THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-001551

Robert L Chimento, Scott Richards, Michael Williamson, Jeremy Brestel, and John T Willis — Respondents,

vs

Town of Mount Pleasant — Appellant

FINAL BRIEF OF RESPONDENTS

Jeffrey A Phillips
PHILLIPS LAW FIRM
404 North Main Street
Travelers Rest, South Carolina 29690
PHONE 864 834 7171
AttyJeff@Bellsouth net

William W Wilkins
Kirsten E Small
NEXSEN PRUET, LLC
55 East Camperdown Way (29601)
Post Office Drawer 10648
Greenville, South Carolina 29603-0648
PHONE 864 370 2211
BWilkins@Nexsenpruet com

ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(Continued)

STATUTES

TABLE OF AUTHORITIES
(Continued)

STATEMENT OF ISSUES ON APPEAL

1 DID THE CIRCUIT COURT CORRECTLY HOLD THAT PLAYING TEXAS HOLD'EM IN A PRIVATE RESIDENCE DOES NOT, BY ITSELF, TRANSFORM THAT RESIDENCE INTO A "HOUSE USED AS A PLACE OF GAMING?"

2 DID THE CIRCUIT COURT CORRECTLY HOLD THAT THE TERM "HOUSE USED AS A PLACE OF GAMING" IS UNCONSTITUTIONALLY VAGUE?

STATEMENT OF THE CASE

On April 12, 2006, Robert L Chimento, Scott Richards, Michael Williamson, Jeremy Brestel, and John T Willis (collectively, "Respondents") were charged with playing a game of cards in a house used as a place of gaming, in violation of S C Code Ann § 16-19-40 At the time of their arrests, Respondents were playing "Texas Hold'em" at the home of Nathan Stallings Respondents pleaded not guilty and the case was tried before Municipal Court Judge J Lawrence Duffy, Jr on February 13, 2009 Judge Duffy issued an order on February 19, 2009, finding that Texas Hold'em is predominantly a game of skill, R p 19, but stating that he was "compelled" to convict Respondents in light of the absence of a "clear guideline from the Legislature or from the majority of this Supreme Court" as to whether South Carolina courts should follow the "dominant factor" test in determining whether an activity is gaming R p 20

Respondents appealed to the Circuit Court *See* S C Code Ann § 14-25-95 (Supp 2009) (authorizing appeal to circuit court from municipal court conviction) That court conducted a hearing on August 4, 2009 Thereafter, on October 1, 2009, the court reversed Respondents' convictions The court (1) concluded that the South Carolina Supreme Court would adopt the dominant factor test to determine whether an activity could be considered "gaming," R pp 7-10, (2) affirmed the finding of the municipal court that Texas Hold'em is predominantly a game of skill, R p 10, (3) held that because Texas Hold'em is not "gaming" under the dominant factor test, Stallings' residence could not have been a "house used as a place of gaming" within the meaning of § 16-19-40, R p 11, and (4) reversed Respondents' convictions, R pp 10-11 Alternatively, the court concluded that the statute was unconstitutionally vague and overbroad R pp 13-15 The State timely noted an appeal

STATEMENT OF FACTS

In its Statement of Facts, the State repeatedly ignores the factual findings of the Municipal Court and mischaracterizes the evidence presented at trial Respondents therefore set out their own statement of the relevant facts

A Facts Regarding Respondents' Conduct

On April 12, 2006, approximately seventeen individuals, including Respondents, gathered at the home of Nathan Stallings to play Texas Hold'em, a game with cards [1] The "buy-in"[2] for the game was between $5 00 and $20 00, the "blinds"[3] were 25¢ and 50¢, and the average pot size was between $5 00 and $10 00 R p 157, lines 9-13, p 162, line 10 – p 163, line 1 [4] The players came together once or twice a week to play

---

[1] The circuit court opinion explains how Texas Hold'em is played R pp 1-2

[2] A "buy-in" is the initial purchase of chips by the individual players

[3] The "blinds" are required bets posted by the two players to the left of the dealer button The "small blind" (which is posted by the player to the left of the dealer button) is equal to half of the minimum bet (25¢ in this case) and the big blind (which is posted by the player to the left of the person sitting in the small blind) is equal to the minimum bet (50¢ in this case)

[4] The State claims that "Stallings testified that at any one time, the amount on the table could be more than $200 " Br of Appellant at 4 This is a gross misstatement of Stallings' testimony, which actually was as follows

> Q What was the average pot[?]
>
> A It's hard to give an average because there's a forced bet, which is a blind [a]nd no one has to call after that So it could have been 75 cents up to anywhere from 20 to 30 bucks
>
> Q That'd be a maximum for a hand?
>
> A Probably I mean, if you had 10 people at a table, you have $200 If everybody went all in, you could win 200 bucks
>
> Q But did everybody ever go all in on 10 people?
>
> A No [O]ur average pot was between 5 and $10

Texas Hold'em R p 161, line 17 – p 162, line 3 Stallings testified without contradiction that the meetings at his residence were not open to the general public R p 177, lines 6-21 While information about the games was available on a social networking website called "meetup com,"[5] one had to be a member of the networking group, or be invited by a member, to attend the games R p 175, line 25 – p 177, line 21

Stallings made no profit from the playing of the game R p 157, lines 6-8 ("Q Did you make any money running this poker game? A No ") The municipal court found as a fact that Stallings merely "took a rake out of the pot to cover food and drink provided " R p 19, *see* R p 157, line 16 – p 158, line 9 Often, these "rakes" were insufficient to cover the actual cost of food and beverage consumed by the players, in which case one of the players contributed or Stallings paid out of his own pocket R p 158, lines 6-9 [6]

R p 162, line 11 – p 163, line 1

[5] "Meetup com" is

> an online social networking portal that facilitates offline group meetings in various localities around the world Meetup allows members to find and join groups unified by a common interest, such as politics, books, games, movies, health, pets, careers or hobbies Users enter their ZIP code (or their city outside the United States) and the topic they want to meet about, and the website helps them arrange a place and time to meet

http //en wikipedia org/wiki/Meetup com (last visited Feb 22, 2010)

[6] Ignoring the factual findings of the municipal court, the State quotes arresting officer Justin Hembree, who claimed that Stallings told him "that he would make $2 from each hand " R p 91, lines 6-7 Officer Hembree's testimony on this point was thoroughly discredited by other trial testimony R p 195, line 18 – p 196, line 12 (Respondent Jeremy Brestel, testifying that a $2-per-hand rake in a 25-50 cent game "would eat up all the cash on the table" in a very short period of time), R p 240, lines 12-22 (expert witness Michael Sexton, stating the same), *see also* R p 138, line 10 – p 140, line 1 (Officer Hembree acknowledging that his affidavit in support of the arrest warrant does not mention the alleged $2-per-hand rake)

The State makes repeated and inflammatory attempts to characterize Stallings' home as a "casino-like facility" Br of Appellant at 7, *id* at 11 ("large-scale casino gambling," "a virtual casino"), *id* at 24 ("little different than a casino"), *id* at 36 ("essentially operating as a casino") These assertions are ludicrous in light of the evidence presented at trial [7] State's Exhibit 1 is a video taken on the night of Respondents' arrest The video shows a total of approximately 15 people seated at two makeshift poker tables (at 00 48, one can see the ragged edges of a hole made for a beverage container) *See* R p 160, line 23 – p 161, line 4 (describing one table as "a plastic table bought from Costco" to which had been affixed "a piece of cardboard and a piece of plywood cut into a circle with some fabric on it so the cards wouldn't slide")

---

[7] Testimony at the preliminary hearing likewise demonstrates that Stallings' private residence bore no resemblance to a casino

> Mr Phillips You said that this house was set up in a casino style Have you ever been in a casino?
>
> Cpl Hembree Yes sir
>
> Mr Phillips Were there any slot machines in this house?
>
> Cpl Hembree No sir
>
> Mr Phillips Were there any black jack tables?
>
> Cpl Hembree I wouldn't know a black jack table if I was sitting in front of it
>
> Mr Phillips Have you ever seen a roulette wheel?
>
> Cpl Hembree Yes I have
>
> Mr Phillips Was there one there?
>
> Cpl Hembree No sir
>
> Mr Phillips Was there a craps table?
>
> Cpl Hembree I'm not sure what that looks like

R p 334, line 19 – p 335, line 12

Seating at both tables consisted of a motley assortment of folding chairs, desk chairs, recliners, and couches There were no house odds, no house dealer, and door charge or surcharge to play

B Facts Regarding Whether Texas Hold'em Is A Game Of Skill

Respondents presented testimony from two expert witnesses regarding the role of skill in Texas Hold'em The first expert was Michael T Sexton, who has been playing Texas Hold'em professionally since 1977 R p 205, lines 16-19 Mr Sexton has won numerous major Texas Hold'em tournaments, including the European Poker Championship and the World Series of Poker Tournament of Champions R p 210, line 19 – p 211, line 4 He writes articles commenting on poker hands, instructs at seminars and "boot camps," and has written a best-selling book about Texas Hold'em R p 209, line 9 – p 210, line 6

Sexton identified ten separate skills that are critical to winning at Texas Hold'em [8]

1 *Putting a Player On Hand* To put a player "on hand" is to deduce that player's hole cards, "probably the top skill" in Texas Hold'em R p 217, lines 1-4 A skilled player will observe other players' "betting action, and their style of play, their body language, *et cetera* " R p 217, lines 14-16

2 *Betting behavior* As Sexton explained, betting strategically is an important skill "you have purpose every time you're betting " R p 219, lines 12-13 For example, a player may induce an opponent to call by making a smaller bet, or may push another player to fold by making a larger bet R p 219, lines 13-18 Betting changes the dynamics of the game R p 228, lines 16-17 "[T]he more skilled players understand the

[8] The State claims that Sexton "admitted that a completely unskilled player could beat an accomplished player, depending upon the cards dealt " Br of Appellant at 5 That is not what Sexton said Sexton's actual testimony was that a novice might prevail in a single hand, or possibly a single game, but that the odds were "a million to one" against a novice consistently beating a skilled player R p 242, lines 18-19

power of betting, when to bet, when not to bet, and it gives them an edge " R p 228, lines 18-20

3 *Math Knowledge* A skilled player of Texas Hold'em will employ a basic knowledge of probabilities and arithmetic to estimate whether an "investment" in the pot (*i e* , a bet) will provide a worthwhile return R p 219, line 25 – p 224, line 8 Sexton explained this principle using a hypothetical hand in which the player calculates his odds of winning at 4 5 to 1 If the player will receive a return on his or her money of greater than 4 5 to 1, he should call, if not, he should fold and save his money for another hand

4 *Folding* "[V]ery simply in poker, money saved is money earned " R p 224, lines 13-14 In many situations, the "best play possible" is to fold, limiting losses and conserving funds for later rounds R p 224, line 15

5 *Bluffing* A player who bluffs successfully will win the hand without having the best cards R p 225, lines 3-4 Having the skill to bluff, and the courage to do it, are key skills R p 226, line 17 – p 227, line 1

6 *Changing Gears* As Sexton explained, predictable players are losing players R p 229, lines 19-23 ("You don't want to be a predictable poker player because in truth the more skilled players will just pick you off like a lion looks at a limping gazelle ") Thus, the ability to change one's style of play "and camouflag[e] the strength of your hand will definitely make you a better poker player " R p 229, lines 16-19

7 *Patience and discipline* The ability to wait out a run of bad cards is a hallmark of experienced players "[T]he biggest mistake that amateur players make is they play too many hands, and they call their money off too much " R p 232, lines 12-14 Better players will wait for better cards rather than trying to "force the action " R p 232, line 20

8 *Self-control* In any game of Texas Hold'em, the likelihood is that a player is going to lose a large pot When this happens, as it does to even the most experienced player, the ability to maintain one's composure and continue to play strategically is an important skill R p 232, line 25 – p 233, line 20

9 *Playing Position* During a game of Texas Hold'em the blinds move around the table, meaning that each player will at some point be the "butt[on]," the last player in the round of betting for that hand R p 235, lines 11-16 A skilled player will capitalize on the opportunity to observe the behavior of those who bet before him and respond accordingly R p 235, line 17 – p 237, line 3 (explaining how players can take strategic advantage of their playing position)

10 *Continuing Study* One becomes a better poker player the same way one becomes a better golfer or chess player through practice and study R p 237, lines 22-24 ("[I]n truth poker is not like/unlike anything else in the world Those that prepare to win do better than those who don't ")

Respondents also presented the testimony of Robert Hannum, Ph D , an expert in statistics and probability related to gaming R p 259, lines 18-20 Dr Hannum testified about two studies he conducted that evaluated the impact of strategy in Texas Hold'em The first study determined what the outcome would be if a player who employed strategy played against one who did not The player employing strategy prevailed 97 percent of the time R p 260, lines 21-25 Another study, which pitted "bots" (computer programs capable of playing Texas Hold'em) of varying skill levels against each other, "showed that the highly skilled players convincingly defeat the players with little to no skill " R p 261, lines 7-14 Based on these studies, Dr Hannum concluded "[t]hat skill is a predominant factor" in Texas Hold'em R p 262, lines 11-12

Dr Hannum also recounted a study that compared top Texas Hold'em players to top golfers The data demonstrated that "the skill differences among poker players [are] similar to the skill differences among top professional golfers," *i e* , future success could be predicted by past performance R p 263, line 19 – p 265, line 1 Necessarily, then, skill was predominant in both activities R p 265, lines 5-7 ("[S]kill needs to be a dominant enough factor in order to be able to predict future success from past finishes ") Another study revealed that out of 103 million hands of Texas Hold'em, 76 percent were resolved by all but one player folding before the showdown, and the best hand won only *half* of the remaining 24 percent R p 270, lines 6-24 Thus, the skill of the winning player was the determining factor in 88 percent of those 103 million hands R p 271, lines 3-7

Dr Hannum explicitly distinguished the greater skill involved in Texas Hold'em as opposed to typical casino games

> The major difference between – maybe I'll call it card room poker, Texas Hold'em as opposed to say games like Caribbean Stud Poker, Let It Ride Poker, those table games that are more or less along the lines of a black-jack type in the sense that I'm describing now [Texas Hold'em] is a game where you are playing against the other players Other games such as blackjack, the Caribbean Stud, the Let It Ride, roulette, slots, you're playing against the house There's a fixed advantage on those games, and you're up against them
>
> In card room poker, you're playing against the other players, and if you're a better player, if you're more skilled, then you can win at card room poker

R p 267, line 19 – p 268, line 9 [9]

The State neither objected to this testimony nor presented any evidence of its own to prove that Texas Hold'em is predominantly a game of chance rather than skill

[9] The State ignores all of the above evidence from Dr Hannum, reducing his testimony to the elementary truth that as between players of absolutely equal skill, the winner will be determined by the luck of the draw Of course, as the State acknowledged, such conditions do not exist outside of a computer lab R p 275, lines 6-14 The same is true of other games of skill, such as golf—it is never the case that two players of exactly the same skill face each other

SUMMARY OF ARGUMENT

Texas Hold'em is an enormously popular pastime for millions of Americans Texas Hold'em and other forms of poker have been played throughout this country's history by presidents, generals, and Supreme Court justices Texas Hold'em tournaments are broadcast to huge television audiences, books on game strategy abound, and hands are analyzed in the same way as hands of bridge

What is true of the country as a whole is true in South Carolina, where every day ordinary, law-abiding citizens gather to play a game involving strategy, psychology, and mathematics In late 2009, Catholic priest Andrew Trapp outplayed 9,999 others to win $100,000 and a chance to play for $1 million against poker great Daniel Negreanu *See* Seanna Adcox, "SC Priest Wins $100,000 for Church in Poker Game," Associated Press (Dec 22, 2009) The ultimate winner of the tournament, retired NYPD officer Mike Kosowski, was a first responder on 9/11 *See* "9/11 Hero Wins $1,000,000 for Beating Negreanu," www bluffeurope com (Dec 21, 2009) Officer Kosowski donated part of his winnings to the Families of Freedom 9/11 Scholarship Fund, another part of the money will pay for his daughter's wedding *See id* For his part, Father Trapp hoped that his participation in the tournament would, in addition to adding to the church's building fund, "demystify" the priesthood by "show[ing] the world that priests are human beings like every one of us " Adcox, *supra*

This case is about the right of the citizens of this state to play Texas Hold'em in their own homes, free of the fear that a SWAT team will suddenly burst into the residence to arrest the players This case is not about casinos, or professional gambling, or any of the other specters the State raises in its brief The right to play Texas Hold'em

at home is overwhelmingly supported by South Carolinians, as shown by a recent online poll by the Charleston *Post and Courier*, in which *86 percent* of those voting believed that a home poker game should be legal *See* http //www postandcourier com/polls/2008/ apr/poker_poll (last visited Feb 22, 2010) What is all the more perplexing about this prosecution is that Respondents' conduct is no different in principle from the conduct of the players in a small-stakes bridge game, which the State believes is legal R p 46, line 6 – p 47, line 5

The State charged Respondents with a criminal offense for playing a small-stakes game of Texas Hold'em in a private residence According to the State, Respondents were guilty of playing cards in a "house used as a place of gaming" in violation of S C Code Ann § 16-19-40 Since Texas Hold'em is indisputably a "game with cards," Respondents' guilt or innocence turns on whether Stallings' residence was a "house used as a place of gaming" on the night of Respondents' arrests [10] The statute does not define this term, nor has this Court explained its meaning

In ordinary usage, the synonymous terms "gaming" and "gambling" refer to games of chance, not to games of skill This definition is confirmed by the plain language of § 16-19-40 and by the South Carolina Constitution Accordingly, a finding that a private residence is a "house used as a place of gaming" requires proof that a game of chance was being played therein—*i e* , that there was gaming going on Since the only

[10] The State repeatedly mentions that Stallings pleaded guilty to keeping a house of gaming, as though this fact were somehow relevant to the legal questions before this Court It is not Moreover, Stallings testified that he pleaded guilty in exchange for the dropping of charges against his fiancee, who had recently been admitted to medical school R p 188, lines 5-11

game being played in Stallings' residence on the night of April 12, 2006 was Texas Hold'em, the question becomes whether Texas Hold'em is a game of skill or a game of chance For the purposes of deciding that question, this Court should—consistent with its own previous decisions and the well-reasoned views of virtually every other United States jurisdiction—adopt the "dominant factor" test

Employing that test, the municipal court has already determined, as a question of fact and based on the overwhelming evidence, that Texas Hold'em is predominantly a game of skill The circuit court has affirmed that finding as being supported by the evidence The State's belated attempt to challenge this conclusion is waived, and in any event is without merit Because Texas Hold'em is predominantly a game of skill, it is not "gaming," and therefore Stallings' home could not have been a "house used as a place of gaming "

As an alternative to their argument that Texas Hold'em is not gaming, Respondents maintain that the record contains no evidence that Stallings' residence bore any recognized hallmark of a "place of gaming " If Texas Hold'em is gaming (which Respondents deny), this Court must identify some other way for prosecutors and trial judges to distinguish a private residence—where gaming is allowed under the statute—from a public "house used as a place of gaming "[11] The two-element structure of § 16-19-40 demands that the determination of whether a residence is a "house used as a place of gaming" be made without reference to the specific activity being carried on inside Just as a tavern is a tavern regardless of whether anyone ever plays a game with cards at

[11] The statute does not prohibit playing games with cards or dice in a private residence, nor does it prohibit betting on such games *See infra*

the bar, whether a private residence has become a "house used as a place of gaming" must be determined independently of the turn of the card The record here, however, contains no such other evidence Stallings charged no entry fee, took no profit, and did not allow the public at large to enter his residence

A proper construction of § 16-19-40 allows the citizens of South Carolina to play cards and other games in their homes but absolutely prohibits public gaming, as the Legislature clearly intended In the absence of the common-sense limiting construction offered by Respondents, § 16-19-40 is vague and overbroad, encouraging arbitrary and discriminatory enforcement and thereby violating the Due Process Clause

The ruling of the circuit court should be affirmed

ARGUMENT

I S C CODE ANN § 16-19-40 DOES NOT REACH RESPONDENTS' CONDUCT BECAUSE NATHAN STALLINGS' RESIDENCE WAS NOT "A HOUSE USED AS A PLACE OF GAMING "

This case turns on a question of statutory construction what is the meaning of the term "house used as a place of gaming" as it appears in S C Code Ann § 16-19-40? In answering this question, the "primary function" of the court "is to ascertain the intent of the legislature " *Whitner v State*, 328 S C 1, 6, 492 S E 2d 777, 779 (1997) To the extent the statute is clear and unambiguous, it should be applied according to its terms *See First South Sav Bank Inc v Gold Coast Assocs Inc* , 301 S C 158, 160, 390 S E 2d 486, 487 (Ct App 1990) Additionally, "when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant " *State v Blackmon*, 304 S C 270, 273, 403 S E 2d 660, 662 (1991) This Court recognized that the rule of strict construction of penal statutes applies to § 16-19-40 in *Darlington Theatres v Coker*, 190 S C 282, 2 S E 2d 782, 786 (1939)

A The plain statutory language does not prohibit card playing in a private residence

S C Code Ann § 16-19-40 provides

> If any person shall play at any tavern, inn, store for the retailing of spirituous liquors or in any house used as a place of gaming, barn, kitchen, stable or other outhouse, street, highway, open wood, race field or open place at (a) any game with cards or dice, (b) any gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or by any figures, (c) any roley-poley table, (d) rouge et noir, (e) any faro bank (f) any other table or bank of the same or the like kind under any denomination whatsoever or (g) any machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes, except the games of billiards, bowls, backgammon, chess, draughts, or whist when there is no betting on any such game of billiards, bowls, backgammon, chess, draughts, or whist or shall bet on the sides or hands of such as do game, upon being convicted thereof, before any magistrate, shall be imprisoned for a period of not over thirty days or fined not over

> one hundred dollars, and every person so keeping such tavern, inn, retail store, public place, or house used as a place for gaming or such other house shall, upon being convicted thereof, upon indictment, be imprisoned for a period not exceeding twelve months and forfeit a sum not exceeding two thousand dollars, for each and every offense [12]

There is no dispute that conviction under the statute requires proof beyond a reasonable doubt of two elements that the defendant (1) engaged in a listed activity, (2) in a listed place [13] *See State v Laney*, 38 S C L (4 Rich) 193 (1850) ("Every playing of cards is not prohibited by [§ 16-19-40], it is only criminal when done at particular places, the place, therefore, must be alleged, because that enters into the definition of the offense ")

The activity relevant here is playing at "any game with cards" except whist,[14] whist is subject to prohibition only when the participants bet on the game Engaging in a listed activity is not by itself illegal, there is no *per se* prohibition on playing blackjack or roulette, for example These games are illegal *only* when conducted in one of the enumerated locations hotels and motels ("any inn"), businesses that sell alcohol ("any tavern [or] store for the retailing of spirituous liquors"), "any house used as a place of gaming", buildings *associated* with a residence ("any barn, kitchen, stable or other outhouse"),[15] and "any street, highway, open wood, race field or open place "

---

[12] The statutory language has existed without material change since 1816, although it has been codified at various locations in the South Carolina Code For the sake of simplicity, Respondents will refer to the post-1816 statutory language as § 16-19-40, regardless of its actual codification at any given time

[13] Alternatively, one may be convicted of being the keeper of a place where the prohibited activity is being carried out or of betting on a game when not a player Neither of these provisions is at issue here

[14] Whist is a card game that is a precursor to bridge www dictionary reference com/browse/whist

[15] In the early 19th century, when § 16-19-40 was enacted, the "kitchen" was not a part of the residence but rather was a separate, detached structure *See* "Plantation Kitchens," *available at* www hushpuppynation com/plantation-kitchens/ (last visited Feb 22, 2010), "Kitchen," *available at* http //en wikipedia org/wiki/Kitchen (last visited Feb 22, 2010)

The plain language of the statute therefore establishes the following

- With the exception of whist, one can *never* play "any game with cards," in any hotel, business that sells alcohol, "house of gaming," residential outbuilding, or open place,
- A game with cards (other than whist) in one of these locations is illegal regardless of whether the players bet on the game,
- One may play whist in a hotel, business that sells alcohol, "house of gaming," residential outbuilding, or open place so long as the players do not bet on the game,
- The statute imposes no prohibition on playing any game of cards in a private residence, *even if the players bet on the game*

In light of the State's arguments, certain aspects of the statutory language bear further discussion

1 By its terms § 16-19-40 does not apply to residences

The State contends "that § 16-19-40 may be applied to all gaming occurring in residences or dwelling houses " Br of Appellant at 20 This argument is contrary to the plain language of § 16-19-40, which nowhere mentions "residences or dwelling houses " The cases relied on by the State to prove that playing cards at home is illegal do not actually support this claim The State first contends that in *State v Faulkener*, 13 S C L (12 McCord) 438 (1823), "this Court recognized that § 16-19-40 may be applied to all gaming occurring in residences or dwelling houses " Br of Appellant at 20 *Faulkener* holds nothing of the sort, as even a cursory reading of the case establishes Defendant Faulkener challenged his conviction under § 16-19-40 on the basis that his particular location—a distillery—"was not such an out house as was contemplated by the act

---

("In the south, the kitchen was often relegated to an ōuthouse, separate from the mansion, [because] the kitchen was operated by slaves, and their working place had to be separated from the living area of the masters by the social standards of the time ")

against gaming" *Faulkener*, 13 S C L 438 The Court rejected this argument In so doing, the Court noted that as originally enacted in 1802, the statute prohibited playing "any game" at "any tavern, inn, store for the retailing of any spirituous liquors, or in any other public house, or in any street, high way, or in any open wood, race field, or open place" *Id* (internal quotation marks omitted) Because the listing of certain places "necessarily exclude[d] all others from the operation of the act," the prohibition was being defeated by playing in various outbuildings *Id* Therefore, in 1816 the Legislature added the words "any house used as a place of gaming, or in any barn, kitchen, stable or other out-house" *Id* (internal quotation marks omitted) Based on this legislative history, the Court concluded that the statute prohibited the playing of games in any residential outbuilding regardless of type, including a distillery *Faulkener* thus establishes that § 16-19-40 applies to residential outbuildings *but not the residence itself*—exactly the opposite of the proposition for which the State cites it

Neither does *State v Brice*, 4 S C L (2 Brev) 66 (1806) support the State's argument Defendant Brice challenged the sufficiency of an indictment under the *1802* version of the statute *Brice* thus tells us nothing about the meaning of "house used as a place of gaming" or "outhouse" because those terms were not then part of the statutory language Additionally, the majority issued no opinion The only legal analysis is found in Justice Brevard's dissent, and under his analysis, Respondents are innocent Noting that the statute was directed toward "keepers of taverns, &c ," Justice Brevard concluded that "[t]he legislature could not intend, that for a casual game being played in a man's house, he should forfeit the penalty" *Brice*, 4 S C L 66 (Brevard, J , dissenting)

In short, it is plain from the statutory language and applicable decisions of this Court that § 16-19-40 does not include a private residence within the list of places where card playing is prohibited This view is reinforced by *City of Greenville v Kemmis*, 58 S C 427, 36 S E 727 (1900) There, Kemmis appealed his conviction for violating a municipal ordinance that forbade "any person or persons to permit his, her or their enclosure or place or house to be used as a place for gaming with cards for money or other stake" *Id*, 36 S E at 729 (internal quotation marks omitted) Kemmis argued that the City of Greenville could not make illegal conduct (playing cards for money in a residence) that was not prohibited under § 16-19-40 *See id*, 36 S E at 728 It thus appears that the City of Greenville (which presumably enacted the ordinance to fill a gap left by the statute) did not believe that § 16-19-40 prohibited card playing, even for money, in a private residence This Court in *Kemmis* did not find otherwise, even though a holding that the prohibitions of the ordinance were duplicative of the prohibitions of the statute would surely have simplified the Court's analysis

Further, adoption of the State's position that any "gaming"—which it defines as playing any game of cards or dice for money—in a private residence is illegal would make criminals of parents and their teenagers playing penny-a-point gin rummy at home on family game night, the residents of a retirement home playing in a small-stakes bridge tournament, and countless others Such an absurd reading of the statute cannot be accepted *See Davis v Sch Dist of Greenville County*, 374 S C 39, 45, 647 S E 2d 219, 222 (2007) (holding that proper statutory construction must "prevent an interpretation that would lead to a result that is plainly absurd") It is no answer to suggest, as the State did in the circuit court, that § 16-19-40 would not be enforced against such violations R

p 46, line 16 – p 47, line 5, *id* p 49, lines 3-8 Selecting among which violations of a statute to prosecute based the arresting officer's subjective views (the weekly bridge game advertised on meetup com is allowed, but the weekly Texas Hold'em game advertised in the same way is not) is the height of arbitrariness *See Grayned v City of Rockford*, 408 U S 104, 108-09 (1972) (holding that a law is unconstitutional when it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application")

2 Section 16-19-40 does not prohibit all card games played for money

While the State insists upon inserting the words "for money" following the phrase "any game with cards or dice," this qualification is absent from the statute, which makes clear that betting is relevant only to the question of whether whist may be played in one of the enumerated locations Neither *State v Scarlet Red*, 41 S C L (7 Rich) 8 (Ct App 1853), nor *State v Robinson*, 40 S C 553, 18 S E 891 (1894), is to the contrary While these cases contain language indicating that betting renders illegal the playing of a game "with cards or dice," in both cases the statements were *dicta* because the defendant was admittedly playing for stakes, so the question of whether a conviction would be proper in the absence of betting was not before the court This Court should disregard *dictum* that is contrary to the plain language of the statute, which states—as Respondents have acknowledged all along—that playing cards in one of the enumerated locations is illegal *regardless* of whether the players bet on the game

B This Court should adopt the "dominant factor" test to determine whether a game is one of skill or chance

For the reasons set forth above, § 16-19-40 does not prohibit playing cards in a private residence The State maintains, however, that Stallings' home was not a private residence, it was a public "house used as a place of gaming " Respondents now turn to the issue of how this term is to be defined and why, under a proper definition of "gaming," Stallings' private residence was not a "house used as a place of gaming "

1 An activity is gaming or gambling only if it is a game of chance

The first and most basic question is, "What constitutes gaming?" In answering this question, this Court must look to the natural and ordinary meaning of the word *See Sloan v S C Bd of Physical Therapy Examiners*, 370 S C 452, 469, 636 S E 2d 598, 607 (2006) The parties agree that "gaming" and "gambling" are synonymous terms *Accord* BLACK'S LAW DICTIONARY 468-69 (6th ed 1991) The term "gambling" is defined as "play[ing] a game of chance for stakes " WEBSTER'S II NEW COLL DICTIONARY 459 (1999)

Black's Law Dictionary defines both "gambling" and "gaming" in terms of chance "Gambling" is defined as involving

> not only chance, but a hope of gaining something beyond the amount played Gambling consists of a consideration, an element of chance, and a reward The elements of gambling are payment of a price for a chance to win a reward

BLACK'S LAW DICTIONARY 468 "Gaming" is

> [t]he practice or act of gambling An agreement between two or more persons to play together at a game of chance for a stake or wager The elements of gaming are the presence of price or consideration, chance, and prize or reward

Id at 469, *see People v Hua*, 885 N Y S 2d 380, 383 (N Y Crim Ct 2009) (holding that "wagering on the outcome of a game of skill is not gambling"), *Town of Centerville v Burns*, 126 S W 2d 322, 322-23 (Tenn 1939) (using terms "gambling" and "gaming" interchangeably and holding that an activity is not gaming unless "chance is the controlling factor" (internal quotation marks omitted)) It is therefore not surprising that Black's also defines "gambling place," a term identical in connotation to "place of gaming," in terms of chance *See id* at 468 (defining "gambling place" as any place for "conducting lotteries or policy games, playing games of chance for money or other property, or playing gambling devices")

South Carolina case law defines "gaming" as playing at a game of chance *See e g*, *Johnson v Collins Entm t Co*, 333 S C 96, 101, 508 S E 2d 575, 578 (1998) (describing § 16-19-40 as "prohibiting games of chance or gambling devices") So too does the South Carolina Constitution, which declares that "[i]t shall be unlawful for any person holding an office of honor, trust or profit to engage in gambling or betting *on games of chance* " S C Const art XVII, § 8 (emphasis added) Further, the statute itself excludes from its ambit the card game of whist, placing it in the same class as pool, bowling, backgammon (a dice game), chess, and checkers, all of which are games of skill *See e g*, *Hua*, 885 N Y S 2d at 383-84 (noting that "games of chess, checkers, billiards and bowling are held to be games of skill" (internal quotation marks & alteration omitted), *Stubbs v Dick*, 89 N E 2d 480, 483 (Ohio Com Pleas 1949) ("[B]ridge in any form and similar social card games are games of skill and not games of chance ") The exclusion of a skill-based card game from the coverage of the statute indicates that the Legislature was concerned only with games of chance

Given that the term "gaming" refers specifically and exclusively to games of chance, the statutory term "place of gaming" must *necessarily* refer to a location in which games of chance are being played *See State v Black*, 94 N C 809, 1886 WL 987, at *3 (N C 1886) (holding that an indictment charging defendant with operating a gaming house did not need to specifically allege that the games played were games of chance, because that was implied by the term "gaming house") The State, however, argues that the statute itself "defines 'gaming' to include '[] any game with cards or dice '" Br of Appellant at 25 This reading collapses the two elements of the offense into one If "any game with cards or dice" is "gaming," then any place where a game with cards or dice is played is a "place of gaming " This reading violates established rules of statutory construction by rendering the list of other enumerated places superfluous *See State v Smith (In re Decker)*, 322 S C 215, 219, 471 S E 2d 462, 463 (1995)

2 Whether an activity is a game of chance should be determined according to the dominant factor test

The courts of the United States have recognized two possible tests for determining whether an activity is a "game of chance " Under the "dominant factor" test, an activity is a game of chance if "chance dominates the distribution of prizes, even though such a distribution is affected to some degree by skill or judgment " *Morrow v State*, 511 P 2d 127, 129 (Alaska 1973) Under the "pure chance" doctrine, a game is one of chance only if skill plays no part at all in the outcome *See id Accord Johnson v Collins Entm t Co* , 333 S C 96, 111-12, 508 S E 2d 575, 583 (1998) (Burnett, J , dissenting) (describing both doctrines)

The overwhelming majority of United States jurisdictions have adopted the dominant factor test to determine if an activity is gambling *See Morrow*, 511 P 2d at

129, *see also Johnson*, 333 S C at 113, 508 S E 2d at 584 (Burnett, J , dissenting) Moreover, it appears that this Court has already recognized the dominant factor test in at least one case, albeit without denominating it as such In *Darlington Theatres*, this Court was asked to decide whether a promotion being operated by a movie theater was a lottery in violation of state law In answering the question, the Court defined a "lottery" as a "species of gaming" and held that a lottery has three essential elements "(1) The giving of a prize, (2) by a method involving chance, (3) for a consideration paid by the contestant or participant " *Darlington Theatres*, 2 S E 2d at 786 (internal quotation marks omitted) As the circuit court recognized, this language "is very similar to that of the dominant factor test " R p 7 *Accord Horner v United States*, 147 U S 449, 458 (1893) (noting that "lottery" is defined as "a distribution of prizes by lot or chance"), *Johnson v Phinney*, 218 F 2d 303, 306 (5th Cir 1955) (holding that if chance predominates over skill "the game or device is a lottery"), *Commonwealth v Plissner*, 4 N E 2d 241, 244 (Mass 1936) ("With reference to cases where [elements of skill and chance are both] present, the rule generally stated is that if the element of chance rather than that of skill predominates, the game may be found to be a lottery ")

Although this Court has not yet definitively ruled on the question, retired Justice Burnett made a persuasive case for the adoption of the dominant factor test in *Johnson* *See Johnson*, 333 S C at 105-120, 508 S E 2d at 580-88 (Burnett, J , dissenting) *Johnson* tasked this Court with determining whether certain types of video gaming machines constituted lotteries in violation of the South Carolina Constitution The majority concluded that the machines were not lotteries under the narrow constitutional definition of "lottery" because no tickets were involved *Id* at 104, 508 S E 2d at 579 In

light of its holding, the majority declined to address the dominant factor test or the definition of the word "chance" *Id*

Justice Burnett, in dissent, found it necessary to define "chance" in light of his view that the constitutional prohibition against lotteries was not limited to games involving tickets In Justice Burnett's view, the Court had defined "lottery" in *Darlington Theatres* as "all schemes involving consideration, chance, and prize" *Id* at 111, 508 S E 2d at 583 (Burnett, J , dissenting), *see id* at 109 & n 4, 508 S E 2d at 582 & n 4 (noting that "[t]he majority of other jurisdictions have adopted the same three element test in defining the term 'lottery'" and citing numerous cases) Since the video gaming machines at issue clearly involved consideration and prize, the question of whether the machines were lotteries turned on the element of chance *See id* at 115, 508 S E 2d at 585

Justice Burnett concluded that whether a game was one of chance should be determined under the dominant factor test, which he noted was "supported by the majority of jurisdictions which have considered this question" *Id* at 114 & n 9, 508 S E 2d at 584 & n 9 (citing cases) He rejected application of the pure chance doctrine because "[u]nder [it] many obviously chance-based games, such as guessing contests, would not be lotteries" *Id* at 113, 508 S E 2d at 584 Then-Justice Toal joined Justice Burnett's dissent and emphasized in her own opinion that "[Justice Burnett] has set forth the legal standard which should be used to define the term lottery as it appears in South Carolina's Constitution in a manner which is faithful to our Court's precedents and well within the mainstream of American court decisions" *Johnson*, 333 S C at 120, 508 S E 2d at 588 (Toal, J , concurring in part and dissenting in part)

For the past 50 years, the Attorneys General of South Carolina have unanimously employed the "dominant factor" test in determining whether a game is one of skill or chance *See, e g*, Op Att'y Gen , 2003 WL 21108489 (May 5, 2003) (Attorney General McMaster) ("Historically, it has been the opinion of this Office, as well as a majority of jurisdictions in this country, that a 'game of chance' is one in which *the element of chance predominates* over any skill involved "), Op Att'y Gen , 2002 WL 31341815 (Aug 28, 2002) (Attorney General Condon) ("It is the opinion of this Office as well as a majority of jurisdictions in the United States that the 'Dominant Factor' test is the appropriate test to determine whether a game is a game of chance "), Op Att'y Gen , 1986 WL 289772 (Mar 24, 1986) (Attorney General Medlock) (opining that a golf tournament is not a lottery because "the element of chance is not dominant" in the play of golf), Op Att'y Gen , 1978 WL 22669 (Dec 5, 1978) (Attorney General McLeod) ("[S]o long as skill and judgment are non-dominant factors in winning, the coin-operated device is one of chance ") In fact, the current Attorney General, who represents the State in this litigation, has opined that this Court ' would likely accept the rule " Op Att'y Gen , 2006 WL 3522434, at *2 (Nov 1, 2006) [16]

This Court should now take the next step and formally adopt the dominant factor test as the means of determining whether an activity involves chance for purposes of

[16] It is therefore ironic that the State refuses to concede that this Court would adopt the dominant factor test Br of Appellant at 32 n 4 The State's position also begs the question of what test the State thinks the Court ought to adopt Would the State prefer that the Court adopt the pure chance doctrine?

South Carolina law [17] There is no reason to believe that the *Johnson* majority would not have adopted the dominant factor test had it needed to reach the question

C Texas Hold'em is predominantly a game of skill

1 The undisputed facts demonstrate that Texas Hold em is predominantly a game of skill

Under the dominant factor test, an activity is classified as either one of skill or chance depending on which element is dominant *See Morrow*, 511 P 2d at 129 The mere presence of some element of chance does not make an activity a game of chance *See, e g , Stubbs*, 89 N E 2d at 482 ("[T]he real test is whether chance is the determining element in the outcome of the game, and not whether the game contains elements of chance or skill "), *D'orio v Startup Candy Co* , 266 P 1037, 1038 (Utah 1928) (same) Four factors are commonly used to determine if skill predominates over chance

> (1) Participants must have a distinct possibility of exercising skill and must have sufficient data upon which to calculate an informed judgment (2) Participants must have the opportunity to exercise the skill, and the general class of participants must possess the skill (3) Skill or the competitors' efforts must sufficiently govern the result [and] (4) The standard of skill must be known to the participants, and this standard must govern the result

Morrow, 511 P 2d at 129 Application of the dominant factor test is an inherently factual inquiry, requiring a case-specific assessment of the nature of the game and the relative roles of skill and chance in game play *See, e g , id* at 130 (holding that the defendant was "entitled to a trial on the factual issue of the predominance of chance or skill"),

---

[17] The State claims that this Court rejected the dominant factor test in *Scarlet Red*, but it seriously misreads this Court's decision There, the defendant contended that what appeared to be a prohibited game of chance—a shell game known as Thimbles and Balls—was actually a game of skill because he won through the exercise of dexterity *See Scarlet Red*, 41 S C L (7 Rich) 8 The Court refused to accept this argument because doing so would leave the defendant free to cheat competitors by falsely claiming

Williams v Justice Court, 40 Cal Rptr 724, 731 (Cal Dist Ct App 1964) (holding that the question of whether an activity is one of skill or chance is "largely factual")

The extensive and uncontroverted evidence in the record demonstrates beyond question that Texas Hold'em is predominantly a game of skill As Mike Sexton explained, "[T]he object of poker is to make correct decisions If you make enough correct decisions, you're going to be a winning player " R p 213, lines 16-19 The ability to make correct decisions comes from the exercise of numerous and varied skills So-called "soft skills"—the ability to "read" people and situations, for example—allow a player to make decisions such as when to fold and whether to bluff R p 208, line 14 ("[P]oker's a people game ") The ultimate expression of this skill is the ability to put a player "on a hand," *i e* , to correctly deduce a player's hole cards based simply on his playing behavior One noted authority in Texas Hold'em has declared that a skilled player should be able to win a tournament without ever looking at his own hole cards R p 217, line 25 – p 218, line 10 This theory was proven in 2007, when Norwegian player Annette Obrestad won an entire 180-person Texas Hold'em tournament without *ever* looking at her hole cards, save for a single "peek" early in the game *See* Stig Moen, "Oh, To Be 18 Again," *Card Player*, Nov 13, 2007

In addition to being able to interpret the signals of others, the skilled Texas Hold'em player must develop a "poker face" in order to conceal from the others his feelings and intentions during the game So-called "hard skills" are also critical to success at Texas Hold'em For example, the ability to calculate odds enables a player to

---

that the game was one of chance *See id*

make an informed judgment regarding whether the potential reward of a given hand is worth the risk

Empirical evidence proves that the exercise of skill plays a determinative role in Texas Hold'em Study after study has demonstrated that players with more skill will prevail over players with less skill, and that one's skills can improve over time The Attorney General has recognized that the ability to improve over time is a hallmark of a game in which skill predominates *See* Op Att'y Gen , 2006 WL 3522434, at *4 (Nov 1, 2006) (concluding that a hockey puck tossing contest "clearly involves a game of skill" because, as in golf, "practice improves performance") Moreover, a study of 103 million hands of Texas Hold'em revealed that the best cards *lost the hand* 88 percent of the time Experience confirms what the studies show Like professional golfers, professional Texas Hold'em Players abound, indicating that one can earn a living from playing the game In contrast, there is no such thing as a "professional" craps player, for the simple reason that in a game that is based primarily on chance and which has a built-in house edge, one cannot influence the outcome so as to be successful often enough to earn a living

In light of evidence like that presented to the municipal court, courts have treated poker as a game of skill *See e g , Harris v Missouri Gaming Comm n*, 869 S W 2d 58, 64 (Mo 1994), *United States v 294 Various Gambling Devices*, 718 F Supp 1236, 1240, 1243 (W D Penn 1989) *Accord People v Mitchell*, 444 N E 2d 1153, 1031 (Ill App Ct 1983) (Heiple, Judge, dissenting) ("This allegation [that Texas Hold'em is a game of chance] is a canard Anyone familiar with even the barest rudiments of the game knows better ") In the recent case of *Commonwealth v Dent*, the court analyzed the

evidence at length and concluded that Texas Hold'em is predominantly a game of skill *See Commonwealth v Dent*, No 733-OF-2008, slip op at 13-14 (Penn Com Pleas Jan 14, 2009)

The courts that have reached the contrary conclusion have, to the extent they offered any analysis at all, relied on the principle that "[n]o amount of skill can turn a deuce into an ace" *Joker Club LLC v Hardin*, 643 S E 2d 626, 630 (N C Ct App 2007) These courts fail to recognize that Texas Hold'em is not a single-hand game R p 232, lines 4-8 (describing game of Texas Hold'em that lasted 7½ hours) Whether one receives good or poor cards in a single hand is unimportant, the important thing is what one *does* with those cards As Mike Sexton explained, "Well, it's true You can't change an ace from a deuce But you can recognize that the more skillful players will win more money when they catch an ace, and they'll lose less money when they catch a deuce" R p 239, lines 10-14 This is precisely why folding, patience, and self-discipline are critical skills for a successful Texas Hold'em player—they are the skills that enable a player to win over time Furthermore, the dominant factor test does not demand that the outcome be determined *solely* by skill, for an element of chance is present in virtually every competition *See PGA Tour, Inc v Martin*, 532 U S 661, 686-87 (2001) (observing that chance is not entirely absent from the skill-based game of golf because course conditions may differ between players on the same day and because "[a] lucky bounce may save a shot or two") "The test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor in determining the result of the game" *In re Allen*, 377 P 2d 280, 281 (Cal 1962), *Mitchell*, 444 N E 2d at 1157

(Heiple, Judge, dissenting) ("There is an element of luck in everything in life But everything that contains an element of luck is not gambling ")

This court should affirm the municipal court's holding that Texas Hold'em is predominantly a game of skill

2 The State has waived any argument that Texas Hold em is not predominantly a game of skill

In both the municipal court and the circuit court, the State argued only that the question of skill or chance was *irrelevant* to Respondents' guilt The State did not argue to the municipal court that Texas Hold'em is a game of chance, and it did not challenge that court's finding that Texas Hold'em is a game of skill in the circuit court In short, the argument presented at pages 31-35 of the State's brief has never been made, much less preserved for appellate review This Court therefore should not consider the State's argument *See Doe v S B M*, 327 S C 352, 356, 488 S E 2d 878, 880-81 (Ct App 1997)

D A private residence in which Texas Hold'em is played is not a "house used as a place of gaming "

Under well-established rules of statutory construction, it is plain that the terms "gaming" and "gambling" refer exclusively to games of chance Because the dominant factor test is consistent with existing case law and is preferable as a matter of policy, this Court should adopt it as the method for determining whether an activity is a game of skill or chance Applying that test, Texas Hold'em is a game of skill Because Texas Hold'em was the only game played in Stallings' home, the residence could not have been a "house used as a place of gaming " The circuit court should be affirmed

E The State attacks straw men

1 A private residence can become a house used as a place of gaming

The State argues at length against Respondents' supposed position that a residence can never be a "place of gaming." Br. of Appellants at 11-13, 21-24. However, Respondents have not once claimed that a residence can never be treated as a "place used as a house of gaming" under § 16-19-40. The only argument Respondents have ever made is that *Stallings'* residence was not a "place used as a house of gaming" on the night of April 12, 2006, because Texas Hold'em, being a game of skill, is not "gaming" for purposes of determining whether a place is being used as a "house of gaming."

2 The State is wrong to claim that it is "irrelevant" whether Texas Hold'em is a game of skill or chance

The State accuses the circuit court of rewriting § 16-19-40 by holding that a card game is prohibited only if it is not a game of skill. Br. of Appellant at 24-25. The State contends (and indeed, Respondents agree) that in § 16-19-40 "the Legislature has prohibited 'any game with cards or dice' in the places specified." *Id.* at 25. Respondents have never disputed that Texas Hold'em is a "game with cards," thus satisfying the second element of § 16-19-40. The only disputed question is whether Respondents were in a "house used as a place of gaming." As to this issue, Respondents maintain that the term "gaming" encompasses only games of chance and that Texas Hold'em is predominantly a game of skill. Because Texas Hold'em, the only game being played in Stallings' residence on April 12, 2006, is not "gaming," Stallings' residence necessarily could not have been a "house used as a place of gaming."

3 *Holding that Respondents conduct was legal does not open the door to casinos in South Carolina*

The State claims that "[t]he Circuit Court's reasoning immunizes from our gambling statute's reach large-scale casino gambling merely based upon the fact of where that gaming occurs" Br of Appellant at 11 This contention is utterly without basis The circuit court's decision does nothing more than protect from criminal prosecution the simple, harmless, and common act of gathering together to play Texas Hold'em

Even if the lower court's decision were subject to a broader reading, the grim picture painted by the State is more fantasy than fact Regardless of the legality of Texas Hold'em under state law, counties and municipalities are free to impose their own restrictions on the play of Texas Hold'em *See Foothills Brewing Concern Inc v City of Greenville*, 377 S C 355, 365-66, 660 S E 2d 264, 269-70 (2008) (holding that a municipality may enact an ordinance imposing civil penalties for conduct not prohibited by state law)

II ALTERNATIVELY, STALLINGS' RESIDENCE WAS NOT A "HOUSE USED AS A PLACE OF GAMING" BECAUSE HE TOOK NO PROFIT AND THE HOME WAS NOT OPEN TO THE PUBLIC

Respondents contend that the foregoing analysis is dispositive of this appeal However, even if this Court disagrees with Respondents that Texas Hold'em is not "gaming," the circuit court should nevertheless be affirmed because the record evidence is insufficient to establish that Stallings' residence was a "house used as a place of gaming "

South Carolina is not unique in prohibiting the playing of certain games in a "place of gaming" or some similarly designated place The purpose of such statutes is not to prohibit gaming *per se*, but rather "to prevent gaming at places which are within the observation of persons indiscriminately, because of the consequences resulting from the evil example " *Gomprecht v State*, 37 S W 734, 735 (Tex Crim App 1896) If this Court were to adopt the State's position, however, South Carolina would be alone in holding that merely playing Texas Hold'em for money in a private residence makes that home a "place of gaming" and renders the players subject to prosecution [18] *See Davis v State*, 165 S W 2d 757, 758 (Tex Civ App 1942) (holding that evidence that the defendants were playing poker in a hotel room for money was "no proof" that the hotel

[18] The State cites a number of cases that it claims hold that playing cards for money is "gaming " In each case, however, the statute or ordinance specifically identified playing cards for money as the prohibited conduct *See Commonwealth v Hubbard*, 69 Pa D & C 2d 571 (Pa Com Pleas 1974) (statute prohibited allowing one's premises to be used for playing games for money), *City of Greenville v Kemmis*, 58 S C 427, 36 S E 727, 728-29 (1900) (city ordinance prohibiting "gaming[] for money in the City of Greenville"), *State v Laney*, 38 S C L (4 Rich) 193 (Ct App 1850) (prohibiting "any white person" from playing "any game of chance" with "any free negro or person of color, or slave" or from betting on those playing)

room was a gambling house) Rather, other states have concluded that a residence becomes a "place of gaming" only when certain factors are present

For example, many courts have held that whether a location is a "place of gaming" depends upon whether the host takes a cut of the profits or charges for admission to the game *See e g*, *Village of Atwood v Otter*, 129 N E 573, 578 (Ill 1920) (holding that a purportedly private amusement club was actually a "place of public resort" when the evidence established that anyone who paid the membership fee was admitted, even if not meeting the other criteria for membership), *Simons v State*, 120 S W 208, 211 (Tex Crim App 1909) (holding that the defendant's home was a "gaming house" in part because the defendant took a profit), *Miller v State*, 34 S W 959, 960 (Tex Crim App 1896) (defining "gaming house" as one operated "for the profits to be derived from the games there played") This Court recognized and applied this very principle in *State v O'Neal*, 210 S C 305, 42 S E 2d 523, 527 (1947), holding that the owner of a night club was properly convicted as the keeper of a gaming house when "a certain percentage of the amount staked on each game was deducted for the benefit of the 'house '"

Here, the testimony established, and the municipal court specifically found, that Stallings did not take a "house profit " He took money from the pot only to cover the expense of food and beverage, and he frequently took too little to cover those costs R p 158, lines 2-9 This factor therefore does not support a conclusion that Stallings' residence was a "place of gaming "

A second factor considered by courts is whether the location is generally open to the public, at any time and without invitation In considering this factor, courts have

stated that in order for a private location to become a "place of gaming," it must be open to the public in general, at any time someone might wish to enter *See, e g , Toll v State*, 23 So 942, 944 (Fla 1898) (holding that a room where card games were played was a "gaming room" when it was accessed from the defendant's bar and bar patrons had free access to the room), *Cole v State*, 13 S W 859, 859 (Tex Ct App 1890) (holding that a place is a "public house" by virtue of "the occupation carried on in them or by the resort of numerous persons")

Stallings' uncontradicted testimony was that the games at his house were not open to the general public One had to be known to Stallings, or known to someone known to Stallings, to be invited The house was not "thrown open" to the public *Pugh v State*, 117 S W 817, 817 (Tex Crim App 1909) To the extent the State contends that a residence may become a public place solely on the basis of the number of people present, such a rule would be impossible to enforce That Stallings posted information about the games on a web page he controlled makes no difference South Carolina residents notify others of events and games of all types on the web site in question, www meetup com

In summary, even if the fact that Texas Hold'em is a game of skill is not alone sufficient to establish that Stallings' residence was not a "house used as a place of gaming," the State is required to prove something more than the mere fact that people gathered at Stallings' home to play Texas Hold'em For example, proof that Stallings took a profit or that the general public was free to enter his home at virtually any time might justify a different result The record is devoid of any such proof, however The absence of such evidence is an alternative basis on which to affirm of the circuit court

III THE TERM "HOUSE USED AS A PLACE OF GAMING" IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD

As written, the prohibition on playing cards in a "house used as a place of gaming" provides no guidance whatsoever as to its proper application and is therefore unconstitutionally vague Further, the statute is overbroad in that it criminalizes a vast array of entirely innocent conduct

A Section 16-19-40 is vague

It is well settled that the Due Process Clauses of the state and federal Constitutions forbid this State from holding an individual "criminally responsible for conduct which he could not reasonably understand to be proscribed" *United States v Harriss*, 347 U S 612, 617 (1954) The prohibition on vagueness "rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication" *City of Beaufort v Baker*, 315 S C 146, 152, 432 S E 2d 470, 473 (1993), *see Grayned v City of Rockford*, 408 U S 104, 108 (1972) While the Constitution does not require absolute precision, *see Rose v Locke*, 423 U S 48, 49-50 (1973), "the provisions of a penal statute [must be] sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judge and jury of standards for the determination of guilt" *Gunyard v State*, 260 S C 220, 226, 195 S E 2d 392, 394 (1973) Therefore, a law that "forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application" violates the Due Process Clause *Curtis v State*, 345 S C 557, 572, 549 S E 2d 591, 598 (2001)

A statute may be vague on its face or as applied A criminal statute is facially vague when it "fails to establish standards for the police and public that are sufficient to

guard against the arbitrary deprivation of liberty interests," particularly when—as here—the statute lacks a scienter requirement *City of Chicago v Morales*, 527 U S 41, 52 (1999) (plurality opinion) When the law in question imposes criminal penalties, "the standard of certainty is higher" and therefore it may be facially invalid "even when it could conceivably have had some valid application " *Kolender v Lawson*, 461 U S 352, 358 n 8 (1983) A law is vague as applied when someone in the defendant's position cannot reasonably discern whether his conduct is prohibited *See Grayned*, 408 U S at 108

Section 16-19-40 is unconstitutionally vague on its face and as applied to Respondents The record of these proceedings amply demonstrates that "a person of common intelligence must necessarily guess" at the meaning of the phrase "house used as a place of gaming " *Curtis*, 345 S C at 572, 549 S E 2d at 598 At trial, Respondents' counsel cross-examined Officer Hembree regarding his understanding of the statute as a law enforcement officer responsible for enforcing it [19] Officer Hembree initially testified that the key factor in determining whether a home game violates § 16-19-40 is whether the house is taking a profit R p 101, line 23 – p 103, line 14 When asked to assume that there was no house profit, Officer Hembree stated that the game would nevertheless be illegal if the players met as often as once a week, regardless of the number of players R p 106, lines 5-17 After further discussion, however, Officer Hembree stated that a

[19] The discussion that follows is not to be taken as a criticism of Officer Hembree, who unquestionably acted in good faith based on his understanding of the statute The point, rather, is that the meaning of the term "house of gaming" is so obscure that even an experienced law enforcement officer, such as Officer Hembree, can only guess at it

game where there is no house profit does not violate the statute R p 109, line 11 – p 110, line 10

The circuit court clearly recognized the problem

THE COURT I don't know how much they played for but I know that my aunt played bridge twice a month, in a house, and they all put in some money and somebody provided food Under your theory, that's gambling

MR GROSSMAN No, it's not a gaming house

THE COURT Whoa, whoa She invited all sorts of people and sometimes they had somebody that wasn't one of the regulars

MR GROSSMAN Doesn't make a difference

THE COURT On what distinction?

MR GROSSMAN How would Your Honor define a gaming house?

THE COURT That's the problem That's precisely the problem If I can't define it, then isn't there something wrong? Isn't there something wrong if I can't give you a definition?

MR GROSSMAN I think that the definition of it is, if you go by Black's Law Dictionary "Gambling is the active risk of something of value, especially money, for a chance to win a prize "

Now, they [have] a definition for "gambling place " "Any location where gambling occurs "

Now, so under your definition –

THE COURT No Under that definition then my aunt's house was a gambling house

MR GROSSMAN Technically

THE COURT Technically? There's no technically about it

R p 46, line 16 – p 49, line 8 Further, the State acknowledged the limitless discretion conferred on law enforcement officers and prosecutors when it argued, "It is not illegal, *in my reading of the statute*, for a group of friends to get together and gamble, play poker in their house " R p 39, lines 4-7

The foregoing portions of the record demonstrate that neither the individuals subject to the prohibitions of the statute, nor the police officer charged with identifying violations of the statute, nor the prosecutor charged with enforcing the statute, nor the Attorney General of South Carolina (whose brief espouses several contradictory theories) understood its meaning and scope The term "house used as a place of gaming" is so vague that it provides no notice of the conduct prohibited and allows arbitrary and discriminatory enforcement As written and as applied to Respondents, it is unconstitutionally vague

B Section 16-19-40 is overbroad

Section 16-29-40 is overbroad, and violates the Due Process Clause, if it "makes criminal activities which by modern standards are normally innocent " *Papachristou v City of Jacksonville*, 405 U S 156, 163 (1972) If, as the State contends, simply playing a "game with cards or dice" turns an otherwise private location into a "house used as a place of gaming," Br of Appellant at 25, the reach of the statute is breathtaking, amounting to an absolute prohibition on the playing of any card game (be it Texas Hold'em or Go Fish) anywhere within the geographical boundaries of South Carolina

C The statute can be saved by limiting construction

Despite the vagueness and overbreadth of the statute, this Court need not declare it unconstitutional Before invalidating a law on constitutional grounds, the reviewing

court must consider any limiting constructions in extant case law *See Village of Hoffman Estates v Flipside, Hoffman Estates, Inc* , 455 U S 489, 495 n 5 (1982), *State v Avery*, 255 S C 570, 573-74, 180 S E 2d 190, 192-93 (1971) And, this Court has recognized that if possible, a statute must be construed so as to avoid a constitutional problem *See Edwards v State*, 383 S C 82, 91-92, 678 S E 2d 412, 417 (2009), *State v Neuman*, 384 S C 395, 402, 683 S E 2d 268, 271 (2009) ("[A]ll statutes are presumed constitutional and, if possible, will be construed to render them valid ") Further, when a portion of a statute is unconstitutional, the court should sever the unconstitutional portion if the rest of the statute "remains complete in itself " *Curtis*, 345 S C at 571, 549 S E 2d at 598

Respondents believe and suggest to this Court that the phrase "house used as a place of gaming" is not vague or overbroad if the term "gaming" is defined in its ordinary sense, as referring to games of chance, with the result that playing a game of skill, such as Texas Hold'em, in a private residence is not prohibited under the statute So construed, the statute would provide fair notice of the conduct prohibited, and its prohibitions would not have an unreasonably broad sweep Alternatively, the term "house used as a place of gaming" should be construed to apply only to locations operated as businesses—where the host takes a profit and the public is welcome to come and go at virtually any time

CONCLUSION

This case is not about flinging open South Carolina's doors to Vegas-style casinos It is not about public card rooms or professional gambling, and it is certainly not about video poker Every single one of those things is absolutely prohibited under Respondents' proposed construction of the statute This case is about the liberty of the citizens of this state to gather together in pursuit of a common hobby Nathan Stallings

hosted casual, low-stakes games of Texas Hold'em, a game in which the outcome is determined by the skill of the players, in his home He took no profit from the game and did not indiscriminately admit all comers His conduct, and that of Respondents, is identical to what occurs in bridge clubs and Bunco groups all over this State It surely cannot be the case, under any reasonable construction of § 16-19-40, that this conduct is illegal The decision of the circuit court should be affirmed

(SIGNATURES ON FOLLOWING PAGE)

William W Wilkins
Kirsten E Small
NEXSEN PRUET, LLC
55 East Camperdown Way (29601)
Post Office Drawer 10648
Greenville, South Carolina 29603-0648
PHONE 864 370 2211
BWilkins@nexsenpruet com

Jeffrey A Phillips KES
PHILLIPS LAW FIRM
404 North Main Street
Travelers Rest, SC 29690
PHONE 864 834 7171
AttyJeff@Bellsouth net

May 3rd, 2010
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-001551

Robert L Chimento, Scott Richards, Michael Williamson,
Jeremy Brestel, and John T Willis — Respondents

vs

Town of Mount Pleasant — Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR

Jeffrey A Phillips KES
PHILLIPS LAW FIRM
404 North Main Street
Travelers Rest, South Carolina 29690
PHONE 864 834 7171
AttyJeff@Bellsouth net

William W Wilkins
Kirsten E Small
NEXSEN PRUET, LLC
55 East Camperdown Way (29601)
Post Office Drawer 10648
Greenville, South Carolina 29603-0648
PHONE 864 370 2211
BWilkins@nexsenpruet com

ATTORNEYS FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-001551

Robert L Chimento, Scott Richards, Michael Williamson,
Jeremy Brestel, and John T Willis — Respondents

vs

Town of Mount Pleasant — Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondents complies with South Carolina Supreme Court's August 13, 2007 Order

Jeffrey A Phillips KES
PHILLIPS LAW FIRM
404 North Main Street
Travelers Rest, South Carolina 29690
PHONE 864 834 7171
AttyJeff@Bellsouth net

William W Wilkins
Kirsten E Small
NEXSEN PRUET, LLC
55 East Camperdown Way (29601)
Post Office Drawer 10648
Greenville, South Carolina 29603-0648
PHONE 864 370 2211
BWilkins@nexsenpruet com

ATTORNEYS FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R Markley Dennis, Jr , Circuit Court Judge

Case No 2009-CP-10-001551

Robert L Chimento, Scott Richards, Michael Williamson,
Jeremy Brestel, and John T Willis — Respondents

vs

Town of Mount Pleasant — Appellant

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondents on Appellant by depositing a copy of it in the United States Mail, postage prepaid, on May 3rd, 2010, addressed to its attorney of record, The Honorable Henry McMaster, care of Deputy Attorney General, Robert D Cook, Esq , P O Box 11549, Columbia, South Carolina 29211

William W Wilkins
NEXSEN PRUET, LLC
55 East Camperdown Way (29601)
Post Office Drawer 10648
Greenville, South Carolina 29603-0648
PHONE 864 370 2211
BWilkins@nexsenpruet com