

No. 77777

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IN THE  
**Supreme Court of Nevada**

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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.*

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*On Writ of Certiorari to the Eighth Judicial District Court  
In and for the County of Clark, Nevada*

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BRIEF FOR PETITIONERS

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Team No. P1  
*Counsel for Petitioners*  
February 22, 2016

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## QUESTIONS PRESENTED

- I. Does Nevada law permit daily fantasy sports operators to evade regulation in light of the games' gambling-like features and the State's public policy to strictly regulate the gaming industry?
  
- II. Does the federal prohibition on sports gambling – the Professional and Amateur Sports Protection Act – permit Nevada to license daily fantasy sports when the only relevant exception requires that the gambling “actually was conducted” between 1989 and 1991, and daily fantasy sports did not originate until 2011?

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## **OPINION AND ORDERS ENTERED BELOW**

The decision and order of the Eighth Judicial District Court in and for the County of Clark, Nevada is unreported and set out in the record. Record at 2-14.

### **STANDARD OF REVIEW**

The Nevada Supreme Court reviews a district court's grant of summary judgment *de novo*, without deference to the lower court. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Further, the Court reviews evidence in a light most favorable to the party against whom summary judgment was entered. *Tore, Ltd. v. Church*, 105 Nev. 183, 185, 722 P.2d 1281, 1282 (1989) (citing *Tschabold v. Orlando*, 103 Nev. 224, 225, 737 P.2d 506, 507 (1987)).

### **STATEMENT OF JURISDICTION**

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

### **STATUORY PROVISIONS**

The following statutory provisions are relevant to this case: selections from the Nevada Revised Statutes, the Professional and Amateur Sports Protection Act, and the Uniform Internet Gambling Enforcement Act. These provisions are reprinted in Appendices A, B, and C, respectively.

## STATEMENT OF THE CASE

*The Procedural Backdrop.* Daily fantasy sports (“DFS”) has come under increased scrutiny in Nevada in recent months. In 2015, the Nevada Gaming Control Board asked the State’s Attorney General to research the legality of DFS under the Nevada Gaming Control Act and corresponding regulations. Record at 21. The AG’s findings spanned 15 pages and concluded that DFS are gambling because they are sports pools, gambling games, and perhaps lotteries. R. at 21. Therefore, they cannot be offered in Nevada without licensure. R. at 21.

Sensing an impending threat to their industry, Draft Masters, a DFS operator, sought protection in the form of declaratory relief from the Eighth Judicial District Court against the State of Nevada. R. at 5. The National Football League, National Hockey League, National Basketball Association, Major League Baseball, and National Collegiate Athletic Association (the “Leagues”), sensing an impending threat of their own, intervened, alleging that Nevada cannot license a DFS company without violating the Professional and Amateur Sports Protection Act (“PASPA”). R. at 5. All three parties moved for summary judgment. R. at 2.

*Draft Masters’ Claims.* Draft Masters claimed that, as a matter of law, DFS are not gambling, and, hence, Draft Masters may operate lawfully in Nevada without obtaining a license. R. at 10. Nevada, on the other hand, relying on the AG’s findings, claimed that DFS constitute gambling. R. at 21. In addition, depending on what “lottery” test the court applied, Nevada found that a fact question existed as to the level of chance involved in DFS. R. at 34.

The district court disagreed with Nevada and agreed with Draft Masters on all fronts. R. at 12. The court found no genuine issues of material fact and denied Nevada’s motion for summary judgment, overriding the AG’s Advisory Opinion, and granting summary judgment for Draft Masters. R. at 6, 10, 14.

***The Leagues' Claims.*** Although the issue later became moot due to the court's disposition of the gambling claim, the Leagues moved for summary judgment, claiming that Nevada may not license DFS operators without violating PASPA. R. at 5. In addition, the Leagues averred, the Unlawful Internet Gambling Enforcement Act ("UIGEA") does not legalize DFS as Draft Masters claimed. R. at 18-19.

The court disagreed with the Leagues on all points and declined to adopt the interpretation of the Third Circuit, the highest court to hear a similar matter, regarding PASPA's grandfathering clauses. R. at 13. Instead, the court concluded that Nevada *may* license DFS without violating PASPA. R. at 13.

***Writ Petition.*** The Leagues filed a petition for writ of certiorari, which petition this Court granted following the district court's December 30, 2015 decision. R. at 1, 14. The Leagues are petitioning the Court to overturn the lower court's ruling by finding that DFS *do* constitute gambling under Nevada law and also that Nevada may not license the same without violating PASPA.

***Daily Fantasy Sports at a Glance.*** Daily fantasy sports are a relatively recent adaptation of an older game – traditional fantasy sports. R. at 22. Traditional fantasy sports track the performance of actual athletes in actual games over the course of an entire season, while DFS track players' performances in single games. R. at 22. Fantasy sports participants receive "fantasy points" based on how their players performed and those points determine who wins the fantasy sports game or league. R. at 22.

Traditional fantasy sports are usually played among friends who pay a nominal entry fee and award the pool to the winner at the end of the season. Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV Gaming L.J.

201, 209, 217 (2014). DFS participants, on the other hand, typically compete against hundreds or thousands of other players, most or all of whom are unknown to them. *Id.* at 210. Each time the DFS participant plays, which may be multiple times a day, he must pay an entry fee that could range from \$1 to thousands of dollars. *Id.* Companies such as Draft Masters operate DFS websites, collect the participants' wagers, retain a rake-off for themselves, and pay out prizes to the winning gamblers. *R.* at 23, 33.

***Legal Landscape.*** The law surrounding the legality of DFS, a matter of first impression in Nevada, is emerging as we speak. Unlike traditional fantasy sports which began evolving as early as 1950, daily fantasy sports have only been around since 2011. Trippiedi, *supra*, at 204, 206. At first, states may have afforded DFS a measure of the trust that traditional fantasy sports have garnered over the years. Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-To-Play Daily Fantasy Sports*, 22 Sports Law J. 79, 81-82 (2015). But after a key DFS operator's employee won \$350,000, disgruntled accusations of insider trading-type violations began to emerge. Kent Babb, *He Turned \$80 Into Six Figures Playing Fantasy Sports. His Luck May Soon Run Out*, The Washington Post (Oct. 18, 2015) <http://wpo.st/HIPD1>. Investigations by the FBI and Justice Department emerged as well. *Id.*

The legal landscape regarding DFS is complex and not easy to summarize. At least 28 states have taken some sort of action to regulate or pass legislation concerning DFS. *DFS State Watch: Monitoring Daily Fantasy Sports Action In State Government*, Legal Sports Report (Feb. 6, 2016) <http://www.legalsportsreport.com/dfs-state-watch/>. The Attorneys General of several states have issued advisory opinions similar to Nevada's, finding DFS to be gambling. Tajha Chappellet-Lanier, *A Blow to Daily Fantasy Sports in Hawaii*, The Atlantic (Jan. 28, 2016), <http://www.theatlantic.com/politics/archive/2016/01/hawaii-might-bid-daily-fantasy-sports->

[aloha/433809/](#). New York has obtained a preliminary injunction against major DFS operators and is currently litigating the legality of DFS on appeal. *People v. Fanduel, Inc.*, No. 453056-15, 2015 N.Y. Misc. LEXIS 4521 (N.Y. Sup. Ct. Dec. 11, 2015). Otherwise, very little case law addressing DFS exists across the country, much less in Nevada. Indeed, this Court’s opinion will be counted among the first.

### SUMMARY OF THE ARGUMENT

Daily fantasy sports are gambling, and Nevada may not license them. While both Draft Masters’ and the State’s positions are sympathetic (Draft Masters does not want to pay millions of dollars in fees – or be shut down, and Nevada would love to collect those same millions of dollars), the law is not on either party’s side.

***DFS are Gambling.*** The district court incorrectly determined that DFS do not constitute gambling under Nevada law. In order to do so, it had to disregard the plain language of Nevada statutes, other Nevada courts’ opinions and Nevada public policy. Its flawed interpretation of the term “wager” led to one error and then another, knocking DFS out of the realm of sports pools and percentage games. Its flawed classification of a computer as other than an electronic device foreclosed the realm of gambling games altogether. And its quick determination that DFS outcomes are clearly determined predominately by skill, not chance, purported to close the door on lotteries.

But the district court was not at liberty to disregard the weight of authority or the plain statutory language it was called upon to apply. Because wagers are present and computers are electronic devices, DFS are both sports pools and gambling games. These two grounds alone are sufficient to establish that DFS are gambling. But DFS may also be classified as lotteries under the statute’s plain language. Even if the Court decided to apply the dominant factor test, the level

of chance involved in DFS would be a question of fact for which summary judgment was inappropriate.

The district court's decision not to require regulation of DFS operators is especially surprising in light of Nevada's public policy, as expressed in the Nevada Gaming Control Act. In order to maintain its inhabitants' confidence and trust, Nevada is committed to the strict regulation of the gaming industry. Therefore, the Leagues ask this Court to reanalyze DFS in light of Nevada's statutes, case law, and public policy, and find that DFS are gambling, requiring licensure.

***Federal Law Prohibits State Licensure.*** While Nevada state law requires licensure, United States federal law prohibits it. PASPA's prohibition on sports betting does provide four exceptions. But the exception targeting Nevada only applies to sports gambling schemes that were authorized before 1991 and actually conducted between 1989 and 1991. This plain language could not be any plainer. Because DFS cannot fulfill this exception, either by themselves or by comparison to other similar schemes, PASPA does not exempt DFS.

Expansion of PASPA's clearly-stated exceptions is not warranted. After all, Congress' intent, as expressed through legislative history, was to prevent sports gambling, not to encourage new kinds to emerge. Existing case law also supports this conservative approach, allowing no more than *de minimis* expansions on formerly authorized schemes. The district court failed to consider congressional intent when it interpreted "actually was conducted" overly broadly as a mere condition rather than a literal mandate.

Respondents are not helped by the fantasy sports carve-out contained in the UIGEA. Contrary to the district court's holding, the UIGEA did not legalize all fantasy sports. Rather, it excepted only fantasy sports games that meet three conditions. These, DFS are unable to meet.

In addition, the UIGEA, though passed later, did not alter PASPA as Respondents contend. The UIGEA begins by stating, “no provision...shall be construed as altering...any Federal law.” Hence, here too, Respondents’ claims are without merit and the district court’s ruling must be overturned. PASPA does not permit Nevada to license Draft Masters and the UIGEA does not prevent PASPA from doing so.

For these reasons, this Court should reverse the decision of the Eighth Judicial District Court and hold that (1) DFS are gambling, requiring a license; and (2) licensing DFS operators defies the federal prohibition on sports gambling.

## **ARGUMENT**

### **I. Daily Fantasy Sports Are Gambling Under Nevada Law and Require Licensure by the Nevada Gaming Control Board to Operate Legally.**

For decades, Nevada has led the nation in the regulation of gambling. NRS 463.745. Promulgated in 1959, the Nevada Gaming Control Act spells out in great detail what constitutes gambling and what steps parties must take to gamble legally within Nevada’s borders. NRS 463.010; *See* NRS 463.

Daily fantasy sports, the subject of this suit, are a relatively new, but very popular, game. Emerging around 2011, they have quickly become a multi-million dollar industry<sup>1</sup>. Trippiedi, *supra*, at 206; Ehrman, *supra*, at 82.

To play, participants visit a DFS operator’s website and choose from an array of games, varying by sport, contest type, entry fee, award, and number of entrants. R. at 4. After choosing a game and paying the requisite entry fee, the participant selects a lineup of athletes who are

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<sup>1</sup> A 2012 study by the Fantasy Sports Trade Association found that the year-old DFS industry was responsible for \$492 million of the over \$3 billion fantasy sports industry spending. However, given the explosion in popularity of DFS, that data is likely outdated and the current spending much higher. Joshua Brustein, *Fantasy Sports and Gambling: Line Is Blurred*, N.Y. Times (Mar. 11, 2013) <http://www.nytimes.com/2013/03/12/sports/web-sites-blur-line-between-fantasy-sports-and-gambling.html? r=0>; Fantasy Sports Trade Association, <http://fsta.org/research/fsta-research-reports/> (last visited 2/13/2016).

about to play in actual sporting events, attempting to pick those who will perform best in that day's or weekend's games. R. at 4-5. If the participant's predictions come true, he may qualify to receive a prize with which to wager all over again. R. at 5.

Contrary to the Eighth Judicial District Court's holding, daily fantasy sports constitute gambling under Nevada law because they are sports pools, gambling games, and lotteries. Indeed, to find otherwise, as Draft Masters urges, would not only violate the plain language of the Nevada Gaming Control Act, it would fly in the face of Nevada's own gaming law public policy. NRS 463.0129.

### **A. DFS Require Licensure Because They Constitute Sports Pools.**

Under Nevada law, it is unlawful for any person to operate a sports pool without first obtaining a gaming license. NRS 463.160. Nevada Revised Statute 463.0193 defines "sports pool" as "the business of accepting wagers on sporting events or other events by any system or method of wagering." NRS 463.0193. Because Draft Masters is (1) in the business of (2) accepting wagers (3) on sporting events, it must obtain a gaming license in order to operate legally in Nevada.

#### **1. DFS Operators Are in the Business of Accepting Wagers.**

Draft Masters and other DFS operators are *in the business of* accepting wagers. They are not operating for their own recreation or pleasure. They are collecting a "rake-off" from the wagers placed by participants in order to operate their businesses and, presumably, make a profit. R. at 33-34. Draft Masters wisely does not challenge this element and, hence, it is established.

#### **2. Wagers Are Present in DFS Games.**

Although this Court supplied a working definition of "wager" that guided courts for over 35 years in *Las Vegas Hacienda v. Gibson*, the Nevada legislature has since codified a statutory



definition. *Las Vegas Hacienda v. Gibson*, 77 Nev. 25, 28, 359 P.2d 85, 86 (1961). “Wager,” as used in the Nevada Gaming Control Act, means “a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.” NRS 463.01962 A statutory definition excludes all other meanings, and courts are not at liberty to look beyond it. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

DFS participants pay a sum of money in order to play. That money is risked because they may or may not get it back. The outcome of the occurrence on which they risk their money is uncertain, as participants cannot possibly know how an athlete will perform on a certain day. Various factors such as injuries, weather, officials, other players, and psychological attitudes may impact an athlete’s performance. Ehrman, *supra*, at 97. The fees DFS participants pay are wagers because each element of Nevada’s unambiguous statutory definition is met.

The district court summarily dismissed DFS from the realm of sports pools. It concluded that no wager is present because players do not risk their money on an uncertain outcome, since “DFS are clearly based on skill, not chance.” R. at 11. But this hasty dismissal is based neither on law nor fact. The primary statutory definition at issue is “sports pool,” informed by the secondary statutory definition of “wager.” By embedding the supplied definitions, a sports pool is “the business of accepting [money risked] on sporting events...” NRS 463.01962; NRS 463.0193.

Respondents claim that DFS involve no “occurrence for which the outcome is uncertain,” but that portion of the definition of “wager” is not up for grabs. R. at 11. The legislature has already supplied it in NRS 463.0193: “sporting events.” Apparently (and not surprisingly), Nevada lawmakers consider sporting events to be occurrences for which the outcome is uncertain.

If DFS participants may exempt themselves from the laws governing sports pools due to their alleged skill in playing the game, why may any sports bettor not likewise exempt himself, claiming that skill, not chance, governs his predictions? This argument fails because the concepts of skill and chance are irrelevant to analyzing sports pools or gambling games. True, “it has long been noted that there is a strong element of skill involved in sports wagering.” R. at 26. But skilled sports wagering still requires licensure because skill is not a statutory element. Rather, the chance versus skill analysis is only relevant in determining what constitutes a lottery. R. at 25-26.

### **3. The Wagering Is on Sporting Events.**

DFS also meet the final element of sports pools. Daily fantasy *sports* participants wager on *sporting* events put on by the Leagues, such as football, baseball, basketball and hockey. While the satisfaction of this element seems self-evident and Respondents have not refuted it, the Attorney General’s Advisory Opinion addressed and easily dismissed certain commentators’ suggestions that because DFS participants do not wager on the final outcome of a particular sporting event, they are not wagering “on sporting events.” R. at 30-31. The Attorney General quickly disposes of this argument, however, not only because of its lack of basis in common sense, but also because Nevada has long recognized as gambling sporting events that depend not on the final outcome, but upon the occurrence or non-occurrence of certain events during a particular game. R. at 30-31. Therefore, because DFS operators are in the business of accepting wagers on sporting events, they are operating sports pools and must obtain a gaming license in order to operate lawfully in Nevada.

### **B. DFS Require Licensure Because They Constitute Gambling Games.**

Nevada Revised Statute 463.160 provides Draft Masters with a second very good reason to visit the Nevada Gaming Control Board today: DFS are gambling games. As with sports pools,

operators of gambling games must also procure and maintain the requisite gaming licenses in order to operate lawfully in Nevada. NRS 463.160.

Nevada Revised Statute 463.0152 defines “gambling games” as games that fall into four categories, two of which apply to DFS. Gambling games are: (1) any game played with cards, dice, equipment or any device or machine for any representative of value; (2) banking games; (3) percentage games; and (4) any other game or device approved by the Commission. NRS 463.0152.

DFS are not “any other game ... approved by the Commission.” DFS are the subject of this suit because the Commission has *not* approved them.

Neither are DFS banking games. Banking games are gambling games “in which players compete against the licensed gaming establishment rather than against one another.” NRS 463.01365. Examples of banking games are craps, roulette, and black jack. *Hughes Props., Inc. v. State*, 100 Nev. 295, 297, 680 P.2d 970, 971 (1984). DFS players are competing against one another by attempting to outperform each other in order to win part of the pool.

Hence, types two and four likely do not apply to DFS. However, DFS *are* gambling games because they are percentage games and games played with a machine for money.

**1. DFS Are Games Played With Cards, Dice, Equipment or Any Device or Machine for Money.**

DFS are gambling games played with computers (or smartphones) for money. While the statutory definition of “gambling game” does not identify computers and phones by name, the Nevada legislature used a broad phrase with which to encompass all such technology: “any mechanical, electromechanical or electronic device or machine.” NRS 463.0152.

Where a statutory definition exists, that definition controls. *E.g. United States v. Havelock*, 664 F.3d 1284, 1289 (9th Cir. 2012); *Consumer Product Safety Comm’n et al. v. GTE*

*Sylvania, Inc. et al.*, 447 U.S. 102, 108 (1980). In the absence of a statutory definition, statutory construction begins with the ordinary meaning of the language used. *Havelock*, 664 F.3d at 1289. In order to determine the ordinary meaning of a term, courts regularly rely on dictionary definitions. *Id.* at 1293.

While the Nevada Gaming Control Act contains no definition of “electronic,” it does define “electronic transfer of money” as “any transfer of money ... that is initiated through an electronic terminal, **telephone**, **computer** or magnetic tape...” NRS 463.01473.

In addition, the ordinary meaning of “electronic” also includes computers. Merriam-Webster defines “electronic” as “operating by means of a **computer**; involving a computer or a computer system.” *Electronic Definition*, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/electronic> (last visited Feb. 14, 2016). The Cambridge Dictionary says that “electronic” means “involving a system of operation that involves the control of a flow of electrons, especially in various devices including **computers**.” *Electronic Definition*, Dictionary.Cambridge.org, <http://dictionary.cambridge.org/us/dictionary/english/electronic> (last visited Feb. 14, 2016). Finally, in the Oxford Dictionary, “electronic” means “carried out or accessed by means of a **computer** or other electronic device, especially over a network.” *Electronic Definition*, OxfordDictionaries.com, [http://www.oxforddictionaries.com/us/definition/american\\_english/electronic](http://www.oxforddictionaries.com/us/definition/american_english/electronic) (last visited Feb. 14, 2016).

For some reason, and without explanation, the district court declined to define a computer as an electronic device. R. at 12. The court admitted that other Nevada statutes explicitly define a computer as an electronic device. *Id*; See NRS 205.4735; NRS 360B.410. Yet it declined to extend that definition to this context, thereby finding that DFS do not fall within the first category of gambling games. R. at 12.

Fortunately, no borrowing of statutory definitions from other Nevada titles is necessary. As mentioned above, the Nevada Gaming Control Act contains its own quasi-definition of electronic, and, alternatively, the ordinary meaning of “electronic device” includes computers, as evidenced by the above-cited dictionary definitions.

DFS players also play “for money.” Participants pay an entry fee for the ultimate goal of obtaining a return on their investment. Because participants play DFS with an electronic device for money, DFS are a gambling game, which requires licensure to operate legally in Nevada.

## **2. DFS Are Percentage Games.**

DFS are also gambling games because they are percentage games. In 1984, this Court defined percentage games as games where “patrons wager against each other and the house takes a percentage of each wager as a ‘rake-off.’” *Hughes Props., Inc.*, 100 Nev. at 297, 680 P.2d at 971. There could be no more fitting description of how DFS work. Players wager against each other, hoping to obtain a higher score than their fellow competitors. DFS operators then pool the wagers and dole them out to winning gamblers after first taking a portion for themselves as a rake-off – their primary source of revenue. R. at 33-34.

Respondents rely upon their previous assertion that no wager is present to escape the clutches of percentage games. However, since their understanding of what constitutes a wager was fallacious, as described above, that defense is inoperative and they are yoked with yet another reason to head to Carson City as soon as practicable.

## **C. DFS Require Licensure Because They Constitute a Lottery.**

A third reason why DFS operators must obtain licensure to operate legally is because DFS are lotteries. Nevada Revised Statute 462 defines “lottery” as a scheme for the disposal of

property by chance among persons who have paid a consideration for the chance of obtaining that property or a portion of it. NRS 462.105.

This definition codifies the common law elements of gambling: (1) chance; (2) consideration; and (3) prize. R. at 9. The district court found that DFS unquestionably involve consideration and a prize. *Id.* As discussed above, participants pay money to play (consideration) in hopes of winning part of the pool (a prize).

Chance is the only element remaining. And yet, because some chance is present, the plain language of the statute may be satisfied. Even if the court were to apply the dominant factor test, DFS would still be a lottery. More accurately, however, the dominant factor test raises a fact question that should have been resolved by a fact finder. Therefore, summary judgment was improper.

#### **1. Nevada’s Lottery Statute Requires Chance and Chance Is Present in DFS.**

Nevada Revised Statute 462 calls for the disposal of property “by chance.” NRS 462.105. The statute does not mention degrees of chance nor any other qualifier. Therefore, this final element of a lottery may be established because chance is present in DFS. DFS players have no control, for example, over the weather, an athlete’s performance, injuries, or other occurrences that may be happening thousands of miles away that will affect the distribution of their property. Hence, DFS are a lottery, since chance, consideration, and a prize are all present.

Nevada would not be alone if it took this approach. Arkansas, Iowa and Tennessee, for example, hold that if the game involves any chance, it will be outlawed. Ehrman, *supra*, at 98.

Other states have arrived at the same conclusion by different means, and at least 11 have already deemed daily fantasy sports illegal.<sup>2</sup>

## 2. Chance Is Also the Dominant Factor in DFS.

Should the Court choose to instead employ the “dominant factor test,” DFS will still come out as a lottery because the winning outcomes are determined predominately by chance rather than skill. This Court stated in *dicta* in 1961 that “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.” *Gibson*, 77 Nev. at 30, 359 P.2d at 87. The dominant factor test is the majority test. Ehrman, *supra*, at 96.

Some games are easy to categorize under the dominant factor test. Bingo is a game of chance and chess is a game of skill. Others, however, are not so easy. States applying the dominant factor test have come out on both sides of the fence where games in the gray area are concerned – games like poker that require a mixture of chance and skill. (Of note, Nevada has statutorily deemed poker to be gambling as a game of chance, not a game of skill. NRS 463.0152.)

While DFS may require a degree of skill, placing it in that gray area, they are a lottery because the outcome depends predominately on chance, the skill involved belonging to the athlete, not the DFS gambler. DFS are most similar to sports betting, which also admittedly involves skill, but skill is not the dominant factor.

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<sup>2</sup> The Attorneys General of Hawaii, Illinois, Nevada, New York, and Texas have found that DFS are illegal gambling under state law. Tajha Chappellet-Lanier, *A Blow to Daily Fantasy Sports in Hawaii*, The Atlantic (Jan. 28, 2016), <http://www.theatlantic.com/politics/archive/2016/01/hawaii-might-bid-daily-fantasy-sports-aloha/433809/>. The Michigan Gaming Control Board deems DFS to be illegal. Chris Grove, *Here's the Truth About the Legality of Daily Fantasy Sports*, Legal Sports Report (Sept. 17, 2015), <http://www.legalsportsreport.com/3967/are-daily-fantasy-sports-legal/>. In addition, DFS operators avoid five states because of unfavorable gambling laws: Arizona, Iowa, Louisiana, Montana and Washington. *Id.*

**a. Vicarious Skill Does Not Count.**

DFS proponents claim that players must spend hours and hours studying statistics and data in order to make educated decisions about their line-ups, essentially acting as pseudo general managers of their imaginary teams. Ehrman, *supra*, at 102-03. The salary-cap feature (having a certain amount of “money” available to “spend” on players’ salaries) adds the element of economic analysis to the mix, they claim, increasing the skill quotient. *Id.* at 103.

However, DFS proponents are confused about whose skill is at issue. In a game of chess, the chess player sits at the board and does the actual playing, and it is her skill that will determine if she wins or loses. Similarly, the bingo player sits at his bingo sheet and chance has its way on the outcome. The DFS player is distinguishable from chess, bingo, or poker players because the DFS player is not actually playing the game. Admittedly, a great deal of skill exists out on the professional baseball or football field. But that skill must not be confused with the skill of the one who sits behind his computer and pays consideration to earn a prize if the winds of chance blow in his favor.

**b. DFS Are Similar to Sports Betting Where Chance Is the Dominant Factor.**

Unlike the typical chance versus skill game, DFS players are betting on the skill of another. This is most akin to what happens in sports betting. While an element of skill is undoubtedly involved, most courts consider chance to be the dominant factor in sports betting cases. Trippiedi, *supra*, at 216. “Because no one knows what will happen in a particular sporting event, skill cannot dominate the outcome of a sports wager.” *Id.*

More specifically, DFS are similar to parlay bets, which are contingent upon combinations of games. *People v. Fanduel, Inc.*, No. 453056-15, 2015 N.Y. Misc. LEXIS 4521, at \*13 (N.Y. Sup. Ct. Dec. 11, 2015). In 2009, the Delaware Supreme Court concluded that



chance is the dominant factor in parlay betting. *Office of the Comm’r of Baseball v. Markell*, 579 F.3d 293, 296 (3rd Cir. 2009) (citing *In re Request of Governor for Advisory Opinion*, 12 A.3d 1104, 1114 (Del. 2009)).

Although questions regarding the legality of DFS are just beginning to emerge, some states have already concluded that chance is also the dominant factor in DFS. Specifically, the New York Attorney General (NYAG) recently sought and obtained an injunction against two of the largest DFS operators in the nation, Fanduel and Draftkings. *Fanduel, Inc.*, 2015 N.Y. Misc. LEXIS 4521 at \*1. After conducting an investigation, the NYAG concluded that DFS entry fees are really “wagers on a contest of chance, with the results depending on numerous elements of chance to a material degree.” *Id.* at \*3. While DFS may involve some skill, operators mislead citizens with the lure of easy money, given that only the top one percent, typically professional gamblers, profit. *Id.* at \*4.

Courts have already determined that chance is the dominant factor in sports betting, notwithstanding the skill involved by gamblers. Because DFS are a type of sports betting, this Court should similarly conclude that chance is the dominant factor in DFS.

### **3. Alternatively, the Dominant Factor Test Is a Matter of Fact and Summary Judgment Was Improper.**

If the Court does not feel comfortable ruling as a matter of law that chance is the dominant factor in DFS, it will be in good company. In *Tooley v. United States*, the U.S. District Court for the District of Nevada was tasked with determining whether a coin operated machine was a game of skill or chance. *Tooley v. United States*, 134 F. Supp. 162 (D. Nev. 1955). The court determined as a finding of fact that the chance element preponderated over the element of skill, and then drew its conclusions of law based on that previously established fact. *Id.* at 163, 167.

According to *Black's Law Dictionary*, a question of fact is an issue that has not been predetermined and authoritatively answered by the law. *Black's Law Dictionary* 1281 (8th ed. 2004). A question of law, on the other hand, is a question that the law itself has authoritatively answered, so that the court may not answer it as a matter of discretion. *Id.* The question of whether chance or skill is the dominant element in DFS has not been authoritatively answered by the law. It is a “disputed issue to be resolved by the jury in a jury trial or by the judge in a bench trial.” *Id.* Respondents, via the Nevada Attorney General, concur that the level of skill involved in DFS is a question of fact, which a finder of fact must examine. R. at 34.

The district court found it clear under its conclusions of law that daily fantasy sports are determined predominately by skill. R. at 10. Based upon that conclusion, it held that DFS are not lotteries because the chance element is lacking. *Id.* However, the district court was not at liberty to draw these conclusions.

As discussed above, the issue of whether chance or skill predominates is a question of fact, not law. Therefore, the court should have submitted the question to a fact finder. This it did not do, however, since it improperly and prematurely granted summary judgment. R. at 6.

Summary judgment is only appropriate when there are no genuine issues of material fact. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). Factual *material* disputes will preclude summary judgment, while disputes over immaterial facts are irrelevant. *Id.* Because chance is one of three elements necessary to constitute a lottery, its presence or absence is a material fact. In the presence of a genuine issue of material fact, a court may not grant summary judgment. *Id.* If the Court chooses to apply the dominant factor test, it should remand the instant case for further proceedings and allow a fact finder to decide whether chance or skill predominates in DFS games.

DFS are a lottery because they involve consideration, a prize, and chance. The statute does not require chance to be the dominant factor and, thus, that element is easily satisfied under the plain language. However, should the Court adopt the dominant factor test, the dominant factor in DFS is chance, both because the DFS players are not actually competing and because DFS are most similar to sports betting, where courts have already concluded that the dominant factor is chance. Notwithstanding the above, the question of chance versus skill is really outside the scope of the Court's purview since it is a matter of fact, not of law. As such, the district court erred by granting summary judgment in the presence of a genuine issue of material fact.

**D. Nevada's Public Policy Precludes a Decision Not to Regulate DFS.**

Nevada is known around the globe for the legal gambling it offers. Indeed, the Nevada Gaming Control Act begins by emphasizing that the gaming industry is vitally important to the economy of the state and the general welfare of its inhabitants. NRS 463.0129. In order to engender public confidence and trust, Nevada's public policy is to strictly regulate the gaming industry and require that all gaming establishments submit to licensure and control to protect Nevada and its inhabitants' interests. *Id.*

In light of these declarations, this Court should construe the above-analyzed statutes in such a way as to give effect to the Nevada legislature's wishes: to strictly regulate the gaming industry; to require that all gaming establishments be licensed and controlled; and to engender public confidence and trust.

DFS constitute gambling under not one, but three separate provisions of Nevada law: as sports pools, gambling games, and lotteries. To hold that Draft Masters may operate without licensure flies in the face, not only of these statutes, but of Nevada's above-cited public policy to strictly regulate the gaming industry in order to maintain public trust and confidence. This Court

may restore that confidence by reversing the district court's decision and holding that DFS are gambling in the State of Nevada.

## **II. Nevada Cannot License DFS Without Violating PASPA.**

A second problem exists for Draft Masters and its fellow DFS operators: Nevada lacks the power to license them. While Nevada would undoubtedly love to collect the half a million dollar application fee for online gambling operators, not to mention the other required taxes and fees, federal law prohibits it from doing so. NRS 463.765; 28 U.S.C. § 3702 (2012).

The Constitution and federal laws are the supreme law of the United States. U.S. Const. art. VI, § 2. While the Tenth Amendment gave wide latitude to the states to regulate non-Constitutional matters, when federal laws exist, the states may not defy them. U.S. Const. amend. X; *See generally McCulloch v. Maryland*, 17 U.S. 316 (1819); *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1852); *Markell*, 579 F.3d 293.

Gambling is one such non-Constitutional matter that states generally regulate. However, almost 25 years ago, Congress enacted PASPA under its authority to regulate interstate commerce. 28 U.S.C. § 3704; *NCAA v. Christie*, 926 F. Supp. 2d 551, 554 (D.N.J. 2013), *aff'd*, 730 F.3d 208 (3d Cir. 2013). PASPA represents Congress' effort to prevent the spread of state-sponsored sports gambling and to protect the integrity of sports in America. *Christie* 926 F. Supp. 2d at 555.

While the Senate Judiciary Committee responsible for PASPA firmly believed that all sports gambling is harmful, it did not wish to enact the law retroactively. S. Rep. No. 102-248, at 8 (1992). Therefore, it authored four exceptions aimed at allowing a handful of states, including Nevada, to continue offering legal sports betting. 28 U.S.C. § 3704. Nevada alleges (and the district court found) that it may license DFS operators because of its tailor-made PASPA

exception: 28 U.S.C. § 3704(a)(2). R. at 13-14; S. Rep. No. 102-248, at 10. However, Nevada is mistaken.

Given (1) PASPA’s plain language; (2) interpretations of PASPA; and (3) subsequent federal legislation regarding sports gambling, daily fantasy sports do not come within a PASPA exception and Nevada may not license DFS operators without violating federal law.

**A. PASPA’s Plain Language Does Not Exempt DFS.**

The language of the statute itself is the starting point of statutory interpretation. *GTE Sylvania, Inc. et al.*, 447 U.S. at 108. PASPA declares it unlawful for:

a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law... a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly... on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702.

As noted above, PASPA also includes several grandfathering clauses. However, the clauses’ plain language does not except all forms of Nevada sports betting, as Respondents contend. Also, Nevada did not actually conduct DFS over the necessary time period; hence, PASPA prohibits Nevada from licensing DFS operators.

**1. Nevada’s Grandfathering Clause Does Not Apply to All Forms of Sports Betting.**

Congress limited the applicability of PASPA through the grandfathering clauses found in § 3704. As mentioned above, one of these specifically benefitted Nevada.<sup>3</sup> According to § 3704(a)(2):

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<sup>3</sup> According to Senate Report 102-248, § 3704(a)(1) applies to Oregon, Delaware, and Montana; § 3704(a)(2) applies to Nevada; and § 3704(a)(3) applies to New Jersey. S. Rep. 102-248, at 10; *NCAA v. Governor of N.J.*, 799 F.3d 259, 262 (3d Cir. 2015), *vacated and reh’g granted*, No. 14-4546, 2015 BL 337640 (3d Cir. Oct 14, 2015) (en banc).

[PASPA] shall not apply to a lottery, sweepstakes, or other betting, gambling or wagering scheme in operation in a State or other governmental entity where both (A) such scheme was authorized by a statute as in effect on October 2, 1991; and (B) a scheme described in section 3702... actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity.

28 U.S.C. § 3704(a)(2).

As this plain language indicates, PASPA did not entirely exempt Nevada. Rather, if a lottery, sweepstakes, or other betting, gambling, or wagering scheme was both (1) authorized by statute as in effect on October 2, 1991; and (2) actually conducted between September 1, 1989 and October 2, 1991, then Nevada may continue to license it. *Id.* In other words, two separate requirements exist: that DFS were authorized *and* conducted. *Id.*

Respondents urge the Court to interpret § 3704(a)(2) broadly as if it does not limit Nevada to licensing “either the sports or types of games previously offered.” R. at 13-14. Rather, because Nevada authorized and conducted *sports betting* during the relevant time period, they reason, Nevada should be allowed to license even previously non-existing gambling, such as DFS, because they are a type of sports betting. However, the plain language of § 3704(a)(2) does not permit such a broad interpretation. Congress was capable of authoring PASPA in such a way that it exempted all forms of sports betting in Nevada. This Congress declined to do.

**2. Nevada Did Not Authorize and Conduct DFS During the Relevant Time Period; Hence, the Grandfathering Clause Does Not Apply.**

Nevada began authorizing sports betting in 1949. *NCAA v. Governor of N.J.*, 730 F.3d 208, 215 (3d Cir. 2013). Specifically, the legislature passed a law allowing gambling on horse racing and professional sports. *Legal Gambling in Nevada*, <http://www.gamblingonline.com/laws/nevada/> (last visited Feb. 14, 2016). Small sports-books began to crop up, replaced later by

major casino sports-books beginning in 1975. *Id.*

Since DFS are sports pools requiring a license under Nevada law, they might fall within the general authorization of sports betting allowed in Nevada beginning in 1949. However, DFS do not comport with the second requirement of § 3704(a)(2) (“actually was conducted”), and hence, Nevada may not license DFS operators.

The plain language of § 3704 states that the PASPA prohibition on sports gambling does not apply to a gambling scheme if it “actually was conducted” at any time from September 1, 1989 to October 2, 1991. 28 U.S.C. § 3704(a)(2)(B). Fantasy sports did not take off until the late 1990s along with the Internet boom. Trippiedi, *supra*, at 205. DFS websites, specifically, did not emerge until 2011. *Id.* at 206. Consequently, there is no doubt that fantasy sports, and especially daily fantasy sports, were not actually conducted between 1989 and 1991.

Draft Masters alleges that there is room for lenience here because fantasy sports are essentially an accumulation of proposition or prop bets, which *were* actually conducted in Nevada between 1989 and 1991. R. at 18. Prop bets are wagers on specific outcomes or statistics of a given match – i.e. three touchdowns in a certain NFL game or over 20 points in a particular NBA game. R. at 18, 31. Fantasy sports, however, do not require athletes to meet such thresholds in order for an owner to profit. Rather, owners must simply earn more points based on their players’ stats than their fellow contestants. Ehrman, *supra*, at 85. Thus, DFS are distinguishable from prop bets. DFS, or a close iteration, were not actually conducted during the requisite time period and so the grandfathering clause does not apply to them.

As stated above, if Congress meant to provide an exception for all forms of sports betting in Nevada, the “actually was conducted” requirement would be superfluous. Congress could have simply left the rule at “was authorized.” Because Congress did not do so, it evidently

recognized that different types of sports betting schemes exist – some legal and some illegal under federal law.

## **B. Interpretations of PASPA Do Not Exempt DFS.**

When the language of a statute is unambiguous, courts may not look beyond it when determining the statute’s meaning. *Erwin v. State*, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995). While the Leagues assert that no ambiguity exists in PASPA as it relates to Nevada’s ability to license DFS operators, this Court may deem otherwise.

When resolving statutory ambiguities, Nevada courts look to legislative history for guidance in determining legislative intent. *Washoe Med. Ctr. v. Second Judicial Dist. Ct.*, 122 Nev. 1298, 1302, 148 P.3d 790, 793 (2006). Courts also interpret statutes in light of the policy and spirit of the law and resolve any doubts in favor of what is reasonable. *Hunt v. Ignacio*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995). Based on the legislature’s desire to limit gambling operations, as well as the reasonable constructions of PASPA exceptions found in existing case law, PASPA does not exempt daily fantasy sports.

### **1. PASPA’s Legislative History Calls for Narrow Interpretation.**

Congress passed PASPA in 1992 in response to rising concerns over state sponsored gambling on sports. Erick S. Lee, *Play Ball: Substituting Current Federal Non-Regulation of Fantasy Sports Leagues with Limited Supervision of Hyper-Competitive Leagues*, 29 Loy. L.A. Ent. L. Rev. 53, 78 (2008). Much of PASPA’s legislative history from both the House and Senate discusses the need to uphold the integrity of sports, reduce the negative impact of gambling on youth, and prevent any expansion of sports gambling or lotteries. *See*, 102nd Cong., 138 Cong. Rec. S17434-36 (1992); 102nd Cong., 138 Cong. Rec. H11756-758 (1992); S. Rep.



No. 102-248 (1992). One senator<sup>4</sup> said that if sports betting spreads, “more and more fans will question every coaching decision and official’s call. Sports would become the gamblers’ game and not the fans’ game.” 102nd Cong., 138 Cong. Rec. S17434-36.

At the same time, Congress did not want to threaten Nevada’s economy, which largely depends on legalized private gambling, including sports gambling. S. Rep. No. 102-248, at 8. This desire led to the exceptions in § 3704.

Given Congress’ goal in adopting PASPA – to stop the expansion and spread of sports gambling – the interpretations that make the most sense are those that limit, rather than enlarge, the application of the statutory exceptions. Indeed, legislative commentary explicitly supports this assertion: “the narrowness of [the exceptions] reflects the committee’s policy judgment that sports gambling should be strictly contained.” *Id.* at 10.

## **2. PASPA Does Not Exempt DFS Under Existing Case Law.**

To date, the highest court to hear any cases involving alleged PASPA violations is the Third Circuit<sup>5</sup>. In these cases, involving Delaware and New Jersey, the court evaluated the constitutionality of PASPA and the scope of its exceptions.

In *Markell*, Delaware sought to institute a new form of sports betting that differed from the multi-game parlays it conducted during the PASPA exception period. *Markell*, 579 F.3d at 295. The Third Circuit analyzed PASPA’s statutory language and found it unambiguous. *Id.* at 302. The court went on to explain that PASPA does not require Delaware’s sports lottery to be identical in every respect to what the State conducted previously. *Id.* at 303. Certain aspects may

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<sup>4</sup> Senator Bill Bradley of New Jersey, a former professional basketball player and the reason PASPA was also known as “the Bradley Act.”

<sup>5</sup> *Office of the Comm’r of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009); *NCAA v. Governor of N.J.*, 799 F.3d 259, (3d Cir. 2015), *vacated and reh’g granted*, No. 14-4546, 2015 BL 337640 (3d Cir. Oct 14, 2015) (en banc). The Third Circuit is currently rehearing en banc the latter case, in which New Jersey is attempting to circumvent PASPA.

differ as long as they “do not effectuate a substantive change from the scheme that was conducted during the exception period.” *Id.* The court recognized that it would be absurd to limit Delaware to selling tickets at identical venues or wagering on identical sports teams. *Id.* Hence, as long as alterations to gambling schemes are *de minimis*, the Third Circuit held, they do not violate PASPA’s language or its central purposes (to limit the spread of sports gambling and maintain sports integrity). *Id.* at 304.

The only sports betting schemes conducted in Delaware during the exception period were multi-game parlays involving NFL teams. *Id.* The court found that Delaware would violate PASPA with any attempts to allow single-game betting or wagering on athletic contests beyond the NFL because they would substantially change the previously conducted schemes. *Id.*

Similarly, during the relevant time period in Nevada, prop betting was the closest sports betting scheme to DFS that Nevada conducted. *R.* at 18, 30-31. DFS are substantially different from prop betting, as described above, and the alterations involved would violate both PASPA’s plain language and its central purposes. Thus, even under the Third Circuit’s *de minimis* alterations rule, DFS impermissibly expand any previously authorized and conducted Nevada gambling scheme, and PASPA does not except them.

### **C. The UIGEA Does Not Exempt DFS.**

After Congress passed PASPA in 1992, it passed the Uniform Internet Gambling Enforcement Act in 2006. The UIGEA states that “no person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling [any financial instrument].” 31 U.S.C. § 5363 (2012). The Act contains a number of carve-outs – from a contract for insurance to the purchase or sale of securities. 31 U.S.C. § 5362(1)(E). One carve-out mentions fantasy or simulation sports games specifically. 31 U.S.C. § 5362(1)(E)(ix). However, despite Respondents’ best efforts to rely upon

this carve-out as their safe harbor, the UIGEA does not sanction fantasy sports, nor does its language modify PASPA.

**1. The UIGEA Did Not Automatically Legalize All Fantasy Sports.**

In defining the term “bet or wager,” the UIGEA includes a carve-out for “fantasy or simulation sports games” that meet three criteria:

- (I) [The] value of the prizes is not determined by the number of participants in the game or the amount of fees paid by the participants;
- (II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominately by accumulated statistical results of the performance of individuals...in multiple real-world sporting events; and
- (III) No winning outcome is based on the score...of any single real world-team or any combination of such teams or solely on any single performance of an individual athlete in any single real world sporting or other event.

31 U.S.C. 5362(1)(E)(ix)(I-III).

Contrary to the District Court’s holding, this carve-out is not a blanket exception for all fantasy sports. R. at 7. Excluded games must first meet the above three conditions. While the carve-out may place the fantasy sports industry in a somewhat safer legal position than other types of online contests, courts must review each fantasy game separately. Ehrman, *supra*, at 94.

DFS do not meet all three criteria, and thus the carve-out does not apply to them. For example, the second condition is that “all winning outcomes reflect the relative knowledge and skill of the participants.” As discussed above, while some skill is arguably required, chance, not skill, determines the winning outcomes.

In addition, seasonal fantasy sports were the only fantasy sports in existence when Congress passed the UIGEA in 2006. Given that seasonal fantasy sports take place over an entire season, participants must manage a wider range of factors than DFS players. 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, 38 (2012). Congress did not envision the limitless gambling opportunities that DFS afford today. It envisioned players participating in one game over an entire season, the outcome of which would be determined by the relative knowledge and skill of the players.

Therefore, notwithstanding the carve-out, the UIGEA exception does not make all fantasy sports “legal.” It lists three conditions that fantasy sports operators must meet in order for the UIGEA not to apply to them. Furthermore, nothing in the UIGEA purports to legalize fantasy sports. It merely guarantees that the government will not use the UIGEA to prosecute fantasy sports operators that meet the three criteria. Ehrman, *supra* at 95.

## **2. The UIGEA Does Not Alter PASPA.**

For yet another reason, Respondents’ attempts to rely upon the UIGEA as a safe harbor are ill-founded. The UIGEA specifically states that “no provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law.” 31 U.S.C. § 5361(b). So while Draft Masters argues that the UIGEA should control over PASPA because it was passed later and “the chronology of the statutes is indicative of Congress’ intent,” this reasoning is unsound. R. at 19. The explicit language of the UIGEA denotes that the UIGEA should not be construed to alter any Federal law. Thus, even if Draft Masters were correct that the UIGEA legalized fantasy sports, the UIGEA does not alter PASPA, which *does* prohibit Nevada from legalizing DFS. Therefore, DFS is still illegal under federal law.

Daily fantasy sports are a multi-million dollar industry. Edelman, *supra*, at 32. They differ significantly from the fantasy or simulation sports games of 2006 that the UIGEA intended to carve out. *Id.* at 38. Because of their short duration, DFS are more prone to “feed the desires of compulsive and addictive gamblers” than the fantasy sports of ten years ago. *Id.* While public policy is not on DFS lovers’ side, if Congress wants to legalize daily fantasy sports under either

PASPA or the UIGEA, it must amend (or repeal) these federal laws. Until that time, PASPA is the leading federal law impacting the legality of daily fantasy sports, and Nevada may not license DFS operators without violating it.

### **CONCLUSION**

FBI investigations; millions of dollars on the line; negative case law, press, and legislation – the legality of daily fantasy sports is quickly becoming about as tenuous as Johnny Manziel’s career. As unfortunate as that may be for Draft Masters, this Court’s solemn duty is to uphold the law, under which DFS are plainly gambling and PASPA prohibits Nevada from licensing them. For the foregoing reasons, Petitioners respectfully pray that this Court reverse the Eighth Judicial District Court on both issues and grant summary judgment in favor of the Leagues.

## APPENDIX A

### Selected Provisions from NRS 205 – Crimes Against Property.

#### NRS 205.4735

##### “Computer” defined.

“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.

### Selected Provisions from NRS 360B – Sales and Use Tax Administration.

#### NRS 360B.410

##### “Computer” construed.

“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.

### Selected Provisions from NRS 462 – Lotteries.

#### NRS 462.105

##### “Lottery” defined.

- (1) Except as otherwise provided in subsection 2, “lottery” means any scheme for the disposal or distribution of property, by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining that property, or a portion of it, or for any share or interest in that property upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle or gift enterprise, or by whatever name it may be known.
- (2) “Lottery” does not include a promotional scheme conducted by a licensed gaming establishment in direct association with a licensed gaming activity, contest or tournament.
- (3) For the purpose of this section, a person has not “paid or promised to pay any valuable consideration” by virtue of having:
  - (a) Engaged in or promised to engage in a transaction in which the person receives fair value for the payment;
  - (b) Accepted or promised to accept any products or services on a trial basis; or
  - (c) Been or promised to have been present at a particular time and place, as the sole basis for having received a chance to obtain property pursuant to an occasional and ancillary promotion conducted by an organization whose primary purpose is not the operation of such a promotion.

## **Selected Provisions from NRS 463 – Licensing and Control of Gaming.**

### **NRS 463.010**

#### **Short title.**

This chapter may be known and cited as the Nevada Gaming Control Act.

### **NRS 463.0129**

#### **Public policy of state concerning gaming; license or approval revocable privilege.**

- (1) The Legislature hereby finds, and declares to be the public policy of this state, that:
  - (a) The gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants.
  - (b) The continued growth and success of gaming is dependent upon public confidence and trust that licensed gaming and the manufacture, sale and distribution of gaming devices and associated equipment are conducted honestly and competitively, that establishments which hold restricted and nonrestricted licenses where gaming is conducted and where gambling devices are operated do not unduly impact the quality of life enjoyed by residents of the surrounding neighborhoods, that the rights of the creditors of licensees are protected and that gaming is free from criminal and corruptive elements.
  - (c) Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments, the manufacture, sale or distribution of gaming devices and associated equipment and the operation of inter-casino linked systems.
  - (d) All establishments where gaming is conducted and where gaming devices are operated, and manufacturers, sellers and distributors of certain gaming devices and equipment, and operators of inter-casino linked systems must therefore be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State, to foster the stability and success of gaming and to preserve the competitive economy and policies of free competition of the State of Nevada.
  - (e) To ensure that gaming is conducted honestly, competitively and free of criminal and corruptive elements, all gaming establishments in this state must remain open to the general public and the access of the general public to gaming activities must not be restricted in any manner except as provided by the Legislature.
- (2) No applicant for a license or other affirmative commission approval has any right to a license or the granting of the approval sought. Any license issued or other commission approval granted pursuant to the provisions of this chapter or chapter 464 of NRS is a revocable privilege, and no holder acquires any vested right therein or thereunder.
- (3) This section does not:
  - (a) Abrogate or abridge any common-law right of a gaming establishment to exclude any person from gaming activities or eject any person from the premises of the establishment for any reason; or
  - (b) Prohibit a licensee from establishing minimum wagers for any gambling game or slot machine.

**NRS 463.01365**

**“Banking game” defined.**

“Banking game” means any gambling game in which players compete against the licensed gaming establishment rather than against one another.

**NRS 463.01473**

**“Electronic transfer of money” defined.**

“Electronic transfer of money” means any transfer of money, other than a transaction initiated by a check, draft or other similar instrument, that is initiated through an electronic terminal, telephone, computer or magnetic tape for the purpose of ordering, instructing or authorizing a financial institution or person holding an account on behalf of another to debit or credit an account.

**NRS 463.0152**

**“Game” and “gambling game” defined.**

“Game” or “gambling game” means 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, including, without limiting the generality of the foregoing, faro, monte, roulette, keno, bingo, fan-tan, twenty-one, blackjack, seven-and-a-half, big injun, klondike, craps, poker, chuck-a-luck, Chinese chuck-a-luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, panguingui, slot machine, any banking or percentage game or any other game or device approved by the Commission, but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player, or games operated by charitable or educational organizations which are approved by the Board pursuant to the provisions of NRS 463.409.

**NRS 463.0193**

**“Sports pool” defined.**

“Sports pool” means the business of accepting wagers on sporting events or other events by any system or method of wagering.

**NRS 463.01962**

**“Wager” defined.**

“Wager” means a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.

**NRS 463.160**

**Licenses required; unlawful to permit certain gaming activities to be conducted without license; exceptions; separate license required for each location where operation of race book or sports pool conducted.**

(1) Except as otherwise provided in subsection 4 and NRS 463.172, it is unlawful for any person, either as owner, lessee or employee, whether for hire or not, either solely or in conjunction with others:

- (a) To deal, operate, carry on, conduct, maintain or expose for play in the State of Nevada any gambling game, gaming device, inter-casino linked system, mobile gaming system, slot machine, race book or sports pool;



- (b) To provide or maintain any information service;
  - (c) To operate a gaming salon;
  - (d) To receive, directly or indirectly, any compensation or reward or any percentage or share of the money or property played, for keeping, running or carrying on any gambling game, slot machine, gaming device, mobile gaming system, race book or sports pool;
  - (e) To operate as a cash access and wagering instrument service provider; or
  - (f) To operate, carry on, conduct, maintain or expose for play in or from the State of Nevada any interactive gaming system, without having first procured, and thereafter maintaining in effect, all federal, state, county and municipal gaming licenses as required by statute, regulation or ordinance or by the governing board of any unincorporated town.
- (2) The licensure of an operator of an inter-casino linked system is not required if:
- (a) A gaming licensee is operating an inter-casino linked system on the premises of an affiliated licensee; or
  - (b) An operator of a slot machine route is operating an inter-casino linked system consisting of slot machines only.
- (3) Except as otherwise provided in subsection 4, it is unlawful for any person knowingly to permit any gambling game, slot machine, gaming device, inter-casino linked system, mobile gaming system, race book or sports pool to be conducted, operated, dealt or carried on in any house or building or other premises owned by the person, in whole or in part, by a person who is not licensed pursuant to this chapter, or that person's employee.
- (4) The Commission may, by regulation, authorize a person to own or lease gaming devices for the limited purpose of display or use in the person's private residence without procuring a state gaming license.
- (5) For the purposes of this section, the operation of a race book or sports pool includes making the premises available for any of the following purposes:
- (a) Allowing patrons to establish an account for wagering with the race book or sports pool;
  - (b) Accepting wagers from patrons;
  - (c) Allowing patrons to place wagers;
  - (d) Paying winning wagers to patrons; or
  - (e) Allowing patrons to withdraw cash from an account for wagering or to be issued a ticket, receipt, representation of value or other credit representing a withdrawal from an account for wagering that can be redeemed for cash, whether by a transaction in person at an establishment or through mechanical means, such as a kiosk or similar device, regardless of whether that device would otherwise be considered associated equipment. A separate license must be obtained for each location at which such an operation is conducted.
- (6) As used in this section, "affiliated licensee" has the meaning ascribed to it in NRS 463.430.

## **NRS 463.745**

### **Legislative findings and declarations.**

The Legislature hereby finds and declares that:

- (1) The State of Nevada leads the nation in gaming regulation and enforcement, such that the State of Nevada is uniquely positioned to develop an effective and comprehensive regulatory structure related to interactive gaming.
- (2) A comprehensive regulatory structure, coupled with strict licensing standards, will ensure the protection of consumers, including minors and vulnerable persons, prevent fraud, guard against underage and problem gambling, avoid unauthorized use by persons located in jurisdictions that do not authorize interactive gaming and aid in law enforcement efforts.
- (3) To provide for licensed and regulated interactive gaming, the State of Nevada must develop the necessary structure for licensure, regulation and enforcement.

## **NRS 463.765**

### **Initial license fee to operate interactive gaming; renewal fee; regulations relating to increasing and decreasing fees.**

- (1) Unless a different fee is established pursuant to this section:
  - (a) Before issuing an initial license for an establishment to operate interactive gaming, the Commission shall charge and collect from the establishment a license fee of \$500,000.
  - (b) Each initial license for an establishment to operate interactive gaming must be issued for a 2-year period beginning on January 1 of the first year and ending on December 31 of the second year.
  - (c) Notwithstanding the provisions of paragraphs (a) and (b) to the contrary, a license for an establishment to operate interactive gaming may be issued after January 1 of a calendar year for a period beginning on the date of issuance of the license and ending on the second December 31 following the date of issuance of the license. Before issuing an initial license pursuant to this subsection, the Commission shall charge and collect from the establishment a license fee of \$500,000 prorated by 1/24 for each full month between January 1 of the calendar year and the date of issuance of the license.
  - (d) Before renewing a license issued pursuant to this section, but in no case later than the second December 31 after the license was issued or previously renewed, the Commission shall charge and collect a renewal fee of \$250,000 for the renewal of the license for the immediately following 1-year period.
- (2) The Commission may, by regulation, increase the license fee pursuant to this section to not more than \$1,000,000 and the renewal fee to not more than \$500,000 if the Commission determines one or more of the following:
  - (a) A higher fee is necessary to ensure licensees have the financial capacity to operate interactive gaming;
  - (b) Regulatory costs to carry out the duties of the Commission and the Board, outside of investigative costs, require additional personnel or other regulatory expenditures;

- (c) A higher fee is necessary because of costs incurred or other conditions associated with entering into an interactive gaming agreement with one or more other states; or
  - (d) Federal legislation requires a higher fee or imposes requirements necessitating the higher fee or making it advisable.
- (3) The Commission may, by regulation, reduce the license fee pursuant to this section to not less than \$150,000 and the renewal fee to not less than \$75,000 in the manner provided in this subsection. Any regulation adopted pursuant to this subsection must be adopted in accordance with the provisions of chapter 233B of NRS, and the Commission must not reduce the fees unless it determines two or more of the following:
- (a) The fee is not competitive with fees charged in other jurisdictions;
  - (b) The low number of applicants demonstrates that the fee is too high;
  - (c) A lower fee would generate greater competition in the market;
  - (d) A lower fee is necessary because of conditions associated with entering into an interactive gaming agreement with one or more other states; or
  - (e) Federal legislation requires a lower fee or makes a lower fee advisable.
- (4) Any increase or decrease in fees established by the Commission pursuant to this section applies to the issuance or renewal of a license on or after the effective date of the increase or decrease.

## APPENDIX B

### The Professional and Amateur Sports Protection Act.

#### 28 U.S.C. § 3701 – Definitions.

For purposes of this chapter—

- (1) the term “amateur sports organization” means—
  - (A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate, or
  - (B) a league or association of persons or governmental entities described in subparagraph (A),
- (2) the term “governmental entity” means a State, a political subdivision of a State, or an entity or organization, including an entity or organization described in section 4(5) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(5)), that has governmental authority within the territorial boundaries of the United States, including on lands described in section 4(4) of such Act (25 U.S.C. 2703(4)),
- (3) the term “professional sports organization” means—
  - (A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or
  - (B) a league or association of persons or governmental entities described in subparagraph (A),
- (4) the term “person” has the meaning given such term in section 1 of title 1, and
- (5) the term “State” means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States.

#### 28 U.S.C. § 3702 – Unlawful Sports Gambling.

It shall be unlawful for—

- (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
- (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

#### 28 U.S.C. § 3703 – Injunctions.

A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.

**28 U.S.C. § 3704 – Applicability.**

(a) Section 3702 shall not apply to—

(1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;

(2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both—

(A) such scheme was authorized by a statute as in effect on October 2, 1991; and

(B) a scheme described in section 3702 (other than one based on parimutuel animal racing or jai-alai games) actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity;

(3) a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only to the extent that—

(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and

(B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality; or

(4) parimutuel animal racing or jai-alai games.

(b) Except as provided in subsection (a), section 3702 shall apply on lands described in section 4(4) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(4)).

## APPENDIX C

### The Uniform Internet Gambling Enforcement Act.

#### 31 U.S.C. § 5361 – Congressional Findings and Purpose.

(a) Findings. — Congress finds the following:

- (1) Internet gambling is primarily funded through personal use of payment system instruments, credit cards, and wire transfers.
- (2) The National Gambling Impact Study Commission in 1999 recommended the passage of legislation to prohibit wire transfers to Internet gambling sites or the banks which represent such sites.
- (3) Internet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit industry.
- (4) New mechanisms for enforcing gambling laws on the Internet are necessary because 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.

(b) Rule of Construction. — 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.

#### 31 U.S.C. § 5362(1) – Definitions.

(1) Bet or wager.—The term “bet or wager”—

- (A) means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome;
- (B) includes the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance);
- (C) includes any scheme of a type described in section 3702 of title 28;
- (D) includes any instructions or information pertaining to the establishment or movement of funds by the bettor or customer in, to, or from an account with the business of betting or wagering; and
- (E) does not include—
  - (i) any activity governed by the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 [1] for the purchase or sale of securities (as that term is defined in section 3(a)(10) of that Act);
  - (ii) any transaction conducted on or subject to the rules of a registered entity or exempt board of trade under the Commodity Exchange Act;
  - (iii) any over-the-counter derivative instrument;
  - (iv) any other transaction that—
    - (I) is excluded or exempt from regulation under the Commodity Exchange Act; or
    - (II) is exempt from State gaming or bucket shop laws under section 12(e) of the Commodity Exchange Act or section 28(a) of the Securities Exchange Act of 1934;
  - (v) any contract of indemnity or guarantee;

- (vi) any contract for insurance;
- (vii) any deposit or other transaction with an insured depository institution;
- (viii) participation in any game or contest in which participants do not stake or risk anything of value other than—
  - (I) personal efforts of the participants in playing the game or contest or obtaining access to the Internet; or
  - (II) points or credits that the sponsor of the game or contest provides to participants free of charge and that can be used or redeemed only for participation in games or contests offered by the sponsor; or
- (ix) participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28) and that meets the following conditions:
  - (I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.
  - (II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.
  - (III) No winning outcome is based—
    - (aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or
    - (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.

**31 U.S.C. § 5363 – Prohibition on Acceptance of Any Financial Instrument for Unlawful Internet Gambling.**

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling—

- (1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);
- (2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person;
- (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or
- (4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.