COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. _____

INTERACTIVE MEDIA ENTERTAINMENT AND GAMING ASSOCIATION, INC. **PETITIONER**

v. **PETITION FOR ORIGINAL PROCEEDING PURSUANT TO CR 76.36**

HONORABLE THOMAS D. WINGATE, JUDGE, FRANKLIN CIRCUIT COURT **RESPONDENT**

AND

COMMONWEALTH OF KENTUCKY, EX REL. J. MICHAEL BROWN, SECRETARY, JUSTICE AND PUBLIC SAFETY CABINET **REAL PARTY IN INTEREST**

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Petitioner Interactive Media Entertainment and Gaming Association, Inc. ("iMEGA"), by counsel, hereby files this petition for original proceeding pursuant to CR 76.36.

INTRODUCTION

J. Michael Brown, the Secretary of the Justice and Public Safety Cabinet of the Commonwealth of Kentucky (the "Commonwealth") filed a civil *in rem* action in Franklin Circuit Court (the "trial court") seeking the forfeiture of 141 Internet domain names that are allegedly being possessed or used by their international owners in violation of Kentucky's gambling statutes. The Commonwealth alleged that the domain names were "gambling devices" under Kentucky law. Despite the fact that these domain names are not located in Kentucky and

do not meet the Kentucky's definition of "gambling device," the trial court ordered the seizure of the domain names in a secret proceeding.

No real defendants were named, no process was issued, and no owner of any domain names was notified. In short, this was an action by the Commonwealth to seize property without the slightest pretext of complying with the fundamental dictates of due process. The trial court lacked jurisdiction to act as it did for a variety of reasons detailed in this petition.

This court granted iMEGA's original petition on January 20, 2009 and issued a writ prohibiting seizure and forfeiture of the domain names. The court held that domain names are not gambling devices under Kentucky law. Judge Taylor concurred because there is no statutory authorization for *in rem* forfeiture of gambling devices absent a prior criminal conviction.

On appeal, the Kentucky Supreme Court found that "[n]umerous, compelling arguments endorsing the grant of the writ of prohibition have been presented," but it did not consider them because it held that iMEGA failed to identify any of its members that suffered a concrete injury in fact. (Mar. 18, 2010 Opinion of Kentucky Supreme Court at 13) ("Supreme Court Opinion").[1] The Court continued, "[t]his is not to say, however, that the failure to establish standing in this writ action completely forecloses relief by way of a writ in the future." (*Id.*) Upon establishing standing,

> the writ petition giving rise to these proceedings could be re-filed with the Court of Appeals. The Court of Appeals could then properly proceed to the merits of the issues raised, or upon a proper motion, this Court could accept transfer of the case, as the merits of the argument have already been briefed and argued before this Court.

(*Id.*)

In compliance with the Supreme Court's opinion, iMEGA herein properly asserts associational standing and with this petition seeks an order requiring the trial court to dismiss the

[1] A copy of the Kentucky Supreme Court Opinion is attached as Exhibit A.

case in its entirety. With this petition, iMEGA also moves this court to immediately stay proceedings in the Franklin Circuit Court, and moves the Kentucky Supreme Court to accept transfer of the case to decide the issues presented by this petition on the merits.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

I. THE PARTIES.

Petitioner is a trade association with members that are registrants of some of the 141 defendant domain names. It is a not-for-profit corporation organized in the state of New Jersey. Petitioner is a voluntary trade organization that collects and disseminates information regarding electronic and Internet-based gaming. Its members include some of the registrants of the subject domain names. Yatahay Limited, a member of iMEGA, owns truepoker.com, one of the 141 domain names that that Commonwealth seeks to forfeit in this case. (*See* Affidavit of Joe Brennan, Jr., Chairman of Interactive Media Entertainment & Gaming Association, Inc., attached as Exhibit B; *see also* Affidavit of Yatahay Limited, attached as Exhibit C).

On September 18, 2008, the trial court issued an Order of Seizure of Domain Names ("the Seizure Order"),[2] which scheduled a hearing "to determine if any party has asserted rights as an owner of the seized property." In response, iMEGA entered an appearance to assert its members' rights. iMEGA asserted associational standing pursuant to *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977). However, the Kentucky Supreme Court, in its opinion of March 18, 2010, concluded that iMEGA "must prove it represents at least one member with an injury in order to obtain relief." (Supreme Court Opinion at 13). "This may be done by reference to the facts in the underlying litigation or a verified assertion, such as in an affidavit, attached to the petition." (*Id.*)

[2] A copy of the Seizure Order is attached as Exhibit D.

In compliance with the Kentucky Supreme Court's instruction, iMEGA submits the affidavits from Joe Brennan, Chairman of iMEGA, and Yatahay Limited ("Yatahay"). (*See* Affidavit of Joe Brennan, Jr., Chairman of Interactive Media Entertainment & Gaming, Inc., attached to iMEGA's Petition as Exhibit B; Affidavit of Yatahay Limited, attached to iMEGA's Petition as Exhibit C). In the affidavits, Brennan and Yatahay state that Yatahay is an iMEGA member and that Yatahay is the registrant/owner of truepoker.com, one of the 141 domain names the Commonwealth has attempted to seize and forfeit in this action. (Brennan Aff. at ¶¶ 3-5; Yatahay Aff. at ¶¶ 2-4). Additionally, Brennan and Yatahay state that iMEGA has represented Yatahay's interests throughout this litigation. (Brennan Aff. at ¶ 6; Yatahay Aff. at ¶ 5). Finally, Brennan and Yatahay affirm that the Franklin Circuit Court's September 18, 2008 and October 16, 2008 Orders for seizure of domain names are directed at truepoker.com. (Brennan Aff. at ¶ 7; Yatahay Aff. at ¶ 6). Because iMEGA has established associational standing in accordance with the Court's Opinion by naming a member of its association that has alleged a concrete injury in fact, this court should now resolve the substantive and important issues this case presents.

The Respondent to this Petition is the Honorable Thomas D. Wingate, Judge of the Franklin Circuit Court.

The Real Party in Interest is the Commonwealth of Kentucky ex rel. J. Michael Brown, Secretary of the Justice and Public Safety Cabinet.

II. THE UNDERLYING ACTION.

The underlying action is *Commonwealth of Kentucky ex rel. J. Michael Brown, Secretary, Justice and Public Safety Cabinet v. 141 Internet Domain Names*, Case No. 08-CI-1409, Franklin Circuit Court.

III. FACTS THAT ENTITLE PETITIONER TO RELIEF.

On August 26, 2008, the Commonwealth initiated his action. The Commonwealth seeks one thing in the case: forfeiture of Internet domain names. Also on August 26, the Commonwealth filed a Motion to Seal Case File.[3] The Commonwealth alleges that "owners of the Domain Defendants are purposely located outside the United States to avoid civil service or criminal prosecution, and in many cases go to great lengths to conceal the true ownership of the property; furthermore, upon notice of the Commonwealth's action, the owners will take actions to remove the property beyond the Court's jurisdiction." *Id.* [4]

The trial court granted the motion, sealed the record, and conducted a secret *ex parte* hearing lasting one hour and 18 minutes on September 18, 2008. The hearing was conducted without prior notice to any registrants of the domain names and without any notice to the public that records were being sealed or that a closed hearing was being scheduled.

The same day, September 18, 2008, the Commonwealth filed its Second Amended Complaint,[5] its Motion for Seizure of Domain Names[6] and supporting memorandum.[7] The trial court issued its Seizure Order the same day. The trial court found that probable cause existed to believe that the domain names "were and are being used in connection with illegal gambling activity" in Kentucky but did not specify by statute or otherwise the alleged illegal activity occurring in Kentucky. (*See* Seizure Order, Exhibit D, at 1).

A domain name is issued by a company known as a "registrar" and is utilized under a contractual arrangement by a "registrant." "Seizure" of a domain name does not amount to

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[3] Motion To Seal Case File is attached as Exhibit E.
[4] The claim that registrants will take actions to remove domain names beyond Kentucky was and is baseless given the fact that the names have never been in Kentucky.
[5] Attached as Exhibit F.
[6] Attached as Exhibit G.
[7] Attached as Exhibit H.

seizure of a website, any more than "seizure" of a telephone number would result in seizure of the telephone. However, in the same way that the commandeering and disabling of a telephone number could result in blocking calls to the telephone, the commandeering and disabling of a domain name blocks prospective users from reaching a website through the avenue of the domain name so seized.

The Seizure Order also ordered that the domain names "shall be immediately transferred" by registrars to the Commonwealth. *Id.* at 2. The trial court set a hearing "to determine if any party has asserted rights as an owner of the seized property pursuant to KRS 500.090." *Id.* iMEGA subsequently appeared at such hearing, on September 26, 2008, for the purpose of asserting the rights of its members.

At that hearing and a subsequent hearing October 7, 2008, the trial court heard objections from various interested parties, including iMEGA. In its Opinion and Order of October 16, 2008 ("Franklin Circuit Opinion and Order"),[8] the trial court held that it had jurisdiction to proceed, held that the prior seizure order was proper, denied motions to dismiss, and scheduled a forfeiture hearing for November 17, 2008.

On October 22, 2008, iMEGA filed a Petition for Original Proceeding Pursuant to CR 76.36 with this court. (*See* Petition for Original Proceeding, Case No. 2008-CA-2000). On October 28, 2008, iMEGA also filed a motion for intermediate relief seeking a stay of orders of the trial court entered September 18 and October 16, and seeking to suspend a forfeiture hearing the trial court had scheduled for December 3, 2008. (*See* iMEGA Motion for Intermediate Relief, 2008-CA-2000). This court granted the motion for intermediate relief on November 14, 2008. (*See* Nov. 14, 2008 Court of Appeals' Order, 2008-CA-2000).[9] The same day, the Court

[8] Attached as Exhibit I.
[9] Attached as Exhibit J.

of Appeals consolidated the iMEGA petition, 2008-CA-002000, with two others: one by Playersonly.com, Linesmaker.com, Mysportsbook.com, Sportsbook.com and Sportsinteraction.com, 2008-CA-002019; and one by Vicsbingo.com and Interactive Gaming Council ("IGC"), 2008-CA-002036. (*See id.*).

Following oral argument, this court granted the petition, and a writ issued on January 20, 2009. (*See* Court of Appeals' Opinion, 2008-CA-2000, Jan. 20, 2009) ("Court of Appeals' Opinion").[10] In it, this court held that "the trial court clearly erred in concluding that the domain names can be construed to be gambling devices subject to forfeiture under KRS 528.100." (*Id.* at 8). Judge Taylor, in his concurrence, also found that the writ should issue because Kentucky law did not authorize the Commonwealth to bring a civil *in rem* action absent a prior conviction. (*Id.* at 12-13.) The Commonwealth filed a notice of appeal.

The Kentucky Supreme Court, following briefing and oral argument, reversed this court, vacating the writ and remanding to this court with instructions to dismiss iMEGA's writ petition. (Supreme Court Opinion at 14). While the Supreme Court noted that "[n]umerous, compelling arguments endorsing the grant of the writ of prohibition have been presented" throughout the litigation, it held that "none of the arguments can even be considered unless presented by a party with standing." (*Id.*). Because iMEGA had not disclosed any person or entity who owns one of the domain names at issue in this case, the association failed to show that one of its members could have sued in their own right. (*Id.* at 13). However, the Court noted "[t]his is not to say, however, that the failure to establish standing in this writ action completely forecloses relief by way of a writ in the future." (*Id.*) If a proper party establishes standing,

> the writ petition giving rise to these proceedings could be re-filed with the Court of Appeals. The Court of Appeals could then properly proceed to the merits of the issues raised, or upon a proper motion, this Court could accept transfer of the

[10] Attached as Exhibit K.

> case, as the merits of the argument have already been briefed and argued before this Court.

(*Id.*)

The Court held that associational standing may be established by proving the association "represents at least one member with an injury in order to obtain relief." (*Id.*) "This may be done by reference to the facts in the underlying litigation or a verified assertion, such as in an affidavit, attached to the petition." (*Id.*)

In compliance with the Kentucky Supreme Court's instruction, iMEGA submits the affidavits from Joe Brennan, Chairman of iMEGA, and Yatahay Limited ("Yatahay"). (*See* Brennan Aff.; Yatahay Aff.). In the affidavits, Brennan and Yatahay state that Yatahay is an iMEGA member and that Yatahay is the registrant/owner of truepoker.com, one of the 141 domain names the Commonwealth has attempted to seize and forfeit in this action. (Brennan Aff. at ¶¶ 3-5; Yatahay Aff. at ¶¶ 2-4). Additionally, Brennan and Yatahay state that iMEGA has represented Yatahay's interests throughout this litigation. (Brennan Aff. at ¶ 6; Yatahay Aff. at ¶ 5). Finally, Brennan and Yatahay affirm that the Franklin Circuit Court's September 18, 2008 and October 16, 2008 Orders for seizure of domain names are directed at truepoker.com. (Brennan Aff. at ¶ 7; Yatahay Aff. at ¶ 6). Because iMEGA has established associational standing in accordance with the Court's Opinion by naming a member of its association that has alleged a concrete injury in fact, this Court should now resolve the substantive and important issues this case presents.

RELIEF SOUGHT

I. REQUEST FOR RELIEF.

iMEGA petitions the court under CR 76.36 to order the trial court to (1) immediately stay all proceedings in the Franklin Circuit Court; (2) vacate the Franklin Circuit Court Opinion and

Order entered October 16, 2008; (3) vacate the Seizure Order of September 18, 2008, and (4) dismiss the underlying case in its entirety.

II. THE RELIEF IS APPROPRIATE.

The Supreme Court's opinion clearly supports the prior finding of this court that the standard for issuance of a writ are met here by suggesting that the petition for a writ be refiled, by finding the arguments for the issuance of a writ "numerous [and] compelling," and by suggesting an immediate transfer of the case to the Supreme Court for a final adjudication. (Supreme Court Opinion at 3, 13). In the initial case, this court correctly held that the standard for issuance of a writ under Kentucky law was met completely in this case upon the finding that the trial court was proceeding without jurisdiction.

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

(Court of Appeals' Opinion at 9-10).

The Supreme Court has held that a

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

Hoskins v. Maricle, 150 S.W.3d 1 (Ky. 2004). Because the trial court "clearly erred in concluding that the domain names can be construed to be gambling devices subject to forfeiture under KRS 528.100," (Court of Appeals' Opinion at 8), the *Hoskins* standard is met.

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

Additionally, "'[g]reat and irreparable injury' means 'something of a ruinous nature.'" *Newell Enterprises, Inc. v. Bowling*, 158 S.W.3d 750, 754 (Ky. 2005), citing *Bender v. Eaton,* 343 S.W.2d 799, 800 (Ky. 1961). Ruin is exactly what the Commonwealth said it wants to inflict upon iMEGA's members.[11] Such intent, coupled with the trial court's unconstitutional seizure order, satisfies any possible requirement of a showing of injustice and harm, were one to be applied.

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

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

MEMORANDUM OF AUTHORITIES IN SUPPORT OF PETITION

I. iMEGA PROPERLY ASSERTS ASSOCIATIONAL STANDING.

iMEGA has properly asserting associational standing in this case, as it has identified one of its members that owns one of the domain names the Commonwealth is attempting to forfeit.

As the Supreme Court held in its Mar. 18, 2010 opinion, associational standing inherently depends on the membership of the association. (Supreme Court Opinion at 9). The Court recited the familiar standard for associational standing used by federal courts pursuant to *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977):

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

Hunt, 432 U.S. at 334.

The Kentucky Supreme Court held that associations seeking to represent its members have the obligation to prove that at least one of its members would have standing in their own right. (Supreme Court Opinion at 10-13). Thus, the Court held that "a writ petitioner must prove it represents at least one member with an injury in order to obtain relief." (*Id.* at 13). This proof may be asserted by "reference to the facts in the underlying litigation or a verified assertion, such as in an affidavit, attached to the petition." (*Id.*).[12] iMEGA has complied with the Supreme Court's direction and now has properly asserted associational standing.

[12] Additionally, the Supreme Court noted with approval the federal district court's opinion in *Coalition for ICANN Transparency Inc. v. VeriSign, Inc.*, 464 F. Supp. 2d 948, 956 (N.D. Cal. 2006), *rev'd on other grounds*, 567 F.3d 1084 (9th Cir. 2009), as an example of how an association may cure standing problems. In that case, the federal district court dismissed the plaintiff's complaint because "CFIT failed to name even one member." *Id.* at 956. However, CFIT subsequently identified one of its members, Pool.com, Inc., which allegedly suffered injury in fact, and met the requirements for associational standing under *Hunt*. *Id.*

Attached to this petition, iMEGA submits the affidavits from Joe Brennan, Chairman of iMEGA, and Yatahay Limited ("Yatahay"). (*See* Brennan Aff., Exhibit B; Yatahay Aff., Exhibit C). In the affidavits, Brennan and Yatahay state that Yatahay is an iMEGA member and that Yatahay is the registrant/owner of truepoker.com, one of the 141 domain names the Commonwealth has attempted to seize and forfeit in this action. (Brennan Aff. at ¶¶ 3-5; Yatahay Aff. at ¶¶ 2-4). Additionally, Brennan and Yatahay state that iMEGA has represented Yatahay's interests throughout this litigation. (Brennan Aff. at ¶ 6; Yatahay Aff. at ¶ 5). Finally, Brennan and Yatahay affirm that the Franklin Circuit Court's September 18, 2008 and October 16, 2008 Orders for seizure of domain names are directed at truepoker.com. (Brennan Aff. at ¶ 7; Yatahay Aff. at ¶ 6). Because iMEGA has established associational standing in accordance with the Supreme Court's pinion by naming a member of its association that has alleged a concrete injury in fact, this court should now resolve the substantive and important issues this case presents.

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

As this court has already held, the trial court lacked subject matter jurisdiction because domain names do not fit the "gambling device" definition in KRS 528.010(4). "[I]t stretches credulity to conclude that a series of numbers, or Internet address, can be said to constitute a 'machine or any mechanical or other device . . . designed and manufactured primarily for use in connection with gambling.'" (Court of Appeals' Opinion at 8).

If Kentucky wants to criminalize Internet gambling, the General Assembly can pass a law. No less than eight other states have passed statutes specifically criminalizing Internet gambling. *See, e.g.*, 720 Ill. Comp. Stat. 5/28-1 (Illinois); IC 35-45-5-1 (Indiana); RCW 9.46.240 (Washington); LRS 14:90.3 (Louisiana); ORS 167.109 (Oregon); NRS Chapter 463

(Nevada); MC 23-5-112 (Montana); SDCL 22-25A-7 (South Dakota). Such statutes raise constitutional questions to the extent that they purport to regulate gambling that is legal where bets are placed, but the Kentucky legislature has enacted no similar legislation.

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

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

KRS 528.010(4) (emphases added).

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

The Commonwealth below argued that the trial court should ignore the definition of "gambling device" and instead look to the "intent" of the General Assembly. (*See* Reply Brief of Com. on In Rem Seizure of Domain Names and Standing of Intervenors, Oct. 6, 2008, at 9). However, the question before this court is not whether a domain name falls within the "intent" of KRS 528.010(4); it is whether it falls within the statute's plain meaning.

Statutes are to be construed according to "the common and approved usage of language." KRS 446.080(4). The first principle of statutory construction is to look at the plain meaning of the words used. *See Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815 (Ky. 2005). "[S]tatutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required." *Commonwealth v. Plowman*, 86 S.W.3d 47,

49 (Ky. 2002). "A court may not interpret a statute at variance with its stated language." *SmithKline Beecham Corp. v. Revenue Cabinet*, 40 S.W.3d 883, 885 (Ky. App. 2001).

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

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

ICANN Glossary—Domain Name System, *available at* http://www.icann.org/en/general/glossary.htm#D (last visited May 19, 2009); *see also Am. Girl, LLC v. Nameview, Inc.*, 381 F. Supp. 2d 876, 879 (E.D. Wis. 2005) (similarly defining domain names). Calling a domain name a gambling device under the definition of 528.010(4) is as illogical as calling a telephone number a gambling device. Suppose, for example, that a sports gambling book operating legally in England or Australia were to accept wagers and credit card payments over the telephone from Kentucky. Applying the Commonwealth's logic, without ever moving against the sports betting operation, Kentucky could proceed *in rem* under KRS 528.100 to seize and seek forfeiture of the operation's telephone number as a "gambling device." Even more absurd is the notion that if an individual in England or Australia named John Smith were receiving wagers that were lawful in

the country in which he resided, the Commonwealth of Kentucky could proceed *in rem* to take the name "John Smith" as a gambling device.

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

A domain name is not a "device" at all, and is not "manufactured." Moreover, when a domain name is "operated," the only thing that happens is that a user's Web browser connects with an IP address. Domain names, as mere connectors, are not operable, as software and Web sites are. While Kentucky cases have held that such machinery as slot machines[13] and pinball machines[14] were "contrivances" under a repealed statute, there are no Kentucky cases finding anything so remote, intangible and insubstantial as "domain names" to fit within the definition of KRS 528.010(4).

Neither the Commonwealth nor the trial court has articulated how a domain name is or can be "manufactured." The plain meaning of "manufactured" requires the creation of a tangible

[13] *See, e.g., 14 Console Type Slot Machines v. Commonwealth*, 273 S.W.2d 582 (Ky. 1954); *Pace Mfg. Co. v. Milliken*, 70 F. Supp. 740 (W.D. Ky. 1947).
[14] *See, e.g., Three One-Ball Pinball Machines v. Commonwealth*, 249 S.W.2d 144 (Ky. 1952); *A.B. Long Music Co. v. Commonwealth*, 429 S.W.2d 391 (Ky. 1968).

object, such as a roulette wheel or a craps table, not a series of letters and numbers.[15] KRS 528.010(4)(b) expressly requires that the "device" be "designed and manufactured." This is not an either/or proposition. If a "device" is not "designed and manufactured," it simply does not meet the statutory definition.

Instead, the trial court based its holding that domain names are "gambling devices" on antiquated Kentucky cases interpreting a gambling statute, KRS 436.280, repealed 35 years ago and on an unsupportable assertion that the General Assembly has a strong public policy prohibiting unregulated gambling operations. (*See* Franklin Circuit Opinion and Order at 12).

Hoping to shoehorn "domain name" into the modern statutory definition of gambling device, the Commonwealth and trial court rely upon *Gilley v. Commonwealth*, 229 S.W.2d 60 (Ky. 1950). (*See* Franklin Circuit Opinion and Order at 24). However, the *Gilley* court did not find that "number slips" were "gambling devices;" it found that they were "contrivances," a term not defined in the old statute and absent from the current statute.

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

Additionally, the trial court cited *Gilley*'s assertion that the General Assembly's intent was to "stop all forms of gambling." 229 S.W.2d at 63. However, this was not the General Assembly's intent when it enacted Chapter 528 in 1974. *Gilley* was decided twenty-four years earlier. The new statutory scheme adopted in 1974 narrowed the scope of the anti-gambling

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

statutes, inserted statutory defenses and exemptions, and limited the scope of a "gambling device" by giving it a specific statutory definition. The General Assembly's intent, then, was to make subject to forfeiture only those "gambling devices" as defined by the plain language of KRS 528.010(4).

The United States District Court for the Western District of Kentucky addressed a similar question of legislative intent.[16] The case presented the question of whether a hotel and motel room tax levied by local ordinance against "motor courts, motels, hotels, inns or like or similar accommodations businesses" could be assessed against amounts collected by companies that market hotel rooms on the Internet. The Louisville ordinance was promulgated under KRS 91A.350, *et seq.* The court held that Internet companies facilitating the renting of rooms could not fall within the meaning of "accommodations businesses." Internet room-rental businesses

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

Hotels.com, Exhibit M at 9 (emphasis added). That is precisely the case here. When KRS 528.010(4) was enacted 35 years ago, the Internet was unknown in American life. The legislature could not have intended such a vastly expansive application of the definition as the Commonwealth and trial court put forth.

Kentucky courts have long recognized that courts are not permitted to "breathe into a statute that which the legislature has not put there." *Commonwealth v. Gaitherwright*, 70 S.W.3d 411, 413 (Ky. 2002). The General Assembly has had numerous opportunities to re-define

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[16] *See Louisville/Jefferson County Metro Government and Lexington-Fayette Urban County Government v. Hotels.com, LP, et al*, Case No. 3:06-CV-480-R, attached hereto as Exhibit M.

"gambling device" to encompass domain names. This court should "not now step in to do what the state and local legislative bodies . . . either failed or chose not to do." *Hotels.com*, Exhibit M at 9. In short, this court should decline to rewrite a statute. *Cf. Commonwealth v. Lundergan*, 847 S.W. 2d 729, 731 (Ky. 1993); *Roney v. Commonwealth*, 695 S.W.2d 863, 864 (Ky. 1985).

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

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

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

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

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

Furthermore, the prohibition of "gambling devices," the definition of "gambling devices" and the statutory provision providing for forfeiture of "gambling devices" all appear in the Penal Code, which makes operating "gambling devices" in violation of statute a Class D felony

punishable by up to five years in prison. Because these are criminal statutes, a court must strictly construe these statutes.

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

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

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

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

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

Although it is clear that the plain language of KRS 528.010(4) is not ambiguous and cannot include Internet domain names, were this court to find some ambiguity, the rule of lenity

would require that ambiguity to be resolved in Petitioner's favor. *White v. Commonwealth*, 178 S.W.3d 470, 484 (Ky. 2005); *see also Haymon v. Commonwealth*, 657 S.W.2d 239, 240 (Ky. 1983) (If "[i]t is not possible to determine which meaning the General Assembly intended . . . the movant is entitled to the benefit of the ambiguity."); *Commonwealth v. Colonial Stores, Inc.*, 350 S.W.2d 465, 467 (Ky. 1961) ("Doubts in the construction of a penal statute will be resolved in favor of lenity.").

Therefore, for multiple reasons that include the principles of strict construction and lenity, domain names are not "gambling devices" and the trial court was without jurisdiction to act otherwise.[17]

III. THE TRIAL COURT LACKED JURISDICTION WITHOUT A CONVICTION.

All forfeiture must be authorized by statute. The General Assembly has not authorized forfeiture of a gambling device under KRS 528.100 without a criminal conviction. Therefore, the trial court lacked jurisdiction to act as it did.

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

The Commonwealth argued, and the trial court held, that an action under KRS 528.100 and KRS 500.090 is civil and that no conviction is required. This argument rests on four erroneous premises: (1) that cases decided under the pre-1974 gambling device forfeiture statute,

[17] In an amicus filing in the prior Court of Appeals' action, the Poker Players Alliance argues that poker is a game of skill, not a game of chance, and does not qualify as gambling. The principles of strict construction and lenity would counsel in favor of a holding that poker is not gambling so long as the question is close. *See generally* Br. of *Amicus Curiae* Poker Players Alliance, *Interactive Media Entm't & Gaming Ass'n, Inc. v. Wingate*, 2009 WL 142995, 2008-CA-2036, Jan. 20, 2009.

KRS 436.280, support the idea that forfeiture proceedings for gambling devices today are civil in nature; (2) that the legislative intent of the General Assembly when enacting 528.100 and 500.090 in 1974 was to punish all forms of gambling; (3) that cases decided under KRS 218A.410, the controlled substances statute, are analogous; and (4) that *United States v. Ursery*, 518 U.S. 267 (1996), provides support for allowing civil forfeiture under KRS 528.100 and KRS 500.090. These premises are either inapplicable or flatly untrue. The General Assembly withdrew a civil remedy for forfeiture of gambling devices when it repealed KRS 436.280 and enacted KRS 528.100 and KRS 500.090 in 1974.

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

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

At English common law, only criminal forfeiture existed, and the right of forfeiture did not attach "until the offending person had been convicted and the record of conviction produced." *Ursery*, 518 U.S. at 275. In this country, however, forfeiture exists only by statute. *See id.* at 276. "A forfeiture proceeding is a special one existing only by act of the Legislature." *Bratcher*, 243 S.W.2d at 1015; *see also* OAG 77-734 ("Forfeiture is not a part of the common law. It exists only by statute."). Because forfeitures are not favored in the law, Kentucky courts must "construe forfeiture statutes strictly against a forfeiture and liberally in favor of the person whose property rights are to be affected." *Bratcher*, 243 S.W.2d at 1013. Absent an explicit statute, property cannot be forfeited without a conviction under Chapter 528.

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

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

(Emphasis added). Thus, prior to 1974, gambling devices were subject to forfeiture under two scenarios: (1) upon conviction of any person using the gambling device as prohibited by statute; or (2) upon a finding by a jury that the device was used for gambling. The statute at that time explicitly authorized seizure and forfeiture of gambling property absent a conviction. In turn, the Kentucky courts appropriately and explicitly relied on this provision when holding that KRS 436.280 contemplated a civil forfeiture proceeding. *See, e.g.*, *Hickerson v. Commonwealth*, 140 S.W.2d 841, 842 (Ky. 1940); *Sterling Novelty Co. v. Commonwealth*, 271 S.W.2d 366, 368 (Ky. 1954); *14 Console Type Slot Machines v. Commonwealth*, 273 S.W.2d 582, 583 (Ky. 1954). Even under this statute, however, there would be a jury trial, presumably open to the public—unlike the procedure applied by the trial court in this case. Each and every reported case concerning civil forfeiture of gambling property in Kentucky was decided under the prior statute. No Kentucky court has recognized that KRS 528.100 is a civil forfeiture statute. Only the long-repealed KRS 436.280, with its unambiguous authorization of a civil forfeiture proceeding, has been recognized as such.

Under that repealed statute, "possession" of a gambling device was not a criminal offense. Only "use" of a gambling device was prohibited. However, the General Assembly had concerns that the civil forfeiture proceeding "resulted in a forfeiture of gambling devices