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.

REPLY BRIEF OF APPELLANT

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APPELLANT'S REPLY BRIEF

Appellant Charles Daniels hosted Texas Hold'Em poker games to raise funds for charity—with Appellee Earle Mobley's acquiescence—for four years until Mobley abruptly threatened Daniels with a felony prosecution. The General Assembly has provided that contests of skill are not illegal gambling, Va. Code § 18.2-333, and the authorities are unanimous that the test is met if skill predominates over chance. Daniels thus brought this declaratory judgment action to clarify his rights. His complaint alleges that Texas Hold'Em is not illegal gambling because skill predominates over chance in determining the outcome. Daniels sought neither damages nor injunctive relief, but only the comfort that if he continued to serve his charitable clients, he would not face the risk and stigma of a felony charge.

At trial, Daniels established with expert evidence that skill predominates in Texas Hold'Em. Mobley did not contest this evidence, nor its import under the statute. Instead, his response rests on the false premise that Daniels failed to plead the issue. In the alternative, Mobley urges this Court to disavow jurisdiction so that citizens must risk prosecution in order to challenge his unlawful reading of the statute. This Court should do no such thing. It should hold that Texas Hold'Em is not illegal gambling, or in the alternative that the definition of illegal gambling is unconstitutionally vague.

I. Mobley Is Not Entitled To Sovereign Immunity.

Mobley argues that Daniels' entire claim is barred by sovereign immunity—an extreme position that would bar relief even for federal constitutional violations. Daniels anticipated and refuted Mobley's argument, contending that immunity does not apply to constitutional claims, nor to statutory claims—like this one—that sound in due process. Daniels Br. 46-47. Daniels also argued that this case does not implicate immunity because it neither compels the government to act nor restrains it from acting. *Id*. 46. He further contended that by expanding the definition of "illegal gambling" Mobley exceeded his authority, placing his conduct beyond the scope of the Commonwealth's immunity. *Id*. 47-48. Finally, Daniels argued that requiring the citizenry to risk prosecution in order to challenge an arbitrarily broad interpretation of a criminal statute would give officers *carte blanche* to adopt such interpretations in violation of the Supreme Court's command that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); Daniels Br. 46, 48-49.

Mobley does not even acknowledge these contentions. Instead, he cites inapposite cases to assert blanket immunity. He relies first on *Afzall v. Commonwealth*, 273 Va. 226, 229, 639 S.E.2d 279, 281 (2007), a case in

which the plaintiff owed the Commonwealth money, and attempted to use a declaratory judgment to decrease the amount due.

The holding in *Afzall* was narrow. The Court did not hold that sovereign immunity always bars declaratory judgment actions against officials. Instead, it stated that sovereign immunity "*may* . . . bar a declaratory judgment proceeding *against the Commonwealth*," and that it barred an action that had "the effect of interfering with government functions" and had an "adverse effect upon protecting the public purse." *Id*. at 231, 233, 639 S.E.2d at 281, 283 (emphasis added). Several distinctions are apparent.

First, the defendant in *Afzall* was the Commonwealth itself, and so the question whether an official had exceeded his authority was not presented. Second, the plaintiff in *Afzall* sought money, presenting a paradigmatic case for immunity. But Daniels does not seek (and will not seek) damages. Third, unlike the plaintiff in *Afzall*, Daniels does not seek to either compel or restrain official action—he has not sought (and will not seek) an injunction, and declaratory relief would have no analogous effect—it would merely provide Daniels with clarity regarding his rights. Moreover, if this Court holds that Texas Hold'Em is lawful, then any "restraint" upon Mobley would not encroach upon his lawful authority, as he cannot prosecute non-crimes. Finally, *Afzall* did not involve any of the weighty due process issues present

here—there was no constitutional claim, and no party would have been forced to risk a felony prosecution in order to clarify the law.

Mobley also cites *Virginia Board of Medicine v. Virginia Physical Therapy Association*, 13 Va.App. 458, 462, 413 S.E.2d 59, 62 (1991) (*VBM*), which involved a plaintiff's attempt to use a suit for declaratory and injunctive relief to circumvent the Virginia Administrative Procedures Act's (VAPA's) provisions for judicial review. In *VBM*, the plaintiff challenged an informal agency position before the agency had promulgated a rule or enforced its position against the plaintiff. *Id*. *VBM* is distinguishable in three important respects. First, it involved injunctive relief, which would have restrained the Commonwealth from acting.[1] Second, the statutory claim in *VBM* did not raise the due process concerns present here. Third, the plaintiff in *VBM* had a remedy at law—it could have challenged the validity of a rule promulgated by the Board pursuant to the VAPA's judicial review mechanism. Daniels, by contrast, must risk prosecution to obtain clarity.

In *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 137, 704 S.E.2d 365, 370-71 (2011), this Court held that sovereign

[1] Courts in the Commonwealth have previously heard declaratory judgment cases against a Commonwealth's Attorney regarding the scope of the very statute at issue here, even as they have dismissed claims for injunctive relief. *See Vegas Time Assocs., Inc. v. Granfield*, 12 Va.Cir. 223, 1988 WL 619233, at *2 (Fairfax County 1988).

immunity does not bar federal constitutional declaratory judgment claims, *i.e.*, Daniels' vagueness claim. However, the Court also stated that immunity applies to "merely statutory claims." *Id*. Mobley properly does not rely on this language, as it was dictum and did not create a rule barring all statutory claims, even those that do not compel or restrain official action. And *DiGiacinto* does not cover Daniels' claim for three reasons. First, unlike the claim here, the statutory claims in *DiGiacinto* were "merely statutory," and did not raise due process concerns. Second, the university in *DiGiacinto* had the same immunity as the Commonwealth, while Mobley acted outside the scope of his authority, and thus lost his entitlement to the Commonwealth's immunity. Finally, the plaintiff in *DiGiacinto* sought to enjoin the university from enforcing a regulation that prohibited him from carrying a concealed weapon on campus. While that injunction plainly would have restrained a government function, Daniels' suit does not.

In sum, while sovereign immunity generally protects the Commonwealth and its officers, the doctrine has never been extended to declaratory judgments that neither compel the Commonwealth to act nor restrain it from doing so. This is not such a case, and this Court should not extend immunity here since both claims raise due process concerns, and the defendant's actions lie beyond the scope of his constitutional authority.

II. Daniels Has Standing.

Mobley fails to address the three cases cited by Daniels (Br. 49) holding that credible threats of enforcement confer standing. Nor does Mobley dispute that he threatened Daniels with imminent prosecution, or that this threat is the sole impediment to Daniels reopening the Poker Palace. Declaratory judgments exist to "guide parties in their future conduct in relation to each other, thereby relieving them from the risk of taking undirected action incident to their rights, which action, without direction, would jeopardize their interests." *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 421, 177 S.E.2d 519, 524 (1970). This suit will accomplish precisely that. The fact that declaratory judgment jurisdiction is "discretionary," (Mobley Br. 32) supports Daniels here because the circuit court chose to exercise its discretion, and that decision warrants respect.

III. The "Chance" Element Of Illegal Gambling Turns On Whether Chance Predominates Over Skill.

As Mobley acknowledges, the General Assembly has expressly provided that the statutory definition of "illegal gambling" should not be construed to reach a contest of skill. Mobley Br. 13. For decades, the Attorney General has stated that a game is lawful if skill predominates over chance. While Mobley is correct that such opinions are persuasive—as opposed to binding—authority, he provides no contrary on-point authority,

binding or otherwise.[2] And, indeed, the Attorney General's view is the most sensible—it is consistent with the ordinary meaning of the term "gambling," with common understandings about the difference between games of skill and chance, and with the majority of state laws on the subject.

As anticipated (Daniels Br. 25-27), Mobley's principal response to the express statutory provision for games of skill is that this Court should simply ignore it. He contends that the trial court "properly declined to address" the applicability of Section 18.2.-333 and that this Court should do the same because the Amended Complaint did not cite that section by number. Mobley Br. 23. This argument is flawed on multiple levels.

First, it implies, without any citation to the record, that the trial court deemed Section 18.2-333 outside the scope of the pleadings. But it did no such thing. Indeed, at a pre-trial hearing, the court stated that Section 18.2-333 was in play: "[T]he hangup here I think is—I believe it's 18.2-333 that says that there's nothing in this section should preclude a game of skill." (Record, Hearing Transcript dated Oct. 26, 2011, at 9). The court again

[2] Mobley cites an Attorney General opinion for the proposition that poker games can be gambling. *See* Hon. Franklin D. Edmondson, 2008 Op. Att'y Gen. 3 (2008). However, two points bear noting. First, the Attorney General was not asked to determine whether the element of chance was met, and was not provided facts about poker. Second, whether skill predominates over chance is a factual determination, which is "not a proper function of" an Attorney General opinion. *Id*. at 3.

referred to the skill-versus-chance inquiry during the trial and post-trial hearing. J.A. 179, 327. Thus, while the court did not ultimately assess whether chance predominates over skill, it never stated that its failure to do so stemmed from a deficiency in the pleadings.

Nor could it have, as the Amended Complaint adequately raises Section 18.2-333. Daniels Br. 25-26. It states that Texas Hold'Em does not constitute "illegal gambling" "due to the predominance of skill over chance in determining the outcome of the game." J.A. 5 ¶ 7; *see also id*. 9 ¶¶ 28, 35. That is the substance of Section 18.2-333, and Mobley does not explain why the omission of the *citation* to Section 18.2-333 prevents this Court from considering it when interpreting Section 18.2-325.

Under this Court's precedents, the Amended Complaint is sufficient. This Court has held that a plain meaning analysis of any statutory section requires a court to consider the entire statute in all cases. *Eberhardt v. Fairfax Cnty Emps' Ret. Sys. Bd. of Trustees*, 283 Va. 190, 194-95, 721 S.E.2d 524, 526 (2012). It has also held that a plaintiff need not cite, or even identify, the specific theories upon which he seeks relief so long as the complaint provides notice of the plaintiff's claim. *See Fein v. Payandeh*, No. 112320, --- S.E.2d ----, 2012 WL 5358699, at *4 (Nov. 1, 2012). Because the citation to Section 18.2-333 "was not a new or different claim

than made in . . . the amended complaint," *id.* at *4, but was instead merely partial support for Daniels' original claim that Texas Hold'Em is not illegal gambling, Daniels was entitled to raise it.[3] In any event, Mobley plainly had notice of the nature of Daniels' claim, as well as the opportunity to request a bill of particulars or to serve discovery. *See id.* at *4 n.7.

This Court therefore must consider Section 18.2-333. Indeed, to rule as Mobley suggests would render the case and this Court's review of it nonsensical, as the central issue would remain unresolved. And even without Section 18.2-333, for the reasons set forth in Daniels' opening brief, the definition of "illegal gambling" incorporates the predominance test.

IV. Texas Hold'Em Is Not "Illegal Gambling."

Under the predominance test, Texas Hold'Em is not illegal gambling. Daniels presented substantial, cogent, and uncontested expert testimony that skill predominates over chance in Texas Hold'Em, whether over the long run or a single hand of poker. Mobley's brief, which addresses the subject in two scant paragraphs (Br. 25-26) does not dispute these points.

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[3] Section 18.2-333 does not provide for a distinct claim or constitute an independent source of rights and obligations. Instead, it merely describes how other provisions in the gambling law, *e.g.*, the definition of "illegal gambling" in Section 18.2-325, should "be construed." The cases Mobley cites (Br. 24-25) are inapposite because the plaintiffs in those cases attempted to assert entirely distinct claims for relief.

Elsewhere (Br. 20), Mobley argues that the relative influence of chance and skill in Texas Hold'Em should be measured in a single hand of poker. But he presents no response to the argument that games must be evaluated as they are typically played, which for poker means considering profits over a series of many hands, especially in tournaments.[4] In any event, Mobley does not dispute that even if the Court considers only a single poker hand, it should consider a typical hand—and in a typical hand, the players' decisions, and not the cards, determine the outcome.

The best authority is *United States v. DiCristina*, --- F.Supp.2d ----, 2012 WL 3573895, at *57 (E.D.N.Y. 2012), in which "[t]wo well-qualified and prepared experts . . . testified" about the role of skill in poker. The defense expert "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*. He "concluded that 'poker is a game of

[4] Mobley argues (Br. 19 n.2) that the term "long run" is vague, but it has always been synonymous with the way the game is typically played—a concept that is not amorphous, but was instead established by testimony. Mobley faults Daniels' experts for failing to quantify the long run, but this criticism rings hollow since Mobley never raised the issue on cross examination. The witnesses testified that a session of poker typically lasts for at least several hours, and that players typically play many sessions. J.A. 49-50, 64-65, 69-70, 136, 237. Mobley does not dispute that over this timeframe, poker is a game of skill.

skill on every hand that is played,' even if 'proving this statistically requires a sufficient number of hands.'" *Id*. The government's expert questioned the defense's methodology, but did not submit "any contrary analysis, nor any studies which support the conclusion that chance predominates over skill in poker." *Id*. On that evidence—which mirrors the evidence here—the court concluded that skill predominates in Texas Hold'Em. *Id*. at *60.

Mobley cites (Br. 21) out-of-state cases holding that poker is gambling. These are not persuasive because each hinged on its own factual record, and therefore includes conclusions that are not supportable here. For example, the statement that poker players cannot "defeat chance with superior skill," *Joker Club, LLC v. Hardin*, 643 S.E.2d 626, 630 (N.C. App. 2007), is belied by the fact that players who successfully bluff use skill to win despite being dealt the worse cards. *See* J.A. 146-47, 240-41. Moreover, none of Mobley's cases analyzed the game as it is actually typically played. This Court should therefore follow the persuasive authority in *DiCristina* and hold that Texas Hold'Em is not illegal gambling.

V. Mobley's Reading Of The Illegal Gambling Statute Renders It Unconstitutionally Vague.

Mobley argues that "[a]s long as the outcome of a contest or game is uncertain or a matter of chance, and where consideration is present, whether skill predominates in a given game or contest is irrelevant." Mobley

Br. 14-15. But as Daniels has demonstrated, the outcome of *every* game is uncertain—indeed, if the outcome of a game was ever a foregone conclusion, there would be no reason to play. And chance can play a dispositive role in practically every game, including sports such as golf and football that involve wind and referees, games such as Scrabble and bridge that involve random distributions of tiles and cards, and activities such as fishing, which the Attorney General has expressly opined is not gambling. Mobley's interpretation outlaws all of these activities, none of which are prosecuted as gambling in the Commonwealth. His reading therefore violates the constitution both because it fails to provide adequate notice of prohibited conduct, and because it guarantees arbitrary enforcement. *See City of Chicago v. Morales*, 527 U.S. 41, 57, 60 (1999) (plurality opinion).[5]

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[5] Mobley argues briefly that the games in this paragraph would not be covered because they are games of skill. Mobley Br. 22-23. But he cannot square this argument with his contention that poker is gambling. Consider golf. Mobley contends that golf is not gambling because "[i]n golf, each player starts and finishes each hole from the same position. The player's skill and ability determines whether he or she posts a better score than his or her opponnts [sic]." Mobley Br. 23. He cites nothing to substantiate this proposition, and it flies in the face of what the Supreme Court has acknowledged: "that golf is a game in which it is impossible to guarantee that all competitors will play under exactly the same conditions or that an individual's ability will be the sole determinant of the outcome." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 686-87 (2001). Indeed, studies have concluded that it takes 9.6 strokes of "good luck" to win a golf tournament. Robert A Connolly & Richard J. Rendleman Jr., *Skill, Luck, and Streaky Play on the PGA Tour*, 103 J. Am. Statistical Ass'n 74, 74-75 (2008). And

Surprisingly, Mobley's brief does not defend the constitutionality of his reading of the statute. Instead, his only argument is that Daniels lacks standing to challenge the statute because Daniels allegedly had notice that the statute applies to poker. Mobley Br. 26-27. That argument is unpersuasive. First, it fails on its own terms because the record shows that Daniels had every reason to believe that poker was lawful. Indeed, Mobley himself told Daniels that poker was a game of skill, and Mobley himself allowed the Poker Palace to operate for four years before threatening a felony prosecution. In the interim, neither the law nor the nature of the games at the Poker Palace changed in any material way.

Independently, Daniels' subjective knowledge is irrelevant to both prongs of the vagueness inquiry. As the Supreme Court has explained, the "actual notice" inquiry must "be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an ad hoc appraisal of the subjective expectations of particular" parties. *Bouie v. City of*

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other studies have determined that repeat success rates in golf and poker are comparable. *See* Rachel Croson *et al.*, *Poker Superstars: Skill or Luck?*, 21 Chance, no.4, at 25, 28 (2008). It is telling that Mobley is willing—without any citation to authority, and in the face of overwhelming (and uncontested) evidence about the role of skill in poker—to argue that poker is gambling and golf is not. The arbitrariness in Mobley's brief reflects the arbitrariness of his enforcement posture toward poker, and illustrates Daniels' vagueness argument.

Columbia, 378 U.S. 347, 355 n.5 (1964). Subjective knowledge is also irrelevant to "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *see Farrell v. Burke*, 449 F.3d 470, 483 (2d Cir. 2006) (Sotomayor, J) (holding that a party with actual notice may raise a challenge under this prong). Mobley's brief never addresses this aspect of the vagueness inquiry, just as it never disputes that Mobley himself has flip-flopped on the meaning of the law, thus engaging in precisely the sort of arbitrary enforcement that vagueness doctrine guards against.

To be sure, if Mobley shows: (1) that the definition of "illegal gambling" has an unambiguous core, and (2) that Texas Hold'Em falls within that core, then Daniels' claim would be barred. Here, Daniels acknowledges that the statute does have a constitutional core that includes traditional gambling games such as slot machines, craps, roulette, keno, and sports betting, and excludes contests of skill between players.

The key question is whether Mobley has shown that Texas Hold'Em falls within the core of the statute. He has not. Daniels has standing to challenge the constitutionality of the statute because Texas Hold'Em is a "contest of . . . skill between men," and therefore outside the constitutional core of the statute. Va. Code § 18.2-333. Multiple expert witnesses have explained

without contradiction that Texas Hold'Em is fundamentally different from the gambling games above because skill predominates over chance; because the players do not bet on the outcome of chance events, but instead attempt to control events through betting; because Texas Hold'Em is a fair game played on a level field (as opposed to a gambling game with stilted odds); and because Texas Hold'Em is a peer-to-peer game (*e.g.*, a "contest . . . between men," Va. Code § 18.2-333) instead of a game played against a casino. Because the Poker Palace only ever offered Texas Hold'Em games, Daniels has standing to challenge the statute.

In sum, Mobley's reading of the gambling statute renders it unconstitutionally vague. However, this Court need not invalidate the statute—instead, it should reject Mobley's reading, construe the chance element of the statute as incorporating the predominance inquiry, and hold that Texas Hold'Em does not fall within the properly construed statute. *Cf. Skilling v. United States*, 130 S. Ct. 2896, 2907 (2010) (paring the honest services fraud statute to its core of bribery and kickbacks, and dismissing indictment that failed to allege such conduct).

CONCLUSION

The judgment of the circuit court should be reversed with instructions to enter judgment for Daniels.

Respectfully submitted,

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CERTIFICATE

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 Reply Brief conforms to the requirements of Rules 5:6, 5:26, and 5:29 of the Rules of the Supreme Court of Virginia.

2. Appellant's Reply Brief does not exceed fifteen (15) pages.

3. Fifteen copies of Appellant's Reply Brief have been transmitted by hand for filing in the office of the Clerk of this Court on this 26th day of November, 2012.

4. An electronic copy of Appellant's Reply Brief, in Adobe Acrobat Portable Document Format, has been filed with the Clerk of this Court by e-mail to scvbriefs@courts.state.va.us on this 26th day of November, 2012.

5. An electronic copy of Appellant's Reply Brief, in Adobe Acrobat Portable Document Format, has been delivered to counsel for Appellee via e-mail, and three copies of Appellant's Reply Brief have been mailed to counsel for Appellee, Earle C. Mobley, in his Official Capacity as

Commonwealth's Attorney for the City of Portsmouth, named below, on this 26th day of November, 2012:

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