

ESPORTS: THE BILLION DOLLAR INDUSTRY WORTH GAMBLING ON

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I'm going to stay awake as long as I can, reading my book, learning the Sicilian Defense. There's fifty-seven pages about it in the book, with a hundred and seventy lines stemming from P to QB4. I'm going to memorize them, and play through them all in my mind.¹

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Similar to Beth Harmon’s analysis and survey of the pieces on a chessboard, we as humans test our individual skill through strategy, decision-making ability, and physical dexterity every day. We test our wits, our strengths, and quantify our wins with trophies, bragging rights, world rankings, and prizes. No matter the event, competitors strive to outdo their opponents using the skills they have honed over years of training, research, and/or natural gifts. New opportunities and emerging technology permit us to refine our skills, embrace new challenges, and fuel our competitive drive. 2007 introduced the world to daily fantasy sports and in 2018 sports betting in the United States got a new lease on life.² Following Netflix’s release of *The Queen’s Gambit*, millions of new fans began playing chess, learning the centuries-old game, and entering chess competitions.³ More recently, the billion-dollar industry of eSports, also known as electronic sports or eSports, has continually expanded and reached heights in popularity comparable to the rise of sports betting, daily fantasy sports, and online gambling. eSports are defined as competitive, organized video gaming—including competitors from different leagues and teams—or as individuals in the same game as their opponents.⁴ From Call of Duty tournaments to online individual competitions played on mobile devices, eSports captures new players, entices new fans, and creates new ways for consumers to play games, test their skills, and win prizes.

Although the types of games are changing, the same questions remain—when played for real money and prizes, are these games legal and, if so, how are they regulated? In order to determine whether these new games and competitions are permitted under law, one must first determine if they are contests of skill or of chance. If they are games of chance, the game is most likely an illegal form of gambling. Gambling is

² See Professional and Amateur Sports Protection Act (“PASPA”), S. 474, 102nd Cong. (1992).

³ See Faith Karimi, ‘*The Queen’s Gambit*’ is Sparking a Surge of Interest in Chess, CNN (Dec. 6, 2020) <https://www.cnn.com/2020/12/06/us/queens-gambit-chess-popularity-trnd/index.html> (explaining that following the Netflix series, millions of players went on “chess.com” for games, lessons, and puzzles regarding chess, giving the site its most annual growth since 2007).

⁴ See AJ Willingham, *What is eSports? A Look at an Explosive Billion-dollar Industry*, CNN (August 27, 2018) <https://www.cnn.com/2018/08/27/us/eSports-what-is-video-game-professional-league-madden-trnd> (defining eSports as competitive, organized video gaming); see also *Esports Glossary*, ROUNDHILL INVESTMENTS, <https://www.roundhillinvestments.com/eSportseSports-glossary> (last visited Apr. 4, 2021) (“Esports stands for electronic sports. The word ‘esport’ is used to describe any video game that has a professional competitive scene. The most popular eSports are League of Legends, Overwatch and Counter-Strike: Global Offensive.”).

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defined differently by each state, but in general, gambling is 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, with the understanding that the actor will receive something of value in the event of a certain outcome.⁵ The debate between whether a game is one of skill or chance goes back to the early days of America.⁶ The recent rise in popularity of eSports, such as daily fantasy sports and online gaming, have put a new wrinkle into the seemingly timeless debate. This emergence invites legislatures and courts to decide whether these games should be permitted, regulated, or perhaps just outright illegal.

This Article focuses on the history, legality, and issues of skill gaming in the United States, specifically eSports. Particularly, this Article illustrates that eSports are games of skill, and therefore not a traditional form of gambling. When requiring entry fees and played for prizes, however, eSports require certain regulation and provisions to help promote player safety and uncompromising integrity similar to gambling. Part I provides an overview of the history of gambling, including the fundamental basics of games of skill, games of chance and the distinctions between each. Part II describes eSports' recent and extraordinary rise in popularity. Part III analyzes whether eSports are games of skill and, if they are, whether associated entry fees into the contests are bets or wagers. Part IV applies daily fantasy sport's legislative and regulatory history to the future of eSports. Part V discusses how lawmakers can promote safe game play and consumer protection in eSports. Part VI concludes that state legislatures should take a more proactive role to promote the safe and efficient growth of the eSports industry.

⁵ See N.J. STAT. ANN. § 2C:37-1(b) (West 2021) (defining "gambling" in New Jersey law); *see also* N.D. CENT. CODE. § 12.1-28-01(1) (West 2021) (defining North Dakota's gambling law as "risking any money, credit, deposit, or other thing of value for gain, contingent, wholly or partially, upon lot, chance, the operation of gambling apparatus, or the happening or outcome of an event, including an election or sporting event, over which the person taking the risk has no control."); IND. CODE ANN. § 35-45-5-1(d) (West 2021) (promulgating Indiana's gambling statute as "'risking money or other property for gain, contingent in whole or in part upon lot, chance, or the operation of a gambling device").

⁶ *See infra* notes 7–23 discussing the history of gambling in regard to games of chance and games of skill.

I. A Brief History of Gambling

A. GAMBLING'S HISTORICAL ROOTS

Gambling has held a place in history throughout time.⁷ There is evidence that gambling occurred in some form even in primitive societies.⁸ Gambling existed in early Chinese history, and the Great Wall was financed in part through a lottery.⁹ Similarly, Ancient Romans and Greeks enjoyed gambling on all matters through the use of dice, and played for “chips” to combat the illegality of the practice in Rome.¹⁰ The original thirteen U.S. colonies used lotteries to sponsor work projects and help raise revenue to finance the Revolutionary War.¹¹

Although gambling has withstood the test of time, it has often faced its fair share of criticism, cultural and religious opposition, roadblocks, and prohibitions.¹² Opposition to lotteries was based on moral grounds, the rise of scandals, and the notion that poorer groups were most often exploited with long-shot hopes of quick riches.¹³ As America took shape, many states chose instead to prohibit lotteries and games of chance, with few permitted exceptions.¹⁴

In the mid-20th Century, lotteries made a comeback. In the late 1960s and early 1970s both New York and New Jersey legalized lotteries, which proved to be enormously successful generating revenues for the states but also appealing to players. State lotteries were there after legalized in more states and now a majority of U.S.

⁷ See Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define Legality of Games of Mixed Skill and Chance*, 57 *DRAKE L. REV.* 383, 384 (2009) (citing Darrell W. Bolen, *Gambling: Historical Highlights and Trends and Their Implications for Contemporary Society*, in *GAMBLING AND SOCIETY: INTERDISCIPLINARY STUDIES ON THE SUBJECT OF GAMBLING* 7 (William R. Eadington ed., 1976)).

⁸ See Bolen, *supra* note 7.

⁹ See Cabot, *supra* note 7, at 385 (citing ROGER DUNSTAN, *GAMBLING IN CALIFORNIA*, ch. 3 (1997)).

¹⁰ The History of Gambling, <https://www.gambling.net/history/> (last visited Apr. 10, 2021) (discussing the history of dice in Rome and Greece).

¹¹ Cabot, *supra* note 7, at 386 (citing HENRY CHAFETZ, *PLAY THE DEVIL: A HISTORY OF GAMBLING IN THE UNITED STATES FROM 1492 TO 1950* 25 (1960)).

¹² Cabot, *supra* note 7, at 387-88 (summarizing issues with the lottery in the colonies and the early history of gambling in certain U.S. states).

¹³ See Cabot, *supra* note 7, at 387.

¹⁴ See REUVEN BRENNER & GABRIELLE A. BRENNER, *GAMBLING AND SPECULATION: A THEORY, A HISTORY, AND A FUTURE OF SOME HUMAN DECISIONS* 1 (1990) (discussing Pennsylvania and Massachusetts as the first states to ban lotteries).

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states have legalized lotteries of their own¹⁵ Following the legalization of lotteries, other forms of gambling, such as casino gambling, were legalized in a handful of states, in addition to Nevada, which first legalized casinos in the 1930s.¹⁶ This growing trend demonstrated greater acceptance of legalized gambling among the states and resulted in further expanded gambling opportunities. A recent leap forward and further expansion of legal gambling occurred in 2018, when the United States Supreme Court overturned a federal law, the Professional and Amateur Sports Protection Act (“PASPA”), paving the way for states to regulate and offer legal sports-betting.¹⁷ Twenty-seven states currently have some form of legalized sports betting, and at least nine additional states are considering legislation to legalize sports betting by the end of 2021.¹⁸

As gambling has expanded by type and geography, it has faced challenges, regulations, trials, and errors. Consumer protection laws, taxes, state budgetary shortfalls, and regulatory licensing are only a few of the many factors considered when debating the legalization and regulation of a new industry within a state. Both federal and state governments must balance the interest of citizens and existing businesses against projected tax revenue streams, increased competition for the public’s entertainment dollar, all while ensuring that operators adhere to rigid, regulatory standards.

B. SKILL AND COMPETITION IN SOCIETY

Unlike lotteries and casino style games of chance—such as roulette—games of skill do not, for the most part, predominantly rely upon chance or randomness, but rather require the player’s physical and/or mental ability, strategy, and decision-making ability to prevail.¹⁹

¹⁵ See generally Matthew Vaz, “We Intend to Run It”: Racial Politics, Illegal Gambling and The Rise Of Government Lotteries In The United States, *THE JOURNAL OF AMERICAN HISTORY* (2014).

¹⁶ See generally Nelson Rose, *The Legalization and Control Of Casino Gambling*, 8 *FORDHAM URB. L.J.* 245 (1980).

¹⁷ *Murphy v. NCAA*, 138 S. Ct. 1461 (2018); see Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704 (1992).

¹⁸ See Ryan Rodenberg, *United States of Sports Betting: An Updated Map of where Every State Stands*, https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization, (Last visited on May 13, 2021) (listing current states that have legalized sports wagering).

¹⁹ See Brent Kelley, *Match Play Strategy in Golf: The Do’s and Don’ts*, *LIVEABOUT* (Feb. 9, 2020), <https://www.liveabout.com/match-play-strategy-1562671>; see e.g., *State v. Am. Holiday Ass’n*, 727 P.2d 807, 809–11 (Ariz. 1986) (describing how different jurisdictions have distinguished between games of chance and games of skill); see generally *Humphrey v. Viacom, Inc.*, 2007 WL 1797648 (D.N.J. June 20, 2007) (discussing daily fantasy sports skill requirements).

Much like games of chance, games of skill have been around for much of history. In Ancient Greece, citizens regularly competed against each other in contests for fame and glory.²⁰ Carnival games, golf tournaments, chess tournaments, and other contests have existed for decades through both friendly and professional competitions between participants.²¹

Games of skill are generally not considered to be gambling under states' laws and thus avoid regulation and prohibition.²² Many forms of skill gaming include an entrance fee to participate in the skill game or competition.²³ Certain states' supreme courts, state appellate courts, and attorneys general have explicitly concluded that skill games and contests are not forms of illegal gambling because they do not materially involve the element of chance.²⁴ The question of whether an underlying game is one of skill or chance is critical in determining whether or not the game would be considered illegal gambling. To reach this

²⁰ See generally Raymond Stefani, *Ancient Olympic Superstars and the Remarkable Skills They Could Teach Today's Athletes*, THE SPORT JOURNAL, Jan. 2020 (noting Olympics sports and games throughout Greek and Roman history).

²¹ See Rules & Regulations, THE UNITED STATES CHESS FEDERATION, <http://www.uschess.org/index.php/Scholastic-Misc/Rules-Regulations.html> (providing a list of chess tournament rules).

²² See *O'Brien v. Scott*, 20 N.J. Super 132 (Ch. Div. 1952):

Games of skill are usually lawful, while gambling by any species of games of chance is generally considered unlawful. 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, or, alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment. It is the character of the game, and not the skill or want of skill of the player, which determines whether the game is one of chance or skill. A game of chance does not cease to be such because it calls for the exercise of skill, nor does a game of skill cease to be such because at times its result is determined by some unforeseen accident.

²³ See, e.g., *State v. Am. Holiday Ass'n*, 727 P.2d 807, 809-11 (Ariz. 1986) (comparing U.S. states that have distinguished between games of chance and games of skill).

²⁴ See *Am. Holiday Ass'n*, 727 P.2d at 809-11 (reasoning a golf tournament or a spelling bee should not be considered gambling); see also *Berckefeldt v. Hammer*, 616 P.2d 183, 185 (Colo. App. 1980) (concluding golf to be a game of bona fide skill); *Pompano Horse Club v. State*, 111 So. 801, 813 (Fla. 1927) (discussing the difference between a purse or prize and a bet or wager); AG Opinion- McConnell (2003) : Citation/Link: 2003 WL 22050876, at *3 (S.C.A.G. Aug. 29, 2003); <http://www.scag.gov/wp-content/uploads/2013/03/03aug-29-Mcconnell.pdf> (concluding when a contest is purely skill and the contest follows all other applicable requirements such as the entry fee not being made up of the prize, purse, or premium, the contest does not likely violate South Carolina's gambling laws); Opinions of the Attorney General to the Honorable D. David Parsons, Sept. 4, 2002, A.G. No. 2002-330 (finding contests such as hole-in-one contests where contestants pay an entry fee, the prize is not made up of the entry fee, and receive a prize based on their skill is not "gambling" under Alabama statutes).

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determination, the majority of courts analyze games by determining whether the specific game or contest consists of three elements: (1) consideration; (2) prize; and (3) chance.²⁵

C. THE NEW JERSEY MODEL – GAME OF SKILL OR GAME OF CHANCE?

Whether a game is one of skill or chance is determinative of its ultimate legality—i.e. whether its operator and participants are engaging in illegal gambling. To illustrate an example of the requisite analysis, this Article posits New Jersey’s accepted definition of illegal gambling, and the deliberation and review of a game’s elements for consideration, prize, and chance.

As with nearly all states, New Jersey prohibited illegal gambling early in its history and determined that the element of chance was at the heart of classifying certain conduct as gambling, and thus illegal under the law.²⁶ In the late 19th century, the New Jersey legislature explained that “all wagers, bets, or stakes, made to depend upon any race, or upon gaming by lot or chance, or upon any lot, chance casualty or unknown contingent event whatever, shall be unlawful.”²⁷ New Jersey’s Constitution has lived up to the cliché and has proven to be a living, breathing document, when it comes to the expansion of gambling having, through multiple amendments, authorized multiple types of gambling.²⁸

In 1969, New Jersey held a voter referendum to amend the New Jersey Constitution to permit a state lottery.²⁹ Shortly after in 1976, New Jersey held another voter referendum to amend its constitution and authorize casino gambling in Atlantic City.³⁰ In 1977, lawmakers enacted the Casino Control Act which legalized casino gambling in New Jersey.³¹ The Casino Control Act provided a structure to regulate gambling in New Jersey, including the casino industry, and its impact on the public at large through the Casino Control Commission (the “Commission”).³² In 2011, New Jersey Governor Chris Christie dramatically restructured the state’s gaming regulatory system, including a transfer of the Commission’s day-to-day regulatory duties to

²⁵ See *O’Brien*, 89 A.2d at 282.

²⁶ See *L. 1871, c. 578*, p. 109.

²⁷ *Carll & Ramagosa, Inc. v. Ash*, 129 A.2d 433, 435 (N.J. 1957) (quoting Act of April 6, 1871, ch. 578, 1871 N.J. Laws 109 (supplementing the Act to Prevent Gambling of 1797)). See also N.J. Stat. Ann. § 2A:40-1 (West).

²⁸ See N.J. CONST. art. IV, § 7, para. 2.

²⁹ See N.J. STAT. ANN. § 5:9-2 (effective Feb. 16, 1970).

³⁰ See *Vaz*, *supra* note 15, at 85 (noting when New Jersey approved a lottery).

³¹ N.J. STAT. ANN. § 5:12-1 *et seq.* (effective June 2, 1977).

³² See *id.* § 5:12-50.

the Division of Gaming Enforcement.³³ Now, the Division of Gaming is responsible for registering casino employees, non-gaming vendors, licensing gaming vendors, patron complaints, and more.³⁴ In addition, they are also charged with regulating new games introduced in the market.³⁵

The New Jersey legislature notably limited the Casino Control Act's jurisdiction over certain types of games, including "[a]ny banking or percentage game located within the casino or simulcasting facility played with cards, dice, tiles, dominoes, or any electronic, electrical, or mechanical device or machine for money, property, or any representative value."³⁶ The Casino Control Act's jurisdiction over specific games is subject to the New Jersey Division of Gaming Enforcement's oversight.³⁷ The New Jersey Division of Gaming also has the authority to enforce state law and prosecute all Casino Control Act violations.³⁸

With the expansion of legal forms of gambling in New Jersey over the recent decades it is critical to recognize that in New Jersey, as in the majority of other states, all gambling is presumptively illegal, unless it is regulated or otherwise expressly permitted. In New Jersey, casino gambling, internet gambling, and sports betting are now expressly permitted and regulated.³⁹ These now legal and regulated forms of gambling are considered games of chance, and not games of skill. New Jersey law includes separate statutory definitions of gambling, contests of chance, and contests of skill.⁴⁰ "Gambling" is defined as "staking or

³³ See N.J. CASINO CONTROL COMM'N, *A Brief History of the Casino Control Commission*, <https://www.nj.gov/casinos/about/history/> (last visited Apr. 10, 2021).

³⁴ See generally N.J.S.A. 5:12-1 *et seq.* (providing regulatory framework for New Jersey Casino Control Commission and the New Jersey Division of Gaming Enforcement).

³⁵ See *id.*

³⁶ N.J. STAT. ANN. § 5:12-21.

³⁷ N.J. STAT. ANN. 5:12-77 (granting the New Jersey Division of Gaming Enforcement power to enforce the Casino Control Act); See N.J. STAT. ANN. § 5:12-21 (The New Jersey Division of Gaming Enforcement uses four elements to determine if the game is under its authority: (1) "banking or percentage game"; (2) "located within a casino or simulcasting facility"; (3) "played with cards, dice, tiles, dominoes, or any electronic, electrical, or mechanical device or machine"; and (4) "played for money, property, or any representative value.").

³⁸ See N.J. STAT. ANN. 5:12-77.

³⁹ See N.J. STAT. ANN. § 5:12-95:17 *et seq.*; N.J. STAT. ANN. § 5:12A-1 *et seq.*; N.J. CONST., Art. 4, § 7, ¶ 2.

⁴⁰ New Jersey provides that a contest of skill where the player pays an entry fee for the opportunity to win a monetary prize does not constitute unlawful gambling and does not constitute a game of chance. N.J. STAT. ANN. § 5:19-1. However, New Jersey law specifically defines what constitutes a "contest of skill." N.J. STAT. ANN. § 5:19-1 provides: "[f]or the purposes of this section, 'contest of skill' means any baking or photography contest, and any similar contest that is approved as a 'contest of skill' by the Attorney

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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."⁴¹ New Jersey law defines a "contest of chance" as "any contest, game, pool, 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 or some other persons may also be a factor therein."⁴² Like most states, New Jersey determines if a game is gambling, and thus illegal or required to be regulated, by analyzing if the game has those three elements—consideration, prize, and chance.⁴³

1. Consideration

New Jersey defines consideration as when both sides "get something out of the exchange."⁴⁴ New Jersey courts most often address monetary consideration when presented with the issue of illegal gambling, for example, the payment of an entry fee required for participation.⁴⁵ Other forms of consideration include an "ante" such as in certain card games like poker, a \$5 dollar chip placed on Number 24 Black in Roulette, or a \$10 moneyline wager on the Philadelphia Eagles in their upcoming game against New York Giants.

2. Prize

A prize is generally anything of value rewarded to a participant in a contest or activity. New Jersey defines "something of value" as "any

General, provided that the winner or winners are selected solely on the quality of an entry in the contest as determined by a panel of judges using uniform criteria to assess the quality of entries. A "contest of skill" shall not include any contest, game, pool, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance. A 'contest of skill' shall also not include any casino game, any sports wager or sports wagering scheme, or any Internet gaming of any kind." N.J. STAT. ANN. § 5:19-1.

⁴¹ N.J. STAT. ANN. § 2C-37-1(b).

⁴² N.J. REV. STAT. § 2C:37-1(a) (2013).

⁴³ See *O'Brien v. Scott*, 20 N.J. 132 (N.J. Super. Ct. Ch. Div. 1952); see also *Midwestern Enters., Inc. v. Stenehjem*, 625 N.W.2d 234, 237 (N.D. 2001) (noting North Dakota's prize, chance, and consideration requirement); *State v. Big Chief Corp.*, 13 A.2d 236, 239 (R.I. 1940) (concluding prize, chance, and consideration are required to find a violation of the state's gambling statute); *Albertson's, Inc. v. Hansen*, 600 P.2d 982, 985 (Utah 1979) (noting an illegal lottery has three elements: prize, chance, and consideration for the chance).

⁴⁴ See *Contl. Bank of Pa. v. Barclay Riding Acad.*, 459 A.2d 1163, 1171 (N.J. 1983).

⁴⁵ See *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 WL 1797648, at *10 (D.N.J. June 20, 2007) (finding consideration present between a fantasy sports operator and a patron).

money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.”⁴⁶ As stated in the general prize definition, an extension of gameplay or service, such as a free round of pinball, free virtual coins for continual gameplay, or an extra life in a video game may be considered a “prize” under a state’s gambling definition.⁴⁷

3. *Chance*

The chance element generally requires that a process beyond the participant’s direct control determines the outcome. Chance appears to be the most ambiguous of the three elements of gambling. States generally view chance on a sliding scale to assess the degree to which chance may influence or determine the ultimate outcome of a contest or game before that contest crosses the line and becomes gambling.⁴⁸ As a result, states settle in one of three categories when concluding whether a game is one of chance or skill: (i) states that follow the predominant factor test (also referred to as the dominant factor test); (ii) states that follow the material element test; and (iii) states that follow the any element of chance test.⁴⁹

i. The Predominant Factor Test

The predominant factor test is a determination as to whether chance is the principal factor in deciding the winner of a contest. It is essentially a balancing test between the elements of chance and skill in the particular game or contest. If the judge or other fact finder

⁴⁶ N.J. REV. STAT. § 2C:37-1(d) (2013).

⁴⁷ *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 787 (9th Cir. 2018) (finding “play points” that extend playing time without charge is considered a prize under Washington law, even if the prize has no “pecuniary value”); *but see* *Mason v. Machine Zone, Inc.*, 851 F.3d 315, 320 (4th Cir. 2017) (finding a free spin on a virtual wheel for an opportunity to obtain virtual prizes with no value are not considered a prizes under Maryland and California law). *See e.g.* *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016); *Ristic v. Mach. Zone, Inc.*, No. 15-CV-8996, 2016 WL 4987943, at *1 (N.D. Ill. Sept. 19, 2016).

⁴⁸ *See infra* notes 49 to 63 for a discussion of the three tests states use to determine if a game is gambling.

⁴⁹ *Compare* Nat’l Conference on Legalizing Lotteries v. Farley, 96 F.2d 861, 863 (App. D.C. 1938) (reasoning that chance must be the predominate factor when analyzing the game at issue) *with* *Thole v. Westfall*, 682 S.W.2d 33, 37 (Mo. Ct. App. 1984) (concluding that chance only needs to be a material element, and not a dominant element, for the game to be found as a game of chance).

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determines chance is the predominant factor in the outcome of the contest, as opposed to the skill of the participant, the contest is classified as a game of chance, even if the exercise of skill or judgment is also a factor in determining the winner of the contest.⁵⁰

ii. The Material Element Test

The material element test provides that if chance is involved to a material degree in determining the winner of the contest or game, although chance may not be the dominant factor in determining the winner of the contest or game, it will be considered a game of chance.⁵¹ In certain states, the dominant factor test and material element test are used interchangeably as courts interpret a showing of a “material degree” as requiring that chance be a dominant factor.⁵²

iii. The Any Element of Chance Test

The third category of analysis used by courts is the any element of chance test. This test requires only that chance or luck play some role in determining the winner of a contest.⁵³ Therefore, any presence or option of chance classifies the game as a game of chance.

New Jersey courts have developed a body of law for identifying whether games constitute gambling and have settled on whether the outcome depends on a material degree upon an element of chance, known as the material element test.⁵⁴ Although promulgated in New Jersey statutes, New Jersey courts’ use and analysis of the material elements test has provided an expansive overview and framework for determining the issue of skill or chance.

In *O’Brien v. Scott*,⁵⁵ the issue before the court involved a game called “Skilo” and the court was asked to determine if the game was one of skill, and thus not illegal gambling under New Jersey law.⁵⁶ In its analysis, the court first described a game of chance by stating:

⁵⁰ See *People v. Settles*, 29 Cal. App. 2d Supp. 781, 787 (Cal. Ct. App. 1938); see also *O’Brien v. Scott*, 20 N.J. Super. 132, 142 (N.J. Ch. 1952) (finding that the skill in the game at issue was the predominant factor in the outcome and therefore it was not a game of chance).

⁵¹ See *Boardwalk Regency Corp. v. Attorney Gen. of New Jersey*, 188 N.J. Super. 372, 378–79 (N.J. Super. Ct. Law Div. 1982).

⁵² See *State v. Torres*, 831 S.W.2d 903, 905 (Ark. 1992).

⁵³ See *id.*

⁵⁴ N.J. STAT. ANN. § 2C:37-1 (West 1978) (codifying the material element test in New Jersey law).

⁵⁵ *O’Brien v. Scott*, 20 N.J. Super. 132, 133–34 (N.J. Ch. 1952).

⁵⁶ *Id.*

The phrase ‘game of chance,’ it has been said, is not one long known in the law and having therein a settled signification. It is a game determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, or are thwarted by chance; a game in which hazard entirely predominates; one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental circumstances incidental to the game or the manner of playing it or the device or apparatus with which it is played, but not under the control of the player.⁵⁷

The court next described a game of skill by stating:

Games of skill are usually lawful, while gambling by any species of games of chance is generally considered unlawful. 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, or, alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment. It is the character of the game, and not the skill or want of skill of the player, which determines whether the game is one of chance or skill. A game of chance does not cease to be such because it calls for the exercise of skill, nor does a game of skill cease to be such because at times its result is determined by some unforeseen accident.⁵⁸

The court analyzed Skilo’s physical parts and mechanics of play, agreeing that Skilo consisted of players each throwing the same number of balls at holes numbered 1 to 75 for a prize that is announced at the beginning of each game.⁵⁹ The game’s objective is for the player to throw the ball into specific numbers until the player obtains a vertical, horizontal, or diagonal row of numbers and the first player to complete a row wins the game.⁶⁰

The court also relied upon the plaintiffs’ expert witness, Dr. Harold William Kuhn, in analyzing whether the game was one of chance or skill.⁶¹ Dr. Kuhn, a mathematics lecturer at Princeton University and

⁵⁷ *Id.* at 137.

⁵⁸ *See id.* at 137-38.

⁵⁹ *Id.* at 138-39.

⁶⁰ *Id.*

⁶¹ *O'Brien*, 20 N.J. Super. at 139.

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expert in the mathematics of games, testified that he “made a statistical study and survey of the game and came to the conclusion that it was one of skill, and that skill predominates over chance.”⁶² Dr. Kuhn testified that games of skill and games of chance are separated by two fundamental criteria: (1) an expert or skilled player can win a substantial majority of games of skill over a novice or unskilled player; and (2) in a game of skill, the expert or skilled player will have, on average, the better ending score than a novice or unskilled player.⁶³ The court, using Dr. Kuhn’s findings, concluded that in Skilo, there is a clear indication that accomplished players are more skillful than novice or average players, and therefore, Skilo is not a game of chance.⁶⁴

In 1982, the court in *Boardwalk Regency Corp. v. Attorney Gen. of New Jersey*,⁶⁵ held that a backgammon tournament constituted gambling because it is a game of chance under New Jersey law.⁶⁶ In deciding the issue, the court reasoned, “[t]he proper focus of the inquiry here is not on the level of skill which may affect the outcome of the contested activity but rather on whether the element of chance is a factor that is material to the final result.”⁶⁷ The court evaluated backgammon’s elements, including the rolling of the two dice to begin the game and at the beginning of each player’s turn.⁶⁸ The plaintiffs’ expert testified that the dice rolls are a “given” element and that the numbers displayed following the roll are “mere background upon which the game’s complex strategies are played” and in turn, the skill in developing the backgammon strategies are more important than the numbers rolled.⁶⁹ The court concluded that “the rolling of the dice constitutes a ‘future contingent event that is not under the [player’s] control or influence,’” and therefore, a material element of chance is embedded in the game of backgammon, making it a form of gambling when analyzed using the material element test.⁷⁰

New Jersey is not the only state that has analyzed whether a game constitutes illegal gambling as a game of chance, not skill. Nearly every

⁶² *See id.*

⁶³ *See id.*

⁶⁴ *See id.* at 141-42.

⁶⁵ *Boardwalk Regency Corp. v. Attorney Gen. of New Jersey*, 188 N.J. Super. 372 (Law Div. 1982).

⁶⁶ *Id.* at 381.

⁶⁷ *See id.* at 375-76.

⁶⁸ *See id.* at 379.

⁶⁹ *See id.*

⁷⁰ *See id.* at 379-81.

states' courts have been tasked with opining on a game's legality.⁷¹ Each analysis generally involves the same type of questions, facts, and reasoning. Although courts have used similar reasoning and analysis, each opinion is necessary for determining whether the game is legal. Using the analytical framework discussed above, courts have been asked to classify whether new types of competitions, such as daily fantasy sports, are games of skill or games of chance.⁷² A court's determination of chance vs skill, ultimately decides whether the public can participate in such contests and whether operators can offer their products in a specific state.

II. A Tutorial on Esports and Regulation

Using “e” as a preface to a word connotes the “electronic” version or edition of the word that follows. Whether it is eCommerce, email, eBooks, or eLearning, that “e” preface implies newness, innovation, and the latest version of something that may have existed in some other version for years, decades, or perhaps centuries. Broadly speaking, eSports falls within that construct. eSports, in general, are competitive, organized video gaming competitions where participants from different leagues, teams, or individuals face off against each other within the same video game.⁷³ The popularity of such contests has exploded in recent years, with the revenue they generate following a similar growth.⁷⁴ The eSport competitions include classic video games such as Super Smash Bros, Call of Duty, and Madden, as well as newer games such as Fortnite Battle Royale.⁷⁵ These games are regularly telecasted or streamed live on services such as Twitch where millions of viewers can view, cheer on,

⁷¹ *State v. Am. Holiday Ass'n, Inc.*, 727 P.2d 807, 809–11 (Ariz. 1986); *Cossack v. City of L.A.*, 523 P.2d 260, 264 (Cal. 1974); *see also Berckefeldt v. Hammer*, 616 P.2d 183 (Colo. App. 1980) (finding that a golf match was not a game of chance, and therefore, not gambling).

⁷² *Humphrey v. Viacom, Inc.*, 2007 WL 1797648 at *1 (D.N.J. June 20, 2007); *see also Dew-Becker v. Wu*, 2020 IL 124472 at *5 (Ill. Apr. 16, 2020) (holding that the appropriate test for determining whether fantasy sports contests constitute a legal game of skill is the predominant factor test). The Illinois Supreme Court noted that daily fantasy sports contests under question in the case—a head-to-head game played on FanDuel based on statistics from NBA games—met the level of skill needed to comply with the predominant factor test. *See Dew-Becker*, 2020 IL 124472 at *6.

⁷³ *See Willingham, supra* note 4.

⁷⁴ *See Willingham, supra* note 4.

⁷⁵ *See Willingham, supra* note 4 (discussing the types of games played in eSports tournaments); *see also Tournaments for all Games*, SMASH.GG, https://smash.gg/tournaments?per_page=30&filter=%7B%22upcoming%22%3Atrue%2C%22videogameIds%22%3A%20%22%7D&page=1 (last visited Apr. 10, 2021) (listing Super Mario Bro. eSports tournaments around the world).

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and track their favorite players.⁷⁶ But, as with most “e” preface words, eSports is not easily defined or limited to only traditional video games. Software developers, such as Skillz Inc. or the Players’ Lounge, offer eSports games that are designed to omit the chance element from their offered games, which in turn, only permits the players to win based on their specific skills.⁷⁷

eSports is now a billion-dollar-a-year industry.⁷⁸ Tournaments offer millions of dollars in prize money for the winning players and/or teams.⁷⁹ Sponsorships, endorsements, salaries, and scholarships are more prevalent in the industry than ever before; but, the industry remains, for the most part, highly unregulated.⁸⁰

State regulatory bodies, including gaming boards and gaming commissions, have authority over regulatory, supervisory, licensing, and enforcement matters for the majority of activities falling under the state gambling regulation and acts.⁸¹ States regulate gambling for a number of reasons. The majority of state gambling statutes and regulations are designed to protect against specific problematic behavior like lack of protection for players and criminal activities including, but not limited to: illegal bookmaking and gambling fraud, as well as a lack of internal controls, integrity, and compliance checks.⁸²

⁷⁶ See Willingham, *supra* note 4 (illustrating how fans enjoy eSports).

⁷⁷ See *The Legality of Skill Gaming*, SKILLZ, <https://skillz.zendesk.com/hc/en-us/articles/200620348-The-Legality-of-Skill-Gaming> (last updated Mar. 27, 2021) (illustrating how skill-based gaming and eSports are not games of chance based on the three-element test); *About Us*, PLAYERS’ LOUNGE, <https://playerslounge.co/about> (last visited Apr. 10, 2021) (describing its business model where users can play in matches based on skill in head-to-head matches and tournament formats).

⁷⁸ Christina Gough, *Revenue of the Global Esports Market 2018-2025*, STATISTA (Mar. 18, 2021), <https://www.statista.com/statistics/490522/global-esports-market-revenue/>; see Willingham, *supra* note 4.

⁷⁹ Willingham, *supra* note 4.

⁸⁰ Sarah Kelly, *Game on – the ethics of eSports*, UNIV. OF QUEENSL. <https://stories.uq.edu.au/momentum-magazine/2019/ethics-of-esports/index.html> (last visited Apr. 2, 2021) (finding “despite the lack of rules, the industry is increasingly attracting sponsorship. Players and spectators are predominantly young and well-educated, from high socio-economic backgrounds”). In addition, “match-fixing and unregulated gambling are amongst the most significant issues and some of the most popular games, such as League of Legends and Counter-Strike: Global Offensive, have been touched by scandals. Doping is reportedly common, and some contestants openly discuss their use of stimulants.” *Id.*

⁸¹ See generally Pennsylvania Gaming Control Board <https://gamingcontrolboard.pa.gov/?p=155>; New Jersey Division of Gaming <https://www.njoag.gov/about/divisions-and-offices/division-of-gaming-enforcement-home/>, and New York State Gaming Commission <https://www.gaming.ny.gov/>.

⁸² See generally 4 PA. CONS. STAT. § 1102 (2017) (promulgating the Pennsylvania’s legislative intent for authorizing gambling and gaming); N.Y. Penal Law § 225.00 (McKinney 2015) (defining gambling law and offenses under New York law).

Gambling is also a major economic activity that offers potentially big paydays to consumers and to states and governments via regulated and licensed operators.⁸³

First, gambling has a rooted history in organized crime as demonstrated by bookies, gambling houses, and illegal lotteries.⁸⁴ Permitting games of chance in one's home or in a local town, without regulation, opened the door for organized crime to take control of rules, payouts, and integrity.⁸⁵ Regulated gambling works diligently to foster confidence in the betting public that they are participating in a "fair game" and that there are protections that prevent the game operator from swindling a better or otherwise fixing the game. It also provides rules that allow patrons to submit complaints to regulators and otherwise facilitate a process that quickly and openly resolves such complaints. Unregulated gambling markets do not present these same avenues of relief.

Second, licensing fees and applicable gaming specific taxes on regulated casinos, sports betting operators, online gambling, provide the state with a significant taxable revenue stream.⁸⁶ The ability to regulate gameplay provides traceable, taxable revenue that can be used for state education programs, seniors' benefits, healthcare, public service, and additional state infrastructure.⁸⁷ Unregulated gaming revenue is not taxed and can be hidden, moved overseas, or placed off-shore, and therefore, citizens rarely receive any additional benefits.⁸⁸

⁸³ Global Betting and Gaming Consultants, *GBGC's Global Gambling Report 2016* (2016). Available at <http://www.gbgc.com/gbgcs-global-gambling-report-2016>.

⁸⁴ See generally Peter Ferentzy & Nigel Turner, *Gambling and Organized Crime – A Review of the Literature*, 23 J. OF GAMBLING ISSUES 111, 111–155 (June 2009) (providing a history of the relationship between gambling and organized crime).

⁸⁵ See 4 Pa. C.S.A. § 1102(10)-(10.2) (discussing public interest of Pennsylvania citizens regarding preventing corruption related to gambling).

⁸⁶ Va. Code § 58.1-4037 (imposing a 15% tax on a sports betting permit holder's adjusted gross revenue); see also Sports Betting Industry Bulletin 1 Re: Sports Betting Regulations – Licensing & Fees, Colorado Department of Revenue Enforcement Division – Gaming (Nov. 27, 2019), <https://sbg.colorado.gov/sites/sbg/files/SB%20Bulletin%201.pdf> (listing licensing fees for sports betting operators, internet sports betting operators, and vendors).

⁸⁷ See Michael Molter, *Where Does Sports Betting Tax Revenue Go?*, LEGAL SPORTS BETTING (July 20, 2019, 9:07 PM), <https://www.legalsportsbetting.com/news/where-does-sports-betting-tax-revenue-go/> (noting New Jersey tax revenue funds are allocated to the Casino Revenue Fund, which splits into a variety of coffers, such as the Department of Human Services "which receives the money to support programs for the elderly and disabled").

⁸⁸ See 4 Pa. C.S.A. § 1102(9) ("Strict financial monitoring and controls shall be established and enforced by all licensees, permittees, registrants and certificate holders." The Pennsylvania Gaming Control Board is tasked with ensuring all financial

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As the eSports industry continues to grow—much like daily fantasy sports and sports betting—states may need to act and decide whether these eSports offerings are legal, subject to review or regulation, and ultimately determine how best to protect consumers. Match fixing and “eDoping” are major integrity issues that not only cause reputational damage to the industry, but also cause players to lose tournaments due to cheating, which, in turn, impacts players’ world rank, sponsorships, and prize money.⁸⁹ Match fixing and fraud are potentially widespread throughout the industry, and without the proper resources to combat them, the consumers are left without recourse.⁹⁰

The critical question remains: should eSports be considered games of skill or games of chance? If they are games of chance, they could be found to be illegal gambling or otherwise be required to be regulated like casino games. As discussed in greater detail below, eSports should not be classified as games of chance, but instead, as games of skill. As games of skill, eSports do not fall under state gambling requirements, licensing guidelines, or restrictions. But eSports combat the same issues states face with gambling, such as underage participation, consumer protection, and operator integrity. As the industry continues to rise, the problems will rise as well.

III. eSports: Games of Skill or Chance?

The current landscape of eSports includes hundreds of different types of games such as first-person shooter games, sport-centric video games, virtual racing games, Bejeweled, Solitaire, and more.⁹¹ While it seems clear that eSports requires some level of skill dexterity to succeed, the critical question to determine legality is how much skill is the determinative factor? Another consideration is the entry fees for

transactions through licensed gaming operations in the Commonwealth of Pennsylvania are legal and accounted for in each transaction.).

⁸⁹ See *The Continued Rise of ESport – Efforts to Combat Match Fixing And Improve Integrity*, LAWINSPORT (Sept. 2, 2016), <https://www.lawinsport.com/topics/features/item/the-continued-rise-of-esport-efforts-to-combat-match-fixing-and-improve-integrity> (analyzing match-fixing and edoping issues in the eSports industry).

⁹⁰ See Mario Christodoulou, *Esports Regulator Says There’s Been a ‘Very Significant Upturn’ in Match-fixing*, ABC NEWS (Nov. 26, 2020, 2:14 PM), <https://www.abc.net.au/news/2020-11-27/esports-corruption-regulator-says-upturn-in-match-fixing/12923156>.

⁹¹ See SKILLZ, *supra* note 77 (discussing the types of games offered). See generally Stephen Carter, *The Games of eSports – Skill, Chance and Everything Inbetween*, IGAMINGBUSINESS (Jan. 5, 2021), <https://igamingbusiness.com/the-games-of-esports-skill-chance-and-everything-inbetween/> (illustrating different categories of eSports).

eSports competitions or tournaments, and whether these fees could be considered bets or wagers.

A. SELECT YOUR SKILL LEVEL – EXPERT, MODERATE, OR NOVICE

Presently, eSports operators, investors, and players presume participating in eSports is not a form of gambling.⁹² Unlike games of skill such as football, baseball, basketball, or golf, eSports are not affected by changing weather, referee discretion, or equipment malfunctions. Instead, for the majority of eSports, each player has the same map and the same equipment, and only competes against the other participants.⁹³ The outcomes are caused by the players' decisions and game play ability, and not by a gust of wind moving a golf ball past the cup or rain causing the football to slip through the quarterback's hands.⁹⁴ In games such as football and golf, skill is essential to win the game, but some element of chance exists. These games have been considered games of skill by the majority of courts, although chance is present.⁹⁵ The top eSports players in the world have not succeeded because of mostly chance, rather their success has, for the most part, been the result of refining their playing skills in certain eSports games.⁹⁶

Considering eSports construction, settings, gameplay, and rules, eSports are games of skill, and therefore, not an illegal form of gambling. Using the reasoning in cases such as *Boardwalk Regency*, the slight presence of chance in eSports, if any, is not enough to rise to a level of dominance or material value.⁹⁷ eSports are centered on the player's skill, and although chance may play a factor in a certain game, without

⁹² James Gatto & Mark Patrick, *Overview of Select Legal Issues With Esports*, 6 Ariz. St. Sports & ENT. L.J. 427, 434 (2017) ("For most of the major, professionally-organized, skill-based games, the presumed answer is that [eSports] is not gambling.").

⁹³ See generally Northwest Esports, <https://nwesports.org/csgo-tournament-rules/> (last visited Apr. 10, 2021) (providing specific rules for Counter-Strike: Global Offensive tournament).

⁹⁴ See Stephen Carter, *The Games of Esports – Skill, Chance, and Everything Inbetween*, iGaming Business (Jan 5, 2021) (noting that first player shooting games do not have random events or chance elements that can affect the outcome of a game).

⁹⁵ See *People v. Cohen*, 160 Misc. 10, 289 N.Y.S. 397, 399 (Magis. Ct. 1936) ("In such games as tennis, golf, billiards, bowling, skee-ball, or even in shooting galleries, where skill is so essential, it cannot be said that any one of them is a game of chance, even though occasionally an unskilled player may make a lucky shot.").

⁹⁶ *E-Sports Earnings*, <https://www.esportsearnings.com/players/3304-n0tail-johan-sundstein> (needs a last visited parenthetical) (listing Johan Sundstein's career earnings playing the game, Dota 2). Johan Sundstein is the current number one ranked eSports player in the world and has been playing competitively since 2010. See *id.*

⁹⁷ See *Boardwalk Regency Corp. v. Attorney Gen. of New Jersey*, 188 N.J. Super. 372, 379-81 (Super. Ct. 1982) (finding backgammon as a game of chance because of the variable randomness of the dice roll and additional factors).

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the player's superior skill and ability, the player will not likely win. The players must accomplish something with precision, certainty, cleverness, and expertness in order to win the game. Whether it is the fewest moves, or the most points, the player's skill, and not chance or other unforeseen circumstance, is the determining and dominating factor in the outcome of an eSports competition.

B. TOP PRIZE FOR THE MOST SKILLED

Assuming eSports are skill-based games, the next question is whether competitions and tournaments involving entry fees and prizes constitute staking or risking something of value through a bet or wager.⁹⁸ The United States District Court for the District of New Jersey opined on whether pay-for-play online fantasy sports leagues violated the anti-gambling laws of New Jersey and several other states in *Humphrey v. Viacom, Inc.*⁹⁹ The plaintiff argued that the online fantasy sports league operators engaged in "gambling because the participant[s] 'wager' the entry fee for the chance to win a prize."¹⁰⁰ The plaintiff also argued that the prize "winner is determined predominantly by chance due to potential injuries to players and the vicissitudes of sporting events in general."¹⁰¹

The District Court did not address whether fantasy sports were games of skill or chance because as a matter of law, it found the entry fees for the operators' fantasy leagues were not "bets" or "wagers".¹⁰² The District Court emphasized three factors in its ruling: "(1) the entry fees [were] paid unconditionally; (2) the prizes offered to fantasy sports contestants [were] for amounts certain and [were] guaranteed to be awarded; and (3) [operators did] not compete for the prizes."¹⁰³

The *Humphrey* court found that the online fantasy sports league operators were parties to an enforceable contract and that they "provide substantial consideration, in the form of administration of the leagues and the provision of extensive statistical and analytical services, in exchange for the entry fees paid for by the participation in the fantasy

⁹⁸ See Gatto & Patrick, *supra* note 92, 434-35 (discussing whether eSports entry fees for competitions and tournaments are bets or wagers in connection to gambling).

⁹⁹ *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 WL 1797648, at *2 (D.N.J. June 20, 2007); see also *Dew-Becker v. Wu*, 2020 IL 124472 (April 16, 2020) (Illinois Supreme Court finding daily fantasy sports is not gambling based on the predominance test).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See *id.* at *8-9 ("the question whether the money awarded is a bona fide prize (as opposed to a bet or wager) can be determined without deciding whether the outcome of the game is determined by skill or chance").

¹⁰³ *Id.* at *9.

sports leagues.”¹⁰⁴ Fantasy sports participants did not “pay anything to [the operators] that [was] in any way dependent on the outcome of any league. Nor [did] participants ever “risk” losing their entry fee.”¹⁰⁵ Instead, the court reasoned that the participants “irrevocably part with [their entry] fee shortly after they enter a league, and receive in exchange substantial services from [the operators] over the course of an extended sports season.”¹⁰⁶ The operators did not bet or wager on the side of any participants, and the operators did not have any financial interest in the outcome of any league or game, and therefore, the court rejected the plaintiff’s claims that the online fantasy sports league operators engaged in illegal gambling.¹⁰⁷ The fantasy operators provide a service for a set fee. They are not the house in a poker game or the book maker in a sports wager taking a “vig.”¹⁰⁸

Following the court’s reasoning in *Humphrey*, an entry fee for an eSports tournament or competition should not be considered a bet or wager for gambling purposes.¹⁰⁹ The entry fees permit the participants to enter the tournament, the participants know what they will receive if they win the tournament, the operators of the tournament have a set amount they will receive, and finally, the operator’s amount does not depend on the outcome of the tournament or competition.¹¹⁰ As stated in *Humphrey*, as long as participants in eSports tournaments and competitions pay unconditionally for the privilege of participating in the contest, the prize is guaranteed, and the entry fee is not a bet or wager.¹¹¹

eSports’s participants, investors, and operators in the space operate in uncertain territory. Although skill games have been present for centuries, eSports provide new challenges and concerns such as underage participation and corruption. There is a plethora of options to access eSports, including the internet, live competitions and tournaments, websites like Twitch.tv, eSports leagues, and college-

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at *10.

¹⁰⁶ See *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 WL 1797648, at *10 (D.N.J. June 20, 2007).

¹⁰⁷ See *id.*

¹⁰⁸ See *Vigorish*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/vigorish> (last visited Apr. 11, 2021) (defining *Vigorish* or as “a charge taken (as by a bookie or a gambling house) on bets”).

¹⁰⁹ See *Gatto & Patrick*, *supra* note 92, 435–36 (citing *Humphrey*, 2007 WL 1797648 at *8) (“...the payment of a bona fide entry fee by participants to compete in the eSports event should not be deemed a bet or wager, assuming the conditions are satisfied.”).

¹¹⁰ See *generally id.* at 434-442 (discussing the basic foundations of an entry fee type tournament and its legality compared with a bet or wager).

¹¹¹ See *Humphrey*, 2007 WL 1797648 at *8.

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funded teams.¹¹² eSports appears to not be gambling, but the seemingly greater public concern with eSports is more consumer protection focused.

IV. Using Daily Fantasy Sports as an Instruction Manual

Determining how to regulate a non-gambling game is difficult, but not impossible. More specifically, various U.S. legislatures and courts have been previously down this path with the rise of daily fantasy sports. In 2007, Chris Fargis, a former professional poker player, introduced fantasy sports into daily life through the daily fantasy sports website.¹¹³ Daily fantasy sports permit contestants to pay an entry fee to draft players from specific sports, such as football or basketball; earn points on the in-game performance of the players the contestant chooses; and win by having the most total points scored at the end of the day.¹¹⁴ Daily fantasy sports took the main stage through the soon to be gaming giants, DraftKings and FanDuel.¹¹⁵ Both DraftKings and FanDuel inked financial partnerships with professional league—DraftKings with Major League Baseball and FanDuel with the National Basketball Association.¹¹⁶

In 2019, daily fantasy sports generated an estimated 2.91 billion dollars in revenue.¹¹⁷ Daily fantasy sports continue to grow in popularity due to increased investment in infrastructure, internet

¹¹² See generally *ESPORTS, BIG EAST CONFERENCE*, <https://www.bigeast.com/index.aspx?path=eSports> (last visited Mar. 29, 2021).

¹¹³ Marc Dib, *A Game of Skill or Chance? Why Texas Should Legalize Daily Fantasy Sports*, 51 TEX. TECH L. REV. 361, 364 (citing Jay Caspian Kang, *How the Daily Fantasy Sports Industry Turns Fans into Suckers*, N.Y. TIMES (Jan. 6, 2016), <https://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html>).

¹¹⁴ See Dib, *supra* note 113; see also *Daily Fantasy Sports*, DRAFTKINGS, <https://www.draftkings.com/about/daily-fantasy-sports/> (last visited Mar. 29, 2021).

¹¹⁵ See Dib, *supra* note 113, at 365 (discussing DraftKings and FanDuel daily fantasy sports success).

¹¹⁶ See Dib, *supra* note 113, at 365 (citing Adam Kilgore, *Daily Fantasy Sports Web Sites Find Riches in Internet Gaming Law Loophole*, WASH. POST (Mar. 27, 2015), https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-lawloophole/2015/03/27/92988444-d172-11e4-a62f-ee745911a4ff_story.html?utm_term=.280e49e2e97a).

¹¹⁷ S. Lock, *Revenue from Fantasy Sports in the United States 2019, by Segment*, STATISTA (Nov. 18, 2020) <https://www.statista.com/statistics/820972/revenue-fantasy-sports-segment/#:~:text=According%20to%20the%20source%2C%20Daily,dollars%20in%20the%20same%20year.>

updates, and additional applications coming into play each year.¹¹⁸ States, lawmakers, and courts taking the initiative early on in daily fantasy sports' history not only assisted in its growth, but also laid the groundwork for consumer protections. Although customer-offered protections are not perfect, the legal process continues to promote safe competition and entertainment.¹¹⁹

As daily fantasy sports ascended, states began to take a closer look, and with it, the courts and legislatures became involved. As with all games, the discussion of the games' legality is a matter of when they are legalized, and not a matter of if. As stated above in *Humphrey*, the United States District Court for the District of New Jersey opined that entry fees for online fantasy sports contests were not bets or wagers, and therefore did not constitute illegal gambling under New Jersey law.¹²⁰

Besides judicial intervention, several state attorney generals and legislatures have also opined on the matter of daily fantasy sports. In 2016, Texas Attorney General Ken Paxton tried to make it clear that daily fantasy sports were an illegal form of gambling in Texas.¹²¹ Attorney General Paxton stated that the presence of an element of chance in the games violated Texas gambling laws.¹²² According to the opinion, and unlike the *Humphrey* court, the Texas attorney general found that players make a "bet" when they pay the entry fee to participate in the daily fantasy sport.¹²³ The opinion further concluded that because chance may play a role in the outcome of any daily fantasy sport contest they must be classified as a "game of chance," no matter if skill is the predominate factor.¹²⁴ Although Attorney General Paxton opined that daily fantasy sports are illegal, major daily fantasy sports operators have continued to offer their services to the Lone Star state,

¹¹⁸ See *Fantasy Sports Market Size is Expected to Reach USD 48.8 Billion by 2027*, PRNEWswire.COM, (Oct. 12, 2020), <https://www.prnewswire.com/news-releases/fantasy-sports-market-size-is-expected-to-reach-usd-48-6-billion-by-2027—-valuates-reports-301150193.html>.

¹¹⁹ See *Dib*, *supra* note 113, at 38 (discussing daily fantasy sports legislation to prevent and combat gambling addiction).

¹²⁰ See *generally* *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 WL 1797648, at *10 (D.N.J. June 20, 2007).

¹²¹ See *generally* Tex. Att'y Gen. Op. No. KP-0057 (2016).

¹²² See *id.* at 9; *Dib*, *supra* note 113, at 370-71 (discussing attorney general opinion regarding daily fantasy sports legality).

¹²³ See *Dib*, *supra* note 113, at 371 (citing PENAL § 47.02); see also Tex. Att'y Gen. Op. No. KP-0057, 6 (2016).

¹²⁴ See Tex. Att'y Gen. Op. No. KP-0057, 4 (2016).

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as the opinion was non-binding and DraftKings has challenged the opinion in court.¹²⁵

There are numerous examples of courts and attorney generals opining on the legality of daily fantasy sports.¹²⁶ If not expressly permitted in legislation, daily fantasy sports operators can rely on a state's case law, attorney general opinions, and the state's definition of "gambling" to determine if offering the product in a certain state is possible. For example, DraftKings offers daily fantasy sports in 43 states, but does not offer them in Arizona, Hawaii, Idaho, Louisiana, Montana, Nevada, and Washington.¹²⁷ States such as Arizona have prohibited daily fantasy sports throughout their history, while other state attorneys general, for example in Idaho, found daily fantasy sports to be illegal gambling and forced the operators out of state.¹²⁸

The rise of daily fantasy sports provides more than just tax revenue for states and entertainment and winnings for participants. It also hints at the direction certain states will lean when presented with new skill games, specifically eSports. The daily fantasy sports framework established in recent years provides optimism that lawmakers, regulators, and eSports operators will take all aspects of eSports into consideration, most importantly player protection and responsible gaming.

¹²⁵ See Brian New, *Will Texas Punt Again On Legalizing Daily Fantasy Sports?*, CBSlocal.com, (Feb. 7, 2021, 9:55 PM), <https://dfw.cbslocal.com/2021/02/07/will-texas-punt-again-on-legalizing-daily-fantasy-sports/> ("Immediately after Paxton issued his opinion, FanDuel pulled out of Texas and DraftKings sued – saying the attorney general distorted Texas law." It is further stated that the court case is still pending, but in 2018 "FanDuel began accepting players from Texas again for real money contests while DraftKings never stopped taking players from the state. Five years after Paxton's opinion rattled the industry, the answer to whether daily fantasy sports is legal in Texas is still not clear."); see generally Tex. Att'y Gen. Op. No. KP-0057, 4 (2016).

¹²⁶ See generally W.V. Att'y Gen. (July 7, 2016); R.I. Op. Att'y Gen. (Feb. 4, 2016); Nev. Op. Att'y Gen. (Oct. 16, 2015).

¹²⁷ DRAFTKINGS, <https://www.draftkings.com/about/daily-fantasy-sports/> (last visited Apr. 11, 2021); See COLO. REV. STAT. § 12-125-101; IND. CODE § 4-33-24; KAN. STAT. ANN. § 21-6403; MD. CODE ANN., Crim. Law § 12-114; MISS. CODE ANN. § 97-33-305; MO. REV. STAT. ch. 313; Fantasy Sports Act, 2016 Tenn. Laws Pub. Ch. 978 (S.B. 2109); Fantasy Contests Act, VA. CODE ANN. 59.1, ch. 51.

¹²⁸ See Messick, Joshua M., Article, *Rejecting the Zero-Sum Game in Daily Fantasy Sports: A Proposal for Arizona*, 60 ARIZONA L. REV. 163, 164 (2018) ("Arizona is one of five states that has historically categorized daily-fantasy sports ("DFS") as a game of chance and as such has banned it as illegal gambling."); *Idaho Attorney General Bans Paid Daily Fantasy Sports Contests*, IDAHO STATESMAN (May 2, 2016), https://www.idahostatesman.com/sports/article_75138197.html (discussing DraftKings and FanDuel's agreement to leave Idaho).

V. With Great Power Comes Great Responsibility

By 2023, eSports are estimated to capture at least 646 million participants and viewers.¹²⁹ eSports today have grown rapidly due to celebrity involvement, such as Michael Jordan and DJ Marshmello, increased coverage on traditional outlets such as ESPN, professional sports team partnerships, and more.¹³⁰ eSports' incredible rise has also brought a major increase in investments, including private equity firms and ETFs.¹³¹ Like daily fantasy sports and sports betting, the major market of eSports provides exciting new possibilities, but also creates concerns. Consumer protection, responsible gaming, underage gambling, and gameplay integrity are all real issues.¹³²

eSports and the Internet go hand-in-hand, and history has shown that the Internet can be a dangerous place for eSports users.¹³³ eSports interactivity among online users can cause some demographics to be more susceptible to manipulation and harmful advertising, however, eSports are more equipped than internet gaming companies to combat problem gambling, underage gambling, and other regulatory concerns.¹³⁴

¹²⁹ Reyes, Mariel Soto, *Esports Ecosystem Report 2021: The Key Industry Companies and Trends Growing the esports Market which is on Track to Surpass \$1.5B by 2023*, BUSINESS INSIDER (Jan. 5, 2021), <https://www.businessinsider.com/esports-ecosystem-market-report#:~:text=Total%20esportsesports%20viewership%20is%20expected,2023%2C%20per%20Insider%20Intelligence%20estimates>.

¹³⁰ See *id.* (listing celebrity endorsement and media outlets as part of the rise of eSports); *Eagles Becomes First NFL Team with Esports Tournament Provider*, PHILADELPHIA EAGLES, <https://www.philadelphiaeagles.com/news/eagles-become-first-nfl-team-with-esports-tournament-provider> (last visited Apr. 11, 2021) (describing eSports Entertainment Group's multi-year partnership with the Philadelphia Eagles to serve as the first eSports tournament provider for an NFL franchise).

¹³¹ See *NERD - The First Pure Play Esports ETF*, ROUNDHILL INVESTMENTS, <https://www.roundhillinvestments.com/etf/nerd/> (last visited Apr. 11, 2021).

¹³² Michael Stead, *Safeguarding Children in the Virtual World of eSports - lessons to be learnt from the real world*, DLA PIPER (Aug. 11, 2020), <https://www.dlapiper.com/en/us/insights/publications/2020/08/safeguarding-children-virtual-world-of-esports/> (analyzing how minors are subject to possible harm with eSports).

¹³³ See *id.* ("Toxic teammates and vexatious trolls (people who intentionally inflame and antagonize others online) - the internet can be a treacherous landscape for anyone to navigate.").

¹³⁴ See *The Continued Rise of ESport - Efforts to Combat Match Fixing and Improve Integrity*, LAW IN SPORT (Sept. 2, 2016), <https://www.lawinsport.com/topics/features/item/the-continued-rise-of-esport-efforts-to-combat-match-fixing-and-improve-integrity> (stating how Facebook, Instagram, and Twitter make internet users more susceptible to manipulation and subtle advertising and analyzing match-fixing and edoping issues in the eSports industry).

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Expansive regulation may not be needed if eSports companies continue to take these issues and concerns seriously and act on their own volition. The good news is that many already are taking up the torch.¹³⁵ For example, Skillz, Inc., a leading mobile eSport platform, offers its product to consumers with the goal of “connect[ing] the world through competition” and providing a “fair and secure competitive gaming [experience]” through specific safeguards and player protection protocols.¹³⁶ Besides ensuring each game offered on its platform is strictly a game of skill as opposed to a game of chance, Skillz implements a number of additional safeguards, including geolocation services, age-verification procedures, and the ability to review potential problem gaming.¹³⁷ Although Skillz offers mobile competitions, unlike traditional eSports such as video games on a PlayStation or Xbox, Skillz’s business model and safeguard foundations are aspects should be provided by all types of eSports operators. Skillz is an example of how operators can ensure the safety of their patrons, protect against unlawful gambling, and promote fair gameplay in the absence of regulation. Internal controls and internal monitoring are tools that all types of eSports operators have the ability to utilize and implement for their patrons and products.

In addition to eSports operators taking an active role in player protection and integrity, the eSports Integrity Commission (“ESIC”), located in both the United Kingdom and Australia, is a non-profit member association that deals with issues of common interest in the eSports space.¹³⁸ Members of the ESIC agree to enforce six fundamental principles, including (1) integrity and respect; (2) fair process; (3) implementation, education, and enforcement in standardized codes; (4) recognition of sanctions; (5) sharing of information; and (6) confidentiality.¹³⁹ The ESIC works to implement an active presence in the eSports space to assist in organizing safe and compliant tournaments, game development, eSports leagues, and even betting operators offering wagers on eSports.¹⁴⁰ The ESIC is an effective partner

¹³⁵ See *SKILLZ*, *supra* note 77 (stating Skillz’s geolocation services, age verification, and additional compliance with federal and state laws).

¹³⁶ See *Our Mission*, SKILLZ, INC., (last visited Apr. 11, 2021), <https://investors.skillz.com/overview/default.aspx>

¹³⁷ See *SKILLZ*, *supra* note 77.

¹³⁸ *Who We Are*, ESIC (last visited Apr. 11, 2021), <https://esic.gg/about/> (stating ESIC’s description of its operations and mission).

¹³⁹ *Id.*

¹⁴⁰ *Id.* (“We are a not-for-profit members’ association and we can help you, whether you’re a tournament organiser, game developer, eSports league or betting operator offering eSports . . .”).

for the United Kingdom, Australia, the Nevada Gaming Control Board, and the Colorado Division of Gaming in assisting and regulating the eSports industry.¹⁴¹

Notably, GameCo LLC, a Las Vegas-based gambling device manufacturer/developer, is attempting “to launch the first-ever eSports dedicated sportsbook” at the Sky Ute Casino Resort in Colorado, which the ESIC will oversee “to ensure match integrity for all wagering activities.”¹⁴² Most recently, Nevada State Senator Ben Kieckhefer introduced a bill that would create the Nevada Esports Commission under Nevada’s Department of Business and Industry.¹⁴³ This bill would introduce a regulatory panel to sanction and oversee video game tournaments and competitions, and require player registration before participating in any event with a prize exceeding \$1,000.¹⁴⁴

Unlike daily fantasy sports, legislatures have not taken the same hands-on approach to eSports, and few courts have been presented with the opportunity to opine on eSports’ legality. New Jersey’s legislature introduced an eSports bill that focuses primarily on permitting wagering on eSports, and prohibits electronic sports and competitive video game competitions sponsored by, or affiliated with, high school or competitions in which the majority of the competitors are under the age of 18.¹⁴⁵ West Virginia addressed eSports as sporting events in which participants are at least 18 years old as “prohibited sports events” in its Sports Wagering rules.¹⁴⁶ Although New Jersey is making progress, and West Virginia provides clarity regarding eSports and sports wagering, the eSports industry still faces questions.

eSports operators like Skillz and commissions like the ESIC are essential for the safe and proper growth of each different type of eSport. But, specifically in the United States, a lack of guidance and oversight of the industry opens the door to consumer protection issues, cheating, and problem gambling. Colorado and Nevada have made important integrations and progress, but the majority of other lawmakers have yet

¹⁴¹ *Members & Supporters* ESIC (last visited Apr. 11, 2021), <https://esic.gg/about/> (listing United Kingdom Gambling Commission as a “Government Body” partner).

¹⁴² See Cody Luongo, *GameCo Launches eSports-dedicated sportsbook in Colorado*, eSports Insider (Dec. 16, 2020) <https://eSportsinsider.com/2020/12/gameco-launches-eSports-dedicated-sportsbook-in-colorado/>.

¹⁴³ See S.B. 165, 2021 Leg., 81st Sess. (Nev. 2021).

¹⁴⁴ See *id.*

¹⁴⁵ See A.B. 637, 2020 Leg., 219th Sess. (NJ 2021). The bill does not prohibit electronic sports or competitive video game competitions where person under the age 18 make up a minority of the participants. See S.B. 165, 2021 Leg., 81st Sess. (Nev. 2021).

¹⁴⁶ See W.Va Code § 179-9-2(2.15).

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to address the industry. This should not happen because this industry is simply too large to ignore.

VI. Protecting the Consumer is Vital for the Future of eSports

The majority of eSports are games of skill, and therefore, should not be considered gambling in most of the United States. Although eSports should not be considered gambling, ensuring player protection, age verification, and gameplay integrity are aspects operators can and should promote. There are already several eSports companies working to promote the safety and responsible gaming of their players, but more can be done for those that are behind the ball. The billion-dollar industry continues to grow and does not appear to be slowing down any time soon. Professional sports leagues are partnering with eSports companies' teams.¹⁴⁷ eSports arenas are being built.¹⁴⁸ eSports are here to stay and without operators continually working and adapting to further promoting safe, fair gameplay and entertainment, the industry may not grow to the heights that it can and should obtain.

¹⁴⁷ See *Eagles Become First NFL Team with esports Tournament Provider*, PHILADELPHIA EAGLES (Dec. 15, 2020), <https://www.philadelphiaeagles.com/news/eagles-become-first-nfl-team-with-esports-tournament-provider>.

¹⁴⁸ FUSION ARENA, <https://fusionarenaphilly.com/> (last visited Apr. 11, 2021).