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The Constitutionality of Mobile Sports Wagering in New York State

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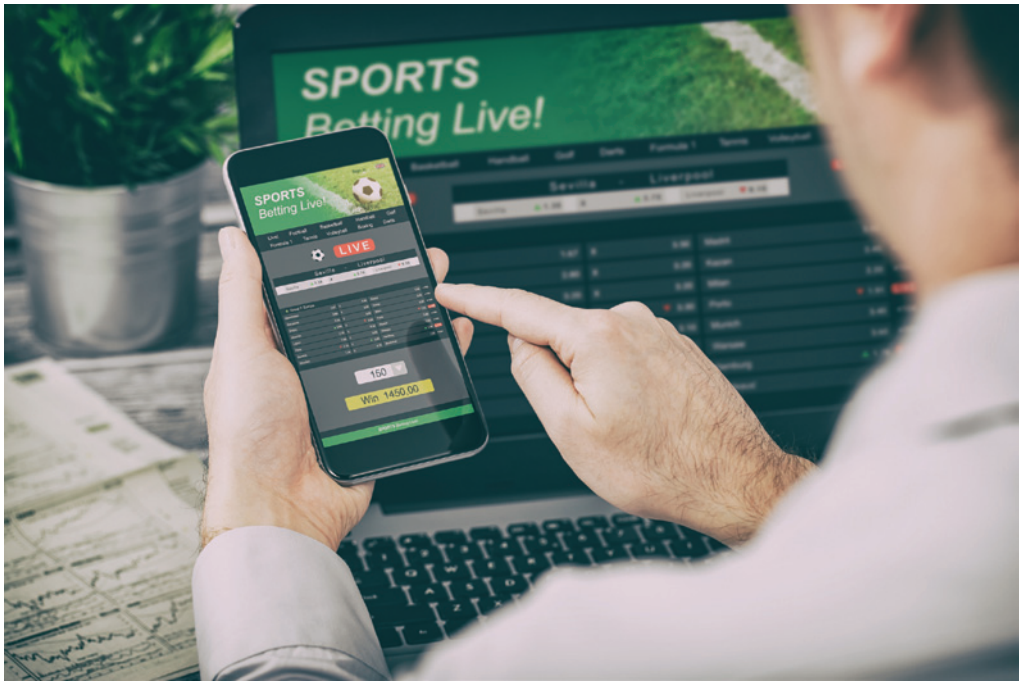

As the 2020 legislative session in New York state gets under way, one of the topics on the agenda is sure to be whether New York will for the first time allow New Yorkers to engage in mobile sports betting. In that context, some may ask whether the Legislature has the power to legalize mobile sports wagering, in light of the restrictions on gambling set forth in our state's Constitution. Ultimately, though, applying the normal methods of constitutional interpretation, we conclude that the state Constitution does not bar mobile sports wagering in New York state. The Legislature is free to authorize it here.

The constitutional question focuses on Article I, §9, which regulates gambling in New York state. In 2013, the Legislature passed an amendment to Article I, §9 (later ratified by the voters). 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 by adopting a statute that conditionally legalized "sports wagering" in New York state, *see* N.Y. Rac. Pari-Mut. Wag. & Breed. Law (PML) §1367. Because sports wagering was at that time forbidden by federal law, the Legislature conditioned the legalization of sports wagering on a change in federal law. PML §1367(2). Last year, in *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481 (S. Ct. 2018), the U.S. Supreme Court invalidated the relevant federal statute, effectuating that change in federal law. As a result, the New York state Legislature is now free to authorize sports betting in accordance with PML §1367.

While New York law now approves of sports wagering as a result of the change in federal law, it does not yet authorize *mobile* sports wagering, unlike the laws of an increasing number of states. The governing statute, PML §1367 provides that sports wagers may only be accepted "from

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persons *physically present*" "in a sports wagering lounge located at a casino." §1367(3)(b), (d) (emphasis added). Thus, under current law, sports betters in New York are permitted to place bets only in person at currently authorized casinos, even as other states, including New Jersey, have authorized online sports betting.

The question is whether the Constitution allows the Legislature to also authorize mobile sports gambling. Based on the text of Article I, §9, any exercise of the Legislature's authority to permit gambling—including mobile sports betting—must comply with two conditions: first, thing authorized must constitute "casino gambling" (a term not defined in the Constitution itself), and second, that casino gambling can only occur "at" one of the facilities "authorized and prescribed by the Legislature." Mobile sports wagering can meet both of these conditions.

First, it is clear that sports wagering falls under the term "casino gambling" and therefore may be authorized by the Legislature both as matter of the Constitution's text and original meaning. 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). Similarly, 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 … ." Wagering on sports, moreover, has long been recognized as a form of gambling under New York law. And if there were any doubt, the fact that the very Legislature that passed the Amendment *also* passed legislation authorizing (non-mobile) sports wagering confirms that Legislature and the voters understood that sports wagering fell within the contours of "casino gambling." See Upstate New York Gaming Economic Development Act of 2013, Assemb. B. 8101, 200th Leg. 1st Sess. (N.Y. 2013). The contemporaneous passage of the constitutional amendment authorizing casino gambling alongside enabling legislation conditionally authorizing sports betting makes clear that the drafters and voters of the constitutional amendment understood that the amendment's reference to "casino gambling" included sports wagering.

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Second, the Legislature can draft legislation that ensures that mobile sports wagering occurs "at" already-authorized "facilities" in New York state, as the Constitution requires. See N.Y. Const. art. I, §9 (permitting "casino gambling at no more than seven facilities as authorized and prescribed by the legislature"). If the Legislature authorized mobile sports gambling run out of authorized casinos, mobile sports wagering could comply with Article I §9. Specifically, the Legislature could determine that mobile sports wagering occurs not at the situs of the device that requests the placement of a wager—e.g., 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. The Constitution empowers the Legislature with vast authority in determining where casino gambling occurs. 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.

And in fact, defining mobile sports wagering as occurring at a server located "at" an authorized gambling facility is consistent with historical understandings of how gambling is consummated. Gambling has long been treated as a form of a completed contract involving at least two parties. See generally *Intercontinental Hotels (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 blackletter 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 is formed where accepted has held fast. See, e.g., *Kay v. Kay*, 2010 WL 2679897, at *3 (Sup. Ct. Nassau Cty. 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) (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").

Under this cardinal principle of contract law, it would surely be rational for the Legislature to determine that a mobile sports bet occurs "at" the casino that houses the sports wagering server. 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 that offer is received and accepted. That server at an authorized casino would receive that offer and accept it, consummating in that moment a wagering contract whose locus is at the physical location of the server. 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.

In fact, New York's legislation could look a lot like New Jersey's, whose gambling regime is governed by a constitutional provision similar to New York's. 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 could properly authorize casinos to receive offers of bets over the Internet if the servers receiving them are physically located "at" the casinos.

Legislation authorizing mobile sports wagering will be consistent with New York's Constitution so long as the sports wagers are deemed consummated at servers located "at" legislatively authorized casinos in this state.

In sum, legislation authorizing mobile sports wagering will be consistent with New York's Constitution so long as the sports wagers are deemed consummated at servers located "at" legislatively authorized casinos in this state. As the Legislature takes up this important issue, it should rest assured that the questions surrounding whether it should authorize mobile sports gambling are issues of policy, not constitutionality. Mobile sports wagering can be authorized in this state consistent with our Constitution.