

# A GAME OF SKILL OR CHANCE? WHY TEXAS SHOULD LEGALIZE DAILY FANTASY SPORTS

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## I. GETTING THE BALL ROLLING

*“There are some things that government should not do — and taking away our right to play fantasy football is one of the things government should not do.”<sup>1</sup>*

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\* J. D. Candidate, Texas Tech School of Law, 2019; B.A. Political Science, Texas Tech University, 2016. This comment is dedicated in loving memory of my grandmother, Olivia Sanchez. To my family and friends, thank you for your unwavering support—I am truly grateful to have each of you in my life. Finally, to everyone who helped me through the comment writing process, your hard work is greatly appreciated.

1. Bob Sechler, *Bill Would Make Daily Fantasy Sports Leagues Legal in Texas*, AUSTIN AM. STATESMAN (Apr. 3, 2017, 12:01 AM), <http://www.mystatesman.com/business/bill-would-make-daily-fantasy-sports-leagues-legal-texas/vfT7R6BYTUmakhHC5NnWCJ/> (providing a statement by Texas Representative Richard Peña Raymond).

Imagine turning a twenty-dollar investment into a seven-figure payday.<sup>2</sup> Al Zeidenfeld accomplished this feat not by winning the lottery but by winning a fantasy football game.<sup>3</sup> Al was not competing in an ordinary office pool fantasy football league; instead, he was competing against over 270,000 other contestants on the daily fantasy sports (DFS) site DraftKings.<sup>4</sup> Similar to Al, many DFS players have turned DFS into a lucrative business venture.<sup>5</sup> The incredible success of both DFS players and companies caught the attention of many people, including a few state attorneys general.<sup>6</sup> Currently, there are six states, including Texas, whose attorney general has declared DFS as games of chance that equate to illegal gambling.<sup>7</sup> On the other hand, massive DFS hosts, DraftKings and FanDuel, claim that DFS are predominantly games of skill, not illegal gambling.<sup>8</sup>

Gambling is defined as an “activity or practice of playing at a game of chance for money or other stakes.”<sup>9</sup> When people think of gambling, most envision a smoky casino full of patrons wagering their money in the hopes of striking a fortune.<sup>10</sup> Although this view is accurate, there has been a recent shift in popularity toward online gambling.<sup>11</sup> One of the most popular forms of online gambling is sports betting.<sup>12</sup> Some studies show that over 118 million Americans wager on sports every year.<sup>13</sup> In 1999, a federally funded study on gambling in the United States estimated that people wagered over \$380 billion on sports alone.<sup>14</sup> Today, the hottest and most controversial form of sports betting are DFS.<sup>15</sup> DFS sites, such as DraftKings and FanDuel, dominated the DFS industry and became household names due to their

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2. See Neil Greenberg, *How the Winner of DraftKings Millionaire Maker Built His Winning Roster*, WASH. POST (Sept. 21, 2016), [https://www.washingtonpost.com/news/fancy-stats/wp/2016/09/21/how-the-winner-of-draftkings-millionaire-maker-built-his-winning-roster/?utm\\_term=.bae4b0db2744](https://www.washingtonpost.com/news/fancy-stats/wp/2016/09/21/how-the-winner-of-draftkings-millionaire-maker-built-his-winning-roster/?utm_term=.bae4b0db2744).

3. See *id.*

4. *Id.*; see *infra* Section II.A (defining and discussing daily fantasy sports).

5. See Jonathan Bales, *Here's What it Takes to Make a Living Playing Fantasy Sports*, BUS. INSIDER (Nov. 6, 2013, 3:53 PM), <http://www.businessinsider.com/how-pros-play-fantasy-sports-2013-11>.

6. Dustin Gouker, *Attorney General Opinions on Daily Fantasy Sports*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/state-legality-of-dfs/> (last updated Dec. 1, 2018).

7. *Id.*

8. See *infra* Section II.C (discussing the myriad of legal issues surround DFS).

9. *Gambling*, DICTIONARY.COM, <http://www.dictionary.com/browse/gambling>.

10. See *Casino Gambling House*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/casino-gambling-house> (last visited Dec. 29, 2018).

11. Elaine S. Povich, *How Casinos, States Are Winning Big from Online Gambling*, HUFFINGTON POST (June 6, 2017, 9:49 AM), [https://www.huffingtonpost.com/entry/how-casinos-states-are-winning-big-from-online-gambling\\_us\\_5936b246e4b0cca4f42d9d5d](https://www.huffingtonpost.com/entry/how-casinos-states-are-winning-big-from-online-gambling_us_5936b246e4b0cca4f42d9d5d).

12. See Peter Keating, *How Much Sports Gambling Is Going on Out There?*, ESPN (July 10, 2012), <http://www.espn.com/espn/magazine/archives/news/story?page=magazine-20030804-article23>.

13. *Id.*

14. *Id.*

15. See *infra* Section II.A (describing DFS).

immense advertising campaigns.<sup>16</sup> DraftKings and FanDuel host thousands of online users who pay to compete for the chance to win money in daily or weekly contests.<sup>17</sup> Both DraftKings and FanDuel experienced success, earning a combined \$3 billion in revenues in 2015 alone.<sup>18</sup>

This Comment focuses on the history and legality of DFS in Texas.<sup>19</sup> Part II explains the basic concepts of DFS, highlights various forms of legal gambling in Texas, and discusses the legal battle that DFS companies experience in Texas.<sup>20</sup> Part III explains the importance of differentiating between games of skill and chance and how various states make this determination.<sup>21</sup> Part III provides a comparative analysis between states that have legalized DFS versus those that have outlawed DFS and discusses what states should consider while regulating DFS.<sup>22</sup> Part IV explains why Texas should change how it determines games of skill versus games of chance and offers a recommendation for how Texas can regulate DFS.<sup>23</sup> Finally, Part V emphasizes the impact that sports have in Texas and the benefits that legalizing DFS would have on the state.<sup>24</sup> Before delving into the legal issues involving DFS, it is important to gain a basic understanding of fantasy sports.

## II. LEARNING THE FUNDAMENTALS

Fantasy sports have been a fan favorite since its inception in the 1950s.<sup>25</sup> The first fantasy sports game was fantasy golf, which was created by Wilfred “Bill” Winkenbach shortly after World War II.<sup>26</sup> In 1962, Winkenbach and

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16. Alexandra Berzon, *Fantasy-Sports Sites Curtail Ad Spending*, WALL STREET J. (Aug. 1, 2016, 8:00 AM), <https://www.wsj.com/articles/fantasy-sports-rivals-slice-ad-spending-1470052800> (articulating that DraftKings and FanDuel spent a combined \$500 million on advertising in 2015).

17. Craig Bennett, *How Does DraftKings Work?*, HEAVY, <https://heavy.com/sports/2015/07/how-does-draftkings-work-promo-code-deposit-bonus-rules-legal/> (last updated Sept. 6, 2018, 3:22 PM).

18. Ashley Rodriguez, *How the \$7 Billion US Fantasy Football Industry Makes Its Money in 2017*, QUARTZ (Sept. 3, 2017), <https://qz.com/1068534/how-the-7-billion-us-fantasy-football-industry-makes-its-money-in-2017/>.

19. This Comment does not propose the legalization of gambling in Texas. Rather, the goal of this Comment is to make a case for why paid fantasy sports are distinctly different from illegal gambling and, thus, should be legal in Texas.

20. See *infra* Part II (discussing the history and basics of DFS).

21. See *infra* Part III (explaining the different tests states use in determining if DFS are games of skill or chance).

22. See *infra* Part III (comparing different states’ approaches to DFS).

23. See *infra* Part IV (recommending a plan for how Texas may legalize and regulate DFS).

24. See *infra* Part V (emphasizing the impact that DFS could have on Texas).

25. Nico Newman, *History of Fantasy Sports*, FANTASY-SPORT.NET (Apr. 4, 2017), <https://fantasy-sport.net/history-of-fantasy-sports/>. A fantasy sport is a game in which participants form virtual teams of real athletes to compete against one another. Participants earn points based on how the selected athletes perform during a real game. The team with the most points after all the athletes have played is the winner. See also Chris Isidore, *Fantasy Sports: What Is It, Anyway?*, CNN (Oct. 6, 2015, 5:13 PM), <http://money.cnn.com/2015/10/06/news/companies/fantasy-sports-101/index.html>.

26. Corinne Green, *‘Wink’: Wilfred ‘Bill’ Winkenbach Invented Fantasy Football Way Back in 1962 with GOPPPL in Oakland*, NEWSNET5 (Sept. 11, 2014, 10:29 AM), <https://web.archive.org/web/>

two writers from the *Oakland Tribune*—Scotty Stirling and George Ross—developed the concept of fantasy football.<sup>27</sup> Fantasy sports gained its notoriety in 1997 when CBS developed the first fantasy sports website.<sup>28</sup> It did not take long for other sports media outlets to recognize the popularity of fantasy sports and develop websites of their own.<sup>29</sup>

From the office to the fraternity house and everywhere in between, sports fans from all walks of life put their knowledge of sports to the test by competing against each other in fantasy sports.<sup>30</sup> People participate in fantasy sports by forming a group of team “owners” who are usually between eight and twelve people, and conduct a “draft,” where the owners select professional athletes for their virtual team.<sup>31</sup> After the draft, teams compete against each other on a weekly basis; the athletes are scored based upon their statistics at the end of each game.<sup>32</sup> Whichever team scores the most points at the end of the week is the winner.<sup>33</sup> Players can choose to participate in fantasy sports leagues for free or with money on the line.<sup>34</sup>

#### A. Daily Fantasy Sports Enters the Game

In 2007, the landscape of fantasy sports forever changed when the concept of DFS was introduced.<sup>35</sup> Chris Fargis, a former professional poker player, created the first DFS site, Instant Fantasy Sports.<sup>36</sup> DFS operate similarly to traditional fantasy sports; however, while traditional fantasy sports games last an entire season for any particular sport, DFS allow contestants to draft players on a daily basis and pay money to enter contests in which the winners are determined at the end of the day (or weekend for football).<sup>37</sup>

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20150929163914/http://www.newsnet5.com/sports/wink-wilfred-bill-winkenbach-invented-fantasy-football-way-back-in-1962-with-gopppl-in-oakland.

27. *Id.* Fantasy football is the most popular fantasy sport to play in America with over 26 million players competing every Sunday. *Id.*

28. *Id.*

29. *Id.*

30. See Newman, *supra* note 25.

31. See generally Jim McCormick, *So You Want to Play Fantasy Football?*, ESPN (July 9, 2010), <http://www.espn.com/fantasy/football/ffl/story?page=nfldk2k10howtoplay> (explaining the general rules of fantasy football).

32. See *Rules - Standard Scoring System*, ESPN (June 23, 2005), <http://www.espn.com/fantasy/football/ffl/story?page=fflrulesstandardscoring>.

33. See Newman, *supra* note 25.

34. See *id.*

35. See Jay Caspian Kang, *How the Daily Fantasy Sports Industry Turns Fans into Suckers*, N.Y. TIMES (Jan. 6, 2016), [https://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html?\\_r=0](https://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html?_r=0).

36. *Id.*

37. Fitz Tepper, *WTF Is Daily Fantasy Sports?*, TECHCRUNCH, <https://techcrunch.com/2016/12/11/wtf-is-daily-fantasy-sports/> (last visited Dec. 29, 2018).

At first, DFS sat the bench while traditional fantasy sports remained in the spotlight.<sup>38</sup> However, in 2013, Major League Baseball (MLB) bought a financial stake in the DFS site DraftKings.<sup>39</sup> Then, in the summer of 2014, the National Basketball Association (NBA) formed a partnership with the DFS site FanDuel, which gave the NBA a 2.5% ownership interest in the company.<sup>40</sup> Landing these massive endorsements led both companies to success during their first four years of operation.<sup>41</sup>

The main source of income for sites like FanDuel and DraftKings comes from the entry fees contestants pay to enter into a contest.<sup>42</sup> The DFS site takes a cut of the entry fees, and the rest is paid out to the winners.<sup>43</sup> For example, FanDuel takes a 10% cut of the earnings from every contest.<sup>44</sup> In 2015, DraftKings and FanDuel raked in a combined \$3 billion from entry fees alone.<sup>45</sup>

Over four million Texans play fantasy sports every year, and a large number of those have participated in DFS as well.<sup>46</sup> Even some of the largest sports teams in Texas—the Dallas Cowboys, San Antonio Spurs, and Texas Rangers—sponsored DFS sites.<sup>47</sup> However, with great success comes great risk, and DFS companies soon learned the harsh realities of Texas gaming laws.<sup>48</sup>

### *B. Home Court Advantage: Texas's Stance on Gambling*

In order to understand Texas gambling laws, it is helpful to consider the history of gambling in Texas. Gambling became popular in Texas during the “Wild West” era of the nineteenth century, particularly along the Mexican border.<sup>49</sup> During that time, most gambling operations were conducted in saloons, where patrons gambled by playing card games.<sup>50</sup> These operations

38. *See id.*

39. Adam Kilgore, *Daily Fantasy Sports Web Sites Find Riches in Internet Gaming Law Loophole*, WASH. POST (Mar. 27, 2015), [https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-d172-11e4-a62f-ee745911a4ff\\_story.html?utm\\_term=.280e49e2e97a](https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-d172-11e4-a62f-ee745911a4ff_story.html?utm_term=.280e49e2e97a).

40. *Id.*

41. *See id.* (“In its four-year history, the company says, DraftKings has raised \$74.8 million in venture capital. FanDuel has raised \$88 million.”).

42. Rodriguez, *supra* note 18.

43. *Id.*

44. *Id.*

45. *Id.*

46. *See* Sanya Mansoor, *For Daily Fantasy Sports Sites, Legal Limbo in Texas Set to Continue*, TEX. TRIB. (June 1, 2017, 4:00 PM), <https://www.texastribune.org/2017/06/01/fantasy-football-fans-lose-legislature-gear-national-convention/>.

47. Dustin Gouker, *DFS Partnership/Sponsorship Tracker*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/dfs-sponsorship-tracker/> (last visited Dec. 29, 2018).

48. *See* TEX. PENAL CODE ANN. § 47.02 (West 2017).

49. *See* Ruben E. Ochoa, *Maverick County*, TEX. ST. HIST. ASS'N (June 15, 2010), <http://tshaonline.org/handbook/online/articles/hcm06>.

50. *See id.*

became illegal when the Texas Constitution was ratified in 1876.<sup>51</sup> However, during the Great Depression, Texas loosened its strict gambling laws and legalized pari-mutuel betting.<sup>52</sup> Pari-mutuel betting is a form of betting in which bettors place wagers against other bettors instead of placing wagers against the bookmaker.<sup>53</sup> All wagers are then placed in a “pool” and shared equally among the winners.<sup>54</sup> Pari-mutuel betting is most common in horse racing.<sup>55</sup> This type of betting did not stay legal for long and was outlawed in 1937.<sup>56</sup> Fifty years later, in 1987, pari-mutuel betting became legal again.<sup>57</sup> Even though pari-mutuel betting is legal in Texas, it remains a highly regulated industry.<sup>58</sup>

Another form of legal gambling in Texas is state-regulated charitable bingo.<sup>59</sup> The Texas Legislature approved charitable bingo in 1981 with the goal of raising money for Texas charities.<sup>60</sup> In 2016, over 15.2 million people packed into bingo halls around the state; sales amounted to over \$761 million with \$30 million of those revenues given to charities.<sup>61</sup> The Bingo Enabling Act was signed into law during the 76th Legislative Session.<sup>62</sup> This Act established the foundation by which charitable bingo is conducted in the State of Texas.<sup>63</sup> Organizations that wish to participate in charitable bingo must be authorized to do so under the Texas Administrative Code.<sup>64</sup> The Texas Administrative Code requires organizations wishing to participate in charitable bingo to pay registry fees, acquire licenses to operate, and assign a bingo “chairperson.”<sup>65</sup> These regulations must be adhered to or else the operators will face criminal penalties.<sup>66</sup> Although bingo fits within the

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51. See TEX. CONST. art. III, § 47. The Texas Constitution declares all forms of gambling illegal but allows the legislature to legalize certain bingo games. *Id.*

52. Julie Domel, *From the Vault: Betting on Horse Racing Made Illegal in Texas in 1937. . . Again*, SAN ANTONIO EXPRESS (Aug. 19, 2010, 4:08 PM), <http://blog.mysanantonio.com/vault/2010/08/from-the-vault-betting-on-horse-racing-made-illegal-in-texas-in-1937-again/>.

53. *Guide to Pari-Mutuel Betting*, GAMBLINGSITES.COM, <https://www.gamblingsites.com/sports-betting/types/pari-mutuel/> (last visited on Dec. 29, 2018).

54. *Id.*

55. *Id.*

56. Domel, *supra* note 52.

57. *Id.*

58. See *id.*; see also TEX. CONST. art. III, § 47 (permitting the legalization and regulation of certain types of gambling).

59. See Anna M. Tinsley, *Texas Opposes Gambling, but Keeps Its Hands Off Bingo*, STAR-TELEGRAM (June 15, 2017, 10:50 AM), <http://www.star-telegram.com/news/politics-government/state-politics/article156313924.html>.

60. *Id.*

61. *Id.*

62. See TEX. OCC. CODE ANN. § 2001 (West 1999).

63. See *id.*

64. See 16 TEX. ADMIN. CODE § 402.400 (West 2018) (Texas Lottery Commission, General Licensing Provisions).

65. *Id.*

66. See *id.*

definition of gambling, State Representative Matt Krause says, “[t]here are no efforts to get rid of bingo . . . .”<sup>67</sup>

Another recent form of legal gambling in Texas is the state-run lottery.<sup>68</sup> Initially, the Texas Constitution explicitly outlawed lotteries, unless they were used for charitable purposes by non-profit organizations such as churches and volunteer fire departments.<sup>69</sup> However, in 1991, Texas voters approved a constitutional amendment to authorize lottery sales in Texas.<sup>70</sup> Then, in 1993, the Texas Legislature established the Texas Lottery Commission, whose role was to regulate the Texas Lottery.<sup>71</sup> One of the more popular aspects of the Texas Lottery is the amount of money it donates to education and veterans.<sup>72</sup> The two forms of gambling described above experienced their fair share of criticism, but at the end of the day there was an overriding interest of Texans who pushed the legislature to legalize these forms of gambling.<sup>73</sup>

Today, the State of Texas considers gambling to be a criminal offense.<sup>74</sup> In fact, the Texas Constitution banned all forms of gambling when it was adopted in 1876.<sup>75</sup> The Texas Penal Code explicitly states that making a bet on “the partial or final result of a game or contest or on the performance of a participant in a game or contest” is considered gambling.<sup>76</sup> However, the Penal Code provides that

(b) It is a defense to prosecution under this section that: (1) the actor engaged in gambling in a private place; (2) no person received any economic benefit other than personal winnings; and (3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.<sup>77</sup>

An example of this exception is a traditional fantasy football league in which a group of friends all pay to compete, and the winners take home a percentage

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67. Tinsley, *supra* note 59.

68. See *Texas Lottery Commission History*, TEX. LOTTERY COMMISSION, [http://www.txlottery.org/export/sites/lottery/About\\_Us/Milestones/](http://www.txlottery.org/export/sites/lottery/About_Us/Milestones/) (last visited Dec. 29, 2018).

69. See TEX. CONST. art. III, § 47.

70. *Texas Lottery Commission History*, *supra* note 68.

71. *Id.*

72. *22 Billion in 22 Years*, TEX. LOTTERY COMMISSION, [https://www.txlottery.org/export/sites/lottery/Supporting\\_Education\\_and\\_Veterans/](https://www.txlottery.org/export/sites/lottery/Supporting_Education_and_Veterans/) (last visited Oct. 8, 2018) (“[T]he Texas Lottery has contributed \$22 billion to the Foundation School Fund, which supports public education in Texas. . . . [T]he Texas Lottery has contributed more than \$101 million for veterans programs.”).

73. See *supra* Section II.B (describing the inception of the Lottery Commission and charitable bingo in Texas).

74. See TEX. PENAL CODE ANN. § 47.02 (West 2017).

75. TEX. CONST. art. III, § 47.

76. PENAL § 47.02(a)(1).

77. *Id.* §§ 47.02(b)(1)–(3).

of the total amount that was entered.<sup>78</sup> This competition would meet all three requirements because it was private, no one earned any benefit other than personal winnings, and each competitor had an equal chance to win.<sup>79</sup> DFS do not fall into this exception because the operator takes a cut of the winnings, thus constituting an economic benefit other than personal winnings.<sup>80</sup> DFS operators acknowledge that they do not fall within this statutory exception, but as you will see later, there is another part of the Texas Penal Code that may justify legalizing DFS.<sup>81</sup>

### *C. Rejected! Legal Issues Involving Daily Fantasy Sports*

Before discussing the legal issues that DFS sites have faced in Texas, it is helpful to understand how the federal government has attempted to regulate gambling. The gaming industry is prevalent across the United States.<sup>82</sup> State gaming commissions regulate casinos and all forms of gambling within a state.<sup>83</sup> A state's constitution and statutes give authority to its commissions.<sup>84</sup> The power to regulate gambling comes from the state's police power "to protect the health, safety, welfare and morality of its residents."<sup>85</sup>

Although the power to regulate gaming is mostly left to the states, the federal government has made its presence known from time to time.<sup>86</sup> The federal government is allowed to regulate Internet gambling because of its power to regulate interstate commerce under the Commerce Clause.<sup>87</sup> Internet gambling falls within Congress's authority to regulate because "[g]ambling over the Internet is *per se* interstate commerce because accessing the Internet requires the use of instrumentalities of interstate commerce . . . ."<sup>88</sup> As such, Congress has exercised its authority by passing laws such as the Professional and Amateur Sports Protection Act (PASPA) and the Unlawful Internet Gambling Enforcement Act (UIGEA).<sup>89</sup>

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78. See Benson Varghese, *Is Your Fantasy Football League Illegal in Texas?*, VARGHESE SUMMERSETT (Feb. 12, 2017), <https://www.versustexas.com/criminal/fantasy-football-legal-in-texas/>.

79. *Id.*

80. *Id.*

81. See *infra* Section II.C (describing the different congressional approaches to DFS).

82. WALTER T. CHAMPION, JR. & I. NELSON ROSE, *GAMING LAW IN A NUTSHELL* 114 (West Academic eds., 2d ed. 2017).

83. *Id.*

84. *Id.*

85. *Id.*

86. See Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704 (1992) (declared unconstitutional by *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018)); see also 31 U.S.C. § 5361 (2006) (recognizing that the National Gambling Impact Study found a need to regulate Internet gambling wire transfers).

87. See Joel Weinberg, *Everyone's a Winner: Regulating, Not Prohibiting, Internet Gambling*, 35 SW. U. L. REV. 293, 301 (2006).

88. See *id.*

89. See 28 U.S.C. §§ 3701–3704; see also 31 U.S.C. § 5361 (showing the need to regulate Internet gambling wire transfers).



### 1. Professional and Amateur Sports Protection Act

In 1992 Congress passed PASPA, which essentially prohibited sports betting with certain exceptions.<sup>90</sup> Some of these exceptions include the following: dog tracks, horse tracks, and pari-mutuels.<sup>91</sup> Senator Bill Bradley, who was a former professional basketball player, supported the passage of PASPA, stating: “State-sanctioned sports betting . . . conveys the message that sports are more about money than personal achievement and sportsmanship.”<sup>92</sup> However, PASPA did not entirely outlaw all sports betting.<sup>93</sup> For example, states such as Delaware, Montana, Oregon, and Nevada were allowed to have their sport lotteries “grandfathered” in.<sup>94</sup> Further, every state had the opportunity to implement sports betting within a one-year time frame from the passage of PASPA.<sup>95</sup>

States that have legislation legalizing DFS seem to be at odds with the federal PASPA.<sup>96</sup> However, PASPA says that only the United States Attorney General or a professional or amateur sport league, whose competitive game is the alleged basis of the violation, may bring a lawsuit under PASPA.<sup>97</sup> Many professional sport leagues have partnerships with DFS sites so they would be unlikely to sue under PASPA, but the same cannot be said about the current United States Attorney General.<sup>98</sup>

### 2. Unlawful Internet Gambling Enforcement Act

In 2006, Congress passed the UIGEA.<sup>99</sup> The UIGEA expressly prohibits “[any] person [who is] engaged in the business of betting or wagering [from] knowingly accept[ing payments], in connection with the participation of another person in unlawful Internet gambling . . . .”<sup>100</sup> The controversial

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90. See 28 U.S.C. §§ 3701–3704; 31 U.S.C. § 5361.

91. Robert M. Jarvis, *Can the Federal Government Force States to Ban Sports Betting?*, 45 PREVIEW U.S. SUP. CT. CASES 72 (2017).

92. *Id.* (alterations in original).

93. *Id.*

94. *Id.*

95. *Id.*

96. See Dustin Gouker, *Calling a Bill ‘Daily Fantasy Sports Betting Regulation’ Isn’t a Great Idea*, LEGAL SPORTS REP. (June 28, 2016, 11:17 AM), <https://www.legalsportsreport.com/10608/paspa-and-fantasy-sports-regulation/>.

97. See Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704 (1992); Gouker, *supra* note 96.

98. Gouker, *supra* note 96. These implications are beyond the scope of this Comment, but the Supreme Court has recently declared PASPA to be unconstitutional in *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018). See Jarvis, *supra* note 91.

99. 31 U.S.C. § 5361 (2006).

100. *Id.* § 5363.

passage of the UIGEA led to the demise of many online casinos.<sup>101</sup> However, the UIGEA contains “carve-out” language that excludes fantasy sports contests from being deemed unlawful under the Act.<sup>102</sup> DFS sites have relied upon this carve-out language to justify their legality.<sup>103</sup> However, the Senate report on UIGEA states that the Act is not intended to legalize fantasy sports contests; states are free to determine whether or not fantasy sports contests are illegal.<sup>104</sup> The intent of the UIGEA was not to criminalize online gambling; rather, the UIGEA was intended to “attack[] the mechanism by which online gambling is funded.”<sup>105</sup>

Both the UIGEA and PASPA attempt to regulate the online gambling industry, which has proven to be challenging.<sup>106</sup> Since there are no federal statutes that specifically aim to regulate DFS, that job has been left to the states.<sup>107</sup>

#### *D. One on One: Texas v. Daily Fantasy Sports*

In 2014, DFS became increasingly popular in Texas due to companies, such as DraftKings and FanDuel, landing major marketing deals with ESPN and FOX Sports.<sup>108</sup> However, the DFS industry fell into controversy in 2015 when an employee for DraftKings won \$350,000 on FanDuel by using insider trading knowledge.<sup>109</sup> This scandal grabbed the attention of many people, including Texas’s Attorney General Ken Paxton.<sup>110</sup>

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101. See Gerd Alexander, *The U.S. on Tilt: Why the Unlawful Internet Gambling Enforcement Act Is a Bad Bet*, 2008 DUKE L. & TECH. REV. 1, 20 (2008) (explaining how the UIGEA language was attached to an unrelated port-security bill just before it was voted on).

102. Elizabeth Steyngrob, *Real Liabilities for Fantasy Sports: The Modern Inadequacies of Our Archaic Legal Framework*, 18 U. PA. J. BUS. L. 1207, 1226 (2016).

103. *Id.*

104. *Id.*; see also Kevin P. Braig, *Daily Fantasy Sports Firestorm*, 30 OHIO L. 12, 13 (2016) (explaining that the UIGEA did not intend to regulate or authorize fantasy sports contests).

105. Steyngrob, *supra* note 102, at 1225.

106. See Weinberg, *supra* note 87, at 296.

107. Steyngrob, *supra* note 102.

108. Darren Heitner, *An Abbreviated History of FanDuel and DraftKings*, FORBES (Sept. 20, 2015, 9:41 AM), <https://www.forbes.com/sites/darrenheitner/2015/09/20/an-abbreviated-history-of-fanduel-and-draftkings/#74ab6a957564>. DraftKings entered into a \$250 million advertising deal with ESPN, but this agreement fell through after DraftKings became embroiled in legal battles. Richard Sandomir, *DraftKings-ESPN Deal Ends*, N.Y. TIMES (Feb. 9, 2016), <https://www.nytimes.com/2016/02/10/sports/draftkings-espn-deal-ends.html>.

109. Marc Edelman, *The Daily Fantasy Sports Scandal: Why Insider Trading May Be Just Tip of the Iceberg for DraftKings*, FORBES (Oct. 15, 2015, 11:12 AM), <https://www.forbes.com/sites/marcedelman/2015/10/15/the-daily-fantasy-sports-scandal-why-insider-trading-may-be-just-tip-of-the-iceberg-for-draftkings/#c3930831749a>.

110. See Tex. Att’y Gen. Op. No. KP-0057 (2016).

*I. Texas Attorney General on DFS*

On January 19, 2016, Texas Attorney General Ken Paxton issued a non-binding opinion calling DFS a form of illegal gambling.<sup>111</sup> The attorney general's reasoning for his opinion was that DFS involve the element of "chance" when participants acquire players for their fantasy teams, which violates Texas gambling laws.<sup>112</sup> Specifically, the opinion cites examples in which "chance" may play a role in any given DFS contest.<sup>113</sup> The opinion explains that even the slightest element of chance is enough, even if skill is a predominate factor.<sup>114</sup>

The attorney general also took issue with the fact that players have to pay an entry fee to participate in DFS contests and likened it to a "bet" as defined by the Texas Penal Code.<sup>115</sup> The Texas Penal Code defines a bet as "an agreement to win or lose something of value solely or partially by chance."<sup>116</sup> However, a bet does not include "an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest . . ."<sup>117</sup> The attorney general explained that this "actual-contestant" exception should only apply to those participating in sporting events and not "those who pay entry fees for a chance to win a prize from forecasting the outcome of the events."<sup>118</sup> Texas courts have not considered the actual-contestant exclusion from the definition of bet.<sup>119</sup>

At the end of his opinion, the attorney general briefly touched on the legality of season-long fantasy sports contests.<sup>120</sup> He explained that if the house charges and retains a portion of the "participation fee" for the season-long contest, then it is considered illegal gambling.<sup>121</sup> However, if the

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111. *Id.*

112. *See* TEX. PENAL CODE ANN. § 47.02 (West 2017); Tex. Att'y Gen. Op. No. KP-0057, at 4.

113. *See* Tex. Att'y Gen. Op. No. KP-0057, at 4–5. The opinion states that many elements of chance, such as injuries, weather conditions, and the calls from refereeing officials, play a large role in the outcome of DFS games. *See id.*

114. *See id.* *But see* Adams v. Antonio, 88 S.W.2d 503, 505 (Tex. Civ. App.—Waco 1935, writ ref'd) (agreeing with the notion that determining whether the gaming statute is violated is decided on whether chance predominates skill).

115. PENAL § 47.02; Tex. Att'y Gen. Op. No. KP-0057, at 6–7.

116. PENAL § 47.01(1).

117. *Id.* § 47.01(1)(B). The attorney general proclaims that a person's "skill" in selecting a player for their team "has no impact on the performance of the player or the outcome of the game." Tex. Att'y Gen. Op. No. KP-0057, at 4. Essentially, the attorney general argues that there will always be the partial element of chance no matter how skilled an individual is in picking their team. *Id.*

118. Tex. Att'y Gen. Op. No. KP-0057, at 6.

119. *Id.* Although Texas courts have not considered the "actual-contestant exclusion," the attorney general reached his conclusion by looking at a former Texas attorney general's opinion from 1994. *Id.*

120. *Id.* at 7–8.

121. *Id.*

participation fee is paid out to all of the contestants, the contest will fall within the Texas Penal Code's defense-to-prosecution exception.<sup>122</sup>

## 2. *FanDuel and DraftKings Respond*

Shortly after the opinion was released, FanDuel reached an agreement with the attorney general in which it would stop offering paid contests in Texas, and, in return, the attorney general would not pursue any legal action against FanDuel.<sup>123</sup> Although FanDuel reached this agreement with the attorney general, it explicitly stated that it believed his opinion was an incorrect interpretation of Texas law and that FanDuel engaged in no misconduct.<sup>124</sup>

DraftKings, on the other hand, decided to sue the attorney general seeking a declaratory judgment in a district court in Dallas County “on whether daily fantasy sports games are legal in Texas.”<sup>125</sup> In its petition, DraftKings first argued that DFS are games of skill and do not constitute illegal gambling.<sup>126</sup> DraftKings furthered this argument by claiming that its operations should fall under the “bona fide contest for the determination of skill” exception to the legal definition of “bet.”<sup>127</sup> Contrary to the attorney general's opinion, DraftKings claimed that DFS are overwhelmingly games of skill because players must “master complex econometric and statistical concepts” to be successful.<sup>128</sup> DraftKings likens the participants in its contests to real-world general managers who compete against other general

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122. PENAL § 47.02 (explaining that it is a defense to prosecution when “(1) the actor engaged in gambling in a private place; (2) no person received any economic benefit other than personal winnings; and (3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants”); Tex. Att’y Gen. Op. No. KP-0057, at 7–8.

123. Dustin Gouker, *FanDuel Leaving Texas in May; DraftKings to Fight AG Paxton in Court*, LEGAL SPORTS REP. (Mar. 4, 2016, 2:27 PM), <https://www.legalsportsreport.com/8825/fanduel-leaving-texas/>; Brandi Grissom & Conor Shine, *FanDuel Agrees to Stop Paid Fantasy Sports Betting in Texas, While DraftKings Heads to Court*, DALL. MORNING NEWS (Mar. 2016), <https://www.dallasnews.com/news/politics/2016/03/04/fanduel-agrees-to-stop-fantasy-sports-betting-in-texas-in-settlement-with-agen-paxton>. Although FanDuel no longer offers paid contests in Texas, it still offers “free games . . .” Gouker, *supra*.

124. Plaintiff's Original Petition for Declaratory Judgment at Exhibit B, *DraftKings, Inc. v. Paxton*, No. DC-16-02593 (68th Dist. Ct., Dallas County, Tex. Mar. 4, 2016) [hereinafter *Petition*].

125. Grissom & Shine, *supra* note 123.

126. *Petition*, *supra* note 124, at 2. Specifically, in its pleadings, DraftKings states that its contests “involve detailed and complex gameplay that integrates innumerable strategic elements that consistently permit more skilled contestants to defeat less skilled contestants.” *Id.* at 9.

127. See PENAL § 47.01(1)(B); *Petition*, *supra* note 124, at 3 (“DFS contests are no different from the many other contests beloved by Texans, such as bass fishing, bull riding, stock picking, and even beauty pageants, all of which involve participants paying entry fees and then using their wits and skills to try to win a predetermined prize.”). DraftKings further argued that activities in which contestants pay an entry fee to compete can be swayed by a certain degree of chance, but they are still considered bona fide contests. *Petition*, *supra* note 124, at 15–16.

128. *Petition*, *supra* note 124, at 2.

managers to skillfully put together a winning team.<sup>129</sup> DraftKings also claimed that every expert in the statistics and economics fields that has studied DFS agrees that the outcomes of DFS games ultimately turn on skill, not chance.<sup>130</sup>

DraftKings's second argument was that its contests do not fall under the Texas Penal Code's definition of "bet" because contestants do not wager on the result of a single game or a player's individual performance.<sup>131</sup> Rather, contestants are paying an entry fee to compete for predetermined prizes "based on the overall performance of the complex mosaic of athletes that comprise their personally selected fantasy teams."<sup>132</sup>

Finally, DraftKings alleged that the attorney general's opinion threatened to cause irreparable harm to its business in Texas and around the United States.<sup>133</sup> DraftKings argued that because Texas has such a large market for DFS operations, other states are watching the legal battle closely, which could lead to nationwide ramifications if Texas successfully outlaws paid DFS contests.<sup>134</sup> The lawsuit was put on hold while the Texas Legislature considered a bill that would legalize paid fantasy sports contests during the 85th Legislative Session.<sup>135</sup> However, as explained in the next section, the bill to legalize paid fantasy sports contests has stalled, and a non-jury trial has been set to occur during the summer of 2018.<sup>136</sup>

### 3. The Legislature's Response to Daily Fantasy Sports

During the 85th Texas Legislative Session, Democratic Representative Richard Peña Raymond introduced House Bill 1457, which would have "classif[ied] fantasy sports as games of skill, not of chance."<sup>137</sup>

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129. *Id.* at 16.

130. *Id.* at 3.

131. *Id.* at 5.

132. *Id.* The Texas Legislature defined the term "bet" to exclude "an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill . . ." PENAL § 47.01(1)(B). DraftKings argues that only three elements are required to meet this exception: "(1) a prize is offered, (2) the contest participants are the recipients of the prize, and (3) the participants are 'contestants in a bona fide contest for the determination of skill.'" Petition, *supra* note 124, at 13–14.

133. Petition, *supra* note 124, at 5 ("DraftKings has suffered substantial harm based on the Attorney General's actions: customers have withdrawn money, erroneously believing DraftKings to be illegal; significant problems have arisen with DraftKings' banks and payment processors; DraftKings has lost investment opportunities and potential business partners; and seen its value as a business decrease.").

134. *Id.* at 6.

135. See Unopposed Motion to Continue Trial Setting at 1, DraftKings, Inc. v. Paxton, No. DC-16-02593 (68th Dist. Ct., Dallas County, Tex. June 22, 2017). Texas residents are still able to participate in paid DFS contests while the legal process plays out. *Texas Daily Fantasy Sports*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/texas/> (last updated on Dec. 1, 2018).

136. Unopposed Motion to Continue Trial Setting, *supra* note 135.

137. Alex Samuels, *Texas Lawmakers Consider Declaring Fantasy Sports Legal*, TEX. TRIB. (Apr. 3, 2017, 12:00 AM), <https://www.texastribune.org/2017/04/03/bill-would-clarify-legality-fantasy-sports-receive-first-hearing/>. Labeling fantasy sport contests as "games of skill" would bring them within the statutory exception to the legal definition of "bet." See *id.*; PENAL § 47.01(1)(B).

Representative Raymond was seeking to clear up the ambiguity regarding the legal status of paid DFS in Texas.<sup>138</sup> This bill received bipartisan support in both houses.<sup>139</sup> Proponents of House Bill 1457 were looking to amend the Occupations Code by adding Chapter 2053, specifically reserved for “Fantasy Sports Contests.”<sup>140</sup> The proposed Chapter 2053 of the Occupations Code would have laid down the foundation for DFS contests in Texas by covering how to participate in DFS, how DFS companies would operate in Texas, and how consumers would be protected from fraud.<sup>141</sup> The bill would also have amended the Texas Penal Code to add the proposed Chapter 2053 of the Occupations Code as a defense to prosecution from Texas’s gambling laws.<sup>142</sup> Furthermore, the bill would have given the state attorney general authority to issue injunctions to restrain those who are in violation of, or threaten to be in violation of, the bill’s provisions.<sup>143</sup>

Opponents of House Bill 1457, such as the Southern Baptists of Texas Convention, believed the bill would have allowed “predatory gambling” and get people hooked on spending “great amounts of their dollars . . . .”<sup>144</sup> Groups who oppose the legalization of DFS in Texas argued that these contests are essentially casino games because they involve the element of chance.<sup>145</sup> These interest groups have a strong influence in Texas, but there are other groups, such as the Texas Fantasy Sports Alliance (TFSA), that are advocating for the legalization of DFS in Texas.<sup>146</sup> The TFSA, which is supported by both FanDuel and DraftKings, is “a coalition of sports fans, champions of free markets and limited government, consumer activists and Texas residents who believe Texans have the right to play the fantasy sports games they love.”<sup>147</sup> The TFSA’s objective is to advocate for legislation that will help grow the industry in Texas.<sup>148</sup> TFSA has conducted polls across the State of Texas, the most recent of which revealed that 81.3% of Texans

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138. House Comm. on Licensing & Admin. Proc., Bill Analysis, Tex. H.B. 1457, 85th Leg., R.S. (2017).

139. See Samuels, *supra* note 137. “The Texas House Committee on Licensing and Administrative Procedures . . . passed [the bill] on a 6–1 vote . . . .” *Texas House Committee Advances Fantasy Sports Legislation*, TEX. FANTASY SPORTS ALLIANCE (Apr. 11, 2017), <https://txfantasysportsalliance.com/2017/04/11/texas-house-committee-advances-fantasy-sports-legislation/>.

140. Tex. H.B. 1457, 85th Leg., R. S. (2017). The Occupations Code would be amended “to authorize a person to pay an entrance fee to participate in a fantasy sports contest, as defined by the bill, in which a prize is awarded to the competition winner and to establish that a person who pays such an entrance fee is not placing a bet for purposes of the application of an offense under Penal Code provisions relating to gambling.” House Comm. on Licensing & Admin. Proc., Bill Analysis, Tex. H.B. 1457, 85th Leg., R.S.

141. See Tex. H.B. 1457.

142. *Id.*

143. House Comm. on Licensing & Admin. Proc., Bill Analysis, Tex. H.B. 1457, 85th Leg., R.S.

144. Mansoor, *supra* note 46.

145. See *id.*

146. *Id.*

147. *About Us*, TEX. FANTASY SPORTS ALLIANCE, <https://txfantasysportsalliance.com/about/> (last visited Dec. 29, 2018).

148. *Id.*

support legislation that would allow citizens over eighteen years of age to participate in paid, online fantasy sports contests.<sup>149</sup>

Although House Bill 1457 never made it to the house floor for a vote, Representative Raymond successfully passed a motion in the house to add similar language to Senate Bill 1970, introduced by Republican Senator Lois Kolkhorst, that was under deliberation at the time.<sup>150</sup> “The motion passed with a 119–25 vote, signaling that a majority of the House agreed with Raymond on the issue . . . .”<sup>151</sup> However, the language never made it into the bill because the Senate Committee on State Affairs never scheduled it for a hearing.<sup>152</sup> There was one more opportunity for House Bill 1457 to be voted on if Governor Greg Abbott added it to the agenda for the special legislative session.<sup>153</sup> However, this did not occur, and the next opportunity for DFS legislation to be introduced will be during the 86th Legislative Session in 2019.<sup>154</sup> Many supporters of DFS who are on the opposite side of the aisle from Representative Raymond feel like fantasy leagues should be legal “based upon the small-government principals [sic] that the GOP traditionally espouses.”<sup>155</sup> The TFSA vows to continue to push the legislature to make DFS legal in Texas and it has the backing of FanDuel, DraftKings, and a majority of the Texas House of Representatives.<sup>156</sup>

### III. DOWN BUT NOT OUT

#### A. Skill Versus Chance

Gambling involves three elements: consideration, reward, and chance.<sup>157</sup> Proving that there was consideration and reward is relatively easy because most gaming cases involve a paid entry fee (consideration) and winnings (reward).<sup>158</sup> The third element of chance is more difficult to prove and has been the subject of debate for DFS.<sup>159</sup>

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149. *81% of Texans Support Legislation Affirming Legality of Fantasy Sports*, TEX. FANTASY SPORTS ALLIANCE (Apr. 27, 2017), <https://txfantasysportsalliance.com/2017/04/27/81-texans-support-legislation-affirming-legality-fantasy-sports/>.

150. Mansoor, *supra* note 46. Senator Kolkhorst explained that “[w]e must protect our liberties and rights, and that includes our ability to play a game of skill that millions of Texans already enjoy.” Dustin Gouker, *Texas Senator Takes Aim at Legalizing Daily Fantasy Sports*, LEGAL SPORTS REP. (Mar. 10, 2017, 1:46 PM), <https://www.legalsportsreport.com/13322/texas-daily-fantasy-sports-senate/>.

151. Mansoor, *supra* note 46.

152. *Id.*

153. *Id.*

154. *Id.*

155. Sechler, *supra* note 1.

156. Mansoor, *supra* note 46.

157. Marc Edelman, *Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation*, 92 IND. L.J. 653, 662 (2017).

158. *Id.*

159. *Id.* at 663.

The legality of DFS within a state is determined by whether they are considered games of skill or games of chance.<sup>160</sup> Prizes won from games of chance are usually considered illegal gambling, while prizes won from games of skill are not.<sup>161</sup> In order to make this determination, a majority of states follow what is called the “predominant purpose test.”<sup>162</sup> Under the predominant purpose test, the court must decide what “is the dominating factor in determining the result of the game.”<sup>163</sup> If the outcome of a contest is determined by at least 51% skill, then it will be considered a game of skill, thus, not illegal gambling.<sup>164</sup> This test is difficult to apply when assessing games, such as poker, that require skill but ultimately are determined by chance.<sup>165</sup> Courts that apply this test must make a subjective determination when assessing if a game was decided predominantly by skill or chance.<sup>166</sup> However, this test is more favorable to DFS operators who argue that DFS is predominantly a game of skill.<sup>167</sup>

Another test that states apply to differentiate between games of skill and games of chance is called the “material element test.”<sup>168</sup> Under this test, the state considers a game as a game of chance “even if 51% or more of the game has an element of skill.”<sup>169</sup> This test is not favorable to DFS because courts may subjectively determine any element of chance to be “material.”<sup>170</sup> For example, a judge may hold that weather conditions are a material element of chance that determines the outcome of DFS games.<sup>171</sup> The material element test is most notably followed by the State of New York, which has legalized DFS.<sup>172</sup>

Texas is in the minority of states that follow the “any chance test.”<sup>173</sup> The any chance test forbids the wagering of money on any game that involves

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160. See Joshua Taggart, *Is Daily Fantasy a Form of Gambling Hidden by Skill?*, 6 MISS. SPORTS L. REV. 81, 86 (2016).

161. See Mark Dourmashkin, *Examining the Legalization of Daily Fantasy Sports*, 25 CATH. U. J.L. & TECH. 414, 429 (2017).

162. See Taggart, *supra* note 160.

163. Jon Boswell, *Fantasy Sports: A Game of Skill That Is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 1257, 1264 (2008) (quoting *In re Allen*, 377 P.2d 280, 281 (Cal. 1962)).

164. Dourmashkin, *supra* note 161.

165. See *People v. Turner*, 629 N.Y.S.2d 661, 662 (N.Y. Crim. Ct. 1995).

166. Boswell, *supra* note 163, at 1265.

167. See Taggart, *supra* note 160, at 86–87. See generally *Petition*, *supra* note 124, at 7 (arguing that DFS is a bona fide contest of skill).

168. See Taggart, *supra* note 160 at 87.

169. *Id.*

170. *Id.* The element of chance must be material but does not need to be dominant. See *Thole v. Westfall*, 682 S.W.2d 33, 37 n.8 (Mo. Ct. App. 1984).

171. See generally Taggart, *supra* note 160, at 87 (explaining the material element test).

172. *Id.*

173. See *State v. Gambling Device*, 859 S.W.2d 519, 523 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (“[I]t is the incorporation of chance that is the essential element of a gambling device, not the incorporation of a particular proportion of chance and skill.”).



the element of chance.<sup>174</sup> This test is incredibly stringent and disallows betting on games that may require an exceptional amount of skill.<sup>175</sup> Because DFS—and fantasy sports in general—involve at least some chance, they are considered illegal under the any chance test.<sup>176</sup>

Texas's adherence to the minority any chance test is far too stringent and ignores legitimate arguments in favor of DFS.<sup>177</sup> Further, the any chance test directly conflicts with the state's Penal Code.<sup>178</sup> For example, the Penal Code provides that prizes awarded to "actual contestants in a bona fide contest for the determination of skill" do not constitute a "bet," which is an essential element to prove illegal gambling.<sup>179</sup> Differentiating between games of skill and games of chance is nearly impossible when applying the any chance test because the slightest amount of chance is prevalent in almost any contest.<sup>180</sup>

Consider the sport of bull riding, which requires participants to pay an entry fee to compete.<sup>181</sup> The element of chance is prevalent in bull riding because contestants are randomly assigned a bull to ride, some of which are more challenging than others.<sup>182</sup> These bull assignments are likely to have an impact on the final outcome of a given competition.<sup>183</sup> Although there are elements of chance in bull riding, Texas allows participants, some of which are children under the age of eighteen, to pay entry fees and compete for prize money.<sup>184</sup> Concluding that people are guilty of illegal gambling when they win money from an activity that involves a small degree of chance, such as bull riding, is unfair. This is exactly what Texas is doing when it applies the any chance test to DFS.

The predominant purpose test is more logical than the any chance test, which is likely why it is the majority rule.<sup>185</sup> The any chance test paints with a broad brush and categorizes many games that require skill as games of chance.<sup>186</sup> For example, under the any chance test, "chess would be considered a game of chance . . . because the player who moves their piece

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174. See Taggart, *supra* note 160, at 87.

175. *Id.*

176. See *id.*

177. See *id.* at 86–87.

178. See TEX. PENAL CODE ANN. § 47.01(1)(B) (West 2017).

179. *Id.*

180. See generally Dourmashkin, *supra* note 161, at 429 (discussing how chess would be considered a game of chance under the any chance test).

181. See *Become a Bull Rider*, PROF. BULL RIDERS, [https://www.pbr.com/en/education/become\\_bullrider.aspx](https://www.pbr.com/en/education/become_bullrider.aspx) (last visited Dec. 29, 2018).

182. See *Scoring and Judging*, PROF. BULL RIDERS, [https://www.pbr.com/en/education/scoring\\_and\\_judging.aspx](https://www.pbr.com/en/education/scoring_and_judging.aspx) (last visited Dec. 29, 2018).

183. *Id.*

184. See *2018 Registration Application*, TEX. YOUTH BULL RIDERS, [www.tybr.org/images/Mem%20Application%2018.pdf](http://www.tybr.org/images/Mem%20Application%2018.pdf) (last visited on Dec. 29, 2018).

185. See Dourmashkin, *supra* note 161, at 428–29.

186. See *id.* at 429.

first will have a higher percentage of winning the game.”<sup>187</sup> This conclusion is not logical considering that chess is predominantly a game of skill.<sup>188</sup>

There is a strong argument that the outcomes of DFS contests are based on at least 51% skill, thus making it a game of skill under the predominant purpose test.<sup>189</sup> For example, a study conducted by Ed Miller—an MIT engineer and author of gaming strategy books—and Daniel Singer—head of McKinsey & Company’s Global Sports and Gaming Practice—found that during the first half of the 2015 Major League Baseball season, “91 percent of DFS player profits were won by just 1.3 percent of players . . . .”<sup>190</sup> The top eleven players, on average, paid \$2 million in entry fees and made \$135,000 in profits each.<sup>191</sup> These top players have developed skills in DFS strategy to become this successful.<sup>192</sup> If DFS were games of chance, the likelihood of the same players consistently winning at these rates would be highly unlikely.<sup>193</sup>

Proponents of DFS concede that there will always be an element of chance in sports contests.<sup>194</sup> However, the skill of DFS players is the predominant factor in determining the outcome of these contests.<sup>195</sup> To support this argument, advocates point out that DFS require more skill than traditional fantasy sports, which have been determined to be primarily skills-based activities.<sup>196</sup> For example, in traditional fantasy sports, players must use their skills at the beginning of the season to develop a research strategy that will help them devise a successful team.<sup>197</sup> On the other hand, DFS players have to implement a similar research strategy but in a much shorter time frame.<sup>198</sup> Furthermore, in order for DFS players to be successful, they must be able to apply advanced game theory tactics.<sup>199</sup> Game theory involves the strategy of incorporating math and logic to reach a favorable

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187. *Id.*

188. *Id.*

189. *See generally* Ed Miller & Daniel Singer, *For Daily Fantasy Sports Operators, the Curse of Too Much Skill*, SPORTS BUS. J. (July 27, 2015), <https://www.sportsbusinessdaily.com/Journal/Issues/2015/07/27/Opinion/From-the-Field-of-Fantasy-Sports.aspx> (discussing how DFS are games of skill by conducting studies that show only a select few players consistently make a profit from DFS).

190. *Id.*

191. *Id.*

192. *See id.* DraftKings points out that this study identified two ways in which skilled contestants prevailed over unskilled contestants: Skilled contestants used (1) lineups that created “covariance by choosing multiple athletes from the same real-life team,” which helped players win these large tournaments; and (2) “sophisticated models” to “exploit salary cap pricing inefficiencies,” which helped them choose the best players for a particular contest. *See* Petition, *supra* note 124, at 27–28.

193. Miller & Singer, *supra* note 189.

194. *See generally* Dourmashkin, *supra* note 161 (explaining how weather conditions and player injuries are elements of chance that are prevalent in DFS).

195. Miller & Singer, *supra* note 189.

196. *See* Boswell, *supra* note 163, at 1277.

197. Jeffrey C. Meehan, *The Predominate Goliath: Why Pay-to-Play Daily Fantasy Sports Are Games of Skill Under the Dominant Factor Test*, 26 MARQ. SPORTS L. REV. 5, 29 (2015).

198. *Id.*

199. *Id.*

outcome in games.<sup>200</sup> One of those tactics is known as the contrarian approach.<sup>201</sup> Under the contrarian approach, players use research to deviate their lineups from the majority.<sup>202</sup> The most skilled players can use the contrarian approach to build effective lineups.<sup>203</sup> Research shows that players who implement these strategies will defeat novice opponents 90% of the time.<sup>204</sup> These numbers show that, although chance is prevalent in DFS, skill is dominant in determining the outcome of these games.<sup>205</sup> Since DFS involve both skill and chance, the predominant purpose test is best suited to allow states to determine the weight of both of these elements.<sup>206</sup>

### *B. States That Have Legalized Daily Fantasy Sports*

The legality of DFS has been discussed throughout the United States.<sup>207</sup> Currently, fourteen states allow paid DFS, nine states have contested it, five states have banned it, and eighteen states have proposed legislation but have yet to pass a bill.<sup>208</sup>

In 2017, Arkansas legalized paid DFS by passing House Bill 2250.<sup>209</sup> This bill states “paid fantasy sports game[s] conducted in compliance with this chapter do[] not constitute gambling for any purpose.”<sup>210</sup> The bill received overwhelming approval in the senate, which approved the bill with a vote of 25–5, and the house approved the “Senate version of the bill 85–0.”<sup>211</sup> The Arkansas bill also includes a tax set at 8% of the DFS operator’s “gross paid fantasy sports game revenues from the previous state fiscal year.”<sup>212</sup> However, contrary to proposed legislation in other states, the Arkansas bill is silent when it comes to regulating the DFS industry.<sup>213</sup>

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200. *Id.* at 28.

201. *Id.* at 30.

202. *See id.* For example, say the quarterback in your lineup is a popular pick with over 90% of contestants selecting the same player. Any points your quarterback generates may only give you an advantage over the 10% who did not make the same pick. *See id.* at 30 n.151. However, if you select a quarterback that only 10% of other players selected, the points they generate may give you an advantage over 90% of the field. *See id.* This, of course, is assuming that the less popular quarterback outperforms the popular one. *Id.*

203. *See id.* at 30.

204. *See id.* at 32.

205. *Id.*

206. *See id.*

207. *See* Ryan Rodenberg, *Where Is Daily Fantasy Sports Legal? A State-by-State Look*, ESPN (July 26, 2017), [http://www.espn.com/chalk/story/\\_/id/14799449/daily-fantasy-dfs-legal-your-state-state-state-look](http://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legal-your-state-state-state-look).

208. *Id.*

209. H.R. 2250, 91st Gen. Assemb., Reg. Sess. (Ark. 2017).

210. *Id.*

211. Dustin Gouker, *Arkansas Governor Signs Fantasy Sports Bill; Becomes 11th State to Legalize FanDuel, DraftKings*, LEGAL SPORTS REP. (Apr. 11, 2017, 12:53 PM), <https://www.legalsportsreport.com/13682/arkansas-fantasy-sports-bill/>.

212. Ark. H.R. 2250.

213. Gouker, *supra* note 211.

Indiana has also legalized DFS.<sup>214</sup> In 2016, Governor Mike Pence signed into law Senate Bill 339, which specifically states that paid fantasy sports do not constitute illegal gambling.<sup>215</sup> This bill is more expansive than similar legislation in other states.<sup>216</sup> For example, the bill provides that operators must verify that all players are over eighteen years old, DFS operations will be overseen by the state gaming commission, DFS sites will be subject to third-party audits, and operators will need to pay a licensing fee.<sup>217</sup> This legislation protects consumers and gives the state more control over the DFS industry.<sup>218</sup>

Mississippi has also assessed the legality of DFS.<sup>219</sup> In 2017, Mississippi Governor Phil Bryant signed House Bill 967 into law, which legalized paid DFS operations.<sup>220</sup> Similar to the Indiana bill, House Bill 967 gives the Mississippi Gaming Commission oversight over DFS operations.<sup>221</sup> House Bill 967 also combines features of both Arkansas's and Indiana's legislation by including both a licensing fee and a revenue tax.<sup>222</sup> House Bill 967 also includes various forms of consumer protection—bans on allowing employees of DFS operators from playing, minimum age requirements to participate, and security of financial information.<sup>223</sup>

### *C. States That Consider Daily Fantasy Sports Illegal*

Louisiana has long considered fantasy sports contests to be illegal gambling.<sup>224</sup> In 1991, the attorney general “concluded that a 1-900 number fantasy football contest[] constituted illegal gambling, but nothing in the 1991 memo touched on DFS-specific issues.”<sup>225</sup> In 2015, Representative Joseph Lopinto sought to address the issue by proposing House Bill 475,

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214. S. 339, 2016 Gen. Assemb., Reg. Sess. (Ind. 2016).

215. *Id.*

216. See Dustin Gouker, *Indiana Becomes Second State to Pass Daily Fantasy Sports Regulation*, LEGAL SPORTS REP. (Mar. 24, 2016, 2:12 PM), <https://www.legalsportsreport.com/9239/indiana-passes-dfs-regulation/>.

217. *Id.* A licensing fee is set at \$50,000 with a \$5,000 renewal and could be increased to \$75,000 in the future. *Id.*

218. *Id.*

219. See H.R. 967, 2017 Reg. Sess. (Miss. 2017).

220. Dustin Gouker, *Mississippi Gov. Phil Bryant Signs New Fantasy Sports Law into Effect*, LEGAL SPORTS REP. (Mar. 13, 2017, 2:49 PM), <https://www.legalsportsreport.com/13354/mississippi-gov-phil-bryant-signs-new-fantasy-sports-law/>.

221. Dustin Gouker, *Daily Fantasy Sports Scores First Legislative Victory of 2017*, LEGAL SPORTS REP. (Mar. 1, 2017, 10:10 AM), <https://www.legalsportsreport.com/13209/daily-fantasy-sports-mississippi/>.

222. *Id.* A licensing fee is set at \$5,000 over three years and the revenue tax is set at 8%. *Id.*

223. *Id.*

224. See Rodenberg, *supra* note 207.

225. *Id.*

which would differentiate fantasy sports from gambling.<sup>226</sup> This bill was met with heavy opposition from interest groups, such as the Louisiana Family Forum, which ultimately led to its demise.<sup>227</sup> While Louisiana promotes “land-based” gambling, they have ardently opposed online gambling of any kind.<sup>228</sup> The bill never made it to a vote, and Louisiana remains one of the five states that have outlawed DFS contests.<sup>229</sup>

Arizona is another state that has determined DFS to be illegal gambling.<sup>230</sup> In fact, in 1998, the Arizona attorney general specifically stated that fantasy sports contests of any kind are illegal.<sup>231</sup> Arizona Attorney General Mark Brnovich has sent letters to both FanDuel and DraftKings, advising them to not bring their operations into the state.<sup>232</sup> Arizona lawmakers remain opposed to legalizing DFS, although they still accept nearly \$100 million annually from Native American casinos.<sup>233</sup>

#### *D. Regulating DFS*

Regulating the DFS industry has become a difficult, yet necessary, task for states to overcome.<sup>234</sup> Many issues, such as determining licensing fees, setting a minimum age requirement, and minimizing the risk of gambling addiction, must be addressed in DFS legislation.<sup>235</sup>

##### *I. Minimum Age Requirements*

States that have legalized DFS have set minimum age requirements for the protection of minors.<sup>236</sup> DFS sites have already set a minimum age requirement of eighteen years; however, states are free to raise this age requirement to coincide with its already established gambling laws.<sup>237</sup>

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226. Dustin Gouker, *Louisiana Daily Fantasy Sports Bill Dead for Current Legislative Session*, LEGAL SPORTS REP. (June 2, 2015, 9:34 AM), <https://www.legalsportsreport.com/1639/louisiana-daily-fantasy-sports-bill-dead-for-current-legislative-session/>.

227. *Id.*

228. *Id.*

229. *Id.*

230. Tyler Rubin, *Scottsdale-Based Fantasy Sports Company Thrives Despite Legal Challenges*, CRONKITE NEWS (Jan. 6, 2017), <https://cronkitenews.azpbs.org/2017/01/06/scottsdale-based-fantasy-sports-company-thrives-despite-legal-challenges/>.

231. *Id.*

232. David Sheldon, *Arizona Daily Fantasy Sports Remain Offline as Gambling Opposition Remains*, CASINO.ORG (Jan. 4, 2017), <https://www.casino.org/news/arizona-daily-fantasy-sports>.

233. *Id.*

234. See generally Patrick Feeney, *Turning Fantasy into Regulatory Reality: A New Approach to Daily Fantasy Sports Laws*, 40 COLUM. J.L. & ARTS 105, 106 (2016) (providing example of DFS employee exploiting insider knowledge).

235. See Edelman, *supra* note 157, at 684, 687, 689.

236. *Id.* at 689.

237. See, e.g., *id.* (explaining how proposed legislation in California offers to set the minimum age requirement at twenty-one).

Enforcing minimum age requirements is an issue that DFS sites will have to address.<sup>238</sup> Professor Marc Edelman offers a few examples of how DFS sites can enforce minimum age requirements, such as requiring players to present their driver's license and conducting Skype interviews with new players.<sup>239</sup> These ideas are feasible but will require state action to ensure DFS companies are enforcing these requirements.<sup>240</sup>

Most states have implemented gaming commissions to enforce regulations, such as minimum age requirements, on DFS companies.<sup>241</sup> Texas currently has two commissions that oversee legal gambling: the Texas Lottery Commission, which oversees the state lottery, and the Texas Racing Commission, which oversees pari-mutuel racing.<sup>242</sup> Texas will need to establish another commission to regulate and enforce laws that apply to DFS.<sup>243</sup> The legislature would have the authority to create this commission through general legislation.<sup>244</sup> Ensuring that minors do not have access to DFS sites is crucial to maintaining the integrity of DFS.<sup>245</sup>

## 2. Licensing Fees

Deciding whether to charge a licensing fee is another issue that states must address when considering DFS legislation.<sup>246</sup> A licensing fee is a payment to conduct business within a state.<sup>247</sup> Many states that have legalized DFS require companies to pay fixed licensing fees.<sup>248</sup>

Many argue that these fixed licensing fees will deter smaller DFS companies from doing business because of the high upfront costs.<sup>249</sup> For example, the State of Virginia charged DFS companies \$50,000 for an initial licensing fee.<sup>250</sup> Larger DFS companies, such as DraftKings and FanDuel, have no problem paying \$50,000 for a license.<sup>251</sup> However, many DFS

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238. *See id.* (discussing how DFS sites have mistakenly allowed fourteen-year-old children to participate in contests).

239. *Id.*

240. *Id.*

241. *See supra* text accompanying notes 220–23 (explaining how the Mississippi Gaming Commission regulates DFS, including imposing minimum age requirements for participation).

242. *See* Chuck Humphrey, *State Gambling Agency Sites*, GAMBLING-LAW-US.COM, <http://www.gambling-law-us.com/Useful-Sites/State-Gambling-Agencies.htm> (last visited Dec. 29, 2018).

243. *See, e.g., supra* text accompanying notes 220–23 (explaining how the Mississippi Gaming Commission regulates DFS).

244. *See generally* TEX. CONST. art. II, § 1. *See also* State v. Rhine, 297 S.W.3d 301 (Tex. Crim. App. 2009) (holding that the Texas Legislature has the authority to delegate its power to commissions).

245. *See* Edelman, *supra* note 157, at 689.

246. *See id.* at 684–85.

247. *Id.*

248. *Id.*

249. *Id.*

250. Dustin Gouker, *First State to Regulate Daily Fantasy Sports Starts Issuing Temporary Licenses*, LEGAL SPORTS REP. (Aug. 8, 2016, 12:12 PM), <https://www.legalsportsreport.com/10939/virginia-fantasy-sports/>.

251. *Id.*

startups do not have the resources to pay such hefty fees.<sup>252</sup> In turn, this may harm consumers by allowing larger companies to charge higher prices because there will be no competitors.<sup>253</sup> States may remedy this issue by charging a reasonable licensing fee accompanied by a tax on revenues.<sup>254</sup> For example, the State of Mississippi implemented a more modest licensing fee of \$5,000 for a three-year license and an 8% tax on revenues.<sup>255</sup> This method will ensure that smaller DFS companies have the opportunity to compete, and the state will benefit from the money generated through the tax.<sup>256</sup>

### 3. Preventing Gambling Addiction

Finally, opponents of DFS argue that it subjects people to gambling addiction.<sup>257</sup> Although there is little evidence of a correlation between fantasy sports and gambling addiction, this is still an issue that state legislatures must address.<sup>258</sup> For example, states such as Tennessee and Massachusetts have proposed implementing caps on the amount of money that DFS companies can collect from participants within a given year.<sup>259</sup> Other states have recommended including gambling addiction warnings on DFS websites.<sup>260</sup> Although there is no definitive way to prevent users from spending all of their money, these propositions can help curb the dangers of gambling addiction.<sup>261</sup>

The Texas Lottery Commission provides a disclaimer on its website about the importance of playing responsibly.<sup>262</sup> In that disclaimer, various resources are provided for people who have a gambling addiction.<sup>263</sup> The Texas Lottery Commission acknowledges that, although its games are meant for entertainment, some people are susceptible to developing a gambling addiction.<sup>264</sup> Similarly, DFS are games meant for entertainment but can be addictive.<sup>265</sup> Texas has shown that it is willing to overlook the risks of gambling addiction in order to appease the interests of its citizens.<sup>266</sup> Millions

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252. *Id.*

253. *Id.*

254. *Id.*

255. *See supra* text accompanying note 223 (discussing the different methods Mississippi uses to regulate DFS).

256. *See supra* text accompanying note 223 (discussing DFS regulation in Mississippi).

257. *See* Edelman, *supra* note 157, at 687–88.

258. *Id.* at 687.

259. *Id.* at 688.

260. *Id.*

261. *Id.*

262. *Texas Lottery Responsible Gaming Plan*, TEX. LOTTERY COMMISSION, [http://www.txlottery.org/export/sites/lottery/Winners/Player\\_Protection/play\\_responsibly/index.html](http://www.txlottery.org/export/sites/lottery/Winners/Player_Protection/play_responsibly/index.html) (last visited Dec. 29, 2018).

263. *Id.*

264. *Id.*

265. *See FAQs*, DRAFTKINGS, <https://about.draftkings.com/faqs> (last visited Dec. 29, 2018).

266. *See supra* Section II.B (discussing the legalized forms of gambling in Texas).

of Texans have expressed their interest in DFS, and they deserve to have their voices heard.<sup>267</sup>

#### IV. HERE'S THE GAME PLAN

Legalizing DFS will enhance sports entertainment for millions of Texans. Texas's current stance against DFS companies is out of touch with the free-market principles that are generally associated with our great state.<sup>268</sup> By mischaracterizing DFS as illegal gambling, Texas is ostracizing an industry that could generate millions of dollars in tax revenue.<sup>269</sup> As such, Texans will no longer be able to play the DFS games that they love unless our leaders make the common-sense decision to legalize DFS.

In order for Texas to legalize DFS, it will have to do away with the any chance test.<sup>270</sup> This archaic test considers any game that involves the slightest element of chance to be illegal gambling.<sup>271</sup> Getting rid of the any chance test will clear up the apparent conflict with the state Penal Code's "bet" exception.<sup>272</sup> Further, without the any chance test, Texas courts will have the opportunity to assess the legality of games such as DFS on a case-by-case basis instead of throwing them all under the same rug.<sup>273</sup> The any chance test is outdated and should be replaced.

Texas should replace the any chance test with the predominant purpose test to determine whether a game is one of skill or chance.<sup>274</sup> The any chance test is overbroad because it allows the state to define illegal gambling as any game that partially involves chance.<sup>275</sup> The predominant purpose test takes into consideration that not all games are equal and that some mix the elements of both skill and chance.<sup>276</sup> Unlike the any chance test, the predominant purpose test would allow Texas courts to consider the fact that DFS are materially different than games such as slot machines, which are purely

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267. See *supra* note 46 and accompanying text (discussing how many Texans would likely support the legalization of DFS).

268. See Tonya Moreno, *Best and Worst States for Business*, BALANCE, <https://www.thebalance.com/best-and-worst-states-for-business-3193240> (last updated Dec. 20, 2018) (ranking Texas as the 11th most business friendly state in the country).

269. See generally Brian C. Miller, *Not Just a Fantasy: The Real Benefits of Daily Fantasy Sports Legislation for Wisconsin*, 2017 WIS. L. REV. 1273, 1300–01 (2017) (explaining how New York collected \$3 million in taxes after only five months of legalizing DFS).

270. See generally Meehan, *supra* note 197, at 18 (explaining how states that follow the any chance test determine every game that involves chance to be illegal gambling).

271. *Id.*

272. See *supra* text accompanying notes 177–80 (discussing how the any chance test conflicts with the state penal code).

273. See *supra* text accompanying notes 180–85 (discussing how overbroad the any chance test is).

274. See Meehan, *supra* note 197, at 16, 18.

275. See *supra* text accompanying notes 187–88 (discussing how chess would be considered a game of chance under the any chance test).

276. See generally Meehan, *supra* note 197, at 16 (discussing how there are many games that fall in between those that are considered "pure chance" and "pure skill").



games of chance.<sup>277</sup> Further, the predominant purpose test will not conflict with the state Penal Code's exception to making a bet because it takes into account that every game involves a certain element of chance.<sup>278</sup> The predominant purpose test is superior to the any chance test and is the most logical way for Texas courts to determine whether DFS are games of chance or skill.

The future of DFS in Texas does not rely solely on the courts. The Texas Legislature has addressed this issue before and should continue to pursue legislation in favor of DFS.<sup>279</sup> House Bill 1457 offered many good ideas on how to regulate DFS, but it also missed out on a few key issues such as: licensing fees, gambling addiction, and enforcing minimum age requirements.<sup>280</sup>

The Texas Legislature should charge DFS companies a licensing fee to conduct business in the state. Implementing a licensing fee will benefit the state by providing important tax revenue.<sup>281</sup> However, the legislature should also take into consideration that implementing a high, fixed licensing fee may act as a deterrent to entry for companies that are just starting up.<sup>282</sup> To curb this issue, the legislature should adopt a similar licensing structure as Mississippi, which charges \$5,000 for a three-year license and taxes the operator's revenue at a rate of 8%.<sup>283</sup> Texas could adopt statutory language similar to Mississippi, which states:

(6) Each applicant for licensure as a fantasy contest operator shall pay an application fee of Five Thousand Dollars (\$5,000.00). A license is valid for three (3) years.<sup>284</sup>

(1) For the privilege of conducting fantasy sports contests in Mississippi, licensees shall pay to the Department of Revenue a fee equivalent to eight percent (8%) of the operator's net Mississippi revenue.<sup>285</sup>

This will ensure that small DFS companies will have the opportunity to conduct business in Texas.<sup>286</sup> This increase of DFS companies in Texas will promote lower consumer prices and higher consumer choice.<sup>287</sup> Furthermore, similar to the Texas Lottery, the legislature should require that a portion of

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277. *See id.*

278. *See supra* text accompanying notes 178–80 (discussing how the any chance test conflicts with the state penal code).

279. *See supra* Section II.B (discussing Texas's history with legalize gambling).

280. *See supra* Section II.D.3 (describing the provisions under House Bill 1457).

281. *See Edelman, supra* note 157, at 684.

282. *See id.*

283. Gouker, *supra* note 211.

284. MISS. CODE ANN. § 97-33-307 (West 2018).

285. *Id.* § 97-33-317.

286. *See Edelman, supra* note 157, at 684.

287. *Id.*

the tax revenues be donated to fund youth education and programs supporting veterans.<sup>288</sup> This incentive would allow DFS companies to make a positive impact on our state.<sup>289</sup>

The legislature should also address how to minimize the risks of gambling addiction. Opponents will always argue that DFS enables gambling that can lead to addiction even though there is little evidence of these claims.<sup>290</sup> Professor Edelman offers a few ways to minimize the risks of gambling addiction, which Texas should take into consideration in future DFS legislation.<sup>291</sup> First, Texas should require that DFS companies provide a “Surgeon General’s-type warning telling players of fantasy’s addictive dangers.”<sup>292</sup> This warning should be prominent on their websites to ensure that participants will notice it.<sup>293</sup> Second, the legislature should require DFS companies to provide information on their websites about how to treat gambling addiction.<sup>294</sup> This requirement is similar to the information that is provided on the Texas Lottery Commission’s website.<sup>295</sup> Finally, the legislature should require DFS companies to set a cap on the amount of money they can collect from any participant within a one-year time frame.<sup>296</sup> This will help ensure that DFS will “operate as a form of social gaming but not as a form of high-volume gambling activity.”<sup>297</sup>

Finally, the legislature must ensure that the DFS minimum age requirements are enforced. House Bill 1457 mentioned that DFS operators needed to verify that all participants are over the age of eighteen but was silent on how to enforce this requirement.<sup>298</sup> Many states require their gaming commissions to enforce age requirements.<sup>299</sup> Texas does not have a gaming commission, and House Bill 1457 never mentioned anything about creating one.<sup>300</sup> To remedy this issue, the legislature should consider creating a commission that oversees all fantasy sports companies in future DFS legislation. Texas should take the same approach as Indiana, a state that has

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288. See *supra* text accompanying note 72 (describing the different ways the Texas Lottery funnels money back into the community).

289. See *supra* text accompanying note 72 (explaining how the Texas Lottery gives money to communities).

290. See Edelman, *supra* note 157, at 687–88.

291. *Id.*

292. *Id.* (quoting David Whitley, *Fantasy Is a Real Threat to Gambling Addicts*, ORLANDO SENTINEL (Oct. 5, 2015, 6:55 PM), <https://www.orlandosentinel.com/sports/os-fantasy-sports-addiction-david-whitley-1006-20151005-column.html>).

293. See *id.* at 688.

294. *Id.*

295. *Id.*; see *Texas Lottery Responsible Gaming Plan*, *supra* note 262.

296. See Edelman, *supra* note 157, at 688.

297. *Id.*

298. See Tex. H.B. 1457, 85th Leg., R.S. (2017).

299. See, e.g., *supra* text accompanying note 221 (explaining how the Mississippi Gaming Commission oversees DFS operations).

300. See *supra* text accompanying note 242 (discussing how Texas only has lottery and racing commissions); see also Tex. H.B. 1457.

implemented its own Paid Fantasy Sports Division, to regulate DFS.<sup>301</sup> Along with regulating fantasy sports, the Indiana division also provides useful information such as how to acquire license applications and complaint forms.<sup>302</sup> Having a resource similar to Indiana's Paid Fantasy Sports Division will be beneficial to DFS in Texas.<sup>303</sup> Providing oversight on DFS companies should be Texas's top priority in future DFS legislation to ensure that companies are following the rules and consumers are being protected.

#### V. AND THAT'S THE GAME!

The DFS industry revolutionized how Americans watch sports.<sup>304</sup> Although DFS have faced many challenges during its short tenure, the industry continues to grow at an impressive rate.<sup>305</sup> With this growth comes the opportunity for states to capitalize through regulation.<sup>306</sup> Nowhere is this opportunity more prevalent than in the State of Texas.<sup>307</sup> Legalizing DFS would provide Texas with tax revenue that could be invested in our public schools and programs to support our veterans.<sup>308</sup> However, Texas will miss out on these benefits if it continues to mischaracterize DFS as games of chance.<sup>309</sup> DFS are games of skill and should be regulated accordingly.<sup>310</sup>

Over 80% of Texans favor the legalization of DFS.<sup>311</sup> The millions of Texans who play DFS are not criminals; they are sports fans that enjoy friendly competition.<sup>312</sup> Legalizing DFS will ensure these Texans the right to continue playing the DFS games that they love. For our elected officials, the decision should be easy: Legalizing DFS is a slam-dunk.

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301. See IND. CODE ANN. § 4-33-24-4 (West 2018).

302. See *Paid Fantasy Sports*, IND. GAMING COMMISSION, <https://www.in.gov/igc/2807.htm> (last visited Dec. 29, 2018).

303. See *id.*

304. See *supra* Section II.A (discussing how DFS was introduced to the public and supported by the MLB and the NBA).

305. See *supra* Section II.A (discussing how DFS is supported).

306. See *supra* Section III.B (discussing how states across the country have taken steps to legalize DFS).

307. See *supra* Section III.B (discussing states that have legalized DFS).

308. See *supra* Part IV (explaining how the legalization of DFS in Texas would generate millions of dollars in revenue).

309. See *supra* Section II.D (describing how Texas Attorney General Ken Paxton characterized DFS as a form of illegal gambling due to DFS being considered games of chance).

310. See *supra* Part IV (referencing the predominant purpose test and how it should be applied in Texas to determine whether DFS are games of skill or chance).

311. See *supra* Section II.D.3 (referencing TFSA's policy results across Texas, indicating broad support for the legalization of DFS).

312. See *supra* Section II.D.3 (citing to the vast support DFS has received among Texas residents).