

Prepared Written Statement of

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For the Hearing entitled

“Daily Fantasy Sports: Issues and Perspectives”

Before the

Subcommittee on Commerce, Manufacturing, and Trade

Of the Committee on Energy and Commerce

House of Representatives

United States Congress

May 11, 2016

Washington, DC, USA

Introduction

Chairman Burgess and other honorable members of the Subcommittee on Commerce, Manufacturing, and Trade, I am pleased to be invited to testify at the hearing entitled “Daily Fantasy Sports: Issues and Perspectives.” I appreciate the opportunity to be on this panel with distinguished representatives and experts connected to the daily fantasy sports industry. Although I work as a professor and freelance author, this prepared statement and my remarks during the hearing reflect only my personal views and do not necessarily reflect the views of my employer Florida State University or any of the media outlets for whom I have written articles as a freelance writer.

While daily fantasy sports contests have existed for almost a decade,¹ only within the past few years have such contests garnered widespread media attention and increased legal scrutiny. Indeed, the still-evolving life cycle of daily fantasy sports somewhat mirrors other innovative, technology-driven enterprises such as online ticket resellers, mobile ride-sharing services, and certain internet-based bed and breakfast providers. As set forth in Figure 1 below, daily fantasy sports’ current legal status lies at the intersection of three overlapping regulatory circles in a Venn diagram – (i) federal gaming law; (ii) state gaming law; and (iii) consumer protection policies. With daily fantasy sports representing only a small portion of the overall American sports gaming market, any substantive discussion of daily fantasy sports must take place in the

¹ Daily fantasy sports are contests where participants select real-world athletes for a “fantasy” team and compete against one or more other participants, with the statistical performances of such real-world athletes (in actual sporting events) used to determine the winners of the corresponding fantasy contests. Daily fantasy sports are closely related to traditional season-long fantasy sports, with at least two major differences. First, daily fantasy sports contests are of short duration, with leagues lasting a week, a day, or a few hours. This is in contrast to traditional fantasy sports leagues taking place over the course of several months. Second, the format of daily fantasy sports differs than its season-long cousin, with virtually all contests taking place online and involving unique configurations ranging from two-person “head-to-head” contests to large-scale tournaments with thousands of entries and seven figure prize money payouts. For a detailed history of fantasy sports, see Cabot & Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 *John Marshall Law Review* 1195-1219 (2007). See also Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1-53 (2012).

context of a simultaneous examination of traditional sports wagering.² Accordingly, I discuss each of Figure’s 1’s three components in detail below.³

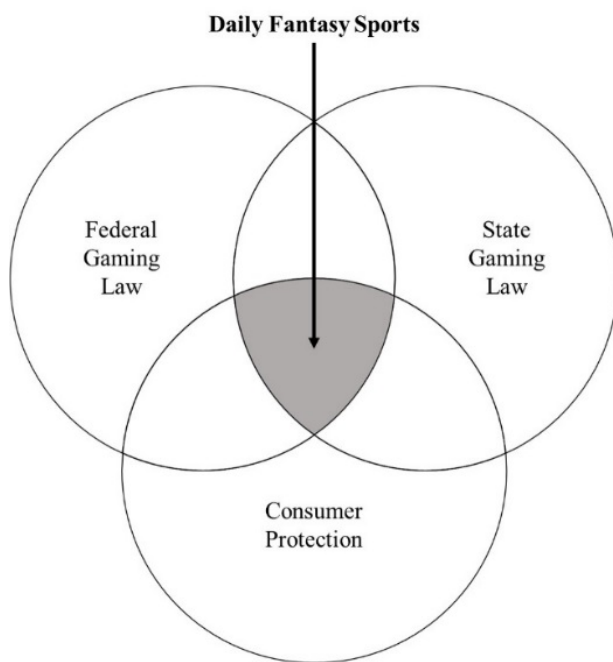


Figure 1 – DFS Legal Status Venn Diagram

Federal Gaming Law

Congress has a considerable history of enacting sports-specific legislation in the gaming realm.⁴ Two federal statutes are most often discussed in connection with daily fantasy sports. The most relevant statute in this space is the Professional and Amateur Sports Protection Act (“PASPA”) of 1992.⁵ PASPA aimed to stop the spread of state-sponsored sports gambling via injunctive relief, with the Department of Justice or “a professional sports organization or amateur sports organization whose competitive game is alleged to be

² I use the term “traditional sports wagering” broadly to include a variety of sports betting options at both the team and individual level, including futures, parlays, point spreads, totals, moneylines, proposition bets, exchange-based trading, and in-game wagering.

³ For the avoidance of doubt, I recognize that the terms “gaming,” “gambling,” “betting,” and “wagering” may hold unique definitional significance under various federal and state laws. Nevertheless, I largely use the terms interchangeably here.

⁴ See Rodenberg & Kaburakis, Legal and Corruption Issues in Sports Gambling, 23 *Journal of Legal Aspects of Sport*, 8-35 (2013).

⁵ 28 U.S.C. § 3701, et seq.

the basis of such violation” deputized to enforce it.⁶ PASPA resulted in a small number of states—Nevada, Delaware, Montana, Oregon, and perhaps others—being exempted under the law’s grandfathering provision.⁷ For grandfathered states, PASPA supposedly “freezes” the scope of that state’s legal sports gaming offerings to then-existing options.⁸ For non-grandfathered states, PASPA paradoxically provides states with the option of either retaining their sports gambling prohibitions or repealing such prohibitions in their entirety, with on-going federal litigation that may set the parameters of a permissible “partial repeal” under PASPA.⁹ Supreme Court Justice John Paul Stevens, writing for a unanimous court in a 1999 decision, opined that PASPA “includes a variety of exemptions, some with obscured Congressional purposes.”¹⁰

PASPA’s apparent scope vis-à-vis daily fantasy sports is important. Under PASPA, in relevant part, it is unlawful for state governments to “sponsor, operate, advertise, promote, license, or authorize...[a] betting, gambling, or wagering scheme based...on one or more competitive games in which amateur or professional athletes participate...or on one or more performances of such athletes in such games.”¹¹ The plain language of PASPA impacts the ability of governments to regulate both daily fantasy sports and traditional sports wagering. To date, no court has directly evaluated daily fantasy sports under PASPA.

The second federal statute with connections to daily fantasy sports is the Unlawful Internet Gambling Enforcement Act (“UIGEA”) of 2006.¹² While UIGEA remains critically important for payment

⁶ Prior to enactment, the Department of Justice raised a number of concerns about the draft bill that would become PASPA. See Letter from W. Lee Rawls, Assistant Attorney General, Department of Justice, to the Honorable Joseph R. Biden, Jr., Chairman, Committee on the Judiciary, Sept. 24, 1991.

⁷ See Holden, et al., Sports Gambling and Your Grandfather (Clause), 26 *Stanford Law & Policy Review Online* 1 (2014). See also Rodenberg & Wertheim, Hedging Their Bets, *Sports Illustrated*, May 12, 2014, p. 52-54.

⁸ See *Office of the Commissioner of Major League Baseball, et al. v. Markell, et al.*, 579 F.3d 293 (3d Cir. 2009).

⁹ See *NCAA, et al. v. Christie, et al.*, 730 F.3d 208 (3d Cir. 2013) (“*Christie P*”). See also *NCAA, et al. v. Christie, et al.*, ___ F.3d ___ (3d Cir. 2015) (“*Christie IP*”). The *Christie II* litigation remains on-going as of May 6, 2016. During the March 17, 2015 oral argument in *Christie II*, New Jersey attorney Ted Olson referred to PASPA as “an Orwellian concept.” Relatedly, attorney Paul Clement representing the five sports league plaintiffs argued on February 17, 2016 that PASPA’s scope would allow up to \$1,000 bets between individuals pursuant to what he described during March 17, 2015 oral argument as a PASPA-compliant “friends and family plan.”

¹⁰ See *Greater New Orleans Broadcasting Ass’n, Inc. et al v. United States*, 527 U.S. 173, 179 (1999)(case pertained to restrictions on gambling-related advertising and was not PASPA-focused).

¹¹ 28 U.S.C. § 3702. PASPA’s prohibition also extends to individuals acting pursuant to “law or compact of a governmental entity.”

¹² 31 U.S.C. § 5361 et seq.

processors servicing the daily fantasy sports sector,¹³ UIGEA is of questionable importance for daily fantasy sports more generally. As recent state attorney general activity has revealed, such uncertainty is ironic given that UIGEA was, at one time, frequently pointed to as establishing and validating the legality of daily fantasy sports.

In late 2015, I undertook a detailed archival examination of UIGEA's oft-referenced fantasy sports exemption.¹⁴ Using publicly-available documents, my take-away was two-fold. First, I could not find any evidence that the drafters of UIGEA explicitly considered daily fantasy sports in the course of creating the statutory carve-out. The closest any Congressional hearing got to addressing short-duration fantasy sports was a brief, non-conclusive exchange on March 23, 1999 between Senator Jon Kyl and Major League Baseball Players Association representative Marianne McGettigan that referenced fantasy contests involving "...a week of activity or a month of activity or a couple of days of activity..."¹⁵ Second, the opening section of UIGEA explicitly states that the law does not alter, limit, or extend "any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States."¹⁶ A frequently-cited subsequent section of UIGEA provides a multi-prong safe harbor for fantasy sports in connection with UIGEA's restrictions for payment processors.

Beyond PASPA and UIGEA, Congress has enacted a number of other statutes that could possibly touch on daily fantasy sports and traditional sports wagering.¹⁷ Examples include the Wire Act,¹⁸ the Sports

¹³ See Grove, Major Payment Processing Partner Demands That Daily Fantasy Sports Sites Exit New York, *Legal Sports Report*, Nov. 11, 2015.

¹⁴ See Rodenberg, The True Congressional Origin of Daily Fantasy Sports, *ESPN.com*, Oct. 28, 2015.

¹⁵ See Internet Gambling Hearing before the Subcommittee on Technology, Terrorism, and Government Information of the Committee on the Judiciary of the U.S. Senate, 106th Cong. (March 23, 1999).

¹⁶ See Rodenberg, What's Next for the Daily Fantasy Industry? *ESPN.com*, Oct. 16, 2015.

¹⁷ In addition to the specific statutes mentioned in this paragraph, the Federal Trade Commission, Internal Revenue Service (e.g. Form 730), and Commodity Futures Trading Commission may have regulations that overlap with certain aspects of daily fantasy sports. First Amendment free speech considerations and rights of publicity concerns have also impacted with fantasy sports. See *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, LP*, 505 F.3d 818 (8th Cir. 2007).

¹⁸ 18 U.S.C. § 1084. See also Seitz, Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act, 35 *Op. O.L.C.* 1-13 (Sept. 20, 2011).

Bribery Act,¹⁹ the Illegal Gambling Business Act,²⁰ and the Dodd-Frank Wall Street Reform and Consumer Protection Act.²¹ The federal wire fraud statute could also apply in cases involving “any scheme or artifice to defraud.”²² Even the so-called “Quiz Show scandal” statute could attach if deception is found in a fantasy sports competition broadcast to viewers.²³

No federal court case has squarely decided whether daily fantasy sports contests constitute illegal gambling under federal law. However, two cases provide guidance. First, the Third Circuit Court of Appeals touched on the issue in a 2013 footnote: “We note, however, the legal difference between paying fees to participate in fantasy leagues and single-game wagering as contemplated by [New Jersey’s] Wagering Law.”²⁴ Second, a New Jersey-based federal judge wrote the following in 2007:

“Courts have distinguished between *bona fide* entry fees and bets or wagers, holding that entry fees do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in a contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize).”²⁵

The Department of Justice has opined on fantasy sports too.²⁶ In a 1999 letter, the Justice Department raised concerns about certain exemptions in a UIGEA precursor bill:

“Specifically, the Department of Justice opposes the exemptions for parimutuel wagering and fantasy sports leagues, because there is no legitimate reason why bets or wagers sent or received by gambling businesses on these activities should be exempted from the ban while bets or wagers on other activities are not.”²⁷

¹⁹ 18 U.S.C. § 224.

²⁰ 18 U.S.C. § 1955.

²¹ 12 U.S.C. § 5301, et seq.

²² 18 U.S.C. § 1343.

²³ 47 U.S.C. § 509.

²⁴ *NCAA, et al. v. Christie, et al.*, 730 F.3d 208, 251, n. 4 (3d Cir. 2013) (“*Christie I*”).

²⁵ *Humphrey v. Viacom, et al.*, 2007 WL 1797648, p. 5 (D. N.J. 2007).

²⁶ Widespread media reports indicate that there are one or more federal probes focused on daily fantasy sports. For example, see Reagan & Barrett, FBI, Justice Department Investigating Daily Fantasy Sports Business Model, *Wall Street Journal*, Oct. 14, 2015. As of May 6, 2016, details of any such probes have yet to be released publicly. See Woodward, Federal Fantasy Sports Probe Could Drag on For Months, Lawyer Says, *Boston Globe*, April 8, 2016.

²⁷ Letter from Jon P. Jennings, Acting Assistant Attorney General, Department of Justice, to the Honorable Patrick J. Leahy, Ranking Minority Member, Committee on the Judiciary, June 9, 1999. The same letter also included the following: “[W]e do urge Congress to craft carefully legislation to ensure that gambling on fantasy sports leagues and contests is not legalized on the Internet, when all other gambling is banned.”

A year later, a Justice Department attorney testified before Congress and said: “There is considerable debate we found in our research over whether or not fantasy sports leagues constitute gambling or whether they are simply a contest...”²⁸ In a letter responding to follow-up questions after an April 5, 2006 Congressional hearing, a different Department of Justice attorney wrote: “The [Justice] Department does not maintain information about regulatory regimes for fantasy sports, which would be a matter of state law.”²⁹

State Gaming Law

Every state has gambling statutes on the books. Some states are restrictive (Utah and Hawaii) and some states are more permissive (Nevada and New Jersey). Other states fall somewhere in between these two extremes.³⁰ But in all cases—as the Department of Justice explained multiple times—states seemingly have the right to regulate (daily) fantasy sports, if in compliance with PASPA.

A number of jurisdictions have already moved to explicitly legalize (and regulate) daily fantasy sports under state law.³¹ As of May 6, 2016, examples include Massachusetts, Indiana, Tennessee, and Virginia. However, there are open questions as to whether some state statutes may permit certain player-level proposition bets that extend beyond what is currently considered mainstream daily fantasy sports.³² Beyond these states where daily fantasy sports are permitted, there are: (i) about a dozen states where the legality of

²⁸ See Statement of Kevin Di Gregory, Internet Gambling Prohibition Act of 1999 Hearing before the Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce, 106th Cong. (June 15, 2000). During testimony, the same Justice Department attorney took part in the following Q&A with Congressman Cox, in relevant part:

Mr. Cox – “What is the prosecutorial policy of the Justice Department with respect to fantasy sports leagues right now?”

Mr. Di Gregory – “I don’t believe that we have engaged in any prosecutions of fantasy sports leagues.”

Mr. Cox – “Is anybody else doing that?”

Mr. Di Gregory – “I know there are laws on the books in some jurisdictions. Montana comes to mind, although I may be wrong, which prohibits fantasy sports leagues and State governments, as they have always been, are, of course, going to regulate in their own States, the kind of conduct that they consider gambling, and regulate accordingly.”

²⁹ Letter from William E. Moschella, Assistant Attorney General, Department of Justice, to the Honorable Howard Coble, Chairman, Subcommittee on Crime, Terrorism, and Homeland Security, July 19, 2006. The same letter also included the following, in relevant part: “...to the extent that ‘fantasy sports’ fall within the exception to the term ‘bet or wager’ in subsection 1081(6)(vii) and, thus, are not subject to the prohibition of Section 1084, if the activity violated the laws of a particular state, it would still be illegal in that state.”

³⁰ See Rodenberg, Why Do States Define Gambling Differently? *ESPN.com*, Feb. 18, 2016.

³¹ See Gouker, DFS State Watch: Monitoring Daily Fantasy Sports Action in State Government, *Legal Sports Report*, April 26, 2016.

³² See Grove, States Passing Fantasy Sports Bills May Be Authorizing Far More Sports Betting Than They Realize, *Legal Sports Report*, Feb. 19, 2016.

daily fantasy sports is currently being contested; (ii) five states where cash-based fantasy sports have historically been banned; (iii) upwards of fifteen states where legislation is pending; and (iv) about a dozen states where there does not appear to be any current legislation under consideration.³³

The skill versus chance debate has dominated recent daily fantasy litigation in New York and elsewhere. While issues pertaining to relative levels of skill exhibited by successful daily fantasy sports participants are important and have a strong historical anchor under both federal and state laws,³⁴ they are not necessarily dispositive. For example, in legal filings, both the Department of Justice and the National Football League (“NFL”) have posited that traditional sports betting is skill-based.³⁵ But these positions did not instantly remove such sports betting from existing prohibitions on the activity. Beyond skill versus chance issues, other state law considerations potentially relevant for daily fantasy sports include provisions related to bookmakers³⁶ and betting pools.³⁷

Consumer Protection

Consumer protection concerns in daily fantasy sports and oft-mentioned “integrity of the game” considerations are best analyzed on two levels. The first level pertains to the real-world sporting events to which daily fantasy sports are tethered. While daily fantasy sports are unlikely to result in widespread corruption of the underlying sporting events, the possibility of manipulation is not completely absent, as an analogy to spot-fixing can be made. It is likely for this reason that the National Basketball Association (“NBA”), National Hockey League (“NHL”), and Major League Baseball (“MLB”) prohibit players and

³³ See Rodenberg, Daily Fantasy Sports State-By-State Tracker, *ESPN.com*, May 3, 2016.

³⁴ For example, UIGEA’s fantasy sports exemption includes a reference to “the relative knowledge and skill of the participants.”

³⁵ See Rodenberg, Documents Show DOJ, NFL Have Argued that Sports Betting is Skill-Based, *ESPN.com*, July 21, 2015.

³⁶ For an example from Washington State, see Rodenberg, ‘eBay Meets Facebook in Las Vegas:’ The Fascinating Story of Betcha.com, *ESPN.com*, Aug. 25, 2015.

³⁷ For an example from Massachusetts, see Massachusetts Gaming Commission, White Paper on Daily Fantasy Sports, p. 6-8, Jan. 11, 2016.

certain team/league personnel from participating in cash-based daily fantasy leagues³⁸ and the NFL does not allow its players, coaches, or executives to win more than \$250 in fantasy contests.³⁹

The second level of integrity-related analysis focuses on the fantasy contest itself.⁴⁰ The (mis-)use of non-public information—whether derived from insiders working for fantasy companies or athletes, coaches, trainers, or executives privy to such information—could influence the results of lucrative payouts from daily fantasy contests. Likewise, the integrity of the fantasy contest could be impacted by software vulnerability, the accuracy of statistical results received from data dissemination firms whose employees may be participating in fantasy leagues themselves, biased game scorekeepers working at the underlying real-world sporting events, opaque fantasy game mechanics, or uneven enforcement of contest rules in response to allegations of policies being violated.

Whether at the federal or state level, consumer protection considerations could take many forms beyond already-implemented post-scandal measures barring daily fantasy companies' employees from playing cash-based fantasy contests.⁴¹ A non-exhaustive list of potential consumer protection-oriented policies includes: (i) advertising restrictions; (ii) prohibiting fantasy play by minors via age verification procedures; (iii) making available compulsive gambling and addiction resources (and implementing data-driven procedures to identify problematic behaviors); (iv) geo-location tracking; (v) availability of self-exclusion lists; (vi) restricting or eliminating the use of algorithms, scripts, and bots; (vii) limiting the number entries in certain daily fantasy contests; (viii) including special protections for “head-to-head” daily fantasy contests;⁴² (ix) requiring the adoption of “know your customer” guidelines; and (x) mandating explicit

³⁸ See Levinson, Daily Fantasy Sports Growth Pushes Leagues to Regulate Players, *Bloomberg*, April 1, 2015.

³⁹ See Florio, NFL Players Can Play Daily Fantasy, They Just Can't Win Much, *Pro Football Talk*, Sept. 29, 2015.

⁴⁰ For a discussion of consumer protection considerations in the gambling industry generally, see Eggert, Truth in Gaming: Toward Consumer Protection in the Gambling Industry, 63(2) *Maryland Law Review* 217-286 (2004).

⁴¹ See McCann, In Wake of Latest Allegations, a Look at the Legality of Daily Fantasy Sports, *SI.com*, Oct. 6, 2015. See also, McCann & Green, Examining the Impact of Potential Preliminary Injunction on DFS Lawsuit, *SI.com*, Nov. 20, 2015.

⁴² Peer-to-peer “head-to-head” daily fantasy contests may deserve special attention from a consumer protection standpoint, as the format could be vulnerable to player collusion or predatory stalking. The binary, winner-take-all (minus the operator's commission) format differs from other types of daily fantasy sports that follow a tournament structure. In addition, head-to-head contests have some characteristics that resemble transactions on exchange-based platforms such as Betfair.

accounting procedures to ensure that fantasy player funds are in segregated accounts and not commingled in general operating funds.

During the past twelve months, the vast majority of daily fantasy companies have moved from a policy stance of resisting regulation to one that is now open to governmental regulation. Whether such oversight is federal, state, or both, regulation in this space seems inevitable.⁴³ But only reasonable regulation would allow the industry to remain viable and meet consumer demand. Unreasonable regulations could possibly result in an illegal daily fantasy sports market similar to that currently in place for traditional sports gambling.⁴⁴ Both the Department of the Treasury's FinCEN division and the Department of Justice have recently expressed concerns about illegal internet gambling and sports betting.⁴⁵ These concerns may apply to daily fantasy sports as well.

Inferences and Outlook

The unique characteristics of daily fantasy sports are different than traditional sports wagering.⁴⁶ However, as over a dozen on-going or recently-concluded federal and state probes have demonstrated, such differences are not enough to completely remove daily fantasy sports from the broad umbrella of federal/state gaming laws and consumer protection concerns. This overlap leads me to a number of inferences about possible near-future developments.

⁴³ Regulation through the enactment of laws is relatively inexpensive, but the enforcement of any federal and/or state regulations specific to daily fantasy sports would be time-consuming and expensive. With no federal regulatory process under consideration and state-level daily fantasy sports regulations in their infancy, it is premature to draw any reasonably clear inferences about how regulatory enforcement could/should be effectuated.

⁴⁴ Nevada and Delaware – two states where certain forms of traditional sports wagering are permissible under PASPA – control only a small fraction of the overall (legal and illegal) American sports betting market. For a textured overview of (il)legal sports gambling, see Griffin, *Gaming the Game: The Story Behind the NBA Betting Scandal and the Gambler that Made it Happen* (Barricade Books 2011).

⁴⁵ See Rodenberg, Biggest Issues for Daily Fantasy after New York Ruling, *ESPN.com*, Dec. 11, 2015. See also Purdum, Department of Justice Will Not Weigh In on DraftKings, FanDuel Controversy, *ESPN.com*, Nov. 13, 2015.

⁴⁶ Sports league executives share in this opinion. See Rovell, Commissioners Say Daily Fantasy Not Akin to Gambling, but Needs Regulation, *ESPN.com*, Oct. 27, 2015; Purdum, NFL's Roger Goodell Sees Difference Between Fantasy and Gambling, *ESPN.com*, Sept. 23, 2015; and Gouker, What the NFL, NBA, and MLB Have to Say about Daily Fantasy Sports and Sports Betting, *Legal Sports Report*, Nov. 4, 2015.

Integrity of the game considerations—for both real-world sporting events and the daily fantasy contests connected thereto—are paramount. If sports fans come to believe that honest athletic competition has been replaced by corrupted or pre-scripted entertainment, spectator sports will likely wither away. Likewise, if the millions of Americans who participate in (daily) fantasy sports come to believe that the pay-to-play fantasy contests are illegitimate, it is difficult to see how consumer interest could be retained. These game integrity concerns, whether related to real-world sporting events or accompanying fantasy contests, lend themselves to an opportunity. Congress and/or state legislators have the opportunity to enact reasonable regulations and meaningful enforcement mechanisms. Indeed, game integrity is one issue where the interests of legislators, law enforcement, sports leagues, and reputable fantasy/gaming operators are allied.

Prominent American sports leagues, a group that includes the National Collegiate Athletic Association (“NCAA”), NHL, NBA, MLB, and NFL, recently posited that they have a proprietary interest in “the degree to which others derive economic benefits from their own games.”⁴⁷ More narrowly, the same quintet of sports leagues argued that they “have an essential interest in how their games are perceived and the degree to which their sporting events become betting events.”⁴⁸ Consistent with these positions, it is plausible to infer that certain sports leagues may: (i) seek to memorialize certain gaming-related intellectual property rights through litigation or legislation; (ii) move to license so-called “official data rights” to third party gaming operators; and/or (iii) create gaming platforms themselves to offer (exclusive) wagering options directly to consumers and, in turn, cut out competitors.

⁴⁷ Response Brief of Plaintiffs-Appellees at 18, *NCAA et al. v. Christie et al.*, (June 7, 2013).

⁴⁸ Response Brief of Plaintiffs-Appellees at 13-14, *NCAA et al. v. Christie et al.*, (June 7, 2013). In the context of real-time sports data, sports leagues have similarly emphasized the value in such data. For example, in *NBA v. Motorola, et al.*, 105 F.3d 841 (2d Cir. 1997), the NFL, NHL, and MLB filed an October 3, 1996 amicus brief and posited that they: “share a common interest with the NBA in protecting and preserving for professional sports leagues and their member clubs, the rights to, and commercial value of, exclusive presentation of real-time running accounts of the live professional sporting event that result from their efforts and investments.” Proprietary and non-proprietary real-time data are the fuel for burgeoning live wagering and in-game fantasy sports. See Rodenberg, et al., *Real-Time Sports Data and the First Amendment*, 11(2) *Washington Journal of Law, Technology & Arts* 63-104 (2015).

Whether through equity investments or advertising partnerships, a number of sports leagues, labor unions, team owners, and media outlets have embraced daily fantasy sports and the commercial benefits that derive from it in the form of increased consumer engagement.⁴⁹ The “second-screen experience” has transformed passive sports spectators into active consumers that can be monitored and monetized. The same type of enhanced consumer engagement can be gleaned from traditional sports gambling, especially the shift to in-game wagering and micro-betting while the game is taking place. Nevertheless, certain sports leagues have simultaneously resisted Delaware and New Jersey’s move to offer traditional sports gaming options. Depending on the result of the on-going New Jersey sports wagering litigation,⁵⁰ discussions about nationwide legalized sports gambling may accelerate.⁵¹

In so doing, at least one positive aspect of a regulated and transparent fantasy and gaming market could result. Data from a highly liquid market could be harnessed to probe for irregular statistical fingerprints indicative of possible integrity issues about both real-world sporting events and fantasy contests. Indeed, in a trilogy of co-authored academic papers,⁵² I have demonstrated how forensic sports law analytics can be a useful tool in the detection of game-fixing or betting fraud. Similarly, there are a number of for-profit commercial entities that provide related services in partnership with sports leagues and athletic events.⁵³ In addition to several professional sports leagues that have adopted the practice,⁵⁴ the

⁴⁹ In addition to partnerships with certain daily fantasy companies, a number of sports leagues have also entered into commercial arrangement with companies in the business of transmitting real-time data and next-generation statistics for gambling and non-gambling purposes. See Fainaru, et al., Betting on the Come: Leagues Strike Deals with Gambling-Related Firms, *ESPN.com*, Jan. 28, 2016. See also Heitner, Is Major League Baseball Ready to Embrace Sports Betting?, *Forbes.com*, April 19, 2016.

⁵⁰ As of May 6, 2016, a decision in the case has yet to be released. Oral arguments before an *en banc* panel of the U.S. Court of Appeals for the Third Circuit took place on February 17, 2016.

⁵¹ For example, NBA commissioner Adam Silver has already articulated a new policy position favoring the legalization of traditional sports gambling. See Silver, Legalize Sports Betting, *New York Times*, Nov. 14, 2014, p. A23.

⁵² See Rodenberg & Feustel, Forensic Sports Analytics: Detecting and Predicting Match-Fixing in Tennis, 8(1) *Journal of Prediction Markets* 77-95 (2014); Feustel & Rodenberg, Sports (Betting) Integrity: Detecting Match-Fixing in Soccer, 19(10) *Gaming Law Review and Economics* 689-694 (2015); and Rodenberg, et al., Reverse Engineering the NBA Referee Betting Scandal, working paper (2016).

⁵³ While betting line monitoring is valuable, it is no panacea, especially if the results of such monitoring are not publicly released and/or turned over to law enforcement officers authorized to conduct follow-up investigations with subpoenas, search warrants, and arrest power.

⁵⁴ See Fainaru, et al. Betting on the Come: Leagues Strike Deals with Gambling-Related Firms, *ESPN.com*, Jan. 28, 2016. See also Rodenberg, MLB to Monitor Betting Lines in Real Time Starting in 2016, *ESPN.com*, Nov. 11, 2015.

commissioner of a prominent college athletic conference wrote, in relevant part, that: “fraud prevention and consultative services are key tools that support preserving and protecting the integrity of our sports and sports competitors.”⁵⁵

As the daily fantasy sports industry matures and works through its current regulatory challenges, changes are likely. Most notably, the format and time-duration of fantasy contests will shift. Like options already popular in Europe and being introduced in Nevada,⁵⁶ the future of daily fantasy sports likely lies in real-time possibilities where contestants dynamically interact as the underlying sporting event progresses. Such in-game options will be available in a variety of different mobile-friendly platforms.⁵⁷

Thank you, Chairman Burgess and members of the Subcommittee on Commerce, Manufacturing, and Trade, for the opportunity to appear before you today.

⁵⁵ Letter from Larry Scott, Pac-12 commissioner, to A.G. Burnett, Chairman, Nevada Gaming Control Board, March 5, 2015.

⁵⁶ See Gouker, NBA Commish, NHL Owner Bullish on ‘In-Game’ Sports Betting in U.S.? *Legal Sports Report*, April 30, 2015). See also Rodenberg, How Gambling ‘Courtsiders’ are Impacting Tennis, *ESPN.com*, Aug. 21, 2015.

⁵⁷ See Rodenberg, The Inevitable Rise of Real-Time Fantasy Sports, *ESPN.com*, Aug. 18, 2015.