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**Testimony of Sarah A. Walters, Counsel  
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Before the New York State Senate Racing, Gaming, and Wagering Committee**

Senator Addabbo, and the esteemed members of the New York Senate Racing, Gaming, and Wagering Committee, thank you for inviting me to address you today regarding provisions of S. 17—A (2019), a bill related to sports betting in the State of New York. My name is Sarah Walters and I am an attorney with Brownstein Hyatt Farber Schreck, located in Washington, D.C. My primary practice area is federal Indian law and I represent Caesars Entertainment Corporation in its dealings with the Oneida Indian Nation, assisting with tribal issues and the interplay of the Indian Gaming Regulatory Act (IGRA) and State law. Prior to joining private practice, I worked at the U.S. Department of the Interior’s Office of the Solicitor in the Division of Indian Affairs, and as chief of staff to the Assistant Secretary – Indian Affairs. I also served as a staff attorney and counselor to the chair at the National Indian Gaming Commission, the federal regulatory agency that oversees Indian gaming.

I appreciate the opportunity to speak to you about S. 17—A as you consider whether to legalize sports betting in the wake of the U.S. Supreme Court’s ruling in *Murphy v. National College Athletic Association*, 138 S. Ct. 1461 (2018). This is no simple task. Advances in technology, including the proliferation of mobile platforms for gaming, have created significant opportunities for revenue and economic growth while also presenting new questions about the legal framework under which gaming establishments operate. States like New York, in which tribes operate Class III gaming pursuant to tribal-state compacts, must also consider the impact new legislation relating to sports betting—and especially mobile sports betting—will have on tribes and compacts. I commend Senator Addabbo for the care he took in drafting S. 17—A to include a solution that both provides tribes the ability to engage in mobile sports betting on par with their commercial counterparts and respects the tribes’ status as sovereign nations under the law.

As you know, tribes on Indian lands, including in New York, participate in gaming activities pursuant to IGRA and federal law. IGRA allows for gaming only on Indian lands, as defined in 25 U.S.C. 2701, et seq. In the event a tribe wishes to engage in gaming activities outside Indian lands, that tribe must operate pursuant to state law as a licensed commercial gaming operator, and, in that instance, the activities are governed by state law and not IGRA. See, e.g. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 134 S. Ct. 2024 (2014). “On Indian lands” was a fairly straightforward concept when the U.S. Congress enacted IGRA in 1988, before the widespread use of technological aids and mobile devices. Players in 1988 had to be physically located at a brick and mortar casino to place a bet. Today, however, a bettor might wish to place a sports bet from home on a mobile device. The technology exists to do that, but is it legally permissible? In a state that has legalized mobile sports betting, a commercial operator could accept that wager,<sup>1</sup> but under the current interpretation of federal law, a tribal operator could not, absent a clear state authorization that does not contravene federal law.

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<sup>1</sup> This statement does not contemplate interstate wagers, which would be subject to the Federal Wire Act, 18 U.S.C. 50 § 1081, et seq.

Under federal law, the U.S. Department of Justice and the National Indian Gaming Commission have interpreted a wager to occur where a bettor is physically located at the time the bet is placed. See *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960 (2018). Under the United States' current interpretation, therefore, tribes would not be able to engage in mobile sports betting or other mobile gaming pursuant to IGRA where bettors are physically located outside tribal lands. As a result, tribes, which are often located in less populous areas, would only have the ability to accept mobile wagers from within their reservation boundaries or on Indian lands, providing them very limited benefit when compared to their commercial counterparts. The structure in the current bill, by contrast, does not rely upon where a bettor is physically located, but, rather, where the wager is received. For mobile gaming, the bill considers a bet to be received at the location of a gaming enterprise's server (at the four authorized casinos). Therefore, under the provisions of S. 17—A, a tribe with a server at an authorized casino within the State could operate mobile sports betting so long as it does so pursuant to a State license. By allowing tribes to engage in sports betting under the same State regulatory regime as commercial casinos, S. 17—A provides tribes an alternative to the strictures of IGRA and the United States' interpretation. Absent the provisions contained in S. 17—A, New York tribes could be left out of statewide mobile sports betting, disadvantaging them vis-à-vis commercial gaming enterprises.

Tribes would not solely be impacted should the State fail to include them in its mobile sports betting framework, however. Unless tribes are provided the opportunity to participate in mobile sports betting operations, commercial operators, as well as the State, would also be negatively affected. Pursuant to their tribal-state compacts or agreements, the tribes in New York enjoy exclusive gaming privileges over a large portion of the State. Due to their wide exclusivity zones, tribes would have the ability to block mobile sports betting from taking place throughout much of upstate New York, including Buffalo, Rochester, Syracuse, Utica, Oswego and Cortland. Alternatively, in the event commercial operations were to accept wagers from within those zones, tribes could limit or completely omit payments to the State (depending on the terms of each tribe's agreement with the State) made in exchange for exclusivity, which risks a significant amount of revenue. Such a scenario is untenable, as it would either create large blackout zones for mobile sports betting or significantly impact revenue to the State.

The structure proposed in S. 17—A provides a respectful solution to this dilemma. The bill recognizes that, as sovereign nations, tribes must have a choice about whether to subject themselves to State licensing and jurisdiction. The bill provides tribes the option to be part of the State's licensing and mobile sports betting regime. If tribes decide to opt in, they would waive the exclusivity contained in their agreements with the State for mobile sports betting only, so that bettors from within those zones could make mobile wagers. Further, S. 17—A provides that tribes' mobile wagers would be permitted on servers owned by the tribes but located at commercial casinos, which assures that mobile sports betting remains under State jurisdiction.<sup>2</sup> Tribes' mobile sports wagers would also, under the bill, be subject to state licensure, taxation and regulation. This would not apply to any wagers at tribal casinos, including on-site sports betting, which would be governed by IGRA.

In the event a tribe does not want to engage in mobile sports betting statewide, the bill respects the right of each tribe to make that choice while at the same time preserving their compact rights. Under that scenario, all provisions of a tribe's Class III gaming compact would remain intact, resulting in the status quo, including that tribe's zone of exclusivity and its duty to make payments to the State.

In short, the sports betting bill has provided an elegant solution to a difficult regulatory and jurisdictional challenge. The framework contained in S. 17—A allows tribes the opportunity to take advantage of technological advancements and changes in the law that may be given to commercial operators, but is

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<sup>2</sup> As discussed previously, under the bill, a bet takes place where a server is located; therefore, if a server were located on Indian lands, under S. 17—A, New York would not have jurisdiction.

unavailable to tribes under IGRA's framework. At the same time, it also recognizes the sovereign status of tribes and the spirit of tribal-state compacts without jeopardizing the State's revenue stream. Absent a federal solution, any state subject to tribal-state compacts should look to this bill as a model when seeking to legalize statewide mobile sports betting.

Thank you again for inviting me to speak with you today. I am available for questions.