NO. 7777

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 RESPONDENTS

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FEBRUARY 22, 2016

QUESTIONS PRESENTED

I. WHETHER THE DISTRICT COURT PROPERLY HELD THAT DAILY FANTASY SPORTS DO NOT CONSTITUTE GAMBLING AND THUS DO NOT REQUIRE A GAMING LICENSE UNDER THE NEVADA GAMING CONTROL ACT AND NEVADA GAMING COMMISSION REGULATIONS.

II. WHETHER THE DISTRICT COURT PROPERLY HELD THAT THE LICENSING OF DAILY FANTASY SPORTS DOES NOT VIOLATE THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT.

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The Nevada Gaming Control Board sought an advisory opinion from the Nevada Attorney General regarding the legality of daily fantasy sports. (R. 5). The Nevada Attorney General determined that daily fantasy sports are gambling and, therefore, require a gaming license in order to operate lawfully. (Id.)

Draft Masters filed suit for declaratory relief against the State of Nevada that daily fantasy sports are *not* gambling. (Id.) The Leagues intervened, pursuant to NRCP 24(b) and filed a Complaint in Intervention against Draft Masters and the State of Nevada, alleging that the licensing of a daily fantasy sports company violates the Professional and Amateur Sports Protection Act ("PASPA"). (Id.) Both parties cross-moved for summary judgment in the Eighth Judicial District Court in and for the County of Clark, Nevada ("District Court). The District Court found for Respondents on both issues. The decision District Court is unpublished but can be found in the Record at pages 2-14.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-3a.

STANDARD OF REVIEW

Summary judgment is appropriate and "shall be rendered forthwith" when the pleadings and other evidence on file demonstrate that no "genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law." NRCP 56(c); Wood v. Safeway, Inc., 121 Nev. 724, 729 (2005) (citing Tucker v. Action Equip. & Scaffold Co., 113 Nev. 1349,

1353 (1997)). The substantive law controls which factual disputes are material and will preclude summary judgment; other disputes are irrelevant. Wood, 121 Nev. at 731 (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986)). A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the non-moving party. Wood, 121 Nev. at 731 (citing Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586 (1986)).

While the pleadings and other proof must be construed in the light most favorable to the non-moving party, that party bears the burden to "do more than simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. Wood, 121 Nev. at 731 (quoting Matsushita, 475 U.S. at 586). The non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment against him." Id. (quoting Bulbman, Inc. v. Nev. Bell, 108 Nev. 105, 110 (1992)). The non-moving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." Id.

NRCP 56(c) should not be regarded as a disfavored procedural shortcut, but instead as an integral part of the Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. See Butler v. Bogdanovich, 101 Nev. 449, 451 (1985).

STATEMENT OF FACTS

A. Factual Background of Fantasy Sports

Fantasy sports are games where lay participants, acting as "owners" of "simulated teams," assemble those teams from rosters and/or lineups of professional athletes. (R. 22). These games are generally played over the Internet using computer or mobile software applications. (R. 22). Fantasy sports cover a number of professional sports leagues, including the National Football League ("NFL), Major League Baseball ("MLB"), the National Basketball Association ("NBA"), the National Hockey League ("NHL"), Major League Soccer ("MLS"), and the National Association for Stock Car Auto Racing ("NASCAR"), as well as collegiate leagues such as the National Collegiate Athletic Association ("NCAA") for football and basketball. (R. 22).

There are two types of fantasy sports games – traditional and daily. Traditional fantasy sports track player performance over the majority of a season, whereas daily fantasy sports ("DFS") track player performance over a single game. (R. 22). In both types of games, the owners of their simulated teams compete against one another with winners being determined by the statistical performances of the athletes on the field. (R. 22). The athletes' performances in their real-life games are converted into "fantasy points" such that they're assigned a specific score at the end of each game. (R. 22). Owners then receive their total scores as a compilation of their players' individual scores. (R. 22).

B. The Leagues' Challenge of Fantasy Sports

The NFL, NHL, NBA, MLB and NCAA ("the Leagues") challenge the finding that DFS contests constitute gambling thereby requiring licensure for lawful operation. (R. 3). DFS games have three main structures: head-to-head matchups, "double-ups," and guaranteed prize pools. (R. 4); see also Nathaniel J. Ehrman, Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy

Sports, 22 Sports Law. J. 79, 87 (2015). In DFS contests, owners draft teams and compete anew each day. (R. 3). Two or more owners are typically permitted to draft the same athletes, but owners are limited in who they can draft by a total team salary-cap. (R. 4). Salary caps are unique to DFS and require owners to strategize who to draft and how to allocate their funds. (R. 4); Ehrman at 86.

Despite the duration of each contest, DFS are similar to traditional fantasy sports. In the traditional setting, skilled and diligent owners begin the fantasy season long before the date of the fantasy draft. (R. 3). These owners carefully study athletes' statistics and any real-world events that could affect their on-field performance, such as injuries, free-agent signings, and preseason games. (R. 3). The athletic season in traditional fantasy sports begins at the draft, which can occur either by turn or in an auction. (R. 3). Throughout the athletic season, these owners continue their work through this same diligent practice of studying statistics and real-world events, along with the performance of their competitors in their sports pools. (R. 3). At the conclusion of the athletic season, the owner with the most successful team wins the entire pool. (R. 3). Other prizes for top placements may also be distributed. (R. 3). In sum, DFS are similar to traditional fantasy sports with three main exceptions: duration (*i.e.*, season versus daily); how the contest is structured; and, how the owners select their teams. (R. 4); Ehrman at 87-88.

C. Draft Masters' Daily Fantasy Sports

Draft Masters, LLC ("Draft Masters") is an international operator of DFS contests. Its games are like those of other DFS games where player performance is tracked over a single game and owners compete against one another with winners determined based on the statistical performances of their players in real-life games. (R. 4). The on-field performances of the athletes are converted into "fantasy points," such that each athlete is assigned a specific score. (R. 4). An

owner will then receive a total score that is determined by compiling the individual scores of each player in the owner's lineup. (R. 5)

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

DFS operators often offer two types of simulated games – guaranteed games and non-guaranteed games. (R. 5). If a simulated game is guaranteed, the winners will be paid out regardless of how many owners entered into the simulated game. (R. 5). If a simulated game is non-guaranteed, the simulated game will be cancelled unless a certain number of owners participate. (R. 5).

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the District Court on both questions presented. This Court should hold that, as a matter of law, Draft Masters' DFS do not constitute gambling under the Nevada Gaming Control Act and Nevada Gaming Commission Regulations. This Court should also hold that, as a matter of law, Nevada's licensing of DFS does not violate PASPA. Summary judgment in Respondents' favor is therefore appropriate on both issues.

ARGUMENT

I. DRAFT MASTERS' DAILY FANTASY SPORTS DO NOT CONSTITUTE GAMBLING UNDER NEVADA LAW

The State of Nevada has codified the components of gambling. To qualify as gambling under Nevada Law, a contest must fall under one of three classifications outlined in the Nevada Gaming Control Act – lottery, gambling game or sports pool. See Nevada Revised Statute ("NRS") 463. A lottery is a game which involves the common law aspects of gambling: (1) prize; (2) chance; and (3) consideration. NRS 462.105. A gambling game must fall within a designated type of game outlined: (1) games played with cards, dice, equipment or any device or machine for any representative of value; (2) banking games; (3) percentage games: and (4) other games or devices approved by the Nevada Gaming Commission. NRS 463.0152. A sports pool requires a determination as to whether: (1) a wager is present; (2) the wagering is done on sporting events or other events by any system or method of wagering; and (3) daily fantasy sports operators are in "the business" of accepting wagers. NRS 463.0193. Draft Masters' DFS contests do not fall within any of these clearly defined categories.

To establish a lottery, the State must show that Draft Masters' DFS are games of chance rather than games of skill.[1] Respondents will demonstrate through use of empirical evidence that its DFS contests are overwhelmingly games of skill, not of chance, and therefore do not fall under § 462.105. Moreover, Respondents urge this Court to apply the Nevada common law's "dominant element" test to find that skill dominates chance in Draft Masters' DFS contests as a matter of law.

To establish a gambling game, the State must show that DFS competitions take place on "any device or machine for any representative of value." NRS 463.0152. The language of the

[1] Respondents do not contest the first and third elements of lottery, that they involve prize and consideration.

NRS plainly does not include computers or mobile phones and therefore cannot be applied to Draft Masters' DFS devices. As a result, the State must show that Draft Masters' DFS competitions are percentage games which have "patrons wager against each other." NRS 463.0152. Respondents contend that, as a matter of law, its DFS contests do not contain wagering, and instead offer prizes.

The State is unable to demonstrate that Draft Masters' DFS contests constitute sports pools. Similarly to the qualifications of gambling games, sports pools require wagers to be present. Respondents again demonstrate that its DFS contests contain prizes, not wagers, under both Nevada common and statutory laws. As such, this Court should accept the District Court's finding that Draft Masters' DFS games are not gambling, and should affirm summary judgment in its favor.

A. DRAFT MASTERS' DFS ARE GAMES OF SKILL, NOT CHANCE, AND THEREFORE NOT LOTTERY GAMES

As a matter of law, DFS contests are games of skill, rather than games of chance. As such, DFS contests are not lotteries under Nevada law. NRS 462.105. This Court should accept the lower court's determination that summary judgment in Draft Masters' favor is appropriate.

1. Under Nevada Law, a Game Is Not Gambling if Skill Is the Dominating Element

A game is one of skill if the element that dominates the outcome is skill, not chance. Courts throughout the United States, including the District Court below, have followed the century-old test for whether a game is one of chance or skill by measuring "the dominating element that determines the result of the game." People ex rel. Ellison v. Lavin, 179 N.Y. 164, 170-71 (1904). Since the New York Court of Appeals' decision in Lavin, other states, including Nevada, have recognized and applied this test. (R. at 9). See e.g., State of Arizona v. American Holiday Association, Inc., 151 Ariz. 312 (1986); Humphrey v. Viacom, Inc., 2007 WL 1797648, at *1

(D.N.J. June 20, 2007). The District Court in this case cited Lavin's test, which was rearticulated in Las Vegas Hacienda, Inc. v. Gibson, as the proper test to be used in Nevada. (R. 9) (citing Lavin, 179 N.Y. at 170-71); see also Las Vegas Hacienda, Inc. v. Gibson, 77 Nev. 25, 30 (1961). In Gibson, the Supreme Court of Nevada determined that it is "not whether [the game] contains an element of chance or an element of skill, but which is the dominating element." Gibson, 77 Nev. at 30.

The dominating element test for differentiating between contests of skill and contests of chance continues to be applied in jurisdictions outside of Nevada. See e.g., People v. Li Ai Hua, 24 Misc. 3d 1142 (Crim. Ct. Queens County 2009). The use of the dominating element test relied upon by this Court in Gibson is wholly appropriate in this case. The State asserted that the dominating element test adopted in Gibson is inapposite, stating that the formulation of the test was *dicta*, and that Gibson is not persuasive because the participants had "direct control" over the outcome of the event. The State emphasizes that the term "wager" is different in the current gambling statute of Nevada, and therefore, had the language been written as it is now, the Court may have come to a different conclusion. (R. 29). However, this argument is nothing more than an attempt to disregard long-standing precedent, and therefore should not be given ample consideration.

The State continues to argue that the dominating element test is inappropriate because there is no "direct control" over the outcome of the event in DFS. (R. 24). However, this Court in Gibson disagreed. There, this Court recognized that it was "within the province of the trial court to determine" that a contest designed around shooting a hole-in-one was a contest of skill because "a skilled player will get the ball in the area where luck will take over more often than an unskilled player." Gibson, 77 Nev. at 30. Players with superior skill increase the chance of hitting a hole-

in-one by improving the odds of getting closer to the hole, without necessarily leading to the desired result each time. Id. A hole-in-one contest does not become one of chance just because a less skilled player may succeed once in a while, over the skilled player. Id. Furthermore, the Gibson Court recognized that skill should be understood as the ability, "through the exercise of effort and aptitude, to increase the prospects of achieving a desired result over what would be expected if events were unfolding at random." Id. This logic extends to more formalized golf tournaments, essay contests, geography contests, and other games of skill. It is apparent from Gibson that dominance of skill appears in the ability of individual players to increase significantly their prospects of winning through the exercise of effort and proficiency.

Nevertheless, in spite of concerns, the District Court below and even the Attorney General concluded that if the test were to be applied today, "a game where skill is the dominant factor would not constitute a lottery." (R. 24). The State fails to provide an alternative course of action, and as such, this Court should take comfort in applying the dominating element test to the question of whether DFS contests constitute lotteries. (R. 14).

2. Evidence Shows that DFS Contests are Games of Skill, Not Games of Chance

Empirical evidence confirms that Draft Masters' contests are games of skill. Evidence has shown that lineups created by skilled participants overwhelmingly outperform both randomly generated lineups, and slightly skilled, generated lineups. Seth Young, I Believe Daily Fantasy Sports Is a Game of Skill, and Here's the Proof, LEGAL SPORTS REPORT (Apr 6, 2015, 8:36 PM), http://www.legalsportsreport.com/820/view-why-dfs-is-a-game-of-skill/. In DFS, participants spend a great deal of time examining player statistics, matchups, injuries, schedule, and past performance. Additionally, the presence of a salary cap creates more room for deliberation and

analysis, and thus adds an extra level of skill required to win. Id. As the District Court correctly noted, "There is an incredible amount of player data—in every sport—available for fantasy gamers to utilize in order to craft optimal teams in season long fantasy competitions, and even more data and nuances to consider when putting together lineups for daily or weekly style games." Id.; (R. 10). DFS is the type of contest that allows room for the skilled participant to distinguish themselves from the more novice competitors.

In games of skill, there is a positive correlation between skill and performance, one which is not present in games of chance. The District Court findings confirm this relationship, citing to the research of Gaming Laboratories International ("GLI"), "an industry leader in game testing and certification." Id. GLI conducted a skilled simulation analysis on DFS, where it found that skill is dominant over chance nearly 70 percent of the time and is even higher when the human element is added.[2] Id. These results are in opposition with the randomness that can be found in classic games of chance like roulette, bingo, or classic state lotteries. Therefore, it is clear that DFS predominantly requires skill for its competitors to perform at high levels.

Ultimately, based on the evidence in support of the dominant nature of skill in DFS, and the applicability of the dominant element test, this Court should affirm the District Court's grant of summary judgment on its gambling claim, finding that DFS is a game of skill, not chance, and thus does not satisfy the qualifications of being a lottery under Nevada Law.

[2] GLI further concluded: "The skilled lineup beat a randomly generated lineup 16,999 times out of 17,000. That means the skilled lineup won 99.994 percent of the time against the unskilled lineup." Id.

B. DRAFT MASTERS' DFS CONTESTS DO NOT INVOLVE WAGERING UNDER NEVADA GAMBLING LAWS, BUT RATHER THE PAYMENT OF ENTRY FEES TO COMPETE FOR PRIZES.

The payment of money involved in Draft Masters' DFS is not the kind prohibited under existing law. Past precedent clearly establishes that entering into fantasy contests in which participants pay an entry fee and engage in a skilled competition with predetermined prizes, does not constitute gambling. See Humphrey, 2007 WL 1797648, at 7, 9 (D.N.J. June 20, 2007). Humphrey, the lone court to address whether fantasy sports constitute illegal gambling on this ground, found that payments made for participation in fantasy sports contests constitute legal contests for prizes. 2007 WL 1797648, at 9. Furthermore, the NRS defines wager as "a sum of money risked on an occurrence for which the outcome is uncertain." NRS 463.01962. In this context, Draft Masters' contests do not constitute such risked money. As such, this Court should affirm the District Court's granting of summary judgment on its gambling claim.

1. Paying a Fee to Enter a Contest for a Preannounced Prize is not a Wager

Draft Masters' DFS collects fees for entry and therefore does not involve wagers. This Court in Gibson conducted a wager analysis whereby it held that in a contest where an entrance fee does not make up the entirety of the purse, the contest does not involve a wager. 77 Nev. at 29 (the alleged wager involved an "offer to pay $5000 to any person who, having paid 50 cents for the opportunity of attempting to do so, shot a hole in one on its golf course"). Thereafter, the NRS changed its definition of "wager" to the current definition. See NRS 463.01962. Despite this change, there is no case law to support the conclusion that Gibson should not be followed. The State used State v. GNLV Corp. to argue that DFS patrons are directly wagering against each other, and therefore, the person offering the prize never relinquishes the right to the offered purse. 108 Nev. 456 (1992); (R. 28). However, it is counterintuitive to claim that each contestant was the

entity offering the purse. It is not the individual patron's exact entry fee that comprises the purse, but rather an amalgam of varying players submitting an entry. In Nevada, this type of contest more resembles a prize than a wager under Gibson. Therefore, the District Court's decision to grant Draft Masters' motion for summary judgment on its gambling issue should be affirmed.

The State of New York has also come out supportive on this issue. In People ex rel. Lawrence v. Fallon, the New York Court of Appeals held that entry fees for prizes in contests of skill are not gambling. 152 N.Y. 12 (1897). In that case, the Court of Appeals dismissed the charge against a proprietor of a club in which horse owners who paid an entrance fee could race their horses against one another for a fixed preannounced price. The club did not have any stake in the race's outcome, and the prizes were solely comprised of the competitor's entry fees. Id. at 16-18. The Court, therefore, did not accept the State's argument that this was a "wager." Id. The Court stated:

> If the doctrine contended for by the [State] is sustained, it would seem to follow that the farmer, the mechanic or the stockbreeder who attends his town, county or state fair, and exhibits the products of his farm, his shop or his stable, in competition with his neighbors or others for purses or premiums offered by the association, would become a participant in a crime, and the officers offering such premium would become guilty of gambling under the provisions of the Constitution relating to that subject. Those transactions are in all essential particulars like this. In those, as in this, one of the parties strives with others for a prize; the competing parties pay an entrance fee for the privilege of joining in the contest, and in those cases, as in this, the entrance fee forms a part of the general fund from which the premiums or prizes are paid. Indeed, all those transactions are so similar to this as to render it impossible to discover any essential difference between them. Id at 19.

The Fallon principles continue to be adopted in other jurisdictions. See e.g., American Holiday Association, 151 Ariz. 312; Gibson, 77 Nev. 25. In American Holiday Association, the Arizona

Supreme Court held that a company that charged a fee to enter a word game, and awarded advertised prizes to the winning contestants, was not taking bets or wagers. 151 Ariz. at 314. Citing Fallon, the Court reasoned that "[an] entrance fee does not suddenly become a bet if a prize is awarded. If the combination of an entry fee and a prize equals gambling, then golf tournaments, bridge tournaments, local and state rodeos or fair contests and even literary or essay competitions, are all illegal gambling." Id. at 314 (citing Fallon, 152 N.Y. at 19). The court then confirmed Fallon's contrast between a wager and a prize by stating:

> A bet is a situation in which the money or prize belongs to the person posting it, each of whom has a chance to win it. Prize money, on the other hand, is found when the money or other prize belongs to the persons offering it, which has no chance to win it and who is unconditionally obligated to pay it to the successful claimant. Id. at 315.

Therefore, pursuant to Fallon and its progeny, a prize exists where there is a pre-fixed pot and the sponsor has no ability to keep or win the announced purse. This principle may be extended to the payment of money involved in Draft Masters' DFS. As the Record reflects, the method in which these contests operate demonstrates a predetermined purse amount, with either a guaranteed payout to a patron, or the return of entry fees to all prospective contestants. (R. 3-5). Therefore, the District Court was right to grant Draft Masters' motion for summary judgment on its gambling issue.

2. Under State and Federal Law, Draft Masters' DFS Contests Are Contests for Prizes That Do Not Constitute Gambling

Fantasy sports contests are contests for prizes, not wagers. As the District Court for the District of New Jersey held in Humphrey, "as a matter of law, the payment of an entry fee to participate in a fantasy sports league is not wagering, betting or staking money." 2007 WL 1797648, at *7. The court reasoned:

> Courts have distinguished between *bona fide* entry fees and bets or wagers, holding that entry fees do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in a contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize). Id. at 8.

The Humphrey Court added examples of allowable contests, such as "livestock, poultry and produce exhibitions, track meets, spelling bees, beauty contests, and the like." Id. at 7. Ultimately, the Court found that it would be "patently absurd" to create a system where these contests "could all be subject to criminal liability." Id. The Court, in extending this logic, found that in the DFS contests at issue, "the entrance fee does not specifically make up the purse or premium contested for." Id. at 8. This illustration applies to DFS in the same manner in which it applies to season-long fantasy sports. Draft Masters' DFS contests allow patrons to enter with a predetermined fee, which is the same fee for all competitive patrons. (R. at 4-5). The competition comprises a finite set of prizes that will be paid to a competing patron, without the possibility of reverting back to Draft Masters. Id. In situations where there are not enough patrons and no prize is awarded, the money is returned to all competitors. Id. For these reasons, Draft Masters' DFS contests are lawful as a matter of law.

The fees paid for participation in Draft Masters' DFS are also permissible under federal statutory law enacted to address the introduction of technology in the world of sports betting. In 2006, Congress codified these common law principles in the Unlawful Internet Gambling Enforcement Act ("UIGEA"). 31 U.S.C §§ 5361-5367 (2012). For purposes of clarifying the federal law, UIGEA was designed to outline that fantasy sports competitions are outside the definition of "bet or wager." This subsection of UIGEA extends to fantasy sports contests involving an entry fee in which "(1) prizes are established and announced in advance, (2) outcomes reflect the relative knowledge and skill of the participants, and are determined predominantly by

the performances of athletes in multiple games, and (3) the result is not determined by the outcome for a real world team or teams or an athletes' performance in a single real world sports event." 31 U.S.C. § 5362(1)(E)(ix). Draft Masters' DFS satisfy these conditions. UIGEA serves as an effective demonstration by Congress that there is a need to recognize the distinction between gambling and contests for a prize. Even the drafters of UIGEA recognize the confusion in applying existing common law to the evolution of the Internet. 31 U.S.C § 5361. As the record reflects, UIEGA simply provides "new mechanisms for enforcing gambling laws on the Internet," which Congress deemed necessary as it felt "traditional law enforcement mechanisms [were] often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders." 31 U.S.C.A. § 5361(a)(4).

The State's position to the contrary is misguided. The State argues that UIEGA's language does not expressly legalize fantasy sports, but merely clarifies that fantasy sports are not inherently illegal. (R. 26). Moreover, the State emphasizes that " [no] provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States." 31 U.S.C. § 5361(b). However, as previously outlined, the State has failed to properly illustrate that a question of fact exists as to DFS's illegality under Nevada Law. (R. 14). In conjunction with UIEGA and the State's failure to show illegality, this Court should affirm the District Court's granting of Draft Masters' motion for summary judgment on its gambling issue. (R. 14).

Consequently, Draft Masters' contests do not constitute illegal gambling because they do not involve the presence of a bet or wager ("risk[ing] something of value"). Instead, Draft Masters' contests allow patrons to pay an entry fee in order to compete for a predetermined, announced, and guaranteed prize; a method long recognized as lawful in the state of Nevada, and more recently

bolstered on the national stage by the Humphrey decision. Therefore, summary judgment as to the element of wagering may be entered in Draft Masters' favor.

C. DRAFT MASTERS' DFS CONTESTS DO NOT CONSTITUTE GAMBLING GAMES UNDER NEVADA LAW

Draft Masters' DFS are not one of the four types of gambling games proscribed under Nevada statute. The four types of gambling games are: (1) games played with cards, dice, equipment or any device or machine for any representative of value; (2) banking games; (3) percentage games: and (4) other games or devices approved by the Nevada Gaming Commission. NRS 463.0152. Only the first and third types of games – games played with any device or machine and percentage games – are at issue on appeal in this case. This Court should affirm the District Court's finding that, as a matter of law, Draft Masters' DFS do not qualify as wagering schemes under the percentage game subcategory, nor do they require the use of devices. As such, they are not gambling games under Nevada Law.

1. A Computer or Mobile Phone Does Not Qualify as a Device or Machine, Under NRS 463.0152

The State fails to provide tangible evidence in support of its claim that a computer or mobile phone qualifies as a device under NRS 463.0152. As the Attorney General notes, "[although] the term "electronic device" is not defined by the Gaming Control Act, other Nevada statutes have defined a computer to be an electronic device." (R. 32). The statutes the Attorney General refers to are NRS 205.4735 and NRS 360B.410, "Crimes Against Property" and "Sales And Use Tax Administration," respectively. See NRS 205.4735 and NRS 360B.410, respectively. It seems troublesome to take two unrelated statutes, where the terminology is specifically outlined, and extend this logic into a legal debate already fraught with ambiguity and confusion. Many statutes

specifically outline varying definitions in question – clearly showing the Nevada legislature's propensity to clarify definitions when necessary. As such, it appears that if the State would like to clarify their understanding of the term "device," the legislature would be willing to oblige. The District Court below took issue with extending this definition, and decided against doing so.

In addition, the Attorney General writes that, "[computer equaling electronic device] is consistent with the general understanding of what an electronic device is." (R. 32). However, this rationale can lead to extremely problematic precedent in Nevada. Again, it has been made clear the Nevada legislature attempts to clarify all definitions where necessary. See NRS 205.4735. If this Court decides to apply the definition of "device" to computers and mobile phones, two terms not found anywhere in the Act, based on "general understanding," then where does the Court stop? (R. 32). It seems most logical to follow the District Court below, granting summary judgment on the gambling issue, and forcing the legislature to clarify the wording to fit its intention, if the current framework fails to do so.

2. Draft Master's DFS Contain Prizes, Not Wagers, And Therefore Are Not Percentage Games Under NRS 463.0152

As stated above, DFS do not contain wagers, but does contain prizes. A prize exists where there is a pre-fixed pot and the sponsor has no ability to keep or win the announced purse. See e.g., Gibson, 77 Nev. 25; Fallon, 152 N.Y. 12; Humphrey, 2007 WL 1797648. As the record reflects, Draft Masters' DFS contests provide for a predetermined and announced prize, and the site relinquishes any right to the potential purse. (R. 3-5). Therefore, based on widely accepted precedent, DFS mirrors competitions in which a host runs a contest where an entry fee allows the opportunity to win the prize based on a patron's own skill. As a result, this Court should follow the District Court below in finding that no wager is present in Draft Masters' DFS and should

affirm grant of summary judgment on the issue of gambling.

D. DRAFT MASTERS' DFS CONTESTS ARE NOT SPORTS POOLS

DFS are not sports pools under NRS 463.0193. In order to qualify as a sports pool it must be determined: (1) whether a wager is present; (2) whether the wagering is done on sporting events or other events by any system or method of wagering; and (3) whether daily fantasy sports operators are in "the business" of accepting wagers. NRS 463.0193. As discussed above, DFS do not contain wagers under Nevada Law. Therefore, there is no "wagering" on sporting events, and Draft Masters is not in "the business" of accepting wagers. As such, this court should affirm the District Court's motion for summary judgment on the issue of gambling.

For the reasons addressed above, paying a fee to compete for a preannounced prize is not a wager. See *supra*. DFS does not satisfy the first, second, or third prong to qualify as sports pools, the same way it is not satisfied to qualify for gambling games. Draft Masters' DFS contests do not constitute illegal gambling because they do not involve the presence of a bet or wager ("risk[ing] something of value"). Instead, Draft Masters' contests allow patrons to pay an entry fee in order to compete for a predetermined, announced, and guaranteed prize; a method long recognized as lawful in the state of Nevada, and more recently bolstered on the national stage by the Humphrey decision. Therefore, summary judgment as to the element of wagering may be entered in Draft Masters' favor. Subsequently, DFS does not satisfy the first prong of NRS 463.0193, and therefore fails to satisfy the second and third prongs.

E. POLICY CONCERNS

Two public policy concerns arise in the event this Court finds in favor of Petitioners. First, this Court should refrain from weighing either the Draft Masters' CEO's language in describing his company in a casual setting, or the terminology used in the webpage's alternative text ("alt text"). Second, as the statute is currently written, respondents agree with the District Court's finding that DFS does not constitute a wager. However, while it is entirely within this Court's jurisdiction to make a ruling on the issues presented to it, Respondents recognize that the statute as written is ambiguous, and may require clarification from the Nevada legislature. Based on both issues, and the aforementioned discussion, we urge this Court to affirm the District Court's granting of summary judgment on the issue of gambling.

1. Neither The Language of Draft Masters' CEO In Informal Settings Nor The Website's "Alt Text" Should Be Given Strong Weight In This Determination

The casual nature with which Draft Masters' CEO made statements regarding the existence of gambling in its DFS contests requires that they be interpreted just as causally. In his memorandum, the Attorney General relied upon specific comments made by Draft Masters' CEO in an online, informal Reddit conversation. The CEO stated that the Draft Masters' "concept is a mash up between poker and fantasy sports. Basically, you pick a team, deposit your wager, and if your team wins, you get the pot." (R. 28). While the statements made are certainly not advisable, the nature in which they were delivered indicates an informality that we must take seriously. Reddit frequently allows for a question and answer exchange between famous persons and ordinary users. Often, the level of the sophistication of the user ranges from the more informed to the less informed. See, Matt Silverman, Reddit: A Beginner's Guide, MASHABLE (June 6, 2012), http://mashable.com/2012/06/06/reddit-for-beginners/#Ly87FskKHiqB. As this case before us

shows, the laws regarding gambling and the prize versus wager distinction have professionally trained attorneys and legislators divided. It can certainly be understood that a CEO of a new company would attempt to simplify his business plan to appeal to the layman. As such, it would be dangerous to make a legal conclusion based on the off the cuff remarks of the company's CEO in a setting where he is attempting to sell his product.

Additionally, the Attorney General takes issue with the alt text found beneath the site's images. (R. 29). The alt text includes "betting," which is placed in a position to tell the website viewers the context of the image. (R. 29). In a similar fashion to the informal statements before, given the confusion and ambiguity in the law pertaining to DFS, the site can only do so much in explaining the disparity, especially in the esoteric world of its alt text. Ultimately, as stated above, it would be a slippery slope to create case law around the use of alt text for a business that's public perception remains entrenched in definitional ambiguity. As such, we ask this Court to disregard these statements, and affirm the District Court's motion for summary judgment on the issue of gambling.

2. This Court Should Follow the Rhode Island Attorney General's Urging and Leave This Issue To The State Legislature

On February 4th, 2016, Rhode Island Attorney General Peter Kilmarten wrote an advisory letter to the Governor of Rhode Island, and the two heads of its legislative chambers. See Lucas Jackson, Fantasy Sports Legal in Rhode Island, Attorney General Says, REUTERS (Feb 4. 2016, 5:33 PM), http://www.reuters.com/article/us-fantasy-sports-rhode-island-idUSKCN0VD2WC. In his letter, Mr. Kilmarten recognized the dominant element test, supported its precedent in Rhode Island, and advised the parties of its prospective legality in the state. Id. Even though Rhode Island and Nevada have differing gambling laws, Mr. Kilmarten's suggestion to the legislature is

germane to all states that have ambiguity in their DFS' laws.[3] Mr. Kilmarten wrote, "it is my very strong suggestion that the legislature, this year, enact a statute which governs the operation of DFS in this state." Id. It is apparent elsewhere in the United States, that the existing laws in place do not address the changing climate of the Internet, and DFS specifically. As such, in addition to the State failing to show DFS as illegal gambling, Respondent suggests additional proof that this issue is one for the legislature. Overall, we ask this Court to affirm the District Court's granting of motion for summary judgment on the issue of gambling.

II. LICENSURE OF DRAFT MASTERS' DFS DOES NOT VIOLATE PASPA AS A MATTER OF LAW AND GRANT OF SUMMARY JUDGMENT FOR RESPONDENTS SHOULD BE AFFIRMED

The second question presented by this appeal is whether the trial court erred in its determination that Nevada's licensing of DFS does not violate the Professional and Amateur Sports Protection Act ("PASPA"). It did not. For the reasons stated below, it is respectfully requested that this Court affirm the District Court's ruling and grant summary judgment in favor of Respondents, the State of Nevada (the "State") and Draft Masters, on Petitioners' meritless PASPA claim.

For the myriad of reasons previously discussed, it remains Draft Masters' position that DFS contests *do not* constitute gambling in the first place and thus do not require licensure under Nevada law at all. However, if this Court were to find that DFS do constitute gambling, their licensure would not violate PASPA. What Petitioners fail to recognize is that Nevada is in a unique position to license DFS without violating PASPA. An examination of the text, legislative history,

[3] Rhode Island General Law § 11-19-1 provides in pertinent part: "Every person who shall directly or indirectly set up, put forth, carry on, promote, or draw publicly or privately any lottery, chance, game, or device of any nature or kind whatsoever, or by whatsoever name it may be called, for the purpose of exposing, setting for sale, or disposing any money … shall be deemed guilty of a felony and shall be imprisoned not exceeding two (2) years or to be fined not exceeding two thousand ($2,000). RI ST § 11-19-1.

and legislative purpose behind the Act make this point clear. The context of subsequent legislation ("UIGEA") further clarifies Respondents' position.

Petitioners', the Leagues, intervened in this action pursuant to NRCP 24(b) and seek a permanent injunction preventing the State from issuing any licensing permits to Draft Masters. See NV ST RCP Rule 24. Petitioner's view is misguided. The Leagues' chief argument urges this Court to adopt the Third Circuit's interpretation of PASPA in OFC Comm'r of Baseball v. Markell, 579 F.3d 392 (3d Cir. 2009). The Markell Court prohibited Delaware from expanding its sports betting because the proposed games were not "actually conducted" during the statute's exception period. Id. at 296-97. However, Petitioners' position is ill founded, inconsistent with the purpose of the Act, and simply, wrong. The Third Circuit's interpretation in Markell is merely persuasive, if that. As such, this Court should exercise its discretion, as the lower court did, in declining to apply it to the case at bar.

Delaware was and is not in the unique position that the State of Nevada finds itself when it comes to licensure of sports betting. Nevada is the only state in the country that is authorized by federal law to regulate sports betting in its casinos and is therefore more easily able to regulate DFS. See generally, NRS 463. Visitors to Nevada can place bets on single games in every major sporting event, parlays on multiple games, and proposition bets on individual performances in games (e.g., who will score the first touchdown in the Super Bowl). Why would requiring DFS service providers to obtain a license and continue to legally operate be any different?

Accordingly, Draft Masters and the State are entitled to summary judgment against the Leagues with respect to the PASPA claim.

A. DFS ARE "GRANDFATHERED-IN" AND THUS PERMITTED UNDER LICENSE WITHOUT VIOLATING PASPA

While it of course remains Respondent Draft Masters' position that DFS are not "a lottery, sweepstakes, or other betting, gambling, or wagering scheme," if this Court disagrees, DFS may still be licensed because Nevada has allowed similar sports betting in the past. PASPA makes it unlawful for any state to "sponsor, operate, advertise, promote, license, or authorize by law . . . betting, gambling, or wagering" on professional or amateur sports games. 28 U.S.C. § 3702 (2012). Nevertheless, PASPA does not apply to states that are "grandfathered-in." Id. at § 3704. States are grandfathered-in if "a lottery, sweepstakes, or other betting, gambling, or wagering scheme" was: (1) conducted at any time during January 1, 1976 through August 31, 1990; or (2) authorized by a State on October 2, 1991, and that scheme "actually was conducted" in that State during September 1, 1989 through October 2, 1991. Id. § 3704(a). Thus, a state may license a gambling venture if the scheme is one which was "actually conducted" in the State during the exemption period.

The State of Nevada is in a unique position to support this argument, and this Court should consider it seriously. Since betting on single games in every major sporting event, parlays on multiple games, and proposition bets on individual performances in games, were conducted in the State of Nevada during the exemption period, DFS may now be licensed without violating PASPA. A recent Third Circuit decision recognizes this notion. "PASPA contains . . . a "grandfathering" clause that releases Nevada from PASPA's grip." Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208, 216 (3d Cir. 2013).

Some states, notably New York, have urged a need for legislation in favor of banning DFS on consumer protection grounds. However, unlike Nevada, those jurisdictions did not have similar sports betting during the exception period. Any out-of-court discussion of the need for legislation

and regulation, and to the effect of the need to repeal PASPA in order for a State to legally permit licensure of DFS, is irrelevant to the issue before this Court. This case is about the *State of Nevada*. There are unique factors to consider given the nature of Nevada's position in the gaming industry. After careful consideration of the Statute and the intent behind the "grandfathered-in" provision, it becomes very clear that the State of Nevada may license DFS lawfully.

Section 3704 exempts the State of Nevada from PASPA's prohibition on sports betting. PASPA exempts any state that had sports betting during the exception period as long as that type of sports betting "actually was conducted." 28 U.S.C. § 3704(a)(2)(B). The relevant inquiry is whether fantasy sports were actually conducted *or* whether they are a substantive change from previous sports betting. The "substantive change" inquiry gives full credit to the spirit and purpose of PASPA, rather than denying States the right to license DFS on a technicality of the Statute.

This Court, like the trial court, should decline to adopt the Third Circuit's interpretation in Markell. As the trial court correctly noted, the phrase "to the extent that the scheme was conducted by that State," identifies a condition. (R. 13). But it does not mean the *exact type* of sports betting must have been conducted at the time of the exception. (R. 13). The weight given to the "actually conducted" language in Markell is misapplied when all things are considered. For example, consider the hypothetical that daily fantasy sports existed, and was as popular as it is now, during the exception period. Would it have been "actually conducted?" There is no reason it wouldn't be.

Daily fantasy sports do not effectuate a substantive change from what was "actually conducted" during the exception period. As stated, the State of Nevada permitted, and still permits, visitors to place bets on single games in every major sporting event, parlay on multiple games, and proposition bets on individual performances in games (e.g., who will score the first touchdown in

the Super Bowl). As Petitioners concede in their brief, as long as DFS "do not effectuate a substantive change from the scheme that was conducted during the exception period" then their licensure will not violate PASPA. (R. 17) (citing Markell, 579 F.3d at 303) ("*We do not hold that PASPA requires Delaware's sports lottery to be identical in every respect* to what the State conducted in 1976. Certain aspects of the lottery may differ from the lottery as conducted in 1976, as long as they do not effectuate a substantive change from the scheme that was conducted during the exception period.") (emphasis supplied). Applied to the case at bar, it becomes clear that Nevada, more than any other state, did not effectuate a "substantive change." Fantasy sports, in fact, are simply an accumulation of "prop bets." Had this idea been as popular as it is now during the exception period, there is no reason why it would not have been actually conducted. DFS are simply a *de minimus* alteration—one that is permissible under Markell. Id. at 304.

Furthermore, Markell is distinguishable. In that case, the Third Circuit held that PASPA did not permit Delaware to license single-game betting *because the relevant grandfathering provision for Delaware permitted only lotteries consisting of multi-game parlays on NFL teams*. Id. (emphasis supplied). This is clearly not the case in Nevada and petitioners fail to recognize this quintessential truth. As Respondents previously articulated, DFS contests are essentially accumulations of "prop bets"—activity that *was* and still *is* very much allowed in the State of Nevada. Since Nevada allowed *similar* sports betting in the past, DFS should be grandfathered-in and permitted under license.

Further, a reading of PASPA's Senate Reports indicate that Nevada is exempt. The Reports note that PASPA exempts Nevada because the Committee did not wish to "threaten [Nevada's] economy." Nat'l Collegiate Athletic Ass'n, 730 F.3d at 216-17 (citing Sen. Rep. 102–248, at 4, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3559). The issue was already lobbied in the legislature and

Nevada is authorized to permit and regulate gambling for a multitude of reasons—the State's economy among them. It is not the Court's role or its burden to lobby for the Leagues.

Accordingly, Draft Masters and the State are entitled to summary judgment as a matter of law against the Leagues regarding the PASPA claim.

B. PASPA'S LEGISLATIVE PURPOSE MAKES CLEAR THAT LICENSING DFS IS CONSITENT WITH PROMOTING "THE INTEGRITY OF THE GAME"

A chief goal behind the passage of PASPA was Congress's desire to preserve the integrity of professional and amateur sporting events and, not coincidentally, the Leagues were its chief lobbyists. The MLB, NBA and NHL are all *investors* in one form or another in DFS. Fantasy sports do not lie within the scope of PASPA because they do not threaten the integrity of professional or amateur sports. The typical vices that are associated with gambling do not apply to fantasy sports; the monetary awards involved in fantasy games are nominal and secondary to the games' interactive and entertainment aspects. The negative externalities associated with traditional gambling are not present; in fact, participation in fantasy sports has positive externalities, which will be addressed below. See Neville Firdaus Dastoor, The Reality of Fantasy: Addressing the Viability of a Substantive Due Process Attack on Florida's Purported Stance Against Participation in Fantasy Sports Leagues that Involve the Exchange of Money, 6 Vand. J. Ent. L. & Prac. 355, 368 (2004).

Gambling on the outcomes of sporting events can create gambling-related scandals that can harm a sports league's integrity, as well as the fans' perception of that integrity. Sen. Bill Bradley, The Professional and Amateur Sports Protection Act - Policy Concerns Behind Senate Bill 474, 2 Seton Hall J. Sport L. 5, 7 (1992). As David Stern, the former Commissioner of the NBA stated, '"[s]ports betting places athletes and games under a cloud of suspicion, as normal

incidents of the game give rise to unfounded speculation of game-fixing and point-shaving."' Jon Boswell, Fantasy Sports: A Game of Skill That Is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law, 25 Cardozo Arts & Ent. L.J. 1257, 1277 (2008) (quoting NBA Commissioner David Stern's 1991 testimony before the Senate Judiciary Committee). The MLB in particular has been forced to work hard to stave off the connection between gambling and the people involved with the organization. The most notable incident of baseball gambling occurred during the 1919 "Black Sox Scandal," when eight members of the Chicago White Sox were banned from the sport following allegations that the White Sox intentionally lost the World Series. Anthony N. Cabot & Robert D. Faiss, Gambling Law Symposium: Sports Gambling in the Cyberspace Era, 5 Chap. L. Rev. 1, 3 (2002). More recently, in 1989, Pete Rose, baseball's all-time hits leader, was banned after he was accused of betting on baseball games in which he played or coached. Id.

Respondents recognize that these legitimate concerns have undoubtedly led to the legislation at issue, but contend that fantasy sports were not and are not of those important concerns about preserving "the integrity of the game" in the minds of PASPA's drafters and lobbyists. The drafters and the Leagues likely had in mind instances such as the Black Sox throwing the 1919 World Series, would-be Hall-of-Famer Pete Rose betting on baseball, and young, financially desperate and easily impressionable amateur athletes being incentivized to engage in foul play. All of these instances involve illicit activity—*at the expense of the "integrity of the game."* In Nevada, the activity in question is not illicit. The concern was not DFS. Fantasy sports—both the daily and traditional models—*promote* the integrity of the game and it would be inconsistent with PASPA's purpose to say that licensing DFS to *continue* promoting the integrity of the game, and its fan base, violates the statute. On its face, PASPA may seem to incorporate all fantasy sports.

See Marc Edelman, A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime, 3 Harv. J. Sports & Ent. L. 1, 36-37 (2012). However, as the District Court correctly pointed out, "[t]hat would be an absurdity, as America's premier professional sports leagues were the chief lobbyists for PASPA, and most American sports leagues both host and endorse seasonal fantasy sports." Id.; (R. 13).

Finally, fantasy sports leagues have a strong social value in that they foster intimate, friendly competition between friends and family. Three out of four fantasy players compete in leagues with people that they already know. Press Release, Fantasy Sports Trade Ass'n, FSTA Discusses Issues Covered During its Spring Conference (Mar. 24, 2006). Thus, participation in a fantasy league can become an enjoyable pastime for a family or a group of friends. Bill Simmons, formerly ESPN's "Sports Guy," echoed this sentiment when he wrote, "[m]aybe it's just a fantasy league, but I can't imagine few things I'll miss more . . . than the annual draft at Lee's house--cracking the same jokes, seeing old friends, laughing for five straight hours, putting another year in the books." Bill Simmons, Draft Day Swan Song, ESPN, http://proxy.espn.go.com/espn/page2/story?page=simmons/021114.

Summary judgment should be upheld in Respondents' favor.

C. CONGRESS INTENDED TO EXEMPT FANTASY SPORTS FROM PASPA WHEN IT PASSED UIGEA

UIGEA's passage further demonstrates that DFS were intended for PASPA exemption. UIGEA *specifically exempted* fantasy sports, indicating Congress' intent to exclude them from violating federal law. 31 U.S.C. § 5362(1)(E)(ix) (2012). The Leagues disagree, citing to the Attorney General's advisory opinion, which offers very little guidance on the issue. (R. 19). The advisory opinion merely states that UIGEA's exemption for fantasy sports "does not mean that

fantasy sports are lawful, only that fantasy sports are not criminalized under UIGEA." (R. 27). The advisory opinion is exactly that—*advisory*. The trial court was not persuaded, and it is Respondents' position that this Court should not be either.

The chronology of the two statutes—PASPA and UIGEA—is indicative of Congress's intent—UIGEA was passed later. UIGEA should not and does not need to replace PASPA, but, like all legislation, context is important. UIGEA clarifies PASPA and makes clear Congress's view on fantasy sports.

If the Court is not persuaded on this point, because Petitioners, adopting the Attorney General's view, acknowledge that fantasy sports are not criminalized under UIGEA, this issue should be left to the legislature for clarification. Presently, there is no clear guidance supporting any position contrary to Respondent's view on this point. Petitioners' argument is baseless. If DFS need to be criminalized, the grievance should be taken up with the legislature. It is not the Court's job to rewrite statutes. The Leagues could lobby their grievances to Congress if they wish, but until the issue goes through the appropriate channels of the democratic process, summary judgment should be affirmed in Respondents' favor. Licensing DFS should be permitted.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court and hold that DFS does not constitute gambling under Nevada law. Alternatively, should this Court find to the contrary, it should hold that DFS licensure is permissible without violating PASPA. Summary judgment should be upheld in Respondents' favor on both issues.

APPENDIX

1. 28 U.S.C. 3702 provides:

   It shall be unlawful for—
   (1) a government 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.

2. 28 U.S.C. 3704 provides in pertinent part:

   (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. 31 U.S.C. 5361 provides:

   (a) Findings.—Congress finds the following:
   (1) Internet gambling is primarily funded through personal use of payment system instruments, credit cards, and wire transfers.
   (2) The National Gambling Impact Study Commission in 1999 recommended the passage of legislation to prohibit wire transfers to Internet gambling sites or the banks which represent such sites.
   (3) Internet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit industry.
   (4) New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.
   (b) Rule of construction.—No provision of this subchapter shall be construed as altering, limiting or extending any Federal or State law or Tribal-State compact prohibiting, permitting or regulating gambling within the United States.

4. 31 U.S.C. 5362 provides in pertinent part:

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;

(E) Does not include—

(ix) Participation in any fantasy or simulation sports game or education 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 any actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28) and that meets the following conditions:

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

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

(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.

(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.

5. NRS 205.4735 provides:

"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.

6. NRS 360B.410 provides:

"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.

7. NRS 462.105 provides in pertinent part:

    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.

8. NRS 463.0152 provides:

    "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.

9. NRS 463.0193 provides:

    "Sports pool" means the business of accepting wagers on sporting events or other events by any system or method of wagering.

10. NRS 463.01962 provides:

    "Wager" means a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.