

No. 13-564

IN THE
Supreme Court of the United States

—————
LAWRENCE DICRISTINA,
Petitioner,

v.

UNITED STATES,
Respondent.

—————
**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

—————
**BRIEF OF PROFESSIONAL
AND AMATEUR POKER PLAYERS AS *AMICI
CURIAE* IN SUPPORT OF PETITIONER**

—————
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STATEMENT OF INTEREST¹

Amici include four highly accomplished professional poker players, as well as ten amateur poker players who reside in the Eastern District of New York where this case was originally decided.

The professional-player *amici* have spent many decades making a living from their poker skills. *Amicus* Michael Sexton has been a successful professional poker player for 30 years and is a member of the Poker Hall of Fame. During the past 11 years, in addition to playing professionally he has served as the lead commentator for nationally televised broadcasts of tournaments sponsored by the World Poker Tour (“WPT”), one of the two leading poker tournament series in the world. He has taught seminars on strategic thinking to law students at Harvard Law School and to MBA students at Ohio State University. And he has provided expert testimony on the question whether skill predominates over chance in poker. *See Town of Mount Pleasant v. Chimento*, 737 S.E.2d 830 (S.C. 2012) (testimony in trial court).

Amicus Gregory Raymer is a 49-year-old professional poker player. Before he played poker for a living, Mr. Raymer earned his master’s degree in biochemistry and a law degree from the University of Minnesota and practiced patent law for 12 years,

¹ The parties have consented to the filing of this brief. Counsel of record for both parties received timely notice of *amici*’s intent to file this brief under this Court’s Rule 37.2. No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

specializing in biotechnology and genetic engineering. In 2004 Mr. Raymer won the prestigious World Series of Poker Main Event, besting a field of 2,576 players and winning \$5 million. He has earned his living as a full-time professional poker player since 2004. In addition to competing in both tournaments and cash games, Mr. Raymer teaches poker seminars and served for many years on the Board of Directors of the Poker Players Alliance, a non-profit organization that works to protect and advance the rights of poker players.

Amicus Jonathan Little is a 28-year-old professional poker player, who has earned his living since college playing cash games and tournament poker both online and in licensed poker rooms. Mr. Little was part of the vanguard of young, tech-savvy players who applied the tools of computer technology in ways that revolutionized the game of poker and fueled the “poker boom” during the first decade of the 21st century. He earned “Player of the Year” honors from the World Poker Tour in 2008.

Amicus Vanessa Selbst is a 29-year-old professional poker player. A graduate of Yale University and Yale Law School, she earns her living entirely from poker, in cash games and in tournaments. In her young career to date Ms. Selbst has won 12 tournament titles including two World Series of Poker titles, and has made five World Series final tables.

The amateur *amici* are Noah Levenson, Anthony DelGigante, David Torchiano, Daniel Schwartz, Danile Guido, David Dilbert, Edward Ritter, Mario Reyes, Martin Salberg, and Mark Spadaro. Their occupations include attorney, physician, engineer,

executive, information technology professional, salesman, and teacher. In their spare time they, like millions of other Americans, enjoy playing poker and honing their skills at the game.

Amici have decades of collective experience, over the course of millions of poker hands, and are experts on the issue of the relative roles of skill and chance in both tournament and cash game poker. The professional *amici* have a strong and continuing interest in the legal status of the activity on which they depend for their livelihood. And it is the common experience of all the *amici* that—as Judge Weinstein held in the District Court—the predominance of skill over chance in poker makes it fundamentally different from the “gambling” games listed in the Illegal Gambling Business Act, 18 U.S.C. § 1955. That categorical difference should have informed the Court of Appeals’ conclusions about what the IGBA means. As DiCristina observes in the petition, the Second Circuit should have recognized that “the examples Congress chose to enumerate in its definition of gambling are all of the same kind: They are all games of chance. The word ‘gambling’ in the IGBA therefore embraces other games of chance. Poker, by contrast, is a game of skill. It thus does not fall within the IGBA.” Pet. 28.

SUMMARY OF ARGUMENT

The four professional and ten amateur poker players filing this brief share a common belief that the game of poker, and players like themselves, have been unfairly treated by federal law enforcement. *Amici*, and indeed all regular poker players, know full well that poker is a game in which relative skill separates winners from losers. In this regard poker

is similar to golf, bridge, Scrabble, and numerous other games of skill where players put up a monetary stake, compete against each other, and reward the winning player. Unlike poker, competitions involving those games have never been branded federal felonies.

The premise underlying the IGBA prosecution of Petitioner is that poker belongs in the same category as “gambling” games of chance such as roulette, lotteries, and slot machines, rather than games of skill like golf, bridge, and Scrabble . But as the *amici* know from experience, and as the District Court found from expert testimony, the government’s categorization of poker is wrong and should be corrected. Poker requires a level of skill not present in any of the games listed in the IGBA. Skilled poker players draw upon a variety of disciplines, including mathematics, game theory, pattern recognition and human psychology. They must weave these disciplines together in real time to produce favorable outcomes, competing against others who are attempting to do the same. In each hand of poker, and over a typical session of poker, players exercise a diverse array of skills, and see their outcomes influenced by how well and how consistently they exercise those skills.

Petitioner was charged pursuant to 18 U.S.C. § 1955, the Illegal Gambling Businesses Act (IGBA). Congress’ choice of name for the statute would seem to limit it to businesses that engage in gambling games, *i.e.*, games of chance; and indeed, the list of games included in the statute’s definition of gambling are solely games of chance. Under any reasonable interpretation of the IGBA, operating a business that routinely hosts Scrabble or golf

tournaments would therefore not be a federal offense, regardless of what state law (if any) says about the matter. Because poker is no less a competition of skill than Scrabble, it is also outside the IGBA's definition of gambling. The Court should grant *certiorari* to correct the Second Circuit's misinterpretation of this important federal statute.

ARGUMENT

I. THE RULES OF NO LIMIT TEXAS HOLD'EM POKER.

No Limit Texas Hold'Em is a poker game played with a standard deck of fifty-two playing cards, and chips that constitute tokens representing value, usually money. The game can be played with as few as two players, but a typical game includes nine or ten. Play proceeds in a series of hands. In each hand, the players create five-card poker hands by combining two personal concealed cards ("hole cards") with five shared "community" cards. Players may use one, both or none of their hole cards.

A typical hand of No Limit Hold'Em takes about two minutes. The sequence of play is as follows. First, the two players to the left of the dealer each post small forced bets, known as the "small blind" and the "big blind". Typically the big blind is twice the amount of the small blind. The blinds are the only compulsory bets, and the obligation to post them rotates clockwise around the table with the start of each new hand.

Once the blinds are posted, each player is dealt two hole cards face down. A round of betting then takes place, in which all players who wish to stay in the hand must at least match the size of the big blind.

When it is his turn to act, a player may “call” (match the previous bet), “raise” (increase the size of the previous bet) or “fold” (discard his hand without putting any chips in the pot). The amount of each raise must at least equal the amount of the previous bet or raise; the maximum amount is equal to the total number of chips in the raising player’s stack. The game is referred to as “No Limit” Texas Hold’Em because a player is permitted to bet all of his chips in a single bet—a maneuver known as “going all in.”

After the first round of betting, three community cards (“the flop”) are dealt face up in the center of the table. Those three cards can be used by each player, in combination with her two hole cards, to create a five-card poker hand. A second round of betting then takes place among those who did not fold during the first betting round.

After the second round of betting, a fourth community card (“the turn” or “fourth street”) is dealt face up in the center of the table. The four community cards can be used by each player, in combination with his two hole cards, to create a five-card poker hand. A third round of betting then takes place among those who did not fold during either the first or second betting round.

Finally, after the third round of betting, a fifth community card (“the river” or “fifth street”) is dealt face up in the center of the table. The five community cards can be used by each player, in combination with her two hole cards, to create a five-card poker hand. A fourth and final round of betting then takes place among those who did not fold during the previous three betting rounds.

There are two ways to win a hand of Texas Hold'Em. The first is to make a bet (during any round of betting) that induces all of the other players to fold. If a player does so, he wins the pot without showing his cards. The vast majority of poker hands end this way. When a player bets in order to induce an opponent to fold a better hand, that maneuver is known as “bluffing,” and it is integral to the game of poker. The second way to win is at the end of the fourth round of betting; if two or more players are still active in the hand, the player who shows the best five-card poker hand (by combining his two hole cards with the five community cards) wins the pot.²

² The rank order of poker hands, from strongest to weakest, is as follows:

- “Straight flush”: five cards of consecutive rank in the same suit. The highest possible straight flush is a “royal flush,” *e.g.*, $T\spadesuit J\spadesuit Q\spadesuit K\spadesuit A\spadesuit$.

- “Four of a kind”: all four cards of the same rank, and a fifth card known as a “kicker,” *e.g.*, $A\spadesuit A\clubsuit A\heartsuit A\diamondsuit 5\diamondsuit$.

- “Full house”: three cards of one rank, and two of another, *e.g.*, $K\spadesuit K\clubsuit K\diamondsuit 3\clubsuit 3\spadesuit$.

- “Flush”: five non-consecutive cards of the same suit, *e.g.*, $A\spadesuit Q\spadesuit T\spadesuit 6\spadesuit 5\spadesuit$.

- “Straight”: five cards of consecutive rank, but different suits, *e.g.*, $3\spadesuit 4\diamondsuit 5\clubsuit 6\heartsuit 7\spadesuit$.

- “Three of a kind”: three cards of the same rank, and two kicker cards.

- “Two pairs”: two separate pairs of cards of the same rank, and a kicker.

- “One pair”: a single pair of cards of the same rank, and three kickers.

(continued on next page)

Once a hand ends, another hand begins immediately, with the obligation to pay the blinds rotating clockwise around the table. Play continues indefinitely. Texas Hold’Em games can also be organized into tournaments, in which the chips do not represent cash. In tournaments, players play until they lose all of their chips, and the prizes are distributed to the players who last the longest, in accord with an agreed-upon payout structure.

II. POKER IS QUALITATIVELY MORE SKILLED THAN GAMBLING GAMES.

Poker is a game of skill in two senses. First, as the evidence below showed, the influence of skill is quantifiably greater than that of chance. Second, poker is qualitatively a game of skill in the sense that poker players use a diverse array of skills to overcome the influence of chance—a feat not possible in a gambling game.

Poker differs from gambling in two important ways. First, gamblers “play the odds”: the most skilled gamblers can make astute predictions about future events beyond their control. Poker players do not play the odds, they change them. They do not merely analyze the likelihood that a given hand may win the pot; they play the hand in a manner that is designed to shift the odds in their favor. The most obvious example is bluffing, where a player, using

• “High card”: a hand that does not constitute any of the above.

If two players have the same kind of hand, the player holding cards of a higher rank prevails; there is no priority of suits. Thus, if two players each have a pair of aces, then the player with the highest kickers wins. If two players have hands of identical rank, they tie.

nothing more than his wits, bets and wins a hand even though he holds the worse cards.

But bluffing is only one example. Every hand of poker requires multiple decisions whether to bet, fold, call or raise (and if so, how much). Skilled players like *amici* bring an array of diverse skills to bear on each decision. As a result, over the course of a typical 4-8 hour session they are able to make hundreds of decisions better than less skilled players. Those decisions are the heart of poker.

Second, success in poker turns on the relative skill levels of the players. Gambling games are rigged to disfavor the players, such that gamblers must “beat the odds” or “get lucky” in order to win. But a poker player does not have to beat the odds—he only has to beat his opponents. This point is important because it means that even an average poker player has the capacity to attain long-term success. By improving one’s skills, anybody can become a successful poker player. But no matter how much somebody studies, he can never become a winning roulette or lottery player. And in the realm of sports betting, consistent success is reserved for an elite few—those who are so skilled and who have such great resources that they can best the predictive ability of professional oddsmakers. The ordinary sports bettor doesn’t stand a chance of making a consistent profit against a bookmaker.

These principles are amply illustrated in real life poker hands, which show that what separates winning poker players from losing players is not the cards they are dealt but rather how skillfully they play their cards.

A pair of aces is the best possible starting hand in No Limit Hold’Em. It doesn’t always win. But when it wins it can win a small pot or a big pot, depending on how skillfully it is played. Conversely, when it loses it can lose a big pot or only a small pot depending on how skillfully it is played.

The following video demonstrates a hand in which an expert player, poker professional Daniel Negreanu, is dealt two aces. His opponent catches a lucky flop which gives him a better hand—three sevens. Most players would lose all their chips in Negreanu’s place, holding two aces and believing it to be the best hand. Instead, through the exercise of his considerable poker skills, Negreanu correctly deduces that his pair of aces is not the best hand and he folds, losing the minimum. *See* <http://www.youtube.com/watch?v=FkemHmyWGcw>.

Conversely, the next video demonstrates a typical No Limit Hold’Em hand in which a skillful player (here, *amicus* Little) “earns” the pot by playing his hand in a manner that is calculated to induce his opponent to fold what would have been the winning hand had he called the final bet. A less skilled player would have played the hand more passively and would have lost the pot (or folded to a bet by his opponent). *See* <http://youtu.be/gtAnAC6DXag>.³

The skills necessary to succeed consistently at the game of poker can be grouped into a few broad categories:

³ This video clip is part of a training video prepared by *amicus* Little for members of his online training site. It is a reconstruction of an actual hand played by *amicus* Little during a WPT championship tournament.

A. Math Skills

Skilled poker players engage in precise calculations on the fly using a variety of tools to weigh the probable costs and benefits of each available move.

Poker math is not limited to numerical calculations and statistical probabilities. Poker players must also develop a working knowledge of advanced mathematical concepts such as game theory in order to make the best possible decisions when to fold, bet or raise (and how much), taking into account how their opponent is likely to respond and recognizing that each player can only estimate (and not know for certain) what cards their opponent holds.

Even more important, these math skills form only a foundation for the exercise of other skills. Unlike gamblers who simply “play the odds,” poker players use their understanding of mathematics as one of many inputs into complex decisions at the table.

B. Observing Your Opponents

Skilled poker players are constantly looking for information they can use to reduce the inherent uncertainty about the cards held by their opponents, and thereby increase their own ability to determine accurately whether they should bet, raise or fold. Highly skilled players like *amici* have the ability to “put their opponent on a hand”—*i.e.*, correctly gauge the type of hand their opponent holds—with precision that often amazes onlookers.

Reading players is a skill born of pattern recognition—observing one’s opponents constantly, and correlating their behaviors to the strength or weakness of the hands they show. Much of that information is collected during hands in which you

have folded, when you are free to concentrate on observing the other players who are contesting for the pot. Over time, players learn to identify patterns of behavior that correlate to demonstrated hand strength (or weakness), and bring those correlations to bear while contesting a pot.

The following is a video clip of a hand in which Daniel Negreanu tried unsuccessfully to induce his opponent, fellow poker professional Freddie Deeb, to fold the better hand. As soon as Negreanu made his final bet Deeb wondered aloud why he chose to make such a large bet. In the end, Deeb reached the correct conclusion that the size of the bet made it more likely that Negreanu was bluffing, and he called with a mediocre hand that was good enough to win the pot, eliciting admiring reactions from the other pros at the table (suggesting that most of them thought Negreanu had the better hand, and they would have folded had they been in Deeb's shoes.) *See* www.bing.com/videos/search?q=+freddy+deeb+calls+negreanu+bluff&mid=E1A60C15665EEEE11CE6E6E1A60C15665EEEE11CE6&view=detail&FORM=VIRE2.

Another source of information about the strength or weakness of an opponent's hand comes from observing unconscious physical movements (often referred to as "tells"). For example, every person has a normal blink rate—the frequency with which her eyes blink. Most people blink faster than usual when they are lying. If an unskilled player makes a big bet and starts blinking faster than usual, it is likely that she is bluffing. Of course you can only take advantage of that information if you have observed that opponent prior to the hand and noted

her normal blink rate while relaxed, and also observe a change in blink rate when the big bet is made.

Skilled players are constantly observing their opponents and noticing a variety of body movements, in order to detect clues that the player is feeling stressed (which often correlates to misrepresenting the strength of their hand). Changes in the position of feet, legs, hands or posture; mouth and eye movements; pulse rate as seen in the pulsing of the carotid artery; respiration rate; dilation of pupils—all can provide clues to a player’s stress level if carefully observed.

The following video shows a hand in which Daniel Negreanu correctly “reads” his opponent as holding a weak hand, and uses that to maximize his profit. At the conclusion of the hand, former FBI polygraph expert Joseph Navarro points out the facial “tells” that tipped off Negreanu to his opponent’s weakness. *See* www.youtube.com/watch?v=bg31pA_aG8U&feature=youtube.

C. Manipulating Your Opponents

The flip side of observing opponents and identifying betting patterns or physical “tells” is giving out disinformation to your opponents in order to induce them to call when you have a strong hand or fold when you are bluffing. Thus you might deliberately increase your blink rate, or lick your lips, when you have a strong hand and want to induce your opponent to call with the second-best hand. Or, if you have shown a winning hand after making a small bet that was called, you might induce your opponent to fold the next time you run a bluff, by making a similarly small bet that he will misinterpret as strength.

In the video referenced on page 10, *supra*, *amicus* Little explains how he induced his opponent to fold the better hand by employing a series of bets that were calculated to lead his opponent to the wrong conclusion about the strength of his hand. .

D. Putting It All Together.

Ultimately, the skill level of each poker player is determined by the extent to which he can (a) develop the variety of skills that contribute to making correct decisions, (b) bring them to bear under stress in the short period of time available each time he must make a decision whether to bet, raise or fold, and (c) do that hundreds of times in a single 4-8 hour session of play.

The following video excerpt of a hand played by poker professional Tom Dwan provides a glimpse of the array of skills he brings to bear in winning a large pot with the worst hand, inducing two other skilled professional players to fold. *See* www.youtube.com/watch?v=gx01mAng090.

Note that the success of Dwan's play depended on the accuracy of his judgment about the type of hands his opponents held (based on their betting) and about how his opponents would react to his moves, based on his observation of his opponents over time.

He correctly determined what his opponents had; he correctly calculated what they would think he had if he bet his hand in a certain fashion; and he correctly judged that they were skilled enough to fold a strong hand if they believed they were beaten. In the minutes it took to play that hand, and the seconds it took to make each decision, Dwan brought to bear his history of observing these opponents as well as many hours of experimenting with positional

plays of this sort. In the end, he had the confidence and courage to make a winning play that would have been very costly if it had failed. In doing so he demonstrated the kinds of skills that *amici* and all winning players employ to achieve consistently better results at the poker table than their less skilled opponents.

III. POKER IS A GAME OF SKILL FOR EVERY PLAYER, INCLUDING AMATEURS.

The skills of an amateur player may not be as advanced as those of *amici* Sexton, Raymer, Little and Selbst, but for all winning poker players at every level of skill poker is a game of skill, not chance.

No matter what the stakes, or what the players' level of skill, poker players all strive to deploy the skills discussed in the previous Part to the best of their ability. Moreover, it is their ability to outplay the people at the table with them that makes poker players successful or not. This makes poker fundamentally different from the gambling games listed in the IGBA. Those games—by their very design—include rules and mechanisms designed to make it impossible for the vast majority of players to ever succeed. For example, in the game of roulette, virtually every bet has an identical expected value. And no matter which bet a player makes, the player is always at a disadvantage versus the house. The same is true, of course, of slot machines, craps games, and every other game traditionally regarded as “gambling.” These are games of chance in the sense that in order to win, the player must overcome slanted odds and get lucky. Players who have a well-developed knowledge of probabilities can sometimes make bets that are *less bad* than others, but they can

never make a play with a positive expected value. The vast majority of players, however, would do just as well by playing randomly as they would by applying their best efforts; the games are built that way.

The same is true of gambling games that appear, on their face, to require skill, such as bookmaking. The amateur bettor simply cannot hope to make money betting at sports because the amateur bettor lacks the resources and knowledge to defeat professional oddsmakers. Courts have long recognized this. *See, e.g., United States v. Frazier*, No. 07-CR-10, 2007 WL 1239206, at *4 (E.D. Tenn. Apr. 27, 2007) (unpublished disposition) (“The athletes themselves, who are competing in any athletic event, are not gambling, even if they are professional athletes who are competing for a valuable purse . . . because, from their perspective, the outcome is based upon their skill and effort, not by mere chance. The same would be true of boxing, football, basketball, and any other sport one would care to name. On the other hand, it undeniably is illegal for spectators to bet on the outcomes of those same sporting events because those outcomes, from the perspective of the spectators, [are] based purely on chance.”); *Commonwealth v. Laniewski*, 98 A.2d 215, 249 (Pa. Super. 1953) (holding that even though “for an avid student of the sport of football the chance taken is not so great as for those who have little interest in the game . . . it is common knowledge that the predictions even among these so-called ‘experts’ are far from infallible. Any attempt to forecast the result of a single athletic contest, be it football, baseball, or whatever, is fraught with chance. This hazard is multiplied directly by the

number of predictions made.”); *State v. Steever*, 246 A.2d 743, 744 (N.J. Super. App. Div. 1968) (holding that football pools were dominated by chance). And studies have reached the same result. See, e.g., ChiUng Song et al., *The Comparative Accuracy of Judgmental & Model Forecasts of American Football Games*, 23 Int’l J. Forecasting 405, 411 (2007) (considering a pool of 18,000 expert forecasts and 12,000 forecasts from statistical systems on the outcome of NFL games to determine that experts “did slightly worse than the naïve forecast,” *i.e.*, flipping a coin, and that “neither experts nor systems achieved” a profit when their predictions were pitted against the Las Vegas oddsmakers’ lines).

Poker is different. At a poker table, a player does not have to defeat the office of a professional oddsmaker, nor does he have to prevail against a set of rules designed to tilt the game against him. Instead, the poker player needs to outwit his opponents at the table with him—who are individuals, just like him. Thus, even an amateur poker player can prevail by exercising skill at his home poker game, his local card room, in an Internet game, or a Las Vegas casino. If that player finds opponents who play with less skill, he will prevail; if he takes on opponents who are better than he is, he will lose. That is the essence of a game of skill, and it makes poker fundamentally different from gambling.

In sum, the games listed in the IGBA’s definition of “gambling” simply have none of the interpersonal jousting that makes poker a favorite pastime for so many Americans. They are qualitatively different games because they involve wagering on events that are outside the players’ control, whereas in poker the

wagers themselves are the primary tool that the players use to control the outcome of the game. That is what makes the Second Circuit's decision classifying poker as gambling so wrong. This Court should grant certiorari to establish that when Congress sought to criminalize "gambling" businesses, it did not intend to impose federal criminal liability for games of skill like poker.

CONCLUSION

Amici urge the Court to grant the petition for a writ of *certiorari*.

Respectfully submitted,

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