APL-2020-00027
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Court of Appeals

STATE OF NEW YORK

JENNIFER WHITE, KATHERINE WEST,
CHARLOTTE WELLINS, and ANNE REMINGTON,

Plaintiffs-Respondents,

—against—

HON. ANDREW CUOMO, AS GOVERNOR OF THE STATE OF NEW YORK, and THE NEW YORK STATE GAMING COMMISSION,

Defendants-Appellants.

BRIEF FOR *AMICI CURIAE*
THE NEW SPORTS ECONOMY INSTITUTE
IN SUPPORT OF PLAINTIFFS-RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals of the State of New York, The New Sports Economy Institute states that: it has no parent corporation and issues no stock; therefore, no publicly held corporation owns 10% or more of The New Sports Economy Institute.[1]

[1] The New Sports Economy Institute received a 501(c)(3) determination letter from the Internal Revenue Service in August 2014, retroactive to July 9, 2011. NSEI's tax exempt status was revoked in 2021 due to COVID-19 related delays, and NSEI is in the process of reinstating its tax exempt status.

STATEMENT OF RELATED LITIGATION

Pursuant to Rule 500.13(a) of the Rules of Practice of the Court of Appeals of the State of New York, The New Sports Economy Institute states that, as of the date of the filing of this amicus brief, there is no related litigation pending before any court.

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NSEI's mission is to transform society through sports by, 1) promoting sports investing; 2) building a stronger economy with stronger ethics; *and* 3) bringing financial literacy to the masses through sports initiatives. NSEI's principal website is at www.thenewsportseconomy.org. NSEI has been an active participant in the courts and has submitted multiple amicus briefs, including one to the Supreme Court of the United States in *Murphy v. National Collegiate Athletic Association*, No. 16-476, 584 U.S. ___ (2018). NSEI is also actively participating in public policy discussions. Among other things, NSEI submitted a comment letter to the Commodity Futures Trading Commission ("CFTC") regarding CFTC's review of proposed RSBIX NFL futures contracts and a comment letter to the SEC on its concept release re: Harmonization of Securities Offering Exemptions. In January 2021, NSEI started issuing a newsletter at the intersection of sports, money and law called Full Court Press, which can be found at www.thefcpblog.com. Finally, NSEI is operating a free educational trading platform called AllSportsMarket, where traders can trade virtual shares of their favorite teams and learn finance through sports.

PRELIMINARY STATEMENT

The proper adjudication of this case requires asking a question that seemingly nobody has ever asked. Is daily fantasy sports ("DFS") a game?

The question of whether DFS is a game of skill has been asked numerous times and is universally interpreted to be equivalent to the question of whether DFS involves skill. However, hidden inside that question lurks yet another, much more fundamental question: Is DFS a game? For, DFS cannot be a game of skill if it is not a game in the first place.

This amicus brief offers a novel insight: DFS is not a game. Rather, DFS is a claim on future contingent events, therefore, it is illegal gambling under the Penal Law.

As Appellants rightly observed, gambling can happen in two ways: i) gambling games; or ii) gambling claims. Critically, these two paths are mutually exclusive; an activity can be a game or a claim but not both. If DFS were to be a game, which it is not, there would be no need to evaluate whether it is a claim on future contingent events. Alternatively, if DFS is not a game, but rather a claim on future contingent events not under a

person's control or influence, the skill question simply becomes moot.

Said differently, the gambling determination is a two-step process. In the first step, the relevant inquiry is whether the activity at issue is a game or a claim on future contingent events. *Only if* the activity is characterized as a game, the test proceeds to the second step and evaluates whether the game involves sufficient skill. This is the critical threshold step that was not properly applied by the lower court. Thus, the lower court reached the right result (that DFS is gambling) for the wrong reasons. Whether DFS involves sufficient skill is irrelevant once it is understood that DFS is not a game.

Often, *unconscious assumptions* are made when one is answering seemingly simple questions. A hypothetical example is: what are the summer months? Most people would respond, incorrectly, that the summer months are June, July, August. The correct answer, of course, is that it depends on whether one is located in the Northern or Southern hemisphere. When the question is silent on the hemisphere, a threshold matter that literally changes the answer to the question, it is typical for most people to not clarify and instead *assume* the first step, presumably based on where

they live. Without realizing that they skipped a crucial step, they proceed directly to the second step. Thus, unconscious assumptions could lead to the wrong answer.

This is precisely the DFS problem that is absolutely critical for the proper adjudication of the case. To answer the question of whether an activity constitutes gambling under the Penal Law, one must first address the threshold matter of characterization. A rational and methodical evaluation leads to only one conclusion: DFS is not a game, but rather a claim on contingent events not under one person's control or influence, specifically athlete performances in sports. Thus, DFS is illegal gambling under the Penal Law.

ARGUMENT

I. Skill is irrelevant because DFS is not a game in the first place.

A. DFS is not a game of skill.

The first step in showing why DFS cannot be a game of skill is to split the universe into two mutually exclusive and exhaustive possibilities. Starting with the premise that DFS is a game of skill, DFS is either i) not

gambling; or ii) gambling. Since each possibility results in a dead end, only one logical conclusion remains: DFS is not a game of skill.

1. DFS cannot be a game of skill and not gambling

We urge the Court to make the following hypothetical inquiry: if Appellants and the dissent below are correct that "given the skill-based nature of the contests, interactive fantasy sports contests are *not* gambling at all," (emphasis original) why would the same argument not extend to sports betting? Appellants Brief 35.

If DFS can escape the gambling characterization, and thus the Constitution by being a game of skill, the logical inference is that the Constitution would not stand in the way of sports betting either. Such is, in fact, the position that the New York Gaming Association ("NYGA") took: "At present, it has been determined that Daily Fantasy Sports (DFS) play is a game of skill. We submit that the criteria for determining what actions to take in DFS play and to place a wager on professional sporting events are the same and require the same review and study before taking action." New York Gaming Association, Testimony Before the Senate Committee on Racing, Gaming & Wagering, Regarding the Potential for Sports

Betting in New York State, available at https://www.nysenate.gov/sites/default/files/1.24.18_testimony_of_michael_kane_of_ny_gaming_association.pdf. The NYGA representative also stated that "game of skill is legal without a constitutional amendment." NYS Senate Sports Betting Hearing January 24th, 2018 available at https://www.youtube.com/watch?v=e-OEtHIdAaY.

An industry publication stated it more bluntly: "A constitutional amendment to authorize sports wagering … [is] ... a lengthy process to be sure and one fraught with political pitfalls … The state could *try to call* sports betting "a game of skill," so it can *skirt* the constitutional amendment requirement. That's the *tactic* used to enact a daily fantasy sports law in 2016." (emphases added). Legal Sports Report, NY Lawmakers to Push for Sports Betting At Racetracks, available at https://www.legalsportsreport.com/16525/ny-sports-betting-law-2018/. One legal practitioner agreed. "In New York, a constitutional amendment is, at minimum, a two-plus-year process … The DFS industry didn't want to wait that long. So, the industry pushed for a one-off bill instead." Rob Rosborough, *Does The New York Constitution Prohibit Daily Fantasy*

Sports? Two New York Courts Say So, But The New York Court of Appeals Will Soon Decide Once and For All, 24 Gaming L. Rev. 272-283 (2020).

It is not unexpected that the DFS operators preferred taking a shortcut based on the game of skill narrative, however, the New York Constitution is not so fragile.

First, proposed sports betting was previously blocked in the state: "To summarize, we find that sports betting is not permissible under … the New York State Constitution. The specific Constitutional bans against bookmaking and pool-selling, as well as a general ban against 'any other form of gambling' not authorized by the Constitution, would operate to invalidate a statute establishing a sports-betting program." 1984 NY Op. Att'y Gen. 1, 41, 1984 NY AG LEXIS 94.

Second, even Appellants acknowledged that sports betting is "a well-recognized form of gambling". Appellants Brief, 53. Thus, it would be inconceivable for Appellants to agree that sports betting would not require a Constitutional amendment, directly conflicting with the position of NYGA, the State's own gaming association.

Third, what the two biggest DFS operators, FanDuel and DraftKings *don't do* is also illustrative: they do not offer mobile sports betting in New York. If sports betting is a game of skill and the Constitution is not a bar, why would a rational profit-maximizing business forgo this large of an opportunity? The answer is obvious if inconvenient for DFS operators: the game of skill argument is a dead end.

Finally, the game of skill argument would also imply that betting on horses could escape the gambling characterization, an activity Appellants referred to as "indisputably a prohibited form of gambling". Appellants Brief 10. This implication was also discussed but ultimately ignored by the Legislature. *See*, *infra*, Section II.A.

If DFS can escape the Constitution under the moniker of game of skill, so can sports betting and horse racing. That position, however, is in direct conflict with Appellants' own views, the 1984 Attorney General opinion, the actual conduct of DFS operators, and views held by certain members of the Legislature. Therefore, DFS cannot be a game of skill and not gambling.

2. DFS cannot be a game of skill but still gambling

Some believe that skill and gambling could coexist.[2] Skill and gambling could indeed coexist, and sports betting is the ultimate example. However, a *game of skill* and gambling, by definition, cannot. If it did, it would imply that the entire prize/chance/consideration framework, the bedrock of gaming law, is effectively nullified. There would be some skill-based games that are not gambling (chess, golf, etc.), and some that are (DFS). That conclusion would be absurd.

To the extent poker is considered a game of skill that is gambling, that, too, is an impossibility. In *Dicristina* for example, the Court found poker is not gambling because there is enough skill, noting that "[p]oker is predominated by skill rather than chance." *United States v. Dicristina*, 886 F. Supp. 2d 164 (E.D.N.Y. 2012). Reconciling this position with the body of law in New York, Judge Weinstein noted: "The conclusion that poker is

[2] One commentator stated: "No matter what the law calls DFS, I believe it is a gambling product. It takes a lot of skill to be successful at it, but it's when you are playing, you are gambling." The host responded: "I like that term you are using: skill-based gambling. I always thought it was strange that there has to be a distinction … [I]t's a game of skill or it is gambling … Why can't it be both?" Yahoo Finance Sportsbook, DFS After The Sports Betting Ruling, available at https://podcasts.apple.com/us/podcast/dfs-after-the-sports-betting-ruling/id1276307433?i=1000412632746 (Mins 10-12).

predominately a game of skill does not undermine the holding that poker is gambling as defined by New York law. While both New York State law and the IGBA require that a game involves chance, each apply different standards in determining whether a particular game is a game of chance or a game of skill." *Id*.

On appeal, the Second Circuit reversed, applying the material-degree standard under the Penal Law. *United States v. Dicristina*, 726 F.3d 92 (2d Cir. 2013). Critically, *neither* court concluded poker is skill-based gambling; rather, they applied different standards to measure skill.

Some may think that poker is a game of skill (and therefore not gambling), and others may think that poker is a game of chance (and therefore gambling). That doesn't mean poker is skill-based gambling, as a game can never involve sufficient skill and be gambling *at the same time*. Similarly, DFS cannot be skill-based gambling, either.

B. DFS is not a game of chance.

If DFS cannot be a game of skill, only two possibilities remain, i) either DFS is a game of chance, *or* ii) DFS is a claim on future contingent events. Either way, DFS is gambling, thus, the Court's inquiry should

effectively end here. That said, the Court should use this case as an opportunity to clarify the Penal Law.

Regarding i), the Court will likely find it difficult to reconcile the position that DFS is a game of chance with the quantitative evidence that Appellants presented. The key insight offered in this brief is that any conclusion of sufficient skill does not conflict with the gambling characterization because DFS is not a game in the first place.

C. DFS is a claim on future contingent events.

If DFS is not a game, there is only one possible characterization left: DFS is a claim on future contingent events. That, in fact, was the State's leading argument when they sued DFS operators DraftKings and FanDuel. *See*, In The Matter Of: People of the State of New York v. DraftKings, Inc., November 25, 2015, Court Transcript ("Transcript") 7-8. "In the words of FanDuel, the outcome of the game is, quote, 'contingent on the positive performance of all of their players,' unquote, in the real sports events. *Id.* at 8. *See also* R. 176. "In fact, if the athletes do not perform or the games are not held, there can be no daily fantasy sports winner or loser." Transcript 8. The State aptly observed that if there are no sports games,

there can never be DFS, because scoring cannot take place and the game cannot conclude.

If DFS is a claim on future contingent events, which it must be because all other possibilities are exhausted, it is illegal gambling under the Penal Law.

II. The Legislature did not act rationally.

A. The Legislature discussed, but ultimately ignored the implausibility of DFS being a game of skill.

It would have already been a stretch to conclude that the Legislature acted rationally given the DFS law leads to a dead end. It is practically impossible to conclude that the Legislature acted rationally when that dead end, and the Constitutionality problem it creates, was openly discussed. The following exchange took place on June 17, 2016: (R. 669)

> ASSEMBLY MEMBER GOODELL: … [A]s the Chair of Racing and Wagering, of course you know that horse racing involves a lot of skill for those who are in it professionally. I mean, they evaluate the horse, track conditions, temperatures, humidity, trends, jockeys, when it ran and they're all provided

with a massive amount of data that they analyze provided by the tracks and others.

Assembly Member Goodell's logic was simple, yet fatal for the DFS industry: if skill and gambling can't coexist, why wouldn't horse racing, which Appellants characterize as "indisputably a prohibited form of gambling." also be non-gambling?[3] Appellants Brief 10. Assembly Member Pretlow, the sponsor of the bill, walked right into the logical trap set by Assembly Member Goodell, and, incredulously, argued the impossible.

> ASSEMBLY MEMBER PRETLOW: Well, I would agree with you, Mr. Goodell, but, you know, horse racing has been around since the 1800s and back then we didn't have the differentiation in laws between skill and chance. So when the Constitution of the State of New York was written, horse racing was included as gambling. *If horse racing were to be invented today, it probably wouldn't fall under this gambling.*

[3] The Legislature heard the parallels between DFS and betting on horses before, *see*, e.g. R. 815-818, which further undermines the argument that the Legislature acted rationally.

(emphasis added)

> ASSEMBLY MEMBER GOODELL: That's very interesting because, clearly, the Constitutional framers considered it gambling because they expressly excluded it from the scope of the Constitutional prohibition against gambling and they wouldn't have excluded it if they hadn't considered it gambling.

Assembly Member Goodell could have made the same argument for sports betting, and Assembly Member Pretlow would have been forced to accept - because there is no other possibility - that sports betting is also not gambling under the Penal Law. He didn't, but the Legislature, if acting rationally, could have easily made that inference.

Assembly Member Goodell ultimately voted no for the bill, stating: "I'm brought up short by that nagging Constitution because not only does it ban gambling, but in this situation, which is so unusual in the Constitution, it actually directs us, as a Legislature, to prohibit gambling." R. 690. Thus the Legislature not only heard that the game of skill argument leads to the blatantly implausible conclusion that horse racing

would not be gambling, but they were also made aware that the DFS law creates a constitutional problem. Still, the Legislature passed the bill, which cannot have been a rational act.

B. If the Legislature cannot declare that roulette is not gambling, it can also not declare that DFS is not gambling.

The dissent below recognized that the Constitution cannot be bypassed so easily. “Plaintiffs' argument would have teeth if, for example, the Legislature found that roulette is not gambling – which is a patently unsupportable opinion given that the game is randomly determined by chance – or if the Penal Law required only "a" degree of chance.” (R. 1460 n.6). Appellants agreed: “The constitutional prohibition on gambling unquestionably poses limits on the Legislature’s authority; for example, the Legislature would not be able to authorize games that rely purely on chance, such as roulette.” Appellants Brief 3-4. Thus, while a game that indisputably sits at the chance end of the skill-chance spectrum, there can be no reasonable disagreement for a pure chance game, there can be rational disagreements between reasonable minds for games where the skill level is somewhere in the middle, e.g. poker.

The fact that DFS involves skill makes it *appear* like poker, which would be an example of " 'line-drawing' in gray areas." R. 1458. However, DFS is not a game, it is a claim on future contingent events. There are no gray areas with DFS. As a result, the Legislature's conclusion that DFS is not gambling is akin to concluding that roulette is not gambling.

C. The Legislature Did Not Fully Appreciate The Mutually Exclusive Nature Of Its Own Laws.

In enacting the Interactive Fantasy Sports Law, the Legislature made two declarations, i) interactive fantasy sports are not games of chance; *and* ii) interactive fantasy sports contests are not wagers on future contingent events not under the contestant's control or influence.

In doing so, the Legislature has demonstrated that it has not fully appreciated the mutually exclusive nature of the gambling test under the Penal Law. As Appellants noted, "the Penal Law specifies two forms of wagering." Appellants Brief 13. Yet, once an activity is properly characterized as either a game or a claim, the other possibility simply becomes moot. If an activity is a bona fide game, the skill vs. chance

determination is conclusive on its own (assuming that something of value is risked and received, which is the case with DFS). Alternatively, if an activity is determined to be a claim on future contingent events, there is no need to evaluate skill at all.

The Legislature did not realize that there is *no* activity that is a game and a claim at the same time and seems to have manufactured language to bypass the Constitution, rather than following a genuine truth-seeking process. This cannot be a rational act.

III. That DFS is a claim on future contingent events is consistent with the history of gambling laws.

A. The Penal Law is consistent with the Statute of Anne and highlights the distinction between games and claims.

The laws of Great Britain are the source of most of the gambling laws in the U.S. At the turn of the 18th century, the Statute of Anne came into effect. In pertinent part, it provided:

> … who shall, at any time or sitting, by playing at Cards, Dice, Tables or other Game or Games whatsoever, or *by betting on the Sides or Hands of such as do play* (emphasis added)

See, State of Tennessee, Office of the Attorney General, Opinion No. 04-046, available at https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2004/op04-046.pdf ("Tennessee AG Opinion").

The Statute of Anne appears to be the first law that effectively distinguished between games and claims, outlawing both certain games and wagering on future contingent events. Enacted more than 300 years ago, it recognized that gambling can happen in two mutually exclusive ways: i) chance games; or ii) entertainment claims on future contingent events.

Those laws quite literally entered, sometimes word by word, the state books at inception. An early version of the gambling statute in Illinois (1827) read almost identical to the Statute of Anne:

> Any person who shall, at any time or sitting, by playing at cards, dice, or any other game or games, or by betting on the side *or* hands of such as do game … so *playing or betting*, any sum or sums of money, or other valuable thing ... (emphases added).

The Revised Code of Laws of Illinois, Enacted by the Fifth General

Assembly 243 (1827). *See also*, Tennessee AG Opinion ("Clearly, some of the legal principles contained within the 1710 Statute of Anne designed to curtail excessive gambling losses have been included, and even expanded, within Tennessee law.")

The Penal Law itself follows the same game vs. claim structure. "[B]y 1910, the Penal Law prescribed both games of chance (including lotteries) as well as wagers on future contingent events." Appellants Brief 10. The 1965 Penal Law continued to respect this dichotomy.[4]

B. The Practice Commentary highlights the distinction between games and claims

The Practice Commentary clearly makes the distinction between games and claims:

> "One illustration of the definition of 'gambling,' drawn from the commentaries of Judges Denzer and McQuillan is the chess game between A and B, with A and B betting against each other and X and Y making a side bet. Despite chess being a game of skill, X and Y

[4] The terms gaming and gambling are *not* interchangeable. There is gaming that is not gambling (i.e. skill games), and there is gambling that is not gaming (i.e. entertainment claims).

> are 'gambling' because the outcome depends upon a future contingent event that neither has any control or influence over. The same is not true of A and B, who are pitting their skills against each other and thereby have a material influence over the outcome; they, therefore, are not 'gambling.' Thus the definition of 'gambling' embraces not only a person who wagers or stakes something upon a game of chance but also one who wagers on 'a future contingent event' [whether involving chance or skill] not under his control or influence."

William C. Donnino, Practice Commentary, N.Y. Penal Law § 225.00, 39 McKinney's Cons. Laws of N.Y. at 355 (2008).

The Practice Commentary supports the Respondents' position. It is not the DFS activity that is similar to the chess game in the Practice Commentary; rather, it is the sports games that DFS scoring is based on. DFS participants are akin to not A and B, but X and Y.

In a similar vein, Appellants' reliance on *Fallon* is improper, as it also supports Respondents' position. *People ex. rel. Lawrence v. Fallon*, 152 N.Y. 12 (1987). Horse racing is a contest of skill from the horse

owner's perspective, as they can control or influence the outcome. That argument does not extend to outside parties who bet on horses, even if skill is involved. From their perspective, the horse race is a future contingent event, just like chess in the Practice Commentary, or football in DFS.

Another state court recognized this critical distinction: "That every reputed owner or co-owner of a horse entered in the race – *and no one else* – paid a fee of $2 for the privilege of having the horse in which he was interested participate in the race." (emphasis added). *Toomey v. Penwell*, 76 Mont. 166, 245 P. 943 (1926). As the *Toomey* court explained: "The purpose of the statute is not to prevent horse-racing but to prevent gambling."

The people who risk money on the outcome of single games (sports betting), or on the outcomes of multiple games (parlay betting), or on the spread (spread betting), or on the performance of individual athletes (proposition bets), or on the performance of a combination of athletes (daily fantasy sports) are all risking money on future contingent events not under their control or influence. It doesn't matter whether the claim is triggered by a single event or multiple events; if it did, it would imply,

illogically, that a sports bet on a single game outcome is gambling, but parlay betting isn't.[5] Similarly, it doesn't matter whether the triggering event is game outcomes or athlete performances; if it did, it would imply, illogically, that a sports bet on a single game outcome is gambling, but a proposition bet on athlete performance isn't. The format does not matter, either; a bettor can transact with a bookmaker (traditional sports betting), with another bettor directly (exchange wagering), or participants can be ranked according to their total scores based on predetermined rules (DFS); if it did, one could simply restructure the format of the wager to escape gambling characterization. The New York Constitution cannot be bypassed so easily.

C. The Penal Law is consistent with federal laws.

While not explicit under § 225.00(2), claims are subject to their own spectrum: economic purpose vs. entertainment. As Appellants observed, insurance claims have similarities to sports wagers ("businesses offering insurance collect premiums from policyholders and make payments based

[5] That Penal Law § 225.00(2) only makes reference to the singular word "event" does not save DFS from gambling characterization. First, that would imply that sports betting can easily escape gambling by simply adding more games to the wager (i.e. parlay betting), Second, the Penal Law references the plural versions elsewhere, *see*, Penal Law § 225.00(9) and Penal Law § 225.00(11).

on the outcome of contingent events not within the policyholder's (or the insurer's) control"), but insurance serves as a risk management tool as opposed to pure entertainment claims: "Nevertheless, the Legislature in 1889 specifically exempted from the statutory prohibition on gambling 'any insurance made in good faith for the security or indemnity of the party insured.'" Appellants Brief 28-29. Thus, the Legislature recognized that not all claims are created equal and the ones that serve a bona fide economic purpose serve the public interest.[6]

For the better part of the 20th century, states mostly regulated both games and claims. Regulatory authority over claims started to shift when CFTC was created by Congress in 1974, generally preempting state jurisdiction. In fact, Appellants' reliance on *Ellison* is inapposite, because *Ellison* itself involved a future contingent claim, not a game. *People ex. Rel. Ellison v. Lavin*, 179 N.Y. 164 (1904). The question the *Ellison* Court dealt with was: "How many cigars (of all brands, no matter by whom

[6] Insurance, initially a vehicle for gambling, evolved into a bona fide risk management tool. "In eighteenth-century England, people would buy life insurance on politicians and other celebrities so that if the named person died, the purchaser of the insurance would receive a payout … The law responded by developing the insurable interest doctrine …" *See*, Eric A. Posner and E. Glen Weyl, *An FDA for Financial Innovation: Applying the Insurable Interest Doctrine to Twenty-First-Century Financial Markets*, 107 Nw. U. L. Rev. 1307, 1328 (2015).

manufactured) will the United States collect taxes on during the month of November, 1903?" *Id.* Similar contracts trade today on designated contract markets under CFTC jurisdiction.[7] Thus, if decided today, *Ellison* would likely fall under federal jurisdiction in the first place, but if decided under the Penal Law it would have been construed as gambling.

DFS may fall under CFTC jurisdiction. "[C]ertain fantasy contests may run counter to Commodity Futures Trading Commission regulations." *See* John T. Holden and Ryan Rodenberg, *Modern Day Bucket Shops? Fantasy Sports and Illegal Exchanges*, 6 Tex. A&M L. Rev. 619 (2019). In any event, though, this Court does not need to determine whether CFTC has jurisdiction over DFS. The Penal Code dates back to the 19th century, and the CFTC was not established until 1974. The simple reconciliatory view is that both the Penal Law and federal laws serve the same purpose: prohibiting claims on future contingent events that do not satisfy the public interest.

IV. Daily fantasy sports claims can be distinguished from games.

Quite central to this case is what a future contingent event means,

[7] NADEX, for example, a designated contract market regulated by the CFTC, offers contracts tied to the number of new jobless claims.

and how games can be distinguished from claims on future contingent events, both of which are addressed below.

A. Future contingent events that potentially impact games and future contingent events artificially created within games are distinguished from future contingent events that claims are based on.

FanDuel and DraftKings ("*Amici*") did not appreciate the subtle but important differences between the three types of uncertainties: i) uncertain events that could potentially impact games; ii) uncertain events *artificially* created within games; *and* iii) uncertain events that claims are contingent on.

Regarding the first type of uncertainty, *Amici* observe that "[e]very game of skill involves some elements of chance or contingent events," and "not even professional athletes can eliminate the risk of 'injury,' 'unexpected weather,' or 'poor officiating.'" Amici Brief 25-26. That, however, doesn't turn a claim, such as DFS, into a game, such as football. While uncertain future events such as weather could certainly impact game outcomes, e.g. extreme snow could derail a field goal attempt, teams don't

get points for predicting the weather. Contracts such as weather derivatives on the other hand pay off based on future contingent events, e.g. if snowfall in Chicago exceeds 10 inches in December. Regulated by the CFTC, these contracts are claims that help stakeholders manage their risks. Weather in this case is not a random event that potentially sways the outcome of a game, it's a future contingent event that directly determines the value of the claim, similar to athlete performances.

As far as the turn of the next card in a card game or the roll of dice etc. are concerned, uncertainty arises *only because* players decided to play a game and follow the game instructions. While those are events that happen in the future, they are *artificial* creations that only arise if a game is played, to begin with. They, too, are different from athlete performances, which happen independent of DFS. The athlete will still be on the football field completely unaware of the fact that somebody, somewhere, made a gambling decision based on expectations around how he will perform on the field.

B. Multiple common sense inquiries can help distinguish claims on future contingent events from games.

Appellants' key argument, that "the Legislature rationally found that the contestants influence the outcome of the fantasy sports contests in which they directly participate," shows the potential danger: any claim can be disguised as a game. Appellants Brief 5. NSEI has developed four intuitive yet powerful tests that can help determine whether any activity is a game or a claim, which is the threshold step for the Penal Law to operate properly.

1. The Pandemic Test

The relevant inquiry under this test is: Can this activity be played during a pandemic?

Gameplay did not stop during the pandemic, people could still play cards, backgammon, charades, chess, etc. Organized sports had largely stopped as public policy choices limited when and where sports could be played, but that did not eliminate sports games entirely. A father and son could still shoot hoops in the backyard or a game of golf could still be played.

DFS, on the other hand, could not be "played" during the pandemic when professional sports events stopped. This was simply a result of the

fact that "play is distinct from 'ordinary' life both as to locality and duration." Johan Huizinga, *Home Ludens: A Study of the Play-Element in Culture* 9 (1950). A game can start, and *conclude,* regardless of what is happening in the real world. Whether life stops because of a pandemic is of no concern to the player, a game has literally nothing to do with future events in real life.[8]

The State of New York took the same position: "In the words of FanDuel, the outcome of the game is, quote, 'contingent on the positive performance of all of their players,' unquote, in the real sports events. In fact, if the athletes do not perform or the games are not held, there can be no daily fantasy sports winner or loser." Transcript 8. It would bely common sense for Appellants to prevail now by arguing the exact opposite.

2. The Mars Test

The relevant inquiry under this test is: Can this activity be played on Mars?

Based on a hypothetical scenario where humanity colonizes Mars,

[8] Real-world information may be relevant in certain games, e.g. trivia or charades. Critically, however, the skill is in knowing what happened in the past, not predicting the future. Knowing who won the Super Bowl LV is sports trivia skill, risking money on Super Bowl LVI is a sports bet.

one can envision that cards, backgammon, charades, chess, basketball, etc. can also be played on Mars. "In effect, play is essentially a separate occupation, carefully isolated from the rest of life, and generally is engaged in with precise limits of time and place. There is place for play: as needs dictate, the space for hopscotch, the board for checkers or chess, the stadium, the racetrack, the list, the ring, the stage, the arena, etc. Nothing that takes place outside this ideal frontier is relevant." Roger Caillois, *Man, Play and Games*, 6-7 (1961).

DFS, on the other hand, cannot be "played" on Mars. Participants can pick their teams, but they can never conclude on the winners. DFS is not ring-fenced the way sports games are. What happens outside the DFS app, e.g. football, *is* relevant. As such, DFS is not a game, but rather a claim on future contingent events.

3. The Information Test

The relevant inquiry under this test is: Does having information on events or people that are not players in the game matter?

One can surely evaluate their opponent based on their *past* behavior

(e.g., does LeBron James go to his right more often?), or try to guess how much someone will play. Yet, the only focal point is the *opponent*, and information on events or people *outside* the playing field is irrelevant. "[Games] certainly cannot spread beyond the playing field (chess or checkerboard, arena, racetrack, stadium or stage)." Roger Caillois, *Man, Play and Games*, 6-7 (1961).

A DFS participant, on the other hand, cares not so much about other DFS participants, but *all the athletes* that can be drafted to field a collective fantasy roster. Thus, how well LeBron James is going to play in the next game, a future contingent event from the DFS participant's perspective, is relevant not because LeBron James is the opponent, but because the DFS participant's payoff would change accordingly.

4. The Rulebook Test

The relevant inquiry under this test is: Does the rulebook change?

Rules *can* be changed to make a game more or less skill-based, thus potentially changing the gambling characterization. "Accordingly, we hold that the games … are not per se violative of our gambling laws. This

conclusion does not preclude appropriate proceedings if at any time these games ... are so manipulated as to cease to be games of skill." *Faircloth v. Central Florida Fair*, 202 So. 2d 608 (Fla. Dist. Ct. App. 1967).

Some legal scholars argued that one can make DFS more skill-based, thus reducing legal risk. "A third strategy to reduce the legal risks of 'daily fantasy sports' is to ensure that, if the contest allows for player selection based on draft lists, these draft lists do not perfectly correlate in-game player salaries with players' expected statistical output." *See*, Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 University of Illinois Law Review 117, 145 (2016).

That suggestion, though well-intended, actually proves why DFS is not a game in the first place. If salary tweaks make DFS cross the skill threshold and turn it into non-gambling, would DFS still be gambling when those tweaks are not made? It would be absurd to conclude that DFS is gambling on some days but not on others. Similarly, the characterization of sports betting as gambling cannot depend on bookmakers tweaking the odds here and there.

The reason such changes don't matter is because these are not rule changes at all. They are *price* changes. If, hypothetically, a four-point line were to be introduced in basketball, that change would be reflected in the rulebook. Rule changes in games can happen, but they are rare. Athlete salaries in DFS, on the other hand, change much more frequently, and depending on the sports, sometimes daily. Betting odds may change by the minute. None of these changes belong to the rulebook. To the extent those price changes make skill more important, that is simply irrelevant from a gambling characterization perspective as neither DFS nor sports betting is a game in the first place.

V. Fantasy sports is an intermittent gap in legal thinking.

A. Traditional fantasy sports is sometimes gambling, but is generally considered not worthy of enforcement.

This Court may inquire: what does the conclusion that DFS is a claim on future contingent events mean for traditional season-long fantasy sports? Is that also gambling under the Penal Law?

In many cases, money does not flow through traditional season-long fantasy sports operators. Instead, the participants create a side pool outside the purview of the operators. If that is not the case, traditional season-long

fantasy sports, too, can be gambling under the Penal Law. The State took the exact same position. "If a site were to offer season-long bets, take a cut of the bets and offer cash prizes for winners, we, the State, would consider whether it was a gambling operation worthy of an enforcement action." Transcript 63.

Thus, traditional season-long fantasy sports, a generally small-stake social activity, is still gambling, but was generally left alone because of enforcement priorities. This position is also consistent with Appellants' observation that "[p]rivate wagers between people who are not otherwise promoting or advancing gambling activity are subject to civil regulation only." Appellants Brief 13.

B. Fantasy sports is akin to a "boiling frog."

Why was it never questioned whether DFS is a game in the first place? Partly, it is attributable to the DFS industry constantly, and rather successfully, advancing the game of skill narrative. Partly, it is because the economic incentives did not become too material until recently. In large part, though, it is because incremental changes happening over a long period, akin to the proverbial "boiling frog."

The origin story of fantasy sports dates back to the 1960s. "[I]n 1961, Hal Richman, a Bucknell University mathematics student, devised a more complex simulation game. Richman's game, Strat-O-Matic Baseball, included one playing card for each Major League Baseball player. Each card contained various ratings and result tables that corresponded to dice rolls. For each game, Strat-O-Matic participants would select teams and batting orders, roll the dice, and then review charts to determine game results." Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 Harvard Journal of Sports & Entertainment Law 1, 4-5 (2012).

Edelman describes the birth of traditional fantasy sports under the erroneous header, "A New Game is Created." *Id.*, 5. He states: "With both traditional 'table games' and 'computer simulation games' failing to provide sports fans with a way to predict players' *future performances*, some highly educated sports fans began to experiment with ways of creating sports simulation games that incorporated *future events."* (emphasis added) *Id.*, 5.

This was precisely the moment when the activity turned from a

game to a claim, literally changing how the Penal Law would apply to such activities. That was a direct result of incorporating future contingent events into the structure. However, the change was subtle. Traditional fantasy sports was a small-stakes social activity and it resembled a game, as participants typically got together in person to draft players.

With the evolution to DFS, both the small-stakes and social aspects ceased to exist. With "prizes" in the millions and strangers getting matched on an app, DFS did not change how the Penal Law applies to fantasy sports, it just created more scrutiny.

The story of the "boiling frog" is often told to describe situations when incremental changes take place over a long time. "The premise is that if a frog is put suddenly into boiling water, it will jump out, but if the frog is put in tepid water which is then brought to a boil slowly, it will not perceive the danger and will be cooked to death." Wikipedia, *Boiling Frog*, available at https://en.wikipedia.org/wiki/Boiling_frog. The boiling frog phenomenon is not literally true; it is just a metaphor.

Fantasy sports is akin to a "boiling frog." We urge this Court to correct the game of skill narrative that has persisted for too long despite

being wrong, recognize the true characterization of daily fantasy sports as a claim on future contingent events, and ultimately determine that DFS is illegal gambling under the Penal Law.

CONCLUSION

For most people, daily fantasy sports is arguably nothing more than "fun and games." It might be fun, but it is not a game. It is a claim on future contingent events.

This subtle, yet critical insight explains why the lower court reached the right result but for the wrong reasons. This Court should affirm the ruling below *and* clarify why it reaches that result.

Dated: August 17, 2021
New York, New York

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