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COURT OF APPEALS
STATE OF NEW YORK

WHITE, ET AL.,

Respondents,

-against-

No. 59

CUOMO, ET AL.,

Appellants.

20 Eagle Street
Albany, New York
October 5, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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Sharona Shapiro
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 59, White v. Cuomo.
2 Counsel?

3 MR. PALADINO: I'd like to reserve two minutes
4 for rebuttal.

5 CHIEF JUDGE DIFIORE: Two minutes, sir.

6 MR. PALADINO: The legislature may, consistent
7 with the Constitution, authorize a contest as a skill-based
8 contest, so long as it's determined predominantly by skill.
9 And here we have an affirmed finding of fact that fantasy
10 sports contests are predominantly determined by skill.

11 CHIEF JUDGE DIFIORE: So what's the definition of
12 "gambling" that we use for the purposes of the
13 Constitution?

14 MR. PALADINO: Well, I think that everyone is in
15 agreement that gambling includes games of chance and wagers
16 on future contingent events beyond the control or influence
17 of the participants. We also know that skill-based
18 contests, where people pay entrance fees to be eligible to
19 participate in the contest and win the prize, are
20 considered not gambling activities.

21 The dispute that I was about to address was over
22 the dominating-element versus material-degree standard. It
23 is conceded that these contests satisfy the dominating-
24 element standard; they are predominantly determined by
25 skill.

1 JUDGE CANNATARO: The dominating-element test is
2 the one that was articulated in Ellison, which is, I think,
3 a 1904 precedent from this court. But that was
4 specifically not the one that was chosen by - - - by the
5 Appellate Division below. They - - - they chose to go
6 another way. Is it your contention that the Third
7 Department applied the wrong test to determine whether this
8 activity was gambling?

9 MR. PALADINO: Yes, Your Honor. The State does
10 contend that there is substantial evidence to support the
11 legislature's finding that the contest satisfied the
12 material-degree standard. But for purposes of argument,
13 I'm assuming that the lower courts were correct that the
14 contests satisfied the dominating-element test but failed
15 the material-degree test. In that case, you would have
16 tension between the current Penal Law definition and
17 Article 14 of the Racing Law.

18 The erroneous conclusion that the courts below
19 drew was that, in light of that tension or conflict, the
20 Article 14 is unconstitutional. That does not follow. The
21 dominating-element standard, although it was articulated in
22 the context of determining what was a lottery, in the
23 Ellison case, was thereafter used, all the way up until
24 1965, to determine whether all manner of activities were
25 games of chance or games of skill. So in other words,



1 imagine if the - - -

2 JUDGE WILSON: Well, those are - - -

3 MR. PALADINO: - - - legislature - - -

4 JUDGE WILSON: Those are - - - those are
5 statutory interpretations, no? I mean, Ellison was.

6 MR. PALADINO: Yes, Your Honor, but my point is
7 that the legislature can say that we will authorize a
8 particular contest, regardless of whether it satisfies the
9 material-degree test, because it satisfies the dominating-
10 element test. And that would be consistent with the
11 Constitution because, all the way up until 1965, that was
12 the test that was used. So if you have what is admittedly
13 under - - -

14 JUDGE WILSON: That is the test that was used for
15 statutory interpretation, no?

16 MR. PALADINO: Well, yes, but the - - - the point
17 is that - - -

18 JUDGE WILSON: I'm trying to go back to the
19 Chief's opening question which is what is the source of
20 your definition for gambling in the Constitution?

21 MR. PALADINO: Well, there is no definition. We
22 have, historically, the fact that, around the time of the
23 1894 amendment, games of chance and wagers on future
24 contingent events were considered to be gambling. We have
25 particular activities, like poker and roulette, that were



1 considered to be gambling. And we have this test that was
2 employed, admittedly for statutory purposes, but if the
3 legislature said tomorrow, we are now going to amend the
4 Penal Law and make this the test, no one could claim that
5 that was inconsistent with the Constitution. The
6 Constitution is a limitation on what the legislature can do
7 with respect to gambling. It could always get tougher on
8 gambling and prescribe more activity than is minimally
9 required.

10 JUDGE FAHEY: Can I ask a question here, Mr.
11 Paladino? Who - - - who's responsible for defining the
12 terms that are in the Constitution?

13 MR. PALADINO: Well, ultimately, the - - - the
14 court is. You - - -

15 JUDGE FAHEY: The Court is. All right. I'd like
16 to take a step back into what I would call reality.
17 Reality is that -- the way I view this case, is that you're
18 arguing that I cannot place a bet on whether or not the
19 Buffalo Bills win their next game, but I can place a bet on
20 whether or not their lead receiver, Stefon Diggs, catches
21 the ball ten times or six times. That is the net result of
22 the argument that you're making. And I say this
23 respectfully, because you've appeared in front of us a
24 number of times, and you're a great lawyer, but this
25 argument is hard for me to accept the logic of. Can you



1 address that?

2 MR. PALADINO: What Your Honor's point
3 illustrates is that one can draw analogies or parallels
4 between fantasy sports and proposition betting. But it is
5 also rational to analogize what the contestants do in these
6 contests - - -

7 JUDGE FAHEY: Well, but aren't we stuck with a
8 particular problem in the court? Our problem is not
9 whether or not there should be gambling or shouldn't be
10 gambling. Our problem for this court is constitutional
11 governance and whether or not, if there is going to be
12 gambling, that it's done legally in the State of New York
13 without an absurd definition of what gambling is. And that
14 would mean that we go through the process that we've gone
15 through six times before, I believe, on gambling questions,
16 and we would amend the Constitution. And we've done this a
17 number of times.

18 It's - - - and I think there's a larger issue at
19 stake here because I - - - I respect the people that worked
20 on this, particularly in the legislature, and yourself, and
21 I recognize that the position of the Attorney General could
22 change over time. Those are all legitimate things.
23 There's nothing illegitimate about that. But the terms in
24 the Constitution are sacrosanct to the extent that they - -
25 - the process themselves - - - itself has to be preserved,



1 and that is only done when that question is put to the
2 ultimate arbiter. And the ultimate arbiter of this
3 question seems, as it's always been with constitutional
4 terms, is by a vote of the people, not by a vote of the
5 legislature, not by a vote of this court, but ultimately by
6 an amendment to the Constitution. And that's done by the
7 people. That's where that power comes from.

8 MR. PALADINO: With respect, Your Honor, that's
9 question-begging. If this isn't gambling, if the
10 legislature has made a rational finding that this is a
11 skill-based competition, it doesn't require a
12 constitutional amendment. It is a general manager
13 simulation contest. There are analogies to proposition
14 betting, but the activity is also analogous to what general
15 managers do.

16 JUDGE FAHEY: See - - -

17 MR. PALADINO: What determines - - -

18 JUDGE FAHEY: Go ahead. I'm sorry. Continue.

19 MR. PALADINO: What determines the outcome is not
20 the result of any particular so-called proposition bet,
21 whether one of your players scores the points you thought
22 he was going to score; it's how the roster that you select,
23 which is a product of skill - - - and that's undisputed - -
24 - how it compares to the rosters of the other contestants.

25 JUDGE FAHEY: No, I - - - I understand how it



1 works. My friends - - - believe it or not, I know people
2 that gamble. And they always said to me that football is
3 tough because it's an oblong ball and it bounces funny, and
4 that there's no such thing as a scientific outcome to those
5 kind of games. If there were, we would all be
6 millionaires, and everyone would be successful at it. But
7 that is not the case.

8 But I'll let some other people ask some questions
9 now.

10 MR. PALADINO: Well, what Your Honor's point
11 illustrates is that chance plays a role in the outcome of
12 these contests. And - - -

13 JUDGE FAHEY: So - - -

14 MR. PALADINO: - - - the question is - - -

15 JUDGE FAHEY: So - - -

16 MR. PALADINO: - - - what is the relative role of
17 chance and skill.

18 JUDGE FAHEY: So the question is, you're arguing,
19 is the degree of chance here isn't as great as - - - as to
20 constitute gambling.

21 MR. PALADINO: Well, it is great enough that it
22 passes the dominating-element test, which should be enough.
23 And it - - - there is substantial evidence that would
24 support the judgment that even if the material-degree test
25 applied, the role of chance is not material, so - - -



1 JUDGE WILSON: So is the role of - - - over here.
2 Sorry. Hard with the masks on.

3 Would you say that the role of chance here is
4 greater or less than investing in the stock market?

5 MR. PALADINO: The role of chance is less in
6 these contests than in picking mutual funds. That is
7 established in one of the studies that is in the record.

8 And if you agree with the Appellate Division that
9 this material-degree question is somehow a de novo question
10 for the court and not something to defer to the legislature
11 on, and if you agree that it's a qualitative judgment - - -

12 JUDGE WILSON: But if that's - - -

13 MR. PALADINO: - - - and not simply a
14 quantitative one - - -

15 JUDGE WILSON: If that's right, why isn't playing
16 the stock market gambling under the constitutional
17 definition?

18 MR. PALADINO: That's because of - - - of
19 history. Before the 1894 amendment, even though you could
20 logically view commodities trading and picking stocks to be
21 wagers on future contingent events, as a historical matter,
22 they were exempted from the definition.

23 The salient point, though, is if you are looking
24 at whether this is material, which is another way of saying
25 significant, you have to compare the role of - - - or the



1 degree of chance in these contests with the degree of
2 chance in other relevant activities. And if fantasy sports
3 is more skill-based than commodities trading, it's entirely
4 rational for the legislature to conclude, as it did, that
5 the role of chance in these contests is immaterial.

6 My opponent, at least makes an effort to draw a
7 comparison saying that, well, with this degree of chance,
8 you'd never get on an airplane. That just shows that what
9 is material is content specific. And in the context of
10 these contests, I think the more relevant comparison would
11 be things like picking stocks - - -

12 JUDGE FAHEY: Yeah, but isn't - - -

13 MR. PALADINO: - - - commodities trading, and the
14 like.

15 JUDGE FAHEY: See, that comparison is funny. In
16 2016 - - - it's in the record; a 2016 New York Times
17 article talks about how people are successful in this form
18 of gambling, specifically gamblers who are - - - are
19 successful have - - - they will put down a bet thousands of
20 times to the average gambler that puts down a bet one or
21 two times. And that those gamblers are, far and away, the
22 most successful. And they're very much like stock brokers,
23 just like most - - - most people would - - - would agree
24 that most major firms that trade on the market are going to
25 do better than any of us individuals. It's the volume of



1 their betting that controls the outcome. Nonetheless, that
2 does not make them like - - - like the stock market. The
3 ball is not bouncing in a funny way to determine the
4 outcome of whether or not stocks go up or down.

5 And so I disagree with you; I think it's an
6 exercise in sophistry to compare the stock market to sports
7 gambling. I think that - - - and I don't say this to - - -
8 understand, please, this is not personal, but it's almost
9 an Orwellian argument. It's like saying, from 1984, war is
10 peace, freedom is slavery. You know, fantasy sports is not
11 gambling; it's really like the stock market. Those - - -
12 those things are directly contrary.

13 The reason people make millions and millions of
14 dollars - - - and this is because they lose, the people
15 that gamble, and the losers are then contributing to the
16 one percent of the winners. And that's classic gambling,
17 in my mind. It's always been that way.

18 And I think that this exercise in sophistry has
19 to really be punctured through because we lose -- the
20 larger purpose and the larger question before us is
21 constitutional decision-making. See, I think you can allow
22 this. You're absolutely right about that, Mr. Paladino,
23 but you can only allow it one way. The people of the State
24 of New York need to vote on whether or not this should be
25 allowed.



1 MR. PALADINO: What the skillful - - -

2 JUDGE RIVERA: Counsel, I'm sorry. Counsel, can
3 I interrupt you? I'm on the screen. My apologies. I know
4 it's a little bit off-putting.

5 Can you just - - - it may be that I've
6 misunderstood how this works. Can you tell me the
7 difference between participating in this and betting on the
8 All-Star Game?

9 MR. PALADINO: Okay. Betting on the All-Star
10 Game is a one-time proposition bet on how you think a
11 particular sporting event is going to come out. The
12 outcome of fantasy sports contests does not - - -

13 JUDGE RIVERA: Well, let me interrupt you there.
14 On the All-Star Game, however, aren't - - - aren't you
15 doing what you're - - - you're doing the fantasy sports
16 which is you're looking, at least up to the point of the
17 game, you're looking at the performance of particular
18 players, players are being selected by voters in a
19 particular way, and then you've got that roster, right?
20 And so you're - - - you're measuring the success of that
21 roster based on that past performance, and who they're
22 going to be playing with as their team member, and who
23 they're going to be playing against as the opposing - - -
24 whether it's the American League, the National League,
25 whatever side we're talking about. So I'm still having



1 difficulty, sort of, getting past how this is - - - is so
2 different from gambling when it comes to looking at the
3 All-Star Game.

4 MR. PALADINO: Well, the predictions that a
5 fantasy sports contestant makes in -- in selecting his or
6 her roster does bear some resemblance to proposition
7 betting. But the important point is that it also is very
8 analogous to what general managers do. This is, after all,
9 a general manager simulation contest. And as long as it is
10 established that it is a skill-based contest, wherein the
11 contestants influence the outcome of the - - -

12 JUDGE RIVERA: Yeah, but they're not - - -
13 they're not - - - I understand what you're saying about the
14 simulation, but it - - - it's false because they're not the
15 manager who sees the athlete before and after performance,
16 during practice, who's coaching them, who's having
17 conversations with them, who may know things that no one
18 else will know.

19 So no, it's -- it's not really that. I - - - I
20 understand the companies want people to feel that way, and
21 the participants want to feel that way, but that's why it's
22 a fantasy. No, they're not actually managers who are privy
23 to all of the information. So in that way, the game turns
24 solely and only on - - - yes, there's some skill; don't get
25 me wrong, but it turns on what are these externalities over



1 which they have no ability to control.

2 Whether it's, as Judge Fahey has pointed out, the
3 shape of the football that bounces a unique or particular
4 way, or you know, the general manager who knows player X
5 had the stomach flu last night, and they're not going to be
6 playing too good today. Right? I mean, just different
7 things that of course cannot - - - it is just not going to
8 be available for simulation purposes.

9 So in that way, it is always - - - the game - - -
10 let me put it this way. In my view, the game cannot exist
11 but for the real life performance. And so, to the extent
12 you're trying to have your fantasy, your fantasy can never
13 really be fulfilled, as is true for so many fantasies,
14 because you have to work in the real world.

15 MR. PALADINO: Several things. First of all, the
16 premise of your point is incorrect. The contestants have
17 available to them a wealth of information, much like the
18 analytics available to the general managers of the world.

19 JUDGE RIVERA: Um-hum.

20 MR. PALADINO: Second, the fact that strange
21 things happen, Tom Brady might slip on a banana peel, shows
22 only that chance plays a role. How much of a role is a
23 factual question as to which the legislature made factual
24 findings that should be upheld and supported by substantial
25 evidence. And the fact that it's not able to exactly



1 duplicate what a general manager does doesn't detract from
2 the rationality of the legislature's judgment that it - - -

3 JUDGE RIVERA: But you agree with me, in your
4 example about Mr. Brady, that the participants can do
5 nothing about that slipping on the banana peel. That is an
6 event, if it happens, it happens; there's nothing that the
7 participants can do about that. So it's not truly a
8 fantasy in the way of changing that. You - - - you agree
9 with that, correct?

10 MR. PALADINO: Yes, but the skillful contestants
11 are aware that such things happen. That's a random
12 variable. The skillful contestants account for the
13 variability in their selections. You don't put all of your
14 money on Tom Brady. You spread your - - - your - - -

15 JUDGE RIVERA: And again - - -

16 MR. PALADINO: - - - risk around.

17 JUDGE RIVERA: - - - how is that - - - but how is
18 that different - - - okay, let's take a different example.
19 How is that different from someone going to the horse
20 track, and knowing about a horse, and knowing about all the
21 other horses, and making a calculated determination about
22 where they're going to put their money and how they're
23 going to bet, place, show, win, whatever it may be?

24 MR. PALADINO: Well, the difference with horse
25 betting you do not ride the horse. Obviously, you cannot



1 control or influence the outcome. But the legislature, in
2 1996, found horse race handicapping contests, which are
3 essentially the same activity structured as a contest, to
4 be a skill-based contest that's not gambling. This court,
5 a hundred years ago, in the Lawrence case, found that a
6 contest between owners of horse races was not a game of
7 chance; it was a skill-based contest because there's skill
8 in how you - - -

9 JUDGE RIVERA: But that is still very different.
10 I mean, if you're owning, in this case, chattel, and - - -
11 and you say to someone, look, my horse is faster than your
12 horse, I'll bet you fifty bucks that it's faster than
13 yours, and when you engage in that particular kind of bet,
14 that strikes me as very different from what's going on in
15 fantasy - - - this fantasy sports that the companies have
16 set up where, again, the participants are not the general
17 managers and certainly not the owners of the clubs. They
18 don't have that kind of - - - of control. And so indeed,
19 they're not invested in that way that one would say an
20 owner who's got chattel and wants to make that personal
21 kind of challenge to someone else.

22 MR. PALADINO: Nevertheless, the contestants are
23 exercising skill in selecting their rosters. It's a
24 predictive - - - admittedly, it's a predictive contest. If
25 there was a weather prediction contest, you couldn't say,



1 well, that's gambling because you can't control the
2 weather. Meteorologists will tell you that's an empirical
3 study. It's the same thing with the selection of these
4 rosters, that there is overwhelming evidence, not just that
5 skillful players are winning by - - - by submitting
6 countless entries, like Judge Fahey is suggesting; they are
7 routinely defeating random-generated - - - randomly-
8 generated rosters. They're routinely defeating less
9 skilled players. That shows that this is a skill-based
10 activity. And the fact that there are - - -

11 JUDGE WILSON: Just to follow up on your example
12 there, so if people were wagering on whether a particular
13 tropical storm was going to turn into a category one, two,
14 three, four, or five, and they were putting money on it,
15 you'd say that's not gambling?

16 MR. PALADINO: Well, what's going on here is the
17 payment of an entrance fee to enter into a contest. That
18 has been historically treated differently than a wager.
19 Here the entrance fee is being paid to a third party, you
20 know, DraftKings or FanDuel, which is not participating in
21 the skill-based contest. It's a fixed amount. It doesn't
22 depend on how many people enter. That distinguishes it
23 from a bet or wager. It's simply paying for the privilege
24 to participate in a skill-based contest. So if you paid an
25 entrance fee to enter into a weather prediction contest - -



1 -

2 JUDGE WILSON: Or a poker tournament.

3 MR. PALADINO: - - - you're not - - -

4 JUDGE WILSON: Or a poker tournament?

5 MR. PALADINO: Well, poker is different because
6 of history. Poker existed in 1894, and was widely
7 considered to be a game of chance. So the legislature may
8 not be able to revisit that activity and find it's skill-
9 based because it existed in 1894.

10 Fantasy sports contests are of recent origin. It
11 was up to the legislature to look at this new activity,
12 which some people analogized to proposition betting.
13 Others analogized it to other skill-based competitions.
14 This was vigorously debated, and ultimately, the
15 legislature came down on the side that this looks to us to
16 be - - -

17 JUDGE RIVERA: But if some people can view it as
18 gambling, in a reasonable, rational way, then how can we
19 exclude that as an appropriate definition? You, yourself,
20 are saying, look, poker, maybe they were wrong about that,
21 maybe poker really is a game of mostly skill and not
22 chance, and you know, the legislature can't revisit that
23 because it's just historical in nature. But I'm not so
24 sure, sort of, what you're arguing as the inverse makes any
25 sense either.



1 MR. PALADINO: What I'm arguing is that new
2 activities come along all the time. There are reasonable
3 arguments on both sides. We've acknowledged all along this
4 is a debatable point. The legislature is constitutionally
5 authorized to make the initial determination into which
6 category this activity falls. It came down on the side of
7 skill-based competition for which people pay entrance fees.

8 JUDGE WILSON: I'm sorry. Why do we think that?
9 Why do we think the legislature - - - I mean, this occurs
10 in - - - in the same provision that concerns freedom of
11 assembly. Would you say that the legislature gets to make
12 the first determination about what constitutes assembly?

13 MR. PALADINO: What I'm saying is with respect --
14 with respect to the factual question of the degree of skill
15 versus chance, that is something that the legislature - - -

16 JUDGE FAHEY: See, I - - -

17 MR. PALADINO: - - - held hearings on and made
18 findings about.

19 JUDGE FAHEY: That's where I disagree with you,
20 Mr. Paladino. I don't think the legislature gets to make
21 that call. I think the only one who can make that call is
22 this court, and then ultimately, the people of the State of
23 New York, depending on how this court rules. And the
24 reason for that is, when the Constitution was written, the
25 corrupting influences of gambling were so feared that they

1 took that power away to decide on whether or not games of
2 chance or contests of - - - of an uncertain outcome can be
3 used as a revenue raiser, because they felt it was a
4 corrupting influence on the democracy.

5 Now, here there's no corruption in the sense of
6 improper activity by anyone here. The corrupting
7 influence, I believe, is that it - - - it corrupts our
8 process, our political process. It takes the power away
9 from the people of the State of New York to decide this,
10 and gives it to the legislature, which they do not have the
11 authority to do.

12 And why is that important? Because once we start
13 doing that, there is no stopping that. And this represents
14 much more than the specific issue of gambling. It's
15 perfectly proper for the legislature to submit an amendment
16 to the Constitution and say that there is going to be
17 casino gambling, and then the people vote on it and allow
18 it. And it will be perfectly proper for them to consider
19 another amendment to do this now. But the corrupting
20 influence of allowing the process to be subverted by
21 calling something which it clearly is not, to a reasonable
22 person's mind, I think undermines the basic principles of
23 constitutional government. That's what's at stake here.

24 CHIEF JUDGE DIFIORE: Thank you, counsel. You'll
25 have your rebuttal.



1 Counsel?

2 MR. MURRAY: Yes. Good afternoon, Your Honors,
3 and may it please the court.

4 Approximately 6 hours from now, and 150 miles
5 east, there's going to be a very important athletic contest
6 which, if any members of the court are sports fans, are
7 going to know the Yankees are playing the Red Sox tonight
8 to determine who gets the wildcard spot.

9 Now, how are those players going to perform in
10 that game? How's Aaron Judge going to do? Giancarlo
11 Stanton, Gerrit Cole, the pitcher? How's Nathan Eovaldi,
12 the starter for the Red Sox, going to do? Those are - - -
13 why is this relevant? Those are all future contingent
14 events which, with all due respect to the court, no member
15 of the court can control how those players are going to do.
16 My very good friend, and esteemed counsel, and worthy
17 adversary can't. I can't. Nobody in this courtroom,
18 nobody in FanDuel or DraftKings or the Attorney General's
19 office can predict how those players are going to perform
20 tonight.

21 Now, we get bogged down a little bit, I
22 respectfully submit, with respect to this skill versus
23 chance, and I say that's a false dichotomy. Skill and
24 chance coexist in all kinds of sports. Horseracing, for
25 example, there's no question; I won't deny that skill



1 exists. But what the Attorney General is asking you to do
2 here is to believe that there is no material element of
3 chance whatsoever in this game. The legislature, by the
4 way, did not redefine - - -

5 JUDGE WILSON: Let me stop you on skill and
6 chance for a second - - -

7 MR. MURRAY: Yes.

8 JUDGE WILSON: - - - because I'm not sure why
9 skill and chance matters here really at all. And let me
10 explain why - - - why I wonder that.

11 MR. MURRAY: Well, I tend to agree.

12 JUDGE WILSON: Hold on. I don't know that I can
13 any more tell you how Gerrit Cole is going to do than how
14 Fidelity Contrafund is going to do, right? But we consider
15 one of those things gambling, and we don't consider the
16 other one gambling, and I'm not sure it has anything much
17 to do with skill or chance. There are skillful people
18 putting together the portfolio of stocks that's in the
19 Contrafund. They have more skill than I do. Gerrit Cole's
20 a better pitcher than I am, no question about that. But
21 nobody knows what's going to happen in either circumstance.
22 So I wonder whether skill and chances matters to this at
23 all.

24 MR. MURRAY: Well, I - - -

25 JUDGE WILSON: And Mr. Paladino, I think, several



1 times, referred to history.

2 MR. MURRAY: Well, I - - -

3 JUDGE WILSON: And I wonder if history, rather
4 than skill and chance, isn't the right answer here.

5 MR. MURRAY: I don't really think history should
6 make a difference. I don't think the Constitution changes
7 over time. The Constitution is constant. And as many
8 people have pointed out here, Article 1, Section 9 occupies
9 a very exalted place in the Constitution because it's in
10 the Bill of Rights. And the wording of the Constitution
11 says no lotteries, pool-selling, book-making, or any other
12 kind of gambling.

13 Now, in this case I do think, Your Honor, with
14 respect, we do get lost a little bit and bogged down into
15 this skill versus chance dichotomy. How do you quantify
16 it? Is it the dominant element, as the Attorney Generals
17 say? The legislature didn't say that.

18 Now, it is true - - - Judge Fahey asked a
19 question: where do we look to for the definition? This
20 court, in Dalton v. Pataki, said it's up to the court to
21 define what a lottery means. Excuse me; I have a bit of a
22 chest cold.

23 But notwithstanding that, right next to that word
24 "lottery" is "pool-selling, book-making, or any other kind
25 of gambling".

1 JUDGE CANNATARO: But counsel, it seems as if
2 we've moved so far past that because, even if there is some
3 degree of skill involved in a lottery, I think most people
4 could easily recognize that lotteries are games of almost
5 pure chance. And now we've moved along this spectrum to
6 where colorable arguments are being made that there is a
7 significant amount of skill involved in putting together
8 these rosters and that there is empirical evidence to show
9 that if you put together the right roster you're going to
10 do really well, which would confirm that there is skill
11 involved. So I'm not sure - - -

12 MR. MURRAY: I concede that, Your Honor.

13 JUDGE CANNATARO: So are - - - are we going down
14 - - - we've heard that maybe this is the wrong road. Maybe
15 measuring relative degrees of skill versus chance isn't the
16 way to do it, that there's a historical perspective or even
17 a philosophical perspective.

18 So my first question would be are we engaging in
19 the right analysis right here, and if we are, where is that
20 line? Where do we draw that line?

21 MR. MURRAY: Well, I think even though the court
22 is the ultimate arbiter of what the Constitution says - - -
23 in Dalton v. Pataki it said that - - - but it also said we
24 look for guidance to the legislature. We don't have to
25 defer completely to them, but we'll look to guidance for



1 what it means. To that end, the court has also said when
2 we look to legislative enactments that are contemporaneous
3 with the adoption of the constitutional amendment, which
4 happened, by the way, in 1894, at that time, the very next
5 year, the legislature enacted a statute - - - in those days
6 it was Section 351 of the Penal Law; it's a different
7 section now. But what did that section say? It said any
8 wager or anything that depends upon the skill, speed,
9 power, or endurance of man or beast. That's clearly
10 athletic events. That's what the -- that's what the
11 legislature itself understood, contemporaneous with the
12 adoption of the Constitutional amendment, in 1894.

13 So I respectfully submit, Your Honor, I know
14 Judge Fahey, you observed that maybe the Attorney General's
15 office can change over time, but I have to say that I think
16 the arguments by FanDuel and DraftKings wreak of hypocrisy.
17 Why do I say that? Now they tell you, oh, this is a game
18 of skill; it's very important. But what did they say
19 before? They said skill, ah, this game is easier than
20 milking a two-legged goat. I mean, that's directly
21 opposite saying, oh, this is a great game of skill. What
22 else did they say? These are - - -

23 JUDGE RIVERA: Counsel? Counsel? I'm sorry to
24 interrupt. I'm on the screen. Sorry. To your left.

25 MR. MURRAY: Oh, I'm sorry, Your Honor.



1 JUDGE RIVERA: No, no, no, my apologies.

2 So yes, I think you set this out in your
3 briefing, so I'm just going to stop you here and ask you
4 something else. Let's say we - - - we are in agreement
5 with you in what you are suggesting about how we should
6 consider fantasy sports gambling. Does that mean then that
7 the companies are bookies?

8 MR. MURRAY: Yes.

9 JUDGE RIVERA: Is that what that boils down to?

10 MR. MURRAY: Yes. Yes, if you look at Section
11 225, subdivision (9), and you look at the definition of
12 book-making, book-making is accepting debts as a business.
13 That's the definition, in Section 225 - - -

14 JUDGE RIVERA: Why isn't it really just accepting
15 the entrance fee, which is, in part, what your adversary is
16 arguing?

17 MR. MURRAY: Well, by the way, an entrance fee,
18 Your Honor, is a euphemism for a bet. Let's - - - I mean,
19 what - - - what's the difference? I think along here
20 they're trying to camouflage everything to try to say it's
21 not gambling anymore.

22 JUDGE FAHEY: Well, counselor, isn't - - - if you
23 went to an illegal book-maker, they'd say you have to pay
24 the vigorish, right?

25 MR. MURRAY: Right.



1 JUDGE FAHEY: All right. And I don't want you
2 all to think I spend a lot of time with illegal book-making
3 but - - - but - - - and this entrance fee is simply another
4 form of the vigorish.

5 MR. MURRAY: That - - - that's what it is. It's
6 a rate. It's a - - - it's a vig, whatever you want to call
7 it.

8 JUDGE FAHEY: Right.

9 MR. MURRAY: Shakespeare said a rose by any other
10 name smells as sweet, and - - -

11 JUDGE FAHEY: There is one other point, though,
12 and I think the change of position, say, of the Attorney
13 General's office arguing for it, you know, in our business,
14 in the business of the law, attorneys do that, they have a
15 right to do that, of course, and an obligation to represent
16 their clients. And so I think we're - - - we're cognizant
17 of it and we expect that, and we're aware of it. It makes
18 for a vigorous debate about what's meaningful. And I don't
19 - - - even though I might have expressed myself strongly, I
20 have no problem with that. I understand that and respect
21 that.

22 MR. MURRAY: I understand, and it's an awkward
23 position, frankly, no matter how you cut it.

24 JUDGE FAHEY: Of course.

25 MR. MURRAY: This is what they said before - - -



1 JUDGE SINGAS: Counselor?

2 MR. MURRAY: - - - now they're saying something
3 entirely different. But I respect that.

4 JUDGE SINGAS: What is the role of the
5 legislature here, and are we to defer to them at all
6 regarding their findings, and do you think you've met your
7 burden to demonstrate that something was overlooked or that
8 they didn't consider something? Talk to me about that.

9 MR. MURRAY: Yes. Well, I think, Your Honor,
10 it's clearly the legislature - - - the command to the
11 legislature, the mandate to the legislature in the
12 Constitution is Article 1, Section 9 prohibits commercial
13 gambling and directs the legislature to pass laws to
14 prevent it.

15 It is - - - and I really, frankly, think what the
16 legislature has done here is bent over backwards to find
17 some kind of way to circumvent that. Instead of worrying
18 about the people who Article 1, Section 9 was designed to
19 protect, average people, and people who have compulsive
20 addictions and gambling problems, which are multitudinous
21 in this state, the problem is that they've done exactly the
22 opposite. Rather than following that mandate, they're
23 trying to find a way, and I believe, through sophistry,
24 semantics, and euphemisms, to camouflage this. It's like
25 trying to thread a needle with a camel to say that daily



1 fantasy sports somehow is not gambling, that it doesn't - -
2 - doesn't depend, to a material degree, upon the
3 performance of athletes.

4 Even FanDuel and DraftKings - - - forget what the
5 Attorney General says; I won't throw back what he's said in
6 previous briefs, or that office, but even - - - even
7 FanDuel and DraftKings says DFS lineups - - - and this is
8 in the record - - - depend upon the combined performance of
9 real-world athletes. They also said they make money almost
10 identical to a casino. Now they're trying to go around and
11 convince this court that somehow daily fantasy sports is
12 not gambling.

13 And to Judge Wilson's question, are we - - - are
14 we getting hung up here too much on the skill versus chance
15 dichotomy, and I respectfully submit we do, because when
16 you look at the Penal Law, if there is a disjunctive "or" -
17 - - in other words, it's either a game of chance, the
18 outcome of which depends, to a material degree, upon an
19 element of chance, not whether it's dominant, but is there
20 a material degree of chance, and the answer to that is,
21 unequivocally, yes.

22 But besides that, there's a disjunctive "or". It
23 also says "or" a contingent event over which the players
24 have no control. Now, the answer - - - both the Supreme
25 Court and the Appellate Division, with the exception of



1 Judge Pritzker, whom I respect very much, but I - - - they
2 all said we don't buy this argument that you somehow
3 control the outcome of the game. And the reason for that
4 is very simply that there are so many factors that go into
5 the outcome of a game, an errant bounce, for one, a player
6 has an off night, an official makes a bad call, a manager
7 makes a stupid decision.

8 JUDGE CANNATARO: Yes, but counsel, that sort of
9 gets us back to the stock market, right? An investor can
10 do all of the research in the world, and learn the
11 fundamentals of a company, and you know, decide that
12 they're going to invest in this aerospace company because
13 it just looks great on paper. And then they design a plane
14 that crashes every time it takes off, and the stock
15 absolutely tanks. There's no way you could have predicted
16 that future contingency. But I think we're all in
17 agreement here that investing in the stock market is not
18 gambling, as that term is defined in New York. And we are
19 groping for a definition of gambling that allows those two
20 things to coexist in the same society.

21 MR. MURRAY: You would turn the financial world
22 and society upside down if you were to equate or conflate
23 gambling, as we know it on sports betting, with investing
24 in the stock market.

25 JUDGE CANNATARO: I agree.



1 MR. MURRAY: They're two different things. And
2 also insurance.

3 JUDGE WILSON: But that's the question.

4 MR. MURRAY: They also have a right in insurance
5 - - -

6 JUDGE WILSON: When you say they're two different
7 things, they're two different things even though they have
8 similar profiles in terms of unforeseeability, chance,
9 skill.

10 MR. MURRAY: They do have those, Your Honor, but
11 we also recognize, by the way, and I think this was in the
12 brief that was submitted by amici recently. One is, does
13 it serve a valid public purpose. And the answer to that is
14 yes, the stock market does, insurance does --

15 JUDGE WILSON: Well, I'm not sure you want to go
16 down that road. I mean, there are plenty of people who
17 think that entertainment is a valid public purpose.

18 MR. MURRAY: Well, Your Honor, all - - - all I
19 can say is - - -

20 JUDGE WILSON: Right? We're not here to make a
21 policy judgment about whether this is good or bad, right?

22 MR. MURRAY: It's not - - - it's not a policy
23 decision; it's about what the Constitution says.

24 JUDGE WILSON: Right.

25 MR. MURRAY: But I - - - I think, without being



1 able to exactly differentiate a stock market and the
2 financial world and Wall Street from gambling, there's a
3 big difference that everybody recognizes.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 MR. MURRAY: Okay. Thank you.

6 CHIEF JUDGE DIFIORE: Counsel --

7 MR. MURRAY: Thank you, Your Honor.

8 CHIEF JUDGE DIFIORE: -- your rebuttal?

9 MR. PALADINO: On the question of whether this
10 contest is a wager on a future contingent event, you have
11 to determine what the relevant activity is, and the
12 legislature determined that the relevant activity is not
13 any individual sporting event or performance of an
14 individual athlete; it is the fantasy sports contest
15 itself. And since that has been found to be a
16 predominantly skill-based contest, the participants in it
17 influence the outcome of the contest in which they directly
18 participate through the exercise of their general manager-
19 like skills.

20 So the role of skill and chance is directly
21 relevant because if you recognize that there is this third
22 thing called skill-based contests, why are they not treated
23 as gambling? People are allowed to stake money on a
24 contest that is determined by skill. Here the relevant
25 contest is the selection of the roster and how it compares



1 with --

2 JUDGE WILSON: So if Brian Cashman bet on the
3 Yankees, put wagers on the lineup, that would not be
4 gambling under the Constitution?

5 MR. PALADINO: What Brian Cashman is doing is
6 running a team - - -

7 JUDGE WILSON: I know what he's doing.

8 MR. PALADINO: Well, if he - - -

9 JUDGE WILSON: He's using his skill to select the
10 players.

11 MR. PALADINO: Well, arguably, he is influencing
12 the outcome through his general manager - - -

13 JUDGE WILSON: Right.

14 MR. PALADINO: - - - actions.

15 JUDGE WILSON: So if he bet on those outcomes,
16 right, that's not gambling under the Constitution?

17 MR. PALADINO: No, because you and I can bet on
18 the outcome of a chess match that you and I play against
19 each other, and in New York, that is historically not
20 treated as gambling. So if I enter a -- a fantasy sports
21 contest, and I influence the outcome of that contest, it's
22 perfectly acceptable for me to pay an entrance fee to the
23 contest operator for the opportunity to participate.

24 This court, in Lawrence, contrary to what my
25 opponent says, drew a distinction between entrance fees and



1 wagers. The owners of the horse races - - - pardon me, the
 2 owners of the horses paid a fee to this association that
 3 ran the contest for the privilege of entering their horse
 4 into the race. Somebody else, a third party wagering on
 5 that, is gambling. But the direct participant in the
 6 contest, which in that instance was the horse race owner -
 7 - -

8 JUDGE RIVERA: But counsel, again, that's the
 9 problem that I have with some of your hypotheticals, the
 10 horse owner, one must assume, ostensibly, has prepared that
 11 horse for the race, and that they're making assessments
 12 about that horse's ability, whereas the participants know
 13 whatever they know, but again, these players are not
 14 chattel to them. It's not an owner relationship. It's
 15 closer, of course, to what Judge Wilson has already
 16 described in his - - - in his questioning to you.

17 And I'm -- I'm having great difficulty, every
 18 time you keep analogizing or trying to - - - to distinguish
 19 between the horse owner or anybody who owns - - - you know,
 20 in a dog race, the dog owner, or any - - - anyone of those
 21 kinds of examples, from participants who pay money to come
 22 up with their dream team that does not exist, but for the
 23 fact that there are actual athletes playing in the real
 24 world, and the participants have no control, they're not -
 25 - - they don't own those players, and they don't otherwise



1 have any control over how the events will unfold. And
2 that's why I say I keep having difficulty with your
3 argument.

4 MR. PALADINO: Well, the analogy is that the
5 contestants own their fantasy team, and they are - - - are
6 stepping into the role of a simulated general manager.
7 There is no support anywhere for the proposition that there
8 is some kind of disqualifying type of contest or
9 disqualifying type of skill because skills are transferable
10 between activities. The - - - the skills that a general
11 manager uses are very similar to the skills that a sports
12 manager uses.

13 JUDGE RIVERA: I guess, counsel, at the end of
14 the day -- and perhaps I'm - - - I'm having sort of the
15 same reaction that Judge Fahey has in this, if I understood
16 him correctly, with his first line of questioning, when you
17 were first at the podium, that I find it very hard to - - -
18 to say what I think you're arguing, it's not gambling
19 because the companies have developed this fantasy world to
20 divide between what happens on the field and what the
21 participants think may happen on the field. You know, just
22 because you put a little layer in between doesn't mean it's
23 not gambling. And I think that's really where I'm having
24 the difficulty with this argument.

25 MR. PALADINO: Well, I would urge the court to



1 ask itself what is the principal basis for distinguishing
2 among skill-based competitions. Where is the principle
3 that says this skill-based competition is okay but this one
4 isn't because it seems to employ skills analogous to what
5 sports better - - - sports betters use, even though it's
6 also similar to the skills that a general manager uses.
7 There is no such principal basis that -- that I can
8 discern. And - - -

9 JUDGE WILSON: Right. And in a way, you've told
10 us that there can't be one because, for example, of poker,
11 that some of these things are not going to be describable
12 in a principled way; they're going to be an artifact of
13 history.

14 MR. PALADINO: Well, that's correct, Your Honor,
15 but again, we have this new activity that comes along, and
16 I think that the legislature does play a role, because the
17 legislature has constitutional authority to implement the
18 gambling prohibition, and you can't implement it unless you
19 first determine into which box a particular activity falls.
20 And there are limiting principles.

21 I mean, I think that my opponent's argument is
22 that if you - - - if you allow this contest to be treated
23 as nongambling, what's stopping the legislature. Well,
24 first you have the fact that it has to be predominantly
25 determined by skill. That is a - - - a limiting principle.



1 The legislature's factual findings have to be rational.
2 And it has to be an activity that didn't exist in 1894.
3 Those are important limiting principles. I mean, the
4 legislature comes along and says we've now determined that
5 roulette is gambling. That's not a ration - - - pardon,
6 not gambling, that's not a rational - - -

7 JUDGE RIVERA: But counsel, I'm sorry to
8 interrupt you, but just because the activity didn't exist
9 doesn't mean that the essence of the activity isn't
10 comparable to the activity that did exist, which I - - -
11 that's, again, where I'm having some difficulty with - - -
12 with your argument. You know, just because it's - - - we
13 want to say it's new because it's on a computer doesn't - -
14 - you know, you can play poker on a computer, of course,
15 but we'd still say it's poker. So the question is whether
16 or not this really, you know, looks -- like Senator Krueger
17 says, you know, it's the duck that walks and quacks like
18 one, so it must be one.

19 Let me ask you a question, though, about
20 something you - - - you just said a moment ago, and I may
21 not have taken a correct note, so you'll correct me if I
22 misunderstood you. I believe you said the legislature has
23 determined that the relevant activity is this fantasy
24 sports activity, not the activity of - - - of the actual
25 athletes. And if that's indeed what you said, why are we



1 bound by that determination? What if we believe that, as a
2 legal matter, that is not the correct - - - that is not the
3 relevant activity that we should look to?

4 MR. PALADINO: I will acknowledge that sounds
5 more like a factual - - - pardon me, a legal question than
6 a factual question. The degree of skill versus the degree
7 of chance plainly is a factual question as to which the
8 legislature made findings. There's ample evidence of the
9 high degree of skill involved.

10 But as to what is the relevant activity, I will
11 acknowledge that sounds more like a question for the - - -
12 the court to decide. But in deciding it, please consider
13 that what the contestants are doing is not predicting any
14 real-world - - - the outcome of any real-world sporting
15 event. And if particular athletes on your team do not
16 perform as expected, that also doesn't determine the
17 outcome of the contest.

18 What determines the outcome of the contest is the
19 overall performance of the roster, and selection of that
20 roster has been shown, with studies, to be overwhelmingly
21 skill-based. That makes it a skill-based competition. And
22 if it is a skill-based competition, it logically follows
23 that the contestants materially influence, if not control.
24 They don't have to control; they just have to influence the
25 outcome of the contest in which they're participating.



1 And because -- just because it's a fantasy
2 contest doesn't matter, because I can articulate no
3 rational principle for how the court would distinguish
4 between various times - - - types of skill-based contests
5 and say this one's a - - - is good enough, but - - - but
6 this one isn't. And the fact that it is a debatable point
7 is a reason why this law should be upheld. Reasonable
8 minds can differ - - -

9 JUDGE RIVERA: What about if - - - let's assume,
10 for one moment, of course, that we agree with you about the
11 great amount of skill that the participants bring to bear
12 in - - - in fantasy sports. But what about if - - - if
13 their skill is meaningless without the skill that's
14 external to them? Could that perhaps be one way of
15 thinking about it? I'm asking you, generally, as a
16 question.

17 MR. PALADINO: If it were, then the outcome would
18 be different. But the - - - the empirical data shows that
19 the experienced contestants, which are the ones who enter
20 more than 1,000 contests, routinely beat -- beat randomly
21 generated teams. If this was a game of chance, if you had
22 lots of data, you would just see a fifty-fifty split
23 between skilled players and randomly generated teams or
24 skilled players and inexperienced players. But the fact
25 that skilled players are winning, like, ninety-six percent



1 of the time is proof positive that it is a skill-based
2 activity employing the same skills that general managers
3 employ. It just happens to be a fantasy simulation. And
4 there's absolutely nothing wrong with that as a
5 constitutional matter. Now, we - - -

6 CHIEF JUDGE DIFIORE: Counsel, we'll have one
7 final question from Judge Fahey, please.

8 JUDGE FAHEY: Counselor, it's my understanding
9 that skill-based players - - - or skill - - - very
10 experienced players in high-stakes poker do much better
11 than everyone else --

12 MR. PALADINO: Um-hum.

13 JUDGE FAHEY: -- that the same percentage of
14 skilled players in fantasy sports do very much better than
15 everyone else, and - - - according to the information that
16 was in the record. And what - - - what that says to me is
17 that the argument you're - - - you're making is, in
18 essence, equating the degree of skill to be successful in
19 poker as the degree of skill to be successful in fantasy
20 sports. Does that equate those two activities, poker and
21 the sports?

22 MR. PALADINO: Well, no, Your Honor. I mean,
23 poker is determined, to a greater degree, by chance than
24 fantasy sports. But let's assume for the moment that it's
25 the same amount of skill.



1 JUDGE FAHEY: Yeah.

2 MR. PALADINO: If - - - if this was a new
3 activity, one could rationally say that - - -

4 JUDGE FAHEY: Let me stop you because we've been
5 at this a long time. If poker was a new activity, would
6 you say that that's not gambling?

7 MR. PALADINO: I would say that it is - - - it
8 could rationally be determined to be a skill-based contest.
9 However, it existed in 1894. Correctly or incorrectly, it
10 was deemed - - -

11 JUDGE FAHEY: See, here's the problem with that
12 argument. When you play poker, if somebody deals you a
13 royal flush, you're going to win the hand. And that's how
14 the cards are dealt. That's the way the deck is shuffled.
15 And if you have Tom Brady as your starting quarterback on
16 fantasy football, the odds are, if you are able to do that,
17 and have the same particular receivers and everything else,
18 that the component elements of what you have are just like
19 the component elements in a game of cards. Let me finish.
20 And that means that your selections, while you get to make
21 them, we both know that you can only make one at a time,
22 and you do them in order, and that it's the luck of the
23 draw, just like it's the luck of the draw in poker.

24 And it's hard for me to see any rational
25 distinction at all between the two except I think your



1 argument leads us to the inevitable conclusion that poker
2 is pretty much the same, certainly the numbers, in terms of
3 how successful a small group of people are in poker and a
4 small - - - and by this I mean less than two percent group
5 of people are successful in fantasy football. The numbers
6 bear that out.

7 MR. PALADINO: There is no random distribution
8 element in fantasy sports which is present in poker. The
9 fact that - - -

10 JUDGE FAHEY: I've got to stop you. I would
11 disagree with that because there is. The way you randomly
12 select in an order for your players is a random
13 distribution element just like how you pick a football
14 player in a draft is random. Of course these things are
15 random. And it's - - - it's a more difficult argument to
16 penetrate, for public purposes, but it is not true.

17 MR. PALADINO: Despite those random variables,
18 there's evidence of the overwhelming skill-based nature.
19 All Your Honor's point proves - - -

20 JUDGE FAHEY: Well, I agree with you about that.
21 It is skill-based. You know, poker players call finding
22 poker players that aren't very good bum hunting. They're
23 going to find guys that are bums, they're lousy at poker,
24 and they're going to get as many of those guys as possible
25 because that's how they make their money, because they're



1 so skilled no matter what cards they draw because they
2 understand the psychology of the game. The same things
3 happens in this sport.

4 MR. PALADINO: Your Honor, it doesn't seem like
5 there's anything that I'm going to say that's going to - -
6 -

7 JUDGE FAHEY: Well, in fairness to you, that's
8 probably true.

9 CHIEF JUDGE DIFIORE: And thank you, counsel.
10 Thank you.

11 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of White, et al. v. Cuomo, et al., No. 59, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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