

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
Eighth Judicial District Court
In and for the County of Clark, Nevada*

BRIEF FOR RESPONDENT

The Inaugural Frank A. Schreck Gaming Law Moot Court Competition,

Counsel for Respondent

QUESTIONS PRESENTED

I. Under the Nevada Gaming Control Act and the Nevada Gaming Commission Regulations, do daily fantasy sports constitute gambling requiring licensure when the outcome is predominately based on skill rather than chance and is not uncertain; the daily fantasy sports operators do not play against the owners; the Nevada Gaming Commission has not approved daily fantasy sports as gambling; and daily fantasy sports are not played with “electronic devices” as intended by the statute?

II. Under the Professional and Amateur Sports Protection Act, would the State of Nevada’s licensing of daily fantasy sports violate the general federal prohibition against sports betting when Nevada conducted sports betting schemes similar to daily fantasy sports during the statutory exemption period?

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iv

OPINIONS OF THE COURT BELOW x

STATEMENT OF JURISDICTION..... xi

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED xii

STATEMENT OF THE CASE..... 1

SUMMARY OF THE ARGUMENT 3

STANDARD OF REVIEW 6

ARGUMENT 7

 I. Daily Fantasy Sports Do Not Constitute Gambling and Do Not Require Licensure Under Nevada Law. 7

 A. Daily Fantasy Sports Are Not Sports Pools, Parlay Card Wagers, Percentage Games, or Lotteries, Because They are Games of Skill and Do Not Involve the Placement of Wagers. 8

 1. Daily Fantasy Sports Are Predominately Games of Skill Because Owners’ Expertise Determines the Outcome..... 9

 2. Daily Fantasy Sports Owners Do Not Place Wagers Because Owners Do Not Depend On Uncertain Events to Win..... 12

 i. Daily Fantasy Sports Are Not Sports Pools Because Owners Do Not Place Wagers. 13

 ii. Daily Fantasy Sports Do Not Amount to Percentage Games Because Owners Do Not Place Wagers..... 14

 iii. Daily Fantasy Sports Do Not Constitute Parlay Card Wagers Because Owners Do Not Place Wagers..... 15

 3. Daily Fantasy Sports Do Not Qualify as Lotteries Because they Are Games of Skill, Not Chance..... 15

B. Daily Fantasy Sports are Not Games Played with Electronic Devices that are Regulated by Nevada.	16
C. Daily Fantasy Sports Are Not Other Forms of Gambling Games.	18
1. Daily Fantasy Sports Are Not Banking Games.	18
2. The Nevada Gaming Commission Has Not Approved Daily Fantasy Sports.	19
II. Nevada’s Licensing of Daily Fantasy Sports Gambling Does Not Violate PASPA.....	20
A. Nevada’s Licensing of Daily Fantasy Sports Would Not Violate PASPA Because Nevada is “Grandfathered-in” to the Statute and is Therefore Exempt from PASPA’s Prohibition Against Licensing Sports Betting.	20
1. Nevada’s Licensing of Daily Fantasy Sports is “Grandfathered-in” Pursuant to 28 U.S.C. § 3704(a)(1).....	21
2. In the Alternative, Nevada’s Licensing of Daily Fantasy Sports is “Grandfathered-in” Pursuant to 28 U.S.C. § 3704(a)(2).	25
i. Nevada Statutorily Authorized Sports Betting Schemes.	25
ii. Nevada Actually Conducted Sports Betting During September 1, 1989 through October 2, 1991.....	26
B. In the Alternative, Nevada’s Licensing of Daily Fantasy Sports Does Not Violate PASPA Because the UIGEA Contains an Explicit “Carve-Out” for Fantasy Sports.	27
1. The Language of the UIGEA Controls Over PASPA.....	28
2. The Explicit “Carve-out” for Fantasy Sports Means Nevada Cannot Violate PASPA.....	29
APPENDICES	A1

TABLE OF AUTHORITIES

Constitutional Provisions:

U.S. Const. amend. X..... 7

Federal Statutes:

28 U.S.C. § 3702 (2012) 20

28 U.S.C. § 3704(a) (2012)..... *passim*

31 U.S.C. § 5361 (2012) 28, 29

31 U.S.C. § 5362(1)(E)(ix) (2012)..... 7, 28, 29

State Statutes:

Nev. Gaming. Reg. § 22.090 (West, Westlaw Current with amendments
available as of November 19, 2015) 8, 15

Nev. R. Civ. P. 56 6

Nev. Rev. Stat. Ann. § 205.4735 (West 2010) 16

Nev. Rev. Stat. Ann. § 360B.410 (West 2011)..... 16

Nev. Rev. Stat. Ann. § 462.105 (West 2012) 8, 15

Nev. Rev. Stat. Ann. § 463.____ [2015, ch. 108 § 1] (LexisNexis,
current through legislation from the Seventy-Eighth Regular
Session (2015), with the exception of Chapters 5, 39, 65, 82,
161, 163, 166, 175, 183, 234, 256, 279, 280, 320, 326, 329,
357, 366, 430, 445, and 487) 9

Nev. Rev. Stat. Ann. § 463.010-790 (West 2010 & Supp. 2015, 1-33) 12

Nev. Rev. Stat. Ann. § 463.0129 (West 2010) 13, 17, 19

Nev. Rev. Stat. Ann. § 463.013, *et seq.* (West 2012 & Supp. 2015, 2)..... 16

Nev. Rev. Stat. Ann. § 463.0133–.01967 (West 2010 & Supp. 1-7)..... 13

Nev. Rev. Stat. Ann. § 463.01365 (West 2010) 18, 19

Nev. Rev. Stat. Ann. § 463.0152 (West 2012) 8, 16, 17, 18

Nev. Rev. Stat. Ann. § 463.0153 (West 2012)	8
Nev. Rev. Stat. Ann. § 463.016425 (West 2010)	17
Nev. Rev. Stat. Ann. § 463.0193 (West 2012)	8, 13
Nev. Rev. Stat. Ann. § 463.01962 (West 2010)	12, 13
Nev. Rev. Stat. Ann. § 463.160 (West 2012 & Supp. 9–10)	22

United States Supreme Court Cases:

<i>BFP v. Resolution Trust Corp.</i> , 511 U.S. 531 (1994).....	23, 24
<i>Branch v. Smith</i> , 538 U.S. 254 (2003).....	28
<i>Burgess v. United States</i> , 553 U.S. 124 (2008).....	21
<i>Freeman v. Quicken Loans, Inc.</i> , 132 S.Ct. 2034 (2012).....	30
<i>Goodyear Atomic Corp. v. Miller</i> , 486 U.S. 174 (1988).....	29
<i>Perrin v. United States</i> , 444 U.S. 37 (1979).....	21
<i>Sandifer v. U.S. Steel Corp.</i> , 134 S.Ct. 870 (2014).....	21
<i>United States v. Nordic Vill. Inc.</i> , 503 U.S. 30 (1992).....	21
<i>United States v. Quality Stores, Inc.</i> , 134 S.Ct. 1395 (2014).....	21
<i>Wachovia Bank, N.A. v. Schmidt</i> , 546 U.S. 303 (2006).....	28

United States Appellate Court Cases:

Alaka v. Attorney Gen.,
456 F.3d 88 (3d Cir. 2006)..... 23

Office of the Comm’r of Baseball v. Markell,
579 F.3d 293 (3d Cir. 2009)..... 22, 23, 26

United States District Courts Cases:

Humphrey v. Viacom, Inc., No. 06-2768 (DMC),
2007 U.S. Dist. LEXIS 44679 (D.N.J. June 19, 2007)..... 10, 14

Interactive Media Entm’t & Gaming Ass’n v. Holder, Civil Action No. 09-1301 (GEB),
2011 U.S. Dist. LEXIS 23383 (D.N.J. Mar. 7, 2011)..... 7

State Supreme Court Cases:

Arizona Cases:

State v. Church,
504 P.2d 940 (Ariz. 1973)..... 17, 18

Nevada Cases:

Banegas v. State Indus. Ins. Sys.,
19 P.3d 245 (Nev. 2001)..... 17

Beazer Homes Nev., Inc. v. Eighth Jud. Dist. Ct.,
97 P.3d 1132 (Nev. 2004)..... 15

Gaming Comm’n v. GNLV Corp.,
834 P.2d 411 (Nev. 1992)..... 12, 13, 15

Grayson v. Jones,
710 P.2d 76 (Nev. 1985)..... 6

Hardy Cos. v. SNMARK, LLC,
245 P.3d 1149 (Nev. 2010)..... 12

Hughes Props. v. State,
680 P.2d 970 (Nev. 1984)..... 14, 15

Kelley v. State,
348 P.2d 966 (Nev. 1960)..... 15

<i>Las Vegas Hacienda v. Gibson</i> , 359 P.2d 85 (Nev. 1961).....	12
<i>Las Vegas v. Macchiaverna</i> , 661 P.2d 879 (Nev. 1983).....	17
<i>Moody v. Manny's Auto Repair</i> , 871 P.2d 935 (Nev. 1994).....	6
<i>Orr Ditch & Water Co. v. Justice Ct. of Reno Twp.</i> , 178 P.2d 558 (Nev. 1947).....	12, 18
<i>Phelps v. State Farm Mut. Auto. Ins. Co.</i> , 917 P.2d 944 (Nev. 1996).....	17
<i>State ex rel. Murphy v. Overton</i> , 16 Nev. 136 (1881).....	15
<i>State Farm Mut. Auto. Ins. Co. v. Comm'r of Ins.</i> , 958 P.2d 733 (Nev. 1998).....	28
<i>State v. Donnelly</i> , 19 P. 680 (Nev. 1888).....	12
<i>Welfare Div. v. Washoe Co. Welfare Dep't</i> , 503 P.2d 457 (Nev. 1972).....	17
<i>Zgombic v. State</i> , 798 P.2d 548 (Nev. 1990).....	17
<u>Vermont Cases:</u>	
<i>State v. Lindsay</i> , 2 A.2d 201 (Vt. 1938).....	9
Secondary Sources:	
<u>Books:</u>	
73 Am. Jur. 2d. Statutes § 97 (2001)	12
<u>Law Review Articles:</u>	
Anthony N. Cabot & Louis V. Csoka, Gaming Law Symposium, <i>Fantasy Sports: One Form of Mainstream Wagering in the United States</i> , 40 J. Marshall L. Rev. 1195 (2007)	11, 14, 29

Anthony N. Cabot & Louis V. Csoka, Symposium, <i>Cross-Border Issues In Gaming: The Games People Play: Is It Time for a New Legal Approach to Prize Games?</i> , 4 Nev. L.J. 197 (2003)	9
Anthony N. Cabot et. al, Article, <i>Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance</i> , 57 Drake L. Rev. 383 (2009)	9
Jefferey C. Meehan, Article, <i>The Predominate Goliath: Why Pay-to-Play Daily Fantasy Sports are Games of Skill Under the Dominant Factor Test</i> , 26 Marq. Sports L. Rev. 5 (2015)	10, 11
M. Christine Holleman, Note, <i>Fantasy Football: Illegal Gambling or Legal Game of Skill?</i> , 8 N.C. J.L. & Tech. 59 (2006)	19
Michael Trippiedi, Note, <i>Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?</i> , 5 UNLV Gaming L.J. 201 (2014).....	10, 11, 19
Nathaniel J. Ehrman, Article, <i>Out of Bounds?. A Legal Analysis of Pay-To-Play Daily Fantasy Sports</i> , 22 Sports Law. J. 79 (2015)	7, 9, 28
<u>Internet Sources:</u>	
Allen Moody, <i>History of Sports Betting</i> , (Feb. 11, 2016 11:18 PM), http://sportsgambling.about.com/od/sportsgambling101/a/sportsbettinghistory.htm	14
<i>An Introduction to Proposition and Matched Betting</i> , Sports Betting Pal, http://www.sportsbettingpal.com/intro-to-proposition-and-matched-betting/ (last visited Feb. 12, 2016).....	26
<i>Conduct</i> , Cambridge Dictionaries Online, http://dictionary.cambridge.org/us/dictionary/english/conduct#american-english-1-1-1 (last visited Feb. 12, 2016).....	24

David McIntire, <i>When the Final Score Doesn't Matter</i> , SB Nation: Longform (Feb. 13, 2016), http://www.sbnation.com/ longform/2013/1/31/3932806/super-bowl-prop-bets-history	26
<i>How It Works</i> , FanDuel, https://www.fanduel.com/how-it-works (last visited Feb. 12, 2016).....	27
Marc Edelman, <i>Lawyer Who Sued FanDuel Brings Another Gambling Lawsuit Against Winner of DraftDay Contest</i> , Forbes (Feb. 11, 2016, 9:10 PM), http://www.forbes.com/sites/marcedelman/2013/05/24/lawyer-who-sued-fanduel-brings- another-gambling-lawsuit-against-winner-of-draftday-contest	7
<i>Nevada Gaming Statutes & Regulations</i> , Nevada Gaming Commission and Nevada Gaming Control Board (Feb. 14, 2016 at 9:07 PM) http://gaming.nv.gov/index.aspx?page=51	7
<i>Scheme</i> , Dictionary.com, http://dictionary.reference.com/browse/scheme (last visited Feb. 12, 2016).....	24
Seth Young, <i>I Believe Daily Fantasy Sports Is a Game Of Skill, And Here's The Proof</i> , (Feb. 11, 2016 10:25 PM), Legal Sports Reporter, http://www.legalsportsreport.com/820/view-why-dfs-is-a-game-of-skill	10, 14
<i>Uncertain</i> , Dictionary.com, (Feb. 14, 2016 9:51 PM), http://dictionary.reference.com/browse/uncertain?s=t	13

OPINIONS OF THE COURT BELOW

The opinion of the Eighth Judicial District Court for the County of Clark, Nevada is unreported. The unreported opinion of the Eighth Judicial District Court for the County of Clark, Nevada appears in the record at pages 2–14.

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution

The Tenth Amendment to the United States Constitution is relevant to these issues. It provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X.

Federal Statutes

The Professional and Amateur Sports Protection Act of 1992 is relevant to these issues. Its text is set forth in the Appendix to this brief. Appendix, *infra*, A.

The Unlawful Internet Gambling Enforcement Act of 2002 is relevant to these issues. Its text is set forth in the Appendix to this brief. Appendix, *infra*, B.

State Statutes

Section 22.090 of the Nevada Gaming Regulations is relevant to these issues. Its text is set forth in the Appendix to this brief. Appendix, *infra*, C.

Section 463.160 of the Nevada Revised Statutes is relevant to these issues. Its text is set forth in the Appendix to this brief. Appendix, *infra*, C.

Section 205.4735 of the Nevada Revised Statutes is relevant to these issues. Its text is set forth in the Appendix to this brief. Appendix, *infra*, C.

Section 360B.140 of the Nevada Revised Statutes is relevant to these issues. Its text is set forth in the Appendix to this brief. Appendix, *infra*, C.

Section 462.105 of the Nevada Revised Statutes is relevant to these issues. Its text is set forth in the Appendix to this brief. Appendix, *infra*, C.

Section 463.____ [2015, ch. 108 § 1] (“Senate Bill 9”) of the Nevada Revised Statutes is relevant to these issues. Its text is set forth in the Appendix to this brief. Appendix, *infra*, C.

Sections 463.010–.790 of the Nevada Revised Statutes are relevant, in part, to these issues. Its relevant texts are set forth in the Appendix to this brief. Appendix, *infra*, C.

STATEMENT OF THE CASE

What Are Daily Fantasy Sports? Daily fantasy sports stem from traditional fantasy sports. In the traditional model, players, (“owners”) draft athletes to their team. Record at 3. Before the draft, owners at all skill levels study athletes’ statistics. Specifically, owners pay close pay attention to athlete injuries, free agent signings, and pre-season games. R at 3. The work continues during the season; owners continue researching statistics, real world events, and athlete performance. R. at 3. During a sporting event, each athlete’s individual performance translates into fantasy points. R. at 3. At the end of the season, the owner with the most fantasy points wins the league. R. at 4.

On the other hand, the daily fantasy sports model allows an owner to draft a new team each day or week instead of being stuck with the same roster for the entirety of a sporting season. R. at 3. Despite the difference in duration, the basic structure of both models is the same because under both models, owners study statistics and life events before the draft, then draft athletes, and in the end the owner with the most successful team wins. R. at 3. Daily fantasy sports only limits owners’ selection of athletes by the establishment of a salary cap, while traditional fantasy sports limits the availability of players during the draft process. R. at 4. A salary cap draft is distinct from traditional fantasy sports drafts that typically operate with a snake-draft. R. at 4. The only other major difference is how the contest is structured. R. at 4. In the traditional model, multiple owners compete against each other over the course of 14-17 weeks and the owner with the most fantasy points wins. R. at 4. In the daily model, owners compete in either a head-to-head or tournament format. R. at 5. In head-to-head games, one owner competes against another owner and the owner with the most points wins. R. at 5. Tournaments involve more than two owners competing against each other. R. at 23. Daily fantasy sports operators can offer

guaranteed and non-guaranteed games. R. at 23. A guaranteed game pays out regardless of the number of owners entered. R. at 23. Non-guaranteed games only pay out when a minimum number of players enter the competition. R. at 23.

How it Works. Draft Masters, LLC is one of many daily fantasy sports host websites. These host sites connect different owners, therefore, permitting individuals to compete against each other. R. at 4. Daily fantasy sports are a multi-billion dollar a year industry. R. at 19. Draft Masters tracks athlete performances over a single game and then converts the athletes' performance into fantasy points. R. at 4. Next, Draft Masters assigns an owner a total score by compiling the individual scores of each athlete in the owner's lineup. R. at 5. Each owner pays a fee to Draft Masters to enter a game. R. at 4–5.

Procedural Background. Because of the growing popularity of daily fantasy sports, the Nevada Gaming Control Board sought an advisory opinion from the Nevada Attorney General regarding the legality of daily fantasy sports. R. at 5. The Nevada Attorney General declared daily fantasy sports are gambling requiring a license. R. at 5. Draft Masters filed suit for declaratory relief against the State of Nevada seeking a holding that daily fantasy sports are not gambling. R. at 5. The National Football League, National Hockey League, National Basketball Association, Major League Baseball, and National Collegiate Athletic Association (The Leagues) intervened and filed a Complaint in Intervention against Draft Masters and the State of Nevada. R. at 5. The Leagues allege that if Nevada licenses daily fantasy sports doing so will violate the Professional and Amateur Sports Protection Act (PASPA), which Congress enacted in 1992. R. at 5. Both parties cross-moved for summary judgment. R. at 5. The Eighth Judicial District Court for the County of Clark, Nevada entered summary judgment in favor of Draft Masters on both issues. R. at 6.

SUMMARY OF THE ARGUMENT

Nevada Gaming Law and Daily Fantasy Sports. Under Nevada law, a gambling game requires a license to legally operate in the state. The United States Congress passed the Unlawful Internet Gambling Enforcement Act (UIGEA) to generally prohibit Internet gambling. The statute contains an exception for fantasy sports. The rationale for the federal exception is that fantasy sports outcomes indicate the skill and knowledge of participants. Not only did the Leagues' lobby for this exception, but Nevada also followed the sentiment of the UIGEA and did not require a license for traditional fantasy sports. Nevada implicitly reached the conclusion that traditional fantasy sports are not gambling. Daily fantasy sports are substantially similar to traditional fantasy sports and therefore, should also not constitute gambling.

Nevada requires a gaming license when the activity is one of the following: (1) a sports pool; (2) a parlay card wager; (3) a lottery; or (4) a gambling game. Nevada defines a gambling game as: (1) a game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine for money; (2) a banking game; (3) a percentage game; or (4) approved by the Nevada Gaming Commission. Participants must place a wager for the game to constitute a sports pool, parlay card wager, or percentage game. An activity is a wager when the outcome is uncertain. An activity qualifies as a lottery when the outcome is predominately determined by chance rather than skill.

Chance or an uncertain outcome is a common element of sports pools, parlay card wagers, percentage games, and lotteries. When the skill of the participant is the dominant factor in the activity, then it does not constitute any of these types of gambling and does not require a license. Daily fantasy sports outcomes are predominately determined by skill for two reasons. First, the expert selection of athletes to a roster by a participant determines the result of daily

fantasy sports, rather than random chance. Second, the salary cap adds an element of skill because it introduces economic analysis into owners' drafting decisions. Therefore, daily fantasy sports outcomes are not uncertain reflect the general skill of the participants, and chance or uncertainty does not predominate over skill. Daily fantasy sports owners do not place wagers, because skill is the dominant factor in the outcome of daily fantasy sports. Therefore, this Court should determine daily fantasy sports are not sports pools, percentage games, parlay card wagers, or lotteries.

Section 463.0152 of the NGCA states that gambling games are games played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine. The only relevant inquiry is whether daily fantasy sports are played with a regulated electronic device. The NGCA does not define "electronic device." Statutory construction reveals that daily fantasy sports are not played with an electronic device as intended in the NGCA to qualify as a gambling game. The other enumerated items identified in this section are solely used for gambling. Daily fantasy sports are only played on computers, tablets, and phones. Computers, tablets, and cell phones have many other functions not related to gambling. Therefore, daily fantasy sports are not played with "electronic devices" as the legislature as intended.

The only other relevant types of gambling under Nevada law are banking games and those the Nevada Gaming Commission has approved. Daily fantasy sports are not banking games, because Draft Masters does not play against the owners. The Nevada Gaming Commission has not approved daily fantasy sports. Therefore, daily fantasy sports are not gambling under Nevada law and do not require licensure.

Nevada's Licensing of Daily Fantasy Sports and PASPA. If this Court holds that daily fantasy sports require licensure, Nevada's licensing would not violate PASPA. PASPA made it

illegal for states to license sports betting, gambling, or wagering schemes. However, PASPA's prohibition does not apply to states that are "grandfathered-in." A state is "grandfathered-in" if the scheme was: (1) conducted by the state at any time from January 1, 1976 through August 31, 1990; or (2) statutorily authorized by the State on October 2, 1991, and that scheme was "actually conducted" in that State from September 1, 1989 through October 2, 1991.

Here, Nevada is grandfathered-in against PASPA's general prohibition because it meets the requirements of subsection (a)(1), and therefore its licensing of daily fantasy sports would not violate PASPA. Nevada has long conducted sports betting schemes during the exception period. Additionally, the lower court correctly held that the phrase "was conducted," as used in the statute, identifies a condition and does not mean that the specific activity must be conducted during the exemption period and because statutory construction analysis produces this interpretation. Contrary to the Leagues' argument, the holding of the Third Circuit in *Markell*, should not be followed because the court is misguided in its application of subsection (a)(1) by incorporating non-existing statutory language.

Alternatively, if this Court does not find that Nevada was "grandfathered-in" subsection (a)(1), then Nevada is grandfathered-in against PASPA through subsection (a)(2). Nevada statutorily authorized sports betting during the exception period. A statutory interpretation of the words "actually was conducted" indicates that the statute refers to the scheme of betting, i.e. sports betting. The statute does not require that the state actually conduct a specific activity, like daily fantasy sports, during the exception period. Sports betting operates primarily through proposition betting. Nevada actually conducted proposition betting during the exception period. Daily fantasy sports utilize a form of proposition betting, and thus do not substantially differ from proposition betting schemes. Therefore, daily fantasy sports qualify under the language

“actually was conducted” and Nevada’s licensing of daily fantasy sports is “grandfathered-in” through subsection (a)(2).

Even if this court should not find Nevada is grandfathered-in through subsection (a)(1) or (a)(2), Nevada’s licensing of daily fantasy sports would not violate PASPA because of the UIGEA’s explicit exemption for fantasy sports. According to settled rules of statutory interpretation, the language of the more recently passed statutes controls in the event of conflict. Congress enacted the UIGEA after PASPA. The UIGEA contains an explicit carve-out for fantasy sports. Moreover, daily fantasy also falls under the statutory provision because the provision contains the word “any.” Therefore, because Congress passed the UIGEA after PASPA and the UIGEA contains an explicit carve-out for fantasy sports, Nevada’s licensing of daily fantasy sports would not violate PASPA.

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings and evidence demonstrate that no genuine issue as to material fact exists and that the moving party is entitled to judgment as a matter of law. Nev. R. Civ. P. 56(c). The appellate court reviews summary judgment orders “...in the light most favorable to the party against whom summary judgment is sought.” *Moody v. Manny's Auto Repair*, 871 P.2d 935, 937 (Nev. 1994). However, the appellant must allege specific facts showing there was a genuine issue for trial. *Grayson v. Jones*, 710 P.2d 76, 77 (Nev. 1985). Here, the lower court correctly granted summary judgment because there are no genuine issues of material fact. Therefore, we ask this Court to affirm the Eighth Judicial District Court’s decision granting summary judgment in favor of Draft Masters and the State of Nevada.

ARGUMENT

I. Daily Fantasy Sports Do Not Constitute Gambling and Do Not Require Licensure Under Nevada Law.

Nevada law controls whether daily fantasy sports constitute gambling. *See* U.S. Const. amend. X. Generally, the regulation of gambling in the United States is left up to the states. *Id.*; *See Interactive Media Entm't & Gaming Ass'n v. Holder*, Civil Action No. 09-1301 (GEB), 2011 U.S. Dist. LEXIS 23383, at *24 (D.N.J. Mar. 7, 2011). However, the United States legislature created one of the few exceptions to the states control over gambling when it enacted the Unlawful Internet Gambling Enforcement Act (UIGEA) to prohibit Internet gambling. *See* 31 U.S.C. § 5362(1)(E)(ix) (2012). Within the UIGEA, Congress provides federal exception for fantasy sports and determined that traditional fantasy sports, which are substantially similar to daily fantasy sports, are not considered a “bet” or “wager” and do not constitute illegal Internet gambling under UIGEA. *Id.*; *See* Marc Edelman, *Lawyer Who Sued FanDuel Brings Another Gambling Lawsuit Against Winner of DraftDay Contest*, Forbes (Feb. 11, 2016, 9:10 PM), <http://www.forbes.com/sites/marcedelman/2013/05/24/lawyer-who-sued-fanduel-brings-another-gambling-lawsuit-against-winner-of-draftday-contest>; *See also* Nathaniel J. Ehrman, Article, *Out of Bounds?. A Legal Analysis of Pay-To-Play Daily Fantasy Sports*, 22 Sports Law. J. 79, 102 (2015). Therefore, daily fantasy sports are not “betting” or “wagering” as defined in the UIGEA, because daily fantasy sports are based on skill and substantially similar to traditional fantasy sports. *See* 31 U.S.C. § 5362(1)(E)(ix).

Because Nevada has not required licensure for traditional fantasy sports, daily fantasy sports also do not constitute gambling under Nevada law. *Nevada Gaming Statutes & Regulations*, Nevada Gaming Commission and Nevada Gaming Control Board (Feb. 14, 2016 at 9:07 PM) <http://gaming.nv.gov/index.aspx?page=51>. Daily fantasy sports are substantially

similar to traditional fantasy sports. For an activity to constitute gambling in Nevada it must either equate to: (1) a sports pool; (2) a parlay card wager; (3) a lottery; or (4) a gambling game. Daily fantasy sports do not meet the requirements of any of these categories and therefore, are not gambling. Nev. Rev. Stat. Ann. § 463.0153 (West 2012); Nev. Rev. Stat. Ann. § 463.0193 (West 2012); Nev. Gaming Reg. § 22.090 (West, Westlaw Current with amendments available as of November 19, 2015); Nev. Rev. Stat. Ann. § 462.105 (West 2012); Nev. Rev. Stat. Ann. § 463.0152 (West 2012).

Because daily fantasy sports are predominately determined by skill, their outcomes are not uncertain and do not constitute a wager. Therefore, daily fantasy sports are not sports pools, parlay card wagers, lotteries, or percentage games (a type of gambling game), because all of these games require the placement of a wager or that chance determines their outcome. Due to the intricacies of daily fantasy sports, they also do not constitute any of the other types of gambling games (games played with “electronic devices”, banking games, or games approved by the Nevada Gaming Commission). Consequently, daily fantasy sports do not require licensure, because they do not constitute gambling.

A. Daily Fantasy Sports Are Not Sports Pools, Parlay Card Wagers, Percentage Games, or Lotteries, Because They are Games of Skill and Do Not Involve the Placement of Wagers.

Daily fantasy sports are “games of skill,” because their outcomes are predominately determined by an owners’ skill. Because daily fantasy sports are predominately determined by skill, their outcome is not uncertain. An activity constitutes a wager when the outcome is uncertain. Therefore, daily fantasy sports are not sports pools, percentage games, parlay card wagers, or lotteries, because they are games of skill and do not involve the placement of wagers.

1. Daily Fantasy Sports Are Predominately Games of Skill Because Owners' Expertise Determines the Outcome.

Daily fantasy sports, like traditional fantasy sports, are games of skill. A game is a “game of skill” when “the skill of the player, rather than chance, is the dominant factor in affecting the outcome of the game...” Nev. Rev. Stat. Ann. § 463.____ [2015, ch. 108 § 1] (LexisNexis, current through legislation from the Seventy-Eighth Regular Session (2015), with the exception of Chapters 5, 39, 65, 82, 161, 163, 166, 175, 183, 234, 256, 279, 280, 320, 326, 329, 357, 366, 430, 445, and 487). Senate Bill 9 defines “skill” as “the knowledge, dexterity or any other ability or expertise of a natural person.” *Id.* Nevada has not defined “chance,” however; courts and legal scholars generally defined “chance” as “an unforeseen or inexplicable cause or its operation...” Anthony N. Cabot et. al, Article, *Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 Drake L. Rev. 383, 394 (2009) (citing to *State v. Lindsay*, 2 A.2d 201, 203–04 (Vt. 1938)). Senate Bill 9 defines a “hybrid game” as game in which a combination of the skill of the player and chance affects the outcome of the game. Nev. Rev. Stat. Ann. § 463.____ [2015, ch. 108 § 1]. Because daily fantasy sports are predominately determined by skill, they meet Senate Bill 9’s definition of “game of skill” and consequently, are not “hybrid games.” Additionally, daily fantasy sports do not constitute sports pools, percentage games, parlay card wagers, or lotteries because they are “games of skill.” See Anthony N. Cabot & Louis V. Csoka, Symposium, *Cross-Border Issues In Gaming: The Games People Play: Is It Time for a New Legal Approach to Prize Games?*, 4 Nev. L.J. 197, 202 (2003).

The similarities between traditional and daily fantasy sports should control the Court’s decision that daily fantasy sports are games of skill. See Ehrman, *supra*, at 102; See Jefferey C. Meehan, Article, *The Predominate Goliath: Why Pay-to-Play Daily Fantasy Sports are Games*

of Skill Under the Dominant Factor Test, 26 Marq. Sports L. Rev. 5, 35 (2015). Daily fantasy sports are substantially similar to traditional fantasy sports in almost all ways. *See* Meehan, *supra*, at 26. Both daily and traditional fantasy leagues require an incredible amount of skill in the research and selection of players, which determines the likelihood of winning. Seth Young, *I Believe Daily Fantasy Sports Is a Game Of Skill, And Here's The Proof*, (Feb. 11, 2016 10:25 PM), Legal Sports Reporter, <http://www.legalsportsreport.com/820/view-why-dfs-is-a-game-of-skill>. For success, traditional and daily fantasy owners must conduct significant research before the season starts to know which athletes to draft, which athletes play in what position, and to understand the dynamics of the teams. *See Humphrey v. Viacom, Inc.*, No. 06-2768 (DMC), 2007 U.S. Dist. LEXIS 44679, at *4 (D.N.J. June 19, 2007). Daily fantasy leagues, while shorter in duration, arguably require just as much skill, if not more, as season-long fantasy leagues. Daily fantasy sports owners use a substantial amount of skill in drafting and research athletes. Owners who skillfully conduct research are about 70% more likely to win over owners who had no knowledge. *See* Young, *supra*. Moreover, 99.994% of the time daily fantasy league winners had a skillfully chosen lineup. *Id.* Owners must conduct large amounts of research if they want to successfully draft a winning roster. Because daily fantasy sports owners draft a new team every day or week, owners must constantly research athletes and their statistics.

Many types of daily fantasy sports games involve a salary cap for the team or individual athletes. Michael Trippiedi, Note, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV Gaming L.J. 201, 209 (2014). This requires owners in daily fantasy sports leagues must figure out how to out-draft other owners and fill their rosters without going over the salary cap, adding another element of skill to daily fantasy sports. Meehan, *supra*, at 12. Even in snake drafts (drafts where owners draft players one by one and

once a player is drafted, they cannot be drafted again), owners must determine if they can wait before drafting a specific athlete or if they need to draft the athlete early. *See* Record at 22.

Because of the frequency with which games are played, daily fantasy league owners must constantly prepare and research athletes and other factors the owner believes are relevant to the outcome of the game. *See generally* Meehan, *supra*, at 13.

In salary cap drafts, owners must skillfully determine which athletes are “worth” drafting because owners only have so much money and cannot draft athletes exceeding that cap. Anthony N. Cabot & Louis V. Csoka, Gaming Law Symposium, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. Marshall L. Rev. 1195, 1196 (2007); Trippedi, *supra*, at 209. Daily fantasy owners can typically draft the same athletes as other owners, which adds another element of skill to daily fantasy sports. Trippedi, *supra*, at 210. Each time an owner drafts for a new game, they can draft the athletes they desire. *See id.* In daily fantasy sports, the owner is not arbitrarily constrained from choosing any athlete by other owners’ selections. R. at 3. An owner is able to choose athletes based solely on skilled research. *See* R. at 3. Daily fantasy sports owners can draft players up until game time, meaning there is less chance an owner is stuck with an athlete that cannot play. *See* R. at 22.

The outcomes of daily fantasy sports are predominately based on skill because the most important aspect of winning a daily fantasy league is owners’ selection of athletes. *See* Young, *supra*. Daily fantasy sports owners have significant control over drafting their roster. Therefore, daily fantasy sports are games of skill, because the outcomes of daily fantasy sports are predominately based on the owner’s skillful selection of athletes.

2. Daily Fantasy Sports Owners Do Not Place Wagers Because Owners Do Not Depend On Uncertain Events to Win.

Playing daily fantasy sports does not constitute wagering because daily fantasy sports are games of skill. The NGCA defines wagers 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 (West 2010) (emphasis added). Before the NGCA’s enactment, this Court stated that a wager “exists when two or more contracting parties have mutual rights in respect to the money wagered and each of the parties necessarily risks something, and has a chance to make something upon the happening or not happening of an *uncertain* event.” *Gaming Comm'n v. GNLV Corp.*, 834 P.2d 411, 412 (Nev. 1992) (citing *Las Vegas Hacienda v. Gibson*, 359 P.2d 85, 86 (Nev. 1961) (emphasis added)). Based on the rules of statutory construction, the statutory definition of wager controls.

However, in interpreting statutes, the court presumes the legislature is aware of common law definitions and that the legislature “did not intend to alter the common law beyond the scope clearly expressed, or fairly implied.” *Orr Ditch & Water Co. v. Justice Ct. of Reno Twp.*, 178 P.2d 558, 571 (Nev. 1947). This Court also stated when enacting a statute “the legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed unless an intention to do so plainly appears by express declaration or necessary implication.” *Hardy Cos. v. SNMARK, LLC*, 245 P.3d 1149, 1155–56 (Nev. 2010) (citing 73 Am. Jur. 2d. Statutes § 97 (2001); *See Orr Ditch Co.*, 178 P.2d at 571; *See State v. Donnelly*, 19 P. 680, 681 (Nev. 1888)). The NGCA does not explicitly abrogate the common law. *See generally* Nev. Rev. Stat. Ann. § 463.010–.790 (West 2010 & Supp. 2015, 1–33). Also, the statutory definition in § 463.01962 and the common law definition of a “wager” easily align. Because the definitions easily coincide and the common law is not explicitly abrogated, the Court may

consider both when determining whether an activity is a wager. *See Nev. Rev. Stat. Ann.* § 463.01962.

Daily fantasy sports are “games of skill” because the outcomes are not predominately determined by chance. The common law definition of a wager requires the players to risk funds based on “chance.” *Gaming Comm’n*, 834 P.2d at 412. Daily fantasy sports are not based on chance; rather, they are based on skill. The statutory definition of a wager requires an uncertain outcome. *Nev. Rev. Stat. Ann.* § 463.01962. Because the statute does not define of “uncertain,” Courts must use the plain meaning of the word. *See Nev. Rev. Stat. Ann.* § 463.0133–.01967 (West 2010 & Supp. 2015, 1–7). The common definition of “Uncertain” is “dependent on chance or unpredictable facts.” *Uncertain*, Dictionary.com, (Feb. 14, 2016 9:51 PM), <http://dictionary.reference.com/browse/uncertain?s=t>. Because about 70% of the time a skilled player beat an unskilled player, the outcome is not predominately based on chance and therefore not uncertain. R. at 10. Thus, daily fantasy sports do not involve wagers.

i. Daily Fantasy Sports Are Not Sports Pools Because Owners Do Not Place Wagers.

Because owners participating in daily fantasy sports do not place wagers daily fantasy sports websites cannot be in the business of accepting wagers. For daily fantasy games to qualify as “sports pools”: (1) the players must place wagers; (2) the wagering must be on sporting events or any other events; and (3) daily fantasy website operators must be “in the business of accepting wagers.” *Nev. Rev. Stat. Ann.* § 463.0193.

The Leagues are concerned with protecting the integrity of sporting events. *See generally Nev. Rev. Stat. Ann.* § 463.0129 (West 2010). The public policy section of the NGCA states the purpose of the act is to ensure “gaming is conducted honestly, competitively and free of criminal and corruptive elements.” *See Nev. Rev. Stat. Ann.* § 463.0129. Sports betting gives rise to many

concerns because bettors bet purely on the outcome of one game or one player's performance. See Allen Moody, *History of Sports Betting*, (Feb. 11, 2016 11:18 PM), <http://sportsgambling.about.com/od/sportsgambling101/a/sportsbettinghistory.htm>. In daily fantasy sports, the concern of fixing the game is so slight it indicates that daily fantasy sports are not gambling. In order to fix a daily fantasy sports event, the owner would have to ensure that only their athletes scored the most points, which would require intimidating or bribing every player, referee, and coach playing on both sides of every game. The owner would also have to make sure other owners did not benefit from the unsavory conduct. In summation, it is nearly impossible for an owner to fix a daily fantasy game to make certain that they won the award.

Unlike gambling, the outcomes of daily fantasy sports are not based on the luck of a pull of a slot machine, or the roll of a dice, or a system's selection of the correct six numbers to win a lottery. Instead, owners earn points in daily fantasy based on skillful selection of rosters. See *Humphrey v. Viacom, Inc.*, 2007 U.S. Dist. LEXIS at *2. To win a daily fantasy league, owners must select a roster that will earn enough points that the owner out scores the other owner(s). See *id.* The owners with the most success, like talent scouts, conduct substantial, meticulous research regarding the athletes' health and statistics. Young, *supra*; Cabot & Csoka, *supra*, at 1213. Participants in daily fantasy sports are not placing wagers because daily fantasy sports outcomes are based predominately on skill. Here, because owners do not place wagers; Draft Masters is not in the business of accepting wagers.

ii. Daily Fantasy Sports Do Not Amount to Percentage Games Because Owners Do Not Place Wagers.

Daily fantasy sports are not percentage games, because owners do not place wagers. *Hughes Props. v. State*, 680 P.2d 970, 971 (Nev. 1984). This Court determined in 1984 that percentage games are: (1) "games where patrons wager against each other"; and (2) "the house

takes a percentage of each wager as a ‘rake-off.’” *Id.* As discussed above, daily fantasy games are not wagers. Therefore, daily fantasy sports are not percentage games.

iii. Daily Fantasy Sports Do Not Constitute Parlay Card Wagers Because Owners Do Not Place Wagers.

Parlay card wagers require for participants to place wagers. Nev. Gaming Reg. § 22.090. Wager is not defined within the statute; therefore the Court must apply the plain and ordinary meaning. *Id.* Statutory construction requires that when a legislature adopts language that has a “particular meaning or history... [the] court may presume the legislature intended the language to have [a] meaning consistent with previous interpretations of the language.” *Beazer Homes Nev., Inc. v. Eighth Jud. Dist. Ct.*, 97 P.3d 1132, 1135–36 (Nev. 2004). This Court previously defined wager as “money wagered and each of the parties necessarily risks something, and has a chance to make something upon the happening... of an uncertain event.” *Gaming Comm'n*, 834 P.2d at 412. Daily fantasy sports are games of skill. Because daily fantasy sports do not involve wagers they are not parlay card wagers.

3. Daily Fantasy Sports Do Not Qualify as Lotteries Because they Are Games of Skill, Not Chance.

The skill of the owner predominately decides the outcome of daily fantasy sports, not chance; therefore, they do not constitute lotteries. A game is a “lottery” under Nevada law, if it: (1) consists of a distribution of property or a prize; (2) by chance; (3) to any person who has paid or promised to pay valuable consideration for the opportunity to acquire the property. Nev. Rev. Stat. Ann. § 462.105; *See also State ex rel. Murphy v. Overton*, 16 Nev. 136, 142 (1881); *See Kelley v. State*, 348 P.2d 966, 969 (Nev. 1960). The only relevant question is whether daily fantasy sports are games of chance. As discussed above, daily fantasy sports are decided predominately on the skill of the owner in selecting and managing their fantasy team. Therefore,

daily fantasy sports do not meet the second element of a lottery. Because daily fantasy sports do not meet the “chance” element of a lottery, they are not lotteries under Nevada law.

B. Daily Fantasy Sports are Not Games Played with Electronic Devices that are Regulated by Nevada.

Daily fantasy sports are not played with electronic devices as the term is used in the NGCA. Nev. Rev. Stat. Ann. § 463.0152. Daily fantasy sports are played on Internet websites, such as DraftMasters.com, via computers, smart phones, and tablets. However, these devices do not constitute the devices described in the NGCA. *Id.* Nevada law consists of four types of gambling games including: 1) “a game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine for money...” (called “electronic device game”); (2) a banking game; (3) a percentage game; or (4) approved by the Commission. Nev. Rev. Stat. Ann. § 463.0152. Nevada law requires two elements to meet this type of gambling game: (1) “a game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine”; and (2) the game must be played “for money, property, checks, credit, or any representative value.” *Id.* It is not disputed that daily fantasy sports meets the second element. Daily fantasy sports are not played with cards, dice, or equipment. *Id.* Statutory construction reveals computers, smart phones, and tablets do not constitute a mechanical, electromechanical, electronic device, or machine as intended by the legislature. *See id.*

The NGCA does not define mechanical, electromechanical, or electronic device or machine. *See Nev. Rev. Stat. Ann. § 463.013, et seq.* (West 2012 & Supp. 2015, 2). Draft Masters’ argument focuses on the term “electronic device.” Multiple interpretations of the term “electronic device” exist. The Eighth District Court stated other statutes defined computers as electronic devices. R. at 12; *See Nev. Rev. Stat. Ann. § 360B.410* (West 2011); *See also Nev. Rev. Stat. Ann. § 205.4735* (West 2010). However, these definitions are not in the NGCA and do

not indicate the legislature's intent regarding devices that can be used in gambling games. The only provision in the NGCA that discusses computers and the Internet is § 463.016425, which discusses "interactive gaming." Nev. Rev. Stat. Ann. § 463.016425 (West 2010). However, this section is not instructive because it discusses games already deemed as gambling. *See id.* To use the definition in § 463.016425 puts the cart before the horse and short-circuits the necessary process of statutory construction. Nev. Rev. Stat. Ann. § 463.0152; Nev. Rev. Stat. Ann. § 463.016425. Therefore, this definition is not controlling.

Because of the lack of a definition in the NGCA, the court must use statutory construction to determine what the legislature intended by "equipment or any mechanical, electromechanical device or electronic device or machine." Nev. Rev. Stat. Ann. § 463.0152. Statutory construction requires the court to ascertain the legislature's intent by the terms in the statute. *Las Vegas v. Macchiaverna*, 661 P.2d 879, 880 (Nev. 1983). The public policy section of the NGCA indicates the legislature intended the statute to prevent organized crime from manipulating the gaming market and sports. Nev. Rev. Stat. Ann. § 463.0129. The public policy section also states, "the continued growth and success of gaming is dependent upon public confidence and trust that ... sale and distribution of gaming devices and associated equipment are conducted honestly and competitively..." Nev. Rev. Stat. Ann. § 463.0129(1)(b); *See Banegas v. State Indus. Ins. Sys.*, 19 P.3d 245, 251 (Nev. 2001) (citing *Welfare Div. v. Washoe Co. Welfare Dep't*, 503 P.2d 457, 459 (Nev. 1972) (stating that subject matter and policy can be used in statutory construction to determine the legislature's intent)).

This Court has applied the doctrine of *ejusdem generis* previously. *Phelps v. State Farm Mut. Auto. Ins. Co.*, 917 P.2d 944, 949 (Nev. 1996) (citing *Zgombic v. State*, 798 P.2d 548, 550 (Nev. 1990) (quoting *State v. Church*, 504 P.2d 940, 943-44 (Ariz. 1973))). *Ejusdem generis*

applies to “things of the same nature, kind, or class as preceding specific enumeration.” *State*, 504 P.2d at 944. This means when a specific list is followed by general words, “the general words are limited to the same kind or class as those expressly mentioned.” *Orr Ditch & Water Co.*, 178 P.2d at 562. After considering the NGCA as a whole and in light of the doctrine of *ejusdem generis*, the court should conclude the legislature’s intent by the terms “equipment or any mechanical, electromechanical device or electronic device or machine” was equipment created with the intent of being used for gambling, such as slot machines, dice, cards, etc. and not computers, tablets, and cell phones, which are used for many other personal, entertainment, and business functions than playing daily fantasy sports. *See Nev. Rev. Stat. Ann. § 463.0152*. Because daily fantasy sports are not played on electronic devices as the legislature intended, daily fantasy sports are not subject to regulation by the Nevada Gaming Commission.

C. Daily Fantasy Sports Are Not Other Forms of Gambling Games.

Daily fantasy sports do not fit into any of the categories of “gambling games” under Nevada law. A “gambling game” must be either: (1) “a game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine for money...”; (2) a banking game; (3) a percentage game; or (4) a game approved by the Commission. *Nev. Rev. Stat. Ann. § 463.0152*. As stated above, daily fantasy sports are not the first or third type of gambling games. Daily fantasy games are also not banking games and have not been approved by the Commission. Because daily fantasy games do not fit under either of these categories, they are not gambling games and do not require licensure under Nevada law.

1. Daily Fantasy Sports Are Not Banking Games.

Daily fantasy sports do not fit within Nevada’s definition of “banking game.” *See Nev. Rev. Stat. Ann. § 463.01365* (West 2010). Under Nevada law, a game constitutes a banking

game when it is played in competition against a licensed gaming establishment, rather than other players. Nev. Rev. Stat. Ann. § 463.01365. Daily fantasy sports leagues are not banking games because Draft Masters does not compete with the players. Draft Masters merely hosts a site for owners to compete with one another.

Daily fantasy sports owners compete against one another to see who can get the most fantasy points with their selected roster. R. at 4–5. The owner with the most points wins. R. at 4–5. There is no competition between the owners and Draft Masters. *See* R. at 4–5. Draft Masters charges a service fee for owners to access the competition and for providing all of the athlete and team statistics to the owners. R. at 34. Because the players compete against one another and not against Draft Masters, daily fantasy sports leagues do not fall under Nevada’s definition of banking games.

2. The Nevada Gaming Commission Has Not Approved Daily Fantasy Sports.

Once the Commission requires a gambling license to conduct business of a game, it becomes clear that the game is considered a gambling game under Nevada law. *See generally* Nev. Rev. Stat. Ann. § 463.0129. Here, the Commission has not required a license for traditional or daily fantasy sports. The Commission is skilled at determining what constitutes gambling. *See* Nev. Rev. Stat. Ann. § 463.0129; *See also* M. Christine Holleman, Note, *Fantasy Football: Illegal Gambling or Legal Game of Skill?*, 8 N.C. J.L. & Tech. 59, 68 (2006). Traditional fantasy sports have had a large presence in Nevada for a long period of time and are not considered gambling. Trippiedi, *supra*, at 208. As discussed above, daily fantasy sports are substantially similar to traditional fantasy sports. The fact that the Commission does not currently require a license for traditional fantasy sports supports the idea that daily fantasy sports are not gambling.

II. Nevada’s Licensing of Daily Fantasy Sports Gambling Does Not Violate PASPA.

Congress enacted PASPA to make sports gambling generally unlawful both federally and at the state-level. 28 U.S.C. § 3702 (2012). Contrary to the Leagues’ position, and assuming *arguendo* this Court holds daily fantasy sports requires a license because it is gambling, such licensing of daily fantasy sports by Respondents, the State of Nevada, would not violate PASPA because the State is “grandfathered-in” under § 3704. Therefore, Nevada’s licensure of daily fantasy sports is exempt from PASPA’s general prohibition against sports betting. In the alternative, Nevada’s licensing of daily fantasy sports does not violate PASPA because the UIGEA legalized fantasy sports within the United States, including Nevada, thus rendering PASPA inapplicable to daily fantasy sports.

A. Nevada’s Licensing of Daily Fantasy Sports Would Not Violate PASPA Because Nevada is “Grandfathered-in” to the Statute and is Therefore Exempt from PASPA’s Prohibition Against Licensing Sports Betting.

Section 3704 of PASPA exempts the prohibition against sports betting by a governmental entity that permits sports betting so long as a lottery, sweepstakes, or other betting, gambling, or wagering scheme (“scheme”) meets one of three carve-outs contained within § 3704(a)(1), (2), or (3). 28 U.S.C. § 3704(a) (2012). Therefore, if the requirements of at least one of the three carve-outs are met, Nevada is “grandfathered-in” and the State’s licensing of daily fantasy sports does not violate PASPA.

As a preliminary matter, subsection (a)(3) does not apply because this carve-out requires the scheme be conducted *exclusively* inside of a casino. *Id.* § 3704(a)(3). Here, daily fantasy sports are not conducted exclusively inside of a casino. Consequently, the analysis turns on either subsection (a)(1) or (a)(2) to determine whether Nevada is “grandfathered-in” to PASPA’s general prohibition against sports betting. Here, Nevada is “grandfathered-in” through subsection

(a)(1) because Nevada conducted fantasy sports during the exception period beginning January 1, 1976 and ending August 31, 1990. In the alternative, if this Court does not agree that Nevada is “grandfathered-in” through subsection (a)(1), then Nevada’s licensing of daily fantasy sports is “grandfathered-in” under subsection (a)(2).

1. Nevada’s Licensing of Daily Fantasy Sports is “Grandfathered-in” Pursuant to 28 U.S.C. § 3704(a)(1).

Section 3704(a)(1) of PASPA states that the prohibition in 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.

28 U.S.C. § 3704(a)(1).

Nevada is “grandfathered-in” under subsection (a)(1) through a statutory interpretation analysis. Courts utilize canons of statutory construction as guidelines to effectuate the intent of Congress. Courts have held that statutory interpretation begins with the actual language of the statute. *See, e.g. United States v. Quality Stores, Inc.*, 134 S.Ct. 1395, 1399 (2014) (noting that the “beginning point is the relevant statutory text” in interpreting a FICA statute). Following this, if Congress provided definitions in a statute, courts must give effect to the definitions provided. *Burgess v. United States*, 553 U.S. 124, 130 (2008). If the statute does not define a term, there is a presumption that Congress intended the undefined term to be construed pursuant to its “ordinary, contemporary, and common” meaning. *Sandifer v. U.S. Steel Corp.*, 134 S.Ct. 870, 876 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). Courts must construe statutes that every word has an operative effect. *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 36 (1992). Here, PASPA contains all statutory definitions in § 3701. However, § 3701 does not define the relevant words “a lottery, sweepstakes, or other betting, gambling, or wagering

scheme.” Importantly, the phrase “to the extent that the scheme was conducted by that State” is also undefined in § 3701. Therefore, it is necessary to utilize the “ordinary, contemporary, and common” meaning of these phrases in order to ascertain legislative intent.

Nevada has long conducted lawful sports betting within PASPA’s boundaries. *See, for example* Nev. Rev. Stat. Ann. § 463.160 (West 2012 & Supp. 9-10) (which requires licensing of “sports pooling” wagers that was enacted in 1955). Therefore, the first part of subsection (a)(1) is met. Instead, the relevant inquiry is whether daily fantasy sports comport with the phrase “to the extent that *the scheme was conducted* by that State.” The lower court correctly held this phrase identifies a condition and does not mean the exact type of sports betting must have been conducted at the time of the exception.

Office of the Comm’r of Baseball v. Markell is the only relevant case decided under PASPA. There, Delaware implemented a statute, which authorized sports betting at certain facilities across the state. *Office of the Comm’r of Baseball v. Markell*, 579 F.3d 293, 295 (3d Cir. 2009). The various sports leagues sought to enjoin the State of Delaware from implementing parts of the statute. *Id.* After the U.S. District Court denied the sports leagues’ motion to grant an injunction, the sports leagues appealed to the Third Circuit. *Id.* There, the Third Circuit engaged in statutory construction of the same subsections in question today and held Delaware’s statute violated PASPA. *Id.* at 300–04.

However, the holding in *Markell* is not binding and this Court should not followed it for several reasons. The Third Circuit, in agreeing with the sports leagues’ interpretation of subsection (a)(1), made it a point to distinguish between a scheme that was “authorized” versus a scheme that was “actually conducted.” *Id.* at 301. The court then reasoned Congress did not mean to “conflate ‘authorized’ and ‘conducted’.” *Id.* After undergoing this analysis, the court

held that Delaware merely “authorized” sports betting but did not “actually conduct” the scheme during the exception period. *Id.* at 301–02, 304.

The Third Circuit’s rationale is misguided because the court’s interpretation broadened the statutory requirement to go beyond the plain language of the statute from “*was conducted*” to “*actually was conducted.*” *Id.*; *See* 28 U.S.C. § 3704(a)(1) (“to the extent that the scheme was conducted”); *cf.* § 3704(a)(2)(B) (“a scheme...*actually* was conducted” (emphasis added)). The court qualified the exception under subsection (a)(1) in such a fashion that incorporated language from subsection (a)(2)—the word “actually”—which is excluded in the language of subsection (a)(1), and then compelled Delaware to meet the burden of having to “actually conduct” the scheme in question to comport with the language in subsection (a)(1). *Markell*, 579 F.3d at 301. This interpretation does not comport with the court’s own application of canons of statutory construction in its holding for two reasons. *Id.* at 301–02. First, it is generally presumed Congress acts intentionally when it includes particular language in one section of a statute but omits it in another. *Id.* (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994)). Second, 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. *Markell*, 579 F.3d at 302 (quoting *Alaka v. Attorney Gen.*, 456 F.3d 88, 97–98 (3d Cir. 2006)). An extension of this logic would yield no difference in the analysis between the carve-outs in subsection (a)(1) and subsection (a)(2), and would render one subsection or the other meaningless, or at the very least lead to an absurd result or consequence.

Instead, a proper reading of subsection (a)(1), utilizing the same canons of construction the court used in *Markell*, would effectuate a different statutory interpretation. The proper interpretation does *not* require that a state “actually conduct” a scheme as the Third Circuit held.

It is generally presumed that Congress acts intentionally when it includes particular language in one section of a statute but omits it in another. *BFP*, 511 U.S. at 537. Therefore, a simple reading of the plain language of (a)(1) does not require the scheme be “actually conducted,” as the Third Circuit held, because Congress chose to exclude the word “actually” from subsection (a)(1) and instead included it in subsection (a)(2). The standard to satisfy subsection (a)(1) must be different than the standard to satisfy subsection (a)(2), which incorporates the word “actually,” because statutory construction presumes Congress intended the subsections to be interpreted differently.

The phrase “was conducted” grammatically operates as the past participle of the verb “conduct,” which is used in its transitive form in this statute, because it follows from a direct object. 28 U.S.C. § 3704(a)(1) (“extent that the *scheme* was *conducted*...” (emphasis added)). The definition of the word “conduct” when used in this sense is “to organize and direct a particular activity.” *Conduct*, Cambridge Dictionaries Online, <http://dictionary.cambridge.org/us/dictionary/english/conduct#american-english-1-1-1> (last visited Feb. 12, 2016). The word “scheme” as used within the phrase “to the extent that the scheme was conducted” refers to “a lottery, sweepstakes, or other betting, gambling or wagering scheme” as used in the preceding phrase of the same sentence. 28 U.S.C. § 3704(a)(1). The definition of “scheme” is “a plan, design, or program of action to be followed; project.” *Scheme*, Dictionary.com, <http://dictionary.reference.com/browse/scheme> (last visited Feb. 12, 2016). The statute does not specify that “the scheme” refers to a specific type of activity. Rather, it is written with generality in accordance with its definition. Therefore, applying the ordinary meaning of the word “conducted,” in conjunction with the word “scheme,” the phrase “was conducted” does not mean daily fantasy sports itself must have been conducted during the exception period. Nevada

conducted similar sports betting during the exception period. Record at 13. Therefore, Nevada meets the requirement of subsection (a)(1) and is grandfathered-in. As a result, daily fantasy sports are permitted under PASPA.

2. In the Alternative, Nevada’s Licensing of Daily Fantasy Sports is “Grandfathered-in” Pursuant to 28 U.S.C. § 3704(a)(2).

Even if this Court finds Nevada’s licensing of daily fantasy sports violates PASPA because it is not grandfathered-in through subsection (a)(1), Nevada’s licensing of daily fantasy sports does not violate PASPA because it is “grandfathered-in” through subsection (a)(2). PASPA’s (a)(2) requires “a...betting...scheme in operation in a State...where both: (A) [the] scheme was authorized by...statute as in effect on October 2, 1991; and (B) the scheme...actually was conducted in that State during [a] period beginning September 1, 1989, and ending October 2, 1991 (the “exemption period”).” 28 U.S.C. § 3704(a)(2). Here, Nevada authorized sports betting schemes by statute in effect on October 2, 1991, and Nevada actually conducted such sports betting schemes during the exception period beginning September 1, 1989, and ending on October 2, 1991, pursuant to Nevada law.

i. Nevada Statutorily Authorized Sports Betting Schemes.

The first requirement of § 3704(a)(2) is that there is a state statute authorizing the scheme. The statute requires that Nevada must have a statute that authorizes sports betting. Here, Nevada statutorily authorized sports betting well before the effective date of PASPA, thus meeting the first requirement in § 3704 subsection (a)(2)(1). *See Nev. Rev. Stat. § 463.160.* Moreover, the Leagues recognize that § 3704 exempts Nevada from PASPA’s prohibition on sports betting in general. R.17. Therefore, Nevada statutorily authorized sports betting schemes in accordance with subsection (a)(2).

ii. Nevada Actually Conducted Sports Betting During September 1, 1989 through October 2, 1991.

The Court should not follow the holding of *Markell* here, but it provides some guidance in the analysis of subsection (a)(2). The court in *Markell* observed that in determining whether a scheme was “actually conducted” during the exception period, PASPA did not require the scheme to be identical in every respect to the scheme the State conducted during the exception period. *Markell*, 579 F.3d at 303. Notably, the court identified that certain aspects of the scheme may differ from the scheme as conducted during the exception period, as long as they do not “effectuate a *substantive change* from the scheme conducted during the exception period.” *Id.* (emphasis added). There, the court held Delaware’s scheme substantially differed from schemes conducted during the exception period, and thus violated PASPA. *Id.* at 304. Here, no such conflation exists. Daily fantasy sports are similar to sports betting schemes conducted during the exception period such that daily fantasy does not effectuate a substantive change from the betting schemes conducted during the exception period.

Sports betting generally operates as a type of proposition betting schemes. *An Introduction to Proposition and Matched Betting*, Sports Betting Pal, <http://www.sportsbettingpal.com/intro-to-proposition-and-matched-betting/> (last visited Feb. 12, 2016). A “proposition bet” (prop bet) is a wager on the occurrence of an event which has no bearing on the outcome of the game. *Id.* A prominent example in prop bets relating to sports is whether a particular athlete achieves a certain goal during the performance of an actual game. *Id.* Nevada actually conducted prop betting during the exception period. R. at 13; *See* David McIntire, *When the Final Score Doesn’t Matter*, SB Nation: Longform (Feb. 13, 2016), <http://www.sbnation.com/longform/2013/1/31/3932806/super-bowl-prop-bets-history> (Nevada conducted sports betting since the 1970s). Daily fantasy sports offer a form of prop betting as its

betting scheme: in lieu of making one prop bet over the occurrence of one specific event, daily fantasy sports created a system of combining multiple propositions with different athletes and facilitating one simple wager over the match. *See How It Works*, FanDuel, <https://www.fanduel.com/how-it-works> (last visited Feb. 12, 2016) (where points are accumulated based on the selected athletes' performances). Although the gamble does not wholly depend on the occurrence of one particular event, the prop bet focuses on the outcome of an aggregate of events occurring, and simply compiles them to form a score. This is no different than placing several individual prop bets on athletes' performances on the occurrence of particular events. Daily fantasy sports merely lumps these multitudes of individual prop bets together over one wager and declares the participant with the higher score as winner. *See* FanDuel, *supra*. Therefore, because of the similar nature of prop betting conducted, daily fantasy sports do not effectuate a substantive change from the sports betting schemes Nevada actually conducted during the exemption period. It is important to note there is no language in subsection (a)(2) which directs that the type of *activity* (i.e. here, daily fantasy sports) must have been actually conducted in the state during the exception period. 28 U.S.C. § 3704(a)(2). Instead, the statute implements broader language by referring to the betting *scheme* that must be actually conducted. *Id.* Because this is the case here, the State's licensing of daily fantasy sports is "grandfathered-in" through subsection (a)(2). Accordingly, Nevada's licensing of daily fantasy sports is "grandfathered-in" because the sports betting scheme offered in daily fantasy sports comports with the exemption contemplated in § 3704(a)(2).

B. In the Alternative, Nevada's Licensing of Daily Fantasy Sports Does Not Violate PASPA Because the UIGEA Contains an Explicit "Carve-Out" for Fantasy Sports.

If this Court does not hold that Nevada's licensing of daily fantasy sports is "grandfathered-in" to PASPA by virtue of § 3704, then in the alternative, Nevada's licensing of

daily fantasy sports does not violate PASPA because the UIGEA contains an explicit “carve-out” for fantasy sports. This “carve-out” prevents Nevada’s licensing of daily fantasy sports from violating the terms of PASPA. In 2006, Congress enacted the UIGEA in an effort to implement new mechanisms for enforcing gambling laws in light of widespread gambling through the Internet. *See* 31 U.S.C. § 5361 (2012). However, as a result of the Leagues’ heavy lobbying efforts, Congress created a statutory exemption for fantasy sports and legalized it across the United States. 31 U.S.C. § 5362(1)(E)(ix) (2012); *See also* Ehrman, *supra*, at 93.

Because Congress enacted the UIGEA more recently than PASPA, courts must presume Congress was aware of PASPA when passing the UIGEA. Further, because Congress passed the UIGEA more recently than PASPA, the UIGEA controls over PASPA with regard to any conflict between both statutes. Utilizing this, statutory interpretation reveals that the explicit “carve-out” for fantasy sports in the UIGEA means Nevada’s licensing of daily fantasy sports cannot violate PASPA. Therefore, the Court should affirm the lower court’s decision and hold Nevada’s licensing daily fantasy sports would not violate PASPA.

1. The Language of the UIGEA Controls Over PASPA.

A fundamental canon of construction, *in pari materia*, states when there are two statutes with the same purpose or object, they should be read as if they were one law to the extent possible. *See Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303 (2006); *See also State Farm Mut. Auto. Ins. Co. v. Comm’r of Ins.*, 958 P.2d 733, 737 (Nev. 1998) (defining *in pari materia* as “when [statutes] relate to the same person or things, to the same class of persons or things, or have the same purpose or object”). However, if the two statutes are irreconcilable, the more recent statute controls. *Branch v. Smith*, 538 U.S. 254 (2003). Furthermore, courts generally presume Congress is aware of the existence of other prior law when enacting new legislation,

and interpret the new statute accordingly. *See, e.g. Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988) (noting the Court presumes Congress is knowledgeable about several States providing additional worker’s compensation awards in evaluating the appropriateness of an award rendered by a state). Applying these canons of construction, alongside the canons mentioned in the analysis of § 3704(a)(1), the language of the UIGEA controls over the language found in PASPA because the UIGEA was enacted more recently than PASPA.

2. The Explicit “Carve-out” for Fantasy Sports Means Nevada Cannot Violate PASPA.

Because the UIGEA explicitly exempts fantasy sports from criminalization, this precludes the prohibition against sports betting found in PASPA relating to fantasy sports. Contrary to the Leagues’ argument that fantasy sports are only “not criminalized” under the UIGEA, a reading of the statute makes clear that fantasy sports are indeed lawful. 31 U.S.C. § 3562(1)(E)(ix); *But cf.* R. at 19. This is because the language of the UIGEA prevails over the language in PASPA due to the UIGEA’s more recent enactment. Consequently, the exemption in the UIGEA renders the prohibition against fantasy sports found in PASPA ineffective because the reading that legalizes fantasy sports in the UIGEA trumps the reading that may prohibit it under PASPA. This reading aligns with the UIGEA notwithstanding the language of § 5361(b) because the Leagues’ heavy lobbying efforts to have Congress exempt fantasy sports indicate tacit legalization. 31 U.S.C. § 5631(b); *See, Cabot & Csoka, supra*, at 1199 (observing that professional sports leagues had an interest in protecting fantasy sports because its future would have been jeopardized if Congress passed the statute with the intent that it would prohibit fantasy sports). Furthermore, daily fantasy sports fall within the statutory exemption in the UIGEA. The statute explicitly states that the term “bet or wager” does not include “*any* fantasy or simulation sports game.” 31 U.S.C. § 5362(1)(E)(ix) (emphasis added). Courts have held the word “any”—

as used in a statute—has an expansive meaning, i.e. one or some indiscriminately of whatever kind. *See Freeman v. Quicken Loans, Inc.*, 132 S.Ct. 2034, 2042 (2012). Accordingly, this Court should construe the UIGEA to include daily fantasy sports.

Even if the Court accepts the League’s argument as true—that the UIGEA merely decriminalizes fantasy sports under its own statute—the result is the same: Nevada’s licensing of daily fantasy sports does not violate PASPA. Because the UIGEA controls over PASPA, the practical effect of UIGEA’s decriminalization also results in the same effect as deeming the UIGEA to make lawful fantasy sports betting, because there remains no enforcement mechanism by which a party can prohibit sports betting.

However, it is important to note that the State of Nevada does not insinuate that the Court’s holding in our favor would result in the UIGEA overruling or rendering the entirety of PASPA meaningless. This Court’s holding would only resolve any conflict between the UIGEA and PASPA specifically relating to traditional and daily fantasy sports; and therefore would leave both statutes’ effects on other sports betting schemes undisturbed.

Therefore, because the language of the UIGEA controls over PASPA with regard to fantasy sports, and the language of the UIGEA also applies to daily fantasy sports, the carve-out contained in the UIGEA reveals that the State of Nevada’s licensing of daily fantasy sports could not violate PASPA.

CONCLUSION

Because daily fantasy sports do not constitute gambling under Nevada law and because Nevada’s licensing of daily fantasy sports would not violate the general prohibition found in PASPA, this Court should uphold the Eighth Judicial District Court’s granting of summary judgment to Draft Masters, LLC and the State of Nevada.

APPENDICES

APPENDIX A: The Professional and Amateur Sports Protection Act of 1992 A2

APPENDIX B: The Unlawful Internet Gambling Enforcement Act of 2006 A4

APPENDIX C: Nevada Revised Statutes A9

APPENDIX A

The Professional and Amateur Sports Protection Act of 1992

28 U.S.C. § 3701. Definitions

For purposes of this chapter --

(1) the term "amateur sports organization" means--

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(2) the term "governmental entity" means a State, a political subdivision of a State, or an entity or organization, including an entity or organization described in section 4(5) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(5)), that has governmental authority within the territorial boundaries of the United States, including on lands described in section 4(4) of such Act (25 U.S.C. 2703(4)),

(3) the term "professional sports organization" means--

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(4) the term "person" has the meaning given such term in section 1 of title 1, and

(5) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States.

28 U.S.C. § 3702. Unlawful sports gambling

It shall be unlawful for--

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

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

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

28 U.S.C. § 3703. Injunctions

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

28 U.S.C. § 3704. Applicability

(a) Section 3702 shall not apply to--

- (1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;
 - (2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both--
 - (A) such scheme was authorized by a statute as in effect on October 2, 1991; and
 - (B) a scheme described in section 3702 (other than one based on parimutuel animal racing or jai-alai games) actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity;
 - (3) a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only to the extent that--
 - (A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter [effective Jan. 1, 1993], to be operated in that municipality; and
 - (B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality; or
 - (4) parimutuel animal racing or jai-alai games.
- (b) Except as provided in subsection (a), section 3702 [28 USCS § 3702] shall apply on lands described in section 4(4) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(4)).

APPENDIX B

The Unlawful Internet Gambling Enforcement Act of 2006

31 U.S.C. § 5362. Definitions.

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 [28 USCS § 3702];
 - (D) includes any instructions or information pertaining to the establishment or movement of funds by the bettor or customer in, to, or from an account with the business of betting or wagering; and
 - (E) does not include--
 - (i) any activity governed by the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 [15 USCS § 78c(a)(47)] for the purchase or sale of securities (as that term is defined in section 3(a)(10) of that Act [15 USCS § 78c(a)(10)]);
 - (ii) any transaction conducted on or subject to the rules of a registered entity or exempt board of trade under the Commodity Exchange Act [7 USCS §§ 1 et seq.];
 - (iii) any over-the-counter derivative instrument;
 - (iv) any other transaction that--
 - (I) is excluded or exempt from regulation under the Commodity Exchange Act [7 USCS §§ 1 et seq.]; or
 - (II) is exempt from State gaming or bucket shop laws under section 12(e) of the Commodity Exchange Act [7 USCS § 16(e)] or section 28(a) of the Securities Exchange Act of 1934 [15 USCS § 78bb(a)];
 - (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 [28 USCS § 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.

(2) Business of betting or wagering. The term "business of betting or wagering" does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service.

(3) Designated payment system. The term "designated payment system" means any system utilized by a financial transaction provider that the Secretary and the Board of Governors of the Federal Reserve System, in consultation with the Attorney General, jointly determine, by regulation or order, could be utilized in connection with, or to facilitate, any restricted transaction.

(4) Financial transaction provider. The term "financial transaction provider" means a creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local payment network utilized to effect a credit transaction, electronic fund transfer, stored value product transaction, or money transmitting service, or a participant in such network, or other participant in a designated payment system.

(5) Internet. The term "Internet" means the international computer network of interoperable packet switched data networks.

(6) Interactive computer service. The term "interactive computer service" has the meaning given the term in section 230(f) of the Communications Act of 1934 (47 U.S.C. 230(f)).

(7) Restricted transaction. The term "restricted transaction" means any transaction or transmittal involving any credit, funds, instrument, or proceeds described in any paragraph of section 5363 [31 USCS § 5363] which the recipient is prohibited from accepting under section 5363.

(8) Secretary. The term "Secretary" means the Secretary of the Treasury.

(9) State. The term "State" means any State of the United States, the District of Columbia, or any commonwealth, territory, or other possession of the United States.

(10) Unlawful Internet gambling.

(A) In general. The term "unlawful Internet gambling" means to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.

(B) Intrastate transactions. The term "unlawful Internet gambling" does not include placing, receiving, or otherwise transmitting a bet or wager where--

(i) the bet or wager is initiated and received or otherwise made exclusively within a single State;

(ii) the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the laws of such State, and the State law or regulations include--

(I) age and location verification requirements reasonably designed to block access to minors and persons located out of such State; and

(II) appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with such State's law or regulations; and

(iii) the bet or wager does not violate any provision of--

(I) the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.);

(II) chapter 178 of title 28 [28 USCS §§ 3701 et seq.] (commonly known as the "Professional and Amateur Sports Protection Act");

(III) the Gambling Devices Transportation Act (15 U.S.C. 1171 et seq.);
or

(IV) the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.).

(C) Intratribal transactions. The term "unlawful Internet gambling" does not include placing, receiving, or otherwise transmitting a bet or wager where--

(i) the bet or wager is initiated and received or otherwise made exclusively--

(I) within the Indian lands of a single Indian tribe (as such terms are defined under the Indian Gaming Regulatory Act); or

(II) between the Indian lands of 2 or more Indian tribes to the extent that intertribal gaming is authorized by the Indian Gaming Regulatory Act;

(ii) the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and complies with the requirements of--

(I) the applicable tribal ordinance or resolution approved by the Chairman of the National Indian Gaming Commission; and

(II) with respect to class III gaming, the applicable Tribal-State Compact;

(iii) the applicable tribal ordinance or resolution or Tribal-State Compact includes--

(I) age and location verification requirements reasonably designed to block access to minors and persons located out of the applicable Tribal lands; and

(II) appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with the applicable tribal ordinance or resolution or Tribal-State Compact; and

- (iv) the bet or wager does not violate any provision of--
 - (I) the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.);
 - (II) chapter 178 of title 28 [28 USCS §§ 3701 et seq.] (commonly known as the "Professional and Amateur Sports Protection Act");
 - (III) the Gambling Devices Transportation Act (15 U.S.C. 1171 et seq.);
 - or
 - (IV) the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.).
- (D) Interstate horseracing.
 - (i) In general. The term "unlawful Internet gambling" shall not include any activity that is allowed under the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.).
 - (ii) Rule of construction regarding preemption. Nothing in this subchapter [31 USCS §§ 5361 et seq.] may be construed to preempt any State law prohibiting gambling.
 - (iii) Sense of Congress. It is the sense of Congress that this subchapter [31 USCS §§ 5361 et seq.] shall not change which activities related to horse racing may or may not be allowed under Federal law. This subparagraph is intended to address concerns that this subchapter [31 USCS §§ 5361 et seq.] could have the effect of changing the existing relationship between the Interstate Horseracing Act [Act Oct. 25, 1978, P.L. 95-515; for full classification, consult USCS Tables volumes] and other Federal statutes in effect on the date of the enactment of this subchapter [enacted Oct. 13, 2006]. This subchapter [31 USCS §§ 5361 et seq.] is not intended to change that relationship. This subchapter [31 USCS §§ 5361 et seq.] is not intended to resolve any existing disagreements over how to interpret the relationship between the Interstate Horseracing Act [Act Oct. 25, 1978, P.L. 95-515; for full classification, consult USCS Tables volumes] and other Federal statutes.
- (E) Intermediate routing. The intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made.
- (11) Other terms.
 - (A) Credit; creditor; credit card; and card issuer. The terms "credit", "creditor", "credit card", and "card issuer" have the meanings given the terms in section 103 of the Truth in Lending Act (15 U.S.C. 1602).
 - (B) Electronic fund transfer. The term "electronic fund transfer"--
 - (i) has the meaning given the term in section 903 of the Electronic Fund Transfer Act (15 U.S.C. 1693a), except that the term includes transfers that would otherwise be excluded under section 903(6)(E) of that Act [15 USCS § 1693a(6)(E)]; and
 - (ii) includes any fund transfer covered by Article 4A of the Uniform Commercial Code, as in effect in any State.
 - (C) Financial institution. The term "financial institution" has the meaning given the term in section 903 of the Electronic Fund Transfer Act [15 USCS § 1693a], except that such term does not include a casino, sports book, or other business at or through which bets or wagers may be placed or received.
 - (D) Insured depository institution. The term "insured depository institution"--

- (i) has the meaning given the term in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)); and
- (ii) includes an insured credit union (as defined in section 101 of the Federal Credit Union Act [12 USCS § 1752]).

(E) Money transmitting business and money transmitting service. The terms "money transmitting business" and "money transmitting service" have the meanings given the terms in section 5330(d) [31 USCS § 5330(d)] (determined without regard to any regulations prescribed by the Secretary thereunder).

31 U.S.C. § 5363. Prohibition on acceptance of any financial instrument for unlawful Internet gambling.

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

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

APPENDIX C

Nevada Revised Statutes

Nevada Gaming Regulation § 22.090 Parlay Card Wagers.

1. As used in this section, “parlay card wager” means a wager on the outcome of a series of 3 or more games, matches, or similar sports events or on a series of 3 or more contingencies incident to particular games, matches or similar sports events.

2. Each sports pool that offers to accept parlay card wagers shall fully, accurately, and unambiguously disclose on all parlay card wagering forms:

(a) The amounts to be paid to winners or the method by which such amounts are to be determined and, if the sports pool limits payouts to an aggregate amount under subsection 3, the aggregate amount and the establishments to which it applies.

(b) The effect of ties.

(c) The minimum and maximum betting limits, if any.

(d) The procedure for claiming winnings, including but not limited to the documentation players must present to claim winnings, time limits, if any, for claiming winnings, whether winnings may be claimed and paid by mail and, if so, the procedure for claiming winnings by mail.

(e) The effects of an event wagered on not being played on the date specified and of other events that will cause selections to be invalid.

(f) The requirement that a parlay card wager must consist of at least three selections that have not become invalid under applicable house rules or the wager will be void and the money wagered will be refunded.

(g) The rights, if any, reserved by the sports pool, including but not limited to reservation of the right to refuse any wager or delete or limit any selection prior to the acceptance of a wager, or to withhold payouts of specified amounts until the outcome of each proposition offered by the parlay card has been determined.

(h) The requirement that the point spreads printed on the parlay card wagering form when the wager is accepted will be used to determine the outcomes of the wagers.

(i) That the sports pool’s house rules apply to parlay cards unless otherwise stated on the parlay card wagering form.

3. As used in this subsection, “parlay card” means a wagering form offering exactly the same propositions on exactly the same terms.

(a) A sports pool, a sports pool and its outstation books, or a sports pool and its satellite books may limit the aggregate amount to be paid to winners on a parlay card in proportion to the amounts won, provided that the aggregate limit must not be less than the amount disclosed on the parlay card (the “base amount”) plus twice the amount wagered on the parlay card at all establishments to which the aggregate limit applies.

(b) When a sports pool knows or reasonably should know that actual payouts on a parlay card will be limited by an aggregate amount established under paragraph (a), the sports pool shall cease accepting wagers and making payouts on the parlay card. After the outcome of the final game, match, or event covered by the parlay card has been determined, the sports pool shall pay each winner at least that proportion of the payout amount stated on the parlay card that the

aggregate limit bears to total payouts (including payouts made prior to the suspension of payouts) that would otherwise have been made but for the limit.

(c) When a book ceases accepting wagers and making payouts on a parlay card under paragraph (b), the book may accept wagers on the parlay card on those propositions whose outcomes have not been determined if the parlay card, patron receipts, and related documentation are distinguishable from the card, receipts, and documentation as to which the book has ceased accepting wagers, in which case the parlay card shall be considered a different parlay card for purposes of this subsection.

(d) If a book pays the winner of a parlay card wager more than 10 percent of the base amount established under paragraph (a) before the outcome of every proposition offered by the parlay card has been determined, the book must pay every winner of a wager on that parlay card the proper payout amount stated on the parlay card in full and without regard to any aggregate limit established under paragraph (a).

(e) In specific cases the commission may waive or impose requirements more restrictive than the requirements of this subsection.

Nev. Rev. Stat. 205.4735 “Computer” defined. “Computer” means an electronic device which performs logical, arithmetic and memory functions by manipulations of electronic or magnetic impulses and includes all equipment related to the computer in a system or network.

Nev. Rev. Stat. 360B.410 “Computer” construed. “Computer” means an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.

Nev. Rev. Stat. 462.105 “Lottery” defined.

1. Except as otherwise provided in subsection 2, “lottery” means any scheme for the disposal or distribution of property, by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining that property, or a portion of it, or for any share or interest in that property upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle or gift enterprise, or by whatever name it may be known.

2. “Lottery” does not include a promotional scheme conducted by a licensed gaming establishment in direct association with a licensed gaming activity, contest or tournament.

3. For the purpose of this section, a person has not “paid or promised to pay any valuable consideration” by virtue of having:

(a) Engaged in or promised to engage in a transaction in which the person receives fair value for the payment;

(b) Accepted or promised to accept any products or services on a trial basis; or

(c) Been or promised to have been present at a particular time and place,

as the sole basis for having received a chance to obtain property pursuant to an occasional and ancillary promotion conducted by an organization whose primary purpose is not the operation of such a promotion.

Nev. Rev. Stat. 463.160 Licenses required; unlawful to permit certain gaming activities to be conducted without license; exceptions; separate license required for each location where operation of race book or sports pool conducted.

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

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

(b) To provide or maintain any information service;

(c) To operate a gaming salon;

(d) To receive, directly or indirectly, any compensation or reward or any percentage or share of the money or property played, for keeping, running or carrying on any gambling game, slot machine, gaming device, mobile gaming system, race book or sports pool;

(e) To operate as a cash access and wagering instrument service provider; or

(f) To operate, carry on, conduct, maintain or expose for play in or from the State of Nevada any interactive gaming system,

without having first procured, and thereafter maintaining in effect, all federal, state, county and municipal gaming licenses as required by statute, regulation or ordinance or by the governing board of any unincorporated town.

2. The licensure of an operator of an inter-casino linked system is not required if:

(a) A gaming licensee is operating an inter-casino linked system on the premises of an affiliated licensee; or

(b) An operator of a slot machine route is operating an inter-casino linked system consisting of slot machines only.

3. Except as otherwise provided in subsection 4, it is unlawful for any person knowingly to permit any gambling game, slot machine, gaming device, inter-casino linked system, mobile gaming system, race book or sports pool to be conducted, operated, dealt or carried on in any house or building or other premises owned by the person, in whole or in part, by a person who is not licensed pursuant to this chapter, or that person's employee.

4. The Commission may, by regulation, authorize a person to own or lease gaming devices for the limited purpose of display or use in the person's private residence without procuring a state gaming license.

5. For the purposes of this section, the operation of a race book or sports pool includes making the premises available for any of the following purposes:

(a) Allowing patrons to establish an account for wagering with the race book or sports pool;

(b) Accepting wagers from patrons;

(c) Allowing patrons to place wagers;

(d) Paying winning wagers to patrons; or

(e) Allowing patrons to withdraw cash from an account for wagering or to be issued a ticket, receipt, representation of value or other credit representing a withdrawal from an account for wagering that can be redeemed for cash,

whether by a transaction in person at an establishment or through mechanical means, such as a kiosk or similar device, regardless of whether that device would otherwise be considered associated equipment. A separate license must be obtained for each location at which such an operation is conducted.

6. As used in this section, "affiliated licensee" has the meaning ascribed to it in NRS 463.430.

Nev. Rev. Stat. Ann. § 463.____ [2015, ch. 108, § 1]

1. The Legislature hereby declares that:

(a) The State of Nevada leads the nation as the home state for companies that design, develop and bring to market the technology which supports the global gaming industry, including gaming devices, associated equipment and various gaming support systems.

(b) The continued growth and success of the gaming industry in the State of Nevada depends on the fostering of a business and regulatory environment that promotes continued advances in the use of technology in gaming, which improves the entertainment experience, encourages innovation and supports expansion of the domestic technology sector of the economy of this State.

2. The Commission shall, with the advice and assistance of the Board, adopt regulations which encourage manufacturers to develop and deploy gaming devices, associated equipment and various gaming support systems that incorporate innovative, alternative and advanced technology.

3. The regulations adopted pursuant to subsection 2 may include, without limitation, technical standards for the manufacture of gaming devices, associated equipment and gaming support systems that:

(a) Define and differentiate between the requirements for and the outcomes of a game of skill, a game of chance and a hybrid game;

(b) Allow flexibility in payout percentages or the outcome of a game as determined on the basis of nondiscriminatory identifiers;

(c) Support integration of social networking technologies;

(d) Facilitate among enrolled players the interactive and concurrent play of games supported by networked server computers;

(e) Accommodate secure account wagering and transactions using electronic commerce; and

(f) Require, when applicable, appropriate information to be disclosed to a player explaining that the outcome of a game will be affected by skill or identifiers.

4. As used in this section:

(a) "Game of skill" means a game in which the skill of the player, rather than chance, is the dominant factor in affecting the outcome of the game as determined over a period of continuous play.

(b) "Hybrid game" means a game in which a combination of the skill of the player and chance affects the outcome of the game as determined over a period of continuous play.

(c) "Identifier" means any specific and verifiable fact concerning a player or group of players which is based upon objective criteria relating to the player or group of players, including, without limitation:

(1) The frequency, value or extent of predefined commercial activity;

(2) The subscription to or enrollment in particular services;

(3) The use of a particular technology concurrent with the play of a gaming device;

(4) The skill of the player;

(5) The skill of the player relative to the skill of any other player participating in the same game;

(6) The degree of skill required by the game; or

(7) Any combination of subparagraphs (1) to (6), inclusive.

(d) “Skill” means the knowledge, dexterity or any other ability or expertise of a natural person.

Nev. Rev. Stat. 463.0129 Public policy of state concerning gaming; license or approval revocable privilege.

1. The Legislature hereby finds, and declares to be the public policy of this state, that:

(a) The gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants.

(b) The continued growth and success of gaming is dependent upon public confidence and trust that licensed gaming and the manufacture, sale and distribution of gaming devices and associated equipment are conducted honestly and competitively, that establishments which hold restricted and nonrestricted licenses where gaming is conducted and where gambling devices are operated do not unduly impact the quality of life enjoyed by residents of the surrounding neighborhoods, that the rights of the creditors of licensees are protected and that gaming is free from criminal and corruptive elements.

(c) Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments, the manufacture, sale or distribution of gaming devices and associated equipment and the operation of inter-casino linked systems.

(d) All establishments where gaming is conducted and where gaming devices are operated, and manufacturers, sellers and distributors of certain gaming devices and equipment, and operators of inter-casino linked systems must therefore be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State, to foster the stability and success of gaming and to preserve the competitive economy and policies of free competition of the State of Nevada.

(e) To ensure that gaming is conducted honestly, competitively and free of criminal and corruptive elements, all gaming establishments in this state must remain open to the general public and the access of the general public to gaming activities must not be restricted in any manner except as provided by the Legislature.

2. No applicant for a license or other affirmative commission approval has any right to a license or the granting of the approval sought. Any license issued or other commission approval granted pursuant to the provisions of this chapter or chapter 464 of NRS is a revocable privilege, and no holder acquires any vested right therein or thereunder.

3. This section does not:

(a) Abrogate or abridge any common-law right of a gaming establishment to exclude any person from gaming activities or eject any person from the premises of the establishment for any reason; or

(b) Prohibit a licensee from establishing minimum wagers for any gambling game or slot machine.

Nev. Rev. Stat. 463.01365 “Banking game” defined. “Banking game” means any gambling game in which players compete against the licensed gaming establishment rather than against one another.

Nev. Rev. Stat. 463.0152 “Game” and “gambling game” defined. “Game” or “gambling game” means any game played with cards, dice, equipment or any mechanical,

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

Nev. Rev. Stat. 463.0153 “Gaming” and “gambling” defined. “Gaming” or “gambling” 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. 463.016425 “Interactive gaming” defined.

1. “Interactive gaming” means 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. The term:

(a) Includes, without limitation, Internet poker.

(b) Does not include the operation of a race book or sports pool that uses communications technology approved by the Board pursuant to regulations adopted by the Commission to accept wagers originating within this state for races, or sporting events or other events.

2. As used in this section, “communications technology” means any method used and the components employed by an establishment to facilitate the transmission of information, including, without limitation, transmission and reception by systems based on wire, cable, radio, microwave, light, optics or computer data networks, including, without limitation, the Internet and intranets.

Nev. Rev. Stat. 463.0193 “Sports pool” defined. “Sports pool” means the business of accepting wagers on sporting events or other events by any system or method of wagering.

Nev. Rev. Stat. 463.01962 “Wager” defined. “Wager” means a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.