APL-2020-00027

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.

REPLY BRIEF FOR RESPONDENTS SUBMITTED IN REPLY TO BRIEF OF *AMICI CURIAE* (FANDUEL, INC. AND DRAFTKINGS, INC.) PURSUANT TO RULE 500.12(f)

O'CONNELL AND ARONOWITZ
Attorneys for Respondents
54 State Street
Albany NY 12207-2501
(518) 462-5601
cmurray@oalaw.com

CORNELIUS D. MURRAY, ESQ.
FRANCIS J. SMITH, JR., ESQ.
ANDREW KO, ESQ.
SAMANTHA FEMIA, ESQ.
MARINA CHU, ESQ.
Of Counsel

Dated: September 8, 2020

Supreme Court, Albany County – Index No. 5861-16

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

New York State Cases

New York State Constitution

Federal Statutes

New York State Statutes

Other

PRELIMINARY STATEMENT

It is indisputable that the outcomes of daily fantasy sports ("DFS") contests necessarily depend on the performance of real-life athletes competing in future real-life games, and that participants in those contests have no control over how those athletes will perform. Nevertheless, FanDuel, Inc. ("FanDuel") and DraftKings, Inc. ("DraftKings"), the self-described "leaders" in providing daily fantasy sports contests in the country (*Amici* Br. at 1), seek to convince this Court that DFS contests are not gambling because:

- they are not games of chance;
- skill is the "dominant" element and chance is not a material factor in determining the outcome of those contests;
- the outcomes are not future contingent events beyond the control of the contestants because the contestants can select the players on their fantasy team rosters; and
- they are "nothing like sports betting" (Amici Br. at 3).

Amici also contend that even if this Court were to hold that DFS is gambling, the Legislature nevertheless would have intended to exempt their multi-million dollar enterprises from the provisions of the Penal Law such that

the provision of Chapter 237 of the Laws of 2016 decriminalizing DFS should survive even if the remainder of the statute is struck down. While they discuss their commercial investments (*Id.* at 1), their Brief, just like the Appellants' Brief submitted by the State Defendants, contains not a single word about the impact upon the forgotten victims of commercial gambling, like the Plaintiffs in this transaction. These are the people, however, whom the prohibition against gambling in the Bill of Rights was designed to protect.

Thankfully, James Maney, the Executive Director of the New York Council on Problem Gambling, did not forget. In his testimony before the Legislature [R. 233-239], he stripped away the façade of tortured logic, semantics and euphemisms like "entry fees" as distinguished from "bets," "fantasy" and "simulated" games as distinguished from real-world games, and cut to the chase. He stated that "the more folks that are involved in fantasy daily sports betting or whatever it's called; we're going to be seeing them in treatment soon" [R. 952]. While referring to the "millions of dollars" earned by DFS operators like FanDuel and DraftKings, he noted that at the same time, this was "money being lost ... a lot, a lot, a lot of money is being lost" [R. 954]. "I believe it's going to really skyrocket. And with that is going to happen

problematic stuff" [R. 956]. Unfortunately, when Mr. Maney conducted his testimony, the Legislature did not ask him a single question [R. 956].

The self-serving assertions by *amici* that DFS is not gambling and is "nothing like sports betting" are belied by earlier statements uttered by their own executives, by their own commercial advertising, and by the record of their activities in other jurisdictions. These executives are the same people who stated that (1) "the concept [of DFS] is almost identical to a casino, specifically poker. We make money when people win pots" [R. 158]; (2) "our concept 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. 146]; (3) its corporate presence was in "gambling space" [R. 154]; and (4) rather than being a game of skill, winning was "easier than milking a two-legged goat" [R. 565]. While now desperately trying to distance itself from its earlier statements and disavow its connection with gambling, in the United Kingdom DraftKings applied for and was licensed as a gambling company [R. 258]. *Amici* have a "credibility problem," as well they should.

This brief will address, in chronological order, the arguments advanced by the *amici* in their Brief and explain why they are legally unsupportable.

ARGUMENT

RESPONDENTS TAKE ISSUE WITH THE FOLLOWING ARGUMENTS ADVANCED BY *AMICI*, FANDUEL AND DRAFTKINGS

1. The Enactment By Other States of Laws Allowing DFS Is Irrelevant.

Page 2 of the *amici* brief points to 20 other states that have enacted similar laws declaring that fantasy sports are not gambling. This is totally irrelevant, since other states are free to pass whatever statutes they like and define gambling however they wish. That does not change the fact that New York's Constitution prohibits gambling, such that the Legislature is not free to allow it or define it any way it wishes.

2. The Unlawful Internet Gambling Act Does Not Apply To This Case, as Determined by the Internal Revenue's Recent Memorandum that DFS "Entry Fees" are Wagers.

Amici also argue on page 2 of their Brief that Congress enacted the Unlawful Internet Gambling Enforcement Act ("UIGEA") which they say "exempted" fantasy sports from the definition of gambling, citing 31 U.S.C. § 5362(1)(E)(ix). This argument ironically supports Respondents rather than FanDuel and DraftKings. The word "exempt" means "to take out or remove; to free from any burden, premise or duty." *See* The Living Webster Encyclopedic

Dictionary of the English Language (1st Ed. 1971). In other words, but for the exemption, the term "gambling" would otherwise apply to DFS.

Since Congress chose not to bring DFS within the ambit of UIGEA, it needed to make an exemption from what would otherwise have qualified as "gambling." Also, as noted by Judge Mendez in granting a preliminary injunction in *People v. FanDuel* when the Attorney General's Office originally prosecuted the *amici*, the language in UIGEA does not apply to "placing, receiving or otherwise transmitting a bet or wager where [it] is initiated and received, or otherwise made exclusively within a single state," citing 31 U.S.C. 5362(2)(10)(B)(i), (ii) [R. 99]. *See also* 31 U.S.C. § 5361(b) ("No provision of this subchapter shall be construed as altering, limiting, or extending any federal or State law or tribal-State compact prohibiting, permitting or regulating gambling within the United States"). Thus, the UIGEA does not supersede or preempt New York State's constitutional prohibition against gambling. DraftKings' CEO also mistakenly relied on this "exemption," stating that UIGEA contains a "carveout" from the prohibition of gambling [R. 156]. The term "carveout" is an admission that but for Congress's decision to "carveout" DFS, it would otherwise be considered gambling.

The recent Memorandum, Number AM 2020-009, released August 7, 2020 by the Office of Chief Counsel for the Internal Revenue Service (delivered to the Court by letter dated August 19, 2020), entitled "Daily Fantasy Sports and The Excise Taxes on Wagering," squarely addresses the issue of whether the fees paid by contestants to DFS operators constitute "wagers." In concluding that they were wagers, the Memorandum stated that UIGEA neither renders legal nor illegal any form of gambling within the United States (*Id.* at 9), citing 31 U.S.C. § 5361(b). More importantly, it held that "skill" involved in selecting fantasy players "is similar to the skill involved in selecting winners of individual professional sports games, horse races, or other traditional sports gambling activities." *Id.* at 8. It stated that "DFS participants merely select a lineup for their simulated teams and have no ability to exercise control or influence over the actions of the players participating in the game and who earn the participants their fantasy points" (*Id.*).

3. The "Skill" Versus "Chance" Comparison Is a False Dichotomy.

On page 2 of their Brief, *amici* argue that skill dominates chance, implying that this is "dispositive" of the issue of whether or not DFS is gambling. While it is for the Court and not the Legislature to determine the definition of gambling, the Legislature itself has rejected the so-called

"dominant element" test. In enacting Chapter 237 of the Laws of 2016, purporting to allow DFS, the Legislature did not change the definition of a "game of chance" as it exists in Penal Law, § 225.00(1). That definition states that a game of chance is one that "depends, to a material degree, upon an element of chance, *notwithstanding that skill of a contestant may also be a factor therein*" (emphasis supplied). The Legislature simply declared – albeit erroneously - that DFS did not meet this definition. Racing, Pari-Mutuel Wagering and Breeding Law ("Racing Law") § 1400(2). The Legislature, however, did not adopt the "dominant element" test. For *amici* to argue otherwise, as it does on Pages 2-3 of their Brief, and more expansively later at pages 15-20, is to grossly distort the state of the current law. *See Donnino*, Practice Commentary to Penal Law § 225 ("The current definition of 'contests of chance' does not require that the element be the 'dominating element.' Rather, it is a 'contest of chance' when, notwithstanding that the skill of the contestants may be a factor in the outcome, the outcome depends in a 'material degree' upon an element of chance." McKinney's Cons. Laws of N.Y., Book 39, Penal Law, § 225.10 at 356), *citing People v. Turner*, 165 Misc.2d 222 (N.Y. City Crim. Ct. 1995). *See also*, pp. 23-24 of Memorandum of Attorney

General in *People v. DraftKings*, N.Y. Sup. Ct., Index No. 453054/2015, 24 *et seq.*, reproduced at [R. 238-239].

Finally, *amici* rely at page 15 of their Brief on *People ex rel. Ellison v. Lavin*, 179 N.Y. 164 (1904) for the proposition that the "dominating element" test can be applied in determining whether the constitutional prohibition in Article I, § 9 has been violated. Such reliance is misplaced. The 1904 decision in *Ellison* involved a statute, namely a Penal Law provision which pertained to the lottery, rather than "gambling" as defined in the Constitution, which was not even referred to in the court's opinion. For these reasons, both Supreme Court [R. 24-26] and the Appellate Division [R. 1451] correctly found that *Ellison* was distinguishable and not dispositive of the case at bar.

4. The "Skill" Exercised By DFS Contestants Is No Different from the Skill Exercised by Bettors in Horse Racing

At pages 6-7 of their Brief, *amici* discuss the skill a contestant in daily fantasy sports must exercise in deciding which players to select for their fantasy team rosters, taking into account how much fantasy money to spend on the salary of a particular player chosen on the roster, how proficient that player is, the quality of the opposing team, the weather, etc. They fail, however, to differentiate this from a person betting on a horse race, who also has to decide

how much money to bet on a particular horse, what the horse's past performances are, the quality of other horses in the race, the condition of the track (whether it is sloppy or firm, depending on the weather), etc. While betting on the future performance of a horse is "gambling," *amici* would have this Court believe that somehow betting on the future performance of a particular football, basketball or baseball players is not. Pari-mutuel wagering on horse racing is clearly gambling, BUT it is legal only because there is a specific exemption carved out for pari-mutuel wagering on horseracing in Article I, § 9 of the Constitution. No such similar exemption exists for DFS.

5. The Fact That DFS Contestants Choose the Athletes on Their Roster Does not Mean They "Control" Future Contingent Events.

On page 9 of their Brief, *amici* embrace the Legislature's rationale as to why DFS is not gambling, arguing that contestants supposedly have "complete" control over the selection of players they choose. But this is true in all forms of sports gambling. In any sports bet, the bettor invariably controls the selection of the player or team upon whom s/he wants to place a bet. A horse racing bettor, for example, must choose which horse to place a wager on. To accept the logic of *amici*, hereafter nothing would qualify as gambling because the bettor would be able to "control" or "influence" a future event simply by

making the selection that occurs in all forms of betting. Describing this argument by FanDuel and DraftKings as their "slipperiest rhetorical move" [R. 237], the Attorney General's office originally countered it by stating that "of course bettors have *control* and *influence* over who and what they bet on. What bettors *do not* control and *cannot* influence is the *future contingent event* that ultimately determines whether they win or lose the sports game on which they are betting" (emphasis in original) [R. 238]. Now the Attorney General's Office must sing a different song, but only because it finds itself in the awkward position of having to retract its own words in order to defend the statute the Legislature has since enacted.

6. Simply Because DFS Operators Have No "Stake" In the Outcome Is Irrelevant as They Make Money Regardless of Which Contestants Win

On page 10 of their Brief, *amici* point out that DFS operators have no stake in the outcome of any contest. This is irrelevant because the operators take a percentage of the wagers bet by the contestants in exchange for providing the platform, collecting the money bet, determining the winners, and distributing the proceeds after they take their cut, known as the "vig" or "rake" in gambling parlance. By registering and collecting the betting money they are involved in book-making, which is strictly prohibited by Article I, § 9 of the

New York State Constitution and Penal Law § 225.00(9), making it a felony under § 225.10.

7. When Carefully Read, The Expert Opinions Relied Upon by *Amici* Do Not Support Their Arguments

On pages 11-13 of their Brief, *amici* cite to various experts, who have opined that DFS is a game of skill. While that alone is not dispositive if chance is still a material element of the contest, *amici* contend that the experts also say that chance is "overwhelmingly immaterial." *Id.* at 11. Upon closer scrutiny, however, their studies do not support the arguments advanced by *amici*. *Amici* would have the Legislature and this Court simply abdicate their responsibility and accept at face value those expert opinions without drilling beneath the surface to determine what those experts actually stated. *Amici* cite Professor Zvi Gilula, for example, who noted that one contestant entered 70 games and won them all. What *amici* does not mention is Professor Gilula's observation that while skill makes a difference, it is "for the tiny minority of top-performing players," but that for the vast majority, "chance predominates" [R. 267]. This begs the question: is a game in which chance predominates for the majority of players who lack the resources to submit multiple entries still really a game of skill? The Attorney General is on record that "DFS [is] a game of chance for the great majority of people who play it..." [R. 195]. Left unanswered in

Professor Gilula's example above is the question of how many entries did the contestant have to enter in each contest in order to win them all.

Amici overlook the biggest flaw in the experts' studies, because the analyses they performed were not based on the DFS games authorized by Chapter 237 of the Laws of 2016. As noted in the main brief of Respondents at page 52, the law enacted by the Legislature imposes strict limits on the number of entries any contest can submit, and computer scripts are not allowed. Racing Law § 1404(2), (7). This is extremely relevant in examining the argument of *amici* with respect to what happened on November 22, 2015, as described by *amici,* when Jerryd Bayless was substituted as a late starter in an NBA basketball game for a different player who normally started. *Amici* Br. at 7. Some very sophisticated DFS contestants using algorithms and computer scripts were able to adjust their submissions at the last second, while the average player did not have those capabilities. *See* citations and references to articles on Pages 54-55 of Respondents' main brief, especially *Blandford*, C., "Why DFS Requires Regulation Regardless of Whether It Is Skill-Based." Those articles point out that sophisticated players who can submit a multitude of entries enjoy an extreme advantage over regular players, but this is not allowed under Chapter 237 of the Laws of 2016, which, as just stated, limits

entries to the larger of 150 entries per player, or 3% of all entries (Racing Law, § 1404[2]), and outlaws computer scripts (Racing Law, § 1404[7]).

Another expert relied upon by *amici*, Professor Annette Hosoi, a professor at MIT, made some other observations left out of the summary provided by the *amici* at pages 11-12 of their Brief. The omissions show that FanDuel and DraftKings are "cherry-picking" parts of those opinions, while leaving out what are the most important observations they made. Professor Hosoi, for example, makes it clear that the simplest way to increase the role of skill in a DFS contest is to increase the number of entries [R. 99]. The inverse of that, of course, is that reducing the number of players has precisely the opposite effect, increasing the element of chance. Also, classifying players by identifying experts, as New York does (Racing Law § 1404[1][g], [h]), allows players to decide to compete only against others with the same skill level, which, of course, increases the element of luck, while reducing the element of skill. Luck is a much bigger factor in determining the outcome of a contest where the participants are of the same skill level. The Green Bay Packers, for example, will beat a high school football team every time, regardless of some bad breaks, but if they are playing the Kansas City Chiefs, the same bad breaks could prove fatal, as confirmed by Professor Hosoi. "To illustrate the

importance of skill distribution, consider a professional golfer playing against a novice, versus two professionals, or two novices playing each other. In the first case, the outcome is a near certainty, since the skill of the professional will dominate. In the second case, if the ability of the two players is similar, skill is no longer a distinguishing characteristic, and the relevant importance of chance in the outcome increases" [R. 1198-99]. What may be a game of skill for a "few" is nevertheless a game of "chance" for most, as noted by Professor Gilula, *supra* at 11.

The reliance of *amici* on the "econometric analysis" performed by Brent Evans (*Amici* Br. at 13) is also not convincing, as he also concluded that the ability of a contestant to submit multiple entries is a "proxy for skill." *See* Abstract of his article at Appendix "A". Simply stated, once again, the limitation on the number of entries, as New York law requires, reduces the element of skill which was precisely the Legislature's intent. Reducing the element of "skill," however, necessarily makes "chance" more "material," bringing games within the ambit of Penal Law § 225.00(1), which defines a "game of chance" as one that contains a material element of chance "*notwithstanding that skill of the contestants may also be a factor therein*" (emphasis added).

Relating back to the analysis performed by Professor Hosoi, the games operated by FanDuel and DraftKings are "daily fantasy sports," as distinguished from "traditional fantasy sports." While both are illegal, the illegality of DFS is even more pronounced, because DFS games are conducted in one day or over the course of a football fall weekend, while traditional fantasy sports are season-long contests. Shorter time spans reduce the element of skill and increase the element of luck. Professor Hosoi observes that "the second game parameter that game designers may choose to adjust is the number of contests per player. Calculating the overall win probability in a best-of-seven series, given the win probability of an individual game, is a common exercise designed in elementary probability courses, and is well-known that the role of skill is amplified through multiple contest. In the words of Levitt, et al., "even tiny differences in skill manifest themselves to near certain victory if the time horizon is long enough. Hence, perhaps the simplest way to increase the role of skill in a contest is to increase the number of games per player in the competition" [R. 1199]. Yet, daily fantasy sports are played, as the name implies, on a daily basis and do not extend over a season. While on any given night, a weaker team may defeat a stronger team, over a long season the

stronger team will prevail. Luck, therefore, plays an even more important role in *daily* fantasy sports than in traditional season-long fantasy sports.

Amici argue at page 14 of their Brief that there is no study or expert opinion in the legislative record, nor in the record in this case that disputes that DFS is a "game of skill." If the Court is looking for expert opinions to the contrary in the record, it need look no further than the CEO's of two of the top gambling executives in the world. Sheldon Adelson, the founder and chairman of the Las Vegas Sands Corporation, stated, "[D]aily fantasy sports is gambling, there is no question about it" [R. 43]. Jim Murren, Chairman of MGM Casinos, agreed ("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]). If anyone ought to know, they should.

The Attorney General has previously dismissed the expert studies referred to by *amici* as self-serving [R. 195]. More importantly, however, and as previously pointed out, when examined more carefully, those expert studies actually contain qualifiers, cautioning that their conclusions with respect to skill are different when limits are placed on the number of entries, or where games involve contestants of similar skill, as is the case in New York. The expert studies, when carefully examined, support Respondents.

8. *Amici* Misstate the Content of the Cases and Statutes They Cite

On Page 17, *amici* grossly distort the holding in *Matter of Plato's Cave Corp. v. State Liquor Authority*, 115 A.D.2d 426 (1st Dep't 1985), *aff'd on other grounds*, 68 N.Y.2d 791 (1986). They imply that *Plato's Cave* stands for the proposition that the so-called dominant element test remains good law in the State of New York. That is simply false. The Court, in fact, found that no further inquiry was necessary as to the role of skill where a material element of fact was found to be present. 115 A.D.2d at 428. While the words "material element" appear in the current statutory language there is no corresponding "dominant element" language. *See* Penal Law § 225.00(1). As FanDuel and Draft Kings themselves conceded in a letter to the National Hockey League, in a state which adopts the "material element" test, it "may prohibit wagering on the game if chance has more than an incidental effect on the game" [R. 239]. New York is such a state.

The fact that FanDuel and DraftKings have in the past stated that their concept is almost "identical to a casino," that winning is easier than "milking a two-legged goat," that their games are a "mash-up between poker and fantasy sports," and that *Plato's Cave* represents a judicial endorsement of the

dominant element test, strongly suggest that *amici* will say whatever it takes to win, regardless of the actual facts.

At page 21 of their Brief, *amici* rely upon *Humphrey v. Viacom, Inc.*, U.S. Dist. LEXIS 44679 (2007), an unreported Federal District Court decision applying New Jersey, not New York, law. *Amici* relied on this case in earlier litigation when the Attorney General prosecuted them both and submitted a Memorandum of Law successfully disposing of the arguments relating to *Humphrey v. Viacom*. Those arguments are reproduced in the record in this case [R. 232-235] and, in the interests of brevity, the Court is respectfully referred to those arguments. Notably, in the present case, even though it is on the "opposite side" of where it previously stood, the Office of the Attorney General has still opted not to cite the *Humphrey* case - and with good reason.

Amici argue that entry fees paid by DFS contestants are not wagers. *Amici* Br. at 23. They rely on UIGEA, which, by its own terms, does not apply to state law. 31 U.S.C. § 5361(b). In any event, the Internal Revenue Service's recent Memorandum, discussed *supra* at 3, disposes of their argument. IRS concluded that in DFS, "the participant has no ability to control the outcome of the simulated contests ... the points a participant earns are based upon the performance of the actual players in the actual sporting events ... [and] a

participant has no control over the player's performance in the actual sporting events." *Id.* at 2. The IRS Memorandum also cited *Edgewood Am. Legion Post No. 448 v. United States*, 246 F.2d 1 (7th Cir. 1957), where the Court rejected as an "exercise in semantics," the theory that the outcome of a certain betting pool was not wagering because the winner was "determined by the number of runs scored ... during the season, rather than on the result of any particular game." IRS Memorandum at 5-6.

9. *Amici* Erroneously Conflate a Game of Chance With the Broader Definition of Gambling, Which Includes Betting on Future Contingent Events

Point II-B of the Brief of *amici* argues that DFS is not a game of chance, but then criticizes the Appellate Division's decision for concluding that contestants cannot control how the athletes ... will perform in real-world sporting events (*Id.* at 24). *Amici* badly misread the statute. Control over a future contingent event is a relevant inquiry, regardless of whether or not a particular game is one of chance or skill. A "game of chance" is defined by Penal Law § 225.00(1), but the broader definition of "gambling" is contained in § 225.00(2), and states that an activity may be gambling if it involves risking something of value on the "outcome of a game of chance *or* a future contingent event not under the [bettor's] control or influence" (emphasis supplied). The

disjunctive "or" is significant. *See also* Donnino, Practice Commentaries, Consolidated Laws of New York, Book 39, Penal Law § 225.00 at 355 ("Thus, the definition of 'gambling' embraces 'not only a person who wagers or stakes something upon a game of chance, but also one who wagers on a future contingent event [whether involving chance or skill], not under his control or influence").

While *amici* argue that the outcome to be focused on is the fantasy game itself (*Amici* Br.at 24), that overlooks the indisputable fact that the outcome of the game itself is nevertheless dictated in turn by contingent events over which a bettor has absolutely no control. Instead of focusing on the game and the profits of FanDuel and DraftKings, the Legislature should have been focusing on the plight of the victims, the losers of the millions of dollars identified by Mr. Maney in his testimony [R. 954].

10. *Amici* Lack Standing to Argue Whether the "Decriminalization" Portion of Chapter 237 of the Laws of 2016 Should Survive Even if the Rest of the Statute is Invalidated

In Point III of their Brief, *amici* argue that even if this Court should affirm that part of the Appellate Division's decision that DFS is unconstitutional, it should nevertheless "sever" that portion of Chapter 237 of

the Laws of 2016 which removes DFS from the provisions of the Penal Law. *See* Racing Law, § 1400(2).

Amici, however, are foreclosed from making such an argument because they are not a party to this case, and while the State Defendants-Appellants did initially appeal to this Court from each and every part of the Appellate Division's Decision and Order [R. 1440-1441], they never pursued the severance argument in either their main brief or reply brief. *See Reform Educational Financing Inequities Today, et al. v. Cuomo*, 199 A.D.2d 488, 490 (2d Dep't 1993) (*Amicus* may not "raise issues and cite alleged errors ... never raised or cited by Plaintiff"). *See also Demetriades v. Royal Abstract Deferred LLC*, 159 A.D.3d 501, 503 (1st Dep't 2018); *Hartford Accident and Indemnity Company v. Village of Hempstead*, 48 N.Y.2d 218, 221 n. 3 (1979) (court declined to consider argument not briefed or argued by Appellants). *See also Schwartz v. Aetna Life Insurance and Annuity Co.*, 214 A.D.2d 975 (4th Dep't 1995) (court refused to consider agreement not raised by Defendant in his Brief).

11. Even if *Amici* Had Standing to Raise the Severance Issue, the Appellate Division Properly Ruled that Severance Was Not Warranted

Amici speculate that because the Legislature was "sympathetic" to the concept of DFS, it would not have wanted to criminalize it, even if it were otherwise unconstitutional. *Amici* Br. at 27. However, as the Appellate Division aptly observed, in enacting Chapter 237 of the Laws of 2016, the Legislature intended to prohibit "unregistered" DFS operations and allow only "registered" operations. Racing Law, §§ 1411, 1412. Also, the Legislature was careful to include in Chapter 237 all kinds of restrictions and requirements on registered DFS operations. Racing Law, § 1404. If, however, this Court were to uphold the Appellate Division's ruling that the rest of Chapter 237 is illegal, then severance would mean that the only DFS activity that could operate would be the "unregistered" variety. This, however, is inconsistent with the only part of the statute the Appellate Division preserved – namely, § 1412, which prohibits "unregistered" DFS [R. 1464].

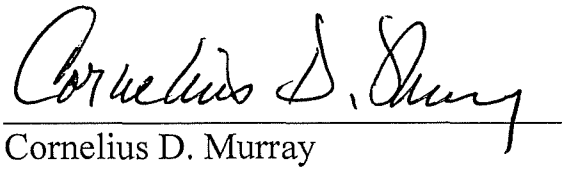
While the Legislature may have been "sympathetic" to DFS, it most certainly did not desire unregistered DFS activity. *Amici* are signaling to the Court that even if DFS is ruled unconstitutional by this Court, they intend to continue operating free of any criminal sanctions, notwithstanding the fact that

such activity would still be "prohibited" by Racing Law § 1412. In other words, *amici* wish to continue to operate their multi-million dollar enterprises regardless of the unconstitutionality of DFS. Such disdain for the law would be simply untenable.

CONCLUSION

The order of the Appellate Division should be affirmed in all respects.

DATED: Albany, New York
September 8, 2020

O'CONNELL AND ARONOWITZ
By: 
Cornelius D. Murray
Attorneys for Respondents
Office and P.O. Address
54 State Street
Albany NY 12207-2501
(518) 462-5601
cmurray@oalaw.com

Cornelius D. Murray
Francis J. Smith
Andrew Ko
Samantha Femia
Marina Chu
Of Counsel

PRINTINGS SPECIFICATIONS STATEMENT

This brief was prepared on a word processor. A proportionately spaced, serif typeface was used, as follows:

Typeface: Times New Roman
Point Size: 14
Line Spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 5,836.

APPENDIX "A"

Abstract of Brent Evans, "Evidence of Skill and Strategy in Daily Fantasy Basketball," *Journal of Gambling Studies*, Vol. 34, pages 757-771 (2018).

- Original Paper
- Published: 27 March 2018

Evidence of Skill and Strategy in Daily Fantasy Basketball

- Brent A. Evans ORCID: orcid.org/0000-0002-4590-3073[1],
- Justin Roush[1],
- [...]
- Joshua D. Pitts[2] &
- Adam Hornby[3]
- -Show fewer authors

Journal of Gambling Studies **volume 34**, pages757–771(2018)Cite this article

Abstract

Using hand-collected data from DraftKings.com, a major daily fantasy sports website, we analyze draft selections of thousands of participants in daily fantasy basketball (DFB). In our study, the first thorough examination of DFB, we show that DFB is a game in which skill is necessary for success. Using econometric analysis, we find that winning participants utilize different strategies than losing participants; for example, winning participants more frequently select NBA rookies and international players. We also find that participants paying to enter more lineups in a given contest earn profits far more often than those entering few lineups, indicating that the number of lineups entered can serve as a proxy for skill. Additionally, we provide a thorough discussion of industry characteristics, prior literature, and gameplay, which should help readers familiarize themselves with this burgeoning fantasy sports variant. This study should further the literature on the contentious activity, which has been outlawed in many U.S. states and continues to elicit controversy.