

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,

Appellants,

v.

THE STATE OF NEVADA, DRAFT MASTERS, LLC,

Respondents.

ON WRIT OF CERTIORARI
TO THE STATE OF NEVADA COURT OF APPEAL

BRIEF FOR RESPONDENTS

February 22, 2016
Team R10

Counsel for Respondents

QUESTIONS PRESENTED

- I. This issue is whether, after the Unlawful Internet Gambling Enforcement Act exempted provided daily fantasy sports with a exemption, under Nevada law will daily fantasy sports be seen as a form of gambling requiring Draft Masters to obtain a gaming license from the state of Nevada, when; (1) daily fantasy sports does not qualify as a lottery, sports pool, or gambling games, (2) daily fantasy sports is primarily a game of skill, not of chance, and (3) the state has yet to extend definitions of certain terms and therefore those terms should not be able to apply to daily fantasy sports?
- II. The issue is whether the Eighth Judicial District Court of Nevada properly determined Nevada's licensing daily fantasy sports does not violate The Professional and Amateur Sports Protection Act of 1992 when previous sports betting were allowed during the exemption period and there is not a substantial change between previous sports betting and daily fantasy sports?

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The unreported opinion by the Gaming and Government Affairs appears on pages 21 – 35 of the record. The opinion of the Eighth Judicial District Court of Nevada granted Defendants’ motion for summary judgment and denied Plaintiff-Intervenors’ countermotion for summary judgment. R. 14.

STATEMENT OF JURISDICTION

The formal statement of jurisdiction is waived pursuant to Competition Rule

STATEMENT OF THE CASE

Statement of Facts

Fantasy sports are games where the participants assemble simulated teams with rosters and/or lineups of actual players of a professional sport. R. 22. Fantasy sports are generally played over the Internet. R. 22. Fantasy sports cover a number of actual professional sports leagues. R. 22. Daily fantasy sports, a type of fantasy sports, track player performance over a single game. R. 22. The owners of these simulated teams compete against one another based on the statistical performance of actual players in actual games. R. 22. The actual players' performance in specific sports events is converted into "fantasy points," such that each actual player is assigned a specific score. R. 22. 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. 22.

When selecting players in daily fantasy sports, people can use methods, such as a snake draft, an auction draft, or a salary-cap draft. R. 22. In a salary-cap draft, each owner has a maximum budget and can select any actual player on their teams, however, the owners cannot exceed their maximum budget. R. 22. However, daily fantasy sports do not generally utilize a snake draft or an auction draft. R. 22.

Generally, there are two types of simulated games offered on daily fantasy websites: head-to-head and tournaments. R. 23. Head-to-head games are the most basic type of daily fantasy sports. R. 23. Head-to-head games put two players against each other in a one-on-one match where the player with the highest score wins the amount wagered on the game. R. 23. Tournaments are simulated games that involve more than two owners. R. 23.

Daily fantasy sports operators offer guaranteed and non-guaranteed simulated games. R. 23. If a game is guaranteed, the winner will be paid out regardless of how many owners enter the

simulated game. R. 23. If a game is non-guaranteed, the simulated game will be cancelled unless a certain number of owners participate. R. 23.

In 1992, Congress passed the Professional and Amateur Sports Protection Act. R. 26. The Professional and Amateur Sports Protection Act is a federal law that prohibits against sports betting, however, this law provides exemptions. R. 12. Fourteen years later, Congress passed the Unlawful Internet Gambling Enforcement Act of 2006. R. 26.

Senate Bill 9 was passed during the 2015 Nevada Legislative Session. R. 25. This bill explicitly authorizes the Nevada Gaming Commission to adopt regulations, applicable to gaming devices, that “define and differentiate between the requirements for and the outcomes of a game of skill, a game of chance, and a hybrid game.” R. 25.

Procedural History

The Nevada Gaming Control Board sought an advisory opinion from the Nevada Attorney General concerning the legality of daily fantasy sports. R. 21. On October 16, 2015, the Nevada Attorney General decided that daily fantasy sports constitute sports pools and gambling games and further concluded that daily fantasy sports cannot be offered in Nevada without a license. R. 35. Draft Masters disagreed with the Nevada Attorney General and filed suit for declaratory relief against the State of Nevada confirming that daily fantasy sports are not gambling, but rather involve skill. R. 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 PASPA. R. 5. Both parties cross-moved for summary judgment. R. 5. On December 30, 2015, the Eighth Judicial District Court was in favor of Draft Masters and held that daily fantasy sports are not gambling games and that

daily fantasy sports are permitted in Nevada under PASPA. The Supreme Court of the State of Nevada granted certiorari. R. 1.

SUMMARY OF ARGUMENT

This Court should affirm the decision of the Eighth Judicial District Court by holding that daily fantasy sports does not constitute gambling. This Court should also affirm the lower court's decision that daily fantasy sports are permitted in Nevada under PASPA.

The Unlawful Internet Gambling Enforcement Act exempted daily fantasy sports from different laws, which govern the criminalization of gambling. In this exemption, each state is granted the authority to determine their respective state's gambling laws. Furthermore, Nevada has established that entities that engage in a specific type of activity are entities which require a state gaming license. In that if an entity is a lottery, sports pool, or gambling game the state will require it to obtain a license. However, the key factor in determining whether or not daily fantasy sports requires a gaming license, is determining whether or not it is a game of skill or a game of chance. Nevada uses the predominate purpose in making this determination, meaning it evaluates which element is more present . . . skill or chance. Daily fantasy sports is a science, a craft that requires skill in order to experience success, with that being the case it is a game of skill, and therefore it is not a lottery or sports pool. Furthermore the state of Nevada has chosen not to define certain terms as and as a result the statutory definition for gambling game cannot be applied to what Draft Masters does.

The Professional and Amateur Sports Protection Act is federal law that exempts daily fantasy sport from its general prohibition against sports betting. Sports betting was legalized in Nevada in 1951. Daily fantasy sports mirror previous sports betting, such as proposition bets and there is not a substantial change between the two. Appellants' contention to the contrary is based solely on the Third Circuit's interpretation that the scheme must be actually conducted during the exemption period.

ARGUMENT

I. THE LOWER COURT WAS CORRECT IN GRANTING DRAFT MASTER'S MOTION FOR SUMMARY JUDGMENT, BECAUSE IT DETERMINABLE THAT DAILY FANTASY SPORTS IS NOT GAMBLING

It was undoubtedly proper for the lower court to have found in favor of Draft Masters. Justification can be found in the fact that it is not necessary for Draft Masters to obtain a gaming license in order to continue to operate because; (1) daily fantasy sports is not a gambling game or sports pool, (2) daily fantasy sports is not a lottery, and (3) in addition to the first two reasons, the Unlawful Internet Gambling Enforcement Act of 2006 permits daily fantasy sports if they are proven to be games of skill versus of game of chance.

In dissecting whether or not Draft Masters is required to have a gaming license based on the regulations within the Nevada Gaming Commission there are several rules that first must be examined. Initially, *Nevada Gaming Regulation 4.010 (Nev Gaming Reg)* declares that all establishments where gambling games are conducted or operated are licensed to do so, and that they go towards better protecting the public health and general health of Nevada inhabitants. Nev Gaming Reg 4.010. Nevada Revised Statute (NRS) 463.160, enacts that it is unlawful for any individual or entity to deal, operate, carry on conduct, maintain or expose for pay in Nevada any gambling game or sports pool without first having a gaming license. *NRS 463.160*.

The above regulations set out a firm precedent that Nevada desires for those dealing with "games of chance," or any form of gambling for that sake, inform the state of their presence and intention, and generally operate for the well-being of those who partake. Which leads to the juncture that one of the only ways to navigate the Nevada Law as it pertains to the requiring a gaming license is to be an entity that is not involved in gambling, and it is our contention that Draft Masters can do that. The first argument to be made is centered on the fact that daily

fantasy sports are not games of chance, but instead they are based on the relative skill of the participants. These arguments will give credibility to the fact that the lower court was correct to grant summary judgment in favor of Draft Masters.

A. DAILY FANTASY SPORTS ARE GAMES OF SKILL NOT CHANCE

1. THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT LEGALIZED FANTASY GAMES IF THE WINNING OUTCOME REFLECTS THE SKILL OF THE PLAYERS.

The Uniform Internet Gambling Enforcement Act (UIGEA) was an act signed into law by President George W. Bush in 2006. 31 U.S.C § 5361 (2012). The act prevents businesses engaged in gambling from knowingly accepting payments in connection with participation of another in unlawful internet gambling. *Id.* § 5362(1)(E)(ix)(II). The act further focuses on: (1) the facts that all the prizes and awards are made known to the participants prior to the contest and the value of the prizes is not dependent upon the number of participants or the amount of the fees, (2) that all winning outcomes reflect the relative knowledge and skill of the participants, and (3) no winning outcome is based on performance is based on a singular performance of a team or the singular performance of an individual athlete. *Id.* § 5362(1)(E)(ix). With that being said the UIGEA exempts fantasy sports, as long as it maintains the above reasons. However, the act does not make daily fantasy sports legal, it just essentially does not criminalize it. The states are allowed deference in deciding whether or not daily fantasy sports are to be legalized within their state. The arguments presented below will help this court determine that daily fantasy sports should be legal in the state of Nevada, and do not require a gaming license to operate within the state. Alone, daily fantasy sports cannot be justified by UIGEA, however UIGEA opens the door for daily fantasy sports by allowing Nevada to create state law for determining if daily fantasy sports is permissible. To start, daily

fantasy sports do not hinge upon specific team or individual performances and they require skill to be consistently successful, they require skill on the behalf of the participant and not luck, as a result of this daily fantasy sports is a game of skill that is exempted by the UIGEA.

2. DAILY FANTASY SPORTS ARE NOT LOTTERIES DUE TO THE SKILL REQUIRED.

The regulations established by the Nevada Gaming Commission provide that if one is conducting a lottery that they are also to be granted a gaming license by the state of Nevada. Nev Gaming Reg 4.010. Nevada Revised Statute 462.105 defines a lottery as:

[A]ny 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.

N.R.S 462.105

Furthermore, courts generally recognize that to constitute a lottery scheme, three elements must be met; there must be consideration to play, a prize, and that it be purely chance. Pure chance is defined by Black's Law Dictionary as, "the entire absence of all means of calculating a result." Black's Law Dictionary 712 (9th ed. 2009). It can be determined that there is more skill and knowledge required than there is actual chance when it comes to daily fantasy sports. There are several cases that point to this very point and present arguments as to why daily fantasy sports are a game of skill, and therefore is not a lottery.

Although, a case holding from another state is secondary law in this situation, we urge the court to take it into consideration. *People ex rel. Ellison v. Lavin* holds merit, and this court has previously referenced the New York case in a case that takes place within Nevada. In *Lavin*, a publisher of a trade newspaper was charged with advertising a lottery, which was to pay

different sized purses to 35,213 different consumers, who were consumers of 30 different types cigarettes. *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 165 (1904). The purse was to be determined by the contestants' ability to state how many cigars the United States was to collect tax on in November of 1903. *Id.* During that time cigars were bearing a \$3.00 tax per thousand. In this case it was determined that it was a lottery, because in some states it requires more than pure chance. *Id.* Lavin defined pure chance as an "entire absence of all means of calculating a result." *Id.* at 167. Lavin also stated that there are states that do not operate on pure chance. *Id.* In these states, Nevada being one, they operate on a test of character of the game, called the "predominant purpose test," and the question becomes which is the more dominating element chance or skill. Furthermore, *Lavin* held that since there was an immense amount of variance in the tax collected from year to year and month to month, that even anyone with skill or knowledge on the matter would not be able to utilize that skill in his or her prediction. *Id.*

The present situation differs from *Lavin* because it can be determined that for daily fantasy sports the skill component outweighs the chance component. In *Lavin*, the variation in the amount of cigars stamped was sporadic to the point where no amount of skill would prevent it from being a competition of chance. Presently, it can be acknowledged that skill is the dominant factor in shaping a fantasy league team. Boswell, John, *Fantasy Sports: A Game of Skill That is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law*, Cardozo Arts and Entertainment Law Journal (2008). There are law review articles that go even further to state that in determining whether skill or chance dominates, one would ask: (1) "is the result of an activity separable from the element of chance, so that skill can be determinative, at least in some cases? And (2) "is the result always sufficiently affected by the operation of chance that chance could always account for the result?" The answers to these questions are

respectively, yes for the first question, and no for the second. *Id.* Managing a roster, keeping up with breaking news on player statuses and injuries, and knowing whether a player is slumping or playing a tough opponent is a skill, and even if on one occasion an unskilled player wins replicating that result would be virtually impossible if one takes into consideration the aforementioned factors

Another case that applies this standard is from Nevada. This case is *Las Vegas Hacienda, Inc. v. Gibson*, it can be determined that daily fantasy sports cannot be considered a lottery scheme, because it lacks the element of chance, based on the “predominate purpose test” administered. *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 30, 359 P.2d 85, 87 (1961). In the *Gibson* case a golf course owner made a public offer to furnish \$5,000 to any person who shot a hole-in-one on the course. *Id.* at 86. Each participating golfer had to pay 50¢ for the opportunity to play. *Id.* When a golfer made that hole-in-one the owner refused to pay. *Id.* The issue was that in Nevada you cannot file an action to collect money that you won from gambling. The court decided to apply the “predominate purpose test” in determining whether or not it was skill or chance. The court determined that skill outweighed chance because although some chance was needed to make the hole-in-one, more skill was required to even place it near the hole. *Id.* at 87. The same can be said about daily fantasy sports though there is chance required in winning a competition; more skill is required to even formulate a team that can open the door to that chance.

The heart and soul of this argument is to be established by whether or not daily fantasy sports are games of skill or games of chance. This determination will go towards determining whether or not daily fantasy sports are sports pools and can assist in determining if they are gambling games. The precedent above sets forth a criteria that makes it blatantly obvious that

daily fantasy sports are games of skill but there are facts and evidence that can further go towards that point and drive the point home that these games are ones of skill.

There are a lot of individuals who partake in daily fantasy sports, it could be easy enough to pick players that one feels will be the most successful on that given day, however it requires skill to evaluate matchups, injuries, free agent signings, preseason games and still make the optimal lineup. Research will help those succeed when they are able to realize that certain players are playing strong opponents or are conceding time to a backup, this is information that is useful and negates the element of chance. Furthermore, in daily fantasy sports there are imaginary budgets assigned that you have to stick to when picking your team, this is crucial because picking a big name can be less beneficial than picking to sub-par names, depending upon the weeks matchup. Lastly, in research conducted it was determined that skill prevailed over chance 70 percent of the time when it came to success in daily fantasy sports.” *I Believe Daily Fantasy Sports Is a Game of Skill, and Here’s the Proof*, Legal Sports Report (Apr. 6, 2015, 8:36 PM), <http://www.legalsportsreport.com/820/view-why-dfs-is-a-game-of-skill/>. Also, further statistics show that a lineup chosen based on the selecting participants skill beat a generated lineup 99.994 percent of the time. *Id.* The above article recognizes how much player data on players is made available to fantasy gamers and utilization of this data is a skill. *Id.*

Based on the above arguments, this court should find that daily fantasy sports are games of skill that do not hinge upon any direct individual or team performance. The amounts that players/contestants stand to win are pre-determined and do not change.

B. DAILY FANTASY SPORTS IS NOT A SPORT POOL OR GAMBLING GAME

1. WHY DAILY FANTASY SPORTS IS NOT A SPORTS POOL

Under the NRS 463.0193, a sports pool is defined as a business where wagers are accepted on sporting events by any means of wagering. NRS 463.0193. NRS 463.01962 defines what a wager is, when money or something of value is risked on an event where the outcome is uncertain. NRS 463.01962. When determining if a daily fantasy sports operation is engaging in a sports pool it must be determined if: (1) a wager is present, (2) whether the wagering is done on sporting events by any system or method of wagering, and (3) whether daily fantasy sports operators are in the business of accepting wagers. *Id.*

There is limited case law or information on classifying whether or not something constitutes a sports pool. Furthermore, the court has been silent on its application of what is and what is not a sports pool, outside of the statutory definition. The opposition will argue that sports pools differ from lotteries, because there is no test required to distinguish between a game of skill and a game of chance. They would be correct on that contention, however since the test for determining whether or not something is a sports pool requires there to be a wagering scheme, it can be ascertained that daily fantasy sports is not a sports pool.

Daily fantasy sports are primarily based on the relative knowledge and skill of the participants. This was stated by the counsel for Draft Masters in the lower court, and since part of wager require that something be risked by the participants there is no reason to find that daily fantasy sports is not part of a wagering scheme. As covered before daily fantasy sports is primarily a showing of skill the more skill that a particular player has of sports and the knowing the system the less risk there is and with less or no risk there is not wager.

Furthermore, if the court were to look closer at how exactly these daily fantasy sites, such as Draft Masters, make money it will be discovered that the site is not engaged in wagering. Coupled with the fact that daily fantasy sports are games of skill, the sites have no interest in the

result of the contests. The site makes its money off of a slight cut of the entry fee. If one were to look closer at the formatting and prizes offer they will discover that most participants rely on their skill to reward them, if they fail to win they view it as a night of fun as they monitor scores from the professional games, or as an investment with at least the option to build on their entry fee. There are instances where a participant and another can go head to head and wager \$1, if one friend were to lose he expects to lose that dollar. The winning friend still builds on what he invests, which makes the money that the daily fantasy sport site makes unnoticeable. Additionally, it can be argued that daily fantasy sports are not part of a wagering scheme because they offer free contestants. In these contestants the participants pay no money, but yet still enabled to the same ability to play daily fantasy sports, minus the possible payout that could have been recognized had they won.

2. WHY DAILY FANTASY SPORTS IS NOT A GAMBLING GAME

To start, NRS 463.0152 defines what a game and a gambling game are. The two terms are one and the same and they mean:

[A]ny game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine for money, property, checks, credit or any representative of value, including, without limiting the generality of the foregoing . . . slot machine, any banking or percentage game or any other game or device approved by the Commission, but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player, or games operated by charitable or educational organizations which are approved by the Board pursuant to the provisions of NRS 463.409.

NRS 463.0152

In it is suggested that daily fantasy sports could possible fall under games played with cards, dice, equipment or any mechanical, electromechanical or electronic device, or it could be a percentage game. To be a part of the first group daily fantasy sports must satisfy two elements; (1) it must be played with one of the instruments that are listed above, and (2) is

must be played for money, checks, credit or anything that has some value. It can be argued that daily fantasy sports meet both of these elements, however this Court has decline to extend the definition of electronic device to Draft Masters electronic component and therefore the first element is not met and daily fantasy sports would not be a game with cards, dice, equipment or any mechanical, electromechanical or electronic device.

Next, it can be argued that daily fantasy sports is a percentage game, in order to be a percentage game there must also be two elements met. *NRS 463.0152*. First, the game must be one in which the patrons wager against each other. *Hughes Props., Inc. v. State*, 100 Nev. 295, 297, 680 P. 2d 970, 971 (1984). The second element, is that the house takes a percentage of each wager as a rake-off. *Id.* As addressed before the court has not progressed its definitions for terms so that they will be applied to daily fantasy sports and therefore daily fantasy sports do not qualify as gambling games. Since daily fantasy sports are predominantly centered on skill, and the court has not defined curtailed terms it can be determined that daily fantasy sports is not a lottery, sports pool, or gambling game. Due to this Draft Kings is not partaking and gambling and is not required to obtain a gaming license. Lastly, the court was correct to grant Draft Master's motion for summary judgment and that decision should be upheld in the present court if the above is taken into consideration.

II. NEVADA'S LICENSING OF DAILY FANTASY SPORTS DOES NOT VIOLATE THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT OF 1992 BECAUSE PREVIOUS SPORTS BETTING WERE ALLOWED IN THE PAST AND THEREFORE, DAILY FANTASY SPORTS ARE EXEMPTED FROM THE ACT.

The Eighth Judicial District Court properly determined that daily fantasy sports are permitted in Nevada under Professional and Amateur Sports Protection Act. R. 14. That court found that Nevada allowed similar sports betting in the past, it is

grandfathered-in, and therefore, daily fantasy sports are permitted now. R. 13. Daily fantasy sports are similar to proposition bets, a type of sports betting legalized in Nevada before PASPA was enacted. R. 18. Furthermore, that court does not interpret PASPA as limiting the State's gaming authority to either the particular sports or types of games previously offered. R. 13-14.

A. PASPA'S PROHIBITION AGAINST SPORTS BETTING EXEMPTS DAILY FANTASY SPORTS.

The Professional and Amateur Sports Protection Act of 1992 (PASPA) exempts daily fantasy sports from the prohibition of sports betting. Furthermore, PASPA is a federal law that prohibits a governmental entity or person from sponsoring, operating, advertising or promoting:

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

28 U.S.C. § 3702. PASPA further provides exemptions against its general prohibition on sports betting to states that are grandfathered-in, such as Nevada. R. 12. A state is grandfathered-in if: lottery, sweepstakes, or other betting, gambling, or wagering scheme to the extent that the scheme was conducted time during the period of beginning January 1, 1976, and ending August 31, 1990 or authorized by a State on October 2, 1991 and that scheme was actually conducted in that State during September 1, 1989 through October 2, 1991. 28 U.S.C.A. § 3704(a). Fantasy daily sports lie within the scope of PASPA's exemptions because Nevada allowed similar sports betting during the exemption period and there is not a substantial change between previous sports betting and daily fantasy sports.

1. NEVADA ALLOWED SIMILAR SPORTS BETTING DURING THE EXEMPTION PERIOD

In order for daily fantasy sports to fall within the exemptions of PASPA, as previously mentioned, similar sports betting must be conducted during the exemption period. The exemption period applicable to daily fantasy sports would include either the time between January 1, 1976 till August 31, 1990 or authorized by Nevada on October 2, 1991. Sports betting was legalized in Nevada in 1951 before PASPA was enacted. History, <http://www.bettingsports.com> (last visited Feb. 17, 2016). Nevada is the only state that offers full-scale legalized sports betting, unlike Delaware, Montana, and Oregon. *Id.*

The phrase “to the extent that the scheme was conducted by that State,” identifies a condition; it does not mean the exact type of sports betting must have been conducted at the time of the exemption. R. 13. It is immaterial as to whether daily fantasy sports were actually conducted during the exemption period. This Court should focus more attention towards the similarities of previous sports betting and daily fantasy sports. Here, Nevada conducts a sports betting similar to daily fantasy sports. One type of sports betting, proposition bets, are wagers on a very specific outcome of a match. R. 18. Proposition bets are tied to different sports, such as the NBA and NFL. Proposition bets are similar to daily fantasy sports because they both are concerned with the actions that take place during the game and in fact, daily fantasy sports are an accumulation of proposition bets. R. 18. For example, a proposition bet may wager whether a particular athlete achieves a certain statistic, while in daily fantasy sports, a person may wager on the statistical performance of a lineup of players. R. 4.

Petitioners err in relying on Delaware case law to claim that PASPA’s exemptions does not include daily fantasy sports because Nevada did not conduct daily fantasy sports during the

applicable exception period. R. 17. Petitioners use *OFC Comm’r of Baseball v. Markell*, 579 F.3d 293 (3rd Cir. 2009) to support their claim. In *Markell*, professional and university sports leagues brought action alleging that Delaware’s Sports Lottery Act violated Professional and Amateur Sports Protection Act. *Id.* at 294. In 2009, the Governor of Delaware proposed three types of sports gambling at existing and future facilities: point-spread bets on individual games; over/under bets on individual games; and multi-game parlay bets. *Id.* In point-spread bets, also known as single game lotteries, bettors must select the winning team in a single sports contest against a point spread. *Id.* at 295. In over/under bets, known as total lotteries, bettor gambles on whether the total number of points scored by both teams in a single contest will be over or under a specific sum. *Id.* Lastly, in multi-game parlay bets, known as parlay lotteries, asked bettors to correctly choose the winners of two or more sports contest. *Id.* That court focused on whether the the proposed sports gambling was actually conducted. *Id.* at 301. The only sports betting scheme conducted by Delaware in 1976 involved the three Scoreboard games, a betting scheme that was limited to multi-game parlays involving only NFL teams. *Id.* at 304. As a result, that court found that any efforts by Delaware to allow wagering on athletic contests involving sports beyond the NFL and any single-game betting would violate PASPA. *Id.* at 293.

The facts in *Markell* differ from daily fantasy sports in Nevada and therefore, this court should decline the Third Circuit’s interpretation that the scheme must be actually conducted in order for a violation of PASPA not to occur. In *Markell*, the proposed sports gambling, such as single-game betting and wagering on athletic sports beyond the NFL were not conducted in 1976. Delaware only conducted one type of sports betting scheme. There were no similarities between the proposed sports gambling and the scheme actually conducted in 1976. In contrast, proposition bets, similar to daily fantasy sports, were conducted in 1976. Previously discussed,

daily fantasy sports are an accumulation of proposition bets. As well, daily fantasy sports and proposition bets cover a number of actual professional sports leagues, including the NFL, the MLB, the NBA, the MLS, NASCAR, as well as college sports such as NCAA football and basketball. R. 22.

2. THERE IS NOT A SUBSTANTIAL CHANGE FROM PREVIOUS SPORTS BETTING AND DAILY FANTASY SPORTS

Alternatively, if this court decides to mirror the Third Circuit's interpretation, *Markell* emphasized that as long as daily fantasy sports do not effectuate a substantive change from the scheme that was conducted during the exemption period, then it will not violate PASPA. *Markell* at 303. Such a de minimis alterations neither violates PASPA's language nor do violence to its central purpose, to limit the spread of state-sponsored sports gambling and maintain the integrity of sports. *Markell*. at 304. If this court attempts to follow the Third Circuit's interpretation, this Court should conclude that there is not a substantial change between previous sports betting, such as proposition bets and daily fantasy sports. Daily fantasy sports does not expand previous sports betting, specifically proposition bets, since it was legalized in 1951. Certain aspects of daily fantasy sports differ from proposition bets, however, daily fantasy sports does not effectuate a substantive change from the scheme of proposition bets during the exception period. Daily fantasy sports is not a new sport or new form of proposition bets. Daily fantasy sports is only an accumulation of proposition bets. This Court does not interpret PASPA as limiting the State's gaming authority to either the particular sports or types of games previously offered. R. 14.

Currently, the District Court of Nevada has decided that licensing daily fantasy sports does not violate PASPA. Therefore, this Court should uphold that decision because similar sports

betting was allowed during the exemption period and there is not a substantial change between previous sports betting and daily fantasy sports.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the decisions of the Eighth Judicial District Court of the State of Nevada.

Dated: February 22, 2016

Respectfully submitted,

Team R10
Counsel for Respondents

APPENDIX A

United States Code Annotated

Title 28. Judiciary and Judicial Procedure (Refs & Annos)

Part VI. Particular Proceedings

Chapter 178. Professional and Amateur Sports Protection

28 U.S.C.A. § 3702

§ 3702. Unlawful sports gambling

Currentness

It shall be unlawful for-

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

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

CREDIT(S)

(Added [Pub.L. 102-559](#), § 2(a), Oct. 28, 1992, 106 Stat. 4228.)

[Notes of Decisions \(2\)](#)

28 U.S.C.A. § 3702, 28 USCA § 3702

Current through P.L. 114-114 (excluding 114-92, 114-94, 114-95 and 114-113) approved 12-28-2015

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APPENDIX B

United States Code Annotated

Title 28. Judiciary and Judicial Procedure (Refs & Annos)

Part VI. Particular Proceedings

Chapter 178. Professional and Amateur Sports Protection

28 U.S.C.A. § 3704

§ 3704. Applicability

Currentness

(a) **Section 3702** shall not apply to--

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

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

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

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

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

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

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

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

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

CREDIT(S)

(Added [Pub.L. 102-559](#), § 2(a), Oct. 28, 1992, 106 Stat. 4228.)

[Notes of Decisions \(4\)](#)

28 U.S.C.A. § 3704, 28 USCA § 3704

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APPENDIX C

United States Code Annotated

Title 31. Money and Finance (Refs & Annos)

Subtitle IV. Money

Chapter 53. Monetary Transactions

Subchapter IV. Prohibition on Funding of Unlawful Internet Gambling

31 U.S.C.A. § 5361

§ 5361. Congressional findings and purpose

Effective: October 13, 2006

Currentness

(a) Findings.--Congress finds the following:

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

(2) The National Gambling Impact Study Commission in 1999 recommended the passage of legislation to prohibit wire transfers to Internet gambling sites or the banks which represent such sites.

(3) Internet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit industry.

(4) New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling

prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.

(b) Rule of construction.--No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.

CREDIT(S)

(Added [Pub.L. 109-347, Title VIII, § 802\(a\)](#), Oct. 13, 2006, 120 Stat. 1952.)

[Notes of Decisions \(1\)](#)

31 U.S.C.A. § 5361, 31 USCA § 5361

Current through P.L. 114-114 (excluding 114-92, 114-94, 114-95 and 114-113) approved 12-28-2015

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APPENDIX D

United States Code Annotated

Title 31. Money and Finance (Refs & Annos)

Subtitle IV. Money

Chapter 53. Monetary Transactions

Subchapter IV. Prohibition on Funding of Unlawful Internet Gambling

31 U.S.C.A. § 5362

§ 5362. Definitions

Effective: October 13, 2006

Currentness

In this subchapter:

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

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

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

(C) includes any scheme of a type described in [section 3702 of title 28](#);

(D) includes any instructions or information pertaining to the establishment or movement of funds by the bettor or customer in, to, or from an account with the business of betting or wagering; and

(E) does not include--

(i) any activity governed by the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934¹ for the purchase or sale of securities (as that term is defined in section 3(a)(10) of that Act);

(ii) any transaction conducted on or subject to the rules of a registered entity or exempt board of trade under the Commodity Exchange Act;

(iii) any over-the-counter derivative instrument;

(iv) any other transaction that--

(I) is excluded or exempt from regulation under the Commodity Exchange Act; or

(II) is exempt from State gaming or bucket shop laws under section 12(e) of the Commodity Exchange Act or section 28(a) of the Securities Exchange Act of 1934;

(v) any contract of indemnity or guarantee;

(vi) any contract for insurance;

(vii) any deposit or other transaction with an insured depository institution;

(viii) participation in any game or contest in which participants do not stake or risk anything of value other than--

(I) personal efforts of the participants in playing the game or contest or obtaining access to the Internet; or

(II) points or credits that the sponsor of the game or contest provides to participants free of charge and that can be used or redeemed only for participation in games or contests offered by the sponsor; or

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

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

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

(III) No winning outcome is based--

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

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

CREDIT(S)

(Added [Pub.L. 109-347, Title VIII, § 802\(a\)](#), Oct. 13, 2006, 120 Stat. 1953.)

[Notes of Decisions \(2\)](#)

Footnotes

¹

So in original. Probably should be followed by a closing parenthesis.

31 U.S.C.A. § 5362, 31 USCA § 5362

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