

**THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

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**APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
The Honorable R Markley Dennis, Jr , Circuit Court Judge**

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C A No 2009-CP-10-001551

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Robert L Chimento, Scott Richards, Michael Williamson,  
Jeremy Brestel, and John Taylor Willis

Respondents,

v

Town of Mount Pleasant

Appellant

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**BRIEF OF AMICUS CURIAE  
THE POKER PLAYERS ALLIANCE  
IN SUPPORT OF RESPONDENTS**

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## STATEMENT OF INTEREST

*Amicus curiae* the Poker Players Alliance is a nonprofit organization whose members are poker players and enthusiasts from around the United States. The Alliance, which works to protect the legal rights of poker players including many thousands of ordinary South Carolinians who play poker, was involved in these proceedings in both of the lower courts. The group's membership has a direct interest in the outcome of this case, because it will determine whether they are permitted to play Texas Hold'em poker in South Carolina or instead will be branded as criminals. *Amicus* appears in order to address issues not otherwise fully briefed by the parties themselves.

## ARGUMENT

The State's appeal to this Court presents a narrow legal question. To resolve the case in Respondents' favor, this Court need only rule that a home game of poker does not violate S.C. Code Ann. § 16-19-40 (2003). Respondents were charged with playing cards in a "house used as a place of gaming" in violation of that statute. As the State and Respondents have agreed, "gaming" in the statute means "gambling." *Amicus* agrees with Respondents that, under South Carolina law, Texas Hold'em is not "gambling" because the outcome is determined predominantly by skill rather than chance. See Br. of Respondents ("Resp. Br.") at 20–25. In this brief, *amicus* explains why the question under the statute is whether skill predominates over chance in Texas Hold'em, why skill does in fact predominate over chance in Texas Hold'em, and why Respondents' particular conduct here therefore does not violate the statute. This brief further explains why the State's proffered interpretation of the statute should be rejected, because it would criminalize the casual and harmless games of poker enjoyed by so many of this State's citizens.

## **I South Carolina Law Does Not Prohibit Gaming Unless Chance Predominates Over Skill**

Respondents were charged with violating Section 16-19-40 by playing poker in a private home. To show that playing poker in such a setting violated the statute in this criminal case, the State had to prove beyond a reasonable doubt that poker is a game in which the outcome is determined predominantly by chance rather than skill. That is true because Section 16-19-40 prohibits playing “any game with cards or dice” in “any house used as a place of gaming.” It necessarily follows that the State could only show that the house in question was being “used as a place of gaming” if there was “gaming” taking place at the house.

As an initial matter, “gaming” in Section 16-19-40 means “gambling,” as both parties here have agreed since the inception of this case. This Court has consistently treated the terms as equivalents, as in *State v Lane*, 82 S C 144, 144, 63 S E 612, 613 (1909), and *Video Gaming Consultants Inc v Dep't of Revenue*, 342 S C 34, 44, 535 S E 2d 642, 648 (2000), in which the Court used them interchangeably. See also *Rorrer v PJ Club Inc*, 347 S C 560, 566, 556 S E 2d 726, 729 (Ct App 2001) (purpose of statute allowing “right to recover excessive gambling losses” is to “punish excessive gaming”). It is thus common ground that this appeal turns on whether Texas Hold'em poker is gambling.

The generally accepted test for whether an activity is “gambling”—so well accepted that it is known as “American rule”—is the so-called “dominant factor” test, which provides that an activity is not gambling if skill predominates over chance in determining the outcome of the activity. That test has been adopted by the highest courts of numerous states, including Nebraska, California, Nevada, North Carolina, Utah, Mis-

souri, and Alaska See e.g., *Indoor Recreation Enters Inc v Douglas*, 235 N W 2d 398, 400 (Neb 1975), *In re Allen*, 377 P 2d 280 (Cal 1962), *Las Vegas Hacienda Inc v Gibson*, 359 P 2d 85, 87 (Nev 1961), *State v Stroupe*, 76 S E 2d 313, 316–17 (N C 1953), *D Orto v Startup Candy Co*, 266 P 1037, 1038 (Utah 1928), *Harris v Missouri Gaming Commission*, 869 S W 2d 58, 62 (Mo 1994), *Morrow v State*, 511 P 2d 127, 129 (Alaska 1973)

The court below correctly recognized that the courts of a number of states follow the dominant factor test (R p 6), and concluded that the test would be the law in this State as well. It based its conclusion on this Court’s decision in *Darlington Theatres v Coker*, 190 S C 282, 2 S E 2d 782 (1939), and on the opinions of Justice Burnett and Chief Justice (then Justice) Toal in *Johnson v Collins Entertainment Co*, 333 S C 96, 508 S E 2d 575 (1998). The court below noted in particular Chief Justice Toal’s conclusion that Justice Burnett’s opinion approving the dominant factor test “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.” R p 9 (quoting *Johnson*, 333 S C at 120, 508 S E 2d at 588 (Toal, J, concurring and dissenting))

In *Johnson*, the question was whether video gaming machines constituted a “lottery” under the South Carolina Constitution. The majority decided that the machines were not a lottery, establishing a principle that the term “lottery” in particular is to be narrowly construed. *Id* at 102. The majority opinion, therefore, did not reach the more general question of what constitutes gambling. Justice Burnett in dissent, however, read the term “lottery” more broadly, finding support in *Darlington Theatres*. Under that case,

Justice Burnett’s opinion understood the term lottery to describe any game involving “(1) [t]he giving of a prize, (2) by a method involving chance, (3) for a consideration paid by the contestant or participant,” *Johnson*, 333 S C at 108–09, 508 S E 2d at 581–82, thus reading the term “lottery” to be expansive enough to cover gambling in general<sup>1</sup> From there, Justice Burnett’s opinion (unlike that of the majority) had to determine what degree of chance is required to satisfy the second prong of the test Justice Burnett’s opinion reasoned that the American rule should apply (as it does in a majority of jurisdictions—by court ruling), and concluded that “where the dominant factor in a participant’s success or failure in a particular scheme is beyond his control, the scheme is a lottery” *Id* at 113, 584<sup>2</sup>

The logic of Justice Burnett’s opinion, approved in the separate opinion of Chief Justice Toal, is convincing, and this Court should confirm that it states the law in South Carolina The wealth of authority that Justice Burnett’s opinion collects demonstrates that the overwhelming majority view in American law in cases of this sort is that the dominant factor test states the proper question *See id* at 114, 584 n 10 (collecting cases) As the court below noted, Justice Burnett’s view is bolstered significantly by the fact that the Attorney General previously had “consistently stated that the test of whether

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<sup>1</sup> Chance consideration and prize are widely recognized as the three elements of gambling *See e.g. Midwestern Enters Inc v Stenhjem* 625 N W 2d 234 237 (N D 2001) ( The three elements of gambling are generally recognized as consideration prize, and chance ) *Monte Carlo Parties Ltd v Webb*, 322 S E 2d 246 248 (Ga 1984) ( The crime of gambling in Georgia consists of three elements consideration chance and prize ) *Pennsylvania v Irwin* 636 A 2d 1106, 1107 (Pa 1993) ( The three elements of gambling are (1) consideration (2) a result determined by chance rather than skill, and (3) reward ), *Kraus v City of Cleveland* 19 N E 2d 159, 161 (Ohio 1939) ( there is involved in the game three elements of gambling namely chance price and a prize )

<sup>2</sup> As Justice Burnett noted under the alternative common law rule the British rule a game requiring *any* amount of skill at all would be outside the ambit of gambling *See id* at 112–13 583–85

a particular game is a game of chance or skill is governed by the so-called ‘predominance’ test” S C Att’y Gen Op dated Jan 22, 2004 (*citing* S C Att’y Gen Ops dated Aug 2, 2001, Sept 5, 1995, Dec 5, 1978)<sup>3</sup> The statute appropriately is understood to incorporate this common law rule, given the presumption that the Legislature acts against the background of, and in accordance with, the common law *E g*, *Nuckolls v Great Atl & Pac Tea Co*, 192 S C 156, 161, 5 S E 2d 862, 864 (1939), *see e g*, *City of Myrtle Beach v Juel P Corp*, 344 S C 43, 48, 543 S E 2d 538, 540 (2001) (applying the common law timeframe for “abandonment” when an ordinance using the term failed to otherwise define it)

Any other rule, including the position now advocated by the Attorney General—that South Carolina suppresses gambling by suppressing *all* card and dice games (Br of Appellant (“App Br”) at 25)—would mean that Section 16-19-40 would suppress a game of bridge or Monopoly That cannot be the law It is true that the text of the Section *could* be read to prohibit “any game with cards or dice,” but that definition cuts too broadly to be sustained<sup>4</sup> “However plain the ordinary meaning of the words used in a statute may be,” this Court will “reject that meaning when to accept it would lead to a

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<sup>3</sup> In the opinion cited, the Attorney General was correct in its assessment of the law *ie* that the dominant factor test applies He erred, however in his determination that card games such as poker are generally games of chance S C Att’y Gen Op 2004 WL 235411 (Jan 22 2004) For the reasons explained in the text and as the court below found (R p 10) Texas Hold Em is a game of skill not of chance

<sup>4</sup> *Amicus* is aware that the Legislature recently failed to act on several bills, including one that would have clarified the applicability of § 16 19 40 *See* H 4267 118th Gen Assem 1st Sess (S C 2009) That the Legislature ran out of time to take up a bill is not tantamount to its endorsement of the existing vague statute *See Langley v Boyter* 284 S C 162 178 325 S E 2d 550 559 (S C Ct App 1984) *rev d on other grounds* 286 S C 85 (observing that it would be wrong to conclude that courts should be guided by legislative inaction) Nor should legislative inaction preclude this Court from clarifying that the common law background against which the original legislation must be read incorporates the predominance test Interpreting the law, especially the common law, is the role of the courts *Cf Marbury v Madison* 5 U S (1 Cranch) 137 177 (1803)

result so plainly absurd that it could not possibly have been intended by the Legislature

” *Broadhurst v City of Myrtle Beach Election Comm n*, 342 S C 373, 380, 537 S E 2d 543, 546 (2000)

But here, it is not necessary to resort to the absurd results, because the State’s proffered interpretation is simply not the better reading of the statutory text. The statute qualifies its prohibition on “any game with cards or dice” by specifying that the game must also be played in a “house used as a place of gaming.” As Respondents observe, the State’s reading would eliminate the requirement that the house be “used as a place of gaming” from the statute, and would result in an interpretation that would sweep in an enormous amount of innocent play. Resp. Br. at 18. That is an absurd result that a proper interpretation of the law must avoid. Otherwise, what would prevent a SWAT team from hauling a group of retirees away from a penny-ante game of bridge, also a game of skill, as Respondents were hauled away from their low-stakes Texas Hold’em game? This absurdity can be avoided by reading Section 16-19-40 in conjunction with the dominant factor test.

The State raises the specter of judicial activism in claiming that “by injecting a ‘chance versus skill’ analysis, [into] the use of § 16-19-40, the Circuit Court ignored the Legislature’s clear mandate that the playing of ‘*any game* with cards or dice’ in the specified locations enumerated in the statute is expressly prohibited.” App. Br. at 8 (emphasis added in App. Br.). However, the State cannot even bring itself to seriously apply the “plain language” of § 16-19-40, which would forbid playing *all* games with cards or dice in South Carolina. Instead, the State qualifies its position by contending that “any game with cards or dice *for money* [is] considered ‘gaming.’” App. Br. at 26 (emphasis added).

The limitation that the game be played for money is not, however, in the text of the statute to which the State would otherwise adhere, but comes from dicta in this Court's opinion in *State v Robinson*, 40 S C 553, 18 S E 891 (1894). While the State holds § 16-19-40 forth as a clear and explicit statute, it does not acknowledge that applying the words on the page—"any game with cards or dice"—leads to results so nonsensical that the State too must turn to the courts to make sense of the statute. It is not "activism" for a court to construe an otherwise vague statute as needed to make its scope reasonable.

The State errs in asserting that this Court has already considered the dominant factor test in *State v Red*, 41 S C L (7 Rich) 8 (1853), and refused to apply it. The defendant there argued that his "thimbles" game was actually an "exhibition of his dexterity" and so was not an illegal shell game. The Court held that the game could be prohibited even though as played by the defendant, who used slight of hand to win, it was not "won or lost by chance." This was because any other conclusion would allow the defendant to cheat players who believed the game was in fact a game of chance. *Id.* The holding in *Red* says nothing about how the dominant factor test may be applied to evaluate the legality of a game that is played according to its rules.

Indeed, the dominant factor test exists in order to encourage games of skill. That is why lotteries, the epitomic games of chance, are regulated with the force of constitutional restrictions in some states, *see e.g.*, Wash. Const. art. II, § 24, but no one thinks that participation in certain beneficial contests is illegal, or even immoral. Participants on the game show *Jeopardy!* have no control over which categories are on the board on any given night, that is a factor of chance that people accept when it is clear that the dominant factor in determining the winner is her intelligence. It is a particular game's attendant

benefits—or lack thereof—that drive its regulation. That is why early American gambling laws, particularly those in the South, were directed only at gaming habits that had negative collateral consequences. Those laws did not threaten poker among individuals, and instead sought to prohibit gaming in taverns and other public places. It is for that reason that in a case challenging the sufficiency of the allegations in an indictment under a predecessor to § 16-19-40, the only legal analysis offered by any member of this Court was the observation that “[t]he legislature could not intend, that for a casual game being played in a man’s house, he should forfeit the penalty.” *State v Brice*, 4 S C L (2 Brev) 66 (1806) (Brevard, J dissenting)

Justice Brevard’s 204-year-old observation rings true today. Did the legislature intend to prohibit casual poker games played in a man’s house? As Respondents observe, the text of § 16-19-40—nearly identical to that of a statute passed some 14 years *after Brice*—makes clear that the legislature only intended to prohibit the vice of gaming in certain public places, including houses of gaming where owners took a profit or opened their doors to all passers-by. Here, a group of people played poker for small stakes in a private house. The owner of the residence who purchased refreshments for these gatherings often did so without full reimbursement for that expense. The Circuit Court, the prosecution, and the arresting officer all had difficulty offering an interpretation of § 16-19-40 that would reach Respondents’ conduct and not simultaneously reach, *e.g.*, a judge’s aunt’s twice-a-month bridge game—an outcome that all parties agree is absurd. The difficulty in finding a construction of the statute that reaches Respondents’ conduct without criminalizing other innocent, casual gaming, points to the conclusion that the

statute simply is not meant to criminalize the kind of game that Respondents were arrested for playing

Thus, at a minimum, the court below was correct to apply the rule of lenity in construing the statute. As this Court has consistently held, “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), *see also State v Cutler*, 274 S C 376, 378, 264 S E 2d 420–21 (1980) (same), *see generally United States v Santos*, 128 S Ct 2020, 2025 (2008) (“[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them”) (collecting cases). Even the trial court here was of the view that it lacked “clear guidance” on the meaning of the statute at issue here. If the trial court acknowledged that it lacked the “guidance” necessary to interpret the statute, Respondents certainly lacked that guidance as well, and the court was correct to construe the statute to permit Respondents’ behavior.

## **II Poker Matches Are Contests of Skill**

Under the dominant factor test, poker is not gambling. As the trial court held here, “the evidence and studies are overwhelming” that “Texas Hold-em is a game of skill.” R p 19. Indeed, at trial, the Town of Mount Pleasant did not dispute that poker is a game of skill, and the trial court’s holding that poker is in fact a game of skill is not at issue. An understanding of poker and how it differs from games of chance nevertheless constitutes important background in this case. For the Court’s convenience, therefore, *amicus* presents below an account of the skill involved in playing poker, drawing upon the trial transcript, caselaw, and *amicus*’s own experience with the game.

As is true for similar games like golf, billiards, and bridge, when good poker players play against bad players, the good players consistently and routinely prevail.

Players who enter golf and bridge tournaments pay a fee to enter, and earn a cash reward if they win, but these are not games of chance because their outcome is determined principally by skill. See *Pennsylvania v Two Elec Poker Game Machines*, 465 A 2d 973, 977 (Pa 1983) (“[i]t cannot be disputed that football, baseball and golf require substantial skill, training and finesse” even though “the result of each game turns in part upon luck or chance”), *In re Allen*, 377 P 2d at 281 (bridge requires skill and is not a “game of chance”). The same is true for poker. To be sure, there is some accumulation of luck over the course of a poker match that will affect how individual players perform. But as *amicus* explains below, skill is nonetheless dominant in poker play. The fact that every hand of poker involves multiple decision points (at each of the multiple rounds of betting), multiple decisions at each decision point (bet, call, raise, or fold), and innumerable factors that call for skill to evaluate each of those decisions (for example, the player’s own cards, the odds of his hand improving, his sense of the strength of the other player’s hand, his sense of the other players’ perception of him), establishes that poker is a contest of skill.

Two general methods of determining the role of chance in an activity have developed in state courts to analyze whether a game is one of skill or chance. The first method is to evaluate the game’s structure and rules. If the structure and rules allow sufficient room for a player’s exercise of skill to overcome the chance element in the game, the game is one of skill and the gambling laws do not apply. See *e.g.*, *In re Allen*, 377 P 2d at 281–82 (holding the card game of bridge to be one predominantly of skill). A second approach, which the scientific community favors, is an empirical approach that examines the actual play of the game. Using the well-accepted premise that in a game predomi-

nated by skill the more skillful players will consistently perform better, this approach looks for specific instances over repeated trials to see if in fact the more skillful players tend to score better than less skillful players. Each method independently—and certainly both methods when taken together—confirms that the game of poker is a game of skill.

**A Making Correct Decisions In Poker Requires A Diverse Array Of Sophisticated Skills That Games Of Chance Do Not**

The essence of poker is correct decision making. Each time it is a player's turn to act, he must choose among several decisions, typically whether to bet, raise, or fold. During the course of a single session, a player will have to make hundreds of those decisions. In order to make the optimal decision the player must take into account a variety of factors. The importance of decision making in poker cannot be understated: the players' decisions alone rather than the cards dealt account for the result in 76% of all the hands played. R p 206, lines 6–14. In other words, in those 76% of hands, all but one player folds, making the remaining player the hand's winner, and the actual cards are never revealed. Moreover, in roughly 50% of hands that do play to a showdown, a player who would have won had he stayed in will have folded. *Id.*<sup>5</sup> This means that in only 12% of hands—that is, half of the 24% that play to showdown—does the player who was dealt the “luckiest” hand win. R p 206, lines 22–23. With player decisions deciding close to 90% of all poker hands, the players who consistently make good decisions will consistently win. Those who do not will generally lose. In all, as expert witness and champion professional poker player Michael R. Sexton testified at trial, “[t]he object of

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<sup>5</sup> A showdown is when all of the cards have been dealt and the players still in the hand expose their hole cards and the best hand wins the pot. It is only at the showdown where the winner is determined by the fall of the cards rather than by which players have folded in response to the moves of other players.

poker is to make correct decisions ” R p 213, lines 16–17 The “luck of the cards” has little to do with one’s decision-making skills

To make the right decisions consistently, poker players must employ a range of skills And by skill, we do not mean simply a sophisticated knowledge of odds Knowledge of the odds is simply a prerequisite to competent poker play See Kyle Siler, *Social and Psychological Challenges of Poker*, *Journal of Gambling Studies* (Dec 25, 2009) (observing that imperfect information in poker makes it impossible to formulate correct strategies via objective decision-frames) To be skilled at poker, players must develop an ability to directly influence the way an individual hand turns out—who collects the pot at the end, and how much is in the pot See generally R p 218 (describing skills involved in deducing what other players are holding), R pp 228–29 (describing how a player exploits how other players perceive him)

It is true that individual moves in poker are called “bets ” But that vocabulary is misleading The “bet” is not a wager on a chance event True wagers, unlike poker “bets,” do not alter the outcome of the event wagered upon A bet on the Super Bowl does not change the score, bets on roulette wheels are placed before the ball is dropped Bets at a poker table are different What is called a “bet” in poker is really a “move” like a move in any other game it is a strategic maneuver designed to provoke a desired reaction from an opponent

The importance of these moves is heightened because, in typical complex poker games, a player must contend with a large number of decision-making stages and a variety of possible courses of action at each stage In each hand of Texas Hold ’Em, a player has four principal decision-making opportunities the first after he receives his down

cards, and the next three as each common card is turned over in three stages. At each stage the player has available to him many courses of action. The focus of each decision is how worthwhile it is to risk additional chips relative to the possibility of winning all the chips in the pot in that hand. These decision-making stages reduce the element of chance in the game, since logical decision-making at each of these stages allows the player to control whether, and how much, he wins or loses.

To make optimal moves at each of these stages, players must be mathematicians, observers of human nature, and capable deceivers. Poker players use their “bets” principally to communicate with, manipulate, and intimidate their opponents. Even in the 24% of hands that do go to a showdown, the players typically are not “betting” on the outcome of a chance event. For example, when a poker player bets as a bluff, he is not hoping that his cards will prove to be better than his opponents’ cards. Instead, the player hopes to win the pot by convincing his opponent to fold the best hand. As noted above, in roughly 50% of hands that do play to a showdown, the player who would have won had he stayed in will have folded, meaning that in 88% of hands the player who eventually won the hand did so by “convincing” his competitor to fold. R p 207, lines 3–7. That fact attests to the skill required of the winning player in bluffing his competitor into folding. *Id.* Of course, a player trying to chase another player out may get called and lose. But what he was betting on was not what cards his opponents held—the essence of gambling. He was betting to influence what his opponents would do—the essence of strategy.

Skeptics claim that “[n]o amount of skill can change a deuce into an ace.” *Joker Club LLC v Hardin*, 643 S E 2d 626, 630 (N C Ct App 2007). It is true that skill cannot change the cards. But a player can fold rather than play the deuce, or use her skill at

poker to make her opponent believe she has an ace, causing the opponent to fold a hand that would otherwise have won the pot. As noted, three-quarters of all hands are won when one player bets and all remaining players fold in response. In some of these hands, a player with a bad hand will have bluffed out a player with a better hand, overcoming the luck of the draw. Further, as Respondents note, Texas Hold'em is not played in one-hand increments. Over the course of an actual game, the skilled player will consistently prevail, regardless of an occasional unlucky turn of a card. Resp. Br. at 29–30.

Further, that the winner of a small percentage of hands will in fact be determined to some extent by the luck of the draw is not sufficient to refute the conclusion that poker is a game predominately of skill. Many games have a chance element, and it is easy to say, after the fact, that the chance element was dispositive in any particular instance of play. For example, when playing golf on a windy day, there is always the chance that the wind will blow the ball off target, causing a player to lose a few strokes, and possibly the game. See e.g., *PGA Tour Inc v Martin*, 532 U.S. 661, 686–87 (2001) (“[G]olf is a game in which it is impossible to guarantee that an individual’s ability will be the sole determinant of the outcome”). Thus a chance element, out of the golfer’s control, may play a dispositive role in deciding the outcome of what is generally acknowledged to be a game of skill. See e.g., S.C. Att’y Gen. Op., 1986 WL 289772 (Mar. 24, 1986) (observing that a golf tournament appears to be a game of skill).

To appreciate the role that chance plays in almost every game, it is important to keep in mind just how few games exist in which luck plays no role at all. Chess is the prototypical example of a game of pure skill, because both players have perfect information regarding the other’s pieces and all that matters is how skillfully a player deploys

them. But such games of pure skill are exceedingly rare, at least some degree of luck plays a role in almost every game people play. In fact, between two equally matched chess players, the coin flip to determine who plays black or white may have an effect on the outcome, since white has the first move and therefore has a slight advantage.

Additionally, consider Scrabble, another game where chance plays a role. As in poker, skill largely determines the outcome in Scrabble, even though one could say of that game too that no amount of skill can turn a “Q” into an “E.” The outcome of a game of Scrabble may in some cases turn on the draw of the tiles just as in some cases the outcome of a round of poker may turn on the draw of the cards, but that does not make either game one of chance.

Furthermore, the outcome of a hand of poker is not only who wins and who loses, but how much each player wins or loses. A player’s assessment of his own cards and what cards the other players are holding will affect whether and how much the player bets, meaning that even in the 12% of hands that reach a showdown and in which the best hand dealt wins the pot, the players’ skill will determine how much is won and how much is lost. Skill thus means that a good player will lose less with a deuce and win more with an ace than a bad one. *See R*, p. 239, lines 7–22.

The importance of skill in poker is further demonstrated by the fact that a novice poker player can improve his talents and raise the level of his game through study and accumulating game experience. *See R*, p. 213, line 22–p. 214, line 13. After only a short time, a player can acquire basic game skills, such as learning when to fold and how to make the basic calculations. The more a person continues to practice and learn, the more

his skills will improve, something that is also true for chess, golf, and bridge players. A significant body of literature is available to help the novice player develop.

Together, the specific skills required to play poker, the demonstrated fact that poker hands are won by maneuvering rather than in a showdown the vast majority of the time, and the fact that in every hand the players' skill determines the amounts won and lost by each player, show that skill is required to be a winning poker player.

This conclusion is confirmed by recent scientific inquiry into the role of skill in poker, which has uniformly found that skill plays the dominant role in the game. As expert witness Professor Hannum testified at trial, "the consensus" view among members of the scientific community "is in agreement with my opinion that skill is the predominant factor in poker." R. p. 208, lines 2–4. The State did not offer testimony rebutting or contradicting Professor Hannum.

It is precisely because poker is a game of skill that poker tournaments now make for popular television. The only people who watch anyone play roulette on television are casino security guards. People only watch lottery drawings to see if they have won. But poker matches are spectator events because, as in any game that people tune in to watch, it is entertaining to watch good players get beaten by even better players. Poker is a game won and lost predominately on the basis of the skills of the players. Respondents in this case were playing a game of skill. They were not engaged in unlawful gambling.

**B Recent Cases in Which Courts and Juries Have Considered the Scientific Literature on Poker, and Venerable Caselaw Considering Other Games, Support the Conclusion That Poker Is A Game of Skill**

In this case, the trial judge, best positioned to judge the evidence of skill, concluded, "Texas Hold'em is a game of skill. The evidence and studies are overwhelming

that this is so.” R p 19 The courts was correct in concluding that Texas Hold’em is a game of skill

The trial court’s conclusion is consistent with older caselaw that recognized that an element of chance in a card game does not simply turn that game into a game of chance. In *In re Allen*, 377 P 2d at 281, the California Supreme Court granted a writ of habeas corpus to a defendant who was convicted of playing bridge for money under an ordinance that prohibited “any game of chance played with cards.” *Id* at 281. Looking to the rules of the game and scholarly descriptions of how it is actually played—as well as “a large amount of literature designed to increase the player’s skill”—the *In re Allen* Court concluded that bridge players, though engaged in a game in which “there is of course an element of chance resulting from the deal of the cards,” nevertheless are playing a game of skill. *Id* at 281–82.

The State’s contention to the contrary that under the dominant factor test Texas Hold’em is a game of chance as a matter of law is not supported by the cases that it cites.

The State relies repeatedly on an advisory opinion of the Rhode Island Supreme Court to support its argument. In that matter, the court was asked whether the establishment of a privately-owned casino would violate the state’s constitutional prohibition on non-state operated lotteries. *In re Advisory Opinion to Governor*, 856 A 2d 320, 322 (R I 2004). At the outset, the court noted that “we are unable to exercise the fact-finding power of the Court,” and that its “opinion is not an exercise of judicial power, is not binding and ‘it carries no mandate.’” *Id* at 323 (internal citation omitted). It then went on to consider whether a casino would be a lottery, by applying “the ‘dominant factor’ doctrine.” *Id* at 328. The parties seeking to build the casino admitted that “roulette,

craps and slot machines specifically ‘amount to nothing more than chance’” *Id*. The court agreed, but went on to add that poker is also a game of chance. It concluded its discussion of the dominant factor test by noting that

Although a certain level of fact-finding would be helpful to determine the exact role that skill or judgment play in a particular game, games that depend on an unpredictable and uncontrollable variable, such as the case in games involving cards and dice, are, as a matter of law, games of chance

*Id* at 329. But see *e.g.* *In re Allen*, 377 P2d at 281–82 (holding that the card game bridge is a game of skill)

Unlike the Rhode Island Supreme Court, this Court has the benefit of the trial court’s fact-finding and reasoned analysis of the evidence. The trial court found that, if the dominant factor test applied, Texas Hold’em would surely be a game of skill. R p 19. The Circuit Court agreed. R p 10. This Court must rely on the record and fact-finding in this case. See *e.g.*, *McGill v Moore*, 381 S C 179, 185, 672 S E 2d 571, 574 (2009) (“In an action at law, tried without a jury, the trial court’s findings of fact will not be disturbed unless found to be without evidence which reasonably supports the court’s findings.”)

Nor does *People v Dubinsky*, 31 N Y S 2d 234 (N Y Ct Spec Sess 1941), on which the State also relies, support the proposition that Texas Hold’em is a game of chance. *Dubinsky* found that “playing ‘stud’ poker”—a simpler game than Texas Hold’em—“for money is a game of chance,” but specifically noted that “the Courts have not gone so far in this State as to say that every game of cards for money in and of itself constitutes gambling.” *Id* at 236–37. And the State’s suggestion that all card games are gambling in California under *Lavick v Nitzberg*, 188 P2d 758 (Cal Dist Ct App 1948), is contradicted by the California Supreme Court’s holding in *In re Allen* that bridge is a

game of skill, 377 P 2d at 281–82, and further undermined by the subsequent holding of an intermediate appellate court that recognized poker as a game of skill, *see Bell Gardens Bicycle Club v Dep t of Justice*, 36 Cal App 4th 717, 747–48 (Cal Ct App 1995) In contrast, the *Lavick* Court was only considering whether a debt incurred in a game of draw poker was enforceable as a contract, and specifically disclaimed to be interpreting a penal law *Lavick*, 188 P 2d at 759

In sum, the relevant caselaw supports the view that poker is a game of skill The most important cases are the recent decisions considering the evidence on the skill involved in poker, which concluded that poker is a game of skill The State cites cases that it contends show that poker is gambling as a matter of law, but its interpretation of those cases is wrong Poker is a game of skill

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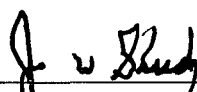
For the reasons discussed above, a ruling that a home game of poker is not illegal gambling is compelled under the law It would also be a good ruling, fair to the people of this State, because poker is an immensely popular and widely played game A ruling that a home game of Texas Hold'em is illegal gambling would be oppressive Since the statute does not call for that interpretation, this Court should avoid it


### CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Circuit Court and hold that S C Code Ann § 16-19-40 does not prohibit playing Texas Hold'em in a private home

Respectfully submitted this 12th day of July, 2010

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**THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

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**APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
The Honorable R Markley Dennis, Jr , Circuit Court Judge**

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C A No 2009-CP-10-001551

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Robert L Chimento, Scott Richards, Michael Williamson,  
Jeremy Brestel, and John Taylor Willis

Respondents,

v

Town of Mount Pleasant

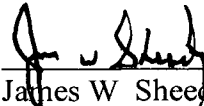
Appellant

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**CERTIFICATE OF COMPLIANCE**

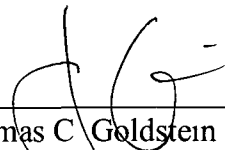
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The undersigned certify that the foregoing brief complies with Rule 211(b),  
SCACR, as well as this Court's August 13, 2007 Order



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