No. 13-564

In the Supreme Court of the United States

LAWRENCE DICRISTINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that a poker business can qualify as an "illegal gambling business" under 18 U.S.C. 1955.

2. Whether a statutory provision that a term "includes but is not limited to" a list of examples narrows the term to things that are like the listed examples.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 726 F.3d 92. The opinion of the district court (Pet. App. 31a-179a) is reported at 886 F. Supp. 2d 164.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2013 (Pet. App. 1a). The petition for a writ of certiorari was filed on November 4, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was found guilty of operating and conspiring to operate an illegal gambling business, in violation of 18

U.S.C. 1955 and 18 U.S.C. 371. The district court granted petitioner's post-verdict motion for judgment of acquittal and dismissed the indictment. Pet. App. 31a-179a. On the government's appeal, the court of appeals reversed and remanded. *Id.* at 1a-30a.

1. The Illegal Gambling Business Act (IGBA), which was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, see *Iannelli* v. *United States*, 420 U.S. 770, 786-788 (1975), provides that "[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business" is subject to criminal penalties. 18 U.S.C. 1955(a). The relevant provision defines "illegal gambling business" as follows:

> (b) As used in this section—
>
> (1) "illegal gambling business" means a gambling business which—
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.
>
> (2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and con-

> ducting lotteries, policy, bolita or numbers games, or selling chances therein.
>
> (3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

18 U.S.C. 1955(b). The provision does "not apply to any bingo game, lottery, or similar game of chance conducted by" a tax-exempt organization. 18 U.S.C. 1955(e).

2. Between December 2010 and May 2011, petitioner and several others operated a poker club in the back room of a New York warehouse. Pet. App. 4a, 92a. The games—involving a variant of poker known as "No Limit Texas Hold 'Em"—were generally held twice a week and were advertised through various means, including text message. *Id.* at 4a-5a & n.1. Petitioner employed paid security, including an armed guard, and used a video surveillance system to decide who would be admitted to the warehouse. Gov't C.A. Reply Br. 3 n.3. Games often lasted all night, and "[p]layers were plied with free food and drinks by a waitress to induce them to stay and play longer." Pet. App. 94a.

Total wagers at the poker club amounted to tens of thousands of dollars per night. Gov't C.A. Reply Br. 4 n.3. Dealers collected a five percent "rake" for the house from each pot, keeping 25% as payment. "The remaining funds from the rake were used for expenses relating to the operation of the business and for profits." Pet. App. 5a (citation omitted).

3. a. Petitioner and another operator of the poker club were charged in a two-count indictment with operating and conspiring to operate an illegal gam-

bling business, in violation of 18 U.S.C. 1955 and 18 U.S.C. 371. Petitioner pleaded guilty, but the district court later permitted him to withdraw his guilty plea. Pet. App. 5a, 43a.

Petitioner moved to dismiss the indictment, arguing that poker does not qualify as "gambling" for purposes of Section 1955 and that his business was therefore not an "illegal gambling business." 18 U.S.C. 1955. Petitioner primarily contended that the provision reaches only games in which chance (rather than skill) predominates and that poker does not fall into that category. Pet. App. 5a-6a, 38a. The district court heard testimony from petitioner's expert about the role of skill in poker, but concluded that whether poker qualifies as "gambling" is a question of law and reserved judgment on that question. *Id.* at 6a.

Petitioner was then tried by a jury. The district court excluded the expert testimony from the trial and instructed the jury that playing poker for money constitutes "gambling" within the meaning of Section 1955. Pet. App. 6a, 38a, 43a-44a. The jury found petitioner guilty on all counts.

b. Following the jury's verdict, petitioner "renewed his motion to dismiss in the form of a motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29." Pet. App. 6a. He contended that a betting activity does not qualify as "gambling" under Section 1955 unless it is "house-banked" (*i.e.*, one in which the house plays against the bettors) and is predominantly a matter of chance rather than of skill. He also asserted that poker did not meet either of those purported conditions. *Id.* at 41a-42a.

After considering additional expert views, the district court issued a lengthy opinion granting petition-

er's motion, setting aside the jury verdict, and dismissing the indictment. Pet. App. 31a-179a. The court examined the text and legislative history of Section 1955 (as well as a variety of other sources), concluded that the provision is ambiguous, and applied the rule of lenity as a tiebreaker between the parties' interpretations. *Id.* at 147a-154a, 178a. The court then limited the meaning of "gambling" in Section 1955 to exclude games "predominated by skill rather than chance," *id.* at 7a, and concluded—based on complex expert testimony asserting that over hundreds of hands a more skillful poker player would be likely to do better than a less skillful player—that poker did not qualify as "gambling." *Ibid.*; see *id.* at 50a-82a, 169a-177a (setting forth charts, graphs, and mathematical formulae).

4. The court of appeals reversed the judgment of acquittal and remanded with instructions to reinstate the jury verdict, enter a judgment of conviction, and proceed with sentencing. Pet. App. 30a. The court stated that "[t]he plain language of § 1955 clearly outlines the activity that it proscribes"—that is, "running a gambling business that (1) operates in violation of the law of the state in which the business is conducted; (2) is conducted by five people or more; and (3) is *either* in operation for more than thirty days *or* earns more than $2,000 in one day." *Id.* at 13a (citing *Iannelli*, 420 U.S. at 788, and *Sanabria* v. *United States*, 437 U.S. 54, 70 (1978)); see *id.* at 18a. The court ruled that a poker business of a sufficient size could fall within the scope of that proscription if it violated state law, and noted the parties' agreement that "poker constitutes gambling" under the law of

New York. *Id.* at 11a-12a & n.5 (citing, *inter alia*, N.Y. Penal Law § 225.00(1)-(2)).

The court of appeals rejected petitioner's contention that Section 1955(b)(2)—which states that "gambling includes but is not limited to" nine particular activities, 18 U.S.C. 1955(b)(2)—sets forth a "definition of gambling" that excludes poker. Pet. App. 14a-15a. The court acknowledged that a statute could "define a term using the verb 'includes' or the phrase 'includes but is not limited to,'" but concluded that "in light of the specific language of [Section 1955(b)(2)] and the context in which it appears" the provision sets forth "a non-exhaustive list of examples" rather than "defin[ing] the term 'gambling.'" *Id.* at 16a & n.9.

The court of appeals rested that conclusion on a close reading of the statute. First, the court contrasted the language of Section 1955(b)(2) with the language of Sections 1955(b)(1) and (b)(3), both of which define terms using "the verb 'means.'" Pet. App. 14a-15a; see *id.* at 14a n.7 (explaining that an "earlier version of the IGBA which was not adopted" stated that "illegal gambling business *means* betting, lottery, or numbers activity" and therefore would have been "limited to certain types of gambling"). Second, the court explained that Section 1955(b)(2) cannot be read to define the term gambling because it "lists acts of running a gambling business"—such as "maintaining" gambling devices and "conducting" games—that do not constitute participation in the games or "the games themselves." *Id.* at 16a-17a; see *id.* at 17a (explaining that Section 1955(b)(2) is not "purposeless" because it provides "an illustration of what may constitute running a gambling operation"). Third, the court stated that if Congress had intended to restrict

"gambling" to games of chance, it could have used the language in Section 1955(e)—which provides a safe harbor for tax-exempt organizations that conduct lotteries or similar "game[s] of chance"—to limit the term. *Ibid.* Finally, the court noted that its decision was consistent with the approach of all other courts to have considered the elements of a Section 1955 violation and whether Section 1955(b)(2) is definitional. See *id.* at 20a-22a.[1]

Having determined that the text of Section 1955 is "clear," the court of appeals found no need to consult the legislative history of the IGBA. Pet. App. 22a-23a.[2] Nevertheless, the court reviewed that history "briefly * * * to demonstrate that Congress's unmistakable purpose in enacting the IGBA bolsters our reading of the statute's clear and unambiguous text." *Id.* at 23a. The court concluded that the statute was intended to "crack down on organized crime" and was therefore "driven by concerns about the revenue generated by large scale gambling business rather than the games that were played." *Id.* at 23a-24a. Nothing in the legislative history, the court explained, suggests "that whether a game was predominated by chance was relevant to whether a business operating

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[1] The court of appeals addressed in a footnote petitioner's suggestion at oral argument that the government had conceded that Section 1955(b)(2) "contains a definition of the word 'gambling.'" Pet. App. 16a n.9. The court explained, with citations to the government's brief, that it did not understand the government to have conceded that point. The court also stated that it was "obligated to determine the meaning of the statute as it was written by Congress" in any event. *Ibid.*

[2] For the same reason, the court rejected reliance on the rule of lenity, which was the main basis for the district court's decision in petitioner's favor. Pet. App. 27a-28a, 168a.

that game constituted an illegal gambling business." *Id.* at 24a-25a. Moreover, the court pointed out, the discussion of poker by particular congressmen "suggests Congress anticipated that poker would be included within the reach of the IGBA"; when concerns were expressed about criminalizing a "friendly game of poker," the response was that such a game would not qualify as a business that met the revenue or duration requirement of the legislation. *Id.* at 25a-27a.

Petitioner did not file a petition for panel or en banc rehearing.

ARGUMENT

Petitioner contends (Pet. 12-18) that the court of appeals erred by defining the gambling-business offense in 18 U.S.C. 1955 solely by reference to state law, in conflict (petitioner claims) with decisions of this Court addressing other criminal statutes. He asserts that, under a proper federal definition, poker is not "gambling." Petitioner also contends (Pet. 18-32) that this Court should resolve a conflict over the meaning of "included but not limited to" clauses and then limit Section 1955 to activities like the examples listed in Section 1955(b)(2). The court of appeals correctly held that petitioner's poker business was prohibited by Section 1955, and its decision does not conflict with any decision of this Court or any other court of appeals. Indeed, the Second Circuit's approach is consistent with that of the only other court of appeals to have expressly addressed petitioner's contention that Section 1955(b)(2) is a definitional provision that limits the statute's reach. Further review of the court of appeals' interlocutory decision is not warranted.

1. As a threshold matter, this Court's review is unwarranted because of the interlocutory posture of the case, which "alone furnish[es] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (a case remanded to district court "is not yet ripe for review by this Court"); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for certiorari). The court of appeals directed the district court to reinstate the jury verdict, enter a judgment of conviction, and proceed to sentencing. Pet. App. 30a; *Berman* v. *United States*, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment."). Following sentencing and the entry of a final judgment, petitioner will have the opportunity to raise his current claim, together with any other claims that he might wish to pursue, in a single petition for a writ of certiorari after any appeal from the judgment is resolved. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). The Court's normal practice is to deny petitions by criminal defendants challenging interlocutory determinations like the decision in this case, and that course is appropriate here.

2. Petitioner challenges the court of appeals' holding that his poker business qualified as an "illegal gambling business" under Section 1955. Pet. 12-18. This Court's review of that question is not warranted. Petitioner has identified no split of authority on the issue, and none exists. Rather, as the decision below details, federal appellate courts have unanimously

accepted that if a poker business violates state law, involves five or more owners or managers, and either brings in at least $2000 in revenue in a single day or is in continuous operation for 30 days, the owner or operator of that poker business has committed a federal crime pursuant to Section 1955. See, *e.g.*, *United States* v. *Pack*, No. 92-3872, 1994 WL 19945, at *1-*2 (6th Cir. 1994); *United States* v. *Rieger*, 942 F.2d 230, 233 (3d Cir. 1991); *United States* v. *Angiulo*, 897 F.2d 1169, 1200-1201 (1st Cir.), cert. denied, 498 U.S. 845 (1990); *United States* v. *Dadanian*, 818 F.2d 1443, 1447-1449 (9th Cir. 1987), modified on reh'g on other grounds, 856 F.2d 1391 (1989); *United States* v. *Tarter*, 522 F.2d 520, 523-524, 527 (6th Cir. 1975); see also Pet. App. 21a-22a (collecting additional cases).

That consensus is well founded. If "gambling" is defined as a matter of federal law, as petitioner urges (Pet. 12-16), then poker readily falls within the federal definition's scope, and the jury was entitled to find petitioner guilty of violating Section 1955. And to the extent that petitioner is correct (Pet. 13) in claiming that the court of appeals "held that 'gambling' must be defined solely with reference to each state's law," then poker is also indisputably a form of "gambling" under that approach: as both courts below concluded, "New York State courts have long held that poker contains a 'sufficient element of chance to constitute gambling under that state's laws.'" Pet. App. 12a n.5. Petitioner does not identify any State that has deemed poker not to be gambling.

a. Petitioner derives his federal-law definition of "gambling," which he contends excludes poker from Section 1955, primarily from Section 1955(b)(2). That provision states that "'gambling' includes but is not

limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein." In petitioner's view, Subsection (b)(2)'s "including but not limited to" language limits "gambling" to things like the listed activities; the listed activities are games of chance; a game of chance is one in which chance predominates over skill, rather than (as under the law of some States) simply one in which chance plays a significant role; and chance does not predominate in poker if a large enough number of hands is statistically analyzed. The court of appeals correctly rejected that flawed chain of reasoning.

To begin, Section 1955(b)(2), with its non-exhaustive list of examples, is not definitional. Unlike Section 1955(b)(1) and Section 1955(b)(3), which both use the word "means" to explain the scope of a statutory term, Section 1955(b)(2) includes certain activities without limiting "gambling" to those activities. Indeed, Section 1955(b)(2) does not even list examples of "gambling"; it lists examples of running a gambling business, none of which would constitute participation in a gambling activity itself. Pet. App. 16a-17a. And Section 1955(b)(2) does not contain any reference to a "game of chance," let alone to a game in which chance predominates over skill. Section 1955(b)(2) therefore serves only to make clear that any federal definition of "gambling" that would exclude the listed activities cannot be correct.

In the absence of a definition of "gambling" in the statute, Congress is presumed to have used that word to have its "ordinary meaning." *Taniguchi* v. *Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012). And the ordinary meaning of "gambling"—now, as in

1970 when the IGBA was enacted—is wagering on an uncertain outcome, including the outcome of a poker game. See Pet. App. 102a-103a (collecting dictionary definitions); Gov't C.A. Br. 19 n.5.

Applying that ordinary meaning to the language of Section 1955 is consistent with other legal authorities that define gambling, including the many state laws (or state decisions) that expressly include poker within the scope of that term. See Gov't C.A. Br. 19-20, 25-26, 33-35; see also *Taylor* v. *United States*, 495 U.S. 575, 598 (1990). That meaning also makes sense of the inclusion in Section 1955(b)(2) of "bookmaking," an activity as to which skilled bettors can earn a living and which therefore is not driven primarily by chance. See Gov't C.A. Br. 29-33. And it is most consistent with the legislative history, which indicates that Congress "anticipated that poker would be included within the reach of the IGBA." Pet. App. 25a-27a.

Petitioner's contrary view, which requires an evaluation of the relative importance of skill or chance in any particular wagering activity, would require individuals, businesses, and courts to engage in a sophisticated and uncertain analysis, on an activity-by-activity basis, to determine the reach of Section 1955—an "extraordinarily complex and unpredictable approach to the statute." Pet. App. 17a-18a n.10. Such a complicated and uncertain approach would frustrate, rather than further, Congress's purpose to choke off the money funneled to organized crime from large-scale illegal gambling businesses. See *Iannelli* v. *United States*, 420 U.S. 770, 787 (1975); *United States* v. *Nardello*, 393 U.S. 286, 296 (1969).

Petitioner's reliance (Pet. 28-32) on portions of the statute other than Section 1955(b)(2) is equally un-

sound. Petitioner suggests (Pet. 30) that Section 1955(e), which creates an exception for tax-exempt organizations and refers to a "game of chance," must shed light on the scope of Section 1955(b), lest some charitable gaming be prohibited. But Section 1955(e)'s reference to "game[s] of chance" actually undermines his position, because it demonstrates that Congress could readily have used the same language in defining the crime of operating an illegal gambling business. See generally *Russello* v. *United States*, 464 U.S. 16, 23 (1983); see also Pet. App. 17a.

Petitioner also incorrectly asserts (Pet. 31) a "common-law consensus" that gambling means a "game of chance" in which chance does not simply play a material role but actually predominates. As the district court's own survey demonstrates, the common law was not sufficiently uniform to support that definition, see Pet. App. 103a-104a; Gov't C.A. Reply Br. 11-17, let alone uniform enough to have a "settled meaning" that Congress is presumed to have adopted, see *Beck* v. *Prupis*, 529 U.S. 494, 500-501 (2000). And petitioner's view of the common law cannot be reconciled with the consistent body of authority, dating back more than a century, deeming poker to be gambling. See Pet. App. 85a-91a. Petitioner has not identified a single authority reaching the opposite conclusion.

b. Petitioner primarily faults the court of appeals for relying on a state-law definition to establish the meaning of "gambling" for purposes of this case. To the extent that it did so, that aspect of the court's reasoning produced a correct ruling about the status of poker under the IGBA, and it does not warrant this Court's review.

i. At the outset, petitioner ascribes a meaning to the court of appeals' decision that is far from apparent. In petitioner's view (Pet. 12), the court of appeals elected "to define a federal crime solely by reference to state law." He suggests that the court of appeals thus adopted state gambling law lock, stock, and barrel. The court of appeals, however, trained its focus on petitioner's argument that *Section 1955(b)(2)* provides "the definition of gambling" for purposes of the statute, Pet. App. 14a, and that was the argument it rejected. See *id.* at 14a-17a. The court repeatedly stated that the statute applied to "gambling"—not only to "certain types of gambling," as petitioner contended. *Id.* at 14a-15a & n.7. Nowhere does the court of appeals conclusively hold that any state-law label would be controlling for purposes of Section 1955, regardless of how idiosyncratic the state provision. All the court of appeals definitively held is that petitioner's effort to derive a definition of gambling from Subsection (b)(2) is incorrect. Indeed, its conclusion presupposes that the federal court must identify "gambling activity" to apply Section 1955. *E.g.*, *id.* at 15a-16a n.8 ("[B]ecause we find that subsection (b)(2) is not definitional, we do not need to decide whether poker—or any other type of gambling—is sufficiently like the enumerated games to fall within the IGBA. Rather, *the gambling activity* must only be prohibited by state law and meet the additional criteria set forth in the IGBA.") (emphasis added).[3]

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[3] In one footnote, the court of appeals omitted the qualifier "gambling" in describing the types of businesses covered by Section 1955(b). See Pet. App. 15a n.7. But that omission hardly implies that the court of appeals would apply Section 1955 to a state

ii. Contrary to petitioner's contention (Pet. 12), no conflict exists between the decision below and *United States* v. *Nardello*, 393 U.S. 286 (1969), or its progeny. Neither *Nardello* nor any of the other decisions of this Court cited by petitioner (Pet. 12-16) involved interpretation of Section 1955. In *Nardello* and *Perrin* v. *United States*, 444 U.S. 37 (1979), the Court construed the Travel Act, 18 U.S.C. 1952. In *Wilkie* v. *Robbins*, 551 U.S. 537 (2007), and *Scheidler* v. *National Organization for Women*, 537 U.S. 393 (2003), the Court construed the Hobbs Act, 18 U.S.C. 1951, and RICO, 18 U.S.C. 1961. And in *Taylor* v. *United States*, 495 U.S. 575 (1990), the Court construed the Armed Career Criminal Act, 18 U.S.C. 924(e). None of those cases construed Section 1955 or the meaning of the word "gambling."

Assuming that the approach of those cases applies to Section 1955's reference to "gambling," state law would not necessarily be irrelevant to ascertaining the meaning of that word. For example, in *Taylor*, this Court explained that, in ascertaining the ordinary meaning of the term "burglary," it would look to "the generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598; see also *Scheidler*, 537 U.S. at 410; see generally *Taniguchi*, 132 S. Ct. at 2002 (terms undefined in a statute are given their ordinary meaning). Under that analysis, the court of appeals would have gone astray only if New York law differed significantly from the law of other States, such that it was not an appropriate exemplar of the States' understanding of "gambling." But New York law is not, in fact, distinct in that re-

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"gambling" law that incidentally prohibited, for example, prostitution or loansharking.

gard. Rather, the law of many States defines gambling as wagering on an uncertain result or specifically characterizes poker as a form of gambling. See Pet. App. 86a-91a; Gov't C.A. Br. 26 & nn.8-9 (collecting state statutes and decisions); Gov't C.A. Reply Br. 13 (collecting state decisions).[4]

iii. Petitioner's suggestion that review is warranted to conform the court of appeals' decision to the methodology of *Nardello* also lacks merit because the court of appeals did not address the applicability of *Nardello* and the other decisions on which petitioner relies, and petitioner did not present those decisions to that court. Because this Court is one "of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), this Court should not address the decisions' relevance to this case in the first instance.

Petitioner asserts (Pet. 17) that the court "sandbagged" him by deciding the case on a ground the government had not pressed. See Gov't C.A. Br. 14 ("[E]ven accepting that there is a federal definition of gambling under the IGBA * * * poker nevertheless constitutes 'gambling' under the IGBA."). But the Second Circuit did agree with a key government argument, and it did not exceed its authority by setting forth its own legal rationale.[5] Courts of appeals

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[4] Notably, the Second Circuit's approach of looking to state law also does not conflict with the other circuits' approach to interpreting and applying Section 1955. See *United States* v. *Atiyeh*, 402 F.3d 354, 372 (3d Cir.), cert. denied, 546 U.S. 1068 (2005); see also Pet. App. 20a-22a.

[5] The court of appeals correctly noted (Pet. App. 16a n.9) that the government both disputed the district court's holding that Subsection (b)(2) "creat[ed] a definition of gambling" and argued that "the IGBA does not contain a definition of 'gambling.'" Gov't C.A. Br. 13. In the government's view, therefore, "gambling" should

routinely decide the specific issue presented to them on grounds other than those argued by the parties, see, *e.g.*, *United States* v. *MacKay*, 715 F.3d 807, 841-842 (10th Cir. 2013), petition for cert. pending, No. 13-274 (filed Aug. 26, 2013); *Poehl* v. *Countrywide Home Loans, Inc.*, 528 F.3d 1093, 1098-1099 (8th Cir. 2008), and that practice is not equivalent to reaching out to decide an issue that has not been presented at all. See *United States Nat'l Bank* v. *Independent Ins. Agents of Am.*, 508 U.S. 439, 446 (1983) ("[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law") (citation omitted). Here, the court of appeals did no more than resolve the central issue in the case, which had also been passed on by the district court: whether a poker business falls outside the scope of Section 1955. To the extent that petitioner believed that the panel should have addressed *Nardello* and other similar cases, he should have raised that point below. Petitioner, however, did not file a petition for rehearing—a type of filing that is specifically intended to alert a panel to a "point of law * * * that the petitioner believes the court has overlooked or misapprehended." Fed. R. App. P. 40(a)(2).

c. Petitioner's suggestion (Pet. 32-33) that interpretation of Section 1955 is specially urgent or im-

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"be defined based on its ordinary meaning, *i.e.*, as wagering on an uncertain outcome." *Ibid.*; see *id.* at 18-19. The court of appeals accepted the government's submission as to Subsection (b)(2) and did not address the government's "ordinary meaning" argument. Nothing in that course of reasoning "sandbagged" petitioner.

portant lacks merit. Poker is unquestionably a popular game—far more so now than it was when the IGBA was enacted. See Gov't C.A. Br. 28. But the Second Circuit's decision in no way suggests that participants in a friendly evening of poker have committed a federal crime. Section 1955 criminalizes only "conduct[ing], financ[ing], manag[ing], supervis[ing], direct[ing], or own[ing]" an "illegal gambling business" that violates state law; involves five or more managers, financers, supervisors, or owners; and has a gross "revenue" of $2000 in a day or has been in "substantially continuous operation" for more than 30 days. 18 U.S.C. 1955. The provision therefore sweeps in those who own or manage the kind of gambling syndicates that could be used to fund organized crime, not the millions of citizens who host games with "moderate stakes." Pet. 32.

Contrary to petitioner's contention (Pet. 33), the number of prosecutions under Section 1955 reflects its modest scope. Between 2006 and 2010 the government prosecuted fewer than 100 defendants per year for violations of that provision, see http://bjs.ojp.usdoj.gov/fjsrc—and many of those prosecutions involved gambling activities other than poker. See, *e.g.*, *United States* v. *Davis*, 690 F.3d 330 (5th Cir. 2012) (reviewing conviction for running illegal lottery), cert. denied, 133 S. Ct. 1283 and 133 S. Ct. 1296 (2013); *United States* v. *Mastronardo*, No. 12-cr-388, 2013 WL 6512055 (E.D. Pa. 2013) (indictment for participation in illegal bookmaking business). Because the court below joined every other court to have considered the issue in holding that a poker business can qualify as an "illegal gambling business" under Section 1955, see Pet. App. 21a-22a (collecting cases), no reason exists

to believe that the decision in this case will cause those numbers to increase.

3. Drawing from cases interpreting federal laws, state laws, settlement agreements, contracts of sale, indictments, warrants, and various other kinds of documents, petitioner also asserts (Pet. 18-31) a conflict of authority with respect to the meaning of the phrase "including but not limited to." Even if there were such a conflict, this case would not implicate it. In any event, no such conflict exists. Although the usual rule, as described by this Court, is that the term "including" does not have a narrowing effect, see, *e.g.*, *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 188-189 (1941); see also *Gooch* v. *United States*, 297 U.S. 124, 128 (1936) (explaining that the rule of *ejusdem generis* "limits general terms which *follow* specific ones to matters similar to those specified" (emphasis added), different decisions interpret "including but not limited to" differently depending on its context. See generally *Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012). This Court's review is not warranted.

a. As an initial matter, this case does not present the question of how the phrase "including but not limited to" should be interpreted in every context in which it arises. Petitioner makes the sweeping claim that the "panel believed such clauses do not narrow the term being defined to items 'analogous to those enumerated.'" Pet. 19 (quoting Pet. App. 15a). But, in fact, the Second Circuit expressly declined to make any such general pronouncement. Although the court understood "including but not limited to" as used in Section 1955 to "signal[] a non-exhaustive list of examples of gambling activities," it explained that this conclusion was reached "in light of the specific lan-

guage" of the provision at issue "and the context in which it appears." Pet. App. 16a & n.9. And the court rejected the proposition that "a statute can never define a term using the verb 'includes' or the phrase 'includes but is not limited to.'" *Id.* at 16a n.9; see *id.* at 15a n.8.

Accordingly, petitioner is wrong to group the Second Circuit with courts that have purportedly held that "the enumerated items" in "including-but-not-limited-to clause[s]" can never indicate a "narrow[ing]" of "the term being defined." Pet. 19, 23. The Second Circuit has left the door open to the possibility that such a clause might signal "restrict[ion]" of "the term being defined to things of the same general kind as those enumerated," Pet. i—and, indeed, as petitioner explained in his brief in the court of appeals, the Second Circuit has previously reached that conclusion in a case that did not involve Section 1955. See *Molloy* v. *Metropolitan Transp. Auth.*, 94 F.3d 808, 811-812 (2d Cir. 1996) (interpreting 49 C.F.R. 37.3). By its own terms, the decision below interprets "including but not limited to" only for the purposes of Section 1955 itself, and none of the other decisions to which petitioner points involves an interpretation of that provision.

b. In any event, the asserted conflict on the definitive meaning of "including but not limited to" in all contexts is illusory. Petitioner's claim of conflict turns on the proposition that some courts have held that "including but not limited to" always "trigger[s] application of limiting canons * * * such that only items similar to the enumerated examples are swept" in. Pet. 23 (asserting that the D.C., First, Fourth, and Eighth Circuits and certain state courts have adopted

that approach). But the courts that petitioner identifies as having so held have not, in fact, established a universally applicable rule that narrowing canons of construction apply to provisions containing that language. Rather, like the Second Circuit, they have taken a context-dependent approach.

For instance, in *Berniger* v. *Meadow Green-Wildcat Corp.*, 945 F.2d 4 (1st Cir. 1991), the First Circuit case on which petitioner primarily relies (Pet. 24), no broad rule about the meaning of "including but not limited to" drove the analysis. The court in that case was interpreting a state statute that addressed inherent risks associated with skiing; because the court found that the risk at issue was "of the same nature as those specified" as examples in the statute, it did not need to resolve whether the statute might also be read to cover a risk of a different nature. See *id.* at 7-8; see also *Marina Bay Realty Trust LLC* v. *United States*, 407 F.3d 418, 423 (1st Cir. 2005) (interpreting relevant statutory language by application of the principle that a waiver of sovereign immunity must be unambiguous), cited in Pet. 24. And in other cases involving different statutes, the First Circuit has concluded that the examples following the word "including" played no limiting role at all. See, *e.g.*, *Reich* v. *Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1191-1192 (1st Cir. 1994) (construing statute permitting all "appropriate relief including rehiring or reinstatement of the employee" to permit an award of back pay in light of comparison to other relevant statutes).

Likewise, the Fourth Circuit has refrained from announcing any sweeping rule. In *United States* v. *Parker*, 30 F.3d 542 (4th Cir.), cert. denied, 513 U.S.

1029 (1994), cited in Pet. 24, the court addressed a statute stating that a "playground" must "contain[] three or more separate apparatus intended for the recreation of children including, but not limited to, sliding boards, swingsets, and teeterboards." 21 U.S.C. 860(d)(1) (1993). The court concluded based on "plain meaning" that a "surface paved with blacktop" could not be an "apparatus intended for the recreation of children"—and it bolstered that conclusion by invoking the *ejusdem generis* canon. 30 F.3d at 552-553; see *Lexington Cnty. Hosp.* v. *Schweiker*, 740 F.2d 287, 290 (4th Cir. 1984) (noting possible application of *ejusdem generis* canon to portion of federal regulation that does not have "including but not limited to" language and resolving interpretative issue based on deference to administrative agency), cited in Pet. 24. In other cases, however, the Fourth Circuit has found the meaning of "including" to depend on context. See, *e.g.*, *Jones* v. *American Postal Workers Union*, 192 F.3d 417, 426 (4th Cir. 1999) (stating that "labor organization" in 42 U.S.C. 2000e(d) could include an organization that represents federal employees even though the statute gives examples following the word "including" that all involve non-federal employers) (citing *Adams* v. *Dole*, 927 F.2d 771, 776-777 (4th Cir.) (stating that "including" is "more often than not the introductory term for an incomplete list of examples"), cert. denied, 502 U.S. 837 (1991)).

Unsurprisingly, the case law is similar in the other courts that petitioner claims always take his preferred approach.[6] It is difficult to imagine how a court could

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[6] That is true for example, in the Eighth Circuit (compare, *e.g.*, *Minnesota ex rel. N. Pac. Ctr., Inc.* v. *BNSF Ry. Co.*, 686 F.3d 567, 572-573 (8th Cir. 2012) (interpreting state statute based on distinc-

rule, as petitioner would have it (Pet. 27), that "including but not limited to" always means—in every possible setting in which it could arise—that the term preceding those words is narrowed by the examples that follow them. A statute or contractual provision might state that a particular defined term "includes but is not limited to" only one example, from which no narrowing principle can be extracted. Or the term in question might obviously be broader than the list of

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tion between different relevant provisions and noting that "[t]he statute's examples are also instructive" because they suggest the same conclusion), cited in Pet. 25, with *Dan's Super Mkt., Inc.* v. *Wal-Mart Stores, Inc.*, 38 F.3d 1003, 1005-1006 & n.2 (8th Cir. 1994) (construing restrictive covenant in light of state law providing that the "ordinar[y]" meaning of "including but not limited to" is that a list is "only illustrative in nature")); the D.C. Circuit (compare, *e.g.*, *United States* v. *Philip Morris USA, Inc.*, 396 F.3d 1190, 1200 (D.C. Cir.) (stating with minimal analysis that in interpreting federal statute with "including but not limited to" language the court would "expand on the remedies explicitly included * * * only with remedies similar in nature"), cert. denied, 546 U.S. 960 (2005), with *United States* v. *Dale*, 991 F.2d 819, 846 (D.C. Cir.) (explaining that search warrant seeking "business records including but not limited to" various "specific and limited" categories "subjected essentially all of [the business's] records * * * to seizure" due to the expansive "including but not limited to" language), cert. denied, 510 U.S. 906 and 510 U.S. 1030 (1993)); and Pennsylvania (compare, *e.g.*, *McClellan* v. *Health Maint. Org.*, 686 A.2d 801, 805 (Pa. 1996) (opinion of Newman, J., in support of affirmance) (opining that *ejusdem generis* canon would be applicable to statute introducing list with "including but not limited to"), cited in Pet. 26, with *Dechert LLP* v. *Pennsylvania*, 998 A.2d 575, 580-581, 584 (Pa. 2010) (interpreting different provision and concluding that "including but not limited to" language "generally reflects the intent of the legislature to broaden the reach of a statute") (citing *Pennsylvania Human Relations Comm'n* v. *Alto-Reste Park Cemetary Ass'n*, 306 A.2d 881, 885-886 (Pa. 1973)).

examples—for example, a regulation that states that hunting and fishing equipment includes but is not limited to "fishing rods, nets, hooks, bobbers, and sinkers." *Ibid.* (quoting *United States* v. *Aguilar*, 515 U.S. 593, 615 (1995) (Scalia, J., concurring in part and dissenting in part)). It might also be the case that the examples are at the very edges of what the term might otherwise be thought to include, so as to make clear that the examples were "inserted out of an abundance of caution" rather than to impose a limit. *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 226-227 (2008) (quoting *Fort Stewart Schs.* v. *FLRA*, 495 U.S. 641, 646 (1990)).

In the end, the "conflict" that petitioner identifies is not one in which different litigants in a case involving the same including-but-not-limited-to provision can expect to be treated differently in different parts of the country. Rather, it is a version of the conflict between canons of construction—an issue as to which particular courts both "thrust" and "parry." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and The Rules or Canons About How Statutes Are To Be Construed*, 3 Vand. L. Rev. 395, 401, 405 (1950) (discussing *ejusdem generis* canon); see *Ali*, 552 U.S. at 226-227 ("[W]e do not woodenly apply limiting principles every time Congress includes a specific example along with a general phrase."). This Court's review of the issue is not warranted.

c. Finally, even if petitioner were correct that the court below should have held that examples following the phrase "including but not limited to" always supply a narrowing construction of the term in question, such a holding would not aid him here. The question would then become "what common attribute connects

the specific items" in Section 1955(b)(2). *Ali*, 552 U.S. at 225. Petitioner says that the common attribute is that each item is a game in which "chance is the dominating factor in determining the result of the game." Pet. 28 (internal quotation marks and citation omitted). But the listed items are much more naturally read to yield a different common attribute—that all nine activities involve the wagering of money on an uncertain outcome. See *Ali*, 552 U.S. at 226; Gov't C.A. Br. 42.[7] That is most consistent with various indicators of the meaning of "gambling," and recognizes that Congress most likely (given the purposes of the IGBA) listed specific items merely because they were the forms of wagering on which organized crime commonly relied in 1970 as a source of funding. See *Iannelli*, 420 U.S. at 787; *Nardello*, 393 U.S. at 296.

That broader reading of the commonalities among the items that "'gambling' includes but is not limited to," 18 U.S.C. 1955(b)(2), readily sweeps in poker—and rightly so, since poker has long been commonly understood to be a form of gambling. See Pet. App. 85a-91a; see also *id.* at 21a-22a. Accordingly, even adoption of petitioner's implausible blanket rule for interpreting "including but not limited to" would not change the outcome here.

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[7] Alternatively, the listed items could be read as consistent with a definition of "gambling" that involves anything in which chance plays a material but not necessarily a predominating role.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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