Memorandum

To: The Madison Square Garden Company

From: Jenner & Block LLP

Re: Legality of New York Mobile Sports Wagering Legislation Under the New York State Constitution

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Executive Summary

This memorandum supports the conclusion that legislation authorizing state-licensed casinos in New York to facilitate mobile sports wagering would be constitutional. Such legislation would allow state-licensed casinos in New York State to accept bets placed by individuals not physically present at the casinos, but rather elsewhere in New York through an internet connection or mobile device. In particular, this memorandum evaluates whether authorizing casinos to accept mobile sports wagering is consistent with Article I, § 9 of the New York State Constitution (the "Constitution") and addresses the primary arguments that such legislation violates the Constitution or related legislation.

In summary, existing case law and the policy considerations at issue strongly support the conclusion that the New York Legislature would not exceed its constitutional authority by enacting legislation to permit licensed casinos to accept sports wagers placed remotely via mobile devices:[1]

- *First*, consistent with existing case law that defines gambling as occurring where a bet is accepted, a reviewing court is likely to find that mobile sports wagers that are accepted and processed in state-licensed casinos would not violate the Constitutional requirement of "no more than seven facilities" in New York State.[2] Moreover, the most relevant case law supports the conclusion that mobile sports wagering is just a modernization of the methods used for casino-based sports betting, rather than a new activity, and is likely to be found consistent with the Constitutional authorization of "casino gambling."[3]

- *Second*, arguments that mobile sports wagering legislation would vitiate the goals and policies that underlie Article I, §9 of the Constitution are not well supported. The Constitutional Amendment authorizing casino gambling but limiting such gambling to seven casinos was not aimed at curtailing *gambling* as an activity, but rather avoiding the excessive proliferation of *casinos* in New York State. Indeed, given the evidence that mobile sports wagering would produce revenue for New York State and for the Upstate communities that the Amendment

[1] This memorandum is not a guarantee of any particular outcome in litigation, but our assessment of the current legal landscape and the currently available information.
[2] N.Y. Const., art. 1, § 9.
[3] *Id*.

and its enacting legislation sought to revitalize, mobile sports wagering would likely further the goals of the Legislature and the citizens of the State in authorizing casinos in the Constitution.

I. Background

In the general election held in November of 2013, the New York electorate approved an amendment to Article I, § 9 of the Constitution (the "Amendment") to allow the Legislature to authorize up to seven casinos in the State, specifically for the purposes of "promoting job growth, increasing funding to schools and permitting local governments to lower property taxes[.]"[4]

In relevant part, Article I, § 9 provides:

> [N]o 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 prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, *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.[5]

As Article I, § 9 is neither self-defining or self-executing, courts have interpreted the section to afford the Legislature substantial authority to enact laws defining the scope of the activities that may be conducted by the licensed casinos, horse racing facilities, or the state in conducting a lottery.[6]

On July 30, 2013, in anticipation of the approval of the referendum that coming fall, the Legislature passed and Governor Cuomo signed into law the Upstate New York Gaming Economic Development Act (UNYGEDA), establishing four destination gaming resorts and outlining a plan

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[4] *See* State of New York, Board of Elections, Form of Submission of Proposal Number One, An Amendment, http://www.elections.ny.gov/NYSBOE/Elections/2013/Proposals/ProposalOneFinal.pdf.
[5] N.Y. Const., art. 1, § 9 (emphasis added).
[6] *See, e.g.*, People ex rel Sturgis v. Fallon, 46 N.E. 302, 302 (N.Y. 1897) (noting Article I, § 9 "was not intended to be self-executing" and that the provision "expressly delegates to the legislature [implementing] authority . . . and requires it to enact such laws as it shall deem appropriate to carry it into execution."); People v. Wilkerson, 73 Misc. 2d 895, 901 (Monroe Cnty. Ct. 1973) ("[S]ince the Constitution commits to the Legislature the duty of preventing gambling, the measures to be adopted in furtherance of that end also rest in the legislative discretion."); *see also* Assembly Memorandum in Support of UNYGEDA, Assembly No. A8 \0I, 2012-13 Legislative Session (revised June 21, 2013) ("Purpose. The pending concurrent resolution to amend the New York State Constitution to permit casino gambling is not self-executing. This legislation would provide a statutory framework for gaming should the concurrent resolution obtain second passage and be approved by the State electorate.")

to increase tourism and economic development in Upstate New York.[7] As part of this implementing legislation, the Legislature also amended Section 1367 of the Racing, Pari-Mutuel Wagering and Breeding Law (RPMWBL) to add that "[n]o gaming facility may conduct sports wagering until such time as there has been a change in federal law authorizing such or upon a ruling of a court of competent jurisdiction that such activity is lawful."[8] The law contemplated a separate licensing process for casinos to operate sports pools.[9]

In May of 2018, the Supreme Court struck down the federal ban on sports betting[10]—an outcome that the New York Legislature clearly contemplated, as evidenced in both the public debate and the legislative text itself, when passing the 2013 Amendment and related legislation.[11]

While several states, including New Jersey, have already passed legislation and begun to implement sports betting,[12] the New York State Gaming Commission is currently in the process of promulgating the required regulations required under Section 1367 to allow sports betting to take place at New York casinos.

Legislation has also been introduced that would expressly authorize mobile sports wagering, defining authorized "sports wagering" 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"[13] through a "system or method of wagering" that utilizes "electronic communication through internet websites accessed via a mobile device or computer and mobile device applications."[14] Such activity, under the bill, would be "authorized and prescribed by the [L]egislature" in the same manner as in-person sports wagering.[15] The bill would further amend Section 1367 to provide 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*

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[7] UNYGEDA (2013), https://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/GPB10-BILL.pdf.
[8] N.Y. Rac. Pari-Mut. Wag. & Breed. Law, § 1367(2) [hereinafter "RPMWBL"].
[9] *Id.* at § 1367(3).
[10] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018) (holding that provisions of the Professional and Amateur Sports Protection Act (PASPA) prohibiting state authorization and licensing of sports gambling schemes violate the Constitution's anticommandeering rule, thus making sports betting legal in the United States).
[11] *See* RPMWBL § 1367(2) (2013) (permitting "sports wagering" following a change in federal law).
[12] State of New Jersey, P.L. 2018, Chapter 33, No. 4111, 281th Legislature (June 11, 2018), https://nj.gov/governor/news/news/562018/approved/20180611b_sportsBetting.shtml.
[13] Legislative Bill Drafting Comm'n 14923-15-8 [hereinafter "Proposed Bill"] at 3:42–43, https://www.nysenate.gov/legislation/bills/2019/s17.
[14] *See id*. at 12:51–53 (describing S.B. 17 as "[relating] to regulation of sports betting and mobile sports wagering in New York."). Note the text of this bill will most certainly change before passage and does require some additional updating. For example, it includes the phrase "until such time as there has been a change in federal law authorizing [sports gambling] . . ." *Id.* However, the Supreme Court already overturned PASPA in May of 2018, making sports betting a state's rights issue. *Murphy*, 138 S. Ct. at 1461.
[15] Proposed Bill at 6:42–143.

pursuant to section thirteen hundred sixty-seven-a of this title."[16] Existing provisions of Section 1367(a) set forth technical specifications and operational rules that would apply to the casinos' mobile wagering system.[17]

II. The Constitutionality of a Statute Authorizing State-Licensed Casinos to Accept Mobile Sports Wagers is Supported by Existing Case Law.

Although it is clear the Legislature cannot pass a law that violates a constitutional proscription, it is also well established and recently affirmed by the Court of Appeals that "[l]egislative enactments enjoy a strong presumption of constitutionality" and that "parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity '**beyond a reasonable doubt**.'"[18] The Court of Appeals has characterized the challenging party's burden as "substantial" and reiterated that the law must be shown to have a "wholesale constitutional impairment . . . in any degree and in every conceivable application."[19] The standard is not a lax one, requiring the challenger to establish that "that no set of circumstances exists under which the Act would be valid."[20] Moreover, courts must avoid, if possible, "interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional."[21]

If the existing statute authorizing sports betting at the state-licensed casinos is found constitutional, any challenge to mobile sports wagering would then focus on whether the proposed statute allowing mobile sports wagering at those casinos would also survive constitutional scrutiny.[22]

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[16] *Id.* at 4:48–49 (emphasis added).
[17] *Id.* at 20:5–25:16.
[18] Overstock.com, Inc. v. New York State Dept. of Taxation & Fin., 20 N.Y.3d 586, 624 (2013) (citing LaValle v. Hayden, 98 N.Y.2d 155, 161 (2002) (emphasis added)).
[19] Dalton v. Pataki, 5 N.Y.3d 243, 255 (2005).
[20] *Id.*
[21] *Overstock*, 20 N.Y.3d at 624.
[22] The constitutionality of in-person sports betting at the state-licensed casinos has not been litigated but is solidly supported by the Legislature's stated intention to authorize such activity when it passed the Amendment and in the enabling legislation. That contemporaneous legislation stated expressly that, once allowed by federal law, "a sports pool shall be operated in a sports wagering lounge located at a casino." RPMWBL §1367(3)(b). New York courts have consistently held that in interpreting a constitutional provision, a contemporaneous enactment by the Legislature of a statute implementing that constitutional provision is entitled to great weight. *See, e.g.*, New York Public Interest Research Group v. Steingut, 40 N.Y.2d 250, 258-259 (1976); People ex rel. Joyce v. Brundage, 78 N.Y. 403, 406 (1879). The Legislature's expectation that sports betting would be conducted in the casinos is not surprising. Sports betting has been a part of casino gambling in Nevada since at least 1974. *See The Vegas Era: Major Sports Betting Legislation* (Aug. 3, 2018), https://www.sportsbettingdime.com/guides/legal/sports-betting-history-part-ii/. Mobile sports wagering has been an offering at Las Vegas casinos since at least 2010. Additionally, congressional analyses of sports betting have also routinely assumed that sports betting is a "form[] of gambling" offered by casinos. *See, e.g.*, Final Report, Commission on the Review of the National Policy Toward Gambling (Oct. 15, 1976) (this report was ordered by Congress and addressed to the President and other top-ranking U.S. government officials), https://ia802205.us.archive.org/4/items/gamblinginameric00unit/gamblinginameric00unit.pdf. Sports betting has also traditionally fallen within the definition of gambling under federal and New York State criminal law. Since at least 1955, federal criminal law has defined "illegal gambling" to include "pool-

Based upon the current state of the factual record, a reviewing court should conclude that opponents to the statute will not establish beyond a reasonable doubt that the New York Legislature exceeded its constitutional authority by enacting legislation to permit licensed casinos to accept sports wagers placed remotely via mobile devices. Such a court is likely to view mobile sports wagering as a mere technological update to the method of placing sports betting wagers, rather than an impermissible new activity.

The New York case law most directly applicable supports the conclusion that the legislation in question would survive constitutional review. In *Dalton v. Pataki*,[23] the New York Court of Appeals denied a challenge to the Legislature's authorization of digital "video lottery terminals" ("VLTs"), rejecting any suggestion that modern features of the updated lottery system rendered the VLTs materially different from the kind of gaming permitted under the Constitution.[24] In particular, the Court stated that:

> "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.* Thus, we conclude that the video lottery is a valid lottery under article I, § 9(1), and that, rather than slot machines, VLTs are simply mechanical devices for the implementation of the video lottery."[25]

Similarly, in *Matter of Mellman v. Metropolitan Jockey Club, Inc.*,[26] the Court of Appeals evaluated a challenge to an act by the Legislature that allowed the vending of pari-mutual betting tickets mechanically, electronically, and by machine.[27] The Court found that, "though the Constitution makes no mention of mechanical machines," an act by the Legislature making certain provisions for both mechanical and manual machines in betting was not invalid.[28]

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selling, bookmaking . . . or selling chances therein." 18 U.S.C.A. § 1955 (West). The Unlawful Internet Gambling Enforcement Act of 2006 also defines sports betting as gambling, outlining "definitions of gambling terms to be used throughout the act" as including "bets or wagers to include risking something of value on the outcome of a contest[or] sports event." U.S.C. §§ 5361–5367. Under the New York Penal Code, "[a] person is guilty of promoting gambling in the first degree when he . . . [e]ngag[es] in bookmaking," and courts have routinely found sports betting operations violate this anti-gambling provision. N.Y. Penal Law § 225.10 (McKinney); *see also* United States v. Offner, 88 F. App'x 438, 440 (2d Cir. 2004) (finding a sports-betting operation is a bookmaking operation for the purposes of federal and New York law). Sports betting also falls squarely within the definition of "gambling" in the provision of the New York State Constitution at issue, which prohibits "the sale of lottery tickets, pool-selling, *book-making*, or any other kind of gambling." N.Y. Const. art. I, § 9 (emphasis added). Accordingly, the plain reading of this provision supports the inclusion of sports betting within the constitutional term "gambling."

[23] 835 N.E.2d 1180, 1193 (N.Y. 2005).

[24] *Id.*

[25] *Id*. (internal citations omitted) (emphasis added).

[26] 195 Misc. 121, 123–25 (Sup. Ct. N.Y. Cty. 1949) (rejecting the argument that the Constitution requires wagering to be accomplished through specific technology).

[27] *Id*. at 122.

[28] *Id.* at 124.

A similar analysis should apply here. Mobile sports wagering is little more than a system or method utilizing modern "mechanical devices for the implementation of" permissible sports wagering, which is duly authorized and prescribed by the Legislature.[29] The wagers would be placed through a mobile device or internet connection but would be accepted only at the sports lounges of the state-licensed casinos themselves. As in *Dalton*, "[i]t is of no constitutional significance" that sports wagers accepted through a mobile wagering system "are electronic instead of paper," and "[t]he language of the Constitution is not so rigid as to prevent this type of update and modernization."[30] Both *Dalton* and *Mellman* indicate that the Legislature has substantial latitude in deciding *how* bets shall be placed, as long as the type of gambling or betting activity—or in this case the facility that runs it—is authorized by the Constitution.

Dalton and *Mellman* are not complete analogs, as the VLTs and technology in question in those cases were still located on race track property and not off-site, as the mobile devices of those participating in mobile sports wagering would be. But several factors likely outweigh this minor distinction:

First, as noted already, the proposed legislation authorizing mobile sports wagering would require that the bets be accepted inside the casinos authorized by the Constitution, and "[t]he intermediate routing of electronic data in connection with mobile sports wagering shall not determine the location or locations in which a wager is initiated, received or otherwise made[.]"[31] Thus, as in *Mellman* and *Dalton*, the bets would be accepted at the casinos themselves.

Second, New York law has regularly deemed wagers to be made where the wager is *accepted* and that "the location of the bettor at the time he places his bet is immaterial."[32] This core principle was recognized by New York courts long before the amendment of Article I, § 9 and the passage of Section 1367.[33] Moreover, "[t]he Legislature is presumed to be aware of the law in existence at the time of an enactment and to have abrogated the common law only to the extent that the clear import of the language of the statute requires."[34] Accordingly, both Article I, § 9 and Section 1367 incorporate, and are consistent with, the principle that bets are deemed made where the bet is accepted and becomes binding on the bettor, meaning at the state-licensed casinos.

Third, New York law regarding pari-mutuel wagers also reflects this rule. New York law has long made "clear that a facility may accept wagers via the telephone in the context of horse racing."[35] Current law also expressly permits pari-mutuel wagers to be received through "telephone wagering

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[29] *Id.*
[30] *Dalton*, 835 N.E.2d at 1193.
[31] Proposed Bill at 2:18–20.
[32] Saratoga Harness Racing, Inc. v. City of Saratoga Springs, 55 A.D.2d 295, 297–98 (3d Dep't), aff'd, 380 N.E.2d 163 (N.Y. 1978).
[33] *See*, *e.g.*, People ex rel. Lawrence v. Fallon, 4 A.D. 82, 87 (1st Dep't 1896) (noting that the constitutional provision concerning gambling "must of course be construed" according to which activities had "been understood to be gambling . . . at th[e] time" it was adopted).
[34] B & F Bldg. Corp. v. Liebig, 564 N.E.2d 650, 652 (N.Y. 1990).
[35] Matter of New York Racing Ass'n, Inc. v. Hoblock, 270 A.D.2d 31, 32 (1st Dep't 2000).

accounts," which "include all those wagers which utilize any wired or wireless communications device, including but not limited to . . . wireless telephones and the internet to transmit the placement of wagers on races and special events offered . . . in this state."[36] In 2013, the New York State Gaming Commission promulgated regulations clarifying that, with respect to such wagers, "[a]ll telephone bets shall be deemed to have been made in the county in which the telephone exchange receiving such telephone call bet is located."[37] In other words, the location at which the electronic wager is deemed to occur is the location at which the wager is *accepted*. Courts would likely apply the same principle to mobile sports wagering.

Finally, although the case law addressing the physical location of electronic wagers is sparse, decisions by New York courts addressing related matters provide additional support. For example, in *Saratoga Harness Racing, Inc. v. City of Saratoga Springs*,[38] the New York Appellate Division observed that, for taxation purposes, "[t]he *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 . . . are conducting betting in any other country from which someone might place a bet by telephone or cable."[39] Moreover, some courts have described "the usual definition of the 'conduct' of a bet" as encompassing a wider series of actions than merely stating a wager, and to include the "regular acceptance of money to be wagered; the transmission of such money to the place of betting; [and] the placing of the bet and the collection of the proceeds"[40] as part of that "conduct" — all of which would occur here, if at all, on the premises of a licensed casino.[41] Enforcement of gambling prohibitions also generally has focused not on bettors, but on the regulation of establishments where bets are accepted.[42] Such precedents are indirectly analogous and lend support to the commonsense reading of the proposed legislation.

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[36] RPMWBL § 1012(17) (2015).
[37] N.Y. Comp. Codes R. & Regs. ("NYCRR"), tit. 9, § 4400.1(i).
[38] 55 A.D.2d 295, 297–98 (N.Y. 1978).
[39] *Id.* (emphasis added).
[40] Application of Stewart, 22 N.Y.S.2d 164, 167 (Sup. Ct.), aff'd sub nom. Stewart v. Dep't of State, 260 A.D. 979 (3d Dep't 1940) (holding that a corporation could not be organized to accept bets outside a pari-mutuel racing track for subsequent forwarding to the track because the Legislature did not intend to authorize "transactions of betting outside race tracks under the guise of an agency to perform acts thereby made lawful within a race track.").
[41] *Cf.* People v. Giordano, 663 N.E.2d 588, 592–93 (N.Y. 1995) (observing that, "[i]nasmuch as neither defendants nor their associates accepted or received bets in Nassau County, the People necessarily relied on evidence" regarding "promoting gambling activity" rather than "engaging in a bookmaking business" to establish jurisdiction in Nassau County).
[42] *See, e.g.*, Watts v. Malatesta, 186 N.E. 210, 210–11 (N.Y. 1933) (quoting People v. Stedeker, 67 N.E. 132, 134 (1903)) (noting that "casual betting or gaming by individuals, as distinguished from betting or gambling as a business or profession, is not a crime," and stating that "[t]he distinction . . . has long obtained in this state where ordinary betting has never been made a crime while the keeping of a gambling house . . . ha[s] been subjected to severe punishment"); *see also* NYCRR, tit. 9, Executive, § 5117.1. (placing the onus on the establishment to prevent underage use of video lottery games unless the minor provides a false identification or other deceptive activity, which even then is only an affirmative defense).

Those parties opposed to mobile sports wagering have advanced arguments that such activity violates the constitutional prohibition on more than seven casinos. It is argued that the relevant location for a transaction completed via the internet or a mobile device is where the bettor herself is located, not where the bet is accepted. Since mobile sports wagering bets are not placed in person at the casino, it is suggested that mobile sports wagering would create a proliferation of gambling locations, thus violating the constitutional limit of seven casinos.[43]

But the case law on which opponents of mobile sports wagering rely for this argument is weak. These cases do not address mobile sports wagering, and usually involve gambling through foreign casinos or those trying to avoid the court's jurisdiction or evade taxation by New York State.[44] As a result, the question is typically whether a party's gambling conduct bears a sufficient relation to the State of New York so as to be subject to the state's laws or to the court's jurisdiction at all—a jurisdictional question that does not arise in the case of mobile sports wagering.

In one of the primary cases cited by opponents, *People v. World Interactive Gaming Corp*.,[45] the court addressed a challenge to its personal jurisdiction over the defendant, holding that if a person "engaged in gambling is located in New York, then New York is the location where the gambling occurred."[46] In the personal jurisdiction context, courts worry that a failure to find jurisdiction would "severely undermine the State's deep-rooted policy against unauthorized gambling . . . and immunize from liability anyone who engages in any activity over the Internet."[47] Not surprisingly, the court placed a primacy on the location of the bettor and not the foreign institution that received his online bet because the court was primarily concerned with "a computer server [functioning] as a shield against liability."[48] By contrast, there is no question that the laws of New York State would apply to a mobile sports wagering transaction accepted and processed by one of the state-authorized casinos. Accordingly, the concern motivating the court's analysis in *World Interactive Gaming Corp.* is inapposite.

In addition, a close reading of *World Interactive Gaming Corp.* makes clear that the court answered an entirely different question from that posed by mobile sports wagering. The court found only that the presence of the individual in New York State at the time a bet is placed is enough to conclude that the individual "engaged in gambling" within the state.[49] In fact, the court explicitly noted that "[e]ven though gambling is legal *where the bet was accepted*, the activity was

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[43] *See* N.Y. Const., art. 1, § 9.
[44] *See, e.g.*, People ex rel. Vacco v. World Interactive Gaming Corp., 714 N.Y.S.2d 844, 850 (Sup. Ct. 1999) (stating that "[t]he act of entering the bet and transmitting the information from New York via the Internet is adequate to constitute gambling activity within the New York state," but finding that "[e]ven though gambling is legal where the bet was accepted, the activity was transmitted from New York"); United States v. Gotti, 459 F.3d 296, 340 (2d Cir. 2006) (stating that "[w]hen bets are placed from New York, the gambling activity is illegal under New York law, regardless of whether the activity is legal in the location to which the bets were transmitted[.]").
[45] 185 Misc.2d 852, 859 (New York Sup. Ct, N.Y. Co., 1999).
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id*

transmitted from New York."[50] For this reason as well, this case does not meaningfully undermine the constitutionality of mobile sports wagering.[51]

Opponents also may rely on a line of tax cases, including *Overstock.com, Inc. v. New York State Department of Tax and Finance.*[52] In *Overstock.com* the New York Court of Appeals upheld the imposition of a New York State sales tax on an out-of-state retailer with respect to purchases made on-line by New York customers. The Court held that the retailer had a "presence" in New York by virtue of the fact that the purchaser was located in New York.[53] In the tax context, the court was tasked with analyzing the dormant commerce clause, and determined that active in-state solicitation which produces revenue by a foreign entity can meet the threshold of presence for tax purposes.[54] Although this analysis involves activity over the internet, however, that is where the similarities between the two cases end.

As in the personal jurisdiction context, in the case of mobile sports wagering there is no question that the gambling activity would be subject to New York tax law — it clearly would. Additionally, given that interstate sports gambling remains a violation of federal law,[55] concepts of anti-commandeering and interstate commerce are inapposite to the mobile sports wagering analysis.

III. *White v. Cuomo* Does Not Suggest That Mobile Sports Wagering is Unconstitutional.

It has been suggested that the 2018 case, *White v. Cuomo*, [56] supports the conclusion that mobile sports wagering would violate the Constitution. In that case, the Supreme Court of New York in Albany County struck down Chapter 237 of the Laws of 2016, which had authorized interactive fantasy sports ("IFS") contests that are registered pursuant to the law and had prohibited unregistered IFS contests.[57]

The IFS fantasy drafts addressed by the statute considered in *White* occurred wholly separate from any authorized casinos, and as such were subject to the broad constitutional prohibition on "gambling." To get around this prohibition, the Legislature attempted to define IFS contests themselves as outside the scope of gambling, terming IFS "a game of skill wherein one or more contestants compete against each other by using their knowledge and understanding of athletic events and athletes to select and manage rosters of simulated players whose performance directly corresponds with the actual performance of human competitors on sports teams and in sports

[50] *Id.* (emphasis added).
[51] Similarly, *United States v. Gotti*, can be distinguished on factual grounds, as it focused on personal jurisdiction over a crime family's gambling business whose clients placed bets in New York that were accepted at a legal institution in Costa Rica. 459 F.3d 296, 340 (2d Cir. 2006); *see also* United States v. Elie, No. S3 10 CRIM. 0336 LAK, 2012 WL 383403, at *2 (S.D.N.Y. Feb. 7, 2012) (finding poker companies headquartered overseas were subject to New York law, but again focusing on personal jurisdiction).
[52] 20 N.Y.3d 586 (2013).
[53] *Id.* at 595–96.
[54] *Id.*
[55] *See* The Wire Act of 1961, 18 U.S.C. § 1804(a).
[56] 87 N.Y.S.3d 805, 810 (N.Y. Sup. Ct. 2018).
[57] *Id.* (referencing RPMWBL §§ 1411, 1412).

events."[58] The statute expressly stated in the legislative findings that IFS contests would not constitute gambling under New York law or the Constitution.[59] The statute also amended the New York Penal Laws to define gambling to exclude "any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein."[60]

Rather than accepting the Legislature's definitions of gambling, the court in *White* framed the legal question as whether interactive fantasy sports actually constituted "gambling" under the plain meaning of the Constitution and if by simply defining IFS as containing a "material degree of skill" the Legislature could except it from the broad prohibition.[61] While noting that the plaintiff "must establish that no set of circumstances exists under which the Act would be valid,"[62] the court nevertheless found that the Legislature could not redefine "gambling" to ensure certain conduct fell outside the prohibition, saying "to countenance such redefining of the term would effectively eviscerate the constitutional prohibition."[63]

To be sure, *White* emphasized the unremarkable proposition that the Legislature does not have unbridled discretion when crafting gambling legislation.[64] However, the legislation overturned in *White* is not analogous to the legislation proposed to legalize mobile sports wagering.

White involved an attempt to redefine the very activity that has for decades been prohibited in the State and to redefine a term whose prohibition is sweeping and clear. By contrast, the proposed legislation to authorize mobile sports wagering would not redefine the language of the Constitution to authorize an entirely new activity. Rather, it would simply authorize a new method or technology to be used in an activity that was expressly envisioned by the Legislature when the Amendment was passed—*i.e.*, sports betting at the state-licensed casinos—and authorized by an existing statute. Accordingly, *White* is persuasively distinguishable.

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[58] *Id.* (referencing RPMWBL § 1401(8)).
[59] Chapter 237 stipulated the following legislative findings: "[T]he legislature declares that interactive fantasy sports do not constitute gambling in New York state as defined in article two hundred twenty-five of the penal law. . . [i]nteractive fantasy sports contests registered and conducted pursuant to the provisions of this chapter are hereby authorized." *Id.* at 809 (referencing RPMWBL § 1400).
[60] *See* Penal Law § 225.00(1).
[61] *White,* 87 N.Y.S.3d at 811.
[62] *Id.* at 814 (citing Moran Towing Corp. v. Urbach, 99 N.Y.2d 443, 448 (2003)) (internal citations and quotations omitted).
[63] *Id.* at 821.
[64] "[T]he mandate does not give the Legislature unlimited authority to define what is 'not' gambling for purposes of such provision. Such interpretation would render the constitutional prohibitions on "authoriz[ing] or allow[ing] . . . pool-selling, bookmaking or any other kind of gambling" meaningless, as the entire field would then be effectively governed by statute, rather than the constitutional provision." *Id.* at 816.

IV. Mobile Sports Wagering Is Consistent with the Goals of the Constitutional Amendment and Enacting Legislation.

In addition to the textual constitutional argument discussed below, opponents of mobile sports wagering argue that allowing mobile sports wagering would subvert the *purpose* of Article I, § 9 of the Constitution. However, this argument misreads the impact of such proposed legislation.

Opponents focus on the Sponsor's Memorandum that accompanied Senate Bill 5898 and introduced the concurrent resolution that ultimately became the 2013 Amendment. However, the Memorandum by its own terms focuses on balancing the potential for economic opportunity with placing an appropriate limit on the number of physical casinos, stating : "Limiting casino gambling to no more than seven facilities guarantees there will not be an excessive proliferation of *casinos* within New York State."[65]

It is argued that mobile sports wagering would vitiate the purported purpose of Article I, § 9 to limit casino gambling to seven sites by allowing a bettor anywhere in the State to place a wager via the Internet. But this argument proves too much. It suggests that every location where someone is placing a bet on a mobile phone would become a "casino" under Article I, § 9. Instead of abiding by the well-established requirement to avoid "interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional,"[66] this construction reads an absurdity into the statute—that every bettor turns his or her location into a casino by placing a bet.

Additionally, this argument misunderstands the concern that motivated the limitation of casinos to a specified number in Article I, § 9. The Amendment did not seek to curtail *gambling* as an activity, but rather the excessive proliferation of *casinos* in New York State, a concern that was expressed frequently in the public debate that preceded the Amendment.[67] Any conflation of the two is

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[65] *See* Sponsor's Memorandum, S5898 (2013) (emphasis added), https://www.nysenate.gov/legislation/bills/2013/S5898.

[66] Overstock.com, Inc. v. New York State Dep't of Taxation & Fin., 20 N.Y.3d 586, 593 (2013) (citing LaValle v. Hayden, 98 N.Y.2d 155, 161 (2002))*; see also* Dalton v. Pataki, 5 N.Y.3d 243, 255 (2005) ("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. In other words, the challenger must establish that no set of circumstances exists under which the Act would be valid.").

[67] *See, e.g.*, The Editorial Board, *No to More Casinos in New York State*, NY TIMES (Oct. 24, 2013) (laying out their argument against the constitutional amendment by focusing on the effects of the physical casinos, not the proliferation of gambling itself, saying "casinos often bring higher crime rates and deterioration of the communities nearby. . . . you should not accept the way this amendment is advertised on the ballot as a jobs and growth initiative for upstate New York. It is liable to fail to deliver on that promise. . . Other communities have reported a loss in local business as gamblers are swept into the casino and stay there to spend their money. And the National Association of Realtors reported in July that when a casino is built in Massachusetts, the effect on homse prices nearby is expected to be 'generally negative.' . . . Putting a small casino at an isolated place like Tioga Downs, which is likely to apply for a casino license if the measure passes, is unlikely to cause much harm. But the same cannot be said of proposals to build casinos near Albany, in the Catskills and ultimately in New York City."), https://www.nytimes.com/2013/10/25/opinion/no-to-more-casinos-in-new-york-state.html; Jesse

unsupported by the legislative history. There is no discussion in the legislative history of either the Senate or Assembly bills of limiting the amount of gambling in the state.[68] In fact, the Senate Sponsor's Memorandum focuses on increasing gambling in New York, expressing concern that without the Amendment, the State will continue to miss out on a "major economic engine" and that "New York is also surrounded by gambling . . . [but the] State is unable to fully capitalize on it."[69] Moreover, the Sponsor's Memorandum accompanying Senate Bill 5898 stated that "[l]imiting casino gambling to no more than seven facilities guarantees there will not be an excessive proliferation *of casinos* within New York State."[70]

The Legislature was not worried about a proliferation of *gambling*; indeed, one of the goals of building the casinos was to increase gambling and generate revenue for the targeted communities where the casinos were placed.[71] In order to target the revenue toward communities that needed it most while avoiding the proliferation of potentially negative impacts of placing a casino in every community across the State, the amendment and related legislation sought to curb the number of *physical casinos*, to seven at most, in New York State.[72] It is undisputed that mobile sports wagering would likely increase gambling in general but not create any of the potentially negative impacts of new casinos beyond the seven already authorized. The bill provides for an 8.5% tax on gross revenue and creates a commission that will license casinos to operate a sports pool, and it is contemplated that each casino would receive an agreed upon percetage of the revenue.[73]

Furthermore, mobile sports wagering is squarely consistent with the numerous stated goals of Article I, § 9. In 2013, the Legislature passed UNYGEDA which included the Amendment not only to "boost economic development, [and] create thousands of well-paying jobs" Upstate, but also to "fully realize the potential of legalized gambling" to "provide added revenue to the state"

McKinley, *Upstate, Opposition to a Casino is a Surprise*, NY TIMES (Jan 12, 2014) (explaining the anti-casino movement in Saratoga organizing around fears "that a bigger casino would drive up crime rates, drive down property values and generally ruin the city's small-town, big-money vibe . . . Mayor Yepsen echoed the sentiment that Saratoga should not become Las Vegas."), https://www.nytimes.com/2014/01/13/nyregion/upstate-opposition-to-a-casino-is-a-surprise.html; Catskill Mountainkeeper, *How Can We Mitigate the Negative Impact of Legalized Gambling in the Catskills* (Nov. 7, 2013) (explaining their opposition as related to traffic in the region, saying "the threat of multiple casinos along Route 17 near Monticello could not only bring a dramatic spike in traffic and pollution problems to the region, but could also forever change the unique rural character of the Western Catskills and bring serious infrastructure and social problems.").

[68] *See id*.; *see also* the Assembly version of the Bill, A8068 (2013), https://www.nysenate.gov/legislation/bills/2013/a8068/amendment/original.

[69] *See* Sponsor's Memorandum, S5898 (2013).

[70] *Id.* (emphasis added).

[71] *See* Section 1320 of RPMWBL listing the criteria that the New York State Gaming Commission and the Resort Gaming Facility Location Board must apply in deciding where the casinos should be located. These details show a high degree of coordination and care in selecting the communities where the casinos would be built in order to stimulate the local economies.

[72] *See* N.Y. Const., art. 1, § 9.

[73] Proposed Bill at 7:7–7:8.

and to ensure that "revenue realized from the casinos shall be utilized to increase support for education . . . and to provide real property tax relief to the localities."[74]

Mobile sports wagering would realize substantial revenues for New York State. Observers have estimated that mobile sports wagering would create 3,088 more jobs and $90 million more in tax revenue for the State each year than in-person sports betting alone.[75]

Opponents of mobile sports wagering suggest that mobile sports wagering would undermine the Upstate economic development envisioned by the Legislature, but that goal too would likely be served by expanding the activities that must take place inside the seven Upstate casinos to accept and process mobile sports wagering bets. Mobile sports wagering would likely result in a larger pool of customers for the Upstate casinos overall as it would allow them to reach and generate revenue from customers who, for a variety of reasons, would not otherwise travel to the physical casino.[76] Opening an avenue for interaction with this otherwise untapped customer base could be a strong source of revenue for the physical casinos.

In sum, the available evidence suggests that mobile sports wagering would serve the stated goals of the Amendment rather than undermining them.

V. Conclusion

In summary, relevant case law and policy considerations strongly support the conclusion that the New York Legislature would not exceed its constitutional authority by enacting legislation to permit licensed casinos to accept sports wagers placed remotely via mobile devices, *i.e.*, to facilitate mobile sports wagering.

[74] RPMWBL at §§ 1300(3), (8).
[75] Oxford Economics, *The Economics of Legalized Sports Betting* (May 2017), https://www.americangaming.org/wp-content/uploads/2018/12/AGA-Oxford-Sports-Betting-Economic-Impact-Report1-1.pdf.
[76] Additionally, even if mobile sports wagering is challenged in court, the State would likely continue to earn revenue from the activity pending the outcome of any litigation unless and until a preliminary injunction is issued over the strong objections of the stakeholders supporting mobile sports wagering.