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Roni Mathew

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## THE LEGALITY OF DAILY FANTASY SPORTS IS IN GAMBLE IN SOME STATES: A CLOSER LOOK AT NEW YORK AND DELAWARE'S RESPONSE TO THIS NEW(ISH) TREND

### I. WHO PUT THE DAILY IN FANTASY SPORTS?

While daily fantasy sports (“DFS”) has gained popularity and publicity only in recent years, it has been around for nearly a decade.<sup>1</sup> Operating under the radar for quite some time, DFS’s growth can largely be linked to the emergence and efforts of the now recognizable “market leaders,” FanDuel and DraftKings, two companies incorporated in Delaware.<sup>2</sup> FanDuel was established in January 2009, whereas DraftKings formed three years later in 2012.<sup>3</sup> Although they have competed in the past for the number one spot, having similar valuations, these titans decided to merge because of the costs of handling looming issues surrounding the legality of DFS.<sup>4</sup> This Comment explores some of these legal

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1. *The Evolution of the Daily Fantasy Sports Industry*, ROTOGRINDERS, <https://rotogrinders.com/static/daily-fantasy-sports-timeline> [https://perma.cc/LJ2W-RYQ5] (last visited Oct. 16, 2016) (“While [DFS] has enjoyed explosive growth since 2013, the industry’s origins can be traced back more than a decade. The concept for DFS was discussed throughout the 2000’s, with the first gaming sites being founded in 2007.”).

2. *See id.* (noting how FanDuel and DraftKings have formed business relationships with major sports leagues and corporations, including National Basketball Association (NBA), Major League Baseball (MLB), NBC, and Comcast). *See generally* Kirby Garlitos, *FanDuel Wins Legal Battle with DraftKings; NFL Imposes Rule on Fantasy Sports Ads*, CALVINAYRE.COM (Mar. 26, 2015), <http://calvinayre.com/2015/03/26/sports/fanduel-wins-legal-battle-with-draftkings-nfl-imposes-rule-on-fantasy-sports-ads/> [https://perma.cc/24U2-DCQ7] (touching quickly on DraftKings’ and FanDuel’s state of incorporation).

3. *See The Evolution of the Daily Fantasy Sports Industry*, *supra* note 1 (providing timeline).

4. *See* Dustin Gouker, *FanDuel vs DraftKings – Who’s Number 1 in Daily Fantasy?*, LEGAL SPORTS REP. (last updated Feb. 13, 2017), <http://www.legalsportsreport.com/3832/fanduel-or-draftkings/> [https://perma.cc/AU8S-6KWG] (comparing services and operations of FanDuel and DraftKings); Dustin Gouker, *DraftKings’ CEO Says Company Has Passed FanDuel for No. 1 in Daily Fantasy Sports*, LEGAL SPORTS REP. (Aug. 15, 2015, 10:30 PM), <http://www.legalsportsreport.com/3387/draft-kings-leads-fanduel-in-dfs-ceo-says/> [https://perma.cc/3P6Z-3WQV] (detailing DraftKings’ progress); *see also* Dustin Gouker, *For DraftKings, FanDuel and Daily Fantasy Sports, What a Difference a Year Makes*, LEGAL SPORTS REP. (Aug. 29, 2016, 7:56 AM), <http://www.legalsportsreport.com/11240/draftkings-fanduel-dfs-2016/> [https://perma.cc/8BV8-ANTK] (describing other DFS sites and noting how Yahoo! Sports is “clear No. 3”). FanDuel and DraftKings wanted to merge because “[I]obbying and legal costs had damaged both companies’ bottom lines.” Joe Drape, *DraftKings and FanDuel Agree to Merge Daily Fantasy Sports Operations*, N.Y. TIMES (Nov. 18, 2016), <http://www.nytimes.com/2016/11/19/sports/draftkings->

issues.<sup>5</sup> Moreover, the merger requires federal regulatory approval, but will likely close in late 2017.<sup>6</sup>

But what exactly is DFS?<sup>7</sup> In contrast to traditional fantasy sports, which typically last full seasons, DFS contests last anywhere from one day to two or three days depending on the sport.<sup>8</sup> To participate, individuals create an account on a DFS website and then deposit money into that account to enter a sports contest of their choosing—their “entry fee.”<sup>9</sup> Participants next create their own individualized rosters, drafting athletes whose prices vary depending on their real-life professional performance.<sup>10</sup> The more “elite” an athlete is, the higher the athlete’s price will be.<sup>11</sup> More than one person can have the same draft because a participant’s roster is independent of others’ rosters.<sup>12</sup> Generally, there is a sal-

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fanduel-merger-fantasy-sports.html?\_r=0 [https://perma.cc/9KPR-NYE5] (describing merger as “one of necessity”); see also Alexandra Berzon, *DraftKings and FanDuel Agree to Merge*, WALL STREET J. (Nov. 18, 2016, 2:52 PM), <http://www.wsj.com/articles/draftkings-and-fanduel-agree-to-merge-1479479405> (noting how both companies have been having trouble with profitability recently due to “legal and lobbying bills”). For further discussion of the difficulties the companies have been facing, see *infra* notes 19–92 and accompanying text.

5. For further discussion of the difficulties the companies have been facing, see *infra* notes 19–92 and accompanying text.

6. See Drape, *supra* note 4 (clarifying that FanDuel and DraftKings will operate independently until deal closes); see also Marc Edelman, *Why Antitrust Regulators Could Block a DraftKings Merger with FanDuel*, FORBES (Oct. 29, 2016, 9:29 AM), <http://www.forbes.com/sites/marcedelman/2016/10/29/why-antitrust-regulators-could-block-a-draftkings-merger-with-fanduel/#2cf2f6f65c52> [https://perma.cc/96AR-RHMS] (indicating regulatory roadblocks merger may face).

7. For a discussion of how DFS works, see *infra* notes 8–16 and accompanying text.

8. See *Playing Daily Fantasy Sports for Dummies and er . . . You!*, DAILY FANTASY SPORTS 101, <http://www.dailyfantasysports101.com/basics/> [https://perma.cc/3AAH-J7NT] (last visited Oct. 16, 2016) (explaining how DFS contests for baseball and basketball differ from football).

9. See Zachary Shapiro, *Regulation, Prohibition, and Fantasy: The Case of FanDuel, DraftKings, and Daily Fantasy Sports in New York and Massachusetts*, 7 HARV. J. SPORTS & ENT. L. 289, 291 (2016) (giving an overview of DFS); see also *DraftKings, 1-Day Fantasy Sports*, DRAFTKINGS, <https://www.draftkings.com/> [https://perma.cc/TW5E-6KP2] (last visited Oct. 16, 2016) (prompting site visitors to join); *FanDuel Combo 5-Pack, Up to a \$50 Value: Play 5 Beginner Contests FREE*, FANDUEL, <https://www.fanduel.com/> [https://perma.cc/BB7R-9ZJA] (last visited Oct. 16, 2016) (advertising deal to gain new members).

10. See Shapiro, *supra* note 9, at 291 (describing how DFS sites and contests generally work); Ken Belson, *A Primer on Daily Fantasy Football Sites*, N.Y. TIMES (Oct. 6, 2015), <http://www.nytimes.com/2015/10/07/sports/football/a-primer-on-daily-fantasy-football-sites.html> [https://perma.cc/VRH4-ZEZ8] (noting that there are “high-dollar athletes and less expensive ones” and imparting tips for securing well-performing roster).

11. See Shapiro, *supra* note 9, at 291 (commenting how athletes’ costs vary).

12. See *Playing Daily Fantasy Sports for Dummies and er . . . You!*, *supra* note 8 (suggesting no limitation on how contestants may select athletes for their rosters).

ary cap for a DFS contest, “with each user allocated a fixed maximum budget to spend on athletes for their team.”<sup>13</sup> Participants’ teams then gain points depending on how their athletes perform during games.<sup>14</sup> The more points a participant accumulates, the higher he or she will be on that DFS contest’s leaderboard.<sup>15</sup> Depending on the contest structure, payout is determined by where a participant ends up on the leaderboard.<sup>16</sup>

As DFS has become more and more popular, however, so have concerns about its legality.<sup>17</sup> For much of its lifetime, DFS has been

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besides staying within salary cap). *But see Rules and Scoring*, FANDUEL, <https://www.fanduel.com/rules> [<https://perma.cc/8D2R-HPLM>] (last visited Jan. 20, 2017) (noting that in addition to salary caps, FanDuel imposes “Lineup Restrictions” in which gamers must “pick players from at least three different teams” and “may not pick more than four players from the same team”). For further discussion of salary caps, see *infra* note 13 and accompanying text. DraftKings also requires that participants make rosters comprised of athletes from different teams and different “real-life” games. *See, e.g., Daily Fantasy Basketball League Rules*, DRAFTKINGS, <https://www.draftkings.com/help/nba> [<https://perma.cc/KW4Y-MARK>] (last visited Jan. 20, 2017) (providing roster requirements for NBA contests); *Daily Fantasy Baseball League Rules*, DRAFTKINGS, <https://www.draftkings.com/help/mlb> [<https://perma.cc/4WDS-PPQV>] (last visited Jan. 20, 2017) (doing same for MLB contests). *See also* Belson, *supra* note 10 (explaining that while contestants may be tempted to create the same roster of “all-stars,” it may be best to diversify roster with lesser-priced players to increase winning probability). Once a tournament or contest “locks,” a contestant may no longer make changes to his or her roster. *See Playing Daily Fantasy Sports for Dummies and er . . . You!*, *supra* note 8.

13. Shapiro, *supra* note 9, at 291; *see also Playing Daily Fantasy Sports for Dummies and er . . . You!*, *supra* note 8 (clarifying that some DFS contests do not use salary cap format); *see generally* Jason Spry, *Salary Caps for Dummies*, DAILY FANTASY SPORTS 101 (Jan. 24, 2014), <http://www.dailyfantasysports101.com/salary-caps-for-dummies/> [<https://perma.cc/Q2WY-RKX2>] (providing backgrounds of DFS salary caps).

14. *See* Shapiro, *supra* note 9, at 291 (explaining briefly relationship between point gain and athletes’ real-life performances). Athletes, and thereby DFS contestants, earn “fantasy points” for accumulating stats such as yards gained, points scored, number of catches, number of touchdowns, number of runs batted in, etc.” *Id.* at 291 n.6.

15. *See Playing Daily Fantasy Sports for Dummies and erFalse You!*, *supra* note 8 (noting that DFS site hosting contest will provide and update leaderboard).

16. *See* Shapiro, *supra* note 9, at 291 (describing types of DFS contests available and how well a contestant must do to receive a prize); *see also* Jason Spry, *Fantasy Football Cash Games vs. GPP Tournaments*, DAILY FANTASY SPORTS 101 (Oct. 11, 2016), <http://www.dailyfantasysports101.com/fantasy-football-cash-games-vs-gpp-tournaments/> [<https://perma.cc/EP3B-SXUW>] (conveying that there are two broad categories of DFS contests—cash games and guaranteed prize pool tournaments—and strategy to win differs based on type of contest). For example, in a “50/50” competition, which falls under the cash game category, contestants who receive enough points to place in the top half of that competition win back their entry fee two-fold. *See* Shapiro, *supra* note 9, at 291 (pointing out that those who place in lower half do not get their entry fees back).

17. *See, e.g.,* Joe Drape & Jacqueline Williams, *Scandal Erupts in Unregulated World of Fantasy Sports*, N.Y. TIMES (Oct. 5, 2015), <http://www.nytimes.com/2015/10/06/sports/fanduel-draftkings-fantasy-employees-bet-rivals.html> [<https://per>

unregulated, existing in a legal landscape of ambiguity, where there has been no clear answer as to whether DFS constitutes gambling.<sup>18</sup> However, in October 2015, the landscape drastically changed with the birth of FanDuel's and DraftKings's first scandal.<sup>19</sup> It all started when a DraftKings employee released non-public information relating to a DraftKings contest.<sup>20</sup> The following week, this employee won \$350,000 in a FanDuel National Football League (NFL) contest.<sup>21</sup> According to DraftKings and FanDuel policies at the time, "employees were not allowed to compete for money on [their own employer's site, but] were allowed to compete on [a competitor's site]."<sup>22</sup> These events consequently drew sharp criticism, unearthing fears of insider trading and lack of gaming integrity.<sup>23</sup> Critics

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ma.cc/WM28-MWCQ] (reporting on data scandal implicating DraftKings and FanDuel and sharing concerns for need to regulate industry); Daniel Roberts, *Full Timeline: The DraftKings/FanDuel Data Scandal*, FORTUNE (Oct. 7, 2015, 5:58 PM), <http://fortune.com/2015/10/07/draftkings-fanduel-scandal-timeline/> [<https://perma.cc/D5QA-76PR>] (providing timeline of DFS industry controversy and noting how lawmakers thereafter inquired into DFS's legality); Shapiro, *supra* note 9, at 295–312 (examining legal issues concerning DFS and providing reasons to regulate industry). For further discussion on DraftKings and FanDuel's "data scandal" and the consequences, see *infra* notes 19–31 and accompanying text.

18. See generally Drape & Williams, *supra* note 17 (shedding light on industry and offering industry analysts' criticisms).

19. See *id.* (discussing scandal and raising concerns about insider trading); Roberts, *supra* note 17 (compiling timeline of scandal and ramifications).

20. See Roberts, *supra* note 17 (explaining that information released was posted to DraftKings contest blog and related to "ownership data" (i.e., contestants' rosters)). The DraftKings employee quickly retracted the information. See *id.* (including DraftKings's employee response to post). For further discussion of the risks of prematurely accessing or releasing this data, see *infra* note 23 and accompanying text. Someone noticed the information and posted about it in a RotoGrinders forum, calling it a "a big leak." See Roberts, *supra* note 17. The DraftKings employee explained that he had resolved the issue and apologized for his mistake. See *id.* He also underscored how he was not allowed to play in DraftKings contests as a DraftKings employee. See *id.* (saying nothing about inability to play on FanDuel). That policy was changed in light of scandal. See *id.*; see also Sarah E. Needleman & Sharon Terlep, *FanDuel, DraftKings Ban Employees From Playing Daily Fantasy Contests for Money*, WALL STREET J. (Oct. 7, 2015, 7:01 PM), <http://www.wsj.com/articles/fanduel-bans-employees-from-playing-daily-fantasy-contests-for-money-1444233537> (confirming that DraftKings and FanDuel have "permanently banned employees from playing in daily contests for money").

21. See Roberts, *supra* note 17 (commenting on timeline of scandal). The employee placed second overall. See *id.* (including position).

22. *Id.* (noting that shortly after both sites began to prohibit their employees from playing on each other's sites); see also Needleman & Terlep, *supra* note 20 (limiting ban only to contests involving monetary prizes).

23. See Drape & Williams, *supra* note 17 (including concerns of DFS analysts). If [the employee] had access to DraftKings ownership data before selecting his lineup in the FanDuel contest . . . it would have given him the competitive advantage of knowing which NFL players were likely to not be selected by many users in the FanDuel contest, since the two sites function so similarly.

and fans were concerned about “the extent to which industry employees should be able to participate in fantasy sports contests on competitor sites.”<sup>24</sup> Privy to this negative attention, the New York Attorney General’s office commenced investigations into both companies for consumer protection reasons.<sup>25</sup> Unfortunately for DraftKings and FanDuel, this culminated in the New York Attorney General (“NYAG”), Eric T. Schneiderman, sending cease-and-desist letters to DraftKings CEO, Jason Robins, and FanDuel CEO, Nigel Eccles, in November of 2015.<sup>26</sup> He stated that DFS operations “con-

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Roberts, *supra* note 17. DraftKings, however, issued a statement explaining that the employee had access to the information only after “FanDuel lineups [were] locked.” *Id.* (sharing DraftKings’ statement). Both companies thereafter also issued a joint statement affirming their commitment to protecting the “integrity of [their] games” and enforcing policies against employees misusing internal information. *Id.* (releasing statement of Fantasy Sports Trade Association, which defends DFS industry’s interests).

24. Roberts, *supra* note 17 (quoting Fantasy Sports Trade Association statement).

25. *See id.* (explaining letters, which requested information about whether any employees won money through other company’s DFS contests). *See generally* Letter from Kathleen McGee, Bureau Chief, Division of Economic Justice, Internet Bureau, State of New York Office of the Attorney General, to Nigel Eccles, CEO, FanDuel, Inc. (Oct. 6, 2015), *available at* <https://www.nytimes.com/2015/10/07/sports/draftkings-fanduel-inquiry-new-york-attorney-general.html> [hereinafter Letter to FanDuel] (listing nine points of inquiry); Letter from Kathleen McGee, Bureau Chief, Division of Economic Justice, Internet Bureau, State of New York Office of the Attorney General, to Jason Robins, CEO, DraftKings, Inc. (Oct. 6, 2015), *available at* <https://www.nytimes.com/2015/10/07/sports/draftkings-fanduel-inquiry-new-york-attorney-general.html> [hereinafter Letter to DraftKings] (listing same points of inquiry). From the outset, both letters also addressed that they are in in response to “reports indicating that employees or agents of [FanDuel and DraftKings] . . . have gained an unfair, financial advantage in [DFS contests] by exploiting their access to nonpublic data.” Letter to FanDuel, *supra*; Letter to DraftKings, *supra* (alluding to Haskell scandal). For further discussion of this scandal, see *supra* notes 20–24 and accompanying text. *See also* Roberts, *supra* note 17 (noting that Federal Bureau of Investigation and U.S. Department of Justice also commenced investigations into DFS industry about a week after New York Attorney General’s office).

26. *See* Louis Bien, *DraftKings and FanDuel Ordered to Stop Accepting Bets by New York Attorney General*, SB NATION (Nov. 10, 2015, 7:15 PM), <http://www.sbnation.com/2015/11/10/9708414/draftkings-fanduel-gambling-new-york-attorney-general-cess-desist-daily-fantasy-sports> [<https://perma.cc/9REL-9TFV>] (reporting news of Schneiderman’s order, including FanDuel and DraftKings’ responses); Notice to Cease and Desist and Notice of Proposed Litigation Pursuant to New York Executive Law § 63(12) and General Business Law § 349 from Kathleen McGee, Bureau Chief, Division of Economic Justice, Internet Bureau, State of New York Office of the Attorney General, to Jason Robins, CEO, DraftKings, Inc. (Nov. 10, 2015) [hereinafter DraftKings Cease-and-Desist Order], *available at* [http://ag.ny.gov/pdfs/Final\\_NYAG\\_DraftKings\\_Letter\\_11\\_10\\_2015.pdf](http://ag.ny.gov/pdfs/Final_NYAG_DraftKings_Letter_11_10_2015.pdf) [<https://perma.cc/4ZUU-F5ZW>] (stating that DraftKings engaged in “illegal gambling” and providing explanation); Notice to Cease and Desist and Notice of Proposed Litigation Pursuant to New York Executive Law § 63(12) and General Business Law § 349 from Kathleen McGee, Bureau Chief, Division of Economic Justice, Internet

stitute[ed] illegal gambling” under New York State law and ordered the sites to “stop accepting wagers” within the state immediately.<sup>27</sup> Mr. Schneiderman reasoned that DFS games were “‘contest[s] of chance’ . . . where winning or losing depend[ed] on numerous elements of chance to a ‘material degree.’”<sup>28</sup> Finding that DraftKings and FanDuel operations constituted gambling and that the companies were not otherwise authorized to engage in such activity, Mr. Schneiderman demanded that both companies “cease and desist

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Bureau, State of New York Office of the Attorney General, to Nigel Eccles, CEO, FanDuel, Inc. (Nov. 10, 2015) [hereinafter FanDuel Cease-and-Desist Order], available at [http://ag.ny.gov/pdfs/Final\\_NYAG\\_FanDuel\\_Letter\\_11\\_10\\_2015\\_signed.pdf](http://ag.ny.gov/pdfs/Final_NYAG_FanDuel_Letter_11_10_2015_signed.pdf) [<https://perma.cc/7KWE-W7JD>] (stating that FanDuel engaged in “illegal gambling” and providing explanation); see also Louis Bien, *Everything You Ever Wanted to Know About Daily Fantasy Sports and Why They’re Getting Sued*, SB NATION (Nov. 24, 2015, 11:58 AM), <http://www.sbnation.com/2015/11/24/9791608/draftkings-fanduel-daily-fantasy-sports-lawsuit-new-york-internet-gambling> [<https://perma.cc/UU7D-96BW>] (summarizing NYAG’s legal arguments). For further discussion of NYAG’s reasoning, see *infra* notes 27–29 and accompanying text.

27. DraftKings Cease-and-Desist Order, *supra* note 26 (reviewing New York’s state law against illegal gambling); FanDuel Cease-and-Desist Order, *supra* note 26; A.G. Schneiderman Issues Cease-and-Desist Letters to FanDuel and DraftKings, *Demanding That Companies Stop Accepting Illegal Wagers in New York State*, N.Y. STATE OFFICE OF THE ATTORNEY GEN., ERIC. T. SCHNEIDERMAN (Nov. 11, 2015) [hereinafter NYAG Press Release], <http://www.ag.ny.gov/press-release/ag-schneiderman-issues-cease-and-desist-letters-fanduel-and-draftkings-demanding> [<https://perma.cc/2M2L-3ELS>] (highlighting that NYAG’s conclusions were based upon investigations instituted month earlier). For further discussion of these investigations, see *supra* note 25 and accompanying text. The press release also highlighted NYAG’s desire to correct the perception that DFS is “neither victimless nor harmless.” NYAG Press Release, *supra*.

28. DraftKings Cease-and-Desist Order, *supra* note 26; FanDuel Cease-and-Desist Order, *supra* note 26. New York Penal Law section 225.00 states  
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.  
N.Y. PENAL LAW § 225.00(2) (McKinney 2015). For further discussion of New York Penal Law section 225.00, see *infra* notes 42–45 and accompanying text.

Further, a “contest of chance” is defined as “any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.” N.Y. PENAL LAW § 225.00(1) (McKinney 2015) (emphasis added); accord Shapiro, *supra* note 9, at 300–01 (explaining that not much recent New York state case law exists determining what constitutes “material degree” of chance and also commenting that determination therefore seems to be rather “subjective”); Jeffrey C. Meehan, *The Predominate Goliath: Why Pay-to-Play Daily Fantasy Sports Are Games of Skill Under the Dominant Factor Test*, 26 MARQ. SPORTS L. REV. 5, 16–17 (2015) (stating that New York employs “Material Element Test”). But see *People v. Li Ai Hua*, 885 N.Y.S.2d 380, 383 (N.Y. Crim. Ct. 2009) (“The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the *dominating element* that determines the result of the game?”) (emphasis added) (quoting *People ex rel. Ellison v. Lavin*, 71 N.E. 753, 755 (N.Y. 1904)).

from illegally accepting wagers in New York State as part of [their] DFS contests.”<sup>29</sup>

With news of these events making national headlines, the lime-light on DFS began to grow in other states as well, prompting government inquiries into this unregulated industry.<sup>30</sup> Specifically, in July 2016, the Delaware Department of Justice warned DraftKings, FanDuel, and Yahoo! Inc. (“Yahoo!”) to halt their operations because DFS was a form of unauthorized gambling and, therefore, was constitutionally prohibited by the state.<sup>31</sup>

This Comment explores the differing responses to DFS in New York and Delaware, including how neither state reacted prudently to this newish industry.<sup>32</sup> Part II provides an overview of the regulatory and legislative developments concerning DFS in each of the

29. DraftKings Cease-and-Desist Order, *supra* note 26; FanDuel Cease-and-Desist Order, *supra* note 26 (discussing N.Y. Penal Law section 225.00 and N.Y. Constitution article I, section 9, which place restrictions on gambling). For further discussion of New York’s legal landscape regarding gambling, see *infra* notes 40–42 and accompanying text.

30. See, e.g., *The Dark World of Fantasy Sports and Online Gambling*, N.Y. TIMES, <http://www.nytimes.com/news-event/sports-betting-daily-fantasy-games-fanduel-draftkings> [https://perma.cc/F25W-9XJA] (last visited Oct. 18, 2016) (providing links to dozens of stories on DFS); Joe Drape, *Texas Attorney General Deems Daily Fantasy Sports Illegal*, N.Y. TIMES (Jan. 19, 2016), <http://www.nytimes.com/2016/01/20/sports/texas-attorney-general-deems-daily-fantasy-sports-illegal.html?rref=collection%2Fnewseventcollection%2Fsports-betting-daily-fantasy-games-fanduel-draftkings> [https://perma.cc/J6RK-2NPN] (informing readers that Ken Paxton, Texas Attorney General, concluded that DFS is gambling and illegal under state law months after NYAG’s decision); see also Sharon Terlep, *New York Orders Daily Fantasy-Sports Companies FanDuel, DraftKings to Cease Operations*, WALL STREET J. (Nov. 10, 2015, 8:07 PM), <http://www.wsj.com/articles/n-y-attorney-general-tells-daily-fantasy-sports-companies-to-cease-operations-in-the-state-1447197512> (noting how NYAG’s cease-and-desist letters were the first time companies were “formally accused of criminal activity” by committing gambling offenses).

31. See *Online Fantasy Sports Contests for Money Asked to Cease in Delaware*, DELAWARE.GOV (July 8, 2016), <http://news.delaware.gov/2016/07/08/ofs/> [https://perma.cc/TC6C-5HRC] (“Put simply, current Delaware law does not permit online fantasy sports contests where there is payment required for participation and a possibility of winning money like those offered by DraftKings, Inc., FanDuel, Inc., and Yahoo! Inc.”); Dustin Gouker, *DraftKings, FanDuel, Yahoo Get Cease-and-Desist Letters in Delaware*, LEGAL SPORTS REP. (July 8, 2016, 2:28 PM), <http://www.legal-sportsreport.com/10679/draftkings-fanduel-yahoo-get-cease-desist-letters-delaware/> [https://perma.cc/9G52-67ST] (mentioning that cease-and-desist letters were sent to the DFS operators and providing overview of Delaware’s constitutional prohibition). Yahoo! is a DFS newcomer, beginning DFS operations in 2015. See Chris Grove, *Yahoo Enters Daily Fantasy Sports Market: Impacts and Analysis*, LEGAL SPORTS REP. (July 8, 2015, 12:03 PM), <http://www.legalsportsreport.com/2152/yahoo-enters-daily-fantasy-sports-market/> [https://perma.cc/3VLF-GGCL] (launching its DFS platform through Yahoo! Sports).

32. For further discussion of the states’ differing approaches, see *infra* notes 37–167 and accompanying text.



states, along with respective legal backdrops.<sup>33</sup> Part III discusses a constitutional shortcoming of New York's response and suggests that Delaware implicitly took note when responding to the legal ambiguity surrounding DFS there.<sup>34</sup> It also suggests that so far both states have responded inadequately in how they have resolved DFS's legality or begun to regulate the industry.<sup>35</sup> Part IV summarizes these issues and considers the possibility of some federal guidance.<sup>36</sup>

## II. STATE RESPONSES TO DFS: A GAME OF SKILL OR A CONTEST OF CHANCE?

### A. New York

#### 1. *New York Develops DFS Legislation*

After sending cease-and-desist letters to FanDuel and DraftKings, the NYAG moved for preliminary injunctions against both companies to "enjoin and restrain" their operations in New York and prohibit them "from accepting entry fees, wagers or bets from New York consumers in regards to any competition, game or contest run" on their websites.<sup>37</sup> In December 2015, Justice Manuel Mendez granted the motions, but shortly thereafter the companies obtained temporary stays of the injunctions.<sup>38</sup> Thus, DraftKings and FanDuel continued to operate in New York, and the stay was

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33. For further discussion of the states' differing approaches, see *infra* notes 37–92 and accompanying text.

34. For further discussion of these issues, see *infra* notes 93–167 and accompanying text.

35. For further discussion about how the states have ineffectively reacted, see *infra* notes 93–167 and accompanying text.

36. For further discussion of potential next steps, see *infra* notes 168–192 and accompanying text.

37. Trial Order, *People v. Fanduel, Inc.*, No. 453056/15, 2015 WL 8490461, at \*1–2 (N.Y. Sup. Ct. Dec. 11, 2015) (noting that cease-and-desist letters were served one week prior to NYAG's filing of motions).

38. Trial Order, *People v. Fanduel Inc.*, No. 453056/15, 2016 WL 1134804, at \*2 (N.Y. Sup. Ct. Mar. 21, 2016) (citing Motion Decision, *Schneiderman v. FanFuel [sic] Inc. - Schneiderman v. DraftKings Inc.*, M-6204, 2016 WL 116379 (N.Y. App. Div. Jan. 11, 2016) [hereinafter Motion Decision]) (furnishing timeline of events and noting that stays were granted by Appellate Division); see also Memorandum of FanDuel Inc. in Opposition to Plaintiff's Motion for a Preliminary Injunction, *People v. FanDuel Inc.*, No. 4530562015, 2015 WL 9320422, at \*19, (N.Y. Sup. Ct. Nov. 23, 2015) [hereinafter Memorandum of FanDuel] (arguing that stay should be granted because companies would suffer greater harm by interference in New York's market if injunctions were granted); Daniel Wallach, *New York Daily Fantasy Sports Court Case May Hinge on Meaning of 'Future Contingent Event'*, LEGAL SPORTS REP. (Dec. 3, 2015, 4:28 PM), <http://www.legalsportsreport.com/6653/new-york-dfs-case-key-argument/> [<https://perma.cc/RY2U-YREV>] (putting forth similar argument).

extended in January 2016, pending an appellate ruling on the merits of the preliminary injunctions originally ordered by Justice Mendez.<sup>39</sup>

Justice Mendez ordered the injunctions primarily on his assessment that NYAG had a “greater likelihood of success on the merits.”<sup>40</sup> Reviewing the language of the New York State Constitution on gambling and its corollary statutory definition, he reasoned that DFS constituted, or at the least, “involve[d] illegal gambling.”<sup>41</sup> New York Penal Law section 225.00 states that “[a] person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he [may] receive something of value.”<sup>42</sup> Upholding New York’s public policy against commercialized gambling, Justice Mendez determined that a DFS entry fee was likely “something of value.”<sup>43</sup> He then must have implicitly determined that DFS contests constituted either “contests of chance” or that “real-game performance[s] of professional athletes” were “future contingent events not under [a DFS user’s] control or influence” to satisfy the remainder of New York Penal Law section 225.00.<sup>44</sup> Otherwise, Jus-

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39. See *Fanduel*, 2016 WL 1134804, at \*2 (citing Motion Decision, *supra* note 38) (granting extension); see also Dustin Gouker, *FanDuel, DraftKings Can Remain Open in New York After Court Grants Stay of Injunction*, LEGAL SPORTS REP. (Jan. 11, 2016, 10:48 AM), <http://www.legalsportsreport.com/7222/fanduel-draftkings-can-stay-open-in-new-york-after-permanent-stay-of-injunction-granted/> [<https://perma.cc/L5A6-3NX7>] (noting that FanDuel and DraftKings could continue doing business in New York in light of staying of injunctions).

40. *Fanduel*, 2015 WL 8490461, at \*6, \*8 (describing factors to consider when deciding to order or stay preliminary injunction).

41. *Id.* at \*6, \*8 (adopting broad interpretations of the statutory and constitutional prohibitions). The New York Constitution prohibits lotteries and “any other kind of gambling,” except (1) state-run lotteries, (2) “pari-mutuel betting on horse races,” and (3) “casino gambling at no more than seven facilities as authorized and prescribed by the legislature.” N.Y. CONST. art. I, § 9, cl. 1. In addition, the constitution requires that “the legislature . . . pass appropriate laws to prevent offenses against any of the provisions of this section.” *Id.* In other words, the legislature must enforce these gambling prohibitions, not undermine them. See *id.*

42. N.Y. PENAL LAW § 225.00(2) (McKinney 2015).

43. *Fanduel*, 2015 WL 8490461, at \*6 (alluding to New York Constitution and finding that entry fees can be “something of value” under New York Penal Law section 225.00(2)); accord N.Y. GEN. OBLIG. § 5-401 (McKinney 2016) (“All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful.”); *Ramesar v. State*, 636 N.Y.S.2d 950, 950 (N.Y. App. Div. 1996) (“Public policy continues to disfavor gambling[.]”). For the text of New York Penal Law section 225.00(2), see *supra* note 42 and accompanying text. For further discussion of how DFS works, see *supra* notes 8–16 and accompanying text.

44. *Fanduel*, 2015 WL 8490461, at \*4–6 (discussing only whether entry fees were “something of value” under New York Penal Law section 225.00(2)); see also

tice Mendez could not have concluded that DFS amounts to gambling in violation of state law and thereby ordered the injunctions.<sup>45</sup>

Justice Mendez also found that the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”)<sup>46</sup> offered FanDuel and DraftKings no protection from scrutiny or regulation under state law.<sup>47</sup> UIGEA is a federal law that prohibits businesses from “knowingly accepting payments in connection with . . . a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law.”<sup>48</sup> FanDuel and DraftKings reasoned that UIGEA contained a carve-out for fantasy sports because participation in fantasy contests does not constitute a “bet or wager.”<sup>49</sup> Therefore, as a type of fantasy sports contest, DFS could not be considered “unlawful Internet gambling.”<sup>50</sup> Specifically, the carve-out stipulates that fantasy sports contests will not qualify as “unlawful Internet gambling” if they meet a number of conditions, including that (1) no fantasy team is made up of members from only a single “amateur or professional sports” team; (2) all rewards are set before

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Shapiro, *supra* note 9, at 307 (“This ruling seemed to set aside the question of skill or chance, as Mandez [sic] pointed out that even if DFS was a game of skill, it could still meet the requirements for prohibition under NY law.”).

45. See *Fanduel*, 2015 WL 8490461, at \*6, \*9 (discussing requirements for issuing preliminary injunctions and granting them).

46. Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361–5366 (2006).

47. See *Fanduel*, 2015 WL 8490461, at \*7 (reviewing UIGEA and explaining how it does not apply to companies’ intra-state business). For further discussion of UIGEA, see *infra* notes 48–55 and accompanying text.

48. FED. DEPOSIT INS. CORP., UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006 OVERVIEW, Attachment A, at 1, <https://www.fdic.gov/news/news/financial/2010/fil10035a.pdf> [<https://perma.cc/SN5W-9Y7Y>] (last visited Oct. 24, 2016) (summarizing purpose of UIGEA); see also 31 U.S.C. § 5362(10)(A) (defining generally “unlawful Internet gambling” under UIGEA); 31 U.S.C. § 5363 (prohibiting persons from accepting any financial instrument for unlawful Internet gambling). For further discussion of UIGEA and its legislative history, see *infra* notes 49–55 and 152–162 and accompanying text.

49. See *Fanduel*, 2015 WL 8490461, at \*7 (reiterating FanDuel and DraftKings’ argument); 31 U.S.C. § 5362(1)(e)(ix) (explaining that “bet or wager” under UIGEA does not include “participation in any fantasy . . . game or contest” where the fantasy sports teams are “based on the current membership of [only one] actual team”). DFS participants must have rosters made of players from at least two teams. See, e.g., *Rules and Scoring*, *supra* note 12 (detailing “lineup restrictions”); see generally Nelson Rose, *Gambling and the Law: Are Daily Fantasy Sports Legal?*, ASIAN GAMING LAWYER (Sept./Oct. 2015), [https://imgl.org/sites/default/files/media/publications/aredailyfantasysportslegal\\_nelsonrose\\_asiangaminglawyer\\_autumn2015.pdf](https://imgl.org/sites/default/files/media/publications/aredailyfantasysportslegal_nelsonrose_asiangaminglawyer_autumn2015.pdf) [<https://perma.cc/F98F-9JAS>] (discussing requirements DFS operators must comply with under section 5362 of UIGEA). For further discussion of DFS roster rules, see *supra* notes 10–13 and accompanying text.

50. See *Fanduel*, 2015 WL 8490461, at \*7 (reviewing FanDuel and DraftKings’ reasoning).

contests begin; and (3) “winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by . . . the performance[s] of [multiples athletes] in multiple real-world sporting . . . events.”<sup>51</sup> FanDuel and DraftKings argued that they satisfied these conditions.<sup>52</sup> However, Justice Mendez explained that the exemption did not displace current state law.<sup>53</sup> He noted that the Internet gambling prohibited by UIGEA includes those bets or wagers that are unlawful under state law and that the UIGEA exception did not apply because there was no corollary New York statutory exemption for fantasy sports.<sup>54</sup> Moreover, he indicated that UIGEA was entirely inapplicable and was of no value to FanDuel and DraftKings because UIGEA does not govern intrastate Internet gambling, where “bet[s] or wager[s] [are] initiated and received or otherwise made exclusively within a single State.”<sup>55</sup>

Nonetheless, things looked up for the DFS companies because of the staying of the injunctions, and legislators quickly made moves to authorize DFS.<sup>56</sup> In February 2016, New York State Senator John J. Bonacic introduced a promising bill to legalize, but thoroughly regulate, DFS.<sup>57</sup> Then, the following month, FanDuel and

51. 31 U.S.C. § 5362(1)(e)(ix) (detailing conditions).

52. *See, e.g.*, Memorandum of FanDuel, *supra* note 38, at \*25 (examining UIGEA).

53. *See Fanduel*, 2015 WL 8490461, at \*7 (explaining inapplicability of UIGEA); *see also* 31 U.S.C. § 5361(b) (expressing UIGEA’s “rule of construction” to not limit states’ gambling laws). For further discussion of this rule of construction, see *infra* notes 154–163 and accompanying text.

54. *See Fanduel*, 2015 WL 8490461, at \*7 (clarifying why UIGEA does not automatically legalize DFS in New York).

55. *Id.* (quoting 31 U.S.C. § 5362(10)(B)) (interpreting UIGEA literally and narrowly); *see also* Dustin Gouker, *UIGEA Author: “No One Ever Conceived” That Law Would Allow Daily Fantasy Sports*, LEGAL SPORTS REP. (May 8, 2015, 8:15 AM), <http://www.legalsportsreport.com/1369/uigea-author-did-not-intend-daily-fantasy-sports-carveout/> [<https://perma.cc/V3YJ-T7MV>] (describing how legislators created UIGEA carve-out for season-long fantasy sports); Shapiro, *supra* note 9, at 297 (pointing out lack of evidence that UIGEA drafters had DFS in mind when creating exemption for fantasy sports). For further discussion of DFS’s origin, see *supra* note 1 and accompanying text.

56. *People v. Fanduel, Inc.*, No. 453056/15, 2016 WL 1134804, at \*2 (N.Y. Sup. Ct. Mar. 21, 2016) (recounting ordering of stay); Dustin Gouker, *Newest Fantasy Sports Bill in New York Is the One to Watch*, LEGAL SPORTS REP. (Feb. 24, 2016, 11:10 AM), <http://www.legalsportsreport.com/8509/newest-new-york-dfs-bill/> [<https://perma.cc/3TJZ-NH4A>] (discussing DFS bills in play).

57. *See* Gouker, *supra* note 56 (comparing bill to previous ones that took less “rigorous approach[es]”). Noticeably, Senator Bonacic’s bill focused more on consumer protections. *See id.* (providing overview of bill).

DraftKings settled with NYAG.<sup>58</sup> However, under the settlement agreements, FanDuel and DraftKings agreed to halt operations in New York at least until September 2016, when the appellate hearing on Justice Mendez's order was scheduled to take place.<sup>59</sup> Importantly, the parties stipulated that if New York authorized DFS by June 30, 2016, NYAG would drop lawsuits against the DFS powerhouses and allow them to quickly restart operations.<sup>60</sup>

To DraftKings and FanDuel's luck, the legislature passed a DFS bill just two weeks shy of the June 30 deadline.<sup>61</sup> There was some delay in getting the bill to New York Governor Andrew M. Cuomo, but on August 3, 2016, Governor Cuomo signed the bill into law, just one day after requesting that it be sent to his desk.<sup>62</sup>

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58. See Chris Grove, *FanDuel, DraftKings Reach Settlement with New York Attorney General*, LEGAL SPORTS REP. (Mar. 24, 2016, 9:00 AM), <http://www.legalsportsreport.com/9130/fanduel-draftkings-reach-ny-settlement/> [https://perma.cc/F3NF-KTAD] (relaying news of settlements). For further discussion of the settlement agreements, see *infra* notes 59–60 and accompanying text.

59. See Grove, *supra* note 58 (providing conditions of settlements and links to agreements). For further discussion of Justice Mendez's order, see *supra* notes 38–55 and accompanying text.

60. See Grove, *supra* note 58 (noting that false advertising claims would still be pursued). NYAG brought false advertisement claims when seeking the injunctions against the companies in November 2015. See *People v. Fanduel, Inc.*, No. 453056/15, 2015 WL 8490461, at \*3, \*5 (N.Y. Sup. Ct. Dec. 11, 2015) (bringing charges because NYAG believed DFS operators misled consumers about their legality and, to a certain extent, guaranteed that participants could win regardless of skill). NYAG settled these false advertising claims with DraftKings and FanDuel for \$12 million. See Patrick Hipes, *DraftKings & FanDuel Settle NY Lawsuits For \$12M*, DEADLINE (Oct. 25, 2016, 1:46 PM), <http://deadline.com/2016/10/draftkings-fanduel-new-york-settlement-lawsuits-1201842592/> (paying \$6 million each). *But see In re Daily Fantasy Sports Mktg. & Sales Practices Litig.*, 158 F. Supp. 3d 1375, 1379 (J.P.M.L. 2016) (combining various jurisdictions' private suits against FanDuel and DraftKings into one multi-jurisdictional litigation, where certain marketing tactics were scrutinized).

61. See Dustin Gouker, *DraftKings, FanDuel Beat The Clock in New York: Legislature Passes Fantasy Sports Bill*, LEGAL SPORTS REP. (June 17, 2016, 11:15 PM), <http://www.legalsportsreport.com/10514/new-york-passes-fantasy-sports-bill/> [https://perma.cc/KX2X-6D9D] (passing more easily in New York State Assembly than in Senate); see also Dustin Gouker, *New York Casinos Emerge as Possible Stumbling Block for Daily Fantasy Sports Bill*, LEGAL SPORTS REP. (May 24, 2016, 4:51 PM), <http://www.legalsportsreport.com/10160/ny-casinos-and-fantasy-sports/> [https://perma.cc/WS45-CEPA] (“New York State Sen. John Bonacic originally offered [another] bill back in February [2016], but that bill had sat idle for months.”). The original bill was not passed. See *Senate Bill S6793A*, N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2015/s6793/amendment/a> [https://perma.cc/S6SG-VZAQ] (last visited Jan. 30, 2017) (tracking bill's progress).

62. See Evan Grossman, *What's the Holdup with Daily Fantasy Sports in New York? Ask Gov. Cuomo*, N.Y. DAILY NEWS (June 27, 2016, 1:50 PM), <http://www.nydailynews.com/sports/holdup-daily-fantasy-ny-gov-cuomo-article-1.2689891> (describing how Governor Cuomo did not call for bill after a week of its passing in legislature); Dustin Gouker, *Still No Daily Fantasy Sports in New York: Wait Continues for Governor to Act on Bill*, LEGAL SPORTS REP. (July 27, 2016, 9:56 AM), <http://www.legalsports>

Since the end of August 2016, DraftKings and FanDuel, along with other DFS operators, have returned to New York.<sup>63</sup> With only temporary licenses to operate in hand, they continue the process for receiving full licenses.<sup>64</sup>

## 2. *A Glimpse Inside New York's DFS Law*

From the outset, the New York statute addresses Justice Mendez's and critics' concerns that DFS is gambling under New York law, legislatively finding that DFS contests constitute neither "games of chance" nor "wagers on future contingent events not under the contestants' control or influence."<sup>65</sup> As such, the statute explicitly

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report.com/10807/wait-continues-new-york-fantasy-sports-law/ [https://perma.cc/JY97-LY35] (noting that by end of July 2016, Governor had still not called for bill); *Governor Cuomo Signs Legislation to Legalize and Regulate Fantasy Sports in New York State*, N.Y. STATE (Aug. 3, 2016), https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-legalize-and-regulate-fantasy-sports-new-york-state [https://perma.cc/8XM2-ULVA] (conveying Governor Cuomo's concession to sign bill because it legalizes and regulates popular DFS industry); Dustin Gouker, *Long Wait for New York Daily Fantasy Sports Almost Over, as Bill Heads to Governor*, LEGAL SPORTS REP. (Aug. 2, 2016, 7:46 AM), http://www.legalsportsreport.com/10865/ny-governor-requests-dfs-bill/ [https://perma.cc/YU4W-42S7] (reflecting what would happen if he did or did not sign it). See generally *Senate Bill S8153*, N.Y. STATE SENATE, https://www.nysenate.gov/legislation/bills/2015/S8153 (last visited Dec. 27, 2016) (providing legislative history and text of Senate version of bill); *Assembly Bill A10736*, N.Y. STATE SENATE, https://www.nysenate.gov/legislation/bills/2015/a10736/amendment/original [https://perma.cc/7NMS-W4CC] (last visited Dec. 27, 2016) (providing Assembly version of bill). See also N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1402-12 (McKinney 2016) (codifying New York's DFS bill); see generally *How a Bill Becomes a Law*, N.Y. STATE SENATE, https://www.nysenate.gov/how-bill-becomes-law-1 [https://perma.cc/AWL5-KW3T] (explaining how governor has ten days to either sign or veto bill when legislature is in session).

63. Dustin Gouker, *DraftKings, FanDuel Among Daily Fantasy Sports Sites Now Live in New York*, LEGAL SPORTS REP. (Aug. 22, 2016, 12:42 PM), http://www.legalsportsreport.com/11160/draftkings-fanduel-new-york-return/ [https://perma.cc/8RBH-BSDG] (noting how certain DFS operators are allowed to operate in New York now with temporary permits); Nick Niedzwiadek, *Cuomo Signs Daily Fantasy Sports Bill*, POLITICO (last updated Aug. 3, 2016, 5:27 PM), http://www.politico.com/states/new-york/albany/story/2016/08/cuomo-signs-daily-fantasy-sports-bill-104490 [https://perma.cc/FN53-9KAX] ("The bill allows for daily fantasy sports companies operating before November 10[,] 2015, the date when Schneiderman filed his suits, to receive temporary permits to resume operating in New York immediately."). For further discussion of the details of the DFS legislation, see *infra* notes 65–79 and accompanying text.

64. See Gouker, *supra* note 63 (linking to permits of five DFS operators).

65. Compare N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1400(1) (McKinney 2016) (explaining that DFS contests are not "games of chance" because participants use "skill and knowledge" to create teams and winners are result of participant's purposeful selections across multiple, independent sporting events), with *People v. Fanduel, Inc.*, No. 453056/15, 2015 WL 8490461, at \*6, \*8 (N.Y. Sup. Ct. Dec. 11, 2015) (ordering injunctions against FanDuel and DraftKings based on finding that NYAG established that DFS likely constituted illegal gambling).

states that “the legislature declares that interactive fantasy sports do not constitute gambling in New York State as defined in article [225] of the penal law.”<sup>66</sup> The statute subsequently provides requirements for DFS operators.<sup>67</sup> For one thing, DFS operators must register and be approved by the New York Gaming Commission (“Commission”) as well as abide by the rules and regulations it promulgates.<sup>68</sup> The Commission must also approve the types and quantity of contests that a DFS operator offers.<sup>69</sup> In addition, DFS operators must provide a statement of their assets and liabilities for review.<sup>70</sup>

Because the registration and approval process will take some time, the legislation does permit DFS operators that were active in New York prior to November 10, 2015, to receive temporary permits, which will be valid until their registrations are approved or denied.<sup>71</sup> If approved, registrations will remain effective for three years, after which they must be renewed.<sup>72</sup> If denied, the DFS operator must cease to offer contests “for which a [ ] . . . player pays an

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66. RAC. PARI-MUT. WAG. & BREED. § 1400(2). *But see Fanduel*, 2015 WL 8490461, at \*6 (“Penal Law § 225.00 is broadly worded and as currently written sufficient for finding that DFS involves illegal gambling.”).

67. *See generally* RAC. PARI-MUT. WAG. & BREED. §§ 1402–12 (providing rules and regulatory framework). For the New York Senate and Assembly versions of this bill, see *supra* note 62.

68. *See* RAC. PARI-MUT. WAG. & BREED. § 1401(3) (defining “commission”); *id.* § 1402(1)(a) (granting this power to Commission); *see also id.* § 1402(6) (explaining how regulations will relate to “the registration and operation of contests in New York” and also offer “protections [from] compulsive play and safeguards for fair play”); *id.* § 1405 (laying out authority of Commission).

69. *See id.* § 1401(12) (“A registrant may utilize multiple interactive fantasy sports platforms and offer multiple contests, provided that each platform and each contest has been reviewed and approved by the commission.”); *id.* § 1403(1)(e) (incorporating this inquiry into registration process).

70. *See id.* § 1403(1)(f) (noting that disclosure is mandatory).

71. *See id.* § 1402(1)(b) (clarifying that qualifying DFS operators that receive temporary permits must apply for registration with Commission); § 1402(2) (indicating that issuance of temporary permit does not mandate the issuance of full license); *see also Interactive Fantasy Sports*, N.Y. STATE GAMING COMMISSION, <https://www.gaming.ny.gov/ifs/> [<https://perma.cc/XL8T-C435>] (offering applications for temporary permits).

72. *See* RAC. PARI-MUT. WAG. & BREED. § 1402(3) (stating that Commission will develop renewal process). It seems that the Commission has yet to create such process. *See Interactive Fantasy Sports*, *supra* note 71 (stating that registration forms for full licenses are not available).

entry fee.”<sup>73</sup> At this time, there does not seem to be an appeals process in place.<sup>74</sup>

For each year that a DFS operator is registered, it must submit an annual report to the Commission.<sup>75</sup> The Commission may then perform a financial audit as part of its review.<sup>76</sup> Moreover, a registered DFS operator must maintain certain safeguards and standards.<sup>77</sup> These include limiting players from having multiple active accounts, prohibiting individuals under the age of eighteen from participating in DFS contests, and having preventative and corrective measures in place to combat or respond to violations.<sup>78</sup>

Finally, but importantly, the bill also requires DFS operators that are approved to pay “a tax equivalent to fifteen percent of their interactive fantasy sports gross revenue generated within [New York]” in addition to other tax and regulatory costs.<sup>79</sup>

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73. RAC. PARI-MUT. WAG. & BREED. § 1402(1)(a) (limiting reach of regulation). This is because New York Penal Law section 225.00 requires “something of value” for a transaction to constitute gambling. See N.Y. PENAL LAW § 225.00(2) (McKinney 2015) (defining “gambling”). An “entry fee” under the DFS legislation is not limited to money. See RAC. PARI-MUT. WAG. & BREED. § 1401(4) (including “cash equivalents” as well).

74. See RAC. PARI-MUT. WAG. & BREED. §§ 1400–12 (mentioning no appellate review).

75. See *id.* § 1406(1) (providing yearly submission date as well).

76. See *id.* § 1406(2) (declaring that audit can be done at whatever time Commission deems necessary).

77. See *id.* § 1404 (maintaining that these standards are what is required at a minimum). For further discussion of these standards, see *infra* note 78 and accompanying text.

78. See RAC. PARI-MUT. WAG. & BREED. § 1404(1) (listing measures to which DFS operators must adhere); see also *id.* § 1402(6) (implying that fear of players engaging in “compulsive play” is informing safeguards, especially in regards to minors).

79. *Id.* § 1407; see also *id.* § 1408 (noting that further costs will be related to total amount expended on regulating DFS industry); *id.* § 1409 (expressing that Commission will pay received taxes into New York’s state lottery fund). “The New York Lottery’s sole mission is to earn revenue for education.” *Introduction*, N.Y. LOTTERY, <http://nylottery.ny.gov/wps/wcm/connect/NYSL+Content+Library/NYSL+Internet+Site/About+Us/Mission+or+Education/> [https://perma.cc/XDU3-4UX3] (last visited Oct. 24, 2016). Between 2015 and 2016, \$3.3 billion came from the New York Lottery. See *New York Lottery’s Mission*, N.Y. LOTTERY, <http://nylottery.ny.gov/wps/wcm/connect/NYSL+Content+Library/NYSL+Internet+Site/About+Us/Mission+or+Education/Where+he+Money+Goes> [https://perma.cc/BAX4-6FLJ] (last visited Oct. 24, 2016) (contributing at least \$58 billion over past forty-eight years); *Gov. Cuomo Signs Daily Fantasy Sports Bill*, CBS6NEWS ALBANY (Aug. 3, 2016), <http://cbs6albany.com/news/local/gov-cuomo-signs-daily-fantasy-sports-bill> [https://perma.cc/ZN7H-VDYY] (highlighting that New York’s DFS legislation is expected to generate \$4 million in revenue for education purposes).



## B. Delaware—A Similar Story, but Contrasting Outcome

Delaware currently does not permit DFS.<sup>80</sup> The Delaware Department of Justice (“DDOJ”) began investigating the legality of DFS in the fall of 2015 when controversy erupted in other states.<sup>81</sup> The following March, the DDOJ informed state regulators that DFS contests were not authorized by Delaware law, but opted not to take action against FanDuel, DraftKings, or other DFS operators in-state.<sup>82</sup> This was because the industry signaled that legislative changes would be introduced in Delaware’s General Assembly.<sup>83</sup> While a bill legalizing DFS was introduced, it was not adopted by the legislature’s June 30, 2016 deadline.<sup>84</sup> Thus, with Delaware law remaining unchanged, the DDOJ formally sent cease-and-desist letters to DraftKings, FanDuel, and Yahoo!.<sup>85</sup>

The DDOJ explained its reasoning in a press release.<sup>86</sup> It first pointed out that the Delaware Constitution prohibits “[a]ll forms of gambling’ except ‘(a) Lotteries under State control for the purpose of raising funds.’”<sup>87</sup> Then it stated how DDOJ attorneys concluded that DFS contests involving money “constitute gambling because chance, as opposed to skill, is the dominant factor in the

80. See *Online Fantasy Sports Contests for Money Asked to Cease in Delaware*, *supra* note 31 (clarifying prohibition is only for DFS contests “that require payment for participation and offer cash awards”). For further discussion of why Delaware outlawed DFS, see *infra* notes 86–91 and accompanying text.

81. See John Offredo, *Delaware Investigating Fantasy Sports Betting*, DEL. ONLINE (last updated Oct. 17, 2015, 2:38 PM), <http://www.delawareonline.com/story/news/2015/10/16/delaware-investigating-fantasy-sports-betting/74079002/> [<https://perma.cc/JFY7-NTVD>] (mentioning Nevada’s banning of DFS and New York’s DFS-related insider trading scandal). For further discussion of New York’s scandal, see *supra* notes 19–22 and accompanying text.

82. See *Online Fantasy Sports Contests for Money Asked to Cease in Delaware*, *supra* note 31 (providing chronology).

83. See *id.* (stating that fantasy sports companies made these indications).

84. See *id.* (alluding to proposed legislation—House Bill 444); Gouker, *supra* note 31 (pointing out that House Bill 444 was introduced quite late); *House Bill 444*, DEL. GEN. ASSEMBLY, <http://legis.delaware.gov/BillDetail?LegislationId=24237> [<https://perma.cc/B354-JCGW>] (last visited Oct. 24, 2016) (showing that bill was introduced just two days before session expired and containing link to House Bill 444). As such, the legislature did not vote on the bill. See Wes, *Delaware DOJ Orders Fantasy Sites to Get Out*, WORLD FANTASY SITES.COM (July 9, 2016), <http://www.fantasysites.com/delaware-doj-orders-fantasy-sites-get-out/> [<https://perma.cc/NSU8-APYA>] (noting how “legislature adjourned before the bill could be considered”).

85. See *Online Fantasy Sports Contests for Money Asked to Cease in Delaware*, *supra* note 31 (hinting disappointment in doing so, but need to follow current law).

86. See *id.* (examining prohibitory language of Delaware Constitution). For further discussion of Delaware’s constitution, see *infra* notes 87–89 and accompanying text.

87. *Online Fantasy Sports Contests for Money Asked to Cease in Delaware*, *supra* note 31 (alteration in original) (quoting DEL. CONST. art. 2, § 17).

outcome of these contests.”<sup>88</sup> Therefore, as “games of chance,” DFS contests were lotteries under the Delaware Constitution, but not under the state’s control to be legal.<sup>89</sup> As such, the DDOJ concluded that DFS contests must cease until Delaware law evolves.<sup>90</sup> The department would have to “enforce [existing] law.”<sup>91</sup> Thus, all DFS operators have been inactive in the Delaware since July 2016.<sup>92</sup>

### III. MISPLACED BETS—THE RIGHT RESPONSE FOR THE OTHER STATE

#### A. New York’s DFS Statute May Not Be the Winning Draw—Constitution Still at Play

Governor Cuomo signing New York’s DFS legislation into law may have decriminalized the industry, but it did not necessarily seal the deal regarding DFS’s legality in the Empire State.<sup>93</sup> Questions

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88. *Id.* The DDOJ conceded that while skill is involved when participants use their sports knowledge during drafts, because athletes are “human and human behavior is unpredictable,” chance is the more dominant factor, making DFS contests illegal gambling in Delaware. *Id.* (reaching its conclusion in skill versus chance debate); see also Nicole Davidson, Comment, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?*, 39 SAN DIEGO L. REV. 201, 243–44 (2002) (explaining how Delaware employs dominant factor test to determine whether skill or chance is dominant factor in activity). For further discussion of the dominant factor test, see *infra* note 89 and accompanying text.

89. See *Online Fantasy Sports Contests for Money Asked to Cease in Delaware*, *supra* note 31 (reiterating implicitly constitutional requirement that all Delaware lotteries be under state control); see also *Nat’l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1385 (D. Del. 1977) (reviewing Delaware state law and concluding that “lottery” under Delaware Constitution “should be interpreted to encompass not only games of pure chance but also games in which chance is the dominant determining factor”); *In re Request of Governor for Advisory Opinion*, 12 A.3d 1104, 1113 (Del. 2009), *as corrected* (May 29, 2009) (adopting Judge Walter K. Stapleton’s conclusion in *National Football League*).

90. See *Online Fantasy Sports Contests for Money Asked to Cease in Delaware*, *supra* note 31 (underscoring that prohibition is limited to only those contests where players must pay to play for monetary prizes); see also Jessica Masulli Reyes, *Delaware Puts an End to Fantasy Sports Betting*, DEL. ONLINE (last updated July 8, 2016, 10:01 PM), <http://www.delawareonline.com/story/news/local/2016/07/08/delaware-puts-end-fantasy-sports-betting/86870566/> [<https://perma.cc/VKJ7-NR86>] (reiterating how DDOJ remarked that DraftKings, FanDuel, and Yahoo! can continue to operate if Delaware law changes).

91. *Online Fantasy Sports Contests for Money Asked to Cease in Delaware*, *supra* note 31.

92. See *id.* (accounting only for activity that involves real money).

93. See *Governor Cuomo Signs Legislation to Legalize and Regulate Fantasy Sports in New York State*, *supra* note 62 (sharing news of Governor Cuomo’s signing of DFS bill). But see Daniel Wallach, *NY Fantasy Sports Law May Face Constitutional Roadblock*, LAW360 (June 21, 2016, 11:34 AM), <http://www.law360.com/articles/809124/nyfantasysportslawmayfaceconstitutionallroadblock> [<https://perma.cc/4CUV-ARA3>] (detailing how DFS bill may violate New York’s constitution); Michael McCann, *Legal Battle Over DFS in New York Not Necessarily Over*, SPORTS IL-

regarding DFS's constitutionality still remain.<sup>94</sup> Specifically, as one commentator has pointed out, just because the legislation states that DFS is not gambling does not mean that it is actually not gambling.<sup>95</sup> Such a determination must be made by a court, which will not be "straightjacketed by the particular labels selected by the legislative body."<sup>96</sup>

The New York Constitution is rather restrictive when it comes to gambling; in fact, it embodies a general policy against it.<sup>97</sup> The constitution specifically authorizes only three forms of gambling—"state lotteries," "pari-mutuel betting on horse races," and "casino gambling at no more than seven facilities."<sup>98</sup> Furthermore, it entrusts the legislature to hinder efforts that violate or attempt to expand these constitutional exceptions.<sup>99</sup>

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ILLUSTRATED (June 18, 2016), <http://www.si.com/fantasy/2016/06/18/draft-kings-fan-duel-daily-fantasy-new-york-legalize> [<https://perma.cc/MD37-QKBV>] (conveying same constitutional issues); see also Andy Moore, *Does State Regulation of Fantasy Sports Violate PASPA?*, LAW360 (Dec. 8, 2015, 10:24 AM), <http://www.law360.com/articles/734823/does-state-regulation-of-fantasy-sports-violate-paspa> [<https://perma.cc/TBN6-TCFF>] (providing federal complications with proposed DFS bills). For further discussion of the constitutionality issues of New York's DFS legislation, see *infra* notes 94–130 and accompanying text.

94. See Wallach, *supra* note 93 (explaining that although the language of New York's DFS bill declares that DFS is not gambling, judiciary will have final say on matter if constitutionality of bill is challenged). For the text of New York's DFS bill, see *supra* notes 62 and 67 and accompanying text. The Stop Predatory Gambling group is already spearheading citizens' private suit challenging the legitimacy and constitutionality of New York's new DFS law. See Dustin Gouker, *Anti-Gambling Group Leads Lawsuit Against New York Daily Fantasy Sports*, LEGAL SPORTS REP. (Oct. 5, 2016, 7:46 AM), <http://www.legalsportsreport.com/11750/new-york-dfs-lawsuit/> [<https://perma.cc/4D88-X6UF>] (describing lawsuit). For further discussion of this litigation, see *infra* note 127 and accompanying text.

95. See Wallach, *supra* note 93 (critiquing New York's legislature's attempt to curtail judicial review).

96. *Id.* (describing how New York court may disregard conclusion of legislators and instead inquire into law's purpose when interpreting statute) (citing *Meehan v. Brown*, 16 N.Y.3d 395, 403 (2011); *People v. Ryan*, 274 N.Y. 149, 152 (1937)); see also N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1400(1)–(2) (McKinney 2016) (declaring that DFS is not gambling under New York Penal Law section 225.00). For further discussion of New York Penal Law section 225.00, see *supra* notes 28, 42–45 and accompanying text.

97. See N.Y. CONST. art. I, § 9 (prohibiting gambling generally); Wallach, *supra* note 91 (citation omitted) (discussing how this prohibitory language signifies "public policy . . . against commercialized gambling"); see also N.Y. GEN. OBLIG. LAW § 5-401 (McKinney 1965) (making unlawful "[a]ll wagers, bets or stakes, made to depend upon any . . . lot, chance, casualty, or unknown or contingent event"). For further discussion of New York's constitution and its policy against gambling, see *supra* note 43 and accompanying text.

98. N.Y. CONST. art. I, § 9, cl. 1. For further discussion of this constitutional section, see *supra* notes 41–42 and accompanying text.

99. See N.Y. CONST. art. I, § 9 ("[T]he legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.").

Accordingly, policymakers must have been aware of the perception that DFS could be considered gambling under New York law, especially in light of the NYAG's actions against DraftKings and FanDuel.<sup>100</sup> This accounts for the state legislature's tactical decision to include language declaring it otherwise in the DFS statute.<sup>101</sup> The constitutional issue was on legislators' radar as well, but was likely brushed aside to get the DFS bill passed quickly so that the state could begin to earn revenue through regulations aimed at financing educational aid.<sup>102</sup>

There were three options for legalizing DFS: (1) passing a bill declaring that DFS was not gambling and therefore legal; (2) changing the statutory definitions of "gambling" and "contest of chance" in tandem with passing a DFS bill; or (3) amending the constitution to permit DFS as the fourth exception to the state's general gambling ban.<sup>103</sup> New York went with the first option, seemingly the easiest of the three because it involved the least moving parts.<sup>104</sup>

Had the legislators changed the definitions of "contest of chance" and "gambling" under New York Penal Law section 225.00 to (1) heighten the requisite degree of chance to qualify for the former and (2) add that a person must lack *all* control or influence over a "future contingent event" in the latter, the less likely it would

100. Compare *DraftKings Cease-and-Desist Order*, *supra* note 26, and *FanDuel Cease-and-Desist Order*, *supra* note 26 (denouncing DFS as "illegal gambling"), with N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1400(1)-(2) (proclaiming that DFS does not constitute gambling).

101. See N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1400(1)-(2) (addressing gambling concern by excluding DFS from New York Penal Law section 225.00's definitional purview); Wallach, *supra* note 91 (deducing that legislators are strategically trying to "skirt" New York Constitution by defining DFS outside the bounds of Penal Law section 225.00, but questioning effectiveness of move).

102. See Dustin Gouker, *New York Assembly Passes Fantasy Sports Bill, Which is Still Stalled in Senate*, LEGAL SPORTS REP. (June 17, 2016, 12:02 PM), <http://www.legal-sportsreport.com/10501/new-york-dfs-legislation/> [<https://perma.cc/RRF3-DYMB>] (noting how New York Assembly members opposing DFS bill openly questioned its constitutionality, but were dismissed by bill's sponsor, who reasoned that legislature could sidestep issue by defining DFS "as not gambling"); *Governor Cuomo Signs Legislation to Legalize and Regulate Fantasy Sports in New York State*, *supra* note 62 (publicizing how bill is expected to generate about "\$4 million in revenue to fund state education aid"). For a discussion of how New York's DFS industry will help fund education, see *supra* note 79 and accompanying text. The consumer protection benefits of the bill were also a motivating factor for getting the bill passed. See Gouker, *supra* (mentioning consumer protection benefit of approving DFS bill sooner rather than later).

103. See Wallach, *supra* note 93 (suggesting options). For further discussion of these options, see *infra* notes 105–130 and accompanying text.

104. See Wallach, *supra* note 93 (labeling legislature's action as "riskiest of three options").

be to find a constitutional issue because the New York Constitution does not define “gambling.”<sup>105</sup> In fact, courts have looked to the statutory definitions as determinative.<sup>106</sup> By changing the definitions, if a New York court was to consider the constitutionality of the current DFS legislation, then the exclusion of DFS as gambling under Penal Law section 225.00 would persuade a court to find that it is not gambling.<sup>107</sup> While such an exclusion still goes against the spirit of constitutional prohibition, DFS would have protection not based only on a siloed legislative finding, as it currently has, but by definitional exclusions that will likely restrain a contrary judicial interpretation.<sup>108</sup> However, as the DFS statute presently stands, it can be constitutionally attacked through Penal Law section 225.00.<sup>109</sup> Had the DFS bill been introduced with or only after the suggested changes to Penal Law section 225.00, such an attack would at least have been hindered from its starting point.<sup>110</sup>

The other option would have been to amend the New York State Constitution to include an exception for DFS, thereby quieting any fear of a constitutional violation.<sup>111</sup> Authorizing DFS

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105. *Cf. id.* (“[T]he Legislature could have changed the statutory definition of “gambling” under Section 225.00 to require a ‘predominance’ of luck or chance, which is the . . . threshold used in many other states.”); Wallach, *supra* note 38 (describing how under “‘predominant factor’ test[,] ‘chance’ must predominate over ‘skill’ before gambling will be said to exist”, but New York “sets a much lower bar”). Because New York decided to “simply remove[ ]” DFS contests from the Penal Law’s “reach,” Wallach foresaw the constitutional challenge to the DFS bill. See Wallach, *supra* note 93 (exploring constitutional issues). Compare N.Y. CONST. art. I, § 9 (supplying no definition for gambling), and *supra* note 41 and accompanying text, with N.Y. PENAL LAW § 225.00(2) (McKinney 2015), and *supra* note 42 and accompanying text (supplying definition for gambling).

106. See, e.g., *People v. Fanduel, Inc.*, No. 453056/15, 2015 WL 8490461, at \*6 (N.Y. Sup. Ct. Dec. 11, 2015) (reviewing language of New York Penal Law sections 225.00(1)–(2) and concluding that DFS contests can fall within them). For further discussion of this opinion, see *supra* notes 37–55 and accompanying text.

107. See Wallach, *supra* note 93 (discussing how “critical” New York Penal Law section 225.00 will be in lawsuits, but reminding that statutory law cannot exceed constitutional limits, authorizing what the latter prohibits). For further discussion of how New York courts determine what constitutes gambling, see *supra* note 28 and accompanying text.

108. *Cf. Wallach, supra* note 93 (noting that constitution embodies general policy against gambling, but also implying how New York legislators strategically should have amended New York Penal Law section 225.00).

109. Compare N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1400 (McKinney 2016) (presenting legislative findings), with N.Y. CONST. art. I, § 9, and N.Y. PENAL LAW §§ 225.00(1)–(2) (permitting plausible conclusion that DFS is gambling).

110. See generally, e.g., *Fanduel*, 2015 WL 8490461, at \*4, \*6 (looking to statutory definition of gambling when deciding whether to grant injunctions against DraftKings and FanDuel as unlawful gambling operators).

111. See Wallach, *supra* note 93 (remarking that this option was New York’s “safest play”); Bennett Liebman, *Fantasy Sports Legislation in New York State: Can it Be Effective?*, SARATOGA INST. ON EQUINE RACING, AND GAMING LAW (Mar. 9, 2016),

through constitutional amendment would have taken much more time, however, and time constraints were likely the underlying reason legislators minimized constitutional issues during floor discussions.<sup>112</sup>

There are a number of requirements that must be satisfied to amend New York's constitution.<sup>113</sup> First, the amendment must be proposed in both houses of New York's bicameral legislature—what it calls its Senate and Assembly.<sup>114</sup> Once proposed, it must also be sent to the NYAG, who, within twenty days, should provide a written opinion describing how the constitution will be affected by the amendment.<sup>115</sup> Thereafter, each house must vote to adopt the amendment.<sup>116</sup> A majority vote is required in both houses for the amendment to move forward.<sup>117</sup> If the majority vote is achieved, then the amendment is “referred to the *next* regular legislative session convening *after the succeeding general election* of members,” where both the Senate and Assembly must again vote in favor of the amendment by a majority vote.<sup>118</sup> In other words, two “‘separately-elected’” legislative sessions are required to approve an amendment.<sup>119</sup> With such approval, the amendment must next be submit-

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[https://saratogainstitute.wordpress.com/2016/03/09/fantasy-sports-legislation-in-new-york-state-can-it-be-effective/#\\_ftnref5](https://saratogainstitute.wordpress.com/2016/03/09/fantasy-sports-legislation-in-new-york-state-can-it-be-effective/#_ftnref5) [<https://perma.cc/GQ8K-DY57>] (illuminating constitutional issues with DFS as well, particularly how legislature cannot impose “post-enactment legislative history” on New York Constitution).

112. See Gouker, *supra* note 102 (playing down constitutional concerns because bill's sponsor had “set[ ] up the rush to legalize DFS”); Wallach, *supra* note 93 (explaining New York's amendment process and how long it would have taken to legalize DFS this way). For further discussion of this amendment process and timeframe, see *infra* notes 113–124 and accompanying text. See also Dustin Gouker, *The New Daily Fantasy Sports Bill in New York Brings Up PASPA Concerns*, LEGAL SPORTS REP. (Dec. 4, 2015, 9:35 AM), <http://www.legalsportsreport.com/6650/ny-dfs-bill-and-paspa/> [<https://perma.cc/5CGQ-8HQG>] (discussing proposed amendment to New York Constitution excepting fantasy sports, but noting that it raised federal preemption issue as amendment would possibly conflict with Professional and Amateur Sports Protection Act of 1992 [“PASPA”]). For further discussion of this PASPA, see *infra* notes 143–164 and accompanying text.

113. N.Y. CONST. art. XIX, § 1 (providing amendment process).

114. See *id.* (including both houses); see also *Branches of Government in New York State*, N.Y. STATE SENATE, <https://www.nysenate.gov/branches-government-new-york-state> [<https://perma.cc/97G6-79B9>] (last visited Jan. 16, 2017) (explaining New York's legislative branch structure).

115. N.Y. CONST. art. XIX, § 1 (noting that failure of NYAG to provide opinion within twenty day-period or at all will not “affect the validity of . . . proposed amendment”).

116. See *id.* (requiring vote from both legislative houses).

117. See *id.* (supplying requisite approval standard).

118. *Id.* (emphasis added) (noting that the first legislative session must publish the adopted proposed amendment for three months).

119. Wallach, *supra* note 93 (explaining the two rounds of legislature voting); Yolanne Almanzar, *How Does New York State Change Its Constitution?*, N.Y. WORLD

ted to the public at a referendum and must receive a majority vote.<sup>120</sup> Only then will the amendment become part of the New York State Constitution.<sup>121</sup> Moreover, even with the electorate's requisite vote, the amendment will not take effect until the following January 1.<sup>122</sup>

This means that if legislators wanted to legalize DFS through a constitutional amendment, the DFS amendment would have needed approval during the 2016 legislative session, which typically lasts between January and June of each year.<sup>123</sup> The Assembly and Senate would both need to approve it again in 2017 to then submit it to the general public for approval to finally become effective on January 1 of 2018—a two-year process.<sup>124</sup> Such an elongated timeline likely dissuaded legislators from going this route, especially when New York's DFS regulation is expected to bring in millions in state revenue each year.<sup>125</sup>

Nonetheless, legalizing and defining DFS through its own separate statute exposes the legislation to a much stronger constitutional attack.<sup>126</sup> A lawsuit already initiated against Governor Cuomo and the Commission asserting that the DFS legislation violates the state constitution illustrates this.<sup>127</sup> Specifically, the com-

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(Mar. 26, 2012), <http://www.thenewyorkworld.com/2012/03/26/the-daily-q-how-does-new-york-state-change-its-constitution/> [<https://perma.cc/EZB3-YG6A>] (reviewing amendment process in context of 2012 constitutional proposal).

120. See N.Y. CONST., art. XIX, § 1 (stating that legislature has some discretion on when to submit proposed amendment to voters); Wallach, *supra* note 93 (clarifying that amendment will be placed on ballots).

121. See N.Y. CONST., art. XIX, § 1 (reaching this conclusion).

122. See *id.* (“[S]uch amendment . . . shall become a part of the constitution on the first day of January next after such approval.”).

123. See Wallach, *supra* note 93 (outlining timeframe); *New York State - Legislative Session Calendar*, N.Y. STATE ASSEMBLY, <http://assembly.state.ny.us/leg/calendar/> [<https://perma.cc/MC6R-R39B>] (providing schedule of New York legislature).

124. See Wallach, *supra* note 93 (delving into amendment process).

125. See *Governor Cuomo Signs Legislation to Legalize and Regulate Fantasy Sports in New York State*, *supra* note 62 (discussing economic benefits of bill). For further discussion of these economic benefits, see *supra* notes 79 and 102 and accompanying text.

126. See Wallach, *supra* note 93 (noting how exceptions in New York Constitution were created through amendment and not by statute alone). For a survey of the current exceptions, see *supra* note 98 and accompanying text.

127. See Gouker, *supra* note 94 (linking to verified complaint); Rick Karlin, *Anti-Gambling Group Sues New York Over Daily Fantasy Sports Legalization*, TIMES UNION (last updated Oct. 6, 2016, 7:12 AM), <http://www.timesunion.com/local/article/Anti-gambling-group-sues-New-York-over-daily-9864264.php> [<https://perma.cc/R6DN-SN39>] (describing how four New York women, “whose lives have [somehow] been [personally] disrupted by [gambling disorders],” claim that state constitution protects them from gambling). The Commission oversees the regula-

plaint states that DFS is gambling and the legislature cannot unilaterally “legalize what the Constitution prohibits.”<sup>128</sup>

The New York legislature should have taken the constitutional prohibition seriously as legislatures did in Delaware, and worked towards legalizing DFS through legitimate means.<sup>129</sup> Now, the enacted regulatory system lies in the balance.<sup>130</sup>

## B. Delaware Should Have Taken a Bite out of the Apple

On the other hand, Delaware should have passed its DFS bill, House Bill 444, as the New York legislature did because it would not have been as vulnerable to a constitutional attack.<sup>131</sup> While the Delaware Constitution generally prohibits gambling, it is far more permissive than New York’s constitution.<sup>132</sup> That is, DFS could have

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tion of the DFS industry. See N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1405 (McKinney 2016) (conferring Commission with this responsibility).

128. Verified Complaint, at 2, ¶ 4, *White v. Cuomo*, No. 5861/2016 (N.Y. Gen. Term Oct. 5, 2016), available at <http://stoppredatorygambling.org/wp-content/uploads/2016/10/2016-NY-DFS-lawsuit.pdf> [<https://perma.cc/SUU9-JT37>].

129. Compare Gouker, *supra* note 102 (conveying certain legislator’s dismissive attitude towards constitutional questions raised during debates on New York’s DFS bill), and Wallach, *supra* note 93 (foreseeing that New York legislators would come to bemoan their chosen path for legalizing DFS through standalone statute), with *Online Fantasy Sports Contests for Money Asked to Cease in Delaware*, *supra* note 31 (outlawing DFS because of constitutional prohibition despite acknowledging how much “Delaware residents and visitors . . . enjoy participating in the full array of fantasy sports contests”).

130. See Verified Complaint, *supra* note 128, at 1, ¶ 1 (suing to declare DFS legislation unconstitutional). But see Justin Fielkow, *New York’s Interactive Fantasy Sports Law Faces Constitutional Challenge*, SPORTS ESQUIRES (Oct. 10, 2016), [http://thesportsesquires.com/new-yorks-interactive-fantasy-sports-law-faces-constitutional-challenge/#\\_ednref6](http://thesportsesquires.com/new-yorks-interactive-fantasy-sports-law-faces-constitutional-challenge/#_ednref6) [<https://perma.cc/MY9Y-SRWS>] (underscoring that New York statutes are “presumed” constitutional and plaintiffs must show “beyond a reasonable doubt” that fantasy sports contests constitute unlawful gambling—a high burden) (citing *Rochester Gas & Elec. Corp. v. Public Serv. Comm’n.*, 71 N.Y.2d 313, 319–320 (1988); *Samuels v. New York State Dep’t of Health*, 29 A.D.3d 9, 12 (2006)); see also Dustin Gouker, *Once a Daily Fantasy Sports Opponent, New York AG Schneiderman Defends Law in New Filing*, LEGAL SPORTS REP. (Jan. 13, 2017, 11:46 AM), <http://www.legalsportsreport.com/12650/schneiderman-and-fantasy-sports/> [<https://perma.cc/W2NL-VJCW>] (reasoning that New York Constitution endows legislature with “broad latitude” in establishing state’s gambling laws) (quoting Memorandum of Law in Support of Motion to Dismiss, *White v. Cuomo*, No. 5861/2016 (N.Y. Gen. Term Jan. 11, 2017) available at <http://www.legalsportsreport.com/wp-content/uploads/2017/01/MOL.pdf> [<https://perma.cc/ZD7F-6NTD>]).

131. See, e.g., DEL. CONST. art. II, § 17 (permitting lotteries, which arguably would include DFS contests, under “[s]tate control”). For further discussion of Delaware’s constitution and its failure to pass House Bill 444, see *supra* notes 84–91 and accompanying text.

132. Compare DEL. CONST., art. II, § 17 (providing broad exceptions to general prohibition against gambling), with N.Y. CONST., art. I, § 9 (providing narrow exceptions).



been legalized through House Bill 444 itself, without having to amend Delaware Constitution.<sup>133</sup> This is because Delaware constitutionally permits lotteries if they are under the state's control.<sup>134</sup> Lottery, as used in the constitution, is construed rather broadly and is "judicially defined as 'a scheme for the distribution of money or prizes by chance.'"<sup>135</sup> Furthermore, the Delaware Supreme Court has opined that a lottery involves three elements: "'prize, consideration and chance.'"<sup>136</sup> Satisfying these two requirements, DFS would constitute a "lottery" in Delaware.<sup>137</sup> As such, as long as Delaware regulates the industry "for the purpose of raising funds," DFS could fit into this established constitutional exception.<sup>138</sup>

Even if a court ruled that DFS was not a "lottery" and that a constitutional amendment were required to legalize DFS, this would still be easier to accomplish in Delaware than in New York.<sup>139</sup>

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133. See *Online Fantasy Sports Contests for Money Asked to Cease in Delaware*, *supra* note 31 (suggesting that DFS contests could constitute "lotteries" under Delaware Constitution); see also DEL. CONST., art. II, § 17 (including no constitutional definition of "lottery"). For further discussion of how DFS contests could be "lotteries" under Delaware's constitution, see *supra* notes 87–89 and *infra* notes 134–138 and accompanying text.

134. See DEL. CONST., art. II, § 17 (stating exceptions to gambling prohibition, which include state controlled lotteries).

135. *Affiliated Enters. v. Waller*, 5 A.2d 257, 259 (Del. 1939) (quoting *State v. Sedgwick*, 81 A. 472, 473 (Del. Ct. Gen. Sess. 1911); *State v. Gilbert*, 374, 100 A. 410 (Del. Ct. Gen. Sess. 1917)). The *Waller* court further adopted that "[a]n acceptable definition is one offered by the Missouri Courts where a lottery is defined as any scheme or device whereby anything of value is, for a consideration, allotted by chance." *Id.* (citing *State v. Emerson*, 1 S.W.2d 109 (Mo. 1927), *rev'd on other grounds* by *State v. Hardy*, 276 S.W.2d 90 (1955)).

136. *In re Request of Governor for Advisory Opinion*, 12 A.3d 1104, 1111 (Del. 2009), *as corrected* (May 29, 2009) (quoting *Nat'l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1383 (D. Del. 1977) (determining constitutionality of Delaware sports betting bill). For further discussion of this opinion, see *supra* note 89 and accompanying text.

137. See *id.* at 1114 (concluding that "the Delaware Constitution allows lotteries to involve an element of skill, but only where chance predominates"); see also *supra* notes 135–136 and accompanying text (describing what constitutes "lottery" under Delaware Constitution).

138. See DEL. CONST. art. II, § 17 (presenting this stipulation); see also *Online Fantasy Sports Contests for Money Asked to Cease in Delaware*, *supra* note 31 (alluding to possibility that DFS could be legalized through statute alone). House Bill 444, in fact, proposed that DFS would be under Delaware's control and would raise funds for the state. See H.B. 444, 148th Gen. Assemb., Reg. Sess. (Del. 2016), available at <http://legis.delaware.gov/json/BillDetail/GetHtmlDocument?fileAttachmentId=49672> [<https://perma.cc/JC9G-EXQU>] (requiring any DFS operator to be registered with director of Delaware Lottery Commission in sections 4863 and 4866). Section 4868 stated that fifteen percent of DFS operators' gross revenue must be paid to Delaware as a tax. See *id.*

139. Compare DEL. CONST. art. XVI, § 1 (explaining how to amend Delaware Constitution), with N.Y. CONST. art. XIX, § 1 (stating how to amend New York Constitution).

Delaware does not require a popular vote like New York does.<sup>140</sup> Instead, it only requires that two-thirds of two successive legislatures vote in favor of the amendment.<sup>141</sup> Had the 2016 session voted in favor of a constitutional amendment to legalize DFS, the industry could have been up and running as early as 2017.<sup>142</sup>

### C. A Federal Contender—The Professional and Amateur Sports Protection Act of 1992

Even if New York or Delaware were to legalize DFS statutorily or by constitutional amendment, a federal preemption issue remains.<sup>143</sup> The Professional and Amateur Sports Protection Act of 1992 (“PASPA”)<sup>144</sup> is a federal law that makes it “unlawful for a government entity to sponsor, operate, advertise, promote, license, or authorize . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more

140. See DEL. CONST. art. XVI, § 1 (mentioning no requirement for popular approval). *But see* N.Y. CONST., Art. XIX, § 1 (“[T]he people shall approve and ratify such amendment . . . by a majority of the electors voting.”).

141. See DEL. CONST. art. XVI, § 1 (noting that both houses must vote in favor). Further, a general election must separate the two legislative votes. See *id.* (“[I]f in the General Assembly next after the said [general] election such proposed amendment . . . be agreed to by two thirds of all the members elected to each House, the same shall thereupon become part of the Constitution.”).

142. See *id.* (indicating immediate effectiveness of constitutional amendments); see also Tom Grazing, *DoJ Issues Letters to Stop Real Money Daily Fantasy Contests in Delaware*, PLAYING LEGAL (July 15, 2016), <https://playinglegal.com/news/doj-issues-letters-stop-real-money-daily-fantasy-contests-delaware-3416> [<https://perma.cc/DEE5-Q65B>] (noting how Delaware’s legislative session expired on June 30 with no DFS bill passed). See generally *Schedule for the Second Legislative Session of the 148th General Assembly*, DELAWARE STATE SENATE, <http://www.desenatedems.com/legislative-schedule.html> [<https://perma.cc/2DN9-9BDX>] (suggesting that legislative sessions last between January and June of each year).

143. See Garrett Greene, *When Fantasy Becomes Reality: Attempts to Regulate the Highly Unregulated Daily Fantasy Sports Industry*, 47 ST. MARY’S L. J. 821, 832–40 (2016) (overviewing PASPA and exploring whether legalizing DFS violates it in certain states); Gouker, *supra* note 112 (raising PASPA concern for legalizing DFS through statute or constitutional amendment in New York); Moore, *supra* note 93 (analyzing how PASPA implicates DFS regulations); Daniel Wallach, *No Question, PASPA Applies to Daily Fantasy Sports*, SPORTS LAW BLOG (Jan. 11, 2016, 1:18 PM), <http://sports-law.blogspot.com/2016/01/no-question-paspa-applies-to-daily.html> [<https://perma.cc/EE99-987Q>] (explaining PASPA violation if states pass DFS legislation); Richik Sarkar, *Daily Fantasy Sports: A Regulatory Dilemma Worth Resolving*, ABA CONSUMER FIN. SERVS. COMMITTEE NEWSL. at 1–3 (2016), [http://apps.americanbar.org/buslaw/committees/CL230000pub/newsletter/201603/feature\\_3.pdf](http://apps.americanbar.org/buslaw/committees/CL230000pub/newsletter/201603/feature_3.pdf) [<https://perma.cc/TS59-88Y4>] (explaining that states may only be able to ban DFS or do nothing because of PASPA). For further discussion of how PASPA implicates states’ abilities to regulate DFS, see *infra* notes 144–167 and accompanying text.

144. The Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. §§ 3701–3704 (1992).

competitive games in which amateur or professional athletes participate.”<sup>145</sup> DFS would most likely be considered a “wagering scheme,” even if not a form of betting or gambling, because winning in DFS contests is based upon the real-life performances of professional athletes.<sup>146</sup> Conceding this, PASPA seemingly prohibits its federal and state governments from authorizing or regulating DFS.<sup>147</sup> This means that New York’s DFS legislation violates this federal law.<sup>148</sup> Moreover, PASPA also makes it unlawful for “per-

145. *Id.* § 3702(1).

146. See Wallach, *supra* note 143 (exploring how state DFS regulations interact with section 3702 of PASPA). For further discussion of how DFS contests work, see *supra* notes 8–16 and accompanying text.

147. See 28 U.S.C. § 3702(1) (stating in plain language that government cannot “directly or indirectly” sanction sports “betting, gambling, or wagering scheme[s]”).

148. See *id.*; Moore, *supra* note 93 (applying § 3702(1) to New York’s legislative efforts). Delaware has a partial exemption from PASPA. See 28 U.S.C. § 3704(a) (creating exceptions to PASPA’s ban on sports betting for “wagering schemes . . . conducted by [a] State . . . [between] January 1, 1976, and August 31, 1990”); Greene, *supra* note 143, at 832 n.45 (citing 28 U.S.C. § 3704(a)) (noting that only four states benefit from any sort of exemption); Linda J. Shorey et al., *States Utilize Exemption From Sports Betting Ban*, WORLD ONLINE GAMBLING LAW REP. 13, 15 (2009) <http://www.klgates.com/files/Publication/57bbabe4-3286-47d4-9fd6-58dbad5c8b7d/Presentation/PublicationAttachment/38948d21-842e-457c-9284-6dd6197f14e1/woglMay09.pdf> [<https://perma.cc/252F-XJHD>] (pointing out that Delaware, Nevada, Oregon and Montana are the states with PASPA exemptions because they had “sports betting games” when PASPA was passed and so Congress “carved out exemptions for [them]”). As such, Delaware can authorize “parlay wagers or pool betting,” but not “single-game sports betting.” Steven Stradbroke, *Delaware Sports Lottery Losing Steam; Pennsylvania Passes Sports Bet Resolution*, CALVINAYRE.COM (Feb. 10, 2016), <http://calvinayre.com/2016/02/10/business/delaware-sports-lottery-losing-steam/> [<https://perma.cc/4A9X-BJUJ>]. DFS likely falls under the former because participants “wager on more than one outcome” during contests. Cf. Shorey, *supra* (explaining difference). For further discussion of how DFS contests work, see *supra* notes 8–16 and accompanying text. Still, in *Office of Commissioner of Baseball v. Markell*, the Third Circuit Court of Appeals held that Delaware “would violate PASPA” if it “allow[ed] wagering on athletic contests involving sports beyond the NFL” because Delaware only “‘conducted’” a betting scheme involving NFL “multi-game parlays” between 1976 and 1990. *OFC Comm’r Baseball v. Markell*, 579 F.3d 293, 304 (3d Cir. 2009) (referencing time period set by 28 U.S.C. § 3704(a)). Accordingly, even if Delaware was to regulate DFS, it could likely only authorize DFS for NFL games, if that. Cf. *id.* (“Delaware may . . . institute multi-game (parlay) betting on at least three NFL games, because such betting is consistent with the scheme to the extent it was conducted in 1976.”). But see *id.* at 303 (holding that Delaware “cannot effectuate a substantive change from the scheme that was conducted during the exception period”). Otherwise, the state would risk violating PASPA. See *id.* at 300–04 (interpreting how § 3704(a) applies to Delaware).

Interestingly, both Delaware and Pennsylvania have made efforts to repeal PASPA. See Stradbroke, *supra* (describing how Pennsylvania introduced “symbolic” bill to abolish PASPA’s sports betting prohibition and explaining how Delaware’s arguments to end PASPA restrictions were refused by federal courts). New Jersey has requested the Supreme Court to confirm PASPA’s constitutionality. See Jacob Gershman, *New Jersey Asks Supreme Court to Hear Sports-Betting Case*, WALL

sons” to “operate, advertise, [or] promote” sports wagering, meaning that PASPA is not a saving grace against state intervention for DFS operators, such as DraftKings and FanDuel.<sup>149</sup>

Under this interpretation, then, state governments generally only have two options when it comes to DFS: (1) outlaw it completely; or (2) let the industry continue to exist unregulated.<sup>150</sup> The latter is an unlikely pick for revenue-generating and consumer protection reasons, however.<sup>151</sup>

Some commentators have argued that the more recent UIGEA and its “carve-out” limit the reach of PASPA’s prohibition in that UIGEA does not consider “participation in any fantasy or simulation sports game” to be a “bet or a wager,” making PASPA inapplicable to DFS.<sup>152</sup> Yet, other commentators have responded that UIGEA makes no such supersession.<sup>153</sup> They have pointed to the legislative history of the 2006 Act, and how it states that it should not be interpreted to limit any other federal gambling law.<sup>154</sup> In addition, UIGEA specifically affirms that “any scheme of a type de-

STREET J. (Oct. 14, 2016, 1:00 PM), <http://blogs.wsj.com/law/2016/10/14/new-jersey-asks-supreme-court-to-hear-sports-betting-case/> (appealing New Jersey federal court decision and arguing that PASPA violates Tenth Amendment’s “anti-commandeering doctrine”).

149. See 28 U.S.C. § 3702(2) (differing unsubsantially from government’s prohibition); Wallach, *supra* note 143 (commenting that “persons” will probably be interpreted to include businesses as well as individuals).

150. See Sarkar, *supra* note 143, at 3 (referring to this as “a Hobson’s choice”). States that benefit from a PASPA exemption may have more options. See, e.g., Moore, *supra* note 93 (explaining how Nevada can regulate DFS without violating PASPA because it had “full sports betting” between January 1, 1976, and August 31, 1990, and therefore can take advantage of the PASPA exemption offered in 28 U.S.C. § 3704(a)). For further discussion of PASPA exemptions, see *supra* note 148 and accompanying text.

151. See Governor Cuomo Signs Legislation to Legalize and Regulate Fantasy Sports in New York State, *supra* note 62 (highlighting motivations for enacting bill).

152. See 31 U.S.C. § 5362(1)(e)(ix) (2006). See, e.g., Greene, *supra* note 143, at 832–36 (asserting that “UIGEA federally exempts [DFS] from being classified as . . . sports gambling” under PASPA); Wallach, *supra* note 143 (discussing how others have taken this stance, but ultimately rejected it). For further discussion of the UIGEA “carve-out,” see *supra* notes 47–55 and accompanying text.

153. See, e.g., Wallach, *supra* note 143 (reviewing and applying “interpretive principle known as *lex posterior derogat legi priori*” that requires later enacted statute to make explicit its repealing or limiting a prior one and because UIGEA contains no such language, PASPA is not affected by UIGEA); see also Greene, *supra* note 143, at 833 n.48 (acknowledging that congressman who drafted UIGEA considers it “sheer chutzpah” for the daily fantasy sites to pretend the law makes them legal”) (citation omitted).

154. See Wallach, *supra* note 143 (highlighting UIGEA’s rule of construction, 31 U.S.C. section 5361(b): “No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.” (emphasis omitted)); Shapiro, *supra* note 9, at 296–97 (pointing out DFS was most

scribed in section 3702” of PASPA is a “bet or wager,” further demonstrating how UIGEA is meant to complement PASPA and not supplant it.<sup>155</sup> Former House Representative James Leach, who authored UIGEA, has even indicated that the Act was “never intended to cover [DFS],” only traditional fantasy sports.<sup>156</sup> He only included the fantasy sports exemption because other members of Congress that they would not otherwise vote for UIGEA.<sup>157</sup> While traditional fantasy sports were prevalent by the mid-2000s, DFS was either unheard of or still very much under development when UIGEA was enacted, making it improbable that legislators contemplated DFS when requesting or creating the exemption.<sup>158</sup> Moreover, in 2015, Representative Leach explained that he intended UIGEA “to constrain a growing gambling ethos in America that could bring the casino to the home.”<sup>159</sup> The ease of playing DFS diametrically opposes this goal and further evidences that the UIGEA exemption is not meant to extend to DFS.<sup>160</sup> In addition, the *Congressional Record* from shortly after UIGEA’s adoption shows that legislators voted in favor of the act because they saw “online gambling [a]s a threat to civic society” and considered UIGEA a foil to the “gambling lifestyle.”<sup>161</sup> The record also reveals an under-

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likely not contemplated when drafting UIGEA because of how unknown it was then).

155. 31 U.S.C. § 5362(1)(c) (referring to PASPA).

156. Josh Israel & Sacha Feinman, *The Hot New Form of Fantasy Sports Is Probably Addictive, Potentially Illegal And Completely Unregulated*, THINKPROGRESS (May 7, 2015), <https://thinkprogress.org/the-hot-new-form-of-fantasy-sports-is-probably-addictive-potentially-illegal-and-completely-4c90c89db63b#.pyeol63s1> [<https://perma.cc/W9PW-6P2V>] (sharing Leach’s objectives for UIGEA); Shapiro, *supra* note 9, at 297 (“There is no evidence that legislators or drafters considered DFS . . . it is only clear that [UIGEA] intended to exempt traditional, season-long, fantasy sports.”).

157. See Israel & Feinman, *supra* note 156 (exposing politics behind passing UIGEA).

158. See Shapiro, *supra* note 9, at 296–97 (pointing to lack of proof of DFS’s existence when UIGEA was enacted); see also Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195, 1198 (2007) (exploring history of fantasy sports and UIGEA’s pre-adoption context); *The Evolution of the Daily Fantasy Sports Industry*, *supra* note 1 (noting that first major DFS site only went live in 2007).

159. Israel & Feinman, *supra* note 156 (recalling Representative Leach’s concern that many Americans were looking to gambling as their means to “obtaining a big payoff” at the time). *But see* Gouker, *supra* note 55 (questioning whether Representative Leach’s opinion matters because “actual language of the law” likely controls interpretation more).

160. See generally Israel & Feinman, *supra* note 156 (supplying UIGEA’s creators’ perceptions about purpose of UIGEA exemption).

161. 152 CONG. REC. S11045-01 (daily ed. Nov. 16, 2006) (statement of Sen. Kyl), 2006 WL 3330257 (seeing UIGEA’s passing as step towards curtailing Internet gambling’s availability).

standing by members of Congress that UIGEA did not modify existing gambling laws but solely enforced against activities already considered illegal Internet gambling under state and federal law.<sup>162</sup>

Accordingly, and in light of no explicit indication that UIGEA restricts PASPA, state legislatures should be wary of violating this federal law by enacting legislation legalizing DFS and thereafter regulating the industry.<sup>163</sup> The same is true even when a state authorizes DFS through constitutional amendment.<sup>164</sup>

With Delaware choosing not to enact DFS legislation, it does not have to fear such scrutiny.<sup>165</sup> On the other hand, New York does have to worry.<sup>166</sup> Such analysis may delay the legislative progress, but also would lead to a more foolproof regulatory scheme.<sup>167</sup>

#### IV. LOOKING FORWARD—WHAT WILL BE EACH STATE'S NEXT PLAY?

Because of these lingering federal questions, states need clarification on PASPA's constitutionality and whether UIGEA limits PASPA's reach.<sup>168</sup> Otherwise, states run the risk of violating federal

162. See, e.g., 152 CONG. REC. E2152-04 (daily ed. Dec. 8, 2006) (statement of Rep. Bachus), 2006 WL 3540936 (“The new law does not change the legality of any gambling activity in the United States.”).

163. See Wallach, *supra* note 143 (warning states to seriously consider PASPA's implications to not “expose their prospective fantasy sports legislation to a future legal challenge under PASPA”). The plaintiffs in the lawsuit against Governor Cuomo and the Commission make this very argument. See Verified Complaint, *supra* note 128, at 8, ¶¶ 16–17 (noting federal preemption issue) (citing NCAA v. Gov. of N.J., 832 F.3d 389 (3d Cir. 2016), *petition for cert. filed* (Aug. 12, 2016)).

164. See 28 U.S.C. § 3702 (not distinguishing between whether government authorizes sports betting through statute or constitutional amendment); Wallach, *supra* note 143 (reaching same conclusion); see also Gouker, *supra* note 112 (discussing how one New York DFS bill proposed constitutional amendment to authorize DFS, but still recognized that PASPA issue still applies). “The key point in the language of this bill is ‘preceded by the elimination of the federal ban on professional sports wagering.’” *Id.* (referring to PASPA).

165. See *Online Fantasy Sports Contests for Money Asked to Cease in Delaware*, *supra* note 31 (ordering DFS operators to halt contests). If, in the future, Delaware decides to regulate DFS, it should take care to not violate its limited PASPA exemption. See *OFC Comm’r Baseball v. Markell*, 579 F.3d 293, 300–304 (3d Cir. 2009) (outlining parameters of Delaware's exemption). For further discussion of Delaware's PASPA exemption, see *supra* note 148 and accompanying text.

166. Cf. Verified Complaint, *supra* note 128, at 8, ¶¶ 16–17 (raising PASPA violation because of New York's DFS legislation).

167. Cf. *id.* This lawsuit and the claims the plaintiffs raise should serve as a cautionary tale to policymakers about PASPA's applicability in the DFS space. For further discussion of the lawsuit, see *supra* notes 126–130, 163, 166–167 and accompanying text.

168. See Sarkar, *supra* note 143, at 3 (questioning how PASPA and UIGEA interact with each other and with states' DFS legislations). For further discussion

law, putting any legislative effort concerning DFS at risk.<sup>169</sup> Whether the federal government will enforce PASPA is another issue.<sup>170</sup> With the pending lawsuit in New York, the industry may very well get the clarification it needs.<sup>171</sup>

Even if UIGEA provides a DFS carve-out like DraftKings and FanDuel have contended, there still remains unresolved issues at the state level.<sup>172</sup> New York and Delaware must both resolve whether they can legalize DFS through statute alone.<sup>173</sup> In New York, the balance tips toward the need for a constitutional amendment as each of its other gambling exceptions was enacted through amendment.<sup>174</sup> The answer is more unclear in Delaware because the border is hazy between what constitutes a “lottery” as opposed to “gambling.”<sup>175</sup> In either case, if a constitutional amendment is required, this would delay both states’ timelines in authorizing

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of how PASPA and UIGEA interact, see *supra* notes 143–164 and accompanying text.

169. See Wallach, *supra* note 143 (discussing PASPA’s preemptive authority). For further discussion of PASPA, see *supra* notes 143–164 and accompanying text.

170. Cf. Verified Complaint, *supra* note 128, at 8, ¶¶ 16–17 (presenting private citizens’ contention that New York’s DFS legislation violates PASPA). PASPA empowers the U.S. Attorney General to sue where a PASPA violation possibly exists, but the U.S. Attorney has not challenged New York’s DFS legislation since it became effective in August 2016. See 28 U.S.C. § 3703 (1992) (authorizing U.S. Attorney General with power to commence suit); see also *Governor Cuomo Signs Legislation to Legalize and Regulate Fantasy Sports in New York State*, *supra* note 62 (noting when DFS bill became effective in New York).

171. See generally Karlin, *supra* note 127 (overviewing New York lawsuit); see also *supra* note 148 and accompanying text (discussing how New Jersey is seeking United States Supreme Court’s review of PASPA’s constitutionality).

172. See, e.g., NYAG Press Release, *supra* note 27 (stating that DFS is “illegal gambling” under New York state law); *Online Fantasy Sports Contests for Money Asked to Cease in Delaware*, *supra* note 31 (affirming DFS’s illegality because Delaware legislation has yet to legalize it); see also *People of New York v. FanDuel, Inc.*, No. 453056/15, 2015 WL 8490461, at \*7 (N.Y. Sup. Ct. Dec. 11, 2015) (reviewing UIGEA defense).

173. See N.Y. CONST. art. I, § 9 (banning gambling generally, but providing exceptions); DEL. CONST. art. II, § 17 (allowing only few forms gambling and outlawing all other forms). For further discussion of whether New York or Delaware would require a constitutional amendment to legalize DFS, see *supra* notes 93–142 and accompanying text.

174. See Wallach, *supra* note 93 (underscoring this history); Liebman, *supra* note 111 (“Since 1894, the State Constitution has had a specific provision banning all forms of gambling[, but it] has been amended to provide exceptions to the gambling ban.”). For further discussion of New York’s constitution, see *supra* notes 41–43, 93–103, and 111–128 and accompanying text.

175. See DEL. CONST. art. II, § 17 (authorizing “[l]otteries under State control”). For further discussion explaining how the Delaware Constitution leaves room that gambling may fall under umbrella term “lottery,” see *supra* notes 132–138 and accompanying text.

DFS.<sup>176</sup> The consequences in New York would be more devastating because DFS has recently resumed there.<sup>177</sup>

In light of all these complications, it may be best for the federal government to intervene and amend PASPA to allow states to authorize and regulate DFS, directly or indirectly.<sup>178</sup> The government could stipulate, however, that the Federal Trade Commission has certain overseeing abilities over the state regulatory body in charge of enforcing the DFS laws.<sup>179</sup> It could also require a payment of a federal tax.<sup>180</sup> This approach should be appealing to federal legislators as they can get ahead of any unfavorable ruling regarding PASPA's applicability to DFS and capitalize from this booming industry.<sup>181</sup> There have already been a few congressional discussions

176. See N.Y. CONST., art. XIX, § 1; DEL. CONST. art. XVI, § 1 (laying out requirements for constitutional amendment). For further discussion for how the New York Constitution can be amended, see *supra* notes 113–125 and accompanying text. For further discussion for how the Delaware Constitution can be amended, see *supra* notes 140–142 and accompanying text.

177. See Gouker, *supra* note 63 (reporting on DraftKings' and FanDuel's return to New York); see also *New York Daily Fantasy Sports*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/ny/> [<https://perma.cc/K7B4-7RWH>] (last visited Oct. 27, 2016) (“If forced to stay out of NY indefinitely, it is a major setback in terms of revenue and liquidity for both FanDuel and DraftKings. New York is believed to be the second largest state in terms of both revenue and users for the two sites.”).

178. See Brian Pempus, *Federal Government to Consider Legalizing Sports Betting*, CARD PLAYER (Oct. 25, 2016), <http://www.cardplayer.com/poker-news/20945-federal-government-to-consider-legalizing-sports-betting> [<https://perma.cc/3NKT-WTAY>] (covering how New Jersey congressman will introduce “legislation to establish federal regulation on sports betting”); Daniel Wallach, *How to Legalize Sports Betting*, DEADSPIN (Aug. 31, 2016, 4:30 PM), <http://deadspin.com/how-to-legalize-sports-betting-1786002079> [<https://perma.cc/5ZDU-9MXY>] (pointing out how PASPA amendment may only happen years from now, but may happen sooner because of rise in DFS legislation and litigation); see also Sarkar, *supra* note 143, at 3 (proposing federal framework where Federal Trade Commission will be charged with regulating DFS); David Purdum & Ryan Rodenberg, *Future of Sports Betting: The Marketplace*, ESPN (Oct. 28, 2016), [http://www.espn.com/chalk/story/\\_/id/17892685/the-future-sports-betting-how-sports-betting-legalized-united-states-the-marketplace-look-like](http://www.espn.com/chalk/story/_/id/17892685/the-future-sports-betting-how-sports-betting-legalized-united-states-the-marketplace-look-like) [<https://perma.cc/FA38-AN8V>] (sharing notion that wagers at or below \$1000 should be exempt from PASPA regulation because “a panel of judges [has opined] that [this] wouldn't run afoul of the federal ban”).

179. See generally Sarkar, *supra* note 143, at 3 (“[T]he [FTC is] the only regulator with the dual mission to protect consumers and promote competition.”). See also Purdum & Rodenberg, *supra* note 178 (including PASPA exception suggestion in which case there would be no federal oversight). For further discussion of this suggested exception, see *supra* note 178 and accompanying text.

180. Cf. N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1407 (McKinney 2016) (implementing tax payment to New York); H.B. 444, *supra* note 138, § 4868 (requiring tax to Delaware).

181. See, e.g., *NCAA v. Gov. of N.J.*, 832 F.3d 389, 402 (3d Cir. 2016), *petition for cert. filed* (Aug. 12, 2016) (ruling on PASPA's constitutionality as applied to restricting states' power to authorize DFS and holding that PASPA “does not unconstitutionally commandeer” states); see also Greene, *supra* note 143, at 833–34 (arguing that UIGEA creates exception from PASPA for DFS).



about federal involvement in regulating DFS, but none has resulted in legislative development.<sup>182</sup> The potential DraftKings and FanDuel merger may just give DFS the traction it needs to become a prioritized item in Congress.<sup>183</sup> Still, Congress should continue to familiarize itself with DFS and meet with key “stakeholders,” that is, representatives from DraftKings and FanDuel as well as representatives from national sports leagues, before forming a “federal framework.”<sup>184</sup>

There is, however, resistance to the idea of federal intervention.<sup>185</sup> Some scholars insist that DFS regulation should remain

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182. See David Purdum, *Congress Reviewing ‘Obsolete’ Federal Gambling Laws, to Introduce New Legislation*, ESPN (Oct. 26, 2016), [http://www.espn.com/chalk/story/\\_/id/17848529/congressional-committee-reviews-federal-gambling-laws-plans-introduce-new-legislation](http://www.espn.com/chalk/story/_/id/17848529/congressional-committee-reviews-federal-gambling-laws-plans-introduce-new-legislation) [<https://perma.cc/ED58-BQ3C>] (reporting that “comprehensive legislation” is being planned to address DFS along with other forms of sports betting, but such legislation has not yet been developed); Dustin Gouker, *After Hearing, Don’t Expect Congress to Get Involved with Daily Fantasy Sports*, LEGAL SPORTS REP. (May 11, 2016, 9:49 AM), <http://www.legalsportsreport.com/9985/congress-and-action-on-daily-fantasy-sports/> [<https://perma.cc/ZYB2-DCG2>] (noting that there is “almost certainly no federal action” resulting from May 2016 meeting of House Subcommittee on Commerce, Manufacturing, and Trade on DFS). Congress seems to be reviewing federal gambling laws, including PASPA and UIGEA, to “harmonize” them through new legislation. See Purdum, *supra* (discussing push to assess these laws because of DFS’s “rise” in popularity and controversy).

183. See generally Dustin Gouker, *Congressional Committee to Tackle US Sports Betting: What it Means and What’s Next*, LEGAL SPORTS REP. (Oct. 21, 2016, 10:44 AM), <http://www.legalsportsreport.com/11871/congressional-committee-to-tackle-us-sports-betting/> [<https://perma.cc/ZYB2-DCG2>] (noting need for “momentum”); Edelman, *supra* note 6 (predicting that Department of Justice and FTC may object to merger on antitrust grounds). This scrutiny may just put DFS firmly within Congress’s radar. See generally *id.* (discussing regulatory challenges merger will face); Purdum, *supra* note 182 (covering how there was push within Congress to review federal gambling laws around time merger announced). For further discussion of DraftKings’ and FanDuel’s merger, see *supra* notes 4–6 and accompanying text.

184. See Dustin Gouker, *Former NBA Commissioner David Stern Calls for Legal US Sports Betting at Vegas Gaming Conference*, LEGAL SPORTS REP. (Sept. 29, 2016, 1:48 PM), <http://www.legalsportsreport.com/11695/former-nba-commissioner-david-stern/> [<https://perma.cc/EJA7-GALH>] (sharing David Stern’s, former National Basketball Association Commissioner, thoughts on federal role in DFS regulation).

185. See generally Steven Titch & Michelle Minton, *Game Changer: Rethinking Online Gambling Regulation in the Age of Daily Fantasy Sports*, COMPETITIVE ENTERPRISE INST. (2016), available at <https://cei.org/sites/default/files/Steven%20Titch%20and%20Michelle%20Minton%20-%20Game%20Changer.pdf> [<https://perma.cc/N6XX-4XVN>] (reasoning that any federal oversight should be limited). Specifically, Titch and Minton contend that there should no federal involvement “beyond [the] enforcement of existing federal laws that apply to all other businesses, such as tax responsibility, antitrust rules, and other economic regulations” because while the Internet is “inherently interstate,” technology can confine online gambling within individual states. *Id.* at 9 (reviewing how certain states have effectively “fenced in” their legalization of online gambling and federal government has not intervened); see also Darren Heitner, *Leave Daily Fantasy Sports Regulation to the States*, FORBES (May 10, 2016, 6:30 AM), (summarizing Titch and Minton’s report);

solely with the states because regulating gambling has traditionally been a “state-level responsibility.”<sup>186</sup> They argue that federal intervention would just mean “greater regulation . . . overall” and lead to a confusing dual regulatory infrastructure.<sup>187</sup> Still, fifty different approaches to regulating DFS with no central oversight does not seem to be a suitable alternative or all that sustainable.<sup>188</sup>

Over the past few years, the DFS industry, particularly DraftKings and FanDuel, has had to face the reality that it will no longer thrive in an unregulated market.<sup>189</sup> That fantasy is long gone.<sup>190</sup> DFS’s best case scenario is to be legalized and regulated, paying taxes to operate.<sup>191</sup> Where they were once fierce competitors, trailblazing a new way to play fantasy sports, the now merging DraftKings and FanDuel are knee-deep in legal battles and legal fees just trying to survive.<sup>192</sup> What a bleak new world.

*Roni Mathew\**

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Jim Pagels, *Should Daily Fantasy Sports Be Regulated by the Government?*, REASON.COM (Oct. 26, 2015), <http://reason.com/archives/2015/10/26/let-the-free-market-give-fantasy-sports/> (criticizing “sudden consumer protection watchfulness” of DFS industry and how regulatory compliance costs will likely “lower payouts” that may then lead to “underground . . . daily fantasy games”).

186. See Titch & Minton, *supra* note 185, at 20 (noting PASPA as exception).

187. See *id.* (remarking that federal regulations would be in addition to state laws).

188. See Gouker, *supra* note 184 (including Stern’s “disdain” for “state-by-state approach,” that “50 different governmental bodies could be involved” and how national sports leagues will probably not support this method).

189. See, e.g., Gouker, *supra* note 63 (describing legislation enacted in New York and permits and restrictions thereunder); *Online Fantasy Sports Contests for Money Asked to Cease in Delaware*, *supra* note 31 (outlawing DFS entirely). For further discussion of the DFS industry becoming regulated, see *supra* notes 17–92 and accompanying text.

190. See, e.g., Drape & Williams, *supra* note 17 (reporting DFS industry’s insider trading scandal and highlighting concerns for heightened protections). For further discussion of this DFS scandal and its aftermath, see *supra* notes 17–31 and accompanying text.

191. See, e.g., N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1407 (McKinney 2016) (stating that “for the privilege” of operating DFS contests in New York, DFS operators must pay fifteen percent tax). For further discussion of DFS legislation in play in New York, see *supra* notes 65–79 and accompanying text.

192. See Berzon, *supra* note 4 (discussing merger and impact of legal challenges on DraftKings’ and FanDuel’s valuations). For further discussion of the merger, see *supra* notes 4–6 and accompanying text.

\* J.D. Candidate, Villanova University Charles Widger School of Law, 2017; B.A., University of Pennsylvania, 2012. Jesus, I love you. For the past two years, my motto has been, “By your grace and for your glory,” and this article is a testament to your sovereignty over my life. I thank my family and friends for supporting me through this process, especially Cassie, Mark, and Alex. I could not have done this without your friendships. To each of my editors along the way, you have been wonderful and I am grateful for all of your help.

