FRIEDMAN KAPLAN SEILER & ADELMAN LLP

MEMORANDUM

To:	FanDuel Group, Inc. and DraftKings Inc.	Date:	February __, 2019
From:	Robert S. Smith	File:	1942/001
Re:	Constitutionality of Senate Bill S17		

You have asked for my opinion as to the constitutionality under New York law of Senate Bill S17, currently pending in the New York State Legislature (Proposed Bill). My opinion is that the Proposed Bill is constitutional.

My opinion follows from two conclusions. First, the constitutional text, fairly read, does not prohibit mobile sports betting: such betting is "casino gambling" within the meaning of the New York State Constitution as amended and in force since January 1, 2014 (Constitution), and the constitutional provision that casino gambling may be permitted "at no more than seven facilities" is satisfied where the server that accepts the bet is physically located at one of those seven facilities. Secondly, the Proposed Bill is consistent with the purpose of the controlling constitutional provision, which is to maximize the economic benefit of gambling for New York's citizens and taxpayers while limiting the number of casinos in the State .

I. The Proposed Bill is Consistent with the Constitutional Text

As the Court of Appeals has held, "[l]egislative enactments are entitled to 'a strong presumption of constitutionality' [ ] 'While 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.'' *Dalton v Pataki*, 5 N.Y.3d 243, 255 (2005) (citations omitted).

Thus, if the text of the Constitution may fairly be read to be uphold a law the Legislature has enacted, that is the interpretation courts will adopt.

The Constitution says, in relevant part: "except as hereinafter provided, no . . . gambling, . . . **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." NY Const art. I, § 9 (emphasis supplied, as amended in 2013). The Proposed Bill would authorize mobile sports betting, defined as "wagering on sporting events or any portion thereof, or on the individual performance statistics of athletes participating in a sporting event, or combination of sporting events", through a "system or method of wagering" using "electronic communication through internet websites accessed via a mobile device or computer and mobile device applications." Specifically, the Proposed Bill says that "[a]n operator shall accept wagers on sports events only from persons physically present in the sports wagering lounge, **or through mobile sports wagering** offered pursuant to [technical and procedural requirements prescribed by statute]." S. 17, 203rd Leg. Sess. (N.Y. 2019) (emphasis added). The textual questions presented are (a) whether sports betting is "casino gambling" and (b) whether sports bets transmitted electronically to a server located in an authorized casino take place "at" that casino.

A. Mobile Sports Betting is "Casino Gambling" Under the Constitution

. The Constitution does not define "casino gambling," so we must look to the plain meaning of that term and the background of the constitutional provision in which it appears to understand it. *See Dalton v Pataki*, 5 N.Y.3d at 264-65 (2005) (looking to the text of the Constitution as well as its legislative history in determining whether video lottery terminals constituted "lotteries" under the Constitution); *Sweet v. City of Syracuse*, 129 N.Y. 316, 330

(1891) *on reh sub nom. Comstock v City of Syracuse*, 129 N.Y. 643 (1891) ("In construing a provision of the Constitution, its history and the conditions and circumstances attending its adoption must be kept in view").

Sports wagering has long been recognized as a form of gambling under New York penal law. *See* New York Penal Law § 225.00(2); *People v. Wright*, 165 N.Y.S. 386, 387 (Cty. Ct. Albany Cty. 1917) (holding that wagering on baseball is a form of gambling); *People v. Busco*, 46 N.Y.S. 2d 859, 863 (N.Y.C. Spec. Sess. Bronx Cty. 1942) (same re: boxing); *People v. Traymore*, 241 A.D.2d 226, 231 (1st Dep't 1998) ("sports-betting operation" fell within purview of statute); *accord People v. Conigliaro*, 290 A.D.2d 87, 88 (2d Dep't 2002). The authors of the 2013 constitutional amendment that authorized "casino gambling" at certain locations must be deemed to have understood the established legal meaning of the term. They also must be deemed to have known that sports gambling in casinos had long been common in Nevada,, and was permissible elsewhere until 1992, when Congress enacted the Professional and Amateur Sports Protection Act (PASPA), generally prohibiting wagering on sports except in Nevada.

Sports betting by people physically present in casinos is now legal in New York by virtue of a statute enacted on the same day as the 2013 constitutional amendment. *See* N.Y. Rac. Pari-Mut. Wag. & Breed. Law (PML) § 1367. PML § 1367 conditionally legalized "sports wagering" in New York State, provided that federal law was modified to permit states to legalize it – a condition fulfilled last year when, in *Murphy v. Nat'l Collegiate Athletic Ass'n*, the Supreme Court of the United States held PASPA's prohibition unconstitutional. 138 S. Ct. 1461, 1481 (S. Ct. 2018). Thus the same Legislature that passed the constitutional amendment

permitting limited "casino gambling" unquestionably understood that sports betting was included within that term.

In short, the plain text of the relevant constitutional provision and the circumstances of its adoption show that sports betting is "casino gambling" within the meaning of the Constitution.

B. A Mobile Wager Takes Place "At" the Physical Location of the Terminal Accepting the Wager

The Constitution, as amended in 2013, authorizes the Legislature to permit casino gambling (which, as I explained above, includes sports wagering) "at" one of up to seven facilities. I find the word "at", on its face, to be ambiguous in this context. Gambling is considered a contract under New York law (*See generally Intercontinental Hotels Corp. (Puerto Rico) v. Golden*), 15 N.Y.2d 9, 13 (1964). Under general contract law principles, a contract is entered into at the location of acceptance. *See, e.g.*, *Kay v. Kay*, 2010 WL 2679897, at *3 (Sup. Ct. Nassau Cty. June 17, 2010) ("the place of contracting is deemed to be the state from which the acceptance was sent."); *United States v. Bushwick Mills*, 165 F.2d 198, 202 (2d Cir. 1947) ("[T]he buyer telephoned an offer which the seller accepted ... in Brooklyn . . . the contract technically was made in Brooklyn.") Under this rule, a bet placed by a better outside a casino would be deemed made at the casino. On the other hand, it has been held under the New York Penal Law that a gambler placing a long distance bet to a server outside of the State is considered to be conducting gambling activities in the State . *See People ex rel. Vacco v World Interactive Gaming Corp.*, 185 Misc. 2d 852, 859-60, 714 N.Y.S.2d 844, 850 (Sup. Ct. 1999) ("under New York Penal Law, if the person engaged in gambling is located in New York, then New York is

the location where the gambling occurred" even though "gambling is legal where the bet was accepted")

In my opinion, the existence of two reasonable interpretations of "at", one of which would permit mobile sports betting, is a reason to uphold the constitutionality of the Proposed Bill. Basic principles of constitutional decision-making would require a court to choose the interpretation that renders a statute valid. *See, e.g., Dalton, supra*, 5 N.Y.3d at 255 (2005) In addition, **t**he circumstances of the enactment of the 2013 constitutional amendment – specifically, the contemporaneous enactment of PML § 1367 – give a more specific reason to infer that gambling "at" specified casinos was understood by the amendment's authors to include bets transmitted electronically to those casinos. What is important is the contrast in the language of the two provisions – the constitutional amendment and the statute – passed on the same day. While the constitutional amendment says only that casino gambling must take place "at" certain casinos, the statute requires that casinos accept sports wagers only "from persons physically present in the sports wagering lounge" located inside the casino. PML § 1367(3)(b), (d). In my opinion, this is a strong indication that the two expressions do not mean the same thing. If the Legislature had intended "at" a casino, in the Constitution, to mean "from persons physically present in" the casino, there would have been no need to add those extra words to PML § 1367.

The Constitution permits the Legislature to regulate where casino gambling, including sports betting, may take place, as long as the regulations do not violate other terms of the Constitution. The Legislature is afforded great deference in interpreting the Constitution. *See New York Pub. Interest Research Grp., Inc. v. Steingut*, 40 N.Y.2d 250, 258 (1976) ("Great deference is certainly due to a legislative exposition of a constitutional provision."). Courts "will

upset the balance struck by the Legislature and declare [a legislative act] unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that. . .every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Cohen v.Cuomo*, 19 N.Y.3d 196, 201-02 (2012) The 2013 Legislature chose to limit sports betting to "persons physically present in" casinos. The 2019 Legislature is free, in my opinion, to strike a different balance.

The Proposed Bill would change the "physically present" rule of PML § 1367 by deeming all mobile sports wagering to occur at the location of the server at which that bet is received and placed. It would not only amend PML § 1367 to allow sports wagers to be placed by "persons physically present in the sports wagering lounge, **or through mobile sports wagering**" but would also provide 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." S. 17, 203rd Leg. Sess. (N.Y. 2019) (emphasis added). This is, in my opinion, within the permissible scope of the Legislature's authority as provided by the Constitution. Nothing in the text of the Constitution *requires* authorizing mobile sports betting – but nothing prohibits it either. *See Adler v Deegan*, 251 N.Y. 467, 480 (1929), *amended*, 252 N.Y. 615 (1930) ("all legislative power remains in the state Legislature, except as the Constitutions, state and federal, have limited such power"); *see also Finger Lakes Racing Ass'n v. New York State Off-Track Pari-Mutuel Betting Comm'n*, 320 N.Y.S.2d 801, 804-05 (Sup. Ct. Albany Cty. 1971) *aff'd*, 30 N.Y.2d 207 (1972) (holding that "every presumption favors the constitutional validity of a legislative enactment" in the gambling context).

I conclude that the Proposed Bill is entirely consistent with the relevant constitutional text.

II. The Proposed Bill Would Further the Goals of the Constitution in Maximizing State Revenue from Gambling While Limiting the Number of Gambling Facilities

Legislative memorandums discussing what became the 2013 amendment to the Constitution explain that the purpose of authorizing certain casino gambling was to increase economic activity and State revenue: The Assembly's memorandum in support of the bill introducing the amendment noted that "[c]asino gaming has significant potential to be a major economic engine for New York State and . . . already exists throughout the State but the State is unable to fully capitalize on it." New York State Assembly, Memorandum in Support of Legislation, Bill No. A8068 (2013), https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A08068&term=2013&Summary=Y&Actions=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y (Assembly Memorandum). Mobile sports betting would obviously advance that end, by adding significantly to the State's revenue stream. *See* Oxford Economics Ltd., Economic Impact of Legalized Sports Betting 29, 37 (2017).

At the same time, the 2013 amendment provided that gambling may take place at no more than seven locations - a limitation intended, according to the Assembly Memorandum, to prevent "an excessive proliferation of casinos within New York State." Nothing in the Proposed Bill undermines that purpose. Authorizing mobile sports betting would not increase the number of casinos, and those who think such establishments objectionable will not be adversely affected. The Proposed Bill would simply allow those who want to place sports bets to do so

without traveling to casinos, by using their own phones or other electronic devices – an activity that has no impact on people who prefer not to gamble.

III. Conclusion

The Proposed Bill, as written, is, in my opinion, consistent with the Constitution. It merely expands existing authorization for sports betting without exceeding the scope of permissible regulation allowed by the Constitution.

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