To be Argued by:
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New York Supreme Court
Appellate Division – Third Department

Appellate Case No.: 528026

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

Plaintiffs-Respondents-Cross-Appellants,

– v. –

HON. ANDREW CUOMO, as Governor of the State of New York, and THE NEW YORK STATE GAMING COMMISSION,

Defendants-Appellants-Respondents.

BRIEF FOR *AMICI CURIAE* FANDUEL, INC. AND DRAFTKINGS, INC.

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INTEREST OF AMICI CURIAE

FanDuel, Inc. ("FanDuel") and DraftKings, Inc. ("DraftKings") (together, "Amici") are the country's leading fantasy sports contest providers, with hundreds of thousands of New York customers. In accordance with New York's statutory scheme, FanDuel and DraftKings maintain licenses to operate legally valid, skill-based fantasy sports contests. Such contests, in which skill is the dominating element, have long been distinguished from gambling, a fact the legislature expressly recognized in explicitly authorizing "interactive fantasy sports" contests in Chapter 237. This appeal is, therefore, vital to Amici's business here.

Amici's brief provides the Court with a review of the longstanding common law jurisprudence, in New York and elsewhere, illustrating that fantasy sports contests, as bona fide contests for a prize in which skill is the dominant factor, have long been considered distinct from illegal gambling, despite that – as in any skill-based contest, like golf or a spelling bee – some element of chance remains. The New York legislature's authorization of interactive fantasy sport contests is entirely reasonable, deserving of deference, and should be upheld as a valid and constitutional exercise of its authority.

PRELIMINARY STATEMENT

In adopting Chapter 237, the legislature properly applied the longstanding "dominating element" test, used for over 100 years and still used today by New

York and courts across the country to reasonably – and correctly – conclude that such contests are bona fide contests of skill and not gambling. Chapter 237's legislative history, New York judicial precedent (both old and recent), and numerous sister states and jurisdictions all make clear that this "dominating element" standard remains the leading test to determine if an activity is gambling. Under this test, a contest in which skill is the dominant factor, even though some element of chance necessarily remains, is not considered gambling, but rather a bona fide contest for a prize. As Amici show here, New York's continued application of this test was not altered by the current Penal Law provision that refers to a "material element" of chance; to the contrary, the tests are substantively equivalent. Even if the current version of the Penal Law were more restrictive, that would not prevent the legislature at any point from reverting to the leading common law test. In concluding that skill is the dominant factor in fantasy sports contests, the legislature properly carried out its responsibility to determine what types of contests are "gambling" for purposes of the New York Constitution; the legislature's decision was thus entirely reasonable and must be upheld.

BACKGROUND

I. Daily Fantasy Sports Contests Are Lawful Competitions in Which Contestants Compete Against Each Other.

Fantasy sports competitions, which millions of sports fans have played throughout the United States for decades, are fee-based or free contests in which contestants match their fantasy teams against other competitors', using their sports knowledge and skill to select real-world athletes from multiple teams in a sport to create "fantasy" lineups or rosters.[1] Record on Appeal ("R.") 727-728, 730-731, 739-740. Daily fantasy sports ("DFS") contests are one variant of fantasy sports competitions in which the outcome of the contest is not decided over the course of a season, but (often) within the same day. R. 729, 741. When creating a lineup, DFS contestants extensively evaluate information, including past performance, injury history, projected game matchups, coaching philosophy, and many other factors. R. 441, 728, 757. A winner of a DFS contest is decided by which fantasy

[1] Fantasy sports competitions have become increasingly popular in recent years because of the Internet and the ability of competitors to enter contests on their mobile devices. R. 739. Indeed, the increased acceptability of fantasy sports competitions – and DFS contests in particular – is illustrated by a recent decision of the U.S. Judicial Panel on Multidistrict Litigation (the "JPML"). In considering whether to consolidate certain suits involving FanDuel and DraftKings, the JPML had to invoke the rule of necessity in order to assure a quorum of the Panel could decide the matter because "certain Panel members . . . could be members of the putative classes" – that is, because those federal judges were players on FanDuel or DraftKings. *In re Daily Fantasy Sports Mktg. & Sales Practices Litig.*, MDL No. 2677, slip op. at 1 n.* (J.P.M.L. Feb. 4, 2016). Accordingly, a number of Panel members "renounced their participation in these classes and . . . participated in th[e] decision." *Id.*

team, relative to all other fantasy teams in that contest, accumulated the highest total points of any single fantasy team. R. 441, 728, 740.

The outcome of a DFS contest depends on a contestant's skill in constructing a roster compared to other contestants: all contestants start on a level playing field, in the same position, and have complete control over their selected lineup, with resource constraints known as a "salary cap." R. 441, 728-730, 740-741. Unlike a casino "house," fantasy sports operators cannot win contests and have no interest in who wins the contests; rather, prizes are announced in advance and guaranteed to the entrants. R. 441. The size of the prize in fantasy sports contests does not change based on any "odds" determined by the number of entrants or their selections. R. 441; *see* Racing, Pari-Mutuel Wagering and Breeding Law § 1404(1)(n).

II. Daily Fantasy Sports Contests Are Competitions Between Two or More Contestants Distinguished from Bets or Wagers on Someone Else's Contest.

Unlike sports bettors, DFS contestants actively participate in, and, through their skill, directly influence, separate contests of their own that are merely parallel to sporting events. *See* R. 1184-1205 (empirical study of fantasy sports outcomes demonstrating that contestants directly influence outcome of separate contest, based on roster-selection acumen). The outcome of a DFS contest is determined by a contestant's ability to assemble a higher scoring fantasy roster than other

contestants': the winner is determined by points awarded based on an aggregation of game statistics that measure how well, comparatively, the contestant selected the roster of real-world athletes. R. 441, 728, 740. The outcome of a real-world athletic contest (*e.g.*, which team wins or loses) or even a series of outcomes, does not determine who wins any licensed fantasy sports contest in New York. R. 441, 728, 740.

III. Under Its Constitutional Authority, the New York Legislature Authorized Interactive Fantasy Sports Contests and Provided for Their Regulation.

In relevant part, Article I, section 9 of the New York Constitution provides:

> [N]o lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, . . . except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.[2]

This provision affords the legislature great discretionary authority and responsibility to enact laws giving it force, including the scope of permissible

[2] N.Y. Const., art. 1, § 9.

activities. Alone, Article I, section 9 is neither self-defining nor self-executing, a characteristic that New York courts have long recognized.[3]

Consistent with this constitutional authority, in 2016, the legislature expressly authorized "interactive fantasy sports" contests and regulated them by enacting Chapter 237. In doing so, the legislature recognized a longstanding common law distinction between illegal gambling on contests of chance and lawful, bona fide contests for a prize in which skill is the dominating element, squarely and correctly placing fantasy sports contests in the latter category. *See People ex rel. Lawrence v. Fallon*, 152 N.Y. 12 (1897); *see also* R. 20.

Plaintiffs, a group of New York taxpayers with alleged gambling disorders themselves or relatives with such, sued to challenge Chapter 237, arguing that it violates the anti-gambling provision of Article 1, section 9. *See White v. Cuomo*, 87 N.Y.S.3d 805 (Sup. Ct. Albany Cnty. Oct. 29, 2018). The Supreme Court held that the legislature violated the Constitution in authorizing and regulating interactive fantasy sports contests through Chapter 237 because they constitute "gambling" prohibited by Article 1, section 9. *Id.* Yet simultaneously, the

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[3] *See, e.g.*, *People ex rel. Sturgis v. Fallon*, 152 N.Y. 1, 11 (1897) (finding it "manifest" that Article I, section 9 "was not intended to be self-executing" and that the provision "expressly delegates to the legislature [implementing] *authority*, and requires it, to enact such laws as it shall deem appropriate to carry it into execution") (emphasis added); *People v. Wilkerson*, 73 Misc. 2d 895, 901 (Monroe Cnty. Ct. 1973) ("[S]ince the Constitution commits to the Legislature the duty of preventing gambling, the measures to be adopted in furtherance of that end also rest in the legislative discretion.").

Supreme Court upheld Chapter 237's elimination of criminal penalties for operating licensed interactive fantasy sports, concluding that the determination of whether to criminalize such conduct was constitutionally delegated to the legislature alone. *Id.*

The State appealed the Supreme Court's first ruling. Amici join to emphasize a basic, but crucial, point: the common law test to distinguish illegal gambling from lawful contests of skill has long been whether skill is the *dominating element* in determining the outcome of the contest. It is beyond dispute on appeal that Amici's licensed fantasy sports contests meet that test, as the legislature found and the Supreme Court below accepted. The Constitution does not hamstring the legislature from following this longstanding common law rule, which was devised by the Court of Appeals and has been applied for decades in New York. Because the legislature passed Chapter 237 by applying this common law standard to fantasy sports contests specifically, the Supreme Court's first ruling regarding the constitutionality of the State legislation authorizing and regulating interactive fantasy sports contests must be reversed.

ARGUMENT

In finding that interactive fantasy sports are contests of skill and not gambling, and expressly authorizing such contests, the legislature exercised its constitutional authority to clarify what particular activities are considered gambling

or, as here, are not considered gambling. In doing so, the legislature applied the longstanding and still valid common law "dominating element" test, first articulated by the New York Court of Appeals decades ago to determine whether a contest is one of chance or skill. *See* N.Y. Const., art. 1, § 9 (expressly authorizing the legislature to "pass appropriate laws to prevent [gambling] offenses"); *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 170-71 (1904) (articulating "dominating element" test).

I. New York Adheres to the Longstanding Common Law Rule that Bona Fide Contests of Skill for Cash Prizes, Such as Interactive Fantasy Sports, Do Not Constitute Gambling.

Courts across the country, including in New York, have consistently held that paying an entry fee to match skills against others in a valid contest for a preannounced prize does not constitute gambling. Over a century ago, the New York Court of Appeals expressly endorsed the legality of such contests involving entry fees and prizes in *Fallon*, upholding a club in which horse owners paid an entry fee to race their horses against each other for a preannounced, fixed purse payable from association assets that included the entry fees, with the association having no stake in the race's outcome. *Fallon*, 152 N.Y. at 16-18, 20. In rejecting the State's contention that this contest was an illegal "wager" or "bet," the court explained the absurd result that would flow therefrom: "the farmer . . . who attends his town, county or state fair, and exhibits [his] products . . . would become

a participant in a crime, and the officers offering such premium would become guilty of gambling." *Id.* at 19. The court explained that, just as in such instances, when parties compete for a prize and pay an entrance fee "for the privilege of joining in the contest" that then forms part of the prize fund, similarly, "the offering of premiums or prizes to be awarded to the successful horses in a race is not in any such sense a contract or undertaking in the nature of a bet or wager as to constitute gambling." *Id.* at 19-20.

Numerous courts have followed this foundational decision. In *State of Arizona v. Am. Holiday Ass'n, Inc.*, 151 Ariz. 312, 727 P.2d 807 (1986) (en banc), for example, the Arizona Supreme Court relied on *Fallon* in holding that a company that charged a fee to enter a word game, and awarded advertised prizes to the winning entries, was not taking bets or wagers. As the court explained,

> [A]n 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, 727 P.2d at 809 (citing *Fallon*, 152 N.Y. at 19). Similarly, the Nevada Supreme Court held in *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961), that the offer of a $5,000 prize to any golfer who scored a hole-in-one after paying a 50¢ entry fee was not a gambling contract, observing (on similar reasoning to *Fallon*) that the required entry fee "does not convert the contest into a

wager," and found sufficient evidence on the record to sustain the lower court's finding that the contest was a "feat of skill." *Id.* at 29, 359 P.2d at 87 (citation omitted); *accord Faircloth v. Central Fla. Fair, Inc.*, 202 So. 2d 608, 609-10 (Fla. 4th Dist. Ct. App. 1967) (various games involving skill played at fair did not constitute gambling); *Toomey v. Penwell*, 76 Mont. 166, 173, 245 P. 943, 945 (1926) (horse racing stakes event with $2 entry fee and $375 purse was not gambling).

The New York legislature has previously determined that contests for prizes over cumulative predictions relating to a broad series of events can be outside the bounds of illegal gambling. For example, New York law provides that handicapping tournaments, in which participants pay entry fees and match their skills at predicting the outcome of multiple identified horse races against others, with prizes to the winners drawn from the entry fees, are lawful, subject to certain regulatory requirements and "shall be considered contest[s] of skill and shall not be considered gambling." N.Y. Racing, Pari-Mutuel Wagering & Breeding Law § 906.

Like the handicapping tournaments recognized by the legislature as contests of skill and not gambling, DFS contests require entrants to pit their roster-picking skills against each other in a contest that does not depend on the outcome of any real-life race or athletic event. And just as the New York Court of Appeals held in

Fallon, and as numerous courts across the country have subsequently held, the fact that fantasy sports contestants pay an entry fee does not mean they are engaging in betting, wagering, or gambling. *Fallon*, 152 N.Y. at 19-20. Fantasy sports players are thus contestants in legal contests similar to golf tournaments, fishing contests, beauty pageants, dog shows, county fair competitions and innumerable other types of contests, all of which involve entry fees, matching of skills among contestants, and pre-identified prizes for winners.

Indeed, the only court to have considered the issue before the 2015 litigation brought by the New York Attorney General agreed.[4] In 2007, a New Jersey federal court dismissed a complaint against fantasy sports operators, holding that, "as a matter of law," the entry fees for the fantasy sports leagues at issue were not

[4] Even then, it should be noted that the Supreme Court in *The People of the State of New York v. Fanduel, Inc.*, 2015 WL 8490461 (Sup. Ct. N.Y. County Dec. 11, 2015), only issued a preliminary injunction, based on pre-discovery briefing, which was immediately stayed pending appeal before the matter was ultimately resolved outside of court. Moreover, consistent with the understanding that entry fees for fantasy sports contests do not constitute bets or wagers, the court in *Langone v. Kaiser*, 2013 WL 5567587 (N.D. Ill. Oct. 9, 2013) dismissed a plaintiff's loss recovery action against FanDuel where the enabling statute required loss "by gambling," finding that FanDuel's taking of commissions from entry fees paid by participants in its fantasy sports games did not make it a "winner" within the meaning of the statute. *Id*. at *1, 6 ("FanDuel risks nothing when it takes entry fees . . . The prize that FanDuel is obligated to pay is predetermined . . . FanDuel does not place any 'wagers' with particular participants by which it could lose money based on the happening of a future event (i.e., the performance of certain athletes), but merely provides a forum for the participants to engage each other in fantasy sports games.").

bets or wagers.[5] *Humphrey v. Viacom, Inc.*, No. 06-2768 DMC, 2007 WL 1797648, at *9 (D.N.J. June 20, 2007). As the court explained:

> 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.[6] Importantly, the New Jersey *qui tam* statute defined gambling in terms indistinguishable, for the purposes of this dispute, from New York's Penal Law § 225.00.[7] *See* N.J. Stat. Ann § 2A:40-1. The court also recognized the fantasy sports contest as separate from real-world events, observing that "[t]he success of a fantasy sports team depends on the participants' skill in selecting players for his or her team[.]" *Humphrey*, 2007 WL 1797648, at *2.

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[5] The court identified three key characteristics of fantasy sports: (1) "participants pay a set fee for each team they enter in a fantasy sports league;" (2) "prizes are guaranteed to be awarded at the end of the [contest], and the amount of the prize does not depend on the number of entrants;" and (3) the contest operators are "neutral parties in the fantasy sports games – they do not compete for the prizes and are indifferent as to who wins the prizes." *Humphrey v. Viacom, Inc.*, No. 06-2768 DMC, 2007 WL 1797648, at *7 (D.N.J. June 20, 2007).

[6] The court concluded that it would be "patently absurd" to adopt a definition of wagering that might mean that "participants and sponsors" of numerous permissible contests with entry fees and winning prizes that do not constitute gambling, such as "track meets, spelling bees, beauty contests and the like . . . could all be subject to criminal liability."[6] *Humphrey*, 2007 WL 1797648, at *7. Thus, *Humphrey* correctly found fantasy sports directly analogous to these traditional forms of contests and distinct from real-world sporting events.

[7] *Compare* N.J. Stat. Ann. § 2A:40-1 (defining gambling as "[a]ll wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event") *with* N.Y. Penal Law § 225.00(2) ("A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.").

The United States Court of Appeals for the Third Circuit later endorsed this analysis, articulating a "legal difference between paying fees to participate in fantasy leagues and single-game wagering as contemplated by the [New Jersey] Sports Wagering Law." *NCAA v. Governor of N.J.*, 730 F.3d 208, 223 n.4 (3d Cir. 2013), *abrogated on other grounds by Murphy v. NCAA*, 138 S. Ct. 1461 (2018). In so concluding, it described *Humphrey* as broadly "holding that fantasy leagues that require an entry fee are not subject to anti-betting and wagering laws," and *Las Vegas Hacienda* as analogously "holding that a 'hole-in-one' contest that required an entry fee was a prize contest, not a wager." *Id.*

Moreover, Congress recognized the same when it declared that fantasy sports contests are not considered gambling under the Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C. § 5362(1)(E)(ix) (2006). Congress first defined "bet or wager" – the basis for the substantive prohibitions and penalties under the statute – in terms strikingly similar to the New York statute at issue here: "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." *Id*. § 5362(1)(A). Congress then specifically clarified that fantasy sports contests involving an entry fee and a prize do not constitute unlawful gambling so long as three criteria are satisfied, similar to those

under Chapter 237: (1) prizes are established and announced in advance; (2) outcomes reflect the "relative knowledge and skill of the participants;" and (3) the result is not determined by the outcome for a real-world team or teams or an athlete's performance in a single real-world sporting event. *Id.* § 5362(1)(E)(ix). Congress thus recognized that fantasy sports contests should be distinguished from sports betting and other forms of gambling.

II. Contests for a Prize in Which Skill Is the Dominant Factor Have Long Been Distinguished from Sports Gambling in New York and Across the Country.

Courts in New York and throughout the country have long recognized that the correct test for whether a game is one of chance or of skill is to ask which of them "is the dominating element that determines the result of the game." *Lavin*, 179 N.Y. at 170-71. The test became the principal one used throughout the country and remains the majority common law test today. *See* Bennett Liebman, *Chance v. Skill in New York's Law of Gambling: Has the Game Changed?*, 13 GAMING L. REV. & ECON. 461, 461-62 (2009).

A. Applying the Majority Common Law Test, a Contest Is Not Gambling When Skill, Rather Than Chance, Is the Dominating Element.

Over a century ago, the New York Court of Appeals articulated this "dominating element" test in its landmark *Lavin* decision. There, a company placed an advertisement in a newspaper that asked potential contestants to guess

the number of cigars on which the country would collect taxes in a certain month; provided the "principal data requisite for making an estimate;" and offered winners a certain sum of money and cigars. *Lavin*, 179 N.Y. at 165-67, 174. The court announced that "[t]he test of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element." *Id.* at 170-71.

Applying this test, the court determined that the game was dominated by chance: the company's provision of the same basic statistics to all participants was done "to eliminate as far as practicable the elements of knowledge and judgment" and made "the contest as fair a gamble for the . . . customers as possible." *Id.* at 174. Thus, the newspaper distribution was "controlled by chance within the meaning of the statute, and [] therefore . . . illegal." *Id.* By contrast, of course, contests in which skill is the dominating element in determining the outcome have long been considered lawful – indeed a celebrated form of competition in New York. *See, e.g.*, *Amusement Enters. Inc. v. Fielding*, 189 Misc. 625, 628 (Sup. Ct. Kings Cnty. 1946), *modified on other grounds*, 272 A.D. 917 (2d Dep't 1947) (alley ball, a game similar to skee ball; also listing basketball, tennis, billiards, bowling, and golf); *Lavin*, 179 N.Y. at 70 (chess, checkers, billiards, and bowling).

B. New York Has Continued to Adhere to the Dominating Element Test and Does So Today.

Since its articulation in *Lavin*, courts in New York and throughout the country have consistently applied the "dominating element" test to determine whether a contest or game constitutes gambling. *See* Liebman, 13 GAMING L. REV. & ECON. at 462 n.16 (collecting cases). For example, in *People v. Cohen*, 160 Misc. 10 (Magis. Ct. Queens Borough 1936), the court cited the *Lavin* test in concluding that an "electric eye" slot machine that required contestants to aim a pistol at a target was a game of skill and not gambling. The court explained that, to succeed, contestants must "possess" or "develop[] by reason of practice" "[s]kill in proper timing, as well as proper aiming." *Id.* at 12; *see also S. & F. Corp. v. Wasmer*, 91 N.Y.S.2d 132, 137 (N.Y. Sup. Ct. Onondaga Cnty. 1949) (issuing temporary injunction against interference with pinball machines until trial court considered "whether or not skill or chance predominates in their use"). In the more than six decades since *Lavin* was decided in 1904 until at least the revisions of the Penal Law in 1965, the "dominating element" test was consistently applied in New York to distinguish lawful contests from illegal gambling – all consistent with Article I, section 9.

Here we part ways with the State's view of the Penal Law amendments, but in a way important for the Court to understand in assessing Plaintiff's flawed arguments. In the State's view, the 1965 revisions to what is now Penal Law

§ 225.00 abandoned the "dominating element" test for a purportedly stricter test, outlawing any contest with a "material element" of chance. State Br. at 31. But there is a strong (we believe better) argument that the *Lavin* test was not substantively altered by the overall revisions to the Penal Law in 1965, including Penal Law § 225.00. That provision defines gambling to include "stak[ing] or risk[ing] something of value upon the outcome of a contest of chance," and defines such contest as any whose outcome "depends in a *material degree* upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." Penal Law § 225.00(1)-(2) (emphasis added). For two reasons, however, the "material element" statutory test should be understood as substantively equivalent to the "dominating element" test.

First, since the adoption of Penal Law § 225.00, numerous New York cases have continued to cite and follow *Lavin* – sometimes explicitly invoking its "dominating element" test and sometimes implicitly applying it – as providing the test for whether an activity constitutes gambling.[8] For example, in 2009, the

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[8] *See, e.g.*, *Dalton v. Pataki*, 11 A.D.3d 62, 82 n.5 (3d Dep't 2004), *modified on other grounds*, 5 N.Y.3d 243 (2005) (citing *Lavin* for basic meaning of "game of chance" in New York law); *People v. Stiffel*, 61 Misc. 2d 1100 (App. Term 2d Dep't 1969) (citing *Lavin* to hold that billiards is not gambling); *People v. Davidson*, 181 Misc. 2d 999, 1001 (Sup. Ct. Monroe Cnty. 1999), *rev'd on other grounds*, 291 A.D.2d 810 (4th Dep't), *appeal dismissed*, 98 N.Y.2d 738 (2002) (citing *Lavin* to hold that playing dice for money is gambling); *People v. Melton*, 152 Misc. 2d 649, 651 (Sup. Ct. Monroe Cnty. 1991) (same); *People v. Hawkins*, 1 Misc. 3d 905(A), 2003 N.Y. Slip Op. 51516(U), at *2 (Crim. Ct. N.Y. Cnty. 2003) (same); *Valentin v. El Diario–La Prensa*, 103 Misc. 2d 875, 878 (Civ. Ct.

(continued)

decision in *People v. Li Ai Hua*, 24 Misc. 3d 1142 (Crim. Ct. Queens Cnty. 2009), quoted the *Lavin* test as providing the meaning of the statutory phrase "material degree":

> While some games may involve both an element of skill and chance, if the outcome depends in a *material degree* upon an element of chance, the game will be deemed a contest of chance. The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the *dominating element* that determines the result of the game[.]

24 Misc. 3d at 1145 (emphasis added; quotation marks and citations omitted).

Similarly, the court in *Matter of Plato's Cave Corp. v. State Liquor Authority*, 115 A.D.2d 426 (1st Dep't 1985), applied the statutory "material degree" test by looking to whether chance or skill was the dominant element. The court upheld the State Liquor Authority's finding that a video poker game was gambling under the "material degree" test of Penal Law § 225.00 because "the outcome depends *in the largest degree* upon an element of chance." *Id.* at 428 (emphasis added). On that basis, the court distinguished another post-1965 case that had found video games were not gambling where the outcome depended "*primarily* on physical skills." *Id.* at 428 (emphasis added) (citing *WNEK Vending & Amusements Co. v. City of Buffalo*, 107 Misc. 2d 353 (Sup. Ct. Erie Cnty. 1980)).

Bronx Cnty. 1980) (citing *Lavin* and applying its "dominating factor" test to conclude that "voting contest" sponsored by newspaper was gambling).

Likewise, in *People v. Hunt*, 162 Misc. 2d 70 (Crim. Ct. N.Y. Cnty. 1994), in applying the statutory "material degree" test, the court implicitly applied the *Lavin* test and looked to whether skill outweighed chance in three-card monte, if honestly played. It quoted the statutory test, analyzed the State's allegations, and concluded that the game was not gambling because "skill *rather than chance* is the material component" of the game. *Id.* at 72 (emphasis added).

Second, legislative history confirms that Penal Law § 225.00 was not intended to overrule or alter *Lavin*'s "dominant element" test. Notably, the Court of Appeals has held specifically that the 1965 Penal Law revisions, which were based on a proposal by a temporary legislative commission, the Bartlett Commission, should not be interpreted to make fundamental changes in existing law unless the Commission specifically identified those changes in its working papers:

> The Bartlett Commission comprehensively studied the entire body of law and was unquestionably aware of [existing Court of Appeals precedents]. Surely their work would have reflected such a fundamental change had it been intended.

People v. Collier, 72 N.Y.2d 298, 302 n.1 (1988); *cf. Hechter v. New York Life Ins. Co.*, 46 N.Y.2d 34, 39 ("[I]t is a general rule of statutory construction that a clear and specific legislative intent is required to override the common law.").

Aside from providing a definition of gambling, the Commission showed no such intent to change the substantive gambling law. To the contrary, it stated that it was focused on streamlining and unifying the provisions to "simplify the framing

and lodging of charges in gambling cases." *Commission Staff Notes on the Proposed New York Penal Law*, in TEMP. COMM'N ON REVISION OF PENAL LAW & CRIM. CODE, THIRD INTERIM REPORT, at 382 (1964). Consistent with this goal, the Commission emphasized that it was making "few actual changes of substance" but "considerable revision with respect to form." *Id*. at 381. The Commission's report does not even mention the "material degree" language it inserted in the definition of "gambling." *See Collier*, 72 N.Y.2d at 303 n.1. Thus, although some commentators have speculated that the "material degree" standard reflected a softening of the test for identifying a "contest of chance," not a single case since Section 225.00's enactment (other than the motion court's decision in the litigation brought by the Attorney General[9] and the order on appeal here) has applied that statutory test to reach a different outcome than would have been reached under the "dominating element" test.[10]

Both the legislative history and post-1965 case law thus clarify that the *Lavin* test and the current statutory test are synonymous. This point matters here,

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9 *See Fanduel, Inc.*, 2015 WL 8490461.

10 *People v. Jun Feng*, 34 Misc. 3d 1025(A), 2012 N.Y. Slip Op. 50004(U) (Crim. Ct. Kings Cnty. 2012), which quoted commentary opining that chance need not be the dominating element for a game to constitute a game of chance, is not to the contrary, because the court did not actually apply that test. Instead, it held that the operators of a mahjong parlor, by using a "house container" to collect a $1 cut of every hand that won $15 or more, were betting on how many hands would be won for at least $15, and therefore – unlike the mahjong players themselves – were gambling under the "future contingent event" prong of the statutory definition, regardless of whether the underlying game was one of skill or chance. *Id.* at *5-6 & *4 n.1.

of course, because even the Court below accepted that fantasy sports contests licensed under Chapter 237 readily satisfy the dominating element test. R. 20.

C. The Dominating Element Test Remains the Majority Rule Across the Country.

Following New York's lead, numerous states across the country have adhered to and continue to apply *Lavin*'s "dominating element" test. Indeed, "[m]ost jurisdictions apply the 'dominant factor' test." *State v. Dahlk*, 111 Wis. 2d 287, 296 (Ct. App. 1983); *see also* Liebman, 13 GAMING L. REV. & ECON., at 461-62 ("The dominating element test [of *Lavin*] became the basic law in this country on whether a contest was a lottery or not . . . [and] similarly became the principal test in the nation for determining whether a game was a gambling game . . . [and] is still the basic law in most states.") (citations omitted).

For example, in determining whether an investment scheme contained the element of chance, one of three necessary elements of a lottery, the Supreme Court of Rhode Island clarified:

> [W]e adopt, as have most jurisdictions which have faced the issue, the 'dominant factor' doctrine, under which a scheme constitutes a lottery when an element of chance dominates the distribution of prizes, even though such a distribution is affected to some degree by the exercise of skill or judgment.

Roberts v. Commc'ns Inv. Club of Woonsocket, 431 A.2d 1206, 1211 (R.I. 1981). In so concluding, the court looked to numerous other states that utilized the doctrine. *See id.* at 1211 n.5 (citing *Morrow v. State*, 511 P.2d 127 (Alaska 1973);

Finster v. Keller, 18 Cal.App.3d 836, 96 Cal.Rptr. 241 (1971); *State v. Steever*, 103 N.J. Super. 149, 246 A.2d 743 (1968); *Commonwealth v. Laniewski*, 173 Pa. Super. 245, 98 A.2d 215 (1953); *Seattle Times Co. v. Tielsch*, 80 Wash.2d 502, 495 P.2d 1366 (1972)). The court thus held that it was "clear that the element of chance permeated" the scheme, despite the fact that it "may have involved some degree of skill or judgment." *Id.* at 1211. Over thirty years later, the same court reiterated the state's continued adherence to the test. *See Narragansett Indian Tribe v. State*, 81 A.3d 1106, 1109 n.5 (R.I. 2014).

Similarly, the Alaska Supreme Court has noted that "the sounder approach" to determine whether a contest is one of chance or skill "is to determine the character of the scheme under the dominant factor rule," which "[m]ost jurisdictions favor," *Morrow*, 511 P.2d at 129 & n.5 (noting that test depends on "which element predominates – skill or chance."). Thus, when skill predominates the determination of the outcome of a contest, the activity is not considered a form of gambling under this leading common law test.

III. The Legislature Properly Exercised Its Constitutional Authority in Permitting Contests in Which Skill Is the Dominant Factor.

As set forth above, following the Court of Appeals' foundational decision in *Lavin*, the majority common law "dominating element" test prevailed in New York for at least six decades (and, in our view, remains the test today). Under this test, as the motion court correctly accepted, R. 20, licensed fantasy sports contests are

not considered to be a form of gambling, but rather bona fide contests of skill for a prize.

Even if the Bartlett Commission revisions in 1965 made the current statutory test under the Penal Law more restrictive, such a change did not (and could not) reduce the legislature's constitutional authority. The legislature could at any time decide to clarify that *Lavin* remains the operative test under the Penal Law, and that New York, like so many others that have followed it,[11] remains a "dominant factor" state. In doing so, the legislature would merely clarify that New York law is in line with the longstanding majority rule in the United States for distinguishing bona fide skill contests from illegal gambling.

Yet that is precisely what the legislature did in enacting Chapter 237, as to the specific activity of fantasy sports contests. It made a factual finding that skill is the dominant factor in fantasy sports contests, and accordingly, declared that such contests are authorized to take place in New York when appropriately licensed.

There can be no doubt this was within the legislature's authority. The "dominating element" test was not unconstitutional when chosen by the Court of Appeals, only ten years after the constitutional prohibition on gambling was established in 1894, as the proper basis to distinguish illegal gambling from permissible contests of skill. It was not unconstitutional for New York courts to

[11] *See* Section II.C, *supra*.

adhere to that test consistently for over six decades, at least until 1965 and likely up to now. Unless *Lavin* was itself an unconstitutional decision – an argument Plaintiffs cannot plausibly maintain – there is no basis to contend that the legislature exceeded its authority by enacting Chapter 237. At a minimum, Article I, section 9 commits to the legislature the discretion to authorize and regulate contests in which skill is the dominant factor, as it did here with interactive fantasy sports.

For example, if an organizer of a spelling bee, a fishing contest, or a golf tournament were sued by a plaintiff in New York, on the grounds that the combination of the tournament entry fee and the award of cash prizes to the winner constitutes illegal gambling, it would be well within the power of the legislature to make clear that spelling, fishing, and golfing are all skill-based activities and outside the scope of the gambling statute – despite the fact that all of these contests involve elements of chance. No one would challenge that decision on constitutional grounds and no referendum would be needed. Such a law would be a common-sense application of the dominating element test. So too here. It is within the legislature's power to recognize and apply the longstanding gambling test for skill-based activities to a set of facts about fantasy sports contests, without any need for a constitutional amendment. Otherwise, the legislature would be

powerless to protect well-understood skill contests from inadvertent, overreaching, or overzealous interpretations of the gambling laws.

Because skill is the dominating element in determining the outcome of licensed fantasy sports contests, as the legislature found and the court below accepted, R. 20, Chapter 237 does not violate Article I, section 9 of the New York Constitution.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should have been denied, and the State's motion for summary judgment upholding Chapter 237 of the Laws of 2016 should have been granted.

Dated: New York, New York
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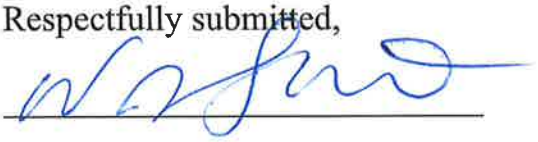
Respectfully submitted,



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