In the

Supreme Court of Virginia

At Richmond

Record No. 121242

CHARLES DANIELS, d/b/a THE POKER PALACE,

Appellant,

– v. –

EARLE C. MOBLEY, in his Official Capacity as Commonwealth's Attorney for the City of Portsmouth,

Appellee.

OPENING BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

For four years, plaintiff Charles Daniels, d/b/a The Poker Palace, hosted Texas Hold'Em poker games at his charitable poker hall, the Poker Palace, which contributed hundreds of thousands of dollars to charities both large and small. The Commonwealth's Attorney, defendant Earle Mobley, had full knowledge of Daniels's operation and had acquiesced in it, agreeing at the outset with Daniels that poker is a game of skill. Then, without any material change in law or circumstances, or any cogent explanation, Mobley stated that he had come to regard poker as "illegal gambling" under Va. Code § 18.2-325. Mobley threatened Daniels with immediate prosecution if he did not close the Poker Palace.

After attempting to discuss the matter with Mobley, Daniels complied with the demand to close and filed this declaratory judgment action. His complaint seeks a declaration that: (1) the Texas Hold'Em poker games conducted at the Poker Palace do not fall within Virginia's statutory definition of "illegal gambling" because the outcome of Texas Hold'Em is determined predominantly by skill, and (2) in the alternative, Virginia's gambling statute is unconstitutionally vague. The complaint does not seek an injunction or damages.

The case was heard in a bench trial, where multiple experts testified that skill predominates over chance in Texas Hold'Em, and no witness testified to the contrary. Indeed, Mobley presented no evidence at all. Instead he moved to strike the complaint, arguing that the role of skill in Texas Hold'Em is irrelevant if the outcome of a game is to any degree uncertain. Over Daniels's objection, the trial court agreed—granting the motion to strike and then denying Daniels's motion for reconsideration.

In granting Mobley's motion, the trial court misinterpreted the statute and misconstrued the evidence. Under the correct standard, Texas Hold'Em can only be gambling if chance predominates over skill in determining the outcome, and the uncontroverted evidence in this case shows that it does not. Poker is a game of skill, and in the vast majority of poker hands the players' decisions—not their cards—determine the result.

Moreover, the trial court's interpretation of the statute renders it unconstitutionally vague. The outcome of literally every contest is at least somewhat uncertain, and so uncertainty alone does not provide a basis to distinguish illegal gambling from lawful risk-taking. The trial court's interpretation denies the public notice of what conduct the statute prohibits, and guarantees that arbitrary enforcement actions—like the one in this case—will occur. This Court should reverse the judgment below.

STATEMENT OF THE CASE

This Part describes the facts and material proceedings below, as well as the rules and characteristics of Texas Hold'Em, the game at issue.

I. Facts and Material Proceedings Below.

For over twenty-two years, Daniels has operated a lawful charitable bingo facility in the city of Portsmouth. J.A. 38. In June 2006, after discussions with representatives of the Virginia Fraternal Order of Police, as well as Mobley, Daniels began hosting Texas Hold'Em poker games on off nights at his bingo hall. J.A. 41-43, 57. The popular games generated funds in excess of $700,000 for prominent charities, including the Fraternal Order of Police, the March of Dimes, the EDMARC Hospice for Children, the Chesapeake Sheriff's Office Charities, Portsmouth Catholic Regional School, the H.E.R. Shelter, and others. J.A. 72-74, 245-50 (letters from charities).

Due to the games' popularity, Daniels sought to expand his facility. In June 2010, he leased the space adjacent to his bingo hall, named it the Poker Palace, and renovated it at considerable expense. J.A. 50-51. On July 26, 2010, Mobley threatened Daniels with prosecution in a letter, which stated "I have come to the conclusion that any and all poker games . . . will be viewed by my office as illegal under Section 18.2-325 of the Code of

Virginia, 1950 as amended." J.A. 244. "Effective immediately, any violations . . . will be subject to investigation and/or prosecuted. To avoid prosecution you must cease and desist any and all forms of illegal gambling, forthwith." *Id*. Daniels met with Mobley to discuss the matter, but received no clear explanation for Mobley's view. J.A. 55-57.

A law abiding citizen, Daniels closed the Poker Palace and filed this declaratory judgment action to obtain clarity on the law. J.A. 57. After pre-trial motions where Mobley's demurrer was denied, the parties proceeded to a one-day bench trial. The court admonished the parties to try the case by stipulation and limit testimony. *See* J.A. 29. Consequently, two of Daniels's experts—Professor Robert Hannum, an expert in casino math, and Professor James Klinedinst, a Ph.D in mathematics—testified by affidavit. A third expert, Gregory Raymer, a world champion poker player, testified in person.

Daniels's experts were well qualified to opine on the nature of poker. Dr. Hannum is a professor of Risk Analysis and Gaming, and holds a master's degree and a doctorate in mathematics. J.A. 232 ¶¶ 1-2. He has taught courses and authored books and papers on gaming and on the role of skill in poker specifically, has delivered conference papers on these topics, and has appeared as an expert witness in multiple cases involving the role of

chance and skill in poker. J.A. 233-34 ¶¶ 4-8. Mobley stipulated to Dr. Hannum's expertise. J.A. 231 ¶ 10.

James Klinedinst is an Assistant Professor of Mathematics at St. Petersburg College, St. Petersburg, FL, and is pursuing a Ph.D in applied mathematics at the University of South Florida. He taught statistics for eight years, and commented only on the mathematical skills involved in Texas Hold'Em.

Greg Raymer has a background in the sciences and the law, but presently plays and teaches poker full time. In his lifetime, he has played approximately 20,000 hours of poker, and has won money in over 100 poker tournaments. J.A. 114. In 2004, Raymer won the most prestigious poker tournament in the world—the Main Event at the World Series of Poker, outlasting 2,575 opponents to win a first prize of $5 million. J.A. 112; *2004 World Series of Poker*, Wikipedia, http://en.wikipedia.org/wiki/2004_World_Series_of_Poker. Mobley stipulated to Raymer's expertise as well. J.A. 231 ¶ 10.

The experts explained the rules of Texas Hold'Em, described the skills involved in Texas Hold'Em, and explained how skill predominates over chance. That testimony is described in detail in Subpart II, *infra*. On cross-examination, counsel for Mobley asked Raymer only three questions. J.A.

180. He asked first whether chance plays a role in poker; Raymer responded that it does. *Id*. He then asked whether the fact that the players do not know which cards they will receive introduces an element of chance; Raymer responded that it does. *Id*. He then asked whether the players are in an unequal position because it was unlikely that two players would have identical cards; Raymer responded that while players can be dealt functionally equivalent starting hands, that is not common. *Id*. Counsel asked no further questions. Instead, he moved to strike the complaint. J.A. 181. The court took the motion under advisement and requested that Mobley present his evidence. Mobley instead rested without presenting any evidence, and renewed his motion to strike. J.A. 205.

After a recess, the judge granted the motion. The court's explanation was brief—in the key portion, the court stated that:

> a game of Texas Hold'em for a single player can last twenty-four hours or it could last for one hand, and all the evidence indicates that the outcome of any one hand is uncertain; and so it is clear to me that this violates the statute as written; and therefore, I will grant the motion to strike in regard to the claim that it is not illegal gambling under the statute.

J.A. 206. The court made no finding that chance predominates over skill, nor did it ever state expressly its view of the meaning of the gambling statute other than to rely on the word "uncertain." The court then heard oral argument on whether the statute is vague, and held that "the statute is not

unconstitutional, that it does give fair notice and that a person of common intelligence could glean the appropriate meaning of the statute by a clear reading of it." J.A. 228. Daniels filed a motion for reconsideration, which raised all of the trial court's errors. That motion was summarily denied. J.A. 331. This appeal followed.

II. The Rules and Characteristics of Texas Hold'Em Poker.

Poker is an American tradition. Invented in this country in the 1800s, the game has been enjoyed by Americans of all walks of life, including presidents, Supreme Court justices, legislators, and other citizens for centuries. Its popularity stems in part from the fact that it is easy to learn, but challenging to master. Texas Hold'Em is one of the most popular forms of poker—it is the form most commonly televised, and also the form used for the Main Event of the World Series of Poker, the most prestigious poker tournament in the world. J.A. 113.[1] It was also the only form of poker played at the Poker Palace. J.A. 38.

The goal in Texas Hold'Em—as in every poker game—is to win money, typically represented by poker chips. Play proceeds in a series of "hands."[2]

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[1] *See also Texas hold 'em*, Wikipedia, http://en.wikipedia.org/wiki/Texas_hold_'em.

[2] A partial glossary of poker terms is available at pages 292 to 298 of the Joint Appendix. Dr. Hannum's affidavit likewise describes the terms and rules of the game. J.A. 235-36 ¶¶ 12-15. During the trial, Raymer dealt and

At the start of each hand, the two players to the dealer's left post "blind" bets—these are compulsory bets that provide seed money for the "pot," which constitutes the prize for the winner of the hand. J.A. 117-18. Typically the blinds are of different sizes, a "small" and a "big" blind. J.A. 118. For example, at the Poker Palace, it was commonplace for the blinds to be $1 and $2. Once the blinds are posted, each player is then dealt two cards from a standard fifty-two card deck of playing cards, after which the players engage in the first "round" of betting. J.A. 119.

During a round of betting, the players act in sequence—the player after the blinds has three choices: she can "fold," which means she contributes no chips to the pot, but also discards her hand and forgoes any opportunity to win the pot; she can "call," which means that she matches the size of the previous bet (in this case the big blind) exactly; or she can "raise," which means that she augments the size of the bet. J.A. 120. The next player then has the same three options. In order to stay in the hand, each player must at least call the largest bet made by one of her opponents—thus, if a player raises, then all players wishing to remain in a hand must call the raise. Play proceeds until either one player has induced all of the others to

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walked the court through a simulated hand of Texas Hold'Em, explaining the basic rules and mechanics, and also explaining how he might play the hand from each position at the table. *See* J.A. 116-133.

fold (in which case the hand ends), or multiple players call the largest bet on the table. J.A. 121-22.

Once the first round of betting ends, assuming that more than one player remains in the hand, the dealer exposes three cards face-up in the middle of the table. These three cards, collectively known as the “flop,” are community cards that any player may combine with her personal cards to make the best five-card poker hand. J.A. 122. Another round of betting ensues, with the first remaining player to the dealer’s left acting first. That player may either “check,” which means she chooses not to bet and to permit the next player to act, or she can “bet,” in which case subsequent players must either fold, call, or raise. J.A. 122-23. This second round of betting ends when either one player induces all of his opponents to fold (in which case the hand ends as well), or all players have either checked or called the largest bet on the table.

After the second round of betting ends, the dealer exposes a fourth community card, known as the “turn” card. J.A. 124. A third round of betting then ensues. Assuming that more than one player remains in the hand through that round, the dealer then exposes a fifth and final community card, known as the “river,” and a fourth and final round of betting occurs. J.A. 124-25. Assuming more than one player stays in the hand through the

final round of betting, the cards of the remaining players are revealed and compared—that comparison is known as a “showdown,” and the holder of the highest ranked hand takes the pot. J.A. 127. After the pot is awarded, a new hand begins immediately, and the obligation to pay the blinds rotates one seat to the left—it continues rotating every hand so that every player at the table must pay the blinds. J.A. 131.

A player can win a pot in one of two ways. The first and most common way is to make a bet that the other players are unwilling to match. If a player bets—and in so doing induces all of her opponents to fold—then she wins the pot by default. J.A. 134-35. Often, players who believe that they do not hold the best cards nevertheless bet in an effort to induce others to fold; that act is commonly known as “bluffing.” The second way to win is if two or more players remain in the hand through all four rounds of betting, the pot is awarded to the player who shows the highest-ranked hand in the showdown. Expert testimony at trial revealed that only approximately ten percent of hands ever reach a showdown. J.A. 134-35.

An important fact that emerged during the trial testimony is that the goal in poker is not to win pots—it is to win money. J.A. 139. While one must win pots in order to win money, not all pots are created equal, and a player can often profit more by winning a small number of large pots than she can by

winning a large number of small pots. J.A. 140. Skilled poker players are therefore selective about the pots they choose to play, and they fold more often than they bet. J.A. 140-41.

At the Poker Palace, Texas Hold'Em games took two forms: "tournaments"; and "ring games," also known as "cash games." In a tournament, the players pay a set entry fee, and each receives an identical number of chips, which have no cash value. Players compete until they are eliminated, and prizes are awarded to players based on how long they last in the tournament, with the lion's share going to the last player standing. By their very nature, tournaments take multiple hands to complete, typically lasting several hours. Larger tournaments can take multiple days.

In a ring game, the players purchase chips that have actual cash value. They can then play indefinitely, and redeem their chips for cash at the end of their session. Testimony at trial revealed that although a player could theoretically play only one hand and then leave, players at the Poker Palace typically played for long periods of time, J.A. 50; expert testimony also showed that poker players generally play for many hours at a time, J.A. 136, 237 ¶ 26. By contrast, the experts testified that they never saw a player leave a poker game after playing only one hand. J.A. 136-38 (Raymer testifies that he has never seen a player play only a single hand),

237 ¶ 26 (Dr. Hannum testifies "I have never encountered anybody resembling the hypothetical player who plays only one hand before retiring").

In both cash game and tournament form, Texas Hold'Em involves considerable skill. Dr. Hannum identified multiple classes of skills, including mathematics, observation, psychology, persuasion and deception, judgment, situational awareness, and money management, and explained that "[e]very decision at the poker table, whether correct or incorrect, represents the player's efforts to distill these various disciplines and processes into a single choice." J.A. 240 ¶ 41. Mr. Raymer's testimony included the submission of a summary document identifying a partial list of poker skills. J.A. 301-06. The list included 6 broad categories—math, observing your opponent, manipulating your opponents, controlling your own play and avoiding manipulation, varying your play with circumstances, and skills away from the table—as well as 159 discrete skills within those categories. *Id*. Raymer testified that a comprehensive list of skills would be "easily ten times longer," J.A. 143. He also testified that cash games and tournaments require equivalent levels of skill. J.A. 174-75.

Raymer described several poker skills in detail, explaining to the court that they manifest themselves not only over the long run, but in every single

hand of poker. For example, in discussing math skills, Raymer described the process of calculating pot odds and implied odds, which requires a series of calculations comparing the strength of one's hand to the size of the pot to determine whether any given bet is a worthwhile investment. J.A. 144-46. Raymer explained that the calculations require not only computations, but also estimates and predictions about likely future events. J.A. 146. He also explained that every player should perform these calculations every time she acts—so in each betting round, and more than once per round if necessary. *Id*. Daniels's third expert, Professor Klinedinst, explained the same points. He walked through the necessary calculations in a Texas Hold'Em hand, J.A. 251-53 ¶¶ 3-10, explained that players must perform them multiple times in every hand, J.A. 251 ¶ 3, and concluded by explaining that "an ability to calculate odds is a necessary, but not sufficient, skill for success," because players must use the information they glean from their calculations as a single input in a much larger decision-making process, J.A. 254 ¶ 12.

Raymer described other skills as well, including the application of game theory to poker, J.A. 153, observing one's opponents to detect patterns and tells, J.A. 157-58, controlling oneself to convey only misinformation, J.A. 169-72, and bluffing, J.A. 172-73. For each of these skills, Raymer offered

a detailed explanation of how they operate, with illustrative examples for the court.

One particularly important feature of Raymer's testimony was that he explained how the skills function independently of the cards dealt. For example, in explaining why skilled players fold hands, Raymer was explicit that while the cards the player holds are "one of many factors, . . . they are not the primary determinant" in a skilled player's decision to compete for the pot. J.A. 142. He highlighted other variables—including the player's position at the table and the player's perception of his opponents' skills and tendencies—as also being highly relevant. J.A. 163-64.

Similarly, Raymer explained that in evaluating the quality of one's own hand, a player should not rely only on the raw strength of the cards, but also on his observations of other players' behavior to determine the relative strength of his hand—testifying in essence that the meaning of the cards changes based on other factors. J.A. 149-50. He illustrated a similar principle in discussing tournament play, describing a scenario where it makes sense to fold the strongest possible starting hand in order to avoid risking one's eligibility for a tournament prize. J.A. 177-78.

Raymer also explained that "one of the primary skills of poker" is determining whether strong play (*e.g.*, a raise) by an opponent equates to a

showing of strength or weakness, J.A. 151, and he described facility in detecting nonverbal “tells” in opponents as “a tremendous factor” in determining one’s success, J.A. 168. In sum, Raymer testified that the cards do not dictate a poker player’s behavior, that skilled players can find ways to maximize their profits even without the best cards, and that skilled players will achieve better outcomes than unskilled players with the same cards.

Dr. Hannum offered a similar explanation. He described some of the decisions that players must make, and the inputs that skilled players use to make such decisions. J.A. 240 ¶¶ 42-45. Dr. Hannum acknowledged that chance sometimes determines the result of an individual poker hand, but he noted that this is a rare result, and that even when it happens, skilled play produces superior outcomes because skilled players will win more money when they get lucky and lose less when the shoe is on the other foot. J.A. 240 ¶¶ 46-47.

Raymer and Hannum both distinguished poker from other games one might find in a casino, explaining that unlike casino gambling, the rules of poker do not create a structural advantage in favor of any particular player. J.A. 115-16, 241 ¶¶ 49-51. They also explained that unlike bets in gambling games, which are merely wagers on events outside the players’ control,

poker bets are a tool that the players use to control the outcome of the contest itself. J.A. 241 ¶¶ 52-53. As Dr. Hannum put it, “a poker bet is never solely a wager on the outcome of a chance event; it is instead a form of strategic communication, like a chess move, or a bid in bridge.” J.A. 241 ¶ 53. Professor Klinedinst made the same point. J.A. 254 ¶ 11.

Finally, Hannum and Raymer testified—without contradiction—that skill predominates over chance in determining the outcome in Texas Hold’Em, whether over the long run or in a single hand of poker. Dr. Hannum framed the inquiry as follows:

> the question of whether skill or chance predominates in Texas Hold'Em is the same as asking whether the deal of the cards or the decisions of the players constitute the predominant factor in determining the outcome of the game. In my opinion Texas Hold'Em is not a game of chance because the decisions of the players have a much larger impact on the outcome than the deal of the cards.

J.A. 238 ¶ 29. And in compliance with an evidentiary ruling by the trial court, Raymer proffered that skill predominates over chance. J.A. 178-79. Both experts testified explicitly that skill is the key element even in a single hand of poker. Dr. Hannum stated that “even if one takes a short-term view of poker, skill predominates over chance in determining the relevant outcomes: who wins the hand, and how many chips that player wins.” J.A. 239 ¶ 39. Mr. Raymer likewise made granular assessments, explaining that math skills are important in even a single hand, J.A. 156-57, and that the

other 100+ skills he identified are likewise important even in a single hand, J.A. 178-79. The experts' factual conclusion that skill predominates over chance in Texas Hold'Em rests on their acknowledged expertise and experience with poker, and was supported by the detailed analysis summarized above.

ASSIGNMENTS OF ERROR

This Court granted review on three assignments of error:

1. The trial court erroneously held that Virginia's gambling statute, Va. Code § 18.2-325, can be violated whenever the outcome of a game is to any degree uncertain, as opposed to when chance predominates over skill in determining the outcome. The parties argued this point during the trial, and that conversation is reflected at J.A. 90-91, 189, 205, 213. This error was then noted for the trial court and preserved on pages 8-11 of Plaintiff's Consolidated Brief in Support of Motion to Reconsider, filed on April 11, 2012, as well as in the final Order dated April 19, 2012, J.A. 334-36.

2. The trial court erroneously held that the Texas Hold 'Em Poker games hosted at the Poker Palace qualify as gambling under Section 18.2-325 because the outcome of those games is uncertain. In making this error, the court misinterpreted both the term "uncertain," as noted in the first assignment of error, as well as the word "outcome." This error was noted for the trial court and preserved on pages 9-24 of Plaintiff's Consolidated Brief in Support of Motion to Reconsider, as well as in the final Order dated April 19, 2012, J.A. 334-36.

3. The trial court erroneously held that its broad reading of the gambling statute did not render the statute unconstitutionally vague. J.A. 228. This error was noted for the trial court and preserved during the oral argument on the vagueness issue itself, *see* J.A. 208-24, on pages 24-26 of Plaintiff's Consolidated Brief in Support of Motion to Reconsider, as well as in the final Order dated April 19, 2012, J.A. 334-36.

The court also granted review on two assignments of cross error, relating to Mobley's immunity defense and Daniels's standing. J.A. 339.

SUMMARY OF ARGUMENT

The record in this case leaves no doubt that skill predominates over chance in Texas Hold'Em. Indeed, the point was essentially undisputed. Thus, if the definition of "illegal gambling" incorporates the predominance test to determine whether the element of chance is satisfied, then the Texas Hold'Em games hosted at the Poker Palace do not constitute "illegal gambling" under Virginia law.

The case in favor of a predominance standard is overwhelming. First, the text and structure of the statute establish that the predominance test applies. While the statute outlaws all betting on contests of others, it applies a different rule to contests in which the bettors themselves participate. The General Assembly expressly provided that "[n]othing in this article shall be construed to prevent any contest of speed or skill between men . . ." Va. Code § 18.2-333. This provision, by its terms, requires a court to consider the role of skill in a contest, and thus forecloses Mobley's argument that the illegal gambling statute applies whenever the outcome of a contest is to any degree uncertain regardless of the skill involved.

Second, the only precedent on point—decades of opinions by the Attorney General—establishes that the predominance test applies. In evaluating a broad range of contests, from fishing competitions to essay

contests to coin operated machines, the Attorney General has steadfastly applied the predominance test to determine whether a particular activity constitutes gambling. This notwithstanding the fact that the outcome of all of these endeavors is “uncertain” in the broad sense of the word. Persuasive authorities from other jurisdictions—including a recent opinion by a federal district court—likewise support the view that gambling refers to contests in which chance predominates over skill.

Finally, the rule of lenity and the canon of constitutional avoidance press heavily in favor of a restrained reading of the gambling statute. This penal statute imposes felony punishment on any operator of an illegal gambling establishment, and criminal sanctions on anybody who plays a gambling game. Courts should exercise extreme caution before ruling that such a law applies to innocent conduct including contests of skill.

In the alternative, Mobley’s reading of the gambling statute renders it unconstitutionally vague. A statute that reaches every game in which the outcome is to any degree “uncertain” is vague on its face because it deprives people of ordinary intelligence of the ability to distinguish prohibited from permitted conduct, and it authorizes arbitrary enforcement actions. That interpretation of the gambling statute would effectively delegate the task of determining legality to police officers, prosecutors, and

courts, as opposed to the General Assembly, which has the sole responsibility to define crimes in the Commonwealth.

This is the case on point. After conferring with Virginia police officers and the Commonwealth's Attorney, Daniels concluded that it would be lawful to host Texas Hold'Em poker games because—like golf tournaments, spelling bees, and chess tournaments—Texas Hold'Em is a game of skill. Mobley acquiesced in that decision for four years before suddenly announcing a new policy. He identified no change in the underlying facts, cited no change in the law, and provided no reasoned explanation for his change in position. At trial, he argued only that the statute applies to any game that has an uncertain outcome. But the fact that the Commonwealth does not pursue the vast majority of such contests highlights the arbitrariness of Mobley's threat to prosecute.

Finally, Mobley's cross-assignments of error are without merit. His sovereign immunity claim ignores the fact that this purely declaratory lawsuit does not compel the government to act, restrain it from acting, nor burden the public fisc. He also ignores that sovereign immunity does not shield him from claims rooted in federal law, or from actions outside the scope of his authority. Thus, it does not foreclose the vagueness challenge in this case, or Daniels's arguments about the scope of the gambling

statute, which themselves sound in due process. The Court should not close the courthouse door here, for doing so would prevent law-abiding citizens from obtaining any recourse against officials who misinterpret the law and then threaten members of the public.

Mobley's challenge to Daniels's standing is even more misguided. The fact that Daniels has not yet been prosecuted does not moot the live controversy between the parties. It is undisputed that Daniels wishes to reopen the Poker Palace, and that the lingering threat of prosecution is all that prevents him from doing so. On these facts, Daniels has a justiciable interest in this controversy, and therefore standing to bring a declaratory judgment action.

ARGUMENT

I. Standard of Review

The standard of review for each assignment of error and cross error is *de novo*. *See Warrington v. Commonwealth*, 280 Va. 365, 370, 699 S.E.2d 233, 235 (2010) (statutory interpretation reviewed *de novo*); *Muhammad v. Commonwealth*, 269 Va. 451, 479, 619 S.E.2d 16, 31 (2005) ("mixed questions" such as application of law to facts reviewed *de novo*); *Covel v. Town of Vienna*, 280 Va. 151, 163, 694 S.E.2d 609, 617 (2010) (vagueness reviewed de novo).

In reviewing the trial court's decision to grant a defendant's motion to strike, this Court "view[s] the evidence in the light most favorable to the plaintiff," "accept[ing] as true all evidence favorable to a plaintiff and any reasonable inferences that may be drawn from such evidence." *Volpe v. City of Lexington*, 281 Va. 630, 639, 708 S.E.2d 824, 828 (2011) (quotation marks and citation omitted).

II. First Assignment of Error: The Statutory Definition of "Illegal Gambling" Applies Only to Contests in Which Chance Predominates Over Skill.

Virginia's statutory definition of "illegal gambling" does not encompass contests in which skill predominates over chance. The definition provides:

> "Illegal gambling" means the making, placing or receipt of any bet or wager in the Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event occurs or is to occur inside or outside the limits of the Commonwealth.

Va. Code § 18.2-325(1). It is a misdemeanor to engage in illegal gambling as a player, *id*. § 18.2-326, a felony to operate an illegal gambling enterprise, *id*. § 18.2-328, and a misdemeanor to aid or abet the operation of such an enterprise, *id*. § 18.2-330.

The gambling statute contains several qualifications, two of which are important here. First, it provides that:

> Nothing in this article shall be construed to prevent any contest of speed or skill between men . . . where participants may receive prizes or different percentages of a purse, stake or premium dependent upon whether they win or lose or dependent upon their position or score at the end of such contest.

Id. § 18.2-333. Second, it provides that "[n]othing in this article shall be construed to make it illegal to participate in a game of chance conducted in a private residence, provided such private residence is not commonly used for such games of chance and there is no operator . . . ." *Id*. § 18.2-334.

An examination of the text and structure of the gambling statute demonstrates that it does not outlaw contests of skill. It is a "settled principle of statutory construction that every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary." *Hubbard v. Henrico Ltd. P'ship*, 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998). Section 18.2-333 expressly excludes contests of skill from the scope of the gambling statute. There is no way to prosecute such contests without reading that provision out of the statute. Yet the trial court's holding—that Texas Hold'Em games are "illegal gambling" because the outcome of any given poker hand is "uncertain"—did precisely that.

The trial court's decision to ignore Section 18.2-333 contravenes other cardinal principles of statutory construction as well. First, it violates the rule

that "[a] statute is not to be construed by singling out a particular phrase." *Commonwealth v. Zamani*, 6 Va. 391, 395, 507 S.E.2d 608, 609 (1998). By adopting an expansive interpretation of the word "uncertain," the trial court privileged that single ambiguous word over the entire remainder of the statute. Second, the trial court's interpretation allows the general definition of "illegal gambling" to swallow the specific rule relating to contests of skill, in violation of the rule that "where there is a clear conflict between statutes, the more specific enactment prevails over the more general." *Eastlack v. Commonwealth*, 282 Va. 120, 126, 710 S.E.2d 723, 726 (2011). Third, this Court has held that "a statute should never be construed in a way that leads to absurd results." *Meeks v. Commonwealth*, 274 Va. 798, 802, 651 S.E.2d 637, 639 (2007). "An absurd result describes situations in which the law would be internally inconsistent or otherwise incapable of operation." *Covel v. Town of Vienna*, 280 Va. 151, 158, 694 S.E.2d 609, 614 (2010) (internal quotation marks omitted). Under the trial court's interpretation, Virginia's gambling statute paradoxically both authorizes and prohibits contests of skill. Moreover, it outlaws literally every game that involves consideration and a prize, including golf tournaments, Scrabble tournaments, essay contests, horse races, and chess competitions. There is no indication whatsoever that the General Assembly intended that result.

In the petition stage of this case, Mobley argued that the Court should not consider the meaning of Section 18.2-333 because it was not identified in the complaint. BIO 20-22. That argument is unpersuasive. The Amended Complaint is explicit that Texas Hold'Em does not fall within the scope of the statutory definition of "illegal gambling" because skill predominates over chance in determining the outcome of the game. *E.g.*, J.A. 5 ¶ 7 (alleging that Texas Hold'Em is not prohibited "due to the predominance of skill over chance in determining the outcome of the game"), 10 ¶ 35 (arguing that Texas Hold'Em does not fall within the definition of illegal gambling "because skill, rather than chance, is the primary determinate of success"). The complaint also requests, in addition to an interpretation of Section 18.2-325, "other relief that is proper and just." J.A. 10 ¶ 37. The complaint therefore expressly invokes the substance, if not the citation, of Section 18.2-333. To win that the Court should *ignore* Section 18.2-333, Mobley must show that the omission of the *citation* somehow deprives this court of jurisdiction to consider the relationship between Section 18.2-333 and the meaning of Section 18.2-325. He cannot do so for two reasons.

First, Mobley errs in treating Section 18.2-333 as separate from and irrelevant to the meaning of Section 18.2-325. As this Court recently explained, when interpreting any statutory provision, "consideration of the

entire statute . . . to place its terms in context to ascertain their plain meaning does not offend the rule" against considering extrinsic evidence "because it is our duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal." *Eberhardt v. Fairfax Cnty Emps' Ret. Sys. Bd. of Trustees*, 283 Va. 190, 194-95, 721 S.E.2d 524, 526 (2012) (internal quotation marks omitted).

This rule has particular force here because the General Assembly styled the exceptions in the gambling statute as rules of construction—*i.e.*, "nothing in this article shall be construed" to reach identified conduct—and so expressly commanded courts to *always* read the entire gambling statute, including the definition of "illegal gambling," in light of all of the exceptions. Thus, in undertaking the inquiry requested by the Amended Complaint—interpreting Section 18.2-325—courts must consider Section 18.2-333, and the fact that the Amended Complaint does not cite the latter section by number is of no moment. *See, e.g.*, *Broaddus v. Commonwealth*, 126 Va. 733, 743, 101 S.E. 321, 324 (1919) ("It is a principle of pleading that whatever is included in, or necessarily implied from, an express allegation, need not be otherwise averred.").

Second, Mobley's argument is at odds with the rule of notice pleading. Under Rule 1:4(d), a pleading "shall be sufficient if it clearly informs the

opposite party of the true nature of the claim or defense." That standard is met when, as here, the Amended Complaint explains the theory on which the claim is based. *See CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993). And the Declaratory Judgment Act does not heighten that pleading standard. As the General Assembly has explained, the Declaratory Judgment Act "is to be liberally interpreted and administered with a view to making the courts more serviceable to the people." Va. Code § 8.01-191. Mobley's argument ignores that purpose in favor of formalism.

Although Section 18.2-333 is one clear indicator that the definition of "illegal gambling" does not reach contests of skill, it is by no means the only one. The language of the definition itself, which applies if the outcome of a game is "uncertain *or a matter of chance*," Va. Code § 18.2-325(1) (emphasis added), is most naturally read to create two tests. The first applies to contests in which the bettors do not participate in the underlying competition; in that scenario, betting is unlawful if the outcome is "uncertain," as it is, for example, in sports betting. The second applies to contests in which bettors do participate; in that scenario, betting is unlawful if the outcome of the contest is "a matter of chance," as it is in roulette. This is the only reading of the statute that gives meaning to each clause of the

definition. Otherwise, the phrase "or a matter of chance" would be surplusage because every event that is a matter of chance is also at least somewhat "uncertain."

That interpretation is also consistent with the ordinary meaning of the word "gamble," which the Oxford English Dictionary defines as "[t]o play games of chance for money, *esp.* for unduly high stakes; to stake money (*esp.* to an extravagant amount) on some fortuitous event." Oxford English Dictionary (2d ed. 1989), online version available at: http://oed.com/view/Entry/76447.[3] That definition sets forth the same two tests: either wagering on the outcome of events beyond one's control, or participating in a game of chance (as opposed to a game of skill).

Additionally, a sweeping interpretation of the phrase "uncertain or a matter of chance" makes little sense in light of the exception in Section 18.2-334, which provides that "games of chance" hosted in private residences are not illegal. Under a broad interpretation of the illegal gambling definition, privately hosted games of chance would receive more

[3] Other authoritative dictionaries produce consistent definitions. For example, the American Heritage Dictionary's first definition of the intransitive verb "gamble" is "[t]o bet on an uncertain outcome, as of a contest," or "[t]o play a game of chance for stakes." *See* American Heritage Dictionary of the English Language, online edition http://ahdictionary.com/word/search.html?q=gambling.

lenient treatment than privately hosted games of skill. That result would be anomalous: to Daniels's knowledge, there is no state in the country that prohibits two players from wagering on a private game of chess but permits them to wager on a private game of roulette—and there is no evidence that the General Assembly intended for Virginia to become the first such state.

Once it is established that the definition of illegal gambling excludes games of skill, the only remaining task is to determine the test to distinguish between games of skill and games of chance. Daniels agrees with the settled opinions of the Attorney General, who has explained that chance is present when "chance is the predominant factor in winning a prize." Hon. M. Frederick King, 1987-1988 Op. Att'y Gen. 287, at *2-3 (1988). This has been the Attorney General's settled view since at least 1976, just one year after the gambling statute was enacted. "Since there have been no corrective amendments to the statute as thus construed," this Court should "conclude that the General Assembly approves the Attorney General's construction." *Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161, 300 S.E.2d 603, 605 (1983).

Five examples illustrate the Attorney General's application of the predominance test. Shortly after the statute was enacted, the Attorney General opined that a bass fishing contest that paid a prize to the person

who caught the largest fish was not gambling. *See* Hon. William F. Parkerson, Jr., 1975-1976 Op. Att'y Gen. Va., at *1 (1976). The Attorney General explained that the element of chance was not met because "winning the prize will depend upon more than mere chance, since it does require skill to be a successful bass fisherman, and the determination of the winner is based on the efforts and ability of the fisherman participating in the contest." *Id*. at *2. The Attorney General highlighted that "the gambling statutes are criminal, and must be strictly construed." *Id*. He reached this conclusion even though—as any fisherman knows—luck plays a significant role in fishing generally, and it plays an even greater role in determining whether one person's fish will be larger than another's.

In a second case, the Attorney General concluded that a machine—where the player would roll coins down a ramp toward a sweeping arm, and win if the arm pushed the coins and other tokens down a chute—was not gambling. Hon. M. Frederick King, 1987-1988 Op. Att'y Gen. 287, at *3 (1988). The Attorney General explained that "[w]hile chance undoubtedly plays some role in the operation of the machine, it is my opinion that chance does not predominate." *Id*. That game involved essentially one skill—aiming a rolling coin at a pile of other coins, but the Attorney General nevertheless concluded that it was not gambling.

In 1996, the Attorney General determined that an essay contest was not gambling because "skill, rather than chance, is the predominant factor" in determining the winner. *See* Hon. Brian J. Moran, 1996 Op. Att'y Gen. 97, at *5 (1996). By contrast, in two cases that involved no skill, the Attorney General applied the predominance test to hold that the element of chance was satisfied. *See* Hon. John Latané Lewis, III, 1995 Va. Op. Att'y Gen. 133, at *1 (1995) (finding no skill required to win a raffle that was appended to an essay contest); Hon. William G. Petty, 1991 Va. Op. Att'y Gen. 122, at *2 (1991) (finding no skill required to win a "duck race").

Other persuasive authorities support application of the predominance standard. As Dr. Hannum explained in his affidavit, "[b]ecause even in the most skillful of games, such as golf, baseball, and chess, a chance event . . . may frequently alter the outcome of the game, it makes the most sense to ask not whether skill *always* and *exclusively* determines the winner, but instead whether skill *predominates* over chance." J.A. 237 ¶ 20. He elaborated that the predominance standard "most accurately tracks how people actually think about games of skill, and is also easy to apply consistently because it is susceptible to measurement." *Id*.

The United States District Court for the Eastern District of New York adopted similar reasoning this year, holding that the federal Illegal

Gambling Businesses Act, 18 U.S.C. § 1955, incorporates the predominance standard and does not reach Texas Hold'Em poker. *See United States v. Dicristina*, --- F.Supp.2d ----, 2012 WL 3573895, at *57 (E.D.N.Y. Aug. 21, 2012) ("The fundamental question is not whether *some* chance or skill is involved in poker, but what element *predominates.* To predominate, skill must account for a greater percentage of the outcome than chance—*i.e.*, more than fifty percent."); *id*. at *55 (explaining that "chance (as compared to skill) has traditionally been thought to be a defining element of gambling and is included in dictionary, common law, and other federal statutory definitions of it").

A majority of states likewise embrace the predominance test. *See* Petition for Appeal 19-20 (collecting cases). Like Section 18.2-325, the gambling definitions in these states do not expressly incorporate the predominance test, but courts have determined that this test fits the intent of their state legislatures in passing their respective gambling and lottery statutes.

The rule of lenity also weighs in favor of the predominance test. "Where the application and enforcement of the criminal law is at issue, any ambiguity shall be resolved against the Commonwealth and in favor of the accused." *Richardson v. Commonwealth*, 25 Va. App. 491, 496, 489 S.E.2d

697, 700 (1997). “This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.” *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). Thus, to the extent that Section 18.2-325 is ambiguous with regard to the degree of chance it requires, the Court must adopt the more “defendant-friendly” interpretation, which is predominance. *Id*.

Finally, the principle of constitutional avoidance presses in favor of the predominance test. Courts “have a duty to construe statutes subject to a constitutional challenge in a manner that ‘avoid[s] any conflict with the Constitution.’” *Copeland v. Todd*, 282 Va. 183, 193, 715 S.E.2d 11, 16 (2011) (quoting *Commonwealth v. Doe*, 278 Va. 223, 229, 682 S.E.2d 906, 908 (2009)); *Skilling v. United States*, 130 S. Ct. 2896, 2929-30 (2010) (same). Mobley’s interpretation raises grave constitutional questions because it deprives citizens of adequate notice of what conduct the statute prohibits, and also invites arbitrary enforcement, all in violation of the Supreme Court’s admonitions against vague criminal statutes. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000); *see also* Subpart IV, *infra*. The predominance test avoids this problem, and its application has been repeatedly upheld as constitutional.

In sum, the predominance test applies in Virginia. The authorities on this question are as clear as they are unanimous, and the Court should not hesitate to apply the test to Texas Hold'Em.

III. Second Assignment of Error: Texas Hold'Em Is Not Illegal Gambling.

The trial evidence established conclusively that skill predominates over chance in Texas Hold'Em. Both Dr. Hannum and Mr. Raymer so testified, identifying over a hundred discrete skills implicating an array of disciplines, which collectively determine who wins in poker and how much money that player wins. Both also presented empirical evidence in support of their conclusions—Dr. Hannum from studies he conducted, and Raymer from twenty years of personal experience as a successful poker player. The experts also compared the relative influence of skill and chance to explain why the former predominates over the latter, both in a single hand and over the long run. The testimony was detailed and reasoned, and Mobley never questioned either witness's qualifications or credibility.

Equally significant, Mobley presented no evidence regarding the role of chance in Texas Hold'Em. Instead, his attorney asked questions which established, at most, the undisputed proposition that chance plays *some* role in poker. J.A. 180. That is simply not enough. And Mobley has no excuse for failing to present a more robust defense. Before the trial, he

moved to exclude the testimony of Daniels's witnesses on the ground that the role of skill in poker is irrelevant to whether the game constitutes gambling. *See* Motion *in Limine* to Exclude Testimony of Plaintiff's Experts, filed on Oct. 11, 2011. That motion was denied, so Mobley was on notice that the issue would be litigated. Moreover, he had seen the affidavit of Dr. Hannum, which was submitted as an exhibit to the Amended Complaint, and was subsequently admitted with the joint stipulation. *See* J.A. 9 ¶ 33, 230 ¶ 1. He also disclosed his own poker expert witness, and brought that witness to trial, but elected not to call the witness after Daniels presented his case, including Raymer's testimony. In sum, Mobley made a conscious decision not to provide any evidence that chance predominates over skill in Texas Hold'Em.

Hannum and Raymer's testimony is also consistent with the most persuasive authority on the subject, the federal opinion in *United States v. Dicristina*. The *Dicristina* court considered expert evidence from both the operator of a poker room and from the United States federal government, which included detailed statistical analyses of the dynamics of Texas Hold'Em. The defendant's expert in that case explained that:

> (1) [P]oker involves a large number of complex decisions, which allow players of varying skill to differentiate themselves ...; (2) many people play poker for a living and consistently win money over time ...; (3) players who obtain superior results with other starting hands tend to

> obtain superior results with any given hand, indicating that the players' abilities, not the cards, are responsible for the results ...; (4) the published studies are all consistent with [these] conclusions.

Dicristina, 2012 WL 3573895, at *57. He also "demonstrated that skill could be shown statistically to determine more than 50% of the outcome in poker in as few as 240 hands—a number of hands which would be played in a typical social game, or in a single session at defendant's shop." *Id.* The expert concluded that "poker is a game of skill on every hand that is played, even if proving this statistically requires a sufficient number of hands." *Id*. (internal quotation marks omitted).

In a 120 page opinion, the federal court agreed that Texas Hold'Em is a game of skill. It acknowledged the defendant's statistical evidence, which showed that skilled players outperform less skilled players "in a relatively short time." *Dicristina*, 2012 WL 3573895, at *60. And it also recognized that while chance plays a role in poker, skill plays the dominant role. The court explained: "While players' actions are influenced by chance events, their decisions are based on skill. Players' decisions, in turn, affect game play, both in the hand being played and in subsequent hands. By bluffing, for example, players can overcome the power of chance and win a hand despite holding inferior cards." *Id*. at *56. It held that this "ability of players to influence game play distinguishes poker from other games, such as

sports betting." *Id*. And it does so in "[t]he majority of poker hands," which "end when one player induces his opponents to fold," such that "the players' decisions alone determine the outcome." *Id.* The court also held that even though chance plays a significant role in many games, including bridge, and "many sports, such as golf . . . no one would dispute that bridge and golf are games of skill." *Id*. at *57 (citation omitted).

Ultimately, the *Dicristina* court applied a methodology very similar to that advanced by Dr. Hannum in this case—it considered multiple tests to assess the role of skill, and concluded that because all of them pointed in one direction, skill predominates in Texas Hold'Em. *See* J.A. 237 ¶ 22 (setting forth metrics for the predominance of skill). Applying that methodology here produces the same result as in *Dicristina*: skill predominates over chance, and Texas Hold'Em is not illegal gambling.

In this case, the trial court reached an erroneous conclusion because it asked the wrong questions: it asked only whether the outcome of a single hand was "uncertain." Specifically, the court held:

> The evidence indicates that Texas Hold'em is a game involving both skill and chance. It also indicates that over a period of time a more skillful player is going to win more often; but although Professor Hannum in his affidavit says that he's never encountered the hypothetical player who plays one hand before retiring, Mr. Raymer testified from the stand here today that that is possible and that he has seen it occur on two occasions.

> So a game of Texas Hold'em for single player can last twenty-four hours or it could last for one hand, and all the evidence indicates that the outcome of any one hand is uncertain; and so it is clear to me that this violates the statute as written; and, therefore, I will grant the motion to strike in regard to the claim that it is not illegal gambling under the statute.

J.A. 207-08. In addition to erroneously applying an "uncertainty" standard instead of the predominance test, the trial court erred in holding that the nature of Texas Hold'Em can be determined by considering only a single hand. That is because the "outcome" of Texas Hold'Em is not who wins a particular hand, but rather who ultimately wins or loses money at the game. The court erred in several key respects.

First, the court's characterization of Raymer's testimony is clearly erroneous. Raymer stated that on one or two occasions, he had seen players leave one poker table and move to another table in the same room. J.A. 136-38. He never testified that he had seen players stop playing altogether after only one hand. He also testified that on average, players stay at the table for approximately six hours at a time, and that many play for years. J.A. 136.

Second, even if the trial court had been correct in its reading of Raymer's testimony, the inference that it drew is untenable. The fact that in over 20,000 hours spent playing poker, Raymer had only *twice* seen a player leave a table after playing a single hand proves that it is an

aberration, and therefore not an accurate window into the nature of the game. A *typical* Texas Hold'Em player does not leave the game after only one hand of poker, and typical players at the Poker Palace stayed for "long periods of time," J.A. 50, and would return regularly, J.A. 64-65.

Third, even if the trial court's assessment correctly describes *cash games* at the Poker Palace, it says nothing about the tournaments, which necessarily last for many hands and several hours. J.A. 49.

Finally, even if the Court decides that the proper unit of measurement in Texas Hold 'Em is a single hand, the question remains: What type of hand should the Court consider? The Court could consider a contrived hypothetical. For example, it could posit a hand in which one player is dealt strong cards, another player is dealt weak cards, and the second player nevertheless bluffs the first into folding using a combination of skills. In that case, it would be clear that skill predominates over chance. Alternately, the Court could posit a hand in which an unskilled player makes a poor decision, but catches an improbable card to win a pot against a more skilled player. In that case, the role of chance would be more pronounced.

The problem with that hypothetical approach is that it can be used to prove anything. A resort to contrived hypotheticals is therefore inconclusive, at best. It plainly would not give effect to the General

Assembly's legislative intent to distinguish games of skill from games of chance, because it would allow courts and lawyers arbitrarily to place games in one category or the other by manipulating the terms of the hypotheticals. Moreover, using a contrived *adverse* hypothetical would likely violate the rule of lenity and fair notice.

Instead of relying on hypotheticals, the Court should attempt to assess what happens over the long run (the way the game is *typically played*), or at a minimum what happens in a *typical* hand, and ask whether skill or chance predominates in that scenario. The best way to do that is to consider what happens in the overwhelming majority of poker hands. As the Supreme Court has explained, "the probative value of statistical evidence varies with sample size." *Connecticut v. Teal*, 457 U.S. 440, 463 n.7 (1982). Evaluations that consider a large number of data points lead to more accurate conclusions, while small sample sizes often produce erroneous ones. *See* J.A. 237 ¶ 25 (Dr. Hannum testified that "[s]mall sample sizes . . . create a significant risk of error, as one risks generalizing from idiosyncratic facts"); *see also Dicristina*, 2012 WL 3573895, at *58 (rejecting the "single hand" argument put forth by the Government's expert because of the risk of error, and concluding that the game should be analyzed as it is typically played).

In this case, the evidence shows that in the vast majority of poker hands, the players' decisions determine the outcome, and skilled players make more profitable decisions than unskilled ones. Moreover, the uncontroverted evidence shows that even if the court considers only a single hand, skill predominates over chance—and Mobley introduced no evidence to the contrary.

In sum, under a correct interpretation of the gambling statute, *i.e.*, the predominance test, poker is not gambling. The evidence on this point is overwhelming, and Mobley is not entitled to any opportunity to augment the record. In a case such as this, "[i]t would be useless to reverse the judgment of the trial court and remand the case for a new trial on account of any error of law that may have been committed, because upon a new trial under proper instructions there is no reason to believe that [Mobley] could prevail." *Atlantic Life Ins. Co. v. Worley*, 161 Va. 951, 965, 172 S.E. 168, 174 (1934). The judgment below should be reversed, with instructions to enter judgment in Daniels's favor.

IV. Third Assignment of Error: The Trial Court's Interpretation of the Gambling Statute Renders it Unconstitutionally Vague.

If the statutory definition of "illegal gambling" includes every game, contest, or event with an outcome that is to any degree uncertain, then the statute must be struck down as unconstitutionally vague under the Due

Process clause of the Fourteenth Amendment. The Supreme Court of the United States has held that a statute is unconstitutionally vague under two circumstances: “First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

When, as here, the statute is read capaciously, but enforced selectively, it fails for both reasons. In *City of Chicago v. Morales*, 527 U.S. 41 (1999), the Supreme Court struck down an ordinance that banned loitering with a gang member. The plurality opinion explained that “[s]ince the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of ‘loitering,’ but rather about what loitering is covered by the ordinance and what is not.” *Id*. at 57 (plurality opinion).

The same is true here: the ordinary meaning of the word “uncertain” is not necessarily vague, but it is inconceivable that the General Assembly intended to prohibit every activity in which the outcome is *to any degree* uncertain, and so the statute is “doom[ed]” for its failure to explain when it applies and when it does not. It is no answer to argue, as Mobley did at the

petition stage, BIO 25-26, that one whose conduct is covered by the statute has no standing to object to its vagueness, because the gravamen of the challenge here is that the statute applies to literally *every* game, and there are alternative readings—indeed, the best reading—of the statute that neither suffer from this problem nor encompass poker.

As this Court has explained, the "the requirement of fair notice contained in due process is not satisfied if the public cannot determine what the law prohibits . . . prior to the statute being enforced, but rather only after the fact from the result of an arbitrary exercise of discretion by the administrative official charged with enforcing the statute." *Volkswagen of Am., Inc. v. Smit*, 279 Va. 327, 341, 689 S.E.2d 679, 687 (2010). It is therefore of no moment that Mobley sent a letter to Daniels threatening prosecution before enforcing the statute—Daniels first waited through over four years of acquiescence before being surprised by Mobley's abrupt change in policy. *Cf. FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2318 (2012) (holding that an abrupt regulatory change deprived regulated parties of notice); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (holding that acquiescence was the only reasonable explanation for a long period of executive non-enforcement).

A broad reading of “illegal gambling” also invites arbitrary enforcement. This prong of the vagueness inquiry is “more important” than even the “actual notice” requirement discussed above. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). By not providing any guidance as to which contests are prohibited, the law “impermissibly delegat[es] policy considerations ‘to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.’” *Tanner v. City of Virginia Beach*, 277 Va. 432, 439, 674 S.E.2d 848, 852 (2009); *see also United States v. Reese*, 92 U.S. 214, 221 (1871) (holding that the Constitution does not permit a legislature to “set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large”).

The history of poker in Virginia illustrates the difficulties with the gambling statute. Poker has been permitted in many jurisdictions, including Portsmouth, for years. The Poker Palace itself operated for more than four years, with the acquiescence of the Commonwealth’s Attorney, until he informed plaintiff that he now regards the charitable poker hall as unlawful. Many respected organizations continue to host poker tournaments in the Commonwealth, and they do not face enforcement actions. The contrast

between the treatment of different poker establishments, and between poker and other contests—including races, golf tournaments, chess tournaments, and similar, all of which have "uncertain" results—further illustrates the potential for arbitrary enforcement of the statute.

Although the trial court's reading of the statute—which Mobley has pressed before this Court—would render the statute unconstitutionally vague, that does not mean the Court must strike down the statute. As the Supreme Court has held, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Nat'l Fed. of Independent Businesses v. Sebelius*, 132 S. Ct. 2566, 2594 (2012) (citation omitted). This Court should apply the canon of constitutional avoidance and save the statute—holding that the predominance test applies to contests where the bettors themselves participate. That result would resolve the constitutional difficulty while preserving the core of the statute. *See Skilling*, 130 S. Ct. at 2931 (paring the "honest services" fraud statute to its "core" in order to save it from unconstitutionality). Only if the Court concludes that the statute cannot be saved should it declare the law invalid.

V. First Assignment of Cross Error: Mobley Is Not Entitled to Sovereign Immunity from this Declaratory Judgment Action.

Sovereign immunity does not bar a declaratory judgment action that does not compel the government to act, restrain the government from

acting, or affect the public purse. That is especially the case when, as here, the suit raises a federal constitutional claim and involves the scope of a criminal statute. A contrary rule would give law enforcement officials *carte blanche* to adopt sweeping interpretations of criminal statutes that are contrary to the constitution and the General Assembly's intent, and to use those interpretations to threaten citizens, forcing the people to risk prosecution in order to vindicate their understanding of the law.

"As a general rule, the Commonwealth is immune both from actions at law for damages and from suits in equity to restrain governmental action or to compel such action." *Alliance to Save the Mattaponi v. Commonwealth,* 270 Va. 423, 455, 621 S.E.2d 78, 96 (2005). This is not such an action. Daniels does not seek damages or an injunction—and the declaratory relief he seeks will neither restrain nor compel the government to do anything—all it will do is provide a defense if Daniels is subsequently prosecuted for reopening the Poker Palace. The Court should therefore hold that while sovereign immunity is generally alive and well in Virginia, it does not apply to this particular declaratory judgment action.

Independently, this Court recently reiterated that "sovereign immunity does not preclude declaratory and injunctive relief claims based on . . . federal law." *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281

Va. 127, 137, 704 S.E.2d 365, 371 (2011). At a minimum, this means that sovereign immunity cannot bar Daniels's vagueness claim, which is rooted in the federal constitution. But the same logic applies to Daniels's request for an interpretation of the illegal gambling statute—a request that sounds in due process and constitutional avoidance. *See, e.g.*, *Dunn v. United States*, 442 U.S. 100, 112 (1979) (explaining that the rule of lenity "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited"); *United States v. Lanier*, 520 U.S. 259, 266 (1997) (explaining that the rule of lenity is a "junior version of the vagueness doctrine," and that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"). When the breadth of a criminal statute is at issue, the threat to individual liberty and the overlap with federal constitutional issues makes sovereign immunity inappropriate, even in nominally statutory cases.

Moreover, this Court has held that sovereign immunity does not protect an official "who exceeds his authority and discretion." *James v. Jane*, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980); *see also Tomlin v. McKenzie*, 251 Va. 478, 481, 468 S.E.2d 882, 884 (1996) (holding that state employee was

not immune when she engaged in a “wanton and intentional deviation from the duties” she had been assigned). The Commonwealth’s Attorney is part of the department of law enforcement, charged with “prosecuting all warrants, indictments or informations charging a felony,” as well as certain other offenses. Va. Code § 15.2-1627. However, “[t]he General Assembly alone has power to define crimes against this Commonwealth.” *Taylor v. Commonwealth*, 187 Va. 214, 220, 46 S.E.2d 384, 287 (1948).

The gravamen of Daniels’s claim is that by effectively reading a statutory limitation to the gambling statute out of the Virginia Code, Mobley exceeded his authority as a law enforcement official and usurped the role of the legislature. Whether Mobley’s reading of the statute is unconstitutional or not, his actions in interpreting the statute are outside the scope of immunity. *See City Council v. Wilder*, 73 Va. Cir. 471, 477 (Richmond 2007). While Mobley will undoubtedly protest that he is acting as a prosecutor, it is telling that his interpretation of the gambling statute is not only incorrect, but also contrary to no less than five opinions of the Attorney General. That interpretation is sufficiently extreme that it is not protected by the state’s immunity.

Finally, a finding of immunity would be grievously unjust. Daniels has done everything he could have done to determine the meaning of the

gambling statute without litigation. He should not be forced to face the risk of a felony conviction in order to obtain clarity on the law.

VI. Second Assignment of Cross Error: Daniels Has Standing to Bring this Declaratory Judgment Action.

Daniels has standing to bring this suit because he has a "justiciable interest" in whether his poker business constitutes illegal gambling. *Deerfield v. City of Hampton*, 283 Va. 759, 764, 724 S.E.2d 724, 726 (2012) (internal quotation marks omitted). Mobley argued (BIO 15-16) that because there is no pending prosecution, Daniels lacks standing. But the law does not set the bar so high.

In *Cupps v. Board of Supervisors of Fairfax County*, 227 Va. 580, 591, 318 S.E.2d 407, 412 (1984), this Court held that a property owner has standing to challenge "government action that affects *or threatens to affect* his particular property" (emphasis added). In *River Heights Associates Ltd. Partnership v. Batten*, 267 Va. 262, 270, 591 S.E.2d 683, 687 (2004), the Court held that when a party asserted that he had the power to proceed with a course of action, and that he would exercise that power, the threat alone was sufficient to create "a controversy within the contemplation of the Declaratory Judgment Act." And in *Wayside Restaurant, Inc. v. City of Virginia Beach*, 215 Va. 231, 232, 208 S.E.2d 51, 52-53 (1974), the Court heard a pre-enforcement declaratory judgment claim challenging the

validity of an ordinance after the police threatened the owners of a topless bar with criminal sanctions.

Mobley does not dispute that on July 26, 2010, he threatened Daniels with immediate prosecution. Nor does he dispute that this threat caused Daniels to close the Poker Palace, and that but for the threat, Daniels would reopen the Poker Palace. J.A. 31. Under this Court's precedents, that threat is enough.

Moreover, a declaratory judgment action is the only avenue to judicial relief that does not subject Daniels to the "risk, publicity, and expense of a criminal trial," *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987), which includes the risk of being branded a felon and sentenced to at least a year in prison, Va. Code § 18.2-328. The Declaratory Judgment Act exists to protect individuals from having to incur such risks in order to clarify their rights and obligations. *See Blodinger v. Broker's Title, Inc.*, 224 Va. 201, 205, 294 S.E.2d 876, 878 (1982) (prosecution was not a viable alternative to declaratory judgment).

CONCLUSION

The decision below should be reversed with instructions to enter final judgment in Daniels's favor. Because the record in this case is complete, there is no need to remand for further factual development.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 5:26 of the Rules of the Supreme Court of Virginia, the undersigned counsel for Appellant, Charles Daniels, d/b/a The Poker Palace, certifies as follows:

1. Appellant's Opening Brief conforms to the requirements of Rules 5:6 and 5:26 of the Rules of the Supreme Court of Virginia.

2. Appellant's Opening Brief does not exceed fifty (50) pages.

3. Fifteen tangible copies of Appellant's Opening Brief and ten tangible copies of the Joint Appendix have been transmitted by hand for filing in the office of the Clerk of this Court on this 15th day of October, 2012.

4. An electronic copy of Appellant's Opening Brief and ten electronic copies of the Joint Appendix, in Adobe Acrobat Portable Document Format on CD Rom, have been transmitted by hand for filing with the Clerk of this Court on this 15th day of October, 2012.

5. An electronic copy of Appellant's Opening Brief and Joint Appendix, in Adobe Acrobat Portable Document Format, has been delivered to counsel for Appellee via e-mail, and three tangible copies of Appellant's Opening Brief and one tangible copy of the Joint Appendix have

been sent via third party commercial carrier to counsel for Appellee, Earle C. Mobley, in his Official Capacity as Commonwealth's Attorney for the City of Portsmouth, named below, on this 15th day of October, 2012:

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