APL-2020-00027

State of New York
Court of Appeals

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

Respondent,

v.

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

Appellants.

APPELLANTS' BRIEF
IN RESPONSE TO THE AMICUS BRIEF OF
THE NEW SPORTS ECONOMY INSTITUTE

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PRELIMINARY STATEMENT

Appellants the Governor of the State of New York and the New York State Gaming Commission submit this brief under Rule 500.12(f) in response to the amicus brief submitted by The New Sports Economy Institute ("Institute Br.") in support of plaintiffs-respondents.

ARGUMENT

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

A. The Institute's contention that interactive fantasy sports contests are not games or contests is unpreserved and, in any event, without merit.

The Institute's core argument is that interactive fantasy sports contests are "not games at all" but rather are "claims on future contingent events" (Institute Br. at 2, 4, 11, 24). As a threshold matter, the argument that interactive fantasy sports contests are not games is unpreserved. In both Supreme Court and the Appellate Division, plaintiffs never disputed that interactive fantasy sports contests are a type of game or contest, and neither court below disputed that premise either. The Institute's "not a game" argument is thus not properly before this Court.

The Institute's newfound contention is meritless in any event. The Institute never offers a coherent definition of a "game," and no such

definition appears in Article 225 of New York's Penal Law. According to legal dictionaries, however, a game is a "contest, for amusement or for a prize, whose outcome depends on the skill, strength, or luck of the players," and includes both games of chance and games of skill. *See* Black's Law Dictionary at 701 (8th Ed.). A contest is commonly understood to mean "a competition in which each contestant performs without direct contact with or interference from his competitors." Webster's Third New International Dictionary (unabridged) at 492.

Interactive fantasy sports easily satisfy these commonly understood definitions. They are a competition in which the participants mimic the role of general managers of sports teams by constructing rosters of players; the contestants then compete against rosters constructed by other contestants, using a scoring system that awards points based on an aggregation of game statistics concerning the performance of real-world athletes on the constructed rosters (R. 441, 728 730-731, 739-740). The competitors strive to earn a prize, derived from the entrance fees paid to enter the contest, with the winner being the player(s) who earned the most points (R. 441). Regardless of whether

fantasy sports are games of skill or chance, they are "games" under the commonly understood definition of the term.

B. The Legislature rationally found that contestants in interactive fantasy sports contests meaningfully influence the outcome of those contests, and thus are not wagering on events outside their control.

Also unconvincing is the Institute's argument that fantasy sports are wagers on future contingent events beyond the control of the contest participants. Like plaintiffs and Supreme Court, the Institute emphasizes that fantasy sports contestants have no control over athletes' performance in real-world sporting events. But unlike sports betting, athletes' performance is not the sole or even principal determinant of success in interactive fantasy sports contests. Rather, as explained in Appellants' Opening Brief (at 53-58), the Legislature rationally concluded that contestants' own choices in constructing their rosters and managing their fantasy teams meaningfully influence the outcome of the fantasy sports contest in which they directly participate. Specifically, the evidence before the Legislature demonstrated that the skills that determine the outcome of fantasy sports contests are similar to the skills employed by successful general managers of sports teams: contestants in many forms of contests must exercise fiscal discipline in spending their

fantasy team budget, and use research and sports knowledge construct rosters of players who will perform well according to whatever scoring metric is applicable (R. 730-731, 772). Although chance still plays some role in these contests, the Legislature rationally concluded that the contestants' direct participation and application of their own skills distinguishes interactive fantasy sports contests from gambling.

This distinction between gambling and skill-based contests (that may still nonetheless be influenced by chance) has long been recognized. This Court, for example, has held that although horse-betting is gambling, a person entering her own horse in a horse race in the hope of winning a prize is not engaged in gambling. *See People ex rel. Lawrence v. Fallon*, 152 N.Y. 12, 18-19 (1897). Courts in other states have recognized the same distinction. (See cases cited in Appellants' Opening Brief at 57.) Indeed, this Court in *Lawrence* found it unthinkable and contrary to the "spirit and intent" of Article I, § 9 to hold that people who pay an entrance fee to participate in skill-based contests, such as those historically offered at state fairs, are engaging in gambling activities, even though the outcome of those contests may to some degree be influenced by chance. 152 N.Y. at 19.

To be sure, the distinction between wagering on a future contingent event and a skill-based contest is a fine one, grounded in history, tradition, and policy judgments. But that uncertainty supports deference to the Legislature's judgment here, as noted in Appellants' Opening Brief (at 34-40). *See Lincoln Bldg. Assocs. v. Barr*, 1 N.Y.2d 413, 415 (1956) ("Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the legislature") (internal quotation marks and citation omitted).

As Appellants have noted (Appellants' Opening Br. at 28-29, 49), many indisputably lawful activities—such as picking stocks, trading commodities, and setting insurance premiums—also rely on analytical predictions of future events, yet such activities are not considered gambling. The Institute attempts to draw a distinction between these lawful activities and fantasy sports, suggesting that even though insurance and commodities trading involve wagering on future contingent events, they further legitimate public interests, such as risk management in insurance, whereas fantasy sports and gambling are mere "entertainment" (Institute Br. at 23). But there is no support for the proposition that, in order for an activity to be recognized as non-

gambling, it must further some public interest other than entertainment. The horse-racing contests that this Court held were not gambling in *Lawrence* did not serve any broader public purpose; nor do activities as wide-ranging as hole-in-one golf contests, skill bingo games, farm stock breeding contests, and horse race handicapping contests (*see* Appellants' Opening Br. at 57). The distinguishing feature of these contests is not that they serve some purpose other than entertainment, but rather that, in the Legislature's judgment, they either involve the application of skill by the contestant, or allow the contestant to influence the outcome of the event to a meaningful degree.

Finally,, the Institute is mistaken in suggesting that the State's position, if accepted, would allow the Legislature to legalize poker. Most States deem poker to be a game of chance, either by statute or decisional law. *See United States v. Dicristina*, 886 F. Supp. 2d 164, 194-197 (E.D.N.Y. 2012) (surveying case law and statutes nationwide), *rev'd on other grounds*, 726 F.3d 92 (2d Cir. 2013). New York courts have likewise deemed poker games to be games of chance. *See United States v. Dicristina*, 886 F. Supp. 2d at 168-169 (citing cases); *People v. Dubinsky*, 31 N.Y.S.2d 234, 237 (Ct. Spec. Sess. 1941). And there is a long historical

pedigree of treating poker as a form of gambling. By contrast, unlike poker, which existed prior to 1894, fantasy sports contests are of relatively recent origin. It was within the province of the Legislature to examine an activity "which had not been understood to be gambling" when gambling was first prohibited by the Constitution in 1894, *People ex rel. Lawrence v. Fallon,* 4 A.D. 82, 87 (1st Dep't 1896), *aff'd*, 152 N.Y. 12 (1897), and rely on empirical evidence of the new activity to decide that it should be legalized and regulated rather than prohibited.

CONCLUSION

The Appellate Division's order should be reversed by declaring that Article 14 of the Racing Law does not violate Article I, § 9 of the New York Constitution.

Dated: Albany, New York
September 16, 2021

Respectfully submitted,

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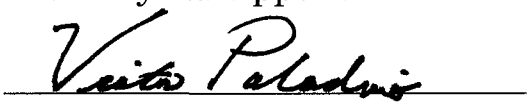
By: 
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