

IN THE

Supreme Court of the State of Nevada

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

vs.

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

No. 77777

Date: February 22, 2016

/s/ **R4**

Counsel for Respondents

QUESTIONS PRESETNED

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

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OPINIONS BELOW

The Nevada Gaming Control Board sought a comprehensive review of the legality of daily fantasy sports under Nevada state law, and requested the Nevada Attorney General to conduct such a review.¹ The Nevada Attorney General concluded that daily fantasy sports constituted gambling under Nevada law, and therefore required a gambling license.² Because the Respondent's daily fantasy sports business did not have a gambling license, the Nevada Gaming Control Board sent a cease and desist letter to Respondents informing them that they could no longer legally operate their business without a gambling license. Respondents, disagreeing with the Nevada Attorney General's opinion, subsequently filed for declaratory relief against the state of Nevada to declare that daily fantasy sports are not gambling.³ The Petitioner professional and collegiate sports leagues thereafter filed a complaint in intervention against the Respondents, alleging that if the state of Nevada were to license daily fantasy sports it would violate the Professional and Amateur Sports Protection Act.⁴ Both Respondents and Petitioners cross moved for summary judgment in favor of their positions.⁵

The Eighth Judicial District Court for Clark County in Nevada, after considering both Respondent's and Petitioner's motions for summary judgment, found for Respondents and declared that daily fantasy sports were neither illegal lotteries nor gambling games such that a gambling license was required under Nevada law.⁶ Specifically, the Court found that daily fantasy sports are games of skill rather than chance, and that the pertinent skill to be assessed is that of the fantasy team owner selecting the lineup rather than the on-the-field athletes playing in

¹ *Record* at 5.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 6.

the games.⁷ The Court also found that the Unlawful Internet Gambling Enforcement Act explicitly legalized fantasy sports, including daily fantasy sports, in the United States.⁸ The Court further found that daily fantasy games do not constitute gambling games because they do not involve wagers, as that term is used in the Nevada statutes, and that daily fantasy games do not constitute sports pools because they are games of skill rather than chance.⁹

The District Court also found that, in the event that the state of Nevada did decide to grant a gambling license to daily fantasy sports games, it would not violate the Professional and Amateur Sports Protection Act.¹⁰ The court stated that Nevada had sufficiently offered similar fantasy games between January 1, 1976 and August 31, 1990, thus grandfathering in daily fantasy sports into protection from the law.¹¹

After the court granted summary judgment to Respondents declaring daily fantasy sports a non-gambling skill based game and that any licensure of daily fantasy sports would not violate the Professional and Amateur Sports Protection Act, the Petitioners appealed the decision. Petitioner's writ of certiorari to the Nevada Supreme Court was subsequently granted.

⁷ *Id.* at 9.

⁸ *Id.* at 8.

⁹ *Id.* at 10-12.

¹⁰ *Id.* at 6.

¹¹ *Id.* at 12-13.

STATEMENT OF JURISDICTION

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

STATEMENT OF FACTS

Respondent Draft Masters is a daily fantasy sports business in which players, known as team “owners,” compete against other players for the chance to win a monetary prize.

Respondent’s games mirror traditional fantasy sports, the main differences arising in their draft process and duration. In traditional fantasy sports, which last an entire sports season, players will draft athletes from various professional sports teams at the beginning of the season, most commonly through a “snake” or “auction” draft.¹² A snake draft consists of the each drafter having reciprocal draft spots in each round until all the teams are filled.¹³ An auction draft consists of a moderator auctioning off each player one by one while owners bid on each player in order to get them on their team. The owner who bids the highest wins each player, and each owner is allotted the same amount of money with which to bid during the entire draft.

Daily fantasy sports, on the other hand, consist of only a single day of games instead of lasting for an entire season. The draft process is usually a salary cap based draft, wherein each owner in the league has the same salary cap from which to buy players for their team.¹⁴ The salary cap draft is similar to the auction draft process, however each player can only be taken once in an auction draft whereas a player may be on as many teams as there are owners who desire them in a salary cap league.

Respondent’s daily fantasy games can be played in various formats, including head-to-head games and tournament games.¹⁵ Head-to-head games are contest which pit one owner

¹² *Id.* at 22.

¹³ By way of example, if a draft had ten owners, the owner who picks first in the initial round would pick tenth in the second round, and the owner who picked tenth in the initial round would immediately pick again in the first slot of the second round.

¹⁴ *Record* at 22.

¹⁵ *Id.* at 5.

against another owner, and the winner is the owner whose selected team scores more fantasy points, which is calculated based on the on-the-field statistics of the athletes in their respective games.¹⁶ Tournament games are similar to head-to-head games, but there are more than two owners who are competing for the top prize.¹⁷ Respondents also offer both guaranteed and non-guaranteed fantasy games. Guaranteed games are games that are paid out no matter how many owners join the contest, whereas non-guaranteed games are games which only occur if a certain minimum number of owners decide to join the contest.¹⁸ In the event that not enough owners join a non-guaranteed contest, all the entrance fees of owners who joined is refunded and the contest does not happen.¹⁹

Respondent's daily fantasy games, and other similar daily fantasy sports games, have become wildly popular in the United States, accounting for nearly half a billion dollars spent in the three billion dollar fantasy sports industry.²⁰ With millions of active players, even professional leagues have jumped onto the daily fantasy sports train, with the National Basketball Association becoming an equity investor in FanDuel, and multiple teams from the National Hockey League and the National Football League have announcing partnership agreements with DraftKings.²¹ As Respondent's business has spread nationwide, they now seek declaratory judgment against the state of Nevada declaring their contests as games of skill that do not constitute gambling under Nevada law in order to ensure their continued presence is legal and to meet the demands of their rabid consumers within the state.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 Sports Law J. 79, 83 (2015).

²¹ See <http://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279/> (By way of clarification, FanDuel and DraftKings are also daily fantasy sports operators that function very similarly to Draft Masters).

SUMMARY OF THE ARGUMENTS

The District Court for the Eight Judicial District of Nevada did not err in finding that Respondent's daily fantasy sports contest were games of skill, and therefore not gambling games requiring a license from the Nevada Gaming Control Board. This is so because the outcome of daily fantasy contests are predominately determined by the skill of the payer rather than by random chance. Furthermore, based on national consensus, as well as the meaning and purpose of the Nevada statutes, daily fantasy sports does not involve a "wager" and therefore is outside the intended reach of the Nevada statute regulating gambling games. Therefore, Respondent's respectfully request that this Court affirm the District Court and declare daily fantasy sports a game of skill and a non-gambling game.

Alternatively, even if the Court is inclined to rule that daily fantasy sports is a gambling game that requires a gambling license, the District Court still did not err because they correctly held that granting a license to Respondents would not violate the Professional and Amateur Sports Protection Act. This is because daily fantasy sports are substantially similar to traditional fantasy sports, which are expressly authorized by statute in Nevada, and similar betting activities were actually conducted in the state prior to the enactment of the Professional and Amateur Sports Protection Act, thus grandfathering in fantasy sports, including daily fantasy sports.

For these reasons, Respondents respectfully request that this Court affirm the District Court on both questions presented, and allow Respondents to continue to operate their highly demanded and legal contests in Nevada.

ARGUMENT

A. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGEMENT TO RESPONDENTS AND PROPERLY DECLARED DAILY FANTASY SPORTS AS A NON-GAMBLING GAME OF SKILL, SUCH THAT IT DOES NOT REQUIRE A GAMBLING LICENSE IN NEVADA.

The Nevada Gaming Control Act (hereinafter, “NGCA”) provides that, in order to promote the continued growth and success of the “vitally important” gaming industry, “all establishments where gaming is conducted and where gaming devices are operated” must have a valid license issued by the Nevada Gaming Control Board.²² This licensure scheme is intended to ensure and promote “public confidence and trust” in the Nevada gaming industry by assuring the populace that all gaming is being conducted “honestly, competitively, and free of criminal and corruptive elements.”²³

In order for an activity to be considered “gambling” under Nevada state law such that a license is required, the activity must fall into one of the categories outlined in the NGCA.²⁴ Pertinent to our discussion of Daily Fantasy Sports (hereinafter, “DFS”) are the categories “gambling games” and “sports pool(s).” Additionally, DFS could run afoul of Nevada state law by being classified as a non-charitable lottery. Under Nevada law, only recognized charitable lotteries may be operated and any other lottery is punishable under the statute.²⁵ A charitable lottery is “a lottery operated by a bona fide charitable or nonprofit organization” that abides by the specific provision of the statute.²⁶

DFS neither constitutes a gambling game nor a sports pool as those terms are defined and understood nationally and under Nevada law. This is true because there is no “wager” present,

²² Nev. Rev. Stat. § 463.0129.

²³ *Id.*

²⁴ Nev. Rev. Stat. § 463.160.

²⁵ Nev. Rev. Stat. § 462.250.

²⁶ Nev. Rev. Stat. § 462.064.

and therefore DFS activities do not require a gambling license from the Nevada Gaming Control Board. Further, DFS does not constitute an illegal lottery under Nevada law because skill rather than chance is the dominate factor in determining the outcome of the contests. Therefore, DFS is neither unlicensed gambling nor an illegal lottery and is therefore entitled to operate their highly desirable and heavily demanded business in Nevada without a gambling license.

I. DFS Does Not Constitute an Illegal Lottery Under Nevada Law Because The Contests are Predominately Determined By Skill Rather Than By Chance.

Under the Nevada state law, a lottery is:

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.²⁷

This statute has, in effect, codified the traditional three essential common law elements of gambling: “(1) a prize; (2) chance; and (3) consideration.”²⁸ The most important and often contested element of the three is the element of chance, and it is this element that is most often the controlling factor in a legality determination²⁹. It is undoubtedly true that chance plays at least a small role in nearly every activity one could engage in. However, this incidental and minimal element of chance is not what the court considers when making such a determination. Rather, the majority of states, including Nevada, apply the dominant element test, which asks, “not whether it contains an element of chance or an element of skill, but which is the dominating element.”³⁰ This test, while seemingly straightforward, has proved a tricky question in many scenarios, and is highly factually dependent. Courts often inquire whether “the result of an

²⁷ Nev. Rev. Stat. § 462.105.

²⁸ *Record* at 24.

²⁹ Jon Howell, Note, *Fantasy Sports: A Game of Skill That Is Implicitly Legal Under the State Law, and Now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 1257, 1263 (2008).

³⁰ *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 71 N.E. 753, 66 L.R.A. 601 (1904).

activity is separable from the element of chance, so that skill can be determinative, at least in some cases,” or if the result could “always sufficiently be affected by the operation of chance such that chance could always account for the result.”³¹ The Nevada Supreme Court found that shooting a hole in one in golf was sufficiently an act of skill, even though a professional golfer testified that “luck is a factor in all holes in one where skill is not always a factor.”³² Even in light of the not insignificant element of chance being present, the act was found to be predominantly one of skill because “skilled players will get it (the ball) in the area where luck will take over more often than an unskilled player.”³³ On the other hand, the Washington Supreme Court found that football pools were chance-dominated because “weather, the physical condition of the players and the psychological attitude of the players” would always be important factors in deciding the outcome of the games and were solely determined by chance.³⁴ Another element of sports pools that made them chance-determinative was the existence of a point spread on the games.³⁵ This is because a point spread is intended to match what the expected outcome of the game will be and thus equalizes the odds of both teams winning, injecting a much greater element of chance than would be present picking the winner straight up.

DFS games are not illegal lotteries because they are primarily dominated by skill as opposed to chance. Skill has been explained to be “the exercise, upon known rules and fixed probabilities, of ‘sagacity,’ which is defined as quickness or acuteness of sense perceptions; keenness of discernment or penetration with soundness of judgment; shrewdness; ability to see

³¹ M. Christine Holleman, Note, *Fantasy Football: Illegal Gambling or Legal Game of Skill?*, 8 N.C. J.L. & TECH. 59, 70 (2006).

³² *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 29-30 (1961).

³³ *Id.* at 30.

³⁴ *Seattle Times Co. v. Tielsch*, 80 Wash.2d 502, 504, 495 P.2d 1366, 1367 (1972).

³⁵ *Bowell*, *supra* note 8, at 1266. *Bowell* explains how a point spread works, stating “[For] example, if a stronger team were favored to beat a weaker team by a point spread of seven points, the contestants would have to decide not only whether the stronger team would win, but also whether it would win by more than seven points.” *Id.*

what is relevant and significant.”³⁶ The District Court correctly recognizes that DFS involves an enormous amount of demonstrable skill, such that highly skilled players will prevail over less skilled players most of the time.³⁷ The court also recognized that “many fantasy owners carefully study statistics of the real athletes and real world events that could affect an athlete’s performance, such as injuries, free-agent signings, and preseason games.”³⁸ Additionally, DFS involves a salary cap based team building model, which incorporates economic analysis into selecting the best team possible. Economic analysis is an additional element of skill that is not present in traditional fantasy sports games, which have been widely recognized as both legal and games of skill since their inception. Furthermore, when compared to traditional fantasy sports, far more skill is involved in DFS due to the decreased amount of “dead time.” In traditional fantasy sports, a line-up must be locked in before the first games of the week, typically on Thursday, and anything that occurs between Thursday and Sunday cannot be controlled or used for decision purposes by the owner. In DFS, on the other hand, because lineups do not need to be set until the start of the single day the contest covers, owners are given more information to juggle in making a decision and the ability to make or refrain from making any changes to their lineup that traditional fantasy owner must simply leave up to chance. Furthermore, according to studies conducted by Gaming Laboratories International (“GLI”), skilled DFS lineups were able to prevail over lesser skilled lineups at least 70% of the time, and in some instance they were able to prevail over random lineups in excess of 99% of the time. This clearly demonstrates that a skilled player is able to exercise their skill and increase their chances of succeeding such that “skill can be determinative, at least some of the time,” which is the standard by which courts

³⁶ *Opinion of The Justices*, 692 So.2d 107 (Ala. 1997).

³⁷ *Record* at 10.

³⁸ *Id.*

judge whether or not skill predominates over chance.³⁹ Therefore, the skill of the owner determines the outcome of the contest to a greater degree than random chance, and therefore DFS is a game that is determined predominately by skill.

The District Court also correctly identified the relevant skill to be examined as the skill of the “owner” of the team in selecting their lineup for a contest rather than the on-the-field skill of the athlete in the game. The vast amount of skill and knowledge required is analogous to the skill of a fisherman in choosing what location and lure to use to catch a specific type of fish. Both the DFS owner and the fisherman conduct a great deal of research into the strategy that will be most effective, and then make decisions in furtherance of their goal. An owner may assess injury reports, past performance, and forecasted weather conditions just like a fisherman will assess the type of fish he is trying to catch, what other fisherman have used successfully, and what time of day is most advantageous to go fishing. Both the owner and the fisherman who make the most skillful decisions based on the available research will ultimately succeed more than a less skilled opponent. Further, both an owner and a fisherman are dependent on the activity of others: players on the field for the owner and fish in the water for the fisherman. Even though a fisherman’s success depends in some part on the activity of fish, no legislature or body throughout the entire country has branded fishing an activity of chance such that fishing tournaments are illegal lotteries. On the contrary, fishing is an accepted national sport of skill in the same way football and basketball are, and no one would honestly argue that these sports are games of chance, even though the element of activity of other people or things does play a role.

³⁹ *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 71 N.E. 753, 66 L.R.A. 601 (1904).

In sum, because the skill to be assessed is that of the owner of the DFS team rather than the actual players, and because scientific studies plainly demonstrate that skillful play dominates unskilled play, DFS is a contest of skill rather than chance, and therefore cannot be an illegal lottery under Nevada law.

II. DFS Does Not Constitute Either Gambling or Sports Pools Under Nevada Law Because the Element of a Wager is Not Present in DFS Contests.

a. What Constitutes a “Wager?”

A “wager,” as it is currently defined under the NGCA, is “a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.”⁴⁰ While this definition is short and seemingly to the point, there are a number of ambiguities that are not defined in the statute itself. The central ambiguities for DFS purposes are, what is the meaning of the term “risked,” and what is the meaning of the term “occurrences?” The NGCA does not define or describe either term, so we must look to the plain meaning of the words as well as the purpose of the statute and the remainder of the statute’s provisions to glean our insight.

As a starting point, Black’s Law Dictionary defines an occurrence as “something that happens or takes place.”⁴¹ This definition is primarily used in the framework of tort and liability claims, and therefore has limited usefulness for our purposes. Because the nature of the definition of wager under the NGCA focuses on a future event, a better definition would be something close to “something that will happen or will take place.” This specific future event language makes perfect sense when applying the definition of wager to traditional gambling that

⁴⁰ Nev. Rev. Stat. § 463.01962.

⁴¹ OCCURRENCE, Black’s Law Dictionary (10th ed. 2014).

the Nevada laws are meant to regulate. When wagering on a sports game, for example, the relevant “occurrence” would be the UNLV Rebels beating their opponent, or Carson Palmer passing for more than 300 yards. These are all clearly specific future occurrence for which the outcome, at present is uncertain.

Black’s law dictionary also defines “risk” as “the uncertainty of a result, happening, or loss.”⁴² Again, this definition is grounded in the fields of liability and insurance and has limited usefulness to the pertinent discussion. However, it seems clear that while the focus is on uncertainty, further guidance is needed as to what level of uncertainty the statute requires before an activity is sufficiently “risked” within the meaning of the statute. To say that any risk, no matter how minor, is what is contemplated by the statute is bordering on absurd. If any risk was the standard, then activities such as paying to play carnival games, county fair contests, buying or selling stocks, and golfing and fishing tournaments would all be illegal gambling under Nevada law. Furthermore, if the “any risk at all” standard was the standard implied by the Nevada statute, traditional fantasy sports would also be illegal gambling games, which we know is not the case.

Because the plain meanings of the terms provide us little guidance, we must next look to the overall purpose of the statute as well as the other provisions of the statute for further clarity. The purpose of the NGCA, as discussed above, is to ensure public confidence in all establishments “where gaming is conducted and where gaming devices are operated” in order to allow the industry to continue to grow and succeed.⁴³ The statutory definition of a “game” is:

Any game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine for money, property, checks,

⁴² Risk, Black’s Law Dictionary (10th ed. 2014).

⁴³ Nev. Rev. Stat. § 463.0129.

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.⁴⁴

The clear focus of this definition is on typical games found in a casino, including table games, slot machines, and other card games that have been widely understood to be gambling under Nevada law. Similarly, the definition of a “gaming device” under the statute is “any object used remotely or directly in connection with gaming or any game which affects the result of a wager by determining win or loss.”⁴⁵ The statute goes on to list certain devices that are expressly included as gaming devices, and the list includes slot machines and other devices that either operate similarly to a slot machine or control the determination of a win or loss in the game. When we couple the purpose of the statute with these relevant provisions we can see a clear pattern that illuminates the true meaning behind the ambiguous terms “occurrence” and “risked.” The statute is operating to regulate traditional gambling games that occur in casinos and other places commonly understood to house gambling devices and games. The statute, when viewed in its totality and with its stated purpose in mind, is meant to regulate gambling games where a traditional wager is involved, or in other words a game primarily determined by chance, rather than games where skill is determinative of the outcome. This makes perfect sense because games of chance are the games where “rigging the game” or “stacking the deck” against the player can lead to the criminal and dishonest activities that the NGCA aims to prevent. This also makes perfect sense when we try to understand the seemingly overbroad definition of wager to include

⁴⁴ Nev. Rev. Stat. § 463.0152.

⁴⁵ Nev. Rev. Stat. § 463.0136.

any possible risk, which would include many activities that the statute does not regulate. Instead, the statute squares its aim only at traditional wagers, where money is bet on the occurrence or nonoccurrence of a future event, determined primarily by chance, and the winner takes all the money and the losers lose their money. This understanding of the definition of a wager comports with the overall thrust and purpose of the statute and explains why activities such as golf tournaments and traditional fantasy sports games are not considered wagers or gambling under Nevada law.

This understanding of the statute also comports with the overriding national interpretation of what constitutes a “wager.” The Unlawful Internet Gambling Enforcement Act (hereinafter, “UIGEA”), a federal statute intended to make enforcement of gambling laws on the internet easier in light of ineffective existing mechanisms, defines a “wager” as “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.”⁴⁶ This definition, focusing on the differences between contests predominated by skill rather than by chance, is the prevailing view of what constitutes a wager, and therefore gambling, nationally and is in line with the underlying meaning of the NGCA. Just because an action places money at risk based on an uncertain future event does not alone render something a wager, and therefore illegal gambling. Rather, a true wager requires, explicitly in national statutes and at least implicitly in the NGCA, that the outcome of the underlying game or action on which money is risked be determined primarily by chance and not by skill in order to be a true wager.

⁴⁶ 31 U.S.C. § 5362 (emphasis added).

This idea is expounded upon when the UIGEA specifically carves out from the definition of a wager all “fantasy or simulation sports” where the team does not consist of a single athlete or only players from a single team, and where all “outcomes reflect the relative knowledge and skill of the participants.”⁴⁷ This declaration demonstrates the national consensus that fantasy sports games do not constitute wagers where the skill of the team owners predominates over the element of chance, and therefore are not illegal gambling. Further, it has been widely accepted, including in Nevada, that traditional fantasy sports are games of skill and do not amount to a wager or illegal gambling under Nevada law.

b. DFS Does not Constitute a Gambling Game Under Nevada Law.

With these principles in mind, it is readily apparent that DFS does not constitute an illegal gambling game under Nevada law because there is no wager present as that term is used, both under the NGCA and nationally. In order to be considered a gambling game under Nevada Law, the game must come within one of the four categories outlined in the NGCA.⁴⁸ These four categories are (1) “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,” (2) any “banking game,” (3) any “percentage game,” and (4) “any other game or device approved by the Commission.”⁴⁹ DFS is not a banking game and has not been approved by the commission, as pointed out by the Nevada Attorney General in their opinion.⁵⁰ Because it seems readily apparent that DFS is not a banking game and has not been approved by the commission, no further discussion of these two categories is necessary.

⁴⁷ 31 U.S.C. § 5362(E)(ix).

⁴⁸ Nev. Rev. Stat. § 463.0152.

⁴⁹ *Id.*

⁵⁰ *Record* at 32, 34.

In order to fall within the first category of gambling games, the game must meet two requirements: (1) the game is played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine,” and (2) the game is played “for money, property, checks, credit or any representative of value.”⁵¹ DFS is obviously played for money, so the second prong has been met. However, the first prong is not met because DFS is plainly not played with cards, dice, or equipment, and the term “electronic device” does not include any computer system, as the District Court properly found.⁵² The term “electronic device” is not defined in the NGCA. While some other Nevada statutes do define a computer as a specific kind of electronic device, those statutes are intended for very different areas of the law, and are outside the scope of the NGCA.⁵³ These different statutes cover topics including crimes involving a computer and taxation issues, and define the term “computer” broadly. When the term computer is viewed through the NGCA, however, the focus, as mentioned at length above, must be focused on the regulation of the gambling industry, not to regulate any computer use that also involves money. For example, no one would argue that E-sports competitions or even traditional fantasy sports are gambling games, even though both are games that use computers and are played for money. This distinction gets back to the heart of the NGCA’s thrust, which is not to act as a broad, catch-all net meant to entangle every conceivable activity involving money and chance, but a surgical, narrow hook meant to catch and regulate all gambling as that concept has been traditionally understood. Therefore, the more narrow definition of an electronic device, such as the devices described in the definition of a “gambling device” and other similar devices using electricity, is the proper scope of the term “electronic device,” and this definition excludes common run-of-the mill laptops or smartphones that are not focused on gambling use.

⁵¹ Nev. Rev. Stat. § 463.0152.

⁵² *Record* at 11-12.

⁵³ *See* Nev. Rev. Stat. § 205.4735, Nev. Rev. Stat. § 360B.410.

Even if the Court is inclined to find that the term “electronic device” does include all common computers, DFS still does not fall into the first category of gambling games because it is not a game as defined by the statute. The definition of a “game” or “gambling game” is circular, in that the statute dictates that a “game” is “any game...” that meets certain named criteria.⁵⁴ Because this ambiguity exists, we must go back, once again, to the main purpose of the statute, which is to regulate traditionally understood casino type games of chance to ensure that no such games are operated by the criminally inclined behind closed doors.⁵⁵ This naturally leads us back to the classic distinction, endorsed nationally and at least implicitly by the NGCA, between gambling games determined predominantly by chance, and non-gambling games determined predominantly by skill. Because DFS is a game clearly determined by skill rather than chance, as outlined above, it cannot be a “game” as that term is meant in the NGCA. Therefore, even though DFS is played for money and uses an electronic device, depending on how the court interprets that term, it is not a gambling game because it is not a “game” as that term is used in the NGCA. This rationale also explains why traditional fantasy sports are not considered gambling games under Nevada law, even though they also utilize computers and are played for money.

In sum, a computer is not an electronic device as that term is understood and used in the NGCA, and therefore DFS does not fall within the first category of “gambling games”. Even if the Court finds that all common computers are electronic devices, DFS remains a game predominantly determined by skill, and is therefore outside the definition of the term “game” as it is used in the NGCA, rendering it a non-gambling game.

⁵⁴ Nev. Rev. Stat. § 463.0152.

⁵⁵ Nev. Rev. Stat. § 463.0129.

DFS also is not a percentage game under Nevada law. In order for a game to be considered a “percentage game,” it must meet two elements: (1) it must be a game where people wager against each other and (2) a game where the operator takes a percentage of the wager as a “rake-off.”⁵⁶ As discussed at length above, based on the meaning of the NGCA and the overriding national interpretation of the term wager, DFS does not constitute a wager because it is a game whose outcome is predominately determined by skill rather than by chance. Therefore, DFS is plainly not a percentage game under Nevada law.

Even if the Court is unwilling to accept that DFS is a game of skill and finds instead that it is a game of chance, DFS still does not qualify as a percentage game. This is because there is no “rake-off” to the operator. By way of example, the traditional way a rake-off works in poker is that the house or dealer will accept wagers on a hand of cards, and take some percentage of the hand up-front, leaving the remaining players to play for the rest of the pot. However, there is a recognized difference between a wager and a prize under Nevada law. The Nevada Supreme Court differentiated a prize from a wager, stating that a wager involves “two or more contracting parties, having mutual rights in respect to the money or thing wagered,” and that “*each of the parties necessarily risks something, and has a chance to make something upon the happening or not happening of an uncertain event.*”⁵⁷ On the other hand, a prize is “offered by a party, and to be awarded to the successful competitor in a contest *in which such party does not engage,*” and where such party “is without the element of gain” which is integral to a wager.⁵⁸ Furthermore, “the fact that each contestant is required to pay an entrance fee” in order to compete for the prize

⁵⁶ *Record* at 33.

⁵⁷ *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 28 (1961) (emphasis added).

⁵⁸ *Id.* at 28-29 (emphasis added).

does not alone render the transaction a wager rather than a prize.⁵⁹ This distinction has been consistently upheld, and was reaffirmed by the Nevada Supreme Court thirty years after the Gibson case.⁶⁰

Once these cases are put into perspective, it is clear to see that the way DFS makes money is not a rake-off from a wager under Nevada law, but rather is merely the collection of an entrance fee from competitors prior to their admittance to the competition for the prize offered by DFS operators. The DFS operator does not participate in the contest, and has no chance to gain back the prize money. Rather, once a competitor has succeeded, DFS operators are sure to lose the prize money to the competitor. Because this methodology is a contest for a prize, there is no wager and no rake-off from said wagers. Therefore DFS cannot be a percentage game under Nevada Law, and is therefore not a gambling game.

c. DFS Does Not Constitute a Sports Pool Under Nevada Law.

The Nevada Gaming Control Act defines a “sports pool” as the “business of accepting wagers on sporting events or other events by any system or method of wagering.”⁶¹ This definition outlines three essential elements that must be met before an activity is deemed to be a sports pool. These are, (1) the existence of a wager, (2) said wagering being done on sporting events, and (3) the operators must be in the business of accepting the wagers. As outlined in great detail above, the purpose and thrust of the NGCA make clear that a wager, as that term is understood in Nevada, necessarily implies the predominating element of chance over the outcome of the event or game. Without this necessary element of dominating chance, no wager

⁵⁹ *Id.*

⁶⁰ *State v. GNLV Corp.*, 108 Nev. 456, 834 P.2d 411 (1992).

⁶¹ Nev. Rev. Stat. § 463.0193.

can be had. Therefore, because DFS is a game of skill it cannot be the subject of a sports pool under Nevada Law. Furthermore, the payment structure of DFS is much more reminiscent of a competitive contest for a prize rather than a wager. The operators do not participate, and are forced to lose the prize money at the end of the contest. Because there is clearly no wager present in DFS transactions, but rather a contest for a prize, DFS cannot be a sports pool under Nevada law, and is therefore not illegal gambling by virtue of being a sports pool.

d. Public Policy Concerns Regarding DFS.

The public policy concerns underlying the Nevada gaming statute is to encourage public trust and support of the gaming industry by ensuring all gambling games are operated “honestly, competitively, and free of criminal and corruptive elements.”⁶² The passage of the UIGEA’s specific carve out for skill-based fantasy sports games demonstrates the overwhelming national sentiment that participation in such games is not gambling and does not require the protective regulations that actual gambling games, such as slot machines, poker, table games, and other chance-dominant games do require.

The fact that “traditional” fantasy sports is viewed as a non-gambling game is decisive on the issue of whether or not DFS is a gambling game, because the two games are identical in all relevant aspects that are of concern based on the NGCA. Both games involve selecting multiple players from various teams, using skill-based calculus and decision making in order to score the most points and win a prize, often times a cash prize. Both games involve some element of the unknown, and both games will reward players who are more skilled at predicting and planning for those unknown variables. Finally, both games are insulated from the fear of criminal

⁶² Nev. Rev. Stat. § 463.0129.

tampering because both games require a fantasy team of multiple players from multiple teams, and no outcome is dependent on a single team winning or losing any game. The only real differences between the two games are in duration and prize money amount, but both differences are a matter of degree, not kind. Under the current statutory scheme in Nevada, nothing would stop a fantasy football operator, such as ESPN or CBS Sports, from offering a traditional season long fantasy sports contest with big entrance fees and large payouts. In fact, CBS Sports did offer such a league this past football season with a \$999.99 entrance fee.⁶³ If this type of high stakes play is of absolutely no concern for season long fantasy sports, then why should it be a concern under the same statute for a nearly identical game that lasts only one week instead of sixteen? The answer is, it should not, because the Nevada statutes place absolutely no importance on the length, duration, or payout of the game in question. Rather, the focus is to maintain the integrity of all games of chance, regardless of what form they appear in or how much money is bet on them. The truth is, DFS does not differ from traditional fantasy sports in any material way under the NGCA, and are games of skill, and therefore non-gambling games, to the same extent that traditional fantasy sports are. If the legislature is concerned that daily fantasy sports are somehow different altogether as compared to traditional fantasy sports, then it is their job to pass specific legislation to explicitly deem DFS as a gambling game. This has not been done however, and it is not the province of the court to rewrite the NGCA to include DFS, or even traditional fantasy sports, when the clear intent of the law has been to exempt these games of skill from gambling regulations because they are outside the purpose and aim of the statute.

III. Conclusion

⁶³ See http://www.cbssports.com/fantasy/football/games/prize-leagues?ttag=FFBP15_new_spoee_games_football.

In conclusion, DFS does not constitute gambling under Nevada law because it is a game whose outcome is predominately determined by skill rather than chance and because the structure of DFS, as well as traditional fantasy sports, is not within the national or Nevada specific understanding of what constitutes a wager or bet. Therefore, DFS is not an illegal lottery, and is not a gambling game or sports pool such that a gambling license is required. In light of this, we respectfully request that this Court affirm the District Court’s finding that DFS does not constitute gambling under Nevada law and grant Respondent’s motion for summary judgment.

B. NEVADA’S LICENSING OF DAILY FANTASY SPORTS WOULD NOT VIOLATE THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT.

The Eighth Judicial District Court did not err in granting Respondent’s motion for summary judgment and denying Petitioner’s countermotion for summary judgment regarding the Professional and Amateur Sports Protection Act (hereinafter, “PASPA”) claim, when it held that Nevada’s licensing of Daily Fantasy Sports (DFS) would not violate PASPA.

In 1992, to protect the integrity of professional and amateur athletics, Congress enacted PASPA to prohibit states from legalizing sports betting.⁶⁴ PASPA makes it unlawful for any state to “sponsor, operate, advertise, promote, license, or authorize by law . . . betting, gambling, or wagering” on professional or amateur sports games or on their participants.⁶⁵

However, the statute contains four distinct exceptions that “grandfather-in” and exempt the three states (Nevada, Delaware, and Oregon) that had some form of legalized sports betting

⁶⁴ 28 U.S.C.A § 3701 (West); *NCAA v. Governor of New Jersey*, 730 F.3d 208, 221 (3d Cir. 2013).

⁶⁵ 28 U.S.C.A. § 3702 (West).

prior to PASPA being enacted in 1992.⁶⁶ Those three states include Delaware and Oregon, where a handful of very specific and limited wagering schemes on professional football games were legal and conducted, and Nevada, where all sports gambling was legal and countless different wagering schemes were being conducted at the time PASPA was enacted. The first exception exempts any “betting, gambling, or wagering scheme” that was in operation in a State at any time prior to August 31, 1990, “to the extent that the scheme was actually conducted.”⁶⁷ The second exception exempts a “betting, gambling, or wagering scheme in operation in a State” when: (1) “such scheme was authorized by statute as in effect on October 2, 1991”; and (2) “a scheme described in § 3702...actually was conducted in that State...at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State.”⁶⁸ The third exception gave municipalities that met certain criteria a one-year window from the enactment of PASPA to authorize schemes, which would be “grandfathered-in”, and the fourth exception exempts “pari-mutuel animal racing or jai-alai games.”⁶⁹

In the case at hand, Nevada legalized all sports betting decades prior to October 2, 1991, and was conducting countless sports gambling schemes for every sport between September 1, 1989, and October 2, 1991, including money-line bets, spread bets, prop bets, head to head bets, parlays, and much more.⁷⁰ Therefore, the Eighth Judicial District Court did not err in holding that the Nevada’s licensing of DFS betting does not violate PASPA because, Pursuant to 28 U.S.C. § 3704(a)(2), DFS betting in Nevada is exempt from PASPA because such a scheme is authorized

⁶⁶ 28 U.S.C.A § 3704(a); *OFC Comm Baseball v. Markell*, 579 F.3d 293, 300 (3d Cir. 2009).

⁶⁷ 28 U.S.C. § 3704(a)(1).

⁶⁸ 28 U.S.C. § 3704(a)(2)(A)&(B).

⁶⁹ 28 U.S.C. § 3704(a)(3)&(4).

⁷⁰ Nev. Rev. Stat. Ann. § 463 (West); *See Types of Bets, Betting Sports*, <http://www.bettingsports.com/types-of-bets/> (last visited Feb. 10, 2016).

by a Nevada statute that was in effect prior to October 2, 1991 and Nevada conducted schemes described in § 3702 between September 1, 1989, and October 2, 1991. Additionally, Pursuant to 28 U.S.C. § 3704(a)(1), DFS betting in Nevada is exempt from PASPA because it is similar to betting schemes Nevada actually conducted prior to August 31, 1991.

I. DFS Betting in Nevada is Exempt From PASPA Because Such a Scheme is Authorized By a Nevada Statute That Was in Effect Prior to October 2, 1991 and Nevada Conducted Schemes Described in § 3702 Between September 1, 1989, and October 2, 1991.

The Eighth Judicial District Court did not err in holding that Nevada’s licensing of DFS betting does not violate PASPA because the statute’s second exception, § 3704(a)(2), applies based on the facts in this case.

PASPA states that “[s]ection 3702 shall not apply to...a lottery, sweepstakes, or other betting, gambling or wagering scheme in operation in a State...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...actually was conducted in that State...during the period beginning September 1, 1989, and ending October 2, 1991.*”⁷¹ For this exception to apply, two elements are required. First, the scheme at issue must have derived its authorization from a statute that was in effect on or before October 2, 1991, rather than requiring a new statute to be enacted for it to be authorized. Second, any single scheme described in § 3702 must have been actually conducted in the State between September 1, 1989, and October 2, 1991.

Turning to the case at hand, betting on sports in Nevada has been legal for the past sixty years. Enacted in 1955, the Nevada statute permits any “sports pool to be...operated...by a

⁷¹ 28 U.S.C. § 3704(a)(2) (emphasis added).

person who is...licensed pursuant to this chapter.”⁷² The statute defines a sports pool as “the business of accepting wagers on sporting events or other events by any system or method of wagering.”⁷³ This broad definition makes betting on any sport using any system or scheme legal in the state of Nevada, thus authorizing the DFS betting scheme at issue in this case and satisfying the first requirement of § 3704(a)(2). In regards to the second requirement of § 3704(a)(2), Nevada was actually conducting countless sports betting schemes between September 1, 1989, and October 2, 1991, including betting schemes for every professional and amateur sport, betting schemes for individual games or multiple games, betting schemes for team performance or individual performance, among many others. Any one of these betting schemes is a scheme described in § 3702, thus satisfying the second requirement of § 3704(a)(2). Therefore, because both requirements have been satisfied, the § 3704(a)(2) exception applies and Nevada’s DFS betting scheme is exempt from PASPA.

In their Countermotion for Summary Judgment, Petitioners’ argue that although § 3704 exempts Nevada from PASPA’s prohibition on sports betting, this exemption does not extend to fantasy sports betting. According to Petitioners’ interpretation of § 3704(a)(2) of PASPA, which they derive from the Third Circuit’s decision in *OFC Comm’r of Baseball v. Markell* and now ask this court to adopt, to qualify for exemption under this exception the issue in the case at hand is whether (1) DFS betting was authorized by statute in October 1991, and (2) DFS betting was actually conducted between September 1989 and October 1991.⁷⁴ Therefore, Petitioners’ argue, because Nevada did not actually conduct DFS betting between September 1989 and October 1991, the second requirement of § 3704(a)(2) is not satisfied so this exception does not apply. In

⁷² Nev. Rev. Stat. § 463.160.

⁷³ Nev. Rev. Stat. § 463.0193.

⁷⁴ *OFC Comm’r of Baseball v. Markell*, 579 F.3d 293, 296-97, 303 (3d Cir. 2009).

Markell, the governor of Delaware had proposed a law in 2009 to legalize a variety of sports gambling schemes, including individual game and multi-game parlay betting on any sport.⁷⁵ However, the leagues of various professional sports filed a complaint claiming this proposed legislation violated PASPA because Delaware had not conducted these sports betting schemes prior to PASPA being enacted.⁷⁶ In response, Delaware argued that because it had conducted three sports betting schemes in 1976, all of which required the bettor to predict the winner of multiple NFL games, § 3704(a)(1) of PASPA applied and therefore any sports betting scheme was exempt in the state of Delaware.⁷⁷ While the court recognized that § 3704(a)(1) was applicable to the state of Delaware, it noted that this exception only exempted other schemes “to the extent” they were actually conducted in the state prior to August 31, 1990.⁷⁸ The court held that while PASPA does not require the scheme to be identical in every respect to the scheme the state conducted prior to August 31, 1990, it does require that it not effectuate a substantive change.⁷⁹ Therefore, because neither single-game betting nor betting on sports beyond the NFL were “conducted by Delaware prior to 1990, the court ruled “such betting is beyond the scope of the exception in § 3704(a)(1) of PASPA, and thus prohibited under the statute’s plain language.”⁸⁰

However, Petitioner’s argument fails for two reasons. First, the sole exception at issue and addressed by the court in *Markell* was § 3704(a)(1), therefore *Markell*’s holding is specific to the application of the § 3704(a)(1) exception and has no effect on the application of the §

⁷⁵ *Id.* at 295.

⁷⁶ *Id.* at 297.

⁷⁷ *Id.* at 301.

⁷⁸ *Id.*

⁷⁹ *Id.* at 303.

⁸⁰ *Id.*

3704(a)(2) exception.⁸¹ Second, and most importantly, Petitioner’s interpretation and subsequent paraphrasing of § 3704(a)(2), which they derived from dicta in *Markell*, badly mischaracterizes and misstates the actual statutory language of § 3704(a)(2).⁸² While briefly discussing the other exceptions contained within PASPA in dicta, *Markell* stated § 3704(a)(2) applies to a “wagering scheme that was both (i) “authorized by a statute as in effect on October 2, 1991,” and (ii) “actually was conducted during the period beginning September 1, 1989 and ending October 2, 1991.”⁸³ However, upon reading § 3704(a)(2) in its entirety, it is clear that the court in *Markell* quoted only a portion of the actual language contained within the second element, § 3704(a)(2)(B), and in doing so actually altered what the exception truly requires in order for it to apply. § 3704(a)(2) states that § 3702 shall not apply to a wagering scheme 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.⁸⁴

A reading of § 3704(a)(2) in its entirety makes clear that it only requires that “*a scheme described in section 3702...actually was conducted,*” not that the wagering scheme seeking to be exempted was actually conducted. If Congress had sought to limit application of § 3704(a)(2) to only schemes that were actually conducted within that time period, they could have added the “to the extent that the scheme was actually conducted” language as they did in § 3704(a)(1). Further, if Petitioner’s characterization of § 3704(a)(2) were correct, it would exempt the exact same

⁸¹ *Id.* at 300, 302.

⁸² *Record* at 13-14; *Markell* at 301.

⁸³ *Markell* at 301.

⁸⁴ 28 U.S.C.A. § 3704 (West) (emphasis added).

schemes that § 3704(a)(1) already exempts (schemes that were actually conducted prior to 1991), and therefore would be redundant and unnecessary.

Although no case law specifically addressing the application of § 3704(a)(2) exists, further support that this exception is different from § 3704(a)(1) and applies in the case at hand exempting Nevada's DFS betting scheme from PASPA can be found in the statute's legislative history. While describing § 3704(a), the Senate Report specifies what paragraph (1) and paragraph (2) are intended to do.⁸⁵ The report states that § 3704(a)(1) allows Oregon and Delaware to conduct sports lotteries because sports lotteries were conducted by those States prior to August 31, 1990, but that it was not intended to allow them to expand those sports lotteries into head-to-head betting.⁸⁶ In regards to § 3704(a)(2), the report states that it applies to Nevada and allows gambling on sports to continue "to the extent authorized by State law, because sports gambling actually was conducted in Nevada between September 1, 1989, and August 31, 1990."⁸⁷

Therefore, because betting on DFS in Nevada is authorized by a statute that was in effect prior to October 2, 1991 and because Nevada conducted many schemes described in § 3702 between September 1, 1989, and October 2, 1991, § 3704(a)(2) applies and Nevada's licensing of DFS is exempt from PASPA.

II. Pursuant to 28 U.S.C. § 3704(a)(1), DFS Betting in Nevada is Exempt From PASPA Because it is Similar to Betting Schemes Nevada Actually Conducted Prior to August 31, 1991.

In the alternative, if this court holds that § 3704(a)(2) does not apply and adopts Petitioner's reading of § 3704(a), the Eighth Judicial District Court still did not err in holding

⁸⁵ S. REP. 102-248, 10, 1992 U.S.C.C.A.N. 3553, 3561.

⁸⁶ *Id.*

⁸⁷ *Id.*

that Nevada’s licensing of DFS betting does not violate PASPA because the statute’s first exception, § 3704(a)(1), applies based on the facts in this case.

§ 3704(a)(1), or Petitioner’s reading of § 3704(a)(2), exempts a scheme “to the extent” that it was actually conducted by the State “at any time” between January 1, 1976 and August 31, 1990.⁸⁸ As the court in *Markell* held, the statute does not require the scheme to be identical in every respect to the scheme the state conducted prior to August 31, 1990, but it does require that it not effectuate a substantive change from the original scheme.⁸⁹

Turning to the case at hand, Nevada conducted countless sports gambling schemes between January 1, 1976 and August 31, 1990. This included moneyline bets, head-to-head bets, spread bets, proposition bets, parlays, teasers, and much more. Further, all of these schemes were available for every professional and amateur sport. Proposition bets allow an individual to bet on a specific individual achievement, or a combination of multiple specific individual achievements. For example, an individual may bet that a specific player will score a certain number of touchdowns or gain a certain number of yards. The individual is not limited to one game or one player, and may make multiple individual predictions across multiple games in one bet. This is very similar to the DFS scheme, as individuals bet that specific players will outperform players that other bettors have selected. Because Nevada’s DFS scheme is similar to the schemes the state conducted between January 1, 1976 and August 31, 1990, § 3704(a)(1) applies and the scheme is exempt from PASPA.

Petitioners argue that, like the scheme in *Markell*, Nevada’s DFS scheme is a substantial change from the type or sports betting that was actually conducted in the State prior and

⁸⁸ 28 U.S.C. § 3704(a)(1).

⁸⁹ *Markell* at 303.

therefore it violates PASPA. Delaware, the state at issue in *Markell*, had three wagering schemes prior to August 31, 1990, all of which were limited to betting on the NFL.⁹⁰ The first scheme offered two pools of seven NFL games each and bettors had to predict the winners in one or both of the pools.⁹¹ In the second scheme, bettors selected the winners and point spreads for their choice of three, four, or five NFL games.⁹² The last scheme required bettors to pick the winners for between four and twelve NFL games.⁹³ All of these schemes were limited to multi-game parlays involving only NFL teams. Therefore, the court held that because no single game betting, no head-to-head betting, and no betting involving sports beyond the NFL occurred in Delaware before August 31, 1991, such schemes effectuated substantial changes and were beyond the scope of § 3704(a)(1).⁹⁴

Unlike Delaware, however, Nevada did conduct single game betting, head-to-head betting, and betting on every sport prior to PASPA being enacted. Furthermore, they even allowed betting on individual players and individual statistics, and allowed multiple predictions in one bet. Because Nevada's DFS scheme is similar because it is just a combination of all of these schemes, it is well within the scope of § 3704(a)(1).

Therefore, because DFS betting in Nevada is similar to betting schemes Nevada actually conducted prior to August 31, 1991, § 3704(a)(1) applies and the scheme is exempt from PASPA.

III. Conclusion

⁹⁰ *Markell* at 297.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 304.

In conclusion, because betting on DFS in Nevada is authorized by a statute that was in effect prior to October 2, 1991 and because Nevada conducted many schemes described in § 3702 between September 1, 1989, and October 2, 1991, § 3704(a)(2) applies and Nevada's licensing of DFS is exempt from PASPA. Alternatively, even if this court holds that § 3704(a)(2) does not apply, the licensure of DFS does not violate PASPA because it is similar to betting schemes Nevada actually conducted prior to August 31, 1991, and therefore § 3704(a)(1) applies.

CONCLUSION

In conclusion, because DFS does not constitute gambling or an illegal lottery under Nevada law, it does not require a gambling license from the Nevada Gaming Control Board and may continue operating in Nevada without one. Respondents therefore respectfully request that this Court affirm the District Court's granting of declaratory relief in favor of Respondent on this issue.

Alternatively, even if the Court decides that DFS does constitute gambling, thus necessitating a gambling license, the issuance of such a license would not violate PASPA because DFS is either authorized by statute or not substantially different from sports betting that existed prior to the enactment of PASPA. Respondents therefore respectfully request that this court affirm the District Court's granting of summary judgment in favor of Respondent on this issue.

Respectfully Submitted,

/s/ R4

Counsel for Respondent