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VIA E-MAIL AND U.S. MAIL

Senator Joseph P. Addabbo, Jr.
Chairman, Committee on Racing, Gaming and Wagering
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Legislative Office Building
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Re: Senate Bill 8412

Dear Senator Addabbo,

I represent the iDevelopment and Economic Association, otherwise known as iDEA Growth (“iDEA”), a non-profit association of gaming industry stakeholders who seek to grow jobs and expand lawful online interactive business in the United States through advocacy and education. iDEA represents the legislative and regulatory interests of national and international businesses with online interactive entertainment platforms that are operating, or that are considering operating, in U.S. states that have legalized interactive gaming. Among other things, the association aims to (i) educate lawmakers, enforcement agencies and the general public; (ii) develop industry best practices and standards around responsible gaming; and (iii) support positive legislation that broadens the U.S. market for safe and successful regulated online gaming. iDEA currently has more than thirty members, including Bet365, DraftKings FanDuel, GeoComply, Kambi, kindred, PointsBet, PlayTech, Resorts Digital Gaming, SportRadar, White



Hat Gaming, WorldPay, and 888 Holdings, plc.

I write to convey the Association's appreciation for the work you have done, and continue to do, on behalf of the gaming industry in New York and to communicate the members' support for the passage of Senate Bill 8412 ("S.B. 8412").

Introduction

If signed into law, S.B. 8412 would legalize online interactive gaming in New York State. More specifically, the bill would authorize the New York State Gaming Commission (the "Commission") to issue interactive-gaming registrations to licensed casinos in New York State and to any New-York-based Native American tribe that is party to a valid tribal-state compact and mobile interactive gaming wagering agreement with the Commission.¹ The registrations would allow each casino and qualifying tribe to offer up to two mobile interactive gaming wagering platforms and brands for authorized games, so long as the platform and brands have been reviewed and approved by the Commission. *See* S.B. 8412 § 1. Should S.B. 8412 become law, casino licensees and qualifying tribes will have the option of operating the interactive-gaming platforms themselves or contracting with up to two independent contractors to provide mobile gaming services. *Id.*

We have undertaken to examine whether the current iteration of S.B. 8412 creates any conflict with the New York Constitution. Section 9[1] of article 1 prohibits gambling in general, but carves out three exceptions: state-run lotteries that help to fund education; pari-mutuel betting

¹ On February 24, 2022, S.B. 8412 was introduced and referred to the Senate Committee on Racing, Gaming and Wagering. *See* The New York State Senate, *Senate Bill S8412 (2021–2022)*. On April 25, 2022, the bill was reported and committed to the Senate Finance Committee.

on horse races from which the government derives a reasonable revenue; and “casino gambling at no more than seven facilities as authorized and prescribed by the legislature.” Thus, the questions presented are (i) whether “interactive gaming” under S.B. 8412² falls within the ambit of “casino gambling” as that term is used in Article 1, section 9[1] of the Constitution, and (ii) whether off-premises mobile betting may be deemed to occur “at” a gambling casino?

For reasons explained more fully below, we conclude that S.B. 8412 creates no inherent conflict with New York’s constitutional prohibition on gambling and exceptions thereto. First, the bill would vest the Commission with authority to license up to seven casino operators so they may offer mobile and online versions of quintessential house games (*e.g.*, casino slot and table games) and possibly gaming tournaments in which players compete against each other. It follows that interactive versions of those games constitute “casino gambling” as that term is used in the Constitution. Moreover, mobile interactive wagers placed by authorized adults in New York will be deemed to be placed at any licensed casino that accepts the bet electronically or through a server or other equipment located on the casino’s physical property.

I. Legal Standard

“Legislative enactments are entitled to ‘a strong presumption of constitutionality.’” *Dalton v. Pataki*, 5 N.Y.3d 242, 256 (N.Y. 2005) (quoting *Schulz v. State of New York*, 84 N.Y.2d 231, 241 (1994)). “While the presumption is not irrefutable, parties challenging a duly enacted statute face the initial burden of demonstrating the statute’s invalidity ‘beyond a

² If passed as drafted, the bill would add Article 15 to the existing Racing, Pari-Mutuel Wagering and Breeding Law. *See* S.B. 8412 § 1.

reasonable doubt.” *Id.* (quoting *Lavalle v. Hayden*, 98 N.Y.2d 155, 161 (2002)). “A ‘basic tenet of constitutional and statutory interpretation [is] that the clearest and most compelling indicator of the drafters’ intent is the language itself. *White v. Cuomo*, 181 A.D.3d 76, 79 (2020) (quoting *Hernandez v. State*, 173 A.D.3d 105, 111 (2019)). “Resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction, and courts have no right to add to or take away from that meaning. *Id.* (internal quotation marks, brackets and citations omitted) (striking down provision stating that interactive fantasy sports contests (“IFS”) are not games of chance and, therefore, not “gambling” under New York law).

“Because ‘[p]ublic policy continues to disfavor gambling,’ exceptions to the constitutional prohibition must be strictly construed to ensure that they do not consume the rule itself.” *Id.* at 80–81 (internal citations omitted). A reviewing court must examine and interpret the constitutional and statutory language and determine for [itself] whether the legislative enactment violates the explicit constitutional provision at issue. *Id.* at 80 (citing *Dalton*, 5 N.Y.3d at 264–64).

II. Discussion

S.B. 8412 comports with the gambling proscription in the New York Constitution because the bill, if passed, would legalize mobile interactive gambling to the extent such gambling falls within the “casino-gambling” exception in section 9[1] of Article 1. And if signed into law, S.B. 8412 will establish that mobile interactive gaming “occurs” at any licensed



gaming facility to which an authorized person transmits a valid wager and at which the wager is accepted using electronic equipment on the facility's property.

A. "Casino Gambling" Encompasses Online and Interactive Gaming

S.B. 8412 is in harmony with the Constitution to the extent the bill would authorize online and mobile interactive gaming that falls within the ambit of "casino gambling," under section 9[1] of Article 1 of the Constitution. As explained below, the term "casino gambling" is sufficiently broad to include any game of chance authorized for play under Article 13 of New York's Racing, Pari-Mutuel Wagering and Breeding Law, including for example, on-premises banking games, slot machines, sports wagering, and table games as well as online and mobile versions of the same.

All gambling legislation in New York must be measured against this constitutional plumbline:

[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, 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, and 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[.]

N.Y. CONST. art. 1, § 9[1]. Whether S.B. 8412 runs afoul of the state constitution's gambling prohibition depends on the meaning of "casino gambling." Neither the term "casino gambling" nor the word "gambling" is defined in the Constitution. Where, as here, the Constitution does

not define a term that is material to a determination of a statute’s constitutionality, courts in New York look first to the legislature’s definition of that term under the penal law as it existed when the constitutional provision was enacted. *Id.* at 81–83 (citing *Dalton*, 5 N.Y.3d at 264 (looking to penal law to determine meaning of “lottery,” which is not defined in N.Y. Const. art. 1, § 9); *Matter of Plato’s Cave Corp. v. State Liquor Auth.*, 115 A.D.2d 426, 428 (1985) (applying penal law definitions for “contest of chance,” “gambling,” “something of value,” and “gambling device” to provisions of Alcoholic Beverage Control Law, which does not define the terms).

Here, the casino-gambling exception was added to the New York Constitution by amendment on November 5, 2013. Thus, the relevant definition for “casino gambling” must be determined, if possible, by reference to the penal code as it existed in November 2013. At that time, the penal law did not include a definition for “casino gambling.” *See* N.Y. Penal Law §§ 225.00–225.95 (McKinney 2013). “Casino gaming,” however, was defined to mean “games authorized to be played pursuant to a license granted under article thirteen of the racing, pari-mutuel wagering and breeding law or by federally recognized Indian nations or tribes pursuant to a valid gaming compact reached in accordance with the federal Indian Gaming Regulatory Act of 1988.” *Id.* § 225.00(15). The term “casino gaming” casts a wider net than does the term “casino gambling” because the former encompasses games of skill as well as games of chance. The constitutional amendment pertains to casino “gambling,” a term the penal code defined as follows:

A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

Id. § 225.00(2). “‘Contest of chance,’ in turn, was defined to “mean[] 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.” *Id.*

§ 225.00(1). Taken together, these statutory provisions support a conclusion that, in 2013, the state legislature understood “casino gambling” to include any authorized game that a person can play at a licensed casino by risking a bet or wager for a chance at winning something of greater value depending on the outcome, which hinges to a material degree on chance or a future contingent event beyond the bettor’s control. In 2013, when the casino-gambling exception was added to section 9[1] of Article 1 of the Constitution, games authorized for play pursuant to a license granted under article 13 of the Racing, Pari-Mutuel Wagering and Breeding Law included banking or percentage games,³ slot machines, sports wagering (contingent on a

³ In 2013, section 1301(19) of the N.Y. Racing, Pari-Mutuel and Breeding Law defined “game” to mean “[a]ny banking or percentage game located within the gaming facility played with cards, dice, tiles, dominoes, or any electronic, electrical, or mechanical device or machine for money, property, or any representative of value which has been approved by the commission.” N.Y. Rac. Pari-Mut. Wag. & Breed. § 1301(19).

favorable change in federal law),⁴ and table games.⁵

The question to be answered then is whether the Constitution’s casino-gambling exception includes casino gambling that occurs, not on location at a physical casino, but offsite “through internet websites accessed via a mobile device or computer, and mobile device applications.” S.B. 8412 § 1. No doubt, it does. Indeed, the New York Constitution does not preclude the legalization of casino gambling conducted with modern technology, and opponents of S.B. 8412 would be hard pressed to establish otherwise beyond a reasonable doubt. In analogous cases, courts in New York have held that methods of play are “constitutionally insignificant” so long as a particular game has the defining features of that type of game. *See Dalton*, 5 N.Y.3d at 265 (holding that, despite their modernized features, video lottery terminals (“VLTs”) fall within the lottery exception in section 9[1] of article 1 because they are used to

⁴ On the same day in 2013, the New York legislature approved the casino-gambling exception for referral to New York voters and amended section 1367 of the N.Y. Racing, Pari- mutuel Wagering and Breeding Law, legalizing sports wagering conditioned on a change in federal law. That condition was met in 2018 when the Supreme Court struck down the Professional and Amateur Sports Protection Act (“PASPA”), 28 U.S.C. §§ 3701–04, which prohibited states other than Nevada and New Jersey from legalizing sports betting within their borders. *See Murphy v. Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1481 (2018) (striking down PASPA as unconstitutional). Notably, the amendment to § 1367 restricted lawful sports wagering to “persons physically present in the sports wagering lounge” of a licensed gaming facility. N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 1367(3)(a) (2014). That same day, the legislature voted to refer the casino-gambling exception to voters but declined in that instance to limit lawful gaming to persons “physically present” at a licensed casino. N.Y. Const. art. 1, § 9[1].

⁵ In 2013, “table games” was defined to mean “[a] game, other than a slot machine, which is authorized by the commission to be played in a gaming facility.” *Id.* at 1301(41); *Mellman v. Metro. Jockey Club, Inc.*, 89 N.Y.S.2d 64 (1949) (upholding statute that allowed for pari-mutuel betting using mechanically operated machines on grounds that such betting falls within the pari-mutuel exception under section 9[1] of article 1, noting that the state constitution “makes no mention of mechanically operated machines”).



play a game of chance that requires the sale of tickets and multiple participation); *Mellman v. Metro. Jockey Club, Inc.*, 89 N.Y.S.2d 64 (1949) (upholding statute that allowed for pari-mutuel betting using mechanically operated machines on grounds that such betting falls within the pari-mutuel exception under section 9[1] of article 1, noting that the state constitution “makes no mention of mechanically operated machines”).

To the extent S.B. 8412 seeks to authorize interactive gaming within parameters established by the Constitution’s casino-gambling exception, the bill, in its current form, would vest the Commission with authority to license up to seven casinos to offer online and mobile versions of approved banking games, slot machine games, sports wagering games, and table games—provided such gambling occurs “at” a licensed gaming facility.

B. Online and Mobile Betting Occurs Wherever a Licensed Gaming Facility’s Server Accepts the Wager.

Wagers placed electronically from any location in New York State would seem to contravene section 9[1] of article 1, which establishes a baseline prohibition on gambling and carves out an exception for casino gambling that takes place “at” up to seven licensed gaming facilities. However, the requirement that casino gambling take place “at up to seven licensed gaming facilities” would not preclude licensed operators from accepting online bets placed from offsite locations using the wires and other modern technology. General principles of contract law, tax law, and New York precedent support that bets occur where they are accepted; and when accepted electronically by a server at the operator’s licensed gaming facility, the bet occurs “at” a licensed casino.

“To form a valid contract under New York law, there must be an offer, acceptance,

consideration, mutual assent and intent to be bound.” *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 427 (2d Cir. 2004) (citing Restatement (Second) of Contracts § 17 (1981)). It is consistent with well-settled doctrines of contract law that a bet or wager is placed wherever it is accepted and supported by consideration because the place of acceptance is the place where the contract is formed. *See* 4 Williston on Contracts § 6:62 (“[I]n contracts by telephone it has been held that the place of the contract is the place at which the acceptor speaks.”); Restatement (Second) of Contracts § 64 cmt. c (“[T]he contract is created at the place where the acceptor speaks or otherwise completes his manifestation of assent.”).

Consistent with these long-standing principles, S.B. 8412’s definitional section makes clear that lawful online bets and wagers will be deemed to occur when and where they are accepted.⁶ Both timing and location are determined without regard to the bettor’s physical location at the time the bet is made, though all bets and wagers must be placed by persons physically present in New York. The bill’s definition for “[a]uthorized participant” addresses the “when”:

All interactive gaming wagers placed in accordance with this article shall be considered placed or otherwise made *when received by the casino or operator at the licensed gaming facility*, regardless of the authorized participant’s physical location at the time such wager is initiated.

S.B. 8412 § 1 (emphasis added). The bill’s definition for “[i]nteractive gaming wager” addresses the “where”:

“Interactive gaming wager” means cash or cash equivalent that is paid by an authorized sports bettor to a casino or operator to participate in interactive gaming by such casino or operator. Any

⁶ *See, e.g.*, S.B. 8412 § 1



wager through electronic communication shall be deemed to take place *at the physical location of the server or other equipment used by a casino or operator to accept interactive gaming wagering*, regardless of the authorized participant's physical location within the state at the time such wager is initiated.

Id. (emphasis added).

The foregoing rules for determining when and where online gambling is conducted are consistent with New York laws in other gambling contexts. For example, in *Saratoga Harness Racing, Inc. v. City of Saratoga Springs*, the court applied a state statute that prohibited local governments from imposing a tax greater than 3% on admissions to certain racing events offered by a regional operator. 55 A.D.2d 295, 297–98 (N.Y. App. 19786). Such tax was to be calculated based on gambling activity that the operator provided within the taxing jurisdiction. *Id.* The plaintiff argued for lower taxes on grounds that the city and county were subject to the 3% cap. *Id.* The plaintiff contended that wagers placed by telephone from bettors physically located in the City of Saratoga and Saratoga County on races outside those jurisdictions triggered application of the statutory cap. *Id.*

The court disagreed, holding that the locus of gambling conduct is not the place from where a bettor makes a bet by telephone. *Id.* at 297–98. The court explained,

The location of the bettor at the time he places his bet is immaterial in the same sense that no reasonable person would consider that the famous betting parlors of London (assuming they are permitted to take bets from non-Britishers) are conducting betting in any other country from which someone might place a bet by telephone or cable.

Id. The court further held that the gambling conduct occurs where the operator has established facilities for taking off-track bets. *Id.* at 298.



Similarly, regulations promulgated by the New York State Gambling Commission provide that “[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.” 9 N.Y. Comp. Codes R. & Regs. tit. 9, § 4400.1(i) (2021).

Extended to online sports wagering, the foregoing logic supports a determination that off-premises bets are placed “at” a licensed gaming facility when transmitted electronically to, and accepted at, a computer server or other device physically located on the licensed casino’s property. Opponents of the bill may disagree with that construction, but they cannot prove beyond a reasonable doubt that the statute is unconstitutional.

Conclusion

In sum, S.B. 8412 authorizes interactive gambling at up to seven licensed gaming facilities in New York and does so consistent with the New York Constitution. The legislation does not conflict with § 9[1] of Article 1 of the New York Constitution, which prohibits gambling generally but expressly allows “casino gambling” at up to seven licensed gaming facilities in New York. If S.B. 8412 is signed into law, courts in New York will give the statute a strong presumption of constitutionality. Those who challenge the law as unconstitutional will not get past the initial step of litigation unless they prove—as they must—the statute’s invalidity beyond a reasonable doubt.

S.B. 8412 does not conflict with the New York Constitution’s gambling ban; rather, the legislation tracks the wording of the casino-gambling exception to the ban and does so in two ways that matter the most: the type of game and the location where it is played. First, S.B. 8412 legalizes online interactive games, but does so only to the extent such games are permitted under the New York Constitution. Article 1, § 9[1] of as amended in 2013, prohibits gambling as a general matter



but carves out an exception for “casino gambling.” There can be little doubt that New York legislators understood the term “casino gambling” to mean betting games authorized for play pursuant to a license granted under New York law, including banking or house games, slot machines, sports-wagering and table games. That understanding was rooted in the New York Penal Code as it existed on the day the legislature approved the wording for the constitutional amendment and amended the New York Racing, Pari-mutuel Wagering and Breeding Law to allow sports wagering conditioned on a change in federal law.

That online casino gambling requires a different method of play is of no consequence under New York law. What matters is that the defining features of online games permitted under S.B. 8412 fall within the general rubric for “casino gambling.”

Second, S.B. 8412 legalizes online interactive games only if game play occurs at one of up to seven licensed gaming facilities. Similarly, the constitution’s casino-gambling exception applies only to gaming that occurs at one of up to seven licensed gaming facilities. Opponents may argue that off-premises betting does not occur “at” a licensed gaming facility. But general principles of contract law and tax law, as well as New York precedent interpreting those laws make clear that a bettor within the borders of New York may place a bet at a casino despite being physically absent from the casino’s retail location. And consistent with general principles of contract and tax law, a bettor may place his or her bet from a remote location using a landline telephone, a mobile device, or another computing device with internet access. As soon as the bet is received and accepted at the casino’s physical property, a gambling contract is formed. And that is true whether the bettor’s “offer” is accepted by a natural person or by a server or other computing device located on the casino’s property. In such cases, the gambling—rightly—can be said to occur at the casino and



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under the aegis of the casino's license.

Based on the foregoing, we conclude that, if signed into law, S.B. 8412 will not contravene the New York Constitution generally or article I, § 9[1] in particular.

Very truly yours,

A. Jeffrey Ifrah
Counsel for iDEA Growth