

No. 77777

IN THE
**Supreme Court of the State of
Nevada**

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

v.

THE STATE OF NEVADA, DRAFT MASTERS, LLC,
Respondents.

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

BRIEF FOR PETITIONERS

P3*

*Counsel of Record

QUESTIONS PRESENTED

1. Whether Daily Fantasy Sports constitute gambling, requiring a gaming license, under the Nevada Gaming Control Act and Nevada Gaming Commission Regulations?
2. Whether Nevada's licensing of Daily Fantasy Sports gambling would violate the Professional and Amateur Sports Protection Act?

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SECONDARY SOURCES

Benjamin Miller, *The Regulation of Internet Gambling in the United States: It's Time for the Federal Government to Deal the Cards*, 34 J. Nat'l Ass'n Admin. L. Judiciary 527 (2014).... 15

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N.Y. Att’y Gen. Op. No. 453054 (Nov. 17, 2015)..... 8, 17, 18

Richard Pandorf, *A Billion Dollar Industry's Billion Dollar Question: Are Fantasy Sports Actually Legal?*, 42 N. Ky. L. Rev. 519 (2015)..... 17, 18

Webster’s Third New International Dictionary (3d ed. 1986)..... 14

OTHER SOURCES

Adam Kilgore, *Daily fantasy sports Web sites find riches in Internet gaming law loophole*, Wash. Post (Mar. 27, 2015) 18

Davey Alba, *DraftKings and FanDuel Scandal Is a Cautionary Startup Tale*, Wired (Oct. 9, 2015), <http://www.wired.com/2015/10/daily-fantasy-sports-scandal-fanduel-draftkings/>..... 19

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DECISION BELOW

The opinion of the district court below is not yet reported but is contained within the record on appeal, pages 2-14.

JURISDICTIONAL STATEMENT

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

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

28 U.S.C.A. §3702 (2015), 28 U.S.C.A. §3704 (2015), 31 U.S.C. § 5362 (2015), 31 U.S.C.A. § 5361 (2015), Nev. Const. art. IV, § 24, cl. 1, Nev. Rev. Stat. Ann. §462.105 (2015), Nev. Rev. Stat. Ann. §463.0152 (2012), Nev. Rev. Stat. Ann. §463.0193 (2009), Nev. Rev. Stat. Ann. §463.160(1)(a) (2007), Nev. Rev. Stat. Ann. §360B.410 (2005), Nev. Rev. Stat. Ann. §463.01962 (1997), Nev. Rev. Stat. Ann. §205.4735 (1986), Nev. Rev. Stat. Ann. §603.020 (1983)

STATEMENT OF FACTS

While the concept of fantasy sports has existed in American culture since the 1950s, the popularity of such contests has flourished over the past decade. Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV GAMING L.J. 201, 203 (2014). Until recently, fantasy sports consisted of season long contests, typically among friends or co-workers, where each owner would draft a full fantasy team at the beginning of each season and retain that team all season subject to the occasional trade or free agent pick up. However, the recent proliferation of Daily Fantasy Sports (hereinafter “DFS”) has fundamentally altered the concept of fantasy sports. What was once a game of bragging rights

among friends has become a business model for gambling where companies like Draft Masters directly profit from their customers' wagers.

Currently, Draft Masters is offering DFS contests to Nevadans without regulation. The Attorney General for the State of Nevada provided an advisory opinion, at the request of the Nevada Gaming Control Board, that Daily Fantasy Sports constitute gambling under Nevada law and therefore, require a gaming license. R. at 5.

Draft Masters, LLC then filed suit in the District Court seeking declaratory relief against the State's gambling determination and licensing requirement. R. at 5. The leagues intervened, filing suit against both Draft Masters and the State. R. at 5. The leagues claimed that Nevada's licensing of DFS would violate federal law. R. at 5. Both parties moved for summary judgment, with the District Court finding in favor of Draft Masters on both issues. R. at 5. This Court then granted certiorari. R. at 1.

SUMMARY OF THE ARGUMENT

The argument that DFS should not be considered a lottery or gambling is not based in logic and cannot be made using the plain meaning of Nevada's Constitution and statutes. Instead, Respondents' argument rests solely on the misguided assertion that DFS is a game of skill and that owners do not risk money when they place bets, for lack of a better term, on which players will perform the best in the aggregate. The lower court incorrectly held that DFS is not a 1) lottery, 2) sports pool, 3) game played with any electronic device or machine for money, or 4) percentage game. If this Court agrees that any one of the four holdings was incorrectly decided, DFS would be considered gambling under Nevada law and if it were deemed a lottery, would be a constitutionally prohibited activity.

This Court has held that activities whose outcomes are dominated by the element of chance are lotteries and thus unconstitutional. The determination that an activity is a lottery should not be made dependent upon the label by which it is called but instead by the character of how the outcome is determined. The elements of a prohibited lottery are a (1) prize, (2) chance, and (3) consideration. DFS owners pay consideration in hopes of winning a prize. Therefore, both elements one and three are satisfied. Respondents cling to the hope that this Court will be convinced that the level of “skill” required to pick an owner’s line up is outweighed by the level of chance that determines the outcome. Their assertion lacks merit and changes the dominant factor test into something akin to “can you find the skill?” While it is true that DFS may require a certain level of skill to pick a competitive line up, this skill required is substantially outweighed by how much chance can affect the outcome. The variables present, that will most undoubtedly alter a player’s performance, cannot be known or predicted before the game starts. Further, because a DFS owner has no actual control of the outcome after he selects his line up, any skill required is relinquished at the onset of the first game of the day.

In the event that this Court finds that DFS’s element of chance does not outweigh its level of skill, the lower court still incorrectly held that DFS should not constitute gambling. The lower court rejected all three of Petitioners’ arguments that DFS constitutes a sports pool, percentage game, or a game played with an electronic device or machine for money. Sports pools are defined as a business that accepts wagers based on sporting events. Obviously, DFS’s transactions are based on sporting events. The transactions themselves should be considered wagers because of the level of risk present when an owner pays his entrance fee and sets his line-up. If the level of chance does not reach that of a lottery, it most certainly reaches the level of risk necessary to be deemed a wager. Further, it would be illogical for this Court to hold that

placing bets on an entire team is betting, placing bets on a singular player is betting, but somehow when you aggregate different players on different teams it is no longer betting. This same reasoning also applies to why the lower court incorrectly held that DFS is not a percentage game. Percentage games require (1) a wager and (2) a “rake-off” by the house. DFS takes a profit off of owners’ wagers and, as previously stated, the transactions present should be considered a wager.

Finally, DFS should be considered a gambling game because it fits directly into one of the Nevada legislature’s definitions of gambling – a game played with any electronic device or machine for money. Obviously, DFS owners are playing for money. If they win, they can obtain either small sums or large sums but no matter the amount, it qualifies as “for money.” The computers or mobile devices that owners use to play DFS should fall within the broad category of “any electronic device or machine.” By excluding such equipment, the lower court went against the plain meaning of the statute without finding any intent to the contrary. To hold that a computer or cell phone is not an electronic device or machine would run contrary to dictionary definitions, previous statutory definitions, and how we use the terms in our every day life. What is a computer if not a device or a machine?

Although Nevada law ultimately governs whether DFS constitutes gambling, it is important to clarify that the Unlawful Internet Gambling Enforcement Act (UIGEA) neither legalized fantasy sports nor exempted DFS. Passed by Congress in 2006, the UIGEA prohibits online transactions related to illegal online gambling. Seemingly applicable to the case at hand, the UIGEA contains an exemption for fantasy sports. However, this exemption does not include *daily* fantasy sports.

The district court bluntly stated that the UIGEA legalized fantasy sports due to its fantasy sports exemption, but this conclusion is incorrect. The UIGEA did not legalize traditional fantasy sports or DFS. Rather, the UIGEA's exemption merely conveys that fantasy sports are not explicitly illegal under this specific federal statute. Thus, each state's laws govern whether a fantasy sports contest constitutes gambling.

But even if this Court agrees with the district court that the UIGEA legalized fantasy sports, the exemption does not protect DFS. Daily contests fail to satisfy two of the exemption's three requirements because 1) the number of participants directly determines the value of the prizes and 2) winning outcomes rely on chance rather than the relative knowledge and skill of the owners. Therefore, DFS are not exempt from the definition of "bet or wager" under the UIGEA.

Moreover, Congress never intended the UIGEA's fantasy sports exemption to apply to DFS companies like Draft Masters. Instead, Congress meant for the exemption to be a small carve out for traditional season-long fantasy sports, which, unlike DFS, actually existed in 2006. Since the recent surge of DFS, congressmen who drafted the UIGEA have spoken out to clarify that the exception was meant to be narrow and that UIGEA does not exempt DFS companies.

Finally, the Professional and Amateur Sports Protection Act (PASPA) makes Nevada's licensing of DFS illegal under Federal law. Passed in order to stop the expansion of sports betting, PASPA prohibits a State from licensing new forms of gambling on sports contests that were not licensed or conducted before the statute's enactment. This prohibition clearly encompasses DFS, as DFS is a form of gambling on sports contests that did not exist before PASPA's enactment. Therefore, PASPA prohibits licensure by the State of Nevada.

ARGUMENT

I. Under Nevada Law, Daily Fantasy Sports Should Be Considered A Lottery Or At The Very Least A Gambling Game

Under Nevada Law, DFS is either downright illegal and unconstitutional or should be considered gambling and thus subject to licensure by the Nevada Gaming Commission. Since DFS has all three common law elements of a lottery (prize, chance, and consideration), the Nevada State Constitution prohibits such contests. R. at 24. Even if this Court finds that the level of chance present in DFS does not rise to that of a lottery, DFS should still be considered gambling. Because DFS can be considered a sports pool, a game played with any electronic device or machine for money, or a percentage game, it should be labeled as gambling. If this Court finds that DFS only falls into one of the above categories, DFS would still be considered gambling, as each is independently sufficient to warrant such a definition.

A. Chance Dominates The Outcome Of Daily Fantasy Sports And Therefore Should Be Labeled A Lottery And Unconstitutional

The Nevada Constitution prohibits the authorization of any lottery within the State. Nev. Const. art. IV, § 24, cl. 1. Per statute, a lottery is defined as any scheme, no matter its label, that distributes property by chance, among persons who have paid any valuable consideration for the chance of obtaining all or a portion of that property. Nev. Rev. Stat. Ann. §462.105 (Lexis 2015). Nevada courts have interpreted this statute quite broadly and have held that, “[e]very scheme for the distribution of prizes by chance is a lottery.” *State ex rel. Murphy v. Overton*, 16 Nev. 136, 142 (1881). As correctly set out by the lower court, “a lottery involves the common law elements of gambling: (1) prize; (2) chance; and (3) consideration.” R. at 9. The lower court also correctly held that, when analyzed as a lottery, DFS incontrovertibly contains the elements of (1) a prize and (3) consideration. R. at 9. Owners pay an entry fee in hopes of winning a larger amount.

However, the lower court incorrectly held that DFS are predominately based on skill rather than chance. In *Overton*, this Court held that once the element of chance enters into the distribution of prizes, it is a lottery, no matter what it is called. 16 Nev. at 143. Later, this Court in *Las Vegas Hacienda v. Gibson*, provided in *dicta* that the character of a game is determined by whether its dominating element is skill or chance. 359 P.2d 85, 87 (Nev. 1961). To be sure, the element of chance in DFS is not as prevalent as it is in traditional lotteries. Nonetheless, the test announced in *Gibson* instructs future courts not to search for a game's skill element but instead, to determine whether chance or skill is the dominant factor. Therefore, a game may still be considered a lottery if it possesses a level of skill but also possesses a dominating level of chance.

The lower court and opposing counsel rely heavily on the premise that picking a line up is a feat that requires a great level of skill and knowledge. However, both simply ignore the multitude of other variables that mitigate, if not eliminate, the "skill" required to win a DFS match-up or tournament. First and foremost, unlike traditional fantasy leagues, owners in DFS may choose the same players. R. at 3. Traditional fantasy leagues utilize an "auction draft" or "snake draft." R. at 22. While the styles are different from one another, they both require owners to actively compete in one way or another for players. In an auction draft, owners bid for players against one another and each owner has the same fixed amount of capital to expend on players. R. at 22. In a snake draft, each owner gets a turn to choose a player but then must wait until it is his turn to choose again. R. at 22. Conversely, DFS generally utilizes a "salary-cap draft" where owners are given a set amount of capital to invest in players that have set value amounts. R. at 22. Therefore, traditional fantasy leagues require an owner to not only strategize which players they will pick but also when and how they will pick them. Under the DFS framework, such a

multifaceted thought process is unnecessary. Since DFS owners choose their line-ups without a competitive draft, one owner's use of clever stratagem or skillful decisions cannot alter opposing owners' preset line-ups. Further, because owners may choose the same players and all are privy to the same statistical information, the outcome of two well-studied competitors will be based primarily on chance rather than on skill. The chance of choosing a winning team is increased in a tournament setting and further increased the smaller the payout pool. Tournaments require owners to not only guess a line up that will beat one competitor, but also to select a line up that will beat a majority, at the very least, of the other players involved in the tournament. The smaller the pay out, the higher the chance. In a "Top-X simulated game", where thousands of competitors compete for the top spots, chance plays an even more prevalent role. R. at 23. The Attorney General of the State of New York provided a perfect example of pure luck altering the outcome of a DFS tournament when he spoke of a recent Chicago Bears game. N.Y. Att'y Gen. Op. No. 453054 (Nov. 17, 2015)¹. Since the Bears were winning by a close margin, Jay Cutler (the Bears' quarterback) took a knee to run out the clock. *Id.* In doing so, Cutler's fantasy points were one-tenth of one point short of what the owner needed to beat his foe. *Id.* Had Jay Cutler pushed just one more yard out of his team, the owner would have won. *Id.* Now this might seem like a trivial loss based on the owner's bad fortune, but it ended up bumping the owner from first to second place, losing \$20,000 in the process. *Id.*

Chance further dominates DFS because the owners have no actual control of a player's performance nor do they have all the information available to them to minimize their risk. Even if an owner tirelessly pours over all of the statistics and plots each data point into a highly sophisticated chart, they will be unable to account for all of the variables that go into a professional game. At any given time, a player may exceed expectations or fall miserably short

¹ Available at http://www.ag.ny.gov/pdfs/DK_MOL.pdf.

of predictions. A player may be distracted by his personal life, encouraged by his fans present, discouraged by his opponents, or fall prey to any number of situations that will alter his performance.

If statistics alone could predict the performance of every player on the team, the actual game would be superfluous. In fact, if Draft Masters' contention that owners can accurately predict how well players will do based upon their prior statistical data were true, upsets and unexpected victories would never happen. And yet they do. That is because, as any player will tell you, there is always an "Any Given Sunday"² variable that is present in every game. In short, the variable's premise is that no matter the odds against a certain team, each has the opportunity to rise against those odds and come out victorious. The element of chance exponentially increases when a third-party, who cannot alter the outcome by any means, bets on a conclusion that no amount of information can predict beforehand.

The fact that a skilled lineup beats a randomly generated line up does not alter this conclusion and in fact ignores the reality of the situation. R. at 10. First, the record is void of any indication as to how the computer randomly selected players. One would assume, that all of the players that are on a team's roster within a league would be assigned a number and the computer randomly selected those numbers. Therefore, with a league like the National Football League, where most teams have secondary and tertiary back ups, which only play when their "starter" is hurt or taken out of the game, the computer would have had between a 50-66% chance of choosing a player that might never see the field. That chance is increased exponentially for every player position that the computer chooses. Therefore, the results of the study might have been

² "Any given Sunday" was a phrase coined by Bert Bell, past National Football League Commissioner. The phrase has been shortened but in its original form it was "On any given Sunday, any team in the NFL can beat any other team." Since its inception the phrase has motivated many young athletes and even inspired a motion picture film titled "Any Given Sunday."

drastically different had the computer been bestowed with the minimum skill required to choose only starting players. This minimal level of knowledge or skill to know who is a starting player surely cannot be said to be the dominating element of DFS. Under Nevada law, skill does not have to be non-existent but instead must be the dominating element. *Gibson*, 359 P.2d at 87. This element of skill does not override the enormous level of chance that each owner undertakes each time they participate in DFS. Even a novice player who knows nothing about the players or the sports will be able to perform a cursory review to ensure that the players the owner is choosing are actually going to play. In the event that this Court finds that the level of chance does not rise to that of a lottery, DFS also constitutes gambling under Nevada law.

B. Daily Fantasy Sports Can Be Considered Either A Sports Pool Or A Gambling Game

Nevada Revised Statute Annotated §463.160(1)(a) makes it a crime for any person to operate a gambling game or a sports pool without having first procured a gambling license. (Lexis 2007). Draft Masters has violated both of the above prohibitions and in doing so its activities constitute illegal gambling. Draft Masters' actions violate the plain meaning of Nevada Statute and are contrary to public policy. DFS contests are sports pools by definition and the fact that multiple wagers are based upon individual players' performance and then aggregately grossed should not alter this determination. Further, DFS fits under two separate definitions of a gambling game. Therefore, there are three independent grounds that would require DFS to be deemed gambling under Nevada law.

1. The Transactions That Occur In A Daily Fantasy Sports League Are Wagers And Qualify The Activity As A Whole As A "Sports Pool"

Nevada Revised Statute Annotated §463.0193 defines a "sports pool" as a business that accepts wagers based on sporting events by any system or method of wagering. (Lexis 2009).

The lower court incorrectly held that DFS is not a sports pool by finding no wager present. R. at 11. If the monetary transactions that DFS and its customers partake in are classified as a wager, the business would satisfy all other statutory qualifications of a sports pool. Nev. Rev. Stat. Ann. § 462.105 (Lexis 2015).

A wager is defined as a sum of money that is risked on an occurrence for which the outcome is uncertain. Nev. Rev. Stat. Ann. §463.01962 (Lexis 1997). The Nevada Supreme Court held in *Gaming Comm'n v. GNLV Corp.*, that a wager is present when two or more parties risk something for the chance to make something upon the happening or not happening of an uncertain event. 834 P.2d 411, 412-13 (Nev. 1992). The Court differentiated a wager from a prize by stating that a prize must be relinquished by the offeror upon the performance of a specified act. *Id.* Conversely, with a wager, each party has a chance to gain but also takes a risk of loss. *Id.* Parties entering into an agreement with a prize present create a legally enforceable contract; parties entering into an agreement with a wager present do so illegally, absent licensure. *See Gibson*, 359 P.2d at 86-87. In *Gibson*, the Court further distinguished the two categories by holding that a wager requires two parties who must know, before the uncertain event, which will win or lose. *Id.* at 87. A prize however, involves only one party until the act, thing, or purpose for which it is offered has been accomplished. *Id.* Therefore, “a [prize] is a reward or recompense for some act done; a wager is a stake upon an uncertain event.” *Id.* at 86. The Court concluded by stating, “[i]n a premium it is known who is to give before the event; in a wager it is not known until after the event.” *Id.* at 87.

Not a single owner in DFS knows precisely what must happen in order to win his competition when he puts forth his money and selects his lineup. The only “certain” event present is the desire to outscore his opponent by selecting a team that will aggregate the highest

score. After an owner has picked his line up and the games have started, he has lost all control to alter the outcome. At no point, until all the players have played their games, will either owner know exactly the score that they must obtain in order to win the match-up. Such an unforeseen event cannot be considered a “specified act” and therefore must qualify as a wager. Such uncertainty is, by its very definition, a risk.

All parties should agree that betting on an individual team would be a wager under Nevada law. All parties should also agree that betting on an individual player’s performance would be a wager under Nevada law. For example, if I were to bet competitor X that my team’s quarterback will score more points than his team’s quarterback, that would be a wager. DFS is simply an aggregate of this style of micro betting. Each owner chooses a player that he or she hopes will perform the best during that day in their given position and repeats this process until a team is selected. An owner who successfully beats his opponent does so because he has placed the most “correct” bets on the most players in his line-up. The logic of holding that betting on an entire team would be gambling; betting on a single player would be gambling; but somehow when DFS owners bet on multiple players on multiple teams it is no longer gambling is unfounded.

2. Daily Fantasy Sports Satisfies Two Of The Four Categories Of Gambling Proscribed By Nevada’s Legislature And Therefore Should Constitute Gambling

In 1922, this Court recognized that gambling may cover a wide range of games and thus is subject to the character of the activity and not merely the label by which it is called.

Christensen v. Valdemar, 208 P. 426, 427 (Nev. 1922). Per statute, a gambling game may be defined four different ways. If any of the four definitions are satisfied, the game is considered gambling under Nevada law. Nev. Rev. Stat. Ann. §463.0152 (Lexis 2012). Two of the four definitions have no bearing upon this present action but the remaining two are directly on point.

DFS can be considered a 1) game played with cards, dice, equipment or any electronic device or machine for any representative value or 2) a percentage game. Nev. Rev. Stat. Ann. §463.0152 (Lexis 2012). Percentage games are “games where patrons wager against each other and the house takes a percentage of each wager as a ‘rake-off’.” *Hughes Properties v. State*, 680 P.2d 970, 971 (Nev. 1984). The court, solely relying on its previous determination that DFS transactions are not wagers, ruled that DFS could not be a percentage game. R. at 12. However, as previously stated in the prior section, the transactions are wagers and therefore satisfy the first element of a percentage game. The second element is also satisfied as it is undisputed that DFS operators take a “rake” or a fee for facilitating the match ups. R. at 23. Therefore, DFS can be considered a percentage game and that determination alone warrants DFS to be considered gambling under Nevada law.

Turning to the first definition, the lower court arbitrarily ruled that “any . . . electronic device or machine” does not include computers. R. at 11-12 (“Although other Nevada statutes have defined computers as an electronic device, this Court declines to extend that definition in this context.”). The court provided no justification for such a ruling and summarily dismissed any contention that the phrase “any electronic device or machine” could include a computer. *Id.* A court must only look beyond the plain language of a statute if that language is ambiguous or if its plain meaning was clearly not intended. *Sheriff, Clark County v. Burcham*, 198 P.3d 326, 330 (Nev. 2008). It is contrary to the plain meaning of the text to exclude computers in the broad definition that the legislature prescribed. The statute states “any . . . electronic device or machine,” which imposes no limiting instructions or qualifications as to how to restrict such a broad declaration. Therefore, it must be clear that such terms would include computers.

Furthermore, multiple Nevada statutes have defined the term computer in relatively the same form as Nevada Revised Statute Annotated §603.020, which states, “‘Computer’ means an electrical *device* . . . and includes any device connected to a computer for the purpose of communicating, processing, storing or retrieving such information.” (Lexis 1983) (emphasis added). *See* Nev. Rev. Stat. Ann. §205.4735 (Lexis 1986); Nev. Rev. Stat. Ann. §360B.410 (Lexis 2005). Webster’s dictionary defines the term “computer” as “a programmable electronic device that can store, retrieve, and process data . . .” *Computer, Webster’s Third New International Dictionary* (3d ed. 1986). Moreover, cell phones (i.e. cellular devices or mobile devices), are also used to participate in DFS and those would also have to be included in the legislature’s broad use of the term “any. . . electronic device or machine.” One would be hard pressed to find a definition of a computer or other electronic equipment used to play DFS that does not include the words device or machine. Therefore, the plain meaning of the statute signifies that this Court should interpret “any. . . electronic device or machine” to include computers. The legislature did not put forth any reason for a court to conclude otherwise.

II. The Unlawful Internet Gambling Enforcement Act Of 2006 Does Not Exempt Daily Fantasy Sports

Although Nevada law ultimately controls, it is important to clarify that the Unlawful Internet Gambling Enforcement Act (UIGEA) neither legalized fantasy sports nor exempted DFS. Since their conception, daily fantasy companies, like Draft Masters, have pointed to the UIGEA to justify their business operations. However, the UIGEA’s narrow fantasy sports carve out was never intended to encourage the emergence of several multibillion-dollar DFS companies. Specifically, such companies rely on 31 U.S.C.A. § 5362(1)(E)(ix), which exempts traditional fantasy sports from the definition of “bet or wager.” However, this exemption fails to justify Draft Masters’ unregulated daily fantasy website for three distinct reasons. First, the

UIGEA exemption for traditional fantasy sports did not explicitly legalize any form of fantasy sports. Second, daily fantasy contests do not comply with the carve-out's three necessary requirements. And finally, even if this Court finds that the UIGEA legalized fantasy sports, Congress clearly did not intend for this exception to extend to *daily* fantasy sports – a vastly different game than traditional fantasy sports.

A. The UIGEA Did Not Legalize Fantasy Sports

Congress passed the UIGEA in 2006 to prohibit financial institutions from processing transactions related to illegal online gambling. Benjamin Miller, *The Regulation of Internet Gambling in the United States: It's Time for the Federal Government to Deal the Cards*, 34 J. Nat'l Ass'n Admin. L. Judiciary 527, 537 (2014). As online gambling grew rapidly, it caused debt collection problems for insured depository institutions and consumer credit companies. 31 U.S.C.A. § 5361(a) (West 2015). Since traditional law enforcement mechanisms failed to adequately regulate interstate online transactions, Congress passed the UIGEA to combat technologically complex debt collection problems and to generally protect people from the dangers of online gambling. *Id.*

Below, the district court declared that the UIGEA “legalized fantasy sports within the United States” due to the fantasy sports exemption. R. at 7. However, the district court flatly mischaracterized the intent and effect of the UIGEA’s fantasy sports carve out. While the UIGEA does contain a specific carve out for fantasy sports, the statute never declares that fantasy sports are legal. R. at 27. Rather, it merely conveys that fantasy sports are not explicitly illegal under this specific federal statute. *Id.* As the Nevada Attorney General opinion stated, the exemption “does not mean that fantasy sports are lawful, only that fantasy sports are not

criminalized under the UIGEA.” *Id.* Therefore, Draft Masters cannot simply point to the UIGEA to claim their legality because the UIGEA never affirmatively legalized fantasy sports.

B. Daily Fantasy Sports Contests Do Not Comply With The Three Requirements Of The UIGEA’s Fantasy Sports Exemption

Accordingly, each daily fantasy format must be individually evaluated for compliance with the UIGEA. To comply with the UIGEA’s exemption, a fantasy contest must satisfy three requirements: 1) the value of the prizes cannot be determined by the number of participants or the amount of fees paid, 2) all winning outcomes must reflect the relative knowledge and skill of the participants, and 3) the fantasy contest’s result cannot be based on the final scores of any real-world games. 31 U.S.C.A. § 5362(1)(E)(ix). While traditional fantasy formats generally comply with all three criteria, most daily fantasy formats fail the first requirement and all daily fantasy contests fail the second requirement.

With respect to the first requirement, top-X guaranteed daily fantasy tournaments violate the UIGEA because the number of tournament participants directly affects the prize amounts. In every daily fantasy “guaranteed” tournament, “winners [are] paid out regardless of how many owners enter the simulated game.” R. at 23. In top-X guaranteed tournaments, which often contain thousands of owners, the top few owners split the entire payout pool. *Id.* Even assuming that Draft Masters establishes and notifies the owners of all potential prizes before the contest, the prizes in top-X guaranteed tournaments are directly “determined by the number of participants” who join the tournament. 31 U.S.C.A. § 5362(1)(E)(ix)(I). In other words, the payout pool increases as more owners join the fantasy contest. Section 5362(1)(E)(ix)(I) of the UIGEA expressly prohibits this type of fantasy game structure.

Further, and most notably, daily fantasy sports violate the second requirement of the fantasy sports exemption because their results predominately rely on chance rather than skill.

Specifically, the second condition of the exemption requires that “all winning outcomes reflect the relative knowledge and skill of participants.” 31 U.S.C.A. § 5362(1)(E)(ix)(II). But two factors, which differentiate daily fantasy from traditional fantasy, make daily fantasy a game of chance rather than a game of skill. These factors are 1) duration and 2) team selection. R. at 4.

In traditional fantasy sports, owners compete against one another for an entire season and must make strategic decisions throughout the entire season. Owners continuously manage their teams for months by making trades with other owners, constantly adjusting line ups, adding and dropping players, and so on. N.Y. Att’y Gen. Op. No. 453054. Thus, the aggregate result of season-long decision-making produces a final winner at the end of the fantasy season. In contrast, DFS owners are not burdened with such rigorous maintenance of a season-long team. As such, DFS contests require much less skill than traditional fantasy sports.

Further, as discussed above, a DFS contest “eschews a competitive draft” by allowing owners to select the same players as their opponents. N.Y. Att’y Gen. Op. No. 453054. When traditional fantasy contests prohibit owners from selecting the same players, owners must diligently select their players round by round. Each time an owner selects a player, he must use his own sports knowledge to determine who is the best player left in the draft. Owners must also calculate the opportunity cost of forgoing a player in hopes that the athlete will still be available in subsequent rounds. This painstaking process requires strategic planning and a significant amount of knowledge about each player. But when daily fantasy contests allow owners to select the same players, like in DFS, all strategic aspects of the draft are eliminated. *Id.*

Moreover, some daily fantasy formats require owners to select only a minimum of three athletes. Such contests cannot fall within the UIGEA exemption because “the element of chance increases as the roster size in a particular contest decreases.” Richard Pandorf, *A Billion Dollar*

Industry's Billion Dollar Question: Are Fantasy Sports Actually Legal?, 42 N. Ky. L. Rev. 519, 524 (2015). Thus, the relative knowledge and skill of the owners drastically depletes in DFS contests that only require owners to select a few players. In contrast, owners in traditional fantasy leagues must select 8-10 players in a snake draft, auction draft, or salary-cap draft. R. at 22. By requiring each owner to select and continuously manage a greater number of players, the contest results rely heavily on the relative knowledge and skill of the owners. However, these factors are not present in DFS and, as such, their results are predominantly based on chance.

C. Congress Did Not Intend For This Narrow Exception To Encompass Daily Fantasy Sports

Even if this Court finds that the UIGEA legalized traditional fantasy sports, Congress clearly did not contemplate DFS when passing the statute. In 2006, when Congress passed the UIGEA to crack down on online sports betting,³ daily fantasy sports did not exist. Rather, as explained above, fantasy sports consisted of a harmless, season long game typically amongst friends where owners “compete[d] for bragging rights or side wagers, not massive jackpots offered by the sites themselves.” N.Y. Att’y Gen. Op. No. 453054. In 2006, Congress could not and did not contemplate fantasy sports evolving into a fast paced, high stakes online gambling arena.

To be sure, the Iowa congressman who drafted the UIGEA, Jim Leach, recently stated that “[t]he carve-out, as I recall, was considered a kind of footnote. . . . It was never much discussed during consideration of UIGEA because it was considered like horse racing, already part of the American betting scene.” Adam Kilgore, *Daily fantasy sports Web sites find riches in Internet gaming law loophole*, Wash. Post (Mar. 27, 2015). In contrast, DFS was clearly not part

³ “Although the UIGEA does not directly regulate gambling, it prohibits many of the financial transactions necessary for Internet gambling.” Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV GAMING L.J. 201, 203 (2014).

of the American betting scene in 2006 because the concept of DFS did not exist. Further, when the Associated Press asked Leach whether the UIGEA legalized daily fantasy sports, he responded, “[t]he only unique legal 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. . . . But 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.” R. at 27. Finally, he assertively concluded, “there is no credible way fantasy sports betting can be described as not gambling . . . [o]nly a sophist can make such a claim.” *Id.*

Congress clearly intended Section 5362(1)(E)(ix) to be a small exception for a harmless industry that already existed – traditional season-long fantasy sports. Congress never meant for the UIGEA’s fantasy sports exemption to sweep broadly and include gambling games like Draft Masters’ daily contests. But from this small exception, several multibillion-dollar companies have violently emerged.⁴ As late night television host John Oliver analogized, “[i]t’s like [Congress] built a doggy door for a beloved pooch, and then daily fantasy came bursting through like a pack of wolves saying, ‘We are dogs; it’s a doggy door, right? That’s for us; we are legally dogs.’” *Last Week Tonight with John Oliver: Daily Fantasy Sports* (HBO television broadcast Nov. 15, 2015).

In conclusion, since 1) the UIGEA did not legalize fantasy sports, 2) DFS do not fall within the UIGEA’s exemption, and 3) Congress did not intend the UIGEA to exempt games like DFS, this Court should find that participation in DFS constitutes a “bet or wager.” 31 U.S.C.A. § 5362(1).

⁴ Over a period of three weeks, DFS companies spent over \$207 million airing national television ads every ninety seconds to lure in customers. Davey Alba, *DraftKings and FanDuel Scandal Is a Cautionary Startup Tale*, WIRED (Oct. 9, 2015, 7:01 AM), <http://www.wired.com/2015/10/daily-fantasy-sports-scandal-fanduel-draftkings/>.

III. Federal Law Prohibits The Licensing Of Daily Fantasy Sports By Nevada

Even though DFS constitute gambling under Nevada law, federal law prohibits their licensure by the State of Nevada. The Professional and Amateur Sports Protection Act (PASPA) prohibits licensure of sports betting by the States. 28 U.S.C.A. § 3702 (Lexis 2015). However, PASPA allows States to license some forms of sports betting if the betting activity falls into one of four narrow categories of exceptions. 28 U.S.C.A. § 3704 (Lexis 2015). DFS do not fall into any of these exceptions. Accordingly, this Court should find that federal law prohibits Nevada’s licensing of DFS.

A. The Professional And Amateur Sports Protection Act Prohibits The Licensing Of Daily Fantasy Sports By The State Of Nevada

The Professional and Amateur Sports Protection Act (PASPA) prohibits the licensing of DFS by the State of Nevada. PASPA provides, in relevant part,

“[i]t shall be unlawful for – (1) a governmental entity to sponsor, operate, advertise, promote, *license*, or authorize by law or compact [. . .] 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.A. § 3702 (emphasis added). This prohibition applies across the board to any type of wagering or betting that takes place based on amateur or professional sports games or individual performances in those games. DFS clearly fits these criteria, and therefore, PASPA prohibits the State of Nevada (a “governmental entity”) from granting Draft Masters a license to operate. *Id.* “When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances.” *Rubin v. United States*, 449 U.S. 424, 430 (1981) (internal quotations and citations omitted).

Here, PASPA's statutory language is clear and unambiguous. States are prohibited from licensing sports betting that is based on professional or amateur sports contests, or any athletic performance of an athlete in a sporting event. DFS not only consists of sports betting based on sports contests and performances, but it also relies exclusively on this type of betting to generate revenue for Draft Masters and winnings for DFS participants. Accordingly, DFS is ineligible for licensure by the State of Nevada under PASPA.

Additionally, relevant case law supports the position that PASPA prohibits a State from licensing sports betting. In *Office of the Comm'r of Baseball v. Markell*, the Court of Appeals for the Third Circuit analyzed whether or not Delaware could legally implement an expanded sports lottery. 579 F.3d 293, 295 (3d Cir. 2009). The sports leagues, as here, including the Office of the Commissioner of Baseball, brought suit seeking an injunction prohibiting the implementation of the sports lottery. *Id.* The leagues claimed that Delaware's implementation of the sports lottery was illegal under PASPA. *Id.* The court found that Delaware was prohibited from implementing the sports lottery by PASPA because Delaware had not actually conducted the betting scheme prior to PASPA's enactment and PASPA prohibited Delaware from doing so going forward. *Id.* at 304. Furthermore, the court found that PASPA's language was unambiguous and Delaware's previously conducted lottery schemes did not trigger any of PASPA's exceptions. *Id.* at 303-304.

This Court should adopt the position held by the Third Circuit in relation to PASPA in the case at bar. Just as Delaware did, the State of Nevada seeks to expand sports betting. This clearly conflicts with the purpose of PASPA, which prohibits the expansion of sports betting that was not conducted prior to PASPA's enactment. 28 U.S.C.A. § 3702. It is unquestionable that DFS was not conducted prior to PASPA's enactment, as the technology required for it was not yet invented. It is also unquestionable, just as in *Markell*, that DFS does not fall under any of the

exceptions to PASPA. For these reasons, this Court should find that PASPA prohibits the State of Nevada from licensing DFS.

B. Daily Fantasy Sports Do Not Fall Under Any Exceptions To PASPA

Even though PASPA prohibits States from licensing sports betting generally, PASPA does contain exceptions for specific sports betting activities that were conducted prior to PASPA's enactment. However, DFS does not fall into any of the categories of exception; therefore, PASPA still prohibits licensure by the State of Nevada.

For a sports betting activity to fall into one of PASPA's four enumerated exceptions, that activity must have been

- (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 pari-mutuel 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) pari-mutuel animal racing or jai-alai games.

28 U.S.C.A. § 3704(a). DFS clearly does not fall into the exceptions provided by subsections (3) or (4), as DFS is not conducted in or by municipal casinos, nor is DFS a type of pari-mutuel

animal racing or jai-alai game. PASPA provides only two further exceptions enabling a State to license a sports betting activity, and those exceptions are listed in subsections (1) and (2) of the statute. Subsection (1) allows an exception for sports betting activities that were conducted in a State between January 1, 1976 and August 31, 1990. This time period is commonly referred to as the “exception period.” Subsection (2) allows an exception for sports betting activities conducted in a State pursuant to statute between September 1, 1989 and October 2, 1991. Sports betting activities authorized under either of these provisions are commonly referred to as being “grandfathered in” under PASPA. DFS does not fall into either of these remaining two categories of exception. Therefore, PASPA prohibits licensure of DFS by the State of Nevada.

1. Daily Fantasy Sports Were Not Conducted During The Exception Period

DFS was not conducted in the State of Nevada during the exception period provided by PASPA. PASPA provides for an exception to its prohibition on sports betting if a particular type of activity was conducted in a State between January 1, 1976 and August 31, 1990. 28 U.S.C.A. § 3704(a)(1). PASPA provides a further exception for sports betting that was conducted pursuant to a statute in a State between September 1, 1989 and October 2, 1991. 28 U.S.C.A § 3704(a)(2). Daily Fantasy Sports were not conducted in Nevada during either of the exception periods and were not conducted pursuant to any Nevada statute. Therefore, neither exception applies to DFS, and thus PASPA prohibits licensure by the State of Nevada.

The Third Circuit thoroughly analyzed these exception periods in its opinion in *Markell*. There, Delaware claimed that its proposed sports lottery fell under one of the exception periods provided by PASPA in that the lottery had been previously conducted during that time period. *Markell*, 579 F.3d at 301. Delaware further claimed that the language in subsection (1) of

PASPA regarding whether or not a sports betting scheme “was conducted” allowed it to authorize new types of sports lotteries simply because it had approved others in the past. *Id.*

The Third Circuit rejected both of these claims. *Id.* The court found that Delaware had not actually conducted the proposed sports lottery during the exception period, but had merely authorized similar sports betting schemes. *Id.* The court found that this statutory authorization was not sufficient to provide an exception under PASPA, as PASPA required that the proposed sports lottery had to have actually been “conducted” in the State to qualify for an exception. *Id.* at 302. Additionally, the proposed lottery was not authorized under subsection (2) for the same reasons. *Id.* at 301.

Here, the State of Nevada finds itself in an even less tenable position than the State of Delaware did in *Markell*. Nevada did not license or actually conduct DFS in the State during the time frame provided by subsection (1) of 28 U.S.C.A. § 3704(a). Additionally, Nevada had no statute that authorized the conduct of DFS during the time frame provided in subsection (2). For these reasons, the exception periods provided by PASPA offer Nevada no refuge in its attempt to license DFS, as DFS was not conducted by the State during those periods.

2. Daily Fantasy Sports Are Not Grandfathered In Under PASPA

Because DFS does not fall into any of the exception categories, DFS is not grandfathered in under PASPA. This prohibits the State of Nevada from licensing DFS. This outcome is consistent with Congress’s intent in enacting PASPA in order to stop the expansion of sports betting. Furthermore, this outcome is consistent with the plain statutory language found in PASPA. For these reasons, this Court should hold that PASPA prohibits the licensing of DFS by the State of Nevada.

CONCLUSION

For the foregoing reasons, this Court should vacate the ruling of the District Court below, find that Daily Fantasy Sports constitute gambling under Nevada law, and that federal law prohibits their licensure by the State of Nevada.

Respectfully submitted,

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