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 OF APPELLEE

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Table of Contents

TABLE OF AUTHORITIES 4

STATEMENT OF THE CASE 6

ASSIGNMENTS OF ERROR 8

I. The trial court erroneously held that Virginia's gambling statute, Va. Code § 18.2-325, can be violated whenever the outcome of a came is uncertain, rather than when chance predominates over skill in determining the outcome. 8

II. The trial court erroneously held that the Texas Hold'Em poker games hosted at the Poker Palace qualify as gambling under Va. Code § 18.2-325 because the outcome of those games is uncertain. 8

III. The trial court erroneously held that Va. Code § 18.2-325 was not unconstitutionally vague. 8

ASSIGNMENTS OF CROSS-ERROR 8

I. The circuit court erred by not granting the special plea and dismissing the action on the grounds that Mobley, a Constitutional officer, was immune from declaratory actions under the doctrine of sovereign immunity. J.A. 181-96; Order, July 28, 2011, J.A. 25. Final Order, April 19, 2012, J.A. 334-35. 8

II. The circuit court erred by not granting the demurrer on the grounds that Daniels lacked standing to challenge a criminal statute under which he had not been charged. J.A. 181-96. Order, July 28, 2011, J.A. 25. 8

AMPLIFIED STATEMENT OF FACTS 9

ARGUMENT 11

I. STANDARD OF REVIEW 11

II. ASSIGNMENT OF ERROR I: The circuit court did not misinterpret Virginia Code § 18.2-325 (2011) by refusing to incorporate a balancing test into a clear and unambiguous statute. 11

A. The circuit court properly declined to incorporate a balancing test.... 11

B. Daniels' definition of "outcome" is flawed. 18

C. Strictly construing the illegal gambling statutes does not lead to the absurd results Daniels suggests. 22

D. The circuit court properly declined to address Daniels' argument that Texas Hold'Em fell within the exception to the illegal gambling statute found in Va. Code Ann. § 18.2-333 23

III. Assignment of Error II: The circuit court did not err in concluding that the Texas Hold'Em poker games held at The Poker Palace constituted illegal gambling. 25

IV. ASSIGNMENT OF ERROR III: Virginia Code Ann. § 18.2-325 is not unconstitutional 26

V. ASSIGNMENT OF CROSS ERROR I: The circuit court erred when it overruled Mobley's Special Plea of sovereign immunity 28

VI. ASSIGNMENT OF CROSS ERROR II: The circuit court erred in overruling Mobley's demurrer alleging that Daniels lacked standing to bring the declaratory action 32

CONCLUSION 33

CERTIFICATE OF SERVICE 35

TABLE OF AUTHORITIES

Cases

Afzall v. Commonwealth, 273 Va. 226, 639 S.E.2d 279 (2007)..... 29, 30, 31
Alliance to Save the Mattaponi v. Commonwealth, 270 Va. 423, 621 S.E.2d 78 (2005) 30
Anderson v. Comm., 182 Va. 560, 29 S.E.2d 838 (1944) 14
Barber v. Danville, 149 Va. 418, 141 S.E. 126 (1928)..... 15
Bd. Zoning App. James City Co. v. Univ. Square Assoc., 246 Va. 290, 435 S.E.2d 385 (1993)..... 24
Buchner v. Kenyon L. Edwards Co., 210 Va. 502, 171 S.E.2d 676 (1970) 24
Burlile v. Commonwealth, 261 Va. 501, 544 S.E.2d 360 (2001)..... 12
Burns v. Warden of the Sussex I State Prison, 268 Va. 1 (Va. 2004)..... 27
Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849 (1999)..... 26
City of Norfolk v. Vaden, 237 Va. 40, 375 S.E.2d 730 (1989) 24
Commonwealth v. Dent, 2010 PA Super 47, 992 A. 2d 190 (Pa. Super. Ct. 2010) 21
Commonwealth v. Hicks, 267 Va. 573, 596 S.E. 2d 74(2004)..... 26, 27
Compton v. Comm. of Virginia, ex rel. Dept. of Mental Health and Mental Retardation, 239 Va. 312, 389 S.E.2d 460 (1990) 14
Fairfield Development Corp. v. Virginia Beach, 211 Va. 715, 180 S.E.2d 533 (1971) 32
Gallaher v. City of Huntington, 759 F.2d 1155 (4th Cir. 1985)..... 26, 27
Harward v. Commonwealth, 229 Va. 363, 330 S.E.2d 89, 92 (1985)..... 14
Hilton v. Amburgey, 198 Va. 727, 96 S.E.2d 151 (1957)..... 28
Hilton v. Martin, 275 Va. 176, 654 S.E.2d 572 (2008) 28
Hinchey v. Ogden, 226 Va. 234, 307 S.E.2d 891 (1983)..... 29
Holsapple v. Commonwealth, 266 Va. 593, 587 S.E.2d 561 (2003)..... 12
Jackson v. Fid. & Deposit Co., 269 Va. 303, 608 S.E.2d 901 (2005) .. 12, 18
Joker Club, L.L.C. v. Hardin, 643 S.E.2d 626 (N.C. Ct. App. 2007) 21, 22
Kolender v. Lawson, 461 U.S. 352, 103 S. Ct. 1855 (1983)..... 26
Messina v. Burden, 228 Va. 301, 321 S.E.2d 28, 29, 31
Minter v. Commonwealth, 74 Va. Cir. 336 (Roanoke County 2007) 33
Muhammad v. Commonwealth, 269 Va. 451, 619 S.E.2d 16 (2005)..... 26
Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547 (1974) 26, 27
Potts v. Mateison Alkali Works, 165 Va. 196, 181 S.E. 521(1935) 24
Reisen v. Aetna Life & Casualty Co., 225 Va. 327, 302 S.E.2d 529 (1983) 32, 33
Scottsdale Insurance Co. v. Glick, 240 Va. 283, 397 S.E.2d 105 (1990)... 25

Simon v. Forer, 265 Va. 483, 578 S.E.2d 792 (2003) 11
Syed v. Zh Techs., Inc., 280 Va. 58, 694 S.E.2d 625 (2010) 11
Three Kings Holdings, L.L.C. v. Six, 45 Kan. App. 2d 1043, 255 P.3d 1218 (2011) 20, 21
Two Electronic Poker Machines 465 A.2d 973, 975 (Pa. 1983) 21
United States v. Dicristina, 2012 U.S. Dist. LEXIS 118037 (E.D.N.Y. Aug. 21, 2012) 17, 18
Virginia Bd. of Med. v. Virginia Physical Therapy Ass'n, 13 Va. App. 458 (Va. Ct. App. 1991) 30, 31
Yamaha Motor Corp. v. Quillian, 264 Va. 656, 571 S.E.2d 122 (2002) 27

Constitutions

Va. Const. Art. VII, ... 28

Statutes

18 U.S. C. § 1955(b)(2) 17, 18
Va. Code Ann. § 8.01-184 ..... 24, 32
Va. Code Ann. § 18.2-325 ..... 6, passim
Va. Code Ann. § 18.2-328 ..... 6, passim
Va. Code Ann. § 18.2-332 12
Va. Code Ann. § 18.2-333. ..... 13, 23
Va. Code Ann. § 18.2-334 13
Va. Code Ann. § 18.2-340 13

Attorney General Opinions

Hon. M. Frederick King, 1987-1988 Op. Att'y Gen. 287 (1988) 15
Hon. Franklin D. Edmondson, 2008 Op. Va. Att'y. Gen. LEXIS 2 (07-084) 15
Hon. R. Edward Houck, 2010 Op. Va. Att'y Gen. LEXIS 60 (10-095) 16

STATEMENT OF THE CASE

Charles Daniels ("Daniels"), a business man in Portsmouth, filed a lawsuit against Earle C. Mobley ("Mobley"), Commonwealth's Attorney for the City of Portsmouth, and Edward G. Hargis, Chief of Police for the City of Portsmouth, seeking declaratory relief. Specifically, the Amended Complaint alleged two causes of action; the first is an action for declaratory judgment asking the court to declare that Texas Hold'Em poker did not constitute illegal gambling as defined in section 18.2-325 of the Code of Virginia. The second cause of action sought a declaratory judgment that section 18.2-328 of the Code of Virginia is unconstitutional because it is vague.

Mobley filed a demurrer and a special plea to the Amended Complaint. The special plea sought dismissal of the Amended Complaint on the grounds that Mobley was protected from declaratory actions by sovereign immunity. The demurrer sought dismissal because Daniels lacked standing to challenge a penal statute that he had not been charged with violating. By order dated July 28, 2011, the circuit court denied Mobley's special plea and his demurrer. Counsel for Mobley noted his objections on the order.

The case proceeded to trial on November 9, 2011, and the court granted Mobley's motion to strike Daniels' case. Daniels' appeal followed.

ASSIGNMENTS OF ERROR

I. The trial court erroneously held that Virginia's gambling statute, Va. Code § 18.2-325, can be violated whenever the outcome of a came is uncertain, rather than when chance predominates over skill in determining the outcome.

II. The trial court erroneously held that the Texas Hold'Em poker games hosted at the Poker Palace qualify as gambling under Va. Code § 18.2-325 because the outcome of those games is uncertain.

III. The trial court erroneously held that Va. Code § 18.2-325 was not unconstitutionally vague.

ASSIGNMENTS OF CROSS-ERROR

I. The circuit court erred by not granting the special plea and dismissing the action on the grounds that Mobley, a Constitutional officer, was immune from declaratory actions under the doctrine of sovereign immunity. J.A. 181-96; Order, July 28, 2011, J.A. 25. Final Order, April 19, 2012, J.A. 334-35.

II. The circuit court erred by not granting the demurrer on the grounds that Daniels lacked standing to challenge a criminal statute under which he had not been charged. J.A. 181-96. Order, July 28, 2011, J.A. 25.

AMPLIFIED STATEMENT OF FACTS

The Fraternal Order of Police approached Daniels and asked him to host Texas Hold'Em tournaments for their benefit. J.A. 38. Daniels was concerned about the legality of holding Texas Hold'Em tournaments and expressed his concern. J.A. 39. Daniels and the Fraternal Order of Police had legislation introduced to legalize Texas Hold'Em and when that was not successful, Daniels insisted on a meeting with the Commonwealth's Attorney before he would consider hosting tournaments. J.A. 39-40. Daniels sought a business license on two occasions for The Poker Palace and was denied. J.A. 60. On each occasion where Daniels was denied a business license influential individuals accompanied him in an attempt to curry favor. J.A. 65-66.

Participants in a Texas Hold'Em tournament hosted by The Poker Palace paid consideration for the opportunity to play. J.A. 67-68. When the Poker Palace first opened, participants in cash games paid consideration in the form a "donation" that was required every thirty minutes. J.A. 71-72. The Poker Palace subsequently amended its procedures in cash games and took a percentage of the pot as the "donation" for each hand. J.A. 71.

Chance plays a role in the outcome of Texas Hold'Em Poker. J.A. 87, 312-14. Daniels' expert testified that chance plays a role in the outcome of

Texas Hold'Em poker, and that the players in Texas Hold'Em poker have unequal starting positions. J.A. 180.

Players in cash games at The Poker Palace could play for as short or as long as they wanted to and could buy in as often as they wanted to as long as they purchased between $60 and $300 in chips each time. J.A. 48-49; 69-70. A player in a tournament could lose all of his chips on the first hand and be eliminated from the tournament. J.A. 69.

Players in both tournaments and cash games hosted by The Poker Palace had the chance to win money or prizes. Roughly the top ten percent of players in a tournament received more money in prizes than they paid to play. J.A. 76-77. Chips in the cash games had dollar values and a player would receive cash in the amount of chips he had when he decided to stop playing. J.A. 75.

Daniels was never charged by either Mobley or the Portsmouth Police Department with a crime related to illegal gambling. J.A. 79.

ARGUMENT

I. STANDARD OF REVIEW

The assignments error and cross-error raise purely legal questions and are reviewed *de novo*. *Syed v. Zh Techs., Inc.*, 280 Va. 58, 69, 694 S.E.2d 625, 631 (2010).

II. ASSIGNMENT OF ERROR I: The circuit court did not misinterpret Virginia Code § 18.2-325 (2011) by refusing to incorporate a balancing test into a clear and unambiguous statute.

A. The circuit court properly declined to incorporate a balancing test.

Virginia's gambling statutes are clear and unambiguous. The Code of Virginia defines illegal gambling 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.

Va. Code Ann. § 18.2-325 (2011). The circuit court correctly declined to adopt Daniels' suggestion to read a balancing test into Virginia Code Ann. § 18.2-325. As this Court has stated:

> We presume that the "legislature chose, with care, the words it used when it enacted the . . . statute." *Simon v. Forer*, 265 Va. 483, 490, 578 S.E.2d 792, 796 (2003) (citation omitted). Courts

> cannot "add language to the statute the General Assembly has not seen fit to include." *Holsapple v. Commonwealth*, 266 Va. 593, 599, 587 S.E.2d 561, 564-65 (2003). "Nor are they permitted to accomplish the same result by judicial interpretation." *Burlile v. Commonwealth*, 261 Va. 501, 511, 544 S.E.2d 360, 365 (2001) (citation and internal quotation marks omitted). Where the General Assembly has expressed its intent in clear and unequivocal terms, it is not the province of the judiciary to add words to the statute or alter its plain meaning.

Jackson v. Fid. & Deposit Co., 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005).

The General Assembly acted deliberately when it enacted Virginia Code Ann. §§ 18.2-325 *et seq.* A person or business is participating in illegal gambling if the person or business makes, places or receives any bet or wager, in exchange for a chance to win a prize, dependent upon the result of any game, contest, or event, the outcome of which is uncertain or a matter of chance. The General Assembly acted deliberately in creating exemptions to the definition of illegal gambling. *See* Va. Code Ann. § 18.2-332 (2011) ("In any prosecution under this article, no consideration shall be deemed to have passed or been given because of any person's attendance upon the premises of another; his execution, mailing or delivery of an entry blank; his answering of questions, verbally or in writing; his witnessing of a demonstration or other proceeding; or any one or more thereof, where no charge is made to, paid by, or any purchase required of him in connection

therewith."); Va. Code Ann. § 18.2-334 (2011) ("Nothing 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 as defined in subsection 4 of § 18.2-325."); Va. Code Ann. § 18.2-334.2 (2011) ("Nothing in this article shall apply to any bingo game, instant bingo, raffle, or duck race conducted solely by organizations as defined in § 18.2-340.16 which have received a permit as set forth in § 18.2-340.25, or which are exempt from the permit requirement under § 18.2-340.23."); Va. Code Ann. § 18.2-334.3 (2011) ("Nothing in this article shall apply to any lottery conducted by the Commonwealth of Virginia pursuant to Chapter 40 of Title 58.1."); Va. Code Ann. § 18.2-334.4 (2011) ("Nothing in this article shall be construed to make it illegal to participate in any race meeting or pari-mutuel wagering conducted in accordance with Chapter 29 (§ 59.1-364 et seq.) of Title 59.1."); Va. Code Ann. § 18.2-333 (2011) ("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."). There is no exemption for card games of any kind.

The cannons of statutory construction precluded the court from reading a "predominate factor test" into a statute that is clear on its face. The court must accept the plain meaning of the statutory terms. *Harward v. Comm.*, 229 Va. 363, 368, 330 S.E.2d 89, 92 (1985) (superseded by statute) (stating "[t]his principle is a valuable guard against unwarranted judicial activism."); *Compton v. Comm. of Virginia, ex rel. Dept. of Mental Health and Mental Retardation,* 239 Va. 312, 314, 389 S.E.2d 460, 461 (1990) ("plain meaning must be accepted without resort to extrinsic evidence or the rules of construction").

It is the function of the General Assembly to draft and pass legislation. "Courts are not permitted to rewrite statutes. This is a legislative function. The manifest intention of the legislature, clearly disclosed by its language, must be applied. There can be no departure from the words used where the intention is clear." *Anderson v. Comm.*, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944).

The circuit court properly declined to read a balancing test into Virginia Code Ann. § 18.2-325. Nowhere in the definition of illegal gambling did the General Assembly include a balancing test. As 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.

Daniels points to several Attorney General opinions for the proposition that the circuit court should have adopted his view. Opinions of the Attorney General, while entitled to consideration, are not binding precedent. *Barber v. Danville*, 149 Va. 418, 424, 141 S.E. 126, 128 (1928). Daniels references a 1987 opinion from Attorney General Mary Sue Terry where she opined that a coin operated machine did not meet the definition of a gambling device because, in her opinion, skill was the predominant factor in winning a prize. Hon. M. Frederick King, 1987-1988 Op. Att'y Gen. 287 (1988). Her opinion related to the definition of "gambling device", not "illegal gambling". More recently however, Attorney General McDonnell was asked specifically about the propriety of poker tournaments and whether they fell under the prohibitions found in Va. Code Ann. § 18.2-325. Hon. Franklin D. Edmondson, 2008 Op. Va. Att'y. Gen. LEXIS 2 (07-084). In determining whether the consideration element of illegal gambling was present, Attorney General McDonnell opined that where the amount of poker chips won or lost did not depend upon the amount of actual money paid by the participants through their admission fees, such activity would not constitute illegal gambling. *Id.* at *5. However, the Attorney General

further opined that if the players were permitted to purchase additional chips after payment of the initial admission fees[1], such activity would be prohibited by Va. Code Ann. §§ 18.2-325 *et seq. Id.* Attorney General McDonnell did not opine that poker fell within any exception to the gambling statutes.

Attorney General Kenneth T. Cuccinelli, II, opined that "[o]nly the forms of gambling that are **specifically** excepted by law (private residence wagering and, generally, regulated activities that include the Lottery, pari-mutuel wagering on horse racing and charitable gaming as defined by statute) are not subject to the gambling prohibition." Hon. R. Edward Houck, 2010 Op. Va. Att'y Gen. LEXIS 60 (10-095), *5, n.1 (emphasis added).

No Attorney General in Virginia has opined that Texas Hold'Em poker as played at The Poker Palace falls within any exemption to Va. Code Ann. § 18.2-325, *et seq.* Similarly, no court in the Commonwealth has held that a balancing test should be applied to Virginia Code Ann. § 18.2-325 in determining whether a particular activity meets the definition of illegal gambling.

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[1] Players in cash games at The Poker Palace were permitted to purchase as many chips as they wanted. J.A. 49, 70.

Tellingly, the General Assembly amended Virginia Code Ann. § 18.2-325 in 2010 and again in 2011. Had the General Assembly considered the statute to be vague or ambiguous in light of any Attorney General opinion, it could have clarified its intentions by inserting a balancing test, which it declined to do.

Daniels' reliance on *United States v. Dicristina*, 2012 U.S. Dist. LEXIS 118037 (E.D.N.Y. Aug. 21, 2012) is unpersuasive. In *Dicristina*, the district court in New York considered the application of the federal Illegal Gambling Business Act ("IGBA"), 18 U.S.C. §1955, to Texas Hold'Em poker. The federal statute defines gambling as "includ[ing] but . . . not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein." 18 U.S.C. § 1955(b)(2). However, the statute does not define "illegal gambling." The District Court noted that "[a]s a matter of statutory construction, poker must fall under the general definition of gambling and be sufficiently similar to those games listed in the statute to fall within its prohibition. It does not." *Dicristina*, 2012 U.S. Dist. LEXIS 118037, 149-150. In determining that the IGBA was ambiguous as to whether Texas Hold'Em was prohibited, the District Court noted that "[a]lthough many states, including New York, consider poker to fall within

the common law definition of gambling as a game of chance, . . . this factor is not determinative in construing a federal statute. *Id.* at 165. Thus, while Texas Hold'Em was illegal under New York law, that factor, by itself, was insufficient for liability under the IGBA. In addition to being illegal under state law, the game must have been sufficiently similar to one of the games listed in 18 U.S.C. 1955(b)(2). The district court determined that Texas Hold'Em poker was dissimilar to the games listed in the IGBA; therefore, even though Texas Hold'Em was illegal under New York law, the business was not subject to prosecution under the IGBA.

B. Daniels' definition of "outcome" is flawed.

Daniels contends that the circuit court erred by not adopting his definition of "outcome" as being profits over time, and because the circuit court used a single hand to determine whether Texas Hold'Em poker constitutes gambling. Daniels is wrong. His suggested definition is not contained in the statute and should not be read into it. *See Jackson v. Fid. & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005).

In support of Daniels' argument that skill predominates over chance in Texas Hold'Em poker, he suggests that by adopting the definition of "outcome" as profits over the "long run," it is clear that skilled players profit more than unskilled players. Applying Daniels' definition, however, two

players could be sitting at the same table playing Texas Hold'Em poker while one is engaged in illegal gambling and the other is not. Players who could prove that they won money over time[2] would not be gambling because they are skillful, while players who lost money or could not prove a profit would be gambling.

Consider a poker player who has been playing Texas Hold'Em poker for more than thirty years. He may be a highly skilled player who plays regularly with the best players in the world but, depending on what timeframe you consider in his poker career, he may have a net loss over time. Next, consider the novice who plays primarily in neighborhood games, but decides to try his hand in a cash game of Texas Hold'Em at The Poker Palace. If the novice player wins money in a single hand, or even after multiple hands over a period of several hours, is he considered to be engaging in illegal gambling or is he just lucky? Using Daniels' definition of "outcome" the poker veteran may be engaged in illegal gambling while the novice would not. Daniels is impermissibly asking the court to create two classes of poker players, those for whom poker is illegal and those for whom it is not.

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[2] It is important to note that neither Daniels nor his experts can tell you what period of time should be considered in determining the "long run."

The circuit court properly used a single hand in determining whether the elements of illegal gambling were met. A single hand is the only discrete and measurable period of play in Texas Hold'Em. A single hand has a beginning, an end, and a winner. Daniels testified at trial that players in cash games could play for as short or as long a period as they wanted. He testified that tournament players could be eliminated from a tournament after the very first hand or play for hours. Similarly, Gregory Raymer, Daniels poker expert, testified that players in cash games can come and go as they please, playing only a single hand or sitting for hours on end.

Courts have used the single hand approach in determining whether poker constitutes illegal gambling. In *Three Kings Holdings, L.L.C. v. Six*, 45 Kan. App. 2d 1043, 255 P.3d 1218 (2011), the Court of Appeals for Kansas affirmed a lower court's ruling that a game similar to Texas Hold'Em constituted illegal gambling when judged by a single hand. The Court of Appeals rejected the plaintiff's assertion that the game should be judged by "the long-run."

> Poker is unique among games in that short-term losses can help reap long-term gains, and the game of poker may indeed be larger than a hand of poker. But this court still must have a useable standard under which to judge the game. As the district court found, the proffered long-run standard is illusory because it has no end game. Kandu Challenge must be judged on the basis of a game: something with a discrete beginning, end, and an ascertainable winner. The rules of Kandu Challenge provide

> that one hand composes a discrete unit of play: it has a beginning, middle, and end. The winner of each hand is awarded the purse.

Id. at 1055.

Other courts, including those in states where illegal gambling statutes do have a predominate factor test, have held that Texas Hold'Em and similar games constitute illegal gambling when coupled with consideration and a chance to win money. The Pennsylvania Superior Court held that even when applying the predominate factor test, poker was a game of chance.

> Applying the "predominate-factor test" as enunciated by the Pennsylvania Supreme Court in *Two Electronic Poker Machines* [465 A.2d 973, 975 (Pa. 1983)], we agree with the cases cited above that, while the outcome of poker may be dependent on skill to some degree, it is predominantly a game of chance. While, as noted in *Two Electronic Poker Machines*, skill can determine the outcome in a poker game, players are still subject to defeat at the turn of the cards.

Common. v. Dent, 2010 PA Super 47, P23, 992 A. 2d 190, 196 (Pa. Super. Ct. 2010).

The North Carolina Court of Appeals came to a similar conclusion.

> Poker, however, presents players with different hands, making the players unequal in the same game and subject to defeat at the turn of a card. Although skills such as knowledge of human psychology, bluffing, and the ability to calculate and analyze odds make it more likely for skilled players to defeat novices, novices may yet prevail with a simple run of luck. No amount of skill can change a deuce into an ace. Thus, the instrumentality for victory is not entirely in the player's hand.

Joker Club, L.L.C. v. Hardin, 643 S.E.2d 626, 630 (N.C. Ct. App. 2007).

Daniels was unable at trial to tell the court what the "long run" should be in determining the outcome of Texas Hold'Em. None of his witnesses provided an explanation. The proper measurement for determining whether Texas Hold'Em poker is gambling is a single hand. In a single hand each player receives two cards, face down, which are known only to that player. The players begin each hand in unequal positions. Some players necessarily have better starting hands than others. As the cards are turned over, one by one, the strength of a player's hand changes through no skill of his own. The best player in the world could lose any given hand to someone playing Texas Hold'Em for the first time. Accordingly, since the outcome of any given hand is uncertain and a matter of chance, Texas Hold'Em, when coupled with consideration and an opportunity to win a prize, falls within the definition of "illegal gambling" found in Virginia Code Ann. § 18.2-325.

C. Strictly construing the illegal gambling statutes does not lead to the absurd results Daniels suggests.

The circuit court's construction of Virginia Code Ann. § 18.2-325 does not lead to absurd results. It does not outlaw "literally every game that involves consideration and a prize, including golf tournaments, Scrabble

tournaments, essay contests, horse races, and chess competitions." Appellant Br. 24.

Golf tournaments are a game of skill between men and fall squarely within the exception of Virginia Code Ann. § 18.2-333. In 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. Chess, billiards, Scrabble tournaments and essay contests are the same. The player's ability determines who wins and loses when all players start and finish on equal footing.

On the other hand, dice games, where the throw of the dice determines the winner, and roulette, where the resting position of the ball determines the winner, are clearly games of chance. Accordingly, absurd results are not reached by the circuit court's construction of the statute.

D. The circuit court properly declined to address Daniels' argument that Texas Hold'Em fell within the exception to the illegal gambling statute found in Va. Code Ann. § 18.2-333.

The Amended Complaint made no mention of Virginia Code Ann. §18.2-333. On the day of trial, Daniels attempted to persuade the court that Texas Hold'Em is a game of skill between men as defined in that section. J.A. 197-206.

Count I of the Amended Complaint sought a declaration that Texas Hold'Em poker was not illegal gambling. Virginia Code Ann. §18.2-333 is an exception to Virginia Code Ann. §18.2-325. Thus, had Daniels asked the court to determine that if Texas Hold'Em poker met the definition of illegal gambling, the game fell within the exception embodied in §18.2 -333, the court could have considered that argument. Daniels did not do this.

"No court can base its decree upon facts not alleged, nor render its judgment upon a right, however meritorious, which has not been pleaded and claimed. Pleadings are as essential as proof, the one being unavailing without the other. A decree cannot be entered in the absence of pleadings upon which to found the same, and if so entered is void. *Potts v. Mateison Alkali Works*, 165 Va. 196, 207, 181 S.E. 521, 525 (1935)." *City of Norfolk v. Vaden*, 237 Va. 40, 44, 375 S.E.2d 730, 733 (1989).

In the declaratory judgment context, this Court has held that

> [Virginia] Code 8.01-184 confers upon circuit courts the power to make binding adjudications of right and to issue declaratory judgments in cases of actual controversy. **However the binding adjudications of right must resolve issues specifically pled in the petition for declaratory judgment. The court is not empowered to make binding adjudications of right which are not specifically pled.** (citing *Buchner v. Kenyon L. Edwards Co.*, 210 Va. 502, 503, 171 S.E.2d 676, 677 (1970). *Accord Bd. Zoning App. James City Co. v. Univ. Square Assoc.*, 246 Va. 290, 435 S.E.2d 385 (1993).

Scottsdale Insurance Co. v. Glick, 240 Va. 283, 289, 397 S.E.2d 105, 108 (1990) (emphasis added).

Accordingly, since Daniels failed in his Amended Complaint to ask the court to determine that Texas Hold'Em poker fell within the exception set forth in Virginia Code section 18.2-333, he is precluded from arguing the applicability of that section at trial and on appeal.

III. Assignment of Error II: The circuit court did not err in concluding that the Texas Hold'Em poker games held at The Poker Palace constituted illegal gambling.

The Texas Hold'Em poker games held at The Poker Palace met all three elements for illegal gambling. Daniels admitted in response to requests for admission that consideration, prize, and chance were all present in Texas Hold'Em games held at The Poker Palace. J.A. 312-14. At trial, Daniels admitted that chance plays a role in Texas Hold'Em poker. Daniels' expert witness, Gregory Raymer, a World Series of Poker Champion, admitted at trial that chance plays a role in the outcome of Texas Hold'Em poker. Dr. Robert Hannum, whose report was admitted as evidence, acknowledged that chance plays a role in Texas Hold'Em. Thus, the element of chance was clearly present in games of Texas Hold'Em poker hosted at The Poker Palace.

Participants paid money to play Texas Hold'Em at The Poker Palace. In return, the participants hoped to win money or a prize. The outcome of any given hand is left, at least in part, to chance. All of the elements of illegal gambling were present in the games played at The Poker Palace and the circuit court correctly determined that Texas Hold'Em as played at The Poker Palace constituted illegal gambling.

IV. ASSIGNMENT OF ERROR III: Virginia Code Ann. § 18.2-325 is not unconstitutional.

Daniels' assertion that Virginia Code Ann. § 18.2-325 is unconstitutionally vague is not compelling. This Court has long held that:

> A successful challenge to the facial validity of a criminal statute based upon vagueness requires proof that the statute fails to provide notice sufficient for ordinary people to understand what conduct it prohibits, or proof that the statute "may authorize and even encourage arbitrary and discriminatory enforcement." *[Chicago v. Morales*, 527 U.S. 41, 52, 119 S. Ct. 1849 (1999)]; *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855 (1983). But "one to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756, 94 S. Ct. 2547 (1974); *Commonwealth v. Hicks*, 267 Va. 573, 580-81, 596 S.E. 2d 74, 78 (2004); (citations omitted) *Gallaher v. City of Huntington*, 759 F.2d 1155, 1160 (4th Cir. 1985).

Muhammad v. Comm., 269 Va. 451, 497, 619 S.E.2d 16, 41-42 (2005).

Daniels' own testimony at trial shows that the statute was not vague and that he was on notice that hosting Texas Hold'Em poker was illegal. He initially declined to host tournaments for the Fraternal Order of Police.

Daniels and the Fraternal Order of Police were instrumental in having legislation introduced to the General Assembly to permit Texas Hold'Em poker. Daniels insisted on a meeting with Mobley prior to commencing his operation. Daniels was denied for a business license on two occasions despite attempting to influence the licensing body. These are not the actions of someone who is uncertain about the application of a criminal statute to his conduct.

"In construing [a] statute, we are guided by the principles that statutes are presumed to be constitutional, and, if possible, construed in a manner that avoids any constitutional infirmity. *Yamaha Motor Corp. v. Quillian*, 264 Va. 656, 665, 571 S.E.2d 122, 126-27 (2002)." *Burns v. Warden of the Sussex I State Prison*, 268 Va. 1, 2 (Va. 2004).

Daniels knew he was engaging in illegal gambling, so he cannot challenge the statute for being vague. *See Parker v. Levy*, 417 U.S. 733, 756, 94 S. Ct. 2547 (1974); *Comm. v. Hicks*, 267 Va. 573, 580-81, 596 S.E. 2d 74, 78 (2004); *Gallaher v. City of Huntington*, 759 F.2d 1155, 1160 (4th Cir. 1985) (a statute is not void for vagueness when a purely facial attack is made simply because it may be unclear in its applications to the conduct of hypothetical parties).

Texas Hold'Em poker as played at The Poker Palace met the definition of illegal gambling, and Daniels knew it. Accordingly, Daniels' facial challenge to the statute lacked merit and the circuit court properly ruled in favor of Mobley in upholding the statute and declining to declare it unconstitutional.

V. ASSIGNMENT OF CROSS ERROR I: The circuit court erred when it overruled Mobley's Special Plea of sovereign immunity.

Mobley is protected by the doctrine of sovereign immunity, and the circuit court should have dismissed the Amended Complaint pursuant to the special plea. "A plea in bar presents a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery." *Hilton v. Martin*, 275 Va. 176, 179-180, 654 S.E.2d 572, 574 (2008).

Sovereign immunity protects Mobley from suits for declaratory judgment.[3] The law of sovereign immunity is alive and well in Virginia, and applies to local as well as state officials. *Messina v. Burden*, 228 Va. 301, 321 S.E.2d 657 (1984). This Court has held that "as a general rule, the sovereign is immune not only from actions at law for damages but also from suits in equity to restrain the government from acting or to compel it to

[3] A Commonwealth's Attorney is a constitutional officer whose duties are regulated and defined by statute. *See* Va. Const. Art. VII, § 4; *Hilton v. Amburgey*, 198 Va. 727, 729, 96 S.E.2d 151, 153 (1957).

act." *Hinchey v. Ogden*, 226 Va. 234, 239, 307 S.E.2d 891 (1983). This Court in *Messina* said that:

> "[T]he doctrine of sovereign immunity serves a multitude of purposes including but not limited to protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation."

Messina, 228 Va. at 308. The doctrine of sovereign immunity protects the government not only from having citizens impede its exercise of discretion but also from the cost and effort of defending such suits. Here, there is no doubt that the lawsuit filed by Daniels was attempting to influence the conduct of governmental affairs.

Even without making a monetary demand, declaratory judgment actions have the ability to restrain the government or compel it to act; therefore, sovereign immunity bars such suits. In *Afzall v. Commonwealth*, 273 Va. 226, 231, 639 S.E.2d 279 (2007), this Court held that sovereign immunity barred a declaratory judgment action against the Department of Medical Assistance Services ("DMAS"). The plaintiff in *Afzall* filed a motion for declaratory judgment, seeking a declaration that the Commonwealth's share of the infant's expenses for legal fees and costs in obtaining settlement in a negligence case against a third party should be deducted

from the Commonwealth's lien for the amount DMAS paid for the infant's care. This Court affirmed the circuit court's dismissal of the action on sovereign immunity grounds. "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." *Id.* at 231 (citing *Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 455, 621 S.E.2d 78, 96 (2005).)

In determining that sovereign immunity barred the declaratory judgment action in *Afzall*, the *Afzall* court looked closely at *Virginia Bd. of Med. v. Virginia Physical Therapy Ass'n*, 13 Va. App. 458, 464 (Va. Ct. App. 1991) ("*VBM I*") *aff'd*, 245 Va. 125, 427 S.E.2d 183, (1993) ("*VBM II*"). In *VBM I*, the Virginia Physical Therapy Association filed a bill of complaint against the Virginia Board of Medicine for declaratory and injunctive relief against the enforcement of any rule prohibiting the use of electromyographic examinations by physical therapists. The trial court granted the injunctive relief. The court of appeals subsequently overturned the trial court holding that the trial court lacked subject matter jurisdiction on sovereign immunity grounds. This Court affirmed the Court of Appeals. Thus, at the heart of *VBM I* was a declaratory judgment action seeking to

restrain the Commonwealth's ability to enforce its laws. As the Court in *Afzall* noted:

> We agree with the Commonwealth that *VBM I* governs the outcome of this case and is not distinguishable. The close similarity between this case and *VBM I* is that in each case the plaintiff seeks to compel the Commonwealth to take certain actions: in *VBM I* to refrain from enforcing a rule against the use of electromyographic examinations by physical therapists and in this case to require a reduction in the amount of the Commonwealth's lien for payments made for Adam's treatment. Both would have the effect of interfering with governmental functions and, in Adam's case, the adverse effect upon "protecting the public purse." *Messina*, 228 Va. at 308, 321 S.E.2d at 660.

Afzall, 273 Va. at 233.

Afzall is dispositive on the issue of sovereign immunity in this case. Mobley made clear to the Plaintiff that in his role as the Commonwealth's Attorney for the City of Portsmouth he viewed the operation of poker establishments not sanctioned by the Commonwealth of Virginia to be engaging in illegal gambling. As such, Mobley stated that he would investigate and/or prosecute anyone who conducted such activity. Just as this Court said in both *Afzall* and *VBM I*, a declaratory judgment action can have the effect of restraining or compelling government action. Daniels' lawsuit sought a declaration from the circuit court that would restrain Mobley from carrying out his duties as a Constitutional officer. As it was in

Afzall and *VBM I*, the declaratory action should have been dismissed on sovereign immunity grounds.

VI. ASSIGNMENT OF CROSS ERROR II: The circuit court erred in overruling Mobley's demurrer alleging that Daniels lacked standing to bring the declaratory action.

Daniels had not been charged with, or convicted of, engaging in illegal gambling in violation of Virginia Code Ann. § 18.2-328; therefore, no actual controversy existed and declaratory judgment was not appropriate.

Section 8.01-184 of the Code of Virginia provides that circuit courts have the power to make binding adjudications of right. However, the power of the circuit court to make a declaratory judgment is discretionary. This Court has held that even though lower courts have given liberal interpretation to the Declaratory Judgment Act they "have nevertheless recognized that the power to make a declaratory judgment is a discretionary one . . . ." *Fairfield Development Corp. v. Virginia Beach*, 211 Va. 715, 717, 180 S.E.2d 533, 534 (1971). Moreover, "[t]he courts do not make mere hypothetical adjudications, where there is no presently justiciable controversy before the court, and where the existence of a 'controversy' is dependent upon the happening of future events." *Reisen v. Aetna Life & Casualty Co.*, 225 Va. 327, 333, 302 S.E.2d 529, 533 (1983). Here, prosecution was premised upon the happening of a

future event, i.e. continued operation of The Poker Palace. However, The Poker Palace ceased operation prior to filing the lawsuit.

In *Minter v. Commonwealth*, 74 Va. Cir. 336, 339-340 (Roanoke County 2007), the circuit court held that a declaratory judgment action was appropriate where the plaintiffs were convicted of violating certain traffic laws and they sought to challenge the laws on constitutional grounds. In *Minter*, unlike here, the challenged law was actually applied to the plaintiffs who were convicted, creating an actual controversy. Here, Daniels sought an advisory opinion that Texas Hold'Em poker does not constitute illegal gambling. Declaratory judgment actions are reserved for cases where an actual controversy and antagonistic denial of rights exists.
Daniels was never charged with conducting an illegal gambling operation. Thus, there was not controversy and Daniels improperly sought an advisory opinion from the circuit court, which is not the purpose of declaratory judgment actions. *Reisen* 225 Va. at 333.

CONCLUSION

Earle C. Mobley, Commonwealth's Attorney for the City of Portsmouth, respectfully requests that this Court:

A. Reverse the circuit court's ruling denying his Special Plea on the grounds of sovereign immunity and enter judgment in his favor;

B. Reverse the circuit court's ruling denying his demurrer on the grounds that Daniels lacked standing to pursue the declaratory action and enter judgment in his favor; or

C. In the alternative, affirm the circuit court's ruling striking the Amended Complaint.

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CERTIFICATE OF SERVICE

Pursuant to 5:26 of the Rules of the Supreme Court of Virginia, the undersigned counsel for Appellee, Earle C. Mobley, certifies as follows:

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

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

3. Fifteen tangible copies of Appellee's Brief have been transmitted by hand for filing in the office of the Clerk of this Court on this 9th day of November, 2012.

4. I further certify that one copy in PDF format was emailed to the Clerk of the Supreme Court of Virginia, scvbriefs@courts.state.va.us.

5. I certify that the appropriate copies of the foregoing Brief of Appellee was served on the following by first class mail and email, postage prepaid:

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