

Docket No. CV-77-2016

IN THE

Supreme Court of the State of Nevada

February Term 2016

NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY
LEAGUE, NATIONAL BASKETBALL ASSOCIATION, MAJOR
LEAGUE BASEBALL, NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION,

PETITIONERS,

v.

THE STATE OF NEVADA, DRAFT MASTERS, LLC,

RESPONDENTS.

ON WRIT OF CERTIORARI

TO THE EIGHTH JUDICIAL DISTRICT COURT OF NEVADA

BRIEF FOR PETITIONERS

NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE,
NATIONAL BASKETBALL ASSOCIATION, MAJOR LEAGUE BASEBALL,
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

Petitioners Team 7

QUESTIONS PRESENTED

- I. UNDER NEVADA LAW DO DAILY FANTASY SPORTS REQUIRE LICENSING WHEN THE OUTCOME OF THE GAMES CAN BE DETERMINED ON MANY CHANCE DEPENDENT FACTORS INDEPENDENT OF THE CONTROL OF PARTICIPANTS, ENTRY FEES ARE WAGERS BASED ON SPORTING EVENTS WHO'S OUTCOME IS UNCERTAIN, PLAYED ON ELECTRONIC DEVICES, AND HOST SITES TAKE A RAKE OF THE WAGERS PLACED?
- II. UNDER FEDERAL LAW DOES NEVADA VIOLATE THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT BY LICENSING DAILY FANTASY SPORTS WHEN DAILY FANTASY SPORTS WHICH INVOLVE MULTIPLE BETTING SCHEMES WERE NOT IN EXISTENCE BETWEEN THE PERIOD OF JANUARY 1, 1976 AND OCTOBER 2, 1991 WHEN GAMBLING SCHEMES WOULD BE AUTHORIZED BY ITS GRANDFATHER CLAUSE?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF JURISDICTION.....	vii
STATEMENT OF FACTS.....	1
STANDARD OF REVIEW.....	2
SUMMARY OF THE ARGUMENT.....	3
I. THE ATTORNEY GENERAL WAS CORRECT IN DETERMINING THAT DAILY FANTASY SPORTS MAY BE LOTTERIES, SPORTS POOLS, AND GAMBLING GAMES REQUIRING LICENSURE BY THE STATE OF NEVADA.	3
II. LICENSING DAILY FANTASY SPORTS GAMBLING VIOLATES PASPA SINCE DAILY FANTASY SPORTS GAMBLING WAS NOT ACTUALLY AUTHORIZED OR CONDUCTED IN NEVADA BETWEEN JANUARY 1, 1976 AND OCTOBER 2, 1991 UNDER 28 U.S.C.A. § 3704.....	4
ARGUMENT.....	6
I. THE LOWER COURT’S DECISION SHOULD BE OVERTURNED BECAUSE DAILY FANTASY SPORTS ARE LOTTERIES, SPORTS POOLS, AND/OR GAMBLING GAMES UNDER NEVADA LAW THUS REQUIRING LICENSURE UNDER THE NEVADA GAMING CONTROL ACT AND NEVADA GAMING COMMISSION REGULATIONS.	6
A. <u>Daily Fantasy Sports Are Lotteries Because Their Outcome Is Determined Predominantly By Chance And Not Skill Since Team Management Is Not Necessary, The Duration Of The Game Is Short, And The Factors Of Chance Are Several Thus Reducing The Element Of Skill.</u>	6
B. <u>Daily Fantasy Sports Are Wagering Schemes Because A Wager In The Form Of Entry Fees In Order To Participate, And There Is A Risk Of Loss Between The Contracting Parties, And The Wager Is Risked On The Performance Of Third Party Athletes Which Is An Uncertain Outcome, Therefore They Are Sports Pools.</u>	12

C. <u>Daily Fantasy Sports Are Gambling Games Because They Are Played For Money On Computers, Tablets, Or Phones Which Constitute Electronic Devices And Because Daily Fantasy Sports Are Wagering Schemes.</u>	17
II. LICENSING DAILY FANTASY SPORTS GAMBLING VIOLATES PASPA SINCE DAILY FANTASY SPORTS GAMBLING WAS NOT ACTUALLY AUTHORIZED OR CONDUCTED IN NEVADA BETWEEN JANUARY 1, 1976 AND OCTOBER 2, 1991 UNDER 28 U.S.C.A. § 3704.....	19
A. <u>Daily Fantasy Sports Betting Is a Substantial Change From Gambling Schemes Previously Conducted In Nevada.</u>	21
B. <u>The UIGEA Was Enacted To Work In Tandem With PASPA To Stop The Spread Of State-Sponsored Sports Gambling And To Maintain The Integrity Of Sports.</u>	23
CONCLUSION.....	25
CERTIFICATE OF SERVICE.....	26
CERTIFICATE OF WORD COUNT.....	27

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT CASES

<i>F.C.C. v. Am. Broad. Co.</i> , 347 U.S. 284 (1954)	6
--	---

UNITED STATES CIRCUIT COURT CASES

<i>Humphrey v. Viacom, Inc.</i> , No. 06-2768, 2007 WL 1797648, (D. N.J. June 20, 2007)	8, 9, 13
<i>OFC Comm Baseball v. Markell</i> , 579 F.3d 293 (3d Cir. 2009)	19, 21, 22
<i>Nat'l Collegiate Athletic Ass'n v. Christie</i> , 61 F. Supp. 3d 488 (D.N.J. 2014)	21
<i>Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey</i> , 799 F.3d 259 (3d Cir. 2015)	21
<i>Interactive Media Entm't & Gaming Ass'n Inc. v. Attorney Gen. of U.S.</i> , 580 F.3d 113 (3d Cir. 2009)	24, 25

STATE COURT CASES

<i>Zamarripa v. First Judicial District Court</i> , 747 P.2d 1386 (1987).....	2
<i>Matter of Halverson</i> , 169 P.3d 1161 (2007)	2
<i>State v. Sargent</i> , 128 P.3d 1052 (2006).....	2
<i>Las Vegas Hacienda, Inc. v. Gibson</i> , 359 P.2d 85 (1961)	7, 13, 14
<i>Seattle Times Co. v. Tielsch</i> , 495 P.2d 1366 (1972)	7, 8
<i>Morrow v. State</i> , 511 P.2d 127 (1973)	10

<i>In re Allen</i> , 377 P.2d 280 (1962)	7, 8
<i>State v. GNLV Corp.</i> , 834 P.2d 411 (1992)	15
<i>Hughes Properties, Inc. v. State</i> , 680 P.2d 970 (1984)	18

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const. amend. X.....	6
Nev. Rev. Stat. Ann. § 34.020 (West 2015).....	2
Nev. Rev. Stat. Ann. § 462.105 (West 2015)	6
Nev. Rev. Stat. Ann. § 463.160 (West 2015)	12, 16, 17
Nev. Rev. Stat. Ann. § 463.0193 (West 2015)	13, 16
Nev. Rev. Stat. Ann. § 463.01962 (West 2015)	13, 18
Nev. Rev. Stat. Ann. § 463.0152 (West 2015)	17, 18
Nev. Rev. Stat. Ann. § 205.4735 (West 2015)	17
Nev. Rev. Stat. Ann. § 360B.410 (West 2015)	13, 14
Nev. Rev. Stat. Ann. Rule 246 (West 2015)	18
28 U.S.C.A § 3702.....	4, 19, 21, 25
28 U.S.C.A. § 3704.....	<i>passim</i>
31 U.S.C.A. § 5361.....	<i>passim</i>
31 U.S.C. § 5362.....	24

OTHER AUTHORITIES

Anthony N. Cabot & Louis V. Csoka, <u>Fantasy Sports: One Form of Mainstream Wagering in the United States</u> , 40 J. Marshall L. Rev. 1195 (2007)	6, 7
Marc Edelman, <u>A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime</u> , 3 Harv. J. Sports & Ent. L. 1 (2012)	8, 12

Nathaniel J. Ehrman, <u>Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports</u> , 22 Sports Law. J. 79 (2015)	8, 10, 13
Jeffrey C. Meehan, <u>The Predominate Goliath: Why Pay-to-Play Daily Fantasy Sports Are Games of Skill Under the Dominant Factor Test</u> , 26 Marq. Sports L. Rev. 5 (2015)	9, 18
Marc Edelman, <u>Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law</u> , 2016 U. Ill. L. Rev. 117 (2016)	8, 9
Michael Trippiedi, Note, <u>Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?</u> , 5 UNLV Gaming L.J. 201 (2014)	11
Jon Boswell, Note, <u>Fantasy Sports: A Game of Skill That is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law</u> , 25 Cardozo Arts & Ent. L.J. 1257 (2008)	11, 12

STATEMENT OF JURISDICTION

The formal statement of jurisdiction is waived pursuant to Competition Rule III.

STATEMENT OF FACTS

The State of Nevada has licensed the operation of Draft Masters, LLC (“Draft Masters”), a unique gambling scheme primarily executed through the Internet. Daily fantasy sports, which are different from the traditional sports betting schemes, would require licensure from the State that would not violate federal law.

Daily fantasy sports allow players to draft new teams for the price of an admission wager. The players are called “owners” and are able to assemble rosters and lineups of actual players from professional and college sports on a daily basis. These games are primarily played over the Internet, either with a computer or through a phone. The owners of the games compete against one another based on the performance of the athletes in the actual games. The statistics of the actual players are converted into points. The players are the parties who actually control their own performance in their respective sport. Depending on the total points earned through the owner’s lineup, the owner can win or lose. Essentially, once an owner solidifies his/her lineup and places the wager, the owner does not have the ability to control the outcome of the game.

Players can select players in three ways: (1) a snake draft, where the owners take turns drafting players; (2) an auction draft, where each owner has a maximum budget to use for their players; and (3) a salary cap draft, where owners have a maximum budget but they are not bidding against each other. Players can also chose different types of simulated games, either head-to-head or tournaments. Head-to-head simulated games are won by the owner with the highest total score. Tournaments are games with two or more owners. In addition, daily fantasy sports operators offer guaranteed and non-guaranteed games. If a game is guaranteed, the winners are paid out regardless of how many owners enter. If it is non-guaranteed, the game will be cancelled, with a full refund, unless a certain number of owners participate

STANDARD OF REVIEW

This case is before the Supreme Court on a petition for a writ of certiorari. Nev. Rev. Stat. Ann. § 34.020 (West 2015). “A writ of certiorari is an extraordinary remedy and the decision to entertain a petition for a writ of certiorari lies within the discretion of this court.” *Zamarripa v. First Judicial District Court*, 747 P.2d 1386, 1387 (1987). A writ of certiorari is granted in all cases where an inferior tribunal, board or officer exercising judicial functions has exceeded its jurisdiction and there is no appeal nor plain, speedy and adequate remedy. Nev. Rev. Stat. Ann. § 34.020(2) (West 2015). Since District Courts have final appellate jurisdiction, there is no adequate remedy. *Zamarripa*, 747 P.2d at 1387. The Supreme Court of Nevada reviews “purely legal issues, including issues of constitutional and statutory construction, de novo.” *Matter of Halverson*, 169 P.3d 1161, 1172 (2007). “Statutory construction is a question of law subject to de novo review.” *State v. Sargent*, 128 P.3d 1052, 1054 (2006).

SUMMARY OF THE ARGUMENT

I. THE ATTORNEY GENERAL WAS CORRECT IN DETERMINING THAT DAILY FANTASY SPORTS MAY BE LOTTERIES, SPORTS POOLS, AND GAMBLING GAMES REQUIRING LICENSURE BY THE STATE OF NEVADA.

This Court should reverse the ruling of the Eighth Judicial District Court for the County of Clark Nevada. The Nevada Attorney General correctly determined that daily fantasy sports would likely constitute lotteries, sports pools, and gambling. Since daily fantasy sports would be found to be gambling they therefore require licensing under Nevada law.

Under Nevada Law, lotteries are games that, after consideration was paid, distribute prizes to winners who are determined by chance. Whether a game is determined by chance is decided by using the predominant factor test. If the element of chance predominates over the element of skill then the game is one of chance. Daily fantasy sports are far shorter in duration than traditional fantasy sports thus incurring chance as a predominant factor because of the limited skill used and the overriding factors of chance.

Under Nevada Law, sports pools are those in the business of accepting wagers and exist when there are wagers placed on uncertain events by a method of wagering. In daily fantasy sports, entry fees are wagered on the uncertain outcome of athletes' performances. Further, by taking a rake-off, daily fantasy sports host sites are in the business of accepting wagers.

Under Nevada Law, gambling games are those played on electronic devices for money or those considered percentage games where participants wager against each other and the house takes rake-off. Daily fantasy sports are played for prize money online using computers, phones, or tablets, all of which are electronic devices. Further, daily fantasy sports are percentage games because players wager against each other and the host site takes a percentage of the wager

places, as is clearly portrayed in head-to-head matches. Therefore, this court should conclude that daily fantasy sports are gambling games.

Therefore, the decision of the Eighth Judicial District Court should be reversed.

II. LICENSING DAILY FANTASY SPORTS GAMBLING VIOLATES PASPA SINCE DAILY FANTASY SPORTS GAMBLING WAS NOT ACTUALLY AUTHORIZED OR CONDUCTED IN NEVADA BETWEEN JANUARY 1, 1976 AND OCTOBER 2, 1991 UNDER 28 U.S.C.A. § 3704.

The Professional and Amateur Sports Protection Act (“PASPA”) makes it unlawful for a government entity to license a lottery or other betting, gambling, or wagering scheme based directly, or indirectly, on one or more competitive games in which amateur or professional athletes participate. 28 U.S. C. A § 3702. However, PASPA contains a “grandfather clause,” which creates an exception for states that previously operated gambling schemes that were authorized by statute between January 1, 1976 and October 2, 1991. *Id.* at § 3704(a)(1). If the gambling schemes described in §3702 ***actually were conducted*** in that State at any time during the period beginning September 1, 1989 and ending October 2, 1991, then PASPA does not preempt state law. *Id.* at § 3704(a)(2)(A), (B) (emphasis added). 3704 was drafted to allow states with a historical gambling industry to achieve legality under PASPA. However, this exception does not extend to state laws that attempt to license new gambling schemes.

The Respondent’s sports betting scheme does not fall within this grandfather period since daily fantasy sports, like the daily fantasy betting the Respondents operate, were not actually conducted during the time period where the grandfather clause would apply. Since the Respondent’s gambling scheme is a substantial change from previously licensed gambling schemes in Nevada, licensing daily fantasy sports violates PASPA.

The Respondents believe that even if daily fantasy sports violate PASPA, the enactment of the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”) legalized fantasy sports and overrules PASPA. UIGEA does not make fantasy sports, or any form of gambling, legal or illegal. UIGEA was passed to preserve the legislative intent of PASPA and to provide a new vehicle for enforcing gambling prohibitions on the Internet. Congress deemed this necessary since, “traditional law enforcement mechanisms [are] often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.” 31 U.S.C.A. § 5361(a)(4).

ARGUMENT

I. THE LOWER COURT’S DECISION SHOULD BE OVERTURNED BECAUSE DAILY FANTASY SPORTS ARE LOTTERIES, SPORTS POOLS, AND/OR GAMBLING GAMES UNDER NEVADA LAW THUS REQUIRING LICENSURE UNDER THE NEVADA GAMING CONTROL ACT AND NEVADA GAMING COMMISSION REGULATIONS

A. Daily Fantasy Sports Are Lotteries Because Their Outcome Is Determined Predominantly By Chance And Not Skill Since Team Management Is Not Necessary, The Duration Of The Game Is Short, And The Factors Of Chance Are Several Thus Reducing The Element Of Skill.

The Eight Judicial District Court of Nevada erred when it disagreed with the Attorney General in its conclusion that daily fantasy sports are not lotteries under Nevada law. Daily fantasy sports are games of chance in which participants pay for an opportunity to play for a prize. The states are allowed to regulate gambling according to the Tenth Amendment of the United States Constitution when it states, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X. Under Nevada law, a lottery is “any scheme for the disposal or distribution of property, by chance, among person who have paid or promised to pay any valuable consideration for a chance of obtaining that property, or a portion of it . . .” Nev. Rev. Stat. Ann. § 462.105 (West 2015). Therefore, three elements are necessary to establish a lottery: (1) Distribution of prizes, (2) determined by chance (3) when consideration was paid. *F.C.C. v. Am. Broad. Co.*, 347 U.S. 284, 290 (1954).

Since a prize is awarded in daily fantasy sports and participants pay to play, thus providing consideration, the determining element of whether daily fantasy sports are lotteries will be if chance determines the game. Nevada follows the majority of states by applying the dominant factor test. Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. Marshall L. Rev. 1195, 1204 (2007). “The test

of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element.” *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (1961). Essentially, the court decides whether a player’s skill is the predominating factor in the outcome of the game or whether chance is more influential. *Cabot & Csoka*, supra, at 1204. In daily pay-to-play fantasy sports, chance is the dominating factor whereas skill is a minor element thus the court should find that daily fantasy sports meet the three elements classifying them as lotteries under Nevada law.

In *Las Vegas Hacienda, Inc.*, 359 P.2d at 86, appellant publicly offered \$5000 to anyone who, upon paying 50 cents to try, could score a hole in one on its golf course. Here, this Court applied the dominant factor test and it found that “there was sufficient evidence to sustain the [lower] court’s finding” that the outcome of a hole in one contest was predominantly determined by skill rather than chance. *Id.* Although in *Las Vegas Hacienda, Inc.*, 359 P.2d at 86, the court found that a golfer’s hole in one was an outcome predominately influenced by his skill rather than chance, the case at bar is distinguishable because a participant in daily fantasy sports rely on chance, rather than skill to win. The daily fantasy sports participants’ scores are dependent on the success of an athlete in a game rather than the gambler’s skill. The athlete, being a third party, is an independent and remote factor that determines the outcome of the participant’s score meaning the outcome of the gambler’s bet is determined by the skill of third parties rather than the skill of gambler, making it a game of chance.

In *Seattle Times Co. v. Tielsch*, 495 P.2d 1366, 1370 (1972), the Supreme Court of Washington held that chance, rather than skill, was the dominant factor in the Times’ ‘Guest Guesser’ contest, a football pool, and as such was a lottery. The Court considered evidence that “the result of a football game may depend upon weather, the physical condition of the players

and the psychological attitude of the players.” *Id.* at 1367. Evidence also suggested that the result of a game “may also be affected by sociological problems between and among the members of a football team.” *Id.* Similarly, these same independent and unforeseeable factors are present in daily fantasy sports. Due to the short duration of daily fantasy sports there is not enough time ‘[f]or a fantasy sports participant’s strategic and negotiating skills to offset “chance factors such as the physical and mental conditions of players, potential problems between team members, and the game-time weather conditions”.’ Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 Harv. J. Sports & Ent. L. 1, 30 (2012). Sports law professor Ryan Rodenburg states, “[a]n injury, a hailstorm, or a ball bouncing strangely could affect a result.” Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 Sports Law. J. 79, 106 (2015). Supporters of daily fantasy sports allege that the element of chance is reduced because participants have the ability to change the lineup until the start of the game. *Id.* at 97. However, according to Realtime Fantasy Sports’ Daily Rules, if “a game’s start time is temporarily delayed by weather or other circumstances, the lineups must still be complete before the originally scheduled start time.”¹ Therefore, because the delay in the game allows for an opportunity like weather or other factor to affect the game and the athlete’s performance and the daily fantasy sports participants cannot change their lineup after the scheduled start time, chance can still have an overriding impact.

In *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 WL 1797648, at *2 (D. N.J. June 20, 2007), it was noted that a fantasy sports team’s outcome depended on the participants’ skills in “selecting players for [their] team, trading players [during] the season, adding and dropping players during . . . the season and deciding who among [their] players will start and which

¹ *RealTime Daily Official Rules*, RealTime Fantasy Sports, <https://www.rtsports.com/daily/rules> (2016).

players will be placed on the bench.” Our case regarding daily fantasy sports is distinguishable because, unlike traditional fantasy sports, daily fantasy sports do not involve trading or negotiating with other participants. Jeffrey C. Meehan, *The Predominate Goliath: Why Pay-to-Play Daily Fantasy Sports Are Games of Skill Under the Dominant Factor Test*, 26 Marq. Sports L. Rev. 5, 13 (2015). Thus, the court should find that chance predominates over skill.

Even if the participants are skilled with access to the applicable information to make informed draft picks, chance will still determine the outcome of the game. There are three categories of chance-based elements in daily fantasy sports. Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. Ill. L. Rev. 117, 131 (2016). Two are present in daily fantasy sports. The first is systemic chance. *Id.* Systemic chance is present when elements of the game are generated by random events. Meehan, *supra*, at 19. It is present in daily fantasy sports when they offer a snake draft method of player selection. Edelman, *supra*, at 131. Snake drafts employ systemic chance in its use of a random lottery to elect who will make the first draft. *Id.* The first participant selected by chance will increase their chance of winning by having first choice. *Id.* The second category of chance-based elements is chance by imperfect information. *Id.* This type of chance occurs in games that consist of both chance and skill and “where skill is not the sole determinate but is influenced by not having complete information of all factors that can impact game results.” Meehan, *supra*, at 20. Essentially, chance arising from “limitations on analysis”. Edelman, *supra*, at 131. The chance of injuries to athletes and their inability to play demonstrates an element of chance classified as imperfect information. *Id.* Another example of imperfect information chance present in daily fantasy sports is the chance of a game being cancelled because of something that could not have been anticipated by available information and analysis. *Id.* Further, Daniel Steinberg, a

recognized online poker player finds that in daily fantasy sports strategic concepts are being missed, logic is poor, and decision-making is basic.² “Supposed great players are choosing lineups that are statistically provable as gigantic errors in judgment. Strategic advice on forums and strategy websites are often logically incorrect.”³ This evidences the weakness of strategizing in daily fantasy sports and demonstrates additional imperfect information chance.

In *Morrow v. State*, 511 P.2d 127, 128 (1973), a ‘football card’, or ticket, was sold that listed football games to be played on specific days. Purchasers would select the winning teams that would need to “beat the opposing team by more than the ‘point spread’” for the participant to win. *Id.* The Supreme Court of Alaska identified several skill factors required for skill to predominate over chance. *Id.* at 129. The first is that “[p]articipants must have a distinct possibility of exercising skill and must have sufficient data upon which to calculate an informed judgment. The test being that without skill it would be absolutely impossible to win the game.” *Id.* Second, participants must be able to use the skill, and the general class of participants must have the skill. *Id.*

Further, Ehrman suggests that daily fantasy sports players cannot auto-draft their teams and that they have to manually choose them. Ehrman, *supra*, at 105. However, daily rules, on realtime fantasy sports, states that, “during the live draft your auto-draft list will be used as a fail-safe backup in case your time limit expires before you make a pick.”⁴ Thus, RealTime Fantasy Sports states that it “will automatically draft a player for [participants]” and that “the player will be the top-ranked player on [the participants’] auto draft list.”⁵ Therefore, auto-draft can occur,

² *Why Play Daily Fantasy Sports?*, Daily Fantasy Winners, <https://dailyfantasywinners.com/why-play-daily-fantasy-sports/> (2015).

³ *Id.*

⁴ *RealTime Daily Official Rules*, RealTime Fantasy Sports, <https://www.rtsports.com/daily/rules> (2016).

⁵ *RealTime Daily Official Rules*, RealTime Fantasy Sports, <https://www.rtsports.com/daily/rules> (2016).

increasing the effect of chance on the outcome of the final scores in the absence of participants analytically choosing, making it a game of chance. Additionally, unlike traditional fantasy sports, where participants cannot choose the same player when drafting, daily fantasy sports allow participants to choose the same players. Michael Trippiedi, Note, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV Gaming L.J. 201, 220 (2014). This reduces the strategy involved in drafting players by no longer requiring participants to critically choose players nor to weaken the teams of their opponents by picking up players the opponents would pick and thus lessens the overall skill involved. Id.

Third, “skill or the competitor’s efforts must sufficiently govern the result”. *Morrow*, 511 P.2d at 129. “Skill must control the final result” Id. “Where chance enters into the solution, of another lesser part of the problem, and thereby proximately influences the final result, the scheme is a lottery.” Id. Accordingly, “where skill does not destroy the dominant effect of chance, the scheme is a lottery.” Id. The performance of an athlete can be influenced by an injury, either during or outside the game, weather, personal tragedies, and suspensions. Jon Boswell, Note, *Fantasy Sports: A Game of Skill That is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law*, 25 Cardozo Arts & Ent. L.J. 1257, 1269 (2008). Thus, the skill that a daily fantasy sport’s participant may use in creating a lineup does not destroy the dominant effect of chance, making daily fantasy sports a lottery. Fourth is that “the standard of skill must be known to the participants and this standard must govern the result.” *Morrow*, 511 P.2d at 129. However, the performance of an independent athlete and not the skill of the participant, governs the resulting score of the participant.

Unlike in *In re Allen*, 377 P.2d 280, 281 (1962), where the Supreme Court of California determined that a game of bridge was one of skill even though there was just one element of

chance from the deal of the cards, here there are multiple elements of chance that dominantly effect the outcome of a participant's score. Those elements are injuries, personal issues, suspensions, and weather, as previously mentioned. Boswell, supra, at 1269. Further, the Supreme Court of California highlighted that bridge, similar to chess, involves recurring "bidding and play of the hand to make decisions." *In re Allen*, 377 P.2d at 281. Yet, in daily fantasy sports, a participant need only select a lineup before the games begin and without necessary management, because of the short duration of the game, there is no continual decision making for that game. Edelman, supra, at 30. Thus, this Court should hold that chance is the dominant element over skill in daily fantasy sports thereby characterizing them as lotteries.

B. Daily Fantasy Sports Are Wagering Schemes Because A Wager In The Form Of Entry Fees In Order To Participate, And There Is A Risk Of Loss Between The Contracting Parties, And The Wager Is Risked On The Performance Of Third Party Athletes Which Is An Uncertain Outcome, Therefore They Are Sports Pools.

The lower court erred when it decided that daily fantasy sports were not sports pools because they were not wagering schemes. The court should hold that daily fantasy sports are sports pools under Nevada Law. In the present case, entry fees are wagers given and daily fantasy sports sites are in the business of accepting them. Furthermore, the wagers within the system of wagering are based on sporting events or other events. In this case, the system of wagering is based on athlete performance during sporting events.

Nevada Revised Statute 463.160 makes it illegal "for any person . . . (a) to deal, operate, carry on, conduct, maintain or expose for play in . . . Nevada any gambling game, . . . or sports pool . . . without having first procured gaming licenses." Nev. Rev. Stat. Ann. § 463.160(1)(a) (West 2015). It also makes it "unlawful for any person to receive, directly or indirectly, any compensation . . . or any percentage or share of the money . . . played for running or carrying on any gambling game . . . or sports pool." Nev. Rev. Stat. Ann. § 463.160(1)(d) (West 2015).

Under Nevada law, a sports pool is “the business of accepting wagers on sporting events or other events by any system or method of wagering.” Nev. Rev. Stat. Ann. § 463.0193 (West 2015). A wager is “a sum of money or representative value that is risked on an occurrence for which the outcome is uncertain.” Nev. Rev. Stat. Ann. § 463.01962 (West 2015). Daily fantasy sport participants risk their sum of money, when they place their bet, or entry fee, on their selected lineups. The total score the participants will receive is uncertain because whether they win is dependent upon the performance of their selected athletes. The participants therefore stand to lose the cost to play and therefore the sum of money is risked. This Court should find that daily fantasy sports are sports pools and the host sites maintain them and receive direct compensation for running them and thus require licensing.

In *Humphrey*, 2007 WL 1797648, at *8, the District Court of New Jersey granted a motion to dismiss concluding that entry fees to play in season-long fantasy sports were not bets or wagers. The court found that,

“entry fees do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in the contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize).” *Id.*

In *Las Vegas Hacienda, Inc.*, 359 P.2d at 86, appellant publicly offered \$5000 to anyone who, upon paying 50 cents to try, could score a hole in one on its golf course. This Court noted that “the fact that each contestant is required to pay an entrance fee where the entrance fee does not specifically make up the purse or premium contested for does not convert the contest into a wager.” *Id.* at 87. On the contrary, one structure of daily fantasy sports is head-to-head matches where two players play against each other, one-on-one, “where the player with the highest score wins the amount wagered on the game.” Ehrman, *supra*, at 86. In head to head matches each

opponents entrance fee becomes part of the “purse” or prize⁶. Also noted in *In Las Vegas Hacienda, Inc.*,

“a prize . . . differs from a wager in that in the former, the person offering the same has no chance of gaining back the thing offered, but, if he abides by his offer, he must lose; whereas in the latter, each party interested therein has a chance of gain and takes a risk of loss.” 359 P.2d at 86.

Unlike in *Las Vegas Hacienda, Inc.*, 359 P.2d at 87, where the appellant could not get back the prize being offered, here the host site does get a chance of gaining back the thing offered, or prize, because participants’ awards after winning “are added to the winning team's account balance”⁷ as specified under FanDuel’s terms. Similarly, RealTime Fantasy Sports states that “[a]fter the conclusion of the Contest all prize awards will be placed in the winner's RTFS account. Prize Winners may use the balance in their accounts to purchase additional RTFS games.”⁸ Thus, daily fantasy sports participants can use that prize to pay for more games. Hence, there is a possibility of returning the rewarded money to the site. Therefore the site does have a “chance of gaining back the thing offered”, distinguishing the prize in *Las Vegas Hacienda* from the awarded amount in daily fantasy sports. *Las Vegas Hacienda, Inc.*, 359 P.2d at 85. Further, both the parties involved in head-to-head matches have an interest and have a chance of gain and a risk of losing the amount wagered meeting the definition of wager that is, “each party interested therein has a chance of gain and takes a risk of loss”. *Id.* at 86. Thus, the court should find that the wagers, entry fees, are risked on the participant’s scores, which depend on the success of the athletes in their lineup, and that being an uncertain outcome allows for daily fantasy sports to come within the definition of a wager under Nevada statute.

⁶ Chris Reilly, *The FanDuel Scam*, The Daily Roto, <http://thedailyroto.com/the-fanduel-scam/>. (see also: *FanDuel Promo Code & Review*, RotoGrinders, (April 12, 2015) <https://rotogrinders.com/reviews/fanduel-promocode-115>).

⁷ *Terms of Use*, FanDuel, <https://www.fanduel.com/terms> (Nov. 17, 2015).

⁸ *RealTime Daily Official Rules*, RealTime Fantasy Sports, <https://www.rtsports.com/daily/rules> (2016).

In *State v. GNLV Corp.*, 834 P.2d 411, 412 (1992), this Court concluded that there was a wager when “two or more contracting parties hav[e] mutual rights in respect to the money [wagered] ... and each of the parties necessarily risks something, and has a chance to make something upon the happening or not happening of an uncertain event.” Thus, because the Golden Nugget's distribution of fifty-cent tickets was required by a contract between it and its “24 Karat Club” members, it was not dependent on the outcomes of a legitimate wager. *Id.* at 413. In contrast, here the prizes of daily fantasy sports games are only distributed to the winners and not to every participant.

Also in *GNLV Corp.*, the distinction was made between a prize and a wager. *Id.* at 412. “A wager exists when two or more contracting parties have mutual rights in respect to the money wagered . . .” *Id.* In a wager each party has a chance of gain and a risk of loss. *Id.* Accordingly in daily fantasy sports, there are at least two parties, for instance in head to head games, and each of the participants in daily fantasy sports has a chance of gain and a risk of losing the money they paid. A prize differed in that “the person offering the prize had to permanently relinquish the prize upon performance of a specified act.” *Id.* There is a contention that daily fantasy sports sites after payment of the entry fee offer the ability to create a lineup and therefore there is no wager, yet the prize is not given until after a participant’s lineup has the highest score, which is based on uncertain events. Therefore, participants do wager on uncertain outcomes. Further, as previously mentioned, because participants’ prizes are awarded and placed into their account⁹, the money awarded may not be permanently relinquished if that award is used to pay for more games. Consequently, part of the award would be given back to the site offering it. This Court should find that there are wagers in daily fantasy sports.

⁹ *RealTime Daily Official Rules*, RealTime Fantasy Sports, <https://www.rtsports.com/daily/rules> (2016).

Under Nevada Law, sports pools occur when wagers are placed “on sporting events or other events by any system or method of wagering.” Nev. Rev. Stat. Ann. § 463.0193 (West 2015). Since money is risked on athletes’ performances in sporting events, an occurrence for which its outcome is uncertain, a wager is in fact given. Athletes’ performance in sports determines the amount of “fantasy points” that daily fantasy sports participants’ will receive. Therefore, the Court should find that wagers are placed on sporting events by a system of wagering.

Further, daily fantasy sport sites are “in the business of accepting wagers” as specified in Nevada statute 463.0193 when they accept participant’s money in the form of entry fees. Nev. Rev. Stat. Ann. § 463.0193 (West 2015). “In 2014, 1.5 million Americans paid more than \$1 billion in tournament entry fees¹⁰.” “FanDuel and DraftKings both expect more than \$1 billion in payouts this year, which would net them about \$100 million each in commission revenue¹¹.” Their acceptance of wagers can be demonstrated in head-to-head matches where the hosting site takes a rake.¹² “The standard rake is about 10%, meaning if you play \$10 they take \$1. That’s why you are only awarded \$18 if you win a \$10 head to head contest.”¹³ Thus daily fantasy sports are in the business of accepting wagers based on sporting events. The Court should find that that daily fantasy sports are sports pools under Nevada law. Thus, DraftMasters and other daily fantasy sports host sites operate sports pools and receive direct compensation for running them and as such require licensing according to Nevada Statute 463.160.

¹⁰ Ed Miller & Daniel Singer, *For daily fantasy-sports operators, the curse of too much skill*, McKinsey & Company (Sept. 2015) http://www.mckinsey.com/insights/media_entertainment/for_daily_fantasy_sports_operators_the_curse_of_too_much_skill.

¹¹ Drew Harwell, *The rise of daily fantasy sports, online betting’s newest empire*, The Washington Post (July 28, 2015) <https://www.washingtonpost.com/news/wonk/wp/2015/07/28/how-daily-fantasy-sites-became-pro-sports-newest-addiction-machine/>.

¹² Chris Reilly, *The FanDuel Scam*, The Daily Roto, <http://thedailyroto.com/the-fanduel-scam/>.

¹³ Id.

C. Daily Fantasy Sports Are Gambling Games Because They Are Played For Money On Computers, Tablets, Or Phones Which Constitute Electronic Devices And Because Daily Fantasy Sports Are Wagering Schemes.

The lower court erred when it found that daily fantasy sports were not gambling games. Nevada Revised Statute 463.160 makes it illegal “for any person . . . (a) to deal, operate, carry on, conduct, maintain or expose for play in . . . Nevada any gambling game, . . . without having first procured gaming licenses.” Nev. Rev. Stat. Ann. § 463.160(1)(a) (West 2015). It also makes it “unlawful for any person to receive, directly or indirectly, any compensation . . . or any percentage or share of the money . . . played for running or carrying on any gambling game.”

Nev. Rev. Stat. Ann. § 463.160(1)(d) (West 2015). Under Nevada law, a “gambling game” is

“(1) any game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine for money, property, checks, credit or any representative of value . . . (2) any banking or (3) percentage game or (4) any other game or device approved by the Commission.” Nev. Rev. Stat. Ann. § 463.0152 (West 2015).

Daily fantasy sports meet the requirements for gambling games that are “played with cards, dice, equipment, . . . electronic devices or machines for money.” *Id.* Under the first type of gambling game, a game must, first, “be played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine” and, second, must be played “for money, property, checks, credit or any representative of value.” *Id.* The lower court erred when it failed to extend computers as electronic devices in this context. Nevada law has clearly defined computers as an electronic device in Nevada statute 205.4735 when it states “‘computer’ means an electronic device which performs logical, arithmetic and memory functions by manipulations of electronic or magnetic impulses and includes all equipment related to the computer in a system or network’. Nev. Rev. Stat. Ann. § 205.4735 (West 2015). Further, in Nevada Revised Statute 360B.410, “‘computer’ means an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions’. Nev. Rev. Stat.

Ann. § 360B.410 (West 2015). Rule 246, titled “Other Devices” also identifies cellphones and laptop computers as electronic devices. Nev. Rev. Stat. Ann. Rule 246 (West 2015). Since daily fantasy sports are played online using a computer or cell phone, they meet the first requirement that the game be played on an electronic device. The second requirement is met because daily fantasy sports are played “for money, property, check, credit or any representative of value” since participants play for money and sometimes prizes. Nev. Rev. Stat. Ann. § 463.0152 (West 2015). Therefore the court should find that daily fantasy sports meet the definition of gambling games under the first description given in statute 463.0152.

The lower court erred when it decided that daily fantasy sports are not percentage games. Daily fantasy sports also meet the requirements for percentage games. ‘Percentage games are . . . where (1) patrons wager against each other and (2) the house takes a percentage of each wager as a “rake-off”.’ *Hughes Properties, Inc. v. State*, 680 P.2d 970, 971 (1984). The Court should find that participants in daily fantasy sports wager against each other, thus meeting the first requirement. A “wager” is “a sum of money or representative value that is risked on an occurrence for which the outcome is uncertain.” Nev. Rev. Stat. Ann. § 463.01962 (West 2015). Participants place wagers in daily fantasy sports games by risking money to play a game that’s outcome is uncertain. As previously mentioned, participants wager their entry fees for a prize when they play daily fantasy sports because there is money put at risk and whether they win is based on the uncertain performance of athletes. Furthermore, daily fantasy sports companies take a percentage of every wager, constituting a “rake-off.” For instance, DraftKings keeps 10% (the “rake”) as revenue. Meehan, *supra*, at 10. Daily fantasy sports are thus percentage games because the participants wager against one another and the companies take a percentage of each wager placed by the participants as a “rake-off”. Thus, the court should find that daily fantasy sports are

gambling games under games played on electronic devices for money or percentage games, therefore requiring licensing under Nevada law.

II. LICENSING DAILY FANTASY SPORTS GAMBLING VIOLATES PASPA SINCE DAILY FANTASY SPORTS GAMBLING WAS NOT ACTUALLY AUTHORIZED OR CONDUCTED IN NEVADA BETWEEN JANUARY 1, 1976 AND OCTOBER 2, 1991 UNDER 28 U.S.C.A. § 3704.

The Professional and Amateur Sports Protection Act (“PASPA”) makes it unlawful for a government entity to license a lottery or other betting, gambling, or wagering scheme based directly, or indirectly, on one or more competitive games in which amateur or professional athletes participate. 28 U.S.C.A § 3702. However, PASPA contains a “grandfather clause,” which creates an exception for states that previously operated gambling schemes that were authorized by statute between January 1, 1976 and October 2, 1991. *Id.* at § 3704(a)(1). If the gambling schemes described in §3702 ***actually were conducted*** in that State at any time during the period beginning September 1, 1989 and ending October 2, 1991, then PASPA does not preempt state law. *Id.* at § 3704(a)(2)(A), (B) (emphasis added). §3704 was drafted to allow states with a historical gambling industry to achieve legality under PASPA. However, this exception does not extend to state laws that attempt to license new gambling schemes.

The Third Circuit has clarified what “actually conducted” means in *OFC Comm Baseball v. Markell*, 579 F.3d 293, 301 (3d Cir. 2009). The language in §3704(a)(2) is unambiguous and distinguishes between wagering schemes that were “authorized” and those that were “conducted” during the applicable windows. While statute authorization is necessary for § 3704 to apply to the state, the specific means by which the gambling scheme was *actually* conducted is also considered. *Id.* (emphasis added). The *Merkell* decision has acknowledged that PASPA does not require sports gambling to be identical to what the State had conducted earlier as long as long as

the variations do not “*effectuate a substantive change*” from the scheme that was conducted during the exemption period. *Id.* (emphasis added).

The Respondent’s sports gambling scheme is unlike any previous sport gambling scheme licensed in Nevada. While Nevada has a history of authorizing and conducting sports gambling, Draft Masters daily fantasy sports gambling is a substantive change from past sports gambling schemes since the player can win by beating the accumulated statistics of his competitor for single games using several betting schemes. This substantive change from previous sports gambling that was conducted during the exemption period does not make §3704 applicable to daily fantasy sports. Therefore, licensure of daily fantasy sports in Nevada would violate PASPA.

The Respondents believe that even if daily fantasy sports violate PASPA, the enactment of the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”) legalized fantasy sports and overrules PASPA. The Respondents assumption that UIGEA legalizes fantasy sports is incorrect. UIGEA does not make fantasy sports, or any form of gambling, legal or illegal. UIGEA unambiguously states, “No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law . . . prohibiting, permitting, or regulating gambling within the United States.”³¹ U.S.C.A. § 5361(b). UIGEA was passed to preserve the legislative intent of PASPA and to provide a new vehicle for enforcing gambling prohibitions on the Internet. Congress deemed this necessary since, “traditional law enforcement mechanisms [are] often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.” 31 U.S.C.A. § 5361(a)(4).

Originally, Congress enacted PASPA with the expressed intent of keeping sports gambling from spreading through state-sponsored schemes. *Nat'l Collegiate Athletic Ass'n v. Christie*, 61 F. Supp. 3d 488, 492 (D.N.J. 2014) *aff'd sub nom. Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 799 F.3d 259 (3d Cir. 2015), *reh'g en banc granted*, opinion vacated (Oct. 14, 2015). UIGEA works in conjunction with PASPA to keep sports gambling from spreading through state licensure and schemes. . By licensing daily fantasy sports, Nevada's law is averse to PASPA since it encouraging the spread of sports gambling while and interferes with the integrity of professional and amateur sports.

A. Daily Fantasy Sports Betting Is a Substantial Change From Gambling Schemes Previously Conducted In Nevada.

The Respondents incorrectly claim that §3704 applies to daily fantasy sports because daily sports betting was previously conducted in Nevada and authorized by statute between 1989 and 1991. The language in §3704(a)(2) is unambiguous and distinguishes between wagering schemes that were “authorized” and those that were “conducted” during the applicable windows. *OFC Comm Baseball v. Markell*, 579 F.3d 293, 301 (3d Cir. 2009). For §3704 to apply, the state of Nevada must have authorized the gambling scheme through statute by 1989. If the scheme authorized by statute was not actually conducted between 1989 and 1991, 3704 is not applicable and §3702 applies. While Nevada statute does allow daily sports betting, online daily fantasy sports betting is a substantial change from previous daily sports betting and does not make 3704 applicable to Nevada.

The Third Circuit ruled that Delaware had violated PASPA when the state proposed and authorized The Sports Lottery Act in 2009. *OFC Comm Baseball v. Markell*, 579 F.3d 293, 301 (3d Cir. 2009). The Act authorized three types of sports betting:“(1) point-spread bets on

individual games, (2) over/under bets on individual games; and (3) multi-game parlay bets.” *Id.* at 295. The Governor had sought an advisory opinion from the Delaware Supreme Court regarding the constitutionality of the the law. *Id.* After the Act was signed into law, the Delaware Supreme Court issued an opinion which found that multi-game betting confined to betting on the NFL would not violate state law.¹⁴ *Id.* at 296. The Leagues filed suit against the Governor and argued that single-game sports betting on sports beyond the National Football League (NFL) violated state law and PASPA since gambling schemes like that have never actually been conducted in Delaware. *Id.* at 296. The state argued that the sports betting scheme qualified for exemption in §3704 as the phrase “to the extent that the scheme was conducted by the state” only meant that the State must have conducted a sports lottery in the past in order to be permitted to operate a sports lottery in the future. *Id.* at 301. While 3704 did not require sports lotteries to be identical to previous sport lotteries, the Third Circuit determined the differences cannot effectuate a substantive change from the scheme that was conducted during the exemption period. *Id.* at 303. By authorizing single-game bets on games other than football, the Sports Lottery Act effectuated a substantive change to the existing gambling schemes that had only allowed betting on multiple games confined to the NFL. *Id.* at 304. This substantive change to what had been applicable under 3704 was found to have violated PASPA. *Id.*

Our case is similar to the precedent set by the Third Circuit. Nevada, like Delaware, has a history of conducting and authorizing sports betting. However, the Respondent’s sport betting scheme is akin to *Markell* since daily fantasy sports betting is uniquely different from the historical sports betting schemes previously authorized and conducted in Nevada. The

¹⁴ The Delaware Supreme Court relied on *National Football League v. Governor of the State of Delaware*, 435 F.Supp. 1372 (D.Del.1997). In this opinion, the the court ruled that the sports betting scheme conducted in 1976 known as “Scoreboard” did not violate the law if it was limited to betting on multiple NFL games.

Respondents argue that licensure of their product does not violate PASPA since their product offers a gambling scheme similar to proposition betting (“prop betting”), which lawfully operate under PASPA under the section 3704 exception.¹⁵ However, like in *Merkell*, the gambling scheme within daily fantasy sports effectuates a substantial change from admissible prop betting. Daily fantasy sports participants combine prop betting *with several other types of betting schemes* to accumulate “fantasy points” to win. (emphasis added) Instead of wagering on the statistics of a single game in order to win, an “owner” in daily fantasy sports gambling can win by beating the collective, accumulated statistics of other competitors using multiple betting schemes (in addition to prop betting). The combination of multiple betting schemes to win is a substantial change from winning from prop betting alone. While Nevada has licensed prop betting in the past, the State has never licensed a gambling game that relied on multiple betting schemes to win. This is a substantial change from authorized and previously conducted gambling schemes in Nevada. By licensing daily fantasy sports, the State of Nevada has effectuated a substantive change from previous prop betting schemes that are permitted under 3704. Due to daily fantasy sports being substantially different from previously permitted gambling schemes, Nevada licensure has violated PASPA.

B. The UIGEA Was Enacted To Work In Tandem With PASPA To Stop The Spread Of State-Sponsored Sports Gambling And To Maintain The Integrity Of Sports.

Congress enacted PASPA in 1992 to prevent sports gambling from spreading through the endorsement of state schemes. With the rise of the Internet, Congress enacted the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”) because “traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the

¹⁵ “Prop betting” is a bet made regarding the occurrence or non-occurrence during a game (usually a gambling game) that does not directly affect the game's final outcome. An example would be a bet placed

Internet, especially where such gambling crosses State or national borders.” 31 U.S.C. section 5361(a)(1). Within the UIGEA, there is a provision that the Respondents claim exclude fantasy sports from violating federal law. 31 U.S.C. § 5362(1)(E)(ix). When this provision was written in 2006, the Internet sports gambling industry was non-existent. While the UIGEA does not criminalize daily fantasy sports, the 2006 Act expressly states that, “No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law . . . prohibiting, permitting, or regulating gambling within the United States.” 31 U.S.C.A. section 5361(b). This provision is an expression of Congress’ legislative intent: to work in accordance with PASPA while making specific provisions regarding Internet gambling. This does not mean the Act should be construed to control PASPA.

Once again, the Third Circuit has provided an example of when by prohibiting businesses from knowingly accepting financial instruments from an individual who places a bet over the Internet where gambling is illegal at the location where the individual initiates the bet.

Interactive Media Entm't & Gaming Ass'n Inc. v. Attorney Gen. of U.S., 580 F.3d 113, 116 (3d Cir. 2009).

Interactive Media involved a not-for-profit corporation that collected information related to Internet-based gaming. *Id.* at 113. The members of this corporation were businesses that provide gaming services, including Internet gambling, to individuals located throughout the United States. *Id.* Interactive Media Entertainment argued that the UIGEA was void due to vagueness. However, the court disagreed with Interactive, stating that the UIGEA clearly provides that accepting bets from an individual who places a bet over the Internet where from which that act is illegal violates the law. *Id.* at 116. The court specifically noted that the UIGEA, “[D]oes not

itself outlaw any gambling activity, but rather incorporates other Federal or State law related to gambling.” *Id.*

The *Interactive* decision clarifies UIGEA’s legislative intent: while it does not outlaw fantasy sports, the UIGEA does incorporate other Federal or State law, like PASPA. The UIGEA specifically prohibits accepting a bet from a player located in a state where that specific type of bet is prohibited. If the Respondents accept online payment from players in Nevada, they would be violating the UIGEA since daily fantasy sports violate 3702 in Nevada.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court reverse the decision of the Eighth Judicial District Court.

Respectfully Submitted,
Petitioners Team Number 7

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 22nd day of February, 2016, a true and correct copy of the foregoing was mailed by U.S. mail to William S. Boyd School of Law, Attn: Stephanie Getler, Schreck Competition Chair, 4505 S. Maryland Pkwy, Box #1003, Las Vegas, NV 89154-1003, and by electronic mail to SCHRECK_MCC2015@law.unlv.edu.

Dated: February 22, 2016

By: _____

Petitioners Team Number 7

CERTIFICATE OF WORD COUNT

We hereby certify that the foregoing memorandum complies with the word limitation specified in Local Rule 14 of the Rules of Procedure for the U.S. Supreme Court. The memorandum is set in Times New Roman 12-point type and, according to the word-count facility of the word processing system used to produce the memorandum, contains 8,883 words.

Dated: February 22, 2016

By: _____

Petitioners Team Number 7