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COURT OF APPEALS  
STATE OF NEW YORK

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WHITE,

Respondents,

-against-

NO. 12

CUOMO,

Appellant.

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20 Eagle Street  
Albany, New York  
February 8, 2022

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
PRESIDING JUSTICE HECTOR D. LASALLE

Appearances:

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Cheryl Odom  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next matter on is  
2 appeal number 12, White v. Cuomo. Counsel, you may remain  
3 in your seats. We'll just wait and give our colleagues  
4 here a moment to leave the courtroom.

5 Counsel?

6 MR. PALADINO: Good afternoon, Your Honors. I'd  
7 like to reserve two minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: You may. And Counsel, in  
9 order for us to invalidate an act of the legislature, the  
10 plaintiff has to establish the unconstitutionality of the  
11 act beyond a reasonable doubt, correct?

12 MR. PALADINO: Yes, Your Honor.

13 CHIEF JUDGE DIFIORE: So let's start there, and  
14 tell us why hasn't the plaintiff met that burden.

15 MR. PALADINO: Well, first, they have not shown  
16 beyond a reasonable doubt that these contests, fantasy  
17 sports contests, are chance-based as opposed to skill-  
18 based. In fact, the evidence is completely one-sided on  
19 the question of the skill-based nature of the activity.

20 And I recognize from the first time this case was  
21 argued that there are other considerations in play,  
22 including policy judgments. We have historical anomalies.  
23 So it's not simply a matter of looking at a definition and  
24 plugging in that definition. And there are a number of  
25 policy reasons here why fantasy sports is distinguishable



1 from sports betting. And that's what the plaintiffs claim  
2 this activity is.

3 Sports betting is a type of proposition bet.  
4 Someone makes an assertion about something that's going to  
5 happen in the world - - - Aaron Judge will hit a home run  
6 tonight; the Yankees will beat the Red Sox - - - that  
7 establishes a benchmark. You look to what happened in the  
8 real world. Did Aaron Judge hit a home run? Once you make  
9 that proposition, whether it proves true or not is  
10 completely outside the control of the parties to the bet.

11 JUDGE WILSON: And therefore, that is gambling  
12 under the definition of the Constitution?

13 MR. PALADINO: Yes, that's correct, because I  
14 believe that the understanding of gambling in 1894 included  
15 sports betting. That's why they're saying this is sports  
16 betting. This is a skill-based competition. The only  
17 proposition that someone who participates in one of these  
18 contests is asserting is, I can assemble a roster of  
19 players that will win the competition.

20 And it is true that there are random variables in  
21 the real-world sporting events, contingent events that  
22 inject an element of chance into the contest. But the  
23 participants in the contest influence, if not control, the  
24 outcome of the contest in which they participate.

25 And Judge Rivera, that's why the relevant contest



1 is the fantasy sports contest, because the prop - - - the  
2 proposition establishes what's relevant. If the  
3 proposition - - -

4 JUDGE RIVERA: But I think I asked you this the  
5 other - - - well, when it was first argued. I'm still  
6 having difficulty, really, following this argument because,  
7 of course - - - and every casino has cameras around to  
8 check on this. There are people with a tremendous skill to  
9 be able to count cards. But no one says that poker or  
10 blackjack is not - - - if I bet, that that's not betting in  
11 the sense of we think of it.

12 So I'm still very confused about your argument.  
13 And of course, there's absolute chance there because it's  
14 back in a casino, right? The croupier has got not just one  
15 set of cards but several sets of cards. So it's - - - it  
16 really takes a particular level of skill to count cards,  
17 but that's what casinos watch out for.

18 MR. PALADINO: I would give the answer I gave  
19 last time. Poker, which is a card game, was considered to  
20 be a game of chance in 1894. It's a historical anomaly  
21 because if it was - - - if it came around today, there's  
22 plenty of evidence that you could view it as a skill-based  
23 competition.

24 Fantasy sports is not a card game, and it is not  
25 a proposition bet. It is an activity in which the people



1 who participate in it influence the outcome. The  
2 proposition bet, the Yankees will beat the Red Sox, that  
3 dictates the relevant activity as the real-world sporting  
4 event over which the bettors exercise no control. I can  
5 out-general-manager you in a fantasy sports contest  
6 establishes that the relevant activity - - -

7 JUDGE RIVERA: But what about all the algorithms  
8 that are used in sports? I mean, aren't there a bunch of  
9 algorithms to kind of say the likelihood of so and so, you  
10 know, getting a particular batting average, being  
11 successful? I mean, I'm a little bit - - - again, I'm  
12 having - - - it's a genuine question to you.

13 I'm having difficulty following this because  
14 there are so many what we call games of chance, or that we  
15 realize involves some guess work, also has a certain amount  
16 of skill attached to it. And sometimes that skill,  
17 nowadays, can be refined through the use of algorithms and  
18 computers and so forth, versus, as you say, poker in the  
19 olden days. Maybe somebody could count the cards. So  
20 again, I'm just having difficulty, generally, trying to  
21 follow the argument.

22 MR. PALADINO: Well, let me try. The - - - it's  
23 important to identify what is the relevant skill in a  
24 fantasy sports contest. Is it, basically, exactly what a  
25 gambler does? And the answer is no. There is a difference



1 between what a general manager does and what a skillful  
2 sports bettor does. They both have math skills. They both  
3 make some predictions in certain ways. But a general  
4 manager identifies undervalued players.

5 That is the essential skill of a fantasy sports  
6 contest. They have to live within the confines, for  
7 example, of a salary cap. You cannot just pick an all-star  
8 team.

9 JUDGE WILSON: So let me - - - can I stop you  
10 there and ask - - - let me give you a more concrete  
11 example. One of the things that I believe that you may  
12 participate through DFS on is NASCAR, right? I just went  
13 onto the DraftKings website, so if you don't know that, you  
14 can just take my representation, or treat it as a  
15 hypothetical.

16 There was a - - - a NASCAR event at the Los  
17 Angeles Coliseum last week on - - - called the Clash at the  
18 Coliseum. There was a 50,000 dollar on DraftKings caps.  
19 It was called a salary cap. And you could pick however  
20 many drivers you want, but you couldn't spend more than  
21 50,000 dollars. And the drivers ranged between something  
22 like 2,000 at the low end, up to 10,000 at the top. So you  
23 could pick - - - out of the very best drivers, you might be  
24 able to pick five or six. If you were willing to choose  
25 drivers who, you know, had lower amounts, you could have



1 more drivers.

2 The points were awarded forty-five points if your  
3 driver finished first, and on down to one for fortieth  
4 place, nothing after that. There were also quarters of a  
5 point awarded for each driver who led a lap, and there was,  
6 I believe, .45 of a point for best time, which I couldn't  
7 understand if that was lap time for every lap of the race  
8 or how that was actually awarded.

9 But why isn't that a prop bet? Why isn't that  
10 just like a daily double or a trifecta or something like  
11 that at a horse track?

12 MR. PALADINO: Your Honor, it may very well be  
13 that that particular fantasy sports contest is  
14 indistinguishable from a proposition bet. This is a facial  
15 challenge. There are plenty of fantasy sports contests  
16 that are not like the one Your Honor described, that do  
17 simulate general managers of sports teams. So that contest  
18 may ultimately be found by the Gaming Commission - - -

19 JUDGE WILSON: But - - - but a fundamental - - -

20 MR. PALADINO: - - - to not qualify.

21 JUDGE WILSON: But a fundamental difference  
22 between what the general managers do is they're assembling  
23 players who play with each other and have to interact. And  
24 that's not true for the daily fantasy sports, right?

25 MR. PALADINO: There are some features that



1 differ, but a skillful fantasy sports contestant does have  
2 to make interrelated decisions. The amount of money you  
3 spend on your quarterback affects the amount of money you  
4 have available to spend on other players, just like a  
5 general manager who has to operate within a salary cap.  
6 It's a - - -

7 JUDGE WILSON: Or just like a horse track bettor  
8 who has 100 dollars at the track, and if he spends it all  
9 on the first race, he's not going to have money for the  
10 second race.

11 MR. PALADINO: The fantasy sports contestant also  
12 has to manage their team. Many of these contests have  
13 bench players. You can make trades. You live within  
14 salary caps. You have a draft. This is a simulation, not  
15 a duplication. And the fact that you can point to slight -  
16 - -

17 JUDGE WILSON: I thought that the - - - I thought  
18 that the record on this reflected that these daily - - -  
19 the DFS didn't actually allow for trades. You lock in  
20 whatever the lineup is as of a - - - a deadline, and that  
21 was it. It was - - - it's distinguished, I believe, from  
22 the season-long or month-long types of competitions; is  
23 that wrong?

24 MR. PALADINO: Yes, that's true, but some  
25 competitions you do have bench players, and some





1 competitions you do make trades. In the daily, you have  
2 either salary caps, sometimes you have a draft. And since  
3 this is a facial challenge, it's the plaintiff's burden to  
4 show that none of these competitions can qualify as a  
5 skill-based competition.

6 There are analogies one can draw to proposition  
7 betting. But the fact remains that you don't control in  
8 any way what happens in a proposition bet. But when you  
9 enter a contest that is determined by skill, it necessarily  
10 follows that your skill is influencing the outcome of that  
11 contest, just like a fishing contest. It's a future  
12 contingent event beyond anyone's control whether the fish  
13 are biting that day or your - - -

14 JUDGE WILSON: But isn't - - - isn't the skill,  
15 really, the combination of proposition bets?

16 MR. PALADINO: No, Your Honor. It is - - -

17 JUDGE WILSON: Isn't that the skill you're  
18 describing?

19 MR. PALADINO: It's the assembly of a team and  
20 the management of the team, in many ways that are very much  
21 like what a general manager does. Your decisions that you  
22 make are related to each other. And a key point, this is  
23 not - - - I think what Your Honor might be alluding to,  
24 this is not a fantasy sports betting contest, which would  
25 be a much tougher call.



1           If it was a contest of, say, you know, look at  
2           the ten football games this weekend; pick the winners of  
3           all of them; whoever picks the most winners wins the  
4           contest, or decide which receivers will catch the most  
5           catches, if - - - in that type of scenario, you are making  
6           wagers or - - - or estimates of what's going to happen in  
7           real-world sporting events and the perform - - - the actual  
8           performance of individual players.

9           And that presents corruption concerns, just like  
10          sports betting, because if I'm betting you that Aaron Judge  
11          will hit a home run tonight, you can pay Aaron Judge not -  
12          - - not to play well and win the bet. You - - - it is  
13          almost impossible to fix a fantasy sports contest. So  
14          there are - - - that is - - - that's a policy reason to  
15          treat this activity differently.

16          JUDGE RIVERA: So if I'm - - - if I'm  
17          understanding this line of argumentation, your point is  
18          because although it depends on some reality in the world,  
19          it's a simulation, which is another way of saying it's  
20          make-believe; they're not really betting. But people are  
21          paying money, and they're losing money, and they're winning  
22          money based on exactly this world that they create, this  
23          simulation. So again, I'm hard-pressed to see how it isn't  
24          covered or prohibited, I should say, by the Constitution.

25          MR. PALADINO: Well - - -



1 JUDGE RIVERA: The fact that - - - the fact that  
2 there's some simulation in it, you know, it's like  
3 handicapping. I mean, I'm not sure I understand.

4 MR. PALADINO: Well, the fact that it is a  
5 fantasy is actually a feature in favor of treating this as  
6 a skill-based competition because you are not wagering on  
7 the outcome of any particular sporting event. If the Bills  
8 beat the Chiefs, it doesn't matter. You are not wagering  
9 that Stefon Diggs is going to catch any particular number  
10 of catches. It is a separate, distinct contest that has  
11 been created in which you exercise general-manager-like  
12 skills.

13 And there's evidence that that skill-based  
14 activity determines or influences the outcome of the  
15 contest. It doesn't present corruption concerns. That's  
16 why it's rational to distinguish it from a proposition  
17 betting or sports betting.

18 If you had a video game - - - skill-based video  
19 game contest, the fact that it is a fantasy makes no  
20 difference. I mean, after all, chess is a fantasy battle  
21 between two feudal kingdoms. That's an irrelevance. To  
22 the extent that all the fantasy nature of this is relevant,  
23 it helps my case because it - - - it's a creation of a  
24 separate activity that happens to derive information from  
25 real-world events. Admittedly, there's some chance element



1 in that. But the skillful player realizes that and is able  
2 to make adjustments based on that.

3 You know, and getting back to the Chief's  
4 question, what evidence is there that this is a chance-  
5 based activity? Not a single study is cited by the other  
6 side. There's no discussion in their papers anywhere about  
7 why this cannot be viewed rationally as a skill-based  
8 competition like a fishing competition, which also hinges  
9 on contingent events outside the control of the  
10 participant.

11 Admittedly, this is a close question. And that's  
12 a reason to uphold the statute. If there are competitions  
13 that could be viewed as skill-based, it doesn't matter that  
14 someone can identify a kind of weirdly constructed NASCAR  
15 competition that looks like proposition betting.

16 If this point is debatable, that's a reason to  
17 uphold the statute. I mean, I know we always tend to cite  
18 the burden of proof and the standard of review at the  
19 beginning of your brief, and then you forget about it.  
20 This is a case where this - - - where it really matters.

21 The Supreme Court of Illinois found that this - -  
22 - these types of contests are skill-based contests. Half  
23 the states in the country have legalized them as skill-  
24 based contests, including New Jersey and Maryland that have  
25 Constitutional prohibitions on gambling. I think the fact



1 that this case is being reargued shows that it's a close  
2 question. So if reasonable minds can differ on the proper  
3 classification, which is something more than just looking  
4 at definitions and plugging them in, I think the  
5 legislature's judgment is entitled to deference and  
6 respect.

7 I know we had discussed what is the role of the  
8 legislature here, and I know it's kind of odd because I  
9 admit that this Constitutional provision is a check or a  
10 limitation on what the legislature can do. But you have a  
11 - - - an express textual grant of authority to the  
12 legislature to implement the gambling prohibition. That's  
13 not simply a matter of attaching penalties to gambling  
14 activities, because you have to decide, in the first  
15 instance, whether a new activity is gambling or not.

16 The limitation on the legislature, I submit, is  
17 that the legislature cannot authorize a - - - an activity  
18 that is predominantly determined by chance. This activity,  
19 it is conceded, is predominantly determined by skill, to a  
20 degree that skill predominates between ninety-six percent  
21 of the time and sixty-five percent of the time.

22 Other lawful activities, like commodities trading  
23 and the like, are determined more by chance than fantasy  
24 sports. So if - - - even if this material degree standard  
25 applies - - - and it doesn't, for the reasons set forth in



1 my brief - - - it's rational for the legislature to find  
2 that these activities are not determined, to a material  
3 degree, by chance.

4 I'll - - - I'll save my remaining time for  
5 rebuttal. Thank you.

6 CHIEF JUDGE DIFIORE: Thank you, Counsel.  
7 Counsel?

8 MR. SHERRIN: Thank you, Your Honors. Jeffrey  
9 Sherrin for the respondents. Your Honors, the legislature  
10 - - -

11 JUDGE LASALLE: Counsel, I - - - Counsel, I have  
12 a - - - just right off the bat, I'm going through your  
13 papers. You argue that this court should not defer to a  
14 legislature determination of the factual question of  
15 whether a fantasy port - - - sport contest is dominated by  
16 skill, rather than by chance.

17 However, when I reviewed your motion for summary  
18 judgment, you provided very little evidence, in my opinion,  
19 to the contrary. So regardless of deference, why shouldn't  
20 this court find and rule that you failed to meet your  
21 burden of establishing invalidity beyond a reasonable  
22 doubt?

23 MR. SHERRIN: Well, several things. First, as  
24 far as the reasonable doubt is concerned, this is not a  
25 factual case. This is not where there was a trial and one



1 had to prove, beyond a reasonable doubt, guilt or  
2 innocence, et cetera. It's a - - -

3 JUDGE LASALLE: So is there a different test we  
4 should be using, then?

5 MR. SHERRIN: Yes. First, let me start and - - -  
6 and get to the deference. The legislature has no more  
7 authority to define the term "gambling" as used in the Bill  
8 of Rights of the Constitution than it has to define the  
9 term "speech." And if the legislature were to say that  
10 certain Internet-based content is not speech, that is not  
11 binding at all on the court, nor does the legis - - - that  
12 legislative determination deserve any deference because the  
13 legislature acted outside of its authority in defining a  
14 term in the Constitution. It's - - -

15 CHIEF JUDGE DIFIORE: So we agree we define the  
16 term. What do you use - - -

17 MR. SHERRIN: How - - -

18 CHIEF JUDGE DIFIORE: - - - to guide us?

19 MR. SHERRIN: So I - - - I think, Judge, that the  
20 - - - first of all, the test is what the common-sense  
21 meaning is. And it's for the court to decide, not the  
22 legislature. In arriving at the common-sense meaning, the  
23 court can apply a test. And there have been two tests that  
24 have been enunciated. One is the dominant theory test, and  
25 the other is the materiality test, which has been in the



1 Penal Law for sixty-five or fifty-five years and which has  
2 served its purpose.

3 Materiality is a term that this court or a test  
4 the court applies every day. In all across the state,  
5 materiality is always a question that courts deal with and  
6 are able to handle. Dominant theory or dominant - - - you  
7 know, dominant theory, to - - - is different. What does it  
8 mean? Dominant fifty-one percent from a quantitative  
9 standpoint, from a qualitative standpoint?

10 If there are seven participants and - - -  
11 wouldn't it be the possibility or the probability that one  
12 skill, if - - - if this is skill, dominates by fifty-one  
13 percent, but it might be forty-eight percent for another  
14 person, three percent for another person, seventy-five  
15 percent for another person?

16 JUDGE WILSON: Can I stop you there for a minute?  
17 So are you saying we should not be concerned with what the  
18 people who implemented the Constitutional provision thought  
19 they were doing? Should we care about that legislative  
20 history, or no?

21 MR. SHERRIN: So interestingly, yes. The - - -  
22 to the extent we want to look at what a legislature  
23 determined or considered to be gambling - - -

24 JUDGE WILSON: Well, really, the Constitutional  
25 Convention.





1 MR. SHERRIN: Right.

2 JUDGE WILSON: That's what I'm asking about.

3 MR. SHERRIN: So you go back to that legislature.  
4 And that legislature, in 1895, when they first, you know,  
5 enacted Penal Law - - -

6 JUDGE WILSON: Hang on. I'm sorry. I'm not  
7 asking about the Penal Law. I'm - - - I'm asking - - -  
8 we're not trying to decide the meaning of the Penal Law  
9 here, right?

10 MR. SHERRIN: Correct.

11 JUDGE WILSON: We're trying to decide the meaning  
12 of a provision in the New York State Constitution - - -

13 MR. SHERRIN: But the - - -

14 JUDGE WILSON: - - - a provision that was  
15 implemented in a Constitutional Convention.

16 MR. SHERRIN: And the legislature at that time  
17 determined that contests of skill or endurance of man or  
18 beast is - - - is what skill is. But if you're betting on  
19 contests of skill or endurance of man or beast, that's  
20 gambling.

21 JUDGE WILSON: I'm trying to ask you a prefatory  
22 question - - -

23 MR. SHERRIN: Of course.

24 JUDGE WILSON: - - - which is simply - - - I'm  
25 not asking what they thought. I'm asking, should we care



1 about what the people who put this provision in the  
2 Constitution thought?

3 MR. SHERRIN: Yes, Your Honor. I - - -

4 JUDGE WILSON: Okay. That's all I was asking.

5 MR. SHERRIN: Yes. I do think you should. And  
6 we should think in terms of how society and the  
7 opportunities to bet or gamble have evolved over a hundred  
8 years or more, because obviously, what is there and  
9 available today was not there and available then.

10 Sports betting was recognized as gambling then.  
11 And this is sports betting. The fact that you're putting  
12 together a team that doesn't really exist doesn't mean it's  
13 not sports betting. You're still betting on the outcome of  
14 those people's production.

15 And to distinguish, for example, the general  
16 manager, the general manager is a participant. The general  
17 manager has control over the team. The general manager, as  
18 Your Honor pointed out, thinks how this player will work  
19 with this player or how - - - how well they'll play  
20 together. Do I need one if I have the other? Is my relief  
21 pitcher going to be, you know, sufficient against right-  
22 handed, you know, batters versus left-handed batters?

23 Your fantasy participant doesn't do any of that.  
24 He selects his team. And then that - - - he has no control  
25 over how that team actually performs in real life.



1                   JUDGE CANNATARO: But Counsel, there's a lot of  
2 activities that take place in the world that involve, you  
3 know, aggregating probabilistic outcomes of - - - of future  
4 events that nobody knows what's going to happen. But you  
5 know, people do it all the time. And some people do it,  
6 and they make really good livings doing it, and it's quite  
7 legal. You can do it with securities. You can do it with  
8 real estate. You can do it with commodities.

9                   I - - - that can't be what the definition of  
10 gambling is, because then a lot of things that happened in  
11 the world would be gambling.

12                  MR. SHERRIN: So this came up in the first  
13 argument.

14                  JUDGE CANNATARO: It did.

15                  MR. SHERRIN: And there's a very major difference  
16 between what's going on here and investing in the stock  
17 market, for example. When you invest in the stock market,  
18 you're not gambling. You are purchasing. You're investing  
19 your money. You're purchasing a proprietary interest in an  
20 entity or a fund.

21                  And you can - - - and someone - - - people have  
22 to do something with their money. They can put it under  
23 their mattress. They can put it in a bank. They can buy  
24 stocks. They are making judgments as to, you know, whether  
25 their money will increase or not. But they buy a



1           proprietary interest, and they could hold it for thirty  
2           years or forty years. They don't give it up. They can,  
3           but they don't necessarily give it up the next day.

4                   JUDGE CANNATARO: But Counsel, what I'm talking  
5           about is someone like a fund manager who puts together  
6           these baskets of whatever it is that you're - - - pardon  
7           the expression - - - betting on will happen in the future.  
8           And some people are really good at doing that, and they  
9           become very successful. And other people who are not so  
10          expert at it, who don't really know how to put together a  
11          nice basket of probabilities, they don't do good.

12                   And I think that's sort of what I'm hearing from  
13          the other side here, that there are people who are going to  
14          excel at this because they have the right skill set for  
15          doing it. And there will be other people, probably lots of  
16          other people, who aren't going to do well at it. But  
17          that's - - - that's indicative that skill is involved.

18                   MR. SHERRIN: But that's their job. And people  
19          rely upon them to make life decisions as to what to do with  
20          their money or their property. That's their job. But no  
21          one has the job of betting on fantasy sports, whether it's  
22          daily or it's - - - it's yearly.

23                   JUDGE CANNATARO: Well, if you do it well enough,  
24          maybe you can make a living off of it.

25                   MR. SHERRIN: You might. And more likely, you



1 won't.

2 JUDGE SINGAS: Counsel, can I ask you a question?

3 MR. SHERRIN: Of course.

4 JUDGE SINGAS: Regardless of the definition of  
5 gambling that we decide to adopt, do we have the authority  
6 - - - can we disturb the legislature's conclusion if we  
7 determine that it did have a rational basis for determining  
8 that IFS was or wasn't gambling?

9 MR. SHERRIN: I respectfully submit, Your Honor,  
10 that this is not a rational basis test. Rational basis has  
11 nothing to do with this. This isn't a question of what  
12 evidence did the legislature consider; did they have the  
13 right witnesses; did they ask the right questions, all the  
14 things that would go into a factual determination for a  
15 rational basis argument.

16 Rational basis is an admin - - - generally  
17 speaking, an administrative agency determination. This is  
18 not an Article 78 proceeding. So yes, you absolutely have  
19 the power to disturb the legislative findings.

20 The legislature - - - the plaintiffs here had no  
21 control over what evidence was presented to the  
22 legislature. They didn't have an opportunity to cross-  
23 examine witnesses. A legislative hearing is something that  
24 helps inform legislators, but it by no means binds the  
25 court in how the court should determine an issue that is



1 solely within the province of the court.

2 CHIEF JUDGE DIFIORE: Thank you, Counsel.

3 Counsel, your rebuttal?

4 MR. PALADINO: Your Honors, I'm not saying that  
5 the legislature's conclusion that this is not gambling gets  
6 deference. What I'm saying is that the question of the  
7 degree of skill versus chance is a factual question, as to  
8 which the legislature held hearings and made findings.

9 And this court, in the For the People Of Theatres  
10 case, held that a substantial evidence standard applies to  
11 reviewing the factual finding of - - - of a legislative  
12 body. The plaintiffs could have appeared before the  
13 legislature and presented evidence. They didn't. And  
14 certainly, in their summary judgment motion they presented  
15 no evidence on the skill versus chance question. For every  
16 analogy he can draw to sports betting, I can draw an  
17 analogy to what general managers do.

18 JUDGE RIVERA: Well, let me ask you this,  
19 Counsel. If the presumptions at work in the legislative  
20 determination of what's skill versus chance are at odds  
21 with the - - - the drafters of the Constitution's ideas, do  
22 we then have to defer to what the legislature now decides,  
23 and it's fundamentally not grounded in the understanding of  
24 the drafters of the Constitution?

25 MR. PALADINO: Well, I would agree with you, but



1 I don't see how there's any fundamental conflict here. I  
2 mean, we do look to what the drafters of the Constitutional  
3 amendment had in mind. And what they had in mind at the  
4 time was based upon - - - guess what - - - statutes that  
5 had been enacted historically by the legislature. I mean,  
6 on that point, we're really not in disagreement because  
7 those statutes all prescribe games of chance, wagers, and  
8 future contingent events. But skill-based competitions  
9 were always exempted from that.

10 He tries to distinguish buying stocks with this  
11 policy argument. Well, who made that policy call? Who  
12 said that that makes a difference that you own something?  
13 The legislature did. That happened in the 18, I think,  
14 '80s that they exempted insurance and commodities trading  
15 and the like from the definition of gambling. It was the  
16 legislature that did that. And that informed the  
17 understanding of what was and wasn't gambling when the 1894  
18 amendment was enacted.

19 So if this does come down to some what's it more  
20 like in some fundamental way, as if you could do that with  
21 a made-up contest, I think that that shows that it's a  
22 judgment call. And if it's a close question, tie goes to  
23 the legislature. Thank you.

24 JUDGE WILSON: And if the test - - - if the test  
25 is not skill versus chance, then the legislative findings



1 don't make any difference, right?

2 MR. PALADINO: Well, yes, but I've yet to hear  
3 any articulable principle otherwise. No one has suggested  
4 - - - I mean, I recognize there are historical anomalies,  
5 like you can say why is - - - why is this which seems to be  
6 skill-based treated as gambling or not gambling. That - -  
7 -

8 JUDGE WILSON: Horse race - - - horse racing, for  
9 example, required a Constitutional amendment, right?

10 MR. PALADINO: Understood, but you don't - - -  
11 you don't ride the horse. But if you enter your horse into  
12 a horse-race contest, that's a skill-based contest. I'm  
13 entering my fantasy team that I own, I assembled through  
14 skill, and I manage through skill, and I can beat you at  
15 that activity. That's the relevant activity since that's -  
16 - -

17 JUDGE WILSON: But you might assemble your  
18 trifecta as well, and that required a Constitutional  
19 amendment.

20 MR. PALADINO: That's right, but I don't think a  
21 tri - - -

22 JUDGE WILSON: And there's some skill there,  
23 right? I mean, there are people who make money at the  
24 track and people who lose money.

25 MR. PALADINO: Those types of bets are not





1 structured in a competitive structure. And that - - - the  
2 structure is important because - - -

3 JUDGE WILSON: Why do you say that? Because  
4 they're parimutuel, so they pay out based on the total  
5 volume of bets.

6 MR. PALADINO: That's not the same thing as  
7 comparing how one person did at a particular activity  
8 versus how another person did at a skill-based activity.  
9 You're betting against - - - you're betting against the  
10 house. You just happen to be having this pooling system  
11 for determining the payouts. And that's a subtle  
12 distinction, but it's an important one.

13 And - - - and the fact that it is structured as a  
14 competition defines the relevant activity. And it's that  
15 activity that you look to. And if I influence - - - I  
16 don't have to control the outcome of that activity. If I  
17 influence it, then it can rationally be viewed as a skill-  
18 based contest.

19 And because it's not a sports-betting contest,  
20 that would be a - - - I think you said this before. That  
21 would be a tougher call because you actually are making  
22 predictions about how real-world sporting events are going  
23 to come out. And that presents policy considerations that  
24 I think aren't present with fantasy sports.

25 CHIEF JUDGE DIFIORE: Thank you, Counsel.



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MR. PALADINO: Thank you.

(Court is adjourned)



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

I, Cheryl Odom, certify that the foregoing transcript of proceedings in the Court of Appeals of White v. Cuomo, No. 12 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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