

12-3720

IN THE
**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellant

v.

LAWRENCE DICRISTINA,

Appellee

STEFANO LOMBARDO, AKA MITZIE

On Appeal from the United States District Court
for the Eastern District of New York

**BRIEF FOR *AMICUS CURIAE* THE POKER PLAYERS ALLIANCE
IN SUPPORT OF APPELLEE AND AFFIRMANCE**

Thomas C. Goldstein
Tejinder Singh
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave. NW # 404
Washington, DC 20015
Tel. (202) 362-0636
Fax (866) 574-2033

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Poker Players Alliance states that it is a not-for-profit organization that has no parent corporation.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE <i>AMICUS</i> AND AUTHORITY TO FILE.....	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	6
I. Poker Is An American Tradition And A Game Of Skill	6
II. Poker Is Not “Gambling” Under The IGBA	9
A. Poker Does Not Resemble Bookmaking Or Pool-Selling.....	10
B. Poker Does Not Resemble Slot Machines, Roulette Wheels, Or Dice Tables.....	22
C. Poker Does Not Resemble Lotteries, Policy, Bolita, Or Numbers	26
CONCLUSION	29
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASES

<i>Commonwealth v. Laniewski</i> , 98 A.2d 215 (Pa. Super. 1953).....	15
<i>Ruben v. Keuper</i> , 127 A.2d 906 (N.J. Super. 1957)	20, 21
<i>State v. Steever</i> , 246 A.2d 743 (N.J. Super. App. Div. 1968)	16
<i>United States v. 294 Various Gambling Devices</i> , 718 F.Supp. 1236 (W.D. Pa. 1989).....	23
<i>United States v. Edge Broad. Co.</i> , 509 U.S. 418 (1993).....	27
<i>United States v. Frazier</i> , No. 07-CR-10, 2007 WL 1239206 (E.D. Tenn. Apr. 27, 2007).....	15

STATUTES

15 U.S.C. § 1171	22
18 U.S.C. § 224	11
18 U.S.C. § 1084(a)	10
18 U.S.C. §§ 1301-04.....	27
18 U.S.C. § 1953(a)	11, 27
18 U.S.C. § 1953(e)	27
18 U.S.C. § 1955	1
18 U.S.C. § 1955(b)(2).....	9, 10, 22, 26
25 U.S.C. § 2703(7)(B)(i)	23

28 U.S.C. § 3702.....11

LEGISLATIVE MATERIALS

116 Cong. Rec. S590 (daily ed. Jan. 21, 1970)10

116 Cong. Rec. S596 (daily ed. Jan. 21, 1970)11

Measures Relating to Organized Crime: Hearings Before the Subcomm. on Crim. Laws & Procedures of the S. Comm. on the Judiciary, 91st Cong. (1969)... 27, 28

Organized Crime Control Act of 1969, S. Rep. No. 91-617 (1969).....28

Organized Crime Control: Hearings Before Subcomm. No. 5 of the H. Comm. on the Judiciary, 91st Cong. (1970) 11, 26, 27

The Attorney General’s Program to Curb Organized Crime & Racketeering, Hearings before the S. Comm. on the Judiciary, 87th Cong. (1961)14

OTHER AUTHORITIES

Am. Gaming Ass’n, *Sports Wagering Fact Sheet* (2012), <http://www.americangaming.org/industryresources/research/fact-sheets/sports-wagering>.....11

Am. Gaming Ass’n, *State of the States 2010* (2010).....6

Andrew Brisman, *Mensa Guide to Casino Gambling* (2004) 18, 24

Bert R. Sugar, *The Caesars Palace Sports Book of Betting* (1992) 16, 17

Brendan Murray, *Poker Recognised as Mind Sport*, Card Player, Apr. 29, 2010, <http://www.cardplayer.com/poker-news/8988-poker-recognised-as-mind-sport> ..8

CBSNews, *Sports Bettor Billy Walter’s Winning Streak*, 60 Minutes (Jan. 17, 2011), <http://www.cbsnews.com/stories/2011/01/13/60minutes/main7243443.shtml>.. 19, 20

ChiUng Song et al., *The Comparative Accuracy of Judgmental and Model Forecasts of American Football Games*, 23 Int’l J. Forecasting 405 (2007).....17

Emanuel Towfigh & Andreas Glöckner, *Game Over: Empirical Support for Soccer Bets Regulation*,
 17 *Psychology, Pub. Pol’y & L.* 475 (2011).....18

Garrett Downing, *Career Sports Bettors Battle the Betting Line*, *Las Vegas Sun*,
 Mar. 30, 200919

H.O. Stekler et al., *Issues in Sports Forecasting*,
 26 *Int’l J. Forecasting* 606 (2010).....18

James McManus, *Cowboys Full: The Story of Poker* (Kindle ed. 2010)6, 7

Jim Kilby et al., *Casino Operations Management* (2d ed. 2005).....17

Marshall Gramm & Douglas H. Owens, *Efficiency in Pari-Mutuel Betting Markets Across Wagering Pools in the Simulcast Era*,
 72 *S. Econ. J.* 926 (2006).....18

Michael Cantinotti et al., *Sports Betting: Can Gamblers Beat Randomness?*,
 18 *Psychology of Addictive Behaviors* 143 (2004).....17

Nevada Gaming Control Board, *Gaming Revenue Report Month Ended January 31, 2013* (2013).....25

Nevada Gaming Control Board, *Nevada Gaming Abstract 2012* (2013)..... 14, 25

Poker Gives, <http://www.pokergives.org>.....8

Poker Players Alliance, *Who Plays Poker?*,
<http://www.scribd.com/doc/23533788/Who-Plays-Poker-PPA-Survey>6

Poker Players Research, *Topline Findings* (2008),
<http://pokerplayersresearch.com/ToplineFindings.aspx>6

Wikipedia, *Poker on Television*,
http://en.wikipedia.org/wiki/Poker_on_television.....8

Wikipedia, *Rake*,
[http://en.wikipedia.org/wiki/Rake_\(poker\)](http://en.wikipedia.org/wiki/Rake_(poker)).....12

William N. Thompson, *Gambling in America: An Encyclopedia of History, Issues, and Society* (2001)23

The Poker Players Alliance (“PPA”) respectfully offers this *amicus curiae* brief in support of Appellee Lawrence DiCristina, and urges this Court to affirm the judgment of the district court.¹

INTEREST OF THE *AMICUS* AND AUTHORITY TO FILE

The PPA is a nonprofit membership organization comprising over one million American poker players and enthusiasts. The PPA believes that poker—one of America’s oldest recreational activities—is fundamentally dissimilar from games traditionally regarded as “gambling” because poker is a contest of wits and wills between the players, and therefore a game of skill—as opposed to “gambling,” which connotes wagering on a game of chance, or on the outcome of events beyond the players’ control. 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 before the district court in this case. Counsel for the PPA assisted Appellee 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.

¹ *Amicus* certifies that no party’s counsel authored this brief, and no person other than *amicus* and its counsel contributed money to fund preparing or submitting the brief.

In sum, the PPA and its members have a strong interest in the outcome of this case. Because the decision below constitutes the first federal opinion to thoroughly consider the nature of poker and whether it is appropriate to treat poker as gambling, this Court's decision is likely to shape federal precedent on this question. The PPA thus respectfully submits this *amicus* brief to highlight poker's importance as an American cultural institution as well as some of the key distinctions between poker and gambling.

The PPA has authority to file because all parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

Poker is an American tradition and a game of skill. Invented in the United States approximately two centuries ago, the game has always been popular. Tens of millions of Americans from all walks of life—including presidents, legislators, jurists, scientists, investors, police officers, physicians, performers, and teachers, to name just a few—regularly play poker.

Poker's popularity is attributable, in significant part, to the fact that it has low barriers to entry, but is an incredibly rich game—indeed, leading academics have posited that poker's complexity exceeds that of chess. Poker also taps into our competitive instincts, appealing to the same part of our collective psyche that loves sports. Moreover, poker is a social activity. It brings strangers together and

cements bonds among friends; it bridges cultural, political, and socioeconomic gaps; and it provides tremendous entertainment and enrichment to the millions of Americans who play.

Poker's popularity also stems from the fact that it is a game of skill. Millions of American poker players recognize what the evidence in this case established: that players succeed or fail based on how well they exercise a diverse array of skills. Unlike gambling, where stilted odds and systemic information asymmetries ensure that the players lose and the house wins, poker players have an opportunity, in every single hand, to outplay their opponents in a fair contest of skill.

When Congress enacted the IGBA, it did not target poker. The statute applies only to "gambling businesses," and its definition of "gambling" does not mention poker games. A close reading of the definition reveals that it is confined to games of chance that do not share poker's core traits. The IGBA thus includes three categories 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. Each category falls cleanly within the traditional definition of "gambling": playing games of chance for money. Each category generated substantial revenues for organized crime. And most importantly, for at least two reasons, each category excludes poker.

First, while the gambling activities in the IGBA are games of chance, poker is a contest of skill. As the evidence shows—and as the Government vigorously disputed below but now concedes, Gov't Br. 14—skill predominates over chance in poker. Crucially, because poker is a peer-to-peer game, even an average poker player can win consistently. That is because a poker player competes only against the other players at his table, and it is the relative skill of these players that determines their results. This fact distinguishes poker from all of the games identified in the IGBA. It distinguishes poker from roulette, where the player competes against the house and the odds are rigged in the house's favor. It also distinguishes poker from the types of organized sports betting (bookmaking and pool-selling) identified in the IGBA. Every sports bettor who hopes to consistently make money with a bookmaker must make better predictions than a professional oddsmaker—a feat that the typical bettor can accomplish only by luck, and therefore not consistently. But in poker, the players compete in a fair contest—typically, as in games like Appellee's—against opponents of comparable skill.

Second, none of the gambling activities identified in the IGBA share poker's distinct place in American history and culture. That matters because Congress would not have targeted poker without even mentioning it. Moreover, Congress was not interested in every activity that might conceivably be regarded as gambling, but only those activities that provided significant revenues to organized

crime. The Government concedes that poker was not such a game. And indeed, poker was and is incapable of being such a game. Poker operators generate revenues through the “rake,” a small fee collected from each pot as compensation for hosting the game. Compared to pit games, where the house takes a losing player’s entire wager, poker rakes generate miniscule revenues. Similarly, organized sports betting and lotteries can generate massive sums by instantaneously collecting wagers from thousands of players without any physical footprint—they are perfect cash cows for organized crime, in a way that poker, which requires that players be physically present for extended periods of time, could not be.²

When viewed in light of these distinctions, any superficial similarities between poker and gambling are insufficient to make hosting a poker game a federal felony under the IGBA. The legality of poker is instead a question of state law, and as the Government itself explains, states are actively regulating the game. Anybody familiar with poker—as legislators, presidents, and millions of Americans are—recognizes that it is qualitatively different from the gambling that Congress targeted. The IGBA’s definition of “gambling” therefore excludes poker, and the district court’s judgment should be affirmed.

² That poker can now be played on the Internet does not undermine this conclusion because organized crime cannot profit from Internet poker. *See* pp. 13-14, *infra*.

ARGUMENT

I. Poker Is An American Tradition And A Game Of Skill

Invented approximately two centuries ago, poker has been an American tradition ever since. Approximately 35 million Americans play poker,³ including 23 million—more than 10 percent of the nation’s adult population—who play regularly.⁴ 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%).⁵ 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,

³ *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* United States 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).

⁴ *See* Poker Players Research, *Topline Findings* (2008), <http://pokerplayersresearch.com/ToplineFindings.aspx>.

⁵ *See* Poker Players Alliance, *Who Plays Poker?*, <http://www.scribd.com/doc/23533788/Who-Plays-Poker-PPA-Survey> (last visited Mar. 22, 2013).

Supreme Court Justices, the scientists of the Manhattan Project, Mark Twain, as well as innumerable athletes, actors, and performers have all been poker aficionados). Our national fondness for poker has only grown in recent years, thanks to televised contests and the advent of Internet poker.

Poker is popular because it balances accessibility and complexity. The rules and equipment are relatively simple and games can be played for any stakes, so there are few barriers to entry. At any stage of the game, the moves available to each player appear straightforward—check, bet, fold, call, or raise. Moreover, the odds do not favor any player, and games are open to all comers. Thus, “[m]ore than politics, warfare, business, or physical sports, poker has become the arena in which men and women of every race and background compete on the most equal footing.” *Id.* at 428.

Simultaneously, because of the human element, which dominates outcomes, poker is a game of potentially infinite richness. The essence of poker is reaching an accurate understanding of a hand by astutely processing imperfect information about one’s opponents and their holdings, and then using the limited set of available moves to convey precise messages to those opponents and achieve a desirable outcome. Success at poker thus requires more than mere calculations or predictions—it also entails discovering what makes one’s opponents tick, and then

learning to exploit those tendencies at the opportune moment, all while defending against the opponents' effort to do the same.

Accomplishing these tasks requires skill in the fields of mathematics, psychology, acting, and money management. The evidence confirms that although poker games include an element of chance, skill predominates. This conclusion was established by Dr. Heeb's rigorous statistical analysis, and has been verified by myriad studies. The evidence is so one-sided that even the Government concedes the point. Gov't Br. 14.

Poker is therefore analogous to other games of skill. In fact, poker was accepted as a game of skill by the International Mind Sports Association, a body recognized by the International Olympic Committee that regulates bridge, chess, draughts, and go, among other skill games. *See* Brendan Murray, *Poker Recognised as Mind Sport*, Card Player, Apr. 29, 2010, <http://www.cardplayer.com/poker-news/8988-poker-recognised-as-mind-sport>. It is therefore unsurprising that top poker players have attained a status similar to athletes, competing in televised contests on networks such as ESPN and Fox Sports, and contributing significant time and money to philanthropy. *See, e.g.*, Wikipedia, *Poker on Television*, http://en.wikipedia.org/wiki/Poker_on_television (last visited Mar. 22, 2013); Poker Gives, <http://www.pokergives.org> (last visited Mar. 22, 2013) (organization that collects and distributes charitable donations from

poker players). But poker is not a game of skill merely because skilled people play it—it is a game of skill because the rules of the game reward skillful play by *all* players. Anybody can hone his skills and become a winning poker player. And for over a century, thousands upon thousands of Americans have done exactly that.

II. Poker Is Not “Gambling” Under The IGBA

When the IGBA was enacted in 1970, poker was well known, widely played, and regulated in some states, but Congress did not target the game. Neither the text of the IGBA nor its history suggest any desire to reach poker games. To the contrary, the IGBA’s language, history, and purpose all support the opposite conclusion.

The clearest evidence that the IGBA does not target poker is the text of the statutory definition of “gambling,” which provides that the term “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). This definition does not mention hosting poker games. Instead, it identifies three categories of gambling. The first is organized sports betting, including bookmaking and pool-selling. The second is “pit” games, including slot machines, roulette wheels, and dice tables at which customers play games of chance against the house. The third is lotteries, including policy, bolita, and numbers. The IGBA’s legislative history established that these

particular categories were mainstays of organized crime. *See, e.g.*, 116 Cong. Rec. S590 (daily ed. Jan. 21, 1970) (statement of IGBA sponsor Sen. McClellan) (listing betting on “horse racing and sporting events” as well as “gambling in the form of lotteries, dice games, and illegal casinos” as principal sources of revenue for organized crime).

As Appellee’s brief cogently explained (at 14-15, 26-29), the examples in the IGBA’s definition of “gambling” limit the scope of the definition to activities that are similar in kind. And all of the gambling activities in the IGBA are fundamentally different from poker. Appellee’s brief explains that while the outcomes in gambling are predominantly determined by chance, the outcome of poker is predominantly determined by skill. In fact, the distinctions run even deeper, as a close analysis of each category reveals.

A. Poker Does Not Resemble Bookmaking Or Pool-Selling

Poker does not resemble organized sports betting, *i.e.*, “bookmaking and pool-selling,” 18 U.S.C. § 1955(b)(2). Organized sports betting is *sui generis* in the law. Multiple federal statutes, enacted before and after the IGBA, have targeted such betting. The Wire Act, enacted in 1961, prohibits the transmission of wagering information relating to “any sporting event or contest.” 18 U.S.C. § 1084(a). The Paraphernalia Act, also enacted in 1961, prohibits the interstate transportation of any paraphernalia designed to be used in “(a) bookmaking; or (b)

wagering pools with respect to a sporting event” *Id.* § 1953(a). The sports bribery statute, enacted in 1964, makes it a federal crime to attempt to influence the outcome of a sporting contest by bribery. *Id.* § 224. And the Professional and Amateur Sports Protection Act, enacted in 1992, prohibits states and private parties from authorizing any “betting, gambling, or wagering scheme based, directly or indirectly” on sports. 28 U.S.C. § 3702.

Congress’s determination to target organized sports betting stems from three concerns. First, bookmaking and pool-selling were lucrative for organized crime. In urging Congress to enact the IGBA, Attorney General John Mitchell explained that “off-track betting, and betting on lotteries and sporting events in violation of State and local laws” were estimated to generate “\$20 billion to \$50 billion a year” in illicit revenues. *Organized Crime Control: Hearings Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 91st Cong. 152 (1970) (hereinafter “*House Judiciary Hearings*”). Senator McClellan, one of the sponsors of the IGBA, explained that after illegal lotteries, “bookmaking is next up the ladder” as a revenue source for organized crime. *See* 116 Cong. Rec. S596 (daily ed. Jan. 21, 1970). Evidence about modern sports betting shows that the concern has only grown. “In 2011, \$2.88 billion was legally wagered in Nevada’s sports books; the National Gambling Impact Study Commission (NGISC) estimated that illegal wagers are as much as \$380 billion annually.” Am. Gaming Ass’n, *Sports*

Wagering Fact Sheet (2012), <http://www.americangaming.org/industryresources/research/fact-sheets/sports-wagering>. Illegal sports betting thrives not only because sports are popular, but because it is possible to operate a sports book or pool without any substantial physical footprint, and a sports book can therefore accept massive wagering volume without creating a high profile. This is especially the case since Las Vegas casinos publish the odds on sporting events—a fact that was true in the 1970s, and is even more salient now since anybody with an Internet connection can free-ride on that expertise in establishing his own book or pool.

Poker is different. No sponsor of the IGBA ever opined that poker generates substantial revenues for organized crime. Indeed, the Government conceded below that it did not. *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].”). And there is a reason that poker has never been as lucrative as bookmaking and pool-selling. Poker revenues are generated as “rakes,” or fees for hosting the game, collected from each pot. Rakes are typically capped at a small amount, *e.g.*, \$5 a hand. *See* Wikipedia, *Rake*, [http://en.wikipedia.org/wiki/Rake_\(poker\)](http://en.wikipedia.org/wiki/Rake_(poker)) (last visited Mar. 22, 2013). And a typical poker game deals approximately 30 hands per hour. SPA 44. Consequently, a Texas Hold’Em table might generate a pre-expense *maximum* gross revenue of

\$150 per hour (often less, as many hands do not reach the \$5 cap). A poker table occupies approximately 25 square feet, not including space for the nine players and the dealer to sit. To earn additional rake, an operator must recruit more players to fill more tables, devoting space, equipment, dealers, and other resources to each game. And even then, revenues are not instantaneous, but accrue slowly over time. In sum, poker inherently lacks the scalability and invisibility that make sports books and pools profitable for organized crime.

The Government argues (Gov't Br. 28-29) that poker has become more popular, and hence a more lucrative opportunity for organized crime. But poker's popularity cannot erase the structural constraints on its ability to generate revenue. Moreover, the Government does nothing to tie organized crime to the "poker boom." Instead, it points to phenomena such as Internet poker and the World Series of Poker—both operated completely openly by global businesses with no ties to organized crime. If anything, these examples disprove organized crime's capacity to make money from poker. Internet poker, for instance, has extremely high barriers to success. Aspiring operators must develop state-of-the-art software, technical infrastructure, and customer support systems, and must expend millions of dollars on marketing on television, in print, and on the Internet to achieve a critical mass of players—marketing that is utterly incompatible with running a clandestine organized crime operation. Any new entrant in the Internet sphere

would have to work especially hard to displace dominant incumbents. There is no evidence that the mob has that capacity. As for large tournaments like the World Series of Poker—operated by the global corporation Caesar’s Entertainment—they may be popular, but they do not generate substantial profits. The Nevada Gaming Control Board collects data from licensees. These entities, which operate the busiest and most sophisticated poker rooms in the United States, reported that in fiscal 2012, poker accounted for only 1.6% of all gaming revenues. *See Nevada Gaming Control Board, Nevada Gaming Abstract 2012*, at 1-3 (2013). The Government has offered no evidence that poker is any more lucrative for organized crime—and intuitively, it would be far less so, as the games in Nevada offer the richest prizes, and run constantly in bright, well-advertised rooms. Less regular games, like Appellee’s, are often canceled for lack of interest. SPA 53.

The second concern unique to sports betting is that gambling interests may undermine the integrity of sports by, for example, bribing players to throw games or shave points. *See, e.g., The Attorney General’s Program to Curb Organized Crime & Racketeering, Hearings before the S. Comm. on the Judiciary, 87th Cong. 5-6 (1961) (Statement of Robert F. Kennedy) (noting that “gamblers have bribed college basketball players to shave points on games”)*. Congress sought to protect the American athletic tradition from that pernicious influence. The contrast with

poker is obvious: while bookmaking and pool-selling threaten an American tradition, poker *is* an American tradition.

A third concern is consumer protection. Games of chance threaten public welfare because they tempt people to risk their livelihoods on unfair bets, and because they funnel substantial funds to illicit purposes. Placing bets with a bookmaker or participating in a sports pool are predominated by chance for two reasons. First, the odds in organized sports betting are highly accurate, ensuring that the typical bettor is reduced to guessing. Second, even the most skilled sports bettors exercise only one skill—prediction—but wager on events that are entirely beyond their influence. To be sure, it takes some skill to predict the result of a sporting contest. But the Government cites no evidence—in the record of this case or any other—that the quantum of skill involved in such predictions overcomes the influence of chance for the typical bettor.⁶

⁶ Courts have generally concluded that sports betting is dominated by chance, notwithstanding the predictive skill of the bettors. *See, e.g., United States v. Frazier*, No. 07-CR-10, 2007 WL 1239206, at *4 (E.D. Tenn. Apr. 27, 2007) (unpublished disposition) (“The athletes themselves . . . are not gambling, even if they are professional athletes who are competing for a valuable purse . . . because, from their perspective, the outcome is based upon their skill and effort On the other hand, . . . those outcomes, *from the perspective of the spectators*, [are] based purely on chance.”); *Commonwealth v. Laniewski*, 98 A.2d 215, 249 (Pa. Super. 1953) (holding that even though “for an avid student of the sport of football the chance taken is not so great as for those who have little interest in the game . . . it is common knowledge that the predictions even among these so-called ‘experts’ are far from infallible. Any attempt to forecast the result of a single athletic contest, be it football, baseball, or whatever, is fraught with chance. This hazard is multiplied

In fact, the evidence suggests the opposite. Bookmakers typically take bets against a “point spread,” also known as a “line,” which is an oddsmaker’s estimate of the final 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 of the contest, but also the margin of victory. The purpose of a point spread is to equalize the odds of bets on contests between unequal teams. 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). Thus, while it may be possible to predict that the New York Giants will defeat the New England Patriots, it is significantly more challenging to predict whether the Giants will win by enough points to cover the spread. “Because victory against the point spread can go either way, the element of luck becomes very important.” *Id.* at 29.

The point spread is not the only challenge a bettor faces, as bets also do not pay even money. A bookmaker generally pays -110, which means that a bettor must risk \$110 to win \$100. So if a bettor bets \$110 that the New York Giants will cover the spread against the New England Patriots, he will lose \$110 if he loses,

directly by the number of predictions made.”); *State v. Steever*, 246 A.2d 743, 744 (N.J. Super. App. Div. 1968) (holding that football pools were dominated by chance).

and receive \$100 if he wins. With these odds, the bettor must win 52.38% of his bets to merely break even, assuming bets of a uniform size. *Id.* at 28.⁷

All evidence indicates that the typical bettor is simply incapable—except by sheer luck—of attaining a win rate greater than 52.38%. Studies have shown time and again that even experienced bettors do not fare better than random guessing, and cannot overcome the point spread. *See, e.g.,* ChiUng Song et al., *The Comparative Accuracy of Judgmental and Model Forecasts of American Football Games*, 23 Int’l J. Forecasting 405, 411 (2007) (considering a pool of 18,000 expert forecasts and 12,000 forecasts from statistical systems on the outcome of NFL games to determine that experts “did slightly worse than the naïve forecast,” *i.e.*, flipping a coin, and that “neither experts nor systems achieved” a 52.4% success rate when their predictions were compared against the Las Vegas lines); Michael Cantinotti et al., *Sports Betting: Can Gamblers Beat Randomness?*, 18 Psychology of Addictive Behaviors 143, 145 (2004) (concluding for hockey predictions that “[e]xpert bettors did not achieve better monetary gains than

⁷ Bookmakers also offer bets without a point spread. For example, some games use a “money line,” where the bettor bets on the outcome of the game, and the odds are calibrated so that bets on underdogs pay more than bets on favorites. *See* Jim Kilby et al., *Casino Operations Management* 324-27 (2d ed. 2005). This form is often used in low-scoring sports like baseball, where point spreads can be difficult to predict. But the money line is also set by oddsmakers, and there is always a spread between payouts and what the bookmaker takes in, which means that in terms of the bettor’s ability to exercise skill, these bets are no different from point spread bets. *Id.*

chance . . .”); Emanuel Towfigh & Andreas Glöckner, *Game Over: Empirical Support for Soccer Bets Regulation*, 17 *Psychology, Pub. Pol’y & L.* 475, 475 (2011) (finding that “there are no overall effects of skill on accuracy in soccer bets and monetary earnings do not increase with skill,” and also that “[c]ognitive biases that might cause financial harm for bettors or even lead to problematic or pathological gambling behavior are even stronger for soccer bets compared to bets on the outcome of lotteries.”); Marshall Gramm & Douglas H. Owens, *Efficiency in Pari-Mutuel Betting Markets Across Wagering Pools in the Simulcast Era*, 72 *S. Econ. J.* 926, 937 (2006) (concluding that it is not possible to profitably exploit inefficiencies in horse betting pools); *see also* H.O. Stekler et al., *Issues in Sports Forecasting*, 26 *Int’l J. Forecasting* 606, 616 (2010) (surveying the literature and concluding that “[t]here is no evidence that either statistical systems or experts consistently outperform the market” in betting on any sport).

Typical bettors fail because professional oddsmakers—armed with reams of data and dedicated full-time to the task of handicapping sports—set point spreads that reduce the decisions of typical bettors to mere guesswork. The oddsmaker’s goal is “to 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). And according to the Government’s own sources, the “odds makers know the intricacies of every factor of the game,” and consequently,

even the *very best* sports bettors “are happy to select a winner 55 to 57 percent of the time.” Garrett Downing, *Career Sports Bettors Battle the Betting Line*, Las Vegas Sun, Mar. 30, 2009 (cited at Gov’t Br. 30).

These successful bettors must go to incredible lengths to obtain those results, as the example of Billy Walters, cited by the Government (at 31) demonstrates. Walters employs “a brain trust of consultants, most of them mathematicians and experts on everything from weather conditions to player injuries,” who “act like analysts for a hedge fund manager.” CBSNews, *Sports Bettor Billy Walter’s Winning Streak*, 60 Minutes (Jan. 17, 2011), <http://www.cbsnews.com/stories/2011/01/13/60minutes/main7243443.shtml>. Moreover, the fact that Walters has “never had a losing year” is an “unprecedented” feat in sports betting. *Id.* Plainly, Walters and his professional colleagues are not typical bettors. And equally plainly, typical bettors do not have the resources or ability to match wits with oddsmakers. All a typical bettor can do is guess.

The degree to which chance controls the outcome of a typical sports bet is worlds away from poker. 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 players in the field). Moreover, the player can choose his opponents, seeking players of comparable skill. The vast majority of bookmakers,

by contrast, use odds calculated in Las Vegas—the best in the business—which means that the typical sports bettor is hopelessly outmatched.

Sports bettors also exercise qualitatively less skill than poker players. Sports bettors exercise one skill: prediction. But the typical bettor has no power to influence the terms of the bet, and no honest bettor can influence the underlying sporting event. The Government disputes this fact, arguing that some gamblers can “influence the ‘betting line’ or ‘point spread’ in order to improve their odds.” Gov’t Br. 32. In support, the Government points again to Billy Walters, but its own source notes that Walters is “unique” for his ability to “sometimes force the bookmakers to change” the line—he is unique both because he has access to superior information, and because he bets such massive amounts that even a Las Vegas sports book can only ignore him at its peril. CBSNews, *supra*. The typical bettor has no such power. On the other hand, *every* poker player can—and indeed must—succeed by skill.

This contrast between typical play and outliers matters. Courts applying the predominance test have explained that the nature of a game “must be judged by what [the operators] actually do, not by a theoretical analysis of an experiment that does not characterize what occurs in their establishments.” *Ruben v. Keuper*, 127 A.2d 906, 909-10 (N.J. Super. 1957). That case dealt with a game resembling a

pinball machine. In deeming it a game of chance, notwithstanding the ability of a few experts to obtain materially better outcomes, the court explained:

The average game they run is one in which a score or more of casual boardwalk passersby of various degrees of inexpertness try their hand in competition with others of the same ilk, and against the house. These are games in which comparative novices can win an occasional prize and thus titillate themselves and others into continued participation. To them the lure is chance and not an opportunity to match skills. Whatever one may say as to the expert, there can be no question but that the average or novice player is risking his dime against the lucky contingency

Id. at 910; *see also* Appellee Br. 31 (collecting cases holding that games must be analyzed as they are typically played). The description of the pinball machine applies equally to bookmaking and pool-selling. While an elite few can exercise skill, the vast majority of bettors cannot, and they may actually be better off flipping a coin.

In sum, bookmaking and pool-selling do not remotely resemble poker. Organized sports betting has always been treated as *sui generis* in the law, which refutes any suggestion that by including those games, Congress intended the IGBA's definition of "gambling" to reach games of skill generally. Moreover, bookmaking and pool-selling threaten the integrity of sports in a way that finds no analogue in poker. And betting with a bookmaker or pool-seller is a game of chance for the typical bettor, while poker is a contest of skill. Congress was aware

of these key traits of bookmaking and pool-selling when it included them in the IGBA, and their inclusion therefore does not suggest the inclusion of poker.

B. Poker Does Not Resemble Slot Machines, Roulette Wheels, Or Dice Tables

Poker does not resemble “slot machines, roulette wheels, and dice tables,” 18 U.S.C. § 1955(b)(2), all of which are gambling devices used in the casino “pit”: the portion of the casino where the house competes against its customers. These devices fall squarely within the traditional definition of “gambling” because in each one, chance predominantly determines the outcome.

A closer examination reveals that slot machines, roulette wheels, and dice tables are qualitatively different from poker in several additional ways. 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;⁸ roulette involves choosing from a series of bets all of which have comparable expected values (none positive), and dice games likewise involve only placing bets and throwing dice.⁹

⁸ The “slot machines” category also includes video poker machines, which offer more choices than basic slots, but are still chance-predominant. Video poker is a house-banked game in which odds are rigged against the player. Aside from using the same rank order of hands, video poker does not resemble poker in any way. *See* SPA 52-53.

⁹ Other federal gambling statutes recognize the overwhelming role of chance in these devices. *See* 15 U.S.C. § 1171 (defining “gambling device” as a “slot machine” or “any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) . . . which when operated may deliver, as

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 merely hosts the game. 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); *see also* William N. Thompson, *Gambling in America: An Encyclopedia of History, Issues, and Society*, 188 (2001) (explaining that house-banked games “include blackjack, craps, roulette, bacarrat, punto banco (minibaccarat), and the big wheel. Las Vegas sports betting on football, basketball, baseball, and hockey games is also house banked.”).

the result of an application of an element of chance, any money or property”); *see also United States v. 294 Various Gambling Devices*, 718 F.Supp. 1236, 1243 (W.D. Pa. 1989) (holding that “the absence of skill elements” was one key factor that made a machine a gambling device). As the district court recognized, no case has held that this statute applies to “paraphernalia used in live poker games.” SPA 83.

Third, for all of these devices, the odds are rigged in the house's favor so that the players' expected value is always negative. Roulette is instructive. An American roulette 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. The payouts for roulette bets are calibrated so that the player expects to lose \$.053 per dollar wagered. *Id.* at 153.¹⁰ 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.* 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, of course, is different. The rules of the game do not arm any player with a statistical advantage, and as the evidence in this case showed, any short-term advantage conferred by the cards is overcome in short order by the players' skills. More skilled players are thus expected to prevail—and in fact do prevail—over their less skilled counterparts in typical poker games.

¹⁰ There is a single exception, the “top line” bet, which has an even worse expected value of \$.079 lost per dollar wagered.

Finally, the enumerated gambling activities generate massive profits for their operators. In fiscal 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).¹¹ 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-generator.¹² The Government concedes that Congress's objective in enacting the IGBA was to disrupt revenue flows to organized crime. Gov't Br. 27. And in lobbying for the bill, the Attorney General was emphatic in assuring Congress 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

¹¹ Operators make so much money because players tend to bet the same money repeatedly until they lose it to the house. The percentage of the amount wagered that is ultimately lost is known as the "hold percentage" or "win percentage." Casino revenue reports state that the hold for roulette over the past year was 17.39%, for craps 13.55%, and for slot machines 6.35%. *See Nevada Gaming Control Board, Gaming Revenue Report Month Ended January 31, 2013*, at 1 (2013). Hold percentages are not even calculated for poker, as the house is not wagering against the players.

¹² That these figures are drawn from lawful casinos as opposed to illicit ones is of no moment, as there is no reason that the relative profitability of poker would be higher in another setting. If anything, the fact that house-banked games are easier to play and more profitable over short time periods means that profitability outside casinos, where players are harder to recruit, would skew even more toward house-banked games.

purpose.” *House Judiciary Hearings* 170 (Statement of John Mitchell). 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 the operators—poker does not.

C. Poker Does Not Resemble Lotteries, Policy, Bolita, Or Numbers

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 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, so that 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 House Judiciary Hearings* 87 (statement of Sen. McClellan).

“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, 18 U.S.C. § 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 its 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 N. 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 marked 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.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Thomas C. Goldstein

Thomas C. Goldstein
Tejinder Singh
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave. NW # 404
Washington, DC 20015
Tel. (202) 362-0636
Fax (866) 574-2033

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(7) and 32(a)(7)(C), I

hereby certify that:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(d) because it contains 6993 words.
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman 14-point font.

/s/ Thomas C. Goldstein

CERTIFICATE OF SERVICE

I certify that on March 28, 2013, I caused the foregoing Brief for *Amicus Curiae* the Poker Players Alliance in Support of Appellee and Affirmance to be served upon counsel for all parties using the CM/ECF system.

/s/ Thomas C. Goldstein