To be argued
By: Victor Paladino
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Supreme Court of the State of New York
Appellate Division – Third Department

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

No. 528026

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.

RESPONDING & REPLY BRIEF FOR APPELLANTS-RESPONDENTS

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PRELIMINARY STATEMENT

Plaintiffs correctly acknowledge that the Legislature enjoys "considerable deference in carrying out the constitutional mandate" to regulate gambling in Article I, § 9. But they err in arguing that the Legislature exceeded the bounds of its "considerable deference" when it found that interactive fantasy sports contests do not qualify as gambling and further do not warrant criminal sanctions.

The extensive record before the Legislature amply supported its considered judgment that interactive fantasy sports should not be classified as gambling and should instead be regulated and taxed. At most, plaintiffs' arguments show that the appropriate classification of interactive fantasy sports is a close question, because such contests share features of both gambling and non-gambling activities. But it is precisely in such areas of ambiguity that the Legislature is entitled to the greatest deference—and even more so here, when the Constitution expressly vests such policy discretion with the Legislature. And here, the Legislature's judgment that the scale tipped in favor of permitting fantasy sports contests was rational, even if the contrary conclusion could also have been reached.

Plaintiffs also cross-appeal from the part of Supreme Court's judgment upholding chapter 237 of the laws of 2016 to the extent it eliminated pre-existing criminal penalties for interactive fantasy sports. This issue would be academic if this Court upholds the Legislature's finding that interactive fantasy sports contests do not constitute gambling under Article I, § 9 of the New York Constitution. But if this Court holds that the Legislature could not permissibly authorize fantasy sports, it should nonetheless uphold the Legislature's separate elimination of criminal penalties. As Supreme Court correctly recognized, Article I, § 9 expressly vests the Legislature with discretion to determine what, if any, sanctions should apply to gambling activities. The Legislature acted well within its lawful authority here.

QUESTION PRESENTED

On the cross appeal:

Did the Legislature properly exercise its express authority to implement Article I, § 9 of the New York Constitution when it eliminated criminal penalties for interactive fantasy sports contests?

Supreme Court answered this question "yes" (R.30-31).

ARGUMENT

POINT I

THE LEGISLATURE'S AUTHORIZATION OF INTERACTIVE FANTASY SPORTS IS CONSISTENT WITH THE CONSTITUTION'S PROHIBITION ON GAMBLING

As explained in the State's opening brief (at 21-30), Article I, § 9 of the New York Constitution generally prohibits "gambling" but does not define that term, instead delegating to the Legislature the discretion to enact implementing legislation. The Legislature here properly exercised that discretion by determining, on the basis of an extensive legislative record, that interactive fantasy sports contests should not be classified as "gambling" at all. The Legislature could have rationally determined otherwise, but the decision was a policy judgment the Legislature, acting rationally, was entitled to make.

Plaintiffs have failed to satisfy their heavy burden of proving that the Legislature exceeded its broad discretion under Article I, § 9. As a threshold matter, plaintiffs are incorrect that legislative exceptions to the constitutional prohibition on gambling "are to be strictly and narrowly construed" (Pl. Br. at 48). The only case they cite does not support their position. In *Finger Lakes Racing Association v. New York State Off-Track Pari-Mutuel Betting Commission*, 30 N.Y.2d 207 (1972),

the Court of Appeals considered whether the Legislature had validly created the New York City Off-Track Betting Corporation pursuant to the Legislature's authority under Article 1, § 9 to authorize "pari-mutuel betting on horse races . . . from which the state shall derive a reasonable revenue for the support of government." The plaintiff challenged the statute on the ground that the bulk of the revenue did not go to the State, but instead to offset the OTB's operating expenses or to fund municipal governments. *Id.* at 216-217. The Court rejected that argument, holding that it would defer to the Legislature's judgment that the statute's direction of revenue to the State was substantial enough to satisfy the Constitution. *Id.*

Likewise here, because Article I, § 9 expressly empowers the Legislature to implement the constitutional prohibition on gambling, its judgment that fantasy sports contests are not gambling is entitled to deference. Under that deferential standard, plaintiffs have failed to show

that the Legislature's findings about interactive fantasy sports were outside the scope of its constitutionally delegated discretion.[1]

A. The Legislature rationally found that interactive fantasy sports contests are not contests of chance.

In permitting interactive fantasy sports, the Legislature expressly found that such contests "are not games of chance" within the meaning of Penal Law § 225.00(1) because contestants select the members of their fantasy teams "based upon [their] skill and knowledge." Racing, Pari-Mutuel Wagering and Breeding Law ("Racing Law") § 1400(1)(a). As explained in the State's opening brief (St. Br. at 30), Supreme Court accepted the Legislature's factual conclusion that success at interactive fantasy sports contests is predominantly a matter of skill, but nonetheless erroneously concluded that such contests are "gambling" under Article I, § 9 because a "material degree" of chance still affects the outcome of such contests (R.18).

As a threshold matter, plaintiffs offer no response to the State's argument that Supreme Court applied the wrong constitutional

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[1] In light of the Legislature's enactment of chapter 237, it is immaterial that the Attorney General's Office previously alleged, in a pre-enactment lawsuit, that daily fantasy sports competitions constituted illegal gambling under New York law as it then existed (Pl. Br. at 49-53).

standard. As the State has explained (Br. at 31-33), the "material degree" standard was part of the *statutory Penal Law* definition of gambling, *see* Penal Law § 225.00(1), but what the Legislature chose to criminalize as gambling does not serve as a general definition of "gambling" for any other purpose. The Court of Appeals has applied the more stringent "dominating element" in evaluating the *constitutional* prohibition on gambling. Plaintiffs do not cite, let alone distinguish, the extensive case law cited in the State's opening brief (St. Br. at 32-33) to establish this point.

Instead, plaintiffs argue that the statutory "material degree" standard still applies to chapter 237's classification of interactive fantasy sports because, in enacting chapter 237, the Legislature did not amend the Penal Law definition of gambling. That argument flies in the face of basic principles of statutory construction. As a subsequent, more specific enactment on the same subject matter, chapter 237 cannot logically "violate" the Penal Law. To the extent there is tension between the two enactments, the subsequent, more specific enactment takes precedence over an earlier and more general enactment. *See* N.Y. Statutes § 238 at 405 (McKinney 1971) ("the particular provision, in other words, is

considered in the nature of an exception to the general where the two are incompatible"); *People ex rel. O'Loughlin v. Prendergast*, 219 N.Y. 377, 381 (1916) (same); *see also Matter of Dutchess County Dep't of Soc. Servs. ex rel. Day v. Day*, 96 N.Y.2d 149, 153 (2001) ("a prior general statute yields to a later specific or special statute") (internal quotation and citation omitted).

Plaintiffs also dispute the conclusions reached by the expert studies relied upon by the Legislature (Pl. Br. at 40). But the Legislature was entitled to credit this evidence, even if it could also rationally have reached the opposite conclusion. Plaintiffs have not met their heavy burden of showing that the expert testimony and reports on which the Legislature based its findings were so lacking in probative value that reliance on them was utterly irrational.

Plaintiffs also opine that the type of skill required to succeed in fantasy sports contests is similar to that required to succeed in poker and betting on horse races (Pl. Br. at 39, 44-45). At most, however, that argument shows that fantasy sports contests resemble in some respects activities that would traditionally be considered games of chance. What the Legislature rationally recognized, however, was that fantasy sports

also have features that more closely resemble contests of skill that are not traditionally considered to be gambling. In particular, like general managers, successful fantasy sports contestants must spend wisely within a budget and make experience-based and data-based projections about how the athletes they draft or sign will perform in future sporting events. While plaintiffs argue that general managers can change their rosters over the course of a season and daily fantasy sports contestants cannot (Pl. Br. at 45), that distinction is immaterial: in both activities, the relevant choices are driven by skillful selection of players based on the participants' research and knowledge. Moreover, while fantasy sports contests rely to some extent on uncertain predictions about the future, the same is true of non-gambling activities such as commodities trading and insurance underwriting. It was not irrational for the Legislature to exercise its constitutional authority to decide that the non-gambling features of interactive fantasy sports took precedence over the features that resemble gambling, even if the Legislature could have rationally concluded otherwise.

Nor is it "total speculation" to say that fantasy sports contests are predominantly skill-based when, as plaintiffs contend, it is uncertain

ahead of time whether the actual participants will in fact exercise any skill (Pl. Br. at 43-44). In any contest of skill, such as a chess tournament or golf tournament, an individual can enter and choose to play just randomly. That eventuality does not make the underlying game one consisting predominantly of chance. Put simply, whether an activity is a game of skill or chance is determined not by what level of skill participants *actually* exercise, but rather whether the *nature* of the activity makes chance, rather than skill, the dominating element of success.

Further, contrary to plaintiffs' arguments, an activity is not gambling under Article I, § 9 simply because chance may sometimes determine the outcome, or because less skillful contestants sometimes defeat highly skilled contestants. For instance, in a hole-in-one contest or even a golf tournament, on any given Sunday a lucky amateur could beat Tiger Woods, yet such contests are not gambling. *See Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 86-87 (Nev. 1961). The occasional fluke does not prove that an otherwise skill-based contest is instead dominated by chance. And here, it was within the Legislature's

prerogative to find that fantasy sports contests are not gambling because skill will determine the winners in most cases.

Finally, plaintiffs take the Legislature to task for requiring fantasy sports operators to identify highly experienced contestants and limit the number of entries such contestants are permitted to submit. *See* Racing Law §§ 1404(1)(g) & (2). Plaintiffs deride these consumer protection measures as "ironic" because, though designed to level the playing field, they supposedly reduce the element of skill and increase the element of chance (Pl. Br. at 41-42). These measures, however, reinforce the conclusion that fantasy sports are games of skill. Their purpose is not to reduce the element of skill, but rather to ensure that highly skilled contestants play against other highly skilled contestants, rather than against vulnerable less-experienced contestants. In any event, plaintiffs' objections are merely policy arguments. Plaintiffs have not demonstrated that these consumer protection measures reduce the element of skill so much that the Legislature could not rationally determine that fantasy sports contests are determined predominantly by chance.

B. The Legislature rationally found that contestants in interactive fantasy sports contests meaningfully influence the outcome of those contests.

Plaintiffs have also failed to show that the Legislature acted irrationally in finding that the outcome of interactive fantasy sports contests are not beyond the control of the participants. Contrary to plaintiffs' argument, it is immaterial that the aggregate statistics on which fantasy sports contests are based derive from real-world sporting events over which the fantasy sports contestants exercise no influence (Pl. Br. at 47): Plaintiffs have focused on the wrong contest: the Legislature rationally determined that the relevant contest is the fantasy sports contest in which the participants directly participate, not the real-world sporting events. In the fantasy sports contest, the Legislature rationally found that participants *do* influence the outcome by exercising the same types of skills as general managers of sports teams—that is, by evaluating data and making experience-based and data-based projections about the performances of the real-world players on their fantasy teams (R.672-673, 676-677, 1208, 1215). By using those skills,

the participants in fantasy sports contests materially influence the outcome of the contests in which they directly participate.

C. The Legislature rationally found that interactive fantasy sports contests are bona fide contests for prizes for which the contestants pay entrance fees.

Plaintiffs fail utterly to distinguish the authorities from the Court of Appeals and other States recognizing that skill-based contests involving entry fees and prizes are not illegal gambling activities, even if the outcome of a contest may rely in part on chance (St. Br. at 38-40). These authorities refute plaintiffs' claim that the entry fees paid by fantasy sports contestants constitute bets or wagers on gambling activities.

A bet or wager is ordinarily an agreement between two or more people that a sum of money, collected from all participants, "shall become the property of one of them on the happening in the future of an event at present uncertain." *See People ex rel. Lawrence v. Fallon,* 4 A.D. 82, 88 (1st Dep't 1896), *aff'd*, 152 N.Y. 12 (1897). By contrast, a prize or premium "is ordinarily something offered by a person for the doing of something by others in a contest in which he himself does not enter." *Id.*; *accord State v. Am. Holiday Ass'n*, 727 P.2d 807, 809-11 (Ariz. 1986); *Las*

Vegas Hacienda, Inc. v. Gibson, 359 P.2d 85, 86-87 (Nev. 1961). And an entrance fee is a payment a person makes to the contest operator in order to participate in the contest and be eligible to win the prize. *Fallon*, 152 N.Y. at 19.

Under this standard, the Legislature rationally concluded that the fees that contestants pay to participate in fantasy sports contests are not bets or wagers. The entrance fees are set amounts, the prizes are preannounced, the prizes do not depend on the number of entrants, and the contest operators do not themselves compete for the prizes they offer to the winner of the fantasy sports contest (R.842, 887-888). These facts thus further confirm the rationality of the Legislature's determination that fantasy sports contests are not gambling.

D. The statute's consumer protection measures do not establish that interactive fantasy sports contests are gambling.

Plaintiffs finally argue that chapter 237's consumer protection measures establish that interactive fantasy sports are gambling (Pl. Br. at 58). The crux of plaintiffs' argument is that chapter 237 contains provisions to protect compulsive contestants (Racing Law § 1404[1][d], [e], [m]), and excludes from the Penal Law definition of gambling only

those contests offered by registered fantasy sports operators, while preserving the prohibitions on other forms of fantasy sports contests (Racing Law § 1402[4]).

Neither of these protections represents a concession by the Legislature that fantasy sports contests are gambling. While the Legislature recognized that fantasy sports may be addictive for some people, people can become addicted to many forms of behavior besides gambling, including Internet use, watching television and playing video games. Moreover, the Legislature has imposed licensing requirements on multiple types of businesses besides gambling operations, including securities brokers and insurance companies.

That the Legislature included such protections in chapter 237 demonstrates only that it believed consumers might be harmed. But plaintiffs err in assuming that such harms necessarily derive from any legislative concession that interactive fantasy sports contests are gambling. Indeed, some of chapter 237's protections presume precisely the opposite: for example, the Legislature has required registered fantasy sports operators to ensure that "winning outcomes reflect the relative knowledge and skill of the authorized players and [are] determined

predominantly by accumulated statistical results of the performance of individuals in sporting events." Racing Law § 1404(1)(o). Thus, plaintiffs cannot rely on chapter 237's consumer protection measures to prove that the Legislature implicitly believed that interactive fantasy sports constituted gambling.

POINT II

THE LEGISLATURE RATIONALLY EXERCISED ITS EXPRESS CONSTITUTIONAL AUTHORITY TO ELIMINATE CRIMINAL PENALTIES FOR INTERACTIVE FANTASY SPORTS CONTESTS

In their cross-appeal, plaintiffs challenge the part of Supreme Court's judgment upholding chapter 237's elimination of pre-existing criminal penalties for interactive fantasy sports. This issue would be moot if this Court holds that the Legislature acted within its authority in authorizing and providing for the regulation of interactive fantasy sports contests. But if this Court were instead to agree with Supreme Court that the Legislature's decision to authorize and regulate fantasy sports violated Article I, § 9, then this Court should nonetheless affirm the Court's separate ruling that the Legislature acted within its constitutional authority in eliminating criminal penalties for such contests.

Under Article I, § 9, "the Legislature shall pass appropriate laws to prevent offenses" of the Constitution's antigambling provisions. The Court of Appeals has expressly recognized that this provision delegates to the Legislature the discretion to decide what sanction, if any, should attach to prohibited gambling activities. In *People ex rel. Sturgis v. Fallon*, 152 N.Y. 1 (1897), the Court upheld a law that decriminalized wagering at licensed horse tracks and provided only for a civil remedy. In upholding the statute, the Court rejected a prosecutor's argument that the failure to impose a criminal penalty violated Article I, § 9, reasoning that the Legislature's delegated authority included discretion to increase or decrease the punishment for gambling offenses as it deemed appropriate. 152 N.Y. at 10. The Legislature routinely exercised this authority to reduce or eliminate criminal penalties for gambling activities. For example, the Legislature has declared that players (as opposed to promoters or operators) are not subject to criminal penalties, and has further exempted the organizers of small-scale social games from criminal sanctions. *See* Penal Law §§ 225.00(3) (defining "player") and 225.00(4) (defining "advanc[ing] gambling activity" to exclude "players").

Plaintiffs contend that the Legislature may not decriminalize interactive fantasy sports unless it "simultaneously substituted some other prohibition," such as the imposition of civil fines upon an operator of such contests (Pl. Br. at 70). Nothing in Article I, § 9 imposes such an obligation on the Legislature.

Plaintiffs also assert that Supreme Court's judgment creates a "statutory and regulatory vacuum" that will allow companies like DraftKings and FanDuel to do business in New York "with total impunity" (Pl. Br. at 70-71). Not so. Fantasy sports operators remain subject to pre-existing consumer protection statutes, such as General Business Law §§ 349-350, and anti-fraud statutes, such as Executive Law § 63(12). Section 63(12), in particular, authorizes the Attorney General to bring an action to enjoin illegal business activity. *See, e.g.*, *People v. World Interactive Gaming Corp.*, 185 Misc. 2d 852, 854 (Sup. Ct. N.Y. Co. 1999) (Attorney General may maintain a proceeding under Executive Law § 63(12) to enjoin a foreign corporation, legally licensed to operate a casino offshore, from offering gambling to Internet users in New York).

For the first time on appeal, plaintiffs argue that the provisions of chapter 237 removing criminal penalties for interactive fantasy sports contests cannot be severed from the remainder of chapter 237 (Pl. Br. at 74). Because plaintiffs did not raise this contention in their complaint (R.37-112) or on the cross-motions for summary judgment (R.492-535, 1346-1385), this Court should decline to address it. *See Brown v. Reinauer Transp. Cos., LLC*, 67 A.D.3d 106, 114 (3d Dep't 2009).

In any event, the argument lacks merit. "Severance is proper when 'the [L]egislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded.'" *Matter of State of New York v. Daniel OO.*, 88 A.D.3d 212, 217 n.3 (3d Dep't 2011) (quoting *Matter of Hynes v. Tomei*, 92 N.Y.2d 613, 627 [1998]) (internal quotation marks and citation omitted). Here, in enacting chapter 237, the Legislature found that "as the internet has become an integral part of society, . . . interactive fantasy sports [is] a major form of entertainment for many consumers." Racing Law § 1400(3). In view of that finding, the Legislature had the discretion to decriminalize fantasy sports contests—thus removing the heavy hand of criminal sanctions—

even if the Legislature were forbidden from officially authorizing such contests.

CONCLUSION

Supreme Court's judgment should be modified by declaring that chapter 237 of the Laws of 2016 has not been shown to violate Article I, § 9 of the New York State Constitution. Alternatively, the judgment should be affirmed.

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Respectfully submitted,

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