IN THE

Supreme Court of Virginia

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.

**BRIEF FOR THE FRATERNAL ORDER OF POLICE OF VIRGINIA, INC.,
THE VIRGINIA MOOSE ASSOCIATION,
PORTSMOUTH CATHOLIC REGIONAL SCHOOL, and CHARITIES, INC.
AS *AMICI CURIAE* SUPPORTING APPELLANT
CHARLES DANIELS, d/b/a THE POKER PALACE**

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Pursuant to Rule 5:30 of the Rules of this Court, the Fraternal Order of Police of Virginia, Inc., the Virginia Moose Association, Portsmouth Catholic Regional School, and Charities, Inc. submit this brief *amici curiae* in support of Appellant Charles Daniels, d/b/a The Poker Palace and respectfully request that this Court reverse the decision below.

INTEREST OF *AMICI CURIAE*

Amici are several of Virginia's charities and non-profit organizations. They have a substantial interest in this case because they have sponsored or would like to sponsor Texas Hold'em tournaments at The Poker Palace or similar venues. Texas Hold'em tournaments have proven very successful tools for fundraising and *amici* hope to sponsor such tournaments to raise funds in furtherance of their charitable missions. *Amici* believe that the decision below is incorrect as a matter of law, and want this Court to recognize that, if allowed to stand, the ruling will have deleterious impacts on them and other charitable organizations in Virginia. The strongly held views of the charities and non-profit organizations participating in this brief are likely shared by many other charitable organizations throughout Virginia.

Amici participating in this case are as follows:

- The Fraternal Order of Police of Virginia, Inc. ("VA FOP"). The VA FOP constitutes the state lodge of the Fraternal Order of the Police and represents the interests of law enforcement officers from across the Commonwealth. It advocates those interests before legislative bodies and other forums throughout Virginia. The VA FOP has held Texas Hold'em poker tournaments at the Poker Palace, and through these tournaments it raised over $90,000 in donations. These donations were used for a variety of causes, including assisting a police officer and his family after their home was destroyed by fire.
- Portsmouth Catholic Regional School ("PCRS"). PCRS is a private not-for-profit school offering faith-based education for students from pre-Kindergarten through Eighth Grade. PCRS has provided educational services to students from Portsmouth, Suffolk, and Chesapeake since 1954. PCRS has held Texas Hold'em poker tournaments at the Poker Palace, and through these events it raised over $200,000, which represented approximately 70% of the school's private donations. These funds were used to provide financial aid to needy families, fund improvements to the school's facilities, and upgrade the school's technology.

- The Virginia Moose Association ("VMA"). In 1936, the VMA became the first State Association sanctioned by the Supreme Lodge of Moose International. It is comprised of 91 lodges and 81 chapters. In total, the VMA has approximately 60,000 members. The VMA is known throughout the Commonwealth for its charitable works. In fact, it has contributed $1.8 million to the Massey Cancer Research Center. As a result of this generosity, an entire wing of the facility was dedicated to the VMA. Because of the popularity of the game, the VMA would like to sponsor Texas Hold'em tournaments. It believes that these tournaments will greatly enhance its fundraising capabilities, which will benefit the entire Commonwealth.
- Charities, Inc. ("CI"). CI is the charitable arm of the Chesapeake Sheriff's Office. CI has raised approximately $50,000 in charitable donations through Texas Hold'em events at the Poker Palace. These donations have allowed CI to provide meals to the needy during the holidays, and hold events where needy seniors are provided a meal and given free medical care.

PRELIMINARY STATEMENT

From the time of its introduction into the United States in the 1800s to the present, the game of poker has captured the American imagination.

For many Americans, the game conjures images of the American frontier—cowboys and prospectors dealing hands in smoky saloons in towns like Deadwood and Dodge City, and riverboat men and plantation owners cutting cards on boats crossing the Mississippi. Poker is today an integral part of America's sports culture with tournaments broadcast over major sports networks like ESPN and Fox Sports, capturing millions of viewers annually. Charities—including *amici*—have for years successfully coupled America's love for the game of poker with the nation's desire to help the less fortunate by sponsoring tournaments and similar events to raise millions in donations.

The ruling below threatens this fundraising pipeline. What is more, the trial court's ruling calls into question the legality of any charitable event where a person makes a donation to participate in a game or contest for a chance to win a donated prize. Such a result would be absurd as a matter of public policy and because it is contrary to the intentions of the Virginia legislature.

The uncontroverted evidence below established that Texas Hold'em poker is a game of skill that falls outside the ambit of Virginia Code § 18.2-325. This Court should accordingly reverse the circuit court and find that

"illegal gambling" as defined by Virginia Code § 18.2-325 does not include Texas Hold'em.

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.

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."

3. The trial court erroneously held that its broad reading of the gambling statute did not render the statute unconstitutionally vague.

These errors were properly preserved below as noted by Appellant's brief. The Court also granted review on two assignments of cross-error, relating to Appellee's sovereign immunity defense and Appellant's standing to bring a declaratory judgment action. While this brief *amici curiae* addresses only those assignments of error brought by Appellant, *amici* agree with Appellant's position that sovereign immunity does not preclude this suit and Daniels has standing to bring this action.

STATEMENT OF FACTS

Amici adopt the statement of facts as stated by Appellant and add the following to detail the long and celebrated history of poker in the United States, the rules and nature of the game, and its use as a fundraising tool for Virginia charities:

I. History and Prominence of Poker in the United States.

Poker is a uniquely American game. It has been called "the most popular [card game] among Americans," "America's national game," and "the national vying game of the United States." In 1875, the New York Times editorial page declared that "the national game is not baseball, but poker." The game has also been described as the "the most popular international card game in history." No doubt the game's international prominence "'is as much due to the prominence and influence of American culture as to its own individual merits.'"

Poker traces its roots to New Orleans where it developed as an amalgam of various European and Middle-Eastern card games played by French settlers, including Poque, Bouillotte, and As-Nas. Following the Louisiana Purchase, poker began to spread rapidly throughout the United States, first north by way of the Mississippi River and then west to the gold mines of California and then on to the rest of the world. Today, more than

sixty-million Americans play poker and hundreds of millions play the game world-wide.

Poker has also been a favorite game of many American political leaders and other public figures. These include Presidents Grant, Truman, Roosevelt, Nixon, and Obama, and Supreme Court justices Frank Vinson, William O. Douglas, and Antonin Scalia.

II. Texas Hold'em: "The Cadillac of Poker."

Although poker has many variations, the most popular by far is known as Texas Hold'em, which has been termed the "Cadillac of poker." The game is played generally in groups of between two and ten players. And like most variants of poker, the objective in Texas Hold'em is to win money, usually represented by poker chips.

Play is broken into a series of hands where each player is dealt two cards face down (known as the player's "hole" cards or "pocket" cards) from a standard deck of 52 cards. These cards are used in combination with the five "community" cards placed face up on the table to make the best five-card hand. The dealer's position is represented by a plastic "button" with that player receiving the last card dealt and acting last during each round of betting. At the beginning of each hand, players must post bets before they

see their hand. The player to the left of the button (the small blind) must post a portion, usually half of the opening bet, while the player to the left of the small blind (the big blind) must post the full amount of the opening bet. These positions change with each hand and rotate clockwise around the table so that each player must post the small and big blinds.

After the two hole cards are dealt and the blinds are posted, the rest of the players have three options: the player can "call" the opening bet by matching the big blind; the player can raise the pot, which forces other players to either match or increase their bet; or the player may fold, ending their participation in the hand. After all bets have been placed, and assuming there remain at least two players taking part in the hand, three community cards are dealt face up (called "the flop") and another round of betting ensues. After the flop betting round ends, the dealer will deal a fourth card face up (called "the turn") and a third round of betting begins. A final card is dealt (called "the river") with a fourth round of betting.

If at any point a player bets and all others fold, that player wins the pot and is not required to show his or her cards. If two or more players remain in the hand through the fourth round of betting, there is a showdown in which each player combines his or her two pocket cards with some or all

of the community cards to make the best five-card hand, and the highest ranked hand wins the pot. If the best hand is shared by two players they split the pot; if the five community cards form the best hand, all players remaining share the pot.

Because of the popularity of Texas Hold'em poker, ESPN, the most popular sports network in the United States, and other sports channels, frequently broadcast Texas Hold'em tournaments to millions of viewers world-wide. For example, each year, ESPN broadcasts the World Series of Poker, which in 2011 was expected to have more than 72,966 participants coming from nations around the globe.

III. Poker as a Fundraising Tool for Virginia Charities.

Charities—including *amici*—have harnessed poker's popularity by organizing poker tournaments to raise funds. Generally, participants in charity poker tournaments pay a donation to play and the monies collected are used by the sponsoring organization to advance its mission. In exchange for the donation, each player is given chips to bet. Players play and bet according to established Texas Hold'em rules, and the players with the most chips at the end of the tournament often receive donated prizes (or sometimes cash).

Poker events have proved very successful for Virginia charities. For instance, before it closed due to threats of prosecution, the Poker Palace raised approximately $700,000 for approximately two-dozen charitable organizations, including several *amici* as well as:

- The Portsmouth Catholic Regional School—all funds raised were used for student aid and improvements to its school facilities, including replacing a decades-old boiler.
- The March of Dimes—all sums raised were used to help Virginia children afflicted with birth defects and other serious childhood health problems.
- The Poker Run for Ella Wells—all donations were used to assist the family of a four-year old girl diagnosed with a brain tumor.
- H.E.R. Shelter Christmas Drive—all funds were used to assist victims of domestic violence and their families during the holidays.

Notably, the UVA Club holds an annual poker tournament called "Cavaliers Against Cancer Texas Hold'em Charity Tournament." According to the organization's website, the event supports the Rebecca Clary Harris, M.D. Memorial Fellowship at the U.Va. Cancer Center. The UVA Club hopes to raise at least $7,500 from the event to be used for cancer research.

The proliferation of charitable poker tournaments speaks to the fact that these events produce real results for *amici* and other charities in

Virginia. Charity poker tournaments create a powerful draw to poker enthusiasts wishing to pit their skills against other competitors for the benefit of others. And it would be most unfortunate if these events were banned in Virginia.

ARGUMENT

I. The Trial Court's Reading of the Relevant Statutes Violates Several Canons of Statutory Construction and Would Make Any Charitable Event Where a Person Pays an Entry Fee and Has a Chance to Win a Prize Illegal.

The court below found that Texas Hold'em fell within the definition of "illegal gambling" because skill and chance are both elements of the game and the outcome of any given hand is "uncertain." This "any chance" standard is erroneous because it offends two basic canons of statutory construction. First, the decision violates the rule against superfluities as it renders § 18.2-333's exception for "contests of skill" meaningless. Inherent within all games is the element of chance. Thus, under the trial court's reasoning, no game could be classified as a "contest of skill." Second, the ruling leads to absurd results. It is not reasonable to conclude that the legislature intended to classify as illegal gambling charity golf tournaments, chess tournaments, fishing tournaments, 5K runs, beauty contests, and similar events.

Simply put, should this Court allow the trial court's decision to stand, it will have a devastating impact on charitable organizations throughout the Commonwealth. Charities raise much of their revenue through events that feature games and contests, like golf tournaments, 5K runs, and marathons. And if there is any question about the legality of these events, charitable organizations will stop sponsoring and organizing them. The harm caused by this will redound not only to the people who benefit from the funds raised by these events, but to the men, women, and children who enjoy participating in them. By reading the gambling statute so broadly, the trial court has already cast a shadow over all contest-based fundraising, and its decision should be reversed.

A. The Trial Court's "Any Chance" Standard Renders Va. Code § 18.2-333 Superfluous.

As with all statutory construction cases, the goal is to ascertain and give effect to the intent of the legislature, and this task begins with an examination of the plain text of the statute. See Crown Cent. Petroleum Corp. v. Hill, 254 Va. 88, 91 (1997) (citation omitted). The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent. Conyers v. Martial Arts World of Richmond, Inc., 273 Va. 96, 104 (2007). If the language of the statute, however, "is subject

to more than one interpretation," a court must apply the interpretation "that will carry out the legislative intent behind the statute." Cuccinelli v. Rector & Visitors of the Univ. of Va., 283 Va. 420, 425 (2012).

When resolving an ambiguity within a statutory scheme, a court must read the provisions within the legislative blueprint "as a consistent and harmonious whole," Eberhardt v. Fairfax County Employees' Retirement System Board of Trustees, 283 Va. 190, 194–95, (2012), and adopt the interpretation that does not make any provision within the scheme superfluous, void, or insignificant, see Commonwealth v. Squire, 278 Va. 746, 752 (2009); Northampton County Bd. of Zoning Appeals v. Eastern Shore Dev. Corp., 277 Va. 198, 202 (2009) ("It is the duty of the Court to read legislative enactments to give meaning to all the words used.")

This case turns on the construction of two related statutes: § 18.2-325 and § 18.2-333 of the Virginia Code. Section 18.2-325, provides as follows:

> "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.

Section 18.2-333, provides certain exceptions to the definition of "illegal gambling" and states in relevant part:

> Nothing in this article shall be construed to prevent any contest of speed or skill between men, animals, fowl or vehicles, 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.

Read together, the statutory scheme creates a dichotomy between two classes of activities: games of chance or uncertainty (proscribed under § 18.2-325) and games of "speed or skill" (excepted under § 18.2-333). The General Assembly did not expressly define the terms "skill," "chance," or "uncertainty." So the Court must look to the ordinary meaning of these terms. City of Virginia Beach v. Flippen, 251 Va. 358, 362 (1996). Black's Law Dictionary defines "skill" this way:

> Ability; proficiency, esp. the practical and familiar knowledge of the principles and processes of an art, science, or trade, combined with the ability to apply them appropriately, with readiness and dexterity.

Bryan A. Garner, Black's Law Dictionary 1392 (7th ed. 1999). In contrast, the term "chance" is generally defined as "unforeseen, uncontrolled, or unintended consequences of an act." Id. at 224. And the term "uncertain"

means: "1. not known, reliable, or definite . . . 2. not completely confident or sure." Oxford American Dictionary & Thesaurus 1416 (2d ed. 2009).

Without question, all contests and games involve some level of chance and uncertainty. In fact, these "unforeseen [and] uncontrolled" consequences are an innate fixture of games commonly considered to require the most skill. For instance, in chess, the player that wins the draw and moves first has an inherent advantage over the player who moves second. See Jacob Aagaard, Excelling at Technical Chess (2004) (discussing the phenomenon of the first-move advantage); Anthony N. Cabot, et al., Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance, 57 Drake L. Rev. 383, 390 (2009). Chance also plays a role, sometimes a determinative one, in golf—even in tournaments played by the best players in the world. PGA Tour, Inc. v. Martin, 532 U.S. 661, 686–87 (2001) ("[G]olf is a game in which it is impossible to guarantee that . . . an individual's ability will be the sole determinant of the outcome. For example, changes in the weather may produce harder greens and more head winds for the tournament leader than for his closest pursuers. A lucky

bounce may save a shot or two. [C]hance may have a[n] . . . impact on the outcome of elite golf tournaments.").

But while chess and golf indisputably require "ability [and] proficiency" and should logically qualify as "contests of skill" for purposes of § 18.2-333, under the trial court's reading, since chance is a facet of each, each activity is "illegal gambling" under § 18.2-325. By extension of the trial court's reasoning, no matter the game or the degree of skill required to play it, it cannot qualify as a contest of "speed or skill" as defined by § 18.2-333. This construction is invalid as it causes § 18.2-325 to swallow the exceptions expressed in § 18.2-333 whole. It could not have been the legislature's intent to enact a meaningless and ineffectual statute. See Squire, 278 Va. at 752 ("We do not consider actions of the General Assembly to be superfluous . . . ."). The trial court's ruling, which assumes just that, should accordingly be reversed.

B. The Trial Court's Reading of the Statutes Creates the Absurd Result that Any Contest for Charity Where Participants Pay an Entry Fee and May Win a Prize is "Illegal Gambling."

In addition to violating the rule that requires a statute to be interpreted in a manner that gives effect to each of its provisions, the trial court's ruling offends a second fundamental rule of statutory construction: it adopts a

ruling that leads to an absurd result that the legislature could not rationally have intended. As this Court has made clear, "[t]he plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction, and a statute should never be construed in a way that leads to absurd results." Meeks v. Commonwealth, 274 Va. 798, 802 (2007) (internal citations and quotation marks omitted); accord United States v. Wilson, 503 U.S. 329, 334 (1992) ("[A]bsurd results are to be avoided").

Under the trial court's construction of § 18.2-325, any activity is "illegal gambling" when a person pays (1) consideration to play (2) a game or contest of chance (3) for an opportunity to win a prize. As long as the element of chance is a part of the game or contest, it falls within the statute. Yet, as discussed in Part I.A., *supra*, every game or contest has an element of chance and uncertainty, and so playing or organizing any game or contest can result in prosecution if the other statutory elements are met. This boundless reading of the statute is irrational because it bans every charitable event held in the Commonwealth of Virginia that involves a game or contest.

When an organization holds a charitable event—such as a poker tournament or a golf tournament, for example—participants are usually asked to pay an entry fee to play. This entry fee pays the administrative costs associated with holding the event and the rest goes to the charitable cause the organization is supporting. Often, participants are given an opportunity to win various donated prizes based on their performance. The annual golf tournament held by the Virginia Commonwealth University School of Medicine to support the Massey Cancer Center operates this way. See http://vcumedgolf2012.weebly.com. But based on the trial court's ruling, the VCU School of Medicine and those participating in its annual event could face criminal prosecution. Indeed, charity golf tournaments, 5K runs, marathons, and any other event where participants pay an entry fee for a chance to win a prize are subject to criminal prosecution.

It would be incredible to conclude that in enacting § 18.2-325 the Virginia legislature had in its sights charity golf tournaments and similar events. This is the quintessential absurd result and requires reversal of the decision below.

C. The Trial Court's Reasoning Will Have Serious Adverse Effects on Charities in Virginia.

Amici, like most charitable and non-profit organizations in Virginia, host and organize events that feature contests and games, and opportunities to win donated prizes. These events are major draws to Virginians because they appeal to their altruistic nature, sense of community, and love of games and sports. In fact, hundreds of thousands of Virginians participate in these events annually and donate millions to the charities that sponsor them. The money donated at these events has a real impact on the lives of the people of the Commonwealth. It supports cancer research, helps the families of sick children, feeds the hungry, provides shelter for abused and lost animals, and aids a host of other worthy causes. But under the trial court's ruling and the argument pressed by Appellee, these events will become a thing of the past.

Even more than ordinary citizens, charitable and non-profit organizations must be viewed by the public as honorable and law-abiding—otherwise, people will feel uncomfortable donating money to them, and they may lose non-profit status. It would be devastating to any such organizations to be prosecuted for illegal gambling, and it is a risk that they simply cannot and will not take. This is especially true for *amicus* VA

FOP—which represents a large segment of Virginia's law enforcement community—as it has a heightened interest in avoiding any appearance of unlawful behavior.

If the trial court's reading of §§ 18.2-325 and 18.2-333 is left to stand, charitable organizations will be forced to cancel any and all scheduled events involving payment of a donation to participate in a contest where winners receive donated prizes. And they will of course have to abandon future plans to hold such events. Otherwise, they will risk being charged with a Class 3 misdemeanor. See § 18.2-325.

Appellee may argue that this claim is more cry than wool because prosecutors will not bring charges against a charitable organization holding a golf tournament or a marathon. This claim, if made, is cold comfort to *amici* and other charitable organizations in the Commonwealth. In this very case, the Commonwealth's Attorney permitted *amici* and other charities to organize and hold Texas Hold'em tournaments at the Poker Palace for four years. But for some reason not known by *amici*, he changed his mind and decided that these charitable events constituted illegal gambling under Virginia law and threatened prosecution. As this illustrates, *amici* and other

charities would be most unwise to leave their legal fates at the mercy of *noblesse oblige*.

II. This Court Should Interpret Virginia's Statutory Scheme Using the Common Law Predominance Test and Find Texas Hold'em Does Not Constitute Illegal Gambling.

The trial court's capacious ruling sweeps within the ambit of § 18.2-325 any game or contest, including chess, golf, and Texas Hold'em, rendering § 18.2-333 meaningless and leading to the absurd result of outlawing a host of charitable activities. These infirmities can be cured, however, by interpreting the statutes through the lens of the common law "predominance test." Application of this test to the uncontroverted record below, establishes that Texas Hold'em does not qualify as "Illegal Gambling" under Virginia law.

A. The Common Law Predominance Test Should Be Adopted to Limit the Scope of § 18.2-325 and Give Effect to § 18.2-333.

Put simply, the trial court's reading of the statutory scheme is fundamentally in error because it sweeps too broadly, leaving § 18.2-333 a dead letter and causing a chilling effect on many activities of charitable organizations. To solve the problem of deciding which games constitute gambling, the common law developed what has been coined the

"predominance test" (or "dominant factor test"). Under this test, an activity is deemed gambling "if a person risks something of value on an activity *predominately determined by chance* for the opportunity to win something of greater value than he or she risked." United States v. Dicristina, 2012 U.S. Dist. LEXIS 118037, at *80 (E.D.N.Y. Aug. 21, 2012) (emphasis in original) (quotation marks and citation omitted); Johnson v. Phinney, 218 F.2d 303, 306 (5th Cir. 1955); Note, Contest of Skill and the Lottery Laws, 23 Va. L. Rev. 431, 436 (1937).

Application of the test requires a court to ask a simple, but critical, question: Does the element of skill predominate over the element of chance in the game or contest at issue? If the answer is yes, the game falls within the skill exception of § 18.2-333. If the answer is no, the activity falls within the scope of § 18.2-325.

Virginia's Attorneys General have uniformly applied the predominance test in interpreting Virginia's gambling statutes. For example, when asked to opine on whether bass fishing tournaments constituted illegal gambling, Attorney General Andrew P. Miller reasoned that "winning the prize [in a fishing tournament] will depend upon more than mere chance, [and] 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 fishermen participating in the contest" these events do not qualify as illegal gambling. Op. of Atty. Gen. Andrew P. Miller, 1976 Va. AG LEXIS 232, at **1-2 (1976). Twenty years later, in deciding whether an essay contest qualified as "illegal gambling" under § 18.2-325, the Attorney General reasoned it did not because "skill, rather than chance, is the predominant factor" in determining the winner. Op. of Atty. Gen. James S. Gilmore, III, 1996 Va. AG LEXIS 72, at *5 (1996).

As demonstrated by the opinions offered by the Attorney General's Office, the predominance test provides the proper means of harmonizing §§ 18.2-325 and -333. Indeed, the test limits the scope of § 18.2-325 and gives effect to the exceptions for "contests of speed or skill" enacted in § 18.2-333. Moreover, it avoids absurd results that the legislature could not plausibly have intended.

B. Application of the Predominance Test to the Uncontroverted Record Below Demonstrates that Texas Hold'em Is a Game of Skill Under § 18.2-333.

The uncontroverted record below proves that skill predominates over chance in Texas Hold'em and should therefore be categorized under Virginia law as a contest of skill and exempt from the reach of § 18.2-325.

The circuit court gave each party an opportunity to present evidence on the issue of whether Texas Hold'em was a game of chance or skill. While the Appellee declined the invitation, Appellant presented extensive evidence, including the testimony of three expert witnesses. These witnesses included Greg Raymer, a professional poker player, Professor Robert Hannum, an expert in statistics, and Professor James Klinedinst, an expert in applied mathematics. Raymer explained the nature of Texas Hold'em and the skills a player must employ to successfully play the game. (Tr. 81–151.) Raymer ended his testimony with a proffer that skill, not chance, is the predominating factor in the outcome of a game of Texas Hold'em, which the trial court accepted. (Tr. 151–52.) And to reinforce Raymer's claim, Professors Hannum and Klinedinst offered empirical data showing that skill plays the predominating role in a game of Texas Hold'em.

Notably, the evidence presented below mirrors the evidence recently found to be persuasive in United States v. DiCristina, 2012 U.S. Dist. LEXIS 118037 (E.D.N.Y. Aug. 21, 2012) (Weinstein, J.)—a case involving whether Texas Hold'em was an illegal activity under the Illegal Gambling Business Act ("IGBA"), 18 U.S.C. § 1955. In finding that Texas Hold'em

was a game of skill that did not qualify as gambling under the federal statute, the district court relied on evidence showing that:

> Expert poker players draw on an array of talents, including facility with numbers, knowledge of human psychology, and powers of observations and deception. Players can use these skills to win even if chance has not dealt them the better hand. And as the defendant's evidence demonstrates, these abilities permit the best poker players to prevail over the less-skilled players over a series of hands.

2012 U.S. Dist. LEXIS 118037, at **162–63. The district court also found support in the expert testimony of Dr. Randal D. Heeb, a renowned economist, statistician, and poker player, and summarized his opinions as follows:

> (1) Poker 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.

Id. at **18, 167–68.

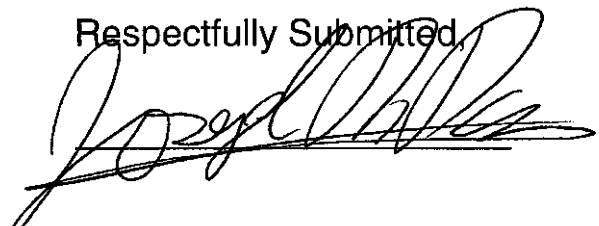
The record before the trial court demonstrated that Texas Hold'em poker is a game in which skill is the predominating factor. And because the evidence below is uncontroverted and consistent with the evidence

presented before other courts, this Court can, and should, reverse and enter judgment in Appellant's favor without remand.

CONCLUSION

The ruling below is based on a construction of §§ 18.2-325 and 18.2-333 that renders § 18.2-333 superfluous. And it leads to the absurd result of subjecting organizers of and participants in charitable events where entrants donate money for a chance to win a donated prize to criminal liability. This ruling, if left to stand, will have a chilling effect on charitable fundraising activities throughout the Commonwealth. This Court should accordingly reverse the decision of the trial court and enter judgment in favor of Appellant. This relief is warranted without remand because the record below established that Texas Hold'em is a game in which skill predominates over chance.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 15th day of October, 2012, the original and fifteen (15) paper copies of this Brief *Amicus Curiae* were hand-delivered to the Clerk of the Supreme Court of Virginia. One copy was also transmitted by electronic mail to the Clerk of the Supreme Court of Virginia. Three (3) paper copies of this Brief Amicus Curiae were mailed, via first-class U.S. mail, postage prepaid, to the following:

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Rule 5:30 Written Consent of Parties

Charles Daniels d/b/a The Poker Palace v. Earle C. Mobley, in his Official Capacity as Commonwealth's Attorney for the City of Portsmouth
Supreme Court of Virginia
Record No. 121242

Under Rule 5:30 of the Rules of the Supreme Court of Virginia, the parties, by counsel, consent to the filing of briefs *amici curiae* in this case.

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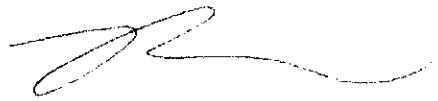

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