A Constitutional Analysis Of Section 5-37(k)
To The Proposed Illinois Sports Wagering Act

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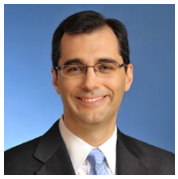
Jenner & Block LLP
353 North Clark Street
Chicago, Illinois 60610
(312) 222-9350

ABOUT THE AUTHORS

ANTON R. VALUKAS is a former United States Attorney for the Northern District of Illinois, former Chairman of Jenner & Block LLP, and a Fellow of the American College of Trial Lawyers. Among his many high-profile engagements, Mr. Valukas in 2014 led a complex internal investigation for General Motors Company regarding events leading up to certain recalls stemming from faulty ignition switches. Similarly, in 2009, Mr. Valukas was appointed as the Examiner in the Lehman Brothers Holdings bankruptcy, reputed to be the largest such case in US history. *Chambers USA* named Mr. Valukas one of the leading US litigation lawyers for eight consecutive years, and in 2009, *Chicago Lawyer* named him "Person of the Year." In 2013 Mr. Valukas was recognized by *The National Law Journal* as one of "The 100 Most Influential Lawyers in America" and by *Best Lawyers* as "Chicago Bet-the-Company Litigation Lawyer of the Year." He has also been recognized by *Best Lawyers* for over 25 years.

IAN HEATH GERSHENGORN is one of the Nation's premier Supreme Court and appellate advocates. From 2013-2017, he served in the Office of the Solicitor General at the US Department of Justice, first as Principal Deputy Solicitor General and then as Acting Solicitor General of the United States, a position he held from June 2016 until the end of the Obama administration in January 2017. While at the Solicitor General's Office, Mr. Gershengorn argued more than a dozen cases at the U.S. Supreme Court and also supervised the government's briefing in a range of high-profile cases. Prior to his service in the Solicitor General's office, Mr. Gershengorn served from 2009 to 2013 as the Deputy Assistant Attorney General in charge of the DOJ's Federal Programs Branch. Currently, Mr. Gershengorn is a partner at Jenner & Block LLP, where he is the char of the firm's Appellate and Supreme Court Practice Group.

THOMAS J. PERRELLI is a nationally recognized litigator who served for three years as associate attorney general of the United States, the third highest-ranking official in the U.S. Department of Justice. In that capacity, Mr. Perrelli was responsible for the Department's Civil, Antitrust, Civil Rights, Environment and Natural Resources, and Tax Divisions, the United States Trustee Program, the Office of Justice Programs and the Office on Violence Against Women, among others. Since 2012, Mr. Perrelli has been a partner at Jenner & Block LLP, where he is the char of the firm's Government Controversies and Public Policy Litigation Practice Group.



CLIFFORD W. BERLOW is a former Assistant Illinois Attorney General. In that role, Mr. Berlow argued more than twenty appeals before the Illinois Supreme Court, the U.S. Court of Appeals for the Seventh Circuit, and all five districts of the Illinois Appellate Court. Mr. Berlow has authored or co-authored more than 100 briefs in state and federal appellate courts, including more than a dozen briefs and petitions in the U.S. Supreme Court, two of which were given Supreme Court Best Brief awards by the National Association of Attorneys General. Mr. Berlow is a partner in the Jenner & Block Appellate and Supreme Court Practice Group.

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EXECUTIVE SUMMARY

The Illinois General Assembly is considering legislation that creates a comprehensive licensing regime that would legalize regulated sports betting in Illinois. Jenner & Block LLP has been retained by FanDuel Group, Inc. to assess the constitutionality of a proposed amendment to that legislation. The amendment would effectively single out FanDuel and DraftKings, Inc. and exclude them from obtaining a license to offer sports betting for the first three years of the new regime.

We have reviewed the proposed amendment and believe there are strong arguments that the relevant provision—Section 5-37(k) of Amendment 2 to House Bill 1260 ("Section 5-37(k)")—is rife with constitutional defects. Section 5-37(k) purports to exclude from the licensing regime any entities that the Illinois Attorney General previously had characterized as having engaged in the crime of illegal gambling under Illinois law. There is ample evidence that this criterion was included as a means of excluding FanDuel and DraftKings from the market, both of which the Attorney General opined in a 2015 Advisory Opinion had committed the crime of illegal gambling. Notably, the Attorney General, or anyone else for that matter, ever sought to enforce the Advisory Opinion. And when FanDuel and DraftKings sought to challenge the Attorney General's opinions in their own lawsuit, the Attorney General sought to thwart any judicial review of her flawed Advisory Opinion by arguing that her Opinion was not reviewable and entirely without legal effect.

In essence, Section 5-37(k) would give that legal effect to the Attorney General's disputed advisory opinion after the fact and without judicial review. It would do so to the benefit of and at the behest of particular in-state casinos. Such obviously discriminatory and unjust special-interest legislation is vulnerable to a range of constitutional challenges, both under the 1970 Illinois Constitution and the U.S. Constitution. Among other things, we believe there are powerful arguments that amendment violates each of the following:

- **Special Legislation Clause**—The Clause prohibits the General Assembly from conferring a benefit on one group, while excluding those who are similarly situated. Here, the amendment would exclude FanDuel and DraftKings from obtaining a license that is available to their competitors, ostensibly because of a legally inconsequential Advisory Opinion. The Special Legislation Clause exists to prevent the General Assembly from picking winners and losers in that seemingly arbitrary fashion.
- **Equal Protection Clause**—The proposed amendment specifically and narrowly excludes two identifiable entities—FanDuel and DraftKings—from a right it grants to a larger class, purportedly based on the fact that they were the subject of the Advisory Opinion declaring their past conduct to be illegal. But this distinction does not appear to have any rational relationship to any legitimate legislative interest; indeed, there is ample evidence that the true purpose of the statute is to protect local competitors, including Illinois casinos, against competition from FanDuel and DraftKings in the sports wagering market.
- **Bill of Attainder**—The federal Constitution prevents States from inflicting punishment on an identifiable set of disfavored entities without a judicial trial. The proposed amendment categorically excludes FanDuel and DraftKings from the market based on an extra-judicial finding of guilt of the crime of gambling. That is exactly what the Bill of Attainder Clause is meant to prevent.

- **Dormant Commerce Clause**—The Dormant Commerce Clause prohibits States from unfairly discriminating against out-of-state businesses. Here, the proposed amendment has as both its obvious purpose and its inevitable effect the exclusion of two prominent out-of-state businesses, at the behest of, and to benefit of, in-state businesses. It does so in spite of the requirement under the Dormant Commerce Clause that in-state and out-of-state competitors be put on equal footing.
- **Due Process Clause**—There is a strong argument that proposed amendment turns the constitutional requirement of due process on its head by requiring FanDuel and DraftKings to prove their innocence of criminal allegations if they wish to be licensed in Illinois. That is simply not how our system is supposed to work. Nothing strikes at basic notions of due process more than requiring the accused to prove her innocence.

The supporters of the proposed amendment have emphasized a single defense of the proposal: Because the regulation of gaming amounts to the exercise of the State's "police power," the scope of the General Assembly's power is unrestrained. In our view, that is no response at all. Constitutional constraints do not disappear because the State has taken action in a theater where its police powers are robust, such as with respect to gaming, alcohol, and firearms. Were it otherwise, the General Assembly could discriminate in arbitrary and irrational ways with impunity.

In short, as the amendment's proponents have made abundantly clear in their committee testimony, the purpose of the amendment is not to seriously assess the suitability of potential operators, but instead to exclude two specific competitors who are leading the market in other states. We believe FanDuel and DraftKings could make a strong claim that this selective targeting of winners and losers is not permitted by the Illinois or U.S. Constitutions.

INTRODUCTION

We have been retained by FanDuel to assess the constitutionality of a recent proposed amendment to legislation that is currently under consideration by the Illinois General Assembly that would legalize sports betting in Illinois pursuant to a comprehensive licensing regime. The proposed amendment, which appears at Section 5-37(k) of Amendment 2 to House Bill 1260 (hereinafter "Section 5-37(k)") would, among other things, prohibit entities that the Illinois Attorney General has previously found of having engaged in the crime of illegal gambling under 725 ILCS 5/28-1(a) from obtaining a license from the Illinois Gaming Board to offer sports betting over the internet for the first three years of the new licensing regime.

We have reviewed the proposal and believe there are strong arguments that Section 5-37(k) is unconstitutional. We believe the provision would be vulnerable to constitutional challenges under no fewer than six different constitutional provisions: Article IV, Section 13 of the Illinois Constitution (the Special Legislation Clause), Article I, Section 2 of the Illinois Constitution (the Equal Protection Clause), Article I, Section 10 of the U.S. Constitution (the prohibition on Bills of Attainder), Article I, Section 8 of the U.S. Constitution (the Commerce Clause), the Fourteenth Amendment to the U.S. Constitution (the Equal Protection Clause and the Due Process Clause), and the Fifth Amendment to the U.S. Constitution (the Takings Clause).

With respect to the arguments under all of these constitutional provisions, the common ground for challenging Section 5-37(k) derives from the fact that its three-year licensing exclusion is premised upon an entity's merely having been accused in a non-binding, advisory opinion of having engaged in the crime of illegal gambling. There is ample evidence that the proponents of this amendment included this provision specifically because there is a 2015 Advisory Opinion issued by the Illinois Attorney General concluding that the operations of two out-of-state companies—FanDuel and DraftKings, Inc.—constitutes the crime of illegal gambling under

Illinois law. But the Attorney General never sought an injunction to enforce that advisory opinion. Nor did any States Attorney Office ever initiate any proceedings to examine whether the companies' conduct violated Illinois law. Nor, of course, did an Illinois jury ever find FanDuel or DraftKings guilty of committing a crime beyond a reasonable doubt. And when FanDuel and DraftKings sought to challenge the Advisory Opinion in their own lawsuit, the Attorney General sought to prevent any judicial review of the Opinion—which both FanDuel and DraftKings believe was wrong when it was written and is wrong now—by arguing that the Advisory Opinion was not reviewable because it was entirely without legal effect.

In essence, Section 5-37(k) would give legal effect to the Attorney General's disputed advisory opinion after the fact and without judicial review, all to the benefit of and at the behest of particular in-state casinos. Although we cannot conclusively determine how a court would rule in a case challenging the constitutionality of Seciton 5-37(k), we believe there are strong arguments that both the 1970 Illinois Constitution and the United States Constitution forbid such obviously discriminatory and unjust special-interest legislation. Because Section 5-37(k) therefore would be subject to such a broad range of powerful constitutional challenges, its adoption by the General Assembly would all but invite legal challenge.

BACKGROUND

I. The Illinois Attorney General's 2015 Advisory Opinion Regarding FanDuel And DraftKings

On December 23, 2015, former Illinois Attorney General Lisa Madigan released an advisory opinion ("the Advisory Opinion"), at the request of then-State Rep. Scott Drury (D-Highwood), opining that daily fantasy sports fell within the definition of prohibited "gambling" under Illinois law per 725 ILCS 5/28-1(a). At no time did the Attorney General seek to enforce the Advisory Opinion, nor did any Illinois State's Attorney Offices pursue an indictment of FanDuel

or DraftKings. Put simply, in spite of the Attorney General having issued an Advisory Opinion accusing the two largest market participants in the growing daily fantasy sports market of being actively engaged in unlawful conduct, the State did nothing.

On December 24, 2015, however, one day after the Advisory Opinion was issued, FanDuel and a second fantasy sports operator, Head2Head Sports LLC ("Head2Head"), filed a lawsuit in the Circuit Court of Sangamon County, Illinois, seeking a declaratory judgment that FanDuel's and Head2Head's fantasy sports contests are lawful under Illinois law and are outside the statute's prohibition on "gambling."[1] That same day, daily fantasy sports provider DraftKings filed a similar lawsuit in the Circuit Court of Cook County, Illinois. The Illinois Supreme Court later ordered the two lawsuits consolidated for litigation in Sangamon County, where the matter was assigned to Circuit Court Judge John M. Madonia.

In their lawsuit, FanDuel and Head2Head asserted that their offerings fit within an exception to the prohibition on "gambling," for "the actual contestants in a bona fide contest for the determination of skill." *See* 725 ILCS 5/28-1(b)(2) (establishing that "gambling" does not include "[o]ffers of prizes, award or compensation to the actual contestants in any bona fide contest for the determination of skill, speed, strength, or endurance"). The lawsuit explained that in fantasy sports contests, the actual contestants are the participants in the contest, who compete against each other for the contests' prizes based on the contestants' skills in assembling effective lineups or "teams" of athletes from a variety of sports. Accordingly, FanDuel and Head2Head asserted that their fantasy sports contests pit contestants against each other in contests for prizes awarded to those contestants who displayed the most skill in acting, in effect, as "fantasy" general managers

[1] FanDuel and Head2Head were represented in that litigation by attorneys at Jenner & Block LLP.

of sports teams. The contests are not, as the Advisory Opinion suggested, vehicles for "wagers" or "bets" on the athletic performance of any particular player or team.

The Illinois Attorney General moved to dismiss the action. The motion asserted that: (1) the Advisory Opinion was advisory, "nonbinding," and not "subject to enforcement in a court of law"; (2) the Attorney General had not "threatened" any of the plaintiffs "with any criminal prosecution, nor could she, because under Illinois law, she does not have primary enforcement powers in such matters"; and (3) the plaintiffs "do not and cannot allege that the Attorney General threatened [the plaintiffs] with any civil enforcement action." In sum, the Attorney General's argument was that the Advisory Opinion is non-justiciable and that the merits of its legal conclusions cannot be contested in any forum unless and until another entity first pursues criminal charges.

Judge Madonia took the Attorney General's motion to dismiss under advisement. While he did so, the parties proceeded through discovery and FanDuel prepared for trial. To that end, FanDuel disclosed multiple witnesses who were prepared to testify to the skill involved in fantasy sports contests and in prevailing against other actual contestants in those contests, as well as how the contestants develop those skills during their own participation in such contests. FanDuel also disclosed that it was prepared to offer testimony concerning fantasy sports contests and how the actual contestants—the fantasy sports contest participants—access the media content to improve their skills for use in the contests. FanDuel also disclosed witness testimony from a specialist in sports analytics (to testify to matters including the degree to which knowledge and use of mathematics and sports analytics play a determinative role in the outcome of fantasy sports contests, and the media market for developing such knowledge and skill) and from a nationally ranked Scrabble player (to testify to his experience, knowledge, and involvement concerning bona

fide contests for the determination of skill and knowledge in the games of Scrabble commonly held lawfully in Illinois and elsewhere). FanDuel also disclosed that it was prepared to call witnesses from multiple academic institutions that offered courses and programs in sports analytics and their application to fantasy sports contests.

During this time, none of the plaintiffs in the consolidated lawsuit were the subject of an enforcement action by any government or prosecuting agency in Illinois. Accordingly, the plaintiffs initiated negotiations with the Illinois Attorney General about possible grounds for an agreed dismissal of the lawsuit. These negotiations continued into 2017 and 2018. As the time for the parties to conduct costly and time-consuming depositions approached, and with still no criminal or enforcement action initiated in Illinois concerning any fantasy sports activities, the plaintiffs in the litigation reached an agreement with the Attorney General that they would forego the ongoing cost of the litigation and dismiss the action voluntarily without prejudice, which would permit them to revive the litigation in the event that any Illinois prosecutor or prosecuting agency were to rely on the Advisory Opinion or initiate any other civil or criminal enforcement actions against the plaintiffs or their fantasy sports operations in Illinois. The voluntary dismissal without prejudice was entered by Judge Madonia on March 7, 2018.

No enforcement action has been initiated in Illinois against FanDuel or, to the best of FanDuel's knowledge, any other fantasy sports operator in the roughly one year since the voluntary dismissal. The dismissal motion and order contained no admission or concession whatsoever as to the validity of the Advisory Opinion, and FanDuel continues to dispute the Advisory Opinion's validity, as FanDuel has done since the day it was released.

II. The Proposed Illinois Sports Wagering Act

The General Assembly is considering proposed legislation known as the Illinois Sports Wagering Act (the "Sports Wagering Act"). The Sports Wagering Act would legalize and regulate sports gambling in Illinois through a new licensing regime overseen by the Illinois Gaming Board.

Initial versions of the Sports Wagering Act directed the Illinois Gaming Board to deny licenses only to entities that had been convicted of criminal conduct in a court of competent jurisdiction beyond a reasonable doubt. That changed on March 26, 2019, however, when Representative Robert Rita proposed an amendment to the Sports Wagering Act that included a new Section 10:

> No sports wagering operator license or Internet sports wagering vendor license shall be granted to an applicant that has accepted, that has or had an affiliate that has accepted, or that has officers or directors who are or have been officers or directors of another party that accepted wagers through the Internet in contravention of any United States law, Illinois law, or any substantially similar laws of any other jurisdiction before the application date pursuant to a final determination of a court or an unequivocal official pronouncement from a government authority or chief law enforcement officer.

The March 26 Amendment thus would have barred the issuance of Sports Wagering Act licenses to companies that "accepted wagers through the Internet in contravention of … Illinois law … before the application date," even when such conduct was established only through "an unequivocal official pronouncement from a government authority or chief law enforcement officer," rather than through an adjudication in a court of law.

On May 8, 2019, Representative Michael Zalewski proposed another amendment to the Sports Wagering Act that included a provision that would replace the proposed Section 10 in the March 26 Amendment—Section 5-37(k):

> To maintain public confidence, trust, and security in the credibility and integrity of sports wagering in this State as a new form of wagering that was previously unauthorized and because the Board must ensure that any applicant has not previously engaged in prohibited or questioned conduct, no online sports wagering

> license or sports wagering skin license shall be granted for a period of 3 years after the effective date of this Act:
>
> > (1) to an applicant if the applicant, any affiliate of the applicant, or any officer or director of the applicant or its affiliate engaged in conduct constituting illegal gambling under any law of the United States, the State of Illinois, or another state as determined by a final decision of a court of competent jurisdiction or as described in an official opinion or pronouncement of the Attorney General of this State or any other state and continued to engage in such conduct after that opinion or pronouncement was issued; or
> >
> > (2) to a person who purchases, licenses, contracts for or with respect to, or uses any covered asset, in whole or in part, for the operation of sports wagering or with a purpose of operating sports wagering. Purchasing, licensing, contracting for or with respect to, or using a covered asset is grounds for revocation of an online sports wagering license or a finding of unsuitability by the Board.
>
> The provisions of this subsection (k) do not apply to any applicant that can demonstrate to the Board, by clear and convincing evidence, that the conduct was not unlawful under any law of the United States, the State of Illinois, or the state where the conduct occurred, or that, in response to each final court decision or official opinion or pronouncement of the Attorney General of this State or any other state, such conduct was promptly ceased. This subsection (k) does not waive the applicant's burden of proof and obligation to comply with all other applicable licensing and suitability requirements set forth in this Act.

Much like the March 26 Amendment, the May 8 Amendment would restrict the availability of licensing for entities that had "engaged in conduct constituting illegal gambling under any law of … the State of Illinois … as determined by … an official opinion or pronouncement of the Attorney General of this State." Unlike the March 26 Amendment, which proposed that such entities be permanently ineligible for Sports Wagering Act licenses, the May 8 Amendment proposed that these entities be ineligible for licenses for the first three years of the new licensing regime.

Although the proposed Section 5-37(k) does not identify specific entities that it would bar from obtaining a license for three years, the targets of the provision are clear. As commentators have noted, the proposed amendment appears to be an effort by two entities with interests in Illinois

casinos to exclude FanDuel and DraftKings—the two largest fantasy sports contest providers—from competing in the legalized sports wagering market.[2]

The legislative history of the amendment further confirms that FanDuel and DraftKings are the targets of the restriction. In March 28, 2019 testimony before the House Revenue and Finance subcommittee, Paul Gaynor, a representative of Rivers casino, a would-be competitor in the Illinois sports wagering market, testified in favor of the March 26 Amendment by arguing that "[w]ithout language barring bad actors from the licensing process, the proposed legislation would ignore DraftKings and [FanDuel's] pattern of criminal conduct and reward bad actors who to this day refuse to comply with the laws." Then, at the May 8, 2019 subcommittee hearing, Mr. Gaynor testified in support of Section 5-37(k) by making two clear references to FanDuel and DraftKings:

- "Including a regulatory waiting period will prevent entities who have operated illegally from benefiting from their anti-competitive conduct. For example, two operators have trumpeted the fact that since they have started operating in New Jersey, they have captured 80% of the sports wagering market in New Jersey since January."
- "One of the entities that has operated illegally in this state and others has said that they will open an office in Chicago with 300 jobs."[3]

III. The History Of "Bad Actor" Provisions In Gaming Legislation

Neither Section 10 of the March 26 Amendment nor Section 5-37(k) of the May 8 Amendment is novel. In the last decade, at least five States have contemplated similar restrictions on gaming licenses, with one State going to far as to enact such a provision.

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[2] *See* W.J. Kennedy, *Billionaire Casino Mogul Neil Bluhm Seeks to Shut Down Competition Through Amendment to Sports Wagering Legislation*, Prairie State Wire (May 10, 2019), *available at* https://prairiestatewire.com/stories/512483868-billionaire-casino-mogul-neil-bluhm-seeks-to-shut-down-competition-through-amendment-to-sports-wagering-legislation; *Crain's Daily Gist: Sports Gambling in Illinois*, Crain's Chicago Business (May 8, 2019), *available at* https://www.chicagobusiness.com/crains-daily-gist/crains-daily-gist-sports-gambling-illinois.

[3] *See also* Danny Ecker, *FanDuel Eyes Chicago Office if Sports Betting Bill Passes*, Crain's Chicago Business (May 8, 2019), *available at* http://www.chicagobusiness.com/commercial-real-estate/fanduel-eyes-chicago-office-if-sports-betting-bill-passes.

In 2013, Nevada enacted legislation that created a licensing regime for online gaming. One of its provisions was a so-called "bad actor" clause that prevented those who "after December 31, 2006, knowingly and intentionally operated interactive gaming that involved patrons located in the United States, unless and to the extent such activity was licensed at all times by a state or the Federal Government," from obtaining a license for the first five years of the new licensing regime. *See* Nev. Rev. Stat. §§ 463.014645(1), 463.750(6). The December 31, 2006 date was the effective date of the federal Unlawful Internet Gambling Act of 2006, 31 U.S.C. §§ 5361-5367.

We are not aware of any constitutional challenge having been brought as to the Nevada "bad actor" provision. But we also are not aware of any State that has followed Nevada's lead. In New Jersey and Pennsylvania, legislators considered the possibility of including bad actor provisions in their own online gaming licensing laws, but ultimately they chose not to do so. Previous efforts to include such a provision in online gaming legislation also failed in New York.

Finally, in California, the questionable constitutionality of a bad actor provision served as a major reason why the State has not yet enacted any online gaming legislation. Notably, in conjunction with a 2014 proposal to incorporate such a provision into a state online gaming bill, Laurence Tribe, Professor of Constitutional Law at Harvard Law School, submitted an analysis concluding that "that the 'bad actor' provisions in two proposed iPoker bills in the California Legislature likely violate the U.S. Constitution." In particular, he concluded that a bad actor provision amounts to an unconstitutional bill of attainder, violates the Takings Clause of the United States Constitution, and violates the Equal Protection Clause of the United States Constitution. In light of Professor Tribe's analysis, the California legislature has not yet taken action on any online gaming legislation.

ANALYSIS

I. Proposed Section 5-37(k) Of The Sports Wagering Act Would Be Vulnerable To Attack Under The 1970 Illinois Constitution.

A. Section 5-37(k) Arguably Constitutes Unconstitutional Special Legislation.

The Illinois Constitution includes a "Special Legislation Clause" that goes beyond the protections afforded by the U.S. Constitution. There is a compelling argument that Section 5-37(k) violates the Special Legislation Clause because it specifically and narrowly excludes two identifiable entities—FanDuel and DraftKings—from a benefit made available to other, favored entities. It purports to do so based on an allegation that both entities previously have been engaged in criminal activities. But this assertion ignores that neither FanDuel nor DraftKings ever was so much as charged with a crime, let alone proven guilty of any offense beyond a reasonable doubt.

The Special Legislation Clause provides that:

> The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.

Ill. Const. art. IV, § 13. The Illinois Supreme Court has summarized the Clause as "prohibit[ing] the General Assembly from conferring a special benefit or exclusive privilege on a person or a group of persons to the exclusion of others similarly situated." *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 391 (1997). The Clause therefore prohibits the General Assembly from enacting legislation that discriminates in favor of a select group in an arbitrary manner. *See Moline Sch. Dist. No. 40 Bd. of Educ. v. Quinn*, 2016 IL 119704, ¶ 24. Consequently, even when a law does not affect a fundamental right or involve a suspect classification, the Special Legislation Clause requires that the classification be "rationally related to a legitimate state interest." *Allen v. Woodfield Chevrolet, Inc.*, 208 Ill.2d 12, 22 (2003). To satisfy this standard, a classification must be "based upon some real and substantial difference in kind, situation or circumstances" and

"bear[] a rational relation to the evil to be remedied and the purpose to be attained by the statute." *Id.* at 29 (quoting *Grasse v. Dealer's Transp. Co.*, 412 Ill. 179, 193-94 (1952)). A classification that is "not founded on any substantial difference of situation or condition" is invalid. *Quinn*, 2016 IL 119704, ¶ 35.

Illinois courts have applied these principles to strike down legislative classifications that "have an artificially narrow focus" or "appear to be designed primarily to confer a benefit on a particular private group without a reasonable basis, rather than to promote the general welfare." *Best*, 179 Ill. 2d at 395. Similarly, classifications have been found to be invalid where they are "not adequately connected to the purpose of the legislation," *Allen*, 208 Ill. 2d at 29, or where they "undermine the stated goal" of the legislation," *Best*, 179 Ill. 2d at 406. As the Illinois Supreme Court has explained, "the hallmark of an unconstitutional classification is its arbitrary application to similarly situated individuals without adequate justification or connection to the purpose of the statute." *Id*. at 396.

Against the backdrop of this precedent, Section 5-37(k) is ripe for constitutional challenge. It immediately grants nearly all Illinois sports wagering providers the right to seek a sports wagering license. But for the next three years, it denies that right to any applicants who the Attorney General concluded in an advisory opinion had engaged in "conduct constituting illegal gambling"—a rule intended to exclude FanDuel and DraftKings from the market. The amendment thus specifically and narrowly excludes these two identifiable entities from a right the General Assembly has seen fit to grant to all their potential competitors. By any estimation, that is an "artificially narrow focus," which strongly suggests that the law is "designed primarily to confer a benefit on a particular group"—here, other sports wagering providers—"rather than to promote the general welfare." *Best*, 179 Ill. 2d at 395.

Section 5-37(k) purports to justify the exclusion of FanDuel and DraftKings from a right granted to all their would-be competitors based on the State's need (1) "to maintain public confidence, trust, and security in the credibility and integrity of sports wagering in this State as a new form of wagering that was previously unauthorized"; and (2) to "ensure that any applicant has not previously engaged in prohibited or questioned conduct." But even assuming the legitimacy of these two purposes, there are strong arguments that the proposed classification is not rationally related to either of them. FanDuel and DraftKings were the subject of an advisory opinion; they were never charged—let alone convicted—of any illegal or improper conduct. Indeed, when FanDuel and DraftKings sought a declaration that their conduct had been legal, the Attorney General took the position that the Advisory Opinion was not reviewable because it was "nonbinding" and not "subject to enforcement in a court of law."

Accordingly, there is a strong case to be made that excluding FanDuel and DraftKings from applying for sports wagering licenses under these circumstances has no rational relationship to Section 5-37(k)'s stated aims. It would not seem to promote "public confidence" in "the integrity of sports wagering" to retroactively punish two competitors with a years-long established track-record of fair and honest dealings with Illinois consumers based on conduct that no Illinois law-enforcement entity saw fit to charge as unlawful, let alone that a jury found sufficiently egregious to justify a finding of guilt beyond a reasonable doubt. Nor does it seem to "ensure" that applicants have not engaged in "prohibited or questioned conduct," as FanDuel and DraftKings have never been adjudicated to have engaged in either. The classification used in the proposed amendment thus appears to be "not adequately connected to the purpose of the legislation," and therefore invalid. *Allen*, 208 Ill. 2d at 29.

In fact, FanDuel and DraftKings have strong arguments that the classification would "undermine the stated goal[s]" of the legislation. *Best*, 179 Ill. 2d at 406. If anything, imposing a three year ban on FanDuel or DraftKings—the two most recognizable, popular, and reputable providers of daily fantasy sports offerings and, in states where it is legal, of online sports wagering—could well erode public confidence in the Illinois sports wagering market.

In short, there are strong arguments that the proposed amendment makes a classification that is "not founded on any substantial difference of situation or condition" and is thus arbitrary and invalid under the Special Legislation Clause. *See Quinn*, 2016 IL 119704, ¶ 35.

B. Section 5-37(k) Arguably Violates The Illinois Equal Protection Clause.

For much the same reason, there is a powerful case to be made that Section 5-37(k) violates the Illinois Equal Protection Clause by discriminating against a narrow and identifiable class based on past conduct that has never been charged and is unrelated to the purposes of the legislation. Although the Special Legislation Clause and Illinois Equal Protection Clause are "not identical," challenges based on the two provisions "are generally judged under the same standards." *Miller v. Rosenberg*, 196 Ill. 2d 50, 59 (2001); *see Best*, 179 Ill. 2d at 393; *see also* Ill. Const. art. I, § 2 (Illinois Equal Protection Clause). The Illinois Equal Protection Clause "requires the government treat similarly situated individuals in a similar manner." *Jacobson v. Dep't of Public Aid*, 171 Ill. 2d 314, 322 (1996). The key question in cases involving an equal protection claim is whether "the method or means employed in the statute to achieve the stated goal or purpose of the legislation is rationally related to that goal." *Id.* at 324. Although the government is not prohibited from drawing distinctions between categories of people, it is prohibited from doing so "on the basis of criteria wholly unrelated to the purpose of the legislation." *Id.* (statute imposing financial responsibility on parents of 18- to 20-year-old children when the children resided in parents' home, but not when

they resided elsewhere, violated Illinois Equal Protection Clause because of inequity of distinction and lack of rational relationship to statute's aim of strengthening family unity).

Just as with the Special Legislation Clause, there are strong arguments that Section 5-37(k) violates the Illinois Equal Protection Clause. Again, it specifically and narrowly excludes two identifiable entities—FanDuel and DraftKings—from a right granted to a larger class, purportedly based on the fact that they were the subject of the Advisory Opinion declaring their past conduct to be illegal. But this distinction does not seem to have a rational relationship to the amendment's stated aims. It is difficult to see how it would promote public confidence in the integrity of sports wagering to ban two of the largest existing providers of sports wagering services throughout the Nation based on past conduct that was never charged. FanDuel and DraftKings have been operating in Illinois without *any* legal challenge—let alone a finding of improper conduct—for years.

Given the lack of a relationship between this classification and Section 5-37(k)'s stated purposes, there is a strong case to be made that the true purpose of the statute is to protect local competitors, including Illinois casinos, against competition from FanDuel and DraftKings in the sports wagering market. Such a finding would be consistent with the legislative history, which indicates that FanDuel and DraftKings are the specific targets of Section 5-37(k). Courts have held that such local economic protectionism is an improper purpose and cannot satisfy the rational basis test. *See, e.g.*, *Keystone Redevelopment Partners, LLC v. Decker*, 674 F. Supp. 2d 629, 667 (M.D. Pa. 2009), *rev'd on other grounds*, 631 F.3d 89 (3d Cir. 2011).

II. Proposed Section 5-37(k) Would Be Vulnerable To Attack Under The United States Constitution.

A. Section 5-37(k) Arguably Violates The Bill Of Attainder Clause.

As a matter of the Federal Constitution, Section 5-37(k) also would be ripe for a constitutional challenge as an unlawful bill of attainder. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 846–47 (1984). It is axiomatic that the United States Constitution forbids state "legislatures from singling out disfavored persons and meting out summary punishment for past conduct" through bills of attainder. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994); U.S. Const., art. I, § 10, cl. 1 ("No State shall … pass any Bill of Attainder ....").

The Supreme Court has given a "broad and generous meaning to the constitutional protection against bills of attainder." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 469 (1977). Indeed, "the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply-trial by legislature." *United States v. Brown*, 381 U.S. 437, 442 (1965). Accordingly, the Supreme Court has held that legislatures must accomplish their objectives by "rules of general applicability," rather than laws which "specify the people upon whom the sanction … is to be levied." *Id.* at 461.

A statute qualifies as a bill of attainder if it (1) specifies certain affected persons and (2) inflicts punishment on those persons (3) without a judicial trial. *Dehainaut v. Pena*, 32 F.3d 1066,

1070 (7th Cir. 1994).[4] There is a strong argument that each of these elements is present with respect to Section 5-37(k).

Specificity

"The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 86 (1961). "When past activity serves as a point of reference for the ascertainment of particular persons ineluctably designated by the legislature for punishment … the Act may be an attainder." *Selective Serv. Sys.*, 468 U.S. at 847 (quotation marks and citations omitted).

A law that "defines a class of persons on the basis of 'irreversible acts committed by them' is adequately specific." *Atonio v. Wards Cove Packing Co.*, 10 F.3d 1485, 1495-96 (9th Cir. 1993) (quoting *Selective Serv. Sys.*, 468 U.S. at 847-48). There is ample evidence that Section 5-37(k) fits that criteria. The class here consists of applicants who the Attorney General has previously accused of engaging in "illegal gambling." These acts cannot be undone and, thus, sufficiently define the targeted group. *See SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 671 (9th Cir. 2002) (targeted group comprised of entities which had committed the "irreversible act of having spilled a specified quantity of oil" was sufficiently specific); *O'Bradovich v. Vill. of Tuckahoe*, 325 F. Supp. 2d 413, 428 (S.D.N.Y. 2004) ("A law is unconstitutional when it penalizes past actions that occurred before its passage and that cannot be undone.").

[4] Corporations are "persons" which may not be singled out for punishment under the Bill of Attainder Clause. *See*, *e.g.*, *Consol. Edison Co. of N.Y. v. Pataki*, 292 F.3d 338, 349 (2d Cir. 2002); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (Bill of Attainder Clause protects "individual persons and private groups"); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995) (bill of attainder may target an "individual or firm").

But there is more. Here, as far as we are aware, the Illinois Attorney General has never issued any "official opinion or pronouncement" identifying an entity other than FanDuel and DraftKings as having engaged in "illegal gambling." Further, as discussed above, Mr. Gaynor's testimony at two committee hearings either explicitly or implicitly referenced FanDuel and DraftKings. So it would seem to be beyond serious dispute that Section 5-37(k) is specific as to who its provisions would burden.

Punishment

Whether a law inflicts "punishment" for purposes of determining whether it is a bill of attainder depends on "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish." *Selective Serv. Sys.*, 468 U.S. at 852 (quotation omitted).

First, the historical meaning of legislative punishments includes not only "death, imprisonment, fines, or confiscation," but also "bans on entry into a particular profession or business." *Atonio*, 10 F.3d at 1496. For instance, the Supreme Court has invalidated laws denying ex-confederate sympathizers admission to the bar, *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1867), and prohibiting them from serving as priests, *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1867). *See also Brown*, 381 U.S. at 448-49 (invalidating statute making it criminal for member of Communist Party to serve as officer or employee of labor union); *Lovett*, 328 U.S. at 314-17 (invalidating statute cutting off salary to certain "subversive" government employees). Given this standard, there is ample reason basis to argue that Section 5-37(k) imposes a legislative

punishment, as it effectively bars DraftKings and FanDuel from entering into a particular business in Illinois for a substantial period of time.

Second, requiring that a "legislative punishment" advance a valid, nonpunitive purpose ensures that the "legislature has not created an impermissible penalty not previously held" to constitute punishment. *Selective Serv. Sys.*, 468 U.S. at 853. On its face, Section 5-37(k) represents that its purpose is to "maintain public confidence, trust, and security in the credibility and integrity of sports wagering in [Illinois] as a new form of wagering that was previously unauthorized." But, as discussed above, there is good reason to question whether banning FanDuel and DraftKings from entering the sports wagering market is reasonably related to this stated purpose. There has been no legislative finding or evidence that banning an entity from licensure solely because that entity was accused in an advisory opinion would in any way maintain or increase public confidence, trust, or security in sports wagering. Arguably, it is just as likely that prohibiting some entities from participating in online sports wagering activities, while allowing others to engage in them, would create public uncertainty about the legal status of online sports wagering. *See Flemming v. Nestor*, 363 U.S. 603, 615 (1960) (describing the "inability to discern any alternative [nonpunitive] purpose which the statute could be thought to serve" as a basis for finding a statute to be punitive).[5]

Third, courts will consider whether the legislative record is reflective of a legislative "intent to punish." *Selective Serv. Sys.*, 468 U.S. at 853. In assessing legislative intent, a "formal legislative announcement of moral blame worthiness or punishment" is not necessary, but can serve as further

[5] In addition, a court considering whether a legislative punishment has a valid, nonpunitive purpose also will "inquire into the existence of less burdensome alternatives by which [the] legislature ... could have achieved its legitimate nonpunitive objectives." *Nixon*, 433 U.S. at 482. Here, even if Section 5-37(k) has an arguably nonpunitive purpose, there is no indication that the Illinois legislature could not pass other, less restrictive measures to achieve the same purpose.

evidence of the legislative purpose. *Nixon*, 433 U.S. at 480, 97. Here, the clearest indicia of what this provision's purpose is comes from Mr. Gaynor's testimony in support of Section 5-37(k), which consists of repeated references to DraftKings and FanDuel both explicitly and by implication, and is replete with assertions that both had "operated illegally in this state." This strongly suggests that the motivation for the legislation was at least in part to punish DraftKings and FanDuel for continuing to operate in Illinois following the Advisory Opinion.

No Judicial Trial

Lastly, there can be little doubt that if Section 5-37(k) imposes punishment, it does so without a judicial trial. On its face, the proposed law subjects certain entities to what is arguably legislative punishment based upon allegedly "illegal" conduct which has never been proven in a court of law. Punishing certain specified entities without any adjudication represents an impermissible "legislative exercise of the judicial function" that amounts to an unconstitutional bill of attainder. *Brown*, 381 U.S. at 442.

B. Section 5-37(k) Arguably Violates The Dormant Commerce Clause.

The Dormant Commerce Clause limits the power of states to enact laws that unfairly target or burden out-of-state commerce in favor of in-state commerce. As a general matter, courts and scholars alike have noted that laws that target online business disproportionately impact interstate commerce and thus implicate the Dormant Commerce Clause. *Cf., e.g., Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003) (finding per se violation of the Dormant Commerce Clause); *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999); *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 170–71 (S.D.N.Y. 1997); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 787 (2001) (noting that the trend in courts to invalidate state Internet regulation as violating the Dormant Commerce Clause likely

"extends to state antigambling laws"). Section 5-37(k) goes even further, by targeting two specific online entities, thus ensuring that it impacts *only* out-of-state conduct.

The key inquiry under the Dormant Commerce Clause is whether the law discriminates against out-of-state entities: Laws that discriminate against interstate commerce in this manner are subject to the highest scrutiny, while those that incidentally burden interstate commerce through a general exercise of police power are scrutinized to a lesser degree. *Granholm v. Heald*, 544 U.S. 460, 476 (2005); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). To trigger heightened scrutiny, laws may appear neutral on their face, yet still discriminate against non-local companies. *See, e.g., Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 349 (1977) (holding that North Carolina statute that required apples sold in the state to bear the standards adopted by the USDA—thus appearing facially neutral—discriminated against apples from Washington state, which had a stricter apple grading standard).

A law that appears facially neutral can discriminate against out-of-state commerce in two ways. First, it can harbor a discriminatory purpose. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) *(*"[W]e need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid Hawaiian industry."). That criteria is satisfied when the purpose of the law is economic protectionism—though discrimination need not be the only, or even the primary, purpose of the law. *See Keystone Redevelopment Partners, LLC v. Decker*, 674 F. Supp. 2d 629, 661 (M.D. Pa. 2009), *rev'd on other grounds*, 631 F.3d 89 (3d Cir. 2011). Second, a seemingly neutral law improperly favors in-state business if the "practical effect" of the statute so reveals. *Hunt*, 432 U.S. at 350.

There is a powerful argument that Section 5-37(k) discriminates against interstate commerce in both purpose and effect. As discussed above, its purpose is apparent. Section 5-37(k)

targets FanDuel and DraftKings for exclusion from the Illinois sports wagering market. Notably, both are out-of-state entities, rather than entrenched, Illinois-based companies. That distinction is particularly notable given Mr. Gaynor's testimony at the March 28 subcommittee hearing at which he emphasized not only that failing to include a bad-actor restriction would "ignore DraftKings and [FanDuel's] pattern of criminal conduct," but also emphasized to the subcommittee that DraftKings Sportsbook and FanDuel Sportsbook have been the dominant entities in the New Jersey market since that state legalized sports wagering. Indeed, he argued to the subcommittee that it was proper to exclude DraftKings and FanDuel from the Illinois market because "[a]s a result of this lack of competition, Illinois will not achieve the maximum tax revenue collections it otherwise could have."

As for the effect of Section 5-37(k), Mr. Gaynor was correct that excluding these two entities would exclude the vast majority of out-of-state business from participating in the new Illinois sports wagering market. Using New Jersey as an example, FanDuel Sportsbook and Draft Kings Sportsbook have been operating for only a year, but already comprise in the aggregate 83% of the sports betting in that state.[6] That is consistent with the daily fantasy sports market, in which a 2017 report from the Federal Trade Commission estimated that FanDuel and DraftKings together accounted for 90% of the nationwide market.[7]

When a state law discriminates against out-of-state commerce, it is subject to the strictest scrutiny. In fact, the United States Supreme Court has explained that such laws "face 'a virtually *per se* rule of invalidity.'" *Granholm*, 544 U.S. at 476 (quoting *Philadelphia v. New Jersey*, 437

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[6] Alex Sherman, *Legal gambling from your phone could be a $150 billion market, but making it happen will be tough*, CNBC (Apr. 27, 2019), https://www.cnbc.com/2019/04/27/fanduel-draftkings-race-to-win-150-billion-sports-betting-market.html.

[7] *DraftKings, Inc./FanDuel Limited*, FED. TRADE COMM'N, (updated Jul. 14, 2017) https://www.ftc.gov/enforcement/cases-proceedings/161-0174/draft-kings-inc-fanduel-limited.

U.S. 617, 624 (1978)). In this analysis, a law that discriminates against interstate commerce is unconstitutional even if it also has another legitimate purpose. For example, the United States Supreme Court has invalidated a law that discriminated against out-of-state apple growers, "even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace." *Hunt*, 432 U.S. at 353. As a result, here, even though Section 5-37(k) states as its purposes maintaining public confidence and ensuring that licensees have not violated the law, that does not mean it accords with the Dormant Commerce Clause. Instead, because Section 5-37(k) targets the out-of-state companies described in the Advisory Opinion, there is a strong argument that the proposed amendment violates the Dormant Commerce Clause.

C. Section 5-37(k) Arguably Violates The Equal Protection Clause Of The Fourteenth Amendment.

FanDuel and DraftKings also have an argument that the proposed amendment singles them out for unfavorable treatment in violation of the federal Equal Protection Clause. Typically, an equal protection claim of this type—known as a "class-of-one" claim—requires a plaintiff to show that it has been intentionally treated different from other similarly situated entities, and that there is no rational basis for doing so. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Woodruff v. Mason*, 542 F.3d 545, 553 (7th Cir. 2008). But when "the plaintiff challenges a statute or ordinance that by its terms imposes regulatory burdens on a specific class of persons … there's no need to identify a comparator; the classification appears in the text of the statute itself." *Monarch Beverage Co. v. Cook*, 861 F.3d 678, 682 (7th Cir. 2017); *see also St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1010 (7th Cir. 2019) (same). FanDuel can persuasively contend that is the case here: Section 5-37(k) would apply the waiting period to a specific class of persons that consists only of FanDuel and DraftKings.

As a result, in asserting a class-of-one equal protection claim, FanDuel and DraftKings need only show that there is no rational basis for singling them out for unfavorable treatment. Although few federal courts have addressed discrimination of this sort in the gaming context, the most thorough analysis supports an equal protection claim. In *Keystone Redevelopment Partners, LLC v. Decker*, the Pennsylvania gaming board declined to award any of its slot machine licenses to companies that operated—or had affiliates that operated—gambling outfits in New Jersey. 674 F. Supp. 2d 629, 640–41 (M.D. Pa. 2009), *rev'd on other grounds*, 631 F.3d 89 (3d Cir. 2011). The plaintiff alleged that the board disqualified these companies because their affiliates also operated in other states. *Id.* at 662. The plaintiff argued that the true purpose of the law "was to horde gamblers and erect barriers to competition, neither of which are legitimate state objectives." *Id.* at 667.

Notably, the *Keystone* court identified multiple *potential* government interests supporting the Board's decision, but agreed that the plaintiff alleged an equal protection claim, because the Board's action amounted to "local economic protectionism" and thus did not satisfy the rational basis test. *Id.* Here too, even accepting that regulating gaming is a legitimate government interest, *see Helton v. Hunt*, 330 F.3d 242, 246 (4th Cir. 2003), FanDuel and DraftKings can argue that the true purpose of Section 5-37(k) is local protectionism. Other courts have found that such economic protectionism is not a legitimate government interest for the purpose of an equal protection rational basis test. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) ("Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose.").

Furthermore, even if FanDuel and DraftKings could not show that Section 5-37(k) was motivated by economic protectionism for entrenched local interests, they might still have a viable equal protection claim. Section 5-37(k) restricts licenses for those who "engaged in conduct constituting illegal gambling" as described in "an official opinion or pronouncement of the Attorney General of this State or any other state and continued to engage in such conduct after that opinion or pronouncement was issued." As discussed above, there are persuasive arguments that barring entities that have been the subject of only an advisory opinion, and never been subjected to any sort of enforcement action, from receiving a wagering license is not rationally related to the statute's aims.

D. Section 5-37(k) Arguably Violates The Due Process Clause Of The Fourteenth Amendment.

Section 5-37(k) would deny FanDuel the opportunity to grow its future business unless FanDuel proves by "clear and convincing evidence" that it has *not* engaged in criminal conduct. This requirement—effectively imposing a guilty-until-proven-innocent standard upon FanDuel—raises significant Due Process concerns under the Fourteenth Amendment.

"A procedural due process claim requires a two-fold analysis. First, [a court] must determine whether the plaintiff was deprived of a protected interest; second, [a court] must determine what process is due." *Pugel v. Bd. of Trs. of Univ. of Illinois*, 378 F.3d 659, 662 (7th Cir. 2004). There is a strong argument that Section 5-37(k) deprives both entities of a protected liberty interest. Under *Paul v. Davis*, a State deprives a claimant of a constitutionally protected liberty interest when a state actor makes allegations that (1) are defamatory and (2) that alter the claimant's legal status. 424 U.S. 693, 708-09 (1976); *see also Townsend v. Vallas*, 256 F.3d 661, 669 (7th Cir. 2001). By any measure, Section 5-37(k) is defamatory. It would effectively tar FanDuel and DraftKings as having engaged in "illegal gambling"—criminal conduct they were

never charged with nor convicted of, and asserts that merely allowing these companies to operate would hurt "public confidence, trust, and security in the credibility and integrity of sports wagering." But Section 5-37(k) arguably goes beyond defamation and alters their legal status. Under Section 5-37(k), the unproven allegations in the Advisory Opinion renders them ineligible for the licenses necessary to their future growth. That would give them a potentially viable claim that Section 5-37(k) deprives them of a protected interest under this "stigma-plus" standard. *Cf. Head v. Chicago Sch. Reform Bd. of Trs.*, 225 F.3d 794, 801 (7th Cir. 2000) (indicating that if a public employee can show both the public infliction of a stigma as well as a "tangible loss of other employment opportunities as a result of the public disclosure," then the employee can state a claim for deprivation of a liberty interest).

FanDuel also would have strong arguments that Section 5-37(k) would deprive them of their property interest in the use or sale of their assets. In addition to barring FanDuel from applying for sports wagering licenses for three years, Section 5-37(k) also bars anyone who "purchases, licenses, contracts for or with respect to, or uses any covered asset," which includes "any tangible or intangible asset" used in connection with what the Advisory Opinion stated was illegal gambling, from obtaining a license. The effect of this provision is to destroy the value of FanDuel's assets by ensuring not only that FanDuel cannot use their assets, but also that FanDuel cannot transfer their assets to someone who can, as any such person would likewise be barred from receiving a license. "Covered assets" is defined broadly in the proposed amendment and includes FanDuel's extremely valuable intangible assets—including trademarks, intellectual property, and customer lists and databases—which are protected property interests under the Due Process Clause. *See, e.g.*, *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 641-42 (1999) (interest in patent is protected by the due process clause); *Roth v. Pritikin*,

710 F.2d 934, 939 (2d Cir. 1983) (interest in copyright is protected by due process clause). FanDuel has made significant investments in these assets over the course of many years, and these assets are of great value in the sports wagering market. Section 5-37(k) would effectively render them worthless.

If a court concluded that Section 5-37(k) deprives FanDuel and DraftKings of a protected liberty or property interest, these companies would then have a persuasive claim that the law does not afford them the procedural protections they are due. To determine the "specific dictates of due process," courts consider "three distinct factors":

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Here, to avoid being barred from license-eligibility, Section 5-37(k) would require FanDuel and DraftKings to "demonstrate to the Board, by clear and convincing evidence, that [its] conduct was not unlawful."

There is a meaningful concern that such a process would not stand up to judicial review under *Mathews v. Eldridge*. Although the government has a substantial interest in regulating online sports wagering, FanDuel and DraftKings too have strong private interests at stake. Were either denied eligibility for a license, their respective reputations would be tarnished by the dint of Section 5-37(k), having been adjudged—without indictment or trial—to have "engaged in conduct constituting illegal gambling." Forcing a person to prove their innocence "by clear and convincing evidence" turns our traditional notions of justice on their head.

Lastly, a due process claim may be strengthened given the grounds on which Illinois opposed the two entities' earlier efforts to challenge the very Advisory Opinion that now threatens

their future. Illinois argued at the time that, because the Advisory Opinion was merely advisory, FanDuel and DraftKings had no standing to sue. To deprive FanDuel and DraftKings of a license based upon that opinion now would arguably catch the two entities in a whipsaw: Illinois originally contended that FanDuel and DraftKings could not argue their case on the merits because the Advisory Opinion did not put their guilt at issue; the state would now use the same Advisory Opinion to presumptively establish their guilt. Such a scenario would seem to implicate the "deep-rooted demands of fair play enshrined in the Constitution" that inform a due process analysis. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring). "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

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Depending on the final language of the Sports Wagering Act, there may be additional constitutional shortcomings with Section 5-37(k). Furthermore, we have focused our analysis on Section 5-37(k) and do not purport to have exhaustively examined all aspects of the May 8 Amendment. But in the end, it is clear that there is a broad range of arguable constitutional defects with Section 5-37(k) that almost certainly would become the subject of litigation from the moment it became law.

III. The State's Police Power Is Not So Broad As To Shield The Proposed Legislation From A Constitutional Challenge.

In 2014, Whittier Law School Professor I. Nelson Rose published an article taking the position that "bad actor" laws are constitutional and that Harvard Law School Professor Laurence Tribe's opinion to the contrary was mistaken. *See* I. Nelson Rose, *Are "Bad Actor" Laws Unconstitutional?*, 18 Gaming L. Rev. 519 (2014). According to Professor Rose, opponents of

"bad actor" laws fail to appreciate that "gambling comes under the state's police power," which "trumps constitutional rights." *Id.* at 519. In effect, Professor Rose argues that actions taken pursuant to a state police power are immune from external constitutional constraints. *See id.* (arguing that, when acting under the police power, "governments can act in ways that would be unthinkable in other commercial and social settings"). That argument has been echoed in recent months by defenders of the proposed amendment. For example, during his recent testimony before the House Revenue and Finance Subcommittee, Mr. Gaynor cited Professor Rose's article and argued that the proposed waiting period is permissible because the "police power of the State to suppress gambling is practically unrestrained."

There is reason to question whether Professor Rose's position would be vindicated by any court. Constitutional constraints do not disappear because the State has taken action in a theater where its police powers are robust; were it otherwise, Illinois could ban only Capricorns from buying lottery tickets or require only Democrats to comply with traffic laws or prohibit only African-Americans from buying cigarettes or ban only Canadian nationals from owning pit bulls. Each of these rules, though ostensibly tethered to the State's police power, would be stricken by any court as unconstitutional. That is because "[c]onstitutional limitations [such as equal protection] must always be observed," even when the State exercises its police powers. *Bowden v. Davis*, 289 P.2d 1100, 1106 (Or. 1955) (en banc). Indeed, as the Supreme Court itself has explained, "due process places some limits on [the] exercise" of "the police power." *Lambert v. People of the State of California*, 355 U.S. 225, 228 (1957); *see also, e.g.*, *Bd. of County Sup'rs of Fairfax County v. Carper*, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959) ("[W]here the police power conflicts with the Constitution the latter is supreme."); *Home Builders League of S. Jersey, Inc. v. Berlin Twp.*, 405 A.2d 381, 387 (N.J. 1979) ("Zoning, reflecting as it does the exercise of

the police power, is subject to due process requirements. Arbitrary or unreasonable zoning ordinances cannot stand." (internal citations omitted)); *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 366 (2008) ("That a law has the police power label—as all laws do—does not exempt it from Commerce Clause analysis."); 16A C.J.S. Constitutional Law § 717 & n.24 (collecting cases for the proposition that a court may decide both "what constitutes a proper exercise of the police power" and whether regulations prescribed under that power "are otherwise unconstitutional").

Professor Rose's arguments to the contrary trammel that precedent. For example, Professor Rose's claim that exercising the police power shields government action from external constitutional considerations is foreclosed by the Supreme Court's opinion in *Craig v. Boren*, 429 U.S. 190 (1976). In that case, the Court invalidated Oklahoma's prohibition on the sale of beer to young men but not young women—a prohibition purportedly grounded on Oklahoma's "police powers with respect to alcohol regulation"—on equal-protection grounds. *Id.* at 205. Professor Rose next suggests that constitutional constraints do not apply when someone "starts shooting at innocent people." *See* Rose, *supra*, at 519. Professor Rose again would seem to be mistaken. *See, e.g.*, *Tennessee v. Garner* 471 U.S. 1, 30 (1985) (holding that a burglary suspect was "seized" under the Fourth Amendment when he was shot to death by a pursuing policeman who was exercising the state's police power); *Hanes v. Zurick*, 578 F.3d 491, 495 (7th Cir. 2009) ("[P]olice officers, in contrast to public employers, exercise the government's sovereign power. Accordingly, constitutional constraints on police power are the norm."). Finally, Professor Rose implies that the fact that States may ban gambling altogether means that lesser regulations on gaming, such as "bad actor" provisions, must be constitutional. *See* Rose, *supra*, at 519. Here too, Professor Nelson's arguments arguably are contradicted by Supreme Court case law. *See, e.g.*, *Parker v. Dugger*, 498 U.S. 308, 321 (1991) (noting that States may choose either to ban the death penalty or allow it, but

that if they do impose capital punishment they must take care not to inflict that penalty in an "arbitrary or irrational" manner); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (noting that "capital punishment [must] be imposed fairly and with reasonable consistency or not at all").

The truth is that the legal framework for adjudicating state action taken under the police power derives from a complex patchwork of interlocking legal standards developed by the Supreme Court—*i.e.*, rational-basis analysis, *see United States v. Carolene Products Co.*, 304 U.S. 144, 152 & n.4 (1938); a due-process balancing test, *see Matthews*, 424 U.S. at 334-35; and a multi-prong test for evaluating regulatory takings, *see Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Professor Rose engages with none of these doctrines. Instead he falls back on the suggestion that *no* action taken under the police power offends the Constitution. We believe that argument is unlikely to be credited by any American court.

CONCLUSION

We acknowledge that we cannot predict with certainty how a court would rule on any of these arguments. But given the range of plausible constitutional challenges that could be raised with respect to Section 5-37(k), we anticipate that if Section 5-37(k) were to become law, both DraftKings and FanDuel would entertain a court challenge to the provision. The federal constitutional claims could be pursued either in state or federal court pursuant to 42 U.S.C. § 1983, which authorizes claims both for prospective injunctive and declaratory relief and claims for damages, as well as the award of attorney's fees under 42 U.S.C. § 1988. As for the state constitutional claims, they could be pursued either directly in state court or as pendent claims in federal court. Regardless of the forum and cause of action, we believe that were the General Assembly to enact Section 5-37(k), it would all but invite a vigorous constitutional challenge under a variety of viable theories.