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.

REPLY BRIEF FOR APPELLANTS

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PRELIMINARY STATEMENT

The extensive record before the Legislature amply supported its considered judgment that interactive fantasy sports should not be classified as gambling and should instead be regulated and taxed. At most, plaintiffs' arguments show that the appropriate classification of interactive fantasy sports is a close question, because such contests share features of both gambling and non-gambling activities. But it is precisely in such areas of ambiguity that the Legislature is entitled to the greatest deference—and even more so when, as here, the Constitution expressly vests such policy discretion with the Legislature. Because the Legislature rationally concluded, based on a careful examination of the facts, that fantasy sports contests are not gambling, Article 14 of the Racing, Pari-Mutuel Wagering and Breeding Law ("Racing Law") does not violate the gambling prohibition in Article I, § 9 of the New York State Constitution.

ARGUMENT

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

A. Plaintiffs misstate their burden of proof and improperly deny the deference that is due to the Legislature.

As the parties challenging the constitutionality of a duly enacted law, plaintiffs bear the heavy burden of demonstrating that the statute was unconstitutional beyond a reasonable doubt. *Matter of County of Chemung v. Shah*, 28 N.Y.3d 244, 262 (2016); *People v. Davis*, 13 N.Y.3d 17, 23 (2009). Plaintiffs attempt to side-step that burden by arguing (Pl. Br. at 40-43) that the reasonable-doubt standard has less weight here because the Legislature has created an "exception[]" to the constitutional anti-gambling provision and that such exceptions must be strictly construed. But as defendants have explained (St. Br. at 35), Article 14 was not an exception to the prohibition; to the contrary, the Legislature found that the prohibition did not apply in the first instance because fantasy sports contests are not gambling. There is thus no basis to avoid the reasonable-doubt standard here.

Plaintiffs also improperly minimize the importance of the reasonable-doubt standard by labeling it as a mere "rule of construction"

(Pl. Br. at 43). To the contrary, the standard is a core component of the separation of powers, reflecting judicial deference to legislative judgments on policy matters. The standard is stringent because "[j]udges, however much they might disagree with the wisdom of the act under review, are not free to invalidate it on that ground." *Hotel Dorset Co. v. Trust for Cultural Resources*, 46 N.Y.2d 358, 370 (1978). The Legislature's prerogative to make policy judgments thus forbids judicial invalidation of a duly enacted law except "as a last unavoidable result." *Van Berkel v. Power*, 16 N.Y.2d 37, 40 (1965).

Such deference is especially important here because the constitutionality of Article 14 does not involve only a pure question of law, but instead implicates a factual question: the extent to which skill predominates over chance in fantasy sports contests. On this critical factual question, the Legislature made findings, after considering a wealth of data, expert studies, and testimony. The Legislature found that chance was not a material element in the outcome of fantasy sports contests; to the contrary, it found that contestants exercised predictive and evaluative skills to meaningfully influence the outcome of the contests in which they directly participated. Under this Court's

precedents, those factual findings must be upheld when, as here, they are supported by substantial evidence. *For People Theatres of N.Y., Inc. v. City of New York*, 29 N.Y.3d 340, 359 (2017).

Contrary to plaintiffs' assertion (Pl. Br. at 43), this Court did not find the reasonable-doubt standard "inappropriate" in *Dalton v. Pataki*, 5 N.Y.3d 243 (2005). Rather, *Dalton* applied the reasonable-doubt standard in sustaining two parts of the statute at issue (which authorized video lottery terminals and a multistate lottery) under Article I, § 9 of the New York State Constitution. 5 N.Y.3d at 255. The Court applied a different standard to uphold another part of the statute, which authorized the Governor to enter into a gaming compact with Indian tribes to allow commercial gambling, but only because the question there was whether federal law preempted New York's Constitution and thus permitted such compacts. *Id.* at 259-62. Here, there is no question of federal preemption, and thus the standard that this Court applied in *Dalton* to that distinct legal issue is inapposite.

Plaintiffs also attempt to show that the Legislature's findings should receive no deference by selectively quoting from the debates of the delegates who passed what became the 1894 amendment to Article I, § 9

(Pl. Br. at 33-35). To be sure, the delegates to the 1894 convention rejected the view that the legality of gambling should be decided *solely* by statute. But the mere fact that the 1894 amendment imposed constitutional constraints does not mean that "the Legislature was to have no 'say' in determining what was gambling" (Pl. Br. at 38). To the contrary, while Article I, § 9 prohibits the Legislature from authorizing "pool-selling, bookmaking, or any other kind of gambling," it left the term "gambling" undefined and specifically authorized the Legislature to enact implementing laws. The drafters of Article I, § 9 thus empowered the Legislature to examine new activities, like fantasy sports, and decide in the first instance whether they more closely resemble activities traditionally deemed gambling, or instead should be analogized to lawful non-gambling activities.

The Legislature therefore does have a "say" in the matter. And it has regularly exercised that discretion to either authorize or prohibit particular activities based on the Legislature's views on the relative degree of chance versus skill. For example, by 1899 the Legislature had examined the then-new technology of slot machines, found them to be gambling devices, and criminalized them in the Penal Code. *See* L. 1899,

ch. 655 (codified at Penal Code §§ 337a-337d (1906)); *see also* William E. Horwitz*, Note: Scope of Gaming Under the Indian Gaming Regulatory Act of 1988 After Rumsey v. Wilson: White Buffalo or Brown Cow?*, 14 Cardozo Arts & Ent. L.J. 153, 157 (1996) ("The first slot machine was invented and marketed in 1887."). By contrast, the Legislature reached the opposite conclusion about insurance, horse race handicapping, and other activities, authorizing these activities even though their outcomes depend to some degree on chance (*see* St. Br. at 9-14, 27-31).

Article 14 represents a similar exercise of judgment by the Legislature about another novel activity. The Legislature extensively debated whether fantasy sports contests resemble sports betting or skill-based contests for which the contestants pay entrance fees and found that the more fitting analogy was to skill-based contests (R.672, 676-678, 687, 690, 762-763, 840-841). In reviewing Article 14, the Court's role is to decide the legal issues, including the constitutional standard for determining what constitutes a game of chance, and to decide whether the Legislature's factual findings and policy decisions are rational and supported by substantial evidence. For the reasons below, the Legislature's judgment satisfies that deferential standard.

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.

Plaintiffs offer no response to the State's argument that the lower courts applied the wrong constitutional standard in evaluating whether interactive fantasy sports contests are games of chance. Plaintiffs themselves maintain that, in interpreting Article I, § 9, the Court "should look to the contemporaneous interpretation of the constitutional prohibition" rather than to statutes "conjured up" decades later (Pl. Br. at 40). Yet rather than following that principle, they base their constitutional argument on a "material-degree" test that was enacted into the Penal Law only in 1965—70 years after the 1894 amendment that added the general antigambling prohibition. As the State has previously explained (St. Br. at 40-45), the prevailing definition of games of chance at the time of the 1894 amendment was the common-law "dominating-element" standard that this Court announced in *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 171 (1904) in applying the statutory prohibition on lotteries.

As plaintiffs observe (Pl. Br. at 44), this Court in *Dalton* identified the common elements of gambling to be consideration, chance, and prize. 5 N.Y.3d at 264. The Court made this observation in the context of examining whether video lottery gaming was a type of lottery and held that a constitutional lottery required "something more," specifically tickets and multiple participation. *Id*. While stating that chance was an element of gambling, this Court in *Dalton* did not address the constitutional standard for determining whether an activity was a game of chance or a game of skill. That standard is the dominating-element standard, which was the prevailing understanding of a game of chance at the time of the 1894 amendment to Article I, § 9. Consequently, activities that satisfy the dominating-element standard are not games of chance under the Constitution.

Plaintiffs do not dispute that, prior to the 1965 adoption of the material-degree standard, New York courts consistently used the dominating-element test to determine whether a particular activity was a game of chance and thus constituted gambling under New York's Constitution (St. Br. at 43-44). Plaintiffs also do not dispute that interactive fantasy sports contests are not gambling under the

dominating-element standard—a conclusion that Supreme Court accepted here (R.20) and other courts have reached as well. *See Dew-Becker v. Wu*, 2020 IL 124472, 2020 WL 1880804 at *5-*6 (Ill. April 16, 2020) (holding that head-to-head daily fantasy sports contests are not gambling under the dominating-element test). Instead, plaintiffs argue that the statutory "material-degree" standard announced in the 1965 Penal Law should be treated as the constitutional standard for evaluating Article 14's classification of interactive fantasy sports because the "Legislature itself chose not to redefine the Penal Law definition of 'gambling'" when it enacted Article 14 (Pl. Br. at 58).

Plaintiffs' argument contradicts basic principles of statutory and constitutional construction. The Legislature's statutory enactment (such as the adoption of the material-degree test in the Penal Law) cannot alter the constitutional dominating-element standard. Nor does the statutory material-degree test prohibit the Legislature from authorizing an activity that satisfies the constitutional dominating-element standard. And the earlier, more general prohibition in the Penal Law does not take precedence over the Legislature's subsequent, more specific authorization of interactive fantasy sports contests in Article 14. *See* N.Y.

Statutes § 238 at 405 (McKinney 1971) ("the particular provision, in other words, is considered in the nature of an exception to the general where the two are incompatible"); *People ex rel. O'Loughlin v. Prendergast*, 219 N.Y. 377, 381 (1916) (same); *see also 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") (internal quotation and citation omitted).[1]

In sum, because plaintiffs concede that fantasy sports contests are not predominantly determined by chance, such contests do not constitute gambling under Article I, § 9, and there is no barrier to the Legislature's authorization of such contests.

[1] In this regard, plaintiffs quote out-of-context a statement in the State's summary judgment memorandum of law that the 1965 Penal Law definition of gambling is "the only currently valid definition of gambling" (Pl. Br. at 45, quoting R.1232 n.7). In seeking summary judgment, the State expressly argued (R.1232 n.8) that the material-degree standard in Penal Law § 225.00(1) defines contests of chance "more expansively than required by the Constitution as interpreted by the Court of Appeals" in *Ellison*, 175 N.Y. at 170-71.

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 Legislature's finding that the role of chance was immaterial must be upheld if supported by substantial evidence. *For People Theatres of N.Y., Inc.*, 29 N.Y.3d at 359; *see Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997).

The evidence available to the Legislature overwhelmingly showed that chance did not play a material role in success at fantasy sports contests. Plaintiffs have not pointed to a single study, or to any data or expert evidence, that would refute the Legislature's finding. Rather than identifying such evidence, plaintiffs instead quote Shakespeare and Senator Krueger's quip that fantasy sports contests "quack like a duck" to suggest that it is self-evident that the contests are a "poorly disguised version of sports gambling" (Pl. Br. at 3, 11, 19). Such rhetoric does not provide a sufficient evidentiary basis to overturn the Legislature's considered judgment to the contrary.

While plaintiffs criticize the expert studies relied upon by the Legislature (Pl. Br. at 51-55), the Legislature was entitled to credit this evidence, even if it could also rationally have reached the opposite conclusion. Plaintiffs miss the mark by noting that the expert reports and testimony were commissioned by fantasy sports companies (Pl. Br. at 51). "[T]hat argument displays a lack of regard for [the Legislature's] fact-finding function." *Turner Broad. Sys., Inc.*, 520 U.S. at 199. "It is the nature of the legislative process to consider the submissions of the parties most affected by legislation" and it is the Legislature's job to weight "conflicting evidence in the legislative process." *Id*. Plaintiffs have not met their heavy burden of showing that the expert testimony and reports on which the Legislature based its findings were so lacking in probative value that reliance on them was irrational.

Plaintiffs also criticize the experts' findings that skilled players beat unskilled players or randomly selected teams between 55% and 85% of the time, quipping that such a level of success would keep people off airplanes (Pl. Br. at 53). Again, this argument merely highlights that the determination of whether chance is "material" is a judgment call that will vary depending on the circumstances. And plaintiffs mischaracterize the

relevance of these figures in any event. These figures support the Legislature's judgment: the record shows that success at predicting the performance of stocks or commodities is more determined by chance than success at predicting the outcomes of fantasy sports contests, yet these other activities are deemed skill-based and not gambling (R.1197-98 & figure 6).

Plaintiffs also opine that the type of skill required to succeed in fantasy sports contests is like the skill required to succeed in poker and horse-betting (Pl. Br. at 50-51). Again, however, this point shows at most that some aspects of fantasy sports contests resemble activities that might traditionally be considered games of chance. What the Legislature rationally found was that this element of chance was not a material feature of fantasy sports contests, and that these contests also have features that more closely resemble contests of skill that are not traditionally considered to be gambling. In particular, like general managers, successful fantasy sports contestants must spend wisely, often within a budget, and make experience-based and data-based projections about how the athletes they "draft" will perform in future sporting events. As one commentator has observed regarding a popular fantasy

sports contest format, "essentially, the skill needed to excel in daily fantasy sports is bargain hunting"—an apt description of the skill needed to be a successful general manager running a sports team on a limited budget. *See* Nikhil Swaminathan, "*Are Fantasy Sports Really Gambling*," NAUTILUS, Issue 44 (January 19, 2017), available at http://nautil.us/issue/44/luck/are-fantasy-sports-really-gambling-rp (last visited August 26, 2020). Though plaintiffs argue that general managers can change their rosters over the course of a season and daily fantasy sports contestants cannot (Pl. Br. at 57-58), that distinction is immaterial: in both activities, the relevant choices are driven by skillful selection of players based on the participants' research and knowledge.

Moreover, while fantasy sports contests rely to some extent on uncertain predictions about the future, the same is true of non-gambling activities such as commodities trading and insurance underwriting. It was not irrational for the Legislature to exercise its constitutional authority to decide that the non-gambling features of interactive fantasy sports took precedence over the features that resemble gambling, even if the Legislature could also have rationally concluded otherwise.

Nor is it "total speculation" to say that fantasy sports contests are not determined to a material degree by chance when, as plaintiffs contend, it is uncertain ahead of time whether the actual participants will in fact exercise any skill (Pl. Br. at 56). In any contest of skill, such as a chess match or golf tournament, an individual can enter and choose to play randomly rather than skillfully. That possibility does not make the game one consisting materially of chance. Put simply, whether an activity has a material degree of chance is determined not by what level of skill some participants might *actually* exercise, but rather whether the *nature* of the activity makes chance a material determinant of the outcome.

Further, contrary to plaintiffs' arguments, an activity is not gambling under Article I, § 9 simply because chance may sometimes determine the outcome, or because less skillful contestants sometimes defeat highly skilled contestants. For instance, on any given Sunday, a lucky amateur could beat Tiger Woods in a hole-in-one contest, yet such contests are not gambling. *See Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 86-87 (Nev. 1961). The occasional fluke does not prove that an otherwise skill-dominated contest is instead affected to a material degree

by chance. And here, it was within the Legislature's prerogative (even though others, even the minority of legislators, might disagree) to find that fantasy sports contests are not gambling because skill determines the winners and chance plays no material role.

Finally, plaintiffs take the Legislature to task for requiring fantasy sports operators to identify highly experienced contestants and limit the number of entries such contestants are permitted to submit. *See* Racing Law §§ 1404(1)(g) & (2). Plaintiffs deride these consumer protection measures as "ironic" because they supposedly reduce the element of skill and increase the element of chance (Pl. Br. at 52-53). But plaintiffs draw the wrong inference from these measures, which reinforce the conclusion that fantasy sports are games of skill. The purpose of these protections is not to reduce the element of skill, but rather to ensure that highly skilled contestants play primarily against similarly skilled contestants, rather than against less-experienced contestants. These protections would be entirely pointless if skill played little to no role in determining the outcome of fantasy sports contests.

Nor do the statute's other consumer protection measures suggest that the Legislature thought that fantasy sports contests are gambling.

To the contrary, some of Article 14's protections presume precisely the opposite: for example, the Legislature has required registered fantasy sports operators to ensure that "winning outcomes reflect the relative knowledge and skill of the authorized players and [are] determined predominantly by accumulated statistical results of the performance of individuals in sporting events." Racing Law § 1404(1)(o). Although Article 14 contains provisions to protect compulsive contestants (Racing Law § 1404(1)(d), (e), (m)), people can become addicted to many forms of behavior besides gambling, including Internet use, watching television, and playing video games. Moreover, the fact that the Legislature has imposed licensing requirements for fantasy sports operators is no concession that they engage in gambling—the Legislature has imposed licensing requirements on multiple types of businesses besides gambling operations, including securities brokers and insurance companies.

Ultimately, the Legislature's decision to include various consumer protections demonstrates only that it believed consumers might be harmed without such protections. But plaintiffs err in assuming that such harms necessarily derive from the fact that fantasy sports contests constitute gambling. Similar harms, and similar consumer protections,

apply in many fields that are not gambling. Thus, plaintiffs cannot rely on Article 14's consumer protection measures to prove that the Legislature implicitly believed that interactive fantasy sports constituted gambling.

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.

Plaintiffs have also failed to show that the Legislature acted irrationally in finding that the outcome of interactive fantasy sports contests are not beyond the control of the participants. Contrary to plaintiffs' argument, it makes no difference that the aggregate statistics on which fantasy sports contests are based derive from real-world sporting events over which the fantasy sports contestants exercise no influence (Pl. Br. at 60). Plaintiffs have focused on the wrong contest: The Legislature rationally determined that the relevant contest is the fantasy sports contest in which the participants directly participate, not the real-world sporting events. In the fantasy sports contest, the Legislature rationally found that participants *do* influence the outcome by exercising the same types of skills as general managers of sports teams—that is, by

evaluating data and making experience-based and data-based projections about the performances of the real-world players on their fantasy teams (R.672-673, 676-677, 1208, 1215). By using those skills, the participants in fantasy sports contests materially influence the outcome of the contests in which they directly participate.

Plaintiffs fail to distinguish the authorities from this Court and other States, discussed in the State's opening brief, recognizing that skill-based contests involving entry fees and prizes are not illegal gambling activities, even if the outcome of a contest may rely in part on chance (St. Br. at 56-58). These authorities refute plaintiffs' claim (Pl. Br. 49, 62) that the entry fees paid by fantasy sports contestants constitute bets or wagers on gambling activities.

A bet or wager is ordinarily an agreement between two or more people that a sum of money, collected from all participants, "shall become the property of one of them on the happening in the future of an event at present uncertain." *See People ex rel. Lawrence v. Fallon,* 4 A.D. 82, 88 (1st Dep't 1896), *aff'd*, 152 N.Y. 12 (1897). By contrast, a prize or premium "is ordinarily something offered by a person for the doing of something by others in a contest in which he himself does not enter." *Id.*;

accord State v. Am. Holiday Ass'n, 727 P.2d 807, 809-11 (Ariz. 1986); *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d at 86-87. And an entrance fee is a payment a person makes to the contest operator to participate in the contest and be eligible to win the prize. *Fallon*, 152 N.Y. at 19.

Under these standards, the Legislature rationally concluded that the fees that contestants pay to participate in fantasy sports contests are not bets or wagers. The entrance fees are set amounts, the prizes are preannounced, the prizes do not depend on the number of entrants, and the contest operators do not themselves compete for the prizes they offer to the winner of the fantasy sports contest (R.842, 887-888). These facts thus further confirm the rationality of the Legislature's determination that fantasy sports contests are not gambling.

This conclusion is not altered by the Internal Revenue Service (IRS) memorandum cited by plaintiffs in a post-briefing submission. *See* IRS Memorandum # AM 2020-009 (July 23, 2020), submitted to the Court by plaintiffs under cover letter dated August 19, 2020. The IRS Office of General Counsel has opined that, for purposes of federal excise tax liability only, entry fees paid by participants in daily fantasy sports contests are wagers within the meaning of Internal Revenue Code

§ 4421(1). In rendering this opinion, the IRS did not opine on whether daily fantasy sports contests are gambling for purposes of state law, observing that states have "varied in the regulation of" daily fantasy contests, with states reaching divergent conclusions on whether the contests are gambling. *See* IRS Memorandum # AM 2020-009 at 7. While the IRS concluded that the skill involved in selecting fantasy players is similar to the skill involved in traditional sports gambling activities, *id.* at 8, the IRS did not address whether a legislature could rationally conclude otherwise. Thus, at most, this IRS opinion illustrates only that the proper classification of fantasy sports contests is a close question on which reasonable minds may differ. The Legislature was entitled to reach its own judgment on this close question, and its reasonable conclusion in Article 14 should be upheld.

CONCLUSION

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

Dated: Albany, New York
August 27, 2020

Respectfully submitted,

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