

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 THE POKER PLAYERS ALLIANCE
AS *AMICUS CURIAE* IN SUPPORT
OF PETITIONER**

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BRIEF OF *AMICUS CURIAE*¹

Amicus curiae the Poker Players Alliance (the “PPA”), respectfully submits this brief in support of petitioner Lawrence DiCristina, and urges that the writ for certiorari be granted.

INTEREST OF THE *AMICUS*

The PPA is a nonprofit membership organization comprising over one million American poker players and enthusiasts. The organization believes that poker—an American tradition and a game of skill—is not properly regarded as “gambling,” as that term is used in criminal statutes. The PPA’s mission is to defend the rights of poker players and ensure that they have a safe place to play.

In connection with that mission, the PPA has appeared as an *amicus* in numerous cases relating to the legality of poker under state and federal law, including in this case. Counsel for the PPA assisted petitioner in drafting his briefs to the district court, and presented oral argument to the court regarding whether the Illegal Gambling Businesses Act (“IGBA”), 18 U.S.C. § 1955, applies to poker. The PPA likewise submitted an *amicus* brief to the Second Circuit detailing the differences between

¹ Pursuant to Rule 37, *amicus* certifies that no party’s counsel authored this brief in whole or in part and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. Both parties received timely notice of *amicus*’s intent to file this brief, and both consented; petitioner has filed a blanket consent.

poker and the games in the IGBA's definition of "gambling."

The PPA's perspective is valuable in this case because the PPA is intimately familiar not only with the facts and law of this case, but also with poker's importance as an American cultural institution as well as the key distinctions between poker and gambling. It respectfully submits this brief to highlight those issues for the Court's consideration.

SUMMARY OF ARGUMENT

This case presents a question of importance to millions of Americans from all walks of life: whether hosting poker games for money constitutes a federal felony. Petitioner engaged in activity that corresponds—at most—with a state law misdemeanor: he hosted a relatively low-stakes poker game, with only two tables, once or twice a week, in the back of a bicycle shop. State and local authorities did not prosecute him, but the U.S. Attorney's office charged him with federal felony violations of the IGBA, an anti-racketeering statute. It did so despite the fact that petitioner's poker game concededly had no connection whatsoever with organized or violent crime.

In the district court, petitioner proved with expert evidence that poker is not "gambling" within the meaning of the IGBA because the word "gambling" refers to games of chance. Petitioner showed not only that skill predominates over chance in a typical poker game, but also that the opposite is true of every game enumerated in the IGBA's definition of gambling. The district court thus dismissed the indictment against him.

On appeal, the Government accepted that the IGBA includes a federal definition of gambling, and stipulated that poker is, indeed, a game of skill. U.S. C.A. Br. 14. But the Second Circuit nevertheless reversed. The court did not disturb the district court's conclusion that poker is a skill game, while the games listed in the IGBA are games of chance. Instead, it determined that "the question of whether skill or chance predominates in poker is inapposite to this appeal," Pet. App. 17a, holding that the IGBA's definition of gambling is "not definitional," *id.* 16a n.8, but instead merely "serves as an illustration of what may constitute running a gambling operation," *id.* 17a. Under the Second Circuit's interpretation, the IGBA "contains only three requirements, all set forth in subsection (b)(1)." *Id.* 18a. They are that a gambling business must violate state law, must involve five or more persons, and must either remain in continuous operation for thirty days or have gross revenue of \$2000 in a single day. *Id.* 22a. Thus, in the Second Circuit's view, it is *irrelevant* that poker does not resemble the games that Congress described as "gambling" in the IGBA.

This Court should grant certiorari to reverse the Second Circuit. The court of appeals' decision is not only wrong, but illogical. Even though Congress defined "gambling" in the IGBA itself, the court deemed that definition irrelevant in deciding whether a business constitutes a "gambling business" under the IGBA. That makes no sense in light of the text and structure of the statute. The Second Circuit's interpretation also poses significant practical problems because state law definitions of gambling are often amorphous—but now they are incorporated

wholesale into a federal felony statute. Applying the correct, federal definition of gambling, it is clear that games of skill like poker do not fall within it.

Certiorari is also warranted because of the importance of the question presented. Even if this case was only about the legality of poker, that would be enough: millions of Americans play, and thousands regularly emulate petitioner by hosting games where they are compensated by the players for providing a dealer, equipment, refreshments, and space. Innumerable charities likewise host poker tournaments that meet the IGBA's size requirements. Many of these activities fall within gray areas under state law—and they almost never precipitate state enforcement actions. Yet the Second Circuit's interpretation of the IGBA exposes them to the risk of federal felony prosecution.

And of course, this case is about much more than poker. It is about whether a federal criminal statute contains any reasonable limits on its scope, and more broadly about whether “including but not limited to” clauses in criminal statutes impose meaningful limits on prosecutions. In this case, federal prosecutors have interpreted statutory ambiguity as a blank check—but this Court's precedents establish that ambiguous criminal statutes must be interpreted narrowly, and in accord with their purpose. Congress did not intend to leave the scope of criminal offenses to prosecutors' discretion, and this Court should reverse the Second Circuit's holding to the contrary.

ARGUMENT**I. The Second Circuit's Interpretation Of The IGBA Is Manifestly Incorrect.**

The IGBA, provides, in relevant part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

(b) As used in this section—

(1) “illegal gambling business” means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

(2) “gambling” includes but is not limited to 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.

The Second Circuit held that an offense under the IGBA has three elements, each codified as a subsection of Section 1955(b)(1), the definition of “illegal gambling business.” But the plain language of that section requires a court—before it even considers those three elements—to first determine whether the business constitutes a “gambling business.”

For example, if a person operated a brothel—in violation of state law, together with five or more persons, continuously for more than thirty days—that would not be an offense under the IGBA, even though all three of the elements that the Second Circuit identified were met. It would not be an offense because prostitution is not “gambling”—even though it is sometimes referred to as a “Risky Business,”² and even though states often regulate prostitution and gambling together, *e.g.*, as offenses against public morals. From that alone, it is clear that the statute contains a fourth element: the business must be a “gambling business.” This is so clear, in fact, that the Government below “accept[ed] that there is a federal definition of gambling under the IGBA.” U.S. C.A. Br. 14.

The next question is how a court should distinguish gambling businesses from others. Petitioner argues, correctly, that “gambling” under federal law is properly limited to games in which chance predominate over skill. The Second Circuit

² See, *e.g.*, *Risky Business* (Geffen Co., 1983) (in which a young Tom Cruise converts his parents’ house into a brothel to finance car repairs).

rejected that argument, and looked instead to state law, Pet. App. 11a-12a. Under this Court's precedents, that was error.

The clearest evidence that state law does not provide the IGBA's definition of "gambling" is Congress's decision to include Section 1955(b)(2), which defines gambling not by reference to state law, but instead by using an illustrative list. As this Court has explained, when Congress uses a list of examples to illuminate a term in a federal criminal statute, courts "should read the examples as limiting" the scope of the term to items that "are roughly similar . . . to the examples themselves." *Begay v. United States*, 553 U.S. 137, 143 (2008) (holding that the Armed Career Criminal Act's proscription on crimes that "involve[] conduct that presents a serious potential risk of physical injury" does not apply to driving under the influence because that offense is not similar to the statute's example offenses: burglary, arson, extortion, and crimes involving explosives). If Congress had intended to make the IGBA's definition of "gambling" "all-encompassing, it is hard to see why it would have needed to include the examples at all." *Id.* at 142.

Additionally, had Congress intended for the IGBA to incorporate state law definitions of "gambling," it could have said so. It is settled that, "[i]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law." *Taylor v. United States*,

495 U.S. 575, 591-92 (1990) (quoting *United States v. Turley*, 352 U.S. 407, 411 (1957)).³ In the IGBA, Congress incorporated state law as one element of the offense: under 18 U.S.C. § 1955(b)(1)(i), a state law violation is essential. But that is not the part of the statute that refers to a “gambling business,” and it is not where the statute defines “gambling,” which indicates that Congress did not intend for state law to govern the meaning of those terms.

Moreover, an interpretation that reads the federal definition of “gambling” out of the IGBA would undoubtedly be the more expansive, and therefore at odds with the rule of lenity. *See United States v. Santos*, 553 U.S. 507, 514 (2008). While many states limit gambling to games predominated by chance, some states have broader definitions. In South Carolina, for example, “[g]ambling . . . includes betting money on the outcome of any ‘game’ whatsoever, regardless of the amount of skill involved in the game,” including “chess.” *Town of Mt. Pleasant v. Chimento*, 737 S.E.2d 830, 837 (S.C. 2012). Thus, under the Second Circuit’s interpretation of the IGBA, the statute permits federal prosecutors to charge the organizer of a South

³ As the Petition explains (at 12-16), it is particularly telling that this Court held that the term “extortion” in the Travel Act, 18 U.S.C. § 1952, is a matter of federal, not state law. *See United States v. Nardello*, 393 U.S. 286, 293-94 (1990). Like the IGBA, the Travel Act targets gambling that violates state law. It would make no sense to hold that the meaning of “gambling” under the Travel Act—which does not define the term—is a matter of federal law, but the meaning of “gambling” under the IGBA is not. *See* Pet. 13-15.

Carolina chess tournament—that gives its proceeds to charity—with a federal felony if the tournament is operated by five or more people and raises \$2000. But nothing in the IGBA puts the organizer on notice that he is committing a federal offense; if anything, the organizer would see the games that Congress decided were “gambling” in Section 1955(b)(2), would see that the statute excludes charitable games of chance from its scope, *see* 18 U.S.C. § 1955(e), and would infer that the statute would not reach a chess tournament. *See* Pet. App. 161a (“[I]t would be notably odd if games of skill were encompassed in the federal definition, but only games of chance were exempted from prosecution under § 1955(e).”). But under the Second Circuit’s interpretation, he would be liable. Thus, to the extent the existence of a federal definition of “gambling” is ambiguous, the Second Circuit’s conclusion construes the ambiguity to expand criminal liability—the antithesis of lenity.

As the Petition explains, the IGBA’s structure and legislative history, the plain meaning of the word “gambling,” and the common law all support the conclusion that Section 1955(b)(2) defines “gambling” for purposes of the IGBA, and limits that term to games of chance. Pet. 28-32. To reach the contrary result, the Second Circuit had to determine that section (b)(2) does no work, and also that section (b) has three subsections, the first and third of which are definitions, but the second of which is purely decorative. Pet. App. 14a-15a. It would be odd for Congress to create such a sandwich—odd enough that the Government itself accepted that the IGBA defines “gambling.” Thus, the Second Circuit’s decision should be reversed.

II. Poker Is Not “Gambling” Under The IGBA.

Having established that Section 1955(b)(2) does supply the IGBA’s definition of “gambling,” the next step is to determine the meaning of that definition, and whether it encompasses poker. The definition provides that “‘gambling’ includes but is not limited to 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). It does not, on its face, include poker, but it is also not exhaustive. Thus, the question is whether, from the face of the definition, a court can determine that the statute unambiguously covers poker. *See Santos*, 553 U.S. at 513-14.

The ordinary meaning of “gamble”—to “play a game of chance for stakes,” American Heritage Dictionary of the English Language (5th ed. 2013), <http://www.ahdictionary.com/word/search.html?q=gamble>—does not unambiguously include poker in light of the Government’s stipulation, the district court’s undisturbed conclusion, and the overwhelming evidence that skill predominates over chance in poker. U.S. C.A. Br. 14; Pet. App. 169a-77a. Thus, the question becomes whether the illustrative examples Congress included in the IGBA’s definition of “gambling” unambiguously broaden the definition enough to reach a game of skill like poker.

For three reasons, they do not. First, unlike poker, the enumerated gambling activities are all games of chance. Second, the enumerated activities all furnished substantial revenues to organized crime, and had strong associations with organized

crime. Poker did not and does not. *See, e.g., United States v. Roselli*, 432 F.2d 879, 886 n.8 (9th Cir. 1970) (noting that poker is not “traditionally associated with organized crime”). And finally, poker is an American tradition and has been wildly popular in this country for more than a century. If Congress had intended to criminalize such a prominent game, it would have done so expressly, as it did with bookmaking and lotteries.

The IGBA’s definition of “gambling” includes three sets of activities: (1) organized sports betting, including bookmaking and pool-selling; (2) pit games, *i.e.*, slot machines, roulette, and dice games in which the players play against the house; and (3) lotteries, including policy, bolita, and numbers. *See* 18 U.S.C. § 1955(b)(2). Each set falls cleanly within the ordinary definition of “gambling”: playing games of chance for money. And poker does not resemble the activities in any of these sets.

Poker does not resemble organized sports betting, *i.e.*, “bookmaking and pool-selling,” *id.*, both of which are games of chance for the typical player. This is so for two reasons. First, the odds in organized sports betting are highly accurate, ensuring that the typical bettor cannot consistently pick winners. Bookmakers typically take bets against a “point spread,” also known as a “line,” which is a professional oddsmaker’s estimate of the score differential between the winner and loser in a sporting contest. Thus, in order to win a bet with a bookmaker, the bettor must not only predict the winner, but also the margin of victory. And casinos employ expert oddsmakers who can “gauge the public’s perceptions so well that the line becomes a

50-50 proposition for the consumer.” Andrew Brisman, *Mensa Guide to Casino Gambling* 208 (2004). The point spread is “the great leveler”— “[w]here once there had been a sure thing, now there was room for a difference of opinion, which is the essence of gambling.” Bert R. Sugar, *The Caesars Palace Sports Book of Betting* 17 (1992). “Because victory against the point spread can go either way, the element of luck becomes very important.” *Id.* at 29.⁴ Casinos also publish their point spreads, which means that even illegal, amateur bookmakers can take advantage of this wealth of expertise.⁵

Second, even the most skilled sports bettors exercise only one skill—prediction—but wager on events that are entirely beyond their influence. The typical bettor has no power to influence the terms of the bet, and no honest bettor can influence the

⁴ There are exceptions—a handful of outliers who can beat the oddsmakers at their own game. But their experience is not relevant to whether organized sports betting generally should be understood as a game of chance or a game of skill. The salient point of analysis is the typical bookmaker’s customer because that is who Congress had in mind when it enacted the IGBA.

⁵ Congress has also repeatedly and expressly regulated sports betting, before, in, and after the IGBA. *See, e.g.*, 18 U.S.C. § 1084(a) (prohibiting transmissions of wagering information relating to sporting events); *id.* § 1953(a) (prohibiting the interstate transportation of paraphernalia for use in bookmaking or sports wagering pools); *id.* § 224 (prohibiting sports bribery); 28 U.S.C. § 3702 (prohibiting states from authorizing sports betting). Tellingly, it has never enacted a statute that mentions poker—a search of the U.S. Code reveals literally zero references.

underlying sporting event. Once a sports bettor places his or her bet, all he or she can do is hope for a favorable result.

Unlike sports bettors, the typical poker player relies on skill. In poker, the player need not defeat professional oddsmakers—he only has to defeat the other players at his table (or in a tournament, outlast other entrants). Moreover, the player can choose his opponents, seeking players of comparable skill. He can then utilize a panoply of skills against those opponents in order to prevail in both the short and the long term. Critically, he does not merely place wagers and rely upon the skills of others: instead, he uses his own skills, deploying maneuvers like bluffing that enable him to win even when chance does not favor him with the best cards. There is no suggestion that the typical sports bettor has any comparable opportunity.

For these reasons, the inclusion of bookmaking and pool-selling in the IGBA does not suggest the inclusion of poker.

Poker also does not resemble the second category of included games—“slot machines, roulette wheels, and dice tables,” 18 U.S.C. § 1955(b)(2)—all of which fall squarely within the ordinary definition of “gambling” because in each one, chance predominantly determines the outcome.

Even a cursory examination reveals that slot machines, roulette wheels, and dice tables are qualitatively different from poker. First, these devices are designed to preclude, not reward, the exercise of skill. Typical slot machines involve only pulling a lever or pushing a button; roulette involves

choosing from a series of bets all of which have comparable expected values (none positive), and dice games likewise involve only placing (bad) bets and throwing dice. That is a far cry from the litany of skills that poker players use to influence and control the outcomes of their games.

Second, all of these devices are used to play house-banked games, *i.e.*, games in which the house competes directly against its customers, and therefore has incentives to either cheat them or misinform them about their true chances of winning. Poker, by contrast, is a peer-to-peer game in which the players compete against each other and the house passively hosts the game. The revenue-generation and consumer-protection concerns for house-banked games are therefore heightened when compared to poker. In fact, the distinction between house-banked and peer-to-peer games has been emphasized in gambling laws, including federal ones—which treat house-banked games more strictly. *See, e.g.*, Indian Gaming Regulatory Act, 25 U.S.C. § 2703(7)(B)(i) (providing that “banking card games” are class III gaming, subject to the tightest restrictions).

Third, for each of the enumerated games, the odds are rigged in the house’s favor so that the players’ expectation is always negative. Consider roulette. An American wheel has 38 slots, numbered 0, 00, and 1 through 36. The 0 and 00 slots are green, half of the remaining numbers are red, and the other half black. Bettors can wager that a ball placed on the spinning wheel will land on a particular color, number, or range of numbers. *See* Brisman, *supra*, at 149-52. Payouts for roulette bets are calibrated so that no matter which bet the player

chooses, he expects to lose \$.053 per dollar wagered. *Id.* at 153.⁶ For example, the odds of the wheel landing on any number are 37 to 1, but a winning bet on any single number pays only 35 to 1. There is nothing the player can do to improve his chances—he cannot bluff, nor otherwise influence the wheel. *Id.* He can only hope to get lucky. And the same is true of a slot machine and a dice game—all the player can do is choose among bets with a negative expectation; he cannot control the outcome, and he can prevail only by chance. Poker is different. The rules of the game do not arm any player with a statistical advantage, and as the evidence in this case showed, skill overcomes any short-term advantage conferred by the cards during the course of a typical session. More skilled players thus expect to prevail—and in fact do prevail—over their less skilled counterparts in typical poker games.

Finally, the enumerated gambling activities generate massive profits for their operators. In 2012, coin operated devices and pit games in Nevada casinos generated \$9,906,149,529, or 96.3% of all gaming revenues. Nevada Gaming Control Board, Nevada Gaming Abstract 2012, at 1-3 (2013). Poker, by contrast, generated only 1.6% of gaming revenues, *id.*, and also generated substantially less money per square foot than either coin operated devices or pit games, *id.* at 1-7. That is not a coincidence, but instead reflects the inherent limitations of poker as a revenue engine: the house does not wager against the

⁶ There is a single exception, the “top line” bet, which has an even worse expected value of \$.079 lost per dollar wagered.

players, but instead collects money slowly over time in the form of a “rake”⁷; and poker tables occupy a large amount of space, while coin-operated and pit games can service far more action with a far smaller footprint. Congress’s objective in enacting the IGBA was to disrupt revenue flows to organized crime. In this case, even the Government conceded that poker did not generate substantial illicit revenues. *See* R96 at 27 (“Congress enumerated the gambling activities that presented law enforcement with its most pressing challenges related to organized crime at that time. Poker . . . simply did not rate among these challenges when Congress drafted and enacted the [IGBA].”). Poker’s drastically lower revenue potential is therefore decisive in proving that the inclusion of slot machines, roulette wheels, and dice tables does not weigh in favor of including poker.

In sum, poker has virtually nothing in common with slot machines, roulette, and dice games. While gambling games, such as blackjack and baccarat, share key features with those games—including being predominantly determined by chance, being house-banked, and generating substantial revenues for operators—poker does not.

The final category of games in the IGBA’s definition of “gambling” is traditional lotteries, *i.e.*, lotteries, policy, bolita, and numbers. *See* 18 U.S.C. § 1955(b)(2). In each of these games, the player

⁷ A rake is a fee collected from each pot, typically capped at a small amount, *e.g.*, \$5. *See* Wikipedia, Rake, [http://en.wikipedia.org/wiki/Rake_\(poker\)](http://en.wikipedia.org/wiki/Rake_(poker)) (last visited Dec. 5, 2013).

selects a number, and a winner is determined by random drawing. The winner receives a large share of the prize pool, and the operator keeps the rest. Lotteries are games of pure chance—other than buying more numbers, the player can do nothing to increase his chances of winning. Moreover, the expected value of lottery games is negative: every time the player buys a number, he loses money. For example, when Congress enacted the IGBA, senators discussed a numbers racket in which the odds of winning were 1000:1, but the payout was only 500 or 600:1. *See Organized Crime Control: Hearings Before Subcomm. No. 5 of the H. Comm. on the Judiciary, 91st Cong. 87 (1970) (statement of Sen. McClellan) (hereinafter “House Judiciary Hearings”).*

“While lotteries have existed in this country since its founding, States have long viewed them as a hazard to their citizens and to the public interest, and have long engaged in legislative efforts to control this form of gambling. Congress has, since the early 19th century, sought to assist the States in controlling lotteries.” *United States v. Edge Broad. Co.*, 509 U.S. 418, 421 (1993). Like sports betting and house-banked games, lotteries have been singled out for regulation in other federal gambling statutes, including the federal lottery statutes, 18 U.S.C. §§ 1301-04, and the Paraphernalia Act, *id.* § 1953(a) (identifying “numbers, policy, bolita, or similar game[s]”), which recognizes that the term “lottery” means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers,” *id.* § 1953(e).

The legislative history of the IGBA reveals that illegal lotteries—organized crime’s chief source of revenue—were Congress’s primary target. In his message to Congress on organized crime, President Nixon identified “the numbers racket” as a particularly important form of gambling. *See Measures Relating to Organized Crime: Hearings Before the Subcomm. on Crim. Laws & Procedures of the S. Comm. on the Judiciary, 91st Cong. 444 (1969)* (Message from the President of the United States Relative to the Fight Against Organized Crime). The Attorney General did the same in his remarks to the Senate. *See id.* at 108 (statement of John Mitchell). And senators likewise noted that “[t]he greatest single source of revenue for organized crime is its gambling activities A great portion of this is gained through numbers rackets, draining from the poorest inhabitants of our ghettos and slums and their families precious dollars which should be spent for food, shelter and clothing.” *Id.* at 158 (Statement of Sen. Tydings). There was also concern that numbers operators had corrupted local law enforcement, and thus harmed communities by undermining law and order. *See, e.g., Organized Crime Control Act of 1969, S. Rep. No. 91-617, at 72 (1969).*

The lengthy discussion concerning lotteries in the IGBA’s legislative history stands in stark contrast with the near-silence regarding poker. As explained above, poker cannot scale to generate revenues in the same way that illegal lotteries can, and poker does not exhibit the vices associated with numbers rackets—for example, poker does not drain funds from the poorest communities, and it has not

been shown to fuel broader patterns of corruption. Most important, the element of skill in poker makes it fundamentally different from the predatory enterprise of an illegal lottery. In sum, there is simply no comparison, and this category of games in the IGBA's definition of "gambling" cannot be read to suggest the inclusion of poker.

Thus, a careful analysis of the games that Congress included in the IGBA's definition of gambling dispels any notion that the statute covers poker. Instead, Congress was targeting games of chance with strong historical connections to organized crime. But poker was not such a game, any more than golf tournaments, bridge games, spelling bees, or chess competitions could have been. While those activities are all arguably gambling under the laws of many states (when played for money), none of them plausibly fall within the IGBA's definition of "gambling." So too with poker.

This Court should thus grant certiorari to reverse the Second Circuit's erroneous holding that poker is gambling.

III. The Questions Presented Are Important.

Certiorari is also warranted because the questions presented are of surpassing importance. First, poker is important. The game was invented in the United States approximately two centuries ago, and has since become an American institution. As early as 1875, the New York Times editorial page opined that "the national game is not base-ball, but poker." *The National Game*, N.Y. Times, Feb. 2, 1875, available at <http://tinyurl.com/3kwtdom>.

Today, approximately 35 million Americans play poker,⁸ including 23 million—more than 10 percent of the nation’s adult population—who play regularly.⁹ Demographic surveys conducted by the PPA reveal that these players come from all walks of life. PPA members include people of all education levels—with over 37% having attained at least a bachelor’s degree; of all income levels—with 57% earning at least \$50,000 per year; and of all political persuasions, with members identifying as 32% Democrat, 28% Republican, and 30% Independent. Veterans are a massive component of the PPA’s membership (approximately 23%).¹⁰ And influential Americans in government, science, literature, sports, and the arts have all been known to play. *See* James McManus, *Cowboys Full: The Story of Poker* 10-16, 22, 62, 223, 425 (Kindle ed. 2010) (noting that Presidents, Supreme Court Justices, the scientists of the Manhattan Project, Mark Twain, as well as innumerable athletes, actors, and performers have all

8 *See* Am. Gaming Ass’n, *State of the States* 2010, at 34 (2010) (reporting that in 2009, 15% of Americans adults surveyed played poker); *see also* U.S. Census Bureau, 2009 American Community Survey 1-Year Estimates: Age & Sex S0101 (2010) (estimating the total U.S. adult population at 232,403,963 (75.7% of 307,006,556)—15% of which would be 34,860,594).

9 *See* Poker Players Research, *Topline Findings* (2008), <http://pokerplayersresearch.com/ToplineFindings.aspx> (last visited Dec. 5, 2013).

10 *See* Poker Players Alliance, *Who Plays Poker?*, <http://www.scribd.com/doc/23533788/Who-Plays-Poker-PPA-Survey> (last visited Dec. 5, 2013).

been poker aficionados). Our national fondness for poker has only grown in recent years, thanks to televised contests and the advent of Internet poker.

Increasingly, individuals are hosting poker games at their homes and businesses. Many do so using a model similar to petitioner: they provide space, a trained dealer, equipment, and refreshments. In exchange, they take a fee—often in the form of a rake—from the players. These games seldom raise any substantial public welfare concerns, but under the Second Circuit’s holding, even such small games might constitute IGBA violations if they meet the statute’s minimal size and continuity requirements.

Charities are especially vulnerable. Poker is a critical avenue for charitable fundraising. Many charitable competitions take place in jurisdictions where the legality of poker falls in a grey area. *See, e.g.,* Clay Barbour & Kathy Adams, *Is Poker Legal in Virginia? High Court Won’t Say*, *The Virginian-Pilot*, Mar. 1, 2013, *available at* <http://hamptonroads.com/2013/02/poker-legal-virginia-high-court-wont-say>. Nevertheless, organizers often proceed with the tacit endorsement of local law enforcement. Establishing that poker is not subject to the IGBA will assure these organizers that their activities will not provoke federal prosecution either.

Wholly apart from the intrinsic value of poker, this case also concerns the proper role of federal law enforcement. As then-Attorney General Robert Jackson famously explained, federal prosecutors must pick their cases, taking care to pursue those “in which the offense is the most flagrant” and “the public harm the greatest,” and which thus pose the

greatest threat to national interests. Robert H. Jackson, *The Federal Prosecutor*, 31 J. Am. Inst. Crim. L. & Criminology 3, 5 (1940).

Congress had the same ideals in mind when it enacted the IGBA. Lobbying for Congress to pass the statute, the Department of Justice was explicit “that we are not trying to bring the whole gambling enforcement problem into the Federal jurisdiction, the Federal courts.” House Judiciary Hearings at 194 (Statement of Asst. Att’y Gen. Will Wilson). Instead, the statute 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.” *Organized Crime Control Act of 1970*, H.R. Rep. No. 91-1549, at 53 (1970). The Attorney General himself promised that the IGBA “is an anti-racketeering measure only and, if enacted, will be enforced by the Department of Justice strictly in accord with its legislative purpose.” House Judiciary Hearings at 170 (Statement of John Mitchell).

This case demonstrates that the Department of Justice has reneged on that promise, and this Court’s intervention is warranted to bring interpretation of the IGBA back in line with Congress’s intent. There simply is no federal interest in prosecuting petitioner, or people similarly situated to him: his activities have no organized crime connection; he engaged in no substantial interstate activity; and there was no suggestion that anybody was ever harmed in connection with his games. It is thus impossible to square this prosecution with Congress’s purposes in

enacting the IGBA, or the public welfare concerns that ought to guide responsible federal prosecutors. And indeed, it is impossible to do so with regard to poker generally. Like other games of skill, poker deserves to be recognized for what it is: an American pastime; not illegal gambling.

Of course, none of this is to say that Congress and the states cannot regulate poker games. They can, and several states have done so expressly. But Congress has never done so—not in the IGBA, nor in any other gambling statute. This Court should not permit the Government to stretch the IGBA to criminalize poker when the statute’s language does not unambiguously support that result, and when the Government’s broad reading serves only to unhinge the statute from its purposes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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