To be argued by:
Cornelius D. Murray, Esq.
Time requested: 20 minutes

STATE OF NEW YORK – SUPREME COURT APPELLATE DIVISION – THIRD DEPARTMENT

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

Plaintiffs-Respondents-Cross-Appellants,

-against-

No. 528026

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

Defendants-Appellants-Respondents.

OPENING BRIEF FOR PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS

O'CONNELL AND ARONOWITZ
Attorneys for Plaintiffs-Respondents-Cross-Appellants
54 State Street
Albany NY 12207-2501
(518) 462-5601
cmurray@oalaw.com

CORNELIUS D. MURRAY, ESQ.
COURTNEY L. ALPERT, ESQ.
Of Counsel

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PRELIMINARY STATEMENT

> "What's in a name? That which we call a rose by any other name would smell as sweet." William Shakespeare, *Romeo and Juliet*, Act II, Scene 2, lines 1-2.

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean – neither more nor less." Lewis Carroll, *Through The Looking Glass*, Ch. 6, p. 205 (Charles L. Dodgson) (1934) (first published in 1871).

Plaintiffs-Respondents-Cross-Appellants (hereinafter "Plaintiffs") are citizens of New York State who either suffer from gambling disorders or are victims of the financial and emotional havoc caused by family members with such disorders. They have brought this action to declare Chapter 237 of the Laws of 2016 of the State of New York unconstitutional and to enjoin permanently the State and its agencies and officials from implementing Chapter 237. The issue in this case is whether the New York State Legislature's enactment of Chapter 237, which purports to authorize, regulate and tax

Interactive Fantasy Sports ("IFS"),[1] violates New York State Constitution's long-standing prohibition against gambling enshrined in Article I, § 9 of the Bill of Rights since 1894 for the expressed purpose of protecting people like the Plaintiffs from the evils of gambling. *See* Charles Z. Lincoln, *Constitutional History of New York*, Vol. III at 46-49 (1906). The answer to that question depends on whether we live in a Shakespearean world inhabited by Romeo and Juliet where substance trumps form, and a rose is, in fact, a rose; or whether we live in a parallel universe of alternative facts, like the one inhabited by Humpty Dumpty – and now by the New York State Legislature – where "gambling" is not "gambling" simply because the Legislature has decided to call it something else.

IFS involves contestants betting money on the future performance in real-life athletic events by real-life athletes on a so-

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[1] The Legislature uses the term "Interactive Fantasy Sports" (IFS); Daily Fantasy Sports is a subset of IFS and, as the name implies, refers to games of shorter duration. While traditional IFS games might, for example, last for an entire baseball season, DFS games typically apply only to games played on a certain day. In the case of football, a DFS contest might last over a weekend. *See* Defendants-Appellants-Respondents' Brief at 12. Plaintiffs contend both are illegal and for the same reason. For purposes of this Brief, unless otherwise indicated, Plaintiffs will use the terms interchangeably.

called "fantasy team" roster chosen by IFS contestants and over whom the contestants have no control. The winner is determined by which contestant's fantasy team performs best in actual future sporting events.

Supreme Court, Albany County (Connolly, J.) found that while the rosters may be "fantasy" teams, the sporting events are real, the players are real, their performances are real, and the IFS contestants who have chosen them on their so-called fantasy teams have absolutely no control over how those athletes will perform. Yet how those athletes perform are future contingent events that materially affect the outcome of any IFS contests. Simply put, IFS involves wagering on future contingent events – namely, the performance of athletes, a classic form of sports betting.

Notwithstanding, therefore, the strong presumption of constitutionality applicable to any statute, Supreme Court concluded "beyond a reasonable doubt" that IFS was, in fact, gambling. Ironically, however, at the very same time the Court said that the Legislature could choose to remove IFS from the definition of

"gambling" under the Penal Law while not substituting any other provision – civil or criminal – to prevent it. The result is that major DFS operators like FanDuel and DraftKings continue to operate freely and openly in this State, notwithstanding the requirement in Article I, § 9 that no such gambling shall hereafter be authorized or allowed in this State.

Defendants-Appellants-Respondents (hereinafter "the State" or "Defendants") are the Governor and the New York State Gaming Commission, the agency responsible under Chapter 237 for licensing and regulating companies like FanDuel and DraftKings that offer IFS contests.

The State has appealed from Supreme Court's judgment that Chapter 237 is unconstitutional to the extent that IFS is "gambling," and Plaintiffs have cross-appealed from so much of the Court's ruling which held that the Legislature could leave an enforcement vacuum. This Brief will address why the Court correctly ruled that IFS is, in fact, "gambling" prohibited by Article I, § 9, but also why it erred in leaving an enforcement vacuum which enables IFS to continue

unabated despite the mandate of Article I, § 9 that the Legislature pass laws to prevent offenses against it.

QUESTIONS PRESENTED

1. Does Chapter 237 of the Laws of 2016 purporting to authorize, regulate and tax interactive fantasy sports violate the prohibitions against gambling as set forth in Article I, § 9 of the Bill of Rights of the New York State Constitution?

Supreme Court answered this question "yes."

2. Did the Legislature violate the mandate of Article I, § 9 which directs the Legislature to pass laws to prevent gambling when it chose to exclude such activity from the definition of "gambling" in the Penal Law without substituting any other provision, civil or criminal, to prevent its occurrence?

Supreme Court answered this question "no."

STATEMENT OF THE CASE

A. The Evolution of the Constitutional Prohibition Against Gambling

New York State's constitutional prohibition against gambling has a long history. It began with the prohibition against "lotteries" adopted in 1821: "No lotteries shall hereafter be authorized or any sale of lottery tickets allowed within the State." *See* Charles Z. Lincoln, *Constitutional History of New York*, Vol. III, p. 46. In 1894, the prohibition was expanded to read as follows: "nor shall any lottery or the sale of lottery tickets, pool-selling, bookmaking *or any other kind of gambling* ... hereafter be authorized or allowed within the State" (emphasis supplied). In the very next legislative session following the 1894 Amendment, the Penal Code was amended to make pool-selling and bookmaking a felony (L. 1895, ch. 572, § 1) [R. 450-451].[2] That statute specified that the prohibition encompassed any contest involving gambling on "the skill, speed, or power of

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[2] References to numbers in brackets preceded by "R." refer to the numbered pages of the Record on Appeal.

endurance of man or beast" involving "any unknown or contingent event whatsoever" [R. 450]. Nearly a century later, in 1984, the Office of the Attorney General stated:

> From the history it is indisputable that since at least 1877 when the Penal Code specifically defined as criminal wagering on the outcome of "contests of speed, *skill* or power of endurance of man or beast", New York law has viewed lotteries and betting on sports events as two distinct forms of gambling. *This distinct statutory ban on sports wagering was elevated to the constitutional level in 1894 and has remained by explicit language in the Constitution until today.* 1984 N.Y. Op. Atty. Genl. 1 (1984 N.Y. AG LEXIS 94 *4, 1984 WL 186643, *4 (emphasis supplied).

In that same 1984 opinion, the Attorney General concluded: "If the state government is to be authorized to run a program in which it accepts wagers on the outcome of professional athletic contests, either single contests or multi-contest parlays, such authorization can only be acquired through an amendment to the Constitution." *Id.* at *13.

Since the 1894 adoption of the amendment prohibiting gambling, four major exemptions have been carved out of the general

prohibition. None applies here. The first, in 1938, allowed pari-mutuel wagering on horse-racing; the second, in 1957, authorized the conduct of games of chance such as bingo and lottery, on a local option basis for prizes which were limited in amount and games could only be operated by bona fide religious or non-profit organizations. The third exception came in 1966 to allow lotteries operated by the State in which the proceeds are to be used exclusively for education. In 2013, the People approved an additional amendment to allow casinos to be operated at no more than seven locations throughout the State. The Constitution has never been amended to carve out an exception for sports betting.

B. The Attorney General's Enforcement Action Against FanDuel and DraftKings

In October 2015, New York's Attorney General commenced an investigation of FanDuel, Inc. and DraftKings, Inc., the two major operators of daily fantasy sports in New York State, who had begun to conduct IFS gambling on internet platforms, inviting contestants to play for prizes (usually substantial monetary awards) on the condition that they paid "entry fees" which provided the funds to pay

the awards after FanDuel and DraftKings had first extracted a "vig," gambling parlance for a cut of the betting pool [R. 170, 173]. This is a classic example of bookmaking.[3] By virtually identical letters dated November 10, 2015 [R. 104-107, 109-112], the Attorney General informed both FanDuel and DraftKings that "[t]he illegality of DFS is clear from any reasonable interpretation of our laws, beginning with the New York State Constitution" [R. 105, 110].

The Attorney General followed up by filing separate but virtually identical complaints against both entities in Supreme Court, New York County [R. 555-589, 591-623]. The complaints quoted the Chief Executive Officer of one DFS operator who described DFS like a "sports betting parlor on steroids" [R. 556, 592].

The DraftKings complaint went on to describe how DFS operated [R. 562-567]. It quoted its CEO, Jason Robbins, who stated that DraftKings makes money in a way that "is almost identical to a casino" [R. 575]. In the cease and desist letters, the Attorney General

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[3] Penal Law § 225.00(9) defines "bookmaking" as "accepting bets from members of the public as a business ... upon the outcome of future contingent events."

also stated that DraftKings (and FanDuel) customers are clearly placing bets on events outside of their control or influence, specifically the future real-life performance of professional athletes in real athletic contests [R. 104, 109]. Further, each DraftKings [FanDuel] "wager represents a wager on a 'contest of chance' where winning or losing depends on numerous elements of chance to a 'material degree'" [R. 104, 109].

The Attorney General also wrote to the New York *Daily News* on November 19, 2015, stating that:

> (1) "Daily Fantasy Sports is much closer to online poker than it is to traditional fantasy sports";
>
> (2) "FanDuel and DraftKings take a cut of every bet. That is what bookies do";
>
> (3) "these companies are based on business models that are identical to other forms of gambling";
>
> (4) "the argument of FanDuel and DraftKings 'that they run games of skill' ... is nonsense"; and
>
> (5) that "[g]ames of chance often involve some

> amount of skill; this does not make them legal."

[R. 139-141].

After proceeding in court against FanDuel and DraftKings, the Attorney General's office filed a Memorandum of Law in support of its Motion for a Preliminary Injunction to enjoin them from accepting entry fees, wagers or bets from any New York consumers regarding any competition, or gaming contest run on their respective websites [R. 169-203].

In that Memorandum of Law, the Attorney General stated:

- "DFS is nothing more than a rebranding of sports betting. It is plainly illegal" [R. 170].
- "DFS operators themselves profit from every bet, taking a 'rake' or a 'vig' from all wagering on their [web]sites." *Id.*
- "[A] DFS wager depends on a 'future contingent event' wholly outside the control or influence of any bettor[.]" *Id.*
- "[G]ambling often mixes elements of chance and skill ... In DFS, chance plays a significant role. A player injury, a slump, a rained out game, even a ball taking a bad hop, can each dictate whether a bet wins or loses" [R. 171].
- "[T]he key factor establishing a game of skill is not the presence of skill, but the absence of a material element of chance. Here, chance plays just as much of a role (if not

more) than it does in games like poker and blackjack. A few good players in a poker tournament may rise to the top based on their skill; but the game is still gambling. So is DFS." *Id.*

- "DFS contests are causing the precise harm that New York's gambling laws were designed to prevent. Problem gamblers are increasingly being seen at Gamblers Anonymous meetings and at counselors' offices addicted to DFS" [R. 172].

- "Experts in gambling addiction and other compulsive behaviors have identified DFS as a serious and growing threat to people at risk for, or already struggling with, gambling-related illnesses" [R. 180].

- "Because DFS is not an authorized form of gambling [under Article I, § 9], FanDuel and DraftKings are in direct violation of the state constitution" [R. 188].

- "[T]he main purported 'skill' in DFS is no different than it is for poker, blackjack or other forms of sports betting: the ability to calculate probabilities and try to handicap the odds of future events" [R. 193].

These arguments resonated with the Supreme Court Justice assigned to decide the case. By decision and order dated December 11, 2015, Justice Manuel J. Mendez granted the Attorney General's motion for a preliminary injunction [R. 92-102]. Justice Mendez held, *inter alia*, that (1) the Attorney General had established the likelihood of success on the merits, and (2) that the balance of

equities favored the Attorney General due to the interest in protecting the public, particularly those with gambling addictions [R. 100].

C. The Legislature Enacts Chapter 237 Purporting to Authorize Interactive Fantasy Sports

On June 14, 2016, six months after the decision by Justice Mendez, the bill that ultimately became Chapter 237 was introduced in both the Assembly and the Senate, sponsored by Assemblyman Gary Pretlow and Senator John Bonacic, respectively. It was accompanied by a massive lobbying effort from the gambling industry which spent more than $2 million between 2015 and 2017. *See* Report of the New York State Joint Commission on Public Ethics [R. 1255]. Three days after its introduction, the bill passed both houses of the Legislature – but not without some pushback.

During the debate in the Assembly, a transcript of which is included in the record [R. 662-691]. Assemblyman Andrew Goodell stated:

> Now what I thought was interesting about

> your bill is that it first declares that fantasy sports is not gambling and then, if I'm correct, imposes almost all the regulatory oversight that we normally impose on gambling, including requirements for notice about compulsory gambling and the problems with it. We put it under the Gaming Commission whose sole responsibility is to regulate gambling, or one of its primary responsibilities I should say. We have the funds going to education just like we do with the lottery which we all agree is a form of gambling. We restrict the age to 18, which is the same type of age restriction we have on gambling. We prohibit certain people who have a conflict of interest from engaging in it, just like we do in other situations involving gambling like in horse racing. I mean, obviously, jockeys and trainers are not allowed to bet on horse racing for obvious reasons.

[R. 670].

A transcript of the Senate debate is also included in the record [R. 693-700]. There, Senator Liz Krueger spoke out as well:

> If it looks like a duck, it swims like a duck, it quacks like a duck, it's a duck. This is another gambling bill. This continues New York State's path into dreaming that all of our economic development and research problems can be solved by increasing the number of people who use all of their disposable income in different styles of

gambling.

> Maybe we can roll them all together in a movie theater that serves liquor, and everybody can just spend their days sitting in their chairs, drinking, watching the movies, and choosing their type of online gambling.
>
> It's not a very attractive future for the State of New York. It's not really in the best interests of the people of New York. I'm particularly entertained by the resolution on our desks clarifying that if New Jersey increases some kind of gambling for themselves, we'll explore how we can do even more. I'm not even sure we could figure out how to do even more, but I'm confident we'll see more bills in the future that just continue down this rabbit hole [R. 699].

Thereafter, the Governor signed into law Chapter 237 of the Laws of 2016, effective August 3, 2016 [*see* R. 82-90]. Chapter 237 added Article 14 to the Racing, Pari-Mutuel Wagering and Breeding Law (the "Racing Law") which purported to authorize and regulate the operation of interactive fantasy sports under the auspices of the New York State Gaming Commission. It declared that interactive fantasy sports games are not games of chance, but rather, "fantasy or simulation sports games" based upon "the skills of contestants" and

are not based on the current membership of an actual team. Racing Law § 1400(1)(a). The Legislature also declared that IFS contests are not wagers on future contingent events out of contestants' control because the contestants control the athletes they choose on their fantasy teams, and the outcome of each contest is not dependent upon the performance of any single player or actual team. § 1400(1)(b). The Legislature declared that IFS conduct was, therefore, not "gambling" as defined in § 225.00(2) of the Penal Law. Racing Law, § 1400(2). "Entry fees" are defined as the amount paid to an IFS registered operator by a contestant in order to participate in the contest. § 1401(4). The law defines a "highly experienced player" as one who has entered more than 1,000 contests offered by a single IFS operator or has won more than three prizes valued at $1,000 each from a single IFS fantasy sports operator. § 1401(g).

Sections 1402 and 1403 define the registration process to become a licensed IFS operator. Provisions in § 1404 require that the number of experienced players participating in any event must be identified and the operator must include information about where

compulsive players can find "assistance." Section 1404, subdivision (2) requires that no contestant may submit more than 150 entries in any contest, or 3% of all entries, whichever is less. Section 1405 lists the powers and duties of the Gaming Commission and directs it to promulgate regulations to implement Article 14 of the Racing Law. Section 1407 contains provisions for a state tax of 15% on gross revenues generated by IFS operators, with an additional tax of .5%, not to exceed $50,000.

D. The Attorney General Settles with FanDuel and DraftKings

After Chapter 237 was enacted purporting to legalize IFS, the Attorney General discontinued the lawsuits against FanDuel and DraftKings, entering into virtually identical settlement agreements [R. 453-466, 468-482]. While the Attorney General discontinued the litigation to enjoin both DraftKings and FanDuel from continuing to operate interactive fantasy sports, the settlement agreements included penalties of $6 million each to be paid by both FanDuel and DraftKings for past activities, including false advertising [R. 453-454, 462, 468-469, 478]. The Attorney General's office came down

hard on DraftKings for its deceptive advertising, which suggested that it was easy to win at DFS, notwithstanding the fact that its own internal data showed differently [R. 454-456, 469-471]. In fact, at one point DraftKings had advertised the ease of winning "massive jackpots" and promoted DFS as making "winning easier than milking a three-legged goat" [R. 568].

In the Settlement Agreements, the Attorney General's Office made several findings:

- DraftKings identified and targeted users with a propensity for gambling and addiction, but failed to disclose the risks of playing its contests or providing safeguards [R. 473].

- Shortly after founding DraftKings, its CEO, Jason Robbins, explained in a Reddit forum online that DraftKings is listed in the "gambling space" , offered a "mash-up between poker and fantasy sports," and made money in a way virtually "identical to a casino." Similarly, in documents prepared for potential investors, DraftKings placed itself in the gambling sector. Moreover, DraftKings sought out and entered sponsorship agreements with various concerns popular with gamblers, including the World Series of Poker and the Belmont Stakes. *Id.*

- DraftKings routinely fielded requests and complaints from customers with addiction and compulsive game play issues who asked that their accounts be shut down.

DraftKings records show customer service inquiries from players featuring subjects such as: "Gambling Addict – Do Not Reopen," "Please cancel account. I have a gambling problem;" and "Gambling Addiction needing disabled account" [R. 473-474].

- Despite targeting a vulnerable population and receiving complaints from customers, DraftKings never provided warnings about addiction or resources to help with compulsive behavior in any of its marketing [R. 474].

- FanDuel identified and targeted users with a propensity for gambling and addiction, but failed to disclose the risks of playing its contests or provide adequate safeguards [R. 457].

- In a 2010 pitch to investors, FanDuel revealed the results of a survey that it used as indicating that over half bet on sports online and that nearly 20% self-identified as "a bit of an addict," while only 9% reported that they did not gamble. In that same pitch, FanDuel told investors its target market for DFS was male sports fans who "cannot gamble online legally." *Id.*

E. The Plaintiffs Commence This Action

After the Attorney General's office abandoned its lawsuit against DraftKings and FanDuel, the Plaintiffs, all of whom are either persons with gambling disorders or those victimized by gambling, brought this action contending that their rights had been violated because the Bill of Rights (Article I, § 9 of the New York

State Constitution) specifically provides that no "pool-selling, bookmaking or any other kind of gambling ... shall hereafter be authorized or allowed within the State."

Each Plaintiff has a tragic story to tell about how their lives have been affected by gambling. Plaintiff Jennifer White is a resident of Grand Island, Erie County, New York, and is a citizen and taxpayer of the State of New York, eligible to vote in elections [R. 45]. She is a direct victim of gambling as her life was nearly ruined by her father's gambling addiction. *Id.* As early as 1992, when Plaintiff White was only 13 years of age, Ms. White's father constantly patronized off-track betting facilities throughout Western New York. *Id.* Plaintiff White's mother was thereafter besieged by phone calls from creditors, loan sharks appearing at her door, cars being repossessed, all culminating in a divorce [R. 46]. As late as 2011, when Ms. White's mother died in the hospital as a result of sepsis following an acute cellulitis infection, she learned that her father had accessed her mother's bank card, making withdrawals of approximately $1,100 while present at the Seneca Niagara Casino in

Niagara Falls [R. 46]. Over a ten-year period, Ms. White's father amassed over $500,000 in gambling losses. *Id.* *See also* [R. 48].

Plaintiff Katherine West is a resident, citizen, taxpayer and eligible voter of the State of New York. She resides in the City of Buffalo [R. 46]. Plaintiff West's husband is a compulsive gambler who "maxed out" the family's credit card, overdrew the checking accounts, cleaned out the savings account, invaded the funds set aside for their children's college fund, all of which directly affected her health, causing depression, acute headaches, and stomach disorders which in turn caused her to miss work, thereby exacerbating her own financial stress, all while trying to hide her husband's problems from their daughters [R. 46]. Ms. West was forced to take time off from work to search for him in casinos, while struggling to cover his debts. *Id.*

The third Plaintiff is Charlotte Wellins, a citizen, taxpayer and eligible voter in the State of New York who resides in Wellesley Island, New York. *Id.* Her husband was a compulsive gambler who signed his name to loans without her knowledge. *Id.* His gambling

led to the loss of their home (which had been mortgaged to the hilt), bankruptcy, divorce, and the forced uprooting of their children from their home and schools, plus the loss of their college education funds [R. 47]. *See also* [R. 49].

The final Plaintiff is Anne Remington, a citizen and taxpayer of the State of New York residing in Jefferson County [R. 47]. Ms. Remington is afflicted with a gambling addiction that nearly ruined her life and family. *Id.* Her initial game of choice was scratch-off instant lottery tickets that started with an occasional purchase and then progressed to the point of lacking money to buy groceries or gas for her family. *Id.* Ms. Remington had been entrusted with control over her family's finances (checkbook, savings, everything). *Id.* By her own admission, Ms. Remington's obsession with scratch-offs made her a liar, a cheat, and a person who grew to hate herself. *Id.* She invaded her family's check book, then the savings account, until both were depleted. *Id.* She got to the point where she fended off creditors calling her and turned off the home phone, and when her husband inquired as to why it was unplugged, blamed it on the

family's pet cat. *Id.* The power company threatened to turn off Ms. Remington's power, cable, Internet and phone service because of unpaid bills. *Id.* When Ms. Remington's husband inquired as to what was happening, she blamed it on a bookkeeping error on the part of the public utilities serving her residence. *Id.* Ms. Remington kept the books in her husband's business, and ultimately he learned the truth when his business was lost. *Id.* Things got so bad that on February 25, 2015, Ms. Remington was arrested for writing bad checks on her account that her husband had closed [R. 48]. By that time, Ms. Remington had already been attending gambling addiction support groups, but would continue to stop to gamble on her way to meetings. *Id.* Ms. Remington has been "clean" for the past twelve years, but she is always concerned about a relapse. *Id.*

These tragic stories are grim reminders of why Article I, § 9 of the Bill of Rights of the New York State Constitution was adopted in the first place. Allowing a virtual casino to enter the living room of every New Yorker via DFS and the internet is sure to exacerbate the

very evils Article I, § 9 was intended to prevent. Indeed, the Attorney General's office itself has acknowledged that:

- "DFS contests are causing the precise harms that New York's gambling laws were designed to prevent. Problem gamblers are increasingly being seen at Gamblers Anonymous meetings and at counselors' offices addicted to DFS" [R. 172].

- "Experts in gambling addiction and other compulsive behaviors have identified DFS as a serious and growing threat to people at risk for, or already struggling with, gambling-related illnesses" [R. 180].

Plaintiffs now must rely on the courts to protect their constitutional rights as set forth in Article I, § 9 of the Bill of Rights which directs the Legislature to pass laws that prohibit gambling. It was adopted for the precise purpose of protecting people like the Plaintiffs. *See* Charles Z. Lincoln, *Constitutional History of New York*, Vol. III at 46-49 (1906). *International Hotels Corp. v. Golden*, 15 N.Y.2d 9 (1964) (prohibition was intended to protect a family man from his own imprudence. *Id.* at 15). "[I]t is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them."

Campaign for Fiscal Equity, Inc. v. State of New York, 100 N.Y.2d 893, 925 (2003).

PROCEDURAL HISTORY AND DECISION BELOW

After the filing of the Complaint, the State moved to dismiss arguing that the Legislature's determination that interactive fantasy sports did not constitute gambling was a rational implementation of its authority to determine the scope of the Constitutional gambling prohibition [R. 113-114]. By Decision and Order dated August 31, 2017, Supreme Court denied the State's motion to dismiss, holding that any such motion was premature, given the allegations of the Complaint which, for purposes of a motion to dismiss, are presumed to be true [R. 424-429].

Thereafter, both parties cross-moved for summary judgment based on a stipulated set of facts [R. 440-444]. On October 26, 2018, Supreme Court issued its Decision and Order [R. 7-34] which recognized that while a statute enjoys a strong presumption of constitutionality, the Plaintiffs had nevertheless demonstrated "beyond a reasonable doubt" that Chapter 237 was unconstitutional

[R. 21-22]. The Court noted, *inter alia*, the "intentionally broad language and application of the constitutional prohibition, the common understanding at the time [of adoption] and of the meaning of the prohibition and of the particular words 'bookmaking' and 'gambling' and the undisputed fact that success in IFS is predicated upon the performance of athletes in future contests" [R. 30]. The Court went on to say that "to countenance such redefining of the term ["gambling"] would effectively eviscerate the constitutional prohibition[.]" *Id.*, citing *Dalton v. Pataki*, 11 A.D.3d 62 (3d Dep't 2004), *aff'd in part and modified in part*, 5 N.Y.3d 343 (2005).

The Court, however, also ruled that despite the fact that DFS was gambling prohibited by Article I, § 9, the Legislature could legally exclude IFS from the definition of "gambling" contained in the Penal Law [R. 30-32]. The Court reasoned that the Legislature was not required to criminalize IFS [R. 32]. This resulted in there being no civil or criminal statute left on the books to prevent DFS, despite the Constitutional prohibition against it and mandate to pass laws to prevent gambling.

The State has appealed to this Court from that portion of Supreme Court's Order and Judgment declaring DFS to be unconstitutional, and Plaintiffs have cross-appealed from that part of the judgment which upheld the constitutionality of the Legislature's exclusion of IFS from the definition of "gambling" under the Penal Law.

SUMMARY OF ARGUMENT

While statutes are normally entitled to a presumption of constitutionality, that presumption evaporates if the alleged factual basis underlying the statute's enactment is irrational. Here the Legislature has "found" that IFS is not "gambling" because contestants who must pay to play are not betting on real teams, but "fantasy teams" despite the fact that whether that fantasy team wins or loses the contest depends in turn on how real life athletes chosen by the contestant for that fantasy team's roster perform in subsequent real-life athletic events. The Legislature also found that those performances were not "future contingent events."

Supreme Court below correctly found that neither of these findings was sufficient to support the exclusion of IFS from the definition of gambling." The Constitution is not for sale, no matter how many millions the gambling lobby may spend to get the Legislature to circumvent it. If IFS is to be allowed in the State, the route to do so is the amendment process in Article XIX of the Constitution, where the People, not the Legislature, get to decide the issue.

Supreme Court correctly determined that IFS is constitutionally prohibited and that Chapter 237 is, therefore, unconstitutional to the extent it purports to permit it.

The Court erred, however, in finding that the Legislature could decriminalize IFS, leaving a statutory and regulatory enforcement vacuum such that IFS can continue to operate, notwithstanding the mandate in Article I, § 9 of the Constitution that the Legislature must pass laws to prevent gambling. That part of the Supreme Court's judgment should be reversed.

ARGUMENT

POINT I

Chapter 237 Lacks the Factual Support Necessary For It To Enjoy the Strong Presumption of Constitutionality To Which Statutes are Otherwise Entitled

The State's principal argument relies on the proposition that statutes are entitled to a strong presumption of constitutionality. State's Brief at 20. The Courts have consistently held, however, that a statute's presumed constitutionality is rebuttable and subject to an important qualifier – "the existence of necessary factual support for its provisions." *Spielvogel v. Ford*, 1 N.Y.2d 558, 562 (1956). *Defiance Milk Products Co. v. DuMond*, 309 N.Y. 537, 540-546 (1956). "It is not a conclusive presumption, or a rule of law that makes legislative action invulnerable to constitutional assault." *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209 (1934). In *Hurd v. City of Buffalo*, 41 A.D.2d 402 (4th Dep't 1983), for example, the Fourth Department, whose reasoning was later upheld by the Court of Appeals (34 N.Y.2d 628 [1974]), noted that despite a strong presumption of a statute's constitutionality, "courts may nevertheless

inquire as to whether its enactment was permissible under the Constitution." 41 A.D.2d at 404. In *Hurd*, the Court found that the City of Buffalo had acted illegally in levying an annual real property tax upon its citizenry that included money to pay pension and retirement benefits, which resulted in the tax levy exceeding the annual 2% tax cap imposed on operating expenses by the State Constitution. The City of Buffalo had attempted to rationalize the levy by arguing that yearly ongoing pension payments would serve a useful purpose for more than one year. The Appellate Division rejected this rationale, noting that despite the fiscal difficulties of the City, the Constitutional mandate could not be circumvented by legislation as the taxpayers of the City of Buffalo could not be deprived of their constitutional rights. *Id.* at 405. In affirming that holding, the Court of Appeals stated emphatically that it could not accept "specious devices to evade ... [and] nullify [Constitutional provisions]." 34 N.Y.2d 628, 629 (1974). The Court of Appeals further stated:

> The plan made express in the Constitution, and sustained by historical antecedents

> reflecting purpose, must therefore be treated as a limitation of the exercise of the powers to the extent, and perhaps only to the extent, that measures to evade are palpably in violation of the plan and purpose.

34 N.Y.2d 628, 629 (1974).

Just as the rights of the citizens of Buffalo in *Hurd* could not be compromised by a rationale that sought to circumvent the Constitution, neither should the Plaintiffs' rights in this case to be protected from gambling be compromised by a rationale that subverts the Constitutional prohibition against it. That right is not merely statutory. It is a right firmly embedded in Article I, § 9 of the Bill of Rights of the New York State Constitution. As such, the Legislature has even less latitude to infringe upon that right. *King v. Cuomo*, 81 N.Y.2d 247, 253 (1993) ("[T]he guiding principle of statutory interpretation is to give effect to the plain language ... especially should this be so in the interpretation of a written Constitution").

It is necessary, therefore, to examine the legislative rationales for Chapter 237 to see whether or not they support the presumption of constitutionality. That inquiry must begin with an analysis of exactly what the Legislature did and did not do in enacting Chapter

237. It did *not* change the definition of "gambling" in Penal Law § 225.00(2), which reads as follows:

> Gambling. 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.

The key elements, therefore, of gambling are (1) whether a contestant stakes or risks something of value, (2) upon a contest of chance[4] *or* a future contingent event not under his control or influence, (3) with the understanding he will receive something of value in the event of a certain outcome.

Instead of amending the definition of gambling, the Legislature simply declared that IFS did not meet that definition (Racing Law, § 1400[1][a], [b]). Whether or not that was a rational determination

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[4] A "contest of chance" is defined as "***any*** contest, game ... in which the outcome depends to 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 supplied)

requires an analysis of how IFS is conducted compared to the definition of gambling in § 225.00(2).

There is no dispute how IFS is played. Contestants pay an entry fee to participate, accompanied by a roster or fantasy team of real life athletes which the contestants choose and submit along with their entry fee. The winner or winners are determined by the aggregate performance of each roster of athletes in subsequent real-life athletic events held on a given day or perhaps on a weekend.[5] The contestants with the best performing rosters are declared the winners and awarded monetary (or cash equivalent) prizes funded by the entry fees paid by all contestants. There is also no question that the outcome of the DFS contests are dependent on a future contingent event – namely the performance of the athletes. The contestants have no control over how the athletes actually perform. Indeed, without the occurrence of that future contingent event, there could be no contest.

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[5] In DFS involving NFL football, for example, the contests may apply to how fantasy team players perform in actual games played over a weekend, commencing with games played on a Thursday night and ending with games played the following Monday night.

DFS, therefore, encompasses all three elements of gambling set forth in Penal Law § 225.00(2). First, there is little doubt that the entry fee paid is *something of value*, which a contestant puts *at risk* in order to play. Second, there is no question that a contestant has absolutely *no control* over how the athletes on his/her fantasy team will actually perform in future athletic events, such that the outcome of IFS is to a very material degree, dependent on a *future contingent* event. Finally, there is also no doubt that there is an understanding that if the contestant's roster outperforms the roster of other contestants, he/she will *receive something of value.*

Despite the fact that DFS meets all the elements of "gambling" as defined in Section 225.00(2) of the Penal Law, the Legislature, in enacting Chapter 237, has excluded it from the otherwise general definition of the term. The Legislature offers two rationales as to why IFS is not "gambling"

> - Interactive fantasy sports are not games of chance because they consist of fantasy or simulation games or contests in which the fantasy or simulation sports teams are selected based on 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]); and

- Interactive fantasy sports contests are not wagers on future contingent events not under the contestant's control or influence, because contestants have control over which players they choose and the outcome of each contest is not dependent on the performance of any one player or 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 choices of others' roster choices (Racing Law, § 1400[1][b]).

Neither of these supposed rationales, however, provides the necessary factual support for the presumption of constitutionality required under the precedents cited above.

A. Interactive Fantasy Sports Contests are Games of Chance

The first rationale advanced by the Legislature to circumvent the Constitutional prohibition against gambling and to justify the exclusion of IFS from the definition of "gambling" is that IFS contests are not games of chance because:

- They consist of fantasy or simulation games or contests;

- In which the fantasy or simulation sports teams are selected based upon the skill and knowledge of the participants; and

- And are not based on the current membership of an actual team (Racing Law, § 1400[b][1]).

This desperate attempt to evade the Constitutional prohibition is almost laughable and easily refuted. The Legislature attempts to draw a distinction between real-life athletes and fantasy teams – a distinction without a difference because even in so-called fantasy games, the outcome is determined by the performance of real life athletes in real – not fantasy – athletic events. Assume two individuals were to bet against each other as follows: each individual must select a fantasy team of five real-life basketball players – each from a different NBA professional team. The first contestant chooses a player from the New York Knicks, the Boston Celtics, the Los Angeles Lakers, the Milwaukee Bucks, and the Chicago Bulls. The other player chooses one player each from five other different teams – the Cleveland Cavaliers, the Portland Trail Blazers, the Oklahoma City Thunder, the Golden State Warriors, and the Phoenix Suns. The winner is determined by which roster of real-life players on that

contestant's fantasy team will score more points on a certain date when all of the actual teams are playing. The fact that the fantasy teams are not real does not negate the fact that all the athletes on the teams are, in fact, real, and the outcome of the bet is determined by how those players actually perform, which is beyond the power of the bettor to control.

It has been recognized by the Legislature itself from the earliest days of the adoption of the Constitution in 1894 that gambling included wagers or bets on the selling of pools based upon the result of any trial or contest of skill of *man* or beast. *See* L. 1895, ch. 1, § 1 amending § 351 of the Penal Law. The timing of the adoption of Penal Law § 351 in 1895 is especially instructive as it occurred immediately following the adoption of the constitutional amendment. "The contemporaneous construction given by the Legislature to a constitutional mandate it is charged with carrying out must be given great deference." *New York Public Interest Research Group v. Steingut*, 40 N.Y.2d 250, 259 (1976), *citing People ex rel. Joyce v. Brundage*, 78 N.Y. 403, 406 (1879) ("Great deference is certainly due

to a legislative exposition of a constitutional prohibition, and especially when it is made almost contemporaneously with such provision and may be supposed to result from the same view of policy and modes of reasoning which prevailed among the framers of the instrument propounded"). *Id.* at 406. The Attorney General has said much the same:

> From the history it is indisputable that since at least 1877, when the Penal Code specifically defined as criminal wagering on the outcome of contests of speed, *skill* or power of endurance of *man* or beast, New York law has viewed lotteries and betting on sports events as two distinct forms of gambling. *This distinct statutory ban on sports wagering was elevated to the Constitutional level in 1894 and has remained by explicit language in the Constitution until today*. 1984 N.Y. Op. Atty. Genl. 1 (1984 N.Y. AG LEXIS 94 *4 (emphasis supplied).

The fact that IFS involves "fantasy" teams or "simulated" teams or simulated games is, therefore, irrelevant. The inescapable truth is that IFS games nevertheless depend for their outcome on the actual performance of real-life players on real-life teams – the same skill of man referred to in Penal Law § 351 enacted back in 1895.

There is also no merit to the skill versus chance argument advanced by the State. That is a false dichotomy, as skill is certainly present in many games that are still universally recognized as gambling. There is no doubt that IFS contestants may exercise skill in selecting their rosters, but that is no different from poker players who exercise skill in playing their cards or from bettors in horse racing who employ their handicapping skills before placing bets. While it is true pari-mutuel wagering on horse racing is permitted, that is only because it is an expressed exception in the Constitution itself to the general prohibition against gambling. It is the exception that proves the rule. If pari-mutuel wagering on horse racing is an exception, it must be gambling in the first place or otherwise no exception would be required. Moreover, the Penal Law definition of a "contest of chance" states that it is one in which "the outcome depends in a material degree upon an element of chance, *notwithstanding that skill of the contestants may be a factor therein*" (emphasis supplied). Penal Law § 225.00(1).

The State argues, nevertheless, that IFS is not gambling because there is no longer a *material* degree of chance. It seeks to buttress its arguments by reliance on alleged expert reports which the Attorney General's office itself had previously dismissed as "self-serving" and "purchased by DFS operators" [R. 195]. The reports submitted by the gambling industry do not support the position they, and now the Legislature, espouse. As previously stated, analyses to show that "skill" dominates "luck" in IFS contests are totally unremarkable as we know that a skilled poker player, for example, will defeat a novice over time, but poker is still gambling. The Legislature itself has decided that "domination" of skill over chance is not a deciding factor in determining whether a game is one of chance. "Materiality" of chance, however, is. *See* Penal Law § 225.00(1). In addition, the so-called expert studies relied upon by the State as "extrinsic evidence" to support its argument that IFS is not gambling were based on games in which there were no limit on the numbers of entries skilled or experienced players could submit, and there were no classified rankings, where only certain players could

participate, based on their skill / experience. Chapter 237 of the Laws of 2016, however, places limits on the number of entries players can submit in any single contest (Racing Law, § 1404[2]) and experienced players must be identified such that less skilled contestants can decide whether or not to play. These provisions were inserted to level the playing field. *See* the State's Memorandum of Law submitted below [R. 1243]. As noted, however, by the Massachusetts Institute of Technology professors who submitted the "Luck and the Law" analysis that appears in the Record at 1184-1205, "the simplest way to increase the role of skill in a contest is to increase the number of games per player" [R. 1199]. The same professors also note that tournaments which are divided up into classes of different skilled players (*e.g.*, having beginners play in a separate pool) are likely to have a larger element of luck than those in which everyone plays on the same pool. *Id.* They observe that skill is no longer a distinguishing characteristic when players' skills are similar. *Id.* The irony is that the Legislature's attempt to level the playing field by limiting the number of entries and classifying

skill levels reduces the element of skill which it says is the reason why DFS is not gambling.

The same experts also make it clear that while skill may play a greater role chance in than determining the outcome of some DFS contests, there is still a material degree of luck present [R. 1197, figure 6]. According to the State's own experts, in fantasy football, the skill / luck ratio is 55/45; in hockey, it is 60/40; in baseball, it is 75/25; and in basketball, it is approximately 85/15. Who boarding an airplane would not consider it "material" if the chances it were to crash were even as low as 15% (the basketball ratio), not to mention as high as 45% (the football ratio)?

Other data submitted as "evidence" relate to the studies allegedly performed by other experts, all of which show that "top performers" consistently beat "average performers" [R. 1168]. Again, this is neither remarkable nor probative. While the percentage of success with respect to the four major professional sports vary from the estimates of other experts, the more important point is that no fantasy sports operator can assure the relative skill of the

contestants in each contest. If the contests pit contestants of equal skill against each other, luck will play a much more important role in the outcome.

The studies also focus on the performance of skilled versus unskilled players over the course of time – e.g., season-long. *See* "Luck of the Law" [R. 1187]. The distinguishing aspect, however, of DFS, a subset of IFS, is that games are played on a daily basis. It is well-known that "on any given night," a team in last place in baseball can defeat the team in first place, or the league's leading hitter may go hitless, while a light-hitting shortstop like Bucky Dent could hit a miraculous home run as he did in 1978 to lead the Yankees to an improbable win over the Red Sox to win the American League East Division in a one-game playoff in route to a World Series title. Who else can forget the Miracle on Ice when a bunch of amateur Americans defeated the heavily favored Russian professionals on the way to winning the Gold Medal in hockey for the United States in 1980?

Nor can anyone overlook other indisputable events that could affect the outcome which fell into the category of luck – an injury, a bad hop, a wrong call by a referee or umpire, and, of course, the weather conditions. No contestant has any control over these factors that could directly affect the outcome of an athletic event.

Finally, the Legislature decrees that interactive fantasy sports contests are not games of chance because "they are based on the skill and knowledge of the participants." This is total speculation. No one knows for certain who all the individuals are that will decide to enter into an IFS contest. Some may have little or no skill whatsoever and simply fill out a roster the same way people pick random numbers in a lottery. There could be no skill or knowledge whatsoever, and yet Section 1400(1)(a) of the Racing Law states that interactive fantasy sports are not games of chance because the fantasy teams are "selected based upon the skill and knowledge of the participants." The Legislature cannot know or find that as a "fact".

The State also argues that IFS involves skill rather than chance because the contestants act more like "general managers" of

real-life sports teams since, in addition to selecting athletes for a fantasy team, the contestants must also stay within a salary cap as GM's do in real life sports and be guided in their roster selection by the past performances of the athletes they choose. They argue that "just as the skill of general managers in picking a roster ... influences significantly – although does not completely determine the outcome of future sporting events ... the skill of fantasy sports materially influences the outcome of the contests in which they participate." State's Brief, at 36.

This is a gross exaggeration. Bettors in horse racing must also take into consideration the funds they have available to bet, and calculate the future odds of horses they bet on. Moreover, in real life, general managers have the option of changing their rosters over the course of a season by hiring new players, getting rid of poorly performing players, and engaging in trades with other teams. No such options are available to DFS contestants who participate in daily or weekend games as they are "stuck" with the roster they have selected after betting is closed before the real-life games begin. They

have far less control over the outcome than general managers of real sports teams.

The State also cites other states that have chosen to exclude IFS from the definition of gambling based on a skill / chance dichotomy. What other states legislate by statute is irrelevant here in New York where the prohibition is embedded in the Constitution and not subject to a statutory change. Note also that many other states have concluded that IFS is indeed gambling [R. 256-343].

B. Interactive Fantasy Sports Contests Involve Wagers Based on Future Contingent Events

Even if this Court were to conclude that "chance" is not a "material" element affecting the outcome of an IFS contest, it is nevertheless true that under the Penal Law "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." Penal Law § 225.00(2) (emphasis supplied). The significance of the disjunctive "or" in § 225.00(2) is that gambling occurs regardless of whether chance is a material factor in the outcome of a contest if the wager depends on the outcome of a future

contingent event. In this case, it is indisputable that the outcome of any IFS contest must inevitably be based upon a future contingent event – the performance of real-life athletes in real-life games. It is equally indisputable that an IFS contestant has absolutely no control over how those athletes will perform in those games, as the State itself has stipulated [R. 441].

The absurd response by the Legislature to this argument is that the real-life performance of athletes is not a "future contingent event" because they have been assigned to fantasy teams. This stretches credulity beyond the breaking point since those fantasy teams contain real-life athletes that must perform in real-life games so there can be doubt that future contingent events must determine the outcome of the contests.[6] The Legislature may have entered into the

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[6] The distinction between a real team and a fantasy team is irrelevant as in either case the performance of the athlete is real. The New York State Gaming Commission itself ignores the difference between a game and an event within a game. In recently published proposed regulations to allow sports wagering at casinos, it defines a "wager" as "a transaction on an authorized sporting event ... *or an occurrence therein.*" (emphasis supplied) *See* proposed 9 N.Y.C.R.R. 5329.1(m). Notice of Proposed Rule-Making, N.Y. State Register, March 20, 2019 at 8-9.

fantasy land of Humpty Dumpty, but there is no requirement that the courts should blindly follow.

C. Exceptions to Constitutional Prohibitions Are To Be Strictly and Narrowly Construed

While ignoring the rebuttability of the proposition that statutes are presumptively constitutional, the State has failed to mention another rule of interpretation that applies both to statutes and, with even more force, to a constitutional prohibition. That rule requires that exceptions to prohibitions are to be strictly and narrowly construed. Indeed, the Court of Appeals has made it clear that exceptions to broad prohibitions should be clearly stated:

> ... *from an absolute constitutional prohibition on gambling in New York of any kind, expressly including "bookmaking,"* which has stood almost 80 years in the New York Constitution (Article I, § 9), a specific exception is carved out in 1939 (emphasis supplied).

Finger Lakes Racing Association v. New York State Off-Track Pari-Mutuel Betting Commission, 30 N.Y.2d 207, 216 (1972).

If an exception is to be made to the general prohibition against gambling, it must be via an amendment to the Constitution pursuant to Article XIX of the New York State Constitution, as been done on four separate occasions to expressly permit pari-mutuel wagering on horse racing, charitable bingo and other games of chance with limited prize amounts, a state-operated lottery, and casinos at seven locations throughout the State. IFS is no different. If there is to be such an exception – that is for the People to decide in a state-wide referendum pursuant to Article XIX of the Constitution. It is their choice, not the Legislature's.

POINT II

The Office of the Attorney General Itself is On Record That DFS is Gambling and Industry Experts Concur

While the Office of the Attorney General now asks this Court to uphold the proposition that IFS is not gambling prohibited by the Constitution, only recently that Office argued precisely the opposite while prosecuting FanDuel and DraftKings. There is no reason for

the change in its position because there has been no intervening change in the Constitution.

In a Special to the N.Y. *Daily News* dated November 19, 2015, then Attorney General Schneiderman stated:

> Daily fantasy sports is much closer to online poker than it is to traditional fantasy sports ... FanDuel and DraftKings take a bite out of every *bet*. That is what bookies do, and it is illegal in New York ... In fact, as our court papers lay out, these companies are based on business models that are identical to other forms of *gambling* ... Consider the final moments of a football game where the outcome has been decided and the winning quarterback takes a knee to run out the clock and assure victory. Let's say it's Eli Manning, and the Giants are defeating the Eagles or the Cowboys. Statistically, this play would cost the quarterback one yard – a yard that could make the difference between someone on DraftKings or FanDuel winning or losing tens of thousands of dollars. What did that have to do with the bettor's skill? It's the classic risk involved in sports betting. Games of choice involve some amount of skill; this does not make them legal. Good poker players often beat novices. But poker is still gambling, and running a poker room – or online casino – is illegal in New York (emphasis supplied) [R. 139-140].

In *People v. DraftKings* (Sup. Ct. N.Y. County, Index No. 453054/2015), the Attorney General submitted documents including an interview of DraftKings' CEO, who stated that "our concept is a mashup between poker and fantasy sports. Basically you pick a team, deposit your *wager*, and if your team wins, you get the pot" [R. 144] (emphasis supplied). Later on, the same individual is quoted as saying, "[t]he concept is also identical to a casino ... specifically [p]oker. We make money when people win pots" [R. 158].

Another document introduced by the Attorney General in *People v. DraftKings*, described how Fan Duel and DraftKings eschew the label of gambling here in the United States to avoid criminal prosecution, whereas in England they applied for a gambling license [R. 161-167]. In a Memorandum in *People ex rel. Schneiderman v. DraftKings*, the Attorney General stated at p. 1 as follows: "Like any sports wager, a DFS wager depends on a 'future contingent event' wholly outside the influence of any bettor ... Until the occurrence of that future contingent event, the winners and losers are *unknown* and *unknowable*" [R. 170 (emphasis in original].

The Attorney General's Memorandum of Law also emphasized that skill and chance are not mutually exclusive and that the presence of skill in a game is hardly dispositive of whether such a contest is gambling, noting that "the key factor establishing a game of skill is not the presence of skill, but the absence of a material element of chance. Here, [referring to DFS] chance plays just as much of a role (if not more) than it does in games like poker and blackjack. A few good players in a poker tournament may rise to the top based on their skill; but the game is still gambling. So is DFS" [R. 171].[7]

In yet another filing in the *DraftKings* case, the Attorney General stated, "DFS is also a contest of chance ... Chance is pervasive at every level of DFS – the unpredictable performance of

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[7] It would also be folly to expect a court to have to calibrate precisely what percentage of a game is skill and what percentage chance in order to determine whether or not it is "gambling." No such precision is or should be required. So long as a game involves a material element of chance, it is "gambling" irrespective of the role played by skill. *See Plato's Cave Corp. v. State Liquor Authority*, 115 A.D.2d 426, 428 (1st Dep't 1985), *aff'd on other grounds*, 68 N.Y.2d 791 (1986); *People v. Delacruz*, 23 Misc.3d 720, 725 (N.Y. City Crim. Ct. 2009). *See also* State's Memorandum of Law submitted while prosecuting DraftKings [R. 192].

an athlete in a given game (*e.g.*, amount of points scored); to the pronouncements of the league office (*e.g.*, athlete suspensions); to the whims of nature (*e.g.*, rained out games). DFS cannot escape its status as a contest of chance, and thus wagering on its outcome is gambling" [R. 216-217].

In the same Memorandum, the Attorney General stated: "Of course, DFS is not a game of skill. Similarly, none of the constitutional claims put forth by DraftKings have any merit" [R. 218]. The Attorney General also stated:

> The notion that DFS exists as a contest separate and apart from actual sports is baseless: there are and can be no winners or losers without the happening of a future contingent event outside of their influence or control. There is no "successful roster" until the relevant athletes compete in actual skill games. DFS cannot escape the law by pretending that it is somehow different from every other sports *bet* that has ever been placed in New York. There is nothing special about DFS. It is simply a way to *wager* on a future contingent event – and thereby qualifies as illegal gambling (emphasis added) [R. 223].

The Attorney General continued:

> DFS Operators should be held to their public statements. When pitching their games to the public (and making arguments in their legal papers), the DFS Operators talk about games of "skill" and profess shock that anyone could think that what they offer is sports gambling. But when the spotlight is off, the story changes dramatically. When DFS Operators describe themselves to investors or potential business partners, they liken DFS to "poker," say it exists in the "gambling space," and operates in a way "identical to a casino." The DFS Operators even register themselves as gambling concerns abroad, in order to access those lucrative markets [R. 227].

Certain facts are, therefore, absolutely undeniable. The outcome of any DFS contest ultimately depends on the performance of actual athletes in actual games. A contestant who enters a roster of players in a DFS football contest, for example, would have no control whatsoever over how many yards a running back on his "fantasy team" roster may subsequently gain, how many touchdowns he may score, what plays may be called, or whether he may slip on the wet turf due to rain. In the real world, those are all significant elements of chance. Nothing passed by the Legislature can change this indisputable reality.

The Attorney General's Memorandum of Law also argued that a Court's acceptance of DraftKings' contention "that all contests where contestants pay a fee to a neutral administrator for a chance to win a predetermined prize are legal would have truly absurd consequences" ... [and] "would eviscerate existing New York prohibitions against gambling, including those set out in the Constitution ... The end result would be to reverse the clear prohibitions on pool-selling, bookmaking, and other kinds of gambling set out in the Constitution and carried into the New York Penal Law" [R. 234-235].

Many gambling industry CEOs agree with the aforementioned arguments of the Attorney General made while prosecuting FanDuel and DraftKings. Sheldon Adelson, the Chief Executive Officer of the Las Vegas Sands Corporation which owns the Marina Bay Sands in Singapore that in turn controls the Venetian Resort Hotel Casino and the Sands Expo and Convention Center, states unequivocally that DFS is "gambling" [R. 43, 348]. "There's no question about it." *Id.* He went on to say that although he is in the gambling business, he opposes DFS because it "exploits poor people" [R. 349].

MGM Casinos chairman Jim Murren said those who argue that DFS is not gambling are "absolutely utterly wrong. I don't know how to run a football team, but I do know how to run a casino and this is gambling" [R. 43]. The Chief Executive Officer of one DFS company stated that DFS are like "a sports betting parlay on steroids" [R. 53]. Shortly after its founding, DraftKings' CEO reportedly stated in a thread in the online form Reddit.com that "this concept where you can basically *bet* your team will win is new and different from traditional leagues that last an entire season" (emphasis supplied) [R. 65]. DraftKings' CEO further emphasized that "the concept is different from traditional fantasy leagues. Our concept is a mash-up between poker and fantasy sports. Basically, you pick a team, *deposit your wager*, and if your team wins, you get the pot." *Id.* (emphasis added). In 2012, the same DraftKings CEO stated that "it operates in the "*gambling* space" (emphasis supplied) [R. 70, 172]. He further stated that DraftKings makes money in a way that "is almost identical to a casino" [R. 71, 158].

On its website, DraftKings embedded key words related to gambling. This led search engines like Google to suggest DraftKings to users looking for gambling. They key words included "fantasy golf *betting*," "weekly fantasy basketball *betting*," "weekly fantasy hockey *betting*," "weekly fantasy football *betting*," "weekly fantasy college football *betting*," "weekly fantasy college basketball *betting*," "Fantasy College Football *betting*," "daily fantasy basketball *betting*," and "Fantasy College Basketball *betting*." (emphasis supplied) [R. 177-178].

Numerous DFS players struggling with gambling addictions have called customer service to cancel their accounts and to plead with DraftKings to permanently block them from playing. DraftKings "records show customer inquiries from DFS players seeking assistance with subjects like 'Gambling Addict [–] do not reopen,' 'Please cancel account. I have a gambling problem,' and 'Gambling Addiction needing disabled account'" [R. 181],

Indeed, a former New York Attorney General said it best:

> To summarize, we find that sports betting is not permissible under Article I, § 9, of the

> New York Constitution. *The specific constitutional bans against bookmaking and pool selling as well as the general ban against "any other form of gambling" not expressly authorized by the Constitution would operate to invalidate a statute establishing a sports betting program ...*
>
> If the state government is to be authorized to run a program in which it accepts wagers on the outcome of professional athletic contests, *either single contests or multi-contest parlays*, such authorization can only be acquired through an amendment to the Constitution (emphasis supplied). 1984 N.Y. Op. Atty Genl (1984 N.Y. A.G. LEXIS 94 at 42, 1984 WL 186643, *13).

POINT III

If It Looks Like a Duck, Walks Like a Duck ...

Interactive Fantasy Sports has all the earmarks of "gambling." It involves betting on the performance of real-life athletes and future sporting events over which the contestants have no control. Bets are pooled by the operators of the contest who take a piece of the action (the so-called "vig"). The Legislature itself chose to place the regulation of interactive fantasy sports in the Racing, Pari-Mutuel

Wagering and Breeding Law that deals exclusively with gambling issues. Regulatory oversight is vested in the New York Gaming Commission. Even though the Legislature "declared" that IFS is not gambling, the law nevertheless contains provisions to protect "compulsive players" and to allow "compulsive players" to self-exclude themselves from participation. This is indeed curious, given the fact that IFS is supposedly not gambling.

Perhaps the most telling argument that IFS is, in fact, gambling can be found in the wording of Chapter 237 itself. The Legislature was careful to exclude from the Penal Law definition of gambling only DFS that is conducted by operators "registered" as such by the New York State Gaming Commission. Racing Law § 1402(4). But DFS is still DFS regardless of whether it is registered or not. If unregistered DFS is gambling, merely registering the activity does not change its nature.

Not even the major executives of FanDuel and DraftKings can in good faith claim otherwise, given their own previous representations that they operate in "gambling space."

The Attorney General's opinion of 1984 still resonates today:

> To summarize, we find that sports betting is not permissible under Article I, § 9 of the New York Constitution. *The specific Constitutional bans against book-making and pool-selling, as well as a general ban against any other form of gambling not expressly authorized by the Constitution, would operate to invalidate a statute establishing a sports betting program* ...
>
> If the State government is to be authorized to run a program in which it accepts wagers on the outcome of professional athletic contests, *either single contests or multi-contest parlays*, such authorization can only be acquired through an amendment to the Constitution (emphasis supplied). 1984 N.Y. Op. Atty Genl (1984 N.Y. A.G. LEXIS 94 at 42).

Senator Liz Krueger succinctly summarized the situation during the legislative debate that precluded passage of Chapter 237: "If it looks like a duck, it swims like a duck, it quacks like a duck, it's a duck" [R. 699].

POINT IV

The Legislature Is Not Free to Define "Gambling" Any Way It Wishes

The State argues that the Constitutional Convention of 1894, which adopted Article I, § 9, essentially gave the Legislature the latitude to define "gambling" since the term is not otherwise defined, and that in directing the Legislature to "pass applicable laws to prevent offenses against this section," the Constitution itself left everything in the hands of the Legislature.[8]

The fact that gambling is not otherwise defined, however, is not a license for the Legislature to ignore certain kinds of gambling, let alone pass laws to enable rather than to prevent it, as it has done here. Words that are not otherwise defined have their common and ordinary meaning. *See King v. Cuomo*, 81 N.Y.2d 247, 253-254 (1993). Otherwise, as Supreme Court pointed out in this case, the prohibition against gambling, a protection embodied in the Bill of

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[8] *See*, for example, written testimony submitted jointly by counsel representing DraftKings arguing that because the term "gambling" is not defined in the Constitution, the Legislature is free to amend or clarify its statutory definition as it sees fit [R. 1002].

Rights in Article I of the New York Constitution, would exist only at the sufferance of the Legislature [R. 21].

While this case is undoubtedly being watched by the Legislature to see how far it can "push the envelope," the constitutional prohibition against gambling is in imminent danger of death by a thousand cuts. During the 2017-18 Legislative session, John Bonacic, Senate Chair of the Racing, Gaming and Wagering Committee, sponsored a bill (S. 3898A) that would have allowed interactive poker as a "game of skill" [R. 1303]. In the Assembly, his counterpart, Gary Pretlow, Chair of the Committee on Racing and Wagering, introduced a similar bill, A.5250 [R. 1317-1325]. Bonacic and Pretlow were also the main sponsors of Chapter 237 of the Laws of 2016.

The recent attempts to chip away at the constitutional prohibition against gambling reflect a lack of legislative understanding of the breadth of the prohibition. As the Attorney General pointed out in 1984, in the ensuing years following the 1894 adoption of Article I, § 9 which prohibited lotteries, book-making,

pool-selling *or any other kind of gambling*, the Legislature has consistently viewed sports wagering as illegal. 1984 N.Y. Op. Att'y Gen. 1, reprinted at 1984 N.Y. AG LEXIS 94*.

The State's brief attempts to make much of the fact that in 1965 the Legislature adopted Penal Law § 225.00 defining a "game of chance" as one in which the outcome depends in a *material degree* upon an element of chance. It is difficult, however, to see how that helps Defendants' cause as it is clear from Point I of this Memorandum that there are material elements of chance in all sporting events.[9] If there were no element of chance in athletic events, the outcomes would be pre-ordained and there would be no "sport" at all. Moreover, as the Attorney General noted in the 1984 Opinion rendered long after Penal Law § 225.00 was enacted,

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[9] *See Plato's Cave Corp. v. State Liquor Authority*, 115 A.D.2d 426, 428 (1st Dep't 1985), *aff'd on other grounds*, 68 N.Y.2d 797 (1986) (so long as a game involves a material element of chance, it is gambling regardless of the role played by skill). *See also People v. Turner*, 165 Misc.2d 222 (Crim. Ct., N.Y. Co. 1995). *See also Dalton v. Pataki*, 11 A.D.3d 62, 90 (3d Dep't 2004), *aff'd in part and modified in part* 5 N.Y.3d 243, 264 (2005) (a game of chance has three elements – consideration, chance, and prize without reference to skill) as cited by Supreme Court below in this case [R. 22-23].

"... even in the penal sense ... a sports betting program may not be operated under the current constitutional provisions."

Defendants would also have this Court ignore former Penal Law § 351, enacted in 1895 (L. 1895, ch. 572, § 1) immediately after the adoption of the 1894 Constitutional prohibition against gambling. While § 351 was repealed and superseded by the adoption of Penal Law § 225.00 in 1965, the 1965 law did not authorize sports wagering, as the Attorney General's 1984 opinion made clear. More importantly, and as previously emphasized, courts have consistently held that the contemporaneous enactment by a Legislature of a statute implementing a very recent Constitutional provision is entitled to "great deference." *See New York Public Interest Research Group v. Steingut*, 40 N.Y.2d 250, 259 (1976). *See also People ex rel. Joyce v. Brundage*, 78 N.Y. 403, 406 (1879) ("Great deference is certainly due to a legislative exposition of a Constitutional prohibition, and especially when it is almost contemporaneous with such provision and may be supposed to result from the same views of policy, and modes of reasoning which prevailed among the framers of

the instrument propounded.") In *People ex rel. Sturgis v. Fallon*, 152 N.Y. 1 (1897), the court held that the "obvious purpose of [Penal Law § 351] is to prevent the offenses mentioned in Section 9 of Article One of the Constitution." *Id.* at 7.

In enacting Chapter 237 in 2016, some 122 years after the Constitutional Convention of 1894 that adopted Article I, § 9 prohibiting gambling, the 2016 Legislature ignored more than a century of prior enactments by the Legislature that interpreted the ban in Article I, § 9 as applying to all forms of sports wagering. *See also Kolb v. Holling*, 285 N.Y. 104, 112 (1941) ("The practical construction put upon a constitutional provision ... by the Legislature ... is entitled to great weight, if not controlling influence, when such practical construction has continued in existence over a long period of time.")

Even if, however, the term "gambling" in Article I, § 9 were ambiguous, that would not give the Legislature the broad discretion it claims here. The State relies on *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307 (1995) for support, but that

reliance is misplaced and ignores the cases that preceded it. In *Board of Education, Levittown Union Free School District v. Nyquist,* 57 N.Y.2d 27 (1982), the Court of Appeals was called upon to interpret Article XI, § 1 of the Constitution which, like the prohibition against gambling, was adopted at the 1894 Constitutional Convention. *Id.* at 47. Article XI, § 1 of the Constitution states:

> "The Legislature shall provide for the maintenance and support of a system of free common schools wherein all the children of this state may be educated."

The Court in *Levittown* went on to interpret the meaning of the obligation that fell to the Legislature to carry out. The Court, not the Legislature, rendered the binding interpretation of the constitutional provision, stating as follows:

> With full recognition and respect, however, for the distribution of powers in educational matters among the legislative, executive and judicial branches, *it is nevertheless the responsibility of the courts to adjudicate contentions that the actions taken by the Legislature and the executive fail to conform to the mandate of the Constitution which*

constrains the activities of all three branches.
(57 N.Y.2d at 39) (emphasis supplied)

In *Levittown*, the Court of Appeals went on to hold that the language in Article XI, § 1 imposed upon the Legislature a duty to provide "a sound basic education." *Id.* at 48. Thereafter, in *Campaign for Fiscal Equity v. State of New York I*, 86 N.Y.2d 307 (1995), the Court of Appeals expanded further on that definition holding that it meant that New York's public schools must be able to teach "the basic literary, calculating and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." 86 N.Y.2d at 316.

Accordingly, *King v. Cuomo*, 81 N.Y.2d 247 (1993), *Board of Education, Levittown v. Nyquist*, 57 N.Y.2d 27 (1982) and *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307 (1995) all teach that while the Legislature may enjoy considerable deference in carrying out a constitutional mandate, it is up to the courts in the first instance to define the meaning of that mandate.

Courts are not required to stand by helplessly while the Legislature interprets the Constitution any way it wants. The difference between what Plaintiffs and the State cite as precedent turns on the distinction between the "interpretation" versus the "implementation" of a constitutional mandate. It is the Judiciary's sole prerogative to interpret "gambling"; it falls to the Legislature to implement laws to prevent it. Thus, the determination on whether daily fantasy sports falls within the definition of "gambling" is for the Judiciary, not the Legislature, to decide. Supreme Court properly interpreted the term.

For all the foregoing reasons (Points I-IV), IFS is gambling and the Legislature, therefore, violated the constitutional prohibition against allowing it when it enacted Chapter 237 of the Laws of 2016 purporting to authorize, regulate and tax IFS.

POINT V

That Part of Supreme Court's Judgment Upholding the Exclusion of Interactive Fantasy Sports from the Penal Law's Definition of Gambling Should Be Reversed and Declared Unconstitutional

Notwithstanding Supreme Court's judgment that the Legislature's rationale "that IFS does not constitute gambling as defined in the Penal Law does not support such conclusion," it held that the provisions of Chapter 237 purporting to exclude IFS from the definition of "gambling" in Article 225 of the Penal Law were not unconstitutional [R. 31, 32].

The Court reasoned that while the Legislature could not authorize IFS, the Constitution did not mandate that the Legislature necessarily criminalize it, citing 1984 N.Y. Op. Att'y Gen. 1, 22-23, which noted the "faulty premise" in equating "what is forbidden to criminals with what is allowed to the State" [R. 32]. The Court erred because, in upholding the exclusion of IFS from the Penal Law definition of gambling, it effectively allowed IFS to continue, a result which flies directly in the face of the mandate in Article I, § 9, that

"no gambling ... pool-selling, book-making, or any other kind of gambling ... shall be authorized *or allowed* within this State and the Legislature shall pass appropriate laws *to prevent* offenses against any other provision of this section" (emphasis added).

It is true that the Legislature could have "decriminalized" IFS by excluding IFS from the definition of gambling in the Penal Law but only if it had simultaneously substituted some other prohibition – not necessarily penal in nature - which would have prevented any gambling. It could, for example, have enacted a civil law prohibiting gambling and imposing civil fines to prevent any person or entity from operating IFS. Instead, it left a statutory and regulatory vacuum by decriminalizing gambling while not substituting something else in its place to prevent it.[10] The Legislature did so intentionally, as Article 225 was the only statute on the books prohibiting this type of gambling. By deleting IFS from the definition of "gambling," the Legislature sought not only to

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[10] Racing Law § 1412, added by Chapter 237, purports to prohibit DFS that is not authorized pursuant to the rest of Chapter 237, but Supreme Court struck down that part of Chapter 237 which purports to authorize and regulate IFS [R. 33].

decriminalize such activity, it sought to permit that which is strictly forbidden by the Constitution.

The supreme irony is that as a result of this Court's decision, the current situation is one in which IFS operators, such as FanDuel and DraftKings, continue to operate in New York with total impunity in defiance of this Court's decision that the authorization for such activity was unconstitutional. According to newspaper reports, neither company is "hitting pause in their operations." David Boies, Esq., outside counsel for DraftKings, is quoted as saying, "Their product is not gambling under state law." Lombardo, David, "Online Games in Legal Limbo, Still Running." Albany *Times Union* (November 20, 2018). A FanDuel spokesperson is quoted as saying "the decision makes clear that the New York Legislature's decision ... cannot be delayed in court ... [and] we will continue to offer fantasy sports to New Yorkers." Tom Precious, Buffalo *News* (November 20, 2018). The Supreme Court's decision currently leaves the State powerless to do anything about it, as there is no longer any criminal or civil statute to prevent FanDuel and DraftKings from engaging in

IFS because, as this Court noted, the Constitutional prohibition against gambling is not "self-executing" [R. 31]. It therefore falls to the Legislature to pass laws to prevent gambling. Despite the Legislature's affirmative duty to pass laws to prevent gambling, it has taken precisely the opposite course, and it has done so deliberately.

This is precisely why Chapter 237 should be struck down in its entirety, and not just partially, as Supreme Court did. The Legislature did not exclude IFS from the Penal Law definition of "gambling" because it intended to substitute in its place some alternative measure to prevent it. Quite to the contrary, it inserted the exclusion for the obvious and sole purpose of enabling IFS to occur, so that the State could regulate and tax it. This is precisely why the exclusion is unconstitutional because it had the effect - an effect that was the Legislature's deliberate objective – to enable that which is constitutionally prohibited. Lest there be any doubt as to the Legislature's motive, one need only look at the Assembly and Senate sponsors' Memoranda in Support of the legislation which

ultimately became Chapter 237. They stated that the purpose of the bill was to "provide for the registration, regulation and taxation of interactive fantasy sports contests in New York State" [R. 352]. Obviously, such registration, regulation and taxation could not occur unless the Legislature sought to exclude IFS from the definition of "gambling."

The case law is very clear. A statute must be interpreted not just by looking at its words in the abstract, but rather in context to discern its true meaning by ascertaining the legislative intent. *Friedman v. Connecticut General Life Insurance Company*, 9 N.Y.3d 105, 115 (2007) ("A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent"). *See* McKinney Cons. Laws of N.Y., Book 1, Statutes, § 97. *See Riley v. County of Broome*, 95 N.Y.2d 455, 463 (2000) ("The primary consideration of courts in interpreting statutes is to ascertain and give effect to the intention of the Legislature"). Absent the removal of IFS from the definition of "gambling" in Article 225 of the Penal Law, the Legislature would have been unable to authorize,

regulate and tax it. The purpose of such removal was not just to decriminalize IFS, it was to authorize it, which the Constitution specifically prohibits.

The provisions of Chapter 237 of the Laws of 2016 excluding IFS from the Penal Law definition of "gambling" cannot, therefore, be severed from the rest of Chapter 237. Given that the purpose of such exclusion was to enable and allow IFS, its effect would be to "invalidate the dog while preserving the tail." *See Association of Surrogates, et al. v. State of New York*, 79 N.Y.3d 39, 48 (1992). *See also CWM Chemical Services, LLC v. Roth*, 6 N.Y.3d 410, 423 (2006), *quoting* Judge Cardozo:

> "The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots" (*People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 [1920]).

See also Boreali v. Axelrod, 71 N.Y.2d 1, 14 (1987):

> It would be pragmatically impossible, as well as jurisprudentially unsound, for us to attempt to identify and excise particular provisions while leaving the remainder ... intact ... since the product of such an effort would be a regulatory scheme that neither the Legislature nor the [agency] intended.

In enacting Chapter 237, the Legislature itself never intended for there to be unregulated or unlicensed IFS. *See Racing, Pari-Mutuel Wagering and Breeding Law*, § 1402(a)(1). As a result, however, of the incongruity in Supreme Court's present decision, that is exactly what is taking place right now and will continue if that part of the lower court's decision is upheld.

CONCLUSION

This Court should modify Supreme Court's Decision, Order and Judgment dated October 26, 2018 by deleting so much thereof as declared that the provisions of Chapter 237[11] excluding IFS from the scope of New York State Penal Law definition of "gambling" is constitutional and in its place declare that "Chapter 237 of the Laws

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[11] *See, specifically,* Racing, Pari-Mutuel Wagering and Breeding Law §§ 1400(2) and 1402(4).

of 2016, to the extent that it excludes IFS from the scope of the New York State Penal Law definition of "gambling" at Article 225, violates Article I, § 9 of the New York State Constitution, and as so modified, affirm the judgment that Chapter 237 is unconstitutional insofar as it purports to allow the State to authorize, regulate and tax interactive fantasy sports.

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O'CONNELL AND ARONOWITZ
By:

Cornelius D. Murray, Esq.
Attorneys for Plaintiffs
Office and P.O. Address
54 State Street
Albany NY 12207-2501
(518) 462-5601

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