HOLWELL SHUSTER & GOLDBERG LLP

M E M O R A N D U M

February 25, 2019

TO: FanDuel Group, Inc. & DraftKings Inc.

FROM: James M. McGuire
Daniel M. Sullivan
Daniel M. Horowitz

RE: **Constitutionality of Mobile Sports Betting in New York**

FanDuel Group, Inc. and DraftKings Inc. have asked us to evaluate whether a bill pending before the New York legislature that would authorize mobile sports betting would fall within the scope of an exception to the New York State constitutional prohibition on gambling. This memorandum sets forth our understanding of the legal and factual background and our analysis. Our conclusions are based on the facts outlined below and might vary on materially different facts.

I. Executive Summary

The New York legislature can—consistent with a 2013 amendment to Article I, Section 9 of the New York Constitution—authorize mobile sports betting. Wagering on sporting events is within the amendment's authorization of "casino gambling." And if the computer servers accepting sports wagers are housed in licensed "facilities" (*i.e.*, casinos), mobile bets are made "at" those casinos. These conclusions are supported by foundational precepts of constitutional interpretation, including precepts relating to the deference the judicial branch accords to the legislative branch in general and to the legislature's understanding of a constitutional provision, particularly when that understanding is expressed contemporaneously with the provision's

adoption; the purpose of an amendment; the context and circumstances under which an amendment is passed; and pre-existing New York law. These conclusions are also supported by the Amendment's express and unqualified grant of authority to the legislature to define its substantive scope.

II. Background

Article I, Section 9 of the New York State Constitution generally forbids gambling within the state by prohibiting any "lottery, or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling." N.Y. Const., art. 1, § 9 ("Section 9"). Over time, however, Section 9 has been amended to create exceptions to the general ban, including—subject to stated conditions—for state-operated lotteries and pari-mutuel betting on horse races. *Id.* In 2013, the legislature passed, and voters ratified, an amendment to Section 9 that created an additional exception (the "Amendment"). The Amendment excepts from the prohibition "casino gambling at no more than seven facilities as authorized and prescribed by the legislature."[1] *Id.*

The same day the legislature passed the Amendment, it also passed the Upstate New York Gaming Economic Development Act of 2013, which enacted Article 13 of New York's Racing, Pari-Mutuel Wagering and Breeding Law ("Article 13"). Through Article 13, the legislature authorized the New York State Gaming Commission—subject to voter approval of the Amendment—to award licenses to four casinos in certain upstate counties. Rac. Pari-Mut. Wag. & Breed. Law § 1310(2)(b); 1311(1). Article 13 also conditionally authorized sports wagering at those casinos but specifically limited participation to "persons *physically present* in the sports wagering lounge." *Id.* at § 1367(3)(a) & (d) (emphasis added).

[1] Prior to voter ratification, an amendment to the New York Constitution must be passed consecutively by two separately elected legislatures. Const. art. 19, § 1. The 2013 amendment to Section 9 first passed the legislature on March 14, 2012. *See* A.B. 9556. & S.B. 6734 (N.Y. 2011-12 Sess.).

Article 13's conditional authorization of sports betting was contingent on a change in federal law, because at the time it was passed, the federal Professional and Amateur Sports Protection Act ("PASPA") effectively prohibited sports betting in most states, including New York. 28 U.S.C. §§ 3701–04. In May 2018, the Supreme Court struck down PASPA as an unconstitutional commandeering of the state legislative process. *Murphy v. Nat'l Coll. Ath. Ass'n*, 138 S. Ct. 1461, 1479 (2018). Accordingly, the necessary change in federal law having occurred, licensed New York casinos will be authorized by Article 13 to offer sports betting to physically present gamblers once the Gaming Commission promulgates the statutorily required regulations. Rac. Pari-Mut. Wag. & Breed. Law § 1367(3).

On January 9, 2019, Senator Joseph P. Addabbo, Jr. introduced a bill (the "Proposed Legislation") that would authorize sports wagers to be placed remotely through electronic devices by amending Article 13 to allow sports wagers to be placed by "persons physically present in the sports wagering lounge, *or through mobile sports wagering*." *See* S.B. 17 § 1 (2019 Sess.) (emphasis added) (proposing amendment to Rac. Pari-Mut. Wag. & Breed Law § 1367(3)(d)).[2] The bill also specifies that "any wager through electronic communication is deemed made at the physical location of the server or other equipment used by an operator to accept mobile sports wagering." *Id.*

III. The Proposed Legislation's Authorization Of Mobile Sports Wagering Is Constitutional.

Article I, Section 9 of the New York Constitution states, in pertinent part:

> [E]xcept as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, . . . except pari-mutuel betting on horse races as may be

[2] Available at: https://legislation.nysenate.gov/pdf/bills/2019/S17.

> prescribed by the legislature . . . , and *except casino gambling at no more than seven facilities as authorized and prescribed by the legislature* shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

The constitutionality of the Proposed Legislation turns on the answers to two questions: whether the term "casino gambling" includes sports wagering and, if so, whether wagers that are initiated by means of mobile devices and accepted electronically through servers or other electronic equipment located within the physical confines of a licensed casino is "gambling at" the casino. We conclude that the answer to both questions should be yes, and, therefore, the Proposed Legislation is constitutional.

A. The Relevant Constitutional Principles.

New York courts afford the legislature substantial deference regarding the constitutionality of statutes. In the first place, "[l]egislative enactments enjoy a strong presumption of constitutionality[, w]hile the presumption is not irrefutable, parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt." *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002) (citing *Paterson v. Univ. of State of N.Y.*, 14 N.Y.2d 432, 438 (1964)); *see also Bordeleau v. State*, 18 N.Y.3d 305, 313 (2011) ("It is well established that enactments of the Legislature—a coequal branch of government—enjoy a strong presumption of constitutionality."); *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003) ("A party mounting a facial constitutional challenge bears the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment."). Thus, a statute will not be struck down so long as it is consistent with an interpretation of the constitutional provision that its text can reasonably bear. *In re Fay*, 291 N.Y. 198, 207 (1943) ("[U]ntil every reasonable mode of

reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible, the statute will be upheld."). And when the terms of a constitutional provision are not self-defining, it is up to the legislature to select an appropriate means of implementing those terms. *Cf. M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406-10 (1819) (recognizing, based in part on the nature of a constitution, implied powers of Congress "to select any appropriate means" to carry out the enumerated powers).

Moreover, the legislature's interpretation of a constitutional provision has persuasive force when that interpretation appeared along with, or at the same time as, the constitutional provision in question. As the Court of Appeals has said, "great deference is certainly due to a legislative exposition of a constitutional provision, and especially when it is made almost contemporaneously with such provision and may be supposed to result from the same view of policy, and modes of reasoning which prevailed among the framers of the instrument propounded." *N.Y. Pub. Interest Research Grp., Inc. v. Steingut*, 40 N.Y. 2d 250, 258 (1976) (quoting *People ex rel. Joyce v. Brundage*, 78 N.Y. 403, 406 (1879)); *see also Cooley v. Bd. of Wardens of Port of Phil.*, 53 U.S. (12 How.) 299, 315 (1851) ("[Congress's] contemporaneous construction of the Constitution since acted on with such uniformity in a matter of much public interest and importance, is entitled to great weight, in determining whether such a law is repugnant to the Constitution."). It is therefore common in federal cases to accord persuasive weight to the views of the First Congress, which included many members of the Constitutional Convention. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) ("This Decision of 1789 provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." (quoting *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986))).

Contemporaneous practices are another recognized form of interpretive evidence. Specifically, courts "look with advantage to circumstances and practices which existed at the time of the passage of the constitutional provision," *Sweet v. City of Syracuse*, 129 N.Y. 316, 330 (1891) ("In giving construction to a provision of the Constitution, its history and the conditions and circumstances attending its adoption must be kept in view . . . ."), such as pre-existing law, *B&F Bldg. Corp. v. Liebig*, 76 N.Y.2d 689, 693 (1990) ("The Legislature is presumed to be aware of the law in existence at the time of an enactment . . . ."), and relevant practices in the area being regulated. *See Steingut*, 40 N.Y. 2d at 258. Courts also consider the drafters' purpose in enacting the provision. *See Ginsberg v. Purcell*, 51 N.Y.2d 272, 276 (1980) ("The Constitution is to be construed . . . to give its provisions practical effect so that it receives a fair and liberal construction, not only according to its letter, but also according to its spirit and the general purposes of its enactment."); *see also Fairbank v. United States*, 181 U.S. 283, 289 (1901) ("The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."); *Bransten v. State*, 30 N.Y.3d 434, 447 (2017) (noting that a constitutional provision should be given "a fair and liberal construction, not only according to its letter, but also according to its spirit and the general purposes of its enactment.").

Analysis of the Amendment in light of these precepts provides compelling support for the conclusion that the Proposed Legislation is constitutional.

B. The Amendment's Authorization of "Casino Gambling" Encompasses Sports Betting.

Sports wagering is "gambling." *See, e.g.*, *Gambling*, Black's Law Dictionary 748 (9th ed. 2004) ("The act of risking something of value, esp. money, for a chance to win a prize."); *Gamble*, American Heritage Dictionary 546 (New College ed. 1975) ("To bet money on the

outcome of a game, contest, or other event."). However, it is not obvious from the plain language alone that the constitutional term "casino gambling" includes sports wagering. For numerous reasons, the more reasonable reading of this term is that it does.

The text of the Amendment weighs heavily in favor of the legislature's position because the text expressly contemplates that the Amendment's scope is to be defined by the legislature. Specifically, the Amendment excepts from the prohibition "casino gambling . . . *as authorized and prescribed by the legislature*." In other words, the Amendment authorizes casino gambling to the degree that the legislature authorizes and prescribes it. *See As*, Webster's Third New Int'l Dictionary 125 (1993) (defining "as" to mean "to the same degree or amount"). This delegation has at least two consequences. It brings the already strong presumption of constitutionality, which is grounded in the legislature's inherent authority to select the means of implementing constitutional provisions, to its zenith. *See Finger Lakes Racing Ass'n v. N.Y.S. Off-Track Pari-Mutuel Betting Comm'n*, 30 N.Y.2d 207, 217 (1972) (holding that scope of horse racing exception to Section 9 was "within the legislative province" because the clause expressly allows horse racing "as prescribed by the legislature"). It also affords the legislature authority not only to select means of implementing the Amendment, but also reasonable discretion to determine its scope, since "casino gambling" is permitted "as authorized and prescribed by the legislature."

The relevant federal cases are instructive. The Fourteenth Amendment (along with other amendments) gives Congress the "power to *enforce*, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5 (emphasis added). The Supreme Court has recognized this as a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). That enforcement discretion,

to be sure, does not permit legislative alteration of the meaning of a constitutional provision. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). But although the "line" between impermissible alteration and permissible enforcement must be drawn, "Congress must have wide latitude in determining where" the line is. *Id.* at 519-20.

New York legislature's latitude under the Amendment in determining the line is broader still. That is because of the difference between the respective texts of the federal Fourteenth Amendment and the Amendment to the New York Constitution under consideration. The legislature's power under New York's Amendment to "authorize and prescribe" the manner in which the constitutional provision is implemented is logically more expansive than the federal Fourteenth Amendment's grant of power to "enforce" a constitutional right.[3] And both are more expansive than the inherent authority of legislatures to "select the means" for implementing a constitution. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) at 409-410.

Other evidence of meaning supports the interpretation of the Amendment embodied in the Proposed Legislation. First, the legislature itself understood the Amendment to contemplate sports betting. After all, the same day it passed the Amendment for the second time, the legislature passed Article 13, which conditionally authorized sports betting for "persons physically present" in casinos. Rac. Pari-Mut. Wag. & Breed. Law § 1367(3)(d). Obviously, the legislature could not have believed this aspect of Article 13 was constitutional unless it understood the term "casino gambling" to include sports wagering. Accordingly, these simultaneous legislative actions illustrate the legislature's own understanding of the Amendment

[3] This conclusion is fortified by the fact that the last clause of Section 9 expressly grants *enforcement* power to the legislature. Thus, the legislature's power to "authorize and prescribe" casino gambling must go beyond mere enforcement. *See In re OnBank & Trust Co.*, 90 N.Y.2d 725, 731 (1997) ("We decline to read the amendment in such a way as to render some of its terms superfluous.").

it adopted when the legislature adopted it, providing strong support for the conclusion that sports wagering is a species of casino gambling. *Steingut*, 40 N.Y. at 258 ("Great deference is certainly due to a legislative exposition of a constitutional provision, and especially when it is made almost contemporaneously with such provision . . . .").[4]

The legislature's understanding that casino gambling encompasses sports betting is consistent with the facts on the ground. Sports betting was and is offered in casinos. In Nevada, widely regarded as the preeminent casino gambling venue in the United States, sports betting has been a staple of casinos for decades. *Murphy*, 138 S. Ct. at 1469 ("Nevada remained the only state venue for legal sports gambling in casinos, and sports gambling is immensely popular."). And in 2012 New Jersey enacted legislation which authorized casinos to offer sports wagering. N.J. Stat. § 5:12A-2 (repealed 2014); *see also Nat'l Coll. Ath. Ass'n v. Christie*, 926 F. Supp. 2d 551, 556 (D.N.J. 2013). Accordingly, reading the term "casino gambling" to embrace sports wagering is consonant with the principle that a constitutional provision should be interpreted in light of the "circumstances and practices which existed at the time of the passage of the constitutional provision." *Steingut*, 40 N.Y. 2d at 258.

Finally, reading the Amendment to allow sports wagering is in line with the Amendment's purpose. The electorate was told that its purpose was to generate revenue to "promot[e] job growth, increas[e] aid to schools, and permit[] local governments to lower property taxes." *See* New York State Board of Elections, *Form of Submission of Proposal*

[4] This same precept governs judicial interpretation of the federal constitution. Thus, the Supreme Court "has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given [the Constitution's] provisions." *Eldred v. Ashcroft*, 537 U.S. 186, 213 (2003) (quoting *Myers v. United States*, 272 U.S. 52, 175 (1926)).

Number One (2013).[5] The Proposed Legislation would directly further that goal. A study by Oxford Economics estimated that New York State stands to generate $123.7M annually from gaming revenue taxes alone, should mobile sports betting be legalized. Oxford Economics, *Economic Impact of Legalized Sports Betting* 37 (May 2017).[6] And the legislature has recognized the potential for sports wagering to generate revenue; when it enacted Article 13 in 2013 it specifically found that "[w]hile gambling already exists throughout the state, the state does not fully capitalize on the economic development potential of legalized gambling." Rac. Pari-Mut. Wag. & Breed. Law § 1300(3).

For all of these reasons, when "every reasonable mode of reconciliation of the [Proposed Legislation] with the Constitution has been resorted to," *In re Fay*, 291 N.Y. at 207, "reconciliation [will not] be[] found impossible." *Id.* That is, the more reasonable interpretation of the term "casino gambling" is that it is capacious enough to include sports wagering.

C. Mobile Sports Wagers Can Occur "At" Casinos.

The Amendment's exception for casino gambling is limited to "casino gambling *at* no more than seven facilities as authorized and prescribed by the legislature." Const., art. 1, § 9 (emphasis added). That a sports wager placed remotely by a mobile device could occur "at" a casino is not compelled by the language of the Amendment, nor is it foreclosed by it. Indeed, the preposition "at" permits multiple interpretations. *See, e.g.*, *At*, Webster's New Int'l Dictionary 172 (2d ed. 1949) ("Primarily, *at* expresses the relation of *presence or contact in space or time*, or of *direction toward*. It has much the sense of *to* without its implication of motion, and is less definite than *in, on, by,* etc."); *At*, Webster's Third New Int'l Dictionary 136 (1993) (similar).

[5] Available at: https://www.elections.ny.gov/NYSBOE/Elections/2013/Proposals/ProposalOneFinal.pdf.
[6] Available at: https://www.americangaming.org/sites/default/files/AGA-Oxford%20-%20Sports%20Betting%20Economic%20Impact%20Report1.pdf.

Given this indeterminacy, the text of the Amendment itself directs that the legislature's choice should prevail. As discussed above, the Amendment expressly provided that its scope would be that "authorized and prescribed by the legislature." That delegation, as discussed above, puts the strong presumption of constitutionality at its zenith. *Cf. M'Culloch*, 17 U.S. at 409-10 ("The government which has the right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of affecting the object is excepted, take upon themselves the burden of establishing that exception."). Indeed, courts honor such capacious constitutional delegations of authority to the legislature (*see Finger Lakes Racing Ass'n*, 30 N.Y.2d at 217), and the case for doing so is all the stronger where the constitutional term is ambiguous.

The available evidence of meaning further justifies the Proposed Legislation. The legislature that adopted the Amendment evinced its understanding that the Amendment could allow for mobile wagers. In its contemporaneous passage of Article 13, the legislature expressly limited sports wagering to "persons physically present" in licensed casinos. Rac. Pari-Mut. Wag. & Breed. Law § 1367(d). If the legislature understood the Amendment to also require physical presence, Article 13's use of the phrase "physically present" would be unnecessary, because the statute could have simply authorized sports wagering "at" casinos. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are . . . reluctant to treat statutory terms as surplusage in any setting."). Rather, these contemporaneous enactments are evidence that the legislature understood that sports wagering could occur "at" a licensed facility without the bettors being "physically present" in the facility. *Cf. Russelo v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of

the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").[7]

Further, and as detailed below, the understanding that mobile bets occur *at* casinos is consonant with gambling practices in existence and laws regulating those practices in place at the time the Amendment was ratified. *See Steingut*, 40 N.Y. 2d at 258. For this reason, too, the interpretation of the Amendment undergirding the Proposed Legislation "reasonabl[y] . . . reconcil[es]" the two enactments and, therefore, "the statute [should] be upheld." *In re Fay*, 291 N.Y. at 207.

Consider the following. When the Amendment was passed, New York's horse-racing laws already permitted bettors to place wagers remotely by telephone, Rac. Pari-Mut. Wag. & Breed. Law § 1012(17), and the Gaming Commission's regulations codified that "telephone bets shall be deemed to have been made in the county in which the telephone exchange receiving such telephone call bet is located," i.e., where the bet is "accepted." 9 N.Y.C.R.R. § 4400.1(i).

And several months before the legislature passed the Amendment (for the second time), the New Jersey legislature enacted a statute authorizing internet gambling, N.J. Sess. Law Serv. Ch. 27, A2578 (2013), notwithstanding that New Jersey's constitutional ban on gambling excepts "casinos *within the boundaries* . . . of Atlantic City." N.J. Const. art. IV, § 7, cl. 2(D) (emphasis added). The New Jersey authorizing statute requires "all hardware, software, and other equipment that is involved with Internet gaming [to] be located in casino facilities in

[7] In addition, the Proposed Legislation itself would, if passed, manifest a legislative understanding of the meaning of the Amendment by providing that "any wager through electronic communication is deemed made at the physical location of the server or other equipment used by an operator to accept mobile sports wagering." Rac. Pari-Mut. Wag. & Breed Law § 1367(3)(d)). This interpretation could reasonably be considered near enough in time to warrant heightened weight. *Cf.*, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884) ("The construction placed upon the constitution by the first act of 1790 and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight . . . .").

Atlantic City," and defines such gambling as "tak[ing] place entirely on the servers and computer equipment located in the casino based in Atlantic City." N.J. Stat. § 5:12-95.17(j)–(k). As is evident, the New Jersey legislature determined that internet gambling occurs "within" Atlantic City if the associated equipment is physically located in Atlantic City. The preposition "at" is no more determinative than the preposition "within" (indeed, it may be less). Both prepositions have no single meaning in their respective constitutional texts, and neither preposition requires that gamblers be physically present inside the casino.

Case law accords with these statutory indications. Most significantly, New York courts recognized—prior to the Amendment's passage—that remote wagers are considered placed *at* the location of their acceptance. *Amorosi v. South Colonie Ind. Sch. Dist.*, 9 N.Y.3d 367, 373 (2007) ("[T]he Legislature is presumed to be aware of the law in existence at the time of an enactment."). In *Saratoga Harness Racing, Inc. v. City of Saratoga Springs*, for example, a harness-race operator challenged the applicability of a tax based on *where* certain betting was conducted, which the Third Department held to be the place the bets are accepted: "The location of the bettor at the time he places his bet is immaterial in the same sense that no reasonable person would consider that the famous betting parlors of London (assuming they are permitted to take bets from non-Britishers) are conducting betting in any other country from which someone might place a bet by telephone or cable." 55 A.D.2d 295, 297-98 (3rd Dep't 1976), *aff'd* 44 N.Y.2d 980 (1978).

Treating a wager as being placed at the location it is accepted is consistent with basic principles of contract law. 4 Williston on Contracts § 6:62 ("[I]n contracts by telephone it has been held that the place of the contract is the place *at* which the acceptor speaks." (emphasis added)); Restatement (Second) of Contracts § 64 comment c ("[T]he contract is created *at* the

place where the acceptor speaks or otherwise completes his manifestation of assent." (emphasis added)); *see also Fremay, Inc. v. Modern Plastic Mach. Corp.*, 222 N.Y.S. 2d 694, 697 (1st Dep't 1961) ("[U]nder New York law (as well as under the law of virtually all, if not all, the Anglo-American jurisdictions) the time and place of making of the contract is established when the last act necessary for its formulation is done, and *at* the place where that final act is done." (emphasis added)).

That the Proposed Legislation would authorize sports wagers to be accepted by computer servers, as opposed to, for example, telephone operators, should not affect the constitutional analysis. In the first place, if a telephone bet takes place where the accepting telephone operator is located—and it clearly does under New York law—it is not reasonable to conclude that a bet accepted by computer servers takes place somewhere other than the place in which the servers are located. Second, in *Dalton v. Pataki*, the Court of Appeals considered whether Section 9's 1966 amendment, which allowed for state-operated lotteries, permitted the legislature to authorize video-lottery terminals. 5 N.Y.3d 243, 263 (2005). Challengers to the law argued that video-lottery terminals were more akin to slot machines than lotteries and were thus prohibited by the constitution. But because the video-lottery terminals included the same definitional components of a traditional lottery (i.e., tickets, multiple participation, and chance), the Court held that the use of new, updated technology was of no moment: "It is of no constitutional significance that the tickets are electronic instead of paper. The particular methods of conducting the lottery are subject to change with time. The language of the Constitution is not so rigid as to prevent this type of update and modernization." *Id.* at 265.

It is scarcely open to question, moreover, that the drafters of the 1966 amendment at issue in *Dalton* understood the phrase "lottery tickets" to mean physical tickets and would not have

contemplated that the amendment could authorize the sale of *electronic* tickets. The Court of Appeals nonetheless held that that difference was of "no constitutional significance." *Id.* The Proposed Legislation's constitutionality follows *a fortiori*. Here, unlike in *Dalton*, and as established above, the type of gambling that the Proposed Legislation would authorize was in existence and understood at the time the Amendment was ratified. *Steingut*, 40 N.Y. 2d at 258 ("[W]e look with advantage to circumstances and practices which existed at the time of the passage of the constitutional provision.").

Further, as discussed above, interpreting the Amendment to allow mobile sports betting is also in furtherance of its express purpose, generating revenue for the state. Indeed, a contrary reading of the Amendment would undermine this purpose by putting New York at a competitive disadvantage to its neighbor, New Jersey, whose authorization of mobile sports betting has drawn significant interest from out-of-state gamblers, including from New York. *See NJ is Scoring With Sports Betting–Thanks to New Yorkers*, N.Y. Post (Jan. 6, 2019)[8]; *Gamblers Crossing the Delaware (and Hudson) for Sports Bets*, NJ.com (Nov. 12, 2018) ("FanDuel says 9 percent of its sportsbook customers live in New York and 4 percent live in Pennsylvania. DraftKings has a similar breakdown, and says about 20 percent of its active customers visit New Jersey from other states to place bets.").[9]

IV. Conclusion

The Proposed Legislation's authorization of mobile sports wagering is consistent with the constitution's allowance for "casino gambling at" certain licensed casinos. Sports betting fits

[8] Available at: https://nypost.com/2019/01/06/nj-is-scoring-with-sports-betting-thanks-to-new-yorkers/.
[9] Available at: https://www.nj.com/news/index.ssf/2018/11/wagerers_crossing_the_delaware_and_hudson_for_spor.html.

well within the definition of “casino gambling,” and mobile wagers are accepted “at” the location of computer servers.