

No. 77777

IN THE

Supreme Court of the State 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, INC.

*Respondents.*

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BRIEF FOR THE PETITIONER

## **QUESTIONS PRESENTED**

- I. Whether daily fantasy sports constitute gambling, requiring a gaming license, under the Nevada Gaming Control Act and Nevada Gaming Commission Regulations.
  
- II. Whether Nevada's licensing of daily fantasy sports gambling violates the Professional and Amateur Sports Protection Act.

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## **STATEMENT OF JURISDICTION**

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

## **CITATION OF THE OPINION AND JUDGMENT DELIVERED IN THE COURTS BELOW**

The Eighth District Court in Clark County, Nevada found in favor of Draft Masters. *The State of Nevada*, No. CV-77-2016 (Nev. 8th J. Dist. Ct. R. 1.01, 2016). In doing so, the District Court held that daily fantasy sports are not lotteries, sports pools, or gambling games and do not require licensure under Nevada law. *Id.* In addition, the Court found that licensure would not violate PASPA. *Id.*

## STATEMENT OF THE CASE

### Statement of Facts

The Leagues challenge the licensing of “Daily Fantasy Sports” which differ from “Traditional Fantasy Sports.” Order at 2. *Draft Masters, LLC v. The State of Nevada*, No. CV-77-2016 (Nev. 8th J. Dist. Ct. R. 1.01, 2016). Under the traditional model, players, referred to as “owners,” begin the athletic season by drafting athletes, either by turn or auction. *Id.* A study of statistics and real world events must be followed, along with performances of an owner’s competitors in his or her fantasy sports pool. *Id.* Under the traditional model, an owner follows this method throughout an entire athletic season. *Id.* At the end of the season, the owner with the most successful team wins the entire pool. *Id.* Daily Fantasy Sports, in contrast, allow an owner to draft a new team each day for a wager. *Id.* The owner may supplement the traditional model, which lasts the entire season, or may decide to play daily leagues individually. *Id.* Daily Fantasy Sports generally allow owners to draft the same athletes as their competitors, as long as the price the owner pays for each athlete does not exceed the total team salary to which the competitors are limited. *Id.*

Daily fantasy games have three main structures: head-to-head matchups, “double-ups”, or a guaranteed prize pool (“GPP”). *Id.* Head-to-head games are the most basic type of Daily Fantasy Sports. *Id.* Head-to-head games pit two players against each other in a one-on-one match where the player with the highest score wins the amount wagered on that game. *Id.* The next common daily fantasy games are Double-Ups. *Id.* In a Double-Ups game, the teams in the top half of the league will win double their buy-in amount and the bottom half of the league will lose theirs. *Id.* The GPP contest is a large field event that allows contestants to submit multiple entries. *Id.* GPPs are the most competitive of the Daily Fantasy Sports leagues and only the top

contestants earn a prize. *Id.* GPPs involve a higher degree of risk and the potential payout reflects the risk involved. *Id.* Some GPP tournaments have prizes of over \$1,000,000 for the first-place finisher. *Id.*

Draft Masters Daily Fantasy Sports track player performance over a single game. *Id.* The owners of these simulated teams compete against one another based on the statistical performance of actual athletes in actual games. *Id.* The actual athletes' performance in specific sporting events is converted into "fantasy points," such that each actual athlete is assigned a specific score. *Id.* An owner will then receive a total score that is determined by compiling the individual scores of each athlete in the owner's lineup. *Id.*

#### Procedural History

Upon request from the Nevada Gaming Control Board, the Nevada Attorney General issued an opinion regarding the legality of daily fantasy sports. *Id.* The Attorney General found that daily fantasy sports constitute gambling and require a gaming license. *Id.*

After the finding, Draft Masters filed for declaratory relief against the State of Nevada, arguing that daily fantasy sports require skill and are thus not gambling. *Id.* Pursuant to NRCPC 24(b), the Leagues intervened and filed a complaint against Draft Masters and the State of Nevada, arguing that licensing daily fantasy sports will violate the Professional and Amateur Sports Protection Act ("PASPA"). *Id.*

Both parties cross-moved for summary judgment. *Id.* The Eighth District Court in Clark County, Nevada found in favor of Draft Masters. *Id.* In doing so, the District Court held that daily fantasy sports are not lotteries, sports pools, or gambling games and do not require licensure under Nevada law. *Id.* In addition, the Court found that licensure would not violate PASPA. *Id.*



## SUMMARY OF THE ARGUMENT

The following analysis will show that Daily Fantasy Sports constitute gambling and therefore require a gaming license under Nevada law. Daily Fantasy Sports can be classified as lotteries, gambling games, and sports pools under several statutory definitions of Nevada law. The Court's interpretation under the lottery analysis ought to apply the "dominant factor" test, finding that the element of chance dominates the element of skill in Daily Fantasy Sports and therefore meets to definition of a lottery. The analysis will demonstrate that Daily Fantasy Sports meet all of the statutory requirements to be classified as "sports pools" under Nevada law. In Daily Fantasy Sports, wagers are present; wagering is done on sporting events; and Daily Fantasy Sports operators are in the business of accepting wagers. The analysis will cover Daily Fantasy Sports' classification as gambling games under four statutory categories of Nevada law. Additionally, this analysis will demonstrate that the UIGEA did not explicitly legalize Daily Fantasy Sports.

While a certain degree of skill is involved in traditional fantasy sports, this brief will argue that even less skill is implicated in Daily Fantasy Sports. The activity is ultimately decided on predicting future outcomes, which is similar to most illegal gambling activities. Daily Fantasy Sports constitute lotteries, sports pools, and gambling games. As a result of this distinction, pay-to-play daily fantasy sports cannot be offered in Nevada without licensure.

Furthermore, licensing daily fantasy sports would violate the Professional and Amateur Sports Protection Act ("PASPA"). PASPA was enacted by Congress to protect the integrity of professional and amateur athletics by prohibiting sports betting. The legislative history confirms the plain language of the statute and the narrowness with which it should be interpreted. Sports

betting should be strictly contained to activities that were actually conducted and should not be expanded.

While the legislation carved out a narrow exception to permit a state to conduct a sports lottery or other sports wagering scheme, thus allowing states to be “grandfathered” in, these are very narrow exceptions. However, the exemption in the statute, by the plain language, does not allow Nevada to license daily fantasy sports. Nevada has never conducted anything similar to daily fantasy sports in the past. As such, daily fantasy sports licensure would violate the plain language and intent of PASPA.

Furthermore, licensing daily fantasy sports would violate PASPA even if this Court were to adopt the Third Circuit’s “substantive change” interpretation of PASPA’s exceptions. Daily fantasy sports are far more than a *de minimus* change from previous forms of sports betting that have previously been conducted in Nevada.

Finally, UIGEA does not override PASPA. Due to the clear differentiation in objectives of the two statutes, along with the UIGEA’s clear language, it is apparent that UIGEA does not override PASPA.

## **ARGUMENT**

### **A. DAILY FANTASY SPORTS CONSTITUTE GAMBLING AND REQUIRE A GAMING LICENSE UNDER THE NEVADA GAMING CONTROL ACT AND NEVADA GAMING COMMISSION REGULATIONS**

The analysis of Daily Fantasy Sports centers on the question of whether skill or chance is involved in the activity. While a certain degree of skill is involved in traditional fantasy sports, even less skill is implicated in Daily Fantasy Sports. The activity is ultimately decided on predicting future outcomes, which is similar to most illegal gambling activities. Daily Fantasy

Sports constitute lotteries, sports pools, and gambling games. As a result of this distinction, pay-to-play daily fantasy sports cannot be offered in Nevada without licensure.

*i) Daily Fantasy Sports Are Lotteries Because They Are Determined Predominately by Chance*

Nevada Revised Statute 462.105(1) defines “lottery” as follows:

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.

The statutory elements of a lottery are: (1) prize; (2) chance; and (3) consideration. Each of these elements must be met for an activity to constitute a lottery. *See also Kroger Co. v. Cook*, 17 Ohio App. 2d 41, 44, 244 N.E.2d 790, 792 (Ohio Ct. App. 1968) (noting the statutory elements of a lottery under Ohio law); *Valentin v. El Diario Prensa*, 427 N.Y.S.2d 185, 186 (N.Y.C. Civ. Ct. 1980) (noting same under New York law). “If prizes are awarded, and chance determines the winner, a business promotion scheme will be held to be a lottery where, regardless of the subtlety of the device employed, it can be shown as a matter of fact that the scheme in actual operation results in payment, in the great majority of cases of something of value for the opportunity to participate.” *Id.*

The Court, in the case of *Las Vegas Hacienda, Inc. v. Gibson*, offered insight into the element of chance. *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961). *Gibson* involved an “offer to pay \$5,000 to any person who, having paid 50 cents for the opportunity of attempting to do so, shot a hole in one on its golf course.” *Id.* at 86. The court, in *Gibson*, provided a test for determining whether a game is one of chance or skill: “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.” *Id.* at 87. Under this “dominant factor” test (also known as the predominant purpose test), a court considers whether skill or unmanageable chance is likely to be the controlling element in determining the outcome of the activity in question. An activity where skill is the dominant factor would not constitute a lottery and an activity dominated by chance would satisfy the statutory element.

Senate Bill 9, which passed during the 2015 Nevada Legislative Session, explicitly authorizes the Nevada Gaming Commission to adopt regulations applicable to gaming devices, that “define and differentiate between requirements for and the outcomes of a game of skill, a game of chance and a hybrid game.” *See* Att. Gen. Mem. (Oct. 16, 2015). A “game of skill” for the purposes of Senate Bill 9 is defined as “a game in which the skill of the player, rather than chance, is the dominating factor in affecting the outcome of the game as determined over a period of continuous play.” *Id.* With this definition, the Nevada Legislature has arguably codified the “dominant factor test”, such a test will have limited applicability in the context of the Gaming Control Act. *Id.*

Applying the dominant factor test, the Nevada Supreme Court ought to find that Daily Fantasy Sports constitute lotteries. Daily Fantasy Sports satisfy the statutory elements of “prize” and “consideration.” The sole determination of whether Daily Fantasy Sports constitute lotteries depends on whether the activity is dominated by chance or skill. The outcome of the matches in Daily Fantasy Sports is determined by the actual players on the field of play. The “owner” of a Daily Fantasy Sports team has zero control or influence on the outcome of the match after the lineups are set. Regardless of an owner’s skill in choosing a lineup and analyzing various factors, the outcome of the match is determined by uncontrollable chance. The owners in Daily Fantasy

Sports are not direct participants in the activity and therefore do not assume ultimate control over the outcome of the event. In contrast to traditional fantasy sports, Daily Fantasy Sports track player performance over a single game. In this regard, the application of an owner's knowledge and skill in selecting a particular lineup is substantially limited in comparison to traditional fantasy sports, which track player performance over an entire season. The owner is left to guess how a particular player will perform on a given day, and while a degree of analysis of performance factors plays a role, the outcome of a Daily Fantasy Sports match is derived from chance. An owner may put considerable research and analysis into daily lineup decisions, but this degree of skill and knowledge is merely incidental to the uncertain outcome of the contest.

*ii) Daily Fantasy Sports Constitute Sports Pools*

Nevada Revised Statute 463.0193 defines a "sports pool" as the "business of accepting wagers on sporting events or other events by any system or method of wagering." To decide whether Daily Fantasy Sports players are participating in a sports pool, one must determine (1) whether a wager is present; (2) whether the wagering is done on sporting events or other events by any system or method of wagering; and (3) whether Daily Fantasy Sports operators are in "the business" of accepting wagers. *Id.* Additionally, Nevada Revised Statute 463.01962 defines a "wager" as "a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain."

The Nevada Supreme Court, in the case of *State v. GNLV Corp*, stated that:

A "wager" exists when two or more contracting parties have 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. A prize differs from a wager in that the person offering the prize must permanently relinquish the prize upon performance of a specified act. In a wager, each party has a change of gain and takes a risk of loss.

*State v. GNLV Corp.*, 108 Nev. 456, 834 P.2d 411 (1992). *GNLV* involved a hotel-casino run program where patrons automatically received a fifty cent ticket each time the last dollar of a total of \$75.00 was placed in designated slot machines. *Id.* The slot machines dispensed the fifty-cent tickets irrespective of gains or losses resulting from the play involved in each \$75.00 increment. *Id.* The Nevada Supreme Court held that because the hotel-casino's distribution of the tickets was required by contract between the hotel-casino and its patrons, it was not dependent upon the result of a legitimate wager. *Id.* In *GNLV*, the patrons were not in competition with one another for the tickets nor receiving tickets based on the outcome of an uncertain event. *See* Att. Gen. Mem. (Oct. 16, 2015).

With respect to each statutory element, Daily Fantasy Sports qualify as "sports pools" under Nevada law. Wagers are present in Daily Fantasy Sports. Owners pay money to compete with one another on the basis of their total scores. If an owner wins, the owner gets the prize money and their wagered money returned. If an owner loses, the owner loses that wager. Daily Fantasy Sports are directly analogous to sports pools in this regard because each party has a chance of gain and takes a risk of loss; Some will win and some will lose. Because owners risk money on a contest for which the outcome is uncertain, wagers are present. *Id.* Additionally, Dr. Bo Bernhard, the Executive Director of the International Gaming Institute, in his review of fantasy baseball, concluded that, "[i]f we broadly define gambling as an activity that risks something of value...on an event whose outcome is uncertain, fantasy baseball clearly qualifies." *See* Bo J. Bernhard & Vincent H. Eade, *Gambling in a Fantasy World: An Exploratory Study of Rotisserie Baseball Games*, 9 UNLV GAMING RES. & REV. J. 29 (2004).

In contrast to *GNLV*, participants in Daily Fantasy Sports compete against one another. In *GNLV*, the patrons in the hotel-casino program were neither competing against each other or

receiving a payout based on the outcome of an uncertain event. However, in Daily Fantasy Sports, each participant has a risk of loss depending on the outcome of their lineup's performance. Although the Nevada Supreme Court found that wagers were not present in *GNLV*, wagers are present in Daily Fantasy Sports applying Nevada law and the holding of *GNLV*.

The CEO of Draft Masters has stated that Draft Masters' "concept is a mashup between poker and fantasy sports. Basically, you pick a team, deposit your wager, and if your team wins, you get the pot."<sup>1</sup> "You are playing against other players, we (Draft Masters) act as the 'points tally' and 'money distributor.'" *Id.* Daily Fantasy Sports operators describe themselves as being in the business of accepting wagers. They operate a system of wagering for team owners to places their wagers on sporting events. The Draft Masters website is dispositive of whether Daily Fantasy Sports operators are in the business of accepting wagers.<sup>2</sup> The website uses an image of a pile of cash with the phrase, "paying out \$1 Billion This Year."<sup>3</sup> That image is identified on each of the site's pages through alternative text ("alt text")<sup>4</sup> with a phrase that includes the word "betting." (i.e., "fantasy golf betting," "weekly fantasy basketball betting," "weekly fantasy football betting," etc.) *See* Att. Gen. Mem. (Oct. 16, 2015). Although it is unclear why this image is identified using the alt text "betting," it appears that despite the site's representatives publicly stating they do not believe daily fantasy sports involve "wagers" or "bets," they do use these terms when they are not dealing with law enforcement agencies. *Id.* Daily Fantasy Sports operators are not simply facilitating fantasy sports matches in the interest of recreation. Operators are in the business of accepting wagers to make money.

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<sup>1</sup> See

[https://www.reddit.com/r/IAmA/comments/x5zrn/we\\_quit\\_our\\_jobs\\_to\\_pursue\\_a\\_dream\\_of\\_starting\\_a/](https://www.reddit.com/r/IAmA/comments/x5zrn/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/)

<sup>2</sup> See e.g., <https://www.DraftMasters.com>

<sup>3</sup> *Id.*

<sup>4</sup> Alt text (alternative text) is a word or phrase that can be inserted as an attribute in an HTML (hypertext markup language) document to tell website viewer the nature or contents of an image. The alt text appears in a blank box that would normally contain the image.

The payouts in Daily Fantasy Sports are not given to owners who only set a lineup in a match, but rather they are given to the owners whose lineups score the most points, which is dependent on the uncertain and uncontrollable outcomes of various sporting contents. The act of setting a lineup does not directly result in any payout. The owners, by paying to set a lineup, are wagering on the outcomes of particular sporting events. “Proposition bets” or “Prop Bets” are an example of Nevada’s historic understanding of regulating sports pools and are similar to Daily Fantasy Sports. *See, e.g.*, Nev. Gaming Comm’n Reg. 22.060(4). A prop bet is a wager on the occurrence or non-occurrence of some event during the course of a sporting event. (e.g. a wide receiver catching 2 or more touchdowns or a batter hitting a homerun). Nevada also regulates combinations of prop bets through the use of “parlay card wagers.” Under Regulation 22.090(1), a parlay card wager is “a wager on the outcome of a series of 3 or more games, matches or similar sporting events or on a series of 3 or more contingencies incident to particular games, matches or similar sports events.” Nev. Gaming Comm’n Reg. 22.090(1). The Nevada Gaming Commission regulations make clear that Nevada intended to regulate wagers on both (1) the outcomes of particular sporting events; and (2) contingencies incident to particular sporting events. *See* Att. Gen. Mem. (Oct. 16, 2015). The logical conclusion is that Nevada’s regulation of sports pools includes (1) wagering on the outcome of particular sporting events; (2) wagering on any activity that takes place during particular sporting events; and (3) wagering on combinations of the outcomes of and/or activities that take place during particular sporting events. *Id.* Daily Fantasy Sports fall under the Nevada Gaming Commission’s regulations because their sole purpose is to wager on outcomes of particular sporting events and contingencies incident to particular sporting events. When an owner sets a lineup, he or she is



wagering that the player selected will have a favorable outcome in the particular sporting event in which they are playing.

Daily Fantasy Sports meet all of the statutory requirements under Nevada Revised Statute 463.0193 and therefore constitute “sports pools” under Nevada law. (1) Wagers are present; (2) wagering is done on sporting events, whether it be on the outcome or certain contingencies incident to the events; and (3) Daily Fantasy Sports operators are in the business of accepting wagers.

*iii) Daily Fantasy Sports Constitute Gambling Games*

There are four types of gambling games under Nevada Revised Statute 463.0152: (1) games played with cards, dice, equipment or any device or machine for any representative of value; (2) banking games; (3) percentage games; and (4) other games or devices approved by the Nevada Gaming Commission. NRS 463.0152. These four classifications of gambling games are not exactly independent of one another.

The first type of gambling game under Nevada Revised Statute 463.0152 contains two elements. The first element is that the game must be a “game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine.” *Id.* The second element is that the gambling game must be played “for money, property, checks, credit or any representative of value.” *Id.*

The second type of gambling game is defined under Nevada Revised Statute 463.01365 as “any gambling game in which players compete against the licensed gaming establishment, rather than against one another.” NRS 463.01365. Nevada Revised Statute 463.0152 defines a “gambling game”, to include any “banking game.” NRS 463.0152. Black’s Law Dictionary defines a “banking game” as a “gambling arrangement in which the house (i.e. the bank) accepts

bets from all players and then pays out winning bets and takes other bettor's losses." See *Banking Game*, BLACK'S LAW DICTIONARY (10th ed. 2014). The Nevada Supreme Court, in the case of *Hughes Props., Inc. v. State*, asserted that gambling games such as craps, roulette, and black jack are examples of banking games. *Hughes Props., Inc. v. State*, 100 Nev. 295, 297, 680 P.2d 970, 971 (1984). The Court's statement in this case is consistent with a logical interpretation of the foregoing statutes under this section; this interpretation is to define a banking game as a game in which (1) participants compete against the operator of the game using representatives of value, and (2) calculation of the payout to any given participant is not based upon the representatives of value used by any other participants.

The third type of gambling games is a percentage game. Under the definition of Nevada Revised Statute 463.0152, this type of gambling game contains two elements. First, it must be a game "where patrons wager against each other." Second, "the house takes a percentage of each wager as a 'rake-off.'" NRS 463.0152. Under *Hughes Props., Inc. v. State*, "percentage games are poker, panguigui and similar games where patrons wager against each other and the house takes a percentage of each wager as a 'rake-off.'" *Hughes Props., Inc. v. State*, 100 Nev. 295, 297, 680 P.2d 970, 971 (1984). The Gaming Control Act defines a "wager" as "a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain." NRS 463.01962.

The fourth type of gambling games include those games or devices that have been expressly approved by the Nevada Gaming Commission.<sup>5</sup>

Daily Fantasy Sports constitute gambling games as applied to the definitions set forth in Nevada Revised Statute 463.0152. Daily Fantasy Sports apply to the first type of gambling game

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<sup>5</sup> List of the approved gambling games by the Nevada Gaming Commission  
<http://gaming.nv.gov/index.aspx?page=31&parent=4605>

as they fall under the definition of “games played with cards, dice, equipment, devices, or machines for any representative value.” Although the term “electronic device” is not defined by the Gaming Control Act, other Nevada Statutes define a computer to be an electronic device. See NRS 205.4735 and 360B.410. Daily Fantasy Sports are played online using computers or mobile phones and therefore meet the first element requiring that the gambling game be a “game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine.” The Gaming Control Act defines a “representative of value” as “any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash.” NRS 463.01862. Generally, Daily Fantasy Sports owners pay money to play the simulated games and compete with each other on the basis of their total scores. The owner who wins collects the money. Daily Fantasy Sports meet the second requirement that the gambling game must be played “for money, property, checks, credit or any representative of value.”

Daily Fantasy Sports may not constitute “banking games.” Daily Fantasy Sports operators do not wager against owners; instead, the owners wager against each other by placing a bet and competing for the highest scores, with the operator paying out to the winners. Att. Gen. Mem. (Oct. 16, 2015). In this circumstance, Daily Fantasy Sports probably do not constitute banking games because the payouts to each owner are directly related to the payouts to the other owners based upon other owner’s simulated teams’ performances. *Id.* If a Daily Fantasy Sports operator were to permit team owners to wager directly against the operator, that specific simulated game would constitute a banking game under Nevada law.

Daily Fantasy Sports are percentage games. Because Daily Fantasy Sports owners pay money to play the simulated games and receive money based upon which of them has the highest total scores, the owners risk money on an occurrence for which the outcome is uncertain. *Id.*

Wagers are present in Daily Fantasy Sports. The first requirement for percentage games is met. Additionally, Daily Fantasy Sports operators earn their profit by taking some percentage of the wagers in each simulated game. This can be done either directly or indirectly. This conclusion is also consistent with how certain Daily Fantasy Sports operators describe themselves. *Id.* In an online discussion, a Draft Masters CEO explains that “In our case, you win the total wager amount of all the people who had teams in that contest. If there were 10 people and each put in \$10 dollars, you’d win \$100 (minus 10% which goes to us).”<sup>6</sup> Daily Fantasy Sports meet the requirements for the classification of percentage games under Nevada law.

Under the fourth type of gambling games, as the Nevada Gaming Commission has not approved Daily Fantasy Sports, analysis of these types of gambling games is unwarranted. Daily Fantasy Sports are not games or devices approved by the Nevada Gaming Commission.

*iv) Daily Fantasy Sports Do Not Fall Under the Exemption of UIGEA*

The UIGEA “prohibits gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law.” 31 U.S.C.A. §§ 5361-5367. In the Act’s first section under the subheading “Rule of construction,” UIGEA states: “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.A. § 5361(b). UIGEA provides “[n]ew mechanisms for enforcing gambling laws on the Internet,” which Congress deemed vital as it stated “traditional law enforcement mechanisms [were] 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).

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<sup>6</sup> See [https://www.reddit.com/r/IAmA/comments/x5zrn/we\\_quit\\_our\\_jobs](https://www.reddit.com/r/IAmA/comments/x5zrn/we_quit_our_jobs)

The UIGEA neither made legal nor illegal any form of gambling within the United States. *See* Att. Gen. Mem. (Oct. 16, 2015). The UIGEA did not explicitly legalize Daily Fantasy Sports. This conclusion is consistent with one of the leading attorneys representing Daily Fantasy Sports operators, who said, “The exemption in UIGEA for fantasy sports does not mean that fantasy sports are lawful, only that fantasy sports are not criminalized under UIGEA.” Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. Marshall L. rev. 1195, 1201 (2007). Former Congressman Jim Leach drafted the UIGEA and when he was asked whether the 2006 Act makes Daily Fantasy Sports operations legal, said, “[t]he only unique basis provided fantasy sports by UIGEA is its exemption from one law enforcement mechanism where the burden for compliance has been placed on private sector financial firms...[b]ut it is sheer chutzpah for a fantasy sports company to cite the law as a legal basis for existing. Quite precisely, UIGEA does not exempt fantasy sports companies from any other obligation to any other law...There is no credible way fantasy sports betting can be described as not gambling...[o]nly a sophist can make such a claim.” Tim Dahlberg, *Former Congressman Says DFS is “Cauldron of Daily Betting,”* at <http://cdcgamingreports.com/former-congressman-says-dfs-is-cauldron-of-daily-betting>. UIGEA is irrelevant to determining the legality of daily fantasy sports under Nevada law. *See* Att. Gen. Mem. (Oct. 16, 2015).

**B. LICENSURE OF DAILY FANTASY SPORTS IN NEVADA WOULD VIOLATE THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT.**

*i. Plain Language of PASPA.*

The Professional and Amateur Sports Protection Act (“PASPA”) was enacted by Congress to protect the integrity of professional and amateur athletics by prohibiting sports

betting. 28 U.S.C.S. § 3701, et seq. In relevant part, PASPA prohibits any person or governmental entity from sponsoring, operating, advertising, or promoting:

“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.S. § 3702.

The legislation carved out a narrow exception to permit a state to conduct a sports lottery or other sports wagering scheme, thus allowing states to be “grandfathered” in. 28 U.S.C.S. § 3704. There are two methods a state may be grandfathered in. First, a lottery, sweepstakes, or other betting, gambling, or wagering scheme must have been in operation in a State or other governmental entity beginning January 1, 1976, and ending August 31, 1990. 28 U.S.C.S. §3704(1). Second, the gambling scheme was authorized by October 2, 1991 and the scheme was actually conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991. 28 U.S.C.S. § 3704(2).

It is well established that, when interpreting a statute, the language of a statute should be given its plain meaning. *We the People Nevada v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170-71 (2008). Thus, when a statute is facially clear, as it is here, a court should not go beyond its language in determining its meaning. *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986); *see Las Vegas Taxpayer Comm. v. City Council*, 125 Nev. 165, 177, 208 P.3d 429, 437 (2009) (explaining that a statute's meaning is plain when it is "facially clear").

It has been stipulated by Petitioners that PASPA recognizes Nevada as one of the states that have been grandfathered in to conduct legal sports gambling. R. 17. However, the exemption in the statute, by the plain language, does not allow Nevada to license daily fantasy sports. It is clear that Nevada never conducted daily fantasy sports until very recently, as they are a rather new invention. *See* Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV Gaming L.J. 201 (2014).

ii. *Legislative History of PASPA.*

PASPA was enacted to prevent the proliferation of sports betting. 102<sup>nd</sup> Cong., 138 Cong. Rec. S7434-01 (1992) (1992 WL 275344). The Legislative history of PASPA could not be more clear that the intent of the bill was to prevent the spread of sports betting:

“State-sanctioned sports betting conveys the message that sports are more about money than personal achievement and sportsmanship ... Sports betting threatens the integrity of and public confidence in professional and amateur team sports, converting sports from wholesome athletic entertainment into a vehicle for gambling ... State-sponsored sports betting could change forever the relationship between the players and the game and between the game and the fans. Sports would become the gamblers' game and not the fans' game.”

*Id.* Furthermore, the Report of the Senate Judiciary Committee makes clear that PASPA's purpose is to "prohibit sports gambling conducted by, or authorized under the law of, any State or governmental entity" and to "stop the spread of State-sponsored sports gambling." Sen. Rep. 102-248, at \*4.

In fact, if this Court were to examine the legislative history, it will find that history to fully support the plain and narrow meaning of the statute's words. Specifically, the Senate Report states "Section 3704(a) specifies the exceptions to the prohibition in section 3702. Paragraph (1) provides that the prohibition does not apply to any lottery, sweepstakes, or other betting, gambling, or wagering scheme in a governmental entity to the extent that such scheme *actually was conducted* by that governmental entity." Sen. Rep. 102-248, at \*9 (emphasis added). The Senate report goes on to specify that "[t]he narrowness of subsection (a) [of Section 3704] reflects the committee's policy judgment that sports gambling *should be strictly contained*." *Id.* at \*10 (emphasis added). As such, the Senate Report confirms the plain language of the statute and the narrowness with which it should be interpreted. Sports betting should be strictly contained to activities that were actually conducted and should not be expanded.

By the clear language of the statute and supporting legislative history, it is clear that licensing daily fantasy sports would violate PASPA. Nevada did not conduct daily fantasy sports during 1976 to 1990, nor were daily fantasy sports authorized by statute in October 1991 and were never actually conducted during September 1989 to October 1991. As such, daily fantasy sports in Nevada do not fall under any of the clear exceptions set forth in PASPA.

*iii. Case Law Interpreting PASPA.*

Case law interpreting PASPA is sparse. Only one Court of Appeals has decided a case under PASPA, the Third Circuit Court of Appeals. *Office of the Comm'r of Baseball v. Markell*, 579 F.3d 293 (3rd Cir. 2009). In *Markell*, Delaware conducted multi-game (parlay) betting on NFL games prior to the enactment of PASPA. *Id.* After PASPA was passed, the state authorized, by statute, a sports betting scheme that included single game betting in addition to multi game on



multiple sports. *Id.* After this bill was passed, the NFL, NBA, NHL, MLB, and NCAA sought to enjoin Delaware officials from implementing the new sports wagering system to the extent that it allowed sports betting and gambling beyond parlay betting on NFL games. *Id.*

On appeal, Delaware argued that single game wagers did not violate PASPA since the state conducted multi-game betting schemes on NFL games since 1976 and therefore qualified for an exception under 28 U.S.C.S. § 3704(a). *Id.* However, the Third Circuit disagreed with Delaware's broad interpretation of the statute. *Id.* The Court noted the narrowness with which PASPA was drafted and held that any effort to allow single game or multi game betting on sports beyond the NFL constituted a violation of PASPA. *Id.*

In coming to its conclusion, the Third Circuit did not hold that PASPA "requires Delaware's sports lottery to be identical in every respect to what the State conducted in 1976." *Id.* at 303. Rather "[c]ertain aspects of the lottery may differ from the lottery as conducted in 1976, as long as they do not effectuate a substantive change from the scheme that was conducted during the exception period. *Id.* (emphasis added). As such, *de minimis* alterations do not violate PASPA nor violate its central purpose of prohibiting the spread of state-sponsored sports gambling. *Id.* at 304.

In this case, Nevada never conducted any type of betting, wagering, or lottery scheme similar to fantasy sports. R. 19. As has been discussed at length, daily fantasy sports are not a *de minimus* alteration of previous sports wagering schemes. Under the traditional model, players, referred to as "owners," begin the athletic season by drafting athletes, either by turn or auction. *Draft Masters, LLC v. The State of Nevada*, No. CV-77-2016 (Nev. 8th J. Dist. Ct. R. 1.01, 2016). A study of statistics and real world events must be followed, along with performances of an owner's competitors in his or her fantasy sports pool. *Id.* Under the traditional model, an owner

follows this method throughout an entire athletic season. *Id.* At the end of the season, the owner with the most successful team wins the entire pool. *Id.* Daily Fantasy Sports, in contrast, allow an owner to draft a new team each day for a wager. *Id.* The owner may supplement the traditional model, which lasts the entire season, or may decide to play daily leagues individually. *Id.* Daily Fantasy Sports generally allow owners to draft the same athletes as their competitors, as long as the price the owner pays for each athlete does not exceed the total team salary to which the competitors are limited. *Id.*

While Respondents argue that daily fantasy sports are similar to proposition bets or prop bets, however, this is an incorrect statement. Unlike prop betting, which requires that the bettor guess a certain statistic that an athlete or team will achieve, fantasy sports do not require that an athlete meet that threshold in order for the owner to profit.

*iv. UIGEA Does Not Override PASPA.*

UIGEA, which generally outlaws Internet gambling, contains an exemption for fantasy sports contests that meet certain criteria. 31 U.S.C.S. § 5361, § 5362. PASPA, on the other hand, prohibits states from authorizing sports gambling schemes based on the “performance” of athletes in amateur or professional sporting events. 28 U.S.C.S. § 3704.

First, Nevada law is clear that a repeal by implication “[is] not favored and will not be indulged if there is any other reasonable construction.” *State v. Thompson*, 89 Nev. 320 (Nev. 1973). A repeal by implication occurs only if the later enactment covers the whole subject matter of the earlier law and it is evident that it was intended as a substitute for it. *Id.*

The rule of stated above cuts against the notion that UIGEA supersedes PASPA. First, UIGEA does not expressly repeal PASPA. Furthermore, the UIGEA statute does not make so

much as even a passing reference to PASPA. Second, the two federal statutes have entirely different aims: UIGEA targets the “recipients” of payments associated with unlawful internet gambling transactions, whereas PASPA forbids "governmental entities" from “authorizing” new sports gambling laws.

Further, UIGEA’s “Rule of Construction” makes clear that UIGEA does not supersede other federal or state laws: “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.S. § 5361 (b) (emphasis added).

## **CONCLUSION**

Daily Fantasy Sports constitute lotteries under Nevada Revised Statute 462.105(1). The element of chance is the dominant factor in Daily Fantasy Sports because the owner is left to guess how a particular athlete will perform on a given day, and while a degree of analysis of performance factors plays a role, the outcome of a Daily Fantasy Sports match is derived from chance. Daily Fantasy Sports also constitute sports pools under Nevada Revised Statute 463.0193 meeting the statutory requirements. Daily Fantasy Sports also constitute gambling games as they fall under the statutory definitions under Nevada Revised Statute 463.0152. Additionally, Daily Fantasy Sports do not fall under the exemption of UIGEA.

Furthermore, licensing daily fantasy sports would violate the clear language and intent of PASPA. Additionally, PASPA has not been overridden by UIGEA. As such, licensing daily fantasy sports in Nevada would violate clear federal law.

As such, the Leagues respectfully request this Court reverse the District Court, and enter judgment in favor of Petitioners.

## Appendix

### 28 U.S.C.S § 3701

For purposes of this chapter [28 USCS §§ 3701 et seq.]--

(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.S. 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.S. 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 [effective Jan. 1, 1993], 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 [28 USCS § 3702] shall apply on lands described in section 4(4) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(4)).

31 U.S.C.A. 5361 (a) (4)

Findings. Congress finds the following:

- (1) Internet gambling is primarily funded through personal use of payment system instruments, credit cards, and wire transfers.

31 U.S.C.A. 5361 (b)

(b) Rule of construction. No provision of this subchapter [31 USCS §§ 5361 et seq.] 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.

NRS 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\

NRS 462.105(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.

NRS 463.01365

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

NRS 463.0152

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

NRS 463.01962

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

NRS 205.4735

“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.

NRS 463.01862

“Representative of value” means any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash.