ORIGINAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of DRAFTKINGS, INC., A Delaware Corporation, Petitioner/Plaintiff, — against — ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; and STATE OF NEW YORK, Respondents/Defendants.	Index No. 102014-15 IAS Part Justice Manuel Mendez

DRAFTKINGS' MEMORANDUM OF LAW IN SUPPORT OF ITS APPLICATION BY ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND EXPEDITED PROCEEDING AND DISCOVERY, AND ITS ARTICLE 78 PETITION

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PRELIMINARY STATEMENT

This application for a temporary restraining order seeks to preserve the status quo and stop New York Attorney General Eric Schneiderman from banishing DraftKings from New York before the company has a chance to defend itself. By threatening DraftKings and its business partners with enforcement actions for illegal "gambling"—a criminal offense—unless they immediately halt their operations in the state, the Attorney General is pursuing his own political agenda in defiance of the Constitution and the rule of law. This Court should not allow the Attorney General to destroy a business that has been openly and legally operating in the state for years without due process of law.

DraftKings is a start-up company built by entrepreneurs, whose backgrounds are in computer science, engineering, and analytics. It offers Daily Fantasy Sports ("DFS") contests to millions of Americans of all backgrounds, including hundreds of thousands of New Yorkers, who enjoy participating in fantasy sports. DFS companies have been operating openly and honestly and permissibly in New York for nearly a decade. DraftKings has a constitutional right not to be put out of business in New York before a court—rather than a single politician—decides whether it is operating lawfully.

DraftKings is asking this Court to issue a temporary restraining order that merely preserves the status quo and thus is reviewed under relaxed standards. *See Masjid Usman, Inc. v. Beech 140, LLC*, 892 N.Y.S.2d 430, 431 (2d Dep't 2009) (status quo injunction may issue upon a "reduced degree of proof"). In particular, DraftKings seeks, among other things, to prevent the Attorney General from pressuring, threatening, or otherwise taking inappropriate action against DraftKings and its partners and vendors, as the Attorney General's Office has been doing, and to permit DraftKings the opportunity to have its case heard, rather than be shut down before it even has its day in court. This Court has the authority to "stay further proceedings" under CPLR 7805

and 2201—including enforcement proceedings pursued by the Attorney General—where, as here, a party's constitutional rights are at stake. *Fortuna v. Prusinowski*, 870 N.Y.S.2d 742, 744 (Sup. Ct. 2008); *see also* 55 N.Y. Jur. 2d Equity § 44.[1] Here, the undisputed facts establish that the Attorney General has violated DraftKings' constitutional rights based on a gross misreading of the plain language of New York law.

This past Tuesday evening, November 10, without any prior notice, consultation, deliberation or offering DraftKings an opportunity to be heard, the Attorney General publicly announced that he considered DraftKings and another DFS operator, FanDuel, to be promoting "illegal gambling" and demanded that they "cease and desist" offering DFS contests in New York within the next five business days. During the prior five weeks, his office communicated, including in multiple meetings with DraftKings' counsel, what appeared to be routine consumer protection-related inquiries, never once suggesting that he questioned the legality of DFS altogether. *See* Affidavit of J.B. Kelly, dated November 13, 2015. Thus, his decision last week came as a complete surprise.

The Attorney General communicated his decree in a four-page letter devoid of judicial authority or coherent analysis. He did not purport to bar from New York any fantasy sports companies other than DraftKings and FanDuel, even though other web-based media businesses offer the same games to New Yorkers. In fact, his letter asserted that while *daily* fantasy sports contests amounted to illegal "gambling," *season-long* fantasy sports contests were wholesome,

[1] Many courts have granted injunctive relief in circumstances very similar to those presented here. *See, e.g., Day Wholesale, Inc. v. New York*, 856 N.Y.S.2d 808, 812 (4th Dep't 2008) (affirming a trial court's decision to grant a preliminary injunction against the Attorney General where he sought to enforce a law that was not yet in effect); *Ulster Home Care Inc. v. Vacco*, 688 N.Y.S.2d 830, 835 (3rd Dep't 1999) (affirming an order enjoining the Attorney General barring enforcement of, or criminal prosecution under, an unconstitutionally vague and ambiguous law); *Kings Cnty. Lighting Co. v. Lewis*, 171 N.Y.S. 819, 821 (Sup. Ct. 1918) (enjoining the Attorney General from applying a statute pending a determination of its constitutionality); *see also Google, Inc. v. Hood*, 96 F. Supp. 3d 584, 596-601 (S.D. Miss. 2015) (granting Google's request for a temporary restraining order against state attorney general).

"traditional," and perfectly legal—an arbitrary and irrational distinction that has no basis in New York law and laid bare the incoherence of his reasoning.

Within hours of his announcement, the Attorney General took to the airwaves to publicly defame DraftKings and FanDuel, alleging that the companies are "the leaders of a massive, multi-billion-dollar scheme intended to evade the law and fleece sports fans across the country"—a malicious falsehood unwarranted by the facts and unbecoming of a public official. DraftKings and FanDuel promptly announced that they intended to exercise their First Amendment rights to seek protection from the courts and obtain a judicial determination regarding whether DFS contests amount to illegal gambling before they would submit to the Attorney General's threats and demands.

In the face of DraftKings' decision to exercise its constitutional rights, the Attorney General resorted to acts of retaliation and intimidation. He claimed that his banishment was effective "immediately"—despite the explicit five-business-day notice period mandated by the very statutes he cited in his letter. When DraftKings would not back down, the Attorney General resolved to act as judge, jury, and executioner, launching a strong-arm campaign of coercion. His aides targeted DraftKings' most important business partners and vendors, including the payment processors on which it depends, threatening them with enforcement actions if they did not immediately stop performing their contractual obligations to DraftKings in New York.

The Attorney General's actions constitute a shocking overreach. They are so extreme that they led a Massachusetts court, just last Friday, to issue a temporary restraining order permitting a DraftKings payment processor to continue its services in the face of threats from the Attorney General. *See DraftKings, Inc. v. NBX Merchant Servs. Corp.* (Mass. Super. Ct. Nov.

13, 2015) (Dent Aff. Ex. 1). Numerous editorial boards have questioned the Attorney General's motives, *see, e.g.*, *Eric Schneiderman's Hypocritical War on Fantasy-Sports Gambling*, New York Post (Nov. 11, 2015), while others have questioned his judgment by explaining that DFS contests are not "gambling" because they are obviously "games of skill," permitted under New York law, *see, e.g.*, *New York's Fantasy Spoilsport*, Wall Street Journal (Nov. 12, 2015).

The Attorney General's lawless actions rest on a legal interpretation that is literally without precedent. The plain text of New York's gambling statute *does not prohibit* the contests of skill that DraftKings operates. Before the Attorney General sent his "cease-and-desist" letter, no New York law enforcement official or regulator—including his immediate predecessor and now Governor Andrew Cuomo—ever took the position that DFS contests were illegal. In fact, no official in the eight other states that have virtually identical gambling laws has ever reached the Attorney General's conclusion. And in one of those states—New Jersey—a federal court ruled that fantasy sports leagues did *not* violate that state's virtually identical gambling laws, holding that "[t]he success of a fantasy sports team depends on the participants' skill in selecting players for his or her team." *Humphrey v. Viacom, Inc.*, No. 06 Civ. 2768 (DMC), 2007 WL 1797648, at *2 (D.N.J. 2007) (Weitzman Aff. Ex. 3). Thus, the Attorney General is now an outlier, standing alone among state regulators and contrary to caselaw in declaring DFS illegal and seeking to immediately shut down DraftKings before it has the opportunity to be heard in court.

Perhaps because the Attorney General rushed to judgment without engaging in any deliberation or discussion, he got it wrong, proffering an incoherent and self-defeating interpretation of New York law that cannot stand. The statute he relies upon, N.Y. Penal Law § 225.00(2) (Weitzman Aff. Ex. 2), provides:

> [A] person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

This statute does not apply to the DFS contests run by DraftKings for many reasons.

First, DFS contestants pay an entry fee to compete for a prize—and courts have recognized that an entry fee does not constitute "staking or risking something of value" on the outcome of the contest. In *Humphrey*, the federal court construed New Jersey's gambling statute, which is substantively identical to New York's, and held that "[a]s a matter of law, the entry fees for Defendants' fantasy sports leagues are *not* 'bets' or 'wagers,'" and thus did not amount to gambling. 2007 WL 1797648, at *9 (emphasis added). The same reasoning applies here: DraftKings serves as a neutral third-party administrator that collects entry fees, sets contest rules, calculates points, and awards prizes to the winner of DFS contests—guaranteed prizes that DraftKings announces in advance of the contests and has no chance of gaining back because it never competes.

Second, a DFS game is not a "contest of chance." Rather, it is a contest of skill. In making this determination, New York courts hold that "[t]he test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the rest of the game?" *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 170-71 (1904). Here, academic scholarship, skills studies, and expert commentary conclusively establish that DFS is a classic game of skill and therefore legal under New York law. The Attorney General's own reasoning makes this clear: His "cease-and-desist" letter states that a minority of experienced, skilled players reap the vast majority of winnings—an acknowledgment tantamount to an admission that this is a game of skill. The Attorney General also makes a remarkable concession. In conceding that "traditional fantasy sports" are entirely legal, he has

sanctioned an activity which is materially indistinguishable from the very activity he is challenging in the letter. Daily fantasy sports involve the *exact same skills* and other elements as traditional fantasy sports played over a season; the Attorney General's letter does not even attempt to coherently distinguish the two types of fantasy games. Indeed, every expert opinion and study available indicates that daily fantasy is even *more* heavily skill-based. Had the Attorney General bothered to review the expert opinions and studies readily available to him before attempting to shut down DraftKings without any process, this fact would have been obvious to him. Indeed, University of Chicago Professor Zvi Gilula has concluded that "the fantasy games offered by DraftKings have an inherent and vast character of skill where chance is *overwhelmingly immaterial* in the probability of winning in such games." Karamitis Aff. ¶ 20 (emphasis added).

Third, a DFS contest does not depend on the "outcome" of "a future contingent event not under [the player's] control or influence." This prong of the statute's "gambling" definition, as its original commentary makes clear, applies only to passive games such as roulette that are entirely outside the player's control, not active games such as DFS, in which participants actively play. Indeed, a DFS contest turns on the player's active participation and skill in researching and assembling a fantasy team—something under the player's *absolute* control. The fact that there may be *some* factors outside the player's control that may affect the contest's outcome does not render it illegal "gambling." Otherwise, a tennis match for prize money—or any other outdoor professional sporting event—that may be affected by weather conditions would be a game of chance, rather than skill, making it illegal "gambling." That is a ludicrous proposition, yet it is effectively the interpretation of the statute that the Attorney General is reduced to advancing here. Moreover, a DFS contest does not turn on the "outcome" of a particular "event" but,

rather, on a series of individual performances. For these reasons as well, DFS falls outside the scope of New York's gambling law.

Fourth, there can be no serious dispute that, at a minimum, it is ambiguous whether New York's gambling statute has any applicability here. For that reason, the rule of lenity requires that DraftKings' interpretation be preferred over the Attorney General's. *See People v. Golb*, 23 N.Y.3d 455, 468 (2014) ("If two constructions of a criminal statute are plausible, the one more favorable to the defendant should be adopted." (citation omitted)). Invoking the rule of lenity is particularly warranted where, as here, the government's interpretation would criminalize an entire industry that has served hundreds of thousands of New Yorkers for a decade without any suggestion by regulators that it was illegal.

The Attorney General's actions are also unconstitutional, and a temporary restraining order should issue for that reason as well. He violated due process by denying DraftKings notice and an opportunity to be heard before demanding that the company shut down. He violated equal protection by singling out *daily* fantasy sports for special punishment while permitting *season-long* fantasy sports to continue, even though the gambling statute provides no basis for drawing such an arbitrary and irrational distinction. And he has violated New York's separation of powers by making what amounts to a legislative judgment that DFS contests should be banned, and by usurping the judiciary's power by effectively convicting and punishing DraftKings prior to any judicial determination that DFS violates New York law. Indeed, the Attorney General has not identified any statute that authorizes him to engage in the overreaching he has in this case.

The irreparable harm that would result from the Attorney General's threatened shutdown is self-evident. New York is home to at least seven percent of DraftKings' customers.

Furthermore, the Attorney General's "cease-and-desist" letter—and the adverse publicity attendant to it—are having a chilling effect on DraftKings' business nationwide, as well as its ability to attract new investors and partners, and causing irreparable damage to its business reputation, having been branded by the Attorney General a criminal involved in a "massive, multi-million dollar scheme" to "fleece sports fans across the country." The Attorney General's aggressive, ongoing efforts since issuing his letter to intimidate DraftKings' business partners into stopping the processing of payments for the company threaten to shut down the company even before the statutory five-business-day period runs. Absent emergency relief, the Attorney General will succeed in forcing DraftKings to shutter its New York operations, harming not just the company, but hundreds of thousands of New Yorkers who enjoy its games—all prior to any judicial determination settling the question of the legality of DraftKings' operations. That outcome would make a mockery of due process—a constitutional deprivation from which irreparable harm is presumed—by effectively denying DraftKings its day in court, forcing it to shut down before it has even had the opportunity to defend itself.

The balance of equities militates strongly in favor of urgent relief. After conducting an abbreviated, five-week look into DFS contests, supposedly focused on consumer protection-related issues, the Attorney General then rushed to ban an industry that has been operating openly in New York for nearly a decade. Not once during that time did anyone from the Attorney General's Office so much as suggest that those companies might be violating the law. Nothing changed last week—other than the Attorney General's mind—that required such a precipitous about-face on the Attorney General's part. In short, there is no justification for the Attorney General's draconian rush to judgment, but his misguided conduct could have devastating consequences for DraftKings.

The Attorney General has unleashed an unlawful campaign to destroy a legitimate industry, intending to deprive hundreds of thousands of New Yorkers of the use and enjoyment of DFS contests. This Court is the last line of defense against abuses of prosecutorial power. Emergency declaratory and injunctive relief is necessary to prevent the irreparable harm that will result if DraftKings is forced to shut down in New York. This Court should protect DraftKings by issuing a temporary restraining order that preserves the status quo and brings an immediate halt to the Attorney General's irresponsible, irrational, and illegal actions.

FACTUAL BACKGROUND

The facts relevant to this application are set forth in detail in DraftKings' Verified Petition and Complaint at ¶¶15-70, Exhibit 1 to the Affidavit of Avi Weitzman, dated November 16, 2015.

LEGAL STANDARD

Temporary restraining orders and preliminary injunctions are provisional remedies designed "to maintain the status quo until there can be a full hearing on the merits." *Pamela Equities Corp. v. 270 Park Ave. Cafe Corp.*, 881 N.Y.S.2d 44, 45 (1st Dep't 2009); *see also Gerald Modell Inc. v. Morgenthau*, 764 N.Y.S.2d 779, 784 (Sup. Ct. 2003). A temporary restraining order is appropriate whenever "immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had." N.Y. C.P.L.R. §§ 6301, 6313. Thereafter, a court may issue a preliminary injunction when the movant is likely to succeed on the merits, there is a "prospect of irreparable injury if the provisional relief is withheld," and there exists "a balance of equities tipping in the moving party's favor." *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988).

Where, as here, a party is seeking injunctive relief that merely preserves the status quo, the usual legal requirements are relaxed. In such cases, a plaintiff has a "reduced degree of

proof" in establishing its likelihood of success on the merits. *Masjid Usman, Inc. v. Beech 140, LLC*, 892 N.Y.S.2d 430, 431 (2d Dep't 2009). Likewise, the balance of equities tilts in favor of the party that is seeking to preserve the status quo. *See CanWest Glob. Commc'ns Corp. v. Mirkaei Tikshoret Ltd.*, 804 N.Y.S.2d 549, 571 (Sup. Ct. 2005).

ARGUMENT

This Court should enjoin the Attorney General's unlawful and unconstitutional actions until this case can be heard on the merits. The Court's authority to do so is well settled. In *Fortuna v. Prusinowski*, 870 N.Y.S.2d 742 (Sup. Ct. 2008), the Court recognized its authority to stay proceedings under CPLR 7805—including enforcement proceedings brought by the Attorney General—where a party's constitutional rights are at stake. The court "reject[ed] the respondents' contention that [it was] precluded under CPLR 6313 to enjoin civil and/or criminal enforcement proceedings," holding that it was "expressly authorized by CPLR 7805 to 'stay further proceedings' or 'the enforcement of any determination under review' in an Article 78 proceeding except those issued from the Appellate Division." *Id.* at 744.

Many courts have granted injunctive relief in circumstances very similar to those presented here. *See, e.g., Day Wholesale, Inc. v. State of New York*, 856 N.Y.S.2d 808, 812 (4th Dep't 2008) (affirming a trial court's decision to grant a preliminary injunction against the Attorney General who sought to enforce a law that was not yet in effect); *Ulster Home Care Inc. v. Vacco*, 688 N.Y.S.2d 830 (3rd Dep't 1999) (affirming an order enjoining an injunction against the Attorney General barring enforcement of, or criminal prosecution under, an unconstitutionally vague and ambiguous law); *Kings Cnty. Lighting Co. v. Lewis*, 171 N.Y.S. 819, 821 (Sup. Ct. 1918) (enjoining the Attorney General from applying a statute pending a determination of its constitutionality); *see also Google*, 96 F. Supp. 3d at 596-601 (granting Google's request for a temporary restraining order against state attorney general).

DraftKings is also asking this Court to use its broad inherent discretion and under CPLR 3101 and 408 to expedite these proceedings, including grant expedited pre-answer discovery as well as an expedited trial on the merits, so that DraftKings can timely obtain the "full disclosure of all matter material and necessary" to support its claims, *Town of Pleasant Valley v. N. Y. State Bd. of Real Prop. Servs.*, 685 N.Y.S.2d 74, 79 (2d Dep't 1999), and proceed to trial on the merits quickly. "[E]xpedited discovery is warranted where there is ample need for it," *Stop BHOD v. City of New York*, 881 N.Y.S.2d 367, 2009 WL 692080, at *14 (Sup. Ct. 2009), especially "to determine the extent of [a party's] unlawful conduct," *Sylmark Holdings Ltd. v. Silicone Zone Intern. Ltd.*, 783 N.Y.S.3d 758, 774 (Sup. Ct. 2004). Given the time urgencies of this case, expedited discovery is critical to ensure DraftKings can vindicate its constitutional rights. *See* C.P.L.R. §§ 3101(a), 3106(a), 3107, 3120; 22 NYCRR § 202.12(c)(2).

I. DraftKings Is Likely To Succeed On The Merits

To establish a likelihood of success on the merits, DraftKings need make only a "*prima facie* showing of a reasonable probability of success." *Weissman v. Kubasek*, 493 N.Y.S.2d 63, 64 (2d Dep't 1985). DraftKings easily satisfies that standard here.

A. DraftKings Is Not Engaged In "Gambling" Under New York Law.

"A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome." N.Y. Penal Law § 225.00(2). DraftKings is not running a "gambling" business because paying an entry fee to compete for a prize does not constitute "stak[ing] or risk[ing] something of value." And even if it did, the statute does not apply because DraftKings runs contests of skill, not "contest[s] of chance." Nor do the outcomes of DraftKings' contests depend on a "future contingent event" outside the contestant's control or influence.

1. Paying An Entry Fee To Compete For A Prize Is Not "Staking Or Risking Something Of Value."

The Attorney General's reasoning fails at the outset because participants in DraftKings' DFS contests pay an *entry fee* to compete. An entry fee is not a bet or a wager—and paying an entry fee to compete for a prize does not constitute "stak[ing] or risk[ing] something of value" on the outcome of the contest. If it did, then many types of contests with entry fees—such as spelling bees, beauty pageants, golf tournaments, and horse shows—would amount to illegal gambling.

The only court that has addressed the legality of fantasy sports applied these principles and concluded that fantasy sports are *not* gambling for this very reason. In *Humphrey*, 2007 WL 1797648, the court considered a *qui tam* suit against the operators of a fantasy sports league in which participants paid an "entry fee" and competed for "prizes" that were "awarded to each participant whose team wins its league." *Id.* at *2. The case arose under the law of New Jersey—a state with gambling statutes nearly identical to New York's. *See* N.J. Stat. Ann. § 2C:37-1(b) ("'Gambling' means staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the actor's control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome."). After recognizing that the "success of a fantasy sports team depends on the participants' skill," *Humphrey*, 2007 WL 1797648, at *2, the court explained why paying entry fees to participate in the contests did not amount to gambling:

> Defendants' fantasy sports league participants pay a set fee for each team they enter in a fantasy sports league. This entry fee is paid at the beginning of a fantasy sports season and allows the participant to receive related support services and to compete against other teams in a league throughout the season. . . . Defendants offer set prizes for each league winner and for the overall winners each season. These prizes are guaranteed to be awarded at the end of the season, and the amount of the prize does not depend on the number of entrants. Moreover, Defendants are neutral parties in the fantasy sports games—they do not

> compete for the prizes and are indifferent as to who wins the prizes. Defendants simply administer and provide internet-based information and related support services for the games.

Id. at *7. The court concluded: "**As a matter of law, the entry fees for Defendants' fantasy sports leagues are not 'bets' or 'wagers'**"—and thus did not amount to gambling. *Id.* at *9 (emphasis added).

That exact reasoning applies with full force here. DraftKings serves as a neutral third-party administrator that collects entry fees, sets contest rules, calculates points, and awards prizes to the winner of DFS contests—prizes that DraftKings announces in advance of the contests and has no chance of gaining back because it never competes. Like the contests in *Humphrey*, the DFS contests DraftKings operates do not fall within the scope of the gambling laws.

2. DFS Are Not "Contests Of Chance."

Even if an entry fee in a contest could be deemed to fall within the scope of the gambling laws, the Attorney General's position is wrong because a DFS contest is not a contest of chance.

(a) New York courts have long distinguished between contests of chance, which are generally unlawful, and contests of skill, which are generally lawful. The distinction hinges on whether chance or skill is the "dominating element" that determines the outcome of the contest. The leading case is *People ex rel. Ellison v. Lavin*, 179 N.Y. 164 (1904), where the Court of Appeals explained:

> Throwing dice is purely a game of chance, and chess is purely a game of skill. But games of cards do not cease to be games of chance because they call for the exercise of skill by the players, nor do games of billiards cease to be games of skill because at times, especially in the case of tyros, their result is determined by some unforeseen accident, usually called "luck." The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game?

Id. at 170-71.

In 1965, the legislature codified the definition of "contest of chance" as "any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." N.Y. Penal Law § 225.00(1). This statute relabeled the common-law "dominant element" test into the new "material degree" test. The statute did not, however, change the substance of the test, which still looks to whether chance or skill dominates:

> Based on legislative history, case law, common sense, and the views of many commentators, it ought to be clear that the "dominating element" test for gambling as established by *People ex rel. Ellison v. Lavin* remains valid law in New York State. . . . There was absolutely no intent to change the substantive law of gambling in New York State.

Bennett Liebman, *Chance v. Skill in New York's Law of Gambling: Has the Game Changed?*, 13 Gaming L. Rev. & Econ. 461, 467 (2009).

Although the Attorney General has taken the position that the "material degree" language established a different and "more liberal" test, *see* 1984 N.Y. Op. Att'y Gen. 11, that position wrongly ignores that New York courts and commentators continue to rely on *Lavin* and its "dominating element" test. *See, e.g.*, *People v. Li Ai Hua*, 885 N.Y.S.2d 380, 383 (Crim. Ct. 2009) ("The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game? It follows then that wagering on the outcome of a game of skill is therefore not gambling as it falls outside the ambit of the statute." (quotation marks and citation omitted)); *People v. Hawkins*, 781 N.Y.S.2d 627 (Crim. Ct. 2003) (citing *Lavin*); *People v. Davidson*, 696 N.Y.S.2d 640 (Sup. Ct.) (citing *Lavin*), *rev'd on other grounds*, 737 N.Y.S.2d 467 (4th Dep't 2002), *appeal dismissed*, 98 N.Y.2d 738 (2002); *People v. Melton*, 578 N.Y.S.2d 377 (Sup. Ct. 1991) (citing *Lavin*); *People v. Stiffel*, 308 N.Y.S.2d 64 (N.Y. App. Term 1969) (citing *Lavin* and

explaining that "[w]agering by the participants on the outcome of a game of skill is not gambling"); Criminal Law in New York § 31:4 (4th ed. 2014) ("Some games involve both an element of skill and chance. To determine if the game is one of chance, the court will look at the dominating element that determines the result of the game." (quotation marks omitted)); 62 N.Y. Jur. 2d Gambling § 3 (2015) ("The test of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the results of the game."); *Liebman*, *supra*, at 467.

The continued applicability of the common-law "dominant element" test is bolstered by the presumption that the Legislature is "aware of the law in existence at the time of an enactment and [has] abrogated the common law only to the extent that the clear import of the language of the statute requires." *B & F Bldg. Corp. v. Liebig*, 76 N.Y.2d 689, 693 (1990). Thus, only where the "clear import" of the statutory language "*requires* a conclusion that the Legislature intended to abrogate [the] common-law" rule, *Llanos v. Shell Oil Co.*, 866 N.Y.S.2d 309, 311 (2d Dep't 2008) (emphasis added), will a court find a statute to have nullified the rule. Here, nothing in the text of Section 225.00(1) suggests—let alone "requires"—the conclusion that the "material element" language abrogated the longstanding "dominant element" common-law rule.

(b) Under a straightforward application of the "dominant element" test—and even under the Attorney General's preferred "material element" test—it cannot be seriously disputed that DraftKings runs contests of skill, not contests of chance. "[W]agering on the outcome of a game of skill is [] not gambling [because] it falls outside the ambit of the statute." *Li Ai Hua*, 885 N.Y.S.2d at 383.

It is widely recognized—through numerous expert studies and academic analyses, summarized in detail in the attached Affidavit of Greg Karamitis (the head of analytics at

DraftKings)—that skill rather than chance is the dominant element in a DFS contest. A DFS contest tests a contestant's knowledge of the sport and skill in assessing the relative values of hundreds of players subject to the constraint of a salary cap that is consistently applied to all contestants. Like the general manager of a professional sports team who constructs a roster of players to maximize talent within a given payroll, DFS contestants evaluate the relative worth of individual players and select a fantasy roster in an effort to score the most fantasy points. *See* Karamitis Aff. at ¶¶ 10-11. Contestants better skilled at such analysis reliably and demonstrably perform better in DFS contests—a point the Attorney General concedes. In his press release touting his cease-and-desist letter, and also referenced in his cease-and desist letter, the Attorney General stated that DraftKings and FanDuel "in fact distribute[] the vast majority of winnings to a small subset of experienced, highly sophisticated players . . . [who] constitute roughly 1% of all players on the two sites."[2] Weitzman Aff. ¶ 13 & Ex. 10.

Many experts who have independently studied DFS contests have determined that they are games of skill. Professor Zvi Gilula—former Chair of the Department of Statistics at Hebrew University and current Adjunct Professor of Statistics and Econometrics at the University of Chicago—analyzed user performance data provided by DraftKings encompassing the 2014-15 NFL season, the 2014 MLB season, and the 2013-14 NFL season. Professor Gilula's conclusion was unambiguous: "one MUST conclude that the fantasy games offered by DraftKings have an inherent and vast character of skill where chance is *overwhelmingly immaterial* in the probability of winning in such games."[3] Karamitis Aff. ¶ 20 (emphasis added).

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[2] Press Release, State of N.Y. Office of the Att'y Gen., *A.G. Schneiderman Issues Cease-And-Desist Letters to FanDuel And DraftKings, Demanding That Companies Stop Accepting Illegal Wagers in New York State* (Nov. 10, 2015), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-issues-cease-and-desist-letters-fanduel-and-draftkings-demanding.

[3] Professor Gilula conducted a rigorous analysis in which he identified high-performing users that win more than 80% of head-to-head contests they enter. Using a binomial distribution approach, Professor Gilula determined

Similarly, a publicly available article entitled, "For daily fantasy sports operators, the curse of too much skill," authored by Ed Miller (an MIT-trained engineer and noted author of gaming strategy books) and Daniel Singer (the leader of McKinsey & Company's Global Sports and Gaming Practice), concluded that 91% of DFS player profits were won by just 1.3% of players in the first half of the 2015 MLB season, reflecting the skill-based nature of DFS.[4] *Id.* ¶ 22. In fact, the Attorney General has endorsed this conclusion, as reflected by his press release and the reference in his cease-and-desist letter to the concentration of DFS contest winnings to "the top one percent of DraftKings winners." Weitzman Aff. ¶ 6, Ex. 5. The Attorney General's ultimate conclusion that DFS is not a game of skill is contradicted by the very facts and sources on which he relied.

Other studies similarly demonstrate that DFS contests are predominantly skill-based. For example, Gaming Laboratories International ("GLI") conducted sophisticated computer simulations involving DraftKings contests in MLB, NBA, NHL, and NFL. *See* Karamitis Aff. ¶¶ 15-19. GLI compared both the performance of actual lineups of skilled DraftKings players in these four major sports with unskilled randomly generated computer simulations, as well as "skilled" computer simulations versus "unskilled" computer simulations. As Mr. Karamitis explained: "The results were dramatic and conclusive. *Id.* ¶ 17. The actual lineups from skilled DraftKings players absolutely dominated the unskilled randomly generated computer simulations. In MLB contests, the skilled players won 82.8% of the time; in NFL contests, the

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the probability of achieving certain win ratios by random chance. For example, one DraftKings user in Professor Gilula's dataset exhibited a win ratio of 83% in 40 NBA head-to-head contests. Professor Gilula concluded that the probability of achieving the same or better results by random chance would have been 0.00000000784, or less than eight times in one billion. *See* Karamitis Aff. ¶¶ 20-21.

[4] Miller and Singer identified two primary ways in which skilled users succeed: they employ lineups that take advantage of covariance by choosing multiple players from the same real-life team in order to produce the extreme outcomes that are necessary to win an occasional "big score;" and they exploit salary cap pricing inefficiencies by using sophisticated models to optimize their lineups by projecting which players are most likely to under- or over-perform relative to their salary on a given day. *See* Karamitis Aff. ¶ 23.

skilled players won 83.4% of the time; in NBA contests, the skilled players won 96.1% of the time; and in NHL contests, the skilled players won 81.9% of the time."[5] *See id.*

These conclusions based on indisputable statistical analyses are amply supported in both the academic and lay literature, where those knowledgeable about DFS contests uniformly agree that DFS contests are games of skill. Weitzman Aff. at ¶¶ 39-51. The Attorney General's cease-and-desist letter omits any reference to this literature, suggesting that the Attorney General either did not investigate these important sources of information, or simply ignored them. Indeed, an entire cottage industry has formed regarding winning strategies for DFS play, *id.* at ¶¶ 52-58, and numerous press articles emphasize the dominant skill-based nature of DFS games. Weitzman Aff. at ¶¶ 44-51. Again, none of these many publicly available sources were mentioned, let alone analyzed, in the Attorney General's cease-and-desist letter.

Even if the Attorney General were correct that the "material degree" language establishes a different and more limited standard, DFS contests still constitute games of skill. As Professor Gilula observed, "chance is overwhelmingly *immaterial* in the probability of winning" the contests. Karamitis Aff. ¶ 20 (emphasis added). To be sure, chance plays some role in DFS contests—as it does in all games of skill—but as the studies above confirm, it does not come close to being a "material" element.

3. DFS Contests Do Not Depend Upon A Future Contingent Event Not Under The Player's Control Or Influence.

A DFS contest is not "gambling" under the second definition in Penal Law Section 225.00 because it does not depend on "a future contingent event not under [the player's] control or influence."

[5] Similarly, the results of the GLI studies demonstrated that the skilled DraftKings players outperformed even skilled computer simulations against unskilled computer simulations, in comparisons across the board in all four sports. *See* Karamitis Aff. ¶ 18.

This definition of "gambling" applies to passive games, such as roulette, in which the player's success depends on events entirely outside his control or influence. It does not apply to active games in which the participant is actually playing the game. The original commentary to Section 225 makes this point explicit by distinguishing between people *playing* a game of skill and people betting on the *outcome* of a game of skill:

> One illustration of the definition of "gambling," drawn from the commentaries of Judges Denzer and McQuillan, is the chess game between A and B, with A and B betting against each other and X and Y making a side bet. Despite chess being a game of skill, X and Y are "gambling" because the outcome depends upon a future contingent event that neither has any control or influence over. The same is not true of A and B, who are pitting their skills against each other and thereby, have a material influence over the outcome; they, therefore, are not "gambling." Thus the definition of "gambling" embraces "not only a person who wagers or stakes something upon a game of chance but also one who wagers on 'a future contingent event [whether involving chance or skill] not under his control or influence.'

Donnino, Practice Commentary, McKinney's Penal Law (citing Denzer and McQuillan, Practice Commentary, McKinney's Penal Law § 225.00, p. 23 (1967)); s*ee also People v. Jun Feng*, 946 N.Y.S.2d 68 (Crim. Ct. 2012) (discussing same).

As established by the numerous expert and academic studies discussed above, participants in a DFS contest are themselves playing a skilled game. Success in a DFS contest turns on how skillfully the player has assembled his fantasy team—an act that is *entirely* under his control and influence. Indeed, if a player's success at DFS depended on future events outside his control, the Attorney General and so many experts would not have found that a small percentage of players experience repeated success at a high rate. This is conclusive evidence that the outcome of DFS contests *are* under the player's "control or influence."

It is no answer to say that a DFS contest falls within the statutory definition because it *also* depends, in part, on the performance of the actual athletes. That would make *every* game

"gambling" because the outcome of *every* game depends, in part, on "contingent events" over which the contestant has no control. For example, a tennis player, while controlling her own racket, cannot control whether the wind might push her shot wide, nor can she control the shots or strategy of her opponent. Indeed, if the outcome of the game were predetermined and depended on no contingent events outside the player's control, there would be no point in playing it.

This definition of gambling is inapplicable to DFS for additional reasons: it applies only to wagers based on the "outcome" of a future contingent "event." N.Y. Penal Law § 225.00(2). A DFS contest, however, does not depend on the "outcome" of a particular game, such as whether the Patriots defeat the Seahawks. Rather, it depends on the player's skill in predicting specific performance measurements of multiple independent athletes relative to their "market" price. Moreover, the word "event" does not mean "performance." In the context of sports betting, the law *distinguishes* between the event (*i.e.*, the outcome of a game) and the performance (*i.e.*, how a player of the game performs). *See*, *e.g.*, 31 U.S.C. § 5362 (Unlawful Internet Gambling Enforcement Act) (federal exemption for fantasy sports applies only if the winning outcome is not based "solely on any single *performance* of an individual athlete in any single real-world sporting or other *event*") (emphasis added); 28 U.S.C. § 3702 (Professional and Amateur Sports Protection Act) (distinguishing between "one or more competitive games" and "one or more performances of such athletes in such games"). Thus, Section 225.00's prohibition on wagering on the outcome of a "future contingent event"—such as the result of a game—does not apply to individual player *performances* across many games.

4. The Rule Of Lenity Requires The Gambling Statute To Be Construed In Favor Of DraftKings.

At the very least, New York law is ambiguous as to whether DFS contests amount to illegal "gambling." The rule of lenity provides that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010) (quotation marks omitted)); *see also Golb*, 23 N.Y.3d at 468 ("If two constructions of a criminal statute are plausible, the one more favorable to the defendant should be adopted." (citation omitted)). This is an additional reason for this Court to construe the statute in favor of DraftKings.

The rule of lenity derives from the principle that criminal statutes should give "fair notice to ordinary people who are required to conform their conduct to the law," *United States v. Kozminski*, 487 U.S. 931, 949-50 (1988), and enshrines the common-sense principle that no person should "be forced to speculate, at peril of indictment, whether his conduct is prohibited," *People v. Feldman*, 791 N.Y.S.2d 361, 383 (Sup. Ct. 2005). To satisfy the fair notice requirement, a statute "either standing alone or as construed," must make "it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier*, 520 U.S. 259, 267 (1997).

Here, neither the language of Section 225.00, nor the way New York courts have defined illegal "gambling" for decades, gave fair notice that DFS contests fall within the scope of the statute. The fact that DraftKings and many other companies have been publicly operating DFS contests in New York for many years without the slightest question conclusively establishes that—at the very least—the statute is ambiguous. Moreover, that so many other prosecutors and elected officials have declared that DFS contests are *not* illegal gambling—either on the basis of

New York's statute, or the gambling statutes of other states that use virtually identical language—is additional proof that the statute can reasonably be read in different ways.

Applying the rule of lenity "is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Liparota v. United States*, 471 U.S. 419, 426 (1985). By defining DFS contests as "gambling," the Attorney General's interpretation would make any game or contest involving some degree of unpredictability a criminal offense in New York. Hosting an essay contest, sponsoring a chess tournament, and many other innocuous activities would potentially subject New York citizens to criminal prosecution—an absurd and intolerable result. This Court should reject the Attorney General's attempt to turn acts widely considered "innocent and lawful" into crimes without "a clear and positive expression of the legislative intent to make [such conduct] criminal." *People v. Carillo*, 246 N.Y.S.2d 692, 697 (2d Dep't 1964) (citation omitted).

Endorsing the Attorney General's construction of New York's gambling statutes would also render them unconstitutionally vague. "The prohibition of vagueness in criminal statutes is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process." *Johnson v. United States*, 135 S. Ct. 2551, 2556-57 (2015) (quotation marks omitted). Due process imposes the "requirement of clarity," *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012), and a statute fails to meet that requirement when "it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits," *City of Chi. v. Morales*, 527 U.S. 41, 56 (1999). Here, because there is nothing in the statutory text or prior judicial decisions that would have provided fair notice that DFS could be deemed "gambling" under New York law, such an interpretation would render that law unconstitutionally vague.

B. DraftKings Is Not Violating Any Other Provision Of New York Law.

The Attorney General is wrong in claiming that Draft Kings is violating related gambling statutes and other provisions of New York law.

First, the Attorney General claims that DraftKings is violating the statute forbidding the "possession of gambling records," including any "writing, paper, instrument or article . . . of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise." N.Y. Penal Law §§ 225.15, 225.20. But this assertion rests on the presumption that DraftKings is engaged in "gambling" activities. As demonstrated above, that presumption is false. Because DraftKings is not engaged in gambling, it is not violating the statute prohibiting the possession of gambling materials. Nor is it violating the prohibition on possessing bookmaking materials, because that statute depends on a predicate finding of gambling. *See* N.Y. Penal Law § 225.00(9) (defining "bookmaking" as "advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events"); *see also id.* § 225.00(4) (providing that a person "'advances gambling activity' when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity"). Furthermore, at common law, "bookmaking" involved taking bets against the public, something DraftKings does not do. *See People v. Goldstein*, 295 N.Y. 61, 63 (1946).

Second, the Attorney General claims that DraftKings is engaged in deceptive acts or practices, in violation of Executive Law § 63(12) and General Business Law §§ 349 and 350, by misrepresenting the company's compliance with applicable laws; the likelihood that an ordinary player will win a jackpot; the degree of skill implicated in DFS contests; and the character of DFS contests as falling outside the realm of gambling. But most of these claims fall along with the Attorney General's mistaken claim that DraftKings is involved in gambling, and there is no

factual support for these claims in any event. DraftKings does not run false or misleading advertising. Advertisements stating that anyone who enters a DraftKings contest can win and that DraftKings has made millionaires are unequivocally true. These types of advertisements with regard to contests are also extraordinarily common. Even advertisements inviting people to become contestants on popular game shows like 'Who Wants to Be a Millionaire' would seemingly constitute deceptive advertising under the Attorney General's poorly articulated logic. DraftKings' advertisements do not mislead or deceive viewers about their prospects of winning.

In any event, all of these claims concern specific advertising that, even if inaccurate, would not justify the Attorney General's efforts to shut down DraftKings entirely. To the contrary, even if the Attorney General were somehow to prevail on these claims, they would, at most, support requiring clarifying language in the particular statements.

C. The Attorney General's Actions Are Unconstitutional.

The Attorney General's campaign against DraftKings—including his legally baseless cease-and-desist letter, as well as his improper attempts to threaten DraftKings' business partners into severing their ties with DraftKings—violate the Constitution in many ways. Any one of these violations provides an independently sufficient basis to enter a temporary restraining order that will protect DraftKings' constitutional rights until the merits of this case can be adjudicated.[6]

1. The Attorney General Did Not Provide Notice And An Opportunity To Be Heard Before Ordering DraftKings And Its Business Partners To Shut Down.

Due process requires that, *before* being forced to forfeit a property interest, parties must be provided with "reasonable notice and the opportunity to be heard." *Karpova v. Snow*, 497 F.3d 262, 270 (2d Cir. 2007). Any deprivation of a property interest, "at minimum," must "be

[6] DraftKings asserts the same claims under both the New York and the United States Constitutions. *See* N.Y. Const. Art. I, Sec. 6 (due process); N.Y. Const., Art. I, Sec. 11 (equal protection); N.Y. Const. Art. III, Sec. 1, Art. IV, Sec. 1, Art. VI, Sec. 1 (separation of powers).

preceded by notice and opportunity for hearing." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). This "right to prior notice" is "central to the Constitution's command of due process." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993).

The Attorney General gave DraftKings no such notice here. DraftKings has a significant property interest in operating in New York: the company has invested substantial funds in the state, creating revenue streams, brand recognition, and customer goodwill. The cease-and-desist letter "demand[s]" that DraftKings forfeit those property interests immediately—before any litigation commences, before any court addresses the legality of DFS, and before DraftKings has an opportunity to defend itself. Then, knowing that DraftKings' ability to operate depends on a chain of vendors, payment processors, and financial institutions, the Attorney General contacted *them*, threatening enforcement actions and demanding that they immediately stop doing business with DraftKings in New York. The Attorney General's unlawful strong-arm campaign of coercion has denied DraftKings due process. *Cf. Activision v. Pinnacle Bancorp, Inc.*, 976 F. Supp. 2d 1157 (D. Neb. 2013) (granting a motion for preliminary injunction against State Attorney General who sent "cease and desist" letter to plaintiff company, and noting "[t]he court is deeply concerned about the ability of the Attorney General to issue cease and desist orders, prior to the conclusion of the investigation, prior to any negative findings, prior to hearings, and prior to permitting submission of documents and evidence by the [plaintiff]").

The constitutional violation is exacerbated by the fact that the Attorney General's actions rest on a novel construction of the gambling statute. It is a bedrock principle of constitutional law that the abrupt enlargement of a criminal statute "is at war with" the fair notice requirements of due process. *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (reversing convictions arising from a novel construction of a state trespass statute). By springing unforeseen criminal

liability, a sudden expansion of a statute "operates precisely like an ex post facto law." *Id.* at 353. Thus, it violates due process to "apply[] a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Lanier*, 520 U.S. at 266.

The Attorney General's disrespect for due process is further established by the fact that he had many opportunities to give notice to DraftKings, but chose instead to keep his legal interpretation a secret. Not once during the month of extensive communications between the Attorney General's office and DraftKings did the Attorney General so much as hint that he was considering, for the first time ever, declaring DFS illegal in New York, let alone give DraftKings an opportunity to present its case. Instead, he chose to operate through secrecy followed by bullying and intimidation—pressuring DraftKings into closing its doors before it can even present its case to a court. To ban an entire industry from the State, without even once informing the affected companies that such a thing was possible or affording them any opportunity to be heard, violates the most basic tenets of fairness and due process.

The possibility that DraftKings one day might be able to present its case by defending an enforcement action under N.Y. Exec. Law § 63(12) would be too little, too late. The entire point of that procedure is to ensure that companies receive due process *before* they are forced to close. Under Section 63(12), the Attorney General cannot unilaterally force a business to close, but must "apply . . . to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages[.]" N.Y. Exec. Law § 63(12). Only if the court, after taking evidence and hearing argument, deems the relief "proper," may it order the business to close. *Id.* The same is true for the other statutes the Attorney General cites in his cease-and-desist letter.

See N.Y. Gen. Bus. Law § 349 (authorizing the Attorney General to file an "action . . . to enjoin unlawful practices"); *id.* §§ 350-c, 350-d (authorizing the Attorney General to recover civil penalties "in a civil action").

Due process requires that the Attorney General follow the law and the procedure established by the Legislature. The Attorney General's attempt to circumvent this procedure by unilaterally forcing DraftKings to close its doors—or to achieve the same result indirectly by threatening its business partners—violates due process.

2. The Attorney General's Singling Out DraftKings And FanDuel For Punishment Amounts To Selective Enforcement That Violates Equal Protection.

The Equal Protection Clause of the Fourteenth Amendment requires that state actors treat similarly situated persons equally under the law. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Clause protects "every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 563-65 (2000). State actors may not treat a person differently based on arbitrary distinctions that lack a rational basis. *Id.*

Here, the Attorney General has selectively enforced New York's gambling laws against DraftKings and FanDuel by declaring DFS unlawful—while approving what he calls "traditional" season-long fantasy sports. AG Letter at 2. That distinction is arbitrary and irrational. New York law provides no basis for distinguishing between a DFS contest and a season-long fantasy sports contest. In fact, winning a daily contest requires just as much and perhaps even more skill than winning a season-long game. *See New York's Fantasy Spoilsport*, Wall Street Journal (Nov. 12, 2015). The Attorney General's observations that season-long fantasy contestants conduct a "competitive draft," compete "over the course of a long season,"

and "repeatedly adjust their teams" are completely irrelevant and offer no logical or constitutional basis for banning DFS games from New York while permitting season-long fantasy sports games to continue.

It is unconstitutional to enforce New York's gambling statutes based on an arbitrary distinction that has no legal significance—the equivalent of enforcing the burglary statute against people whose last names begin with the letters A through L, while not enforcing it against people whose last names begin with M through Z. When a law enforcement official strictly enforces the laws against one party—but declines to enforce them against a similarly-situated party—that discrimination can indicate a violation of equal protection. *See 303 W. 42nd St. Corp. v. Klein*, 46 N.Y. 2d 686, 694-96 (1979) (selective enforcement of building code); *People v. Acme Markets, Inc.*, 37 N.Y.2d 326, 331 (1975) (evidence that "purely private interests" motivated discriminatory enforcement of a Sunday sales law supported selective-enforcement claim).

3. The Attorney General's Attempt To Outlaw DFS Exceeds His Authority And Violates The Separation Of Powers.

Article III of the New York Constitution vests the Senate and the Assembly with the legislative power; Article IV vests the Governor with the executive power; and Article VI vests the courts with the judicial power. These separate grants of power to each of the coordinate branches of government imply that each branch is to exercise power within its given sphere of authority. This means that "the Legislature make[s] the critical policy decisions, while the executive branch's responsibility is to implement those policies." *Saratoga Cnty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 821-22 (2003) (quotation marks omitted).

Here, the Attorney General has impermissibly encroached on the power of the Legislature and Judiciary. His encroachment on the legislative prerogative—by making what amounts to a legislative determination that DFS should be outlawed—is clear in light of the four-

factor test the Court of Appeals established in *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), for evaluating potential separation-of-powers violations. First, the Attorney General acted based on his own conception of "sound public policy" in light of his own cost-benefit analysis. *See* AG Letter at 3 ("DFS appears to be creating the same public health and economic problems associated with gambling."). Second, the Attorney General acted without employing the "interstitial rule making that typifies administrative regulatory activity." *Boreali*, 71 N.Y.2d at 13 (citations omitted). Third, the "Legislature has repeatedly tried—and failed—to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions" in the area of DFS. *Id.* Fourth, the Attorney General lacks expertise in the area of DFS but seeks to impose a blanket rule in that area. For these reasons, the Attorney General's actions amount to an impermissible legislative judgment that violates the separation of powers.

The Attorney General also violated the separation of powers by arrogating to himself the power the Constitution vests in the Judiciary—the power to determine, in individual cases, whether a particular individual or company has violated the law. By forcing DraftKings to shut down *before* a court has heard argument, examined the evidence, and made a ruling on the lawfulness of its business, the Attorney General has encroached on the judiciary's constitutional power. The Constitution gives the judiciary the exclusive power to declare conduct lawful or unlawful—and if unlawful, to impose punishment on the defendant. The Attorney General is improperly attempting to seize that power here by making its own adjudication and imposing its own punishment on DraftKings.

In launching his campaign against DraftKings, the Attorney General has exceeded his authority. The Office of the Attorney General is a "constitutionally created office[], with no

common law duties except those imposed by statute." *People v. Ferone*, 641 N.Y.S.2d 815, 817 (Mount Vernon City Ct. 1996) (citation omitted). In other words, "the powers and duties of the attorney general . . . have been prescribed by the legislature." *People v. Corning*, 2 N.Y. 9, 18 (1848). If the legislature has not authorized the Attorney General to act, he is powerless to do so.

The Attorney General has not identified any statute permitting his actions against DraftKings. No statute empowers him to demand that a company shut down. Nor does any statute authorize him to indirectly shut down a company by threating its business partners with enforcement actions. His job is simply to investigate and identify potential illegal activity, "charge [a] violation of law," and initiate a "proceeding." *Hassan v. Magistrates Court of City of New York*, 191 N.Y.S.2d 238, 241 (Sup. Ct. 1959). "It is then for the judiciary to interpret and apply the law in the particular case where the charge is made." *Id.*

New York courts also have explained that the Attorney General is "an administrative official" who may not engage in "judicial powers" such as "pass[ing] upon [a] question of civil violation or of criminal guilt." *Dunham v. Ottinger*, 243 N.Y. 423, 434 (1926). If the Attorney General believes illegal activity is occurring, "[t]he ultimate and *only* end to which he can proceed is by action or criminal prosecution to submit to the courts the question whether a person has been guilty of such unlawful practices." *Id.* (emphasis added). And if, "through ignorance or intention," the Attorney General should attempt to exceed his limited powers, "the victim of his illegitimate and oppressive attempt . . . can always appeal to the courts for protection." *Id.* at 434.

If the Attorney General believes DraftKings is violating the law, his only option is to file a court action or press charges; he may not pass judgment, demand the company shut down, or engage in other illegitimate and oppressive conduct outside of a judicial proceeding. Indeed,

many statutes—including those cited in the cease-and-desist letter—expressly require the Attorney General to seek judicial assistance, not take matters into his own hands, if he suspects a business is unlawful. *See* N.Y. Exec. Law § 63(12) ("the attorney general may apply . . . to the supreme court . . . for an order enjoining . . . [illegal] business activity"); *id.* N.Y. Gen. Bus. Law § 349(b) ("the attorney general . . . may bring an action . . . to enjoin such unlawful acts"); *see also id.* § 350-b-2 ("application may be made by the attorney general . . . to a court . . . to issue an injunction").

II. DraftKings Will Suffer Irreparable Harm Absent A Temporary Restraining Order, And The Balance Of Equities Tips Heavily In Its Favor.

DraftKings will suffer massive and irreparable harm in many ways if this Court does not preserve the status quo through a temporary restraining order. Irreparable injuries are those that "cannot be repaired, restored, or adequately compensated in money, or where the compensation cannot be safely measured." *Bisca v. Bisca*, 437 N.Y.S.2d 258, 261 (Sup. Ct. 1981).

The immediate and irreparable harms that would ensue in the absence of a temporary restraining order are described in detail in the attached Affidavit of Timothy Dent.

First, DraftKings would suffer irreparable harm if it is forced to shutter its operations in New York—one of its largest markets. There are 375,000 DraftKings customers in New York, accounting for a large percentage of the approximately 2.5 million total players who play in the company's contests. DraftKings' New York customers have paid more than $99 million in entry fees thus far in 2015, generating more than $10 million in revenue. Should DraftKings cease operations in New York, the loss of such a large percentage of total revenue from this key market would be devastating to the company, its employees, its New York office, and to shareholder value.

Moreover, DraftKings would lose the support of its investors and its fundraising efforts would be severely hampered. DraftKings has partnered with major sports entities such as Fox Sports, Major League Baseball, the National Hockey League, Major League Soccer, and the owners of the New England Patriots, Dallas Cowboys, New York Knicks, New York Rangers, and Los Angeles Dodgers. DraftKings also has business relationships with sports companies such as The Madison Square Garden Company and Legends Hospitality. A shutdown would have a chilling effect on DraftKings' ability to attract new investors and partners and would impede its ability to continue its relationships with its existing investors and partners. All of this harm would not be confined to New York, but would cause a cascading effect throughout the country—including in the dozens of states where DraftKings continues to operate lawfully—adversely affecting its customer base and its business relations with vendors, customers, and regulators.

The harm to DraftKings would be severe and incalculable. New York courts have found irreparable injury where a party will "likely sustain a loss of business impossible, or very difficult, to quantify." *Willis of New York, Inc. v. DeFelice*, 750 N.Y.S.2d 39, 42 (1st Dep't 2002); *see also IXIS N. Am., Inc. v. Solow Bldg. Co. II, L.L.C*, 847 N.Y.S.2d 902, 2007 WL 2274426, at *3 (Sup. Ct. Aug. 9, 2007) (granting plaintiff's motion for preliminary injunction where damages "would be extremely difficult to calculate and . . . would be severely detrimental to plaintiff's business"). Irreparable injury will also be found where a company's revenues and customer goodwill are threatened. *See Second on Second Cafe, Inc. v. Hing Sing Trading, Inc.*, 884 N.Y.S.2d 353, 366 (1st Dep't 2009) (finding irreparable injury where a company's inability to operate jeopardized business licenses, damaged revenues, harmed customer goodwill, and meant the loss of a real estate investment); *Four Times Square Assocs., L.L.C. v. Cigna Invs.*,

Inc., 764 N.Y.S.2d 1, 3 (1st Dep't 2003) (finding irreparable harm where customer goodwill and business creditworthiness threatened).

DraftKings would also suffer irreparable harm to its reputation, including the loss of customer and public goodwill. The Attorney General has made—and continues to make—malicious false statements about DraftKings, such as:

- "It is clear that DraftKings and FanDuel are the leaders of a massive, multi-billion-dollar scheme intended to evade the law and fleece sports fans across the country."
- "Daily Fantasy Sports . . . [is] really just a new version of online gambling . . . it really does lure in people who are the most prone to gambling addiction problems."
- "[U]nlike traditional fantasy sports, daily fantasy sports companies are engaged in illegal gambling under New York law, causing the same kinds of social and economic harms as other forms of illegal gambling, and misleading New York consumers."

A complete collection of the Attorney General's statements about DraftKings is in the attached Affirmation of Avi Weitzman.

The Attorney General's false and defamatory public statements have a profound stigmatizing and chilling effect; they deter potential customers and investors from getting involved in what the Attorney General has mischaracterized as an unlawful business. New York courts treat harm to business reputation as *per se* irreparable. *See, e.g.*, *Jacob H. Rottkamp & Son, Inc. v. Wulforst Farms, LLC*, 844 N.Y.S.2d 600, 605-06 (Sup. Ct. 2007) (injury to "business reputation and good will can be difficult or impossible to quantify and [thus] demonstrate[] irreparable harm"); *Zomba Recording LLC v. Williams,* 839 N.Y.S.2d 438, 2007 WL 1063869, at *10 (Sup. Ct. 2007) ("A preliminary injunction may also be granted to protect a company's goodwill and credibility in its industry"); *CanWest*, 804 N.Y.S.2d at 571 (noting that irreparable harm exists when there is a "loss of reputation, good will and business opportunities").

Lastly, deprivation of a constitutional right constitutes, in and of itself, irreparable harm. *See Statharos v. NYC Taxi & Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir.1999) ("Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary."); *Cmty. Charter Sch. v Bd. of Regents of the Univ. of N.Y.*, 2013 WL 10185566, at *17 (N.Y. Sup. Ct. June 18, 2013) ("Further, when an alleged deprivation of a constitutional right is involved, ... no further showing of irreparable injury is necessary" (citations omitted)).

"[T]he 'balancing of the equities' usually simply requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief." *Ma v. Lien*, 604 N.Y.S.2d 84, 87 (1st Dep't 1993). In this case, the balancing strongly favors DraftKings, as failing to grant injunctive relief would cause DraftKings far greater injury than would the imposition of a temporary restraining order against the Attorney General. DraftKings stands to suffer substantial and irreparable monetary and non-monetary harm, whereas the government will lose nothing. Because "the failure to grant preliminary injunctive relief would cause greater injury to [DraftKings] than the imposition of the injunction would cause to the" government, *Clarion Assocs., Inc. v. D.J. Colby Co.*, 714 N.Y.S.2d 99, 101 (2d Dep't 2000), the balance of equities weighs heavily in favor of granting a temporary restraining order.

Moreover, New York courts have held that that balance of equities tilts in favor of the party who merely seeks to preserve the status quo. *See CanWest*, 804 N.Y.S.2d at 571 ("[S]ince [plaintiff] merely seeks to maintain the status quo, the balance of equities tilt in its favor. Absent a TRO, [defendant] will be free to take additional actions which may cause [plaintiff] further irreparable injury"); *Gramercy Co. v. Benenson*, 637 N.Y.S.2d 383, 384 (1st Dep't 1996) ("[T]he balance of the equities tilts in favor of plaintiffs, who merely seek to maintain the status quo . . ."); *see also State v. City of New York*, 713 N.Y.S.2d 360, 361 (2d Dep't 2000)

("Although the State may not ultimately prevail on the merits, the equities lie in favor of preserving the status quo while the legal issues are determined in a deliberate and judicious manner."). Here, it is DraftKings that is seeking to preserve the status quo. DFS contests have been played in New York since 2007, and the Attorney General has never once asserted they were unlawful—until now. There is no immediate threat to public health or safety. Allowing this longstanding business to continue to operate until this lawsuit is resolved will not harm the government in any way.

"The purpose of a preliminary injunction is to preserve the status quo pending trial." *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co.*, 498 N.Y.S.2d 146, 151 (2d Dep't 1986). That is all DraftKings seeks here: the preservation of the longstanding status quo pending a final judgment in this case.

CONCLUSION

The Court should preserve the status quo by issuing a temporary restraining order and preliminary injunction that enjoins the Attorney General from taking enforcement actions or making threats against DraftKings or its business partners until the questions concerning the lawfulness of DFS contests can be resolved on the merits. The Court should further order an expedited schedule to trial and expedited discovery here, and the Court should grant DraftKings' Article 78 Petition.

Dated: New York, New York
November 16, 2015

Respectfully submitted,

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