Appeal No. 08-1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Interactive Media Entertainment & Gaming Association, L.L.C.,	:	Appeal No. 08-1981
Plaintiff-Appellant,	:	On Appeal from the United States District Court,
-vs-	:	District of New Jersey, Docket No. CV-072625-07
Peter D. Keisler, Attorney General, *et al.*	:	(MLC)
Defendants-Appellees.	:	Sat Below: Hon. Mary L. Cooper, U.S.D.J.

PLAINTIFF'S PRINCIPAL BRIEF
AND APPENDIX VOLUME ONE JA-1 TO JA-33 *LAR* 32.2.

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CORPORATE DISCLOSURE

United States Court of Appeals for the Third Circuit

No. 08-1981

Corporate Disclosure Statement and
Statement of Financial Interest

Interactive Media Entertainment & Gaming Association, L.L.C., *Plaintiff-Appellant,*

v.

Peter D. Keisler, Attorney General, *et al., Defendants-Appellees.*

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b)requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26,1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption: 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is

to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filled out upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. An original and three copies must be filed. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has been previously filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Interactive Media Entertainment & Gaming Association [also known as "iMEGA"] makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: N/A.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: N/A.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: N/A.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in this appeal, this information must be provided by appellant: N/A.

Eric Martin Bernstein Dated: September 29, 2008

Eric Martin Bernstein, Esquire
(Signature of Counsel or Party)

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JURISDICTIONAL STATEMENT, *F.R.A.P* 28(a)(4).

A. The District Court's Subject Matter Jurisdiction.

The Plaintiff is a trade association whose members and affiliates face criminal prosecution and civil enforcement under the Unlawful Internet Gambling Enforcement Act, codified as 31 *U.S.C.* § 5361, *et seq.* (hereinafter referred to as the "UIGEA" or the "Act"). The District Court below found Plaintiff to have Article III standing under the Federal Constitution. JA-11 to JA-12 the Plaintiff below raised arguments under the Federal Constitution and International Law which the District Court rejected, dismissing the case. Under 28 *U.S.C.* § 1331, a Federal District Court has original subject matter jurisdiction over an action for injunctive relief based on constitutional claims. *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 *F.3d* 144, 156, fn. 12 (3d Cir. 2002), *cert. denied,* 539 *U.S.* 942, 123 *S. Ct.* 2609 (2003). Therefore, Plaintiff submits that the District Court had a sound basis for exercising its jurisdiction over this matter.

B. The Third Circuit Court of Appeals' Subject Matter Jurisdiction.

This court exercises plenary review over the District Court's Final Order and Judgment. Under 28 *U.S.C.* § 1291, "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." Moreover, "review over constitutional issues is plenary". *United States v. One Toshiba Color Television,* 213 F.3d 147, 151 (3d Cir. 2000). Plaintiff submits that this case presents a proper case and controversy based on Plaintiff's request for a preliminary injunction against enforcement of the UIGEA. A constitutional controversy clearly exists between the Plaintiff and the Defendants Attorney General, Commission and Board who must enforce the UIGEA against iMEGA and its members, prosecute violators and adopt regulations for enforcement. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 *U.S.* 270, 272 (1941).

The requirement for establishing a constitutional controversy is satisfied when "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Step-Saver Data Systems, Inc. v. Wyse Technology,* 912 *F.2d* 643, 647 (3d

Cir. 1990); *St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Gov't of U.S. Virgin Islands*, 218 *F.3d* 232, 240 (3d Cir. 2000). Thus, Plaintiff submits that the proceedings in this matter present an appropriate subject for review by this court.

C. STATEMENT OF TIMELINESS OF APPEAL, *F.R.A.P.* 28(a)(4)(d).

The District Court issued its Memorandum Opinion and Order on March 4, 2008. Since the United States and two (2) of its agencies are parties to the action, under *F.R.A.P.* 4(a)1(B) this appeal had to be filed within sixty (60) days of the date of the service of the District Court's Memorandum Opinion and Order. The appeal was docketed on April 9, 2008 and filed on April 14, 2008, approximately thirty five (35) days later. Therefore, the appeal is timely.

D. STATEMENT OF APPEAL FROM FINAL ORDER DISPOSING OF ALL CLAIMS.

In its Memorandum Opinion dated March 4, 2008 the District Court disposed of all claims before the court in connection with Plaintiff's motion for preliminary injunction and Defendants' cross motion for dismissal. The Order entered by the Court below dismissed all claims and entered a Final Judgment of Dismissal. JA-29. Therefore, the matter is ripe for adjudication on appeal.

THE STANDARD OF REVIEW.

This matter was filed on or about June 5, 2007, seeking a preliminary injunction enjoining the enforcement of the "The Unlawful Internet Gambling Enforcement Act of 2006," codified as 31 U.S.C. § 5361, et seq. (hereinafter referred to as the "UIGEA" or the "Act") and/or rulemaking thereunder. JA-20. No testimony was taken in the trial court. The matter was submitted to the trial court below by motion of the Plaintiff, with supporting Certifications of Edward Leyden, President of Plaintiff, Interactive Media Entertainment & Gaming Association, L.L.C. (hereinafter referred to as "iMEGA"). Defendants cross-moved for dismissal for lack of subject matter jurisdiction under *F.R.Civ.P.* 12(b)(1) and alternatively for failure to state a claim upon which relief can be granted under *F.R.Civ.P.* 12(b)(6). In the interim, after briefing but before an Opinion and Order was issued, the Defendants United States Treasury and the Federal Reserve Board promulgated a Joint Proposed Rulemaking approximately two (2) months after the statutory deadline for rulemaking in the Act. The district court below, following oral argument, denied Plaintiff's motion and granted Defendants' motion.

On review before this court, the district court's decision is evaluated under a three-part standard. *American*

Civil Liberties Union, et al., v. Reno, 217 *F.3d* 162, 172 (3d Cir. 2000). The district court's legal conclusions are reviewed *de novo.* Findings of fact are reviewed for clear error. Finally, the district court's decision to grant or deny the preliminary injunction is reviewed for an abuse of the district court's discretion. *Id.*

STATEMENT OF THE ISSUES ON APPEAL

POINT ONE

UIGEA IS UNCONSTITUTIONALLY VAGUE WITHIN THE PARAMETERS OF THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS AND CANNOT BE ENFORCED IN THE ABSENCE OF CLARIFICATION OF SEVERAL KEY TERMS, INCLUDING BUT NOT LIMITED TO "UNLAWFUL INTERNET GAMBLING."

Plaintiff asserts that the Act is void for vagueness because it declares payment system instruments which are in whole or part transmitted over the Internet are illegal, if part of the transaction relates to gambling in a jurisdiction where that gambling is illegal. Thus the Act, and the proposed regulations under it, fail to define the gravamen of the offense, leaving that critical function to the regulated financial community. The Act is unconstitutionally vague because it fails to provide fair notice of its prohibitions to those required to enforce such and those whose transactions are at issue. It also clearly fails to provide a clear and ascertainable definition of "unlawful and internet gambling."

POINT TWO

THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFF COULD NOT ASSERT THE FIRST AMENDMENT RIGHTS OF PRIVATE CITIZENS WHO MAY ENGAGE IN INTERNET GAMBLING BUT FOR THE ACT'S OVERREACHING PROHIBITIONS.

Plaintiff asserts in Point Two that the district court erred in holding that Plaintiff lacked standing to assert

the privacy and due process rights of its member customers who do, or wish to, engage in Internet gambling on a private personal computer. In essence these persons are customers of the Plaintiff's members throughout their Internet transactions. Prior Supreme Court jurisprudence and Circuit Courts of Appeal have found that this relationship gives the requisite standing to assert privacy and due process rights.

POINT THREE

THE TRIAL DISTRICT ERRED IN EQUATING INTERNET GAMBLING WITH ILLEGAL ACTIVITY, WHERE THAT CONDUCT IS PRIVATE, CONSENSUAL AND LEGAL UNDER THE ACT.

Plaintiff asserts that the district court erred in its analysis of Internet gambling under the Act. By law, by constitutional delegation and by traditional jurisprudence Internet gambling is a matter of state regulation and even the federal statutory scheme is riddled with exceptions. Further, the district court erred in requiring privacy and due process considerations to constitute "expression" and ignored the current status of Internet conduct jurisprudence in the Third Circuit and United States Supreme Court, which recognize constitutionally protectable interests in non-expressive conduct on the Internet. Plaintiff argues that under the relevant *Borden* balancing test, Internet gambling is protected conduct where the

statutory and regulatory scheme proposes to delegate identification of conduct as "illegal" where the regulated community has stated this cannot be done.

STATEMENT OF THE CASE

On October 6, 2006, Congress enacted the "The Unlawful Internet Gambling Enforcement Act of 2006," codified as 31 U.S.C. § 5361, et seq. (hereinafter referred to as the "UIGEA" or the "Act"). The Act was signed into law on October 13, 2006 by President George W. Bush. The Act prohibits the transfer of funds by any payment system instrument over the Internet if the funds are to be used for gambling "where the gambling is illegal." That location may be the point of origin or any other place in the stream of Internet commerce under the Act.

Further, the Act, and proposed rules, which were announced several months late without authority under the Administrative Procedures Act, do not provide a guideline for determining what transactions may be involved in "unlawful internet gambling." Instead, they delegate that responsibility to the regulated financial community. In numerous comments to the proposed rules, that community has unequivocally stated that the rules and the Act are unenforceable as written and will likely result in interference with constitutional rights.

Thereafter, Plaintiff, an Association representing its members who are businesses or businessmen who engage in interactive Internet entertainment, including but not

limited to Internet gambling, filed suit to enjoin enforcement of the Act or adoption of rules to create guidelines requiring financial institutions to intercept "illegal" gambling electronic fund transfers via the Internet.

Plaintiff submits that enforcement of the Act must be restrained. Under the United States Supreme Court's precedents in *Ashcroft v. American Civil Liberties Union,* 542 *U.S.* 656, 124 *S.Ct.* 2783 (2004) and *Lawrence v. Texas,* 539 *U.S.* 558, 123 *S.Ct.* 2472 (2003), Plaintiff submits that the act of gambling on private computers in private on the internet is protected by First Amendment privacy concerns. Further, filtering technology is recognized by the Supreme Court, led by the Third Circuit's integration of tradition and technology in the COPA litigation, as a less restrictive means to regulate protected conduct. State laws in at least the states of Missouri, Alaska, Alabama and New Jersey do not specifically criminalize the act of a private person betting with or for private winnings. Thus, the individual's right to access iMEGA's represented interests is a constitutionally protected activity which cannot be infringed by the UIGEA.

Finally, there is precedent under *In Re MasterCard Litigation,* 313 *F.3d* 257 (Fifth Cir. 2002), holding that

transmittal of Internet gambling funds through the use of internet payment system instruments is not an illegal act. Further, the UIGEA itself is so inconsistent in striking across individual state regulation, sovereign Tribal licensing and sovereign international control of Internet gambling as to make the UIGEA violative of First Amendment rights as well as the Commerce Clause of the United States Constitution. This inconsistency is nowhere more apparent than New Jersey, which permits the transfer of funds by payment system instrument by computer for the purpose of gambling, without reference to the location of the bet or wager, and further prohibits any person or organization except a federal or state agency from intercepting an electronic fund transfer.

Thus, iMEGA asserts that the district court erred in denying a preliminary injunction against enforcement of the Act because Plaintiff satisfied the criteria for issuance of a temporary restraining order because: (1) there is a substantial likelihood that iMEGA will prevail on the merits; (2) clearly, iMEGA's members and those whose interests are represented will suffer irreparable injury unless the injunction issues; (3) the threatened injury to protected rights outweighs the lack of damage if the UIGEA

is not restrained; and, (4) the injunction, if issued, is not adverse to the public interest.

STATEMENT OF FACTS

Plaintiff, Interactive Media Entertainment & Gaming Association, L.L.C. (hereinafter referred to as "iMEGA"), is a not-for-profit corporation duly formed and constituted under the laws of the State of New Jersey. iMEGA was formed to represent the interests of its members, who are businesses or individuals involved in Internet interactive media, entertainment and gaming, including Internet gambling. iMEGA does not itself participate in any electronic gaming on the Internet, but it does engage in the collection and dissemination of information and advice regarding such services to its members and members of the general public in various media, including speech, print and Internet media. Some of its members are individuals or business entities engaged in the business of providing interactive entertainment services to individuals through use of personal computers, both with and without a fee.

Starting in about 1995 and prior to October 2006, some of iMEGA's members engaged in the business of operating "Internet Casino websites." An Internet Casino website is actually a computer image generated and supported by computer technology and accessible to anyone, with a personal computer and access to the Internet through dial-up, broadband, wireless or dedicated access, who wants to

engage in games of chance or skill. Persons wishing to engage in games of chance and/or skill and betting or wagering on them through iMEGA members' Internet Casino websites may originate such an activity while located anywhere in the world, including any jurisdiction of the United States. Some of iMEGA's members and the interests of the some of the industries which it represents, through the facilities of the Internet, reach an audience for the supplying of entertainment through wagering and betting which potentially encompasses all of the states of the United States and most foreign countries. iMEGA members advertise their activities in various media, including but not limited to magazines, periodicals and on the Internet. Advertising is a necessary incident to such commercial operations. iMEGA members correctly and accurately represent that they operate legally in the country wherein they are incorporated and where their servers are located.

Persons wishing to engage in games of chance or skill and betting or wagering on them through some of iMEGA members' casino websites prior to October 2006 were able to do so by transmitting funds belonging to them by wire transfer, debit card, credit card, by mail or by other means to the said Internet Casino website websites of iMEGA members. Such transactions, of necessity, involve transfer

of funds from the wagerer through financial institutions including banks, clearing houses and the Defendant Federal Reserve System itself. Transactions are processed through financial instruments known as "payment system instruments." A payment system instrument can consist of checks, wire transfers, debit card or direct debit transactions, electronic transfer, or credit card transactions. The actual transfers of funds through payment system instruments does not involve the wagering or betting of any thing of value and does not involve, implicate or rely in any way upon any luck in order to accomplish the transaction which is requested by the bettor and accepted by the Internet Casino. However, these financial institutions may assess a small set fee for the use of their services which is not tied to or dependent upon the placing, winning or losing of a bet or wager in any way.

Congress, on or about October 6, 2006, passed a law entitled "The Unlawful Internet Gambling Enforcement Act of 2006," codified as 31 *U.S.C.* § 5361, et seq. (hereinafter referred to as the "UIGEA" or the "Act"). The Act was signed into law by President Bush on October 13, 2006. The UIGEA creates an offense entitled "unlawful Internet gambling," which the UIGEA attempts to define as to "place, receive, or otherwise knowingly transmit a bet or wager by

any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received or otherwise made," according to 31 *U.S.C.* § 5362(10)(A). The UIGEA imposes criminal liability on any person or entity violating 31 *U.S.C.* § 5363, including a term of imprisonment of up to five (5) years. Under the UIGEA, 31 *U.S.C.* § 5362(10)(A), unlawful Internet gambling means to "place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet is initiated, received or otherwise made." Thus, the UIGEA criminalizes the financing of betting or wagering by financial institutions such as banks, clearing houses and other financial institutions licensed by the Defendant Federal Reserve System, financial services known as payment system instruments, as well as financial companies issuing credit cards.

The government has been prosecuting the Internet gambling business through prosecutions under the Wire Act, 18 *U.S.C.* § 1084, in the Eastern District of Missouri under Indictment No. 4:06-CR-337-CEJ (MLM), in the matter of

United States v. Carruthers, et al. An indictment has been returned under the Wire Act, 18 *U.S.C.* § 1084, in the District of Utah in the matter of *United States v. CurrenC Worldwide, et al.* Criminal complaints have been unsealed in the Southern District of New York in the matters of *United States v. Lawrence* and *United States v. LeFebvre.*

The United States also indicted, earlier this year, two (2) individuals in the Southern District of New York for money-laundering. They are, or were, the executives of Neteller, P.L.C., a company organized, legally operating and publicly traded in the United Kingdom. They were charged with conspiring to transfer funds with the intent to promote Internet gambling. The allegations refer to the activity as "laundering" because Internet gambling is termed purportedly illegal in that indictment.

Further, the government subpoenaed financial institutions such as HSBC, Credit Suisse and Deutsche Bank, which underwrote initial public offerings of offshore Internet Casino website businesses. iMEGA's members have lost significant revenues since the UIGEA was passed. iMEGA's members have been advised that banks, clearing houses, financial services issuing payment system instruments, as well as credit card companies have discontinued the acceptance of funds for transfer by

persons wishing to bet or wager with iMEGA members' Internet Casino websites because of the imminent threat of criminal prosecution, forfeiture and other penalties under the Act.

In the interim, after this case was briefed by both parties, but before an Opinion and Order were issued by the district court, the Defendants, United States Treasury and the Federal Reserve Board, promulgated a Joint Proposed Rulemaking, approximately two (2) months beyond the statutory deadline for rulemaking under the Act. More than 300 comment documents were filed in response to such Joint Proposed Rulemaking.JA-262 to JA-313.

LEGAL ARGUMENT

POINT I

UIGEA IS UNCONSTITUTIONALLY VAGUE WITHIN THE PARAMETERS OF THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS AND CANNOT BE ENFORCED IN THE ABSENCE OF CLARIFICATION OF SEVERAL KEY TERMS, INCLUDING BUT NOT LIMITED TO "UNLAWFUL INTERNET GAMBLING".

The operative thread of the UIGEA is the term of art, "unlawful Internet gambling," the legal definition of which is set forth under 31 *U.S.C.* § 5362(10)(A) as being, "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet, where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made." (Emphasis provided).

The term "unlawful Internet gambling," in turn, forms the basis for 31 *U.S.C.* § 5363, under which "[n]o person engaged in the business of betting or wagering may knowingly accept in connection with the participation of another person in unlawful Internet gambling," any one of several general categories of financial credit instruments such as credit cards, electronic fund transfers, and checks commonly known as payment system instruments. Anyone convicted of violating the Act faces, under 31 *U.S.C.* § 5366(a), a fine and imprisonment for up to five (5) years.

Additionally, under 31 *U.S.C.* § 5366(b), they may be permanently enjoined from "placing, receiving, or otherwise making bets or wagers or sending, receiving, or inviting information assisting in the placement of bets or wagers" regardless of the legal status of any such activities. In essence these statutes combine to create a commercial "death penalty" for any member of iMEGA operating in the Internet gaming industry, even in a lawful manner.

Under 31 *U.S.C.* § 5364(a) the Federal Reserve and the Treasury Department are mandated to jointly prescribe regulations in consultation with the Justice Department to require designated payment systems such as banks and other financial institutions to identify and block or otherwise prevent or prohibit the acceptance of restricted transactions as defined in 31 *U.S.C.* § 5362(7). 31 *U.S.C.* §5364(d) further provides statutory immunity from liability to any designated payment system that, among other things, blocks or otherwise refuses to honor a transaction that it reasonably believes to be a "restricted transaction."

A. The UIGEA is unconstitutionally vague because it does not provide fair notice of its prohibitions.

1. The UIGEA does not provide a clear and ascertainable definition of "unlawful Internet gambling."

The core of the UIGEA, and the source of both its criminal and civil enforcement powers, is the practical and functional meaning of the term "unlawful Internet gambling." As a consequence, pursuant to the due process principles established in the Fifth and Fourteenth Amendments to the United States Constitution, UIGEA must be declared void for inherent vagueness unless this core term of "unlawful Internet gambling" provides the enactment with a "readily ascertainable and constitutionally protected center." *See Smith v. Goguen*, 415 *U.S.* 566, 578 (1974).

Accordingly, the proper inquiry for determining whether the UIGEA is void for vagueness is whether the term "unlawful Internet gambling", as employed throughout the Act: (1) "fail[s] to provide a person of ordinary intelligence fair notice of what is prohibited"; or, (2) "is so standardless that it authorizes or encourages seriously discriminatory enforcement." *U.S. v. Williams*, ___*U.S.* ___, 128 *S. Ct.* 1830, 1845 (2008), *citing Hill v. Colorado*, 530 *U.S.* 703, 732, 120 *S. Ct.* 2480 (2000);

Grayned v. City of Rockford, 408 *U.S.* 104, 108-109, 92 *S. Ct.* 2294 (1972); *quoted by ACLU v. Mukasey*, 534 *F.3d* 181 (3d Cir. 2008).

Defendants Federal Reserve Board and Treasury Department jointly acknowledged in the Notice of Proposed Rulemaking issued under 31 *U.S.C.* § 5364(a) of the UIGEA that "[t]he legality of a particular Internet gambling transaction might change depending on the location of the gambler at the time the transaction was initiated, and the location where the bet or wager was received." 72 Fed. Reg. at 56690 (October 4, 2007). Accordingly, in deciding whether to accept a financial transfer associated with a particular bet or wager that involves the Internet, an iMEGA member, to avoid prosecution under 31 *U.S.C.* § 5363, must correctly ascertain whether the bet or wager is unlawful from where it was placed or where it was received. Although the Notice of Proposed Rulemaking ignores the term "otherwise made," that term also is part of the definition of "unlawful Internet gambling." An iMEGA member must also consider this term in deciding whether a bet or wager is unlawful for purposes of UIGEA.

Thus, iMEGA members must also determine whether an individual player is engaged in lawful or unlawful Internet gambling. Again, 31 *U.S.C.* § 5362(10)(A) makes it unlawful

for a bettor "to place, receive or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet, where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made." Thus, iMEGA members must first determine where the bettor and the bet are located, and then proceed to determine whether the betting violates any applicable law where the bet is placed, received or transmitted. As noted both above in relation to the regulators' comments and below, in relation to the comments of the regulated community, at best, this process creates an ambiguity over legality, but that process also purports to render iMEGA members in violation of law. At worst, constitutionally, there is no applicable standard to identify a true lawbreaker.

Further, iMEGA has proffered that its members who operate online gambling sites do so from places outside of the United States where every aspect of the operation is fully legal under the applicable local law and jurisdictionally not subject to Unites States law. The answer to the question of whether, for purposes of 31 *U.S.C.* § 5362(10)(A), U.S. law extends to reach the

distinct act of receiving a bet which is legal outside of the United States is, at best, a deeply ambiguous one.

For example, a list of the federal criminal statutes that the government would likely argue apply to a non-U.S. operator's act of "receiving" a "bet or wager" would include 18 U.S.C. §1084 (the "Wire Act"), 18 *U.S.C.* §1952 (the "Travel Act"), and 18 *U.S.C.* §1955 (the "Illegal Gambling Business Act" or "IGBA").[1] However, none of these statutes would appear to textually or directly outlaw the act of receiving a bet or wager if done so from outside of the United States.

The Wire Act employs the term "transmission of bets or wagers," in contrast to the UIGEA, which applies a separate legal analysis and treatment to the distinct acts of receiving and sending, respectively. It must be noted, each of these terms could be modified by the third active verb in the first sentence of 31 *U.S.C.* § 5362(10)(A), *namely*, "otherwise knowingly transmit." The government may suggest that the phrase "otherwise knowingly transmit" as used in 31 U.S.C. § 5362(10)(A), being in proximity to the reference later in the same sentence to the "Internet," was

[1] *See* Doyle, *Internet Gambling: Overview of Federal Criminal Law*, Appendix II (Novinka 2006), for a nonexhaustive listing of more than 33 federal enactments having an anti-gambling focus potentially bearing on Internet gambling.

intended to connote that the acts of "place" and "receive" are identical to the acts described in the Wire Act of using a wire communication or facility for the "transmission" of "bets or wagers." This suggestion is undercut, however, by the reality that if Congress intended the UIGEA to unambiguously mirror the Wire Act, it could have simply written 31 U.S.C. § 5362(10)(A) to incorporate the exact same terminology as 18 U.S.C. §1084 employs. Moreover, since such a reading of 31 U.S.C. § 5362(10)(A) would have the practical effect of, essentially, amending the Wire Act to have it unambiguously apply to the Internet and/or to gambling other than sport betting, this suggestion is further undercut by 31 U.S.C. § 5361(b), which makes it explicitly clear that the UIGEA cannot be construed as "altering, limiting, or extending" any federal or state law, which would, of course, include the Wire Act. Moreover, the Fifth Circuit, the only federal appellate court to have decided the issue to date, has held that the Wire Act, by its own terms, applies only to sports betting, and not to any other forms of Internet gambling. *See In re Mastercard Int'l Inc. Internet Gambling Litig.*, 313 *F.3d* 257, 262-263, n. 20, (5th Cir. 2002).

A violation of the Travel Act occurs through either a separate violation of *another* Federal law or a violation of

the state law governing the place where a "gambling offense" has been "committed." If the place where the relevant act is "committed" is construed to be the place at which the "bet or wager" is "received"--and that place is outside of the United States--then no state statute or other Federal law has been violated, with the result that the Travel Act has not been triggered for purposes of 31 *U.S.C.* § 5362(10)(A) or otherwise.

The IGBA employs a similar analysis for illegality based on where a targeted business is "conducted", which leads to the same legal conclusion that, for the same reasons that the Travel Act is inapplicable to the act of "receiving" a "bet or wager" in a locale where such "receipt" is perfectly legal, IGBA is also inapplicable.

It is important to note that, as stated in 31 *U.S.C.* § 5361(d), the UIGEA may not be "construed as altering, limiting, or extending," any Federal or state law, with the result that if these and other Federal statutes did not apply to the act of receiving a bet from outside of the United States before the enactment of UIGEA, then the same holds true today. Further intensifying the innate ambiguity of this enactment are the exemptions the UIGEA contains for, among other things: (i) bets or wagers initiated or received within a single state , such as in lotteries (31

U.S.C. § 5362(10)(B)); (ii) bets or wagers within or among Tribal lands (31 *U.S.C.* § 5362(10)(C)); (iii) certain horseracing activities (31 *U.S.C.* § 5362(10)(D); and, (iv) fantasy or simulation sports games (31 *U.S.C.* § 5362(1)(E)(ix)).

It should be also beyond meaningful dispute that U.S. federal and state law does not and cannot extend to render "unlawful," for purposes of 31 *U.S.C.* § 5362(10)(A), a bet that is placed from outside the United States and received at a location that is also outside of this country. § 5362(10)(E) makes it clear that the intermediate routing of a given transaction over the global Internet has no bearing on the determination of the location or locations in which a bet or wager is initiated, received, or otherwise made. This demonstrates the undeniable ambiguity of the UIGEA. Suppose, for example, a jurisdiction outside the United States provides on its Internet site the following notice: "All bets are deemed made and received in this jurisdiction and subject only to the laws of this jurisdiction." Does this mean that no federal or state law could possibly apply to an Internet bet placed on this site? No one can answer this question, and the ambiguity makes UIGEA unconstitutionally vague as applied to iMEGA members.

As noted, in seeking to avoid a violation of 31 *U.S.C.* § 5363, an iMEGA member receiving a particular Internet gambling transaction at a physical location outside of the United States must also ascertain the precise geographical location on the globe from which the bet was actually placed. In the same vein, many of iMEGA's members, and the interests of those who would be customers of iMEGA'a members as argued below, are simply interested individuals who enjoy betting and participating in Internet gambling, with the result that their continued freedom and financial well-being may well depend on the answer to the question: "Is Internet gambling 'unlawful' in the place where I happen to be now?" While current filtering technologies do offer an impressively high and improving level of accuracy, these invaluable software tools are not infallible. More importantly, current technology also enables a technologically savvy bettor who, for whatever reason, wishes to mask his true location, to make it appear to an Internet gambling site that a gaming transaction has been initiated in a place other than whence it was placed — *i.e.*, a bettor in Utah could make it appear that the "bet or wager" was being placed from some other state, or even some country other than the United States. Thus, every Internet gambling transaction with which an iMEGA member

must deal in seeking in good faith to comply with the UIGEA is rife with inherent technological ambiguity. The site operator must, in essence, rely on the bald representations of the bettor as to his or her actual physical location. The wide proliferation of laptops and handheld devices—and the consequent "on the go" computing such devices enable—renders wholly obsolete the formerly employed tracking methodology of matching a known user's identification to the individual's disclosed physical address. Today, a user may communicate from anywhere on the globe, while on the move, even from a moving vehicle crossing state lines. Thus, a given transaction that is perfectly legal when initiated from a moving automobile nearing a state line may become unlawful by the time the bettor presses the "send" button of her Blackberry as the car reaches other side of the border. The difficulty for the site operator is complicated by the fact that a bettor may list an address in one state as an identifying address while actually placing a bet from another state, or a bettor may forward a bet from his/her home state to an individual in another state who relays the bet to an iMEGA member without revealing the fact that forwarding has occurred.

As an example of the treacherous pitfalls confronting iMEGA members, suppose an Internet gaming site with all of

its operations located in STATE B, which has expressly legalized online gaming or, perhaps, in a location outside of the United States where Internet gambling is wholly legal receives a bet from CITIZEN, who is physically located in STATE A, which has explicitly outlawed Internet gaming. CITIZEN represents when placing the bet that he or she is actually located in STATE C, in which the act of placing a bet on the Internet is not expressly outlawed. Furthermore, the Internet address and message trail for CITIZEN provide no conclusive clues or indices of the true physical location of CITIZEN or any dispositive reason for the operator to determine that CITIZEN is actually located at that moment in STATE B. Accordingly, based on CITIZEN's representations, the operator accepts the bet. Has the operator just committed a crime under 31 *U.S.C.* § 5363?

31 *U.S.C.* § 5363, like many of the other sections of the Act, is ambiguous as to which delineated activity "knowing" modifies. It appears, in connection with 31 *U.S.C.* § 5366, to criminalize "knowing acceptance" of various money or credit transfers, but it does not appear to require that the operator actually *know* that CITIZEN has misrepresented the location from which a bet is actually place. The stakes for an iMEGA member who guesses wrongly in the midst of this stark ambiguity are five (5) years of

imprisonment and a permanent ban from the online gaming business.

Even if 31 *U.S.C.* § 5366 was not considered ambiguous with respect to *mens rea* (which it is), the fact remains that an iMEGA member would have to run the risk that the government would allege *ex post* that the member "knew" where a transaction was placed or, that, if the iMEGA member was unsure as to the place of the transaction it would have to turn it down in order to be sure that it did not "know" the transaction was placed in a jurisdiction where it was illegal. The end result, given the impossibility of being sure as to the origins of an Internet bet, is that iMEGA members would have to reject virtually all transactions, even if all or almost all actually were lawful. The chilling effect produced by the ambiguity would be devastating to the ability to conduct business.

Even if an operator is able to clearly ascertain the physical location in the United States from which a bettor is "placing" a particular "bet or wager," it still must then determine if the bettor's act of "placing" an Internet "bet or wager" is unlawful under any Federal or state (or Tribal) law.

With respect to Federal law, at least one trial-level court has held that the Wire Act is not enforceable against individual bettors. *U.S. v. Baborian*, 528 *F. Supp.* 324, 328 (D.RI 1981). Similarly, in *Sanabria v. U.S.*, 437 *U.S.* 54, 70, fn. 26 (1978), the United States Supreme Court acknowledged that seven separate federal circuit courts of appeal have universally concluded that the IGBA does not extend to "proscribe" participation in a "gambling business" if the individual is merely a "bettor."

As previously discussed, the applicability of the Travel Act turns, in part, on the "commission" of "gambling offenses in violation of the State in which they are committed." Accordingly, to determine whether the bettor's act of "placing" a bet violates any state's law, an operator must be able to instantaneously ascertain just where the bettor is at that moment. Consequently, the factors described above regarding the grave ambiguity an operator faces in ascertaining the actual physical location of a bettor apply with full weight with regards to the Travel Act, as they also obviously do with respect to the burden of ascertaining a state law violation.

As of this writing, four (4)of the fifty (50) states have statutes that make it "unlawful" for an individual bettor to "place" a "bet or wager" using the Internet:

Washington (*Wash. Rev. Code* §9.46.240); Illinois (720 *Ill. Comp. Stat.* 5/28-1(a)(12)); Nevada (*Rev. Nev. Stat.* §§465.091, 465-093); and Wisconsin (*Wis. Stat. Ann.* §945.03(g)). Six other states have laws that might conceivably be construed as outlawing Internet betting by individuals: South Dakota (*S.D. Codified Laws* §§ 22-25A-7, 10); Louisiana (*LA. Rev. Stat. Ann.* §14:90.3); Indiana (*Ind. Code* §35-45-2(c)); Michigan (*Mich. Comp. Laws* §§750.301 and 752.796(1)); Montana (*Mont. Code Ann.* §§ 23-5-112(18)(e) and 23-5-152(1)(b); and, Oregon (*OR. Rev. Stat.* §167.109), with all other states not having the potential prohibitions and/or acceptance of on-line gaming for its residents. New Jersey falls into this second category.

As a direct and proximate consequence, an iMEGA member who operates a non-U.S. Internet gaming site and seeks, in good faith, to comply with the UIEGA must, not only surmount impracticable technological barriers, but simultaneously undertake for each transaction a detailed legal and comprehensive analysis of an impenetrable and open-ended jungle of statutes and case law, each prone to conflicts and nuance, to discern the meaning of "unlawful Internet gambling." The difficulty of that task is underscored by the fact that where a state that is silent

as to Internet betting, but prohibits certain other forms of betting within the terra firma of the state provides no clue whether the state has an intent to bar placement of an Internet bet with a receiver who is in another state or jurisdiction in which receipt of the bet is lawful. For example, suppose a State has a law that prohibits betting on sports events. The question arises whether the State intends to prohibit betting that occurs completely within the State or whether it intends to prohibit anyone inside the State from placing a bet outside the State. Plainly, a citizen of the State could travel to Las Vegas and place a bet that is legal there, or travel to another state in which telephone wagers may be transmitted and place a bet by phone there. The ambiguity problem is exacerbated by the plain fact that, in almost all states, it is impossible to know with certainty the reach of the anti-gambling laws. iMEGA members are even less able to know given their need to deal with all federal law and the laws of every state.

Informed testimony speaking to the draconian nature of this task can be found in the Statement of Louise L. Roseman, who is the Director, Division of Reserve Bank Operations and Payment Systems for the Board of Governors of the Federal Reserve System, the entity empowered to regulate UIGEA. On April 2nd, 2008, at a hearing convened

by the House Financial Services Committee regarding the UIGEA and the proposed rules issued on October 4, 2007, Ms. Roseman noted that the UIGEA "does not spell out which gambling activities are lawful and which are unlawful but rather relies on the underlying substantive Federal and State law," and also acknowledged that the proposed rules "did not specify what constitutes unlawful Internet gambling." She then cautioned that "[t]he activities that are permissible under the various Federal and State gambling laws are not well settled and can be subject to varying interpretation." (Emphasis supplied.) *Proposed UIGEA Regulations: Burden Without Benefit?* Hearing Before the Subcommittee on Domestic and International Monetary Policy, Trade and Technology, U.S. House of Representatives, Serial Publication No. 110-102, April 2, 2008, at page 95, ff., (www.house.gov/apps/list/hearing/financialsvcs_dem/hr040208.shtml).

Similar testimony was offered during this same congressional hearing by Wayne Abernathy of the American Bankers Association, representing the private sector "designated payment systems" that are deputized under the UIGEA to be the first bulwark against "restricted transactions." Cautioning that the term "unlawful Internet gambling" is "too vague a term by itself to be

operationally useful," Mr. Abernathy described the issues confronted by financial institutions in distinguishing lawful from unlawful Internet gambling as including, "who (minors, residents, insiders, public officials, licensed or unlicensed operators, convicted felons) is engaging in what conduct (games of chance, amateur sports, professional sports, horse racing, dog racing, lotteries, and so forth), where (on location, in the same state, across state lines, across international boundaries, in the air, on rivers or at sea, on reservations, and so forth), and when (after hours, Sunday, holidays, before or during events being wagered on)." *Proposed UIGEA Regulations: Burden Without Benefit?* Hearing Before the Subcommittee on Domestic and International Monetary Policy, Trade and Technology, *supra*, at page 45 ff. (Emphasis supplied)

It is just these operational obstacles and this same unsettled legal landscape, in combination with the technological and geophysical impediments to determining the actual physical locale of a bettor at any given moment, that deprives iMEGA's members who receive Internet "bets or wagers" from outside of the United States of the fundamental right to fair notice of criminal jeopardy that the Fifth and Fourteenth Amendments to the Constitution guarantees them.

b. Any *scienter* element contained in the UIGEA is, itself ambiguous and, thus, cannot cure the unconstitutional vagueness of the enactment's criminal enforcement provisions.

31 *U.S.C.* § 5366 punishes "[a]ny person who violates § 5363" with up to five years imprisonment and permanent enjoinment from any activity generally having to do with betting or wagering, whether lawful or otherwise. The conduct, under § 5363, that would subject a "person engaged in the business of betting or wagering" to such punishment is to "knowingly accept in connection with the participation of another person in unlawful Internet gambling" one of the financial instruments listed in the statute and that are commonly employed in the modern electronic economy, such as a credit card, electronic funds transfer, check, or the like. [*Emphasis added.*]

It is a well-settled principle of constitutional law that a "scienter requirement [in a statute] may mitigate a law's vagueness, especially with respect to the adequacy of notice that [certain conduct] is proscribed." *See Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 *U.S.* 489, 499 (1981). However, in order to cure an otherwise vague statute, a "knowingly" element must require that the defendant have performed the act with some degree

of self-awareness. *Hill v. Colorado*, 530 *U.S.* 703, 732 (2000).

In *U.S. v. Williams*, 128 *S. Ct.* 1830 (2008), the Supreme Court held that 18 *U.S.C.* § 2252A(a)(3)(B) contained just such a sufficient *scienter* requirement. Specifically, the Court determined that the word "knowingly", as placed as the first word in paragraph (a) applied to each of the immediately following subdivisions, namely subparagraph (B) and the clauses [(i) and (ii)] under it — defining certain pandering and soliciting behaviors in context of child pornography. The Court stated that § 2252A(a)(3)(B) did not present a case where grammar or structure enables the challenged provision or some of its provisions to be apart from 'knowingly' requirement. The Court concluded that the word 'knowingly' introduces the challenged provision itself, "making clear that it applies to the provision in its entirety, and there is no grammatical barrier to reading it that way."

By contrast, this Honorable Court, in *ACLU v. Mukasey*, 534 *F.3d* 181 (3d Cir. 2008), affirmed the decision in *ACLU v. Gonzalez*, 478 *F. Supp.* 775 (E.D. Pa. 2007) in holding that 47 *U.S.C.* § 231, the Child Online Protection Act (hereinafter referred to as "COPA"), is unconstitutionally vague even though it also included the *scienter* element of

the word "knowingly." In relevant part, COPA punishes anyone who "knowingly and with knowledge of the character of the material," makes available to "any minor," generally over the Internet, "any material that is harmful to minors." The failure of the *mens rea* requirement in COPA to provide clear guidance to those who deal with materials involving children is similar to the failure of UIGEA to provide clear guidance.

In applying these standards to UIGEA, 31 *U.S.C.* § 5363 is ambiguous as to what to the word "knowingly" modifies. When read in connection with 31 *U.S.C.* § 5366, it appears to criminalize the knowing acceptance of the various financial instruments and transfers, but does not appear to require that a payment system operator or gambling site operator actually know that a bet originated from or is bound to a place where the bet is illegal. Further, there would be liability both criminal and civil even if a bettor has misrepresented the location from which a bet has been placed. Finally, it ignores the modern technical reality that the payment system instruments are merely computer information stored in bytes and transmitted from computer to computer, and the regulators and the regulated acknowledge they cannot design practical systems to earmark illegality. In short, UIGEA suffers from the same kind of

fatal vagueness which the Supreme Court recognized in *Williams*, above.

Thus, any Internet gambling entity would be at risk for prosecution no matter what steps it took to assure that individuals are not placing bets from states that make those bets unlawful. A further illustration may help to illustrate the point. Suppose that an iMEGA member takes all conceivable precautions to determine where a bettor is located, but reaches an incorrect legal conclusion. Under the most obvious reading of 31 *U.S.C.* § 5363 and § 5366, it appears that the iMEGA member would be criminally or civilly liable, since it knowingly received a bet in the form of one of the covered financial transactions. In short, there would be strict liability as to the criminal conduct for any bet knowingly received. All bets would be so received and thus strict liability would govern every transaction. Accordingly, and in direct contrast to *Williams, supra,* consistent with the *COPA* cases this Honorable court considered during the past year, the *scienter* or *mens rea* provision of 31 *U.S.C.* § 5363 is, itself, ambiguous. Hence, it cannot and must not be allowed to serve to cure the unconstitutional vagueness from which UIGEA suffers.

2. Other terms in UIGEA are impermissibly ambiguous.

As noted herein, iMEGA members must determine whether a particular individual's bet violates applicable Federal or state law in the state or tribal land where the bet is placed, received and/or transmitted. iMEGA members must further determine whether a Federal or state law is violated in the lands in which the bet or wager is initiated, received and/or otherwise made. Each of these terms are also ambiguous. We offered above the jurisdiction example as to whether a bet made inside or outside the United States that makes Internet gambling. If an iMEGA member is located in that jurisdiction and commits itself to the laws of that jurisdiction, a question arises as to whether it may reasonably and confidently rely upon those laws. What if another state enacts a law that states "any Internet bet that originates in this state is deemed made and received here?" What jurisdiction's law governs?

One might respond to these hypotheticals by saying "let's wait until such statutes are enacted." But, the reality is that the conflicts posed by the hypotheticals exists today in the absence of such statutes. It is clear that Internet gambling is lawful in some jurisdictions, whether they are within or without the United States. Those jurisdictions may well presume, even without specific

statute, that all bets are placed and received within their jurisdiction are governed by their laws and legal. Jurisdictions that purport to make certain gambling unlawful may take the view that any bet originating in their territory are governed by their law. How can any iMEGA member know which law governs? No reliable answer exists, thereby creating further ambiguities under UIGEA.

Moreover, the word "initiate" is itself ambiguous. Suppose that Bettor A sends an email from State A (unlawful to bet) to Bettor B in State B (lawful to bet) suggesting a bet. Does the bet initiate in State A? How would any iMEGA member know whether or not events unfolded in this way. It could not, of course. Yet, it might be criminally and civilly liable for receiving a bet from Bettor B in State B.

The words "or otherwise made" further adds to these ambiguities. Suppose Bettor B sends an email from State b (lawful to bet) to Advisor X in State X (unlawful to bet), and Advisor X advises B as to the bet and how to make it. If B then makes a bet with an iMEGA member in a jurisdiction where such bets are lawful, does B's reliance on Advisor X mean that the bet was otherwise made in violation of law? How would any iMEGA member ever know that such an even occurred. It could not, of course, but might

be criminally and civilly liable from receiving otherwise lawful bet from Bettor B. All of these ambiguities makes UIGEA even more unconstitutionally vague.

B. The UIGEA Is Unconstitutionally Vague Because It Encourages And Authorizes Arbitrary And Significantly Discriminatory Enforcement.

According to *Williams, supra,* 128 *S. Ct.* 1830 at 1846, an alternative basis upon which a statute may be void for vagueness is if the enactment "is so standardless that it authorizes or encourages seriously discriminatory enforcement." In formulating this standard, the Court cited and referred to its earlier holding in *Grayned, supra,* 408 *U.S.* at 108 (1972), in which the Court described the rationale for this test as being that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."

This failure of UIGEA to provide an ascertainable and workable definition of "unlawful Internet gambling" demonstrates the precise lack of standards cautioned against in *Williams* and the other cases cited above. As a result, the enactment's vague reference to an unsettled and undifferentiated body of Federal and State law provides direct authorization and encouragement for arbitrary and "seriously discriminatory" enforcement by Federal law

enforcement agencies. In addition, the designated payment systems that must enforce the law have become the "police, prosecutors, judges, and executing marshals in place of real law enforcement officers" tasked with identifying, blocking, and otherwise prohibiting or preventing restricted transactions in connection with unlawful Internet gambling. *See Proposed UIGEA Regulations: Burden Without Benefit?* Hearing Before the Subcommittee on Domestic and International Monetary Policy, Trade and Technology, *supra,* at 47-48.

The substantial criminal penalties provided for in UIGEA and the commercial death penalty available under the statute provide any government prosecutor or regulator with a mighty weapon to chill all Internet betting. As long as an iMEGA member is under threat of liability form one or more of the various interpretations of UIGEA set forth above, the chilling effect of the statute could not be more obvious.

The federal agencies statutorily designated to enforce the UIGEA, the Federal Reserve and the Treasury Department, in consultation with the Justice Department, have themselves been consistent in warning about the pitfalls presented by the lack of a clear statutory definition of the term "unlawful Internet gambling." For example, in the

Notice of Proposed Rulemaking issued on October 4, 2007, the rule-making agencies themselves acknowledged the difficulties presented by this lack of a statutory definition for "unlawful Internet gambling" by stating that "[t]he proposed rule does not attempt to further define gambling-related terms because the [UIGEA] itself does not specify which gambling activities are legal or illegal and the [UIGEA] does not require the Agencies to do so." Federal Resserve System, 12 CFR Part 233, Regulation GG; Docket No. R-1298; Treasury Department, 31 CFR Part 132, RIN 1505-AB78 (October 4, 2007). They then warned, "[a]pplication of some of the terms used in the [UIGEA] may depend significantly on the facts of specific transactions and could *vary* according to the location of the particular parties to the transaction or based on other factors unique to an individual transaction." Louise Roseman, the Federal Reserve's Director of Reserve Bank Operations and Payment Systems, cautioned in her April 2nd, 2008 testimony before the House Financial Services Committee that "the ability of the final rule to achieve a substantial further reduction in the use of the U.S. payment system for unlawful Internet gambling is uncertain." *Proposed UIGEA Regulations: Burden Without Benefit?* Hearing Before the Subcommittee on Domestic and International Monetary Policy, Trade and

Technology, *supra*, at 96. And as noted below in Point Two, the private sector designated payment systems that are deputized under the UIGEA to enforce the law against unlawful Internet gambling have expressed similar concerns about the enactment's lack of workable standards for identifying "unlawful Internet gambling." As a consequence, the private sector, faced with the prospect of regulatory penalties for guessing incorrectly and not blocking a given restricted transaction, have noted that there is a real and substantial likelihood that they will avoid jeopardy altogether by simply blocking <u>any</u> transaction that might be a "restricted" one and, in the process, block many fully lawful transactions that should not be "restricted" at all. Notice of Proposed Joint Rulemaking at 19, JA-280. This process, called "overblocking," is discussed below in more detail. Moreover, the effort of financial payment system participants to avoid unwanted regulatory controversy is exemplified by the discussions both in the preamble to the proposed rules and in the comments to them calling for the creation of a list of unlawful Internet gambling businesses. Notice of Proposed Joint Rulemaking at 24, JA-285.

This will create a "blacklist" which would, by its very nature, punish the innocent along with the potentially guilty, in plain derogation of all principles of fundamental fairness and due process. Accordingly, the UIGEA, by virtue of the indisputable vagueness of its terms, provides an inherent incentive for designated payment systems to engage in the very kind of "arbitrary" and seriously discriminatory enforcement that *Williams* and its progeny decry.

Even more importantly, the UIGEA explicitly authorizes arbitrary and discriminatory enforcement. 31 *U.S.C.* § 5364(d), extends statutory immunity from liability to any person that identifies, blocks, prevents or prohibits a transaction that it reasonably believes is a restricted transaction. Thus the Act explicitly invites a designated payment system, when in doubt as to whether a given transaction is connected with unlawful Internet gambling, to block it with impunity, without fear of sanction or penalty from anyone. Similarly providing statutory authority for overblocking is 31 *U.S.C.* § 5364(b)(4), which, by expressly instructing the designated federal agencies to ensure that those categories of transactions expressly exempted under 31 *U.S.C.* §§ 5362(10)(B), (C), and (D)(i) are "not blocked or otherwise prevented," implicitly

authorizes unrestricted "blocking" of every other transaction. And further,

> [t]he Agencies believe that the Act does not provide the Agencies with the authority to require designated payment systems or participants in these systems to process any gambling transactions, including those transactions excluded from the Act's definition of unlawful Internet gambling, if a system or participant decides for business reasons not to process such transactions.
>
> Notice of Proposed Joint Rulemaking at 19, JA-280.

Neither UIGEA nor the proposed rules, in derogation of fundamental due process principles, provide any guidance regarding factors that might give rise to the requisite "reasonable belief" that would justify a designated payment system in blocking a transaction. Similarly, an Internet gaming operator who may be justifiably aggrieved that a designated payment system is persistently blocking transactions that may not be restricted transactions, or who has been unfairly included on some kind of official or *de facto* "blacklist," is statutorily denied any avenue to set a legal benchmark by which to determine what constitutes unlawful Internet gambling.

C. The UIGEA Unconstitutionally Delegates To The Executive Branch And To The Judiciary The Task Of Defining "Unlawful Internet Gambling" And Fails To

Provide Law Enforcement With Sufficient Standards And Guidance.

One of the earliest landmark decisions in the evolution of the vagueness doctrine is *U.S. v. Reese*, 92 *U.S.* 214 (1875). In *Reese*, the Court, after determining that without judicial polish a certain Reconstruction-era statute criminalizing voting rights violations would be unconstitutionally vague and overly broad under the Fifteenth Amendment, nevertheless refused to trim the enactment, stating "it would certainly be dangerous if the legislature could set a large enough net to catch all possible offenders and leave it to the courts to say who could be rightfully prosecuted." To do so, the Court concluded, would substitute the judicial for the legislative branch of government.

As the Supreme Court instructed nearly a century later "legislatures may not abdicate their responsibilities for setting the standards of criminal law" but must, at a minimum, "establish minimum guidelines to govern law enforcement." *Smith v. Goguen*, 415 *U.S.* 566, 574-75 (1974) Two years earlier, in *Grayned, supra,* 408 *U.S.* at 108-09, the Court had enunciated the rationale for this continuing concern, warning that, "[a] vague law impermissibly

delegates basic policy matters to policemen, judges, and juries."

With UIGEA, by contrast, the definition of "unlawful Internet gambling" varies across states, and by the type of game, the age of the player, the amount wagered and whether that wager is personal winnings, and even, with respect to sports betting in certain states, whether the subject of the betting has commenced or not (*e.g.*, "has the soccer match started yet or can I can still place a bet?"). Hence, even if it was constitutionally permissible as a matter of separation of powers for the legislative branch to defer this basic function to the regulators, and they in turn to the regulated, there exists no consensus benchmark to which a court may turn in crafting an elemental definition of unlawful Internet gambling, the commission of which, in turn, is a fundamental predicate for the commission of a civil and/or criminal violation of UIGEA.

As a point of comparison, in mounting prosecutions under the Wire Act and the Travel Act, Federal prosecutors must bear the burden of proving, beyond a reasonable doubt, the commission of a state law crime as a predicate for proving a violation of these Federal statutes. Accordingly, no court would ever punish a defendant under these statutes without the government first having met its burden of

proof, much less countenance the government preempting its duty to meet this burden by drafting a private third party to punish the government's target if the private entity merely has reason to suspect that the target may have engaged in conduct that violates some unspecified state law. However, this is precisely what the UIGEA was carefully and deliberately crafted to do.

It is also important to remember that Congress could draft a statute that constitutionally defines a prohibited act by reference to a separate body of law. In *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 *U.S.* 548 (1973), the Court considered a challenge to 5 *U.S.C.* §7324(a)(2) (the Hatch Act), which defines, with respect to certain executive branch and District of Columbia employees, the forbidden conduct of taking an active part in political management or in a political campaign by reference to those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, through determinations of the Civil Service Commission prescribed by the President. A three judge panel of the U.S. District Court for the District of Columbia below had determined that this formulation unfairly forced concerned employees to test for forbidden partisan conduct

against an unworkable framework consisting of several thousand Civil Service Commission adjudications and prior Commission proceedings, orders, and rulings, many of which were termed undiscoverable, inconsistent, or incapable of yielding any meaningful rules to govern present or future conduct.

The Supreme Court concluded, however, in reversing the District Court, that the Hatch Act was saved from unconstitutional vagueness by the fact that, in 1939, the Civil Service Commission's extensive body of decisions and rulings had been essentially subsumed into *Civil Service Form No. 1236*, as amended in 1942, 1944, and 1966, which, in conjunction with a printed summary card listing the most pertinent rules, had been promulgated as published regulations in 1970 under 5 *C.F.R.* pt. 733. By contrast here, as the designated executive branch agencies and private financial services providers have each testified, neither UIGEA nor the proposed rules promulgated under it provide any such workable guidance. Furthermore, it must be emphasized that the designated agencies could not now legally attempt to remedy this shortfall by issuing final regulations containing "safe harbor rules" proclaiming, for example, that: "For purposes of complying with §§ 5363 and 5364, any bet or wager involving the Internet may be

treated as constituting 'unlawful Internet gambling'," or, perhaps, "For purpose of 31 *U.S.C.* § 5363, every Federal or State law with any connection to gambling may be regarded as being applicable to any 'bet or wager' involving the Internet." Ignoring for the moment the stark reality that, as a practical matter, the overblocking practices encouraged and authorized under § 5364 lead essentially to this same result, the legal effect of such safe harbor rules would amount to a significant "altering, limiting, or extending" of existing Federal and state law, in direct contravention of 31 *U.S.C.* § 5361(b). More importantly, such regulations would not constitute a permissible exercise by the Executive branch of legislative authority properly delegated to it by the Congress, as occurs sometimes, for example, with respect to tax regulations issued under the Internal Revenue Code, but, instead, a wholly unconstitutional abridgement of Article II powers by the Executive Branch to draft laws that the Constitution has unquestionably assigned to the Congress, and which the Congress may not delegate.

Therefore, the UIEGA is unconstitutional not merely because it attempts to incorporate by reference an amorphous body of undifferentiated law as a substitute for workable standards that clearly define the conduct that the

enactment seeks to punish, both criminally and civilly—although this factor, standing alone, *would* be sufficient to disqualify the statute. Nor is the UIGEA unconstitutional only because, to quote *Grayned, supra,* 408 *U.S.* at 108, it impermissibly delegates to the executive branch basic policy matters -- nor even because it deputizes private financial payment system entities to function, without meaningful guidance or standards, as both *de facto* and *de jure* law enforcement arms of the federal government. Instead, it is the aggregation of all of these things, separately and together, that cause the UIGEA to fall well short of constitutional muster and therefore must be struck down as such.

POINT II

THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFF COULD NOT ASSERT THE FIRST AMENDMENT RIGHTS OF PRIVATE CITIZENS WHO MAY ENGAGE IN INTERNET GAMBLING BUT FOR THE ACT'S OVERREACHING PROHIBITIONS.

The district court ruled that Plaintiff had standing to assert whether the Act burdened a protected legal right and moved into a determination of the merits of the First Amendment arguments made by Plaintiff in connection with its motion for issuance of a preliminary injunction. JA-15. However, in denying that iMEGA could assert the rights of any third parties, the district court stated that "[t]he plaintiff here has failed to explain how it, as an association promoting electronic gambling, shares a 'close relationship' with individual electronic gamblers. . . . The plaintiff also does not articulate what obstacles exist to prevent those individuals from bringing their own actions." JA-27. The district court held that there was no showing that individuals were barred from asserting individual claims, and that iMEGA did not represent their individual interests.

However, iMEGA asserted sufficient facts to show that it more than adequately represents the interests of private individuals who wish to gamble using iMEGA's members' services but face consequences under the Act. iMEGA was

formed to represent the interests of its members, who are businesses and/or individuals involved in internet interactive media, entertainment and gaming, including but not limited to Internet gambling, not only as business, but participants themselves. While iMEGA does not itself participate in any electronic gaming on the Internet, some of its members are individuals and/or business entities who actively engage in Internet gambling both with and without a fee. Some iMEGA members offer and/or participate in Internet gambling, which is available to private individuals anywhere in the world as a form of entertainment which can be engaged in by persons within the privacy of their homes or other places using private personal computers.

In *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008) the Fifth Circuit Court of Appeals rejected the government's argument that commercial businesses could not assert their individual customer's rights because they lacked third party standing. The court held that "businesses can assert the rights of their customers and . . . restricting the ability to purchase an item is tantamount to restricting that item's use." *Id.* at 743, *citing Griswold v. Connecticut*, 381 *U.S.* 479 , 481, 85 *S.Ct.* 1678 (1965) and *Carey v. Population Servs. Int'l*, 431

U.S. 678, 683-91, 97 *S.Ct.* 2010, 2015-19 (1977). Clearly, under this reasoning, iMEGA can assert to this court the rights of the customers of its members and its members themselves who, after all, are the consumers of some of services in question.

Further, iMEGA submits that it demonstrates the requisite "close relationship" to private citizens engaging in Internet gambling because the Act and the proposed rules require payment systems to identify customers accessing Internet gambling sites, and that identification raises constitutional questions. The Proposed Joint Rulemaking contains the following regulations which apply to each of the five (5) regulated payment systems. Proposed Rule (hereinafter referred to as "PR") § 5(a) states that:

> [a]ll non exempt participants in designated payment systems shall establish and implement written policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions.

PR §6(b-f) sets forth so called "Safe-Harbor" provisions providing that regulated payment systems could be free from liability, but only they adopt policies and procedures which:

> Address methods for conducting due diligence in establishing or maintaining a customer relationship designed to ensure that the customer will not originate restricted transactions as ACH debit transactions or

> receive restricted transactions as ACH credit transactions through the customer relationship, * * *.

Some of the proposed methods which may be used by the financial institutions are screening potential commercial customers to ascertain the nature of their business, creating contract language prohibiting restricted transactions and creating a system for reporting and acting upon transactions which may be illegal, including segregation of funds and notification to the government. In responding to the proposed rules' procedures for reporting illegal conduct, one (1) private Internet gambler stated that: "[t]he agencies seem to suggest that as a U.S. citizen my name might be placed on a list of criminals without evidence of a crime? . . . Not only would I then have an account closed, which any bank can do for business reasons, but likely be unable to open an account anywhere." *Comment of Joseph E. O'Neill*, www.regulations.gov/TREAS-DO-2007-0015-0127.1. Another private Internet gambler commentated that: "I think it is wrong for the government to decide what they think is right for us." *Comment of Barry Nelson*, www.regulations.gov/TREAS-DO-2007-0015-0123.

In its comment, Bank of America noted that the "Safe Harbor" provisions of the proposed rules are inconsistent and could allow transactions which should be blocked to be

approved, but could nonetheless exempt possible illegal transactions if it is not "reasonably practical" to block or prevent the transaction. *Comment of Gregory A. Baer, Deputy General Counsel,* Bank of America, www.regulations.gov/TREAS-DO-2007-0015-0128.1. Financial institutions commented that the Act and the proposed regulations purposely do not define what is an illegal Internet gambling transaction, but require the payment systems to do so and promise safety from prosecution only if citizens are reported for activities which may be otherwise be legal! See, e.g., *Comment of Farmers Capital Bank Corporation,* www.regulations.gov/ TREAS-DO-2007-0015-0105.1; *Comment of Visa U.S.A.,*www.regulations.gov/ TREAS-DO-2007-0015-0001; *Comment of American Bankers Association,* www.regulations.gov/TREAS-DO-2007-0015-0001, calling the proposed regulations a "compliance trap."

Commenting organizations also pointed out that the proposed regulations may invade private legal transactions in Internet gambling by "deputizing" financial institutions to engage in scrutiny and segregation of the transactions deemed to involve the movement of funds via the Internet, without standards to determine if they involve internet gambling. The Consumer Bankers Association raised concerns

about the impact of the proposed transaction prohibitions, questioning whether:

> [t]his blocking responsibility [is] the same prescribed action set forth in anti-money laundering regulations. . . that includes not only cessation of processing, but also . . . payment of the amount of the transaction into a blocked account in order to preclude the use of the funds?

Comment of Joseph L. Crouse, Legislative and Regulatory Counsel, Consumer Bankers Association, www.regulations.gov /OTS-2008-0004-0127.1.

The United States Supreme Court and the Third Circuit recognize that such reporting raises privacy issues in the gambling context. The United States Supreme Court reversed its own prior holdings regarding whether the declaration of income from wagering under § 4412 of the Internal Revenue Code implicated constitutional prohibitions against self incrimination. *Marchetti v. United States,* 390 *U.S.* 39 (1968); and, *Grosso v. United States,* 390 *U.S.* 62 (1968). In Marchetti:

> [t]he Court [in prior cases] reasoned that even if the required disclosures might prove incriminating, the gambler need not register or pay the occupational tax if only he elects to cease, or never to begin, gambling. There is, the Court said, 'no constitutional right to gamble.'
>
> We find this reasoning no longer persuasive. The question is not whether petitioner holds a 'right' to violate state law, but whether, having done so, he may

be compelled to give evidence against himself. *Marchetti, supra,* at 51 (Emphasis provided).

The Court's about-face in *Marchetti* recognized the rights of an individual to be protected under the constitution from possible self-incrimination coming from merely reporting wagering income. The Third Circuit has followed the *Marchetti* doctrine in *United States v. Quatermain,* 613 *F.2d* 38 (3d Cir. 1980), marking its concern with potential incrimination and privacy issues from mere reporting regulations.

Thus, iMEGA submits that it adequately represents the interests of those individuals and entities which face a significant risk of harm regardless of whether Internet gambling is legal at some point in the internet transaction. This dichotomy between legal versus illegal gambling is at the heart of the problems of enforcement inherent in the Act as well. Under the Act the criminalization of otherwise innocent individuals and seizure of property is the result of conduct occuring anywhere along the Internet stream, although the Act purports to reach only gambling where it is "unlawful." (Emphasis provided) The constitutional parameters are more fully explored *infra.*

In *Doe, et al., v. Prosecutor, Marion County, Indiana,* ___ *F.Supp.2d* ___, 2008 *WL* 2600177 (S.D. Ind. 2008), the Plaintiffs, persons subject to sex offender registration, challenged a state law provision requiring consent to searches of their personal computers with internet capability and installation of monitoring software. The law did not specify by whom the computers could be searched and monitored remotely. The court held that the Plaintiffs had standing to bring a pre-enforcement action on behalf of themselves and those potentially affected by the law, including family members. The court enjoined enforcement because the regulation could potentially reach private computer records such as personal finances or the computerized documents of spouses or other members of the household not subject to the impending registration law. The court granted standing and pre-enforcement injunctive relief because the class of Plaintiffs had to "choose now between committing a new crime by refusing to consent and giving up their Fourth Amendment rights to privacy and security in their homes, their 'papers,' and their effects." *Id.* at ___, 2008 *WL* 2600177 at 2. Further, the court ruled that even though the regulation was silent as to computerized monitoring of Internet activity, such investigation was a law enforcement activity and delegation

to private companies could not be used to avoid responsibility for state action.

Here, UIGEA and the proposed regulations regulate the Internet gambling business in the same way as in *Doe* - remote computer monitoring of Internet activity which may or may not be "illegal" or "unlawful" depending on where parts of the transaction may travel. As already noted, the actual regulated community under the Act has unequivocally stated that the proposed regulations place them in the role of investigators without standards and without a clear understanding of what transactions to block. Therefore, iMEGA submits that this court should determine that iMEGA sufficiently represents the interests of third party private citizens in this matter. Contrary to the district court's determination, iMEGA represents the rights and interests of its members and their customers, who face criminal prosecution and loss of property under the Act.

POINT III

THE DISTRICT COURT ERRED IN EQUATING INTERNET GAMBLING WITH ILLEGAL ACTIVITY, WHERE THAT CONDUCT IS PRIVATE, CONSENSUAL AND LEGAL UNDER THE ACT.

The Act and the proposed regulations raise significant constitutional issues with regard to the rights of iMEGA's members and private persons who seek to use the services of its members for Internet gaming and gambling. The district court below found that iMEGA's assertion that Internet gambling is entitled to First Amendment protections was without merit, holding that the conduct barred by the Act was not entitled to such protections as it was mere conduct, not a protected interest. JA- (Opinion at 18-19).

The district court further held that "[t]he Plaintiff has not identified, and the Court does not discern, any 'communicative element' inherent in the only conduct criminalized by UIGEA - the taking of another's money." JA- (Opinion at 19). However, Plaintiff submits that this argument failed to consider the analysis in *Lawrence v. Texas, 539 U.S.* 558 (2003), which recognized a First Amendment right to private, consensual legal conduct within the home which does not have a "communicative element." The district court below failed to address the constitutional implications of private Internet conduct, not specifically "expressive," which permeates our society.

Lawrence, supra, struck down a statute in Texas which prohibited sodomy between members of the same sex. Defendant and his companion were arrested for having consensual anal sex in their home. The court phrased the question presented as "whether the petitioners were free as adults to engage in their private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." *Id.* at 564, *S.Ct.* at 2473. In striking down the conviction on constitutional grounds, the Court stated that:

> Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.

Id. at 575, *S.Ct.* at 2482. The court struck down the Texas Sodomy law because it proscribed private, consensual conduct which did not involve minors, force or public conduct, which was subject to increasing acceptance and uneven treatment as a crime from state to state. *Id.* *Lawrence* requires a court to examine <u>any</u> law attempting to restrict private consensual conduct for its substantive validity. Therefore, in examining the Act's regulation of

internet gambling, the first reason that this court should restrain any further enforcement of the Act is because the Act, and the proposed regulations, unconstitutionally interfere with private conduct in an unevenly applied landscape of state and Federal regulation.

There were several reasons advanced for the adoption of the Act by its sponsors and supporters. The sponsors of the Act dealt with gambling on the Internet as a moral dilemma, placing this legislation squarely on all fours with *Lawrence.* They cited cases of suicide, damage to the fabric of the American family, gambling by minors, and financial ruin. Other supporters cited loss of tax revenue from unregulated billions in gambling revenues. *Congressional Record,* 109th Congress Debate, 109th Congress, Debate on H.R. 4411, July 13, 2006 at Govtrac.com.

There is no doubt that constitutional protections extend to transactions over the Internet. In fact, this case before this Court is one of the first delving into the broader area of digital civil rights. Striking down the Act would produce an opinion of landmark proportion in this burgeoning field of technology. The United States Supreme Court has made clear that the First Amendment's protection extends to speech on the Internet. *See Reno v. ACLU,* 521 *U.S.* 844, 870-71 (1997). Speech is more than the utterance

of words; it involves transaction through a communicative medium, which is the Internet. To merely view transactions as to communicative because they are not "uttered" fails to recognize the present and stature and nature of digital civil rights and the Internet. Against this backdrop of technical achievement and growing acceptance of gambling (with some limitations), the constitutional protections afforded by *Lawrence* have been applied to protect conduct which occurs over the Internet. In *Reliable Consultants, Inc. v. Earle*, 517 *F.3d* 738 (5th Cir. 2008), Plaintiffs operated retail stores in Texas that carried a stock of sexual devices. They were sold for off-premises private use. A second Plaintiff also engaged in the retail distribution of sexual devices. It operated no facilities in Texas and only sold sexual devices by Internet and by the United States Postal Service. The *Reliable Consultants* Plaintiffs filed their declaratory action to challenge the constitutionality and enjoin the enforcement of state statutory provisions criminalizing the promotion of sexual devices. They alleged that these provisions violated the substantive liberty rights protected by the Fourteenth Amendment and their commercial speech rights protected by the First Amendment and Due Process Clauses.

The court struck the statute down, stating in no uncertain terms that:

> Just as in *Lawrence*, the State here wants to use its laws to enforce a public moral code by restricting private intimate conduct. The case is not about public sex. It is not about controlling commerce in sex. It is about controlling what people do in the privacy of their own homes because the State is morally opposed to a certain type of consensual private intimate conduct. This is an insufficient justification for the statute after *Lawrence*. *Id.* at 746 (Emphasis provided).

Therefore, the court struck down the regulation of conduct by Internet sale. The application of *Lawrence* was direct and succinct.

> [W]e hold that the Texas law burdens this constitutional right. An individual who wants to legally use a safe sexual device during private intimate moments alone or with another is unable to legally purchase a device in Texas, which heavily burdens a constitutional right. This conclusion is consistent with the decisions in *Carey* and *Griswold*, where the Court held that restricting commercial transactions unconstitutionally burdened the exercise of individual rights. *Id.* at 744.

Further, the court reiterated *Lawrence's* formula that the act was otherwise: (1) private, (2) consensual; and, (3) legal. *Id* at 746, fn. 40.

iMEGA submits that the rationale of *Lawrence* and *Reliable Consultants* should be followed in this matter, where specific non-sexual conduct, at the national and international level, not merely the state level, is protected by the Constitution. In *Borden v. School Dist. of*

Tp. of East Brunswick, 523 *F.3d* 153 (3d Cir. 2008), this Honorable Court dismissed a challenge to a school board regulation which prohibited a school team coach from participating in the team's prayer session before games. The conduct was described as "bowing the head and taking the knee," referring to the team's practice. The court equated the conduct to "expression" and stated:

> the proper inquiry is whether a statute or policy "prohibits a substantial amount of protected expression." . . . To determine how broad the statute or policy sweeps, we look to four factors: (1) the number of valid applications, (2) the historic or likely frequency of conceivably impermissible applications, (3) the nature of the activity or conduct sought to be regulated, and (4) the nature of the state interest underlying the regulation." *Id.* at 165 (Citations omitted).

iMEGA submits that *Borden's* four part overbreadth test is appropriate for evaluation of all conduct which may have constitutional protections, whether expressive or private. In regard to the first factor, the number of valid applications, the *Borden* court looked to the actual activity which Plaintiff sought to validate and determined that the potential for teacher involvement in school activities which violate the Establishment Clause of the Constitution was "immense." The number of possible Internet gambling transactions is more than "immense," but the significant factor of "filtering," which this court found

determinative in striking down COPA in *ACLU v. Mukasey, 534 F.3d* 181 (3d Cir. 2008) undercuts any governmental concern that the volume and harm of illegal Internet gambling cannot be limited without the Act's protections. The district court, in the *ACLU* case, found, as a fact, that existing technology can not only filter out or prevent unwanted Internet transactions, but also can pinpoint them geographically. *ACLU v. Gonzales,* 478 *F. Supp. 2d* 775, 807 (E.D. Pa. 2007). Furthermore, Plaintiff showed in the trial court that Internet gambling filtering technology is readily available and was even proposed more than four years before the Act's passage.

The second factor, the historic or likely frequency of conceivably impermissible applications, is clearly met here because, the Act and the proposed regulations deliberately fail to define unlawful Internet gambling transactions, undercutting the very rationale of the Act. (Emphasis provided) The regulated community defined in PR §6(b-f) notes that they cannot identify whether a transaction is legal or illegal and this dilemma shall result in a myriad of transactions being blocked and some being passed through improperly, thereby even further highlighting the vagueness of "unlawful Internet gambling."

The actual likelihood of conceivably impermissible applications because of the variables of state to state regulation, was recently applied by this court to strike down, on First Amendment grounds, the Federal ban on selling depictions of animal cruelty over the Internet. In *U.S. v. Stevens,* 533 *F.3d* 218 3d Cir. 2008), this court struck down the conviction of Defendant in the first prosecution to proceed to trial under 18 *U.S.C.* §48 for knowingly selling depictions of animal cruelty with the intention of placing those depictions in interstate commerce for commercial gain. This court, in examining 18 *U.S.C.* §48 to determine whether it was narrowly tailored to further a legitimate governmental interest, noted that anti-animal cruelty statutes have been enacted in all fifty states and the District of Columbia. *Id.* at ___, 2008 WL 2779529 at 12. This court noted that "[t]hese statutes target the actual conduct that offends the sensibilities of most citizens. The fundamental difference between these state statutes and § 48 is that the latter does not federally criminalize the conduct itself." *Id.* (Emphasis provided).

This is precisely the defect which has been pointed out by the major financial institutions filing comments, as noted herein, regarding the proposed regulations

promulgated under the Act. The Act prohibits payment system transactions involving Internet gambling where it is illegal, but neither the Act nor the regulations provide any means to identify it except to instruct the regulated community to determine legality or illegality, where the states all have concurrent gambling laws which vary from jurisdiction to jurisdiction.

Factor number three in *Borden*, the nature of the activity or conduct sought to be regulated, is internet gambling. As already argued this conduct partakes of Constitutional privacy concerns. Under *U.S. v. Stevens, supra,* the uneven state-to-state treatment of gambling alone militates against the government's requirement to intercept Internet gambling transactions. However, the trial court below never distinguished between legal and illegal gambling. (Emphasis provided) The Act itself requires distinction between the two, but fails to provide a way to do so constitutionally. The proposed regulations, as have been discussed, deliberately do not distinguish between legal and illegal Internet gambling and leave such distinctions, with potential criminal and civil penalties, to private entities.

Finally, factor four, the nature of the state interest underlying the regulation, is recognized in the area of

gambling but also is noted to be eroding. In *Greater New Orleans Broadcasting Ass'n v. U.S.* 527 *U.S.* 173, 119 *S.Ct.* 1923 (1999), the United States Supreme Court invalidated regulations banning advertising of casino gambling which crossed state lines. The government cited a number of interests which were served by the regulations (as were noted in the creation of this Act), including the control of corruption, organized crime, bribery, narcotics trafficking and other illegal conduct. 527 *U.S.* at 185-186; *S.Ct.* at 1931. The Supreme Court, however, rejected such arguments and found that:

> We can accept the characterization of these two interests as "substantial," but that conclusion is by no means self-evident. No one seriously doubts that the Federal Government may assert a legitimate and substantial interest in alleviating the societal ills recited above, or in assisting like-minded States to do the same. . . . . Despite its awareness of the potential social costs, Congress has not only sanctioned casino gambling for Indian tribes through tribal-state compacts, but has enacted other statutes that reflect approval of state legislation that authorizes a host of public and private gambling activities. . . . That Congress has generally exempted state-run lotteries and casinos from federal gambling legislation reflects a decision to defer to, and even promote, differing gambling policies in different States.

527 *U.S.* at 186-187; *S.Ct.* at 1932. UIGEA here itself recognizes significant gambling exceptions to the rule, echoing the Supreme Court's holdings in *Greater New Orleans Broadcasting Ass'n, supra.*

For all these reasons, Plaintiff submits that it has demonstrated a protectable constitutional interest in the privacy of consensual legal Internet gambling transactions, and that the Act and proposed regulations impermissibly infringe on that right. Under *Lawrence* and *Reliable Consultants,* iMEGA submits that conduct in private which is not otherwise illegal must receive protection from invasive government regulation. Under the various recent Third Circuit cases cited, UIGEA and proposed regulations fail to satisfy the important balancing test between the government's regulatory interest and the risk of interfering with constitutional rights. Thus, iMEGA submits that the district should overrule the trial court below and enter an Order granting a preliminary injunction and related relief sought by the Plaintiff, or, in the alternative, remand the matter to the trial court with instructions to issue the preliminary injunction.

CONCLUSIONS

For all of the reasons set forth above, this Honorable Court should reverse the district court below, strike down UIFEA as unconstitutional, enjoin the enforcement of UIGEA or, in the alternative, remand the matter to the district court with instructions to enjoin enforcement of UIGEA. The Act is unconstitutionally void for vagueness because it fails to define "unlawful Internet gambling", despite that same is the target of the Act and, as a result, in the absence of a clearly defined foundation, all of the subsequent proposed rules and regulations built upon it must fail. Accordingly, UIGEA must be found unconstitutional for failing to clearly proscribe the behaviors it seeks to regulate.

Further, the Act, and the proposed regulations, regulate internet gambling business by remote computer monitoring of internet activity which may or may not be legal and clearly impacts on privacy concerns under the First Amendment and the Due Process Clause. The regulated financial community under the Act has unequivocally stated that the proposed regulations place them in the role of investigators without standards, without guidelines and without a clear understanding of what transactions to block. Therefore, iMEGA submits that this court should

reverse the district court and hold that iMEGA sufficiently represents the interests of third party private citizens in this matter to assert these claims not only for its members but those members of the public who, by corollary, are customers of the businesses which have been eliminated by the Act. Contrary to the district court's determination, iMEGA represents the rights and interests of its members and their customers, who face criminal prosecution and loss of property under the Act.

Appellant submits that it has demonstrated a protectable constitutional interest in the privacy of consensual legal Internet gambling transactions and that the Act and proposed regulations impermissibly infringe on that right. Under *Lawrence* and *Reliable Consultants* supra iMEGA submits that conduct in private which is not otherwise illegal must receive protection from invasive government regulation. Under *Borden, supra,* the Act and its proposed regulations fail to satisfy the important balancing test between the government's regulatory interest and the risk of interfering with constitutional rights.

Therefore, iMEGA submits this the court should overrule the district court below, find UIGEA unconstitutional and enter an Order granting Appellant injunctive and related relief sought by the Plaintiff, or,

in the alternative, remand the matter to the district court with instructions to issue the injunctive and related relief sought.

Dated:

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Interactive Media Entertainment & Gaming Association, L.L.C.,	:	Appeal No. 08-1981
Plaintiff-Appellant,	:	On Appeal from the United States District Court,
-vs-	:	District of New Jersey, Docket No. CV-072625-07
Peter D. Keisler, Attorney General, *et al.*	:	(MLC)
Defendants-Appellees.	:	Sat Below: Hon. Mary L. Cooper, U.S.D.J.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a).

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

I, Philip G. George, Esquire, of full age, hereby depose and say:

1. I am an Attorney at Law of the State of New Jersey, and I am an Associate in the Law Firm of Eric M. Bernstein & Associates, LLC, the attorney of record in this matter representing the Plaintiff-Appellant, iMEGA, L.L.C. I am fully familiar with the facts of this matter.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   [X] this brief contains 13,925 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

   [ ] this brief uses a monospaced typeface and contains <state the number of> lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   [X] this brief has been prepared in a proportionally spaced typeface using Microsoft XP Office Professional 2001, with updates through September 19, 2008 in Courier New Typeface, 12 point, or

   [ ] this brief has been prepared in a monospaced typeface using <state name and version of word processing program> with <state number of characters per inch and name of type style>.

Dated: September 29, 2008

/s/ *Philip G. George*

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Interactive Media Entertainment & Gaming Association, L.L.C.,	:	Appeal No. 08-1981
Plaintiff-Appellant,	:	On Appeal from the United States District Court,
-vs-	:	District of New Jersey, Docket No. CV-072625-07
Peter D. Keisler, Attorney General, *et al.*	:	(MLC)
Defendants-Appellees.	:	Sat Below: Hon. Mary L. Cooper, U.S.D.J.

PROOF OF SERVICE OF PLAINTIFF'S BRIEF AND APPENDIX PURSUANT TO *F.R.A.P* 25(B)(ii) and *F.R.A.P* 25(d)(2).

I, Philip G. George, Esquire, of full age, hereby depose and say:

1. I am an Attorney at Law of the State of New Jersey, and I am an Associate in the Law Firm of Eric M. Bernstein & Associates, LLC, the attorney of record in this matter representing the Plaintiff-Appellant, iMEGA, L.L.C. I am fully familiar with the facts of this matter.

2. On Monday, September 29, 2008, an original and ten (10) copies of Plaintiff's Principal Brief and Appendix were placed for delivery within three (3) business days via Express Delivery Service, a third party commercial carrier, to the United States Court of Appeals for the Third Circuit, 21400 United States Courthouse, 601 Market Street, Philadelphia, PA 19106-1790.

3. On the same day I caused to be filed on PACER electronic filing system PDF documents consisting of Plaintiff's Principal Brief and Appendix by email to electronic_briefs@ca3.uscourts.gov. The electronic version and the paper version are identical.

4. The PDF documents consisting of Plaintiff's Principal Brief and Appendix which were filed by email to electronic_briefs@ca3.uscourts.gov were virus checked and found to be computer virus free using Trend Micro Worry Free Business Security Advanced version 5.0.

5. On the same date, two (2) copies of the same documents were placed for delivery via Federal Express Priority Overnight Delivery to the following parties:

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4. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I may be subject to punishment.

Dated: September 29, 2008

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Appendix, Volume One Pursuant to *L.A.R.* 32.2(C)

Appendix, Volume One Contents