

No. 13-564

IN THE
Supreme Court of the United States

LAWRENCE DICRISTINA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

**BRIEF OF JAMES McMANUS AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONER**

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BRIEF OF JAMES McMANUS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

James McManus respectfully submits this brief as *amicus curiae* in support of petitioner Lawrence Di-Cristina.¹

STATEMENT OF INTEREST

Professor James McManus is a noted authority on poker and an expert on its cultural influence and significance. Professor McManus currently serves on the advisory board of the Mind Sports Research Network at the Berkman Center for Internet & Security at Harvard University. He has written about poker for *The New York Times*, *Foreign Policy*, *Los Angeles Times*, *Harper's Magazine*, *Card Player*, ESPN.com, and *The New Yorker*. Professor McManus is also an accomplished player in his own right, having finished fifth in the 2000 World Series of Poker Main Event. His account of that competition, *Positively Fifth Street*, was a *New York Times* bestseller. His *Cowboys Full: The Story of Poker* is considered a definitive history of the game.

As someone who has devoted his career to poker, Professor McManus has an interest in safeguarding the game's reputation and ensuring that people from all walks of life can sit around the poker table with-

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or his counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that Petitioner and Respondent, upon timely receipt of notice of Professor McManus's intent to file this brief, have consented to its filing.

out fear of federal felony prosecution. He believes that poker should be celebrated, not condemned. Because the Second Circuit's decision ignores poker's virtues, unjustifiably equates the game with forms of gambling rooted in the criminal underworld, and exposes recreational players to federal prosecution, Professor McManus supports DiCristina's petition for certiorari.

SUMMARY OF ARGUMENT

By failing to compare poker to the games enumerated in the Illegal Gambling Business Act (“IGBA”), 18 U.S.C. § 1955, the Second Circuit deviated from elementary notions of statutory interpretation and congressional intent. Its decision that poker qualifies as “gambling” under the IGBA overlooks poker’s prominent place in American culture and its lack of a meaningful connection to organized crime. Given that poker was enjoyed by a wide segment of American society at the time of the IGBA’s enactment, it is unlikely that Congress would have sought to bring it within the ambit of the IGBA and clearer still that if Congress *had* so intended, it would have expressly referenced poker in the statute. The omission of poker from the text of the IGBA, as the District Court aptly noted, “is the dog that didn’t bark.” *United States v. Dicristina*, 886 F. Supp. 2d 164, 225 (E.D.N.Y. 2012).

Glossing over the stark differences between recreational poker and the crime-riddled games listed in the IGBA, the Second Circuit attached *no* meaning to Congress’s enumeration of the games—instead concluding that organizing *any* game that violates state law, no matter its characteristics, can give rise to federal felony prosecution. The Second Circuit’s interpretation of the IGBA “is thus at odds with one of the most basic interpretive canons, that ‘a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.’” *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

Had the Second Circuit performed the appropriate inquiry, it would have discovered that the IGBA's text and legislative history establish that Congress's principal concern lay with the negative social effects of certain types of gambling—and, in particular, the influence of organized crime on communities and public officials. Unlike the activities specifically enumerated as “gambling” under the IGBA, however, poker occupies a different place in American life. Whereas traditional forms of gambling have longstanding associations with criminal syndicates and shady underworlds, poker is a mainstream activity that is enjoyed by Americans from all walks of life. Poker is also inherently social and allows for the exercise of considerable skill, unlike games such as slots or roulette, which depend entirely on chance and lack the tactical elements intrinsic to poker.

In short, poker bears almost no resemblance to the crime-riddled activities that motivated Congress to pass the IGBA. The Second Circuit's reading of the IGBA, unmoored from text and intent, should be reversed.

ARGUMENT

I. Poker's Intimate Connection To American Culture Sets It Apart From Activities Commonly Classified As Gambling.

For 200 years, from battlefield tents to kitchen tables to the White House, poker has enjoyed a respected place in American culture. Americans from all walks of life enjoy the inherently social nature of poker, the camaraderie around the card table, and the opportunity to deploy their tactical skill and psychological acumen.

A. Poker's Ascent To Prominence In American Life Began Almost Two Centuries Ago.

In New Orleans in the years immediately following the Louisiana Purchase, Americans borrowed concepts from popular European vying games to create the game of poker that millions enjoy today. Modern poker thus reflects the melting-pot nature of American society, which in New Orleans contributed not only jazz, blues, and Creole cuisine, but also a more complex and exciting blend of the English brag, Spanish *mus*, German *poch*, and, most notably, French *poque*. JAMES MCMANUS, COWBOYS FULL 55 (2009).

Poque, a game played with twenty cards by only four players, evolved into modern poker on the riverboats plying the Mississippi above New Orleans. Settlers from across the globe made New Orleans one of the most culturally diverse cities in the newly formed United States. *Id.* at 52–53. Its hybrid society was uniquely receptive to new forms of music, food, language, and card games. *Id.* As a result, when European immigrants and Acadians from Nova Scotia brought *poque* to New Orleans at the turn of the nineteenth century, the game quickly attracted legions of enthusiasts and spread swiftly to other port cities. *Id.* at 52–55. The Southern pronunciation, *pokuh*, became *poker* as the card game spread north on the riverboats.

Riverboat players soon made the game their own, ushering in the rule changes that are standard today, including the adoption of brag's 52-card deck and the straights and flushes made possible by the extra cards. *Id.* at 55. The expanded deck also allowed

more people to play simultaneously. According to Hoyle, by approximately 1850 nearly all poker players agreed that, after being dealt five cards from a 52-card deck, participants would either check, bet, call, or fold, and choose whether to discard and draw additional cards. *Id.* If two or more players remained after another round of betting, they would proceed to a showdown, in which the hierarchy of hands used today determined the winner.

The advent of commercial steamboats around 1814 permitted more rapid transit of new ideas throughout the United States, increasing the popularity of poker along the country's vast system of rivers. The luxury steamers traveling up and down the Mississippi, the Missouri, the Ohio, and their tributaries featured card rooms and exposed small-town America to poker. Within a generation or two, poker had become ubiquitous in American culture. As early as 1875, a *New York Times* editorial proclaimed, "[W]e are forced to the conclusion that the national game is not base-ball, but poker." Editorial, *The National Game*, N.Y. TIMES, Feb. 12, 1875.

B. Poker Embodies Distinctly American Ideals.

Why has poker become the "national game?" Although many theories abound, the best answer might be that of historian John Lukacs. Lukacs described poker as "the game closest to the Western conception of life," emphasizing the parallel between poker, in which "it is not so much fate as human beings who decide," and Western thought, "where free will prevails over philosophies of fate or of chance." John Lukacs, *Poker and the American Character*, HORIZON, Nov. 1963, at 57, 57.

Similarly, some commentators have observed that poker's merit-based nature, in which logical decision making and a keen grasp of psychology contribute substantially to success, resonated with the core ideals of America's burgeoning free-market democracy. *See, e.g.,* MCMANUS, *supra* at 20. Because success in poker is tied predominantly to individuals' skill (with chance playing a far more minor role and, in any event, not more likely to favor one player than another), it offers a level playing field for all. For this reason, buffalo hunters, printer's assistants, sharecroppers, and freemen all played on level footing in poker's earliest days.

This egalitarian sentiment endures. Charles A. Murray, a scholar at the American Enterprise Institute, labels today's poker tables "pure meritocracies." Charles Murray, *Poker is America*, N.Y. TIMES, Feb. 23, 2013, at SR7. "When you are outthought and outplayed . . . by a skinny 28-year-old wearing a football jersey and with his baseball cap on backward, it is hard to condescend to him because he . . . never went to college." *Id.*

C. Millions Of Americans From All Backgrounds Enjoy Poker.

Poker is not only a thinking person's game, but also a social game. Its communal nature has made it the game of choice for millions of Americans, while distinguishing it from other activities that the government has sought to regulate. Unlike activities such as bookmaking, numbers, and slot machines, poker is by definition a game played not just against, but with, other people. Players at a poker table not only compete, but also converse and socialize. Participants are in close contact with one another for hours

on end, which naturally leads to discussions ranging from small talk to the profound. Instead of walking down fairways yards apart from one another, bumping elbows in the paint, or silently stalking pheasant, poker buddies chat with one another all game long, making poker a particularly effective networking tool. MCMANUS, *supra* at 4.

The communal quality of poker has contributed to its popularity. Today, tens of millions of Americans play, watch, and read about the game, with an estimated 23 million Americans, or 10.1 percent of the adult population, playing regularly. Poker Players Research, Survey Findings, Feb. 2009. Poker games are common among coworkers, friends, and associates within industries. Taking advantage of poker's mass appeal and social nature, nonprofit organizations and event planners often arrange "poker nights" as both a fun way to raise funds and an opportunity to network.

Americans' fascination with poker extends beyond playing it themselves. Public demand for the latest poker news is great enough that ESPN (which lists poker as a sport on its website) regularly publishes articles covering the game's major tournaments and social events. Americans also flock to their televisions for the entertainment value inherent in poker, with an average of 664,000 viewers tuning in to each of the ten annual telecasts of the World Series of Poker Main Event.² The televised success of the World Series of Poker has spawned over a dozen poker-related television programs, such as *National*

² WSOP Main Event TV Ratings Show Big Increase, CARBON POKER BLOG (Nov. 21, 2012), <http://carbonpoker.ag/blog/wsop-tv-ratings-increase-21/>.

Heads-Up Poker Championship (NBC), *High Stakes Poker* (Game Show Network), and *Poker Dome Challenge* (Fox Sports Net).

Poker is enjoyed not only by millions of everyday Americans, but also those in high office. Presidents Theodore and Franklin Roosevelt, Johnson, Truman, Eisenhower, and Nixon were all avid players. MCMANUS, *supra* at 8–9. Theodore Roosevelt introduced himself to New York’s Republican Party by finding a seat at its poker games above a saloon on East 59th Street. *Id.* at 9–10. To “get inside the machine,” Roosevelt recalled, “I used to play poker and smoke with them.” *Id.* at 10. During World War II, FDR participated in “marathon poker games with his cabinet officers at which the only thing he thought about was how to beat the other guys in poker.” Doris Kearns Goodwin, 109th Landon Lecture (Apr. 22, 1997). And as a state senator in Illinois, Barack Obama played in a regular poker game that helped him break the ice with colleagues in both parties. John Roszkowski, *Colleagues Saw Great Things for Obama*, BUFFALO GROVE COUNTRYSIDE (IL), Aug. 21, 2008. Military generals from Lee, Grant, and Sherman to Pershing and Eisenhower have likewise enjoyed poker and analogized poker tactics to battlefield strategy. As Admiral John S. McCain, Jr. once told his son John, “[l]ife is run by poker players, not the systems analysts.” MCMANUS, *supra* at 7.

Interest in poker extends throughout the government. Members of this Court from diverse backgrounds have been regular players in home games. High-ranking federal officials also have enjoyed interbranch poker games, with Justice Douglas frequently playing at President Roosevelt’s poker parties and Chief Justice Vinson joining games with

President Truman. *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 917 (2004). And thousands of members of Congress have likely played the game over the years. *See, e.g.*, Roxanne Roberts, *Hello, Mr. Chips!*, WASH. POST, Apr. 18, 2005 (describing poker as “one of Washington’s favorite pastimes” and recapping the inaugural Capitol Hill Texas Hold’Em Tournament, which featured senators and representatives); Maureen Dowd, *Minister Replaces Morris*, ALBANY TIMES UNION, Feb. 13, 1997, at A11 (recounting Barry Goldwater’s remark that senators “all used to get together on weekends and have drinks and play poker” (internal quotation marks omitted)).

D. Poker Has Had A Distinct Influence On American Culture.

A broad spectrum of Americans ranks poker as one of the nation’s pastimes, lending it a unique position in American culture—and one quite distinct from the sorts of games referenced in the IGBA.

1. Poker’s Unique Qualities Make It Particularly Appealing To Americans.

Poker’s multiple dimensions have fueled its ascent to status as the “national game.” Participants in a poker game can enjoy the competitive atmosphere, camaraderie around the table, and exercise of skill. Parents across the country commonly teach their children how to play poker—not because of the prospect of financial gain, but because kids are able to enjoy gameplay and can learn critical skills by testing their developing grasp of the concepts of probability, logic, psychology, and reasoned decision making. In sharp contrast to the intrinsic pleasure of playing poker better than one’s tablemates, the solitary endeavors enumerated in the IGBA are one

dimensional, focusing almost exclusively on the possibility of monetary gain. There are few examples of participants enjoying a night of playing slots with no money at stake and even fewer examples of parents teaching children to play numbers or bolita.

Much of the enjoyment in poker derives from the game's social, strategy-centered nature, which contrasts markedly with traditional forms of gambling. Poker demands steady attention to the other players, creating a friendly, competitive environment. The game requires participants to consider both the seen and unseen cards, monitor the slightest movements and expressions of fellow players, and make a series of effective strategic decisions. All of this contributes to the cerebral stimulation of the game.

It is thus not surprising that poker has achieved high visibility on network television. Millions of viewers around the world each year enjoy watching high-stakes poker games between the most skilled players. Unlike games commonly classified as gambling, poker tournaments are broadcast on national network television, including NBC, ESPN, and the Travel Channel. *See* MCMANUS, *supra* at 248–49.

Poker's ability to attract such a large television audience further underscores a key difference between poker and the games listed in the IGBA. Poker's intrinsic value and interest as a game blending substantial skill, calculated risk taking, and human interaction attracts nonparticipants to the viewing screen, even when none of their money is at stake. It is almost impossible to imagine similar interest being drummed up over televised coverage of people sitting down at a slot machine for the night or betting on a roulette wheel, as those activities lack

all of the socializing, strategizing, and communication that draws audiences (and players) to a game of poker.

2. Poker References Are Common In American Writing And Conversation.

Poker's influence on American culture can immediately be seen by looking at its effect on the American lexicon. Americans use phrases such as "go all-in," "raise the stakes," "poker face," "play the hand you're dealt," "cash in your chips," "the buck stops here," "put your cards on the table," "ace up your sleeve," and variations on "bluff" to express and add texture to their opinions and stories. *See, e.g., The American Heritage Dictionary of the English Language* 202, 1357 (4th ed. 2006) (defining "bluff" and "poker face"); *Webster's Third New International Dictionary of the English Language* 56, 242–43, 1752 (Philip B. Gove ed. 1981) (defining "all-in," "bluff," "poker face," and "poker faced"). These phrases trace their origins to poker's genesis in Louisiana and are invoked in conversations and publications today all across the world, in a manner similar to terms derived from other popular American pastimes, such as baseball's "home run" or basketball's "slam dunk."

Cognizant of the terminology's resonance with the public at large, elected officials often deploy poker-related phrases to achieve political ends. Indeed, the names of two of this country's most significant public-policy initiatives have poker origins. Theodore Roosevelt's domestic policy program, the Square Deal, derived its name from the honest dealing of cards and was rooted in notions of fairness. President Roosevelt touted the program in a 1905 speech replete with poker imagery:

When I say I believe in a square deal I do not mean . . . to give every man the best hand. If the cards do not come to any man, or if they do come, and he has not got the power to play them, that is his affair. All I mean is that there shall not be any crookedness in the dealing.

THE WISDOM OF THEODORE ROOSEVELT 76 (Donald J. Davidson ed., 2003). Following suit, FDR, an avid poker player like his cousin, named his domestic policy program the New Deal.

Businesspeople, too, have drawn on poker terminology and strategy to cultivate important lessons for success. See AARON BROWN, *THE POKER FACE OF WALL STREET 1* (2006) (“Poker has valuable lessons for winning in the markets, and markets have equally valuable lessons for winning at poker.”). “Being a strong poker player has long been associated with success in business.” *Poker Players Choose Obama 2:1 Over McCain*, BUSINESS WIRE, Sept. 4, 2008. Indeed, commentators for over sixty years have analogized poker players to buyers and sellers in a marketplace and concluded that “[a]ny industry serves as an example of strategic[] game play.” JOHN McDONALD, *STRATEGY IN POKER*, BUSINESS & WAR 73, 80 (1950). As a testament to the tactical overlap between poker and business, Bill Gates observed that he gained important business skills from the marathon poker games that he played while a student at Harvard. MCMANUS, *supra* at 397.

II. Because Of A Strong Connection To American Life And The Absence of Any Meaningful Association With Organized Crime, Poker Is Readily Distinguishable From Games Generally Classified As Gambling.

Granting that the IGBA’s enumeration of forms of gambling “serves as an illustration of what may constitute running a gambling operation,” *United States v. DiCristina*, 726 F.3d 92, 100 (2d Cir. 2013), the Second Circuit nevertheless ignored the list when construing the meaning of “gambling” under the statute. The court’s disregard of context contravened the traditional rule “that a word is known by the company it keeps”—a rule that takes on even greater force “where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.” *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

A more thorough inquiry, however, reveals that poker is inherently different from games commonly classified as gambling, including the nine activities specifically enumerated in the IGBA’s definition of “gambling”: “pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein,” 18 U.S.C. § 1955(b)(2). The games enumerated in the IGBA are evocative of illicit activity, whereas poker connotes honorable and friendly competition. Application of conventional interpretive canons therefore militates against classifying poker as “gambling” under the statute.

Unsurprisingly, given its refusal to confer meaning to each part of the statute, the Second Circuit

produced a decision completely divorced from Congress’s intent—and one that casts the specter of federal criminal liability over recreational poker games. This Court should grant DiCristina’s petition to ensure that the scope of criminal liability under the IGBA appropriately hews to the statute’s text and Congress’s intent.

A. The Absence Of A Significant Connection Between Poker And Organized Crime Militates Against Interpreting The IGBA To Cover Poker.

The distinctive characteristics of poker that have catapulted it to national prominence likewise render it an unsuitable vehicle to achieve the ends of organized crime.

1. Congress Aimed The IGBA At Types Of Gambling That Had A Strong Connection To Organized Crime.

Responding to concerns that the IGBA would bring within its ambit recreational card games played around the kitchen table, Congress stressed that the intent of the legislation was “not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions.” H.R. REP. NO. 91-1549, at 4029 (1970). Indeed, the House Report stated that the IGBA was “intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and those corrupt state and local officials who make it possible for them to function.” *Id.*

Courts, both at the time of the IGBA’s enactment and more recently, have confirmed that Congress

passed the statute to “curtail[] *syndicated gambling*, the lifeline of organized crime, which provides billions of dollars each year to oil its diversified machinery.” *United States v. Sacco*, 491 F.2d 995, 998 (9th Cir. 1974) (emphasis added); *see also DiCristina*, 726 F.3d at 103 (“The legislative history is remarkably clear that the passage of the statute was driven by the desire to crack down on organized crime.”); *United States v. Boyd*, 149 F.3d 1062, 1066 (10th Cir. 1998) (listing congressional findings made pursuant to the IGBA, which demonstrate that rooting out the corruption and bribery that are used by illegal gambling enterprises to facilitate their operations was a principal motivation behind the statute’s enactment).

2. Organized Crime Is Drawn To House-Banked Games That Are Easy To Operate And Require Centralization.

Organized crime favors large-scale forms of gambling that are house-banked and simple to operate. All indications are that Congress intended the IGBA to target games fitting this profile.

House-banked games, in particular, offer the most lucrative opportunities for organized crime. In such games, the odds are always set against the players. And an unscrupulous house can stack the deck further by manipulating the odds or rigging the game to boost its profit. For this reason, house-banked games are tempting targets for—and have histories rooted in—corruption. *See* DAVID G. SCHWARTZ, *ROLL THE BONES: THE HISTORY OF GAMBLING* 325–45 (2006).

Examples abound of corruption in the house-banked games enumerated in the IGBA. Game fixing and point shaving, used to manipulate bookmaking,

have plagued sporting competitions over the past century. As is well known even to non-sports fans, an organized crime figure bribed players on the Chicago White Sox to throw the 1919 World Series in the infamous Black Sox Scandal. JOHN LYMAN MASON & MICHAEL NELSON, *GOVERNING GAMBLING* 86 (2001). Similar scandals spread to college athletic events in the 1940s and 1950s. *Id.* So, too, has corruption beset lotteries over the years, with one particularly ignominious example occurring in 1823, when the manager of the Grand National Lottery to benefit Washington, DC skipped town with nearly \$100,000 owed to the winner. SCHWARTZ, *supra* at 148. Rampant bribery of state and federal officials in the Louisiana Lottery prompted Congress effectively to outlaw lotteries in 1895. Kay C. James *et al.*, National Gambling Impact Study Commission Report, 2-1 (1999).

In addition to its preference for house-banked games that require centralization, organized crime gravitates toward “relatively simple and standardized goods and services” rather than services involving more complexity. Andrew R. Dick, *When Does Organized Crime Pay? A Transaction Cost Analysis*, 15 INT’L REV. L. & ECON. 25, 38 (1995). Because organized crime favors simplicity in operation and monitoring, it is drawn to “prostitution and loan-sharking but not embezzlement or securities fraud” and “restaurants and laundromats but not banks or insurance companies.” *Id.* This logic extends to the domain of gambling, where organized crime follows the motto, “The simpler the better.”

Participation in the “numbers racket,” “the most common illegal game in America’s cities,” underscores organized crime’s interest in simple chance-

based games, from which massive profits can be obtained. See SCHWARTZ, *supra* at 387. Starting in Harlem and spreading to big cities throughout the Midwest and Eastern Seaboard, the game of “Clearing House numbers” allowed individuals to wager on a single number between 0 and 999 that would end up as the day’s randomly generated number. SHANE WHITE ET AL., PLAYING THE NUMBERS 12, 19 (2010). Easily understood by all and requiring little investment of time and no skill, Clearing House numbers (like similar numbers games that dominated urban areas) “was a brilliant scheme—simple, transparent, and elegant.” *Id.* at 12. Because of its simplicity, chance-based nature (which meant that no amount of study or gameplay could increase a person’s odds of winning), and large payouts averaging 600 to 1, numbers was “especially alluring to low-income persons.” See Thomas James Friedrich, *Internet Casino Gambling*, 11 COMMLAW CONSPECTUS 369, 383 n.233 (2003). Indeed, numbers was a “lucrative enterprise” attractive to organized crime precisely because it was “a way of gambling that . . . consume[d] the pennies nickels, and dimes of the city’s myriad poor, entranced by the chimerical hope of easy money.” WHITE ET AL., *supra* at 25, 57.

When a relatively easy-to-manage game operates on a large scale and requires centralization, organized crime is able to reap maximum profit. “Scores of thousands” of ordinary people played the same game of numbers at the same time, creating a “multi-million dollar business” in a single city alone. *Id.* at 23, 25. The large-scale nature of numbers generated roughly \$2 billion a year nationally (\$32 billion today) by the late 1940s. SCHWARTZ, *supra* at 380. Book-making, too, became a profitable endeavor for

organized crime because of its outsized scale and need for centralization. By connecting bookmakers across the country, organized crime was able to distribute large bets “among their fellow bookmakers” to “spread the risk” and thereby increase the potential for profit. MASON & NELSON, *supra* at 86.

3. Poker Lacks The Characteristics Favored By Organized Crime.

In view of the role of the house as an organizer and facilitator, not competitor, and poker’s inherently decentralized nature and low profit margins, poker is an inefficient vehicle to fund organized crime. Not surprisingly, therefore, Congress elected not to include it among the games enumerated in the IGBA.

Because it is not house-banked, poker lacks a characteristic fundamental to the games enumerated in the IGBA. The house only offers a service to players by providing the facility, tables, cards, and chips, but it faces no exposure to risk, and thus has no incentive to cheat or fix the games. “[M]oney won or lost is merely transferred from one player to another,” enabling the operator of a poker game to collect only a modest “rake,” or percentage of each pot. *See* Anthony Cabot & Robert Hannum, *Poker: Public Policy, Law, Mathematics, and the Future of an American Tradition*, 22 T.M. COOLEY L. REV. 443, 452–53 (2005).

Moreover, poker requires skill both to deal and play, and is thus less attractive to organized crime. Poker’s far greater complexity stands in contrast to the simple services infiltrated by organized crime, such as prostitution and loan sharking. *See* Dick, *supra* at 38. And it contrasts with relatively simple games, like the lottery or roulette.

Poker's decentralized nature also differs from the centralized gambling operations long favored by organized crime. A poker game, while demanding considerable skill to deal, has comparatively low barriers to entry. Moreover, the house is not betting against anyone; its role is simply as the supplier of cards, chips, tables, and venue. For this reason, poker can be—and is—played virtually anywhere by anyone, and organized crime correspondingly has difficulty gaining a toehold. The games enumerated in the IGBA, by contrast, necessitate an active role by a centralized manager to coordinate the game and take positions opposite the players, making them alluring targets for organized crime to manipulate for profit.

Poker's comparatively low profit margins render it less attractive still to organized crime. See Liz Benston, *Some Veer Owners Uncomfortable with Policy of Renting Their Units*, LAS VEGAS SUN, July 16, 2010 (describing the “tiny profit margins involved in casino poker,” specifically that “Nevada casinos often make only about \$4 per player per game”). Even compared with other casino games, poker is lacking. Slots, for instance, “can carry two or three times the profit margin” of card games like poker. *Borgata's Opening Puts Focus on Table Games in A.C.*, THE ASSOCIATED PRESS, Dec. 14, 2003.

Poker's relative lack of profit potential and absence of appeal to organized crime can be explained in part because it does not feature lopsided odds and extreme payouts. Games featuring such characteristics are especially enticing to low-income individuals and are frequently associated with organized crime. See *Dicristina*, 886 F. Supp. 2d at 207 (observing that congressional debates over the IGBA “focused primarily on Mafia-run numbers rackets—intrastate

lotteries that offered lopsided odds and thus leached significant sums from poor communities”); MASON & NELSON, *supra* at 21 (explaining that poor and low-educated individuals play lotteries the most). To succeed consistently in poker typically requires “grinding it out,” using a combination of calculated risk taking and patience to prevail, a strategy incongruous with the get-rich-quick messages that are especially appealing to less affluent individuals. See WHITE ET AL., *supra* at 25, 57. Even on the extremely rare occasions when a player is able to swoop in to a ten-person poker game and proceed to win every player’s money, he will be collecting at most ten times his investment, far from the numbers winner who sees a return of 600 times his outlay, Friedrich, *supra* at 383 n.233, let alone the 250 million to 1 payouts awarded to some lottery winners.

The very facts involved in this case illustrate the characteristics of poker that render it unattractive to organized crime. DiCristina and his two partners attempted to generate interest in their poker games through word-of-mouth and targeted text messages, but there were times when not enough players would show to allow for even a single game. *Dicristina*, 886 F. Supp. 2d at 198. The games themselves were low stakes. One table held a “1-2” game, in which \$1 and \$2 forced bets, or “blinds,” were required by two players; and the other table a “5-5” game, in which the blinds were set at \$5. *Id.* Adjusting for inflation, these games were not much different from the penny stakes of a common nineteenth century game, see MCMANUS, *supra* at 122. Nor was any “unlawful conduct by [DiCristina] . . . shown” or any “connection to organized crime . . . suggested.” *Dicristina*, 886 F. Supp. 2d at 198.

Given the well-defined differences between poker and forms of gambling long preferred by organized crime, it comes as no surprise that the Ninth Circuit in a case decided contemporaneously with the enactment of the IGBA stated that poker is not “the kind of game traditionally associated with organized crime,” *United States v. Roselli*, 432 F.2d 879, 886 n.8 (9th Cir. 1970). The government agrees. Brief and Special Appendix for the United States at 28–29, *United States v. Dicristina*, No. 12-3720 (2d Cir. filed Dec. 20, 2012) (conceding that poker had no meaningful association with organized crime at the time of the IGBA’s enactment).

B. Other Federal Gambling Laws Demonstrate Congress’s Intent Not To Sweep Poker Within The Reach Of Federal Oversight.

A review of federal gambling laws reveals a consistent congressional judgment not to bring poker within the ambit of federal legislation. The IGBA, as noted, enumerates several forms of gambling, none of which is related to poker. *See* 18 U.S.C. § 1955(b)(2). Similarly, in defining “gambling establishment,” the Wire Act states that “gambling” is “accepting, recording, or registering bets, or carrying on a policy game or any other lottery, or playing any game of chance, for money or other thing of value.” *Id.* § 1081. And the Wagering Paraphernalia Act criminalizes the use of paraphernalia in bookmaking; sports-wagering pools; or “numbers, policy, bolita, or similar game.” *Id.* § 1953(a).

Congress’s legislation governing gambling thus establishes a core set of games that constitute “gambling” as the term is used throughout the U.S. Code.

That *none* of the statutes mentions poker—and that all reference only games that have close associations with organized crime—strongly suggests that Congress has concluded that poker does not qualify as gambling under federal law. *See Dicristina*, 886 F. Supp. 2d at 225 (“Poker is, for the purposes of this case, an elephant—or perhaps an eight hundred pound gorilla—that Congress would have been unlikely to ignore.”).

CONCLUSION

For the foregoing reasons, and those stated by Petitioner Lawrence DiCristina, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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