To be argued
By: Victor Paladino
10 minutes requested

Supreme Court of the State of New York
Appellate Division – Third Department

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.

No. 528026

CORRECTED OPENING BRIEF FOR APPELLANTS-RESPONDENTS

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellants-Respondents
The Capitol
Albany, New York 12224
(518) 776-2012
Victor.Paladino@ag.ny.gov

STEVEN C. WU
Deputy Solicitor General
VICTOR PALADINO
Assistant Solicitor General
of Counsel

Dated: March 8, 2019

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PRELIMINARY STATEMENT

In 2016, the New York State Legislature authorized "interactive fantasy sports" contests, and provided for their regulation, by enacting chapter 237 of the laws of 2016. The Legislature found, based on the extensive record before it, that interactive fantasy sports do not constitute "gambling" in this State under the Penal Law, and that regulatory oversight over this increasingly popular activity was essential to protect participants and prevent abuses. Chapter 237 accordingly declared that interactive fantasy sports contests are not subject to criminal penalties and instead imposed registration and other regulatory requirements on operators of such contests. Like New York, eighteen other States have similarly concluded that interactive fantasy sports contests are not a form of prohibited "gambling" and have chosen to regulate rather than criminalize such contests.

A group of New York taxpayers with gambling disorders or relatives with gambling disorders challenged chapter 237, arguing that it violates the anti-gambling provision in article I, § 9 of the New York Constitution. This provision generally prohibits gambling, but it leaves that term

undefined and expressly authorizes the Legislature to "pass appropriate laws" to prevent gambling offenses.

Supreme Court (Connolly, J.) concluded that the Legislature violated the Constitution in authorizing and regulating interactive fantasy sports contests through chapter 237, because the court found that such contests were a form of "gambling" prohibited by article I, § 9 (Record [R.] 7-35). This brief challenges that ruling.

At the same time, Supreme Court upheld chapter 237's elimination of criminal penalties for interactive fantasy sports, holding that the determination of whether to criminalize gambling was one that the Constitution entrusted to the Legislature alone. The plaintiffs have cross-appealed from that ruling.

This Court should reverse Supreme Court's holding that chapter 237 violates the Constitution by authorizing interactive fantasy sports contests. By leaving the term "gambling" undefined and expressly delegating implementation authority to the Legislature, article I, § 9 necessarily conferred discretion on the Legislature to determine whether particular activities would constitute "gambling." Here, the Legislature providently exercised its delegated discretion. The Legislature conducted

an extensive inquiry into the nature of interactive fantasy sports contests and made factual findings that such contests do not constitute "gambling" because they are not games of chance and because participants have meaningful influence over those outcomes. The Legislature accordingly concluded that interactive fantasy sports are not a form of sports betting, but rather authorized them as mixed skill-and-chance contests, subject to regulation. As the Court of Appeals and courts around the country have recognized, such contests have long been a traditional part of American life and do not constitute illegal gambling.

In concluding that the law was unconstitutional beyond a reasonable doubt, Supreme Court erroneously disregarded the Legislature's factual findings and considered judgment that interactive fantasy sports is not gambling. Accordingly, Supreme Court's judgment should be modified to declare that chapter 237 has not been shown to be unconstitutional.

QUESTION PRESENTED

Is the gambling prohibition in article I, § 9 of the New York Constitution violated by State legislation authorizing and providing for

the regulation of interactive fantasy sports (chapter 237 of the Laws of 2016)?

Supreme Court answered this question "yes."

STATEMENT OF THE CASE

A. The Constitutional Prohibition of Gambling

The first Constitution of the State of New York, adopted in 1777, made no mention of lotteries or gaming. During this period, the colonial and state legislatures authorized numerous public lotteries for a variety of purposes. *See Dalton v. Pataki,* 11 A.D.3d 62, 77 (3d Dep't 2004), *mod.*, 5 N.Y.3d 243 (2005); *People ex rel. Ellison v. Lavin*, 93 A.D. 292, 300-01 (1st Dep't), *rev'd on other grounds*, 179 N.Y. 164 (1904). The practice of using lotteries to raise public revenue fell into disfavor in the wake of corruption and scandal. 1984 Ops Atty. Gen. No. 84-F1 at 13, 1984 N.Y. AG LEXIS 94. In 1821, the Constitution was amended to prohibit lotteries not already authorized by law. 1821 N.Y. Const., art. VII, § 11. A similar provision restricting lotteries was included in the Constitution adopted in 1846. *See* 1846 N.Y. Const., art. I, § 10.

The first constitutional prohibition of gambling apart from lotteries in this State appeared in the 1894 Constitution, which provided: "Nor

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; and the Legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section." 1894 N.Y. Const., art. I, § 9. A substantially identical provision was included when the current Constitution was approved in 1938.

Since 1938, art. I, § 9 has been amended six times, in each case to expand permissible gambling:

- a 1939 amendment permitted pari-mutuel betting on horse races;
- a 1957 amendment authorized localities to permit religious, charitable, and nonprofit organizations to conduct bingo or lotto games;
- a 1966 amendment permitted the State to conduct a lottery, with the net proceeds to be used to support education;
- in 1975, section 9(2) was amended to allow localities to authorize certain "games of chance" – such as bingo, lotto or other types of games where a winner is determined on the basis of a winning number, color, or symbol;
- a 1984 amendment provided that the previously mandatory $250 limit on single prizes and $1,000 limit on a series of prizes in games permitted by the 1957 and 1975 amendments could be varied by law; and
- a 2013 amendment allowed casinos to be operated at no more than seven locations throughout the state.

See Robert Allan Carter, NEW YORK STATE CONSTITUTION: SOURCES OF LEGISLATIVE INTENT at 7-9 (2d ed. 2001); *see also Dalton v. Pataki*, 11 A.D.3d at 77-79.

The current constitutional provision states, in full:

> [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, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and 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.

N.Y. Const., art. I, § 9(1).

B. Laws Implementing the Gambling Prohibition

Although the Constitution did not define gambling, the Legislature almost immediately enacted penal statutes prohibiting gambling. In the 1895 legislative session immediately following the 1894 constitutional amendment (which was the first amendment that addressed gambling beyond lotteries), the Legislature amended section 351 of the Penal Code

to make pool-selling[1] and bookmaking a felony. *See* L. 1895, ch. 572, § 1 (reproduced at R.450-451); 1984 Ops Atty. Gen. No. 84-F1 at 14. Specifically, the Penal Code criminalized recording or registering bets or wagers (*i.e.*, bookmaking), as well as selling pools "upon the results of any trial or contest of skill, speed or power of endurance, of man or beast," or upon any "unknown or contingent event whatsoever." L. 1895, ch. 572, § 1; former Penal Code § 351. This prohibition was long understood to prohibit betting on sporting events. *See* 1984 Ops Atty. Gen. No. 84-F1 at 14; *see also People v. Traymore*, 241 A.D.2d 226, 231 (1st Dep't 1998); *People v. Conigliaro*, 290 A.D.2d 87, 88 (2d Dep't 2002).

In 1910, the penal prohibitions against bookmaking and pool-selling were re-codified in section 986 of the Penal Law. *See* L. 1910, ch. 488, § 1. The Penal Law at that time was further amended to make unlawful "[a]ll wagers, bets or stakes, made to depend upon any race, or

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[1] Pool-selling is not defined in the Constitution or the Penal Law. But pool-selling is commonly understood to mean "the receiving from several persons of wagers on the same event, the total sum of which is to be given the winners, subject ordinarily to a deduction of a commission by the seller of the pool." *United States ex rel. Rafanello v. Hegstrom*, 336 F.2d 364, 365 (2d Cir. 1964), quoting *State v. Fico*, 192 A.2d 697, 699 (Conn. 1960). The term also broadly encompasses the taking of bets or wagers. *Id.*; *see People v. McCue,* 87 A.D. 72, 73 (2d Dep't 1903).

upon any gaming by lot or chance, or upon any lot, chance, causality, or unknown or contingent event whatever." Penal Law § 991 (McKinney 1917).

In 1965, the gambling offenses in the Penal Law underwent comprehensive revisions in a new article 225. *See* L. 1965, ch. 1030. As under former law, a player, contestant, or bettor is not criminally liable, but criminal liability is imposed on anyone who operates, promotes or advances a gambling enterprise or activity. *See* William C. Donnino, Practice Commentaries to Penal Law § 225.00, 39 McKinney's Cons. Laws of N.Y. at 354 (2008).

"Gambling" is now defined in Penal Law § 225.00(2) for purposes of criminal culpability. The statute provides that "a person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a 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."

As under prior law, the current Penal Law definition of gambling specifies two forms of prohibited wagering: one on a "contest of chance," and the other on a "future contingent event" not under the bettor's

"control or influence." The Penal Law defines a "contest of chance" as "any contest, game, gaming scheme or gaming device in which the 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) (emphasis added). The "material degree" language in this definition reflected a substantive change from pre-existing case law on the meaning of "gambling" under the Penal Law. The Court of Appeals in *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 170-71 (1904), had interpreted an earlier version of the Penal Law's gambling prohibition as applying only to a narrower category of games where chance is the "dominating element" that determines the result—rather than the broader category of games where chance might affect the outcome "in a material degree." *See also* William C. Donnino, Practice Commentaries to Penal Law § 225.00, 39 McKinney's Cons. Laws of N.Y. at 356 (2008) (explaining that a game is a contest of chance, even if the skill of the contestant may be a factor, if "the outcome depends in a 'material degree' upon an element of chance").

To explain the Penal Law's separate language that gambling also involves wagering on a "future contingent event," the practice

commentaries use the hypothetical of a "chess game between A and B, with A and B betting against each other and X and Y making a side bet." While A and B are not gambling because they are engaged in a game of skill in which their respective efforts "have a material influence over the outcome," X and Y *are* gambling "because the outcome [of their wager] depends upon a future contingent event that neither has any control or influence over"—namely, the chess match between A and B. William C. Donnino, Practice Commentaries to Penal Law § 225.00, 39 McKinney's Cons. Laws of N.Y. at 355 (2008) (quoting Denzer & McQuillin, Practice Commentaries to Penal Law § 225.00, 39 McKinney's Cons. Laws of N.Y. at 23 (1967)). For similar reasons, while the actual participants in a horse race are engaged in a contest of skill, bettors on horse racing are gambling under the Penal Law. *See* Denzer & McQuillin, Practice Commentaries to Penal Law § 225.00, 39 McKinney's Cons. Laws of N.Y. at 23 (1967).

C. Factual Background

The following facts are drawn from the record before the Legislature when it enacted chapter 237.

1. Traditional Fantasy Sports

Fantasy sports contests—which have existed for more than thirty-five years—are a type of contest in which the competitors mimic the role of general managers of sports teams (R.727-728, 730-731, 739-740). Just as a general manager evaluates extensive information in selecting players for a real-world team, competitors in fantasy sports contests use their sports knowledge and strategy to select fantasy teams of real-world athletes (R.441, 728, 730-731, 739-740, 757). In selecting their fantasy teams, competitors may look to past performance, injury history, performance trends, a team's strength of schedule, forecasts of weather conditions, and other factors (R.441, 728, 757). Contestants assemble teams in a fantasy draft, in which each real-world athlete can be selected only by a single contestant (R.728, 741).

Contestants then compete against each other with their fantasy teams, based on a scoring system that awards points based not on the outcome of any real-world games, but rather on an aggregation of game statistics concerning the performance of individual real-world athletes. The scoring system thus measures how well, compared to others, the contestant selected a fantasy roster of players (R.441, 728, 740). The

object of the fantasy sports contest is to assemble a team of real-world athletes whose performance will accumulate the most points across multiple fantasy scoring categories (R.441, 728, 740). For example, a running back may earn one point for every ten rushing yards and six points for a touchdown (R.728, 740).

2. Daily Fantasy Sports

In season-long contests, contestants must wait several months for the real-world season to end before the winner of the fantasy sports contest is determined (R.729). To provide more immediate results, online interactive fantasy sports providers began offering subscribers shorter-term online fantasy sports games, including daily contests. Daily contests share many of the same features of season-long contests, but are shorter in duration (R.729, 741). In addition, while in the season-long format each real-world athlete can be selected by only a single contestant, in daily and weekly leagues the real-world athletes are assigned a fantasy salary to be paid out of the fantasy contestant's team budget and can be selected by more than one contestant so long as any fantasy team does not exceed its "salary cap" (R.729, 741).

Like real-world general managers, daily fantasy sports contestants must exercise fiscal discipline and spend their fantasy team budget wisely (R.731). How well their team performs hinges on contestants' knowledge and skill at predicting which real-world players will provide the most bang-for-the-buck in scoring (R.730). For instance, the New York Giants' quarterback Eli Manning might "cost" $15,000 of the contestant's fantasy roster budget, whereas a rookie quarterback might cost just $5,000, but the unproven rookie quarterback might yield more points per dollar spent, leaving a greater portion of the contestant's fantasy budget to allocate to other valuable players whose performances help the fantasy roster accumulate contest points (R.772).

Contestants typically pay entry fees to participate in daily fantasy sports contests. The winnings paid to successful online contestants come from the entry fees paid by all contestants (R.441), but cannot depend upon the number of contestants. *See* Racing, Pari-Mutuel Wagering and Breeding Law § 1404(1)(n) (contest prize value may not be determined by the number of contestants or the amount of any entry fees paid by such contestants). The interactive fantasy sports operators derive their revenue by retaining a portion of the entry fees (R.441).

3. The Attorney General sues DraftKings and FanDuel

The daily fantasy sports industry is dominated by two competing services: the New York-based FanDuel and the Boston-based DraftKings. In November 2015, the New York Attorney General sued both companies in Supreme Court, New York County, alleging that their daily fantasy sports competitions constituted illegal gambling under New York law (R.555, 582-584, 591, 616-619). The complaints sought a judgment enjoining the companies from violating New York law, as well as restitution, penalties, and other relief for deceptive advertising and consumer fraud (R.588-589, 622-623).

Supreme Court granted the Attorney General's motion for a preliminary injunction in December 2015 (R.92, 101). DraftKings and FanDuel appealed, and the Appellate Division, First Department stayed the preliminary injunction pending appeal (R.638).

During the pendency of the appeal, the Legislature enacted chapter 237, the statute at issue here. Upon the passage of the statute, the Attorney General discontinued the parts of the actions alleging that the daily fantasy sports offered by DraftKings and FanDuel constituted illegal gambling under New York law (R.640-641, 643-644). The

remaining portions of the actions (including consumer-protection claims) were settled, with DraftKings and FanDuel agreeing to pay penalties and costs and to implement various reforms to their marketing practices (R.453-466, 468-482, 646-650).

D. The Legislature Authorizes Interactive Fantasy Sports Contests

Before enacting chapter 237, the Legislature conducted an extensive inquiry into daily fantasy sports (R.663-664). It heard hours of testimony on the subject from a full range of interested parties (R.719-992), considered expert reports (R.1174-1182, 1184-1205, 1207-1216), researched the operations of fantasy sports and the skill needed to succeed in the contests, and publicly debated the character of the contests to determine whether they constitute gambling within the meaning of the New York Constitution (R.661-700).

Chapter 237 amended the Racing, Pari-Mutuel Wagering and Breeding Law ("Racing Law") by adding a new article 14 (reproduced at R.652-660). The statute defines an "interactive fantasy sports contest" as "a game of skill wherein one or more contestants compete against each other by using their knowledge and understanding of athletic events and athletes to select and manage rosters of simulated players whose

performance directly corresponds with the actual performance of human competitors on sports teams and in sports events." Racing Law § 1401(8). And the statute declares "that interactive fantasy sports do not constitute gambling in New York state as defined in article [225] of the penal law," thereby eliminating criminal penalties for fantasy sports contests. *Id.* § 1400(2).

The Legislature made two findings to support chapter 237. First, the Legislature found that interactive fantasy sports "are not games of chance." Rather, they are contests "in which the fantasy or simulation sports teams are selected based upon the skill and knowledge of the participants and not based on the current membership of an actual team that is a member of an amateur or professional sports organization." Racing Law § 1400(1)(a).

Second, the Legislature found that interactive fantasy sports contests "are not wagers on future contingent events not under the contestants' control or influence." To the contrary, the Legislature found that contestants influence the outcome of fantasy sports contests because they

> have control over which players they choose and the outcome of each contest is not dependent upon the performance of any one player or any one actual team. The outcome of any fantasy sports contest does not correspond to the outcome of any one sporting event. Instead, the outcome depends on how the performances of participants' fantasy roster choices compare to the performance of others' roster choices.

Racing Law § 1400(1)(b).

Chapter 237 provides for consumer safeguards, minimum standards, and the registration, regulation, and taxation of interactive fantasy sports providers. Racing Law §§ 1402-1410. The statute authorizes only those contests registered and conducted under article 14 (Racing Law § 1411) and expressly prohibits unregistered contests (Racing Law § 1412). To become registered, an operator must implement measures that "ensure all winning outcomes reflect the relative knowledge and skill of the authorized players and shall be determined predominantly by accumulated statistical results of the performance of individuals in sports events." Racing Law § 1404(1)(o). Recognizing that the outcomes of fantasy sports contests are heavily influenced by skill, the statute requires operators to identify any highly experienced players and limit the number of entries such players can submit (Racing Law §§1404(1)(g) and (2)) so that less skillful players are on notice of the

quality of their opponents and may choose to engage in contests against less skillful players.

The statute also imposes taxes on registered companies operating in New York. *Id.* § 1407. The proceeds of those taxes, as well as any interest or penalties collected by the Gaming Commission, must be directed to the State Lottery Fund for education. *Id.* § 1409.

E. This Action

Plaintiffs commenced this action against the Governor and the New York State Gaming Commission seeking a judgment declaring that chapter 237 violates article I, § 9 of the New York Constitution. Plaintiffs also sought to enjoin defendants from implementing the statute's regulatory framework (R.44-45, 79).

On the parties' cross-motions for summary judgment, Supreme Court invalidated chapter 237 in part and upheld it in part. First, the court concluded that interactive fantasy sports amounted to "gambling" within the meaning of article I, § 9, and that the Legislature had thus exceeded its constitutional authority by expressly authorizing such contests. The court accepted the Legislature's finding that success in interactive fantasy sports contests is predominantly attributable to "skill

rather than chance" (R.20, 24). It nonetheless found, based on historical usage, that the constitutional prohibition of "pool-selling, bookmaking and any other kind of gambling" encompassed sports gambling (R.22-26), and that interactive fantasy sports are indistinguishable from other forms of sports gambling or other recognized types of gambling (such as poker) (R.9). The court further rejected the argument that the level of skill involved in interactive fantasy sports removed such contests from the constitutional prohibition on gambling because the court found that interactive fantasy sports contests still involved a material element of chance beyond the contestants' control or influence (R.19).

Second, however, Supreme Court upheld chapter 237 to the extent it eliminated pre-existing criminal penalties for interactive fantasy sports. The court recognized that article I, § 9 is not self-executing and instead explicitly grants authority to the Legislature to implement the constitutional prohibition on gambling. The court concluded that the Legislature thus had the discretion to decide whether a particular activity should, or should not, rise to the level of a criminal offense (R.30-31).

ARGUMENT

THE LEGISLATURE'S AUTHORIZATION OF INTERACTIVE FANTASY SPORTS DOES NOT VIOLATE THE CONSTITUTION'S PROHIBITION ON GAMBLING

Chapter 237 enjoys a strong presumption of constitutionality, *Cohen v. State*, 94 N.Y.2d 1, 8 (1999), grounded in part on "the respect due the legislative branch." *Dunlea v. Anderson*, 66 N.Y.2d 265, 267 (1985). To overcome that presumption, plaintiffs bear the heavy burden of establishing the statute's unconstitutionality "beyond a reasonable doubt." *Matter of E.S. v. P.D.*, 8 N.Y.3d 150, 158 (2007) (internal quotation and citation omitted). Because plaintiffs contend that chapter 237 is unconstitutional on its face rather than as applied, they face the additional burden of having to prove "that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment." *Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003) (internal quotes omitted). Supreme Court erred in concluding that plaintiffs here satisfied these demanding standards in challenging chapter 237.

A. The Constitution empowers the Legislature to make rational judgments about what constitutes "gambling," and the Legislature's determination is entitled to considerable deference.

Article I, § 9 of the New York Constitution provides, in pertinent part, that "no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling," except for certain specified activities, "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." The Constitution does not define "gambling." Nor is the constitutional prohibition on gambling self-executing, as Supreme Court correctly recognized (R.20-21). Rather, Article I § 9 "expressly delegates to the legislature the authority [to implement the provision], and requires it to enact such laws as it shall deem appropriate to carry it into execution." *People ex rel. Sturgis v. Fallon*, 152 N.Y. 1, 11 (1897).

As the Court of Appeals has long recognized, when, as here, the Constitution explicitly empowers the Legislature to implement a broad and otherwise undefined constitutional command, courts should defer to the Legislature's rational choices in interpreting that command. For instance, article XVII, § 1 of the Constitution mandates that the State

provide "aid, care, and support of the needy," but entrusts the Legislature with determining the "manner" and the "means" for providing that assistance. Courts have accordingly deferred to the Legislature's judgment as to the "sufficiency of the benefits distributed to each eligible recipient," *Bernstein v. Toia*, 43 N.Y.2d 437, 449 (1977), as well as its reasonable definition of who is deemed "needy." *Matter of Barrie v. Lavine*, 40 N.Y.2d 565, 570 (1976). Similarly, in interpreting the constitutional guarantee of a sound basic education, the Court of Appeals has recognized that "deference to the Legislature's education financing plans" is critical to "avoid intrusion on the primary domain of another branch of government." *Campaign for Fiscal Equity, Inc. v. State of New York*, 8 N.Y.3d 14, 28 (2006). As these examples demonstrate, while New York courts are "the ultimate arbiters of our State Constitution," *id.*, judicial deference is appropriate in order to respect the separation of powers, one of the core tenets of our Constitution—particularly when, as here, the Constitution itself expressly vests the Legislature with the responsibility of carrying out the Constitution's commands.

Deference to the Legislature makes particular sense here. Deciding how to regulate gambling or whether a specific activity should lead to

criminal culpability as "gambling" has historically required factual findings and policy judgments that the Legislature is well-suited to make. Reasonable minds will often differ about the relative balance of skill or chance involved in an activity, or about the degree to which participants can influence the outcome of a contest—the two factual criteria that have historically determined whether an activity constitutes "gambling" for purposes of criminal penalties in New York. *See* William C. Donnino, Practice Commentaries to Penal Law § 225.00, 39 McKinney's Cons. Laws of N.Y. at 355 (2008) (quoting Denzer & McQuillin, Practice Commentaries to Penal Law § 225.00, 39 McKinney's Cons. Laws of N.Y. at 23 (1967)) (while some games are obviously contests of chance and others are obviously contests of skill, "'there is a vast middle ground or gray area . . . that had caused the courts considerable difficulty'"). Even before enacting chapter 237, the Legislature has repeatedly exercised its constitutional prerogative to deem certain activities to be gambling (or not) depending on the specific features of those activities and the Legislature's judgment about where to draw the line between permissible and prohibited activities. *Cf. FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("[R]estraints on

judicial review have added force where the legislature must necessarily engage in a process of line-drawing" (quotation marks omitted)).

For instance, businesses offering insurance collect money from policyholders (as premiums) and offer payment based on the outcome of contingent events not within the policyholder's control—namely, whether a person, home or property will suffer damage. Nevertheless, the Legislature in 1889 specifically exempted from the statutory prohibition on gambling "any insurance made in good faith for the security or indemnity of the party insured." *See* L. 1889, ch. 428, § 1, amending Penal Law former § 343.[2] Likewise, certain investment activities, such as commodities or futures trading, involve speculators' "anticipation of price movements" not within their direct control,[3] yet such investments are not unlawful "gambling" in New York. *Cf.* 53 U.S.C. § 5362(1)(E)(i)-(iv)

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[2] Although the insurance exemption was deleted as part of the 1965 Penal Law revisions, this omission did not make a substantive change but was part of an overall effort to simplify and consolidate the gambling and lotteries articles. *See* Staff Notes of the Commission on Revision of the Penal Law, Proposed New York Penal Law, McKinney's Spec. Pamph. (1964), pp. 381-382.

[3] *See* Commodity Futures Trading Commission, CFTC Glossary: A Guide to the Language of the Futures Industry, available *at* https://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/index.htm

(clarifying that federal gambling prohibitions do not extend to investment activities).[4]

As a final example, in 1995, the Legislature authorized horse race handicapping tournaments, finding that such tournaments "shall be considered a contest of skill and shall not be considered gambling." L. 1995, ch. 2, § 110, now codified at Racing Law § 906(3) (McKinney's 2019 Supp.). Like fantasy sports contestants, participants in handicapping tournaments match their predictive and evaluative skills against each other for prizes derived from their entry fees and awarded

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[4] In 1889, the Legislature amended former Penal Code § 343 to make it a misdemeanor to operate a place for making wagers or bets made to depend on, among other things, "the future price of stocks, bonds, securities, commodities or property of any description whatever." L. 1889, ch. 428, § 1. This provision, however, did not criminalize the buying or selling of stocks or stock options. *See People v. Todd*, 4 N.Y.S. 25, 51 Hun. 446 (Sup. Ct. Gen. Term, 1st Dep't 1889). While it prohibited the keeping of a room for the making of bets or wagers, it was "not intended to disturb the fair and honorable business of the various respectable mercantile exchanges of New York city." Gov. Approval Mem. for Assembly bill No. 943, reproduced in PUBLIC PAPERS OF DAVID B. HILL, GOVERNOR, 1889 (Argus Co. 1890) at 199. This provision, along with the insurance exemption, was deleted as part of the 1965 Penal Law revisions.

by comparing the relative predictive skills of the contestants, not by the absolute outcomes of the races. Racing Law § 906(2)(a).[5]

The enactment of chapter 237 is thus simply the most recent exercise of the Legislature's constitutionally delegated authority to determine how to implement article I, § 9's prohibition on gambling—and more specifically, to decide whether to classify a particular activity as "gambling" at all and whether the activity should be prohibited, allowed, or regulated. In enacting chapter 237, the Legislature brought to bear the full panoply of its unique powers as a political branch to resolve the difficult factual and policy issues raised when considering activity that involves both skill and chance.

On the factual side, the Legislature conducted an extensive inquiry into the nature of interactive fantasy sports contests—it held hearings, received testimony from interested parties on both sides of the issue, and considered a broad range of evidence on the degree of skill involved in

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[5] While the Racing Law does not define handicapping tournaments, *see* Racing Law § 906(1), an example of a handicapping tournament would be a contest inviting contestants to make hypothetical win, place, or show wagers on races within a particular time frame among races at a certain set of tracks, with the winner of the contest being the contestant who earns the greatest hypothetical payoffs, based on the pari-mutuel payouts that actual bettors won for such races.

interactive fantasy sports and the degree of influence that participants have on the outcome of the contests. The legislative history here shows that these questions were close ones: for example, in debating the bill, some legislators analogized the skill involved in fantasy sports to lawful activities such as day trading in securities (R.677-678, 840-841), while others thought that the proper analogy was to sports betting (R.687, 690). But upon consideration of all viewpoints on these questions, the Legislature ultimately made detailed findings that interactive fantasy sports contests do not constitute "gambling" because they do not involve staking something of value on the outcome of either a contest of chance or a future contingent event outside of the player's control or influence. Racing Law § 1400(1)(a)(b).

The Legislature further made important policy judgments in deciding that interactive fantasy sports contests were not similar to the types of activities that had traditionally been considered "gambling." For example, the Legislature took note of the important fact that the major professional sports organizations—the National Football League, Major League Baseball, the National Basketball Association, and the National Hockey League—support fantasy sports contests notwithstanding their

vigorous opposition to sports betting (R.734, 1012, 1019, 1021, 1024, 1167). And the Legislature specifically found that interactive fantasy sports contests had become "a major form of entertainment for many consumers" even before the enactment of chapter 237. Racing Law § 1400(3).

The Legislature's factual examination and policy judgments are rational and merit substantial deference here. *See East N. Y. Sav. Bank v. Hahn*, 293 N.Y. 622, 627 (1944) ("legislative findings are entitled to great weight"). As courts have long recognized, legislative bodies are better equipped than courts at fact-finding when addressing social and economic issues. While courts are generally limited to the evidence presented by the litigants, the Legislature may draw from a wide range of sources and shared understandings to arrive at appropriate legislation. *See I.L.F.Y. Co. v. City Rent & Rehabilitation Admin.,* 11 N.Y.2d 480, 489 (1962); *see also Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196, 199 (1997). And courts also regularly defer to legislative policy judgments over complex social issues. *See People v. Francis,* 30 N.Y.3d 737, 751 (2018); *Saratoga County Chamber of Commerce v. Pataki,* 100 N.Y.2d 801, 823 (2003); *Matter of N.Y. State Inspection, Sec. & Law*

Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v. Cuomo, 64 N.Y.2d 233, 239-240 (1984).

To be sure, the Legislature's factual findings are not immune from judicial scrutiny. If, for example, the Legislature were to declare that roulette was not a game of chance, a court could properly reject that finding as irrational based on the nature of the game and the long history of its treatment as a classic form of gambling. But interactive fantasy sports have a relatively modern origin, and unlike with roulette reasonable minds may differ about whether interactive fantasy sports should be considered gambling. Indeed, those differences of opinion were fully ventilated before and considered by the Legislature here. Under the proper standard of review for evaluating the Legislature's resolution of those differences of opinion, the relevant question is whether the Legislature's action is unconstitutional beyond a reasonable doubt. Because the Legislature's findings in support of chapter 237 are rational, this Court should uphold them, even if it might have reached a contrary conclusion upon de novo review. *See Lincoln Bldg. Assocs. v. Barr*, 1 N.Y.2d 413, 415 (1956) (quoting *Old Dearborn Co. v. Seagram Corp.*, 299 U.S. 183, 196 (1936) ("Where the question of what the facts establish is a

fairly-debatable one, we accept and carry into effect the opinion of the legislature")).[6]

B. 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). It reasoned that interactive fantasy sports are contests "in which the fantasy or simulation sports teams are selected based upon the skill and knowledge of the participants and not based on the current membership of an actual team that is a member of an amateur or professional sports organization." Racing Law § 1400(1)(a).

Supreme Court accepted the Legislature's finding that success at interactive fantasy sports contests is predominantly a matter of skill (R.20). But it erroneously went on to hold that interactive fantasy sports

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[6] Although courts have refused to defer to legislative judgments about constitutional interpretation in certain narrow circumstances, those circumstances are not present here. Chapter 237 does not impinge on fundamental rights, rest on outdated stereotypes, or reflect hostility toward a protected class. *See, e.g., Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (courts must conduct an independent review of the factual record to determine whether campaign contribution limits violate the First Amendment); *Califano v. Westcott*, 443 U.S. 76, 88 (1979) (looking skeptically at congressional fact-finding supporting sex-based stereotypes and classifications).

contests nonetheless constitute "gambling" under article I, § 9 because a "material degree" of chance still affects the outcome of such contests (R.18).

In reaching this conclusion, Supreme Court applied the wrong constitutional standard. The "material degree" standard is part of the *statutory* definition of gambling that the Legislature adopted in 1965 and codified in Penal Law § 225.00(1). *See* William C. Donnino, Practice Commentaries to Penal Law § 225.00, 39 McKinney's Cons. Laws of N.Y. at 356 (2008). But that statutory definition, when enacted, was intended to broaden the then-extant Penal Law definition of "gambling" that had been the prevailing standard since the Court of Appeals' decision in *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 170-71 (1904), which was issued shortly after the 1894 amendment to the Constitution that first added a gambling prohibition.

There is a clear difference between the two standards. Under the dominating-element standard, a game is a contest of chance only if chance predominates by accounting for "more than fifty percent" of the outcome of the game, with the participants' skill playing a lesser role. *See United States v. Dicristina*, 886 F. Supp. 2d 164, 231 (E.D.N.Y. 2012),

rev'd on other grounds, 726 F.3d 92 (2d Cir. 2013). By contrast, under the material-degree test, a game would be a contest of chance if its outcome depends "in a material degree upon an element of chance"—a standard that could be satisfied if chance accounted for less than fifty percent of the outcome—"*notwithstanding that skill* of the contestants may also be a factor therein." Penal Law § 225.00(1)(emphasis added); *see, e.g.*, *Plato's Cave Corp. v. State Liquor Auth.*, 115 A.D.2d 426, 428 (1st Dep't 1985); *People v. Jun Feng*, 34 Misc. 3d 1205(A), 2012 WL28563, **2-5 (Kings Co. Crim. Ct. 2012).

From *Ellison* in 1904 to the enactment of the 1965 Penal Law amendments, New York courts consistently used the dominating-element test rather than the material-degree test to determine whether particular games constituted unlawful games of chance. *See, e.g., International Mutoscope Reel Co. v. Valentine*, 247 A.D. 130, 133 (1st Dep't 1936) (concluding that machines known as the "crane" were slot machines because "the element of chance not only exists, but . . . predominates"); *Shapiro v. Moss*, 245 A.D. 835, 835 (2d Dep't 1935) (applying *Ellison*'s dominating element test in determining that a "pin or mechanical bagatelle game, known as 'The Sportsman,'" was designed primarily for

gambling purposes); *Matter of Cullinan*, 114 A.D. 654, 655-56 (4th Dep't 1906) (slot machine known as Yale Wonder Clock was a gambling device under the dominating-element test). Indeed, as a legal scholar has observed, the dominating-element test announced in *Ellison* became the established test throughout the country for determining whether a game is a contest of chance or skill. *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).

The long-standing and widespread adoption of the dominating-element test is thus inconsistent with Supreme Court's conclusion that the constitutional prohibition—in place since 1894—embodies the broader material-degree test that the Legislature only adopted by statute some seventy years later. While the Legislature was free to modify the statutory definition to prohibit conduct broader than what the Constitution prohibits, it did not thereby set the constitutional standard, which remains undefined in the Constitution itself. Because Supreme Court accepted (R.20) the Legislature's finding that success at interactive fantasy sports is predominantly a matter of skill, it should have

sustained the Legislature's determination that such contests are not contests of chance prohibited by article I, § 9.

Even if the material-degree test were constitutionally required, the evidence before the Legislature would be sufficient to permit it to find that interactive fantasy sports contests are not games of chance under this standard. The Legislature heard a wealth of expert opinion, witness testimony, and statistical studies supporting the view that skill was such a dominant element in success at interactive fantasy sports contests that the role of chance was "overwhelmingly immaterial" (R.1215; *see also* R.1168, 1184-1205, 761, 873). Unlike poker and similar card games, where there is a random distribution of cards that introduces a material element of chance, there is no "random distribution element" in fantasy sports contests, according to the testimony (R.873-874, 1005-1006). Rather, these contests are "played by considering a number of known, interlocking, and often shifting factors that, through strategic risk-taking and decision-making, help predict an enormously diverse set of future events" (R.1007). The Legislature was entitled to credit this evidence that chance does not have even a material role in the outcome of interactive fantasy sports contests.

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

Equally rational is the Legislature's finding that interactive fantasy sports contests "are not wagers on future contingent events not under the contestants' control or influence." Racing Law § 1400(1)(b). Rather, the Legislature found that the participants in such contests have meaningful influence over the outcome based on their strategic decisions.

In rejecting the Legislature's finding on this issue, Supreme Court likened interactive fantasy sports to sports betting, a well-recognized form of gambling (R.29-30). Supreme Court reasoned 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 (R.29-30). But the Legislature specifically debated this feature of interactive fantasy sports contests and concluded rationally that the proper focus is not on participants' influence over real-world sporting events (which is zero), but rather on their influence on the fantasy sports contests themselves (R.672, 676, 762-763). In those contests, the participants *do* meaningfully influence the outcome because they are able to maximize their chances of winning by making skillful

decisions in assembling their fantasy teams and in predicting, based on data, the aggregate future performance of their fantasy teams. The Legislature could rationally find that the choices made by participants are analogous to the choices made by general managers of sports teams, who make similar experience- and data-based projections about how the real-world players they draft or sign will perform in future sporting events (R.672-673, 676-677, 1208, 1215). Just as the skill of general managers in picking a roster of players influences significantly—though does not completely determine—the outcome of future sporting events in which their teams participate, the skill of fantasy sports contestants influences the outcome of the contests in which they participate (R.672, 676-677, 1208, 1215).

Indeed, the same evidence that supports the Legislature's finding that fantasy sports contests are predominantly contests of skill (a finding that Supreme Court accepted) supports the Legislature's related finding that contestants meaningfully influence the outcome. The evidence before the Legislature showed that small percentages of participants in fantasy sports contests win the overwhelming majority of the prizes (R.678, 759-763, 873, 1168). For instance, a skill simulation analysis of

baseball contests showed that "skilled fantasy participants will defeat unskilled fantasy participants more often than not in a daily fantasy baseball head-to-head matchup," and fantasy baseball participants will routinely defeat computer-generated rosters (R.1178). This evidence supports the inference that skill dictates the outcome of the relevant contest—the fantasy sports contest in which the contestants directly participate (R.763, 1168).

The Legislature also could rationally find that participants in the fantasy sports contests are active players in a competition of their own, rather than bettors on a sporting event. Companies hosting interactive fantasy sports contests do not offer contests based on any single sporting event (R.766). Nor do they permit participants to construct a lineup that substantially coincides with an actual, real-world team (R. 766). As the Third Circuit has recognized, there is a "legal difference between paying fees to participate in fantasy leagues and single-game wagering" (i.e., sports betting). *NCAA v. Gov. of New Jersey*, 730 F.3d 208, 223 n. 4 (3d Cir. 2013). Unlike sports gambling, in which the occurrence of a future event entirely determines the wager's outcome, in interactive fantasy sports, no particular event by itself determines a contest winner. Rather,

it is the ability of a contestant to skillfully assemble a roster of successful athletes—with those athletes' success determined by an aggregation of future events—that influences the outcome of these contests.

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

During the public hearings, proponents of chapter 237 urged the Legislature to conclude that interactive fantasy sports contests were not gambling, but instead skill-based contests for which contestants pay entry fees to win prizes—a well-recognized lawful activity (R.747-748). Based on the extensive record before it, the Legislature could rationally have adopted this view.

The Court of Appeals, and courts nationwide, have long recognized 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. In *People ex rel. Lawrence v. Fallon*, 152 N.Y. 12 (1897), a racing association sponsored a horse race for which the owners of the competing horses paid entrance fees to the association. *Id.* at 16. The association awarded prizes to the winning horse owner, with the prizes being a definite, guaranteed sum, payable out of the association's general fund.

Id. at 16-17. The Court of Appeals rejected the prosecutor's contention that these contests violated the constitutional prohibition on gambling. Specifically, it rejected the contention that the entrance fees paid by the horse owners were illegal wagers, concluding that they were instead merely a price that allowed a horse owner to personally participate in a contest. And the Court highlighted the absurd consequences that would follow if entrance fees for skill-based contests were to be deemed unlawful gambling wagers:

> [I]t would seem to follow that the farmer, the mechanic or the stockbreeder who attends his town, county or state fair, and exhibits the products of his farm, his shop or his stable, in competition with his neighbors or others for purses or premiums offered by the association, would become a participant in a crime, and the officers offering such premium would become guilty of gambling under the provisions of the Constitution relating to that subject.

152 N.Y. at 19.

Following *Fallon*, other states' courts have repeatedly held that contests for which the contestants pay entrance fees and for which prizes are awarded are not illegal gambling activities, even if some degree of chance determines which contestant prevails. *See State v. Am. Holiday Ass'n*, 727 P.2d 807, 808-11 (Ariz. 1986) (company conducting word-puzzle "skill bingo" games was not engaging in illegal gambling

operations); *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85 (Nev. 1961) (hole-in-one contest for which contestants paid entrance fee and stood to receive a $5000 prize was not illegal gambling); *Cobaugh v. Klick-Lewis, Inc*, 561 A.2d 1248 (Pa. Super. Ct. 1989) (enforcing contract to award automobile to winner of hole-in-one contest); *Faircloth v. Central Florida Fair, Inc.*, 202 So. 2d 608, 609 (Fla. Dist. Ct. App. 1967) (statute prohibiting betting on games of skill was intended to proscribe wagering on the results of games as opposed to playing games for prizes); *State v. Prevo*, 361 P.2d 1044, 1049 (Haw. 1961) (statute prohibiting "any other game" in which money may be won applies only to gambling games and not those in which contestants pay entry fees to compete against each other for prizes). Rather than constituting gambling, "[p]aying an entrance fee in order to participate in a game of skill, or mixed skill and chance, in the hope of winning prize money guaranteed by some sponsor to successful participants, is a traditional part of American social life." *State v. Am. Holiday Ass'n*, 727 P.2d at 812.

E. The Legislature's determination that interactive fantasy sports contests do not constitute gambling is consistent with determinations made by other jurisdictions.

In evaluating the constitutionality of a New York statute, the Court of Appeals has considered, as persuasive authority, whether sister States have enacted similar laws and whether those laws have survived constitutional challenges. *See Landes v. Landes*, 1 N.Y.2d 358, 362 (1956); *Brous v. Smith*, 304 N.Y. 164, 169 (1952). This factor weighs in favor of upholding chapter 237's legality. In recent years, eighteen other states have enacted similar laws that either have expressly found that interactive fantasy sports contests do not constitute gambling[7] or have legalized these contests, subject to regulation.[8]

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[7] Interactive fantasy sports contests have been determined not to be gambling by the Legislatures of Arkansas (A.C.A. § 23-116-103), Delaware (29 Del. C. § 4871), Indiana (Ind. Code Ann. § 4-33-24-1), Kansas (K.S.A. § 21-6403(a)(9)), Maryland (Md. Crim. Law Code § 12-114), Massachusetts (2016 Mass. Acts Ch. 219 § 135), Missouri (§ 313.920 R.S.Mo.), New Jersey (N.J. Stat. § 5:20-2), Tennessee (Tenn. Code Ann. § 39-17-501) and Virginia (Va. Code Ann. § 59.1-569).

[8] The following states have legalized regulated interactive fantasy sports contests, without specifically declaring that they do not constitute gambling: Colorado (C.R.S. § 12-15.5-101 et. seq.), Connecticut (Conn. P.A. 17-2 § 649), Maine (2017 Me. SP 449), Mississippi (Miss. Code Ann. § 97-33-301 et. seq.), New Hampshire (2017 NH HB 580), Ohio (O.R.C. Ann. § 3774.01 et seq.), Pennsylvania (4 Pa. C.S. § 301 et seq.), and Vermont (2017 Vt. S. 136).

Three of these states—New Jersey, Delaware, and Maryland—are of particular relevance here because, like New York, they have constitutions that generally prohibit gambling. *See* N.J. Const., Art. IV, § VII, ¶ 2; Del. Const., Art. II, § 17; Md. Const. Art. XIX, § 1(d). Of these three, two have penal laws that define gambling essentially the same way as New York does. *See* N.J. Stat. § 2C: 37-1(b); Maryland Code Ann., Criminal Law § 12-102(a)(1)-(4). These States' authorization of interactive fantasy sports contests thus provides especially strong persuasive evidence in support of the Legislature's parallel determination here.[9]

While none of these other jurisdictions' decisions dictate this Court's interpretation of the New York Constitution, this broad trend toward authorizing interactive fantasy sports buttresses the reasonableness of the Legislature's judgment here. For all of these reasons, chapter 237's authorization of interactive fantasy sports

[9] While Congress has not directly addressed whether interactive fantasy sports is gambling, it decided to exclude such contests from a federal statute, the Unlawful Internet Gambling Enforcement Act of 2006, that prohibits certain financial transactions associated with gambling. *See* 31 U.S.C. § 5362(1)(E)(ix).

contests is constitutional, and Supreme Court erred in concluding otherwise.

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.

Dated: March 8, 2019
Albany, New York

Respectfully submitted,

LETITIA JAMES
Attorney General of the State of New York
Attorney for Appellants-Respondents

By: 
VICTOR PALADINO
Assistant Solicitor General

Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2012

STEVEN C. WU
Deputy Solicitor General
VICTOR PALADINO
Assistant Solicitor General of Counsel

PRINTING SPECIFICATIONS STATEMENT

This brief was prepared on a word processor. A proportionally spaced, serif typeface was used, as follows:

Typeface: Century Schoolbook
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 8,400.