

Disguised Coverages: A Legal Standard for Identifying “Daily Fantasy Sports” Imposters

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I. INTRODUCTION

“And it’s no good . . .” Many Super Bowl LVIII viewers either won or lost wagers on retired NFL player Rob Gronkowski missing a field goal during “Kick of Destiny 2,” a FanDuel advertisement event during the Super Bowl’s pre-game festivities.² At the bottom of the screen, a gambling addiction warning is shown, along with a listing of jurisdictions where wagering on the kick was permitted.³ Sports fans today have become familiar with FanDuel and its main competitor DraftKings, since their inception as online daily fantasy sports (DFS) platforms to companies with billion-dollar revenues who enjoy sponsored partnerships with major American sports leagues.⁴ As part of their growth, FanDuel and DraftKings have ventured beyond the world of fantasy sports and into the gambling industry, where they each offer online casinos and sportsbooks where patrons can play online blackjack, place wagers on sports matches, and at FanDuel’s sportsbook specifically, bet on Gronkowski’s Kick of Destiny.⁵

¹ This note and any potential views expressed herein are my own and do not represent any present views of my current employer, Perkins Coie LLP, or any client legal work engaged thereby.

² Erich Richter, “Rob Gronkowski Misses Again in Viral FanDuel Super Bowl 2024 Field Goal Commercial,” *New York Post*, February 11, 2024, <https://nypost.com/2024/02/11/sports/rob-gronkowski-misses-again-in-fanduel-super-bowl-2024-field-goal-commercial/>.

³ FanDuel, “FanDuel Kick of Destiny 2 Featuring Rob Gronkowski,” YouTube, February 11, 2024, <https://www.youtube.com/watch?v=bXrhgATNVbE>.

⁴ Darren Heitner, “An Abbreviated History of FanDuel and DraftKings,” *Forbes*, September 20, 2015, <https://www.forbes.com/sites/darrenheitner/2015/09/20/an-abbreviated-history-of-fanduel-and-draftkings/?sh=2deafb2e7564>; “NFL Announces Tri-Exclusive Official Sports Betting Partners,” National Football League, April 15, 2021, <https://www.nfl.com/news/nfl-announces-tri-exclusive-sports-betting-partners>; “DraftKings, FanDuel become NBA’s co-official sports betting partners,” National Basketball Association, November 4, 2021, <https://www.nba.com/news/draftkings-fanduel-become-nbas-co-official-sports-betting-partners>; “MLB names FanDuel a new official sports betting partner in North America,” Major League Baseball, March 2, 2023, <https://www.mlb.com/press-release/press-release-mlb-names-fanduel-a-new-official-sports-betting-partner-in-north-a>.

⁵ FanDuel Casino, <https://casino.fanduel.com>; DraftKings Casino, <https://casino.draftkings.com/casino-welcome>. Consistent with the jurisdiction-specific prohibitions on online gambling, wagering on FanDuel’s Kick of Destiny event was not available to residents of at least California and Texas. “FanDuel Kick of Destiny 2,” FanDuel, accessed April 16, 2024, <https://www.fanduel.com/rob-gronkowski-kick-of-destiny>.

Some fear that the line between the DFS industry and the gambling industry is becoming blurred, as exemplified by these new ventures helmed by these leading DFS companies.⁶ FanDuel and DraftKings themselves certainly seem conscious of these shifts and the regulatory implications arising therewith; for example, FanDuel Sportsbook & Casino, FanDuel Casino, and FanDuel Fantasy exist on mobile app marketplaces as three individually downloadable mobile apps and indicate different location controls in their app descriptions.⁷

The blending of DFS and sports gambling is also occurring on another front. Smaller market competitors to FanDuel and DraftKings have appeared on the scene, each advertising their own DFS experience.⁸ But the contest experiences offered by these smaller market competitors differ from the original DFS experiences that continue to be offered by FanDuel and DraftKings and instead appear more similar to forms of sports gambling. These new DFS contest experiences are currently available in jurisdictions where online sports gambling is prohibited. Meanwhile, online sports gambling through standard channels like casino and gaming companies remains prohibited in those same jurisdictions.⁹

For regulatory consistency, a standard is needed to identify these DFS imposters who effectively slip sports gambling into prohibited jurisdictions. This note proposes a novel standard that considers the degree by which an alleged DFS contest simulates the management and/or the

⁶ David Purdum, “Inside How Sports Betting Went Mainstream,” ESPN, August 9, 2018, https://www.espn.com/chalk/story/_/id/24310393/gambling-how-media-daily-fantasy-new-thinking-us-pro-sports-commissioners-helped-sports-betting-become-accepted.

⁷ Heitner, “An Abbreviated History of FanDuel and DraftKings;” “FanDuel Sportsbook & Casino,” Apple App Store, <https://apps.apple.com/us/app/fanduel-sportsbook-casino/id1413721906>; “FanDuel Fantasy Sports,” Apple App Store, <https://apps.apple.com/us/app/fanduel-fantasy-sports/id599664106>; “FanDuel Casino - Real Money,” Apple App Store, <https://apps.apple.com/us/app/fanduel-casino-real-money/id1506229470>.

⁸ “PrizePicks Named the Fastest-Growing Sports Company in America as Part of the 2022 Inc. 5000 List,” PR Newswire, August 16, 2022, <https://www.prnewswire.com/news-releases/prizepicks-named-the-fastest-growing-sports-company-in-america-as-part-of-the-2022-inc-5000-list-301606827.html>.

⁹ “Sports Betting in California: When It Will Be Legal, How to Bet Online, Where to Get Picks, Plus Promos,” CBS Sports, October 26, 2023, <https://www.cbssports.com/general/news/sports-betting-in-california-when-it-will-be-legal-how-to-bet-online-where-to-get-picks-plus-promos/>.

in-game dynamics of a real-life sports team; a contest failing to provide a simulated experience akin to managing a real-life sports team would fail to earn a classification as fantasy sports and the legal exemptions associated therewith. This standard brings historical perspective and consistency into current regulation systems and is more administrable and robust compared to existing or potential standards.

II. BACKGROUND & FACTS

As suggested by its name, DFS embodies a short-term variant of fantasy sports contests (e.g., fantasy football, fantasy basketball), allowing users to assemble a fantasy team for just one week and receive contest results once that week's sports matches are over. DFS distinguishes itself against the season-long efforts of traditional fantasy sports contests. These traditional fantasy sports contests typically begin with each contestant assembling a personal fantasy team, competing in head-to-head matches against other fantasy teams based on real-life sports match results, and ultimately celebrating a contest winner at the end of the season.¹⁰ A given head-to-head match between two fantasy teams would be decided by measuring a fantasy team's performance via fantasy point scores that aggregate the player's statistical performance in a real-life sports match.¹¹ Many users were and still are drawn to fantasy sports for the opportunity to role-play as a sports team's general manager through the construction and management (e.g., addition of free agents, starting lineup changes) of an imagined sports team.¹²

The imagined sports team that a contestant puts together is not arbitrary. In many fantasy football contests or leagues, a fantasy football team must include a quarterback, some running

¹⁰ Joshua Taggart, "Is Daily Fantasy a Form of Gambling Hidden by Skill?" *Mississippi Sports Law Review* 6, no. 1, (Fall 2016): 81-83.

¹¹"Rules – Standard Scoring System," ESPN, June 19, 2005, <https://www.espn.com/fantasy/football/ffl/story?page=flrulesstandardscoring>. For example, an NFL running back who collected 40 rushing yards and 20 receiving yards and scored a touchdown in his real-life match may be assessed a fantasy score of 12 points.

¹² Steve Lee, "Why are Fantasy Sports so Popular?" *Stack*, May 11, 2023, <https://www.stack.com/a/why-are-fantasy-sports-so-popular/>.

backs, some receivers, and a defense; similarly, a fantasy basketball team would be assembled with players at the point guard position, the center position, and the remaining positions.¹³ Success in these fantasy contests requires position-specific talent evaluation at the draft stage and throughout the season.¹⁴ Other traditional fantasy contests may be configured with a salary cap constraint, where a sum of artificial values pre-assigned to players drafted onto a contestant's personal fantasy team must not exceed an artificial threshold.¹⁵ A salary cap constraint also exists in real-life sports leagues, including the NFL and the NBA.¹⁶ Managers of the real-life sports teams in those leagues must make difficult decisions regarding which players to recruit and keep on their team, whether to renegotiate contract amounts, whether to trade players, and the like, in order to comply with the salary cap constraint.¹⁷

Forms of traditional fantasy sports began at least as early as 1962 and have since been treated favorably under the law with explicit statutory exemptions that distinguish fantasy sports from sports gambling.¹⁸ The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) regulates online gambling in the United States, by “prohibiting gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or

¹³ Pierre Becquey, “Fantasy Football Beginner’s Guide; Get Started in Five Easy Steps,” ESPN, August 19, 2022, https://www.espn.com/fantasy/football/story/_/id/34389554/fantasy-football-beginners-how-play-fantasy-football-2022; “ESPN Fantasy Basketball 101: How to Play,” ESPN, October 4, 2023, https://www.espn.com/fantasy/basketball/story/_/id/20783155/espn-fantasy-basketball-101-how-play.

¹⁴ Lenny Pappano, “Best Way to Draft Fantasy Football,” Draft Sharks, accessed April 9, 2024, <https://www.draftsharks.com/kb/best-way-to-draft-fantasy-football#:~:text=For%20example%2C%20QB%20is%20the,waiting%20on%20QBs%20and%20TEs>.

¹⁵ “Salary Cap Draft,” ESPN, <https://support.espn.com/hc/en-us/articles/360000037931-Salary-Cap-Draft>.

¹⁶ Jeremy M. Evans, “Weekly Column: Do Salary Caps Work in Professional Sports?” *California Sports Lawyer*, October 23, 2023, <https://www.cslegal.com/weekly-column-do-salary-caps-work-in-professional-sports/>.

¹⁷ Gary Davenport, “2024 NFL Free Agency: Bargain Options for the 10 Teams in the Worst Salary-Cap Shape,” Bleacher Report, February 16, 2024, <https://bleacherreport.com/articles/10109527-2024-nfl-free-agency-bargain-options-for-the-10-teams-in-the-worst-salary-cap-shape>.

¹⁸ Nathan Zegura, Adam Augustyn, “Fantasy Sport.” *Encyclopedia Britannica*, August 2, 2023, <https://www.britannica.com/sports/fantasy-sport>; 31 U.S.C. §§ 5361-5367 (2006).

wager that involves the use of the Internet and that is unlawful under any federal or state law.”¹⁹ Under its own definitions, the UIGEA specifically excludes, from its definition of gambling, “participation in any fantasy or simulation sports game or educational game or contest . . . [where] all winning outcomes reflect the relative knowledge and skill of the participants.”²⁰ The language relating to “all winning outcomes reflect[ing] the relative knowledge and skill of the participants” seems to echo a historical standard that regulates a game based on whether the game is skill-based or chance-based.²¹ Under that standard, games that require more skill, such as poker or Tetris, are less strictly regulated than games that involve more chance, such as roulette.²²

Since its appearance in the fantasy sports world, DFS has grown in popularity and evolved into different variants or contest configurations. FanDuel and DraftKings both offer a similar suite of DFS contest types. These include standard draft contests, in which contestants assemble their fantasy team by selecting players for each of multiple team positions, and salary cap contests, in which the sum of relative values of a team’s drafted players must not exceed a fixed salary cap threshold.²³ Because of their transient nature, these FanDuel and DraftKings DFS contests do not determine their winners and losers based on a win-loss record collected over a season and instead rely on unique scoring or settlement methods. These include a head-to-head method where just two players pit their respective teams against each other, and a “50/50” method where the top

¹⁹ “Unlawful Internet Gambling Enforcement Act of 2006 Overview,” Federal Deposit Insurance Corporation (FDIC), <https://www.fdic.gov/news/financial-institution-letters/2010/fil10035a.pdf>.

²⁰ 31 U.S.C. § 5362(1)(E)(ix).

²¹ “Game of chance,” Wikipedia, The Free Encyclopedia, https://en.wikipedia.org/w/index.php?title=Game_of_chance&oldid=1211331959 (accessed April 9, 2024); James McManus, “No More Bluffing,” *New York Times*, August 24, 2012, <https://www.nytimes.com/2012/08/25/opinion/poker-an-american-pastime-and-a-game-of-skill.html>. Poker, for example, has recently been classified as a game of skill instead of a game of chance based on statistical evidence.

²² Michael Orkin, “Games of Chance and Games of Skill,” *Chance*, <https://chance.amstat.org/2021/11/games/>.

²³ “Snake Draft Rules,” FanDuel, <https://www.fanduel.com/snake-draft-rules>.

scoring half of an entire population of fantasy teams are crowned as winners and earn payouts accordingly.²⁴

The newer operators appearing on the scene, including PrizePicks and Sleeper Picks, offer their own twist on DFS contests. Both PrizePicks and Sleeper Picks present, to a user, projected performance metrics for each of a multitude of players competing in real-life matches that day.²⁵ Depending on the sport, these include, for example, a projected number of touchdowns, a projected number of yards, a projected aggregate metric (e.g., “Total Runs, Hits & RBIs” for a baseball player), and a projected number of turnovers.²⁶ On the PrizePicks and Sleeper Picks platforms, a user assembles a fantasy team “by selecting two to eight statistical player projections, comprised of at least two players from multiple teams” and “predict[ing] whether each selected player will gain more or less than various projected performance metrics in the game.”²⁷ If the user is correct on each and every one of their predictions, the user is crowned a winner and earns a payout.²⁸ And as stated, the only constraints that limit which players can be selected for the fantasy team are real-life team membership and arbitrary size limits for the fantasy team. With PrizePicks, a player can even “combine NFL player projections with sports like the NBA, MLB, NHL, NCAAB, NCAAF, PGA, esports, and much more!”²⁹

Outside the world of fantasy sports, sports betting today receives different treatment from jurisdiction to jurisdiction, and the UIGEA characterizes itself as not “altering, limiting, or

²⁴ “Which Types of Fantasy Contests Are Available?” FanDuel, <https://support.fanduel.com/s/article/Which-types-of-contests-are-available>.

²⁵ “How to Play PrizePicks | PrizePicks Daily Fantasy Sports,” PrizePicks, March 31, 2024, <https://www.prizepicks.com/resources/how-to-play-prizepicks>; “Sleeper Picks Basics,” Sleeper, <https://support.sleeper.com/en/articles/5556078-sleeper-picks-basics>.

²⁶ “Total Runs, Hits & RBIs,” BookMaker, <https://get.bookmaker.help/hc/en-us/articles/14556149262609-Total-Runs-Hits-RBIs>.

²⁷ “How to Play PrizePicks | PrizePicks Daily Fantasy Sports,” PrizePicks; “Sleeper Picks Basics,” Sleeper.

²⁸ “How to Play PrizePicks | PrizePicks Daily Fantasy Sports,” PrizePicks; “Sleeper Picks Basics,” Sleeper.

PrizePicks also offers Flex Play, where “[o]ne or two of your picks can lose and you can still get paid out.”

²⁹ “Daily Fantasy Made Easy,” PrizePicks, <https://www.prizepicks.com/sport/nfl>.

extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.”³⁰ In some jurisdictions, like Tennessee and Wyoming, online sports betting is legal while in-person sports betting remains outlawed.³¹ In California, both online sports betting and in-person sports betting are illegal and remain so despite recent legalization efforts in 2022.³²

One popular form of sports betting includes proposition bets and parlays thereof.³³ In contrast to moneyline bets and spread bets that wager on the overall outcome of a sports match, proposition bets (“props”) can relate to the performance of a specific player.³⁴ Using American football as an example, a bettor can wager a prop bet on whether a player will score above or below a projected number of touchdowns determined by the operator (e.g., a casino or sportsbook), whether the player will gain above or below a projected number of yards, and the like.³⁵ A projected metric is carefully set by the operator to induce a balanced amount of wagered money on either side of the projected metric, enabling the operator to manage risk and avoid large payout losses.³⁶ A bettor can also parlay multiple prop bets together, and those props can be placed on different players.³⁷ But still, prop parlays remain a form of sports betting and are therefore prohibited in some jurisdictions.

³⁰ Chris Bengel and Shanna McCarriston, “U.S. Sports Betting: Here is Where All 50 States Currently Stand on Legalizing Online Sports Betting Sites,” *CBS Sports*, November 17, 2023, <https://www.cbssports.com/general/news/u-s-sports-betting-here-is-where-all-50-states-currently-stand-on-legalizing-online-sports-betting-sites/>; 31 U.S.C. § 5361(b).

³¹ Bengel and McCarriston, “U.S. Sports Betting.”

³² Bengel and McCarriston, “U.S. Sports Betting.”

³³ Devon Platana and Brian Pempus, “How Does Sports Betting Work?” *Forbes*, February 6, 2024, <https://www.forbes.com/betting/guide/how-does-sports-betting-work/>.

³⁴ Platana and Pempus, “How Does Sports Betting Work?”

³⁵ Platana and Pempus, “How Does Sports Betting Work?”

³⁶ Matt Metcalf, “How Lines Are Set: An Oddsmakers Perspective,” Circa Las Vegas, <https://www.circalasvegas.com/blog/sportsbook/from-the-experts/article/how-lines-are-set-an-oddsmakers-perspective/>.

³⁷ Luke Lindholm, “What Is a Prop Bet? A Sports Prop Bet Explained,” *Michigan Live*, January 30, 2024, <https://www.mlive.com/betting/guides/prop-bets/>. Some player props are inter-linked and correlated, thus increasing

III. DISCUSSION

Inconsistent regulation occurs in jurisdictions that permit fantasy sports but prohibit sports betting. The contests offered by newer DFS operators facilitate prop parlay bets in all but name. A “fantasy team” comprising a combination of player performance predictions is created, judged, and rewarded in a manner indistinguishable from a parlay of player prop bets. As a result, a sports fan receives a location restriction message in their casino/sportsbook app when attempting to place a proposition parlay bet, but the fan is uninhibited from wagering and winning money on a “fantasy team” comprising the same predictions via the PrizePicks or Sleeper Picks app. Thus, legal exemptions identifying “fantasy sports” by name only are vulnerable to exploitation, warranting a standard by which a contest’s use of the name “fantasy sports” can be scrutinized.

As proposed here, an effective standard should measure whether, or to what extent, the contest sufficiently simulates the management experiences or challenges associated with a real-life sports team. A contest that is reasonably structured to simulate those real-life management experiences would earn the classification of fantasy sports and any legal exemptions associated therewith. Otherwise, if a contest is divorced or agnostic to the fundamental experiences of managing a real-life sports team, the contest would be scrutinized as a fantasy sports imposter. How closely a contest adheres to and simulates real-life management experiences can be shown at least from the rules and constraints placed upon contestants, such as with respect to fantasy team construction. Relatively unrestrained and unguided contest gameplay would be regulated separately from fantasy sports and instead be grouped with sports gambling.

This simulation standard would be effective in dividing the current landscape of DFS operators. Consider FanDuel’s standard draft DFS contests and salary cap DFS contests. Each of

the likelihood of parlays thereof cashing. “However, sportsbooks are aware of this correlation and price it into the odds.”

these DFS contests retain the simulation gameplay that is incorporated into traditional fantasy sports. For example, in FanDuel's standard draft DFS contest, contestants are constrained by positional team structure when assembling their fantasy team. As a result, contestants must exercise position-specific talent evaluation and make prioritizations between team positions to maximize a likelihood of winning, thus mirroring the work that real-world team managers must do to manage their sports teams. A similar level of simulated strategy is imposed in FanDuel's salary cap DFS contests.³⁸

But on the other side, the contests operated by PrizePicks and Sleeper Picks at best place minimal importance on such strategic considerations. First, PrizePicks and Sleeper Picks have configured their contests without any constraints that enforce team-level strategy; the team size requirement is an implementation choice, and the team membership requirement is simply a base characteristic of fantasy sports.³⁹ Second, contestants have no significant reason to take a team-level approach by considering, for example, synergies or tradeoffs between player positions because the contest outcome is judged based on the individual and independent result of each player prediction.

And not unimportantly, a fantasy contest with an insufficient degree of simulation results in fantasy teams that do not look and feel like real-life sports teams. FanDuel's standard draft DFS contests require contestants to select players for each position, and resultant fantasy teams could conceivably form the bones of actual teams in an alternate reality because of those player position constraints. Consider, for instance, a fantasy football team with a quarterback and wide receivers who belong to different real-life teams. The team's owner can easily picture an alternate reality

³⁸ If a FanDuel contestant is able to fully optimize the individual salary values (e.g., by selecting low value players who outperform their expectations), then the contestant will likely outperform the competition.

³⁹ A fantasy team whose players belong to only one real-life sports team is obviously not fantastical or an imagined hypothetical.

where the team's quarterback is throwing the football to those wide receivers, and the team's accumulation of points in the contest through each of those players can approximate that fantasy. A fantasy team in a salary cap DFS contest also has a realistic basis on account of a range of high-value players and low-value players, an effect observed in real-life sports leagues with salary caps.⁴⁰

On the other hand, non-constrained PrizePicks and Sleeper Picks contests result in fantasy teams that look simply like a random list of individual players rather than a cohesive team. As an illustrative example, a PrizePicks fantasy football team can be comprised of only Aaron Rodgers and Patrick Mahomes, but an NFL fan would strain to think of a hypothetical reality in which an NFL team roster would be built only on the combination of Rodgers and Mahomes.⁴¹

Textual and historical rationales support the adoption of this simulation standard. First, the simulation standard is consistent with and supported by existing statutory language. The UIGEA of 2006 permits "any fantasy or simulation sports game,"⁴² thus already suggesting a connection between fantasy games and simulation. Implementation of the standard could be based upon this text or require minimal amendments or additions to the statute.

Additionally, the simulation standard remains true to the historical origins of fantasy sports and historical reasons why fantasy sports enjoyed different treatment than sports gambling. A primary purpose of fantasy sports was to give sports fans an outlet to role play and apply their sports knowledge in a competitive setting. To be sure, fantasy sports frequently involve

⁴⁰ Cf. Brando Simeo Starkey, "Eliminating the NBA Salary Cap Could Do Away With Superteams Like the Warriors," *Andscape*, July 19, 2018, <https://andscape.com/features/eliminating-the-nba-salary-cap-could-do-away-with-superteams-like-the-warriors/>. Salary caps are generally seen as a means by which talent is equitably distributed across multiple teams in a league.

⁴¹ A Rodgers-Mahomes team would fail to convincingly capture the essence of a real-life football team, for its failure to capture real-life team dynamics like having both a running offense and a passing offense or simply a quarterback having receivers to whom he can throw the ball.

⁴² 31 U.S.C. § 5362(1)(E)(ix).

participation buy-ins and winner payouts. But this monetary dimension is a less prominent motivator for fantasy sports compared to the purely financial motivations in sports gambling, suggesting why fantasy sports was generally considered as less of a vice (and less needing of regulation) as sports gambling. Requiring some degree of simulation in a DFS contest would reduce the prominence of financial gain as a motivator for the DFS contest and holds the DFS contest closer to the historical purpose of fantasy sports.

Finally, this proposed simulation standard is more administrable and would be longer-lasting than other possible standards. For one, the skill-or-chance standard currently implemented in many gambling regulation laws is widely recognized as inconsistent and difficult to administer.⁴³ Whether a game is skill-based or chance-based is debatable and difficult to determine, as suggested by “the mountain of statistical evidence [from analysis of] 415 million hands” needed for poker to be ruled by a judge as a skill-based game.

Other potential inquiries only relate to specific implementation details that can be easily circumvented without addressing the core issues identified herein. Indeed, regulators can easily require PrizePicks constrain selection of player predictions to just one sports league, for example, but the departure from a fantasy or alternative reality experience would still persist. Some may suggest that DFS contests should be required to use fantasy point scoring that aggregate real-life player performance—a recognizable characteristic of traditional fantasy sports. But PrizePicks, Sleeper Picks, and most casino sportsbooks already allow predictions/wagers with respect to

⁴³ See generally Taggart, “Is Daily Fantasy a Form of Gambling Hidden by Skill?”; “Unregulated ‘Skill’ Machines Are Games of Chance, Say Two-Thirds of Americans Familiar With Them,” *American Gaming Association*, August 23, 2023, <https://www.americangaming.org/new/unregulated-skill-machines-are-games-of-chance-say-two-thirds-of-americans-familiar-with-them/>. Brent Schrottenboer, “New York Legalizes Daily Fantasy Sports,” *USA Today*, August 3, 2016, <https://www.usatoday.com/story/sports/2016/08/03/daily-fantasy-sports-fanduel-draftkings-legal-new-york/88039822/>. In 2015, the New York Attorney General declared that FanDuel and DraftKings “were illegal gambling operations and told them to cease and desist.” This attack on the New York DFS industry quickly ended by New York Governor quickly signing describing DFS as “games of skill.”

aggregate statistical categories (e.g., Total Runs, Hits & RBIs) and with respect to fantasy point scores. Thus, regulation based upon point scoring methods is less likely to be effective.

Another alternative is regulation based upon the inter-user competition nature of a contest, but this alternative may be overinclusive or overreaching. It is true that sports gambling, PrizePicks, and Sleeper Picks are not inherently head-to-head competitions; one patron's wager (or fantasy team) wins or loses with no regard to another patron's wager. But FanDuel's 50/50 contest method replaces head-to-head scoring with score ranking without compromising the core tenets of fantasy sports. Accordingly, regulation with respect to whether a contest incorporates head-to-head competition would reach contest types that should generally be permissible.

Therefore, the proposed standard would be effective in enforcing regulation of certain DFS operators, is supported by well-founded rationales, and robustly focuses on the important distinctions between fantasy sports and sports gambling.

IV. CONCLUSION

Fantasy sports and sports gambling have historically been treated as separate goalposts. Newer DFS operators have crossed the gap from fantasy sports to sports gambling, thus causing inconsistent regulatory treatments in multiple jurisdictions. Reference to "fantasy sports" in gambling regulation exceptions can be better defined as requiring some degree of simulation of the management experience of a real-life sports team. This additional scrutiny on the meaning of fantasy sports keeps these two goalposts at an appropriate width from one another, a width through which even Gronkowski can make a field goal.