

No. 77777

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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, LLC.,  
*Respondents.*

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**On Writ of Certiorari to  
the Supreme Court of the State of Nevada**

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**BRIEF FOR PETITIONERS**

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**QUESTIONS PRESENTED**

- I. IS DAILY FANTASY SPORTS CONSIDERED GAMBLING UNDER NEVADA LAW?**
- II. DOES LICENSING DAILY FANTASY SPORTS AS GAMBLING VIOLATE THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT (PASPA)?**

**TABLE OF CONTENTS**

QUESTIONS PRESENTED.....	-i-
TABLE OF CASES AND AUTHORITIES .....	-iii-
STATEMENT OF JURISDICTION.....	-v-
STATEMENT OF THE CASE.....	-v-
STATEMENT OF FACTS .....	1
ARGUMENT .....	4
I. STANDARD OF REVIEW.....	4
II. DAILY FANTASY SPORTS IS GAMBLING UNDER NEVADA LAW .....	5
III. LICENSING DAILY FANTASY SPORTS VIOLATES PASPA .....	11
CONCLUSION.....	18
CERTIFICATE OF COMPLIANCE.....	19
CERTIFICATE OF SERVICE .....	20

## **TABLE OF CASES AND AUTHORITIES**

### **CASES**

<i>Alaka v. Attorney General of U.S.</i> , 456 F.3d. 88 (2006).....	13
<i>BFP v. Resolution Trust Corp.</i> , 511 U.S. 531, 114 S. Ct. 1757 (1994).....	12
<i>Chenard v. Marcel Motors</i> , 387 A.2d 596 (Me. 1978).....	7
<i>Com v. Lousiville Atlantis Community/Adapt Inc.</i> , 971 S.W.2d 810 (1997).....	5
<i>GES Inc. v. Corbitt</i> , 117 Nev. 265, 21 P.3d 11 (2001).....	4
<i>Las Vegas Hacienda v. Gibson</i> , 77 Nev. 25 (1961).....	8,9
<i>Off Comm'r of Baseball v. Markell</i> , 579 F.3d. 293 (2009).....	13,14
<i>United States v. Useni</i> , 516 F.3d 634 (7 <sup>th</sup> Cir. 2008).....	6
<i>United States v. Wall</i> , 92 F.3d 1444, 1996 FED App. 0266P (6 <sup>th</sup> Cir. 1996).....	7
<i>Wood v. Safeway</i> , 121 Nev. 724, 121 P.3d 1026 (2005).....	4

### **STATUTES:**

18 U.S.C. § 1955(a)(b)(1).....	6,8
31 U.S.C. § 5361(b)(2012).....	17
31 U.S.C. § 5362(1)(a)(b)(2006).....	4, 7, 20
18 U.S.C.A. § 1511(c)(1994).....	7
28 U.S.C.A. § 3702(1992).....	12
28 U.S.C.A. §3704(a)(1992).....	12
28 U.S.C.A. §3701(1992).....	12
31 U.S.C.S. § 5361(a)(4)(2012).....	18
31 U.S.C.S. § 5362(1)(E)(ix)(2012).....	17
Nev. Rev. Stat. § 462.105 (2005).....	8
Nev. Rev. Stat. § 462.0152 (2005).....	5
Nev. Rev. Stat. § 463.0153 (2005).....	5
Nev. Rev. Stat. § 463.01642 (2005).....	5
Nev. Rev. Stat. Ann. § 465.092 (1997).....	15
Nev. Rev. Stat. Ann. § 465.094 (1997).....	15
Nev. Rev. Stat. Ann. § 463.0193 (1975).....	15
Nev. Rev. Stat. Ann. § 463.01962 (1997).....	15

### **OTHER SOURCES**

N.R. Civ. P. 56(c).....	4
Professional and Amateur Sports Protection Act S. Rep. No. 102-248 (1992).....	14
Nev. Gaming Reg. 22.090(1985).....	15

4 UNLV Gaming L.J. 273 (2013).....	16
22 Sports Law J. 79 (2015).....	16

### **STATEMENT OF JURISDICTION**

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

### **STATEMENT OF THE CASE**

The Nevada Gaming Control Board sought an advisory opinion from the Nevada Attorney General concerning the legality of daily fantasy sports. (R. p. 5) The Nevada Attorney General determined that daily fantasy sports are considered gambling and require a gaming license. (R. p. 5) Subsequently, Draft Masters filed suit for declaratory relief against the State of Nevada alleging that daily fantasy sports are not gambling and instead involve skill. (R. p. 5) The Leagues intervened, pursuant to NRCP 24(b), and filed a Complaint in Intervention against Draft Masters and the State of Nevada, alleging that if Nevada licenses a daily fantasy sports company, it will violate the Professional and Amateur Sports Protection Act (PASPA). (R. p. 5) Both parties cross-moved for Summary Judgment. (R. p. 5) The Eight Judicial District Court for the county of Clark, Nevada granted Summary Judgment in favor of Draft Masters concerning the gambling claim. (R. p. 14) The Eight Judicial District Court also granted Summary Judgment in favor of Draft Masters and the State of Nevada against the Leagues concerning the PASPA claim. (R. p. 14). The Leagues filed a petition for *Writ of Certiorari* with the Nevada Supreme Court which was granted. (R. p. 1)

## **STATEMENT OF THE FACTS**

### **OVERVIEW OF DAILY FANTASY SPORTS**

Fantasy Sports is an online sports system that allows an individual to play simulated sports online with players from professional leagues. An individual is allowed to select a player or group of players from a team online and is awarded points based off of their performance. Several leagues are represented through fantasy sports. These leagues include the National Basketball Association, National Football League, National Hockey League, Major League Baseball, National Collegiate Athletic Association. Draft Masters LLC, is an organization that hosts daily fantasy sports for its participants and awards a “pay-out” for the participant that wins its tournaments.

Under traditional fantasy sports, players, referred to as “owners,” begin the athletic season by drafting athletes, either by turn or auction. (R. p. 3) At the end of the season, the owner with the most successful team wins the entire pool, or there can be prizes for the top placements. (R. p. 3) Differently, daily fantasy sports allow an owner to draft a new team each day for a wager. (R. p. 3) The owner may supplement the traditional fantasy league, which lasts the entire season, or may decide to play daily leagues by themselves. (R. p. 3)

Draft Masters’ daily fantasy sports tracks player performance over a single game. (R. p. 4) The owners of these simulated teams compete against one another based on the statistical performance of actual players in actual games. (R. p. 4) The actual players’ performance in specific sporting events is converted into “fantasy points,” such that each actual player is assigned a specific score. (R. pp. 4-5) An owner will then receive a total score that is determined by compiling the individual scores of each player in the owner’s lineup. (R. p. 5)

Simulated games can generally be divided into two categories: (1) head-to-head; and (2) tournaments. (R. p. 5) In head-to-head simulated games, one owner competes against another owner. (R. p. 5) The owner with the highest total score will win the entire payout pool. Tournaments are simulated games that involve more than two owners. (R. p. 5)

Daily fantasy sports operators often offer both simulated games that are guaranteed and simulated games that are non-guaranteed. (R. p. 5) If a simulated game is guaranteed, the winners will be paid out regardless of how many owners enter the simulated game. (R. p. 5) If a simulated game is non-guaranteed, the simulated game will be cancelled unless a certain number of owners participate. (R. p. 5)

Daily Fantasy sports allow an owner to draft a new team each day for a wager. (R. p. 21) Each league member will earn points based on the performance of the players that were selected. (R.p. 2)

## **OVERVIEW OF PASPA**

To protect the integrity of professional and amateur athletics, Congress enacted the Professional and Amateur Sports Protection Act (PASPA) to prohibit states from legalizing sports betting. (R. p. 16) Congress recognized that sports betting would put temptation on the players to fix games and destroy the honesty of the sport. (R. p. 16) Thus, PASPA makes it unlawful for any state to “sponsor, operate, advertise, promote, license, or authorize by law . . . betting, gambling, or wagering” on professional or amateur sports games. 28 U.S.C. § 3702. (R. p. 12, 16) However, PASPA does not apply to states that are grandfathered-in. 28 U.S.C. § 3704. (R. p. 12, 16) States are “grandfathered-in” if “a lottery, sweepstakes, or other betting, gambling, or wagering scheme” was: (1) conducted at any time during January 1, 1976 through August 31,



1990; or (2) authorized by a State on October 2, 1991, and that scheme “actually was conducted” in that State during September 1, 1989 through October 2, 1991. *Id.* § 3704(a). (R. p. 12-13, 6)

The Leagues recognize that § 3704 exempts Nevada from PASPA’s prohibition on sports betting. (R. p. 17) Nonetheless, § 3704 exempts any State that had sports betting during the exception period as long as that type of sports betting “actually was conducted.” 28 U.S.C. § 3704(a)(2)(B). (R. p. 17) As long as daily fantasy sports “do not effectuate a substantive change from the scheme that was conducted during the exception period,” then it will not violate PASPA. (R. p. 17) Nevada did not conduct a similar type of daily fantasy sports that was conducted in 1999, during the applicable exception period. (R. p. 17, 19)

## **OVERVIEW OF UIGEA**

The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) provides that betting and wagering does not include:

(ix) participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28 [28 U.S.C.S. § 3701]) and that meets the following conditions:

(I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.

(II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.

(III) No winning outcome is based--

(aa) on the score, point-spread, or any performance or Performances of any single real-world team or any combination of such teams; or

(bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.

31 U.S.C.S. § 5362(1)(E)(ix)(2012). (R. p. 8)

The UIGEA was passed after PASPA but provides that “[n]o 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. § 5361(b). (R. p. 19, 26)

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

This Court should reverse the lower court’s decision because the district court incorrectly granted Appellee’s Motion for Summary Judgment. Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file ... show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” N.R. Civ. P. 56(c). “The mere existence of some alleged factual dispute between parties will not defeat an otherwise properly supported motion for summary judgment.” *Wood v. Safeway*, 121 Nev. 724, 730, 121 P.3d. 1026, 1030 (2005).

“The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the governing law will properly preclude the entry of summary judgment.” *Id.* The standard of review for summary judgment is “de novo.” *Id.* at 729, 121 P.3d. at 1029. The Supreme Court reviews a district court’s grant of summary judgment “without deference to the district court’s findings.” *GES, Inc. v Corbitt*, 117 Nev. 265, 268, 21 P.3d. 11, 13 (2001). Based upon the record before this Court, the district court erroneously granted Appellee’s Motion for Summary Judgment. This Court should reverse the decision in favor of Petitioner-Appellant.

## **II. DAILY FANTASY SPORTS IS CONSIDERED GAMBLING UNDER NEVADA LAW**

Participation in daily fantasy sports constitutes gambling under Nevada statutory law. The individual states may prohibit gambling entirely if it so chooses and may put limits on gambling that it could not otherwise put on other legitimate business organizations. *Com v. Louisville Atlantis Community/Adapt Inc.*, 971 S.W.2d 810 (Ky Ct. App. 1997).

The state of Nevada has defined gambling as, “means to deal, operate, carry on, conduct, maintain or expose for play any game as defined in NRS 463.0152, or to operate an inter-casino linked system. Nev. Rev. Stat. § 463.0153 (Nevada Revised Statute). Code section Nev. Rev. Stat. § 463. 0152 eludes to the definition of a gambling game to include an “electronic device”. This would naturally include a computer, cellular phone, etc, the means through which daily fantasy sports are commonly conducted.

The state code also defines interactive gaming as the conduct of gambling games through the use of communications technology that allows a person, utilizing money, checks, electronic checks, electronic transfers of money, credit cards, debit cards or any other instrumentality, to transmit to a computer information to assist in the placing of a bet or wager and corresponding information related to the display of the game, game outcomes or other similar information. ” Nev. Rev. Stat. § 463.016425.

Draft Masters, LLC is an organization that allows for its participants to track a player’s statistical performance in actual games. Each participant will compete against the others in a competition. The actual performance of the players that are selected will determine the success of each participant. The player’s performance is converted into “fantasy” points and the participant with the most points will win the competition for that day. Under the Draft Masters’ current structure and format its league members participate in daily fantasy sports via an

electronic device, such as a computer, specifically mentioned in chapter 463 of the Nevada Revised Statute. Each participant places a wager related to the outcome of the game.

Conducting a gambling business in violation of state or local law constitutes an offense that is punishable by imprisonment. 18 U.S.C. § 1955 (a)(b)(1). Section b of this statute defines an “illegal gambling business” as a business that is in violation of state law, involves five or more people who conduct or manage the business, and has been in existence for a period in excess of thirty days or has gross revenue of \$2,000 in any single day. *Id.* It does not matter that those who run the illegal gambling business be aware that their activity is illegal in order to be in violation of the statute. *U.S. v. Useni, 516 F. 3d 634 (7<sup>th</sup> Cir. 2008)* A closer look at the following elements that are outlined by the code will show that Draft Masters, LLC satisfies at least one if not all of the elements. Draft Masters has been in existence for over thirty days and the gross revenue made from the participation of the league participants exceeds over \$2,000. Thus, Draft Masters, LLC is considered an “illegal gambling business” according to federal law.

#### **A. DRAFT MASTERS, LLC USES A WAGERING SCHEME**

A wagering scheme is the manner in which each participant will recover compensation if they are successful. One important factor that determines if an activity constitutes gambling is if it involves a wagering scheme. Draft Masters’ daily fantasy sports system constitutes gambling because it involves a wagering scheme. The United States Code has defined a wagering scheme as follows.

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

(A) means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome;

(B) includes the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance);

31 U.S.C. § 5362(1)(a)(b)(2006).

A contest is not considered a wager for the simple fact that participants are required to pay an entrance fee. *Chenard v. Marcel Motors*, 387 A.2d 596 (Me. 1978). However, the collection of the entrance fees will constitute a wagering scheme. *Id.* The competitions that are hosted by Draft Masters, LLC is exactly what is defined as a wager by the statute. Each participant in the tournament is able to collect the payout from the pool. They are risking something of value each time they choose to play in a daily tournament. There is a possibility that the money that forms the pool will not be won by the participants. The present structure of Draft Masters, LLC falls directly within the language of the statute.

Furthermore, Congress passed legislation that prohibits a private person or governmental entity from sponsoring, licensing, wagering scheme based directly or indirectly on one or more competitive games in which amateur or professional athletes participate. It states:

This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1986, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization, except as compensation for actual expenses incurred by him in the conduct of such activity.

18 U.S.C.A. § 1511(c)

Draft Masters, LLC does not fall into the exception that has been carved out by Congress under this portion of the code. The federal statute that prohibits illegal gambling businesses has been upheld as a constitutional and valid exercise of Congress' legislative power. *United States v. Wall*, 92 F.3d 1444, 1996 FED App. 0266P (6<sup>th</sup> Cir. 1996).

## **B. DAILY FANTASY SPORTS IS A GAME OF CHANCE, NOT SKILL**

Success in Daily Fantasy sports is an activity that is purely determined by chance, not skill. Many proponents of the argument that daily fantasy sports is not considered gambling will argue

that the activity is strictly skill-related and does not involve chance. However, a closer look at this argument is flawed in many respects. Daily fantasy sports are similar to Nevada's state lottery. According to Nevada law, a lottery is defined as:

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.

Nev. Rev. Stat. § 462.105(1)(2005).

The participation of daily fantasy sports with Draft Masters, LLC will show the average person that its activity is similar to that of a lottery. The lottery by its very definition provides that it is an activity of chance among those who have paid any valuable consideration for the chance of obtaining a prize. Similarly, participants in Draft Masters' league pay valuable consideration to enter a tournament in hopes of obtaining the "pay-out", which is considered the prize.

The Nevada Supreme Court addressed the issue of skill versus chance in the context of what constitutes gambling. This Court used the "dominant factor test" to determine whether a particular activity involves skill or chance. *Las Vegas Hacienda v. Gibson*, 77 Nev. 25. This test provides that if an activity contains more of the element of chance than it does skill, then the activity constitutes a lottery. *Id.*

In *Gibson* there was an offer made to pay any person "\$5,000 if they could make a hole-in-one on a golf course. *Id.* To be eligible each participant has to pay 50 cents. *Id.* The court noted that the participants directly controlled the outcome and therefore, the activity was one of skill. *Id.* It is true that the activity would require a good amount of skill in hopes of making the hole in

one, which is a difficult task for any golfer. However, it does not negate the fact that the participants directly controlled the outcome and the activity is one more of skill. The distinction, as it pertains to daily fantasy sports, is that the actions are controlled by a third party and not the league participants themselves. There is no direct control by its participants like that of the golfers in *Gibson*, thus the activity is one of chance.

Furthermore, daily fantasy sports are a game of chance as the outcome is one where it is not controlled by the individual that participates. The phrase “game of chance” refers to a game or an activity that is determined completely by mere luck and does not involve skill. One reason that daily fantasy sports depend on chance and is not a game of skill is that the participants have absolutely no control over the actions of the athletes that are actually participating in the games.

There are many variables that go into the success of the athlete such that each participant in daily fantasy sports can win a tournament. One such variable is the player’s preparation for the actual game. As an average fan of the game I am totally detached from the preparation, skill, and input into a player’s success in reality of sports. In other words, an athlete puts countless hours into practicing their craft and honing their skills independent of the average participant in its league. There is no direct correlation between each participant in Draft Masters drafting a player in their daily fantasy sports league and their success on the grid iron or the hardwood.

Another factor involved in the equation of success is the possibility of injury of an athlete and if their ability to play in the next game for their team. This act of a player’s injury in and of itself has nothing to do with the skill of the league participant that chose him or her as a “fantasy” player. No one is likely to predict an injury that could occur beforehand and even if they were able to do so, they would not choose the injured player on their team. For example, in the National Football League from the year 2000-2014, there were over 30,000 injuries leading

to over 51,000 regular season weeks missed.<sup>1</sup> This is an average of nearly two weeks missed per injury per player.<sup>2</sup> With the frequency of the injuries that could happen to any player on an given week, it is difficult, if not impossible to predict the availability of the players in each league and the role they will play in their team's success.

Another variable that speaks to the fact that daily fantasy sports are one of chance is weather conditions. Often times weather prevents teams from making scheduled trips which lead to delayed games and is often a distraction and cause of the team's success or failure. In sports such as football or baseball that are played outdoors the grass could be slippery and cause a player to fall. Even more in football, the ball could be slippery and cause fumbles or dropped passes. The weather is one factor that is an act of God and is completely out of the hand of participants in daily fantasy sports.

Unforeseeable events such as a death in the family either fuels a player's determination or is the result (although understandably so), of a bad performance. For example, Torrey Smith, former Wide Receiver of the Baltimore Ravens received news that his younger brother had passed away in a motorcycle accident then took the playing field less than 24 hours later and scored two touchdowns.<sup>3</sup> The nature of this event was completely irregular. Furthermore, if Torrey Smith was on a player on an owner's fantasy team during this time it would not be irrational to assume that he would not take the field to play for personal reasons, and if he did that he would not perform well.

An additional factor that comes into play that many people have no control over and shows that daily fantasy sports is a game of chance is last-second plays. These plays are often

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<sup>1</sup> Zzachary O. Biney, NFL Injuries Part I: Overall View, (Sept 25, 2015), <http://www.footballoutsiders.com/stat-analysis/2015/nfl-injuries-part-i-overall-view>

<sup>2</sup> *Id.*

<sup>3</sup> Sal Paolantonio, Big game for emotional Torrey Smith, (Sept. 24, 2012) [http://espn.go.com/nfl/story/\\_/id/8416267/brother-baltimore-ravens-wr-torrey-smith-dies-accident](http://espn.go.com/nfl/story/_/id/8416267/brother-baltimore-ravens-wr-torrey-smith-dies-accident)



dramatic and can swing the game in the “underdog’s” favor and can help or hurt the point spread in Las Vegas. These plays are plays in the game such as the homerun grand slam in baseball, the half-court shot in basketball, or the Hail Mary touchdown in football. These plays are a rarity but do happen each time an actual game takes place.

Some of sports greatest memories come from last second plays. Again, this act is not rendered by the skill of a participant who wants to win a daily tournament but is rather the result of the “luck of the draw” which is open to time and chance. The chances of such a tough play being duplicated lends more credence to the fact that time and chance play a more vital role because of the unexpected nature of the event and the likelihood of reproducing such a play. The unpredictable nature the daily activity of a player is exactly unknown and open to chance, not an act of skills.

Daily fantasy sports are an activity that involves chance, not skills. The many variables that undoubtedly play a vital role in each player’s success is independent of each league participant. Applying the “dominant factor test” as outlined by the Nevada Supreme Court will prove that participation in daily fantasy sports is an activity dominated by random chance rather than skills.

### **III. LICENSING DAILY FANTASY SPORTS AS GAMBLING VIOLATES PASPA AND THE STATUTORY LANGUAGE OF PASPA SHOULD BE CONSTRUED LITERALLY**

#### **A. PASPA REQUIRES THAT A STATE’S GAMBLING SCHEME MUST HAVE BEEN ACTUALLY CONDUCTED DURING THE EXCEPTION PERIOD**

The district court erred when it declined to adopt the Third Circuit’s interpretation of the Professional and Amateur Sports Protection Act (PASPA). When evaluating the statutory language, the legislative history supports the conclusion that Congress enacted PASPA to

prevent sports betting and wagering that was not “actually conducted” in the State during its exception period. PASPA provides:

It shall be unlawful for 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 (1992).

Despite this provision, PASPA is not applicable to states that are grandfathered-in. 28 U.S.C.A. § 3704(a). States are grandfathered-in if “a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation” was: (1) conducted at any time during the period beginning January 1, 1976 and ending August 31, 1990; or (2) was authorized by State statute on October 2, 1991, and that scheme (other than one based on pari-mutuel animal racing or jai-alai games) was “actually conducted” in that State during the period of September 1, 1989 through October 2, 1991. *Id.*

Draft Masters and the State Nevada contend that the phrase “to the extent that the scheme was conducted by that State” identifies a condition, and therefore, licensing daily fantasy sports does not violate PASPA. However, this is a misstatement of Congress’s intent. Congress did not define how it intended the term “actually conducted” to be construed. 28 U.S.C.A. § 3701. “It is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another.” *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 114 S. Ct. 1757, 1761 (1994). Moreover, “it is a fundamental canon of statutory construction that where sections of a statute do not include a specific term used elsewhere in the statute, the drafters did not wish such a requirement to

apply.” *Alaka v. Attorney General of U.S.*, 456 F.3d 88, 97-98 (2006). Thus, if Congress intended for that particular phrase to serve as a condition, it would have done so purposefully.

The question of statutory interpretation of PASPA arose in *Off Comm’r of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009). In that case, Delaware argued that the phrase “merely identifies a condition rather than limiting the State’s gaming authority to either the particular sports or types of games previously offered.” *Id.* at 301. Delaware argued that because the state “authorized a broad lottery encompassing many types of games and many sports,” then it may “now institute a broad lottery with those features.” *Id.* However, the Third Circuit disagreed with Delaware’s interpretation. *Id.* In contrast, the League argued “that it is not sufficient that a particular lottery may have been contemplated, or even authorized, but rather we must consider the specific means by which the lottery was actually conducted.” *Id.*

The Third Circuit agreed with the Leagues interpretation stating “there is a clear distinction between wagering schemes that were merely ‘authorized’ and those that were ‘conducted.’” *Id.* Furthermore, the Court determined that PASPA requires that there be a determination of the “extent” or “degree” to which a lottery was conducted. *Id.* In arriving at this conclusion the Court determined that “a statutory provision is not ambiguous simply because by itself, [it is] susceptible to differing constructions . . .” *Id.* at 302. The court found, “in addition to statutory language ...itself, we take account of the specific context in which that language is used, and the broader context of the statute as a whole.” *Id.* In evaluating the plain language of the exception, the Court found PASPA’s exception unambiguous. *Id.*

Thus, PASPA only allowed states to conduct sports wagering schemes that were not only authorized, but also conducted during the exception period. Lastly, legislative history provides that “the narrowness of subsection (a) reflects the committee’s policy judgment that sports

gambling should be strictly contained.” Professional and Amateur Sports Protection Act, S. Rep No. 102-248, at 9 (1992). Therefore, the plain language of the exception should be construed against licensing daily fantasy sports in Nevada.

**B. NEVADA DID NOT CONDUCT SPORTS BETTING SIMILAR TO DAILY FANTASY SPORTS**

The district court erred when it concluded that Nevada did not violate PASPA by licensing daily fantasy sports. Daily fantasy sports are only permitted in Nevada to the extent that they were conducted during 1976 to 1990, or were authorized in the State and were actually conducted between September 1989 to October 1991. In evaluating the statutory language, the Third Circuit concluded that PASPA does not require a state’s sports betting to be identical to the schemes conducted during the exception period. *Markell*, 579 F.3d. at 303. Instead, “certain aspects of the lottery may differ from the lottery conducted in 1976, as long they do not effectuate a substantive change from the scheme that was conducted during the exception period.” *Id.* As such, a substantial change would occur, “by expanding the very manner in which Delaware conducts gambling activities to new sports or new forms of gambling- namely single-game betting ....” *Id.* The same is true in the current instance.

Nevada is one of the few states that have passed specific statutes permitting sports wagering. However, licensing a daily fantasy sports league is a substantial change because it expands the type of sports wagering that was actually conducted during the exception period in violation of PASPA. Nevada gaming law provides, “a person, alone or with others, shall not knowingly, within or outside of this state: (a) accept or receive, directly or indirectly, through any medium of communication a wager from another person who is physically present within this state.” Nev. Rev. Stat. Ann. § 465.092 (1997). However, this provision does not apply to a wager placed by a person for the person’s own benefit or, without compensation, for the benefit

of another this is accepted or received by, placed with, or sent, transmitted, or relayed to: a race book or sports pool that is licensed ...if the wager is accepted or received within this State and otherwise complies with all other applicable laws and regulations concerning wagering. Nev. Rev. Stat. Ann. § 465.094 (1997). Nevada defines a sports pool as a business that accepts wagers on sporting events or other events “by any system or method of wagering.” Nev. Rev. Stat. Ann. § 463.0193 (1975). Moreover, Nevada defines its wagering scheme as “a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.” Nev. Rev. Stat. Ann 463.01962 (1997).

Draft Masters and the State of Nevada contend that daily fantasy sports are similar to the sport wagering schemes offered during the exception period. For example, the Attorney General compares parlay card wagers to daily fantasy sports wagering. Nevada defines parlay card wagering as “a wager on the outcome of a series of 3 or more games, matches, or similar sports or on a series of 3 or more contingencies incident to particular games, matches, or similar sports events.” Nev. Gaming Reg. 22.090. This form of sports wagering is substantially different than daily fantasy sports. While daily fantasy sports allow a wager to occur in many different methods, daily fantasy sports goal is to accumulate the highest points in a day’s game. Whereas, parlay card wagers are based on a series of 3 or more games, contingences, or matches in a particular sporting event. In addition, “parlay card means a wagering form offering exactly the same propositions on exactly the same terms.” *Id.* The mere premise of daily fantasy sports is the ability to change your wager daily. Unlike parlay card wagering where an individual is placing the same exact bet on a specific series of events. Thus allowing a daily fantasy league to change their bet from game to game is substantially different than parlay card wagers.

In addition to parlay card wagers, Draft Masters and the State of Nevada have identified other forms of sports betting, specifically proposition bets. Proposition bets or prop bets are “wagers on an individual’s performance in a game or an event.” Daniel Bernard, *The NFL’s Stance on Gambling: A Calculated Contradiction*, 4 UNLV Gaming L.J. 273, 275 n.28 (2013). Draft Masters argue that fantasy sports are an accumulation of prop bets. However, this is untrue. Unlike prop bets, which requires a player to place a bet on a specific outcome or event in a sporting game, daily fantasy sports teams allow owners to play in varied methods.

For example, in a head-to-toe game, which is one of the most basic types of daily fantasy sports, the owner with the highest score wins the wagered game. Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 Sports Law J. 79, 86 (2015). This method of wagering is substantially different than prop bets because an owner placing a prop bet is required to guess a certain statistic in order to win; whereas, there is no such requirement in daily fantasy sports. Additionally, in making a prop bet, owners are given a scenario in which they place their bets. This is not true in daily fantasy sports where an owner may use a salary cap league to select their teams. *Id.* at 87. As such, owners may not go over their allotted budget when selecting their teams.

Based on the manner in which owners select their teams and the payout structure that differs from prop bets, daily fantasy sports leagues are substantially different than the scheme that Nevada actually conducted. Due to the substantial change in the scheme that Nevada conducted during the exception period, licensing daily fantasy sports would violate PASPA. While Nevada authorized sport pools and wagering schemes, Nevada did not “actually conduct” similar wagering schemes to that of daily fantasy sports.

### **C. The UIGEA did not legalize Daily Fantasy Sports**

The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) provides, in relevant part, that betting and wagering does not include:

(ix) participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28 [28 U.S.C.S. § 3701]) and that meets the following conditions:

(I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.

(II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.

(III) No winning outcome is based--

(aa) on the score, point-spread, or any performance or Performances of any single real-world team or any combination of such teams; or

(bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.

31 U.S.C.S. § 5362(1)(E)(ix)(2012). (R. p. 8)

However, even though the UIGEA was passed after PASPA, the UIGEA also provides that “[n]o 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. § 5361(b)(2012). (R. p. 19, 26) Therefore, from this provision, it can be concluded that the UIGEA did not make any form of gambling within the United States legal or illegal. (R. p. 26) The UIGEA was clearly not meant to alter or override PASPA. Moreover, if Congress intended for gambling to be legal within States, PASPA would

not exist. Additionally, the UIGEA only provides that “[n]ew mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.” 31 USCS § 5361(a)(4)(2012). Thus, the congressional intent for enacting the UIGEA in the first place was only to enforce gambling laws, not to legalize gambling within States. Therefore, based on statutory language and congressional intent, the UIGEA did not legalize daily fantasy sports, and this Court should conclude that daily fantasy sports violate PASPA.

### **CONCLUSION**

Petitioner respectfully submits: Daily fantasy sports constitute gambling under both Nevada law and Federal law. Draft Masters uses a wagering scheme that has been defined by title 31 of the United States Code as gambling. Lastly, licensing daily fantasy sports violates PASPA.

For the foregoing reasons, Petitioners respectfully pray that this Court reverse the decision of the district court granting summary judgment for Defendants.

Respectfully submitted, this the 22<sup>nd</sup> day of February, 2016.

By:     P5      
Counsel for Petitioners



**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 38(a) of the Federal Rules of Appellate Procedure, the undersigned counsel for the Petitioner certifies that the foregoing brief, which is prepared using a proportional font, is within the 30-page limitation (excluding cover, indexes, table of authorities, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software used to prepare this brief.

P5

Counsel for Petitioners

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this date served the attached Petitioners' Brief upon all parties to this cause by:

☐ Hand delivering a copy hereof to the attorney for each said party, or leaving a copy at the office of said attorney with a person in charge thereof.

☒ Depositing a copy hereof, postage pre-paid, in the United States mail, properly addressed to the attorney for each said party as follows:

William S. Boyd School of Law  
Attn: Stephanie Getler, Schreck Competition Chair  
4505 S. Maryland Pkwy Box #1003  
Las Vegas, NV 89154-1003

This the 22<sup>nd</sup> day of February, 2016.