "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." KRS 528.010, Official Commentary (Banks/Baldwin 1974). *See also* Robert G. Lawson & William H. Fortune, KENTUCKY CRIMINAL LAW AND PROCEDURE § 17-2 (2008) ("The definition of 'gambling device' speaks specifically of slot machines, roulette wheels, and gambling tables and seems to contemplate coverage for only major items of gambling equipment.").

In contrast to the statutory definition of a "gambling device" as a machine or mechanical device, internet domain names are simply nicknames. For example, Dictionary.com is a domain name that can be used to look up definitions, including the definition of "domain name":

> ***a name*** owned by a person or organization and consisting of an alphabetical or alphanumeric sequence followed by a suffix indicating the top-level domain [such as, ".com" or ".gov"] used as an Internet address to identify the location of particular Web pages.[13]

[13] See the entry for "Domain Name" at www.Dictionary.com.

Each computer on the internet is identified by a unique "Internet Protocol" (IP) address.[14] A domain name serves as a nickname for the computer's numerical IP address. For instance, a useful educational web page is at IP address 70.42.251.42. Instead of the numerical address, Internet users can use the domain name, "howstuffworks.com," and eliminate the need to remember the numbers. In other words, a domain name simply identifies the numeric address of a web page on the Internet.

To obtain a domain name for a website, the website operator ("registrant") selects the appropriate top level domain (".com" or ".gov" or ".edu" or ".net", etc.) and creates a name that people can associate with the website, such as "Amazon.com." The registrant then enters into a contractual relationship with a service provider ("domain name registrar") to enter and maintain the domain name in the Domain Name System ("DNS") directory with a corresponding IP address.

When internet users use a program like Internet Explorer to surf the web, all domain names found through searches or typed directly into the search program will call up a numerical address. The DNS, therefore, is an electronic telephone book of domain names with their corresponding IP addresses. Like any other name, domain names are not "designed and manufactured," nor can they be "operated" as a "device."

B. The Cabinet's arguments are not supported by the statute's plain meaning.

Recognizing that names are not tangible, mechanical devices falling within the "gambling device" language of KRS 528.010(4), the Cabinet argues that this Court should attempt to determine the General Assembly's intent in 1942 when it enacted *now*

[14] The Internet Protocol is a communication standard by which computers on the Internet have agreed to use to communicate to each other. A computer's IP address is a sequence of four numbers separated by periods, where each number is less than 256, e.g., "70.42.251.42."

defunct gambling statutes that preceded the current law (enacted in 1974).

As this Court often finds occasion to state, "[t]he most logical and effective manner by which to determine the intent of the legislature is simply to analyze the plain meaning of the statutory language: 'resort must be had first to the words, which are decisive if they are clear.'" *Stephenson v. Woodward,* 182 S.W.3d 162, 169-70 (Ky. 2005). "This Court shall not speculate what the General Assembly may have intended but failed to articulate; instead, we determine the General Assembly's intention '*from the words employed in enacting the statute.*'" *Comm. v. Gaitherwriciht*, 70 S.W.3d 411, 414 (Ky. 2002) (emphasis added). *See also Gateway Constr. Co. v. Wallbaum,* 356 S.W.2d 247, 249 (Ky. 1964). Only after ascertaining the legislature's intent from the words employed, can a statute be construed liberally.

Judicial construction may not be used to rewrite statutory language. As this Court cautioned in *Gateway Construction, supra*: "no intention must be read into the statute not justified by the language." 356 S.W.2d at 249. "'We are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used.'" *Hale v. Combs*, 30 S.W.3d 146, 151 (Ky. 2000) (quoting *Beckham v. Bd. of Educ. of Jefferson County*, 873 S.W.2d 575, 577 (Ky. 1994)).

In any event, the Cabinet's attempt to construct a favorable argument on legislative intent is inapplicable because the Cabinet is relying on KRS 436.230, a statute repealed in 1974 in favor of KRS 528.100. While the predecessor statute used the term "contrivance," the enactment of KRS 528.100 in 1974 replaced "contrivance" with the more specific term "gambling device."

The Cabinet also relies on *Gilley v. Commomwealth*, 220 S.W.2d 60 (Ky. 1950), for evidence of a legislative intent to "stop all forms of gambling." But the language

considered by the court in *Gilley* did not survive the enactment of KRS 528.100.[15] Instead of stopping all forms of gambling, the legislature very soon amended KRS 436.230 to exempt horse racing from prohibited gambling activity. *See* KRS 436.230(4).

Not surprisingly, changes in Kentucky law since *Gilley* reflect an increasingly nuanced approach toward gambling.[16] The current statute, KRS 528.010, enumerates multiple exceptions from criminal liability, including pinball machines and charitable gaming. KRS 528.010(4)(c). And the General Assembly continues to expand gambling activities. In 2005, the legislature requested an opinion from the Attorney General on whether the Kentucky Constitution would prohibit legalization of additional gambling activities. See OAG 05-003 (March 21, 2005).

Amending the scope of a statute obviously is a legislative function. If the General Assembly truly were interested in "stopping all forms of gambling" or re-writing the anti-gambling statutes to encompass internet gaming sites, it could certainly do so. But Kentucky has not seen fit to alter the current law in response to issues purportedly arising from the proliferation of internet businesses, and modern trends suggest that neither the legislature nor the judiciary is moving in that direction. *See, e.g., Louisville/Jefferson County Metro Gov't v. Hotels.com, LP*, 2008 U.S. Dist. LEXIS 76415 (W.D. Ky. Sept. 26, 2008) (refusing to expand the definition of "accommodations business" to Internet hotel booking companies because the legislature has not done so). As the Court of Appeals put it, "[r]egardless of our view as to the advisability of regulating or

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[15] The Cabinet also cites *Meader v. Commonwealth*, 363 S.W.2d 219 (Ky. 1963) and *Scott v. Curd*, 101 F.Supp. 396 (E.D. Ky. 1951). These cases also addressed the old statute.

[16] For example, in the 1974 Legislative Research Commission Commentary, the Kentucky Crime Commission confirmed the more relaxed intent toward gambling, indicating that devices used "to dispense tickets at licensed race tracks and certain pinball machines are expressly excepted" from the definition of gambling device.

criminalizing Internet gambling sites, the General Assembly has not seen fit to amend KRS 528.010(4) as to bring domain names within the definition of gambling devices." Ky. Ct. App. Op., p. 9.

Finally, the operative words in KRS 528.100 require that a gambling device be "possessed" or "used" in violation of law. The Cabinet does not explain how domain names were *possessed* by anyone. The civil complaint does not plead possession of a gambling device under KRS 528.080, nor could it. "Possession" is a defined term under the Penal Code that means "actual physical possession or otherwise to exercise actual dominion and control over a *tangible object*." (Emphasis added, *see* KRS 500.080(14)). The Cabinet repeatedly argues that the domain names are intangible property, a characterization that precludes "possession" in violation of the Penal Code.

The Cabinet also fails to show how any domain names were or could be "used" in violation of any statute—particularly in light of the fact that the Cabinet's consultants apparently "used" a Google search engine, not domain names, to find gambling websites that they then discovered were associated with the various domain names. Moreover, the statutory definition of "gambling device" contemplates use or operation of the device in a way that would entitle someone to receive money or property as a result of chance. A domain name is not used or operated to somehow entitle a player to receive something of value, in stark contrast to a slot machine or roulette wheel.

C. Expanding the definition of "gambling device" would cause unintended consequences.

The Cabinet adopts Judge Caperton's dissent that Kentucky should expand the scope of KRS 528.010 to cover "any necessary component of a gambling device." Ky. Ct. App. Op., pp. 14-16 (dissent). This argument claims that a player's home computer,

the Internet, and any remote server hosting a gambling site are unified into a single "gambling device," of which the domain name is an "essential component." This statutory definition of gambling device inevitably leads to absurd, unintended, and undesirable results.

First, this argument recognizes that the remote server that hosts a gambling website is, and always has been, located outside Kentucky.[17] Beyond this, the statute specifically references "devices," and a court "may not interpret a statute at variance with its stated language." *Layne v. Newberg*, 841 S.W.2d 181, 183 (Ky. 1992) (citing *Gateway, supra*, 356 S.W.2d 247). A domain name is still a name, not a "device." A domain name is no more a computer component than it is a device. Even if the Commonwealth could physically seize a Kentucky resident's home computer because of internet gambling, the domain name would still exist: it is not a part of a computer any more than a street address is part of a building. A domain name also is not a "necessary component" of any cobbled-together gambling device consisting of the various items identified by the Cabinet and Judge Caperton. A gambler can gamble by remembering the IP address and never type in a domain name, or by doing what Howard and his team did and performing searches for online casinos through a search engine like Google.

Moreover, if a domain name is deemed a gambling device, consistency would require that the street address of a building housing a poker table also be considered a gambling device, as well as the telephone number used to call a bookmaking operation. Similarly, the telephone directory listing the offending address and telephone number

[17] Seizing an individual's computer for alleged gambling violations would lead to another anomalous result because it is not illegal for Kentucky residents to gamble. Kentucky provides that "[t]he status of a 'player' shall be a defense to any prosecution under this chapter." KRS 528.010(7).

associated with that address also become necessary components of a "gambling device." Indeed, under the Cabinet's own reasoning, the Internet itself would be an "essential component" of the so-called gambling device, subject to forfeiture to Kentucky. No one can seriously suggest that such far-flung results were intended by the General Assembly.

D. The Cabinet would erroneously impose criminal penalties without a criminal indictment or conviction.

As previously described, the Cabinet began this lawsuit with the filing of a civil complaint by private attorneys who paid a civil filing fee to the Clerk of the Franklin Circuit Court. The Clerk assigned the case a civil case number. The Cabinet also filed a "Motion for Seizure of Domain Names," which was treated by the Clerk as a civil motion and was placed on the civil hearing docket. [18]

Instead of proceeding as a civil action, however, the Cabinet switched to quasi-criminal procedures—including the use of probable cause as the standard for seizing the domain names. "Evidence" adduced in Franklin Circuit Court on September 18, 2008, was presented by private attorneys and heard in secret. No Attorney for the Commonwealth participated.[19] The Cabinet did not present evidence to a grand jury for indictment, no criminal complaint was filed, and no warrants were issued.

In his concurring opinion below, Judge Taylor justifiably bridled at this use of civil-style procedures to impose criminal penalties. Ky. Ct. App. Op., at 13–14 (Taylor,

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[18] The Cabinet acknowledges that it has no authority in criminal matters. It agrees that the Attorney General is the chief law officer of the Commonwealth charged with representing the Commonwealth in all matters in which it has an interest. *See* KRS 15.020. Counsel for the Cabinet is not a Commonwealth's or county attorney enforcing the penal laws of Kentucky and prosecuting violations of Kentucky criminal law. *See* KRS 15.020, 15.725. Since the Attorney General is absent from this action, having expressly refused to participate, and no county or Commonwealth's attorney is litigating the matter, there is no authority for the Cabinet's claim that it has the power to prosecute purported forfeiture actions pursuant to the Kentucky Penal Code.

[19] "Attorney for the Commonwealth" means the attorney general, the Commonwealth's attorney, county attorney, or special prosecutor, exercising functions assigned to them by law, and an authorized assistant of any of them. RCr 1.06(b).

J., concurring) ("I believe for there to be a forfeiture, the clear legislative intent requires a conviction of one of the crimes enumerated in KRS Chapter 528. No other logical interpretation of the "violation" requirement of KRS 528.100 can be made, given that KRS Chapter 528 is a penal statute.")

The writ was granted in part to stop the Cabinet's effort to enforce criminal penalties without a criminal indictment or conviction. KRS 528.100 reads in part, "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...." During oral argument before the Court of Appeals, the Cabinet acknowledged to Judge Taylor that not every domain name could be subject to forfeiture:

> JUDGE TAYLOR: So, any – any domain name then arguably could be a gambling device?
>
> MR. LYCAN: Well, not any, just as any table is not a poker table, any domain name is not a domain name [sic]. It has to be designed specifically for use in illegal gambling.

But when asked whether a criminal charge must precede forfeiture, the Cabinet responded "absolutely not." Not surprisingly, Judge Taylor's concurrence subsequently took the Cabinet to task for bypassing due process to impose a criminal sanction. *See* Ky. Ct. App. Op., at 10–14.

Judge Taylor was undoubtedly right. KRS 500.090(1) covers all property "subject to forfeiture under any section of the Kentucky Penal Code." Subsection 1(a) requires that forfeited property cannot be destroyed unless by order of the trial court and "by the sheriff of the county in which *the conviction was obtained.*" (Emphasis added). KRS 500.090(2) governs the forfeiture of money. This subsection reads: "[m]oney which has been obtained or conferred in violation of any section of this code shall, *upon*

conviction, be forfeited to the use of the state." (Emphasis added). The Kentucky Crime Commission/LRC Commentary on subsection (2), analogizing the subsection to gambling, further explained that "KRS 436.280 provided that money and other things staked to allure people to wager was to be forfeited...[t]he money actually had to be used in the gambling activity or it was not subject to forfeiture. The *requirement of prior conviction* contained in subsection (2) achieves a similar result." (Emphasis added).

An Attorney General's opinion, OAG 75-287, reached the same conclusion. The opinion was issued in 1975, when KRS 500.090 was a new statute. The opinion distinguished existing statutes, like those governing controlled substances, and emphasized that, under KRS 500.090, "there can be no forfeiture without a conviction." And, in *Commmonwealth v. Fint*, 940 S.W.2d 896 (Ky. 1997), this Court discussed KRS 514.130, another criminal forfeiture statute, using KRS 500.090 to illustrate the concept of forfeiture as an additional criminal penalty.

To read the language "possessed or used in violation of this chapter" in KRS 528.100 as *not* requiring a conviction conflicts with KRS 500.090 and its expectation that conviction precedes the disposition of property. KRS 500.090(1)(a) and (2) contain the word "conviction," and this meaning, whether arising from 528.100 or 500.090, is necessary. A respected criminal law treatise, BRICKLEY'S KENTUCKY CRIMINAL LAW, supports this view: "[u]pon *conviction* of a gambling offense any gambling device...involved in the commission of the offense shall be forfeited...." *Id.* § 25.07 on "Forfeiture," at 296 (emphasis added).

KRS 436.280 previously allowed forfeiture of certain gambling items *either* (1) upon conviction of the person setting up or keeping them *or* (2) in the absence of a conviction, if a jury found that the items were used or intended to be used for gambling.

KRS 436.280 has since been repealed, and its replacement statutes, KRS 528.100 and KRS 500.090, require a criminal conviction. Judge Taylor's concurrence correctly noted that the new statutes no longer give a court jurisdiction to have a jury decide forfeiture of a gambling device absent a conviction. *See* Ky. Ct. App. Op., p. 12. And, in any event, there was no jury here.

The Cabinet's brief relies primarily on decisions interpreting Kentucky gambling statutes repealed in 1974, decisions from other states, and decisions by federal circuits applying unique federal laws. The persuasive or precedential value of these sources is essentially zero, given that "[f]orfeiture is not a part of the common law[,] [i]t exists only by statute." OAG 77-734, Attorney General Robert F. Stephens. The only Kentucky case that references KRS 528.100, *Commonwealth v. Fall*, 245 S.W.3d 812 (Ky. App. 2008), shows that the suspect property was seized incident to a search warrant, arrest, and conviction.

In sum, the "evidence" of gambling presented by the Cabinet's private attorneys simply is insufficient as a matter of law to support forfeiture under KRS 528.030 or 528.020. Unlike the Kentucky statutes governing forfeiture of drugs, a gambling device must be "possessed or used in violation of this chapter" [KRS 528 *et seq.*], which necessarily means that an individual person must "possess or use" the device. "Possession" is a defined term under the Kentucky Penal Code; it means: "actual physical possession or otherwise to exercise actual dominion and control over *a tangible object.*" KRS 500.080 (14) (emphasis added). The Cabinet cannot establish "possession." As for "use," the evidence shows that the consultants "used" Google, and they might have used "software" downloaded from the websites, but the Cabinet cannot establish that the consultants "used" domain names that they did not know existed (and which they did not

in fact use to access the websites).

II. There is no *in rem* or personal jurisdiction in Franklin Circuit Court.

From the beginning, the Domain Name defendants—including the appellees here—raised fundamental jurisdictional challenges to the Cabinet's lawsuit. The Court of Appeals issued a writ based on the Franklin Circuit Court's lack of statutory subject matter jurisdiction, but it could have justified the writ on the ground that Franklin Circuit Court had no *in rem* jurisdiction as originally claimed by the Cabinet.

The elements of *in rem* and *in personam* jurisdiction have befuddled many lawyers, the Cabinet's counsel among them. The Cabinet's complaint against 141 Domain Names actually started as an *in rem* action but evolved—at least in the minds of the Cabinet's counsel—into an action *in personam.* Only the imagined presence of *in personam* jurisdiction could support this remarkable assertion: "There is no question that Kentucky has jurisdiction over the owners and operators who used the Domain Defendants to operate their illegal gambling enterprises within the Commonwealth." Cab. Bf at 38.

How and why *in rem* jurisdiction came to be seen by the Cabinet as the equivalent of jurisdiction *in personam* is central to understanding that Franklin Circuit Court cannot exercise either form of jurisdiction over the 141 Domain Names sued by the Cabinet. Because of the absence of *in rem* or *in personam* jurisdiction, the writ must be affirmed.

A. *In rem* jurisdiction applies to property in the forum; *in personam* jurisdiction applies to persons having "minimum contacts" with the forum.

A state's authority to adjudicate is based on jurisdiction over property or persons. *See Shaffer v. Heitner*, 433 U.S. 186, 199 (1977). "If jurisdiction is based on the court's

power over property within its territory, the action is called 'in rem' or 'quasi in rem.'"[20] *Id.* "If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated 'in personam' and can impose a personal obligation on the defendant in favor of the plaintiff." *Id.* The primary difference between the two is that "[t]he effect of a judgment [*in rem*] is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court." *Id.*

Pennoyer v. Neff, 95 U.S. 714 (1878), established the bedrock principle that a state has exclusive jurisdiction over persons and properties within its boundaries but not over persons or property beyond its boundaries. *See Shaffer*, 433 U.S. at 196-99. Over time, however, personal jurisdiction developed beyond the rigid rule of *Pennoyer*. *See id.* at 201-05. Corporations, for example, lacking a true physical presence, were deemed to be "present" and amenable to suit in states in which they did business. *See id.* at 201-02. In exchange for the right to drive the highways of a state, a driver was deemed to designate the Secretary of State as his agent for service of process, so that service upon the Secretary could subject the non-resident driver to personal jurisdiction. *Id.* at 202-03.

Ultimately, the U.S. Supreme Court distilled the various legal fictions used to assert *in personam* jurisdiction into the rule that a person must have sufficient "minimum contacts" with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 203 (citing and quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) and *Milliken v. Meyer*, 311 U.S. 457, 463

[20] True *in rem* actions affect the interests of all persons in the property at issue, and *quasi in rem* actions affect only the interests of particular persons in the subject property (and are used either to secure a preexisting claim by one party against the claims of other parties, or to apply the defendant's property to satisfaction of a debt owed to the plaintiff). *See id.*

(1940)). "Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction." *Shaffer*, 433 U.S. at 204.

This minimum contacts doctrine serves two vital purposes: it protects non-resident defendants from being forced to litigate in distant or inconvenient forums, and it ensures that no state reaches beyond the limits imposed upon it by its status as a co-equal sovereign with its sister states. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980). Due process is central to the minimum contacts doctrine: "Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *Id.* at 294.

B. *In rem* jurisdiction requires "minimum contacts" with the property owner *and* the presence of property in the forum.

For nearly a century after *Pennoyer*, in contrast to the evolution of *in personam* jurisdiction, *in rem* jurisdiction essentially remained stagnant. While personal jurisdiction came to be viewed through the minimum contacts analysis to ensure the exercise of personal jurisdiction comported with due process, parties remained free to bring *in rem* actions based solely upon the presence of property in the chosen jurisdiction, regardless of whether the owner of that property had any real connection to the state, or whether the property had any connection to the claims asserted. It was merely a matter of

time until the Supreme Court addressed this disparity. *Shaffer v. Hetiner*, *supra*, was the vehicle to do just that.

At issue in *Shaffer* was a Delaware statute allowing for the seizure of property in the state to force non-resident defendants to appear and submit to the court's jurisdiction or have their property sold to satisfy the plaintiff's claims. *Id.* at 190-91 and n.4. When this statute was applied to seize stock of a Delaware corporation to force its owners to appear in Delaware or risk losing the stock, the Supreme Court analyzed whether a defendant's interests in his property should remain subject to *in rem* jurisdiction solely because the defendant's property was located in the forum state. *Id.* at 205–06. That is, the question was whether mere presence of the property was sufficient to support *in rem* jurisdiction or whether a minimum contacts analysis also was necessary.

The Supreme Court held the Delaware statute unconstitutional. Rejecting the notion that property located within a forum can be seized to coerce its owner to appear before the court, the Supreme Court held that the exercise of *in rem* jurisdiction over property located within a state also must comply with the minimum contacts standard articulated in *International Shoe*. *See id.* at 205-12. *Shaffer* thus raised the bar. By requiring more than mere presence of property, *Shaffer* added the minimum contacts requirement to satisfy due process for *in rem* jurisdiction.

C. *In rem* jurisdiction still requires the presence of property in the forum.

The Cabinet's brief confuses the differences between jurisdiction *in rem* and jurisdiction *in personam*. The Cabinet seems convinced that the presence of property within a state is no longer necessary for jurisdiction *in rem*, but apparently the slightest fiction will support jurisdiction *in personam*. Only by this reasoning can the Cabinet

launch this litigation by filing a complaint denominated *in rem* but wind up asserting here that Kentucky has jurisdiction *in personam*. Cab. Bf at 38.

In rem jurisdiction is and always has been founded on "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 Hisle v. Lexington-Fayette Urban County Gov't*, 258 S.W.3d 422 (Ky. App. 2008) ("Generally, state courts of general jurisdiction have *in rem* subject matter jurisdiction over real property in the state."). The obvious corollary to the principle that *in rem* jurisdiction rests upon property being located within the forum is that states have no *in rem* jurisdiction over property located beyond their borders.

The fundamental flaw in the Cabinet's complaint is that none of the 141 Domain Names is present in Kentucky. "[P]roperty, like an individual, must have, in contemplation of law, some place of abode, and likewise when its situs becomes fixed at one place it must in law remain there until it acquires another situs." *Comm. v. Bingham's Adm'r.*, 223 S.W. 999, 1000 (Ky. 1920). Tangible real or personal property is, obviously enough, located wherever it is found. *See Millett's Ex'r v. Comm.*, 211 S.W. 562 (Ky. 1919).

Intangible property, however, is "universally recognized" to be located at the place of its owner's domicile. *Bingham*, 223 S.W. at 1000. This recognition may be a "legal fiction," but it is a "legal necessity without which laws of descent and distribution, comity between states and nations, and many others as well as taxation, would become a hopeless tangle utterly incapable of just administration." *Id.* In rare circumstances, intangible property may acquire a situs apart from its owner, such as when intangible property becomes taxable in a place where it has become an integral part of a local, separate, and independent business activity in that jurisdiction. *Comm. ex rel. Luckett v.*

L&N R.R. Co., 479 S.W.2d 15, 17-18 (Ky. 1972). The legislature also has the ability to assign intangible property a situs for particular purposes. *See Comm. v. Sun Life Assur. Co. of Canada*, 170 S.W.2d 890, 895-96 (Ky. 1943) (discussing Legislature's ability to assign situs to intangible property for taxation purposes).

If a domain name is property at all, which is an unsettled proposition, *see, e.g.*, *Dorer v. Arel*, 60 F. Supp. 2d 558, 560 n.9 (E. D. Va. 1999) (describing domain name as a contract for services between a registrant and registrar), it would clearly be intangible. A domain name is therefore located where its owner resides unless the legislature assigns it a different situs. For example, the United States Congress has established a situs for certain types of *in rem* actions involving domain names as the state (or country) where the domain name registrar or registry is located. *See*, 15 U.S.C. § 1125(d), *et seq.*, Anticybersquatting Consumer Protection Act (ACPA). Since no domain name owner, registrar, or registrant is located in Kentucky, the domain names are not present in Kentucky under any theory.

The decisions relied upon by the Cabinet to support extra-territorial jurisdiction do not furnish the hoped-for foundation. *State v. Western Union Financial Services, Inc.*, 199 P.3d 592 (Ariz. App. 2008), relied upon in the Cabinet's brief (at 32–35), reiterates the principle that property must be located within the state's territory for *in rem* jurisdiction to exist. In that case, Arizona seized Western Union wire transfers relating to illegal immigration activities within the state. *See Western Union*, 199 P.3d at 598. The court recognized at the outset that "states inherently are prohibited from exercising extraterritorial jurisdiction over persons and property" and that, "to exercise jurisdiction, a state must have authority over the person ('in personam' jurisdiction) or power over property within its territory ('in rem' or 'quasi in rem' jurisdiction)." *Id.* at 601 (citing

Shaffer, 433 U.S. at 197, 199).

The court held that Western Union was in possession of the money (or "res") at issue. *See id.* at 602–03. After analyzing Supreme Court precedent on *in rem* and *in personam* jurisdiction, the court held that the wire transfer funds were present within Arizona because Western Union was present in Arizona. *See id.* at 605. Consistent with *Shaffer v. Heitner*, the appellate court acknowledged that the mere presence of the property alone could not support the exercise of jurisdiction, so the court also looked for minimum contacts between Arizona and the funds' owners and concluded that constitutional due process was satisfied. *See id.* at 605–06 ("The owners or beneficial interest holders in the [funds], who are parties to this illegal enterprise, purposefully facilitated illegal acts in Arizona and should expect therefore to adjudicate their rights to the res in Arizona.").

The Cabinet also relies on several federal decisions for the proposition that extraterritorial forfeiture is allowed. (*See* Cab. Bf at 35-38.) These cases interpret and apply 28 U.S.C. § 1355, a statute dealing with forfeiture proceedings in federal courts under federal law. Kentucky has no equivalent statute, nor could it, as a *state*, create such legislation. "[I]t would be impossible to permit the statutes of [Kentucky] to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914). "This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound." *Id. See also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570–73 (1996) (holding that while Congress may legislate policy affecting the nation as a

whole, states may not do so, nor may they impose their policy decisions on neighboring states).

D. "Minimum contacts" analysis requires purposeful availment.

Even if the Cabinet could establish that domain names were somehow present in Kentucky, it cannot meet the additional requirements imposed by the Due Process Clause. Due process means that establishing jurisdiction over a non-resident defendant requires "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

The "constitutional touchstone" in the due process analysis is "whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); *see also CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1263 (6th Cir. 1996) ("the question of whether a defendant has purposefully availed itself of the privilege of doing business in the forum state is 'the *sine qua non* for *in personam* jurisdiction'"). Kentucky likewise considers "whether the defendant purposefully availed himself of the privilege of acting within the forum state or causing a consequence in the forum state." *Wilson v. Case*, 85 S.W.3d 589, 593 (Ky. 2002).

The purposeful availment analysis focuses on the defendant's actions in establishing contacts with the forum. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Burger King*, 471 U.S. at 474 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). It is "essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the

forum State, thus invoking the benefits and protections of its laws." *Id.* at 475 (quoting *Hanson*, 357 U.S. at 253). The defendant's actions must be directed at the forum state in more than a random, fortuitous, or attenuated way to support the exercise of jurisdiction. *Burger King*, 471 U.S. at 475.

The Cabinet apparently believes that owning a domain name linked to a website constitutes purposeful availment of any jurisdiction in which someone interacts with the website. *See* Cab. Bf at 41-42. The notion that a website accessible throughout the world can create personal jurisdiction over the owner or the website (much less the owner of the domain name) in any jurisdiction in which the website is accessed has been roundly rejected by the courts. *See, e.g., Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 394-401 (4th Cir. 2003); *Chloe v. Queen Bee of Beverly Hills, LLC*, 571 F. Supp. 2d 518, 529–30 (S.D.N.Y. 2008); *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104, 115 (D. Conn. 1998); *Rothschild Berry Farm v. Serendipity Group, LLC*, 84 F. Supp. 2d 904, 909 (S.D. Ohio 1999). "If jurisdiction were [to] be based upon a defendant's mere presence on the Internet, this would lead to a defendant's being subjected to jurisdiction on a worldwide basis and would eviscerate the personal jurisdiction requirements as they currently exist." *Edberg*, 17 F. Supp. 2d at 115.

To create jurisdiction through a website, the "level of commerce between the defendant and customers in the forum state" must be analyzed. *Rothschild*, 84 F. Supp. 2d at 909; *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). Significantly, there must be facts indicating a specific intent to target the forum state. *See Chloe*, 571 F. Supp. 2d at 530; *Edberg*, 17 F. Supp. 2d at 112–15. Thus, there is no jurisdiction over a passive, advertising website simply because someone in a given jurisdiction accesses the site. *See Zippo*, 952 F. Supp. at 1124 (citing *Bensusan*

Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996)). As to interactive sites, in *Carefirst*, the Fourth Circuit held that the defendant had not exhibited a "manifest intent" to target Maryland residents specifically, even though its website allowed anyone in the world to make donations, have their names and addresses stored in the defendant's database, and have advertising and/or "thank you" messages sent to them. *See Carefirst*, 334 F.3d at 397–401. The same was held in *Chloe*, in which the defendant operated a website that advertised products worldwide, including in New York, sold products in New York, and plainly "demonstrated its willingness to sell to New York residents." *See Chloe*, 571 F. Supp. 2d at 526.

The Cabinet presented no evidence of purposeful availment by any of the 141 Domain Name Defendants. The only jurisdictional evidence presented by the Cabinet consists of private consultants searching for, identifying, and initiating contact with the IP addresses represented by 141 Domain Names. None of the Cabinet's evidence describes the domain names—or the domain name registrars or registrants, or the operators of web sites reached through the domain names—acting to avail themselves of the privilege of conducting business in Kentucky. Quite the contrary, the consultants who search via Google for potential gambling sites deceived the sites they located, making every effort to protect their identities, and interacted directly with the web sites—not the domain names—in the most nominal and insubstantial way. *See* Statement of the Case, *passim*. The Cabinet further admits that some of the domain names seized here are associated with purely passive, advertising websites whose owners cannot be subjected to jurisdiction in Kentucky simply because the Cabinet's agents found and accessed the sites. Without purposeful availment, there can be no jurisdiction even under the Cabinet's "*in rem* equals *in personam*" theory.

E. Constitutional due process prohibits manufactured jurisdiction.

Because the constitutional inquiry considers whether a defendant has purposefully availed itself of the forum, "[i]t is beyond dispute that jurisdiction cannot be manufactured by the Plaintiff." *ISI Brands, Inc. v. KCC Int'l, Inc.*, 458 F. Supp. 2d 81, 89 (E.D.N.Y. 2006). A plaintiff cannot reach out to a defendant, as by purchasing a product, simply to establish a contact between the defendant and the forum that would create jurisdiction. *See Regent Lighting Corp. v. Am. Lighting Concept, Inc.*, 25 F. Supp. 2d 705, 711 (M.D.N.C. 1997) (holding that personal jurisdiction was lacking because the plaintiff could not manufacture jurisdiction by placing an order that would result in the product's being delivered to North Carolina). This is true even when a defendant advertises in national (or even worldwide) publications and accepts an order from the plaintiff in the plaintiff's chosen forum. *See Sunwest Silver, Inc. v. Int'l Connection, Inc.*, 4 F. Supp. 2d 1284, 1287 (D.N.M. 1998) (holding that the defendant's advertisement in a national trade magazine, and its sale of products to the plaintiff in New Mexico were insufficient to allow personal jurisdiction in New Mexico).

Any defendant's contacts with the forum state that are manufactured by a plaintiff's actions must be disregarded when assessing jurisdictional facts. *McGill Tech. Ltd. v. Gourmet Tech., Inc.*, 300 F. Supp. 2d 501, 506 (E.D. Mich. 2004) (holding that plaintiff could not create jurisdiction by having its counsel solicit a price quotation from the defendant in Michigan). Courts are particularly loath to allow a plaintiff to manufacture jurisdiction for the express purpose of creating a lawsuit in a particular forum. *See Carefirst, supra*, 334 F.3d at 397–400; *Chloe, supra*, 571 F. Supp. 2d at 524–26 (collecting cases and holding that the weight of authority is against allowing personal jurisdiction to be premised on a plaintiff's attorney's efforts to manufacture contacts);

DeSantis v. Hafner Creations, Inc., 949 F. Supp. 419, 424–25 (E.D. Va. 1996) (noting that allowing a plaintiff's counsel to manufacture jurisdiction over a defendant by initiating a commercial transaction "seems as inequitable as it is illegitimate"); *Edberg*, *supra*, 17 F. Supp. 2d at 112–15 (holding that the plaintiff could not manufacture jurisdiction by initiating a purchase of the defendant's product); *Krepps v. Reiner*, 588 F. Supp. 2d 471, 479 (S.D.N.Y. 2008) (holding that a plaintiff cannot manufacture jurisdiction by orchestrating purchases over the Internet).

The Fourth Circuit's opinion in *Carefirst*, *supra*, is particularly instructive. The defendant's website allowed users to make donations, have their names and addresses stored in the defendant's database, and receive advertising materials and/or "thank you" emails. *See id.* at 394-95. But the only "concrete evidence" of any interaction with Maryland was a transaction initiated by plaintiff's counsel. *Id.* at 401. The court held that a defendant must intentionally direct his activities towards the forum state, exhibiting a "manifest intent" to target residents of the forum, to support constitutionally valid jurisdiction. *See id.* at 397–98, 400 (citing *Calder v. Jones*, 465 U.S. 783, 789–90 (1984)). Contact created by plaintiff's counsel could not create jurisdiction, the court held, because a plaintiff cannot manufacture jurisdiction. There was no indication that the defendant's website was directed to Maryland in particular, so the transaction initiated by plaintiff's counsel was disregarded. *See id.* at 401.

Chloe v. Queen Bee, supra, 571 F. Supp. 2d 518, is similarly instructive. In *Chloe*, plaintiffs sued the defendants for allegedly selling over the internet counterfeit products designed to look like the plaintiffs' handbags. Defendants maintained offices in Alabama and California, however, not New York. *See id.* at 521. In an attempt to obtain jurisdiction in New York, an employee of plaintiffs' counsel ordered a handbag from

Queen Bee's website and had it shipped to a New York address. *See id.* at 521-22.

Acknowledging the overwhelming weight of authority, the court held that the sale of the handbag to an employee of plaintiffs' counsel would not support jurisdiction over the non-resident defendant. *See id.* at 524-26. "[E]ven though Queen Bee has demonstrated its willingness to sell to New York residents, the Court believes it would violate due process to permit a plaintiff to manufacture personal jurisdiction by purchasing an allegedly infringing product in a plaintiff's forum of choice." *Id.* at 562. Because all of the relevant activity occurred outside of New York, "it would be unreasonable to exercise personal jurisdiction over defendants in this district on the basis of a contact that would not exist but for this litigation." *Id.*

The Cabinet's attempt to manufacture jurisdiction here should receive the same treatment as those condemned in *Carefirst*, *Chloe*, and a host of other decisions. None of the Domain Names, nor any registrars or owners of the Domain Names, reached into Kentucky to do business with Kentucky residents. The Cabinet's private lawyers simply hired people to scour the internet to find web sites meeting the lawyers' litigation purposes. The Cabinet offers nothing beyond rank speculation that anyone in Kentucky ever accessed a single one of the 141 Domain Names, much less the sites reached through the IP address. Without evidence of "minimum contacts," the Cabinet's jurisdictional gambit does not pass constitutional muster. *See ISI*, 458 F. Supp. 2d at 88-89.[21]

[21] The combination of a contingent fee counsel and evidence of manufactured jurisdiction requires heightened scrutiny. Kentucky prohibits prosecutors from participating in proceedings in which they have a financial interest. KRS 15.733(2)(f). The prohibition against government counsel having a personal stake in forfeiture proceedings is widely recognized. *See, e.g.*, U.S. DOJ Nat'l Code of Prof'l Conduct for Asset Forfeiture ("No prosecutor's or sworn law enforcement officer's employment or salary shall be made to depend upon the level of seizures or forfeitures he or she achieves."); Nat'l Dist. Attorneys Assoc. Guidelines for Civil Asset Forfeiture ("Salaries and personal benefits of any person influencing or controlling the selection, investigation, or prosecution of forfeiture cases must be managed in such a way that employment or salary does not depend upon the level of seizures or forfeitures in which they participate.").

III. Vicsbingo.com and IGC are proper parties.

The Cabinet relies on KRS 500.090 in asserting that the forfeiture statutes "specifically restrict the right to contest forfeiture to the 'lawful claimant'" and citing KRS 500.090(4) and (5). Cab. Bf at 15. The Cabinet also makes scattered references to federal cases addressing forfeiture actions. *See id.* at 14–19. These decisions are inapplicable because this is not a forfeiture action. This is an original action brought in the Court of Appeals for a writ of prohibition. IGC's standing does not rest upon KRS 500.090, but on longstanding principles of associational standing. Even if the Cabinet were correct that KRS 528.100 and 500.090 operate together to deny anyone other than an innocent owner of a seized gambling device the right to contest forfeiture (and, as discussed below, that is not so), this does not prevent vicsbingo.com or IGC from petitioning for a writ to enjoin the forfeiture proceedings.

A. Vicsbingo.com is an affected party, and IGC has associational standing.

There is no worthy argument that vicsbingo.com, one of the domain names seized by the Cabinet, and submitted by its registrar to the "dominion and control" of Franklin Circuit Court, lacks standing to seek a writ.[22] IGC also had standing to pursue a writ, just as it had standing to appear before the trial court to assert the rights of its members before the Circuit Court wrongly tried to revoke its standing. Even if the Cabinet were correct that only innocent owners had the right to appear in the trial court action, pursuit of a writ

[22] The Cabinet's argument that property cannot appear on its own behalf ignores the fact that property cannot actually be sued either—*in rem* proceedings are, in reality, proceedings against the owners of the property and adjudicate the rights of parties regarding that property. *See Shaffer*, 433 U.S. at 205–07. In an *in rem* proceeding, the property obviously does not litigate for itself, though it remains the formal "party" to the action, and any appeals are taken in the property's name. *See, e.g., Three One-Ball Pinball Machines v. Com.*, 249 S.W.2d 144, 145 (Ky. 1952). As an owner need not formally intervene in an *in rem* proceeding and pursue an appeal in his own name, there is no reason why a writ cannot be pursued in the name of property to prohibit Franklin Circuit Court from proceeding with an action that will result in forfeiture of that property rather than the name of the owner.

by IGC to prevent the Franklin Circuit Court and the Cabinet from pursuing improper forfeiture proceedings is proper use of associational standing.

IGC has standing to petition the Court of Appeals for a writ if (1) its members would have the right to sue on their own behalf; (2) the interests it seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested require the participation of individual members of the IGC. *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *see also City of Ashland v. Ashland F.O.P. #3, Inc.*, 888 S.W.2d 667, 668 (Ky. 1994) (holding that police association had standing to challenge ordinance requiring city employees to live within the city). Notably, "whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought." *Warth v. Seldin*, 422 U.S. 490, 515 (1975). A petition for declaratory or injunctive relief that would benefit the association's membership presents a textbook case for associational standing. *See id.*

Each of the *Hunt* criteria is satisfied here. First, IGC's members, who own or operate nearly half of the domain names seized by the Cabinet, would have standing to challenge the trial court's improper efforts to exercise jurisdiction over their domain names. Second, protecting Internet domain names used by its members as part of their business operations is germane to IGC's purpose to promote its members' interests and Internet gaming generally. Finally, there is no need for the individual members of IGC to appear, as IGC is not seeking damages or other relief that properly would flow to individual members of IGC. IGC seeks a remedy in the nature of an injunction that will benefit IGC and its members by preventing the Cabinet and the Franklin Circuit Court from unconstitutionally and improperly applying KRS 528.100 to Internet domain names.

The remedy sought—injunctive relief to prevent the Franklin Circuit Court from taking improper actions adverse to IGC's members—is the classic type of remedy that associational standing exists to accomplish.

IGC's petition for a writ serves the same purpose as the police association's challenging the Ashland residency requirement ordinance in *City of Ashland*. The Ashland Fraternal Order of Police had standing to challenge an ordinance that directly affected its members. IGC likewise had standing to petition the Court of Appeals to prevent the application of a criminal statute in a manner having an immediate and direct effect on its members. Preventing the trial court from proceeding beyond its limited statutory authority, which was done here, accomplishes the same purpose as preventing enforcement of a facially invalid statute, which occurred in *City of Ashland*. Indeed, allowing IGC to pursue a writ is particularly appropriate in light of the Cabinet's stated intent to pursue criminal actions against any domain name owners who would appear to protect their interests. *Cf. NAACP v. Ala.*, 357 U.S. 449, 458-59 (1958) (holding that the NAACP had standing to assert its members' right not to disclose their membership in the organization, as requiring individual members to appear to assert their own rights would effectively nullify the right being asserted).

B. Kentucky recognizes associational standing.

Moreover, KRS 528.100 and KRS 500.090 simply do not operate in the manner urged by the Cabinet. KRS 528.100 provides that a gambling device "possessed or used *in violation of* [KRS Chapter 528] is forfeited to the state, and shall be disposed of in accordance with KRS 500.090." KRS 528.100 (emphasis added). KRS 528.100 provides for the forfeiture of gambling devices upon violation of the gambling laws; KRS 500.090 simply establishes the procedure by which the property, once forfeited, is

disposed. As Judge Taylor recognized in his concurring opinion below, the plain language of KRS 528.100 requires that there be a criminal indictment and conviction for forfeiture to occur. (Ky. Ct. App. Op. at 13 (Taylor, J., concurring).) Without possession or use of a gambling device in violation of Chapter 528, there can be no forfeiture under KRS 528.100. Without a criminal conviction, there can be no violation of KRS Chapter 528, as a device itself obviously cannot violate the gambling laws.[23]

According to the Cabinet, however, it may decide that a domain name is an illegal gambling device and seize it *ex parte* without giving notice to its owner, sealing the court record to prevent anyone from learning of the proceedings. Through this clandestine process, the Cabinet alone establishes the alleged criminal act giving rise to forfeiture under KRS 528.100. Its evidence and arguments are unchallenged through any adversarial proceedings, and no jury considers whether a domain name was possessed or used in violation of KRS Chapter 528 (assuming, of course, that domain names could even be considered gambling devices). After the seizure occurs, KRS 500.090 provides the process by which the domain name may be disposed of, and only a "lawful claimant" can appear to raise the sole defense that the property was used without his knowledge. *See* KRS 500.090(4). At no time is the domain name owner able to challenge the Cabinet's actions or the trial court's determinations. No jury hears any evidence, and no adversarial proceedings are held to safeguard the rights of the domain name owners. The

[23] Clearly, a device cannot "use" itself in violation of KRS Chapter 528—a person must use the device in a way that violates one or more provisions of Chapter 528. Possession of a gambling device is a specifically enumerated crime that requires a person to "believ[e] that [the device] is to be used in the advancement of unlawful gambling activity." KRS 528.080. Thus, as Judge Taylor opined, merely possessing a gambling device is not enough to constitute a crime in the absence of the possessor's belief as to the device's intended use. (Ky. Ct. App. Op., at 12 n.1 (Taylor, J., concurring).)

deprivation of basic due process reflected in the Cabinet's position is manifest.[24]

Significantly, in enacting KRS 528.100, the General Assembly repealed KRS 436.280. That statute did allow for forfeiture of certain gambling items *either* (1) upon conviction of the person setting up or keeping them *or* (2) in the absence of a conviction, if a jury found that the items were used or intended to be used for gambling. The Cabinet ignores the plain language of KRS 528.100 and the repeal of KRS 436.280. The Cabinet argues that the repeal of KRS 436.280 and enactment of KRS 528.100 somehow created an entirely new type of civil forfeiture proceeding, disposing of the need for any criminal conviction or a jury's determination of a violation of the gambling laws. Instead, in the Cabinet's view, the unlawful possession or use of a gambling device may be established *ex parte*, without a jury, without cross-examination, and without an opportunity to present contrary evidence. After that, a lawful claimant may appear to assert its rights under KRS 500.090, which permits it to argue only that it did not know the item was used for gambling. Such a process contravenes all notions of due process, the adversarial process on which the American legal system is based, and the right to trial by jury deemed "sacred" by Section 7 of the Kentucky Constitution.

IV. The Cabinet's seizure and threatened forfeiture is unconstitutional.

The power to regulate interstate and foreign commerce lies with the United States Congress. U.S. Const. Art. I, § 8, cl. 3. The Constitution not only empowers Congress to legislate with respect to these areas, but curtails the states' ability to affect them. *See*

[24] The Cabinet's offhand characterization of KRS 500.090 as allowing owners of the domain names to offer any defenses they want, (Cab. Bf at 20), ignores the plain language of the statute, which provides only for remittance of the forfeiture if the lawful claimant appears and shows that the property was used unlawfully without his knowledge and consent. *See* KRS 500.090(4). The reason for the inclusion of only this defense is that, as discussed above, KRS 500.090 merely provides the mechanism by which forfeited property is disposed of—it presumes that a lawful forfeiture already has occurred.

Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 571–72 (1997). The Cabinet and the Franklin Circuit Court overstepped the bounds imposed upon them by the U.S. Constitution by seizing, subject to forfeiture, 141 Internet domain names accessible throughout the world. This deliberate effort to choke off channels of interstate and foreign commerce, and to impose the Cabinet's policy decisions upon the world, is constitutionally impermissible.

"It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow." *C & A Carbone, Inc. v. Town of Clarkstown, NY*, 511 U.S. 383, 389 (1994). The Commerce Clause thus precludes a state from projecting its laws and policy decisions beyond its borders. *See Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989). Whether the state intends to do so is immaterial. The "critical inquiry" is whether the "practical effect" of the state's action "is to control conduct beyond the boundaries of the State." *Id.* at 336.

These principles are consistently applied to laws affecting the Internet. In *American Booksellers Foundation v. Dean*, 342 F.3d 96, 102-04 (2d Cir. 2003), the Second Circuit held that a Vermont statute prohibiting dissemination of certain materials to minors violated the Commerce Clause because the Vermont statute had the practical effect of regulating conduct in other states. The decision in *American Libraries Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997), likewise struck down a New York statute that affected the ability of individuals to post content on the Internet. The Court of Appeals correctly put a stop to the unconstitutional application of the state law

in a manner that violated the Commerce Clause.[25] So too, here, the Cabinet's attempt to put the fate of a nationwide (indeed, worldwide) domain name in the hands of a Kentucky trial court violates the essential guarantees of the Commerce Clause.

CONCLUSION

The Franklin Circuit Court is following a dangerously unprecedented and unconstitutional path. Unless the proceedings below are halted by a writ, no one will be able to restore the loss of access by domain-name users around the world, and no one will be able to undo the constitutional harm caused by the actions of the trial court and the Cabinet.

[25] IGC and vicsbingo.com also refer to the well-reasoned *amicus* briefs submitted to this Court by eBay, Inc., (eBay Bf., at 12–15), and the Electronic Frontier Foundation, the Center for Democracy and Technology, the American Civil Liberties Union of Kentucky, the Media Access Project, the United States Internet Industry Association, the Internet Commerce Coalition, and the Internet Commerce Association, (EFF *et al.* Bf., at 5–7) for additional arguments setting forth the unconstitutionality of the Cabinet's and the Franklin Circuit Court's efforts to infringe upon interstate and foreign commerce.

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