APL-2020-00027

To be argued by:
Cornelius D. Murray
20 minutes requested

STATE OF NEW YORK
COURT OF APPEALS

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

Respondents,

-against-

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

Appellants.

BRIEF FOR RESPONDENTS

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PRELIMINARY STATEMENT

The prohibition against gambling has been enshrined in Article I, § 9 of the New York State Constitution's Bill of Rights since 1894 when it was adopted by the People to protect the citizens of this State from the evils associated with it. *International Hotels Corp. [Puerto Rico] v. Golden*, 15 N.Y.2d 9, 15 (1964) (Article I, § 9 was adopted to "protect ... the family man from his own imprudence at the gaming tables"). Charles Z. Lincoln, *Constitutional History of New York*, Vol. III at 46-51 (1906).

It is still there over 125 years later – and for good reason. Its presence in the Bill of Rights underscores its importance. "Gambling" remains a serious problem in New York State. According to findings from a study conducted by the New York State Office of Alcohol and Substance Abuse Services (OASAS), approximately 5% of adults have a "gambling problem" as defined by the Diagnostic and Statistical Manual of the American Psychiatric Association.[1] As stated on OASAS's website, "[g]ambling among college students has become increasingly popular due to ... increased accessibility and

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[1] Rainone, G.; Marcel, R.; Gallati, R.J.; and Gargon, N. (2007), *Gambling Behaviors and Problem Gambling Among Adults in New York State* (available at https://www.gaming.ny.gov/gaming/20140409forum/Other%20Materials/OASAS,%20Gambling%20in%20New%20York%20State%20(2006).pdf

availability of gambling opportunities on the internet." (https://oasas.ny.gov/system/files/documents/2020/03/college-students-gambling-brochure-2.25.20.pdf).

This is why for the past 125 years Article I, § 9 has imposed a direct and broad restraint on the Legislature, requiring that "no lottery ... pool-setting, book-making *or any other kind of gambling* ... shall hereafter be authorized or allowed within the State ..." (emphasis supplied). It further commands that "the Legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section." *Id.* Simply stated, the Legislature may not legalize gambling and, indeed, must pass laws to prevent it. As will be discussed in great detail (*infra* at Point I, p. 31 *et seq.*), the proceedings and debates at the Constitutional Convention in 1894 make it unequivocally clear that the prohibition was placed in the Constitution precisely for the purpose of preventing the Legislature from finding ways to allow gambling.

The four women who are Respondents in this case are the very type of individuals meant to be protected by Article I, § 9. By virtue of the acts of their spouses, their parents, or themselves, their lives have nearly been destroyed as a direct result of the familiar evils associated with gambling, including the agony and shame of addiction, the indignity of a criminal conviction, being fired from

one's job, bankruptcy, mortgage foreclosure, loss of the family home, the squandering of savings initially set aside for their children's education, the heartbreak of divorce, and the breakup of a family. Complaint, ¶¶ "21"-"47" [R. 9-12].[2]

Respondents brought this case in 2016 when, following a massive lobbying campaign involving the expenditure of over $2 million by the gambling industry,[3] the Legislature enacted Chapter 237 of the Laws of 2016, which purports to authorize, regulate and tax interactive fantasy sports. Chapter 237 of the Laws of 2016 is codified in Article 14, § 1400 *et seq.* of the Racing, Pari-Mutuel, Wagering and Breeding Law (the "Racing Law").

Respondents argue that, instead of prohibiting gambling as mandated by the Constitution, the Legislature has done precisely the opposite. They contend that interactive fantasy sports is nothing more than a poorly disguised version of "sports gambling," which the Legislature conjured up in an effort to circumvent the constitutional prohibitions in Article I, § 9. Both Supreme

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[2] Numbers in brackets preceded by "R" refer to the numbered pages of the Record on Appeal.

[3] *See* Annual Report of New York State Commission on Public Ethics [R. 1254].

Court and the Appellate Division, Third Department (with one dissenting vote) agreed, holding that Chapter 237 was enacted in violation of Article I, § 9.

Supreme Court found that the Constitution's prohibition against the "authorization or allowance of pool-selling, bookmaking or any other kind of gambling encompasses IFS [interactive fantasy sports]" and that the "intentionally broad language and application of the constitutional prohibition, the common understanding at the time and now of the meaning of the prohibition and of the particular words 'bookmaking' and 'gambling,' and the undisputed fact that success in IFS is predicated on the performance of athletes in future contests all lead to such conclusion" [R. 29-30].

In affirming Supreme Court's decision, the Appellate Division specifically rejected the proposition that the presence of skill in interactive fantasy sports contests removed them from the definition of "gambling." It held correctly that skill and chance are not mutually exclusive, observing that even the Appellants conceded in the Statement of Agreed Upon Facts [R. 440-445] that contestants in interactive fantasy sports games "cannot control how the athletes on their IFS teams will perform in real-world sporting events" [R. 1453]. It aso agreed that Chapter 237 was unconstitutional "beyond a reasonable doubt" [R. 1453] and "IFS contests are not excluded from the

constitutional meaning of 'gambling' merely because the Legislature now says that it is so" [R. 1449].

Appellants, the Governor and the New York State Gaming Commission, have now appealed to this Court.

As noted by Appellants, there are now six exceptions that have been carved out of the prohibition against gambling since 1894 (App. Br. at 7). In each case, however, those amendments were accomplished via the formal amendment process set forth in Article XIX of the Constitution. Here, in contrast, via tortured and convoluted logic, the Legislature has sought to bypass that process, claiming that no amendment is needed as interactive fantasy sports are not "gambling" because:

- they are not games of chance because they consist of fantasy or simulation sports games or 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); and

- they are not wagers on future contingent events not under the contestants' control or influence, because contestants have control over which players they chose and the outcome of each contest is not dependent upon the performance of any one player on any 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 performance of participants' fantasy

> roster choices compare to the performance of others' roster choices. Racing Law § 1400(1)(b).

In a futile effort to disguise the true nature of interactive fantasy sports, Appellants describe these contests as ones "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" (App. Br. at 50). Who knew that betting on how athletes will perform in future athletic events could be described in such a complicated fashion? It is painfully obvious that rather than carrying out the mandate of the Constitution to enact laws to prevent gambling, the Legislature has instead tried to get around that mandate in a shameless exercise of sophistry and semantics in order to advance the agenda of the gambling industry and its highly paid lobbyists while forsaking the people whom Article I, § 9 was meant to protect.

The Constitution, however, should not be for sale, and the Legislature is not free to define gambling any way it wishes. As this Court stated in *Dalton v. Pataki*, 5 N.Y.3d 243 (2005), it is the prerogative of the Court, rather than the Legislature, to determine its meaning ("[s]ince the Constitution does not define the term 'lottery,' we must first determine what constitutes a 'lottery' within the meaning of Article I, § 9"). *Id.* at 264. The Appellate Division below noted

that "allowing the Legislature unfettered discretion to determine what is not gambling would render meaningless the constitutional prohibition ... because this area would devolve to being governed by statutory law and not by the constitutional provision" [R. 1449].

Rather than placing its imprimatur on the tortured language adopted by the Legislature in an effort to exclude fantasy sports from the definition of gambling, in determining the meaning of Article I, § 9, this Court should give "full effect" to its "plain and unambiguous language" and the intent of the framers who adopted it at the Constitutional Convention in 1894. *King v. Cuomo*, 81 N.Y.2d 247, 253-254 (1993). In 1984, the Attorney General noted:

> To summarize, we find that sports betting is not permissible under Article I, § 9 of the New York Constitution. *The specific Constitutional bans against book-making and pool-selling, as well as a general ban against any other form of gambling not expressly authorized by the Constitution, would operate to invalidate a statute establishing a sports betting program ...*
>
> If the State government is to be authorized to run a program in which it accepts wagers on the outcome of professional athletic contests, *either single contests or multi-contest parlays,* such authorization can only be acquired through an amendment to the Constitution (emphasis supplied). 1984 N.Y. Op. Atty Genl (1984 N.Y. A.G. LEXIS 94 at 42).

The Attorney General's Office now finds itself in an awkward position in this case. Before Chapter 237 was enacted, it had aggressively prosecuted both FanDuel and DraftKings[4] for having conducted their fantasy sports operations on the grounds that it was unconstitutional. At that time, the Attorney General stated:

> DFS[5] is much closer to online poker than it is to traditional fantasy sports ... FanDuel and DraftKings take a bite out of every *bet*, that is what bookies do, and it is illegal in New York ... In fact, as our court papers lay out, these companies are all based on business models that are identical to other forms of *gambling* ... Games of chance involve some amount of skill; this does not make it legal. Good poker players often beat novices. But poker is still gambling, and running a poker room – or on-line casino – is illegal in New York." (emphasis supplied) [R. 139-141].

In virtually identical letters to both FanDuel and DraftKings, the Attorney General also stated that their "operations constitute illegal gambling under New York law ... and "the illegality of DFS is clear from any reasonable

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[4] FanDuel and DraftKings are the two dominant commercial enterprises conducting interactive fantasy sports, as acknowledged by Appellants (App. Br. at 18).

[5] DFS is an acronym for daily fantasy sports, a subset of interactive fantasy sports, the difference being that interactive fantasy sports can include season-long contests involving, for example, baseball which could last from April through October. DFS contests, on the other hand, can be conducted daily or over a football weekend. DFS is, therefore, far more profitable for commercial operators like FanDuel and DraftKings.

interpretation of our laws beginning with the New York State Constitution" [R. 104-105; 109-110]. In prosecuting DraftKings, the Attorney General stated that "DFS contests are causing the precise harms New York's gambling laws were designed to prevent. Problem gamblers are increasingly being seen at Gamblers Anonymous meetings and at counselors' offices addicted to DFS" [R. 172]. Now the Attorney General's Office appears before this Court tasked with the responsibility of defending what it had previously condemned.

The Attorney General's Office is not alone in trying to explain away its prior statements directly contradicting what it now says is not gambling. Both DraftKings and FanDuel have a similar problem. While now contending that DFS is not gambling, DraftKings' CEO is on record that: "Our contest is a mash-up between *poker* and *fantasy sports*. Basically, you pick a team, deposit your *wager*, and if your team wins, you get the pot" [R. 144] (emphasis supplied). While also claiming now that DFS is a game of skill rather than chance, DraftKings previously advertised it as a game in which winning was "easier than milking a two-legged goat" [R. 565]. FanDuel claims now that DFS games are not wagers on future contingent events. But its spokesperson is on record that the success of players "is contingent on the positive performance of all players" in actual games [R. 191].

Advocates of DFS now choose their words more carefully in an effort to avoid further implicating DFS as gambling, but there is inevitably a Freudian "slip of the tongue" as occurred when John Bonacic, the main sponsor of the bill in the New York State Senate that ultimately became Chapter 237 of the Laws of 2016, sent a letter to the Governor's counsel urging the Governor to sign the bill into law. Senator Bonacic enclosed with that letter the legislative memorandum prepared in conjunction with the bill which contained a "Justification" that referred to the Attorney General's investigation of FanDuel and DraftKings, explaining how they agreed temporarily to "stop taking *bets*" (emphasis supplied) during the investigation. Westlaw New York Bill Jacket, 2016 A.B. 10736, Chapter 237 at 6/78 [R. 355].

The issue in this case distills to whether Article I, § 9, designed to protect People against the evils of any kind of gambling, was ever intended to provide a "loophole" to accommodate the type of interactive fantasy sports contests described in Chapter 237 of the Laws of 2016. The answer is "NO!" The "Constitution is to be construed ... to give its provisions practical effect ... not only according to its letter, but also according to the spirit and the general purposes of its enactment." *Ginsberg v. Purcell*, 51 N.Y.2d 272, 276 (1980). IFS contests are a classic form of sports gambling in which people bet money

(euphemistically referred to in the legislation as "entry fees")[6] in the hopes of winning more money in contests played on the internet but whose outcomes are determined by how real-life athletes perform in future real-life contests over which the bettors have absolutely no control. No matter how creative the Legislature may be in an effort to tactfully camouflage interactive fantasy sports, it has done nothing more than attempt to legalize what is illegal.

"That which we call a rose by any other name would smell as sweet." Shakespeare, *Romeo and Juliet*, Act II, Scene 2. Or, as Senator Liz Krueger said during the floor debate on the bill at issue, "If it looks like a duck, it swims like a duck, it quacks like a duck, it's a duck. This is another gambling bill." [R. 699]

QUESTION PRESENTED

Did the Legislature's authorization of interactive fantasy sports pursuant to Chapter 237 of the Laws of 2016 violate the prohibitions against allowing any kind of gambling set forth in the Bill of Rights in Article I, § 9 of the New York State Constitution?

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[6] See Racing Law § 1400(4).

STATEMENT OF THE CASE

A. The Evolution of the Constitutional Prohibition Against Gambling

New York State's constitutional prohibition against gambling has a long history. It began with the prohibition against "lotteries" adopted in 1821: "No lotteries shall hereafter be authorized or any sale of lottery tickets allowed within the State." *See* Charles Z. Lincoln, *Constitutional History of New York*, Vol. III, p. 46. In 1894, the prohibition was expanded to read as follows: "nor shall any lottery or the sale of lottery tickets, pool-selling, bookmaking *or any other kind of gambling* ... hereafter be authorized or allowed within the State" (emphasis supplied). In the very next legislative session following the 1894 Amendment, the Penal Code was amended to make pool-selling and bookmaking a felony (L. 1895, ch. 572, § 1) [R. 450-451]. That statute specified that the prohibition encompassed any contest involving gambling on "the skill, speed, or power of endurance of man or beast" involving "any unknown or contingent event whatsoever" [R. 450]. Nearly a century later, in 1984, the Office of the Attorney General stated:

> From the history it is indisputable that since at least 1877 when the Penal Code specifically defined as criminal wagering on the outcome of "contests of speed, *skill* or power of endurance of man or beast",

> New York law has viewed lotteries and betting on sports events as two distinct forms of gambling. *This distinct statutory ban on sports wagering was elevated to the constitutional level in 1894 and has remained by explicit language in the Constitution until today.* 1984 N.Y. Op. Atty. Genl. 1 (1984 N.Y. AG LEXIS 94 *4, 1984 WL 186643, *4 (emphasis supplied).

In that same 1984 opinion, the Attorney General concluded: "If the state government is to be authorized to run a program in which it accepts wagers on the outcome of professional athletic contests, *either single contests or multi-contest parlays*, such authorization can only be acquired through an amendment to the Constitution." (emphasis supplied) *Id.* at *13.

Since the 1894 adoption of the amendment prohibiting gambling, six exemptions have been carved out of the general prohibition. None applies here. The first, in 1938, allowed pari-mutuel wagering on horse-racing. Subsequent amendments allow bingo and other games limiting the amount that can be wagered and which can only be operated by religious or other bona fide charitable non-profit organizations. In 1966, lotteries operated by the State were allowed provided the proceeds were to be used exclusively for education. Finally, in 2013, the People approved an additional amendment to allow casinos to be operated at no more than seven locations throughout the State.

The Constitution has never been amended to carve out an exception for betting on daily fantasy sports over the internet.

B. The Attorney General's Enforcement Action Against FanDuel and DraftKings

In October 2015, New York's Attorney General commenced an investigation of FanDuel, Inc. and DraftKings, Inc., the two major operators of daily fantasy sports in New York State. They had begun operating IFS gambling on internet platforms, inviting contestants to play for prizes (usually substantial monetary awards) on the condition that they paid "entry fees" which provided the funds to pay the awards after FanDuel and DraftKings had first extracted a "vig," gambling parlance for a cut of the betting pool [R. 170, 173]. This is a classic example of bookmaking specifically prohibited by Article I, § 9.[7] By virtually identical letters dated November 10, 2015 [R. 104-107, 109-112], the Attorney General informed both FanDuel and DraftKings that "[t]he illegality of DFS is clear from any reasonable interpretation of our laws, beginning with the New York State Constitution" [R. 105, 110].

[7] Penal Law § 225.00(9) defines "bookmaking" as "accepting bets from members of the public as a business ... upon the outcome of future contingent events."

The Attorney General followed up by filing separate but virtually identical complaints against both entities in Supreme Court, New York County [R. 555-589, 591-623]. The complaints quoted the Chief Executive Officer of one DFS operator who described DFS like a "sports betting parlor on steroids" [R. 556, 592].

The DraftKings complaint went on to describe how DFS operated [R. 562-567]. It quoted its CEO, Jason Robbins, who stated that DraftKings makes money in a way that "is almost identical to a casino" [R. 575]. In the cease and desist letters, the Attorney General also stated that DraftKings (and FanDuel) customers are clearly placing bets on events outside of their control or influence, specifically the future real-life performance of professional athletes in real athletic contests [R. 104, 109]. Further, each DraftKings [FanDuel] "wager represents a wager on a 'contest of chance' where winning or losing depends on numerous elements of chance to a 'material degree'" [R. 104, 109].

The Attorney General also wrote to the New York *Daily News* on November 19, 2015, stating that:

> (1) "Daily Fantasy Sports is much closer to online poker than it is to traditional fantasy sports";
>
> (2) "FanDuel and DraftKings take a cut of every bet. That is what bookies do";

(3) "these companies are based on business models that are identical to other forms of gambling";

(4) "the argument of FanDuel and DraftKings 'that they run games of skill' ... is nonsense"; and

(5) that "[g]ames of chance often involve some amount of skill; this does not make them legal."

[R. 139-141].

After proceeding in court against FanDuel and DraftKings, the Attorney General's office filed a Memorandum of Law in support of its Motion for a Preliminary Injunction to enjoin them from accepting entry fees, wagers or bets from any New York consumers regarding any competition, or gaming contest run on their respective websites [R. 169-203].

In that Memorandum of Law, the Attorney General stated:

- "DFS is nothing more than a rebranding of sports betting. It is plainly illegal" [R. 170].
- "DFS operators themselves profit from every bet, taking a 'rake' or a 'vig' from all wagering on their [web]sites." *Id.*
- "[A] DFS wager depends on a 'future contingent event' wholly outside the control or influence of any bettor[.]" *Id.*
- "[G]ambling often mixes elements of chance and skill ... In DFS, chance plays a significant role. A player injury, a slump, a rained out game, even a ball taking a bad hop, can each dictate whether a bet wins or loses" [R. 171].

- "[T]he key factor establishing a game of skill is not the presence of skill, but the absence of a material element of chance. Here, chance plays just as much of a role (if not more) than it does in games like poker and blackjack. A few good players in a poker tournament may rise to the top based on their skill; but the game is still gambling. So is DFS." *Id.*

- "DFS contests are causing the precise harm that New York's gambling laws were designed to prevent. Problem gamblers are increasingly being seen at Gamblers Anonymous meetings and at counselors' offices addicted to DFS" [R. 172].

- "Experts in gambling addiction and other compulsive behaviors have identified DFS as a serious and growing threat to people at risk for, or already struggling with, gambling-related illnesses" [R. 180].

- "Because DFS is not an authorized form of gambling [under Article I, § 9], FanDuel and DraftKings are in direct violation of the state constitution" [R. 188].

- "[T]he main purported 'skill' in DFS is no different than it is for poker, blackjack or other forms of sports betting: the ability to calculate probabilities and try to handicap the odds of future events" [R. 193].

These arguments resonated with the Supreme Court Justice assigned to decide the case. By decision and order dated December 11, 2015, Justice Manuel J. Mendez granted the Attorney General's motion for a preliminary injunction [R. 92-102]. Justice Mendez held, *inter alia*, that (1) the Attorney General had established the likelihood of success on the merits, and (2) that the

balance of equities favored the Attorney General due to the interest in protecting the public, particularly those with gambling addictions [R. 100].

C. The Legislature Enacts Chapter 237 Purporting to Authorize Interactive Fantasy Sports

On June 14, 2016, six months after the decision by Justice Mendez, identical companion bills that ultimately became Chapter 237 were introduced in both the Assembly and the Senate, sponsored by Assemblyman Gary Pretlow and Senator John Bonacic, respectively. They were accompanied by a massive lobbying effort from the gambling industry which spent more than $2 million between 2015 and 2017. *See* Report of the New York State Joint Commission on Public Ethics [R. 1255]. Three days after its introduction, the bill passed both houses of the Legislature – but not without some pushback.

During the debate in the Assembly, a transcript of which is included in the record [R. 662-691]. Assemblyman Andrew Goodell stated:

> Now what I thought was interesting about your bill is that it first declares that fantasy sports is not gambling and then, if I'm correct, imposes almost all the regulatory oversight that we normally impose on gambling, including requirements for notice about compulsory gambling and the problems with it. We put it under the Gaming Commission whose sole responsibility is to regulate gambling, or one of its primary responsibilities I should say. We have the funds going to education just like we do with the

> lottery which we all agree is a form of gambling. We restrict the age to 18, which is the same type of age restriction we have on gambling. We prohibit certain people who have a conflict of interest from engaging in it, just like we do in other situations involving gambling like in horse racing. I mean, obviously, jockeys and trainers are not allowed to bet on horse racing for obvious reasons.

[R. 670].

A transcript of the Senate debate is also included in the record [R. 693-700]. There, Senator Liz Krueger spoke out as well:

> If it looks like a duck, it swims like a duck, it quacks like a duck, it's a duck. This is another gambling bill. This continues New York State's path into dreaming that all of our economic development and research problems can be solved by increasing the number of people who use all of their disposable income in different styles of gambling.
>
> Maybe we can roll them all together in a movie theater that serves liquor, and everybody can just spend their days sitting in their chairs, drinking, watching the movies, and choosing their type of online gambling.
>
> It's not a very attractive future for the State of New York. It's not really in the best interests of the people of New York. I'm particularly entertained by the resolution on our desks clarifying that if New Jersey increases some kind of gambling for themselves, we'll explore how we can do even more. I'm not even sure we could figure out how to do even more, but I'm confident we'll see more bills in the future that

just continue down this rabbit hole [R. 699].

Thereafter, the Governor signed into law Chapter 237 of the Laws of 2016, effective August 3, 2016 [*see* R. 82-90]. Chapter 237 added Article 14 to the Racing, Pari-Mutuel Wagering and Breeding Law (the "Racing Law") which purported to authorize and regulate the operation of interactive fantasy sports under the auspices of the New York State Gaming Commission. It declared that interactive fantasy sports games are not games of chance, but rather, "fantasy or simulation sports games" based upon "the skills of contestants" and are not based on the current membership of an actual team. Racing Law § 1400(1)(a). The Legislature also declared that IFS contests are not wagers on future contingent events out of contestants' control because the contestants control the athletes they choose on their fantasy teams, and the outcome of each contest is not dependent upon the performance of any single player or actual team. § 1400(1)(b). The Legislature declared that IFS conduct was, therefore, not "gambling" as defined in § 225.00(2) of the Penal Law. Racing Law, § 1400(2). "Entry fees" are defined as the amount paid to an IFS registered operator by a contestant in order to participate in the contest. § 1401(4). The law defines a "highly experienced player" as one who has entered more than 1,000 contests offered by a single IFS operator or has won more than

three prizes valued at $1,000 each from a single IFS fantasy sports operator. § 1401(g).

Sections 1402 and 1403 define the registration process to become a licensed IFS operator. Provisions in § 1404 require that the number of experienced players participating in any event must be identified and the operator must include information about where compulsive players can find "assistance" (a curious provision indeed if the activity is, in fact, not considered "gambling"). Section 1404, subdivision (2) requires that no contestant may submit more than 150 entries in any contest, or 3% of all entries, whichever is less. Section 1405 lists the powers and duties of the Gaming Commission and directs it to promulgate regulations to implement Article 14 of the Racing Law. Section 1407 contains provisions for a state tax of 15% on gross revenues generated by IFS operators, with an additional tax of .5%, not to exceed $50,000.

Section 1402(6) required the Gaming Commission to promulgate regulations to implement the statute including "responsible protections with regard to compulsive play and safeguards for fair play." Four years have elapsed since the law was enacted, but the Commission has yet to issue any such regulations.

D. The Attorney General Settles with FanDuel and DraftKings

After Chapter 237 was enacted purporting to legalize IFS, the Attorney General discontinued the lawsuits against FanDuel and DraftKings, entering into virtually identical settlement agreements [R. 453-466, 468-482]. While the Attorney General discontinued the litigation to enjoin both DraftKings and FanDuel from continuing to operate interactive fantasy sports, the settlement agreements included penalties of $6 million each to be paid by both FanDuel and DraftKings for past activities, including false advertising [R. 453-454, 462, 468-469, 478]. The Attorney General's office came down hard on DraftKings for its deceptive advertising, which suggested that it was easy to win at DFS, notwithstanding the fact that its own internal data showed differently [R. 454-456, 469-471]. In fact, at one point DraftKings had advertised the ease of winning "massive jackpots" and promoted DFS as making "winning easier than milking a two-legged goat" [R. 568].

In the Settlement Agreements, the Attorney General's Office made several findings:

- DraftKings identified and targeted users with a propensity for gambling and addiction, but failed to disclose the risks of playing its contests or providing safeguards [R. 473].

- Shortly after founding DraftKings, its CEO, Jason Robbins, explained in a Reddit forum online that DraftKings is listed in the "gambling space" , offered a "mash-up between poker and fantasy sports," and made money in a way virtually "identical to a casino." Similarly, in documents prepared for potential investors, DraftKings placed itself in the gambling sector. Moreover, DraftKings sought out and entered sponsorship agreements with various concerns popular with gamblers, including the World Series of Poker and the Belmont Stakes. *Id.*

- DraftKings routinely fielded requests and complaints from customers with addiction and compulsive game play issues who asked that their accounts be shut down. DraftKings records show customer service inquiries from players featuring subjects such as: "Gambling Addict – Do Not Reopen," "Please cancel account. I have a gambling problem;" and "Gambling Addiction needing disabled account" [R. 473-474].

- Despite targeting a vulnerable population and receiving complaints from customers, DraftKings never provided warnings about addiction or resources to help with compulsive behavior in any of its marketing [R. 474].

- FanDuel identified and targeted users with a propensity for gambling and addiction, but failed to disclose the risks of playing its contests or provide adequate safeguards [R. 457].

- In a 2010 pitch to investors, FanDuel revealed the results of a survey that it used as indicating that over half bet on sports online and that nearly 20% self-identified as "a bit of an addict," while only 9% reported that they did not gamble. In that same pitch, FanDuel told investors its target market for DFS was male sports fans who "cannot gamble online legally." *Id.*

E. Why The Plaintiffs Commenced This Action

After the Attorney General's office abandoned its lawsuit against DraftKings and FanDuel, the Plaintiffs, all of whom are either persons with gambling disorders or those victimized by gambling, brought this action contending that their rights had been violated because the Bill of Rights (Article I, § 9 of the New York State Constitution) specifically provides that no "pool-selling, bookmaking or any other kind of gambling ... shall hereafter be authorized or allowed within the State."

Each Plaintiff has a tragic story to tell about how they have suffered because of gambling. Plaintiff Jennifer White is a resident of Grand Island, Erie County, New York, and is a citizen and taxpayer of the State of New York, eligible to vote in elections [R. 45]. She is a direct victim of gambling as her life was nearly ruined by her father's gambling addiction. *Id.* As early as 1992, when Plaintiff White was only 13 years of age, Ms. White's father constantly patronized off-track betting facilities throughout Western New York. *Id.* Plaintiff White's mother was thereafter besieged by phone calls from creditors, loan sharks appearing at her door, cars being repossessed, all culminating in a divorce [R. 46]. As late as 2011, when Ms. White's mother died in the hospital as a result of sepsis following an acute cellulitis infection, she learned that her

father had accessed her mother's bank card, making withdrawals of approximately $1,100 while present at the Seneca Niagara Casino in Niagara Falls [R. 46]. Over a ten-year period, Ms. White's father amassed over $500,000 in gambling losses. *Id.* *See also* [R. 48].

Plaintiff Katherine West is a resident, citizen, taxpayer and eligible voter of the State of New York. She resides in the City of Buffalo [R. 46]. Plaintiff West's husband is a compulsive gambler who "maxed out" the family's credit card, overdrew the checking accounts, cleaned out the savings account, invaded the funds set aside for their children's college fund, all of which directly affected her health, causing depression, acute headaches, and stomach disorders which in turn caused her to miss work, thereby exacerbating her own financial stress, all while trying to hide her husband's problems from their daughters [R. 46]. Ms. West was forced to take time off from work to search for him in casinos, while struggling to cover his debts. *Id.*

The third Plaintiff is Charlotte Wellins, a citizen, taxpayer and eligible voter in the State of New York who resides in Wellesley Island, New York. *Id.* Her husband was a compulsive gambler who signed his name to loans without her knowledge. *Id.* His gambling led to the loss of their home (which had been mortgaged to the hilt), bankruptcy, divorce, and the forced uprooting of their

children from their home and schools, plus the loss of their college education funds [R. 47]. *See also* [R. 49].

The final Plaintiff is Anne Remington, a citizen and taxpayer of the State of New York residing in Jefferson County [R. 47]. Ms. Remington is afflicted with a gambling addiction that nearly ruined her life and family. *Id.* Her initial game of choice was scratch-off instant lottery tickets that started with an occasional purchase and then progressed to the point of lacking money to buy groceries or gas for her family. *Id.* Ms. Remington had been entrusted with control over her family's finances (checkbook, savings, everything). *Id.* By her own admission, Ms. Remington's obsession with scratch-offs made her a liar, a cheat, and a person who grew to hate herself. *Id.* She invaded her family's check book, then the savings account, until both were depleted. *Id.* She got to the point where she fended off creditors calling her and turned off the home phone, and when her husband inquired as to why it was unplugged, blamed it on the family's pet cat. *Id.* The power company threatened to turn off Ms. Remington's power, cable, Internet and phone service because of unpaid bills. *Id.* When Ms. Remington's husband inquired as to what was happening, she blamed it on a bookkeeping error on the part of the public utilities serving her residence. *Id.* Ms. Remington kept the books in her

husband's business, and ultimately he learned the truth when his business was lost. *Id.* Things got so bad that on February 25, 2015, Ms. Remington was arrested for writing bad checks on her account that her husband had closed [R. 48]. By that time, Ms. Remington had already been attending gambling addiction support groups, but would continue to stop to gamble on her way to meetings. *Id.* Ms. Remington has been "clean" for the past twelve years, but she is always concerned about a relapse. *Id.*

These tragic stories are part of this Brief's Statement of the Case because they serve as grim reminders of why Article I, § 9 of the Bill of Rights of the New York State Constitution was adopted in the first place. Allowing a virtual casino to enter the living room of every New Yorker via DFS and the internet is sure to exacerbate the very evils Article I, § 9 was intended to prevent. Indeed, the Attorney General's office itself has acknowledged that:

- "DFS contests are causing the precise harms that New York's gambling laws were designed to prevent. Problem gamblers are increasingly being seen at Gamblers Anonymous meetings and at counselors' offices addicted to DFS" [R. 172].

- "Experts in gambling addiction and other compulsive behaviors have identified DFS as a serious and growing threat to people at risk for, or already struggling with, gambling-related illnesses" [R. 180].

Plaintiffs now must rely on the courts to protect their constitutional rights as set forth in Article I, § 9 of the Bill of Rights which directs the Legislature to pass laws that prohibit gambling. It was adopted for the precise purpose of protecting people like the Plaintiffs. *See* Charles Z. Lincoln, *Constitutional History of New York*, Vol. III at 46-49 (1906). *International Hotels Corp. v. Golden*, 15 N.Y.2d 9 (1964) (prohibition was intended to protect a family man from his own imprudence. *Id.* at 15). "[I]t is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them." *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893, 925 (2003).

PROCEDURAL HISTORY AND DECISIONS BELOW

After the filing of the Complaint, Appellants moved to dismiss arguing that the Legislature's determination that interactive fantasy sports did not constitute gambling was a rational implementation of its authority to determine the scope of the constitutional gambling prohibition [R. 113-114]. By Decision and Order dated August 31, 2017, Supreme Court denied Appellants' motion to dismiss, holding that any such motion was premature, given the allegations of the Complaint which, for purposes of a motion to dismiss, were presumed to be true [R. 424-429].

Thereafter, both parties cross-moved for summary judgment based on a stipulated set of facts [R. 440-444]. On October 26, 2018, Supreme Court issued its Decision and Order [R. 7-34] which recognized that while a statute enjoys a strong presumption of constitutionality, the Plaintiffs had nevertheless demonstrated "beyond a reasonable doubt" that Chapter 237 was unconstitutional [R. 21-22]. The Court noted, *inter alia*, the "intentionally broad language and application of the constitutional prohibition, the common understanding at the time [of adoption] and now of the meaning of the prohibition and of the particular words 'bookmaking' and 'gambling,' and the undisputed fact that success in IFS is predicated upon the performance of athletes in future contests all lead to the conclusion that the constitutional prohibition encompasses DFS" [R. 30]. The Court went on to say that "to countenance such redefining of the term ["gambling"] would effectively eviscerate the constitutional prohibition[.]" *Id.*, citing *Dalton v. Pataki*, 11 A.D.3d 62 (3d Dep't 2004), *aff'd in part and modified in part*, 5 N.Y.3d 343 (2005).

The Court, however, also ruled that despite the fact that DFS was gambling prohibited by Article I, § 9, the Legislature could legally exclude IFS from the definition of "gambling" contained in the Penal Law [R. 30-32].

Supreme Court reasoned that the Legislature was not required to criminalize IFS [R. 32]. This resulted, however, in a regulatory vacuum leaving no civil or criminal statute on the books to prevent DFS, despite the constitutional prohibition against it and the mandate to pass laws to prevent gambling.

Appellants thereafter appealed to the Appellate Division from that portion of Supreme Court's Order and Judgment declaring DFS to be unconstitutional, and Respondents cross-appealed from that part of the judgment which upheld the Legislature's exclusion of IFS from the definition of "gambling" under the Penal Law.

The Appellate Division affirmed that part of Supreme Court's determination that IFS was "gambling" prohibited by the Constitution, holding that IFS is "not excluded from the constitutional meaning of 'gambling' merely because the Legislature now says that it is so." [R. 1449] It also reversed that part of Supreme Court's decision that the Legislature could nevertheless "decriminalize" IFS. The Appellate Division noted that if such decriminalization had occurred, then, notwithstanding IFS's unconstitutionality, there would have been no statute on the books, civil or criminal, to prevent it from continuing [R. 1456].

The Governor and the New York State Gaming Commission have now appealed to this Court.

ARGUMENT

POINT I

Article I, Section 9 of the Constitution Does Not Give the Legislature the Power to Define Gambling in a Manner Different From its Commonly Understood Meaning or to Independently Set Policy With Respect to What Should Be Prohibited

Appellants' principal argument is that, because Article I, § 9 of the Constitution does not define "gambling," and because the last sentence of Article I, § 9(1) states that "the Legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section," the Legislature has the right to make the "policy judgment about what activities to classify as gambling as well as how to regulate such activities" (App. Br. at 8). The full text of Article I, § 9, the history surrounding its adoption by the Constitutional Convention in 1894, and judicial precedent, however, all tell a different story.

A. The Proceedings and Debates at the Constitutional Convention of 1894 Establish that the Adoption of the Amendment Was Intended to Prevent the Legislature from Defining Gambling

The wording of Article I, § 9 itself makes it unequivocally clear that lotteries, pool-selling, book-making and "any other kind of gambling" shall not be allowed. The Legislature was afforded no discretion regarding what constitutes "gambling" as the language at the end of this section was merely a command to enforce the prohibition against gambling – not to define it or decide what could be excepted from it. The proceedings of the Constitutional Convention of 1894, as recorded by Charles Z. Lincoln, a delegate to the Convention, make it clear that the delegates did not trust the Legislature to determine what should be gambling. While the last sentence of Article I, § 9 gave the Legislature the limited discretion to criminalize certain forms of gambling while subjecting other forms to civil sanctions, it did not give it the right to carve out exceptions to the comprehensive ban on "any other kind of gambling." See remarks of delegate Veeder: "The proposition in this constitutional amendment is that gambling shall not be allowed, leaving it to legislative declaration as to what should be the penalty for the violation." (*Proceedings and Debates of the N.Y. Constitutional Convention of 1894*, Vol. 6 at p. 2605).

Until 1894, the constitutional prohibition applied only lotteries. At the 1894 convention, a proposal was made to expand the prohibition to include pool-selling, book-making or any other kind of gambling. A very focused and impassioned debate ensued with regard to whether the new prohibition should be expanded to include pool-selling and book-making in addition to lotteries, or whether it should include, as well, "any other kind of gambling" (*See* Proceedings and Debates, *Id.* at 2599-2610) The debate also included arguments about whether the matter should be left to legislative discretion or should instead be imbedded within the Constitution. Lincoln, *Constitutional History of New York*, Vol. III at 50.[8] One delegate, Mr. Abbott, opposed the Constitutional amendment, arguing that it should be "purely a matter of legislation." (*Proceedings and Debate* at 2602.) Delegate J. Johnson, however, rose in rebuttal:

> [t]his amendment is aimed at a well known form of gambling ... which has proven more powerful than

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[8] Lincoln's *Constitutional History of New York* is recognized by this Court as "perhaps the most authoritative study of the State's early constitutional history. *Bransten v. State*, 30 N.Y.3d 434, 449 (2017). It is frequently cited in opinions by this Court. *See also, e.g., Cohen v. State*, 94 N.Y.2d 1, 14 (1999); *King v. Cuomo*, 81 N.Y.2d 247, 254 (1993), *Shultz v. State*, 84 N.Y.2d 231, 242 (1954); *Van Berkel v. Power*, 16 N.Y.2d 37, 41 (1965).

> the Legislature, and, therefore, needs the power of a Constitutional Convention to prohibit ... there is no one [in this Convention] but what says it should be stopped, and no one but what agrees that the Legislature *is impotent to stop it, and this is the only place to stop it* ... (*Id.* at 2602) (emphasis supplied).

This prompted delegate Brown to observe that it was "a necessary thing that the Constitutional Convention should show that there should never be a law affirmatively justifying gambling" (*Id.* at 2603). Another delegate, Mr. Lauterbach, bemoaned the fact that "any effort to induce the Legislature to come to the rescue has been futile, and that this wrong had been maintained under various pretenses," concluding with the plea: "Now, here, at this Convention, and in this presence, I implore that an end shall be put to it forever" (*Id.* at 2609).

The amendment, as finally worded, included a prohibition not just against pool-selling and bookmaking, but also "any other kind of gambling", leaving nothing to legislative discretion. It was adopted overwhelmingly by a vote of 109 to 4" (*Id.* at 2610). It is against this backdrop that intent must be discerned. Lincoln's account and the actual debate confirm that the delegates to the Constitutional Convention who adopted what is now Article I, § 9 had absolutely no intention whatsoever to delegate to the Legislature the right to decide for itself what is or is not gambling. "[A]s is evident from the debates in

the Convention, it was intended that no opening should be left ..." *People ex rel. Sturgis v. Fallon*, 4 A.D. 76, 79 (1896), *aff'd* 152 N.Y. 1 (1897). The delegates feared that absent an unequivocal constitutional prohibition, the Legislature would find a way around it. Those fears have now proven to be justified given the Legislature's attempt 122 years later to authorize interactive fantasy sports betting.

B. This Court Has Consistently Held That Rights In the Constitution Are to be Interpreted By and Safeguarded by the Judiciary

This Court has already ruled that the meaning of the prohibitions in Article I, § 9 of the Constitution is for the Court, not the Legislature, to determine. *Dalton v. Pataki*, 5 N.Y.3d 243, 264 (2005) ("Since the Constitution does not define the term 'lottery,' we must first determine what constitutes a lottery within the meaning of Article I, § 9"). The term "lottery" appears right next to the words "pool-selling, bookmaking or any other kind of gambling" which are also undefined.

The Court's holding in *Dalton v. Pataki* is consistent with its prior rulings that the Judiciary should always define rights that are specifically set forth in the New York State Constitution. In 1943, in *People v. Barber*, 289 N.Y. 378 (1943), this Court stated:

> "The Bill of Rights embodied in the Constitution of the State and Nation is not an arbitrary restriction upon the powers of government. It is a guarantee of those rights which are essential to the preservation of the freedom of the individual rights which are part of our democratic traditions and *which no government may invade.* Where a legislative body has sought to invade a field from which under the Bill of Rights the Government is excluded, and has violated rights guaranteed by the Constitution, the Courts must refuse to recognize or sanction the legislative decree ..." (emphasis supplied). *Id.* at 385.

"[I]t is the province of the judicial branch to *define,* and safeguard, rights provided by the New York State Constitution, and order redress for violation of them" (emphasis supplied). *Campaign for Fiscal Equity v. State ("CFE")*, 100 N.Y.2d 893, 925 (2005). In *CFE*, this Court was referring to a "right" that was not even clearly defined as such in Article XI, § 1 of the State Constitution, which mandated that: "The Legislature shall provide for the maintenance and support of the system of free common schools wherein all children of the State may be educated." Here, the right to be protected against gambling is far more explicit, and it is set forth in the Bill of Rights itself.

CFE was a sequel to an earlier case in which this Court, rather than the Legislature, decided what the right in Article XI, § 1 meant – namely, "a sound basic education" while also reserving for itself the right to adjudicate the nature

of the duty. *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 314 (1995).

In *Board of Educ., Levittown Union Free School Dist.*, 57 N.Y.2d 39 (1982), this court noted that "it is nevertheless a responsibility of the courts to adjudicate contentions that actions taken by the Legislative and executive failed to conform to the mandates of the Constitution ..." *Id.* at 39.

Appellants cite prior decisions of this Court in support of their argument that the Judiciary must defer to legislative judgments in cases where the Constitution delegates powers to the Legislature. App. Br. at 26-27. Those cases are all distinguishable from the case at bar.

In *Bernstein v. Toia*, 43 N.Y.2d 437 (1977), for example, the Court dealt with Article XVII, § 1 of the Constitution which states that: "The aid, care and support of the needy ... shall be provided by the State ... *in such manner and by such needs as the Legislature may from time to time determine*" (emphasis supplied). *Barrie v. Levine*, 40 N.Y.2d 565 (1976), also cited by Appellants, involved the same Constitutional provision. The obvious distinction is that in those cases, the Constitution itself delegated to the Legislature the determination as to what was needed from time to time. Here, in contrast, the

Constitution does not give the Legislature any authority to determine the meaning of gambling.

Campaign for Fiscal Equity, Inc. v. State, 8 N.Y.3d 14 (2006) (App. Br. at 27) was a sequel to an earlier case involving the interpretation of Article XI, § 1 of the Constitution. By the time the case had reached this Court for the third time, it was clear that the Court – not the Legislature – had already defined what the constitutional prohibition meant, and the sole issue before the Court in the third *Campaign for Fiscal Equity* case was whether the Legislature had lived up to the meaning previously determined by the Court. Here, again by contrast, the Legislature is claiming it, rather than the Court, has the right to determine the meaning of the Constitution in the first place. The crucial distinction is that while the Legislature may be given deference in implementing a constitutional prohibition, it is the prerogative of the Court to determine what the provision means in the first instance.

C. Even if the Court Were to Defer to the Legislature, the Law Passed in 1895, the Year After the Amendment Was Adopted, Is a More Reliable Indicator of Intent Than One Passed in 2016

Despite the fact that the delegates to the 1894 Constitutional Convention of Article I, § 9 made it clear that the Legislature was to have no "say" in determining what was gambling, if this Court were to nevertheless accept

Appellants' argument that it should defer to the Legislature's determination as to the meaning of the language in Article I, § 9, then the best evidence of its meaning would not be what the Legislature enacted in 2016, 122 years after its adoption. The Court should look instead to Penal Law § 351, enacted pursuant to Chapter 572 of the Laws of 1895 immediately after the Constitutional Convention of 1894. Section 351 provided that:

> Any person who engages in pool-selling, or book-making at any time or place at any time or place; or any person who keeps or occupies any room, shed, tenement, tent, booth, or building, float or vessel, or any part thereof, or who occupies any place, or stand at any time, upon any public or private grounds, within the State, with books, papers, apparatus or paraphernalia, for the purpose of recording or registering bets or wagers, or selling pools, and any *person who records or registers bets or wages, or sells pools upon the result of any trial or contest of skill, speed or power of endurance, of man or beast,* etc. is guilty of a felony ... and upon conviction, is punishable by imprisonment in the State prison for a period of not more than two years, or by a fine not exceeding $2,000 ... (emphasis supplied) [R. 450-451].

"The contemporaneous construction given by the Legislature to a Constitutional mandate it is charged with carrying out must be given great deference." *New York Public Interest Research Group v. Steingut*, 40 N.Y.2d 250, 259 (1976), *citing People ex rel. Joyce v. Brundage*, 78 N.Y. 403, 406

(1879) ("Great deference is certainly due to a legislative exposition of a Constitutional prohibition, and especially when it is made almost contemporaneously with such provision and may be supposed to result from the same view of policy and modes of reasoning which prevailed among the framers of the instrument propounded." *Id.* at 406.

For all the foregoing reasons, it is clear that (1) the wording of Article I, § 9 itself forbids gambling of any kind, (2) the framers of the revised amendment at the Constitutional Convention of 1894 did not trust the Legislature to decide what gambling meant and, therefore, included the broad proscription against "any other kind of gambling" in the Constitution itself, (3) this Court has consistently decided that the rights set forth in the Constitution are for the Judiciary, not the Legislature, to define, and (4) even if judicial deference were warranted, the Court should look to the contemporaneous interpretation of the constitutional prohibition reflected in a statute enacted immediately after the Amendment was adopted, rather than one conjured up 122 years later. The Legislature's enactment of Penal Law § 351 in 1895 clearly indicates that it understood Article I, § 9 applied to wagering on all athletic activities involving the "skill, speed, or power of endurance of man or beast." The outcome of interactive fantasy sports contests directly depends on

how real-life athletes will perform in future events. In simpler terms, it's "sports betting." It is as illegal today as it was in 1894.

POINT II

The "Beyond a Reasonable Doubt" Standard of Judicial Review Is Not the Only Applicable Rule of Construction Given That Article I, § 9 of the Constitution is Part of the Bill of Rights

Both the Supreme Court and the Appellate Division correctly determined that Respondents had overcome the admittedly "high bar" in establishing the unconstitutionality of Chapter 237 of the Laws of 2016 beyond a reasonable doubt. In reaching that conclusion, Supreme Court alluded to the "intentionally broad language and application of the constitutional prohibition, the common understanding at the time and now of the meaning of the prohibition and of the particular words 'bookmaking' and 'gambling,' and the undisputed fact that success in IFS is predicated upon the performance of athletes in future contests ..." [R. 30]. In affirming that determination, the Appellate Division noted "the skill level of an IFS contestant cannot eliminate or outweigh the material role of chance in IFS contests" [R. 1453]. In so ruling, they were mindful as well that this case involved an important right protected by the Bill of Rights, and that the courts are the guardians of those rights. As Supreme

Court noted below, "[i]t is axiomatic ... that ... 'it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them," quoting *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893, 895 (2005) [R. 18].

The Appellate Division was also cognizant of the "reasonable doubt" standard [R. 1446-1447] as well, but it also recognized that its "role is to examine and interpret the constitutional and statutory language, and to determine for [itself] whether the legislative enactment violates the explicit constitutional provision at issue" [R. 1446]. In its opinion [R. 1448], the Appellate Division cited this Court's decision in *Dalton v. Pataki*, 5 N.Y.3d 243 (2005), where, as an aid to determining the meaning of a constitutional provision, the Court examined the constitutional history reflected in the debates surrounding the adoption of the Constitutional amendment. *Id.* at 265.

Accordingly, the "beyond a reasonable doubt" standard is not a rubric to be applied without context. In deciding, therefore, whether Chapter 237 is constitutional, it must be determined in light of what the framers of Article I, § 9 had in mind when they adopted it with the intent to prohibit "any kind of gambling" while leaving the Legislature no latitude to define it, but only the mandate to enact laws to prevent it (*See* Point I, *supra* at 31 *et seq.*).

This Court was also careful to note in *Dalton v. Pataki* that since Article I, § 9 expressly prohibits commercial gambling, the "reasonable doubt" standard was inappropriate to review whether Article I, § 9 was violated by a law that authorized the Governor to enter into compacts with Indian tribes to allow such gambling on Indian lands within the State. *Id.* at 5 N.Y.3d at 255.

In addition, the Appellate Division was aware of another important well-recognized rule of construction that exceptions to constitutional prohibitions should be narrowly construed. *Ramesar v. State of New York*, 224 A.D.2d 757, 759 (1996), *lv denied*, 88 N.Y.2d 811 (1996). *Molina v. Gaines Management Services*, 58 N.Y.2d 523 (1983) [R. 1449]. *See, also, Dalton v. Pataki*, 11 A.D.3d 62, 90 (3d Dep't 2004), *aff'd* 5 N.Y. 3d 243 (2005). McKinney's Cons. Laws of N.Y., Book I, Statutes, § 213 at 372. Appellant tries to distinguish those cases by arguing that interactive fantasy sports are not exceptions to the prohibitions against gambling since they are not gambling at all [App. Br. 35]. That, of course, simply begs the central question in this case.

The "reasonable doubt" standard should, therefore, be applied along with other rules of construction whenever (1) a constitutional right in the Bill of Rights is directly implicated by the legislative action under review; (2) certain action is entirely prohibited by the Constitution (*Finger Lakes Racing*

Association v. New York State Off-Track Pari-Mutuel Betting Commission, 30 N.Y.2d 207, 220 [1972]), (3) the history of the Constitutional provision at issue indicates a determination by the framers to keep the Legislature from defining its meaning, and (4) exceptions to prohibitions embedded in the Constitution are to be narrowly construed.

The presumption of constitutionality is also not irrebuttable as noted by the dissent in the Appellate Division [R. 1458] and "courts may scrutinize the basis of legislative enactments predicated on the existence of a particular state of facts." *Defiance Milk Products Co. v. DuMond*, 309 N.Y. 537, 541 (1956). *See also Lincoln Building Association v. Barr*, 1 N.Y.2d 413 (1956). The next point will address that particular set of facts and the rationale invoked by the Legislature to justify interactive fantasy sports.

POINT III

Interactive Fantasy Sports Contain All the Elements of Gambling, as Identified By This Court

In *Dalton v. Pataki*, 5 N.Y.3d 243 (2005), this Court identified the elements common to gambling – consideration, chance, and a prize. *Id.* at 264. These common elements are all set forth, as well, in § 225.00(2) of the Penal Law definition of "gambling" which, as noted by Appellants, has been on the

books for over 55 years since the last time there was a comprehensive overhaul of the Penal Law in 1965. App. Br. at 12. Section 225.00(2) of the Penal Law defines gambling as follows:

> Gambling. 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.

Respondents have no quarrel with that definition, as it reflects the commonly understood definition of the term. It is, therefore, consistent with this Court's ruling in *King v. Cuomo*, 81 N.Y.2d 247 (1993), that the Constitution should be interpreted in accordance with the ordinary meaning of words. *Id.* at 253-254. The Living Webster Encyclopedia of the English Language (1st Ed. 1971) defines "gamble" as follows: "To play at any game of chance for stakes; to stake or risk money or anything of value on something involving chance or unknown contingencies." *Id.* at 398. Indeed, the Appellants themselves have agreed that the definition in Penal Law § 225.00(2) is "the only currently valid definition of gambling." *See* Appellants' Memorandum of Law dated March 7, 2018 at n. 7 [R. 1232].

What Respondents are objecting to is not the definition of gambling in the Penal Law that has been there since 1965 and is consistent with the

ordinary, commonly understood definition of the term, but rather, the Legislature's attempt to separate out interactive fantasy sports from that definition – a special exception that applies only to interactive fantasy sports, and to no other activity. Racing Law, § 1400(2).

The Constitutional history surrounding the adoption of Article I, § 9, the wording of the statute itself, the way in which it has been interpreted over the years as being an outright ban on sports gambling, the statements by the CEO's of both FanDuel and DraftKings before the legal spotlight was focused on them, and the remarks of the Attorney General's office in prior litigation, which it is now attempting to "walk back," all established that the attempt to carve out interactive fantasy sports from the definition of "gambling" is unconstitutional.

The Court need not take Respondents' word for it. Until this case arose, the Attorney General's office argued vigorously that interactive fantasy sports was unconstitutional. Professional experts in the business of gambling unequivocally say the same thing. *See, e.g.*, the remarks of Sheldon Adelson, the founder, chairman and CEO of the Las Vegas Sands Corporation ("daily fantasy sports is gambling, there is no question about it") [R. 43]. *See also* remarks of Jim Murren, the Chairman of MGM Casinos ("I don't know how to

run a football team, but I do know how to run a casino and this is gambling" [R. 43].

A. There Is No Dispute as to How IFS Is Conducted

The parties agree on exactly how interactive fantasy sports contest are conducted [R. 440-444]. That conduct meets the definition of "gambling" as described by this Court in *Dalton v. Pataki*, 5 N.Y.3d 243, 264 (2005), and as defined by Penal Law § 225.002(2). In IFS, contestants pay an entry fee to participate, accompanied by a roster or fantasy team of real-life athletes which the contestants choose to submit, along with their entry fee. The winner or winners are determined by the aggregate performance of each roster of athletes in subsequent real-life athletic events held after betting is no longer allowed. The contestants with the best performing rosters are declared the winners and awarded monetary (or cash equivalent) prizes funded by the entry fee paid by all contestants. There is no question that the outcome of DFS contests depend upon future contingent events as the outcome is dictated by the performance of real-life athletes on real-life teams. The contestants have no control over how those athletes will perform, as conceded by Appellants in the Agreed-Upon Statement of Facts. This is "gambling" under any commonly understood

meaning of the term. The elements of consideration, chance and prize are all present.

B. Interactive Fantasy Sports Contests are Games of Chance

The first rationale advanced by the Legislature to justify the exclusion of IFS from the definition of "gambling" is that IFS contests are not games of chance because:

- They consist of fantasy or simulation games or contests;
- In which the fantasy or simulation sports teams are selected based upon the skill and knowledge of the participants; and
- Are not based on the current membership of an actual team (Racing Law, § 1400[b][1]).

This disingenuous attempt to evade the Constitutional prohibition is almost laughable and easily refuted. The Legislature attempts to draw a distinction between real-life athletes and fantasy teams – a distinction without a difference. Even in so-called fantasy games, the outcome is determined by the performance of real life athletes in real – not fantasy – athletic events. Assume two individuals were to bet against each other as follows: each individual must select a fantasy team of five real-life basketball players – each from a different NBA professional team. The first contestant chooses a player from the New York Knicks, the Boston Celtics, the Los Angeles Lakers, the Milwaukee

Bucks, and the Chicago Bulls. The other player chooses one player each from five other different teams – the Cleveland Cavaliers, the Portland Trail Blazers, the Oklahoma City Thunder, the Golden State Warriors, and the Phoenix Suns. The winner is determined by which roster of real-life players on that contestant's fantasy team will score more points on a certain date when all of the actual teams are playing. The fact that the fantasy teams are not real does not negate the fact that all the athletes on the teams are, in fact, real, and the outcome of the bet is determined by how those players actually perform, which is beyond the power of the bettor to control.

It has been recognized by the Legislature itself from the earliest days of the adoption of the Constitution in 1894 that gambling included wagers or bets on the selling of pools based upon the result of any trial or contest of skill of *man* or beast. *See* L. 1895, ch. 1, § 1 amending § 351 of the Penal Law. The Attorney General has said much the same:

> From the history it is indisputable that since at least 1877, when the Penal Code specifically defined as criminal wagering on the outcome of contests of speed, *skill* or power of endurance of *man* or beast, New York law has viewed lotteries and betting on sports events as two distinct forms of gambling. *This distinct statutory ban on sports wagering was elevated to the Constitutional level in 1894 and has remained by explicit language in the Constitution*

> *until today*. 1984 N.Y. Op. Atty. Genl. 1 (1984 N.Y. AG LEXIS 94 *4 (emphasis supplied).

The fact that IFS involves "fantasy" teams or "simulated" teams or simulated games is, therefore, irrelevant. The inescapable truth is that IFS games nevertheless depend for their outcome on the actual performance of real-life players on real-life teams – the same skill of man referred to in Penal Law § 351 enacted back in 1895.

There is also no merit to the skill versus chance argument advanced by Appellants. That is a false dichotomy, as skill is certainly present in many games that are still universally recognized as games of chance. Skill and chance are not mutually exclusive and coexist in many forms of gambling. There is no doubt that IFS contestants may exercise skill in selecting their rosters, but that is no different from poker players who exercise skill in playing their cards or from bettors in horse racing who employ their handicapping skills before placing bets. While it is true pari-mutuel wagering on horse racing is permitted, that is only because it is an expressed exception in the Constitution itself to the general prohibition against gambling. It is the exception that proves the rule. If pari-mutuel wagering on horse racing is an exception, it must be gambling in the first place or otherwise no exception would be required. Moreover, the Penal Law definition of a "contest of chance" states that it is one

in which "the outcome depends in a material degree upon an element of chance, *notwithstanding that skill of the contestants may be a factor therein*" (emphasis supplied). Penal Law § 225.00(1).

Appellants argue, nevertheless, that IFS is not gambling because there is no longer a *material* degree of chance. They rely on alleged expert reports which the Attorney General's office itself had previously dismissed as "self-serving" and "purchased by DFS operators" [R. 195]. The reports submitted by the gambling industry do not support the position they, and now the Legislature, espouse. As previously stated, analyses to show that "skill" dominates "luck" in IFS contests are totally unremarkable because a skilled poker player, for example, will defeat a novice over time, far more often than not, but poker is still gambling. The Legislature itself has decided that "domination" of skill over chance is not a deciding factor in determining whether a game is one of chance. "Materiality" of chance, however, is. *See* Penal Law § 225.00(1). In addition, the so-called expert studies relied upon by Appellants as "extrinsic evidence" to support their argument that IFS is not gambling were based on games in which there were no limits on the numbers of entries skilled or experienced players could submit, and there were no classified rankings, where only certain players could participate, based on their skill /

experience. Chapter 237 of the Laws of 2016, however, places limits on the number of entries players can submit in any single contest (Racing Law, § 1404[2]) and experienced players must be identified such that less skilled contestants can decide whether or not to play. These provisions were inserted to level the playing field. *See* Appellants' Memorandum of Law submitted below [R. 1243]. To the extent there might otherwise be any merit to the argument that interactive fantasy sports contests involve skill, the Legislature removed it by inserting language in the statute to level the playing field.

As noted, moreover, by the Massachusetts Institute of Technology professors who submitted the "Luck and the Law" analysis that appears in the Record at 1184-1205, "the simplest way to increase the role of skill in a contest is to increase the number of games per player" [R. 1199]. The same professors also note that tournaments which are divided up into classes of different skilled players (*e.g.*, having beginners play in a separate pool) are likely to have a larger element of luck than those in which everyone plays on the same pool. *Id.* They observe that skill is no longer a distinguishing characteristic when players' skills are similar. *Id.* The irony is that the Legislature's attempt to level the playing field is self-defeating. Limiting the number of entries and

classifying skill levels reduces the element of skill which it says is the reason why DFS is not gambling.

The same experts relied upon by Appellants are also careful to point out that while skill may play a greater role chance in than determining the outcome of some DFS contests, there is still a material degree of luck present [R. 1197, figure 6]. According to Appellants' own experts, in fantasy football, the skill / luck ratio is 55/45; in hockey, it is 60/40; in baseball, it is 75/25; and in basketball, it is approximately 85/15. Who boarding an airplane would not consider it "material" if the chances it were to crash were even as low as 15% (the basketball ratio), not to mention as high as 45% (the football ratio)?

While the percentage of success with respect to the four major professional sports vary from the estimates of other experts, the more important point is that no fantasy sports operator can assure the relative skill of the contestants in each contest. If the contests pit contestants of equal skill against each other, luck will play a much more important role in the outcome.

Other data Appellants submitted as "evidence" relate to the studies allegedly performed by other experts, all of which show that "top performers" consistently beat "average performers" [R. 1168]. Again, this is neither remarkable nor probative. This observation, heavily relied upon by the dissent

in the Appellate Division [R. 1462], is grossly misleading. The type of interactive fantasy contests described by the various witnesses and lobbyists who testified before the Legislature is not the type of game ultimately authorized by the Legislature pursuant to Chapter 237 of the Laws of 2016.

Those witnesses and lobbyists failed to mention that in the games they were testifying about to prove that "skill" was the dominant element such that they were won by a very small percentage of "professional sharks," sophisticated players with deep pockets were allowed to submit an unlimited number of entries, using third-party computer scripts. *See* Blandford, C., "Why DFS Requires Regulation Regardless of Whether It Is Skill-Based: An Outline of the Growth of Fantasy Sports, the Scandals and a Return to Gaming in the United States," 7 U.N.L.V. Gaming Law Journal, 161, 187 (2017), available at https://law.unlv.edu/unlv-gaming-law-journal/vol7/why-dfs-requires-regulation-regardless-whether-it-skill-based-outline-growth-fantasy-sports-scandal-1120.html). *See also* Jay Caspian Kang, "How the Daily Fantasy Sports Industry Turns Fans Into Suckers," N.Y. Times Magazine (January 6, 2016), available at http://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html). This accounts for the fact that the average bettor has "no chance" at winning and why so few

individuals prevail in what Blandford describes as "DFS's rapacious ecosystem." Notably, Blandford refers to the exact same statistics quoted by Appellants. *Compare* App. Br. at 48 with Blandford's law journal article, *supra* at 187 (91% of the profits are won by 1.3% of the players).

The type of interactive fantasy sports authorized by Chapter 237, however, is a much different game. The Legislature has prohibited unlimited entries and scripts. Section 1404(2) of the Racing Law limits the number of entries a single user can submit (the lesser of 150 or 3% of all entries), and the New York Gaming Commission prohibits scripts or scripting programs. *See* New York Gaming Commission Website: Interactive Fantasy Sports Operators: Advertising and Other Restrictions (https://www.gaming.ny.gov/ifs/index.php?ID=3). Once again, however, the irony is that these are all the very measures that reduce the element of skill and increase the element of chance.

The studies also focus on the performance of skilled versus unskilled players over the course of time – e.g., season-long. *See* "Luck of the Law" [R. 1187]. The distinguishing aspect, however, of daily fantasy sports (DFS), a subset of IFS, is that games are played on a daily basis. It is well-known that "on any given night," a team in last place in baseball can defeat the team in first

place, or the league's leading hitter may go hitless, while a light-hitting shortstop like Bucky Dent could hit a miraculous home run as he did in 1978 to lead the Yankees to an improbable win over the Red Sox to win the American League East Division in a one-game playoff in route to a World Series title. Who can forget the Miracle on Ice when a team of amateur Americans defeated the heavily favored Russian professionals on the way to winning the Olympic Gold Medal in hockey for the United States in 1980? Odds may even out over the course of a long season in traditional interactive fantasy sports, but on any given day, anything can happen in the shorter daily fantasy sports version of the game. Just ask the Russians.

Other events that could undoubtedly affect the outcome of a game also fall into the category of luck – an injury, a bad hop, poor officiating, and, of course, weather conditions. No contestant has any control over these factors.

The Legislature's declaration in Racing Law § 1400(1)(a) that interactive fantasy sports contests are not games of chance because "they are based on the skill and knowledge of the participants" is total speculation. No one knows for certain who all the individuals are that will decide to enter into an IFS contest. Some may have little or no skill whatsoever and simply fill out a roster the same way people pick random numbers in a lottery. There could be no skill or

knowledge whatsoever, and yet Section 1400(1)(a) of the Racing Law states that interactive fantasy sports are not games of chance because the fantasy teams are "selected based upon the skill and knowledge of the participants." The Legislature cannot know or find that as a "fact".

Appellants also argue that IFS involves skill rather than chance because the contestants act more like "general managers" of real-life sports teams since, in addition to selecting athletes for a fantasy team, the contestants must also stay within a salary cap as GM's do in real life sports and be guided in their roster selection by the past performances of the athletes they choose. Bettors in fantasy sports are not, however, members of the fantasy team. Conversely, in real life, a general manager is, in fact, an integral part of a team that is engaged in a sporting event. Appellants argue, nevertheless, that "just as the skill of general managers in picking a roster ... significantly influences – without completely determining - the outcome of future sporting events ... the skill of fantasy sports materially influences the outcome of the contests in which they participate." App. Br. at 54.

This is a gross exaggeration. Bettors in horse racing must also take into consideration the funds they have available to bet, and calculate the future odds of horses they bet on. Moreover, in real life, general managers have the option

of changing their rosters over the course of a season, trading poorly performing players for new players, and bringing up promising prospects from an organization's farm team. No such options are available to DFS contestants who participate in daily or weekend games as they are "stuck" with the roster they have selected after betting is closed before the real-life games begin. They have far less control over the outcome than general managers of real sports teams.

Appellants also cite other states that have chosen to exclude IFS from the definition of gambling based on a skill / chance dichotomy. What other states legislate by statute is irrelevant here in New York where the prohibition is embedded in the Constitution and not subject to a statutory change. Note also that many other states have concluded that IFS is indeed gambling [R. 256-343].

Finally, Appellants place great reliance on *People ex rel. Ellison v. Fallon*, 179 N.Y. 164 (1904), which they claim supports their argument that games in which skill dominate chance fall outside the definition of gambling. This ignores the fact that the Legislature itself chose not to redefine the Penal Law definition of "gambling" which rejects the "dominant element" test when it enacted Chapter 237. Instead, it rationalized its carveout of interactive

fantasy sports from gambling on the basis that it was not a game of chance at all. Appellants' embrace of the "dominant element" test is curious because in the lower court they argued that the current Penal Law, which adopted the "materiality" rather than the "dominant element" standard, was the "only currently valid" standard. The courts have made it clear as well that if there is material element of chance, the activity is "gambling." *Plato's Cave Corp. v. State Liquor Authority*, 115 A.D.2d 426, 428 (1985). In any event, the issue in *Ellison* does not inform the analysis as it concerned whether the activity under scrutiny fell within the definition of a "lottery," rather than the broader term of "gambling" which is at issue in this case.

For all the foregoing reasons, interactive fantasy sports undoubtedly meets the definition of a "game of chance" and "gambling" as defined in Penal Law § 225.00(1) and (2), respectively.

C. Interactive Fantasy Sports Contests Involve Wagers Based on Future Contingent Events

Even if this Court were to conclude that "chance" is not a "material" element affecting the outcome of an IFS contest, it is nevertheless true that under the Penal Law "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." Penal Law § 225.00(2)

(emphasis supplied). The significance of the disjunctive "or" in § 225.00(2) is that gambling occurs regardless of whether chance is a material factor in the outcome of a contest if the wager depends on the outcome of a future contingent event. In this case, it is indisputable that the outcome of any IFS contest must inevitably depend upon a future contingent event – the performance of real-life athletes in real-life games. It is equally indisputable that an IFS contestant has absolutely no control over how those athletes will perform in those games, as the State itself has stipulated [R. 441].

The absurd response by the Legislature to this argument is that the real-life performance of athletes is not a "future contingent event" because each contest is not dependent upon the performance of any one player on any actual team. This stretches credulity beyond the breaking point since those fantasy teams contain real-life athletes that must perform in real-life games so there can be no doubt that future contingent events must determine the outcome of the contests. What differentiates a game of chance from a game of skill is the participating contestant's ability to overcome chance by the exercise of skill. In football, for example, a team can train for bad weather, change plays at the line of scrimmage to adjust to a defensive alignment, or substitute players if the situation calls for a pass rather than a running play. But a person wagering in

that contest has no ability to control the game's outcome. The indisputable fact remains that the outcome of interactive fantasy sports contests depend on the performance of several different real-life players over whom the contestants have no control and who are competing in real-life future events, the outcomes of which can not be known in advance. The Legislature may have entered into Fantasyland, but that is no reason the courts should blindly follow.

Appellants argue that Supreme Court "focused on the wrong event" which should be on the fantasy sports contest itself as the future contingent event rather than the sporting events upon which the outcome of the contest depends. App. Br. at 53-54. They then argue that contestants influence the outcome of the contest because they choose the rosters. *Id.* This is pure sophistry. Penal Law § 225.00(2) speaks about two different outcomes – one a contest of chance *or* a future contingent event. There is no doubt that future athletic contests are an important part of any interactive fantasy sports contests. Indeed, there could be no contests without them. Appellants concede both in their Brief at 54, and in their Statement of Facts [R. 441] that they have "zero" control over the future contingent events. Thus, IFS contestants cannot influence future contingent events (the performances of the athletes on their roster) which critically affect the outcome of the contest.

For all these reasons, interactive fantasy sports are games of chance that depend on future contingent events which the contestants can not control. Because the games are gambling, IFS operators accepting "entry fees" from contestants would be involved in illegal "bookmaking." *See*, Penal Law § 225.00(9).

POINT IV

Article XIX of The Constitution Is The Only Route By Which Interactive Fantasy Sports Could Be Authorized In This State

The procedure for amending the State Constitution is set forth in Article XIX. The process takes time, and it can only be accomplished by the People, not the Legislature. Section 1 of Article XIX provides that both houses of two separately elected Legislatures must first approve any proposed amendment after which time the People must then vote on whether to accept such amendment at a statewide election. If the amendment is then approved, it would take effect the first day of the following year. Alternatively, Section 2 of Article XIX provides that the People or the Legislature may convene a Constitutional Convention with three delegates from each Senatorial district and 15 at-large delegates to be elected by the People. It would then be up to the delegates to propose any constitutional amendment they deem appropriate.

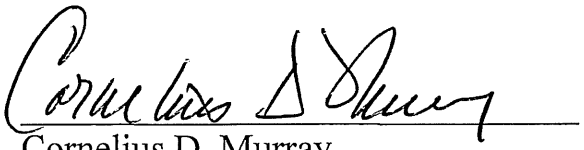
Once again, however, any such amendment could be adopted only if approved by the voters in a subsequent statewide election and the amendment would not take effect until January 1 of the following year.

Under either of the foregoing scenarios, there is, of course, no certainty that the amendment would be approved by the People. The process is deliberate; but it was meant to be as the Constitution is the bedrock upon which the whole structure of State Government rests. The Constitution belongs to the People, not to the Legislature, and it is the function of the Judiciary to protect it. Here, the Legislature has sought to short-circuit the process and deprive the People of their exclusive right to amend the Constitution.

CONCLUSION

The order of the Appellate Division [R. 1445-1464] dated and entered February 6, 2020 should be affirmed in all respects, with costs.

DATED: Albany, New York
August 6, 2020

O'CONNELL AND ARONOWITZ
By: 
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