



GIBSON DUNN

Mobile Sports Wagering

# Benefits of Mobile Sports Wagering

1. Reduce Budget Deficit
2. More Funding for Education
3. Help Struggling Upstate Casinos
4. Capture Funds Going to Neighboring States
5. Bring Transparency to Existing and Ongoing Activity

# Mobile Sports Wagering Constitutionality?

ANSWER: YES

# New York State Constitution

## Article I, Section 9

- Effective: January 1, 2014
- “. . .except 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, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, 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.”

## Key Provisions

- “casino gambling”
- “at no more than seven facilities”
- “as authorized and prescribed by the legislature”

## Constitutionality

- First, mobile sports wagering fits comfortably within the contours of “casino gambling,” which the Constitution authorizes the Legislature to legalize and regulate.
- Second, online sports wagering can occur “at” a casino “facility” because online sports wagers are made at the physical location of the server on which bets are received and accepted.

Question:

Is **Sports Wagering** A Form of **Casino Gambling**?

Answer:

YES.

# Sports Wagering is A Form of Casino Gambling

- Plain Reading
- 2019 Gaming Commission Sports Wagering Regs – Sports betting can occur at casinos
- 2013 Upstate New York Gaming Economic Development Act – legalized sports betting at casinos prospectively if Federal statute prohibiting it was struck and if constitutional amendment was adopted (both happened)
- 2013 Act enacted same day as resolution in favor of the constitutional amendment legalizing casino gaming
- Consistent with NYS and Federal case and statutory law
- Nevada Casino's have engaged in sports wagering since 1949

## New York Law

- New York Penal Law § 225.00(2) defines “gambling” to include “stak[ing] . . . something of value upon . . . a future contingent event not under [the bettor’s] control or influence . . . .”
- New York courts have regularly found that sports gambling falls within this definition, whether it be in the form of bets on baseball, *see People v. Wright*, 165 N.Y.S. 386, 387 (Cty. Ct. Albany Cty. 1917); boxing, *see People v. Busco*, 46 N.Y.S. 2d 859, 863 (N.Y.C. Spec. Sess. Bronx Cty. 1942); or any other taken up by a “sports betting operation,” *People v. Traymore*, 241 A.D.2d 226, 231 (1st Dep’t 1998); *accord People v. Conigliaro*, 290 A.D.2d 87, 88 (2d Dep’t 2002).

Question:

Does **Mobile Sports Wagering** Occur **At Casinos**?

Answer:

YES.

# Mobile Sports Wagering Occurs At Casinos

- Constitutional Amendment does not have a “physical presence” requirement. [Cf. 2013 Upstate New York Gaming Economic Development Act states “physical presence.” Statute narrower than the constitutional amendment.] This shows that the Legislature recognized that the Constitutional Amendment did not limit “casino gambling” to in person transactions.
- Constitution does not state that “casino gambling” can be authorized “at no more than seven facilities” only if “all acts related to gambling also occur at those facilities.”
- Constitutional Amendment expressly authorizes the Legislature to implement “casino gambling.” Legislature responsible for defining terms and implementing. Meaning Legislature is responsible for interpreting.
- The Court of Appeals in *Dalton v. Pataki* reiterated that “[t]he language of the Constitution is not so rigid as to prevent [the] update and modernization.. . “ 5 N.Y. 3d 243, 265 (2005)

# Mobile Sports Wagering Occurs At Casinos

- Legislature’s definition that a mobile sports wager occurs where offer to enter the wager is accepted, i.e., “at” the server located in an “authorized casino” is not only rational, but consistent with New York law and the constitutional amendment.
- Legislature’s definition entirely consistent with New York contract law. For 200 years, New York contract law has provided that a contract forms where it is accepted, because that is where the meeting the minds between the parties occurs.
- The 2013 law does not represent the extent of the Legislature’s authority: that the Legislature authorized sports wagering on premises only does not say anything about its ability to authorize mobile sports wagering, too.
  - 2013 law is narrower than constitution on its face—only authorized *four of seven* casinos
  - Legislature is not bound to any prior versions of statute

# New Jersey

- New Jersey has similar constitutional provision to New York's and the New Jersey legislature adopted a statute defining the bets as occurring at the servers of the casinos in Atlantic City.
- And it's working. NJ is making money.
- "Internet gaming ...will take place entirely on equipment located in the casino based in Atlantic City." NJ 5:12-95.17(j)
- New Jersey Legislature Provided:
  - "For example, in an online poker or other card game, the 'table' is the server hosted by the operator in the casino premises in Atlantic City. The 'cards' are played on that table in Atlantic City, and the wager is placed on and accepted at that table. No activity other than the transmission of information to and from the players along common carriage lines takes place outside of Atlantic City[.]"

## Statutes Are Rarely Found Unconstitutional

- Courts defer to the Legislature's interpretation
- Only in very narrow circumstances can a court deem a statute unconstitutional, only if it is able to find beyond a reasonable doubt that the statute conflicts with the amendment.
- That is not this, especially given NY contract law.

# Red Herrings

- *White v. Cuomo* - not relevant; about daily fantasy sports and not about bets occurring “at” casinos
- Indian Gaming - exclusivity is preserved
- Personal Jurisdiction, venue – different legal concepts that do not make contractual analysis any less correct.
- Will not legalize criminal conduct – still prosecute bookies.
- Won’t result in proliferation of casinos – point of amendment
- We will get sued – so what, you’ll likely win and collect substantial revenues. (highly deferential standard, disregard 200-years-old cardinal rules of contract formation, not to mention Constitution expressly authorizes Legislature to decide where casino gaming occurs.)

# Conclusion

- The Constitution expressly authorizes the Legislature to decide where casino gambling occurs and defining that as at the server of the casino is entirely consistent with the amendment and contract law.
- Let's create a [win, win, win](#) for New York today.