APL-2020-00027

To be argued by:
Victor Paladino
20 minutes requested

State of New York
Court of Appeals

JENNIFER WHITE, KATHERINE WEST,
CHARLOTTE WELLINS AND ANNE REMINGTON,

Respondent,

v.

HON. ANDREW CUOMO, as Governor of the State of New York,
and the NEW YORK STATE GAMING COMMISSION,

Appellants.

BRIEF FOR APPELLANTS

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellants
The Capitol
Albany, New York 12224
(518) 776-2012
Victor.Paladino@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
VICTOR PALADINO
Senior Assistant
Solicitor General
of Counsel

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

UNITED STATES CONSTITUTION

NEW YORK CONSTITUTION

OTHER CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES (cont'd)

PAGE

NEW YORK STATE STATUTES

TABLE OF AUTHORITIES (cont'd)

PAGE

NEW YORK STATE STATUTES (cont'd)

OTHER STATE STATUTES

TABLE OF AUTHORITIES (cont'd)

OTHER STATE STATUTES (cont'd) **PAGE**

TABLE OF AUTHORITIES (cont'd)

OTHER STATE STATUTES (cont'd) **PAGE**

FEDERAL STATUTES

MISCELLANEOUS

TABLE OF AUTHORITIES (cont'd)

MISCELLANEOUS (cont'd) **PAGE**

TABLE OF AUTHORITIES (cont'd)

MISCELLANEOUS (cont'd) **PAGE**

PRELIMINARY STATEMENT

The issue in this appeal is whether Article I, § 9 of the New York Constitution forbids the Legislature from enacting a statute that authorizes and provides for the regulation of interactive fantasy sports contests—a type of contest that allows the competitors to mimic the role of general managers of sports teams by assembling a roster of players whose collective performance is then measured against rosters assembled by other competitors. While the constitutional provision generally prohibits gambling, it does not define what constitutes gambling; rather, it empowers the Legislature to enact implementing laws.

Since the adoption of this provision in 1894, the Legislature has repeatedly exercised its authority to define what activities constitute gambling. In two early decisions reviewing statutes enacted near contemporaneously with the constitutional provision, this Court articulated its understanding of the meaning of gambling at that time. First, this Court held that a "game of chance" would constitute gambling if chance rather than skill "is the dominating element that determines the result of the game." *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 171

(1904). Second, this Court held that the direct participants in a contest for prize money are *not* engaged in gambling within the meaning of the constitutional prohibition, even if the outcome depends in part on chance or on events outside of their control, because their participation in such prize contests is categorically different from outsiders betting on a contest in which they have no direct role. *People ex rel. Lawrence v. Fallon,* 152 N.Y. 12, 18-19 (1897). The current Penal Law definition of "gambling," enacted in 1965, borrows from these standards but, for purposes of defining criminal liability, expands the meaning of games of chance beyond *Ellison*'s "dominating-element" standard to include contests whose "outcome depends *in a material degree* upon an element of chance." Penal Law § 225.00(1) (emphasis added).

At issue here is whether the Legislature violated Article I, § 9 when it authorized interactive fantasy sports contests in its 2016 enactment of Article 14 of the Racing, Pari-Mutuel Wagering and Breeding Law (Racing Law). Such contests involve both skill and chance and thus do not self-evidently constitute "gambling." After extensive hearings, the Legislature found that interactive fantasy sports contests are neither "games of chance" nor "wagers on future contingent events not under the

contestants' control or influence." Racing Law § 1400(1)(a)-(b). Instead, the Legislature found that "the skill and knowledge of the participants," rather than chance, determine the outcome of interactive fantasy sports contests; and it further found that "contestants have control" over the outcomes of the contests, because it is their selection of fantasy rosters compared to other contestants' selections that determines which contestant prevails. *Id.* Instead of criminalizing such contests, Article 14 provides consumer safeguards, imposes taxes on registered companies offering the contests, and authorizes the Gaming Commission to regulate the industry. In so doing, the Legislature joined twenty-three other States that have likewise authorized and regulated interactive fantasy sports contests rather than criminalizing them.

A divided panel of the Appellate Division, Third Department found Article 14 to violate the gambling prohibition in Article I, § 9, affirming a decision by Supreme Court, Albany County that had concluded the same. This Court should reverse.

The constitutional prohibition on gambling unquestionably poses limits on the Legislature's authority; for example, the Legislature would not be able to authorize games that rely purely on chance, such as

roulette. But when an activity does not involve wagering on a pure-chance event, there are both factual and policy judgments to be made about how to characterize the activity. The Constitution entrusts the Legislature to make rational determinations on these difficult factual and public policy questions, subject to judicial review to ensure that the Legislature does not cross the bounds of rationality.

Here, the Appellate Division majority erred in overturning the Legislature's rational judgments within the scope of its constitutional authority. As a threshold matter, the majority erred in holding that the *constitutional* standard for whether an activity is a game of chance is the same as the *legislative* "material-degree" standard that the Legislature first adopted in 1965, rather than the "dominating-element" standard that this Court articulated in *Ellison* in upholding a statute enacted shortly after the adoption of the 1894 gambling prohibition. Under either standard, however, the evidence available to the Legislature supported its finding that interactive fantasy sports contests do not constitute prohibited games of chance because of the degree of skill that affects contest outcomes.

Supreme Court (though not the Appellate Division) separately concluded that interactive fantasy sports contests are gambling because they involve wagers on "a future contingent event not under [the player's] control or influence," but that conclusion too is mistaken. While participants in interactive fantasy sports contests cannot influence the outcome of real-world sporting events, the Legislature rationally found that the contestants influence the outcome of the fantasy sports contests in which they directly participate, through the exercise of their evaluative and predictive skills.

These legislative findings are rational and entitled to deference. Plaintiffs accordingly failed to carry their burden of demonstrating Article 14's unconstitutionality beyond a reasonable doubt. The Appellate Division's order should be reversed by declaring that plaintiffs did not meet their burden of demonstrating that Article 14 is unconstitutional.

QUESTION PRESENTED

Does Article 14 of the Racing Law comport with Article I, § 9 of the New York Constitution?

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal under C.P.L.R. 5601(b)(1). The Appellate Division's opinion and order declared that Article 14 of the Racing Law violates Article I, § 9 of the New York Constitution (R.1464). That order disposed of all claims between the parties, thereby finally determining the action.

The constitutional question is preserved. It was the sole cause of action raised in the complaint (R.78). It was briefed on cross-motions for summary judgment (R.518-35, 1229-51, 1353-85, 1390-1400) and in the Appellate Division.

STATEMENT OF THE CASE

A. The Constitutional Prohibition on Gambling

New York's first Constitution, adopted in 1777, did not mention gambling. At that time, the colonial and state legislatures authorized numerous public lotteries for a variety of purposes. *See Dalton v. Pataki,* 11 A.D.3d 62, 77 (3d Dep't 2004), *mod.*, 5 N.Y.3d 243 (2005); *People ex rel. Ellison v. Lavin*, 93 A.D. 292, 300-01 (1st Dep't), *rev'd on other grounds*, 179 N.Y. 164 (1904).

Later, the practice of using lotteries to raise public revenue fell into disfavor in the wake of corruption and scandal. *See* 1984 Ops Atty. Gen.

No. 84-F1 at 13, 1984 N.Y. AG LEXIS 94. In 1821, the Constitution was amended to prohibit lotteries not already authorized by law. 1821 N.Y. Const., art. VII, § 11. A similar provision restricting lotteries was included in the Constitution adopted in 1846. *See* 1846 N.Y. Const., art. I, § 10.

The first constitutional prohibition of gambling apart from lotteries in this State appeared in the 1894 Constitution, which provided: "Nor shall any lottery or the sale of lottery tickets, pool-selling, book making, or any other kind of gambling hereafter be authorized or allowed within this State; and the Legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section." 1894 N.Y. Const., art. I, § 9. A substantially identical provision was included when the current Constitution was approved in 1938.

Since 1938, Article I, § 9 has been amended six times. It now expressly authorizes pari-mutuel betting on horse races; bingo and lottery games conducted by religious, charitable, and nonprofit organizations; certain games of chance authorized by localities; a state-run lottery; and up to seven casinos. *See* Robert Allan Carter, NEW YORK

STATE CONSTITUTION: SOURCES OF LEGISLATIVE INTENT at 7-9 (2d ed. 2001); *see also Dalton*, 11 A.D.3d at 77-79.

The current constitutional provision states, in relevant part:

> [N]o lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

N.Y. Const., art. I, § 9(1).[1]

B. Laws Implementing the Gambling Prohibition

Aside from prohibiting or permitting certain specified activities, the Constitution has never defined "gambling." Over the years, the

[1] A subsequent subsection provides additional exceptions to the gambling prohibition for certain games offered by charities and other authorized organizations. N.Y. Const. Art. I, § 9(2).

Legislature has made different policy judgments about what activities to classify as gambling, as well as how to regulate such activities.

In the 1895 legislative session, the Legislature amended section 351 of the Penal Code to prohibit pool-selling[2] and bookmaking. L. 1895, ch. 572, § 1 (reproduced at R.450-451); *see* 1984 Ops Atty. Gen. No. 84-F1 at 14. Specifically, the Penal Code criminalized recording or registering bets or wagers (*i.e.*, bookmaking), as well as selling pools "upon the results of any trial or contest of skill, speed or power of endurance, of man or beast," or upon any "unknown or contingent event whatsoever." L. 1895, ch. 572, § 1 (former Penal Code § 351). This prohibition was long understood to prohibit betting on sporting events. *See* 1984 Ops Atty. Gen. No. 84-F1 at 14; *see also People v. Conigliaro*, 290 A.D.2d 87, 88 (2d Dep't 2002); *People v. Traymore*, 241 A.D.2d 226, 231 (1st Dep't 1998). At the same time, the Legislature determined that gambling at licensed racetracks—though

[2] Pool-selling is not defined in the Constitution or the Penal Law. But pool-selling is commonly understood to mean "the receiving from several persons of wagers on the same event, the total sum of which is to be given the winners, subject ordinarily to a deduction of a commission by the seller of the pool." *United States ex rel. Rafanello v. Hegstrom*, 336 F.2d 364, 365 (2d Cir. 1964), quoting *State v. Fico*, 192 A.2d 697, 699 (Conn. 1960). The term also broadly encompasses the taking of bets or wagers. *Id.*; *see People v. McCue,* 87 A.D. 72, 73 (2d Dep't 1903).

indisputably a prohibited form of gambling—should not be a crime but should instead be regulated by making collection of gambling debts unenforceable. L. 1895, ch. 570, § 17; *People ex rel. Sturgis v. Fallon*, 152 N.Y. 1, 11 (1897) (upholding this statute). And the Legislature expressly authorized horse owners to hold races between their horses where the winning owner would collect a prize consisting in part of the fees paid by all owners participating in the race. *See* L. 1895, ch. 570, § 3; *People ex rel. Lawrence v. Fallon,* 152 N.Y. at 19.

The Legislature continued to make policy judgments about how it wished to regulate gambling in the early twentieth century. In 1908, the Legislature repealed the 1895 provisions that imposed only civil rather than criminal consequences for gambling at licensed racetracks. L. 1908, ch. 506, § 2. In 1910, the penal prohibitions against bookmaking and pool-selling were re-codified in section 986 of the Penal Law. *See* L. 1910, ch. 488, § 1. The Penal Law at that time was amended to make unlawful "[a]ll wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, causality, or unknown or contingent event whatever." Penal Law § 991 (McKinney 1917). Thus, by 1910, the Penal Law proscribed both games of chance (including

lotteries) as well as wagers on future contingent events. In 1934, the Legislature decided to return to the 1895 regime, under which gambling at racetracks carried only civil liability. L. 1934, ch. 233, § 1.

The penal statutes during these periods did not define the standard for determining whether an activity was gambling. Two earlier decisions from this Court, however, had described standards for determining whether an activity was a game of chance or involved a wager on a contingent future event, the two types of gambling the Legislature had recognized.

First, in *People ex rel. Ellison v. Lavin*, 179 N.Y. 164 (1904), this Court articulated what became known as the "dominating element" test in the context of interpreting a statute prohibiting lotteries: the "test or the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game." *Id.* at 170-171. This test became the standard in New York and nationwide to evaluate whether an activity was a game of chance and thus a form of gambling, or instead a game of skill that should not be deemed gambling even though some degree of chance influenced its outcome. *See* Bennett Liebman, *Chance v. Skill in*

New York's Law of Gambling: Has the Game Changed?, 13 GAMING L. REV. & ECON. 461, 461-62 (2009).

Second, in *People ex rel. Lawrence v. Fallon,* 152 N.Y. 12 (1897), this Court drew a distinction between (a) participants who pay an entrance fee to compete in a contest that they directly influence (even though chance may also affect the outcome) and (b) outside parties who wager on the outcome of contingent events over which they have no influence whatsoever, and held that Article I, § 9 prohibits only the latter activity. At issue in *Lawrence* was the Legislature's 1895 authorization of contests in which horse owners would race their horses to win a prize consisting of the entrance fees paid by all other competing owners. This Court upheld the statute, finding "a plain and obvious distinction" between a wager made by "one not a party to the contest," and "a race where the stake is contributed by the participants alone, and the successful contestant is to have the fund thus created." 152 N.Y. at 19.

In 1965, when the criminal laws of New York were codified in a new Penal Law, the gambling offenses underwent comprehensive revisions in a new Article 225. *See* L. 1965, ch. 1030. For purposes of criminal culpability, "gambling" is now defined in Penal Law § 225.00(2). The

statute provides that "a person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome." Under the 1965 law, still in effect today, a person faces criminal liability not for merely engaging in gambling, but instead for "promoting" or "advancing" "gambling activity," Penal Law §§ 225.00(4), 225.00(5), 225.05, 225.10, or for possessing gambling records or devices, *id*. §§ 225.15, 225.20, 225.30. Private wagers between people who are not otherwise promoting or advancing gambling activity are subject to civil regulation only. *See* Gen. Oblig. Law §§ 5–401-5–423.

Like prior statutes, the Penal Law specifies two forms of wagering for purposes of criminal culpability: one on a "contest of chance," and the other on a "future contingent event" not under the bettor's "control or influence." (The same two types of gambling are also identified in the separate provisions that render gambling debts civilly unenforceable. Gen. Oblig. Law § 5-401.) For purposes of criminal liability, the 1965 Penal Law replaced *Ellison's* common-law dominating-element standard with a more expansive standard for games of chance: it defines a "contest

of chance" as "any contest, game, gaming scheme or gaming device in which the outcome depends *in a material degree* upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." Penal Law § 225.00(1) (emphasis added).

To explain the Penal Law's separate language that gambling also involves wagering on a "future contingent event not under his control or influence," the practice commentaries use the hypothetical of a "chess game between A and B, with A and B betting against each other and X and Y making a side bet." A and B (the chess players) are not gambling because they are engaged in a game of skill in which their respective efforts "have a material influence over the outcome." But X and Y (the side bettors) *are* gambling "because the outcome [of their wager] depends upon a future contingent event that neither has any control or influence over"—namely, the chess match between A and B. *See* William C. Donnino, Practice Commentaries to Penal Law § 225.00, 39 McKinney's Cons. Laws of N.Y. at 355 (2008). For similar reasons, while the actual participants in a horse race are engaged in a contest of skill (even though chance can play a significant role in the outcome of a horse race), members of the general public betting on horse racing are gambling

under the Penal Law. *See* Denzer & McQuillin, Practice Commentaries to Penal Law § 225.00, 39 McKinney's Cons. Laws of N.Y. at 23 (1967).

C. Factual Background

The following facts are drawn from the record before the Legislature when it enacted Article 14.

1. Fantasy Sports Contests

Fantasy sports contests—which have existed for more than thirty-five years[3]—are a type of contest in which the competitors mimic the role of general managers of sports teams by constructing rosters of players that then "compete" against rosters constructed by other contestants (R.727-728, 730-731, 739-740). Just as a general manager evaluates extensive information in selecting players for a real-world team, competitors in fantasy sports contests use their sports knowledge and strategy to select fantasy teams of real-world athletes (R.441, 728, 730-731, 739-740, 757). In selecting these teams, competitors may look to past performance, injury history, performance trends, a team's strength of

[3] *See* Daniel Okrent, "The Year George Foster Wasn't Worth $36: An Introduction to Rotisserie League Baseball" in Glen Waggoner, ed., ROTISSERIE LEAGUE BASEBALL 3-7 (1984) (describing origins of the original, season-long fantasy baseball league).

schedule, forecasts of weather conditions, and other factors (R.441, 728, 757). In one form of contest, contestants assemble teams in a fantasy draft, in which each real-world athlete can be selected only by a single contestant (R.728, 741).

Contestants then compete against each other with their fantasy teams, using a scoring system that awards points based not on the outcome of any real-world games, but rather on an aggregation of game statistics concerning the performance of the individual real-world athletes on their constructed rosters. The scoring system thus measures how well, compared to others, the contestant selected a fantasy roster of players (R.441, 728, 740). The object of the fantasy sports contest is to assemble a team of real-world athletes whose performance will accumulate the most points across multiple fantasy scoring categories (R.441, 728, 740). For example, a running back may earn one point for every ten rushing yards and six points for a touchdown (R.728, 740).

In season-long contests, contestants must wait several months for the real-world season to end before the winner of the fantasy sports contest is determined (R.729). To provide more immediate results, online interactive fantasy sports providers began offering contestants shorter-

term online fantasy sports games, including weekly and daily contests. Daily contests share many of the same features of season-long contests, but are shorter in duration (R.729, 741). In addition, daily and weekly leagues often assign real-world athletes a fantasy salary to be paid out of the contestant's fantasy team "payroll" budget; these leagues also allow athletes to be selected by more than one contestant so long as any fantasy team does not exceed its fantasy payroll "salary cap" (R.729, 741).

Like real-world general managers, daily fantasy sports contestants must exercise fiscal discipline and spend their fantasy team budget wisely (R.731). How well their team performs hinges on contestants' knowledge and skill at predicting which real-world players will provide the most bang-for-the-buck in scoring (R.730). For instance, the veteran quarterback Tom Brady might "cost" $15,000 of the contestant's fantasy roster budget, whereas a rookie quarterback might cost just $5,000 of the contestant's hypothetical roster budget, but the unproven rookie quarterback might yield more points per dollar "spent," leaving a greater portion of the contestant's fantasy payroll budget to allocate to other valuable players whose performances help the fantasy roster accumulate contest points (R.772).

Contestants typically pay entry fees to participate in daily fantasy sports contests. The winnings paid to successful online contestants come from the entry fees paid by all contestants (R.441) but, as Article 14 requires, cannot depend upon the number of contestants. *See* Racing Law § 1404(1)(n) (contest prize value may not be determined by the number of contestants or the amount of any entry fees paid by such contestants). The interactive fantasy sports operators derive their revenue by retaining a portion of the entry fees (R.441).

2. The Attorney General sues DraftKings and FanDuel

The daily fantasy sports industry is dominated by two competing services: the New York-based FanDuel and the Boston-based DraftKings. In November 2015, prior to the Legislature's enactment of Article 14, the New York Attorney General sued both companies in Supreme Court, New York County, alleging that their daily fantasy sports competitions constituted illegal gambling under New York law (R.555, 582-584, 591, 616-619). The complaints sought a judgment enjoining the companies from violating New York law, as well as restitution, penalties, and other relief for deceptive advertising and consumer fraud (R.588-589, 622-623).

Supreme Court granted the Attorney General's motion for a preliminary injunction in December 2015 (R.92, 101). DraftKings and FanDuel appealed, and the Appellate Division, First Department stayed the preliminary injunction pending appeal (R.638).

While the appeal was pending, the Legislature enacted Article 14, the statute at issue here. Upon passage of the statute, the Attorney General discontinued the parts of the actions alleging that the daily fantasy sports contests offered by DraftKings and FanDuel constituted illegal gambling under New York law (R.640-641, 643-644). The remaining portions of the actions (including consumer-protection claims) were settled, with DraftKings and FanDuel agreeing to pay penalties and reform their marketing practices (R.453-466, 468-482, 646-650).

D. The Legislature Authorizes Interactive Fantasy Sports Contests

Before enacting Article 14 (reproduced at R.652-660), the Legislature conducted an extensive inquiry into daily fantasy sports (R.663-664). It heard hours of testimony on the subject from a full range of interested parties (R.719-992), considered expert reports (R.1174-1182, 1184-1205, 1207-1216), researched the operations of fantasy sports and the skill needed to succeed in the contests, and publicly debated the

character of the contests to determine whether they constitute gambling within the meaning of the New York Constitution (R.661-700).

Article 14 defines an "interactive fantasy sports contest" as "a game of skill wherein one or more contestants compete against each other by using their knowledge and understanding of athletic events and athletes to select and manage rosters of simulated players whose performance directly corresponds with the actual performance of human competitors on sports teams and in sports events." Racing Law § 1401(8). The statute declares "that interactive fantasy sports do not constitute gambling in New York state as defined in article [225] of the penal law," thereby eliminating criminal penalties for fantasy sports contests. *Id.* § 1400(2).

The Legislature made two findings to support Article 14. First, the Legislature found that interactive fantasy sports "are not games of chance." Rather, they are contests "in which the fantasy or simulation sports teams are selected based upon the skill and knowledge of the participants and not based on the current membership of an actual team that is a member of an amateur or professional sports organization." Racing Law § 1400(1)(a). Although the Legislature did not expressly refer to the "dominating element" or "material degree" tests in this finding, its

next finding that interactive fantasy sports contests are not gambling under the Penal Law, *id.* § 1400(2), demonstrates that the Legislature found that the outcome of such contests did not depend to "a material degree upon an element of chance." *Cf.* Penal Law § 225.00(1).

Second, the Legislature found that interactive fantasy sports contests "are not wagers on future contingent events not under the contestants' control or influence." To the contrary, the Legislature found that contestants influence the outcome of the fantasy sports contests in which they are competing because they

> have control over which players they choose and the outcome of each contest is not dependent upon the performance of any one player or any one actual team. The outcome of any fantasy sports contest does not correspond to the outcome of any one sporting event. Instead, the outcome depends on how the performances of participants' fantasy roster choices compare to the performance of others' roster choices.

Racing Law § 1400(1)(b).

The statute provides for consumer safeguards, minimum standards, and the registration, regulation, and taxation of interactive fantasy sports providers. Racing Law §§ 1402-1410. The statute authorizes only those contests registered and conducted under Article 14 (Racing Law § 1411) and expressly prohibits unregistered contests (*Id.* § 1412). To become registered, an operator must implement measures that

"ensure all winning outcomes reflect the relative knowledge and skill of the authorized players and shall be determined predominantly by accumulated statistical results of the performance of individuals in sports events." Racing Law § 1404(1)(o). Recognizing that the outcomes of fantasy sports contests are heavily influenced by skill, the statute requires operators to identify any highly experienced players and limit the number of entries such players can submit (*Id.* § 1404(1)(g) and (2)) so that less skillful players are on notice of the quality of their opponents and may choose to engage in contests against less skillful players.

The statute also imposes taxes on registered companies operating in New York. *Id.* § 1407. The proceeds of those taxes, as well as any interest or penalties collected by the Gaming Commission, must be directed to the State Lottery Fund for education. *Id.* § 1409.

E. This Action

Plaintiffs are New York taxpayers with gambling disorders or relatives with gambling disorders. They sued the Governor and the New York State Gaming Commission in Supreme Court, Albany County seeking a judgment declaring that Article 14 violates Article I, § 9 of the

New York Constitution and enjoining defendants from implementing the statute's regulatory framework (R.44-45, 79).

On cross-motions for summary judgment, Supreme Court invalidated the statute in part and upheld it in part. First, the court concluded that interactive fantasy sports contests are "gambling" within the meaning of Article I, § 9, and that the Legislature had thus exceeded its constitutional authority by declaring that they are not, and by authorizing such contests. Second, Supreme Court severed and upheld the discrete section of Article 14 that eliminated pre-existing criminal penalties for interactive fantasy sports contests, reasoning that the Legislature would have wanted to remove criminal penalties even if it could not remove the constitutional ban (R.30-31). The parties cross-appealed to the Appellate Division, Third Department.

A divided Third Department panel modified and affirmed the judgment. The majority held that interactive fantasy sports contests are games of chance and thus constitute gambling as a matter of law. Consequently, the majority affirmed the judgment below by holding that the statute violated Article I, § 9 to the extent it authorizes and provides for the regulation of interactive fantasy sports contests (R.1450-53). The

majority modified the judgment below by also invalidating Article 14's separate elimination of criminal penalties for interactive fantasy sports contest. The majority recognized that the Legislature could lawfully decriminalize the contests, but it concluded that Supreme Court had improperly severed the decriminalization provisions of the statute from the other provisions, reasoning that the Legislature would not have wanted to decriminalize the contests if it had known that it could not constitutionally regulate them (R.1453-56). Finally, the majority upheld Section 1412 of the statute, which prohibits the conduct of unregistered fantasy sports contests (R.1453).

The dissenting justice would have upheld the statute in its entirety (R.1456-63).

ARGUMENT

THE LEGISLATURE'S AUTHORIZATION OF INTERACTIVE FANTASY SPORTS DOES NOT VIOLATE THE CONSTITUTION'S PROHIBITION ON GAMBLING

Like any other statute, Article 14 enjoys a strong presumption of constitutionality, *Cohen v. State*, 94 N.Y.2d 1, 8 (1999), grounded in part on "the respect due the legislative branch." *Dunlea v. Anderson*, 66 N.Y.2d 265, 267 (1985). To overcome that presumption, plaintiffs bear

the heavy burden of establishing the statute's unconstitutionality "beyond a reasonable doubt." *Matter of E.S. v. P.D.*, 8 N.Y.3d 150, 158 (2007) (internal quotation marks and citation omitted). Because plaintiffs contend that Article 14 is unconstitutional on its face rather than as applied, they must prove "that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment." *Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003) (internal quotation marks omitted). The Appellate Division erred in concluding that plaintiffs' challenge to Article 14 satisfied these demanding standards.

A. The Constitution empowers the Legislature to make rational judgments about what constitutes "gambling."

1. In the absence of a clear definition of "gambling," the Constitution's delegation of implementing authority to the Legislature gives it latitude to determine whether to authorize activities that involve both skill and chance.

Article I, § 9 of the New York Constitution does not define "gambling." Nor is the constitutional prohibition self-executing. Rather, Article I § 9 "expressly delegates to the legislature the authority [to implement the provision], and requires it to enact such laws as it shall

deem appropriate to carry it into execution." *Sturgis*, 152 N.Y. at 11.

As this Court has long recognized, when, as here, the Constitution explicitly empowers the Legislature to implement a broad and otherwise undefined constitutional command, the Legislature has latitude in exercising this authority, and courts should defer to the Legislature's rational choices in implementing its constitutional responsibilities. For instance, Article XVII, § 1 of the Constitution mandates that the State provide "aid, care, and support of the needy," but entrusts the Legislature with determining the "manner" and the "means" for providing that assistance. This Court has accordingly deferred to the Legislature's judgment as to the "sufficiency of the benefits distributed to each eligible recipient," *Bernstein v. Toia*, 43 N.Y.2d 437, 449 (1977), as well as its reasonable definition of who is deemed "needy." *Matter of Barrie v. Lavine*, 40 N.Y.2d 565, 570 (1976).

Similarly, in interpreting the constitutional guarantee of a sound basic education, this Court has recognized that "deference to the Legislature's education financing plans" is critical to "avoid intrusion on the primary domain of another branch of government." *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28 (2006). As these examples

demonstrate, while New York courts are "the ultimate arbiters of our State Constitution," *id.*, judicial deference is appropriate to respect the separation of powers, one of the core tenets of our Constitution—particularly when, as here, the Constitution itself expressly vests the Legislature with the responsibility of implementing its commands.

Deference to the Legislature makes sense here. Since the adoption of the Constitution's gambling prohibition in 1894, the determination of whether activities constitute gambling has historically required factual findings and policy judgments that the Legislature is well-suited to make. Over the past 125 years, the Legislature has made many different judgments about what activities should be regulated as gambling, and in what manner. *See supra* at 9-14. For activities that involve a mix of skill and chance, the Constitution does not compel the Legislature to make those judgments one way or another, so long as the Legislature acts rationally in implementing its policy choices.

For many activities, reasonable minds can differ about the relative balance of skill or chance involved, or about the degree to which participants can influence the outcome of a contest—the factual criteria that have historically determined whether an activity constitutes

"gambling" in New York. *See* Donnino, *supra* at 355 (in the Penal Law context, observing that while some games are obviously contests of chance and others are obviously contests of skill, "'there is a vast middle ground or gray area . . . that had caused the courts considerable difficulty") (internal quotation marks and citation omitted). The enactment of Article 14 was not the first time the Legislature exercised its constitutional prerogative to deem certain activities to be gambling (or not), depending on the specific features of those activities and the Legislature's judgment about where to draw the line between permissible and prohibited activities. *See generally FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("[R]estraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing" (internal quotation marks and citation omitted)).

For instance, businesses offering insurance collect premiums from policyholders and make payments based on the outcome of contingent events not within the policyholder's (or the insurer's) control—namely, whether a person, home, or property will suffer damage. Nevertheless, the Legislature in 1889 specifically exempted from the statutory prohibition on gambling "any insurance made in good faith for the

security or indemnity of the party insured." *See* L. 1889, ch. 428, § 1, amending Penal Law former § 343.[4]

In the same statute, the Legislature made it a misdemeanor to operate a place for making wagers or bets that depended on, among other things, "the future price of stocks, bonds, securities, commodities or property of any description whatever." L. 1889, ch. 428, § 1. But this provision did not criminalize the actual buying or selling of stocks or stock options, even though those activities involve making predictions about price movements outside the purchaser's and seller's control. *See People v. Todd*, 4 N.Y.S. 25, 28, 51 Hun. 446 (Sup. Ct. Gen. Term, 1st Dep't 1889); *see also* Gov. Approval Mem. for Assembly bill No. 943 (prohibition "not intended to disturb the fair and honorable business of the various respectable mercantile exchanges of New York city"),

[4] Although the insurance exemption was deleted as part of the 1965 Penal Law revisions, this omission did not make a substantive change but was part of an overall effort to simplify and consolidate the gambling and lotteries articles. *See* Staff Notes of the Commission on Revision of the Penal Law, Proposed New York Penal Law, McKinney's Spec. Pamph. (1964), at 381-382.

reproduced in PUBLIC PAPERS OF DAVID B. HILL, GOVERNOR, 1889 (Argus Co. 1890) at 199.[5]

To take another example, this Court upheld the Legislature's 1895 authorization of contests in which horse owners raced their horses for prize money. *Lawrence*, 152 N.Y. at 12. Although such contests turned in part on chance as well as on events over which the owners had no direct control—namely, the actual running of their horses during the race—this Court found it meaningful that the owners were direct participants in the races rather than outside bettors. *Id.* at 19. And this Court found such races functionally indistinguishable from numerous other contests where individuals competed to earn a prize. If the Constitution forbade all such contests, this Court reasoned, then "it would seem to follow that the farmer, the mechanic or the stockbreeder who attends his town, county or state fair, and exhibits the products of his farm, his shop or his stable, in competition with his neighbors or others for purses or premiums offered by the association, would become a participant in a crime"—an intolerable result. *Id.*

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[5] The United States Congress has also clarified that commodities and futures trading are not gambling within the meaning of federal statutory gambling prohibitions. 53 U.S.C. § 5362(1)(E)(i)-(iv).

As a final example, in 1995, the Legislature authorized horse race handicapping tournaments, finding that such tournaments "shall be considered a contest of skill and shall not be considered gambling." L. 1995, ch. 2, § 110, now codified at Racing Law § 906(3) (McKinney's 2019 Supp.). Like fantasy sports contestants, participants in handicapping tournaments match their predictive and evaluative skills against each other for prizes derived from their entry fees and awarded by comparing the relative predictive skills of the contestants, not by the absolute outcomes of the races. Racing Law § 906(2)(a).[6] Article 14 is thus simply the most recent exercise of the Legislature's constitutionally delegated authority to determine how to implement Article I, § 9's prohibition on gambling—and more specifically, to decide whether to classify a particular activity as "gambling" at all.

In enacting Article 14, the Legislature brought to bear the full panoply of its unique powers as a political branch to resolve the difficult

[6] While the Racing Law does not define handicapping tournaments, *see* Racing Law § 906(1), an example would be a contest in which participants make hypothetical win, place, or show wagers on races within a particular time frame among races at a certain set of tracks, with the winner being the contestant who earns the greatest hypothetical payoffs, based on the pari-mutuel payouts that actual bettors won for such races.

factual and policy issues raised when considering activity that involves both skill and chance. On the factual side, the Legislature conducted an extensive inquiry into the nature of interactive fantasy sports contests—it held hearings, received testimony from interested parties on both sides of the issue, and considered a broad range of evidence on the degree of skill involved in interactive fantasy sports and the degree of influence that participants have on the outcome of the contests. The legislative history shows that these questions were close: for example, in debating the bill, some legislators analogized the skill involved in fantasy sports to lawful activities such as day trading in securities (R.677-678, 840-841), while others thought that the proper analogy was to sports betting (R.687, 690). But after considering all viewpoints on these questions, the Legislature ultimately made detailed findings that interactive fantasy sports contests do not constitute "gambling" because they do not involve staking something of value on the outcome of either a contest of chance or a future contingent event outside of the player's control or influence. Racing Law § 1400(1)(a)(b).

The Legislature further made important policy judgments in deciding that interactive fantasy sports contests were not like the types

of activities that had traditionally been considered "gambling." For example, the Legislature observed that the major professional sports organizations—the National Football League, Major League Baseball the National Basketball Association, and the National Hockey League—support fantasy sports contests notwithstanding their vigorous opposition to sports betting at the time (R.734, 1012, 1019, 1021, 1024, 1167). And the Legislature specifically found that interactive fantasy sports contests had become "a major form of entertainment for many consumers" even before Article 14's enactment. Racing Law § 1400(3).

The Legislature's factual findings and policy judgments are rational and should be upheld unless it is established beyond a reasonable doubt that the Legislature has acted unconstitutionally. *Matter of E.S.*, 8 N.Y.3d at 158; *see East N. Y. Sav. Bank v. Hahn*, 293 N.Y. 622, 627 (1944) ("legislative findings are entitled to great weight"). As courts have long recognized, legislative bodies are better equipped than courts to engage in fact-finding when addressing social and economic issues. While courts are generally limited to the evidence presented by the litigants, the Legislature may draw from a wide range of sources and shared understandings to arrive at appropriate legislation. *See Turner Broad.*

Sys., Inc. v. FCC, 520 U.S. 180, 196, 199 (1997); *see also I.L.F.Y. Co. v. City Rent & Rehabilitation Admin.*, 11 N.Y.2d 480, 489 (1962). This Court also regularly defers to legislative policy judgments over complex social issues. *See People v. Francis,* 30 N.Y.3d 737, 751 (2018); *Saratoga County Chamber of Commerce v. Pataki,* 100 N.Y.2d 801, 823 (2003); *Matter of N.Y. State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233, 239-240 (1984).

2. The Appellate Division erred in rejecting the Legislature's findings and substituting the court's own judgment.

The reasons given by the Appellate Division majority for refusing to accept the Legislature's findings on fantasy sports are not persuasive.

First, the Appellate Division majority erred in holding that the Legislature was entitled to *less* deference here than an administrative agency whose findings are reviewed for substantial evidence (R.1448). The majority characterized the Legislature's action in authorizing fantasy sports as carving out an "exception" to the gambling prohibition in Article I, § 9. Such exceptions, it reasoned, must be "strictly construed"—a heightened standard of review it deemed incompatible with judicial deference (R.1449).

This characterization of Article 14 is incorrect. As the dissent below properly observed (R.1456-57 n.1), the Legislature did not create any "exception" to the constitutional prohibition on gambling; rather, it found that, given the skill-based nature of the contests, interactive fantasy sports contests are *not* gambling at all. Nor do the cases cited by the Appellate Division majority support its view that heightened judicial scrutiny applies to *all* statutes that deem an activity to fall outside the constitutional gambling prohibition. To the contrary, these cases hold more specifically that, because gambling contracts are by statute generally unenforceable in this State, administrative rules regulating gambling contracts and lotteries must be strictly construed. *See Moina v. Games Mgt. Servs.*, 58 N.Y.2d 523, 529 (1983) (holding that Division of the Lottery rules insulated from liability a private sales agent and contractor whose negligence allegedly caused the rejection of plaintiff's winning lottery ticket); *Ramesar v. State*, 224 A.D.2d 757, 759 (3d Dep't) (upholding application of lottery regulations that invalidated the claimant's Lotto subscription entry), *lv. denied*, 88 N.Y.2d 811 (1996); General Oblig. Law § 5-411 (declaring gambling contracts "void").

In contrast, when the Legislature exercises its constitutional authority to enact laws implementing Article I, § 9, this Court has deferred to the Legislature's policy judgments. In *Finger Lakes Racing Ass'n v. N.Y. State Off-Track Pari-Mutuel Betting Comm'n*, 30 N.Y.2d 207, 216-217 (1972), for example, this Court held that the Legislature validly created the New York City Off-Track Betting Corporation pursuant to the Legislature's authority under Article 1, § 9 to authorize pari-mutuel betting on horse races "from which the state shall derive a reasonable revenue for the support of government." Even though the bulk of the OTB's revenue did not go to the State but was used to offset the OTB's operating expenses or to fund municipal governments, this Court deferred to the Legislature's judgment that the statute's direction of revenue to the State was substantial enough to satisfy the Constitution. *Id.* at 216-217.

This Court has recently confirmed that courts should accept legislative findings even in areas where a constitutional prohibition may be applicable. In *For People Theatres of N.Y., Inc. v. City of New York*, 29 N.Y.3d 340 (2017), this Court reviewed a challenge under the First Amendment (and the parallel provision of the New York Constitution) to

the application of zoning regulations to the adult entertainment industry. Even though the zoning restrictions implicated intermediate scrutiny, this Court held that judicial review of the Legislature's findings in support of the restrictions was limited to determining whether the Legislature "'has drawn reasonable inferences based on substantial evidence.'" 29 N.Y.3d at 359 (quoting *Turner Broadcasting System, Inc.*, 520 U.S. at 195). This standard, the Court emphasized, requires courts to be "more deferential" to the Legislature than they are "to judgments of an administrative agency" because the Legislature is "best equipped to amass and evaluate the vast amounts of data bearing upon legislative questions." *Id.* (internal quotation marks and citation omitted).

To be sure, the Legislature's factual findings are not immune from judicial scrutiny. If, for example, the Legislature were to declare that roulette was not gambling, a court could properly reject that finding as irrational based on the nature of the game and the long history of its treatment as a classic form of gambling, both in New York and other states. But interactive fantasy sports have a relatively modern origin (R.271, 735), and the Legislature is owed greater latitude when it considers the status of activities "which had not been understood to be

gambling" when gambling was first prohibited by the Constitution in 1894. *See People ex rel. Lawrence v. Fallon,* 4 A.D. 82, 87 (1st Dep't 1896), *aff'd*, 152 N.Y. 12 (1897). Unlike with roulette, reasonable minds may differ about the degree of skill involved in the interactive fantasy sports contests and whether they are more appropriately characterized as gambling or as lawful activities. Indeed, those differences of opinion were fully vetted before the Legislature, as the dissent below aptly observed (R.1461-62). Under the proper standard of review for evaluating the Legislature's resolution of those differences of opinion, the relevant question is whether the Legislature's action is unconstitutional beyond a reasonable doubt. *Matter of E.S.*, 8 N.Y.3d at 158. Because the Legislature's findings in support of Article 14 are rational, this Court should uphold them, even if de novo review might yield a contrary conclusion. *See Lincoln Bldg. Assocs. v. Barr*, 1 N.Y.2d 413, 415 (1956) ("Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the legislature") (internal quotation marks and citation omitted).

Second, the Appellate Division majority erred in finding that *Dalton v. Pataki*, 5 N.Y.3d 243, 263-265 (2005), forecloses any deference

to the Legislature in applying Article I, § 9. In *Dalton*, one of the questions was whether video lottery gaming was a lottery within the meaning of the exception in Article I, § 9 permitting state-run lotteries, or instead a form of slot-machine gaming that would be prohibited under the Penal Law. *Dalton* does not mention deference, but the Appellate Division majority in this case inferred that this Court gave the Legislature no deference because the Court decided the constitutional question "without mentioning the source of factual information relied upon, or that such information came from the legislative record or was before the Legislature" (R.1448).

That silence is unsurprising because no party in *Dalton* raised a dispute concerning how video lottery terminals operated or the relative balance of skill and chance that affected the outcome of those games—factual questions that the Legislature specifically examined and answered here in authorizing interactive fantasy sports. More fundamentally, in *Dalton*, this Court *upheld* the Legislature's judgment that video lottery terminals should be classified as lottery games instead of as slot machines, despite acknowledging plaintiffs' argument that video lottery terminals "resemble slot machines" in many ways. 5 N.Y.3d

at 263. In so doing, the Court acknowledged that the Legislature had flexibility to apply the gambling prohibition's lottery exception to technologies unheard of at the time of the exception's adoption because "[t]he language of the Constitution is not so rigid as to prevent this type of update and modernization." *Id.* at 265. Here, by contrast, the Appellate Division majority refused to recognize any flexibility in the Constitution's gambling prohibition and declined to give any deference to the Legislature's application of that provision to the relatively new activity of interactive fantasy sports contests.

B. The Legislature rationally found that interactive fantasy sports contests are not contests of chance.

1. The constitutional standard for determining whether a contest is a game of chance is the dominating-element standard, not the material-degree test.

In permitting interactive fantasy sports, the Legislature expressly found that such contests "are not games of chance" within the meaning of Penal Law § 225.00(1), and thus do not violate the Penal Law's "material-degree" test—let alone *Ellison*'s "dominating-element" test. The Legislature reasoned that, in interactive fantasy sports contests, "the fantasy or simulation sports teams are selected based upon the skill

and knowledge of the participants and not based on the current membership of an actual team that is a member of an amateur or professional sports organization." Racing Law § 1400(1)(a).

Supreme Court accepted the Legislature's finding that success at interactive fantasy sports contests is predominantly a matter of skill (R.20). The Appellate Division majority did not disturb that finding. Yet it agreed with Supreme Court that interactive fantasy sports contests nonetheless constitute "gambling" because a "material degree" of chance affects the outcome of the contests (R.18, 1452-53).

In reaching this conclusion, the Appellate Division applied the wrong standard. The "material-degree" standard is not part of the *constitutional* definition of gambling. Instead it is part of the *statutory* definition of games of chance that the Legislature codified in Penal Law § 225.00(1) in 1965, more than seventy years after the adoption of Article I, § 9. *See* Donnino, *supra*, at 356. That statutory definition was enacted to broaden the then-extant "dominating element" definition of games of chance that had been the prevailing standard in New York (and indeed around the country) since *Ellison*—namely, limiting the definition of games of chance to contests where chance rather than skill was "the

dominating element that determines the result of the game." 179 N.Y. at 170-71.

There is a clear difference between the two standards. Under the dominating-element standard of *Ellison*, a game is a contest of chance if chance accounts for "more than fifty percent" of the outcome of the game, with the participants' skill playing a lesser role. *See United States v. Dicristina*, 886 F. Supp. 2d 164, 231 (E.D.N.Y. 2012), *rev'd on other grounds*, 726 F.3d 92 (2d Cir. 2013); *Dew-Becker v. Wu*, ___ N.E.3d ___, 2020 WL 1880804 at *4 (Ill. April 16, 2020) (under dominating-element standard, "contests in which the outcome is mathematically more likely to be determined by skill than chance are not considered gambling"). By contrast, under the material-degree test, a game would be a contest of chance if its outcome depended "in a material degree upon an element of chance"—a standard that could be satisfied even if chance accounted for much less than fifty percent of the outcome—"notwithstanding that skill of the contestants may also be a factor therein." Penal Law § 225.00(1); *see, e.g.*, *Plato's Cave Corp. v. State Liquor Auth.*, 115 A.D.2d 426, 428 (1st Dep't 1985); *People v. Jun Feng*, 34 Misc. 3d 1205(A), 2012 WL28563, **2-5 (Kings Co. Crim. Ct. 2012).

The Appellate Division majority rejected the dominating-element test as the constitutional standard, but its reasoning does not withstand scrutiny. It first distinguished *Ellison* as merely involving "the interpretation of the statutory definition of 'lottery' under the then-applicable Penal Law" (R.1451). It then observed that the Legislature, in 1965, replaced the dominating-element test with the more stringent material-degree standard. Without citation to any authority, however, the Appellate Division majority concluded that the current Penal Law definition, adopted in 1965, "comports with the common understanding of the meaning of the constitutional prohibition and of the particular words 'book-making' and 'gambling'— at both the time of the prohibition's enactment and now" (R.1451).

Although *Ellison* itself addressed the meaning of a lottery, the dominating-element test this Court announced was not thereafter limited to lotteries. The Appellate Division majority overlooked that from *Ellison* in 1904 to the enactment of the 1965 Penal Law amendments, New York courts consistently used the dominating-element test, not the material-degree test, to determine whether all manner of activities constituted games of chance or skill. *See, e.g., International Mutoscope*

Reel Co. v. Valentine, 247 A.D. 130, 133 (1st Dep't 1936) (concluding that machines known as the "crane" were slot machines because "the element of chance not only exists, but . . . predominates"); *Shapiro v. Moss*, 245 A.D. 835, 835 (2d Dep't 1935) (applying *Ellison*'s dominating element test in determining that a "pin or mechanical bagatelle game, known as 'The Sportsman,'" was designed primarily for gambling purposes); *Matter of Cullinan*, 114 A.D. 654, 655-56 (4th Dep't 1906) (slot machine known as Yale Wonder Clock was a gambling device under the dominating-element test). Thus, *Ellison's* dominating-element test reflected the prevailing understanding of games of chance when the 1894 amendment was adopted and thereafter.

The Appellate Division was also wrong to construe *Ellison* as resolving only the then-applicable statutory definition of gambling (R.1451). This Court did not limit its discussion to the intent of the Legislature that enacted the law at issue, but instead drew more generally on broader understandings of the distinction between "games of chance" and "games of skill," 179 N.Y. at 169-70—including from cases in England and other States that preceded the 1894 constitutional provision and thus would have formed part of the backdrop against which

that provision was adopted. *Cf. Arbegast v. Bd. of Educ. of S. New Berlin Cent. Sch.*, 65 N.Y.2d 161, 169 (1985) ("The Legislature is . . . presumed to be aware of the decisional and statute law in existence at the time of an enactment."). More fundamentally, the Appellate Division thus had no basis to conclude that a constitutional prohibition in place since 1894 embodied a material-degree test that the Legislature did not adopt until more than seventy years later. While the Legislature was free to modify the statutory definition to prohibit conduct more broadly than the Constitution did, it did not and could not thereby set a new constitutional standard.

Because interactive fantasy sports contests satisfy the dominating-element test, the Legislature could constitutionally authorize such contests even if they would fail the Penal Law's material-degree test. Contrary to the view of the Appellate Division majority (R.1451-52), it makes no difference that in enacting Article 14, the Legislature did not explicitly amend the 1965 Penal Law definition of gambling. There was no reason for the Legislature to do so: its subsequent, more specific authorization and decriminalization of interactive fantasy sports contests take precedence over the earlier and more general enactment.

See Matter of Dutchess County Dep't of Soc. Servs. ex rel. Day v. Day, 96 N.Y.2d 149, 153 (2001) ("a prior general statute yields to a later specific or special statute").

Finally, policy considerations reinforce the use of *Ellison's* dominating-element standard as the constitutional test for evaluating legislation. This standard sets a clear, bright-line standard (more than 50% chance is a game of chance) that is capable of quantitative analysis by experts. *See* Jeffrey C. Meehan, *The Predominant Goliath: Why Pay-to-Play Daily Fantasy Sports are Games of Skill Under the Dominant Factor Test*, 26 MARQ. SPORTS L. REV. 5, 15-16 (2015). The material-degree test, in contrast, "lacks any form of benchmarking or quantifiable nature," and so is the more subjective of the two standards. *Id.* at 17; *see Dew-Becker*, 2020 WL 1880804 at *5 (material-degree test "depends too greatly on a subjective determination of what constitutes 'materiality'" whereas dominating-element standard "provides a workable rule that allows for greater consistency and reliability").

2. Even if the material-degree test were the constitutional standard, the Legislature rationally concluded that interactive fantasy sports contests satisfy that standard.

Even if the Penal Law's material-degree test were the constitutional standard, the Legislature rationally found that interactive fantasy sports contests are not games of chance under this standard. The Penal Law does not define "material degree"—and the Constitution of course does not use that phrase. In other contexts, the meaning of "material" varies widely. For example, in the law of evidence, an item is material "if it has some logical connection" with a fact of consequence, whereas in contract law an item is material if it is "significant." *See* Black's Law Dictionary at 998 (8th ed.).

Accordingly, even if the "material degree" test were the constitutional test, the Legislature would not be barred from authorizing an activity merely because it was in some way influenced by chance. Here, the Legislature received a wealth of expert opinion, witness testimony, and statistical studies showing that skill was such a dominant element in success at interactive fantasy sports contests that the role of chance was "overwhelmingly immaterial" (R.1215; *see also* R.1168, 1178, 1184-1205, 761, 873). For example, the evidence showed that only a very

small percentage of interactive fantasy sports contestants won the vast majority of the contests. In the first half of the 2015 major league baseball season, 91% of daily fantasy sports player profits were won by 1.3% of the players (R.759). A study of the win percentages of 28 of DraftKings' most successful players concluded that it was "overwhelmingly unlikely" that the success of these players could be due to chance (R.761, 1215). One player won 70 out of 70 major league baseball fantasy games. The probability that such a record could occur by chance, rather than as a result of the player's skill, was "1 in a Million raised to the power of 50" (R.1215; 715).

Another study found that skilled players routinely defeated randomly-generated fantasy teams: in major league baseball fantasy contests, skilled players won 82.8% of the time; in NFL contests, skilled players won 83.4% of the time; in NBA contests, skilled players won 96.1% of the time; and in NHL contests, skilled players 81.9% of the time against randomly-generated teams (R.759-60, 1168). Other data showed that "[a]ctual users beat computer-generated lineups 95% of the time in basketball contests, 73% in baseball, 86% of the time in football, and 68% of the time in hockey" in FanDuel-run contests, and that players

improved with practice (R.1168; *see also* 1178). And more experienced participants "had significantly higher win rates over time" (R.1168).

The significance of this data is put in perspective by comparing it to the relative role of skill and luck in lawful activities historically recognized as skill-based. The evidence before the Legislature showed that the success of mutual funds—"investment programs run by (perhaps skillful) managers"—has historically involved more luck and less skill than success at fantasy sports contests (R.1197-98 & figure 6). The fact that these investment programs, and commodities trading and the like, are not regarded as games of chance strongly suggests that the Legislature had a rational basis for finding that interactive fantasy sports contests are likewise not games of chance.

The evidence before the Legislature also distinguished interactive fantasy sports contests from activities historically recognized as gambling. Unlike poker and similar card games, where there is a random distribution of cards that introduces a material element of chance, there is no "random distribution element" in fantasy sports contests (R.873-874, 1005-1006). Rather, as established by the testimony and scholarship before the Legislature, these contests are "played by considering a

number of known, interlocking, and often shifting factors that, through strategic risk-taking and decision-making, help predict an enormously diverse set of future events" (R.1006). Moreover, unlike traditional sports betting, interactive fantasy sports contestants do not simply predict the outcome of future sporting events, but rather make meaningful decisions about roster choices and allocation of their fantasy "salary cap" that directly influence the outcome of their fantasy sports competitions. See *infra* at 53-55. The Legislature was entitled to credit this evidence that, unlike with classic, well established gambling activities, chance does not have a material role in the outcome of interactive fantasy sports contests.

In rejecting this evidence, the Appellate Division majority improperly substituted its judgment for that of the Legislature on the factual question of materiality. Properly framed, the question is not whether the court thought the Legislature "was correct to determine" that the role of chance was immaterial. *Turner Broadcasting System, Inc.*, 520 U.S. at 211. Rather, the question is whether the Legislature's conclusion about the role of chance in fantasy sports contests was rational and supported by substantial evidence. *See For People Theatres of N.Y.,*

Inc., 29 N.Y.3d at 359 (citing *Turner Broadcasting System, Inc.*, 520 U.S. at 211).

The Appellate Division majority reasoned that a material degree of chance determines the outcome of interactive fantasy sports contests because many random variables affect how the athletes on their fantasy teams "will perform in the real-world sporting events" (R.1453). But although there "is no debate that a freak injury, and unexpected change of the weather, or an unbelievably unlikely event may occur during any given game," that risk "does not negate the skill involved in building a successful daily fantasy team." Nathaniel J. Ehrman, *Out of Bounds? A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 SPORTS LAW J. 79, 107 (2015). To the contrary, the skills required to succeed at fantasy sports include the ability "to gauge uncertainty and use it to your advantage." *Id.*

The Appellate Division acknowledged the empirical evidence showing the significant effect of skill on the outcome of interactive fantasy sports contests, but it nonetheless concluded that chance plays a sufficiently large role because skill "cannot eliminate or outweigh the material role of chance" in such contests (R.1453). But a standard

requiring that skill "eliminate" any influence from chance would be impossible to satisfy. As this Court has observed, "games of billiards do not cease to be games of skill because at times . . . their result is determined by some unforeseen accident, usually called luck." *Ellison*, 179 N.Y. at 170. And, as the Supreme Court of Illinois observed in finding that interactive fantasy sports contests do not constitute gambling under an Illinois statute, "[e]ven chess, a highly skill-based contest, can be affected by the random factors of who draws white (and thus goes first) or whether one's opponent is sick or distracted." *Dew-Becker*, 2020 WL 1880804 at *4.

Thus, even assuming that the Constitution bars the Legislature from authorizing contests whose outcomes are influenced by chance to a "material degree," the Legislature rationally found based on the evidence before it that chance does not play a sufficiently material role in determining the outcome of interactive fantasy sports contests to make such contests a form of gambling prohibited by the Constitution.

C. The Legislature rationally found that contestants in interactive fantasy sports contests meaningfully influence the outcome of those contests, and thus directly compete for prizes rather than betting on events outside their control.

Also rational is the Legislature's finding that interactive fantasy sports contests "are not wagers on future contingent events not under the contestants' control or influence." Racing Law § 1400(1)(b). Rather, the Legislature found that the participants in such contests have meaningful influence over the outcome based on their strategic decisions.

While the Appellate Division majority did not reach this issue, Supreme Court did. In rejecting the Legislature's finding on this issue, Supreme Court likened interactive fantasy sports to sports betting, a well-recognized form of gambling (R.29-30). Supreme Court reasoned that the aggregate statistics that determine fantasy sports contests derive from real-world sporting events over which the fantasy sports contestants exercise no influence (R.29-30).

Supreme Court focused on the wrong contest, as the dissent below aptly observed (R.1463). The Legislature specifically debated this feature of interactive fantasy sports contests and concluded rationally that the proper focus is not on participants' influence over real-world sporting

events (which is zero), but rather on their influence on the fantasy sports contests themselves (which is substantial) (R.672, 676, 762-763). In those contests, the participants *do* meaningfully influence the outcome: they can maximize their chances of winning by making skillful decisions in assembling their fantasy teams and in predicting, based on data, the aggregate future performance of their fantasy teams.

Indeed, the evidence before the Legislature showed that the choices made by participants are analogous to the choices made by general managers of sports teams, who make similar experience- and data-based projections about how the real-world players they draft or sign will perform in future sporting events (R.672-673, 676-677, 1208, 1215). Just as the skill of general managers in picking a roster of players significantly influences—without completely determining—the outcome of future sporting events in which their teams participate, the skill of fantasy sports contestants influences the outcome of the contests in which they participate (R.672, 676-677, 1208, 1215).

Indeed, the same evidence that supports the Legislature's finding that fantasy sports contests are predominantly contests of skill (a finding that Supreme Court accepted and the Appellate Division did not disturb)

supports the Legislature's related finding that contestants meaningfully influence the outcome. This evidence supports the inference that skill dictates the outcome of the relevant contest—the fantasy sports contest in which the contestants directly participate (R.763, 1168).

The Legislature also rationally found that participants in fantasy sports contests are not just betting on outside sporting events; instead, they are active players in a competition of their own whose "outcome depends on how the performances of participants' fantasy roster choices compare to the performance of others' roster choices." Racing Law § 1400(1)(b). As the Third Circuit has recognized, there is a "legal difference between paying fees to participate in fantasy leagues and single-game wagering" (*i.e.*, sports betting). *Nat'l Collegiate Athletic Ass'n v. Gov. of N.J.*, 730 F.3d 208, 223 n.4 (3d Cir. 2013), *cert. denied*, __ U.S. __, 134 S. Ct. 2866 (2014), *abrogated on other grounds by Murphy v. Nat'l Collegiate Athletic Ass'n,* __ U.S. __, 138 S. Ct. 1461 (2018). Unlike sports gambling, in which the occurrence of a future event entirely determines the wager's outcome, in interactive fantasy sports, no particular event by itself determines a contest winner. Rather, the outcome of these contests depends on the ability of a contestant to skillfully assemble a roster of

successful athletes—with those athletes' success determined by an aggregation of future events.

The Legislature rationally concluded that the proper analogy to interactive fantasy sports contests is not sports betting, but instead other skill-based contests for which contestants pay entry fees and then compete to win prizes. This Court, and courts nationwide, have long recognized that such contests are not illegal gambling activities, even if the outcome of a contest may rely in part on chance or events outside of the player's direct control.

The seminal case is *People ex rel. Lawrence v. Fallon*, 152 N.Y. 12 (1897), where a racing association sponsored a horse race for which the owners of the competing horses paid entrance fees to the association. *Id.* at 16. The association awarded prizes to the winning horse owner, with the prizes being a definite, guaranteed sum, payable out of the association's general fund. *Id.* at 16-17. The Legislature had expressly authorized such contests, and this Court rejected the contention that this authorization violated the constitutional prohibition on gambling. Specifically, it deemed the horse owners to be direct participants in the races who had merely paid an entrance fee for the privilege of competing

directly with other owners—no different from farmers or stock breeders who pay an entrance fee to have their goods judged against others' at a county fair. *Id*. at 19.

Following *Lawrence*, other states' courts have repeatedly held that contests for which the contestants pay entrance fees and for which prizes are awarded are not illegal gambling activities, even if the outcome of such contests turns to some degree on chance or events outside of the contestant's direct control. *See State v. Am. Holiday Ass'n*, 727 P.2d 807, 808-11 (Ariz. 1986) (company conducting word-puzzle "skill bingo" games was not engaging in illegal gambling operations); *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85 (Nev. 1961) (hole-in-one contest for which contestants paid entrance fee and stood to receive a $5000 prize was not illegal gambling); *Cobaugh v. Klick-Lewis, Inc*, 561 A.2d 1248 (Pa. Super. Ct. 1989) (enforcing contract to award automobile to winner of hole-in-one contest); *Faircloth v. Central Florida Fair, Inc*., 202 So. 2d 608, 609 (Fla. Dist. Ct. App. 1967) (statute prohibiting betting on games of skill was intended to proscribe wagering on the results of games as opposed to playing games for prizes); *State v. Prevo*, 361 P.2d 1044, 1049 (Haw. 1961) (gambling statute did not apply to games in which contestants pay entry

fees to compete against each other for prizes). Rather than constituting gambling, "[p]aying an entrance fee in order to participate in a game of skill, or mixed skill and chance, in the hope of winning prize money guaranteed by some sponsor to successful participants, is a traditional part of American social life." *Am. Holiday Ass'n*, 727 P.2d at 812.

D. The Legislature's determination that interactive fantasy sports contests do not constitute gambling is consistent with determinations made by other jurisdictions.

In evaluating the constitutionality of a New York statute, this Court has considered, as persuasive authority, whether other States have enacted similar laws and whether those laws have survived similar constitutional challenges. *See Landes v. Landes*, 1 N.Y.2d 358, 362 (1956); *Brous v. Smith*, 304 N.Y. 164, 169 (1952). This factor weighs in favor of upholding Article 14's legality. In recent years, twenty-three other States have enacted laws that either have expressly found that

interactive fantasy sports contests do not constitute gambling[7] or have legalized these contests, subject to regulation.[8]

Three of these states—New Jersey, Delaware, and Maryland—are particularly relevant because, like New York, their constitutions prohibit gambling. *See* N.J. Const., Art. IV, § VII, ¶ 2; Del. Const., Art. II, § 17; Md. Const. Art. XIX, § 1(d). Of these three, two have penal laws that define gambling essentially the same way as New York does. *See* N.J. Stat. § 2C: 37-1(b); Maryland Code Ann., Criminal Law § 12-102(a)(1)-(4). Those States' authorization of interactive fantasy sports contests

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[7] Interactive fantasy sports contests have been determined not to be gambling by the legislatures of Alabama (Al. St. §§ 8-19F-2(3), 8-19F-8), Arkansas (A.C.A. § 23-116-103), Delaware (29 Del. C. § 4871), Indiana (Ind. Code Ann. § 4-33-24-1), Kansas (K.S.A. § 21-6403(a)(9)), Maryland (Md. Crim. Law Code § 12-114), Massachusetts (2016 Mass. Acts Ch. 219 § 135), Mississippi (Miss. Code Ann. § 97-33-305), Missouri (R.S. Mo. § 313.920), New Jersey (N.J. Stat. § 5:20-2), Tennessee (Tenn. Code Ann. § 39-17-501) and Virginia (Va. Code Ann. § 59.1-569).

[8] The following states have legalized interactive fantasy sports contests, without specifically declaring that they do not constitute gambling: Colorado (C.R.S. § 12-15.5-101 et. seq.), Connecticut (Conn. P.A. 17-2 § 649), Iowa (I.C.A. § 99E.2), Louisiana (La. R.S. §§ 27:303, 27:305), Maine (2017 Me. SP 449), Michigan (Mi. St. § 432.503), Mississippi (Miss. Code Ann. § 97-33-301 et. seq.), New Hampshire (2017 NH HB 580), Ohio (O.R.C. Ann. § 3774.01 et seq.), Pennsylvania (4 Pa. C.S. § 301 et seq.), and Vermont (2017 Vt. S. 136).

thus provides especially strong, persuasive evidence in support of the Legislature's parallel determination here.[9]

While none of these other jurisdictions' decisions dictate this Court's interpretation of the New York Constitution, this broad trend toward authorizing interactive fantasy sports—and treating them as exempt from prohibitions on gambling—buttresses the rationality of the Legislature's judgment.

[9] While Congress has not directly addressed whether interactive fantasy sports is gambling, it has excluded such contests from a federal statute, the Unlawful Internet Gambling Enforcement Act of 2006, that prohibits certain financial transactions associated with gambling. *See* 31 U.S.C. § 5362(1)(E)(ix).

CONCLUSION

The Appellate Division's order should be modified by declaring that Article 14 of the Racing Law does not violate Article I, § 9 of the New York Constitution.

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Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellants

By: *s/Victor Paladino*
VICTOR PALADINO
The Capitol
Albany, New York 12224
(518) 776-2012
Victor.Paladino@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
VICTOR PALADINO
Senior Assistant
Solicitor General
of Counsel

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