Statement to the New York State Senate
Standing Committee on Racing, Gaming and Wagering
Public Hearing: Sports Betting with a Mobile Component in New York State

May 8, 2019

Witness: Daniel Wallach

Good afternoon, Chairman Addabbo and members of the Committee.

Thank you for inviting me to testify today. My name is Daniel Wallach, and I am the founder of Wallach Legal LLC, a law firm devoted primarily to the burgeoning field of sports wagering and gaming law in the United States. I am also the Co-Founding Director of the University of New Hampshire School of Law's Sports Wagering and Integrity Program, the nation's first law school certificate program dedicated to the study of sports wagering law and regulation. One of the classes that I teach focuses on state constitutional limits on gambling expansion, an appropriate subject for today. I have been admitted to practice in New York State since 1992. During my career in private practice, I have had primary or substantial responsibility in nearly 200 appeals, many of them involving state and/or federal constitutional legal issues.

Chairman Addabbo has asked me to address the following question: would the addition of mobile sports betting in New York require an amendment to Article I, Section 9 of the New York Constitution? I have researched this issue extensively, and have written and published on the subject in a number of different contexts. I have concluded that the addition of mobile sports wagering would not necessitate an amendment to the New York Constitution, and could be accomplished through new legislation enacted by the New York Legislature. There are a number of compelling reasons that support this conclusion.

A. The New York Constitution Addresses Only Substantive Gambling Categories, Not Delivery Channels; Mobile is a Delivery Channel, Not a Category of Gambling

As an initial matter, it is worth noting that the words "mobile," "online," or the "internet" do not appear anywhere in Article I, Section 9's general prohibition against gambling. To the contrary, Article I, Section 9 only addresses *substantive* categories of gambling – such as "lotter[ies], the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling" – and it also contains carve-outs, or exceptions, for other *specific categories of gambling*, such as "state-operated lotteries, pari-mutuel betting on horse races, and casino gambling at no more than seven facilities." Whether it's expressed as a prohibition of specific gambling activity or as one of the allowable exceptions, Article I, Section 9 only addresses *substantive* categories of gambling, and not the delivery channels for how bets are placed. And that's precisely what mobile wagering is: a mere delivery channel for placing a category of bets that the state constitution already allows.

In other words, the Internet is merely a mode or channel of distribution for the delivery of various goods and services. It is not a substantive gambling category in and to itself, like the very

specific types of gambling denoted in Article I, Section 9. As such, it does not logically or definitionally fit within the scope of that provision.

Critically, none of the specific gambling categories listed in Article I, Section 9 are defined by the state constitution. The words "gambling," "lotteries," "pari-mutuel betting on horse racing," and "casino gambling" are not accompanied by any definition, as you sometimes might see in other state constitutions. This omission is by design. When the terms of a constitutional provision are not self-defining, it is up to the legislature to select the appropriate means of implementing those terms. As the New York Court of Appeals observed in *People ex rel. Sturgis v. Fallon*, it is "manifest" that Article I, Section 9 "was not intended to be self-executing. . . . It expressly delegates to the legislature the authority, *and requires it*, to enact such laws as it shall deem appropriate to carry it into execution."

Which brings us to the "*as prescribed and authorized*" language in Article I, Section 9, which makes crystal clear that the Legislature can shape the contours of constitutionally-authorized forms of gambling and implement the means and methods by which such gambling can be conducted.

B. Article I, Section 9 Specifically Empowers the Legislature to "Authorize and Prescribe" The Means and Methods for Implementing Constitutionally-Authorized Forms of Gambling, and to Determine How Such Wagering Will be Conducted

Article I, Section 9 of the New York Constitution generally forbids gambling within the state by prohibiting any "lottery, or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling." Over time, however, Article I, Section 9 has been amended to create several exceptions to the general ban, including for state-operated lotteries, pari-mutuel betting on horse races, and casino gambling. But each one of those exceptions is left undefined, and, as New York's highest court observed in *Sturgess*, it "expressly delegates" to the Legislature the authority and responsibility to determine their scope. That's why the constitutional exceptions allowing the state lottery, pari-mutuel betting on horse races and casino gambling include the key phrase – "*as may be authorized and prescribed by the legislature*," meaning that it's up to state lawmakers to "authorize and prescribe" how wagering on those constitutionally-permitted forms of gambling will work. This provision affords the legislature the discretionary authority – and the obligation – to enact laws breathing life into these exceptions, including by defining the scope of activities that may be conducted by licensed casinos, horse racing facilities, or the state in conducting a lottery.

1. The Legislature Has Already Authorized Mobile Betting on Horse Racing.

The expansion of pari-mutuel betting in New York provides a clear-cut illustration of this legislative prerogative at work. When the New York Constitution was amended in 1939 to allow "pari-mutuel betting on horse races *as may be prescribed* by the legislature," it did not include the mechanics of how pari-mutuel wagering was to work. Instead, it left those details up to the Legislature, which originally limited pari-mutuel betting to those wagers placed "within the grounds or enclosure of a race track." Over time, however, the New York Legislature has re-shaped the contours of permissible horse race wagering. In 1970, the Legislature allowed off-

track betting for the first time. In 1984, the Legislature authorized limited simulcast wagering. In 1990, it added betting by telephone. In 2006, the Legislature approved online and mobile wagering on horse races. Mobile wagering is now offered through each of the state's five off-track betting corporations. Constitutional amendments were not necessary for any of these developments because off-track betting, simulcast wagering, telephone wagering, and mobile betting were merely new means to offer the same form of gambling that was already allowed.

New York's gradual expansion of horse race wagering through legislative enactment provides a compelling precedent for allowing mobile betting on sporting events without amending the New York Constitution.

2. New York's Highest Court Has Declared that Article I, Section 9 of the State Constitution Does Not Bar the "Modernization" of Constitutionally-Authorized Forms of Gambling Through the Introduction of New Technological Methods.

As the horse racing example shows, the Legislature is given ample room to modernize or update the methods for wagering in connection with those categories of gambling that have already been constitutionally authorized. The *Dalton v. Pataki* decision[1] reinforces that point. In *Dalton*, the New York Court of Appeals considered whether the Legislature's authorization of video lottery terminals fit within the constitutional exception for state-operated lotteries. The challengers to the new law argued that the video lottery terminals were not a "lottery" because they physically resembled slot machines. However, the Court of Appeals determined that video lottery gaming was constitutionally permissible because it satisfied the definitional requirements of a "lottery" in that they were games of chance involving multiple participants competing for a finite number of prizes, as opposed to just a single player competing against a single machine.

In so holding, New York's highest court rejected any suggestion that the modern features of video lottery terminals – such as the fact that they were electronic devices linked to a central bank of computers, and did not include the traditional paper tickets normally associated with lotteries – rendered them materially different from the kind of gambling permitted under the constitution. In particular, the Court stated that:

> It is of no constitutional significance that the tickets are electronic or paper. The particular methods for conducting the lottery are subject to change with time. The language of the Constitution is not so rigid as to prevent this type of 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 a traditional lottery.

In making that statement, New York's highest court could just as easily have been referring to mobile sports wagering, which is a modernization of the systems and methods used for permissible casino-based sports betting – a form of gambling that has already been duly "authorized and prescribed" by the Legislature in accordance with its constitutional authority under Article I, Section 9. Just as in *Dalton*, "[i]t is of no constitutional significance" that sports

[1] *Dalton v. Pataki*, 5 N.Y.3d 243 (2005).

wagers accepted through a mobile wagering system "are electronic instead of paper," as "[t]he language of the Constitution is not so rigid as to prevent this type of update and modernization."

3. New Jersey Has Already Legalized Internet Gambling Without Undertaking a Separate Constitutional Amendment, Despite a More Restrictive State Constitution.

One need only look across the Hudson River to see the application of this basic principle at work. The manner in which New Jersey has legalized internet gambling without amending its state constitution should serve as a valuable lesson to New York lawmakers. New Jersey's constitution expressly confines casino gambling to just a single location – the casinos in Atlantic City. In that regard, it is much more restrictive than the New York Constitution, which allows casino gambling at up to seven locations. Yet, in 2013, New Jersey's Legislature passed a law that allows internet gambling from anywhere in the state because the servers and hardware associated with such online gambling are housed at the Atlantic City casinos, and thus the bets are still deemed to be placed *at* the casinos. In enacting legislation authorizing such gambling, the New Jersey Legislature expressly found that "Internet gaming in this State shall be deemed to take place where a casino's server is located in Atlantic City regardless of the player's physical location within this State." New Jersey lawmakers were thus able to authorize mobile betting without needing to amend the state constitution.

There are numerous other examples to draw upon. Several other states – such as Michigan and Rhode Island – likewise have state constitutions that are specific as to the locations where casino gambling may occur. And yet both of those states have recently introduced (and, in Rhode Island's case, passed) legislation that would allow statewide mobile betting on professional and collegiate sporting events. In both of those states, the legislation declared that any mobile bet received by an operator was deemed to have been made at the licensed casinos where the servers and other computer equipment accepting the bets were located, regardless of where the bettor was physically located when he or she initiated the wager over the Internet.

4. Treating Mobile Bets as Being Placed at the Casinos is Consistent with Basic Principles of Contract Law and is Widely Followed in the Gambling Context.

These examples reflect a basic principle of contract law that every law student learns during their first year of law school: that a contract is made and entered into at the location of its "acceptance." Here, that's when the casino accepts the bet and thus forms a binding contract at its physical location. New York's appellate courts have long recognized that wagers are deemed made where the wager is accepted and that "the location of the bettor at the time he places his bet is immaterial." In *Saratoga Harness Racing, Inc. v. City of Saratoga Springs*, the Appellate Division analogized the bet takers in this setting to the "famous betting parlors of London," noting that these British betting parlors receive calls from all over the world, but the betting is still said to take place in London.

Moreover, New York courts have described "the usual definition of the 'conduct' of a bet" as encompassing a wider series of actions than just simply the initiation of the wager. As explained by one Albany County court, the "[t]he regular acceptance of money to be wagered;

the transmission of such money to the place of betting, the placing of the bet and the collection of the proceeds all seem to fall within the usual definition of the 'conduct' of a bet."[2] In the context of remote casino betting, virtually all of those actions would occur at the licensed casino.

Consider also the example of pari-mutuel betting on horse racing, which – just like casino gambling – is one of the exceptions to the general prohibition against gambling in the state Constitution. In the context of telephone betting on horse racing, the regulations of the New York Gaming Commission make clear 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." In other words, the location at which the electronic wager is deemed to occur is the location at which the wager is *accepted*."[3]

Consistent with the approach followed in each of these examples, the Legislature would be acting entirely consistent with well-established contract and gaming law principles if it enacted legislation declaring that a mobile sports bet occurs "at" the casino that houses the sports wagering server. When a mobile sports bettor enters on her smartphone an offer to place a bet, her action represents 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, upon acceptance at the casino, the gambling contract forms, and the casino constitutes the place at which the sports wagering has actually occurred.

The proposed legislation adheres to these bedrock principles. Senate Bill 17 and Assembly Bill 6113 make clear that a mobile sports bet takes place at the licensed casino where the servers accepting the bets are located. Pursuant to Section 1367(b) of the proposed bill, "[a]ll sports wagers placed in accordance with this section are considered placed or otherwise made when received by the operator at the licensed gaming facility, regardless of the authorized sports bettor's physical location at the time the sports wager is initiated." As to electronic wagering, Section 1367(x) of the bill makes plain that "[a]ny wager through electronic communication shall be deemed to take place at the physical location of the server or other equipment used by an operator to accept mobile sports wagering, regardless of the authorized sport bettor's physical location within the state at the time the wager is initiated." Finally, the new proposed section on mobile sports wagering (at subsection (j) of Section 1367-a) reinforces that "[a]ll mobile sports wagering initiated in this state shall be deemed to take place at the licensed gaming facility where the server or other equipment used by an operator to accept mobile sports wagering is located, regardless of the authorized sports bettor's physical location within this state."

These provisions – which are similar to those successfully enacted in New Jersey and Rhode Island – comport with New York law and do not run afoul of the New York Constitution. In approving such a bill, the Legislature would simply be doing precisely what it is already permitted to do under Article I, Section 9 – that is, to "*authorize and prescribe*" how a constitutionally-permitted form of gambling will work. So just as the Legislature was able to modernize the state-operated lottery and pari-mutuel wagering on horse racing to take advantage

---

[2] *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).

[3] N.Y. Comp. Codes R. & Regs. ("NYCRR"), tit. 9, § 4400.1(i).

of new technological advancements, it can also modernize casino-based sports betting to include a mobile component where the bets are received at the constitutionally-approved casino facility.

The Legislature has already blazed the path forward for online and mobile betting as a method for offering constitutionally-authorized forms of gambling in New York. It now can follow the same blueprint for mobile sports betting that it previously implemented for pari-mutuel betting on horse racing. The New York Constitution does not stand in the way.

I appreciate the opportunity to appear here today and welcome any questions that you may have. Thank you again for the opportunity to share my perspectives and insights.