

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
FANDUEL, INC. AND DRAFTKINGS INC.
IN SUPPORT OF DEFENDANTS-APPELLANTS

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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, FanDuel, Inc. states that:

- Its parent corporation is FanDuel, Ltd., which is owned by TSE Holdings Ltd., Fastball Holdings LLC, Boyd Interactive Gaming LLC through FanDuel Group Parent LLC, FanDuel Group Inc., Fastball Parent 1 Inc., and Fastball Parent 2 Inc.
- TSE Holdings Ltd. is a subsidiary of Flutter Entertainment plc through Betfair Group Limited and The Sporting Exchange, Ltd. Flutter Entertainment plc operates an extensive business, substantially all of which are operated through wholly owned subsidiaries, and could be considered to be affiliates of FanDuel, Inc.
- FanDuel Inc. also has the following direct subsidiaries and affiliates: Fandom Gaming, Inc., numberFire, Inc., FanDuel Deposits LLC, Showdown Sports, Inc. and FanDuel PA LLC.

DraftKings Inc., a Nevada Corporation, states that:

- It has the following direct subsidiaries: DraftKings Inc., a Delaware Corporation, and SBTech (Global) Limited.
- DraftKings Inc., a Delaware Corporation, has the following direct subsidiaries: Crown Europe Malta Limited, DKUK Services Ltd,

DraftKings Australia Pty Limited, DK-FH Inc., DK Player Reserve LLC, Crown Gaming Inc., and Crown DFS Inc.

- Crown Europe Malta Limited has the following direct subsidiaries: Crown DFS Malta Limited, and Crown Gaming Malta Limited.
- Crown Gaming Inc. has the following direct subsidiaries: Crown Gaming Ireland Limited, Crown MS Gaming Inc., Crown NJ Gaming Inc., Crown NV Gaming Inc., Crown NY Gaming Inc., Crown PA Gaming Inc., Crown WV Gaming Inc., Crown IA Gaming LLC, Crown IN Gaming LLC, Crown MA Gaming LLC, Crown NH Gaming LLC, Crown CO Gaming LLC, Crown TN Gaming LLC, Crown IL Gaming LLC, and Crown MI Gaming LLC.
- Crown DFS Inc. has the following direct subsidiary: Crown PA DFS Inc.
- SBTech (Global) Limited has the following direct subsidiaries: Gaming Tech Ltd, SBTech (Gibraltar) Limited, SBTech Malta Limited, Sky Star Eight Limited, and Software Co-Work Cyprus Limited.
- SBTech Malta Limited has the following direct subsidiary: SBTech US Inc., and Lucrative Green Leaf Limited.
- Software Co-Work Cyprus Limited has the following direct subsidiary: LLC “Software Co-Work.”

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, FanDuel, Inc., and DraftKings Inc. state that, as of the date of the filing of this *amicus* brief, there is no related litigation pending before any court.

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF <i>AMICI CURIAE</i>	1
PRELIMINARY STATEMENT	1
BACKGROUND	3
A. How DFS Contests Work.....	4
B. Strategic Elements Of DFS.....	5
C. Key Differences Between DFS And Sports Betting.....	9
D. Studies Confirm That DFS Is A Contest Of Skill.....	11
E. The Legislature Overwhelmingly Concluded, Like Many Other States And The Federal Government, That DFS Is Not Gambling.....	14
DISCUSSION.....	15
I. DFS Contests Are Not Gambling Under The Proper “Dominating Element” Test.....	15
A. The Dominating Element Test Applies To The Question Whether A Contest Is Gambling.....	16
B. Skill Dominates In Determining The Outcomes Of DFS Contests.....	19
II. DFS Contests Are Not Gambling Under § 225.00’s Material Degree Test.....	20
A. DFS Contestants Pay Entry Fees That Are Not “Staked Or Risked” On A Contest Of Chance.....	20
B. DFS Is Not A Contest Of Chance.....	24
III. The Decriminalization Provision Of Article 14 Survives Even If Other Parts Of The Statute Are Invalid.....	26
CONCLUSION.....	29

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Cooney v. Hauck</i> , 211 P. 617 (Kan. 1923).....	21
<i>Dalton v. Pataki</i> , 11 A.D.3d 62 (3d Dep’t 2004).....	18
<i>Delier v. Plymouth Cty. Agric. Soc’y</i> , 10 N.W. 872 (Iowa 1881).....	21
<i>Dew-Becker v. Wu</i> , 2020 IL 124472.....	20, 23, 25
<i>Faircloth v. Cent. Fla. Fair, Inc.</i> , 202 So. 2d 608 (Fla. Dist. Ct. App. 1967).....	26
<i>FanDuel, Inc. v. Schneiderman</i> , No. 161691/2015 (Sup. Ct. N.Y. Cty. Nov. 23, 2015).....	12
<i>Hankins v. Ottinger</i> , 47 P. 254 (Cal. 1896).....	21
<i>Hinton v. Vill. of Pulaski</i> , 33 N.Y.3d 931 (2019).....	17
<i>Humphrey v. Viacom, Inc.</i> , 2007 WL 1797648 (D.N.J. June 20, 2007).....	21, 22, 26
<i>In re Vill. of Middletown</i> , 82 N.Y. 196 (1880).....	27
<i>Matter of Plato’s Cave Corp. v. State Liquor Authority</i> , 115 A.D.2d 426 (1st Dep’t 1985).....	17, 18
<i>Misner v. Knapp</i> , 9 P. 65 (Or. 1885).....	21
<i>NCAA v. Governor of N.J.</i> , 730 F.3d 208 (3d Cir. 2013).....	23

<i>People v. Cohen</i> , 160 Misc. 10 (N.Y. Magis. Ct., Queens Cty. 1936)	26
<i>People v. Davidson</i> , 181 Misc. 2d 999 (Sup. Ct. Monroe Cty. 1999)	18
<i>People ex rel. Alpha Portland Cement Co. v. Knapp</i> , 230 N.Y. 48 (1920)	29
<i>People ex rel. City of Rochester v. Briggs</i> , 50 N.Y. 553 (1872)	27
<i>People ex rel. Ellison v. Lavin</i> , 179 N.Y. 164 (1904)	15, 16
<i>People ex rel. Lawrence v. Fallon</i> , 152 N.Y. 12 (1897)	26
<i>People ex rel. Lawrence v. Fallon</i> , 4 A.D. 82 (1st Dep’t 1896)	21
<i>People v. Hunt</i> , 162 Misc. 2d 70 (N.Y. Crim. Ct. 1994)	18
<i>People v. Li Ai Hua</i> , 24 Misc. 3d 1142 (N.Y. Crim. Ct. 2009)	17
<i>People v. Liberta</i> , 64 N.Y.2d 152 (1984)	27
<i>People v. Melton</i> , 152 Misc. 2d 649 (Sup. Ct. Monroe Cty. 1991)	18
<i>People v. Phyfe</i> , 136 N.Y. 554 (1893)	17
<i>People v. Stiffel</i> , 61 Misc. 2d 1100 (App. Term 2d Dep’t 1969)	18
<i>White v. Cuomo</i> , 181 A.D.3d 76 (3d Dep’t 2020)	16, 24, 25, 26, 27, 28

Statutes

31 U.S.C. § 5362(1)	2, 15, 23
29 Del. Code § 4861(b).....	2
N.J. Stat. § 2A:40-1	22
N.Y. Penal Law § 225.00.....	20, 21, 22, 24
N.Y. Racing, Pari-Mutuel Wagering and Breeding Law.....	1, 14, 20, 24, 27
N.Y. Stat. Law § 150 (McKinney 2020).....	27

Other Authorities

20 N.Y. Jur. 2d Constitutional Law § 22 (2020)	15, 17
38 C.J.S. Gaming § 143 (2020).....	21
62 N.Y. Jur. 2d Gambling § 3 (2020)	18
Bennett Liebman, <i>Chance v. Skill in New York’s Law of Gambling: Has the Game Changed?</i> , 13 Gaming L. Rev. & Econ. 461 (2009).....	19
Brent A. Evans et al., <i>Evidence of Skill and Strategy in Daily Fantasy Basketball</i> , 34 J. Gambling Studies 757 (2018)	13
Criminal Law in New York § 31:4 (4th ed. 2014)	18
Paul Hagen, <i>Commissioner Pleased with Ratings Increase</i> , Major League Baseball (Oct. 26, 2015), https://tinyurl.com/rt5n5w5	10
Todd Easton & Sarah Newell, <i>Are Daily Fantasy Sports Gambling?</i> , 5 J. Sports Analytics 35 (2019).....	13

Constitutional Provisions

N.Y. Const. art. I, § 9 (1894)	16
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INTEREST OF AMICI CURIAE

Amici FanDuel, Inc. and DraftKings Inc. are the country’s leading daily fantasy sports (“DFS”) contest providers. They have offices in New York and employ hundreds of people here. In Article 14 of the Racing, Pari-Mutuel Wagering and Breeding Law (“Racing Law”), the New York Legislature confirmed that “interactive fantasy sports,” which include DFS contests, “do not constitute gambling.” Relying on Article 14, FanDuel and DraftKings—and over a dozen other companies—operate DFS contests in New York and have invested substantial resources to provide the contests to hundreds of thousands of New York customers. FanDuel and DraftKings have a strong interest in the survival of Article 14 and the reversal of the Third Department’s decision invalidating the statute.

PRELIMINARY STATEMENT

After building a legislative record spanning over 400 pages, the New York Legislature voted overwhelmingly to confirm that DFS contests “are not games of chance” because fantasy teams are selected “based upon the skill and knowledge of the participants” and because contest outcomes “depend[] on how the performances of participants’ fantasy roster choices compare to the performance of others’ roster choices.” Racing Law § 1400(1). For those and other reasons, DFS contests “do not constitute gambling.” *Id.* § 1400(2).

These legislative findings followed a six-hour hearing with testimony from eleven witnesses, many of whom described how DFS contests work and the skill required to win. The Legislature also considered dozens of written submissions, including undisputed expert studies. One study found that contestants improve with practice—a hallmark of skill games. *See* R.1184, 1188. Another study concluded that “chance is overwhelmingly immaterial in the probability of winning.” R.1215.

In recognizing that DFS contests do not constitute gambling, the Legislature joined over twenty other States that have passed similar laws confirming that fantasy sports are not gambling (or regulating the contests as a lawful activity). *See, e.g.*, 29 Del. Code § 4861(b) (“[I]nteractive fantasy sports do not constitute gambling.”). Congress, too—by unanimous consent in the Senate and a 409-2 vote in the House—exempted fantasy sports from the definition of gambling in the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5362(1)(E)(ix) (“UIGEA”). The Legislature’s reasonable decision to join this growing national consensus is entitled to deference.

It is also correct. Studies resoundingly demonstrate that chance does not determine the outcome of DFS contests—*skill* does. In fact, FanDuel and DraftKings design their DFS contests to minimize the role of chance and to reward the skill contestants use when selecting a fantasy team of real-world athletes. Contestants exercise complete control over their selections—and as a result, they

exert substantial control over the success of their fantasy teams and the outcomes of fantasy contests. This holds true even though DFS contests—just like chess, Contract Bridge, Scrabble, bass fishing, spelling bees, and all other skill contests—involve some elements not entirely within the contestants’ control.

It does not matter whether the correct test for determining if a contest is gambling comes from the common law and asks whether chance is the “dominating element,” as the Attorney General argues, or instead comes from New York Penal Law § 225.00 and asks whether chance is involved to a “material degree,” as the Third Department held. The answer is the same. DFS contests are not gambling because they are games of skill: skill plays a dominating role in determining their outcomes, and chance is immaterial. The Legislature therefore acted rationally, correctly, and constitutionally when it enacted Article 14.

BACKGROUND

Millions of Americans have enjoyed competing in DFS contests for over a decade. Someone unfamiliar with how DFS contests actually work might assume they are a type of sports betting where people passively wager on the outcome of a sporting event. But a proper understanding of how the contests work—and the research, analysis, and strategy involved—demonstrates that they are nothing like sports betting but are games of skill in which contestants actively compete against each another and directly influence contest outcomes.

A. How DFS Contests Work

DFS contests emerged in the 2000s as a way for sports fans to play fantasy sports without the months-long commitment required to participate in traditional season-long contests. Both season-long and daily fantasy contests involve the same fundamental activity: contestants compete against each other and act as general managers of sports teams, using knowledge and skill to assemble a fantasy team of real-world athletes. An NBA DFS team, for example, typically has eight professional basketball players. DFS contestants select those players from at least two real-world teams and include three guards, three forwards, a center, and one “utility” player from any position. There are hundreds of NBA players to choose from, and millions of ways to assemble a DFS team.

After making their selections, contestants match their fantasy team(s) in competitions against the fantasy team(s) of other contestants. Contestants earn fantasy points based on the performance of the real-world athletes on their fantasy teams—e.g., the number of rebounds, assists, and points an athlete has in a basketball game. The outcome of the fantasy contest is determined by which fantasy team earns the most fantasy points. FanDuel and DraftKings publicly disclose on their websites their methods for awarding fantasy points, and top contestants carefully study these methods and other contest rules.

Contestants pay a fee to enter their fantasy teams in a cash contest (but there is no fee for a free contest). The winners receive prizes, the structure of which is always disclosed before contestants enter the contest. The prizes do not change based on the number of entries.

B. Strategic Elements Of DFS

The strategy required to play DFS successfully is unrelated to predicting the outcome or margin of victory in real-world sporting events, as in traditional sports betting. Instead, DFS contests are designed to reward how skillfully contestants assemble a fantasy team. These design features include (1) fantasy salary caps, (2) fantasy point scoring systems, and (3) prize eligibility structures.

1. *Fantasy Salary Cap.* FanDuel and DraftKings assign all athletes a fictional salary, and contestants must assemble a fantasy team of real-world athletes within the same fantasy salary cap. The fantasy salaries are typically different on FanDuel and DraftKings, and are not based on the athletes' real-world salaries. They are based on many factors, including statistics about past performance and expected performance in real-world sporting events.

Managing the salary cap—i.e., picking the right mixture of athletes for a fantasy team—is a complex skill to master that lies at the heart of DFS strategy. The more fantasy money a DFS contestant spends on one athlete, the less fantasy money

the contestant has available to spend on other athletes. Selecting any athlete has an opportunity cost—the lost opportunity to afford other athletes.

The fantasy salary cap prevents contestants from simply selecting the best-known star athletes, as those athletes typically have the highest fantasy salaries. For instance, a star NBA athlete might be so “expensive” that selecting him would require completing a fantasy team with less expensive, lower-performing players. But selecting a lesser-known athlete who is less expensive might yield more fantasy points *per fantasy dollar spent*, leaving more of the contestant’s fantasy budget available for other valuable athletes. Thus, just like general managers of real-life professional sports teams who cannot afford to assemble a team of only all-star athletes, DFS contestants must perform cost-benefit analyses for athletes and make tradeoffs to get under the salary cap.

Successful DFS contestants research and analyze many data points to discover value in athletes that less-skilled contestants might not see. For example, casual sports fans might recognize the value of an NFL running back whose team frequently runs the ball. The running back will likely have many opportunities to gain rushing yards and thereby garner many fantasy points. But it takes skill to identify and evaluate other factors that might increase or decrease the running back’s value on any given day—e.g., the quality of the opposing team’s run defense and tendency to blitz, the weather forecast, whether key linemen are expected to play, and so on.

Further enhancing the strategic aspects of the salary cap, fantasy salaries remain fixed once established for a contest. This rewards DFS contestants who constantly monitor and analyze sports-related news that might affect athlete valuations. For example, a skilled DFS contestant might identify undervalued backup players who are replacing injured starters, or athletes who will have additional scoring opportunities because of changes to the opposing team’s roster.

Consider what happened on November 22, 2015, when NBA player Jerryd Bayless—who typically does not start—was announced as a starter 36 minutes before a DraftKings DFS basketball contest. Because Bayless’s fantasy salary already was “locked,” contestants who closely followed sports news realized that Bayless was now a valuable selection for their fantasy team: they could get a starting NBA player at the cheaper fantasy salary of a backup player. So that day, Bayless was a more valuable *fantasy* selection than LeBron James, although James was still the more valuable athlete in the real-world basketball game:

Athlete	Fantasy Salary	Fantasy Points Earned	Fantasy Dollars Spent Per Fantasy Point Earned	Average Total Fantasy Team Points With Athlete	Win % of Fantasy Teams With Athlete
LeBron James	9,700	61.75	157.1	265.04	51.5%
Jerryd Bayless	3,200	34.75	92.1	281.79	78.8%

Bayless earned almost twice as many fantasy points per fantasy dollar spent. Skilled contestants who discovered the value in Bayless that day and selected him for their

fantasy teams had an advantage over their competition: they had more fantasy dollars leftover to spend on other high-performing athletes, which increased their overall fantasy points and their likelihood of winning.

2. *Fantasy Point Scoring Systems.* DFS contests involve unique scoring systems that skilled contestants study to gain an advantage over competitors. For example, the DraftKings scoring system for NFL contests awards 1 point per reception, whereas FanDuel awards 0.5 points per reception. That difference seems small, but it significantly affects the values of wide receivers (who generate many receptions) relative to running backs (who usually do not). To account for this difference, skilled DFS contestants might spend more fantasy dollars for a top wide receiver in a DraftKings contest than they would in a FanDuel contest, or they might research and select running backs who play for a team that features running backs in the passing game.

3. *Prize Eligibility.* Prize eligibility introduces another element of skill and strategy. DFS contests typically award prizes to top finishers, but some contests involve more top-heavy prize structures. For example, large-field tournaments generally award prizes to the top 20% of contestants, but the top half of the field receives prizes in “50/50” contests. These differences give rise to many different strategies. For example, in a 50/50 contest, a skilled DFS contestant might identify and choose athletes who perform the most reliably, as the goal is to outperform half

the other contestants. But in a large-field tournament, a skilled DFS contestant might identify and choose athletes with the highest potential upside, as the goal is to outperform 80% of the other contestants.

C. Key Differences Between DFS And Sports Betting

The strategic elements of DFS gameplay distinguish DFS from sports betting in at least five key ways.

First, DFS involves actively assembling a team of real-world athletes after performing complex cost-benefit analyses, not passively picking the winner of a real-world sporting event.

Second, unlike sports bettors who win money if they correctly pick the outcome of a game over which they have *no* control, DFS contestants are the actual participants in the DFS contest and win prizes only if they assemble their fantasy team—a matter over which they have *complete* control—more skillfully than the other contestants.

Third, the outcomes of real-world sporting events are dispositive in sports betting, but DFS contests do not depend on the outcome of any one game or the performance of any one athlete in a game. Indeed, winning fantasy teams often comprise athletes from losing real-world teams. FanDuel and DraftKings further ensure that fantasy teams cannot function as proxies for real-world teams—and thus

not function as proxies for the outcome of real-world sporting events—by limiting the number of athletes contestants can select from any one real-world team.

Fourth, sports bettors choose how much to wager against a “house” that changes the betting “lines” or “odds,” whereas DFS contestants pay a fixed entry fee to compete against each other for pre-set prizes. And unlike the house in sports betting, FanDuel and DraftKings have no interest in the outcome. They simply collect the fees, administer the contests, and award the prizes to whoever wins.

Fifth, DFS contests do not raise concerns about “fixing” a real-world sporting event because the outcomes of those events do not impact the outcomes of fantasy contests. *See* R.1167. As MLB Commissioner Rob Manfred put it, “there’s a huge difference between Rob Manfred, citizen, betting on whether Kansas City beats Toronto or whomever on the one hand, and Rob Manfred picking nine guys off 18 teams to try to see if he can accumulate more points within a given set of guidelines than a hundred guys trying to do the same thing.” Paul Hagen, *Commissioner Pleased with Ratings Increase*, Major League Baseball (Oct. 26, 2015), <https://tinyurl.com/rt5n5w5>.

In fact, FanDuel and DraftKings partner with most New York professional sports teams, many of which urged lawmakers to enact Article 14. *See, e.g.*, R.1019, 1021, 1024.

D. Studies Confirm That DFS Is A Contest Of Skill

Expert studies repeatedly confirm that DFS is a contest of skill. At least three of these studies are in the legislative record—and all are unchallenged.

First, Professor Zvi Gilula, an elected fellow of the Royal Statistical Society and the American Statistical Association and former Chair of Hebrew University’s Statistics Department, examined the win percentages of 28 of DraftKings’s most successful contestants and determined that chance could not explain their success. R.1207, 1212-15. One contestant competed in 70 fantasy contests and won them all. The odds of that occurring by chance was essentially zero: “less than 1 in a [m]illion raised to the power of 50.” R.1215. Another contestant won 27 of 29 contests. *Id.* The odds of that occurring by chance was “about 3 in 10 [b]illion.” *Id.*

Based on these findings—and because games of chance involve an “extremely low likelihood” of a participant consistently winning, R.1211—Professor Gilula concluded that DFS contests “have an inherent and vast character of skill where *chance is overwhelmingly immaterial* in the probability of winning,” R.1215 (emphasis added).

Second, Professor Annette (Peko) Hosoi, the Associate Dean of Engineering at the Massachusetts Institute of Technology, performed a statistical analysis of two seasons of FanDuel data from DFS contests. R.1184, 1187. She made three main findings. First, contestant choices impact contest results. R.1188-90. Second,

contestants improve with practice. R.1188. And third, in the short term, good players are consistently good, and bad players are consistently bad. R.1190-95.

According to Professor Hosoi, these three statistical findings are hallmarks of games of skill and are inconsistent with the hypothesis that DFS contests are games of chance. R.1185-86, 1196. If DFS *were* a game of chance, a contestant's choices would have little or no impact on the result, contestants would not improve with practice, and contestants would have wide variations of success or failure in the relative short term. The opposite is true for DFS—demonstrating “unmistakably that . . . DFS contests are skill-based games” with “outcomes . . . predominantly based on skill.” Aff. of Anette (Peko) Hosoi, *FanDuel, Inc. v. Schneiderman*, No. 161691/2015, Dkt. No. 29, ¶¶ 9, 13 (Sup. Ct. N.Y. Cty. Nov. 23, 2015) (“Hosoi Aff.”).

Third, a group of gaming experts confirmed that skilled fantasy contestants consistently beat the competition. *See* R.1174. In MLB contests, “[t]he average win percentage for the skilled [DFS] participant in head-to-head matchups against the unskilled participant” was just over 73%, demonstrating that “[s]killed participants’ scores dominate unskilled participants’ scores.” R.1176-77. The experts also identified the top fifteen skilled fantasy baseball contestants, matched their fantasy teams against those of simulated unskilled contestants, and found that the skilled contestants won nearly 83% of the time. R.1177-78. The same experts later found

similar results for NBA contests, where skilled contestants won just over 96% of the time; for NFL contests, where skilled contestants won about 83% of the time; and for NHL contests, where skilled contestants won just under 82% of the time. R.1168; *see also* Hosoi Aff. ¶ 24 (reporting similar win percentages from her independent analysis).

Other peer-reviewed studies further confirm that DFS is a contest of skill. For example, one study entered randomly selected fantasy teams in 35 DraftKings contests and lost *every time*, showing “that chance has no reasonable probability of outperforming skill in DFS contests” and “that unskilled participants probabilistically never win.” Todd Easton & Sarah Newell, *Are Daily Fantasy Sports Gambling?*, 5 J. Sports Analytics 35, 36, 41 (2019).

Another study used an “econometric analysis” of DraftKings data for NBA contests and reported that winning fantasy lineups are more likely to include rookie athletes, international athletes, and athletes on teams with losing records—not just popular American superstars from winning teams—confirming “that there are clearly differing strategies between winning and losing” and “that [DFS] is a skill-based game.” Brent A. Evans et al., *Evidence of Skill and Strategy in Daily Fantasy Basketball*, 34 J. Gambling Studies 757, 768-70 (2018).

In sum, experts studies using different statistical techniques agree that DFS is a contest of skill. Neither the legislative record nor the record in this case contains any study, expert opinion, or statistical analysis disputing these results.

E. The Legislature Overwhelmingly Concluded, Like Many Other States And The Federal Government, That DFS Is Not Gambling

Before enacting Article 14, the Legislature conducted an extensive inquiry into DFS—compiling a legislative record of over 400 pages. That record includes live testimony from legal experts, published expert studies, and other written submissions demonstrating that DFS is a contest of skill. During one hearing on the bill, Assemblyman Dean Murray offered insights based on his experience playing DFS, telling colleagues that “[t]he more research you do . . . there is no question that you will have a much better chance of winning.” R.839.

After publicly debating whether DFS is gambling, the Legislature enacted Article 14 by vote of 111 to 21 in the Assembly and 45 to 17 in the Senate. R.702-04. The statute begins with two legislative findings: DFS contests (1) “are not games of chance” and (2) “are not wagers on future contingent events not under the contestants’ control or influence.” Racing Law § 1400(1)(a), (b). The statute then declares that “interactive fantasy sports do not constitute gambling” and, among other things, creates a framework for taxing and regulating the contests. *Id.* § 1400(2).

Article 14 is in good company. The vast majority of other States—at least 40 out of 50—allow paid DFS contests, including over 20 that have statutes confirming that fantasy sports are not gambling or regulating them as a lawful activity. *See* Appellants Br. 59 & nn. 7, 8 (citing statutes). Congress also concluded that fantasy sports are not gambling. *See* 31 U.S.C. § 5362(1)(E)(ix).

DISCUSSION

The parties dispute whether the prohibition of gambling in the New York Constitution means any game where chance is the “dominating element” or, instead, means any game involving a “material degree” of chance. Although the common law “dominating element” test is the correct one, DFS contests are not gambling under either test. Thus, the Legislature rationally concluded in Article 14 that DFS contest are not gambling, and the statute survives constitutional scrutiny.

I. DFS Contests Are Not Gambling Under The Proper “Dominating Element” Test.

For over a century, New York has defined gambling as any contest where chance is the “dominating element.” *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 171 (1904). Courts applied this common-law test in the years immediately after the State enacted its constitutional prohibition of gambling in 1894, confirming that the framers of the prohibition and the people who adopted it intended this test to apply. *See* 20 N.Y. Jur. 2d Constitutional Law § 22 (2020) (“[A] constitution is to be given the effect and meaning contemplated by its framers and by the people who adopted

it.”). Applying this test to DFS contests confirms that they are not unconstitutional gambling because skill—not chance—dominates in determining their outcomes.

A. The Dominating Element Test Applies To The Question Whether A Contest Is Gambling.

The constitutional prohibition of gambling first appeared in the 1894 Constitution and provided: “[N]or shall any lottery or the sale of lottery tickets, pool-selling, book making, or any other kind of gambling hereafter be authorized or allowed within this State.” N.Y. Const. art. I, § 9 (1894). Materially identical language remains in Article I, § 9 today.

A few years after the constitutional prohibition was enacted, this Court explained that the test for determining whether a game is one of chance or skill asks “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.” *Lavin*, 179 N.Y. at 171 (emphasis added). Lower courts consistently applied this “dominating element test” in the early 20th Century. *See* Appellants Br. 43-44 (citing cases).

The Third Department declined to apply the dominating element test, reasoning that the word “gambling” in the Constitution means any contest involving a “material degree . . . of chance.” *White v. Cuomo*, 181 A.D.3d 76, 83 (3d Dep’t 2020) (quotation marks omitted). But the court cited no authority—from New York or elsewhere—applying the “material degree” test when the constitutional prohibition was enacted. That is not surprising, as the test did not appear in New

York law until 1965 when Penal Law § 225.00(1) was enacted. The test therefore could not possibly have been “contemplated by [the] framers and by the people who adopted” the constitutional prohibition in 1894. 20 N.Y. Jur. 2d Constitutional Law § 22; *see also* Appellants Br. 45.

Regardless, § 225.00’s material degree test did not displace the common law’s dominating element test.¹ In *People v. Li Ai Hua*, 24 Misc. 3d 1142 (N.Y. Crim. Ct. 2009), for example, the court applied *Lavin*’s dominating element test when construing the meaning of “material degree” in § 225.00:

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.

Id. at 1145 (emphases added; quotation marks and citations omitted).

Similarly, in *Matter of Plato’s Cave Corp. v. State Liquor Authority*, 115 A.D.2d 426 (1st Dep’t 1985), the court found that a video poker game was gambling under the material degree test of § 225.00 because “the outcome depends in the *largest degree* upon an element of chance.” *Id.* at 428 (emphasis added; quotation

¹ This conclusion is consistent with the rule that “the common law must be held no further abrogated than the clear import of the language used in [a] statute[] absolutely requires.” *Hinton v. Vill. of Pulaski*, 33 N.Y.3d 931, 940 (2019). Because nothing in § 225.00 compels the conclusion that the statute displaced the common-law dominating element test, the material degree test is construed to “conform to the rules of the common law.” *People v. Phylfe*, 136 N.Y. 554, 558-59 (1893) (“[T]he presumption is that no such change was intended, unless the enactment is clear and explicit in that direction.”).

marks omitted). The court then distinguished a case finding that video games are *not* gambling because, in the court’s view, the outcome of those games depends “*primarily upon physical skills.*” *Id.* (emphasis added).

Likewise, in *People v. Hunt*, 162 Misc. 2d 70 (N.Y. Crim. Ct. 1994), the court considered whether chance was the dominating element when deciding whether three-card monte, if honestly played, was “gambling” under § 225.00. After quoting the statutory material degree test, the court concluded that the game was not gambling because “skill rather than chance is *the* material component” of the game. *Id.* at 72 (emphasis added). Here again, when applying the statutory material degree test, the court looked to the common-law test from *Lavin* and asked whether skill or chance dominated. Many other decisions do the same thing.²

Until the Third Department’s decision below, it was blackletter law that the dominating element test applies in New York. At the very least, it informed the contours of both § 225.000 and the constitutional prohibition of gambling. *See, e.g.*, 62 N.Y. Jur. 2d Gambling § 3 (2020) (“The 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.”); Criminal Law in New York § 31:4 (4th ed. 2014) (similar);

² *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); *People v. Stiffel*, 61 Misc. 2d 1100, 1100 (App. Term 2d Dep’t 1969); *People v. Davidson*, 181 Misc. 2d 999, 1001 (Sup. Ct. Monroe Cty. 1999), *rev’d on other grounds*, 291 A.D.2d 810 (4th Dep’t 2002), *appeal dismissed*, 98 N.Y.2d 738 (2002); *People v. Melton*, 152 Misc. 2d 649, 651 (Sup. Ct. Monroe Cty. 1991).

Bennett Liebman, *Chance v. Skill in New York's Law of Gambling: Has the Game Changed?*, 13 Gaming L. Rev. & Econ. 461, 467 (2009) (“Based on legislative history, case law, common sense, and the views of many commentators, it ought to be clear that the ‘dominating element’ test for gambling . . . remains valid law in New York State.”).

B. Skill Dominates In Determining The Outcomes Of DFS Contests.

The Third Department did not identify any studies or expert testimony showing that chance is the dominating element in DFS contests. Nor could it. The record of this case contains no such evidence. Nor does the legislative record.

Instead, both the legislative record and the record of this case contain multiple studies from experts in mathematics, statistics, and gaming showing that skill dominates in DFS contests. *See supra* pp. 11-14. As Professor Gilula explained, the “unequivocal conclusion . . . based on facts [and] analyses” is that “winning a prize in [DFS] strongly depends more on skill than on chance.” R.1207. Or as Professor Hosoi put it, the statistical evidence “suggest[s] that skill is *always* the dominant factor.” R.1196 (emphasis added); *see also* Hosoi Aff. ¶¶ 9, 13 (“[T]he outcomes . . . are predominantly based on skill.”). The gaming experts agree that “[s]killed [DFS] participants’ scores dominate unskilled participants’ scores.” R.1177.

Courts also agree. Citing “peer-reviewed . . . research that has established the predominance of skill in DFS contests,” including Professor Hosoi’s study, the

Supreme Court of Illinois applied the dominating element test and held that people who enter head-to-head DFS contests do “not engage[] in ‘gambling.’” *Dew-Becker v. Wu*, 2020 IL 124472, ¶¶ 26-28. As the court explained, contest outcomes are not determined by chance but “by the skill of the participants in using their knowledge of statistics and the relevant sport to select a fantasy team that will outperform the opponent.” *Id.* ¶ 26. “Indeed, the fact that DFS contests are predominately skill-based is . . . widely recognized to be true.” *Id.*

The Legislature reasonably and correctly reached the same conclusion based on a robust legislative record. DFS contests are “games of . . . skill,” “not games of chance,” and “do not constitute gambling.” Racing Law § 1400(1), (2).

II. DFS Contests Are Not Gambling Under § 225.00’s Material Degree Test.

Even if the Third Department correctly concluded that § 225.00’s material degree test governs, and even if that test displaced or sweeps broader than the common law dominating element test, DFS contests still are not gambling—and thus Article 14 is constitutional—for two independent reasons: (1) contestants do not “stake[] or risk[]” something of value on a contest of chance, and (2) chance does not play a “material” role in determining who wins. N.Y. Penal Law § 225.00(1)-(2).

A. DFS Contestants Pay Entry Fees That Are Not “Staked Or Risked” On A Contest Of Chance.

Paying an entry fee to match skills against others in a contest for pre-set prizes—as contestants do in DFS—is not gambling because it does not involve

“stak[ing] or risk[ing] something of value upon the outcome of a contest of chance.” N.Y. Penal Law § 225.00(2); *see also* 38 C.J.S. Gaming § 143 (2020) (“[A] prize . . . offered to the successful player in a game or competitor in a contest by persons other than such players or competitors is not a bet or wager, and does not constitute gambling if the contest is one of mental or physical skill.”).

In the landmark case of *People ex rel. Lawrence v. Fallon*, 4 A.D. 82 (1st Dep’t 1896), the court held that owners of race horses were not gambling when they paid “entrance money” and competed “for a purse” offered by a third party. *Id.* at 83-84. The court distinguished between *unlawful* “bets” or “wagers” in a gambling game, on one hand, and *lawful* “purses” or “prizes” in a skill contest, on the other:

[A] bet or wager is ordinarily an agreement between two or more, that a sum of money, in contributing which all agreeing take part, shall become the property of one of them on the happening in the future of an event at present uncertain. There is in them an element which does not enter into the purse, prize or premium, namely, that each party to the bet gets a chance of gain from the others, and takes a risk of loss of his own to them. One or the other thing must necessarily occur.

Id. at 88. Many other States have long recognized this distinction. *See, e.g., Cooney v. Hauck*, 211 P. 617, 618 (Kan. 1923); *Hankins v. Ottinger*, 47 P. 254, 255 (Cal. 1896); *Misner v. Knapp*, 9 P. 65, 66 (Or. 1885); *Delier v. Plymouth Cty. Agric. Soc’y*, 10 N.W. 872, 874 (Iowa 1881); *see also* Appellants Br. 57-58.

The first court to address the legality of modern fantasy sports applied this distinction and concluded that they are not gambling. In *Humphrey v. Viacom, Inc.*,

2007 WL 1797648 (D.N.J. June 20, 2007), the court considered a *qui tam* suit against the operators of fantasy sports contests in which participants paid an “entry fee” and competed for “prize[s]” that were “awarded to each participant whose team wins.” *Id.* at *2.³ After recognizing that the “success of a fantasy sports team depends on the participants’ skill,” *id.*, *Humphrey* explained that entry fees and prizes do not transform the fantasy contests into unlawful gambling because:

- “fantasy sports league participants pay a set fee for each team they enter . . . [that] allows the participant to receive related support services and to compete against other teams;”
- “Defendants offer set prizes” for winners that “are guaranteed to be awarded;”
- “the amount of the prize does not depend on the number of entrants;” and
- “Defendants are neutral parties in the fantasy sports games,” are “indifferent as to who wins,” and “simply administer and provide internet-based information and related support services for the games.”

Id. at *7. “As a matter of law,” therefore, “the entry fees for . . . fantasy sports leagues are not ‘bets’ or ‘wagers,’” but instead are lawful entry fees paid to enter a skill contest and compete for a prize. *Id.* at *9.

³ The New Jersey *qui tam* statute defines gambling in terms similar to § 225.00. *Compare* N.J. Stat. § 2A:40-1 (“All wagers, bets or stakes made to depend upon any . . . any gaming by lot or chance, or upon any . . . contingent event.”), *with* N.Y. Penal Law § 225.00(2) (“[S]tak[ing] or risk[ing] something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence.”).

The U.S. Court of Appeals for the Third Circuit similarly has recognized the “legal difference between paying fees to participate in fantasy leagues and single-game wagering.” *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). And the court has noted that “fantasy leagues that require an entry fee are not subject to anti-betting and wagering laws.” *Id.*; *see also Dew-Becker*, 2020 IL 124472, ¶ 21 (“[T]here is no question that when [the parties] entered into the DFS contest, they were actual contestants who had before them a possible prize.” (quotation marks omitted)).

Congress also has recognized this distinction. Like § 225.00, UIGEA defines gambling as placing a “bet or wager,” which in turn means “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.” 31 U.S.C. § 5362(1)(A). And like Article 14, UIGEA exempts fantasy sports from this definition and confirms that “participation in any fantasy or simulation sports game” involving an entry fee and a prize does not constitute gambling. *Id.* § 5362(1)(E)(ix). UIGEA further confirms that DFS contests are games of skill that involve paying entry fees to compete for fixed prizes offered by third parties. They are not gambling.

B. DFS Is Not A Contest Of Chance.

The Legislature’s conclusion that DFS contests are not gambling under § 225.00 is correct for another independent reason: they are not “contest[s] of chance” because their outcomes do not “depend[] in a material degree upon an element of chance.” N.Y. Penal Law § 225.00(1); *see also* Racing Law § 1400(1)(a) (finding that DFS contests “are not games of chance”).

The expert studies before the Legislature confirm that chance is immaterial to DFS outcomes. *See supra* pp. 11-14. As Professor Gilula explained, “chance is evidently immaterial in the probability of winning.” R.1207. In fact, “one MUST conclude that [DFS contests] have an inherent and vast character of skill where *chance is overwhelmingly immaterial.*” R.1215 (second emphasis added).

The Third Department nevertheless reasoned that DFS is gambling because contestants “cannot control how the athletes on their [DFS] teams will perform in the real-world sporting events.” *White*, 181 A.D.3d at 84. But that ignores how DFS contests actually work. Success in DFS does not turn on how well any individual athlete or real-world team performs, but on which contestants most skillfully assemble a fantasy team—an act *entirely* under their control. And skilled DFS contestants use analysis and strategy when assembling a fantasy team in order to eliminate any material role of chance *in the fantasy contest*. *See id.* at 92 (Pritzker, J., dissenting) (“[T]he proper focus is not on the participants’ influence over the real

world events and a specific athlete's performance, but the participants' unquestionable influence on winning the contest by making skillful choices in assembling a fantasy roster."); *see also* Appellants Br. 53-55.

The Third Department further reasoned that DFS contests are gambling because a contestant's skill cannot "eliminate or outweigh the material role of chance," such as "player injury," "unexpected weather conditions," or "poor officiating." *White*, 181 A.D.3d at 84 (footnote omitted). But again, although DFS contestants—like participants in any skill contest—cannot *eliminate* the element of chance, they render chance *immaterial* through skill, strategy, and analysis. A skilled DFS contestant, for example, might "devalue" real-world athletes who are injury-prone, struggle in inclement weather, or are expected to underperform for some other reason.

Every game of skill involves some elements of chance or contingent events that competitors cannot eliminate. *See Dew-Becker*, 2020 IL 124472, ¶ 22. Not even professional athletes can eliminate the risk of "injury," "unexpected weather," or "poor officiating." *White*, 181 A.D.3d at 84. But no one would dispute that professional tennis players, ski racers, and marathon runners are engaged in skill contests. So too for professional chess players who cannot control who plays white, bridge players who cannot control the distribution of cards, Scrabble players who cannot control the letters they and their opponents draw, and competitors in a

spelling bee who cannot control what words they and their opponents must spell. Nor can the owner of a horse control all variables that influence whether his horse runs the fastest and wins a race. *See People ex rel. Lawrence v. Fallon*, 152 N.Y. 12, 17 (1897). The potential for chance to sway the outcome of these contests does not mean they are gambling or involve a “material degree” of chance. They remain skill contests even if “occasionally an unskilled player may make a lucky shot.” *People v. Cohen*, 160 Misc. 10, 11 (N.Y. Magis. Ct., Queens Cty. 1936).

Construing gambling to mean any contest where skill cannot eliminate the role of chance would be “patently absurd,” *Humphrey*, 2007 WL 1797648, at *7 (quotation marks omitted), and would outlaw many activities that “[n]o one seriously considers . . . to be gambling,” including “dog shows, . . . automobile racing, musical competition[s], and essay contests,” *Faircloth v. Cent. Fla. Fair, Inc.*, 202 So. 2d 608, 609 (Fla. Dist. Ct. App. 1967); *see also Fallon*, 152 N.Y. at 19 (similar).

Even under the material degree test from § 225.00, DFS contests are games of skill and not gambling regardless of whether chance sometimes plays a role in determining their outcomes.

III. The Decriminalization Provision Of Article 14 Survives Even If Other Parts Of The Statute Are Invalid.

If the Court affirms the Third Department’s decision invalidating Article 14 “to the extent that it authorizes and regulates” DFS contests, *White*, 181 A.D.3d at 78, the Court should sever the portion of the statute expressly exempting the contests

from the definition of gambling in Penal Law § 225.00(1), *see* Racing Law § 1400(2).

The “universal rule [is] that where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void.” *People ex rel. City of Rochester v. Briggs*, 50 N.Y. 553, 565-66 (1872). Courts must sever and save a statutory provision unless it is “so connected together in subject-matter, meaning, or purpose [with the unconstitutional provision], that it cannot be presumed the legislature would have passed the one without the other.” *In re Vill. of Middletown*, 82 N.Y. 196, 202 (1880); *see also* N.Y. Stat. Law § 150 n.17 (McKinney 2020). “The question is . . . whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised.” *People v. Liberta*, 64 N.Y.2d 152, 171 (1984) (quotation marks omitted).

The Legislature plainly would have intended Article 14’s decriminalization provision to survive if the provisions authorizing and regulating DFS contests were invalid. The Legislature passed Article 14 because it “was sympathetic to and supportive of [DFS] participants,” *White*, 181 A.D.3d at 86, having found that “fantasy sports [are] a major form of entertainment for many consumers” and “do not constitute gambling,” Racing Law § 1400(1)-(3). The overriding purpose of the statute is to confirm that DFS contests are lawful. If the Legislature had known that

it could not affirmatively authorize and regulate the contests, it at least would have wanted to make clear they are not a *crime*.

The Third Department “refuse[d] to sever th[e] [decriminalization] provision, and invalidate[d] it as well,” reasoning that “we have rejected the Legislature’s explicitly stated basis for the removal of [DFS] from the Penal Law.” *White*, 181 A.D.3d at 86. Put another way, the court reasoned that because *it* found that DFS is gambling, *the Legislature* when it enacted Article 14 would have wanted the decriminalization provision to fail. That makes no sense. The Legislature voted overwhelmingly to “support[] . . . [DFS] participants,” *id.*, and judicial disagreement years later about whether DFS is gambling does not undermine that legislative support. The Third Department also noted that the Legislature “intended that [DFS] contests be heavily regulated,” *id.*, which only confirms that the Legislature viewed DFS as a lawful activity and therefore would have wanted the decriminalization provision to survive if other parts of the statute fail.

The Third Department further held that *only* the provision of Article 14 prohibiting “unregistered [DFS] contests” could be severed and saved, reasoning that only that provision “is consistent with the N.Y. Constitution’s prohibition on gambling.” *White*, 181 A.D.3d at 84 (quotation marks omitted). That makes no sense either. “Consistency” is not the standard for severance. Even if it were, there is nothing inconsistent with the Constitution prohibiting DFS contests and the

Legislature *decriminalizing* them. The Legislature, for example, has determined that deceptive business practices and false advertising are unlawful, but not criminal. *See* R.1386, 1395. Regardless, the Third Department’s severance holdings might be “consistent” with *the court’s* conclusion that DFS contests are crimes and should be banned, but the holdings defy *the Legislature’s* conclusion—based on a robust legislative record—that the contests are not a crime and should be authorized, taxed, and regulated.

Courts have a “duty . . . to save unless in saving [they] pervert.” *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 63 (1920) (Cardozo, J.). Because it is at least reasonable to presume that the Legislature would have wanted Article 14’s decriminalization provision to survive if the authorization and regulation provisions fail, the Court should sever the decriminalization provision if it invalidates any other part of the statute.

CONCLUSION

The Legislature’s determination that DFS and other interactive fantasy sports are not gambling was rational and, indeed, correct. This Court should reverse the decision below and affirm the constitutionality of Article 14.

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Respectfully submitted,

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** Pro Hac Vice Application Forthcoming*

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