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AUTHORIZING MOBILE SPORTS WAGERING IN NEW YORK

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EXECUTIVE SUMMARY

This white paper analyzes whether the New York Constitution permits the Legislature to authorize mobile sports wagering in New York, and concludes that the answer is yes. 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"—a constitutional requirement for any casino gambling in New York—because online sports wagers are made at the physical location of the server on which bets are received and accepted. Finally, the legalization of mobile sports wagering, restricted to wagers placed through servers located at authorized casinos, is consistent with the purpose and goals of the 2013 casino gambling amendment: allowing New York to maximize the economic benefits of casino wagering, while simultaneously limiting the number of casinos in the State.

BACKGROUND

In 1992, Congress passed the Professional and Amateur Sports Protection Act ("PASPA"), which generally prohibited wagering on sports in the United States, except in Nevada. In the years since PASPA was passed, the States have discovered that a prohibition on sports betting simply has not worked. During the nearly two-decade prohibition, Americans did not stop wagering on sports—and especially not over the internet. Ultimately, individuals who wished to participate in sports betting turned instead to an unregulated black market.

Recognizing this problem, a number of states have moved to legalize sports betting in recent years. New York was at the forefront. In 2013, the New York Legislature passed both an amendment to Article I, Section 9 of the State's Constitution (later ratified by the voters), and a statute conditionally legalizing "sports wagering" in New York State, *see* N.Y. Rac. Pari-Mut. Wag. & Breed. Law ("PML") § 1367. The constitutional amendment authorized the Legislature

to provide for "casino gambling at no more than seven facilities as [it may] authorize[] and prescribe[]." N.Y. Const. art. I, § 9. It expressly delegated to the Legislature the task of implementing relevant laws relating to wagering, which the Legislature did the same day it passed the amendment. Specifically, by statute, the Legislature legalized "sports wagering" in New York but conditioned legalization on a change in federal law because PASPA was still in force at that time: "[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." PML § 1367(2).

On May 14, 2018, the United States Supreme Court invalidated PASPA, on the ground that it unconstitutionally encroached on the sovereignty of the states. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481 (S. Ct. 2018) (invalidating 28 U.S.C. § 3702(1)). Pursuant to the Supreme Court's decision, federal law no longer bars sports betting, and states are permitted to authorize it. As a result, New York's conditional legalization of sports wagering is now in effect.

While New York law now legalizes sports wagering, it does not yet authorize *mobile* sports wagering, unlike the laws of an increasing number of states. *See Legal U.S. Online Sports Betting*, PlayUSA, https://www.playusa.com/sports-betting ("Delaware, Nevada, and New Jersey all enacted online gambling legislation") (last visited Jan. 16, 2019). Section 1367 provides that sports wagers may only be accepted "from persons physically present" "in a sports wagering lounge located at a casino." § 1367(3)(b), (d). Thus, sports betters in New York are only permitted to place bets in person at currently authorized casinos (all of which are located in upstate New York), even as other states have authorized online betting. *See Legal U.S. Online Sports Betting*, *supra*.

Against this backdrop, we have been asked to evaluate the constitutionality of potential legislation that would amend New York's sports wagering law by: (i) eliminating the requirement that anyone participating in sports wagering be "physically present" in a "sports wagering lounge located at a casino," § 1367(3)(b), (d); (ii) expressly permitting authorized casinos to conduct mobile sports wagering from servers on their premises; and (iii) deeming such sports wagering to occur "at" the physical location of the server or other equipment used by an authorized casino operator to accept wagers.[1]

During the current legislative session, Senator Addabbo, Chairman of the Committee on Racing, Gaming and Wagering, introduced Senate Bill 17, a bill that expressly includes these provisions. The bill (the "Proposed Legislation") also provides that "[a]ny 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.* § 1(1)(z). Senate Bill 17 has numerous features intended to regulate the safety and integrity of mobile sports wagering and ensure that the State reaps economic benefits from such activity, including:

- Restrictions and regulations for mobile sports wagering operators that conform to a series of safeguards consistent with other types of gaming, *see* S. 17, 203rd Leg. Sess. § 2(2)(d), (4)(a)(ii) (N.Y. 2019);
- Authorization for New York State to negotiate arrangements with other states "to enable the sharing of information to facilitate integrity monitoring," *id.* § 1 (15)(g); and
- Enactment of an 8.5% tax on mobile sports wagering, *id.* § 1(9), which the bill estimates would provide between $10-30 million annually towards New York education.[2]

[1] Our analysis would apply with equal force to any bill that would authorize mobile sports wagers by licensed casinos and deem wagers accepted at the casino's on-premises server to occur "at" the casino.

[2] *See NY State Senate Bill S 17* N.Y. St. Senate, https://www.nysenate.gov/legislation/bills/2019/s17 (last visited Jan. 16, 2019).

LEGAL ANALYSIS

I. New York's Legislature Is Constitutionally Empowered to Enact the Proposed Legislation.

Pursuant to the 2013 amendment to Article I, Section 9, New York's Constitution vests in the Legislature the power to authorize gambling in certain circumstances. Specifically, the Legislature is empowered to provide for "casino gambling at no more than seven facilities as [it may] authorize[] and prescribe[]." N.Y. Const. art. I, § 9.[3] Thus, any exercise of the Legislature's authority to permit gambling must comply with two conditions: first, it must constitute "casino gambling" (a term not defined in the Constitution itself), and second, casino gambling can only occur "at" one of the facilities "authorized and prescribed by the Legislature." The Proposed Legislation meets both of these requirements. Consequently, it falls well within the Legislature's powers and should be deemed constitutional.

A. Sports Wagering Is "Casino Gambling."

Pursuant to the tools of constitutional interpretation generally applied in this State, sports wagering falls within the term "casino gambling," and thus may be authorized by the Legislature. *See, e.g., Brukhman v. Giuliani*, 94 N.Y.2d 387, 395 (2000) (highlighting "plain reading, interpretive history and guiding precedent" as the guideposts of constitutional interpretation).

[3] The relevant constitutional provision reads in full:

> [E]xcept as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except [1] 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 [2] 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 [3] 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.

N.Y. Const. art. I, § 9.

The relevant constitutional principles are longstanding, and the Court of Appeals has consistently applied them in ascertaining the meaning of the State Constitution.

In *Dalton v. Pataki*, 5 N.Y.3d 243 (2005), for instance, the Court of Appeals analyzed the Constitution's text and history in determining whether video lottery terminals—networked terminals "each connected to a central system"—constituted the types of "lotteries" that the Legislature was empowered to authorize pursuant to Article I, Section 9 of the Constitution. *See Id.* at 263. The Court began its analysis with the text of Section 9, *see supra* n.3, (providing full text). It noted that while "the Constitution does not define the term 'lottery,'" the surrounding text made clear that "an authorized lottery requires the sale of tickets." *Id.* at 264. The Court then looked to the understanding of the term "lottery" at the time the power to authorize lotteries was added to the Constitution, consulting that amendment's legislative history: according to the Court, the legislative history "reflect[ed] the same understanding." *Id.* (citation omitted). Based on its interpretation of the text and its understanding the amendment's purpose, the Court concluded that video lottery terminals were constitutionally permissible lotteries. *Id.* at 264-65.

Application of each of these interpretational tools likewise demonstrates that "casino gambling" includes "sports wagering." The 2014 version of Black's Law Dictionary—roughly contemporaneous with the adoption and enactment of the relevant constitutional provision—broadly defines "gambling" as "[t]he act of risking something of value, esp. money, for a chance to win a prize." *Gambling*, Black's Law Dictionary (10th ed. 2014); *see also, e.g.*, *De La Cruz v. Caddell Dry Dock & Repair Co.*, 21 N.Y.3d 530, 534 (2013) (relying on dictionary definitions in constitutional interpretation). Sports wagering fits that bill. In fact, wagering on sports, has long been recognized as a form of gambling under 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). Sports wagering—as longstanding New York law and even federal law have long recognized, *see* 25 C.F.R. § 502.4—plainly falls within "casino gambling."

There is little question that wagering on sports is among the types of gambling that occurs at casinos, and thus can be authorized pursuant to the Legislature's Article I, Section 9 powers. As the Supreme Court noted in *Murphy*, Nevada—the sole state in which sports wagering was legal under federal law—has long permitted "legal sports gambling *in casinos*." 138 S. Ct. at 1469 (emphasis added). Nevada legalized "wagers . . . on most sports events" in 1949,[4] and sports gambling has been a fixture of Las Vegas casinos as far back as 1975.[5] Thus, as a matter of history, it is clear that sports wagering (where legal) has been considered an integral part of the casino gaming experience for decades.

Moreover, the legislative history of the amendment makes clear that when the amendment to Article I, Section 9 of the New York Constitution permitting "casino gambling" was adopted, the Legislature envisioned sports wagering as a form of gambling in particular. *See generally Dalton*, 5 N.Y.3d at 264; *Cappelli v. Sweeney*, 634 N.Y.S.2d 619, 622 (Sup. Ct. Kings

[4] Comm'n on the Review of the Nat'l Policy Toward Gambling, Gambling in America: Final Report of the Commission on the Review of the National Policy Toward Gambling 130 (1976).

[5] *See Question of the Day - 17 November 2017*, Las Vegas Advisor, https://www.lasvegasadvisor.com/question/sports-betting-history (last visited Nov. 4, 2018).

Cty. 1995) (courts should assess "the legislative history of the provision and historical practices in order to ascertain its intended purpose"), *aff'd* 646 N.Y.S.2d 454 (1996); *see also, e.g.*, *Sweet v. City of Syracuse*, 129 N.Y. 316, 330 (1891) (courts interpreting the New York Constitution should analyze both the text and its historical meaning, which includes the "conditions and circumstances attending its adoption"). In considering whether to propose a constitutional amendment to allow for casinos in New York,[6] the Senate Committee on Racing, Gaming and Wagering specifically asked for testimony about whether "sports betting" would "help . . . if that were to become a possibility here in the state of New York?" *To Develop Potential Legislation to Enhance the Racing Industry in New York State: Hearing Before the N.Y. State S. Standing Comm. on Racing, Gaming & Wagering*, 199th Leg. Sess. 1st Sess. 21 (N.Y. 2011). In response, a casino representative testified that "we would be foolish if we didn't recognize that there's a multi-billion-dollar market that exists," and that sports betting has traditionally been a major part of casino gambling. *Id*. at 21. A Senator similarly remarked, after lamenting that illegal bookies were the only people profiting from internet sports wagering, that he hoped "we can come up with something that is a twenty-first century model that works, going forward." *Id.* at 95.

Perhaps most tellingly, on June 21, 2013, the Legislature passed both an amendment to the Constitution and a related bill: the amendment ultimately became Article I, Section 9, which authorizes casino gambling, and the bill—the Upstate New York Gaming Economic Development Act of 2013 ("UNYGEDA"), *see* Assemb. B. 8101, 200th Leg. 1st Sess. (N.Y. 2013)—became New York's statute conditionally authorizing sports wagering by persons who were physically present at casinos. *See* PML § 1367; *see also Town of Verona v. Cuomo*, 22

[6] Note that the Amendment did not affect or refer to casinos that already existed on *Tribal* lands within New York State. Such casinos were not subject to the prior constitutional prohibition on casino gambling.

N.Y.S.3d 241, 247 (3d Dep't 2015) (noting that UNYGEDA "provided that its provisions . . . would take effect only after constitutional amendments authorizing casino gambling were approved and ratified"). The contemporaneous passage of the constitutional amendment authorizing casino gambling alongside enabling legislation conditionally authorizing sports betting makes clear that it was understood that the constitutional amendment's reference to "casino gambling" included sports wagering. Further, the legislation makes clear that the amendment was even designed in part to authorize sports betting in New York State.

Moreover, UNYGEDA also expressly refers to PASPA, which confirms that the Legislature expected that casino gambling could encompass sports wagering. UNYGEDA provided that sports wagering could not occur in New York "until such time as there has been a change in federal law"—PASPA—"authorizing such or upon a ruling of a court of competent jurisdiction that such activity is lawful." PML § 1367(2). Congress enacted PASPA in response to a movement to legalize sports gambling in casinos, *Murphy*, 138 S. Ct. at 1482, and allowed certain states that "permitted *casino gambling* during the ten years prior to the enactment" of PASPA "to authorize a sports wagering scheme" in those casinos up to a year after PASPA's effective date, *Interactive Media Entm't & Gaming Ass'n, Inc. v. Holder*, 2011 WL 802106, at *1 (D.N.J. Mar. 7, 2011) (citing 28 U.S.C. § 3704(a)(3)) (emphasis added). In referring to a "change in federal law," then, the Legislature was signaling clearly that it intended that sports wagering would be included as one of the games authorized at casinos, just as soon as federal law allowed.

Finally, federal regulations in effect at the time of the constitutional amendment's passage expressly provide that "sports betting" falls within the same category of gaming as other commonplace forms of casino gambling such as "baccarat, chemin de fer, blackjack (21), [] pai

gow . . . roulette, craps, and keno . . . ." 25 C.F.R. § 502.4; *see also* 25 U.S.C. §§ 2703(7)(B)(i) & (8); *Citizens Against Casino Gambling v. Kempthorne*, 471 F. Supp. 2d 295, 304 (W.D.N.Y. 2007), *amended on reconsideration in part*, 2007 WL 1200473 (Apr. 20, 2007).[7] These regulations underscore that sports wagering is properly understood as a form of "casino gambling."

In sum, the plain meaning of the Constitutional text, the legislative history and context of the constitutional amendment's passage and enactment, the historical backdrop, and the association between sports wagering and casino gambling in various federal laws and regulations extant at the time all support that sports betting falls within the contours of the Constitution's authorization of "casino gambling."

B. Locating a Mobile Sports Wagering Server in an Authorized Casino Satisfies the Requirement That Casino Gambling Take Place "at" Such a Facility.

The Constitution requires that gambling take place "at" authorized "facilities" in New York State. *See* N.Y. Const. art. I, § 9 (permitting "casino gambling at no more than seven facilities as authorized and prescribed by the legislature"). The Proposed Legislation would satisfy this requirement because the legislation deems all mobile sports wagering to occur not at the situs of the device that requests the placement of a wager—*i.e.*, a smartphone or laptop—but rather at the location of the server at which that bet is received and placed. If all such servers were located "at" an authorized casino gambling "facility," mobile sports wagering would comply with the Constitution's locational requirement, consistent with the Constitution's express text, historical backdrop, purpose, and its broad delegation of authority to the Legislature. *See*,

[7] Federal law similarly broadly defines "gambling establishment" as "any common gaming or gambling establishment operated for the purpose of gaming or gambling, including *accepting, recording, or registering bets* . . . or playing any game of chance, for money or other thing of value." 18 U.S.C. § 1081 (emphasis added); *see also* 45 C.F.R. § 264.0 (broadly defining "Casino, gambling casino" as "an establishment with a primary purpose of accommodating the wagering of money").

e.g., *Brukhman*, 94 N.Y.2d at 395; *New York v. United States*, 505 U.S. 144, 174-83 (1992) (looking to text, history, and judicial precedent as interpretative sources in constitutional interpretation).

Indeed, the statute passed contemporaneously with the 2013 amendment demonstrates that the Legislature plainly never intended to require all gambling to physically occur *at* New York State casinos as a matter of constitutional law. The Legislature that passed the casino gambling amendment to the Constitution concurrently passed PML § 1367(3)(b), (d) authorizing sports wagering should it become legal. Section 1367(3)(b), (d) expressly provides that sports wagering may be accepted only "from persons physically present" "in a sports wagering lounge located at a casino." If the Constitution limited the scope of gambling "at" designated facilities to that which occurred physically at those facilities, then it would be entirely unnecessary to state that sports wagers may only be accepted "from persons physically present": all the Legislature would have had to state is that sports wagering could only occur "at" an authorized casino. This they did not do, because they plainly meant for the constitutional amendment to be broader in scope than the legislation they ultimately passed pursuant to the power granted by that amendment. And notably, nowhere in the 2012 amendment does the word "physically" appear.

1. The Legislature is Authorized to Define the Location at Which a Sports Wager Occurs as the Physical Site of the Server That Consummates the Bet.

Article I, Section 9's plain text empowers the Legislature to authorize mobile sports betting at servers located in casino gambling facilities in the State. Section 9 authorizes "casino gambling"—which includes sports wagering, *see supra* Pt. I.A—"at" certain gambling "facilities as authorized and prescribed by the Legislature." N.Y. Const. art. I, § 9. As courts have long held, Article I, Section 9 is not self-executing, and instead "expressly delegates" and contemplates legislative definitions of its terms and subsequent enactments. *See People v.*

Mumford, 12 N.Y.S.2d 925, 927 (N.Y. Magis. Ct. 1939); *accord People ex rel. Collins v. McLaughlin*, 128 A.D. 599, 614 (1st Dep't 1908) (holding that the Constitution's general prohibition against betting would not make betting a crime unless the Legislature "so provided by positive enactment"). The Constitution thus permits the Legislature to determine where sports gambling may occur, consistent with any restrictions in the Constitution itself. That power in turn permits the Legislature to declare that a mobile sports wager occurs at the server located "at" one of the "facilities" the Legislature has authorized.

In New York State, courts "will upset the balance struck by the Legislature and declare [an 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); *see also 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."). Where the Legislature makes "conclusions and findings of fact essential to the validity of a statute," such findings will be "considered presumptively true, in the absence of a showing to the contrary." *Billie Knitwear v. N.Y. Life Ins. Co.*, 22 N.Y.S.2d 324, 326 (N.Y. Sup. Ct. N.Y. Cty. 1940); *accord White v. Cuomo*, 87 N.Y.S.3d 805, 814 (N.Y. Sup. Ct. Albany Cty. 2018). And enactments are "presumed to be supported by facts known to the legislative body." *All Am. Crane Serv. Inc. v. Omran*, 58 A.D.3d 467, 467 (1st Dep't 2009).

That same deference to legislative enactments and findings applies to the Legislature's exercise of its constitutionally-delegated authority to define the contours of legal gambling. In analyzing a different provision of Article I, Section 9, which allows "betting on horse races *as may be prescribed by the legislature*," (emphasis added), the courts affirmed that "every

presumption favors the constitutional validity of a legislative enactment" in the gambling context, too. *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) (emphasis added), *aff'd*, 30 N.Y.2d 207 (1972). In *Finger Lakes Racing Association*, race track operators claimed that the State's method of sharing revenue from wagering at the tracks violated the requirement that the State "derive a reasonable revenue for the support of government" from race bets, because the Legislature also allowed municipalities to benefit from racing revenues. *See* 32 N.Y.S. 2d at 804-07. But the court upheld the Legislature's interpretation of the provision as a valid exercise of the authority conferred by the Constitution in Section 9, which empowers the Legislature to regulate horse racing as "it [sees] fit." *Id.* at 808-09. And although the court in *White*, 87 N.Y.S.3d 805, rejected the legislature's findings in that case, the court affirmed clearly that legislative findings are owed significant deference and that statutes may only be invalidated when they are unconstitutional "beyond a reasonable doubt." *Id.* at 814-16, 821.[8]

Defining mobile sports wagering as occurring at a server located "at" an authorized gambling facility is wholly consistent with historical understandings of how gambling is

[8] *White*, which the State has appealed, relied on a 1984 New York Attorney General opinion that found that the clause of "the Constitution . . . empower[ing] the Legislature to authorize and prescribe a lottery"—a clause different from the one added to the Constitution as part of the 2013 Amendment—did not allow for "the kind of [sports] gambling" that had been proposed. 1984 WL 186643 at *1. The opinion, which was drafted decades before the 2013 Amendment, is of limited relevance where online sports wagering would only be authorized "at" facilities that the Legislature is constitutionally authorized to allow. Like the 1984 Attorney General opinion, *White* did not analyze the 2013 constitutional amendment. As with *White*, *People v. Giordano*, 87 N.Y.2d 441 (1995), is also irrelevant. *Giordano* held merely that venue in Nassau County was proper for a prosecution of illegal bookmaking that occurred primarily in Manhattan, particularly given that the defendants' accomplice made telephone calls in furtherance of the scheme in both counties and that "oral statements made over the telephone are deemed to be statements made in both the sending and receiving counties." *Id.* at 449 (citing CPL 20.60)). *Giordano*, however, does nothing more than interpret a statute that the Legislature would be free to amend—it says nothing about the relevant constitutional questions here and it predates the relevant amendment by some 20 years. At that time, *all* sports betting was illegal—not only betting that failed to occur "at" an authorized facility. Moreover, the venue question that *Giordano* addresses under State law only is no more probative of the Constitutional question at hand than cases addressing the propriety of personal jurisdiction for internet transactions, *see infra* n.9.

consummated. Gambling has long been treated as a form of a completed contract involving at least two parties. *See generally Intercontinental Hotels Corp. (Puerto Rico) v. Golden*, 15 N.Y.2d 9, 13 (1964). General contract law principles hold that a contract forms when and where it is accepted. This centuries-old rule springs from the notion that acceptance marks the moment in space and time at which the "meeting of the minds" between the parties happens. *See Mactier's Adm'rs v. Frith*, 6 Wend. 103, 118 (N.Y. 1830); *see also* Amelia Rawls, *Contract Formation in an Internet Age*, 10 Colum. Science & Tech. L. Rev. 200, 205 (2009) (explaining that New York was the first state to adopt this rule). Indeed, it is black letter law that a "contract is created at the place where the acceptor speaks or otherwise completes his manifestation of assent." Restatement (Second) of Contracts § 64 cmt. c. (1981).

Even though technology has, for more than a century, enabled new means for parties to enter into contracts, the rule that a contract forms where accepted has held fast. *See, e.g.*, *Kay v. Kay*, 2010 WL 2679897, at *3 (Sup. Ct. Nassau Cty. June 17, 2010) ("[W]hen acceptance of a contract is sent between two states, 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."); *Field v. Descalzi*, 120 A. 113, 114 (Pa. 1923) (a counteroffer made from Pennsylvania to Willis, Texas via telegraph led to "the offer and acceptance *at* Willis, Tex." (emphasis added)); *Bank of Yolo v. Sperry Flour Co.*, 74 P. 855, 855 (Cal. 1903) (when plaintiff "called . . . defendant at Sacramento by telephone . . . the contract should be deemed to have been made . . . where the offer of one is accepted by the other—in this case in Sacramento").

Given this cardinal principle of contract law, it would be wholly rational for the Legislature to determine that a mobile sports bet occurs "at" the casino that houses the sports wagering server and to draft a statute reflecting that fact. When a mobile sports bettor enters on her smartphone or laptop an offer to place a bet, her action constitutes nothing more than an offer to engage in gambling activities, until it is received and accepted by a server. That server receives the offer, accepts it, and in that moment consummates a wagering contract at the physical location of the server. Therefore, consistent with the Legislature's expected findings in the Proposed Legislation, upon acceptance "at" the casino, the gambling contract forms, and the casino constitutes the place at which the sports wagering has actually occurred. *Cf. Frith*, 6 Wend. at 118. Consequently, the Legislature could constitutionally legalize mobile sports wagering "at" casinos if the servers were located in the casinos, in accordance with longstanding common law principles.[9]

[9] We also reviewed the impact that the law of personal jurisdiction might have on the constitutionality of mobile sports wagering in New York but determined that analogies to personal jurisdiction cases are of limited effect. Where a wager occurs for constitutional purposes is distinct from the question of where a defendant may be haled into court for personal jurisdiction purposes. Specifically, the constitutionality of casino gambling depends on whether such gambling occurred "at" an authorized casino facility, whereas the personal jurisdictional question generally asks whether a defendant's out-of-state activity impacted another state, or whether an out-of-state defendant availed himself of a state's laws or customs such that it would be fair as a matter of due process to haul a litigant before a court in that state. *See Laufer v. Ostrow*, 55 N.Y.2d 305, 310 (1982) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). For the purposes of personal jurisdiction, courts have held that a person who accesses a "server in New York" in order to "purposefully transact[] business in New York" will be treated as if she were in New York. *Golden Archer Investments, LLC v. Skynet Fin. Sys.*, 2012 WL 123989, at *5 (S.D.N.Y. Jan. 3, 2012); *accord MacDermid, Inc. v. Deiter*, 702 F.3d 725, 728 (2d Cir. 2012) (Connecticut could exercise personal jurisdiction where defendant "accessed computer servers located in MacDermid's offices in Waterbury, Connecticut."). Other cases, however, suggest that an out-of-state defendant may be subject to personal jurisdiction in New York merely for operating a website on an out-of-state server that New Yorkers can access and interact with. *See Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 378 (2014); *see also, e.g.*, *Murphy v. Cirrus Design Corp*., *Murphy v. Cirrus Design Corp.*, 2013 WL 765318, at *4 (Sup. Ct. Erie Cty. Feb. 18, 2013) (defendant was "subject to personal jurisdiction" in New York because its "website was interactive and permitted New York residents to transact business with it"); *People ex rel. Vacco v. World Interactive Gaming Corp.*, 185 Misc. 2d 852, 854, 857 (Sup. Ct. N.Y. Cty. 1999) ("Internet gambling casino" website physically located outside New York that was advertised and accessible to New Yorkers considered to be "do[ing] business in New York" for personal jurisdiction purposes). Nonetheless, given the differences of the two inquiries, neither line of cases seems especially relevant.

At bottom, the Constitution could have been drafted to limit sports gambling to physical, on-site gambling. The internet existed in 2013 when the Legislature passed the Amendment as did online gaming. But the fact that such a physical-presence requirement was not included in the Constitution's text and the fact that the Legislature drafted UNYGEDA—a statute that does not at all purport to authorize gaming to the full extent the Constitution allows—to impose a physical-location requirement on sports betting demonstrates that the Constitution does not require all parties to a wager to be located on casino grounds when a bet is placed. As the Court of Appeals has explained, the Constitution is not "rigid" and does not "prevent . . . update[s] and modernization." *Dalton*, 5 N.Y.3d at 265 ("It is of no constitutional significance that the tickets are electronic instead of paper."). The Constitution provides that a maximum of seven facilities can provide casino gambling in New York State—and by locating the serves that receive an online request for a bet and then place that bet, casinos would be doing just that.

2. New Jersey's Analogous Legislation Treats Mobile Sports Wagering as Occurring at the Site of the Server Where Bets are Received.

New Jersey has legalized mobile wagering similarly to how the Proposed Legislation would work here. New Jersey has expressly declared that mobile wagering takes place at the servers where the bets are received. As in New York, New Jersey's Constitution authorizes gambling at specific locations within the State: it empowers the New Jersey "Legislature to authorize by law . . . casinos *within the boundaries* . . . of Atlantic City . . . ." N.J. Const. art. IV, § VII, cl. 2D (emphasis added). In enacting legislation authorizing such gambling, the New Jersey Legislature expressly found that "Internet gaming, as defined and strictly limited [by statute] . . . will take place entirely on the servers and computer equipment located in the casino based in Atlantic City . . . ." N.J. Stat. § 5:12-95.17(j). The Legislature reasoned:

> 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[.]

Id. at (k). Applying this reasoning, the New York Legislature may properly authorize casinos to receive offers of bets over the internet if the servers receiving them are physically located "at" the casinos. As in New Jersey, "[t]he language of [New York's] Constitution is not so rigid as to prevent this type of update and modernization" of the locational requirement for gambling activities. *Dalton*, 5 N.Y.3d at 265.

II. Mobile Sports Wagering is Consistent With the Goals and Purpose of the 2013 Constitutional Amendment.

The aim of the 2013 casino gambling amendment was two-fold: allowing New York to reap the economic advantages of casino wagering, while simultaneously limiting the number of authorized casinos. The legalization of mobile sports wagering, restricted to wagers placed through servers located at authorized casinos, is consistent with both goals.

A. Mobile Sports Wagering Will Further the Goal of Realizing the Economic Benefits of Legal Gambling for New York State.

In placing the "casino gambling" amendment on the ballot, the Legislature hoped to reap the economic benefits of legalized wagering. The Assembly's memorandum in support of the bill finds 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."[10] Indeed, although casino gambling on its own is lucrative—it is estimated to generate "over $ 1 billion of economic activity" in New York, *id.*—legalized mobile sports wagering could far eclipse the economic benefits of non-sports casino gambling. Mobile sports wagering

[10] 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.

could add over $1.8 billion to New York's overall economic output (*i.e.*, the amount of money spent on all goods and services in the state) per year, with additional annual in-state tax revenues of approximately $172 million. *See* Oxford Economics Ltd., Economic Impact of Legalized Sports Betting 29, 37 (2017).

Mobile sports wagering is likely to provide the boon to jobs, tax revenue, and New York's overall economy that the constitutional amendment anticipated. *See generally* Oxford Economics Ltd., *supra*. Modeling estimates indicate that legal mobile sports wagering would provide New York with about three times as much GDP as is expected to be generated by casino gambling under current law. If (as under current law) sports wagering is limited in this State to certain physical locations, such wagering would be expected to contribute $168.3 million to our State's GDP directly, and roughly $455 million in total. *Id.* at 29, 30. By comparison, if mobile sports wagering were legalized, the sports wagering industry would contribute $1.49 billion to New York's GDP in total, with $637 million of that growth coming directly from the sports wagering industry. *Id.* at 38-39. In addition to the impact on New York's GDP, sports wagering with online access is expected to add $2.66 billion to New York's economic output. *Id.* at 37. Estimates also indicate that three times more jobs would be created and nearly three times as much worker income generated if the Legislature legalized mobile sports wagering than if sports wagers could be placed only by those physically present at a casino. *Id.* at 32, 37, 40. And tax revenues arising from mobile sports betting would be nearly triple the revenue generated by sports wagers placed by those physically present at a casino. *Id.* at 29-30, 37-38.[11] These are the very benefits that the 2013 gambling amendment sought to bring about.

[11] Estimates assumed a tax rate of 10 percent, although the currently pending legislation at issue would set only an 8.5 percent tax rate. S. 17, 203rd Leg. Sess. 2d § 1(9) (N.Y. 2018). Were that lower rate to come into effect, tax revenues would be somewhat lower than what the models discussed above predict but still significant.

B. Legalizing Mobile Sports Wagering Is Consistent With the 2013 Gambling Amendment's Purpose of Limiting Physical Gambling Locations.

By "[l]imiting casino gambling to no more than seven facilities," the 2013 casino gambling amendment was also meant to ensure "there will not be an excessive proliferation of casinos within New York State."[12] When the amendment was presented to the people for ratification, it was explained in this same way: to allow New York to realize the economic benefits of gambling at casinos without seeing casinos popping up on every street corner. *See* New York Public Interest Research Group, *Voters Guide to the Proposed Changes to the New York State Constitution That Will Be on the Ballot this November 5, 2013*, at 2 (2013).

Voters and legislators were concerned that a proliferation of physical gambling locations would potentially have negative effects. Whether or not that correlation is accurate, legalizing mobile sports wagering will not pose that risk. Evidence suggests that more than a quarter of all American adults engage in sports wagering, with a total market size of about $107 billion annually, Oxford Economics Ltd., *supra*, at 8.[13] Legalizing mobile sports wagering would short-circuit the negative effects of what has plainly been an illegal market by "caus[ing] gamblers to shift from betting in illegal markets to legal ones." Oxford Economics Ltd., *supra*, at 7; *see also* Barbara Mantel, *Betting on Sports: Should It Be Legal Nationwide?*, CQ Researcher (Oct. 28, 2016), https://library.cqpress.com/cqresearcher/document.php?id=cqresrre2016102802 (organized crime controls vast majority of illegal gambling, with proceeds used to fund racketeering and other crimes). Additionally, legalized sports wagering could more easily be regulated to minimize any harms; for example, the Legislature could authorize the promulgation

[12] New York State Assembly, Memorandum in Support of Legislation, Bill No. A8068, 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.

[13] The American Gaming Association estimates this number to be closer to $150 billion a year. Global Market Advisors, An Examination of Sports Betting in America & Forecast of Revenues by State 1 (2017).

of regulations that channel problem gamblers to appropriate services for help. Such action would be consistent with current law, under which a licensed casino must provide and have approved a "problem gambling plan" for helping individuals who suffer from gambling addiction. PML § 1362.

III. Mobile Sports Wagering Would Not Impair the State's Tribal-State Compact Obligations.

Pursuant to the Indian Gaming Regulatory Act, New York State has entered into compacts with three Indian Tribes (the "Compacts") granting, among other things, the privilege of exclusively operating certain gambling activities within designated areas. We have considered whether mobile sports wagering is likely to violate the exclusivity rights in the Compacts, and our view is they do not for two reasons. First, two of the Compacts confer exclusivity rights only for narrow types of games irrelevant to mobile sports wagering. And second, mobile sports wagering will be deemed to occur "at" a casino located out of any tribal exclusivity zone—*i.e.*, "at" the legislatively authorized casinos. Such mobile sports wagering would therefore not occur *in* those zones and would not violate the Tribes' exclusivity rights. The Proposed Legislation would thus not impact the State's obligations under the Compacts.

First, of the three Compacts with exclusivity guarantees, two of those grant exclusivity rights only for types of gaming irrelevant to mobile sports wagering. Specifically, the Seneca and St. Regis Mohawk Compacts grant exclusivity rights only for specialized electronic gaming devices. The Seneca Compact of 2002 provides the Seneca "total exclusivity with respect to the installation and operation of . . . Gaming Devices" in a region in western New York west of State Route 14. Seneca Compact of 2002 § 12(a)(1). Gaming Devices are defined as "slot machines" and "video lottery games." *Id.* § 1(m). The St. Regis Mohawk Compact limits the Mohawk Tribe's rights further—it authorized exclusive rights only "with regard to the installation and

operation of . . . slot machines" in a set of eight counties in Northern New York. St. Regis Mohawk Compact Amend. of 2005, Art. XXVII(b), (c). As no mobile sports wagering legislation would permit installation and operation of slot machines or electronic gaming devices within any Tribal exclusivity zones, these two Compacts simply could not be violated by such a law.

Second, although the other New York Tribal-Compact confers broader exclusivity rights than do the other two, its provisions still would not be offended. The Oneida Settlement of 2013, amending the Oneida Compact of 1993, provides the Oneida "total exclusivity with respect to the installation and operation of Casino Gaming and Gaming Devices" in 10 counties in the northern/central part of New York State. Oneida Settlement, Art. IV(A). "Casino Gaming" is defined as "Class III gaming activity," referring to a category of gaming under IGRA that includes sports wagering, 25 C.F.R. § 502.4(c), and "Gaming Devices" are defined to include specialized devices such as "Slot Machines, Video Lottery Gaming Devices and Instant Multi-Games," Oneida Settlement of 2013, Art. II(B), (E). Under the proposed mobile sports wagering legislation, no sports gambling would occur within (and certainly no Gaming Devices would be authorized within) any of the ten counties in question—the law's entire premise is that a mobile sports wager occurs "at" the situs of the casino receiving the bet, *not* at the place where an individual requests the wager. *See supra* Pt. I.B. Thus, even if an individual initiates a sports wager from within the Oneida's exclusivity zone, the wager itself would only occur at a casino located outside the exclusivity zone.

In sum, the plain text of the compacts and the legal framework undergirding mobile sports betting in New York State—which reflects that an electronically placed wager is, as a

matter of law, located at the situs of a server, not the requesting smart phone or computer—should ensure that New York State's mobile betting regime does not breach the Tribal compacts.

CONCLUSION

The Proposed Legislation authorizing mobile sports wagering would be consistent with New York's Constitution, provided that the wagers are consummated at servers located at legislatively authorized casinos in this State.