New York Supreme Court
Appellate Division – Third Department

Appellate Case No.: 528026

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

Plaintiffs-Respondents-Cross-Appellants,

– v. –

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

Defendants-Appellants-Respondents.

NOTICE OF MOTION ON BEHALF OF CAPITAL REGION GAMING, LLC D/B/A RIVERS CASINO SCHENECTADY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

PERKINS COIE LLP
ADAM H. SCHUMAN
Attorneys for Capital Region Gaming, LLC d/b/a Rivers Casino Schenectady
1155 Avenue of the Americas
22nd Floor
New York, New York 10036
(212) 261-6844
aschuman@perkinscoie.com

Of Counsel:
DAVID J. BURMAN*
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099

ADAM L. MARCHUK*
131 South Dearborn Street, Suite 1700
Chicago, Illinois 60603

*Not Admitted in New York

Albany County Clerk's Index No. 5861/16

PLEASE TAKE NOTICE that upon the annexed Affirmation of Adam H. Schuman and the accompanying brief, dated June 28, 2019, Capital Region Gaming, LLC d/b/a Rivers Casino Schenectady, by its attorneys Perkins Coie LLP, will move this Court, at the Supreme Court, Appellate Division, Third Department, Robert Abrams Building for Law and Justice, State Street, Albany, New York, on July 15, 2019, at 10:00 a.m. or as soon thereafter as counsel may be heard, for an order permitting the proposed *Amicus* to serve and file a brief as *Amicus Curiae*.

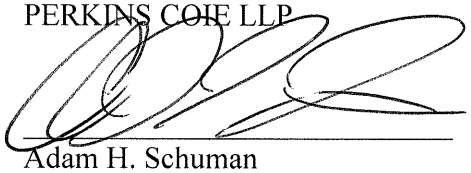
PLEASE TAKE NOTICE that pursuant to CPLR 2214(b), answering papers, if any, must be served upon the undersigned at least seven (7) days before the return date of this motion.

This motion is filed pursuant to CPLR 2214 and Rule 1250.4(f) of the Practice Rules of the Appellate Division and relates to the above-captioned appeal filed by the Defendants-Appellants-Respondents Hon. Andrew Cuomo, as Governor of the State of New York, and the New York State Gaming Commission, and should be heard by the same motions panel assigned to hear Defendants-Appellants-Respondents' motion.

Dated: New York, New York
June 28, 2019

Respectfully submitted,

PERKINS COIE LLP



Adam H. Schuman
1155 Avenue of the Americas
22nd Floor
New York, New York 10036-2711
T: +1.212.262.6900
F: +1.212.977.1649
E: ASchuman@perkinscoie.com

Of Counsel:
David J. Burman*
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099

Adam L. Marchuk*
131 South Dearborn Street, Suite 1700
Chicago, Illinois 60603-5559
**Not admitted in New York*

Attorneys for Capital Region Gaming, LLC d/b/a Rivers Casino Schenectady

TO: Letitia James
Attorney General
State of New York
Steven C. Wu
Deputy Solicitor General
Victor Paladino
Assistant Solicitor General
Of Counsel
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2012
Attorneys for Defendants-Appellants-Respondents

Cornelius D. Murray
Courtney L. Alpert
O.CONNELL AND ARONOWITZ, P.C.
54 State Street
Albany, New York 12207-2501
(518) 462-5601
Attorneys for Plaintiffs-Respondents-Cross-Appellants

W. David Sarratt
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

Marc Zwillinger
Of Counsel
ZWILLGEN PLLC
1900 M Street NW, Suite 250
Washington, DC 20036
Attorneys for FanDuel Inc.

Joshua Schiller
BOIES, SCHILLER & FLEXNER LLP
55 Hudson Yards
20th Floor
New York, New York 10001
(212) 303-3520
Attorneys for DraftKings, Inc.

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

Defendants-Appellants-Respondents.

AFFIRMATION OF ADAM H. SCHUMAN IN SUPPORT OF MOTION ON BEHALF OF CAPITAL REGION GAMING, LLC D/B/A RIVERS CASINO SCHENECTADY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

PERKINS COIE LLP
ADAM H. SCHUMAN
Attorneys for Capital Region Gaming, LLC d/b/a Rivers Casino Schenectady
1155 Avenue of the Americas
22nd Floor
New York, New York 10036
(212) 261-6844
aschuman@perkinscoie.com

Of Counsel:
DAVID J. BURMAN*
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099

ADAM L. MARCHUK*
131 South Dearborn Street, Suite 1700
Chicago, Illinois 60603

*Not Admitted in New York

Albany County Clerk's Index No. 5861/16

ADAM H. SCHUMAN, an attorney duly admitted to practice before the courts of the State of New York, affirms the following to be true under penalty of perjury pursuant to CPLR 2016:

1. I am a member in good standing of the Bar of the State of New York and a partner in the law firm Perkins Coie LLP, attorneys for proposed *amicus* Capital Region Gaming, LLC d/b/a Rivers Casino Schenectady ("Rivers"). This affirmation is made in support of Rivers' Motion for Leave to File Brief as *Amicus Curiae* in Support of Plaintiffs-Respondents-Cross-Appellants. Rivers has demonstrated interest in the issues in this matter and can be of special assistance to the Court. A copy of the proposed *amicus* brief is attached hereto as Exhibit A.
2. Article I, § 9 of the New York Constitution broadly prohibits "lotter[ies], . . . pool-selling, book-making, or any other kind of gambling," but it allows "casino gambling at no more than seven facilities as authorized and prescribed by the legislature," among certain other limited exceptions. N.Y. Const., art. I, § 9. Rivers is one of only four casinos that have met the rigorous regulatory standards to secure a license to conduct casino gambling in the State of New York.
3. This appeal is of great importance to Rivers, and to the regulated gambling industry more broadly, because it implicates the proper role of the courts and Legislature in interpreting the Constitution's ban on gambling.
4. Rivers' proposed *amicus* brief explains that Chapter 237, which authorized daily fantasy sports ("DFS"), violates the Constitution's general prohibition on gambling. The Legislature found that DFS contests are not gambling under the New York Penal Law because, according to the Legislature, such contests are games of skill, and the entry fees players pay are not wagers on future contingent

events. Rivers highlights that no matter how the Legislature purports to define DFS contests, the text, history, and purpose of the Constitution's prohibition on gambling demonstrate that DFS contests are gambling within the meaning of the Constitution. Because the Legislature cannot alter the meaning of gambling under the Constitution, Chapter 237 is unconstitutional.

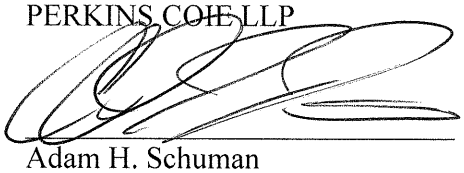
5. Defendants-Appellants-Respondents' and Plaintiffs-Respondents-Cross-Appellants' counsel have been notified of this motion.
6. Defendants-Appellants-Respondents' notice of appeal is attached hereto as Exhibit B, and Plaintiffs-Respondents-Cross-Appellants' notice of cross-appeal is attached hereto as Exhibit C.
7. The order appealed from is attached hereto as Exhibit D.

WHEREFORE, I respectfully request that the Court grant Rivers' motion to file its brief as *Amicus Curiae*.

Dated: New York, New York
June 28, 2019

Respectfully submitted,

PERKINS COIE LLP



Adam H. Schuman
1155 Avenue of the Americas
22nd Floor
New York, New York 10036-2711
T: +1.212.262.6900
F: +1.212.977.1649
E: ASchuman@perkinscoie.com

Of Counsel:
David J. Burman*
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099

Adam L. Marchuk*
131 South Dearborn Street, Suite 1700
Chicago, Illinois 60603-5559
**Not admitted in New York*

Attorneys for Capital Region Gaming, LLC d/b/a Rivers Casino Schenectady

TO: Letitia James
Attorney General
State of New York
Steven C. Wu
Deputy Solicitor General
Victor Paladino
Assistant Solicitor General
Of Counsel
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2012
Attorneys for Defendants-Appellants-Respondents

Cornelius D. Murray
Courtney L. Alpert
O.CONNELL AND ARONOWITZ, P.C.
54 State Street
Albany, New York 12207-2501
(518) 462-5601
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W. David Sarratt
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

Marc Zwillinger
Of Counsel
ZWILLGEN PLLC
1900 M Street NW, Suite 250
Washington, DC 20036
Attorneys for FanDuel Inc.

Joshua Schiller
BOIES, SCHILLER & FLEXNER LLP
55 Hudson Yards
20th Floor
New York, New York 10001
(212) 303-3520
Attorneys for DraftKings, Inc.

Exhibit A

Submitted by:
ADAM H. SCHUMAN

New York Supreme Court
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BRIEF FOR *AMICUS CURIAE* CAPITAL REGION GAMING, LLC D/B/A RIVERS CASINO SCHENECTADY

PERKINS COIE LLP
ADAM H. SCHUMAN
Attorneys for Capital Region Gaming, LLC d/b/a Rivers Casino Schenectady
1155 Avenue of the Americas
22nd Floor
New York, New York 10036
(212) 261-6844
aschuman@perkinscoie.com

Of Counsel:
DAVID J. BURMAN*
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
*Not Admitted in New York

ADAM L. MARCHUK*
131 South Dearborn Street, Suite 1700
Chicago, Illinois 60603

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INTEREST OF AMICUS CURIAE

For more than 125 years, the New York Constitution has, on its face and in common understanding, broadly prohibited all forms of gambling. The only way to authorize and expand gambling was constitutional amendment, and such an amendment was enacted in 2013 to allow casino gambling. That amendment expressly allowed the Legislature to "authorize[] and prescribe[]" such casino gambling, and the enabling legislation allowed up to seven destination gaming resorts to boost tourism and economic development in New York.

Capital Region Gaming, LLC d/b/a Rivers Casino Schenectady ("Rivers"), operates one of those seven casinos. In 2016, Rivers paid $50,000,000 for its casino gaming license. Rivers built at a cost of over $300,000,000 and, since 2017, has operated an approximately 275,000 square foot casino and hotel facility. Rivers employs over 1,000 individuals in Upstate New York. In 2018, Rivers paid more than $52,000,000 in gaming taxes to the State.

This appeal has important implications for Rivers' business and for the regulated gambling industry more broadly. The industry has relied upon the settled understanding that the Constitution's prohibition on gambling bound the Legislature, such that the only way to authorize a form of gambling was through constitutional amendment. To say the least, Chapter 237fundamentally upsets the legal framework upon which this industry has justifiably relied.

The entire landscape of New York gambling regulations would be thrown into flux if, by mere legislative enactment, any game involving skill could be exempted from Article I, § 9 of the Constitution. Such a legal regime would be susceptible to political winds and legislatively-selected winners and losers—something the framers of the Constitution's prohibition against gambling explicitly sought to prevent.

PRELIMINARY STATEMENT

Article I, § 9 of the Constitution broadly prohibits "any . . . kind of gambling" with limited exceptions that do not apply here:

> [N]o lottery . . . pool-selling, bookmaking, or *any other kind of gambling* . . . shall hereafter be authorized or allowed within this state . . .

(emphasis added). The Constitution both told the Legislature what it could not do—authorize or allow such gambling—and directed it to "pass appropriate laws to prevent offenses against" the prohibition. *Id.* When conduct qualifies as gambling under the Constitution, the Legislature must ascribe appropriate penalties, whether criminal or civil, to prevent continuing and future infractions. But determining how best to enforce a prohibition is not the same as determining whether to allow the conduct at all. The Legislature simply lacks the power to "authorize[] or allow[]" gambling activities in New York not approved by constitutional amendment.

The parties acknowledge that the Constitution broadly prohibits all forms of gambling, but thereafter jump to debating whether daily fantasy sports ("DFS") is gambling subject to enforcement under the Penal Law. Their principal dispute is whether DFS is a game of skill or chance. In this debate, the State conflates "whether to allow" with "how best to prevent," and the parties equate the term "gambling" in the Penal Law with that in the text of the Constitution.[1] (*See* Pl. Reply Br., at 7 ("whether DFS is or is not gambling must be measured against the constitutional standard adopted by the Legislature in Penal Law § 225.00."); *see also* (St. Br., at 30-31 (arguing that DFS is not gambling under the 1895 Penal Law and, therefore, Chapter 237 is constitutional)). But the New York Penal Law stands subordinate to the Constitution, and the scope of "gambling" activities covered by the New York criminal laws and by the Constitution is not coterminous.

Before considering the meaning and scope of the Penal Law, this Court *first* must decide if DFS constitutes gambling *as that term is used in the Constitution*. For reasons explained below, the term gambling as used in the Constitution means simply: *to wager on games of skill or chance*. Whether DFS is viewed as a game of

[1] The parties dispute which version of the Penal Law applies: the current version (Plaintiffs) or the 1895 version (the State). The State, for example, contends that (1) the definition of gambling under the 1895 Penal Code was more stringent, (2) that criminal gambling in New York was limited to activities where chance was the "dominating element," and (3) that Chapter 237 is constitutional because the dominant element in DFS is skill. (*See* St. Br., at 30-31; *see also* St. Reply Br., at 5-10). Those arguments miss the point. Whether DFS is a game of skill or chance, it is unlawful gambling in violation of the Constitution.

skill or chance, or should be subject to criminal penalties in New York, it is still unauthorized "gambling" as that term is used in the Constitution. From there, the Legislature presumably may decide to criminalize DFS, or to prescribe civil penalties, but the Legislature cannot somehow "authorize" DFS. Chapter 237, therefore violates the Constitution's general prohibition against gambling.

Because neither party has fully addressed the meaning of the term "gambling" as used in the Constitution, Rivers, as *amicus*, makes this limited submission.

BACKGROUND

In DFS contests, participants pay entry fees to pick teams of real-world athletes and then collect points based on the athletes' performance in actual events. (*See* R. 9-10; *see also* R. 441, at ¶ 2). The results of DFS contests "turn" on the performance of real-world athletes, (*see* R. 766), but "[p]articipants cannot control how the athletes on their fantasy sports teams will perform in such sporting events." (R. 9; *see also* R. 441, at ¶ 2). The contestant accumulating the most points based on his or her fantasy team's performance, compared to the field, wins some portion of the pot. "The winnings paid to successful [fantasy contest participants] come from the entry fees paid by all contestants." (R. 9-10). Just like the "house" in casino poker, "[t]he online interactive fantasy sports providers derive their revenue by retaining a portion of such entry fees." (R. 10).

In May 2016, the Legislature passed Chapter 237, which claims to "authorize," not prevent, DFS contests in New York: "[DFS] contests registered and conducted pursuant to the provisions of this chapter are hereby authorized." (R. 90, at § 1411). The Legislature allegedly found that DFS contests do not constitute gambling *under § 225 of the Penal Law* because they are (1) "games of skill" and (2) the entry fees that New York residents pay to play in a DFS contest "are not wagers on future contingent events not under the contestants' control or influence." (*See* R. 82-83, at § 1400.1-1400.2). But nowhere did the Legislature or the text of Chapter 237 actually address whether DFS constitutes "gambling" under the Constitution. (*See* R. 81-90 (Chapter 237)).

ARGUMENT

The threshold question for this Court is whether the definition of gambling in the Constitution includes DFS. In answering that question, the traditional judicial tests for interpreting the Constitution's meaning—the text, history, and purpose of Article I, § 9—point unavoidably to the conclusion that DFS does constitute "gambling." By passing Chapter 237 and declaring that DFS is not gambling, the Legislature "authorized or allowed" gambling and violated the Constitution.

The Supreme Court performed a similar analysis, concluding that Chapter 237 violated the Constitution based on the plain meaning of Article I, § 9 and the State's historical treatment of gambling activities, including sports betting, book-making,

and pool-selling. (See R. 20-30). In doing so, the court rejected the State's argument that "the only currently valid definition of the term 'gambling' in Article I §9 is found in the Penal Law § 225.00(2)," because the Penal Law "does not have the effect of changing the meaning of the constitutional terms." (R. 28). This submission is intended to supplement, not to replace, the Supreme Court's analysis and to shed further light on the meaning of gambling as used in the Constitution

A. The Plain and Ordinary Meaning of "Gambling" Includes Wagering on Games of Skill or Chance

The Constitution does not define the terms "gambling" and "pool-selling," but it does indicate that they are to be given an expansive definition. The provision broadly applies to "*any* . . . pool-selling, book making *or any other* kind of gambling . . . ." (Emphasis added.) Further definition would have only created the risk of leaving something out. And even had the Constitution not expressly required a broad definition, the terms must at least be given their "ordinary meaning." *Burton v. New York State Dept. of Taxation & Fin.*, 25 N.Y.3d 732, 739 (2015); *see also* McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 94 (explaining that "words of ordinary import receive their understood meaning").

Dictionary definitions of gambling from the period in which the 1894 Constitution's prohibition was adopted, uniformly describe gambling as *wagering (i.e., the staking of money or a thing of value) on a game of chance or skill*. *See* N. Webster, *An American Dictionary of the English Language* (1st ed. 1828) (defining

"gamble" as "[t]o play or game for money or other stake"); *Webster's International Dictionary of the English Language* 610 (1906) (same); *Chambers's Twentieth Century Dictionary of the English Language* 375 (1903) (defining "gamble" as "to play for money in games of chance or skill").

The related term "gambler" commonly meant, as it still does, "one who follows or practices games of chance or skill with the expectation and purpose of thereby winning money or other property." *Thomson v. Hayes*, 59 Misc. 425, 427 (1908); *see also Clement v. Belanger,* 120 A.D. 662, 664 (3d Dep't 1907) ("In common parlance a gambler is one who follows or practices games of chance or skill, with the expectation and purpose of thereby winning money or other property."); *Buckley v. O'Neil*, 113 Mass. 193 (1873) (same). Even accepting that DFS is a game involving skill (as the lower court did), selling access to a pool that rewards some players also falls within the scope of gambling that violates the plain language of the Constitution.[2]

[2] The State urges that DFS is not gambling under the Constitution because it calls what DFS participants pay to support the pool "entrance fees" rather than "wagers." (St. Br., at 38-40). It is conceded in this appeal that in DFS contests, "[t]he winnings paid to successful … contestants come from entry fees paid by all contestants." (R. 441, ¶ 3). The legal authority in New York is consistent with the common-sense notion that when entry fees go to make up the purse competed for, each participant "gets a chance of gain from others, and takes a risk of loss of his own to them," and the entry fees are a bet or wager. *Harris v. White*, 81 N.Y. 532, 539 (1880); *see also People ex. rel. Lawrence v. Fallon*, 152 N.Y. 12, 19 (1897). In a similar context, pari-mutuel betting involves placing bets where winning players divide the total amount of the pooled bets, subtracted for management expenses. Pari-mutuel betting on horse races is gambling that was only legalized by a *constitutional amendment* in 1938. *See* N.Y. Const. art. I, § 9. (*See also* State Br. at 5.)

The courts that interpreted the Constitution's prohibition against gambling immediately after its adoption confirm the broad definition of the term "gambling":

> Other forms of gambling, to be sure, are mentioned [beyond lotteries, pool-selling and bookmaking] . . . because, as is evident from the debates at the convention, it was intended that no opening should be left by which anybody who desired to pursue the business of bookmaking or poolselling in some other way than had been pursued before, could be able to do so, and thereby evade constitutional prohibition.

People ex rel. Sturgis v. Fallon, 4 A.D. 76, 79 (1st Dep't 1896), *aff'd*, 152 N.Y. 1 (1897). And immediately after the 1894 constitutional convention, the Legislature, too, adopted a broad definition of the terms in Article I, § 9. The Legislature amended the Penal Law to make pool-selling and bookmaking a felony, specifying that the prohibition included any contest involving gambling on "the skill, speed, or power of endurance of man or beast" involving "any unknown or contingent event whatsoever." *See* L. 1895, ch. 1, § 1, amending § 351 of the Penal Law. A "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) (citation omitted). DFS plainly falls within this definition. DFS players stake money on "the skill, speed, or power of endurance of man" (sporting events) "involving [an] unknown or contingent event" (future athletic performance).

B. The Purpose of Article I, § 9 Was to Prohibit All Gambling, Including Games of Skill, and to Prevent the Legislature from Authorizing Gambling.

1. The 1894 Constitution banned wagering on games of skill.

The 1894 Constitution was designed to prohibit wagering on games of skill involving unknown or contingent events. That definition pervaded the discussion before, during, and after the constitutional convention. Prior to 1894, gambling that involved wagering on games of skill was repeatedly prohibited. *See People ex rel. Collins v. McLaughlin*, 128 A.D. 599, 602 (1st Dep't 1908) ("At the time of the adoption of this Constitution, all betting and gambling was illegal, except in the case of betting on race courses.") In 1877, the Legislature prohibited gambling defined as: "bet[ting] or wager[ing] . . . upon the result of any trial or contest of skill, speed, or power of endurance, of man or beast, or upon the result of any political nomination, appointment or election." Chapter 178, p. 192 of the Laws of 1877. "This statute seems to have been the origin of section 351 of the Penal Code," originally adopted in 1881, that prohibited gambling under the same terms. *McLaughlin*, 128 A.D. at 607. And, as pointed out above, when the Legislature amended § 351 in 1895, nearly contemporaneously with the adoption of the 1894 Constitution, it likewise prohibited gambling activity involving wagering on "the skill, speed, or power of endurance of man or beast" involving "any unknown or contingent event whatsoever." *See* L. 1895, ch. 1, § 1, amending § 351 of the Penal

Law. The intention of the constitutional convention of 1894 was thus clear: gambling, including wagering on games of skill, was to be prohibited.

2. Article I, § 9 was intended to restrict the Legislature's ability to authorize gambling.

The record of the 1894 constitutional convention reveals not only that Article I, § 9 adopted a broad definition of gambling but that the purpose of doing so was specifically *to prevent* the Legislature from authorizing forms of gambling. That the provision limits the Legislature is clear from the start of the sentence that contains the gambling prohibition: "No law shall be passed abridging the rights of the people peaceably to assemble to petition the government . . . ." Would the State contend that the Legislature could narrow the common understanding of "assembly" under the Constitution by adopting a merely rational definition? The gambling prohibition answers that question directly: The Legislature may not "authorize[] or allow[]" "any" kind of gambling not expressly approved by the Constitution.

The history of the 1894 constitutional convention demonstrates, in detail, that the framers chose to enshrine the prohibition on gambling in the Constitution because they were (wisely) concerned that the Legislature would be unable to avoid the temptation to exempt particularly lucrative forms of gambling in the future.[3]

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[3] A similar purpose was at work in the Constitutions of 1821 and 1864:

> For many years prior to 1821 there had existed laws for the prohibition of all lotteries other than such as should be authorized by the legislature . . . . The legislature, however, had by special acts authorized them to such an extent as to

This concern was borne of the framers' recent historical experience. Prior to the adoption of the 1894 New York Constitution, the Legislature of 1877 had adopted a prohibition on "bookmaking and pool-selling on races, and other forms of gambling." *See* 3 Lincoln's *Constitutional History of New York*, 46 (1906). But ten years later, the Legislature backtracked, passing the "Ives pool law," which "authorized racing and pool-selling between the 15th day of May and the 15th day of October each year." *Id*. at 47. In the convention debate around the prohibition against gambling, the framers stated their frustration that the Legislature had been unable to repeal the Ives pool law. *Id*. at 50 (Delegate Jesse Johnson stated that "gambling" had proved "more powerful than the legislature.").

It was the Legislature's demonstrated weakness in authorizing this racing and pool-selling that motivated the framers to take the question out of the legislative domain. *Id*. at 49 ("The amendment sought to reach the evil which the legislature had legalized."). In fact, the State's interpretation of the prohibition—that the provision intended to largely leave the question of gambling regulation as "purely a matter of legislation," was voiced at the convention but *by those who opposed* the prohibition *and lost*. *Id*. at 50 ("Mr. Abbott opposed the amendment because it was

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> call for a constitutional prohibition. *Evidently, it was not deemed wise to trust the legislature on the subject*.

Reilly v. Gray, 77 Hun. 202, 28 N.Y.S. 811, 815 (4th Dep't 1894) (emphasis added).

'purely a matter of legislation.'"). Meanwhile, DeLancey Nicoll, a delegate from New York City and supporter of the prohibition understood the amendment to put the Constitution's "seal of condemnation upon *all forms of gambling*." *Id*. at 49 (emphasis added). And Delegate Edward Lauterbach implored the Convention to adopt a broad prohibition on the grounds that they could "[s]weep the whole brood together—gamblers, poolsellers, bookmakers—all of the racing fraternity into oblivion together." *Id*. at 51. The sweeping language of Article I, § 9, prohibiting "any kind of gambling," matched the sweeping intention of those who drafted and adopted the language. The State's position was considered. The 1894 Constitution rejected it. This Court should as well.

Against this backdrop, the State still argues that, because Article I, § 9 purposely chose a broad and general prohibition and vests the Legislature with "pass[ing] appropriate laws to prevent offenses against any of the provisions of this section," the Legislature is empowered to determine the meaning of the term "gambling" so long as the Legislature makes "rational choices." (St. Br., at 21-23.) That interpretation is untenable. The Legislature is, of course, owed deference with respect to the manner in which it chooses *to execute* the Constitution's prohibition on gambling. *See People ex rel. Sturgis v. Fallon*, 152 N.Y. 1, 11 (1897) (holding, regarding a statute decreasing a gambling penalty, that "we are aware of no principle of constitutional law which would authorize this Court to condemn it as invalid or

unconstitutional because, in our opinion, some more effective or appropriate law might have been devised or enacted"). Thus, criminalization of gambling is not constitutionally mandated. But the Legislature's duty to enforce a prohibition does not carry with it the power to define away the prohibition. Even if Article I, § 9 is "not self executing" (St. Br., at 21), that does not mean that it has no substantive meaning or has only such meaning as the Legislature determines.[4] Meaning and enforcement are not one and the same. New York courts are "the ultimate arbiters of our State Constitution." *Campaign for Fiscal Equity, Inc. v. New York*, 8 N.Y.3d 14, 28 (2006). As such, the courts cannot defer to the Legislature's erroneous interpretation of the term "gambling" in the Constitution.

Also, the State's interpretation nullifies or violates multiple provisions at the very heart of the Constitution. If the Constitution had somehow authorized the Legislature to change the constitutional definition of gambling through legislative enactment, then this would integrally conflict with the restriction of constitutional amendments to the processes mandated in Article XIX of the Constitution. *See* N.Y. Const. art. XIX, § 1 (explaining that "any amendment . . . to this constitution" must, *inter alia*, be approved by the New York Senate and Assembly in two consecutive legislative sessions and then receive a majority of popular support). Moreover, the

[4] *Amicus* DraftKings made this point in litigation before a New York court in 2015: "Article I, Section 9 prohibits . . . the *legislature's* authorization of "gambling" or "bookmaking." *New York v. DraftKings, Inc.*, Index No. 453054/2015, NYSCEF Doc. No. 92, at 12 (Nov. 24, 2015).

State's interpretation of Article I, § 9 renders the Constitution's prohibition on gambling a nullity—allowing the Penal Law's prohibition of gambling (or lack thereof) to stand in the place of the Constitution's prohibition. Any interpretation that nullifies Article I, § 9 impermissibly violates a core canon of legal interpretation. *See Albano v. Kirby*, 36 N.Y.2d 526, 530 (1975) ("To construe the rule in question . . . resulting in the nullification of one part of the rule by another, is not permissible.").

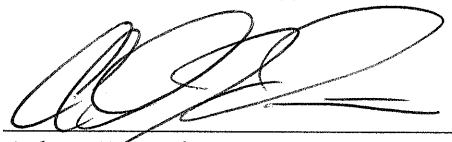
CONCLUSION

For the reasons stated above, even accepting that DFS is a "game of skill," it is gambling under Article I, § 9 of the Constitution. The Supreme Court rightly held that Chapter 237, which "authorizes" rather than "prevents" DFS, is void.

Dated: New York, New York
June 28, 2019

Respectfully submitted,

PERKINS COIE LLP



Adam H. Schuman
1155 Avenue of the Americas
22nd Floor
New York, New York 10036-2711
T: +1.212.262.6900
F: +1.212.977.1649
E: ASchuman@perkinscoie.com

Of Counsel:
David J. Burman*
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099

Adam L. Marchuk*
131 South Dearborn Street, Suite 1700
Chicago, Illinois 60603-5559
**Not admitted in New York*

Attorneys for Capital Region Gaming, LLC d/b/a Rivers Casino Schenectady

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Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

----------X

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

Plaintiffs,

-against-

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

Defendants.

----------X

NOTICE OF APPEAL

Index No. 5861-16

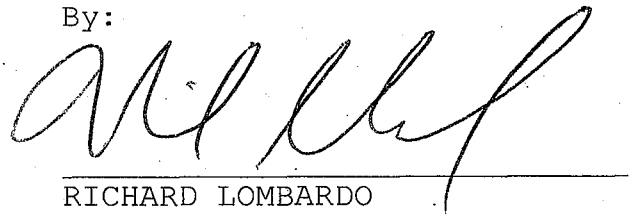
PLEASE TAKE NOTICE that defendants, Hon. Andrew Cuomo, as Governor of the State of New York, and the New York State Gaming Commission, hereby appeal to the Appellate Division of the Supreme Court for the Third Judicial Department, from the Decision, Order & Judgment signed by Hon. Gerald W. Connolly, Acting Justice, New York State Supreme Court, on October 26, 2018, and entered in the office of the Albany County Clerk on October 31, 2018.

This appeal is taken from each part of said Decision, Order & Judgment that aggrieves the defendants and is appealable by them.

Dated: Albany, New York
November 28, 2018

Yours, etc.,

BARBARA D. UNDERWOOD
Attorney General of the
State of New York
Attorney for Defendants
By:



RICHARD LOMBARDO
Assistant Attorney General
The Capitol
Albany, New York 12224
(518) 776-2624

To: O'Connell and Aronowitz, P.C.
Attorneys for Plaintiffs
54 State Street
Albany, New York 12207

Exhibit C

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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

Plaintiffs,

-against-

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

Defendants.

NOTICE OF CROSS-APPEAL

Index No. 5861-16

PLEASE TAKE NOTICE that Plaintiffs hereby cross-appeal to the Appellate Division – Third Department of State Supreme Court from so much of the Decision, Order and Judgment of Supreme Court, Albany County (Gerald W. Connolly; Acting Supreme Court Justice) dated October 26, 2018 (a copy of which is annexed hereto as Exhibit "A") insofar as said Decision, Order and Judgment (1) declared that the provisions of Chapter 237 of the Laws of 2016 excluding interactive fantasy sports from the definition of "gambling" in Article 225 of the Penal Law did not violate Article I, § 9 of the New York State Constitution); and (2) failed to issue an injunction permanently enjoining Defendants from implementing any of the provisions of Chapter 237 of the Laws of 2016 and/or expending taxpayer dollars pursuant thereto.

The Defendants filed their Notice of Appeal dated November 28, 2018 to the Appellate Division, Third Department.

DATED: November 30, 2018
Albany, New York

O'CONNELL AND ARONOWITZ
By: Cornelius D. Murray

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

TO: Albany County Clerk
Albany County Courthouse
Eagle Street
Albany NY 12207

Richard Lombardo, Assistant Attorney General
Office of the Attorney General
New York State Capitol
Albany NY 12224

Exhibit D

COPY

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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

Plaintiffs,

-against-

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

Defendants.

DECISION, ORDER & JUDGMENT

Index No.: 5861-16

(Supreme Court, Albany County, All Purpose Term)

APPEARANCES: O'Connell and Aronowitz
(Cornelius D. Murray, Esq. of Counsel)
Attorneys for Plaintiffs
54 State Street
Albany, New York 12207

Hon. Barbara D. Underwood
New York State Attorney General
(Richard Lombardo, Asst. Attorney General, of Counsel)
Attorneys for Defendants
The Capitol
Albany, New York 12224-0341

Connolly, J.:

Plaintiffs, citizen-taxpayers of the State of New York who either have gambling disorders or are relatives of individuals who have such disorders, have brought the within action requesting a declaratory judgment that Chapter 237 of the Laws of 2016 of the State of New York, which authorizes interactive fantasy sports contests with monetary prizes (hereinafter "IFS"), is unconstitutional as in violation of the anti-gambling provision at Article 1, §9 of the state constitution. Plaintiffs further request a permanent injunction enjoining the State and its agencies

and officials from implementing such chapter. By Decision and Order of August 31, 2017, the Court denied the defendants' motion to dismiss the complaint. Subsequently, the parties agreed to waiver of discovery and a timetable for submission of motions for summary judgment. The parties have now fully submitted upon both the motion of plaintiffs and the cross-motion of the defendants.

Article 1, Section 9 of the State Constitution provides, in pertinent part:

> 1 .... except as hereinafter provided, no 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, 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.

Chapter 237 states certain Legislative findings:

> 1. The legislature hereby finds and declares that: (a) Interactive fantasy sports are not games of chance because they consist of fantasy or simulation sports games or 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; (b) Interactive fantasy sports contests are not wagers on future contingent events not under the contestants' control or influence because contestants 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.
> 2. Based on the findings in subdivision one of this section, the legislature declares that interactive fantasy sports do not constitute gambling in New York state as

defined in article two hundred twenty-five of the penal law. (RPMWBL §1400)[1].

In other pertinent part, Chapter 237 affirmatively states that "[i]nteractive fantasy sports contests registered and conducted pursuant to the provisions of this chapter are hereby authorized." (RPMWBL §1411).

Stipulated Facts

Upon the within submissions, the parties have stipulated and agreed to the following enumerated facts:

(1) Online interactive fantasy sports providers offer their subscribers season-long, weekly, and daily online interactive fantasy sports contests.

(2) Participants in such contests select fantasy teams of real-world athletes and compete against other contestants based on a scoring system that awards points based on the individual athlete's performances in actual sporting events that are held after contests are closed and no more participants may enter the contest. Participants in fantasy sports contests may use, among other things, their sports knowledge and statistical expertise to determine how athletes individually, and their fantasy teams overall, are likely to perform in such sporting events. Participants cannot control how the athletes on their fantasy sports teams will perform in such sporting events.

(3) The winnings paid to successful online interactive fantasy sports contestants come

---

[1] Penal Law §225 (2) defines "Gambling" as follows: "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". A "Contest of Chance" is defined at Penal Law §225.00(1): "... 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."

from the entry fees paid by all contestants. The online interactive fantasy sports providers derive their revenue by retaining a portion of such entry fees.

(4) On August 3, 2016, Governor Cuomo signed into law Chapter 237 of the Laws of 2016, which amends the Racing, Pari-Mutuel Wagering and Breeding Law (hereinafter, "RPMWBL") by adding a new Article 14.

(5) Chapter 237 of the Laws of 2016 authorizes interactive fantasy sports contests that are registered and conducted pursuant to the law (RPMWBL §1411) and prohibits unregistered interactive fantasy sports contests (RPMWBL §1412).

(6) Chapter 237 of the Laws of 2016 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." (RPMWBL §1401(8)).

(7) Chapter 237 of the Laws of 2016 provides for the registration of interactive fantasy sports providers (RPMWBL §1402), required safeguards and minimum standards as a condition of such registration (RPMWBL §1404), annual reporting by registered interactive fantasy sports providers (RPMWBL §1406), taxation of registered interactive fantasy sports providers (RPMWBL §1407), and the assessment of regulatory costs upon registered interactive fantasy sports providers (RPMWBL §1408).

(8) The total tax revenue that the State of New York received in 2016 from the operation of interactive fantasy sports conducted pursuant to Chapter 237 of the Laws of 2016 was

$2,338,607.00.

(9) To become registered, the interactive fantasy sports provider 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." (RPMWBL§1404(1)(o)).

(10) Chapter 237 of the Laws of 2016 requires registered interactive fantasy sports providers to design games requiring the identification of highly experienced players and limiting the number of entries a contestant may submit for any single contest. (RPMWBL §1404(1)(g) and (2)).

(11) Chapter 237 of the Laws of 2016 requires registered interactive fantasy sports providers to enable contestants to "self-exclude" themselves from contests and provide information regarding assistance for compulsive players. (RPMWBL §1404(1)(d) and (m)).

Plaintiffs' Contentions

Plaintiffs argue that the plain meaning of the term "gambling" in the Constitution includes IFS and that the existence of a material degree of skill in IFS competition does not exclude IFS from the definition of gambling, as such competitions indisputably contemplate a material degree of chance. Plaintiffs reference the IFS scoring system, wherein points are awarded based upon contingent future events (performances of the selected "fantasy" players).

Plaintiffs assert that the legislative mandate in the constitutional provision is solely to pass laws to prevent gambling offenses and not to carve out exceptions to the provision. Plaintiffs argue that if the Legislature had the right to arbitrarily define gambling [via statute], the Constitutional prohibition would be a nullity. Plaintiffs assert that all prior exceptions to such prohibition,

including for pari-mutuel wagering on horse racing, certain lotteries and casinos, have been authorized solely by constitutional amendment.

Plaintiffs point to anti-gambling laws, specifically now-superceded Penal Law §351 passed shortly after the 1894 amendment expanding the scope of the constitutional prohibition, which specifically criminalized bets, wagers and pools on the results of contests of skill, speed, power or endurance, as evidence of the use and meaning of the word "gambling" in the constitutional provision. Plaintiffs argue that such an contemporaneous interpretation by the Legislature of a Constitutional provision is entitled to great deference, citing to, *inter alia, New York Public Interest Research Group v. Steingut*, 40 NY2d 250, 258 (1976) (hereinafter *Steingut*). Plaintiffs argue that the Legislature cannot now, by legislation, define "gambling" to the contrary of its common and ordinary meaning.

Plaintiffs also argue that Chapter 237 of the Laws of 2016, by its terms, appears to accept that IFS is gambling, as it requires operators to both enable contestants to exclude themselves from contests and to prominently list information on their websites concerning assistance for compulsive play. Plaintiffs note that § 225.00 of the Penal Law defines, for criminal prosecution purposes, a "contest of chance" as one that depends, to a "material degree", upon an "element of chance", and defines "gambling" as occurring when a person "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...". Plaintiffs enumerate multiple well-known historical amateur and professional sporting results to demonstrate the impossibility, IFS player skill notwithstanding, of any conclusively correct prediction of such results.

Plaintiffs cite to cases interpreting Article XI, §1 of the Constitution, including *Board of Education, Levittown Union Free School District v. Nyquist*, 57 NY2d 27 (1982) and *Campaign for Fiscal Equity v. State of New York*, 86 NY2d 307 (1995) for the proposition that, while the Legislature is entitled to deference in carrying out a constitutional mandate, the Courts must first define the meaning of that mandate.

Plaintiffs also cite to a prior Opinion of the Attorney General: "[t]o summarize, we find that sports betting is not permissible under Article 1, §9 of the New York State Constitution. The specific Constitutional bans against bookmaking 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." (1984 NY Op. Att'y Gen. 1, 41, 1984 NY AG LEXIS 94). Plaintiffs also proffer the position taken by the Attorney General in a Memorandum of Law in cases filed against IFS providers DraftKings, Inc. and FanDuel, Inc. in 2015: "[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 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." (Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, pg. 12).

Plaintiffs further argue that, should the Court apply a presumption of constitutionality in this review of the duly-enacted statute, the presumption has been rebutted as Chapter 237, *inter alia*, makes daily fantasy sports legal only when the operator is registered in accordance with the provisions of RPMWBL §1402. Plaintiffs argue that, as the same activity as that allowed under

Chapter 237 would be illegal if the participant were not registered, and as the activity would, by definition, involve the same level of skill and chance as legal IFS, which would be distinguished solely by its compliance with other provisions of Chapter 237, the premise that one activity is gambling while the same is not due to factors not related to the definition of gambling renders such distinction, and Chapter 237, irrational.[2]

Defendants' contentions

Defendants assert that Chapter 237 carried out the Legislature's constitutional mandate to devise appropriate gambling laws (Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, p. 2), arguing that such mandate necessarily authorizes the Legislature to define what is not gambling. Defendants assert that the Constitution does not require a particular statutory definition of gambling and that there is sufficient basis in the record to find that the Legislature made a rational policy choice in determining that IFS is not gambling.[3]

Defendants set forth in detail the record before the Legislature at the time of the discussion of Chapter 237, and argue that such record demonstrates that "plaintiffs cannot prove beyond a reasonable doubt that there is no rational basis for this legislative policy choice" (Memorandum of

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[2] Plaintiffs finally argue that the Legislative Record evidence submitted by the defendants in support of their position that the finding that IFS is not "gambling" is insufficient to constitute a rational basis for such finding. Plaintiffs argue that significant portions of such evidence were generated by interested parties, those being the organizations (or their hirees) directly impacted by the proposed legislation.

[3] Defendants cite, at page 5 of their reply brief, to certain statutory provisions regarding horse racing for the proposition that the Legislature can make a rational determination that horse handicapping contests do not constitute gambling, though they cite to no case law applying the within constitutional provision to such statutes.

Law, p. 2). In sum, while not denying that IFS contests carry a material degree of chance, defendants argue that such showing is insufficient, in light of the evidence of skill in IFS demonstrated to the Legislature, to overcome the presumption that the statute declaring such contests games of skill and accordingly not gambling was constitutional. In support of such argument, defendants note certain submissions to the Legislature of (i) statistics demonstrating the results of the activities of Fanduel, Inc. and Draftkings, Inc., two of the largest on-line interactive fantasy sports providers[4], showing, *inter alia*, that actual users are likely to defeat computer-generated randomly selected teams and (ii) studies showing that there is a high winning percentage of the most successful IFS participants.

Defendants cite to case law which they argue demonstrates that, when an activity could reasonably be considered to be gambling or not, there is latitude for the Legislature to declare whether such activity should be prohibited (*see People ex rel Ellison v Lavin*, 179 NY 164, 170 - 171 [1904] [hereinafter *Ellison*])[5]. They argue that, given the disparity between legal definitions of the word "gambling" (referencing statutory analysis), that where, as here, the activity within does not constitute pure chance, such as roulette, the Legislature may rationally determine that the activity does not constitute gambling as used in the Constitutional prohibition. The defendants concede solely that a game of "pure chance" is prohibited by the Constitutional provision. Defendants cite to alleged Court interpretation of the Penal law prior to 1965 (a period of approximately 70 years

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[4] Fanduel, Inc. and Draftkings, Inc. offer their subscribers weekly and daily online fantasy sports formats (*see* Defendants' Memo of Law in Opposition, pgs 4-5).

[5] Defendants cite further to the exercise of the Legislature's latitude inherent in the choices made at Penal Law Art. 225 and Racing Law § 906.

from the enactment of the constitutional provision) wherein they argue that gambling referred only to activities where chance, not skill, was the "dominating element" (*see Id*).

Defendants cite to cases demonstrating deference in the interpretation of the Article 1, §9 (*see, Saratoga County Chamber of Commerce v Pataki*, 293 AD2d 26 [3d Dept 2002], *affirmed in part and modified in part*, 100 NY2d 801 [2003], *Dalton v Pataki*, 11 AD3d 62, 65 [3d Dept 2004], *affirmed in part and modified in part*, 5 NY3d 243 [2005] [hereinafter *Dalton*]). Defendants further cite to *People ex rel Sturgis v Fallon*, 152 NY 1 (1897) (hereinafter *Sturgis*) for the proposition that a highly deferential standard of review had been applied to a constitutional challenge to the sufficiency of a statute creating criminal penalties for horse racing. Defendants also assert that the Court should disregard the earlier statements of the Attorney General with regard to IFS constituting gambling as such statements were made prior to the Legislative determinations herein. Further, defendants cite to the determinations of a number of other state legislatures that IFS does not constitute gambling, though neither party has identified a case in which a Court has directly addressed the issue of whether IFS constitutes gambling for purposes of the New York (or any other state's) constitution.

Summary Judgment Standard

To obtain summary judgment, a movant must establish his or her position "'sufficiently to warrant the court as a matter of law in directing judgment'" in his or her favor (*Friends of Fur Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979], quoting CPLR §3212 [b]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any genuine material issues

of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once that showing is made, the burden shifts to the party opposing the motion for summary judgment to come forward with evidentiary proof in admissible form to establish the existence of material issues of fact which require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Discussion

"Legislative enactments enjoy a strong presumption of constitutionality [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt. Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional" (*Overstock.com, Inc. v. New York State Dept. of Taxation & Fin.*, 20 NY3d 586, 624 [2013], *citing LaValle v Hayden*, 98 NY2d 155, 161 [2002]; *see also, Dalton*, 5 NY3d 243, 255 [2005]. "A party mounting a facial constitutional challenge bears the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment. In other words, the challenger must establish that no set of circumstances exists under which the Act would be valid" (*Moran Towing Corp. v. Urbach*, 99 NY2d 443, 448 (2003)) (internal citations and quotations omitted). It is axiomatic, however, that "... it 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 NY2d 893, 925 [2005]).

Based upon the stipulated facts and submissions before the Court, IFS involves, to a material degree, an element of chance, as the participants win or lose based on the actual statistical performance of groups of selected athletes in future events not under the contestants [players] control or influence. "It may be said that an event presents the element of chance so far as after the exercise of research, investigation, skill and judgment we are unable to foresee its occurrence or non-occurrence or the forms and conditions of its occurrence" *(Ellison, supra* at 169). In *People ex rel Lawrence v Fallon*, 4 AD82, 84-85 [1st Dept 1896], *aff'd*, 152 NY 12 [1897], the First Department stated as follows:

> There certainly is a wide distinction between the wager of money upon the result of any game and the purchase of shares in a lottery. To a certain extent it may be said that what is called chance enters into the result of any game, even the game of chess, and that nothing which is the result of a contest or competition is decided without some other element entering into it than the mere skill of the persons who take part in the contest. Everybody recognizes that in a baseball game or a game of football, or in running or walking matches, the result depends not alone upon the skill and strength and agility of the competitors, but upon numerous incidents which may or may not occur and whose occurrence depends upon something which nobody can predict and which so far as human knowledge is concerned have no reason for existing. This is a chance pure and simple, but yet the result of those games cannot in any just sense be said to be a lottery. The distinction we apprehend to be that in a lottery no other element is intended to enter into the distribution than pure chance, while in the result of other contests which are forbidden under the act against betting or gaming other elements enter, and the element of chance, although necessarily taken into consideration, may be, and is, eliminated to a very considerable extent by the skill, careful preparation and foresight of the competitors.

To the extent that the legislative findings stated at RPMWBL §1400(1)(a) and (b), which serve as the basis for the statutory determination that IFS does not constitute gambling as defined in Penal Law §225.00, can be read as inconsistent with the proposition that IFS involves a material degree of chance, the stipulated facts and the language of the statute (RPMWBL §1401(8)) applied

in light of the standard referenced above are sufficient to overcome any presumption or deference to be accorded such legislative finding. Neither the finding that IFS are not games of chance or the finding that IFS does not constitute wagers on future contingent events addresses the fact that points are scored (and cash pieces won or entry fees lost) based upon performances of selected athletes in events held after "contests are closed". No research, investigation, skill or judgment of the IFS participant can effect such future athletic performances.

In IFS, the scoring of the participants is directly related to the performance of their selected players[6] as compared to the performance of the selected players of other participants. IFS participants have no control whatsoever of the performance of the selected players, though the experience, research and related skill involved in selecting an IFS team can sharply impact an IFS participant's chances of prevailing. IFS only allows participants to score points based on the performance of individual players, which occur after the participant have selected their team, that is, in future events. As such, the first legislative finding proffered, that is, the rationale for why "IFS is not a game of chance", does not lead to the conclusion that there is not, to a material degree, an element of chance to IFS competition.

By the same token, the rationale for the second conclusion also does not provide a logical basis for the conclusion. The findings state that "IFS are not wagers on future events not under the

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[6] The parties have not presented to the Court specific evidence with regard to the "scoring" of IFS competitions involving football players. Though the ability to create a system to award points based on individual offensive performances (e.g., yards gained, touchdowns scored, completed passes) is apparent, the ability to create such a system based on individual defensive performances, rather than team effort, is significantly less so.

contestants control or influence", and then references the facts that IFS relies upon agglomerated performances of individuals in team events rather than individual or team performances. Such rationale does not support the broad statement; the fact that IFS is scored based on agglomerated individual performances in future events not under the contestants' control or influence does not negate the fact that the wagers are placed on performances in future events not under the contestants' control or influence.

Based upon the submissions of the defense however, including the legislative findings and the (legislatively received) statistical analysis of Draftkings, Inc. and Fanduel, Inc. results demonstrating the likelihood of success of a small percentage of players as well as the performance of players against randomized computer models, it is equally clear that there is a significant element of skill in IFS competition. In light of the deference to be accorded the Legislature in the exercise of its responsibilities, the Court will, for purposes of the within discussion, accept the proposition that the chance versus skill assessment of IFS weighs on the skill side; that is, that IFS participation and success is predominated by skill rather than chance (*see* RPMWBL §1400 (1)(a)).

Legislative Authority

The constitutional provision, as relevant herein, contains two clauses: first, a proscription on the authorization or allowance of any gambling within the State, and second, a mandate that the Legislature pass appropriate laws to prevent such offenses. The latter clause "...was not intended to be self-executing...as it expressly delegates to the legislature the authority, and requires it to enact such laws as it shall deem appropriate to carry it into execution." (*Sturgis, supra* at 11). Such provision mandates that the Legislature, in the exercise its discretion, pass laws to prevent offenses

to the provision. Such grant of authority is explicit and cannot be challenged in the context of the constitutional sufficiency of scope of an anti-gambling statute. In *Sturgis* the Court held that "[i]t is not within the province of this court to declare that section seventeen is in contravention of the Constitution, for the reason that it does not deem the provision adopted appropriate or sufficient to prevent such offenses." (*Id.* at 10). The defense argues that the second clause effectively grants the Legislature authority to statutorily define the term "gambling" in the negative.

Despite such mandate, the plain language of the first referenced clause of the constitutional provision does not require absolute deference to the statute, as the mandate does not give the Legislature unlimited authority to define what is "not" gambling for purposes of such provision. Such interpretation would render the constitutional prohibitions on "...authoriz[ing] or allow[ing]..." "...pool-selling, bookmaking or any other kind of gambling" meaningless, as the entire field would then be effectively governed by statute, rather than the constitutional provision (*see Dalton*, 11 AD3d 62, 90 [3d Dept 2004], *affirmed in part and modified in part*, *Dalton*, 5 NY3d 243, 264 [2005])[7]. As set forth above, the Defendants to some degree accept this point, admitting that a statute authorizing an activity governed purely by chance (e.g. roulette) would be unconstitutional.

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[7] The Appellate Division in *Dalton* discussed the application of the lottery exception amendment to the constitutional ban on gambling in the context of a very general definition of lotteries advanced by defendants which was consistent with all gambling. There the Court held that "[s]uch a broad interpretation would expand the constitutional exception permitting state-run lotteries to such an extent that it would swallow the general constitutional ban on gambling" (*Dalton*, 11 AD3d 62, 90, *affirmed in part and modified in part, Dalton*, 5 NY3d 243, 264 [2005]; *see also,* 1984 Op. Atty. Gen. *supra* at 41 which provides that "[i]n addition, such arguments proceed from faulty premises in that they...seek to equate what is forbidden to criminals with what is allowed to the State.").

Plaintiffs argue that IFS is gambling, and it is axiomatic that the Legislature cannot pass a law that violates a constitutional proscription. The constitutionality of the enactment authorizing and regulating IFS turns upon the scope of the prohibition as used in the Constitution, and whether plaintiffs have demonstrated beyond a reasonable doubt, in the context of the presumption of constitutionality, that IFS, a game determined by a dominant degree of skill and a material degree of chance, fits the constitutional definitions of the prohibited activities. The Court finds that plaintiffs have made such demonstration.

"Words of ordinary import receive their understood meaning, technical terms are construed in their special sense. Especially is the plain import of the language to be given its effect in the construction of constitutional provisions, for the words are deemed to have been used most solemnly and deliberately; and where the intent of the constitutional provision is manifest from the words used and leads to no absurd conclusion, there is no occasion for interpretation, and the meaning which the words import should be accepted without conjecture" (McKinney's Cons. Laws of New York, Statutes, §94 [internal citations omitted]). "When language of a constitutional provision is plain and unambiguous, full effect should be given to the intention of the framers... as indicated by the language employed and approved by the People" (*Matter of King v Cuomo*, 81 NY2d 247, 253 [1993] [citations omitted]).

In determining the import of the phrase "...pool-selling, book-making, or any other kind of gambling...", the Court finds that such phrase incorporates sports gambling, and such gambling is generally precluded by such constitutional prohibition. Such finding comports with Formal Opinion No. 84-F1 of the Office of the New York State Attorney General, which legally and historically

analyzed the constitutional prohibition under circumstances not dissimilar to those herein; that is, in assessing proposed legislation which would affirmatively create, and authorize the State Division of the Lottery to conduct, a game in which parlay bets would be placed on the outcome of pro sports events (*see* 1984 NY Op. Att'y Gen. 1). After discussing the 1894 Amendment to the then-existing constitutional provision (which previously banned solely lotteries) to add prohibitions upon "pool-selling, book-making or any other kind of gambling...", such opinion specifically referenced the amendment to the constitutional provision thus: "this distinct statutory ban on sports wagering [referencing the 1877 Penal Code] was elevated to the constitutional level in 1894 and has remained by explicit language in the Constitution until today" (*Id.* at 11). In light of the legal and constitutional history cited by the Attorney General in the 1984 opinion, particularly *Reilly v Gray*, 77 Hun. 202 (1894), it is clear that the added language regarding "poolselling, bookmaking and any other kind of gambling" generally encompassed sports gambling.

Further, the virtually contemporaneous enactment of then-Penal Law §351, creating criminal penalties for, *inter alia*, sports gambling, compels the conclusion that sports gambling cannot be authorized absent a constitutional amendment, as the contemporaneous interpretation of a constitutional provision by the Legislature is to be accorded great deference, 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." (*Steingut, supra* at 258 [1976] [internal quotations and citations omitted]). This seems particularly applicable where, as both here and in *Steingut*, the contemporaneous Legislature was exercising the authority granted by the constitutional provision.

In *Sturgis,* the Court referenced (now superceded) Penal Law §351 which clearly

encompassed sports gambling and provided that "...any person who records or registers bets or wagers, or sells pools upon the result of any trial or contest of skill speed or power of endurance, of man or beast... or upon the result of any lot, chance, casualty, unknown or contingent event whatsoever...is guilty of a felony..." stating that "[t]his examination of the statute discloses that the legislature has passed laws, the obvious purpose of which is to prevent the offenses mentioned in section nine of article one of the constitution" (*Sturgis*, *supra* at 7).

Having concluded that the prohibition generally bans the authorization of sports gambling, the Court next turns to the position of the plaintiffs that the prohibition does not apply to a law authorizing a practice which includes any degree of skill. As stated above, in assessing such issue, the Court will presume the accuracy of the [Court-interpreted] legislative conclusion that success in IFS is predominantly determined by the skill of the participant.

Initially, the Court cannot agree with the citations of the defendants to *Ellison,* 179 NY 164 (1904), for the proposition that it has been held that the constitutional prohibition does not apply to a law authorizing a practice where the outcome is dependent upon a degree of skill (*see* Defendants' MOL in Support of Cross-Motion of Summary Judgment, pg. 13, fn. 8; Defendants' MOL in Reply, p.3). The discussion in *Ellison* was addressed to then-Penal Law §327, and does not address the meaning of the constitutional provision. Moreover, as discussed below, the statute reviewed by the Court of Appeals in *Ellison* was not the sports gambling statute enacted immediately after the constitutional amendment, but the lottery statute.

The discussion in *Ellison* was with regard to the element of chance in then Penal Law §§323 and 327 creating penalties for operation of a lottery, and accordingly focused upon whether the

allegedly illegal conduct, which created a system not governed exclusively by chance, fit such definition. There, the Court found that a contest for the guessing of the number of cigars sold violated the anti-lottery statutes, though involving elements of both chance and judgment, because chance was the dominant element. The Court did not opine on whether such conduct fit the constitutional definition of the separate constitutional terms "pool-selling, book-making or any other gambling". Such determination on what constituted a lottery for purposes of the Penal Law, in the opinion of the Court, carries no precedential value herein.

Separate from *Ellison*, the Court cannot agree with the defendants' contention that only legislative authorization of games constituting pure chance (e.g., lotteries or roulette) is barred by the prohibition. It is clear that the drafters of the 1894 prohibition intended to bar contests based on future contingent events. Former Penal Law § 351, in addition to enacting criminal penalties specific to "... the result of any trial or contest of skill, speed or power of endurance...", also encompassed "...the result of any lot, chance, casualty, unknown or contingent event whatsoever" (emphasis added) (*Sturgis, supra* at 7-8). The caution in *Steingut, supra,* that special consideration be given to relatively contemporaneous acts of the Legislature in constitutional interpretation leads to the conclusion that the actions further described in Penal Law § 351 were within the contemplation of the drafters of the constitutional prohibition.

Further evidence that the prohibition is meant to be read more broadly than the interpretation urged by the defendants is found in the plain language of the prohibition. Initially, the provision bans laws authorizing lotteries, which, as discussed in *Ellison* in detail at both the Appellate Division and Court of Appeals decisions, were arguably seen at the time as games of pure chance (*see Ellison,*

179 NY 164 [1904] *rev'g*, 93 AD 292 [1st Dept 1904]). If the intent of the Article 1, §9 drafters were to simply bar "pure chance" gambling, they could have done so, instead of going on, via the amendment of 1894, to bar pool-selling, book-making and other gambling.

Additionally, the provision does not simply bar the authorization of gambling, it bars the authorization of "...lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling" (emphasis added). Applying the rule of construction that words used in constitutional provisions should be given their ordinary meaning and not be deemed superfluous, the "any other kind" proscription calls for an expansive, not a limited, interpretation of the term "gambling". This is particularly so where the preceding language enumerates differing descriptions of gambling activities, including bookmaking, which is defined in our current Penal Law at §225.00 (9) as "...advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events". The commentaries to such statute note that it codified "...the views set forth by the Court of Appeals" defining bookmaking prior to the imposition of the statutory definition (Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law §225.00 at 356). It is axiomatic that sporting events are included within such "future contingent events" (*see generally, People v. Abelson*, 309 NY 643 [1956]; 1984 Op. Att'y. Gen. 1). It is also beyond dispute that those amending the Constitution had a clear view at the time of the differences between "pure chance" activities (*e.g.*, lotteries, roulette) and those involving bets on sporting events (*see People ex rel Collins v McLaughlin*, 128 AD 599 [1st Dept 1908] [discussing evolution of anti-gambling statutes in the State]).

While the Court is mindful of the doctrine of *ejusdem generis*, the use of "Book-making" and "Pool-selling" in the preceding language to the broad ban on "any other" form of gambling strongly implies that placing bets on performances in IFS, which practice is recognized as entailing substantial skill, falls within such prescription *(see Philbrick v Florio Co-op,* 137 AD 613, 616 [1st Dept 1910], *aff'd*, 200 NY 526 [1910]) and at least one contemporary Appellate Court discussed such prohibition in similar fashion:

> It must be remembered that the evil which the people aimed at in passing that constitutional amendment was the sale of lottery tickets, the establishment of lotteries and pool-selling and bookmaking, which had been conducted so generally and under such circumstances as to become a grave public evil. Other forms of gambling, to be sure, are mentioned--not particularly, because the people deemed it unnecessary to put a constitutional prohibition upon other forms of gambling, for the Legislature had already by stringent laws taken steps to do that--but because, as is evident from the debates in the convention, it was intended that no opening should be left by which anybody who desired to pursue the business of bookmaking or poolselling in some other way than had been pursued before, could be able to do so, and thereby evade the constitutional prohibition.
>
> (*Sturgis,* 4 AD 76, 79 [1st Dept 1896], *aff'd,* 152 NY 1 [1897]).

Further, the Court of Appeals has previously referenced the prohibition in a fashion strongly implying that it was meant to be broad in application: "[f]rom an absolute constitutional prohibition on gambling in New York of any kind, expressly including 'book-making', which has stood almost 80 years in the New York Constitution (art. I, § 9), a specific exception was carved out in 1939." (emphasis added) (*Finger Lakes Racing Ass'n v. N.Y. State Off-Track Pari-Mutuel Betting Comm'n,* 30 NY2d 207, 216 [1972]).

Finally, while the parties have not identified a Court determination defining "gambling" for the purposes of the constitutional provision, in *dicta* in *Dalton*, the Third Department, discussing the definition of the word "lottery" in article 1, §9, referenced gambling as "defined by the three

elements of consideration, chance and prize" and makes no reference to the inclusion of an element of skill as negating the application of the other three elements *(Dalton,* 11 AD3d 62, 90 [3d Dept 2004]). Such holding cites to, *inter alia*, the modern New York Penal law definitions of "Gambling" and "Contest of Chance". Such definition was adopted again, (in *dicta*) by the Court of Appeals in their decision affirming in part and modifying in part the Third Department's decision (*see Dalton*, 5 NY3d 243, 264 [2005]). Such definition comports with the modern Penal Law provisions passed in fulfillment of the constitutional mandate, and is, at a minimum, evidence of the commonly understood meaning of the term "gambling".

Defendants argue that "[b]ecause Article I, §9 explicitly instructs the Legislature to determine what laws are appropriate to implement a general prohibition of gambling, the only currently valid definition of the term "gambling" in Article 1 §9 is found in Penal Law §225.00 (2)" (*see* Defendants' MOL at pg.13, fn. 7).[8] It appears undisputed that, aside from the IFS exception specified in Chapter 237, IFS falls within the Penal Law definition of gambling. As discussed below, the Legislature has the authority to address and exclude certain acts, including IFS, from the ambit of the Penal Law. Such discretionary exclusion, however, does not have the effect of changing the meaning of the constitutional terms each time the statute is revised; the constitution is not so fungible.

The defendants also discuss the differences between IFS and real sports competitions,

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[8] Such argument, however, is inconsistent with the position of the defendants that the Legislature, in defining "contest of chance", did so more expansively than required by the constitutional provision.

including the key elements differentiating the two, those being that the points are scored based on aggregated individual (rather than team) performances and that the IFS participants select their own "team". Neither of these facts effects the conclusion that the performances of the individuals are future events over which the IFS participants have no control.

There is little, if any, identified difference between complex gambling practices (*e.g.*, poker, horse handicapping and complex betting on sports events including point spreads, over/under bets, and parleys) and IFS. Each of these actions involve a significant amount of "skill", including the ability to assess multiple options of play and, using talent, information gained by experience and dedicated research, to maximize one's chances of winning, whether against the "house" or against a group of opponents. As discussed above however, this skill/chance dichotomy was by no means unknown to those who enacted the relevant constitutional provision, and the provision made no reference to even a dominant degree of "skill" as negating the definitions of pool selling, bookmaking and any other gambling.

The broad constitutional prohibition cannot be allowed to contemplate a parsing of the degree of skill involved in a practice which encompasses a material degree of chance based upon the outcome of a future contingent event or events (the separate performances of a group of selected athletes). The proposed exclusion from such ban of games with a degree, or even a dominant degree, of skill, if intended by the provision drafters, would have been clearly stated; instead, the language was made broad enough to encompass every eventuality wherein gambling was conducted on future contingent events.

Based on all of the above, the Court finds and holds that the Constitutional prohibition upon

authorization or allowance of pool-selling, bookmaking or any other kind of gambling encompasses IFS, including in circumstances where the Legislature has determined that ultimate success in an activity premised upon the performance of selected athletes in future contests is predominantly determined by the skill of the individual selecting the athletes. The intentionally broad language and application of the constitutional prohibition, the common understanding at the time and now 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 all lead to such conclusion. Moreover, as referenced above, to countenance such redefining of the term would effectively eviscerate the constitutional prohibition (*see Dalton,* 11 AD3d 62 [3d Dept 2004], *affirmed in part and modified in part, Dalton,* 5 NY3d 243 [2005]). As such, the plaintiffs have demonstrated beyond a reasonable doubt, that, to the extent Chapter 237 authorizes and purports to regulate IFS registered and conducted pursuant to the provisions of such Chapter, it is unconstitutional.

Penal Law Provision

In addition to the provisions authorizing, regulating and taxing IFS, Chapter 237 also affirmatively declares, within the context of the RPMWBL, that IFS does not constitute gambling in New York as defined in Penal Law Article 225. As discussed in detail above, the legislative findings upon which such declaration is based do not factually support such declaration, and, to the extent it is not clear from the discussion above, IFS does fit the statutory definition of gambling set forth in Article 225.

As further stated above, it is facially clear that, pursuant to Article 1, § 9, the authority to

pass appropriate laws to prevent offenses against the provisions of such section rests in the Legislature. Such clause "...was not intended to be self-executing...as it expressly delegates to the legislature the authority, and requires it to enact such laws as it shall deem appropriate to carry it into execution." (*Sturgis, supra* at 11). Such grant of authority is explicit and cannot be challenged in the context of the constitutional sufficiency of scope of an anti-gambling statute (*Id.* at 10: "It is not within the province of this court to declare that section seventeen is in contravention of the Constitution, for the reason that it does not deem the provision adopted appropriate or sufficient to prevent such offenses").

In *Sturgis,* the Court declined to invalidate a statute of which "[t]he most that can be said is, ...its effect was to reduce the then existing penalty or punishment for that particular offense" (*Id. at* 10), citing to the clear mandate of legislative authority in the constitutional section. The Court went on to hold, with reference to such statute, that "[i]t being in a degree appropriate, we are aware of no principle of constitutional law which would authorize this Court to condemn it as invalid or unconstitutional because, in our opinion, some more effective or appropriate law might have been devised and enacted" (*Id.* at 11). Further, "[c]ourts do not sit in review of the discretion of the legislature, or determine upon the expediency, wisdom or propriety of legislative action in matters within the power of the legislature." (*Id.*).

The statute herein, as regards the Penal law, expressly declares that IFS does not constitute gambling for the purposes of such statutory definition. The Court has found that IFS is gambling for the purposes of the constitutional provision, and, further, that the stated rationale for the finding that IFS does not constitute gambling as defined in the Penal Law does not support such conclusion.

Nevertheless, in light of the specific discretion afforded the Legislature in the constitutional provision, that is, to enact laws to prevent such offenses, the Court cannot find that the provision ostensibly excluding IFS from the ambit of the Penal Law definition of gambling is unconstitutional. (*see* 1984 N.Y. Op. Att'y Gen. 1, 22-23 [stating, "[i]n addition, such arguments proceed from faulty premises in that they...seek to equate what is forbidden to criminals with what is allowed to the State." (*Id.* at 41)]).

The Legislature, in the exercise of its authority and discretion, has enacted an anti-gambling statute (Penal Law Article 225). It has apparently seen fit to exclude from such statute IFS. It is not within the authority of this Court to usurp the Legislature's authority in fashioning such statute. As argued by the defendants, such authority has previously been exercised by the Legislature in excluding "Players" from the scope of the anti-gambling Penal Law provisions (*see* Penal Law §225.00(3)). As the enactment of statutes to prevent gambling offenses lies within the clear responsibility of the legislature, the legislature has the full authority to define and limit such offenses in the context of an anti-gambling statute as in its discretion it deems appropriate, and any finding of unconstitutionality in such context would be beyond the scope of the judicial review authority *(see McKinney's Cons. Laws of New York, Statutes,* §73).

Accordingly, the Court finds and holds that plaintiffs have failed to meet their burden herein with regard to the provision of Chapter 237, now codified at RPMWBL §1400 (2), which purports to except IFS from the anti-gambling provisions of the Penal Law; moreover, the defendants have met their burden with regard to such provisions, and the plaintiffs have failed to meet their burden in opposition.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, it is hereby

ORDERED, ADJUDGED and DECLARED that Plaintiff's motion for Summary Judgment is granted herein (and Defendant's cross-motion denied) as follows: that Chapter 237 of the Laws of the State of New York, to the extent that it authorizes and regulates IFS within the State of New York, is found null and void as in violation of Article I, §9 of the New York State Constitution; and it is further

ORDERED, ADJUDGED and DECLARED that Defendant's cross-motion for summary judgment granting dismissal of the within action is granted herein (and plaintiff's motion denied) as follows: Chapter 237 of the Laws of the State of New York, to the extent that it excludes IFS from the scope of the New York State Penal Law definition of "gambling" at Article 225, is not in violation of Article I, §9 of the New York State Constitution.

This shall constitute the Decision, Order and Judgment of the Court. This original Decision, Order and Judgment is being returned to the attorney for the plaintiffs. The below referenced original papers are being transferred to the Albany County Clerk's Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

SO ORDERED.
ENTER.

Dated: October 26, 2018
Albany, New York

Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. Statement of Agreed upon Facts dated January 18, 2018;
2. Plaintiffs' Notice of Motion for Summary Judgment dated January 29, 2018 with Exhibits A-E annexed thereto; Affirmation of Cornelius D. Murray, dated January 29, 2018 with Exhibits A-E annexed thereto; Affidavit of Jennifer White, sworn to January 15, 2018 with Exhibit A annexed thereto; Affidavit of Charlotte Wellins, sworn to January 24, 2018 with Exhibit A annexed thereto; and Memorandum of Law in Support of Motion for Summary Judgment dated January 29, 2018;
3. Notice of Cross-Motion dated March 9, 2018; Affirmation of Richard Lombardo, dated March 9, 2018; Affidavit of Evan Stavisky, sworn to March 6, 2018, with Exhibits A-PP annexed thereto; and Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment dated March 9, 2018;
4. Affirmation of Cornelius D. Murray, dated May 1, 2018 with Exhibits A-E annexed thereto and Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment dated May 1, 2018;
5. Defendants' Memorandum of Law in Reply to Plaintiffs' Response to Defendants' Cross-Motion for Summary Judgment dated June 7, 2018;
6. Letter from Richard Lombardo dated August 23, 2018;
7. Letter from Cornelius D. Murray dated August 27, 2018; and
8. Letter from Cornelius D. Murray dated August 28, 2018.