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NO. 61779-6

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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LEE H. ROUSSO,

Appellant *pro se*,

v.

STATE OF WASHINGTON,

Respondent.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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**APPELLANT'S OPENING BRIEF**

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Appellant Lee H. Rousso, appearing *pro se*, respectfully submits Appellant's Opening Brief to the Court:

### STATEMENT OF THE CASE

This action is a constitutional challenge to Washington State's ban on certain forms of internet gambling.<sup>1</sup>

On or about July 1, 2003, after learning of the success of Tennessee accountant and World Series of Poker Champion Chris Moneymaker (yes, his real name), Appellant joined the millions of Americans who enjoy playing the game of poker over the internet.<sup>2</sup> While not a professional caliber player, Appellant is a "skilled amateur" who managed to win an internet qualifying tournament for the 2005 World Series of Poker.<sup>3</sup> The 2005 qualifying tournament was offered by Pokerstars, the largest and most well known internet poker site.<sup>4</sup>

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<sup>1</sup> In the lower court proceedings, Appellant limited the scope of this challenge by noting that there is no Commerce Clause right to bet on sports, as interstate betting on sports is banned by the Wire Act, 18 U.S.C. § 1054 (1961). By way of further clarification, Appellant makes no claim that there is any Commerce Clause right to engage in interstate lotteries. This challenge only goes to those forms of interstate gambling where Congress has not yet acted. Most importantly, Congress has not yet acted on the issue of internet poker, although a bill that would clarify that poker is a game of skill and not "gambling" was introduced on October 1, 2008. S. 3616, The Internet Skill Game Licensing and Control Act, introduced by Sen. Robert Menendez, D-NJ.

<sup>2</sup> Declaration of Lee H. Rousso, ¶¶ 5-6. Clerk's Papers ("CP") 40-41.

<sup>3</sup> *Id.* at Exhibit D, CP 58.

<sup>4</sup> *Id.*

Pokerstars is domiciled in the Isle of Man, United Kingdom, and holds an Isle of Man e-gaming license.<sup>5</sup>

In 2006 the Washington State Legislature moved to ban internet gambling, other than internet gambling on horseracing.<sup>6</sup> To accomplish this objective, the Legislature acted indirectly by amending RCW 9.46.240, “Gambling information, transmitting or receiving,” to include the internet among the restricted modes of communicating gambling information. This action was “indirect” because RCW 9.46.240 does not cover actual acts of *gambling*, but instead reaches only the transmission and reception of gambling information.<sup>7</sup> However, as a practical matter, one cannot gamble on the internet without transmitting or receiving gambling information, so RCW 9.46.240 effectively acts as a ban on internet gambling.<sup>8</sup>

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<sup>5</sup> *Id.* at Exhibit G, CP 64-66.

<sup>6</sup> For historical reasons, pari-mutuel wagering, the wagering method associated with horseracing, is excluded from the definition of “gambling” under Washington law, RCW 9.46.0237. However, horseracing is a “sporting event or contest” in the context of the Wire Act, and is therefore considered gambling under federal law.

<sup>7</sup> For a detailed discussion of the statutory language of RCW 9.46.240 and the relationship between Section 240 and the other sections of the Gambling Act, please see Plaintiff’s Motion for Declaratory Judgment, pp. 5-7, CP 21-23.

<sup>8</sup> Of course, this statement is only true if one accepts that the State has jurisdiction over internet gambling. Specifically, since RCW 9.46.240 is tied to the definitions of “Gambling Information,” RCW 9.46.0245, and “Professional Gambling,” RCW 9.46.0269, the application of RCW 9.46.240 to internet gambling necessarily assumes that Washington can export its statutory definitions to other jurisdictions.

The amendments to RCW 9.46.240 were contained in Senate Bill 6613, commonly referred to as the Internet Gambling Ban (the “IGB”).<sup>9</sup> SB 6613 took effect on June 7, 2006.

In stark contrast all other state and federal gambling regulations, the IGB draws no distinction whatsoever between those who participate in the business side of gambling and those who participate strictly for purposes of recreation and amusement.<sup>10</sup> Accordingly, under Washington law, penny-ante poker players face the same legal consequences as large scale bookmakers, i.e., felony convictions and the loss of their homes.<sup>11</sup>

On July 6, 2007, opening day of the 2007 World Series of Poker Main Event, Appellant filed this action in King County Superior Court (Cause No. 07-2-22438-6 KNT) seeking a declaration under the Uniform Declaratory Judgments Act, RCW 7.24 *et seq.*, that the IGB violates the Commerce Clause of the United States Constitution, Article 1, Section 3, Clause 8.<sup>12</sup>

On May 15, 2007, the King County Superior Court, the Honorable Mary E. Roberts presiding, heard oral argument and considered the briefs of the parties. The lower court denied Plaintiff/Appellant’s request for a

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<sup>9</sup> See Exhibit A to Declaration of Lee H. Rousso, CP 44-50.

<sup>10</sup> Notably, individual gamblers enjoy complete immunity under federal law.

<sup>11</sup> RCW 9.46.240; RCW 9.46.231(1)(g)(ii).

<sup>12</sup> Appellant also alleged that the IGB violates the Eighth Amendment of the United States Constitution. Appellant has abandoned that claim and it is not before the Court.

declaratory judgment striking down the IGB, and granted the State's cross-motion to dismiss the action. Appellant filed a timely Notice of Appeal and now appeals the lower court's ruling to this Court.

### **ASSIGNMENTS OF ERROR**

Appellant assigns error as follows:

#### **First Assignment of Error**

The lower court erred in holding that that the State's purported history of "eschewing gambling" is both an accurate statement of history and relevant to the question of whether the IGB violates the Commerce Clause.

#### **Second Assignment of Error**

The lower court erred in finding that "regulation of gambling is reserved to the states."

#### **Third Assignment of Error**

The lower court erred in finding that Congress has deferred to the states and/or has granted the states authority to regulate internet gambling.

#### **Fourth Assignment of Error**

The lower court erred in finding that the IGB does not discriminate against out of state business interests, where such discrimination, if shown, would render the IGB *per se* unconstitutional.

**Fifth Assignment of Error**

The lower court erred in finding that the effect of the IGB on interstate commerce is merely “incidental,” and therefore allowed under the *Pike v. Bruce Church*, 397 U.S. 137 (1970), balancing test.

**Sixth Assignment of Error**

The lower court erred in finding that the State’s interest in regulating internet gambling justifies the burden placed on interstate commerce, again under *Pike*.

**Seventh Assignment of Error**

The lower court erred by failing to consider the impact of the IGB on international commerce, a consideration that would have subjected the IGB to a heightened level of scrutiny.

**Eighth Assignment of Error**

The lower court erred by failing to apply the mandatory “least restrictive means” test to the IGB. Under the least restrictive means test, where a compelling state interest is shown, the state must establish that the means chosen to effectuate the interest places the lightest possible burden on interstate commerce.

## STANDARD OF REVIEW

A constitutional challenge presents questions of law that are reviewed *de novo*. *Kraft v. Dep't of Social and Health Services*, 145 Wn.App. 708, 715, 187 P.3d 798 (2008).

## BURDEN OF PROOF

Statutes enacted by the Legislature are presumed to be constitutional and the party challenging the statute must show that the statute is unconstitutional “beyond a reasonable doubt.” *State v. Heckel*, 143 Wash.2d 824, 832, 24 P.3d 404 (2005), citing *State v. Brayman*, 110 Wash.2d 183, 193, 751 P.2d 294 (1988).

While this standard sets the bar high for the challenger, the burden is eased considerably by the fact that the State bears the burden of proof on several key issues.

First, where the State claims to be acting on a Congressional grant of Commerce Clause authority, the burden is on the State to show the existence of the grant in clear and unambiguous terms. *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992), citing *Maine v. Taylor*, 477 U.S. 131, 139 (1986). The State cannot make a showing that satisfies this burden.

Second, where the State discriminates against out-of-state commerce in the absence of a Congressional grant of authority, the burden

is on the State to justify the discrimination. *Granholm v. Heald*, 544 U.S. 460, 492 (2005). This burden may not be satisfied by the state’s self-serving assertions of a “compelling state interest.” *Id.* The State cannot make a showing that satisfies this burden, either.

Third, even where the court finds under the *Pike* balancing test that the state interest in regulation outweighs the burden on interstate commerce, the state still has the burden of proving that it has chosen the least restrictive means of protecting the state interest. *Pike v. Bruce Church*, 397 U.S. at 142. Given that Washington has chosen the *most restrictive means* to regulate internet gambling, the State is once again faced with a burden it cannot meet.

While these varying burdens of proof do not as a matter of law shift the ultimate burden of proof away from the challenger, the practical effect is indistinguishable; the state’s failure is the challenger’s success.

## ARGUMENT

The first three assignments of error go to the policy question of whether state regulation of gambling is “special,” and is thereby entitled to deference from the courts or Congress or both. The remaining five assignments of error go to the proper method of conducting Commerce Clause analysis.

In Washington, at least, and notwithstanding the Legislature's fevered protestations to the contrary, gambling is not "special," or even disfavored. It is, instead, a thriving, mainstream industry, and restrictions on the industry should be viewed in the same light as restrictions on any other industry.

With respect to Commerce Clause analysis, the lower court should have followed the analytical steps laid out in *Heckel*, the lone Washington State case addressing a Commerce Clause challenge to a statute regulating activities conducted over the internet. Unfortunately, the lower court failed to reach several mandatory points of analysis (e.g., the impact of the IGB on international commerce and the least restrictive means test) and reached untenable conclusions on the issues it did address (e.g., finding no discrimination against out-of-state business interests and finding only an incidental burden on interstate commerce).

Showing deference where no deference is due is, of course, reversible error. Failing to conduct certain required analytical steps is also reversible error. Finally, reaching conclusions that find no support in the facts is also reversible error.

**A. THE LEGISLATURE IS OWED NO DEFERENCE WITH RESPECT TO GAMBLING REGULATIONS. GAMBLING IN THIS STATE IS GENERALLY LEGAL, NOT ILLEGAL, AND IS THE SUBJECT OF CIVIL RATHER THAN CRIMINAL LAW.**

“Hypocrisy is the homage vice pays to virtue.”<sup>13</sup>

The overarching theme of the State’s lower court briefing is that gambling is a public nuisance and a social vice and, accordingly, is abhorred and despised by the Legislature. According to this line of reasoning, because gambling is a highly disfavored and repugnant activity, the Legislature should be given greater rein to regulate than it would have with respect to an activity that is socially or morally neutral.

The lower court gave this argument substantial weight, noting “I will start by reminding all of us that this state does have a long history of eschewing gambling...and it’s a history that I have to take into account.”<sup>14</sup> While the lower court did not use the word “deference,” it is clear that the court did in fact give deference to the Legislature and to its historical statements of animosity towards gambling. However, deference to the Legislature has no place in Commerce Clause analysis.<sup>15</sup> Moreover, the lower court’s recitation of history is at odds with the facts.

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<sup>13</sup> Francois de la Rochefoucauld, 1613-1680.

<sup>14</sup> Report of Proceedings (“RP”) at 3:8-18.

<sup>15</sup> Indeed, if courts were forced to defer to legislatures, no state statute would ever be struck down on Commerce Clause grounds, as the legislature has made its public policy position known by passing the challenged law in the first place.

At best, the lower court could have said that Washington *had* a long history of eschewing gambling, though even this statement would have overlooked the fact that betting on horse racing was legalized by the Legislature in 1933, at the height of the Great Depression.<sup>16</sup>

The State's modest history of eschewing gambling came to a crashing end in 1973, with the passage of the Gambling Act of 1973, RCW 9.46 *et seq.* In other words, the Gambling Act is not a ban on gambling, but is instead a tool created for the purpose of enabling gambling. Indeed, one of peculiarities of gambling regulation is that states legalize gambling by ostensibly making it illegal, and then granting exemptions (often to the state itself) under the law. Washington is a textbook example of this backhanded practice: under the supposed restraints and prohibitions of The Gambling Act, the volume of legal gambling in this state increased from \$33.5 million in fiscal year 1974 to \$1,695.3 million in fiscal year 2005, a staggering fifty-fold increase in legal gambling!<sup>17</sup> (Imagine the increase if the Legislature *liked* gambling!) Stripped of legislative pretensions, it is clear that prosecutions under the Gambling Act do not serve the purpose of policing public morals, but, instead, punish encroachments on the State's monopoly ( a

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<sup>16</sup> REMINGTON REVISED CODES, § 8312-11 *et seq.* (1933).

<sup>17</sup> Washington State Gambling Commission Strategic Plan 2007-2011, p.7, Exhibit B to Declaration of Lee H. Rousso. CP at 52.

monopoly that has in large part been farmed out by the state). It is a law of economic policy, not moral policy.

The lower court either failed to recognize the State's hypocrisy with respect to gambling or, if it recognized the hypocrisy, chose to reward it. This Court is not obligated to follow in the lower court's footsteps, nor should it.

While no court has the authority to completely eliminate legislative hypocrisy, there are in fact judicially imposed limits on the amount of disdain towards gambling that can be expressed by a state that has legalized a vast and prosperous gambling industry.

In *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987), the United States Supreme Court examined California's gambling laws. At issue in *Cabazon Band* were California's efforts to enforce its gambling laws on tribal land.

Under Public Law 280,<sup>18</sup> California was granted authority to enforce state criminal laws with respects to crimes committed by or against tribal members on tribal land. *Cabazon Band*, 480 U.S. at 202. Conversely, Public Law 280 did not grant the California the power to impose civil regulatory authority over tribal lands. *Id.*

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<sup>18</sup> Pub. L. 83-280, codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. § 1321-26.

The Cabazon Band of Indians conducted bingo games on tribal property. *Id.* The State of California and Riverside County attempted to apply their gambling laws, which like Washington's Gambling Act are nominally criminal statutes, on tribal land. *Id.* Due to the limitations of Public Law 280, the issue before the Court was whether California's gambling laws are criminal in nature or civil in nature. "California insists that these are criminal laws that Pub. L. 280 permits it to enforce on the reservations." *Id.* at 209. However, due to the fact that California has substantial legal gambling, the Supreme Court rejected the argument that its gambling laws are criminal in nature. "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates, rather than prohibits, gambling in general and bingo in particular." *Id.* at 211. "If the intent of a state law is to generally prohibit certain conduct, if falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory, and Pub. L. 280 does not authorize its enforcement on an Indian Reservation." *Id.* at 209. "But that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280." *Id.* at 211. The Court

also rejected the argument that California had a “compelling state interest” with respect to gambling. *Id.* at 213.

In the context of this litigation, the lesson of *Cabazon Band* is that a state may prohibit gambling or regulate it, but not both. Given the scope of legal gambling in this state, it should be clear that the Legislature has decided to regulate rather than prohibit gambling. Put another way, gambling is not against public policy in Washington, gambling *is* public policy in Washington. The State *does not* eschew gambling and the Legislature’s declarations to the contrary are empty exercises in hypocrisy. Gambling laws are no different than laws regulating any other economic enterprise; no deference is owed and no deference is due.

**B. IT IS NOT TRUE THAT REGULATION OF GAMBLING HAS BEEN RESERVED TO THE STATES; REGULATION OF INTRASTATE GAMBLING HAS BEEN RESERVED TO THE STATES, WHILE REGULATION OF INTERSTATE GAMBLING HAS BEEN AN AREA OF EXCLUSIVE FEDERAL JURISDICTION.**

While not specifically invoking the Tenth Amendment,<sup>19</sup> the lower court asserted that the regulation of gambling has been reserved to the states.<sup>20</sup> This assertion is both legally and factually incorrect.

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<sup>19</sup> U.S. CONST. AMEND. X, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

<sup>20</sup> RP at 6:2-3.

By definition, regulation of interstate commerce has been delegated to the United States under the Commerce Clause. In order to find that regulation of internet gambling was reserved to the states, a court would have to first determine that internet gambling *is not* interstate commerce. However, the lower court did not articulate any basis for asserting that interstate gambling is not interstate commerce.<sup>21</sup> Furthermore, it is hard to imagine an activity more commercial in nature than gambling, an activity that exists, in economic terms at least, for the sole purpose of redistributing wealth.

The lower court also ignored the traditional division of labor between state and federal authorities with respect to gambling regulation: the states have historically and exclusively had jurisdiction over intrastate gambling while the federal government has historically and exclusively had jurisdiction over interstate gambling.

In finding that the regulation of gambling has been reserved to the states, the lower court apparently ignored the long and colorful history of federal efforts to regulate interstate gambling, a history which includes at a minimum the following enactments:

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<sup>21</sup> Indeed, because the lower court acknowledged that the IGB has *some* effect on interstate commerce (RP at 4:21-22), the lower court must also have acknowledged that internet gambling is in fact interstate commerce.

- Act of September 19, 1890 (The Lottery Act), prohibiting the use of the mails to distribute lottery tickets.
- 18 U.S.C. § 1804 (1934), barring radio broadcasts of lottery results.
- 18 U.S.C. §§ 1081-1083 (1948), prohibiting gambling ships.
- 15 U.S.C. §§ 1171-1177 (The Johnson Act)(1950), prohibiting *interstate* transportation of gambling devices.
- 18 U.S.C. § 1084 (The Wire Act)(1961), barring *interstate* transmission of gambling information.
- 18 U.S.C. § 1953 (1961), barring *interstate* transportation of gambling paraphernalia.
- 18 U.S.C. § 1952 (The Travel Act)(1961), prohibiting *interstate* travel or transportation in furtherance of crimes including illegal gambling.
- 15 U.S.C. §§ 3001 *et seq.* (The *Interstate* Horseracing Act)(1978), carving out an exception to the Wire Act for the horseracing industry.
- 18 U.S.C. § 3702 (The Professional and Amateur Sports Protection Act)(1992), barring sports betting except where previously allowed.

- 31 U.S.C. § 5361 *et seq.* (The Unlawful Internet Gambling Enforcement Act)(2006), prohibiting banks and credit card companies from handling transactions in support of illegal internet gambling.<sup>22</sup>

Against this mountain of evidence, neither the State nor the lower court can cite the existence of a single state law regulating interstate gambling, other than the law challenged here and the handful of imitators that have emerged in other states.<sup>23</sup> Thus, any argument that regulation of internet gambling has been reserved to the states is completely unfounded.

**C. CONGRESS HAS NOT GRANTED THE STATES THE AUTHORITY TO REGULATE INTERNET GAMBLING AND HAS NOT RECOGNIZED OR PROTECTED STATE AUTHORITY IN THIS AREA.**

In addition to incorrectly concluding that regulation of internet gambling has been reserved to the states, presumably under the Tenth Amendment, the lower court compounded its error by concluding that Congress has recognized and/or protected state authority over interstate gambling.<sup>24</sup> Once again, the lower court ignored the historical division of

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<sup>22</sup> While the UIGEA was passed over two years ago, the Treasury Department has yet to formulate rules for its implementation. A bill to repeal the UIGEA is making steady progress in Congress, and there is a significant likelihood that the UIGEA will never be implemented. House Resolution 6870 (2008). It is worth noting that the UIGEA *did not* make it a crime to gamble on the internet.

<sup>23</sup> While a handful of states have attempted to regulate internet gambling, it is worth noting that Washington stands alone in threatening the smallest players with felony consequences.

<sup>24</sup> RP at 6:6-7.

labor between the federal government and the states: the federal government has *always* had exclusive jurisdiction over *interstate* gambling and the states have *always* had exclusive jurisdiction over intrastate gambling.

Unfortunately, the ruling from the bench offers few clues as to how the lower court reached its conclusion with respect to Congressional deference. Perhaps the lower court found Congressional deference in the fact that state and federal gambling laws are alleged to be complementary in nature. Indeed, the vast majority of the State's briefing in the lower court was directed to the legally irrelevant issue of whether the IGB is in conflict with federal law.<sup>25</sup> However, the absence of conflict between state and federal law is not the equivalent of an affirmative grant of authority from Congress. Otherwise the "dormant" or "negative" Commerce Clause would be an illusion; states would be free to burden interstate commerce to whatever degree they desired, as long as their burdens did not conflict with federal law covering the same subject matter. This would, of course, turn Commerce Clause jurisprudence upside down.

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<sup>25</sup> The State's analysis in the lower court focused heavily on cases involving the regulation of lotteries, e.g., *Pic-A-State Pa. Inc. v. Pennsylvania*, 42 F.3d 175 (3d. Cir. 1994). However, the lottery cases are not on point, as the federal government has banned interstate commerce in lottery tickets. Because Congress has already declared that the underlying activity is not in the public interest, states are free to burden the commerce as they see fit. *Pic-A-State*, 42 F.3d at 180. However, **Congress has never passed any law banning internet poker.**

More specifically, the fact that certain federal laws (e.g., the Wire Act) “assist” the states is completely consistent with the historical federal/interstate state/intrastate dichotomy; if the states had the authority to regulate interstate gambling, they wouldn’t need an “assist” from the federal government.

By far the most severe flaw in the lower court’s reasoning with respect to alleged Congressional deference to the states is that it defies the rule laid out in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). In *Wyoming*, the United States Supreme Court held that Congress “must manifest its unambiguous intent,” before a statute will read to include a grant of Commerce Clause authority to the states. *Wyoming*, 502 U.S. at 458. In other words, if there is any doubt as to whether Congress has granted Commerce Clause authority to the states, that doubt must be resolved by finding that no such grant exists. However, neither the State nor the lower court can point to any federal statute containing the unmistakable and unambiguous grant of authority required by *Wyoming*.

Absent an explicit grant of authority, the State argued below that the grant could be *inferred* from the tea leaves of other statutes, e.g., the Wire Act. Of course, such *inference* is exactly what *Wyoming* disallows.

The intellectual poverty of the State’s position is most apparent with respect to the Wire Act. Not only does the “assist” of the Wire Act

not act as an explicit grant of authority, but the grant, if recognized, would only extend to sports betting.<sup>26</sup> Thus, even if, by some stretch of the imagination, the Wire Act contained some grant of Commerce Clause authority to the states, that grant would not reach to the internet gambling at issue in this action, as Appellant has eliminated sports betting from the scope of this constitutional challenge.

Congress could, if it wanted, grant the states complete Commerce Clause authority to regulate internet gambling. As of today, Congress has not made that grant and the Commerce Clause authority claimed by Washington is simply a mirage. For the lower court to conclude otherwise was a grievous error.

**D. THE IGB DISCRIMINATES AGAINST OUT-OF-STATE BUSINESS INTERESTS AND IS SUBJECT TO A VIRTUALLY *PER SE* RULE OF INVALIDITY.**

The lower court's first three errors allowed misguided policy concerns (The State's bogus, self-serving claim that it eschews gambling, a pointed disregard of the federal government's long history of exclusively regulating interstate gambling, and illusory evidence of Congressional deference to the states) to crowd out a proper analysis of the IGB under established rules of Commerce Clause jurisprudence. Put another way, by the time the lower court actually turned its attention to the Commerce

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<sup>26</sup> For a discussion on the scope of the Wire Act, see Plaintiff's Reply on Declaratory Judgment and Opposition to State's Summary Judgment Motion, pp. 8-11, CP

Clause, it was already too late. However, it was not a case of “better late than never,” as the lower court committed significant errors at every step of its Commerce Clause analysis.

Of course, the states have always chafed against the restraints of the Commerce Clause.<sup>27</sup> The advent and growth of the internet has merely given the states a fresh opportunity to commit Commerce Clause mischief and mayhem. In that regard, Washington leads the pack.

The Washington State Supreme Court has reviewed only one Commerce Clause challenge to a state statute regulating the internet, *State v. Heckle*, 143 Wash.2d 824, 24 P.3d 404 (2005). Accordingly, *Heckel* provides the authoritative analytical framework for this case.

The first analytical step under *Heckel* requires the Court to consider whether the challenged statute openly discriminates against out-of-state business interests. *Heckel*, 143 Wash.2d at 832. If the Court finds discrimination, the analysis is over: the statute is subject to a *per se* rule of invalidity. *Wyoming v. Oklahoma*, 502 U.S. 437, 456 (1992)(striking down facially discriminatory Oklahoma coal mining law); *Bacchus Imports v. Dias*, 468 U.S. 270-71 (1984)(striking down liquor tax exemption for beverages produced in Hawaii); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978)(striking down New Jersey law against

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<sup>27</sup> For a general discussion of the evolution of the Commerce Clause, please see Plaintiff’s Motion for Declaratory Judgment, pp.8-10. CP at 24-26.

the importation of garbage). The lower court stumbled badly on this first step and, unsurprisingly, never regained its footing.

The lower court concluded that it could not “make a determination that Washington businesses are being protected in a way that discriminates against out of state economic interests.”<sup>28</sup> However, from the standpoint of internet poker players, the discrimination against out-of-state economic interests could not be more self-evident.

Absent the IGB, a Washington State poker player would have two options. The first option would be to play in a brick-and-mortar card room located in Washington and owned by Washington State business interests, and the second would be to go on the internet and play poker against citizens of other states and other countries by way of a poker website located in a foreign country.<sup>29</sup> Eliminating the second option obviously works to the competitive advantage of the brick-and-mortar card rooms. This conclusion is even more inescapable in light of the fact that the Gambling Act exists primarily to regulate competition, not morals. Applied intrastate, the Gambling Act protects licensed operators from unlicensed competitors. Applied interstate, or internationally, the

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<sup>28</sup> RP at 4:10-13.

<sup>29</sup> See Declaration of Lee H. Rousso and exhibits E, F and G thereto. CP 40-42, 59-66. Appellant knows of no internet poker sites located within Washington and the State has not suggested in its briefing that any such sites exist.

Gambling Act protects in-state operators from out-of-state competition, even if that out-of-state competition is otherwise legal.

The Commerce Clause prohibits differential treatment of in-state and out-of-state *economic interests*. *Granholm*, 544 U.S. at 472, citing *Oregon Waste Systems, Inc., v. Dept. of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994). In-state card rooms are an economic interest. Internet poker rooms are an economic interest. The IGB openly discriminates in favor of one and against the other. This Court should recognize that discrimination and impose the *per se* rule of invalidity that the law requires.

**E. THE EFFECT OF THE IGB ON INTERSTATE COMMERCE IS NOT MERELY “INCIDENTAL,” BUT IS INSTEAD PRIMARY AND DIRECT.**

Where a statute does not openly discriminate against out-of-state business interests, the analysis then turns to the *Pike* balancing test. *Heckel*, 143 Wash.2d at 832-33. Where the protected local interest is found to be legitimate and the burden on interstate commerce is found to be incidental, the statute will generally be upheld although the court must still engage in a balancing between the burden on interstate commerce and the value of the local interest protected. *Id.*

“Incidental,” where describing and effect, describes an effect that is secondary or indirect, i.e., not the direct or intended result of an action. BLACK’S LAW DICTIONARY (SIXTH ED. 1991), p. 762. Thus, in finding that the burden placed on interstate commerce was “incidental,” the lower court was apparently concluding that the IGB has some other intended purpose, and that the burden on interstate commerce was merely a side effect or by-product of the statute’s primary purpose. More precisely, while the lower court did not articulate its basis for finding the burden of the IGB “incidental,” it apparently accepted the State’s argument that the IGB was passed for the purpose of enforcing moral rectitude rather than the purpose of controlling the competitive landscape. However, as *Cabazon Tribe* makes clear, where a state has legal gambling, it regulates the gambling as commerce, not vice. Thus, the direct and intended result of the IGB was to place a burden on interstate and international commerce. Indeed, this intent is clear from the Senate Bill Report (Exhibit A to Declaration of Lee H. Rousso, CP 43-45), which states that the ban on internet gambling “is needed to support the state’s policy in this regard against lawsuits and challenges brought under various *international trade agreements*.” Not only does this comment reflect an obvious intent to meddle in international relations (a clear violation of the Commerce Clause), it reflects an obvious intent by Washington to put up a “Keep

Out” sign where the internet crosses the state borders. Thus, contrary to the lower court’s finding, the effect of the IGB on interstate commerce is not incidental. Once again, the statute led the lower court to a point in its analysis where it should have struck down the statute, but failed to do so.

**F. THE LOWER COURT FAILED TO CONDUCT A PROPER BALANCING TEST UNDER *PIKE*.**

Due to the fact that the IGB openly discriminates against out-of-state economic interests, the lower court was not required to reach the *Pike* balancing test. However, the lower court did reach the *Pike* balancing test and concluded that the IGB local benefits justify the burden on interstate commerce. Unfortunately, the lower court’s reasoning on this issue was so vague that it gives the Appellant almost nothing to work with.

Specifically, it is not clear what facts the lower court placed on the “local interest” side of the scale and what facts the lower court put on the “burden on interstate commerce” side of the scale, although Appellant suspects that one side of the scale contained “the state’s history of eschewing gambling” while the other side contained “the incidental effect on interstate commerce.” If this was in fact the lower court’s reasoning, the lower court was clearly mistaken. First, of course, Washington does not eschew gambling and regulates it primarily (or exclusively) to protect monopoly rights. Second, even if the IGB is held to protect public morals,

there is no “morality exception” to the Commerce Clause, a fact established by cases dealing with alcohol (*Granholm*) and child pornography. *American Libraries Ass’n v. Pataki*, 969 F.Supp. 160 (1997). Third, the IGB’s effect on interstate commerce is not “incidental.”

In short, the lower court’s position appears to be that when a state claims to have a compelling state interest, that claim is dispositive of whether the statute satisfies the Commerce Clause. Put another way, the lower court did not really and truly conduct a balancing test. This Court need not reach the test due to the open discrimination of the IGB, but if the Court does reach the balancing test, it should conduct the test with more rigor than the lower court.<sup>30</sup> As discussed extensively in the Appellant’s lower court briefing, the State’s claims regarding the dangers of internet gambling have no factual support whatsoever, and merely recite the usual list of imagined horrors. The state interest is miniscule; the burden on interstate commerce is gigantic: the IGB badly fails any honest balancing test.<sup>31</sup>

**G. THE LOWER COURT FAILED TO CONSIDER THAT THE IGB BURDENS INTERNATIONAL COMMERCE AND IS THEREFORE SUBJECT TO A HIGHER LEVEL OF SCRUTINY.**

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<sup>30</sup> Please see Plaintiff’s Motion for Declaratory Judgment, pp. 11-17, CP 27-33 and Plaintiff’s Reply on Declaratory Judgment, pp. 14-18, CP 198-202.

<sup>31</sup> Due to the fact the lower court did not reveal the details of its balancing test, Appellant cannot refute the lower court in detail. For the balancing test proposed by the Appellant, please see Motion for Declaratory Judgment, pp. 11-17, CP 27-33.

The IGB does not merely impair the rights of the citizens of this state to enjoy the fruits of the Commerce Clause with respect to interstate commerce; it also impairs the ability of the citizens to engage in international commerce. This fact subjects the IGB to an even greater level of scrutiny. *South-Central Timber Dev. Inc. v. Winnicke*, 467 U.S. 82, 100 (1984)(“It is a well-accepted that state restrictions burdening foreign commerce subjected to a more rigorous and searching scrutiny.”)

The lower court acknowledged that on the internet “everything is faster and more international instantly.”<sup>32</sup> This is also an apparent acknowledgement that internet poker is international poker. The Senate Bill Report for SB 6613 also acknowledged the international nature of the subject matter.<sup>33</sup>

While the fact that the IGB burdens international commerce is beyond dispute, neither the State nor the lower court gave this issue any attention in the lower court proceedings. The State’s failure to address the issue was understandable, perhaps, as there is no counter-argument to the rule laid out in *South-Central Timber*. However, the State’s studied avoidance of the issue did not give the lower court a license to likewise

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<sup>32</sup> RP at 3:34.

<sup>33</sup> Senate Bill Report, Exhibit A to Declaration of Lee H. Rousso, CP 43-45.

avoid it. As with so many of the other errors committed by the lower court, this error constitutes reversible error.

**H. THE LOWER COURT FAILED TO CONDUCT THE LEAST RESTRICTIVE MEANS TEST.**

The analytical steps laid out in *Heckel* and other important Commerce Clause cases are not optional; they present questions the court *must* ask. Unfortunately, and for reasons not clear from the record, the lower court simply failed to ask many of the questions it was required to ask. This lack of diligence was most striking with respect to the lower court's failure to address the least restrictive means test.

Where a court's analysis makes it through all the steps described in *Heckel*, the court must round out its analysis by determining whether the state has chosen the least restrictive means of effectuating its legitimate local interest. *Pike*, 397 U.S. at 142; *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). This requirement was ignored by the State in its lower court briefing and was ignored by the court as well. Once again, the State's avoidance of this issue is understandable, though not excused, while the lower court's avoidance is reversible error.

Reading between the lines, it appears the lower court concluded that the State's interest is so compelling that it admits to no limitations whatsoever. While this may be true with respect to the State's regulation

of purely intrastate gambling, it is a decidedly false proposition when interstate and/or international commerce is involved. And, of course, any application of the least restrictive means test buries the IGB, as the State has clearly adopted the most restrictive means of achieving its real or imagined objectives, whatever they may be.

### CONCLUSION

Where a court commits a grand error, a thousand smaller errors will follow. That is exactly what has happened in this case.

In short, the lower court found the State's self-proclaimed aversion to gambling to be completely dispositive, i.e., that where gambling is involved, there can be no judicial recognition of any limit on state power. The rest of the lower court's decision was, frankly, epilogue.

The lower court committed each and every error assigned to it by the Appellant. This Court should apply fresh eyes to the case, recognize that Washington has grossly overstepped the limits of its powers under the United States Constitution, and issue a declaration striking down the IGB to the extent the it reaches internet gambling other than purely intrastate internet gambling and to the extent it reaches internet gambling other than gambling on sports and lotteries.

Respectfully submitted this the 2<sup>nd</sup> day of October, 2008.

A handwritten signature in black ink, appearing to read "Lee H. Rousso", with a long horizontal flourish extending to the right.

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STATE OF WASHINGTON  
2008 OCT -2 PM 3:32

NO. 61779-6-I  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

LEE H. ROUSSO, Petitioner,

v.

PROOF OF SERVICE

STATE OF WASHINGTON,  
Respondent.

Alecia J. Rivas states as follows:

I am over the age of 18 years, not a party to the above-entitled action, and am competent to be a witness therein.

I certify that on the 2<sup>nd</sup> day of October, 2008, I caused a true and correct copy of the following documents:

Appellant's Opening Brief

To be served on the following in the manner indicated below:

Mr. Jerry Ackerman (X) U.S. Mail, First Class  
Attorney General's Office ( ) Hand Delivery  
1125 Washington St S ( ) Legal Messenger  
Olympia, WA 98504-0100

Court of Appeals ( ) U.S. Mail  
Division I ( ) Hand Delivery  
600 University St (X) Legal Messenger  
One Union Square  
Seattle, WA 98101-1176

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: 2 October 2008, at Renton, King County, Washington.

Green & Rousso, PLLC

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line that extends to the right and then curves downwards.

Alecia J. Rivas  
Legal Assistant

LAW OFFICES OF  
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October 2, 2008

Mr. Richard D. Johnson  
Clerk of the Court  
Washington State Court of Appeals  
600 University St  
One Union Square  
Seattle, WA 98101-1176

RE: Rousso v. State  
Cause No. 61779-6

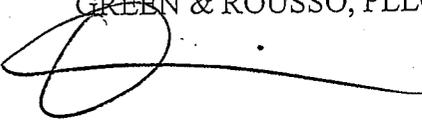
Dear Mr. Johnson:

Enclosed please find the Appellant's Opening Brief and a Certificate of Service for filing.

Please call if you have any questions.

Most Sincerely,

GREEN & ROUSSO, PLLC

  
Alecia J. Rivas  
Legal Assistant

AJR/ajr

Enclosure

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