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

AND

JACK CONWAY,
ATTORNEY GENERAL,
COMMONWEALTH OF KENTUCKY REAL PARTIES 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 ("Secretary Brown") 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. 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 without notice to the owners. The trial court intends to proceed November 17, 2008 with a hearing on their forfeiture.

Domain names are not websites. They are not persons, or entities, or corporations, or tangible things. They are nothing more than words, letters, and characters strung together to advertise a message, communicate with others, and direct a person to a website. Domain names are commonly thought of as website "URLs" or addresses. For example, "http://kentucky.gov" is a domain name. Domain names, and only domain names, are what the trial court seized and what Secretary Brown seeks in forfeiture.

All of the domain names ordered to be seized are located outside of Kentucky. Secretary Brown alleges that all of the owners of those domain names are located outside of the United States. For these and other reasons, the trial court lacked jurisdiction and erred in a manner that is resulting in the irreparable deprivation of constitutional rights.

Specifically, the trial court erroneously held that iMEGA, an association asserting the rights of its members, which include registrants of some of the subject domain names, does not have standing in the action brought by Secretary Brown. The trial court failed to follow established Kentucky and United States Supreme Court precedent entitling associations to assert the rights of their members. This holding has created irreparable harm by depriving iMEGA members of the ability to defend their rights in the trial court. Some of iMEGA's members have had their domain names seized and face immediate, irreparable harm as well as the threat of self-incrimination. The trial court has put registrants in a position in which they must either

surrender their Fifth Amendment constitutional guarantees against self-incrimination or see their interests in the domain names forfeited in violation of their due process rights.

The trial court also lacks jurisdiction for several reasons. First, the subject domain names are not located in Kentucky as required by United States Supreme Court holdings. Second, in order to establish jurisdiction, the trial court invaded the province of the Kentucky General Assembly and breached the doctrine of separation of powers by interpreting Kentucky's statutory definition of "gambling device" to include domain names. Third, Secretary Brown lacks any statutory authority and thus standing to bring this action. Fourth, the trial court lacks jurisdiction because the alleged violations of certain of Kentucky's penal statutes upon which the action is based all allegedly occurred outside of Kentucky. Fifth, there is no basis in Kentucky law for a civil forfeiture proceeding under KRS 528.100, a penal statute.

In addition, with its seizure order, the trial court has effected an unconstitutional prior restraint upon the protected commercial speech of scores of lawful international businesses. By proceeding to forfeiture of the domain names, Secretary Brown threatens the ultimate permanent restraint, the destruction of the speech, such that those businesses may no longer use certain words to advertise their businesses. Secretary Brown also seeks to impede lawful Internet activity and economic transactions on a worldwide scale. The trial court is impeding interstate and foreign commerce in violation of the dormant commerce clause of the United States Constitution. Finally, the trial court's reliance on the "evidence" presented in the unconstitutional, secret, *ex parte* hearing, continues to irreparably deprive iMEGA members of the seized domain names and their constitutional rights.

Thus, the writ that iMEGA seeks is warranted on the ground that the trial court is proceeding without jurisdiction and erroneously. By denying rights guaranteed under the United

States Constitution, the trial court is doing a great injustice and causing present and on-going irreparable injury upon members of Petitioner. In this petition, iMEGA seeks an order requiring the trial court to dismiss the case in its entirety.

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. On September 18, 2008, the trial court issued an Order of Seizure of Domain Names ("the Seizure Order")[1], 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). *See also Interactive Media Entm't & Gaming Ass'n v. Gonzales*, No. 07-2625 MLC, 2008 U.S. Dist. LEXIS 16903 (D.N.J. Mar. 4, 2008).[2]

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

The Real Party in Interest are the Commonwealth of Kentucky ex rel. J. Michael Brown, Secretary of the Justice and Public Safety Cabinet. Kentucky Attorney General Jack Conway is also included as real party in interest by virtue of KRS 15.020, which provides that the Attorney General "shall appear for the Commonwealth in all cases in the ... Court of Appeals wherein the Commonwealth is interested ...."

[1] A copy of the Seizure Order is attached as Exhibit A.
[2] A copy of this opinion is attached hereto as Exhibit B.

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, Secretary Brown initiated his action. Secretary Brown seeks one thing in the case: forfeiture of Internet domain names. Also on August 26, Secretary Brown filed a Motion to Seal Case File.[3] Secretary Brown 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 17 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, Secretary Brown filed his Second Amended Complaint,[5] his 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

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[3] Motion To Seal Case File is attached as Exhibit C.
[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 D.
[6] Attached hereto as Exhibit E.
[7] Attached hereto as Exhibit F.

activity" in Kentucky but did not specify by statute or otherwise the alleged illegal activity occurring in Kentucky. Seizure Order, Exhibit A, at 1.

A domain name is issued by a company known as a "registrar" and is utilized under a contractual arrangement by a "registrant." iMEGA has members who are registrants, or users, of domain names, under such contracts. "Seizure" of a domain name does not amount to seizure of a website, any more than "seizure" of a telephone number would result in seizure of the telephone. However, in the same way that the commandeering and disabling of a telephone number could result in blocking calls to the telephone, the commandeering and disabling of a domain name 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 also ordered that notice be sent to registrars and registrants. *Id.* The trial court set a hearing "to determine if any party has asserted rights as an owner of the seized property pursuant to KRS 500.090." *Id.* 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 ("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. The trial court held that iMEGA did not have standing in the case and dismissed it as a party. This has rendered the interests of iMEGA's members unrepresented.

[8] Attached as Exhibit G.

This trial court erred in multiple ways. It lacked jurisdiction over the action. Further, its holdings on numerous aspects of this case violate the United States Constitution.

RELIEF SOUGHT

I. REQUEST FOR RELIEF.

iMEGA petitions the Court under CR 76.36 to order the trial court to (1) vacate the Opinion and Order entered October 16, 2008; (2) vacate the Seizure Order of September 18, 2008, and (3) dismiss the case in its entirety.

II. THE RELIEF IS APPROPRIATE.

The Kentucky Supreme Court has held,

> 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.

Cain v. Abramson, 220 S.W.3d 276, 278 (Ky. 2007). Subject matter jurisdiction is lacking in this case because the trial court exercised *in rem* jurisdiction over domain names that do not reside within the state. Rather, the domain names, the registrants of the domain names, and the registries where all of the domain names are registered are located outside of Kentucky.

The trial court is without jurisdiction for additional reasons. Forfeiture is a creature of statute, and Kentucky created jurisdiction for the forfeiture of "gambling devices." In order to establish jurisdiction, the trial court failed to strictly construe the definition of "gambling device" and erroneously interpreted it to include domain names. The trial court is also without jurisdiction because Secretary Brown lacks any statutory authority and thus standing to bring this action. The trial court lacks jurisdiction because the alleged violations of certain of Kentucky's penal statutes upon which the action is based all allegedly occurred outside of Kentucky.

Finally, there is no jurisdiction in Kentucky law for a civil forfeiture proceeding under KRS 528.100, a penal statute.

Furthermore, the trial court rejected iMEGA's associational standing on behalf of its members and dismissed iMEGA as a party from the case. This was error and is irreparably harming iMEGA members' ability to assert their rights in this case without waiving their rights against self-incrimination. iMEGA's exclusion from the case (prior to the time to answer the Second Amended Complaint) prohibits iMEGA from asserting to the trial court some of the very argument set out herein.

Additional constitutional violations by the trial court constitute "great injustice and irreparable injury." 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). As to the First Amendment, "[r]estraining free speech constitutes immediate and irreparable harm, if unauthorized." *Id.* at 605 (citing *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976)).

Finally, because iMEGA asserts the violation of First Amendment rights by the trial court, a writ is especially appropriate. Courts of Kentucky have recognized that a petition for a writ of mandamus is appropriate where First Amendment rights are being violated. *Courier-Journal and Louisville Times Co. v. Peers,* 747 S.W.2d 125, 127 (Ky.1988). Here, where the trial court has acted unconstitutionally in violation of First Amendment rights, where it has sealed court records and proceedings without a hearing and without required findings, and where it is exercising continuing prior restraint on protected speech, this petition is appropriate pursuant to *Peers*.

MEMORANDUM OF AUTHORITIES IN SUPPORT OF PETITION

I. THE TRIAL COURT ERRED WHEN IT HELD THAT iMEGA DOES NOT HAVE ASSOCIATIONAL STANDING AND IN SO DOING DEPRIVED iMEGA'S MEMBERS OF THEIR CONSTITUTIONAL RIGHTS.

The trial court erred when it held in its Opinion and Order that iMEGA[9] does not have associational standing. Furthermore, in so holding, the trial court has placed iMEGA members in the position of suffering violations of either (1) their due process rights to be heard concerning the potential forfeiture of their domain names, or (2) the guarantees of the Fifth Amendment.

The trial court in its October 16 order denied iMEGA associational standing and also denied it intervenor status. It held that iMEGA did not meet the third prong of the test for associational standing set out by the United States Supreme Court in *Hunt*, *supra,* p. 4. The *Hunt* test holds that

> [a]n 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 (emphasis added). The trial court simply held that iMEGA has not shown individual participation of iMEGA members "is not indispensable for the complete and proper resolution" of the case against 141 domain names, thus the third prong of *Hunt* "will not be satisfied." Opinion and Order, Exhibit G, at 37. The trial court held, "The registrants or other persons with an interest in the *res* must present their claims over the seized *res*, if they wish to be fully heard." *Id.* (emphasis added).

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[9] iMEGA is a not-for-profit corporation organized in the state of New Jersey. It 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, entities directly affected by the trial court's orders.

This is clearly erroneous. There is nothing in statutes or case law that says a person with an interest in property subject to an *in rem* action must appear in court. The trial court cited no authority for its opinion that registrants "must present their claims," and it offered no explanation for its conclusion that registrants are indispensable for complete and proper resolution.

To arrive at that conclusion, the trial court appears to have misapplied the third prong of *Hunt*. That prong held that associations are appropriate parties, and thus individual members are not necessary, where "neither the claim asserted nor the relief requested" requires their participation. The trial court failed to recognize that the relief iMEGA requested, dismissal of the action pursuant to CR 12.02(f), did not require the participation of iMEGA members. In fact, the trial court denied that motion without participation of any individual iMEGA members. Additionally, as to the claim asserted, iMEGA clearly can represent members' interests, and in fact already has. iMEGA has attended two hearings in Franklin Circuit Court and has effectively represented members' interests there and through various pleadings. Therefore, there is no basis for the trial court's holding that members "must present their claims." The third prong of the *Hunt* test for associational standing thus is met.

For reasons that are not clear, the trial court discussed but did not apply the associational standing standard set forth in Kentucky case law. If it had applied the more lenient Kentucky standard, iMEGA would have met that, as well. Associational standing, as the trial court correctly observed, has been recognized by the Kentucky Supreme Court. Under such standing, associations may "assert claims or defenses on behalf of its members of the association." Order and Opinion of October 16, Exhibit G, at 35, *citing Warth v. Seldin,* 422 U.S. 490, 511 (1975).

In general, standing is established when a party has "a judicially recognizable interest in the subject matter of the suit." *Ashland v. Ashland F.O.P No. 3, Inc.*, 888 S.W.2d 667, 668 (Ky.

1994). In *Ashland F.O.P.*, the non-profit F.O.P lodge was recognized as having standing on the ground that its members had "a real and substantial interest" in a dispute over a city ordinance requiring new city employees to live inside the city limits. *Ashland*, 888 S.W.2d at 668.

Similarly, in *Warren County Citizens for Managed Growth, Inc. v. Board of Com'rs of City of Bowling Green*, 207 S.W.3d 7 (Ky. App. 2006), this Court recognized standing of the non-profit Warren County Citizens group on the ground that members living four miles from the proposed development at issue would "be directly affected." *Warren County Citizens*, 207 S.W.3d at 13.

Beyond doubt, iMEGA's members have "a real and substantial interest" in the dispute raised by Secretary Brown, and would "be directly affected" by it.

The arguments made by iMEGA do not turn on the individual circumstances of particular members. The arguments apply equally to all members. Thus, this is the ideal case for associational standing; iMEGA speaks for all members and there is no reason for any particular domain registrant to appear because the registrant has nothing to add to the arguments that iMEGA makes.

By denying standing to iMEGA, the trial court also has placed iMEGA members who also are registrants in the position of either staying away, thus abandoning their rights to be heard, or coming forward, thus subjecting themselves to possible prosecution by the Commonwealth, which alleges criminal violations in its complaint. The threat of criminal prosecution is clear. It is for the registrants to rely upon their association to challenge the

unconstitutional action of the Commonwealth and the ultra vires orders of the trial court.[10] Either way the registrants turn, their constitutional rights will be violated.[11]

> As one commentator has expressed the dilemma in such a circumstance,
>
> > If the Government brings the civil forfeiture first without also filing criminal charges, it puts property owners in a Fifth Amendment vise. Unless courts fashion an accommodation to protect their right to remain silent [such as a grant of immunity, or stay of proceedings pending a government decision on criminal prosecution], property owners must either waive their Fifth Amendment rights, and thereby incriminate themselves in order to defend their property, or try to defend the action without the benefit of their testimony.
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> Sandra Guerra, *Between a Rock and a Hard Place: Accommodating the Fifth Amendment Privilege in Civil Forfeiture Cases*, 15 Ga. St. U.L.R. 555, 598-99 (1999) (cited approvingly by *United States v. Three Hundred Thirty-Nine Thousand Eight Hundred Eighty-Four Dollars in United States Currency*, 2000 WL 34612065, 7 (S.D. Fla. 2000)).

Here, the trial court has placed registrants in this unconstitutional "vise" by erroneously denying standing to iMEGA. The Commonwealth in its Second Amended Complaint has alleged that operation of websites reached through the domain names constitutes violations of KRS 528.020, promoting gambling in the first degree, a Class D felony, and KRS 528.030, promoting gambling in the second degree, a Class A misdemeanor. Second Am. Compl. at 9-10. While registrants vigorously dispute that any criminal violation has occurred, it is undisputed

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[10] The Fifth Amendment states that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

[11] It is highly ironic that the trial court based its finding that it has jurisdiction in this matter largely on its reading of *Shaffer v. Heitner*, 433 U.S. 186 (1987). *Shaffer* in fact stands for a contrary idea: that *in rem* action should not be the basis for personal jurisdiction over someone not within the forum or not otherwise properly reached by *in personam* jurisdiction. In *Shaffer*, "the only role played by the property is to provide the basis for bringing the defendant into court. ... In such cases, if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible." *Shaffer*, 433 U.S. at 209. Nevertheless, this is precisely the circumstance the trial court here has created by holding that the registrants "must present their claims" before the trial court, and that iMEGA may not on their behalf. Clearly, such appearances would accomplish just what the state is seeking: *in personam* jurisdiction through the vehicle of an *in rem* action, the very thing *Shaffer* disapproved. *See* discussion of the trial court's erroneous application of *Shaffer* at Memorandum of Authorities Section II, *infra*.

that the registrants would be subjecting themselves to potential prosecution merely by coming forward to speak to the *in rem* action. Clearly, the Fifth Amendment right against self-incrimination extends to the context of this civil action. *See, e.g., Lefkowitz v. Turley,* 414 U.S. 70, 77 (1973), holding that the Fifth Amendment creates grounds upon which one may decline to "answer official questions put to him in any proceeding, civil or criminal, formal or informal."

There is a clear and logical alternative: associational standing for iMEGA. Without such an order, the constitutional rights of iMEGA members will continue to be violated.

In sum, within the meaning of *Hunt* and *Ashland F.O.P.*, iMEGA satisfies the requirements of associational standing. Therefore, the trial court erred and is proceeding unconstitutionally to the immediate, continuing and irreparable harm of members of iMEGA.

iMEGA asserts in this petition that the action below is groundless and should be dismissed in its entirety. However, if the case is permitted to proceed, the trial court should be ordered to recognize iMEGA's associational standing.

II. THE TRIAL COURT LACKS JURISDICTION BECAUSE THE DOMAIN NAMES ARE NOT LOCATED IN KENTUCKY.

The trial court lacked subject matter jurisdiction because the domain names are not subject to *in rem* jurisdiction in Kentucky, and any action by a Kentucky court with regard to them is void under the Due Process Clause of the Fourteenth Amendment. It is well settled that *in rem* jurisdiction is valid within a state only if the property is located within that state. *See Durfee v. Duke*, 375 U.S. 106, 107-08 (1963) ("The Nebraska court had jurisdiction over the subject matter of the controversy only if the land in question was in Nebraska."); *see also* 20 Am. Jur. 2d *Courts* § 72 ("A decision *in rem* can be rendered by a state court only with reference to a *res* situated in the state . . . ."). A state's attempt to use *in rem* jurisdiction with respect to

property not within the state is a violation of the Due Process Clause of the Fourteenth Amendment. *See Hanson v. Denckla*, 357 U.S. 235, 246-50 (1958).

In *Hanson*, the state of Florida attempted to exercise *in rem* jurisdiction over a trust established in Delaware by a settlor who later became domiciled in Florida. *Id.* at 238-39. The Court, in overturning the Florida Supreme Court's determination that the state could exercise jurisdiction over the trust, limited the reach of *in rem* jurisdiction to situations in which "the presence of the subject property [was] within the territorial jurisdiction of the forum State." *Id.* at 246. Moreover, the Court detailed the resulting Fourteenth Amendment violation:

> With the adoption of that Amendment, any judgment purporting to bind the person of a defendant over whom the court had not acquired *in personam* jurisdiction was void within the State as well as without. *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565. Nearly a century has passed without this Court being called upon to apply that principle to an *in rem* judgment dealing with property outside the forum State. The invalidity of such a judgment within the forum State seems to have been assumed—and with good reason. Since a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction. Therefore, so far as it purports to rest upon jurisdiction over the trust assets, the judgment of the Florida court cannot be sustained.

Id. at 250 (emphasis added). Because the domain names at issue are not located within Kentucky, the trial court has no jurisdiction over the subject matter at issue and therefore no constitutional basis with which to adjudicate this case.

A. *Shaffer v. Heitner* Does Not Eliminate the Threshold Requirement that Property Subject to *In Rem* Jurisdiction Must Be Located Within Kentucky.

The trial court cites *Shaffer v. Heitner*, 433 U.S. 186 (1977), for the proposition that *in rem* actions only require "minimum contacts" between the forum state and the property. The court erroneously held that *Shaffer* somehow abrogated the basic requirement that only property located within the jurisdiction of the court is subject to an *in rem* action. The opposite is true.

Shaffer held that in addition to the fundamental requirement that property subject to *in rem* jurisdiction be located in the state, the state must have an interest in the persons who own the property, as analyzed through *International Shoe*'s "minimum contacts" prism. *See id.* at 205-12. This holding limits, and does not expand, *in rem* jurisdiction, stating that physical presence alone does not give the state a *per se* right to seize the property. But the threshold requirement that the property be located in the state still exists. *Shaffer* never overruled *Hanson*, and the Court makes this clear throughout the opinion. *See id.* at 204 n.20 ("Nothing in *Hanson v. Denckla* is to the contrary.") (citation omitted).[12] It is clear that *Shaffer* in no way affected the principle that property subject to *in rem* actions must be located within the court's territory.[13]

Shaffer thus supports the Petitioner's proposition in this case. In *Shaffer*, the state of Delaware attempted to seize defendants' stock located within the state in order to force their consent to personal jurisdiction. The Court noted that the "express purpose of the Delaware sequestration procedure is to compel the defendant to enter a personal appearance." *Id.* at 209. The Court, in striking the action down as unconstitutional, reasoned, "[I]f a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible." *Id.*

The "minimum contacts" determination of the domain names' connection with Kentucky is inappropriate, as the threshold matter of whether the domain names were located in Kentucky was never addressed by the trial court. Applying the minimum contacts test, the trial court

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[12] *See also id.* at 211 n.38 ("In *Hanson v. Denckla* we noted that a state court's *in rem* jurisdiction is '[f]ounded on physical power' and that '[t]he basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State.' We found in that case, however, that the property which was the basis for the assertion of *in rem* jurisdiction was not present in the State. We therefore did not have to consider whether the presence of the property in the State was sufficient to justify jurisdiction.") (citation omitted).

[13] Commentators agree with this reading. *See, e.g.*, Adam M. Greenfield, *Reviving the Distinction Between* In Rem *and* In Personam *Jurisdiction By Way of the Anti-Cybersquatting Consumer Protection Act*, 35 AIPLA Q. J. 29, 55 (Winter 2007) (discussing *Shaffer* and still noting that "[T]he lawful assertion of *in rem* jurisdiction requires the *res* be located in the forum's territory.").

deemed the domain names to have a "presence" in the state, *see* Opinion and Order 16-22, but never actually found that they were located within Kentucky. The trial court found that the fact that the Commonwealth's investigators accessed and utilized websites via the domain names was sufficient to establish that the domain names were present in Kentucky. Under the trial court's logic, any official of any state or any country in the world could establish jurisdiction over a domain name by causing government officials to utilize a domain name in order to utilize a website. This would subject domain names to the jurisdiction of every jurisdiction in the world with the an Internet connection. As is set forth below, this is not the law. Rather, a finding of *in rem* jurisdiction still requires that the domain names be located in Kentucky.

B. Domain Name *Situs* Has Been Deemed by Congress to be Located in the District of the Registrar, and Therefore, the 141 Domain Names Are Not Subject to *In Rem* Jurisdiction in Kentucky.

The *situs* of intangible property is one of two locations: (1) the domicile of the property owner; or (2) the location of the intangible instrument (i.e., a stock or bond certificate), if there is one. *Commonwealth v. Bingham's Adm'r*, 223 S.W. 999, 1000 (Ky. 1920); *see also, e.g.*, *In re De Lano's Estate*, 315 P.2d 611 (Kan. 1957) (holding that Kansas courts had no jurisdiction to adjudicate dispute over stock and bond certificates located in Missouri, as intangible property is located in the state of its certificate); Fletcher R. Andrews, *Situs of Intangibles in Suits Against Nonresident Claimants*, 49 Yale L.J. 241, 242-43 (1939) (collecting historical cases). This principle remains true for Internet domain names, and Congress has followed this tradition when enacting the Federal Anticybersquatting Consumer Protection Act ("ACPA"), 15 U.S.C. § 1125(d), *et seq*. However, a brief discussion of the domain name registration process is in order to elucidate this point.

To regulate the problem of directing traffic over the Internet, the Internet Corporation for Assigned Names and Numbers ("ICANN") was established in 1998. *See* ICANN, http://www.icann.org/tr/english.html (last visited Oct. 1, 2008). An international, quasi-governmental, non-profit partnership, ICANN has as its exclusive mission and purpose the task of addressing Internet space allocation and Domain Name System assignment. ICANN organizes and directs traffic over the Internet. *Id.* The Domain Name System ("DNS") was established to make it easier for people to find their way around the Internet by allowing users to use a familiar string of letters (a "domain name") instead of a string of archaic numbers, thus making Internet usage easier for the public. *Id.* Instead of typing the Internet Protocol address to visit a Website, a user can type a familiar phrase to visit the same Website (e.g., typing "www.icann.org" instead of "192.0.34.163"). This makes the Internet more user friendly.

Domain names are issued to holders through a domain name registrar. A domain name registrar is one of several entities licensed by ICANN to grant domain names to applicants, or "registrants." *Mattel, Inc. v. Barbie-club.com*, 310 F.3d 293, 296 n.2 (2d Cir. 2002). For a fee, a domain name registrant obtains the exclusive right to use a domain name for a specified time, while the registrar holds title to the certificate, which the ACPA establishes is a "document sufficient to establish [a court's] control and authority regarding . . . the use of a domain name." 15 U.S.C. § 1125(d)(2)(C)(ii). This certificate is located in the headquarters of the registrar.

While the issue of a domain name's *situs* has not been addressed by the Kentucky courts or the General Assembly, Congress studied the issue exhaustively when enacting the ACPA. This analysis is relevant to the issue before this Court. Applying traditional notions of intangible property location and adapting these concepts to the Internet age, Congress found a constitutional mechanism permitting *in rem* jurisdiction over domain names. The ACPA allows *in rem*

jurisdiction over a domain name only "in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located." *Id.* § 1125(d)(2)(A). Subsection (d)(2)(C) states that the *situs* of a domain name in an *in rem* action shall be deemed to be "in the judicial district in which . . . the domain name registrar, registry or other domain name authority that registered or assigned the domain name is located." *Id.* § 1125(d)(2)(C).

The *Mattel* court articulates why Congress established *situs* in this manner. Mattel brought an action against several domain names under the ACPA in the U.S. District Court for the Southern District of New York. The trial court dismissed the action for lack of *in rem* jurisdiction on the ground that the defendants' registrar was in Maryland. *See Mattel*, 310 F.3d at 294. The Second Circuit upheld the district court's dismissal, stating that Congress recognized that allowing an *in rem* action against a domain name, accessible in every state in the U.S., in any federal court may offend due process or principles of international comity. *See Mattel*, 310 F.3d at 302. Requiring a "nexus" between the registrar and the court lessens these concerns as the domain name, the subject of the action, is most connected with the jurisdiction where the registrar resides. *Id.* at 302; *see also* H.R. Rep. No. 106-412, at 14 (1999). The presence of the domain name in the judicial district of the registrar "anchors the *in rem* action and therefore satisfies due process." *Mattel*, 310 F.3d at 302. This analysis has been followed in nearly all litigation under the ACPA. *See, e.g., Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214 (4th Cir. 2002) (holding that when Internet domain name was registered in Virginia, Virginia had *in rem* jurisdiction consistent with due process).

This Court should follow the traditions of intangible property *situs* analysis, and the lead of Congress, in refusing to find jurisdiction. Much like traditional intangible property, domain

names have consistently been recognized as having a *situs* at the location of the registry, or in the location of the domain holder. *See* ICANN—Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy § 4.9. Congress's reasoning has proven persuasive, as at least one court has adopted its jurisdictional reasoning in a non-ACPA case. *See Office Depot, Inc. v. Zuccarini*, No. C 06-mc-80356 SI, 2007 WL 2688460, at *4 (N.D. Cal. Sept. 10, 2007) ("In light of the foregoing, faced with the somewhat metaphysical question of where the intangible property comprising a domain name exists, this Court will follow Congress' suggestion in ACPA that a domain name exists in the location of both the registrar and the registry.").

Further, domain names are accessible in every state in the U.S. If any court within the U.S. can claim *in rem* jurisdiction over a domain name, domain names could be taken from their holders for a multitude of potential reasons. The result would stifle the dynamic and important function of the Internet as an outlet for national and international commerce. Only jurisdictions with a "nexus" to the domain name should properly adjudicate these disputes. Otherwise, any party that registers a domain name could be required to defend itself in any jurisdiction in the country. Such a notion would surely "offend traditional notions of fair play and substantial justice" that anchor the due process requirement. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Though the *situs* of a domain name may be a "somewhat metaphysical question," one thing is clear: Kentucky's exercise of jurisdiction in this case would be both unprecedented and inappropriate.

III. THE TRIAL COURT LACKS JURISDICTION OVER THE DOMAIN NAMES BECAUSE THEY DO NOT QUALIFY AS "GAMBLING DEVICES" UNDER KRS 528.010(4).

By seizing the domain names, the trial court exceeded its subject matter jurisdiction. KRS 528.010(4) specifically defines "gambling devices" that are subject to forfeiture under Kentucky law. Under KRS 528.010(4), a "gambling device" means,

> (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.

(Emphases added).

A. The Trial Court Failed to Strictly Construe the Statute.

The trial court erred because it failed to strictly construe the statutory language against Secretary Brown.

The trial court held that the domain names met the definition in KRS 528.010(4)(b). Focusing exclusively on the word "design," it surmised,

> To this Court's mind, domain names in this particular case are designed: they are designed to attract players. . . . Internet domain names, when used as virtual keys to access, create and maintain a virtual casino, contain the vice at which the statute is directed. . . .

Trial Ct. Op. at 24.

The trial court applied a test of construction that focused on the "spirit" of the statute, not its literal text: "Like most endeavors, a person who adheres to the literal text of the law, but

violates its spirit, cannot succeed." Opinion and Order at 23-24. The trial court erred by applying this standard of construction. Kentucky law requires the literal text of the statute to be construed.

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 trial court exclusively cites KRS 446.080(1) for its proclamation that "[o]ur legislature has made it clear that all statutes should be interpreted to carry out its intent." However, Kentucky's highest court made clear even after the General Assembly enacted KRS 446.080(1) that when 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 Kentucky Penal Code, which makes operating "gambling devices" a Class D felony punishable by up to five years in prison. As such, a court must read that term strictly, and in favor of iMEGA.

Strict construction of criminal statutes dates at least back to Chief Justice John Marshall. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820). As a principle of fundamental fairness, citizens should be duly advised of what is considered criminal and what is not:

> 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. To make the warning fair, so far as possible the line should be clear.

McBoyle v. United States, 283 U.S. 25, 27 (1931). Applying the rule of strict construction in holding that an airplane was not a "motor vehicle" for purposes of the National Motor Vehicle Theft Act, Justice Holmes held, in language particularly appropriate here, 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). The most important reason for strict construction of criminal statutes is 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, they should be construed strongly against it. *Id.* at 13.

Since the statute at issue has penal consequences, the trial court was required to follow the rule of lenity, which it failed to acknowledge. It is clear that domain names do not fit the meaning of the statute if strictly construed. However, if the court somehow found the statute ambiguous, the rule of lenity requires any ambiguity in a statute to be resolved in favor of a criminal defendant. *White v. Commonwealth*, 178 S.W.3d 470, 484 (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 . . . ."); *Atlantic Coast Line R. Co. v. Commonwealth*, 193 S.W.2d 749, 758 (Ky. 1946).

This statute is part of the Kentucky Penal Code, and a violation of promoting gambling within the Commonwealth that triggers forfeiture is a Class D felony with a prison term of five years. Though KRS 528.010(4) is a criminal statute, the trial court concluded this was a civil proceeding. Trial Ct. Op. at 12 ("KRS 528.100 contemplates a separate and independent civil proceeding.") However, it is irrelevant whether this is a civil proceeding. Trial Ct. Op. at 10–12. A term used in both civil and criminal statutes must be read consistently. In *Clark v. Martinez*, 543 U.S. 371 (2005), the United States Supreme Court held that a statutory provision that appears in more than one place must be read consistently, regardless of the application.[14] In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), a unanimous Court held that a definition within a statute "must be interpreted consistently," regardless of whether it arises in a criminal or noncriminal context. *Id.* at 11 n.8. And in *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 (1992), the Court applied the criminal rule of lenity to interpret a tax statute in a civil setting because, as here, the statute had "criminal applications." In other words, when the same term is used in both a criminal and civil statute, the term must be interpreted identically regardless of whether the setting is a criminal or civil case.

Thus, the interpretation of "gambling device" is impacted by the term's inclusion in KRS 528.020, the statute prohibiting the promotion of gambling. KRS 528.020(1)(c). "Gambling device" cannot mean one thing in KRS 528.100 and something else in KRS 528.020. And it cannot mean one thing today and another thing a year from now if a domain name registrant were to appear before the trial court as a criminal defendant. "Gambling device" must be interpreted in this case as the Court would in a criminal prosecution for a violation of KRS 528.020.

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[14] *Id.* at 724 ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.").