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

REPLY BRIEF FOR PETITIONER

NEAL KUMAR KATYAL
Counsel of Record
DOMINIC F. PERELLA
ELIZABETH B. PRELOGAR
DAVID M. GINN
HOGAN LOVELLS US LLP
555 13th Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

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The Government comes close to confessing error in its brief in opposition. It does not defend the Second Circuit's holding that state law alone defines "gambling" for purposes of 18 U.S.C. § 1955. And it makes no effort to square that holding with *United States* v. *Nardello*, 393 U.S. 286 (1969). Instead, the Government weakly tries to explain away the error—and the clear conflict between the decision below and this Court's holdings—by offering an implausible interpretation of the Second Circuit's decision. But the panel's own words disprove that interpretation. At the end of the day, the Government cannot hide the fact that the Second Circuit's holding contravenes over 40 years of precedent from this Court.

That alone makes this case worthy of review. *See* S. Ct. R. 10(c). But the Government's brief

highlights several additional reasons why *certiorari* is warranted. First, the Government bends facts in a futile attempt to deny that the Second Circuit decided the case on an unbriefed theory the Government had conceded below. Second, the Government tries to downplay a recognized circuit split regarding the interpretation of including-but-not-limited-to clauses. The Government suggests that the cases on one side of the split do not follow a categorical rule. But that misses the point: The cases on the other side of the split *do* follow a categorical rule; the Second Circuit followed the same approach below; and that approach is misguided. It has led, and will lead, the lower courts astray in construing a host of federal laws.

Finally, unable to defend the Second Circuit's decision, the Government proffers its own interpretation of the Illegal Gambling Business Act (IGBA), apparently in an effort to show that the Second Circuit reached the right outcome even if its analysis was wrong. But the Government's alternative explanation does not insulate the Second Circuit's mistaken holding from review. Quite the contrary: It underscores the importance of this Court's intervention. Under both the Second Circuit's approach and that proposed by the Government, the definition of "gambling" in this—and potentially other—criminal statutes will be remarkably broad. That is an unacceptable state of affairs because it will subject an enormous swath of innocent activity to potential federal prosecution. Congress did not intend such a dramatic expansion of federal authority over small-scale poker games having no link to organized crime. Review is warranted.

I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT.

Petitioner's lead argument is straightforward: The Second Circuit held that state law alone defines "gambling" under the IGBA, and that conflicts with this Court's holdings that similar federal criminal statutes incorporate a uniform *federal* definition of the crime. Pet. 12-16. Remarkably, the Government does not engage that argument; it never even claims that such a holding would not conflict with *Nardello* and its progeny. Instead, it tries to rewrite the Second Circuit's holding.

"Nowhere," the Government says, "does the court of appeals conclusively hold that any state-law label would be controlling for purposes of Section 1955, regardless of how idiosyncratic the state provision." BIO 14. Instead, according to the Government, the panel's opinion "presupposes that the federal court must identify 'gambling activity' to apply Section 1955." *Id.* The Government evidently believes the opinion below is consistent with the *Nardello* requirement that "gambling" have an independent federal definition.

That is wishful thinking. The Second Circuit held that the IGBA has "only three requirements"—a violation of state law, and two requirements regarding the size of the business—"all set forth in subsection (b)(1)." Pet. App. 18a. The panel reiterated that "the gambling activity must only be prohibited by state law" and meet the IGBA's size requirements to fall within the statutory prohibition. *Id.* 16a n.8. And in applying that rule, the panel looked only to "state law definitions of gambling" to

determine whether poker was gambling. Pet. App. 11a.

In short, the Second Circuit did indeed "adopt[ ] state gambling law lock, stock, and barrel." BIO 14. The Government's effort to reconcile the opinion with *Nardello* by rewriting it fails.

2. The Government offers three other arguments against review of the *Nardello* issue, all meritless.

a. First, the Government points out that no decision in the *Nardello* line involved the precise statute at issue here. BIO 15. Apparently the Government believes that left the court of appeals free to fashion a new rule for this case.

That is wrong. By requiring like cases to be treated alike, stare decisis helps preserve " 'a jurisprudential system that is not based upon "an arbitrary discretion." ' " *Hubbard* v. *United States*, 514 U.S. 695, 711 (1995) (citation omitted). The doctrine would not fulfill its role if each decision served as a precedent only with respect to its unique agglomeration of facts. That is why lower courts are bound not just by the specific results of this Court's cases, but also by the broader principles the Court articulates. *See, e.g.*, *American Tradition P'ship* v. *Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam). They may not employ "semantic games of reformulation and hair splitting in order to escape the force of a fairly resolved issue." *Bhandari* v. *First Nat'l Bank of Commerce*, 829 F.2d 1343, 1352 (5th Cir. 1987) (en banc) (Higginbotham, J., specially concurring).

The principle articulated in *Nardello* and its progeny is simple: When a federal statute refers to a generic crime such as extortion or burglary, that

word must be given a uniform federal definition and cannot depend on the peculiarities of state-law labels. Pet. 14. That holds true even if the statute *also* requires a violation of state law as an element of the federal offense. Pet. 14-15. The IGBA's reference to "gambling" in violation of state law falls squarely within the governing principle. In every material respect, the IGBA is identical to the statutes at issue in this Court's prior decisions. Indeed, the IGBA was enacted as part of the same omnibus legislation as RICO, which also refers to "gambling" in violation of state law. *See* 18 U.S.C. § 1961(1). This Court's cases applying the *Nardello* principle to RICO (*see, e.g.*, *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409-10 (2003)) confirm that the same principle extends to the IGBA.

b. The Government next contends that, even accepting *Nardello* as the governing precedent here, "state law would not necessarily be irrelevant to ascertaining the meaning" of the word "gambling." BIO 15. That is true but entirely beside the point. *Nardello* and its progeny discuss various ways to derive a uniform federal definition of a crime, one of which is to look to the definition prevailing in most states. *See Taylor* v. *United States*, 495 U.S. 575, 598 (1990). But that is not at all what the Second Circuit did. It held, instead, that a *single state's law* is controlling—that it is both the beginning and the end of the inquiry. *See, e.g.*, Pet. App. 16a n.8. That is the very approach *Nardello* and its progeny reject. *See* Pet. 14-15.

c. Finally, the Government contends that this Court should not resolve the *Nardello* conflict because "the court of appeals did not address the applicability of *Nardello* and the other decisions on

which petitioner relies, and petitioner did not present those decisions to that court." BIO 16. That claim takes chutzpah. The reason DiCristina did not brief *Nardello* below, of course, is because the Government had *conceded* that "gambling" has a federal definition. Pet. 11-12.[1] And DiCristina had every right to rely on that concession. Litigation, after all, is a " 'winnowing process, and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided.' " *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 487 n.6 (2008) (citation omitted). Litigants do not have to, and should not be forced to, re-argue every conceivable issue at each stage of the proceedings.

That is not to say a court is bound by a party's erroneous concession of law. It is not. But when parties have been induced not to brief an issue, the court should call for more briefing, not surprise the parties by deciding the issue *sua sponte*. *See, e.g.*, *Day* v. *McDonough*, 547 U.S. 198, 210 (2006) ("Of course, before acting on its own initiative, a court must accord the parties fair notice and an

[1] The Government suggests, disingenuously, that it did not concede the issue because it said in its Second Circuit brief that the IGBA "does not contain a definition of gambling." BIO 16 n.5. Read in context, the Government was arguing that the federal element of "gambling" should be given its ordinary meaning rather than an interpretation informed by subsection (b)(2). *See* Gov't CA2 Br. 13. With respect to the issue on which the Second Circuit based its holding—whether state law alone defines gambling under the IGBA—the Government on the very next page of its brief expressly "*accept[ed] that there is a federal definition of gambling*." *Id.* at 14 (emphasis added); *accord* Gov't CA2 Reply Br. 6-7 (arguing that the IGBA does not "simply incorporate state law wholesale").

opportunity to present their positions."). That is what this Court does when it detects an important issue lurking in the record. *See, e.g.*, *NLRB* v. *Noel Canning*, 133 S. Ct. 2861 (2013); *United States* v. *Woods*, 133 S. Ct. 1632 (2013); *Kiobel* v. *Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012). The panel's departure from that salutary practice conflicts with this Court's precedent and provides an independent basis for review. *See United States* v. *IBM Corp.*, 517 U.S. 843, 855 (1996) (deeming it "inappropriate" to consider an issue "without the benefit of the parties' briefing"); *Singleton* v. *Wulff*, 428 U.S. 106, 119-21 (1976) (court of appeals abused discretion by deciding issue before litigant had "an opportunity to be heard"); *Fountain* v. *Filson*, 336 U.S. 681, 683 (1949) (per curiam) (same).[2]

In any event, the Second Circuit's failure to cite *Nardello* does not prevent this Court from reviewing the judgment below. The Court is free to address "[a]ny issue 'pressed or passed upon below.'" *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002). And the Second Circuit plainly passed on the question whether "gambling" is defined according to state law or federal law. That is sufficient to preserve the issue for this Court's review. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

3. Perhaps recognizing that its arguments do not remotely explain away the panel's break with

[2] The Government attempts to lay blame at DiCristina's feet by suggesting he should have filed a petition for panel rehearing. BIO 17. But there is no requirement that a party seek rehearing before petitioning for *certiorari*. *See* S. Ct. R. 13.3; *Schiavo ex rel. Schindler* v. *Schiavo*, 403 F.3d 1289, 1296 n.4 (11th Cir. 2005) (per curiam) (a petition for rehearing "is not, of course, required before a petition for certiorari may be filed").

Nardello, the Government buries those arguments and leads off with a long discussion of the merits—a discussion in which it flees from the Second Circuit's holding and proposes its own rule. BIO 9-13. That argument amounts to a confession of error; the Government conspicuously never endorses the Second Circuit's holding. More to the point, the mere fact that the *Government* can think up an interpretation of the IGBA that comports with the *Nardello* line does not change the fact that the *Second Circuit* has broken with that precedent. Review in this Court is linked to what the court below actually "decided," S. Ct. R. 10(c), not what alternative theories the Government can concoct to substitute for the flawed reasoning below.

The Government's alternative theory is wrong in any event. As the petition and the amici have explained, "gambling" in the IGBA refers to games in which chance predominates over skill. Pet. 28-32; Hannum Amicus Br. 19-22; Poker Players' Alliance Amicus Br. 10-19. The Government's proposed definition—"wagering on an uncertain outcome," BIO 12—has no basis in the statutory text and is vastly overbroad. It would sweep in everything from Scrabble tournaments to investing in the stock market. *See* Scrabble & Bridge Players' Amicus Br. 17-22. Contrary to the Government's suggestion (at 18), the statute's size requirements will not meaningfully limit that definition. Even a small Elks lodge running a charitable bridge tournament would easily meet those requirements. And while the Government assures us (at 18) that it will exercise its vast power responsibly, " 'prosecutorial discretion is not a reason for courts to give improbable breadth to criminal statutes.' " *Freeman*

v. *Quicken Loans, Inc.*, 132 S. Ct. 2034, 2041 (2012) (citation omitted). The Government's expansive interpretation only underscores the need for this Court's immediate intervention. *See* Pet. 32-33.

II. THE CIRCUITS ARE SPLIT.

The Second Circuit's disregard for this Court's precedent is not the only reason to grant review. The decision below also exacerbates a circuit split on the proper function of including-but-not-limited-to clauses. Pet. 18-27. Some courts hold that such clauses have no bearing on the meaning of the general word that precedes them, *see* Pet. 19-22; whereas many others hold that the general word should be understood in light of the illustrative list that follows, *see* Pet. 23-26. The split of authority is well-recognized. *See, e.g.*, *United States* v. *West*, 671 F.3d 1195, 1202-03 (10th Cir. 2012) (Lucero, J., concurring).

The Government points out that courts in the second category do not *always* conclude that the general term is limited by the specific illustrations. BIO 20-24. That may be true, but it misses the point. The problem is that courts in the first category *never* conclude that the general term is limited by the specific illustrations. Then-Judge Alito's decision in *Cooper Distributing Co.* v. *Amana Refrigeration, Inc.*, 63 F.3d 262 (3d Cir. 1995), exemplifies that approach; it describes the including-but-not-limited-to clause as "the classic language of totally unrestricted * * * standards" and concludes that *ejusdem generis* categorically does not apply. *Id.* at 280. Other circuits are to the same effect. *See* Pet. 19-22. That approach is diametrically opposed to the approach of circuits that, even by the Government's lights, are willing to read including-

but-not-limited-to clauses as triggering limiting canons "depending on [the] context." BIO 19.

It is true that the Second Circuit claimed it was not adopting a categorical rule. Pet. App. 16 n.9. But saying it does not make it so. The court of appeals made no effort to explain what "context," *id.*, convinced it that the IGBA's including-but-not-limited-to clause is not definitional. The panel did not hold, for example, that the enumerated terms have nothing in common or that this Court's precedent compelled a broader definition, *cf. Reich* v. *Cambridgeport Air Systems, Inc.*, 26 F.3d 1187, 1191 (1st Cir. 1994). The decision to simply ignore the including-but-not-limited-to clause aligns the Second Circuit with the courts in the first category.[3] The Court should grant *certiorari* to review that split of authority and reverse the Second Circuit's cramped interpretation of the IGBA.

III. THIS CASE IS RIPE FOR REVIEW.

DiCristina has now been sentenced and will not take a second appeal challenging his sentence. Nevertheless, the Government urges the Court to reject the petition on the ground that it comes to the Court in an "interlocutory posture." BIO 9. According to the Government, the Court should follow its "normal practice" and deny the petition as premature. *Id.*

The Government's argument rests on a mistaken premise. The appeal below was *not* interlocutory.

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[3] The panel's fig leaf likely was an attempt to explain its break from earlier circuit precedent that lines up on the other side of the circuit split. *See Molloy* v. *MTA*, 94 F.3d 808, 812 (2d Cir. 1996). That sudden change of course only underscores the confusion in the lower courts.

After trial, the district court entered a judgment of acquittal under Federal Rule of Criminal Procedure 29. That was a final judgment. *See, e.g.*, *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 120 (2003) (Ginsburg, J., dissenting) ("The standard way for a defendant to secure a final judgment in her favor is to gain an acquittal."). Had the Government not appealed, the case would have been over.

The Government nevertheless claims that the Second Circuit's reversal of that final judgment transforms this into an interlocutory appeal. It suggests (at 9) that the Court's "normal practice" is to deny *certiorari* in this situation. Not so. It is utterly commonplace for the Court to review decisions of the courts of appeals reversing final judgments, such as dismissals on the pleadings and summary judgments. *See, e.g.*, *Stanton* v. *Sims*, 134 S. Ct. 3, 4 (2013) (per curiam); *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013); *Sebelius* v. *Auburn Regional Med. Ctr.*, 133 S. Ct. 817, 823 (2013). Although criminal cases rarely arrive at the Court in that posture (because Government appeals are uncommon), the Court has not hesitated to grant *certiorari* when they do. *See, e.g.*, *Carlisle* v. *United States*, 517 U.S. 416, 419 (1996) (court of appeals reversed judgment of acquittal); *Hudson* v. *United States*, 522 U.S. 93, 98 (1997) (court of appeals reversed dismissal of indictment); *Witte* v. *United States*, 515 U.S. 389, 395 (1995) (same); *Beecham* v. *United States*, 511 U.S. 368, 370 (1994) (same). The procedural posture therefore poses no obstacle to review.

Deferring review would serve no purpose other than to multiply costs and delay justice. DiCristina does not intend to challenge his sentence. Yet the

Government would have DiCristina take another appeal to the Second Circuit raising the very same argument rejected in the decision below. When the Second Circuit inevitably rejects that argument again, DiCristina will be back in this Court with the very same petition. Nothing will have changed. There is no reason to delay review of DiCristina's challenge.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of *certiorari* should be granted.

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Respectfully submitted,

NEAL KUMAR KATYAL
Counsel of Record
DOMINIC F. PERELLA
ELIZABETH B. PRELOGAR
DAVID M. GINN
HOGAN LOVELLS US LLP
555 13th Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner