

No. 13-564

In The
Supreme Court of the United States

LAWRENCE DICRISTINA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Second Circuit

**BRIEF OF CHAMPION SCRABBLE AND BRIDGE
PLAYERS AS *AMICI CURIAE* IN SUPPORT OF
PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Amicus curiae Joe Edley was the first three-time winner of the National Scrabble championship and is the author of several Scrabble books, including *Everything Scrabble*. He won his first National Scrabble Championship in 1980, his second in 1992, and his third in 2000. Since the beginning of his career in 1978, he has played at least 2,079 tournament games, winning about 68%, and earning at least \$102,000 in prize money. Mr. Edley previously served as the Director of Clubs and Tournaments for the National Scrabble Association.

Amicus curiae Jesse Day is a top-ranked Scrabble player who has won over 20 tournaments since 2005, when he began playing competitive Scrabble. He has finished in the top 5 at the National Scrabble Championship for the last two years, is currently ranked in the top 5 in North America and will be participating in this year's World Scrabble Championship. He is currently a third-year graduate student at the University of California-Berkeley studying Atmospheric Science, focusing on climate in Asia and China, and speaks six languages with varying degrees of fluency.

Amicus curiae Martin Fleisher is a longtime champion bridge player. Having first learned bridge at the age of eight, in 1976 at the age of 17 he became the youngest American Contract Bridge League

¹ All counsel of record received timely notice of *Amici's* intent to file this brief and provided written consent. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

(ACBL) Life Master from the New York metropolitan area. At the same time, his team reached the final of the Grand National Teams knockout championship, making him the youngest player ever to reach the finals of a North American team bridge championship a record he still holds. Less than two years later he won the Intercollegiate regional bridge championship by the largest margin ever recorded in a pairs championship. Mr. Fleisher has won six national bridge championships and placed second in seven others. Among his many other victories, he won the 2000 Cavendish Invitational, the world's strongest contest for money prizes, and in 2010 won the United States Bridge Championship for open teams to earn entry in the 2011 Bermuda Bowl (as one of two U.S. entries). Mr. Fleisher also is an attorney and Managing Director of Dearborn Capital Partners LLC.

STATEMENT

This case involves, *inter alia*, whether the word “gambling” in the Illegal Gambling Business Act (“IGBA”), 18 U.S.C. § 1955, has any independent meaning. In the Court below, the Government advocated a broad definition of gambling as “wagering on an uncertain outcome” or “to play a game for . . . money.” Gov. Br. at 13; *see also id.* at 19 (citing unusually broad definition from Webster’s New Collegiate Dictionary 471 (1976), defining “gamble” as “to bet on an uncertain outcome” or “to play a game for (as money or property)”; *id.* at 21 (defining “‘gambling’ to mean, in substance, betting on an uncertain outcome”). Alternatively it proposed a narrower definition of gambling as “‘to play at any game of chance for stakes,’” Gov. Br. at 19 (quoting The Random

House College Dictionary 542 (rev. ed. 1980)), but then gave the subsidiary phrase “game of chance” the unusually broad and non-standard definition of any game wherein “chance plays *some* role in the outcome, whether or not it predominates over skill,” *id.* (emphasis added). The Second Circuit, however, did the Government one better, and read the federal statutory term “gambling” out of the IGBA entirely. It held that virtually *any* business that involved illegal gambling under *state* law would also violate the IGBA if it met certain minimal size requirements.

Of particular interest to *amici* here is the critical defect that the Government’s approach below, and the Second Circuit’s still broader approach, are both grossly overinclusive and could make a federal crime of organizing many common games that are played competitively with the prospect of monetary gain for the winners.

This brief will focus on two examples of such games – Scrabble and bridge – that are played competitively in tournaments and casual games with money at stake. Neither game has traditionally been viewed as involving gambling, and both are played by millions of law abiding citizens. Yet the approaches of the Government and the court of appeals would brand them as gambling and place the force of a federal criminal statute behind any misguided state attempt to make playing such games with money at stake illegal. Because such a result would be absurd and wholly beyond Congress’s contemplation in enacting the IGBA, both the Government’s and the court of appeals’ approaches should be rejected. This

Court thus should grant the petition for a writ of certiorari and reverse the decision below.

SUMMARY OF ARGUMENT

Both Scrabble and bridge are games that, like poker, are contests of skill where some element of chance is involved. In addition, both are regularly played with the prospect of financial gain, casually and in organized tournaments throughout the Nation. The court of appeals' elimination of any federal content for the statutory term "gambling," as well as the Government's broad definitions of gambling, would encompass these and other games commonly recognized as games of skill and would thus lend the power of federal criminal enforcement to any similarly misguided attempts by some States to criminalize playing games of skill for money.

Whatever leeway States may have in adopting unusually broad definitions of gambling that might suppress games of skill within their own jurisdictions, Congress had a much narrower and practical focus on organized crime. Congress had no interest in blindly supporting local laws not similarly concerned with traditionally recognized gambling activity, and certainly never contemplated making a federal crime out of widely popular contests of skill played with the prospect of financial gain. Because the decision below and the Government's previously proposed definitions of gambling, would have precisely that effect, they are absurd and should be rejected in the context of a criminal law. Rather, the more natural reading of the term "gambling" in the IGBA is one limited to games of chance where chance predomi-

nates over skill; this reading more reasonably comports with the language and history of the statute and the common law, with basic common sense and the long game-playing tradition in this country, and with the fundamental rule of lenity.

ARGUMENT

I. **The Roles of Skill and Chance in Poker Are Similar to Their Respective Roles in Common Games Such as Scrabble and Bridge.**

In its opinion below, the district court correctly noted that a strong reason to reject the Government's expansive definitions of gambling was Congress's failure to include poker and other "widely played" card games like "pinochle, gin rummy, and bridge" among the games listed in § 1955(b)(2). SPA 102. In recognizing the popularity of such card games, and the implausibility that Congress had implicitly criminalized such games through an expansive definition of gambling, the court could just as well have listed numerous other games that are widely popular in the United States and often played with the prospect of financial gain for the winner. Under the Second Circuit's "no definition" approach or the broadest of the Government's definitions, all professional sports, all game tournaments in which a prize is awarded to the winner, and every casual contest on which a wager is made – from a weekend golf round to grandma's weekly gin-rummy get-together – could constitute gambling. Even if the law in some States reached that far – based on poor drafting or an unusual aversion to playing games for money – the notion that Congress was concerned with providing further fed-

eral support for such laws is nowhere reflected in the statute or its history and defies common sense.

Scrabble and bridge are two particularly salient examples of the absurdity of the Government's position. There are many similarities between poker and games such as Scrabble and bridge that have a systemic element of chance but are correctly regarded as games of skill. These games are not considered gambling, even when players compete for money or other prizes. In poker, Scrabble, and bridge, although an element of randomness or chance is introduced by the rules of those games, the structure, rules, and dynamics of the games are such that skill in responding to that element of chance, and to the behavior of one's opponents, is the predominant factor in determining the outcome.

A. Scrabble.

Few people in America have not played, or at least heard of, Scrabble. The tremendously popular word-game involves attempting to form words on a game board from a selection of lettered tiles of different values, with the object of scoring more points than your opponents. Scrabble is played with 100 tiles, 98 of which are marked with a letter and point value and 2 of which are blank, and a board of squares, each of which accommodates a single tile, and some of which cause the value of the tile or the word to be multiplied by two or three.

To start the game, each player draws a tile and the person with the letter closest to A goes first. Each player then draws seven random tiles and the first player forms a word from the tiles he or she has drawn and places it on the board. The point value of

each square is added (along with any applicable multipliers) to form the player's score for that turn and the player replenishes his or her tiles. The next player adds one or more letters to those already played to form new words. Play continues counterclockwise until all letters have been drawn and one player uses his last letter, or when all possible plays have been made.

Although Scrabble can be played by persons of all ages and abilities, Scrabble enthusiasts regularly compete in tournaments, often for significant prize money. Like poker, therefore, Scrabble is often a game played for money that could potentially be deemed gambling under idiosyncratic state gambling laws. Under the Second Circuit's approach (or the Government's broadest definition of gambling), organizing a sufficiently large Scrabble tournament could violate the IGBA.² So too for the Government's alternative definition of playing for stakes any game in which chance plays *some* role. Scrabble would still absurdly constitute gambling given that the order of play and the lettered tiles a player draws are both functions of chance. But Scrabble is most assuredly not a game of chance as that phrase is commonly and reasonably understood, and participating in or organizing Scrabble tournaments or games where money is at stake is not gambling or the running of a gambling business. Rather, Scrabble, like poker, is a contest of skill where one element of the skill involved is adapt-

² Common Scrabble and bridge tournaments often involve more than 5 people organizing and running the tournament and can easily involve more than \$2000 in total entry fees.

ing and responding to the challenges introduced by the limited element of chance built into the rules.

Although a limited element of chance is introduced into a Scrabble game through the random distribution of tiles drawn by players throughout the game (much like the cards dealt in poker), such chance distribution of tiles only sets the stage for the exercise of the many skills that successful Scrabble play requires.

As in poker, the skill elements of Scrabble are numerous and varied. To be consistently successful at Scrabble requires a large and varied vocabulary, accurate spelling skills, strategic and tactical abilities regarding which words to play to maximize your final score and minimize that of your opponents, mathematical skills both to quickly determine which plays are the highest value and to estimate the probabilities that valuable tiles remain available for future turns, quick and adaptable mental abilities to respond to your opponents' plays and to newly selected tiles, patience and emotional discipline to carry a winning strategy to conclusion, physical discipline to suppress damaging "tells," and observational and deductive skills to be able to read your opponents' tells and infer their plans and tiles.

Unlike in genuine games of chance, where the uncontrollable element is the final step in the process and is determinative of the outcome, in Scrabble, like in poker, the elements of chance introduced at the outset or during play only create the circumstances in which the game proceeds. It is how the players respond to such circumstances, and to the conduct of their opponents, that is ultimately determinative of

the outcome of the game. As Andrew Fisher, co-author of *The Art of Scrabble* (2003), has explained, precisely because of the limited element of randomness or chance in Scrabble, successful play requires “skills such as adaptability, calculation of probabilities rather than forced sequences, judging when to attack and when to defend, and so forth.” Word Buff, *Interview with Andrew Fisher*, <http://www.wordbuff.com/scrabble-strategy.html>. Those same skills are likewise needed to succeed in poker.

Also like poker, successful Scrabble play requires one to be able to anticipate, interpret, and respond to your opponents’ behavior and, conversely, to control or manage your own behavior so as to thwart your opponents’ ability to do the same. Because a successful Scrabble strategy depends not only on the tiles that a player has, but also on those of his or her opponents and how those opponents might play them, good Scrabble players can adapt their own behavior and affect the outcome of a game by being able to infer their opponents’ likely letters and intent through body language, facial expressions, and word selection and placement during the game. This allows a Scrabble player, like a poker player, to react advantageously to an opponent who may be bluffing or building towards a future high-value move such as a seven-letter word, a placement creating multiple words, or placement on a valuable multiplier. Conversely, and also like poker players, Scrabble players must also be able to keep their body movements, facial expressions, and tactical moves as opaque as possible. See Joe Edley & John D. Williams, Jr., *Everything Scrabble* 249 (3d ed. 2009).

Mathematical skills are likewise valuable in Scrabble, just as they are in poker. Given a fixed number of tiles in fixed proportions, Scrabble players adept at calculating the probabilities that particular tiles remain to be drawn or might be in the possession of their opponents can then make judgments regarding whether they or their opponents might be able to form a more valuable word given the state of the board and then select a strategy that has a higher probability of success. While calculating and recalculating such probabilities cannot *assure* a particular result, over the course of a game or multiple games or tournaments, taking advantage of higher-probability strategies and tactics will improve a player's probability of success. Skill and speed in adjusting such calculations and behavior to take into account future uncertainties and changing circumstances further enhances a player's potential to make a high-value move, or to block such a move by an opponent. Those same skills, of course, apply in poker to determining the probabilities that needed cards remain available and will be dealt or the likely nature of your opponents' hands.

Strategic thinking, foresight, and emotional control are also important skills required to execute a long-term strategy in Scrabble. During a game, a player often has the choice of forming a number of different words from the tiles he has drawn, and forming the highest-value word available on every *turn* is not always the best choice when the goal is the most points at the end of the *game*. Some of the competing considerations that factor into a long-term strategy include the point values of potential words

on that turn, whether the letters left on the rack will combine well together or can be supplemented by the likely remaining undrawn tiles, and the probabilities that one's opponent will be able to make high-value words off the word played. The strategy, foresight, and patience to play a low-value word now for the prospect of a much bigger gain later is a significant part of what determines success in competitive Scrabble. See Michael Betzold, *Bingo!: The Secret to Scrabble Success* 5 (2010) ("While both vocabulary and luck do play important roles, winning at Scrabble depends quite heavily on using a winning strategy."). As with the other Scrabble skills discussed, poker likewise often depends on strategy, foresight, and patience, and a poker player might fold a good hand or continue to bet on a weak hand in order to influence or misdirect his opponents in future rounds having larger pots as a part of a long-term strategy.

A final factor that illustrates the predominance of skill in the game of Scrabble is that, like poker players, Scrabble players can substantially improve through study, practice, and experience. See, e.g., Nate Kornell, Ph.D., *The Psychology of Scrabble, Everybody is Stupid Except You* (Jan. 11, 2012), <http://www.psychologytoday.com/blog/everybody-is-stupid-except-you/201201/the-psychology-scrabble> (explaining that practice appears to be the main contributor to success at Scrabble). Were chance the predominant factor in Scrabble, practice, study, and experience would have little impact on outcomes.

In the end, while chance is certainly an element of Scrabble (and poker), the most important factors in a Scrabble game or tournament are the myriad skills

players use to respond to those elements of chance and influence the course of the game, the conduct of their opponents, and ultimately the outcome. Indeed, the opportunity to manage and deal with the elements of chance and the actions of an opponent you cannot directly control calls for a broad set of skills that contributes to success in both Scrabble and poker, has no impact in roulette or in a lottery, and thus illustrates the difference between games of skill and games of chance.

B. Bridge.

Another extremely popular game containing elements of both chance and skill, but in which skill unquestionably predominates, is contract bridge. Contract bridge is card game played by four people sitting at a square table with the pairs of players sitting across from each other forming competing partnerships. Each player receives thirteen cards. Play of the hand has two phases: bidding and card-play. Starting with the dealer, each player in turn makes a bid to own the contract. A bid is a statement of how many tricks (from seven to thirteen) a player claims his partnership can win on that deal. The bidding process is quite complex, with bids progressing through seven potential levels (corresponding to how many tricks above six are being bid) while also stating one of five potential “trump” variations (the four suits and “no trump,” with Clubs being the lowest value variation and no trump being the highest value variation). Bidding progresses as players make successively higher-value bids or pass until the winning bid is reached. That bid sets the contract that the declaring side must attempt to make or exceed and the

trump, or lack thereof. The teams then play the hand attempting to take at least the number of tricks necessary to fulfill or defeat the contract. Players score the results with a scheme based the difficulty of the contract, whether or not the contract was met or defeated and by how many tricks, and a number of other complex rules. Multiple hands of bridge are played and the team with the highest score at the end of the contest is the winner.

Bridge is one of the most popular card games in the world and is played by millions in clubs, tournaments, and casual games. *See* Wikipedia, *Contract Bridge*, http://en.wikipedia.org/wiki/Contract_bridge. And, like Scrabble and poker, bridge is often played with money at stake, either in the form of prizes for the top finishers at a tournament, or in money exchanged between the competing teams.

As with Scrabble and poker, bridge contains an element of chance. That element is introduced from the random deal of the cards, as in poker. Thus, under both the Second Circuit's "no definition" deferral to any unusually broad state laws or either of the Government's proposed definitions, bridge could constitute gambling in any game or tournament in which there was money or prizes to be won. But once again, that conclusion is absurd given the predominant role of skill in the game of bridge, notwithstanding the element of chance that helps set the stage for each hand.

As with Scrabble and poker, the skill elements of bridge are extensive. The bidding process itself requires numerous skills in order to establish a makeable contract, impose an un-makeable contract on an

opponent, and determine the trump, if any. Those skills are intellectual, psychological, and physical. They include the ability to calculate odds, to read and interpret signals from both your opponents and your partner, the ability to formulate long- and short-term strategy and tactics, and to forecast and respond to the strategy and tactics of your opponents.

Like betting in poker, the bidding process is a critical means of communicating within a game and influencing the conduct of your opponents. Bids serve a variety of functions, with early, lower, bids serving to convey information to your partner that can help inform whether future bids are likely to be makeable, and later bids designed to maximize the points your side can gain or minimize the points your opponents can gain. The strategy that goes into bidding and into the order and manner in which the hand is eventually played, is extremely complex, requires a broad array of skills to set up and execute, and is what ultimately distinguishes highly successful players from less successful players. While any given hand of bridge begins with an element of chance in the cards that the players receive, the many skills involved come into action before any given hand is played, while play progresses within a hand, and across and among multiple hands.

For example, as with both Scrabble and poker, success at bridge sometimes requires the patience and discipline to make short-term sacrifices in the service of a longer-term strategy. Bidding a contract you likely will not make may be necessary to prevent your opponents from having the winning bid that would earn them more points than you will lose from

failing to make your contract. The knowledge, experience, and discipline to formulate and implement a long-term strategy that sometimes requires short-term sacrifice thus can play a critical role in winning the contest even while seemingly losing a particular hand. Bridge also requires the mathematical ability to estimate the probable distribution of different cards among the players, both during the bidding process and as play progresses. Such continually revised probabilities can influence the likely success of the bids made or the order in which the cards are then played. Flexibility and adaptability likewise play a significant role in bridge, particularly when your opponent (or partner) does something unanticipated or thought to have a low probability. The ability to adjust to such changed or unexpected circumstances, rather than continuing with an obsolete tactic or strategy, is an important skill that contributes to success in bridge.

It is the continual application of these and many other skills over multiple hands that ultimately plays the largest role in determining the outcome of a contest, notwithstanding the initial element of chance in each hand. *See In re Allen*, 377 P.2d 280, 281-82 (Cal. 1962) (“[I]t is obvious that, although there is of course an element of chance [in bridge] resulting from the deal of the cards, there is a continually recurring necessity in the bidding and play of the hand to make decisions which, considered together, will ordinarily be determinative of the outcome of the game.”).

Commentators such as Bob Hamman, thought by some to be the greatest bridge player in the world, have noted the skills involved in bridge and the ad-

vantages to be had from skillful observation and analysis of your opponents' actions. Such observation and reasoning can provide valuable information from which one can infer what cards they likely hold and react accordingly. *See, e.g.*, Paul Burka, *Mr. Bridge*, TexasMonthly (May 2010), <http://m.texasmonthly.com/id/14867/Lifestyle/#part1>. The same skills, of course, are critical to success in poker, as Mr. Hamman has noted. *Id.*

Finally, also like Scrabble and poker, study, practice, and experience are important factors in improving at bridge. More experienced players and teams have a decided advantage in bridge, and the literature directed at the skills and strategy for improving your bridge game is extensive. *See, e.g.*, *In re Allen*, 377 P.2d at 282 (“It has been said that the literature on bridge is unapproached in quantity by that on any other game and that more than 5,000 volumes were written on the subject between 1927 and midcentury.”); *Introduction to Bridge*, The Bridge World Magazine, http://www.bridgeworld.com/default.asp?d=intro_to_bridge&f=next.html (discussing the many teaching materials available regarding bridge but noting that the main way to improve is to play).

As with Scrabble and poker, therefore, a broad range of skills are the predominant factors in success at bridge, notwithstanding the systematic introduction of chance at the beginning of each hand. Successful players use their skill to manage the elements of chance involved, manage their partners and opponents, and over the course of a game or tournament succeed notwithstanding the elements of chance.

II. The Second Circuit’s “No Definition” Approach and the Government’s Definition of Gambling under the IGBA Sweep too Broadly.

Both Scrabble and bridge are games that are often played for money, and both involve some elements of chance. Both accordingly might fall within the Second Circuit’s “no definition” approach to the IGBA, or within the Government’s proposed definitions of gambling. Several of the more expansive state laws cited below by the Government would, under the Government’s interpretation of those laws, seem to encompass Scrabble and bridge as well. *See*, Gov. Br. 26 (citing statutes the Government claims apply a broad definition of gambling not dependent on the relationship between chance and skill).³ Insofar as the Government’s reading of those few state laws is correct (which it may not be), then such interpretation would seem to include any tournament at which a

³ The Government’s expansive interpretation of even those few state laws would seem to be exaggeratedly broad, as was argued by the Petitioner below. DiCristina CA2 Br. at 38-42. The point here, however, is that even were the Government correct in its broad view of that small minority of broad state laws regarding gambling, they do not represent the common-law tradition regarding what constitutes gambling, of which Congress would have been aware. And there is no indication that Congress intended to support *anomalous* state laws that, according to the Government, might make all forms of skillful game play for money or prizes illegal, rather than just those state laws addressing traditional gambling linked to organized crime. Indeed, that is the reason for having a federal definition of gambling in the first place – to set minimum requirements for federal prosecution notwithstanding whether something was deemed gambling under a peculiar claimed construction of state laws.

prize is offered that is greater than the entry fee, as well as any games in which money (or even a fancy dinner) is risked between the players on the outcome.

Notwithstanding such unusually broad definitions, however, Scrabble and bridge are not generally regarded as “gambling,” even when the players compete for a monetary or other reward. The Government’s proposed broad definition of “gambling,” or the Second Circuit’s broader “no definition” approach, that encompasses games of skill such as Scrabble and bridge (and poker), particularly where there is no evidence of organized crime involvement in such games, is *too* broad.

Adopting the Second Circuit’s or the Government’s approaches to what constitutes gambling under the IGBA would make potential federal criminals out of the millions of law-abiding citizens who regularly play Scrabble and bridge, not to mention the many millions more who play poker. *See* Sharon Osberg, Bring Bridge Back to the Table, *NEW YORK TIMES* (Nov. 27, 2005), <http://www.nytimes.com/2005/11/27/opinion/27osberg.html> (roughly three million people regularly play bridge); National Scrabble Association, History of Scrabble, <http://www.scrabble-assoc.com/info/history.html> (between one and two million Scrabble sets sold annually in North America).⁴

⁴ While few States likely would intentionally choose to make such games illegal, broadly worded statutes or particularly stringent public policy views might nonetheless accomplish that result. There is simply no reason to believe Congress would have wanted to support the enforcement of such unusually

Presidents from both parties and Supreme Court Justices of diverse judicial leanings have been enthusiasts of Scrabble, bridge, and poker. *See The sublime joy of Scrabble*, THE INDEPENDENT (Dec. 15, 2008) <http://www.independent.co.uk/news/uk/this-britain/the-sublime-joy-of-scrabble-1067061.html> (listing Presidents Obama and Nixon, among many other notables, as Scrabble enthusiasts); NPR, *Obama: Serious Poker Player, Serious President?*, <http://www.npr.org/templates/story/story.php?storyId=96785022> (President Obama a poker player); NEW YORK TIMES, *Eisenhower's Other Title: Bridge Player in Chief* (Jan. 18, 2009) (President Eisenhower an avid bridge player); *Above the Law, Poker-Playing Attorneys* (Sept. 29, 2006) <http://abovethelaw.com/2006/09/poker-playing-attorneys/> (Justice Scalia and Chief Justice Rehnquist poker players); Sheryl Gay Stolberg, *et al.*, *A Climb Marked by Confidence and Canniness* (May 10, 2010), <http://www.nytimes.com/2010/05/10/us/politics/10kagan.html?pagewanted=all> (Justice Kagan, same); Rebecca Dana, *Why Stephen Breyer and Other Power Players Love Bridge*, NEWSWEEK (Feb. 20, 2012) <http://www.thedailybeast.com/newsweek/2012/02/19/why-stephen-breyer-and-other-power-players-love-bridge.html> (Justice Breyer a bridge player); *Supreme Court Justice is Duplicate Fan*, ACBL DAILY BULLETIN (July 25, 2009), <http://www.acbl.org/nabc/2009/02/bulletins/db2.pdf>

stringent laws by deferring to peculiarly broad state law definitions of gambling or itself adopting an unusually broad definition of gambling in the IGBA.

(Justice Stevens and Chief Justice Rehnquist, same). These games have many other famous players as well, including Warren Buffett and Bill Gates (bridge), the singer and actress Madonna (Scrabble), members of the band Radiohead (bridge), and Olympian Michael Phelps (poker), among many others. The fact that so many well-known and public figures play these games of skill, along with millions of others around the country, is just one more indication that this Court should be highly skeptical of the government's suggestion that Congress intended to make a potential federal crime out of games of skill such as these well-known and popular games. Such a reading and result would be absurd.

Equally absurd, the Government's definitions of gambling would potentially criminalize valuable educational programs based on Scrabble and bridge – which may have tournaments, entry fees, and cash prizes – that seek to impart to students the many skills and educational benefits that come from playing these games. *See, e.g.*, EDUCATION WORLD, *Scrabble Clubs Spell Learning, Fun*, http://www.educationworld.com/a_admin/admin/admin444.shtml (discussing the national School Scrabble program); PR NEWSWIRE, *200 Young SCRABBLE Experts to Vie for \$10,000 Top Prize at the 2011 National School Championship April 15-16 In Orlando* (Mar. 29, 2011), <http://www.prnewswire.com/news-releases/200-young-scrabble-experts-to-vie-for-10000-top-prize-at-the-2011-national-school-championship-april-15-16-in-orlando-118838014.html> (noting prize money at stake at the national school Scrabble championship); School Bridge League, *The Beginning of*

School *Bridge* *League*,
<http://www.schoolbridgeleague.org/whats-in-a-game.aspx> (Bill Gates and Warren Buffett supporting a school bridge league for the educational benefits it can provide); Martha T. Moore, *Billionaires bank on bridge to trump poker*, USA TODAY (Dec. 19, 2005), http://usatoday30.usatoday.com/news/education/2005-12-19-bridge-schools_x.htm (same); *see also* Scrabble Association, *2012 National Scrabble Championship Prize Table*, <http://www.scrabbleassociation.com/tourneys/2012/nsc/build2/tsh/prizes.html> (winner of the 2012 National Scrabble Championship won \$10,000).

While it may seem unnecessary to be concerned about federal prosecution of Scrabble or bridge tournaments, prosecutors and others have unfortunately shown themselves to be especially adept at being overzealous when armed with overbroad criminal laws. In this case itself, for example, there is no suggestion that the State of New York intended to prosecute defendant for his card-game. Yet federal prosecutors inexplicably felt a greater need to support the State's supposed interest in illegal "gambling," broadly defined, than did the State itself. And it pursued this federal case notwithstanding that defendant's activities had nothing to do with the organized-crime-fighting purposes animating the IGBA.

Such prosecutorial "zeal" is much of the reason why so much of our Constitution and our criminal jurisprudence is designed to cabin the power and potential abuse of criminal law enforcement. This Court should thus take little comfort in any suggestion that the Second Circuit's "no definition" approach or the

Government's broad definitions somehow would be applied to spare popular games that few would otherwise even consider calling gambling. "[P]rosecutorial discretion is not a reason for courts to give improbable breadth to criminal statutes." *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2041 (2012) (quotation marks and citation omitted).

The absurd results described above help illustrate the fatal flaws in the Second Circuit's "no definition" approach and the Government's proposed definitions of gambling, which are not required by, and in fact inconsistent with, the language, history, and purposes of the IGBA, the common law, and the rule of lenity. The mere presence of a systemic element of chance is insufficient to transform a game into gambling when the conduct of the game is otherwise dominated by skill and it would be illogical to interpret the IGBA to reach such games.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

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