STATE OF NEW YORK
COURT OF APPEALS

(Action No. 1)
JOSEPH DALTON, *et al.*,
Appellants-Respondents,
-against-
HON. GEORGE PATAKI, *et al.*,
Respondents-Appellants,
and
PARK PLACE ENTERTAINMENT,
Intervenor-Respondent.

(Action No. 2)
MRS. LEE KARR,
Appellant-Respondent,
against
HON. GEORGE PATAKI, *et al,*
Respondents-Appellants,
and
PARK PLACE ENTERTAINMENT,
Intervenor-Respondent.

REPLY BRIEF OF APPELLANTS-RESPONDENTS IN ACTION NO. 1

O'CONNELL AND ARONOWITZ
Attorneys for Appellants-Respondents in Action No. 1
54 State Street
Albany NY 12207-2501
(518) 462-5601

CORNELIUS D. MURRAY, ESQ.
JAMES A. SHANNON, ESQ.
Of Counsel

Dated: February 10, 2005

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Out-of-State Cases

Federal Constitution

State Constitution

Federal Statutes

Legislative History

State Statutes

Federal Regulations

State Regulations

Newspapers

Other

PRELIMINARY STATEMENT

This Reply Brief is respectfully submitted on behalf of the Plaintiffs in Action No. 1, Appellants-Respondents Joseph Dalton, *et al.*, and will respond to the arguments advanced by the Respondents-Appellants, the Governor and other State officials (the "State") who are the Defendants in Action No. 1. This Brief will also address and respond to the arguments of the Defendant-Intervenor, Park Place Entertainment ("Park Place"), as well as the various racetracks and racing-related interests who are themselves either Defendants or *amici* in this litigation and who have also submitted briefs with respect to this appeal.

Point I of this Brief will address first the issues related to the constitutionality of Indian-casino gaming (L. 2001, c. 383, Part B); Point II will address the constitutionality of video lottery terminals ("VLTs") at racetracks (Part C of Chapter 383); Point III, the constitutionality of the interstate lottery (Part D of Chapter 383); and finally, Point IV will address the constitutional adequacy of the Message of Necessity that accompanied the enactment of Chapter 383.

This Brief should also be read in conjunction with the first brief submitted to this Court on behalf of Plaintiffs dated October 1, 2004.

ARGUMENT

POINT I

Article I, § 9 of the N.Y. Constitution Prohibits the Legislature from Authorizing or Allowing the Type of Commercialized Gambling Permitted by Part B of Chapter 383 of the Laws of 2001

A. Introduction

The first major issue in this case is whether the Legislature can empower the Governor to enter into Compacts under the Federal Indian Gaming Regulatory Act ("IGRA") with Indian tribes allowing them to engage in so-called "Class III" commercialized gambling in New York State notwithstanding the prohibitions in Article I, § 9 of the N.Y. Constitution which specifically provides that no such gambling "shall hereafter be authorized or allowed within this State."

In their respective briefs, neither the State nor Park Place seriously contends that the type of commercialized gambling contemplated by Part B of Chapter 383 fits within the narrow exceptions carved out of the broad proscriptions against gambling embodied in Article I, § 9 of the Bill of Rights of the N.Y. Constitution. Nor do they dispute that Article I, § 9 expresses the will of the People – as distinguished from the Legislature and the Governor – that the Legislature and the Governor themselves are prohibited from "authorizing" or "allowing" such gambling "within this State." Indeed, Article I, § 9 commands the Legislature to pass laws "to prevent" commercialized gambling.

Nor do the State and Park Place dispute that both this Court and the Legislature have confirmed that this State's aversion to "commercialized" gambling is a strong, deeply-rooted, long-held public policy. ***Watts v. Malatesta***, 262 N.Y. 80, 82 (1933); ***International Hotels Corp. v. Golden***, 15 N.Y.2d 9, 15 (1964); General Municipal Law § 185. *See also* ***Saratoga County Chamber of Commerce v. Pataki***, 100 N.Y.2d 801, 826-831 (George Bundy Smith, J., concurring in part and dissenting in part).

Both the State and Park Place nevertheless argue, and the Appellate Division held, that the prohibitions embodied in Article I, § 9 are preempted by IGRA and, therefore, do not "… apply with the same force and effect on Indian lands as they do elsewhere within the State." ***Dalton v. Pataki***, 11 A.D.3d 62, 83 (3d Dep't 2004) ("***Dalton***").[1] Accordingly, the Appellate Division ruled that because some charitable Class III gaming is already allowed by New York State, albeit on a limited, highly regulated and rigidly enforced basis, the State could, under IGRA, enter into Compacts with Indian tribes allowing them to operate huge multi-million dollar commercialized Class III Las Vegas-style gambling casinos that remain open 24 hours / day, 7 days / week.

As will hereinafter be demonstrated, the decision by the Appellate Division and the arguments advanced by both the State and Park Place in support of that decision are fundamentally flawed.

---

[1] The Appellate Division's decision in this case was even more remarkable given its pronouncement in an earlier case challenging the validity of a Tribal-State Compact in which it opined that "the commercialized Las Vegas style gambling authorized by the Compact is the antithesis of the highly restricted and rigidly regulated forms of gambling permitted by the N.Y. Constitution …" ***Saratoga County Chamber of Commerce v. Pataki***, 293 A.D.2d 20, 24 (3d Dep't 2002), *aff'd* 100 N.Y.2d 801 (2003), *cert denied*, 540 U.S. 1017 (2003).

First, IGRA did not preempt Article I, § 9; instead, it incorporated the prohibitions of Article I, § 9 into Federal law with a proviso that the only way around them would be for a state like New York to subsequently and voluntarily enter into a Compact with Indian tribes, giving them the right to engage in Class III gambling. In a state like New York, however, that can only be done if the People - not the Governor or the Legislature - first amend the Constitution to delete the current prohibitions in Article I, § 9 explicitly forbidding the Legislature from hereafter allowing or authorizing such gambling. Under IGRA, New York State cannot give the power to a tribe that it does not itself possess. *See* Point I-B, *infra*.

Second, as a result of recent decisions by the U.S. Supreme Court on the subject of federalism, it is clear Congress cannot require a state to enter into such a Compact. It is also clear from both the statutory language and the legislative history that in enacting IGRA, Congress did not intend to force states to enter into a Compact but rather fully intended to give states the final "say" with respect to whether Indian tribes could engage in sophisticated, commercialized Class III gambling such as occurs in Las Vegas and in Atlantic City. Congress did so precisely because of the legitimate concerns states would have as to the effects of such big-time gambling on their public policy and their citizens. *See* Point I-C, *infra*.

The Appellate Division erroneously wrote an exception into Article I, § 9 that appears nowhere in its text. It concluded that state officials were free to ignore the prohibitions against allowing or authorizing commercialized gambling in their own Constitution because that Constitution somehow did not apply. The decision ignores the

fundamental fact that state officials are not employees of the Federal Government, and when they take actions pursuant to IGRA, they are acting as state officials within the confines of their own state's constitutions. IGRA did not create a constitutional vacuum in which New York State officials were empowered to act independently of their own Constitution. *See* Point I-D, *infra*.

The State, Park Place, and the Appellate Division, however, all erroneously rely on an outdated pre-IGRA decision by the U.S. Supreme Court in ***California v. Cabazon Band of Mission Indians***, 480 U.S. 202 (1987), which applied a civil-regulatory / criminal-prohibitory test that did not survive the enactment of IGRA. *See* Point I-E, *infra*.

Unfortunately, the Appellate Division, the State and Park Place also assumed that in the absence of a Tribal-State Compact, the U.S. Secretary of the Interior could unilaterally dictate the terms under which Indians could engage in Class III gaming. That incorrect determination was based upon a further misreading of IGRA and reliance on federal regulations that the Secretary of the Interior herself assured Congress she would not enforce because of serious questions to their constitutionality. Those issues were raised in a case presently pending in Federal District Court in Florida. Even assuming, however, that the Secretary of the Interior could issue such regulations, that has absolutely no bearing whatsoever on whether the Legislature can authorize Class III gaming when the State Constitution prohibits it. *See* Point I-F, *infra*.

Even assuming, *arguendo*, that Part B of Chapter 383 were otherwise legal insofar as it purports to authorize commercialized gambling on what is already Indian reservation land,

the same is simply not true with respect to lands in areas of the State, namely the Catskills, where there are currently no Indian reservations. Federal law itself provides that in such cases, the Governor of the State where gaming on newly-acquired Indian land is to occur must first agree that such gambling will not affect the "surrounding" communities. Given New York's public policy, as articulated in the Constitution, that commercialized gambling is to be prevented, there is no way our Governor can make a concurrence which defies that public policy. The rationale behind the constitutional prohibition was the negative effect commercialized gambling would have on the people of the State of New York. *See* Point I-G, *infra*.

Part B is also unconstitutional insofar as it seeks to give the Governor a veritable blank check to negotiate compacts with Indian tribes in the Catskills without appropriate guidance from the Legislature as to what the contents of those compacts should be. As a result, given the decision by this Court in ***Saratoga County Chamber of Commerce v. Pataki***, 100 N.Y.2d 801 (2003); *cert den.* 540 U.S. 1017 (2003), holding that the provisions of a tribal-state compact under IGRA involve policy choices that are the epitome of legislative - rather than executive - power, those provisions of Part B of Chapter 383 that purport to give the Governor unlimited power to negotiate compacts violate the separation of powers doctrine and constitute an unlawful delegation of power to the Governor. *See* Point I-H, *infra*.

While the advocates of Class III Indian gaming in New York State have other ways to accomplish their objective - namely, asking Congress to amend IGRA or asking the voters

of the State of New York to amend the Constitution - they have instead asked this Court to impart a clearly tortured interpretation to our State Constitution to enable them to do precisely what the Constitution emphatically forbids. *See* Point I-H, *infra*.

B. IGRA Makes the Prohibitions of Article I, § 9 Applicable to Class III Indian Gaming and the Only Way to Avoid Those Prohibitions Would Be For the State to Enter Into a Tribal-State Compact Which Would First Require a Constitutional Amendment; Congress, Moreover, Cannot Force the State to Amend Its Constitution or Agree To a Compact in the Absence of Such An Amendment

Both the State and Park Place argue, and the Appellate Division held that, in effect, the will of the People, as expressed in our Constitution's Bill of Rights, can be thwarted and its prohibitions against commercialized gambling circumvented by IGRA, which they say preempts Article I, § 9. Their superficial analysis, however, misreads IGRA, grossly overstates the preemption doctrine, and reflects a fundamental misunderstanding of the positions states occupy as dual and co-equal sovereigns with the Federal government under our Nation's Constitutional blueprint. *See generally*, ***Printz v. United States***, 541 U.S. 848, 935 (1997).

As Plaintiffs have readily acknowledged from the outset of this litigation, Congress could pass laws pursuant to the power vested in it by Article I, § 8, cl. 3 of the U.S. Constitution, the so-called "Indian Commerce Clause," giving Indians the unqualified and unrestricted right to engage in Class III commercialized gambling on Indian lands in New York and the State would be powerless to prevent it, notwithstanding the provisions of Article I, § 9 of our State Constitution.

It was not New York State, however, that prohibited Indian tribes from engaging in such gaming. Congress did. Subsection (a) of § 23 of IGRA, codified at 18 U.S.C. § 1166(a), provides as follows:

> Subject to subsection (c), ***all State laws pertaining to the licensing, regulation or prohibition of gambling, including but not limited to criminal sanctions applicable thereto***, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State (emphasis supplied).

Subsection (b) of § 23 of IGRA, codified at 18 U.S.C. § 1166(b), further provides as follows:

> Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, ***which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State*** in which the act or omission occurred, under the laws governing the licensing, regulation or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to like punishment (emphasis supplied).

The U.S. Second Circuit Court of Appeals has already ruled that under these provisions, "gambling activity that violates … state laws is punishable, even though it may not violate Federal law." ***United States v. Cook***, 922 F.2d 1026, 1035 (2d Cir. 1991); *cert den sub nom.*, ***Tarbell v. United States***, 500 U.S. 941 (1991).

Contrary, therefore, to what the Appellate Division held, Article I, § 9 of the New York Constitution, prohibiting commercialized Class III gaming and directing the Legislature to pass laws preventing it, was incorporated, rather than preempted, by the

foregoing provisions of IGRA, which apply to Class III gaming by Indian tribes. The term "all" in subsection (a) of § 23 means what it says. Article I, § 9 is a state law; indeed a state law of the highest kind since it is embodied in the Constitution itself.

To be sure, subsection (c) of § 23 of IGRA, 25 U.S.C. § 1166(c)(2), provides that the prohibitions in State law would no longer apply to Indian gaming if a state and tribe were to subsequently enter into a Tribal-State Compact, which the Appellate Division relied upon to conclude that Article I, § 9 would not apply if the State thereafter entered into a Compact. ***Dalton***, *supra* at 71. Once, however, Article I, § 9 of the N.Y. Constitution became applicable by virtue of subsections (a) and (b), in order for the State to thereafter enter a Compact, the Constitution would first have to be amended. In the meantime, IGRA provides that Class III gaming by Indian tribes would be strictly illegal; stating:

> … Class III gaming activity shall be lawful on Indian land ***only*** if such activities are … conducted in conformance with a Tribal-State Compact entered into by the Indian tribe and the State (emphasis supplied).

25 U.S.C. § 2710(d)(1)(C).

Congress made it clear, moreover, that states are not obligated to enter into such Compacts and the courts interpreting IGRA, including the Appellate Division in this case, have uniformly agreed. ***Dalton***, 11 A.D.3d at 84. *See also* 25 U.S.C. § 2710(d)(3)(B), providing that a "… State … ***may*** enter into a Tribal-State Compact" (emphasis supplied). *See also* ***Ponca Tribe of Oklahoma v. State of Oklahoma***, 37 F.3d 1422, 1432-1435, *rev'd on other grounds*, 517 U.S. 1129 (1996); ***Yavapai-Prescott Indian Tribe v. State of Arizona***,

796 F.Supp. 1292, 1297 (1992). Both the State and Park Place concede this point. *See* State's Brief at 51; Park Place Brief at 49.

Indeed, the legislative history makes it unequivocally clear that states are under no obligation to enter into such Compacts:

> … States are not required to forgo any state governmental rights to engage in or regulate Class III gaming except whatever they may ***voluntarily cede*** to a tribe under a Compact. (emphasis supplied).

1988 U.S.C.C.A.N. 3071 [R. 331].[2]

The legislative history just quoted is crucial to understanding IGRA and to the outcome of this case. It makes clear that Indian tribes can engage in Class III gaming only if the State gives them that right. A state may not, however, cede a power which it does not have. Since, by virtue of IGRA itself, Article I, § 9 of the New York Constitution applies to prevent Class III Indian gaming in the absence of a Tribal-State Compact, the central issue in this case is whether Article I, § 9 also prevents the State from entering into such a Compact. Once put in play by IGRA, Article I, § 9 simply cannot thereafter be ignored. This Court has already ruled, moreover, that the question of how a State can enter into a Compact under IGRA is determined by state, not Federal law.[3] ***Saratoga County Chamber of Commerce v. Pataki***, 100 N.Y.2d 801, 822 (2003), *cert denied* 540 U.S. 1017, 124 S.Ct. 570 (2003)

---

[2] References to numbers in parentheses preceded by an "R." refer to the numbered pages of the Record on Appeal.

[3] The Federal agency charged with enforcing IGRA, the U.S. Department of the Interior, also agrees that State rather than Federal law determines whether a State can validly enter into a Compact under IGRA and that such issues should be left to a state's own judiciary. *See* letter dated April 25, 1998 from Assistant Secretary of the Interior for Indian Affairs, addressed to Hon. Pete Wilson, Governor of California [R. 1380-1381].

("***Saratoga***"), *citing* ***Pueblo of Santa Ana v. Kelly***, 104 F.3d 1546, 1557 (10th Cir. 1997), *cert denied* 522 U.S. 807 (1997). *See also*, ***State ex rel. Clark v. Johnson***, 120 N.M. 562; 904 P.2d 11 (1995); ***State ex rel. Stephan v. Finney***, 251 Kan. 559; 836 P.2d 1169 (1992); ***Narragansett Indian Tribe of Rhode Island v. Rhode Island***, 667 A.2d 280 (R.I. 1995). This Court has further ruled in ***Saratoga*** that the State could not enter into a Tribal-State Compact under IGRA in the absence of legislation authorizing the Governor to do so. *Id.* at 824. This Court left open, however, the question of whether Article I, § 9 would also prevent the Legislature from enacting such a law. *Id.* at 825. That issue, however, is squarely presented in this case.

Given the specific, unequivocal wording of Article I, § 9 of the New York Constitution, it is clear that such gaming cannot be authorized by the Legislature unless the Constitution is amended. Article I, § 9 states:

> … no lottery … ***or any other kind of gambling … shall hereafter be authorized or allowed within this State***, and the legislature shall pass laws to prevent offenses against the provisions of this section (emphasis supplied).

IGRA did not preempt Article I, § 9 of the N.Y. Constitution rendering it inapplicable to Class III Indian gaming. It did precisely the opposite. As soon as IGRA was adopted, Article I, § 9 of the N.Y. Constitution applied to prohibit Indian gaming in New York State. 18 U.S.C. § 1166(a), (b). Rather, therefore, than being released by IGRA from the prohibitions of Article I, § 9 of the Constitution, Indian tribes, the Governor and the Legislature all became instantaneously bound by it. In order to avoid those prohibitions

under subsection (c) of § 1166, the State would have to subsequently enter into a Tribal-State Compact to permit such gaming. 18 U.S.C. § 1166(c)(2); 25 U.S.C. § 2710(d)(1)(C). As previously stated, however, in order for that to happen, the People would first have to amend Article I, § 9, to permit such gaming. The Legislature could not do so unilaterally by enacting Part B of Chapter 383 of the Laws of 2001. *See* N.Y. Const. Article XIX.

Nothing in IGRA gives the New York State Legislature the power to suspend, defy, or ignore the provisions of its own Constitution. Federal preemption and the Supremacy Clause of the U.S. Constitution on which it is based can only go so far. They are a check on state power, not a source of it. Preemption renders inapplicable state laws that are inconsistent with the operation of federal laws legitimately enacted by Congress. Rather than invalidating state laws, however, IGRA actually expanded them to apply to Indians. *See* 18 U.S.C. § 1166. Congress did not and could not, however, impose an affirmative obligation on states to enact laws to carry out federal policy, by, for example, requiring them to enter into a Tribal-State Compact under IGRA. Otherwise, the preemption doctrine would upset the carefully-crafted division of powers between the states and the Federal Government implicit in the original U.S. Constitution and later clarified by the 10th Amendment. ***New York v. United States***, 505 U.S. 144 (1992); ***Printz v. United States***, 521 U.S. 848, 918-919 (1997).

By enacting IGRA, Congress could not give State elected officials powers they are prohibited from exercising by the People of the State who voted them into office. ***New York v. United States***, *supra* at 182. Yet at page 41 of its Brief, Park Place, ignoring the

"voluntary cession" language in IGRA's legislative history, *supra* at 10, advances the aggressive proposition that IGRA preemption extends so far that New York State officials "must" negotiate a compact with Indian tribes to allow the very type of gambling within New York State that violates the State Constitution's Bill of Rights. *See* Park Place's Brief at 45, 54. That Bill of Rights, however, was adopted by the People to protect New York's citizens from the evils associated with such gambling. Article I, § 9 takes away from the State the power to allow commercialized gambling. It warrants repeating that New York State simply cannot cede what it does not have. ***Hotel Employees and Restaurant Employees International Union v. Wilson***, 981 P.2d 990, 1008 (Cal. 1999) (California could not enter into a Tribal-State Compact under IGRA to authorize gaming prohibited under its own Constitution).

Park Place's argument that a State must, via a Tribal-State Compact, affirmatively place its imprimatur on an activity repugnant to its own Constitution and the will of its People will certainly come as surprising news to the U.S. Supreme Court. ***New York v. United States***, *supra*, instructs that if Congress wants to require something, it must legislate directly rather than "commandeering" state officials to authorize it in defiance of the will of the electorate to whom they are accountable. *Id*. at 168-169; ***Printz v. United States***, 521 U.S. at 920. Under IGRA, Congress gave states the ***option*** to enter into compacts. By no means did it or could it ***require*** state officials to enter into such compacts, particularly if their own Constitutions forbids them from doing so. "No matter how powerful the Federal

interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." ***New York***, *supra* at 178.

The State's and Park Place's selective allusions to parts of IGRA's legislative history regarding its preemptive effect, therefore, must not be read out of context. The wording of IGRA itself, its legislative history, and case law all make it unequivocally clear that:

- State laws prohibiting Class III gambling apply to Indian tribes in the absence of a Tribal-State Compact. 18 U.S.C. § 1166;
- Indian casino gambling is, therefore, illegal in the absence of a Tribal-State Compact. 25 U.S.C. § 2710(d)(1)(C); 1988 U.S.C.C.A.N. 3076 [R. 323]; 18 U.S.C. § 1166;
- States may, but are not required, to enter into such Compacts. 25 U.S.C. § 2710(d)(3)(B); 1988 U.S.C.C.A.N. 3083 [R. 330]. *See also* ***Ponca Tribe of Oklahoma v. Oklahoma***, 37 F.3d 1422 (10th Cir. 1994); *vacated and remanded on another issue*, 517 U.S. 1129 (1996); ***Cheyenne River Sioux Tribe v. South Dakota***, 3 F.3d 273, 281 (8th Cir. 1993); ***Yavapai-Prescott Indian Tribe v. Arizona***, 796 F.Supp. 1292 (D. Ariz. 1992); and
- Such a Compact may not be entered into by New York State without an amendment to Article I, § 9 of the N.Y. Constitution.

If, as both the State and Park Place have reluctantly conceded, and as the Appellate Division has already found, "IGRA does not force a state to execute a particular compact" (11 A.D.3d at 84-85), then it follows as well that Congress cannot force a state to negotiate a

compact. Otherwise, the 10th Amendment would be violated by virtue of the same anti-commandeering principles the U.S. Supreme Court enunciated in ***New York v. United States***, *supra*, and ***Printz v. United States***, *supra*, both of which were decided by the U.S. Supreme Court ***after*** the U.S. Second Circuit Court of Appeals decision in ***Mashantucket Pequot Tribe v. Connecticut***, 913 F.2d 824 (2d Cir. 1991), *cert denied* 499 U.S. 975 (1991) ("***Mashantucket***"), so heavily relied upon by both the State and Park Place.

Indeed, the State itself is on record before no less an authority than the U.S. Supreme Court that IGRA cannot be read as requiring a State to "negotiate" a Compact under IGRA. It took that position, post-***Mashantucket***, in 1996, when the Supreme Court dismissed a suit brought by the Seminole Indian Tribe against the State of Florida for failure to negotiate in good faith with respect to a Tribal-State Compact under IGRA. The Court ruled that IGRA could not deprive a state of its sovereign immunity from such suits under the 11th Amendment to the U.S. Constitution (***Seminole Tribe of Florida v. State of Florida***, 517 U.S. 44 [1996]). In that case, 29 State Attorneys General across the nation, including the New York Attorney General Dennis Vacco, at a time when Governor Pataki was Governor, filed an *amicus curiae* brief with the Supreme Court in which they all vehemently argued that Congress could not, via IGRA, compel a State to negotiate a Compact, citing the 10th Amendment to the U.S. Constitution. A copy of that *amicus* brief is attached hereto as Appendix "A".

In ***Seminole Tribe***, *supra*, the U.S. Supreme Court never reached the 10th Amendment issue, having ruled in favor of the State of Florida on 11th Amendment

sovereign immunity grounds. Contrary, however, to what both the State and Park Place may imply at pages 51 and 60, respectively, of their briefs, the U.S. Supreme Court has never held that IGRA could compel a State to negotiate a compact. Indeed, the Court specifically refused to address the 10th Amendment issue because of the parties' failure to raise it in the lower courts. ***Seminole Tribe***, *supra* at 61 n 8. The Supreme Court's pronouncements in other cases like ***New York v. United States***, *supra*, and ***Printz v. United States***, *supra*, however, clearly indicate that, ***Mashantucket*** (decided in 1990 prior to both ***New York*** and ***Printz***) and other cases to the contrary notwithstanding, IGRA may not be read as imposing an obligation on states to "negotiate" a compact.

Park Place nevertheless contends that "under IGRA, so long as the State 'permits [casino-style] gaming for *any* purpose by *any* person, organization or entity, it ***shall*** negotiate a compact to permit Indian tribes to conduct such gaming." Park Place Brief at 38. Obviously carried away by what it mistakenly perceives as the strength of its own case, Park Place then issues the following implicit challenge: "… *Appellants cite no case – and we are aware of none – where any court anywhere has ever banned Indian tribes from conducting types of gambling that a State permits any other person to conduct for any purpose*" (emphasis in original). Park Place Brief at 56-57. *See also* State's Brief at 47 (citing ***Mashantucket*** for the proposition that a State "must" negotiate a Compact).

Plaintiffs accept that challenge. One need look no further than ***Hotel Employees and Restaurant Employees International Union v. Wilson***, 981 P.2d 990 (Cal. 1999) ("***Hotel Employees***"), where a proposition appeared on the California ballot containing a model

tribal-state compact under IGRA that would authorize various forms of gaming in tribal casinos. California's Supreme Court found the proposition unconstitutional on the grounds that Article IV, § 19(e) of the California Constitution provided that the "Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey."

The Court specifically ***rejected*** the following argument advanced by proponents of the ballot proposition:

> … under IGRA, states may not regulate the manner in which Class III games are played or, indeed, impose any regulation except to prohibit specific games, by any means other than a Tribal-State Compact. *Because Section 19(e) is not a prohibition on particular gaming activities, but on conducting them in a Nevada or New Jersey-style casino … IGRA preempts its application to tribal gaming* (emphasis supplied).

Hotel Employees, *supra* at 1008.[4]

In ***rejecting*** that specific argument, the Court, citing § 23 of IGRA, 18 U.S.C. § 1166(a), noted that federal law incorporated all state laws prohibiting gambling and made them applicable to Indian lands. It acknowledged, as well, that subsection (c) of § 1166 could remove the ban imposed by State law, but only if a State entered into a Compact valid under state law. The Court went on to note that "valid" under State law meant one executed

[4] *See also*, ***Cheyenne River Sioux Tribe v. South Dakota***, 3 F.3d 273 (8th Cir. 1993), where an Indian tribe sued South Dakota, arguing that IGRA required that state to negotiate with respect to traditional keno because it allowed video keno. The Eighth Circuit rejected that argument, noting that 25 U.S.C. § 2710(d)(1)(B), relied upon by the Tribe, could not be read so broadly as to require a State to permit all forms of a game just because it permitted one form. ***Cheyenne River Sioux***, *supra* at 279.

in conformance with that State's Constitution, *citing* ***Pueblo of Santa Ana v. Kelly***, 104 F.3d 1546, 1555 (10th Cir. 1997); ***Kickapoo Tribe of Indians v. Babbitt***, 827 F.Supp. 37, 44-46 (D.D.C. 1993), *reversed on other grounds sub nom.* ***Kickapoo Tribe of Indians in Kansas v. Babbitt***, 43 F.3d 1491 (D.C. Cir. 1995). *See also*, ***State ex rel. Clark v. Johnson***, 120 N.M. 562, 904 P.2d 11 (1995); ***State ex rel. Stephan v. Finney***, 251 Kan. 559, 836 P.2d 1169 (1992); ***Narragansett Indian Tribe of Rhode Island v. Rhode Island***, 667 A.2d 280 (R.I. 1995). This meant, of course, that the ballot initiative proposing a tribal-state compact allowing gambling in California was invalid because that state's constitution prohibited such casinos. ***Hotel Employees***, *supra* at 1008.

Indeed, in ***Seminole Tribe***, *supra*, the U.S. Supreme Court itself noted that IGRA "provides that an Indian tribe may conduct certain gaming activities only in conformance with a ***valid*** compact between the tribe and the state" (emphasis supplied). 517 U.S. at 47.

It is indisputable, therefore, that contrary to both the State's and Park Place's briefs, an ample body of case law exists that Indian Class III gaming cannot be authorized in violation of a State's Constitution. This is true even if such gambling might otherwise be permissible in some other form within that state. ***Hotel Employees***, *supra* at 1008.

Just as was the case with California in ***Hotel Employees***, New York State cannot enact a law authorizing the Governor to enter into a Tribal-State Compact permitting Class III commercialized gambling because its Constitution forbids it.

C. In Enacting IGRA, Congress Gave Each State the Power to Decide Whether to Allow Class III Indian Gaming Within Its Borders Precisely Because of the Effect Such Gaming Might Have On the State

While both Park Place and the State made much of the argument that it is not right for the State of New York to tell the Indians what they can and cannot do, it was Congress that did so in enacting IGRA by purposely making State prohibitions against Class III gaming applicable to tribes unless a State voluntarily agreed to enter into a Tribal-State Compact. 18 U.S.C. § 1166; 25 U.S.C. § 2710(d)(1)(C); 1988 U.S.C.C.A.N. 3083 [R. 330].

This is significant in understanding IGRA because Congress gave states no direct role to play with respect to either Class I or Class II Indian gaming under IGRA. 1988 U.S.C.C.A.N. 3077 [R. 323]; 25 U.S.C. §§ 2710(a); 2710(b). When, however, it came to Class III involving high-stakes sophisticated forms of gambling typically found in venues like Las Vegas and Atlantic City, Congress recognized that fundamental state interests were implicated. Indian gaming is not just about Indian self-governance; it is obvious that the vast majority of individuals who will patronize the casinos that the tribes seek to operate in New York will be non-Indians, and a substantial – if not a clear majority – of those patrons will be New York citizens. *See* National Governors Association Policy Paper EDC-6 on Indian Gaming ("Gambling activities conducted under IGRA … are designed to attract non-tribal patrons. The effect of Indian gaming activities are felt far beyond the geographical boundaries of the reservations") [R. 1366]. Congress understood that a state like New York would surely be affected if its citizens were to wager their earnings in commercialized gambling casinos located within its borders and operated 24 hours per day by Indian tribes.

That is the very reason for the "voluntary cession" language that appears in the legislative history. 1988 U.S.C.C.A.N. 3071, *supra* at 10.

Indeed, that history recognizes that Class III Indian casinos implicate a number of state interests:

> A state's governmental interest with respect to Class III gaming on Indian lands includes the interplay of such gaming with the State's public policy, safety, laws and other interests as well … 1998 U.S.C.C.A.N. 3083 [R. 330].

The problem for those advocating Class III Indian gaming in New York State, therefore, is not with the New York State Constitution; but rather with Congress and the manner in which it drafted IGRA. Instead of asking Congress to amend IGRA, Park Place and the State turn to this Court, urging it to ignore a clear and unequivocal prohibition in our State Constitution that prevents our State from entering into such Compacts. It is not the function of the Judiciary, however, to amend the Constitution anymore than it is the Governor's or the Legislature's. That power rests exclusively with the People of the State. *See* N.Y. Const., Art. XIX. *See also* ***Hotel Employees and Restaurant Employees International Union v. Wilson***, 981 P.2d 990 (Cal. 1999).

While Congress gave New York the option of allowing Class III Indian gaming, that prerogative can only be exercised by the People should they decide to amend Article I, § 9.

D. IGRA Did Not Create a Vacuum in Which the Governor and Legislators, Who Are State Officials, Can Act Independently of This State's Constitution

Contrary to the urgings of both Park Place and the State, the Appellate Division could not, by waving its judicial magic wand, make Article I, § 9 perform some kind of disappearing act - "Now you see it, now you don't!" - on the theory that Congress can empower state officials to act in defiance of their own Constitution (11 A.D.3d at 83). The Appellate Division, by judicial fiat, wrote an exception into Article I, § 9 that appears nowhere in its text. It mistakenly concluded that IGRA preempted rather than incorporated Article I, § 9 of the N.Y. Constitution insofar as it pertains to Class III gaming by Indian tribes. *See* Point I-B, *supra*. Article I, § 9 applies, however, as indeed the rest of our Constitution applies, whenever state officials have the power to act, because such officials derive their power from no other source but the State Constitution. State officials are not deputies of the Federal Government. ***Printz v. United States***, *supra*. *See* ***Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States***, 367 F.3d 650, 661 (2004); *cert denied*, _____ U.S. _____, 2005 U.S. LEXIS 470 (2005) ("***Lac Courte Oreilles***"). *See also,* ***Confederated Tribes of Siletz Indians of Oregon v. United States***, 110 F.3d 688, 697 (9th Cir. 1997). In ***Lac Courte Oreilles***, the Court held that under IGRA, Wisconsin's governor could not "act outside of the strictures of the gaming policy that Wisconsin already established through … the Wisconsin Constitution." 367 F.3d at 664. The Supreme Court reminds us that state officials are not functionaries of the Federal Government. "The positions occupied by state officials appear nowhere on the Federal

Government's most detailed organizational chart." ***New York v. United States***, 505 U.S. at 188.

While it is clear, therefore, that Congress cannot tell state officials what laws they must enact, the State and Park Place would have the Governor and the Legislature act in a Constitutional vacuum, unrestrained and unchecked by our own State Constitution as well. If the Appellate Division were correct that the Governor and the Legislature are not subject to the State Constitution, and if, as the U.S. Supreme Court has told us, they are not federal officials, then they would function in some "no man's land" where they would have to answer to no one but themselves. The Appellate Division's remarkable decision that a portion of the State Constitution's Bill of Rights does not apply when Congress gives the State authority to deal with Indians leaves open the question as to what other provisions of the Bill of Rights State officials are free to ignore when Congress delegates powers to the States to deal with Indian tribes. In their Briefs, neither the State nor Park Place offers any answers.

The State's position is fatally flawed. While conceding that IGRA does not and cannot force the State to enter into a Compact but rather gives the State a choice, it argues, in effect, that such choice need not be exercised by the Executive and the Legislature in conformity with the will of People and that they can disregard the Constitution's requirement that no commercial gambling "shall hereafter be authorized or allowed within this State." No branch of Government, however, is free to ignore that mandate.

E. The *Cabazon* Civil-Regulatory / Criminal-Prohibitory Test Does Not Apply to Class III Indian Gaming

Both Park Place and the State contend that if this State were to invoke the Constitutional prohibitions of Article I, § 9 banning commercialized gambling as a defense to an Indian tribe's demand to negotiate a compact, there is a line of cases which hold that a tribe might then successfully sue the State in Federal Court for failure to negotiate in good faith.[5] They reason that although Article I, § 9 prohibits "commercialized" gambling, our Constitution contains exceptions that permit charitable gaming, and IGRA provides that if a State permits Class III gaming by any person, for any purpose, then it "must" allow Indians to engage in such gaming regardless of whether or not such gaming is commercialized. 25 U.S.C. § 2710(d)(1)(B). They rely primarily on an outdated decision, ***Mashantucket***, *supra*,[6] but cite other cases as well for the proposition that not even a State Constitutional ban against commercialized gambling provides a good-faith defense to a demand to negotiate if the State allows the same type of gaming for charitable purposes. *See* ***United States v. Sisseton-Wahpeton Sioux Tribe***, 897 F.2d 358 (8th Cir. 1990) ("***Sisseton-Wahpeton***").

In support of their position, the State and Park Place as well as the Second and Eighth Circuits in ***Mashantucket*** and ***Sisseton-Wahpeton***, respectively, relied heavily on the civil-regulatory / criminal-prohibitory test applied by the U.S. Supreme Court in ***California v.***

---

[5] After ***Seminole Tribe of Florida v. Florida***, 518 U.S. 44 (1996), however, no federal court would even have subject matter jurisdiction absent a waiver of sovereign immunity by the State. New York State can only waive its immunity by ***express*** constitutional or legislative enactment. ***Psaty v. Duryea***, 306 N.Y. 413 (1954); ***Cass v. State***, 88 A.D.2d 305 (3d Dep't 1982).

[6] The decision by the Second Circuit is not binding on this Court. *See* ***People v. Kin Kan***, 78 N.Y.2d 54, 59-60 (1991). This is especially true in light of subsequent decisions by the U.S. Supreme Court.

Cabazon Band of Mission Indians, 480 U.S. 202 (1987) ("***Cabazon***"), which they say survived the subsequent enactment of IGRA and continues to apply to both Class II and Class III gaming. They contend that since New York State allows non-Indians to engage in Class III gambling for charitable purposes, its public policy is civil-regulatory rather than criminal-prohibitory, notwithstanding its Constitutional proscriptions and criminal statutes outlawing commercialized gambling. Therefore, they contend, New York must allow Indians to engage in commercialized Class III gaming under ***Cabazon***, as later codified by IGRA.

The Senate Report that accompanied IGRA's adoption, however, discusses ***Cabazon*** only in the context of Class II gaming but does not mention it with respect to Class III. 1988 U.S.C.C.A.N. 3076 [R. 323]. This was no accidental oversight as the State and Park Place suggest. *See* State's Brief at 39; Park Place's Brief at 44. The Appellate Division made the same erroneous assumption in this very case (11 A.D.3d 73) as did the Second Circuit in ***Mashantucket***, 913 F.2d at 1030. A careful reading of both the statute and the legislative history reveal, however, that Congress had no intention of applying the civil-regulatory / criminal-prohibitory test with respect to Class III gaming as distinguished from Class II gaming. The Senate Report relating the historical background leading to IGRA's enactment noted that in arriving at the civil-regulatory / criminal-prohibitory test in ***Cabazon***, the U.S. Supreme Court:

> … using a balancing test between Federal, State, and tribal interests, found that tribes, in States that otherwise allow gaming, have a right to conduct gaming activities on Indian

> lands ***unhindered by State regulation*** (emphasis supplied). *Id.* at 3072 [R. 319].

Later, the same Senate Report, specifically discussing how courts should interpret IGRA with respect to Class III gaming, rejected the balancing test applied by the Supreme Court in ***Cabazon***, stating:

> Federal courts should ***not*** balance competing Federal, State and Tribal interests to determine the extent to which various gaming activities are allowed (emphasis supplied). *Id.* at 3071 [R. 323].

The language of IGRA itself definitely does not differentiate between civil regulation and criminal prohibitions insofar as Class III gaming is concerned. On the contrary, it unequivocally makes both the civil and criminal laws of a state applicable to Indian gaming. Subdivisions (a) and (b) of § 23 of IGRA, codified at 18 U.S.C. § 1166(a) and (b), could not be more emphatic. They provide as follows:

> (a) Subject to subsection (c), for purposes of Federal law, ***all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto,*** shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State (emphasis added).
>
> (b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, ***under the laws governing the licensing, regulation, or prohibition of gambling*** in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment

(emphasis supplied).

"All" means all. The only way Class III Indian gaming would be exempted from the above provisions is if a State were to enter into a Compact with a Tribe to permit such gaming. *See* 18 U.S.C. § 1166(c)(2); 25 U.S.C. § 2710(d)(1)(C).[7]

The State and Park Place, as well as the Second Circuit in ***Mashantucket***, however, placed great emphasis on the nearly identical language in IGRA with respect to permitting Class II gaming (25 U.S.C. § 2710[b][1][A]) and Class III gaming (25 U.S.C. § 2710[d][1][B]). They have missed the point. Tribes may engage in any Class II gambling that a State otherwise permits regardless of what the State has to say. With regard to Class III, tribes may also engage in any such gambling otherwise permitted by the State, provided, however, that the State must also agree via a Compact.

The fundamental flaw in the analysis of IGRA by the State, Park Place, the Appellate Division, and the obsolete holding by the Second Circuit in ***Mashantucket*** is the failure to recognize that § 2710(d)(1) contains three separate, distinct, cumulative prerequisites for Class III gambling by Indian tribes: (A) there must be a valid tribal ordinance, (B) such gambling must otherwise be permitted in some form in the State if it is to be conducted by a tribe; ***and*** (C) a Tribal-State Compact must be in effect. The satisfaction of the first two prerequisites does not mandate the third. Otherwise, subparagraph (C) of § 2710(d)(1)

[7] That, however, only begs the question of whether a State can ignore its own Constitutional ban on such gaming made applicable by virtue of those very same sections of IGRA. It may not. *See* Point I-B, *supra*. *See also* ***Hotel Employees***, *supra* at 1008.

would be superfluous.[8] Unlike Class II gaming, therefore, the State must also enter into a Compact before there can be Class III Indian gaming, even if the State otherwise permits such gaming in some form by others within the State. Respondents' oversimplified logistical syllogism fails. It is not if A and B, then C. Rather, it is if A and B ***and*** C, then, and only then, can there by Class III Indian gaming. This is precisely the same error that the Appellate Division made, as well. ***Dalton***, *supra* at 71. The Respondents fail to recognize that the added requirement of a Compact was deliberately inserted to ensure that States would be able to protect their interests before they decided there should be Class III Indian gaming within their borders. *See* Point I-C, *supra* at 20.

There is, of course, a very good reason why a state might not be able to enter into such a Compact – namely its unconstitutionality under that state's law. ***Hotel Employees***, *supra*; ***Lac Courte Orielles***, *supra*. Even assuming a tribe would then sue a State in federal court under IGRA (*See* 25 U.S.C. § 2710[d][3]), and even assuming the State were to waive its sovereign immunity under ***Seminole Tribe,*** *supra*,[9] it is clear from the decisions by the U.S. Supreme Court that a state may not be forced to negotiate a Compact to permit Class III commercialized gambling just because it allows Class III charitable gambling. ***New York v. United States***, *supra*; ***Printz v. United States***, *supra*.

---

[8] Even assuming, *arguendo*, that the ***Cabazon*** civil-regulatory / criminal-prohibitory test had some residual application to Class III gaming, it would apply only as a limit on what types of games might be allowed under subparagraph (B) of § 2710(d)(1). It would not, however, mean that a State would have to agree to such games unless it also voluntarily entered into a Compact which, for reasons stated earlier, New York State may not do. *See* Point I-B, *supra*.

[9] *See* note 5, *supra* at 23.

A great deal has changed since the Second Circuit handed down its decision in ***Mashantucket*** in 1990 that the State and Park Place rely upon so heavily. *See, e.g.*, ***Seminole Tribe***; ***New York v. United States***; and ***Printz v. United States***. Like the proverbial ostrich with its head in the sand, however, they prefer to remain comfortably trapped in their own time warp, oblivious of the important developments in federalism jurisprudence that have unfolded over the past 15 years.

There is, moreover, a significant difference between charitable and commercial gambling. Charitable gaming in New York State is highly restricted and rigidly regulated as to the amount that can be bet, the times it can occur, and local communities have a veto over its operation. *See generally*, New York Const., Article I, § 9; General Municipal Law, Article 9-A; 9 N.Y.C.R.R. Part 5600. *See also* ***Saratoga County Chamber of Commerce v. Pataki***, 293 A.D.2d 20, 24 (3d Dep't 2002). In contrast, the casino that the Seneca Nation of Indians has already opened in Niagara Falls operates without any local municipal approvals 24 hours a day, 7 days a week, with free "round the clock" drinks for gamblers. Michelmore, B., *Seneca Niagara Casino: Wait Is Over: Let the Gaming Begin*, Buffalo *Evening News*, December 31, 2002. Green, R., *Niagara Falls Prepares for Casino Opening*, Hartford *Courant*, December 7, 2002. It is, therefore, a gross oversimplification to equate commercial and charitable gambling or to suggest that New York's public policy, as expressed by the People in the Constitution, is not violated when commercialized – as distinguished from charitable – gambling is undertaken pursuant to Chapter 383 of the Laws of 2001 on a scale never contemplated by Article I, § 9 of the Constitution.

F. The U.S. Secretary of the Interior Does Not Have the Power to Unilaterally Permit Class III Gaming by Indian Tribes in New York State in the Absence of a Tribal-State Compact

The Appellate Division erroneously agreed with the arguments advanced here by both the State and Park Place that in the absence of a Tribal-State Compact, the State would simply lose the opportunity to have any control over Indian Class III gaming, and that the U.S. Secretary of the Interior could then unilaterally dictate the terms of such gaming. ***Dalton***, *supra* at 84. *See* State's Brief at 46; Park Place Brief at 49-50.

That conclusion is belied by the legislative history and the language in IGRA itself. Section 11(d)(1)(C) of IGRA makes it clear that Class III Indian gaming can be engaged in ***only*** if there is a Tribal-State Compact. 25 U.S.C. § 2710(d)(1)(C). *See also* 1988 U.S.C.C.A.N. 3076 (IGRA "does not contemplate and does not provide for the conduct of Class III gaming activities on Indian land in the absence of a Tribal-State Compact") [R. 323]. The Appellate Division based its conclusions on two different provisions – 25 U.S.C. § 2710(d)(7)(B)(vii) and 25 C.F.R. Part 291. ***Dalton***, *supra* at 84. Reliance on those provisions was misplaced.

Section 25 U.S.C. § 2710(d)(7)(B)(vii) applies only in a case where an Indian tribe has first sued a state in federal court for failure to negotiate in good faith, and the Court has found that the State has in fact failed to negotiate in good faith.[10] Then, and in that event, the Secretary of the Interior would be allowed to define the terms of Indian gaming, provided,

[10] There is a serious question whether any court would have subject matter jurisdiction in such a case. *See* note 5, *supra* at 23.

however, that such procedures are "consistent with the relevant provisions of state law …" That obviously begs the question as to whether a compact can be consistent with State law if, as in the case in New York State, its Constitution prohibits the very type of gaming contemplated by IGRA. For the reasons already stated, New York's constitutional ban on commercialized gaming is a good faith defense. ***Hotel Employees***, *supra*; ***New York v. United States***, *supra; **Printz v. United States***, *supra*. *See also* Point I-B, *supra*.

As for 25 C.F.R. Part 291, adopted in April 1999, the U.S. Secretary of the Interior has committed to Congress that she will not enforce it because of serious concerns about its constitutionality raised in a federal case presently pending in Florida. ***State of Florida v. United States*** (N.D. Fla; Case No. 4:99-CV137-RH). Part 291 purports to give the Secretary the authority to unilaterally dictate the conditions under which Class III Indian gaming can occur if an Indian tribe is unsuccessful in getting a state to enter into a Compact. When promulgated, these regulations provoked a huge uproar with the National Governors Association ("NGA"). By letter dated July 27, 1999, the NGA advised the then-Majority and Minority leaders of the U.S. Senate as follows:

> The nation's Governors strongly believe that no statute or court decision provides the Secretary of the U.S. Department of the Interior with the authority to intervene in disputes over compacts between Indian tribes and states about casino gambling on Indian lands [R. 1365].

One of the four governors who signed that letter on behalf of the NGA was none other than George Pataki, Governor of New York, and Chair of NGA's Committee on Economic Development and Commerce (*Id.*).

During that very same period, the NGA also adopted a position paper in which it unequivocally stated the Governors' views with respect to IGRA and Part 291. It stated as follows:

> The Governors assert that ***public gambling policy must be determined by state interpretation of a state's laws and regulations*** (emphasis supplied) [R. 1366].
>
> Inability to agree on a compact should not be treated as an indication of bad faith by either party. ***In particular, a state's adherence to its own laws and constitutions should not be regarded as bad faith*** (emphasis supplied) [R. 1367].
>
> As the Governors interpret the effects of ***Seminole [Tribe]***, nothing in IGRA or any other law endows the Secretary with the authority to independently create such a process (referring to secretarial intervention in the absence of a Tribal-State Compact). IGRA continues to be the sole mechanism through which tribal governments can operate Class III gaming. It is unthinkable that a Supreme Court decision endorsing state sovereignty could become the vehicle for an inappropriate expansion of the Secretary's authority … ***The Governors are opposed to the implementation of amendments to 25 C.F.R. Part 291, published April 12, 1999, that assert the Secretary's power to authorize tribal governments to operate Class III gaming.*** The Governors support the suit initiated by Florida and joined by other states disputing the Secretary's authority to permit Class III gaming, without a Tribal-State Compact. State and tribal governments are best qualified to craft agreements on the scope and conduct of Class III gaming under IGRA. ***The Governors believe that the Secretary should take no further steps to***

> ***implement or enforce this rule.*** (emphasis supplied) [R. 1367]

Finally, the NGA said:

> The Secretary's ability to permit Class III gaming ***must be strictly limited*** to what is allowed under the state's gambling laws, regulations, and ordinances … (emphasis supplied) [R. 1367]

After the NGA expressed its views, on July 25, 2001, M. Sharon Blackwell, Deputy Commissioner of Indian Affairs for the U.S. Department of the Interior, testified before the Senate Committee on Indian Affairs for the Oversight Hearing on the Indian Gaming Regulatory Act [R. 1369-1371]. In her testimony, Ms. Blackwell stated as follows:

> ***The Secretary [of the Interior], of course, will abide by the commitment of her predecessor not to issue Class III procedures for any tribe until a final decision is rendered on any lawsuit by any state challenging the authority of the Secretary to promulgate the regulation in 25 C.F.R. Part 291.*** Currently the State of Florida and the State of Alabama have jointly filed a lawsuit against the Secretary regarding this matter. (emphasis supplied)

[R. 1370]

The litigation referred to by the Secretary is entitled ***State of Florida v. United States of America***, referred to previously at p. 30, *supra*. That case was also the one referred to in the NGA's position paper, *supra*. *See also* court order dated July 18, 2002 [R. 1372-1373]. The undersigned counsel hereby represents that his office has spoken with counsel for one of the parties in the ***Florida*** litigation to verify that there have been no subsequent substantive

developments in the case since that court order.[11] It is clear, therefore, that the Appellate Division erroneously relied on 25 C.F.R. Part 291 in concluding that the U.S. Secretary of the Interior has the power to impose procedures relating to Indian casino gaming in the absence of a Tribal-State Compact.

In any event, it is irrelevant to the legal issue in this case whether the Secretary of the Interior could issue regulations permitting Class III Indian gaming in the absence of a Tribal-State Compact. If the New York Constitution prohibits the State from authorizing such gaming, that renders Part B of Chapter 383 invalid regardless of whether the Secretary could then permit such gaming on her own.

Finally, it should be noted that the Governor has apparently undergone a remarkable change of position since the State filed an *amicus* brief in ***Seminole Tribe*** (Appendix "A"), and since he signed the letter to the Majority and Minority Leaders of the U.S. Senate, setting forth the National Governors Association's vehement opposition to any attempt to unilaterally impose a Compact on states. The NGA's position paper is also revealing in another respect. As this Court is by now well aware, one of the arguments advanced by the Governor in this case is that if the State allows charitable gaming, then it must allow gambling for any other purpose. In its position paper, the NGA, however, also stated that:

> Tribes can only negotiate to operate gambling of the same type and subject to the same restrictions that apply to all other gambling in the State. For example, charitable gaming permissible on an occasional basis in states is no justification

[11] Telephone conversation between James Shannon, Esq. of O'Connell and Aronowitz with Jonathan Glogau, Esq., Assistant Attorney General for the State of Florida on December 30, 2004.

> for 24-hour-per-day or even 40-hour-per-week operation of such games … ***Ultimately, a governor must not be compelled by Federal law to negotiate for gambling activities or devices that are not expressly authorized by State law.*** (emphasis supplied) [R. 1366]

It is, of course, impossible, for the Governor to reconcile what he stated in his letter to Congress and the position he advocated on behalf of the NGA in the policy paper with his positions in this case. Nor is it possible for him to reconcile his current statements on IGRA with the brief submitted on behalf of the State of New York by his then Attorney General to the U.S. Supreme Court in 1996 (Appendix "A").

The only explanation for the State Respondents' remarkable 180-degree U-turn has, of course, nothing to do whatsoever with the Constitution or the law, but very simply reflects their desperate hope that somehow Indian Class III gaming will help solve the State's current economic woes. The Constitution, however, should not be sacrificed on the basis of such a transparent Machiavellian rationale.

G. The Governor Cannot, as a State Official, Make the Necessary Concurrence Required Under IGRA Before Indians Can Conduct Class III Gaming in the Catskills Pursuant to 25 U.S.C. § 2719(b)(1)(A).

Even conceding, *arguendo*, the constitutionality of Part B of Chapter 383 insofar as it pertains to the establishment of Class III gaming on recognized Indian reservations, IGRA itself requires additional conditions above and beyond a Compact before Indian tribes may conduct any gaming whatsoever on so-called "after-acquired lands," *i.e.*, lands taken into

trust by the U.S. Secretary of the Interior for the benefit of Indian tribes after October 17, 1988, the effective date of IGRA.

In such cases, Congress itself recognized that such property would, until such transaction, be part of the sovereign soil of the State in which it was located. Congress, therefore, prohibited any gaming - regardless of whether it is Class I, Class II, or Class III - on such property unless the Secretary of the Interior determined, *inter alia*, that such gaming would not be detrimental to the ***surrounding*** community, "… but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination …" 25 U.S.C. § 2719(b)(1)(A). *See generally*, ***Lac Courte Orielles***, *supra*.

It is clear that with respect to that portion of Part B of Chapter 383 which adds § 12(b) to the Executive Law, authorizing the Governor to negotiate compacts to establish casinos in the Catskills where there are currently no Indian reservations [R. 918-930], the Governor simply cannot make such a concurrence. The reason is that the whole rationale for the ban on commercialized gambling embodied in Article I, § 9 of the Constitution is the detrimental effect such gaming would have on the community. *See* Main Brief of Appellants-Respondents in Action No. 1 at 57-61. The State suggests, however, that the Governor is free to ignore the public policies behind Article I, § 9, even though IGRA itself speaks specifically to the effect on the surrounding (*i.e.*, non-Indian) community. 25 U.S.C. § 2719(b)(1)(A). State's Brief at 55. The Appellate Division mistakenly agreed. ***Dalton***, *supra* at 85.

Even assuming, *arguendo*, that the Appellate Division correctly concluded that Article I, § 9 of the N.Y. Constitution did not otherwise apply to Indian lands (11 A.D.3d at 83), that clearly is not so with respect to the "surrounding" community which, in this case, would be New York territory where, of course, Article I, § 9 would apply.

The analysis of both the State and the Appellate Division is inherently contradictory. They contend that the Governor is free to make a favorable concurrence as to the "social and economic consequences" of commercial gambling on the surrounding community, but those very considerations are why such gambling was banned in New York State in the first place. *See* Lincoln***, "Revised Record of the Constitutional Convention of the State of New York***," Vol. IV (1894) [R. 588-623]. The ban on commercialized gambling was enacted to prevent the family man of modest means from squandering his resources at the gaming table. ***International Hotels Corp. v. Golden***, 15 N.Y.2d 9, 15 (1964).

The Appellate Division itself conceded that "New York does have a strong policy against *commercialized* gambling" (emphasis supplied), but nevertheless concluded that "the Governor's concurrence cannot be said to violate New York public policy." ***Dalton***, 11 A.D.3d at 86. Having already concluded in ***Saratoga County Chamber of Commerce v. Pataki***, *supra*, that such gaming is commercial and antithetical to the types of highly regulated and rigidly enforced forms of gambling permitted by the N.Y. Constitution (293 A.D.2d at 24), the decision of the Appellate Division in this case cannot be reconciled with its prior determination in ***Saratoga***.

Moreover, the U.S. Eighth Circuit Court of Appeals recently concluded in the context of a Governor's concurrence under Section 2719(b)(1)(A) as follows:

> The tribes ***erroneously*** assume that § 2719(b)(1)(A) vests the Governor of Wisconsin with the authority to act outside of the strictures of the gaming policy that Wisconsin has already established through legislation and amendments to the Wisconsin Constitution. (emphasis supplied)

Lac Courte Orilles, *supra*, 363 F.3d at 664, *cert denied*, ____ U.S. _____, 2005 U.S. LEXIS 470 (January 10, 2005).

Given that New York's public policy clearly and unequivocally prohibits commercialized gambling, there is no way that the Governor of New York State is free to ignore and defy that policy by concurring under 25 U.S.C. § 2719(b)(1)(A) that Indian Class III gaming would not adversely affect the communities in New York State that "surround" such gaming enclaves. Article I, § 9 clearly applies to the surrounding community which is sovereign soil of the State of New York. Accordingly, § 12(b) of the Executive Law, as added by Part B of Chapter 383 of the Laws of 2001, is unconstitutional.

H. Executive Law § 12(b) is Unconstitutional Because the Legislature Failed to Give the Governor Any Guidance With Respect to the Critical Policy Choices That Must Be Made Before New York State Can Enter Into a Compact Under IGRA.

In their Briefs, the State at pp. 56 *et seq.* and Park Place at pp. 61 *et seq.*, both argue in favor of the Appellate Division's brief analysis in which it rejected Appellants' argument that Executive Law § 12(b) was an unconstitutional delegation of power to the Governor to

negotiate compacts with unnamed tribes in unspecified locations in Sullivan and Ulster Counties. ***Dalton***, 11 A.D.3d at 85-86.

In ***Saratoga County Chamber of Commerce***, *supra*, however, this Court made it abundantly clear that the Governor could not enter into such compacts absent direction from the Legislature with respect to a number of important policy decisions under IGRA that only the Legislature could make. This Court went on to identify those policy concerns, including, *inter alia*, (1) the application of criminal and civil laws and regulations of the Indian tribe and of the State that are directly related to, and necessary for, licensing and regulation; (2) the allocation of civil and criminal jurisdiction between the State and the tribes necessary for the enforcement of such laws and regulations; (3) the assessment by the State of such activities in such amounts as are necessary to defray the cost of regulation; (4) taxation by the Indian tribe of such activities; and (5) standards for the operation of such activities and the maintenance of the gaming facilities. ***Saratoga County***, *supra* at 822-823. As this Court further observed, "Compacts addressing these issues necessarily make fundamental policy choices that epitomize legislative power. Decisions involving licensing, taxation and criminal and civil jurisdiction require a balancing of different interests, a task that the multi-member, representative Legislature is entrusted to perform under our Constitutional structure." *Id.* at 823.

While the Legislature was at least aware of what the Governor had in mind when it enacted subdivision (a) of Executive Law § 12, that was because the Governor had already entered into a Memorandum of Understanding with the Seneca Nation of Indians regarding

the conduct of gaming in Western New York. There is, however, no similar guidance of any kind in subdivision (b) with respect to what should be contained in the Compact for the casinos to be located in Sullivan and Ulster Counties regarding the issues identified by this Court in ***Saratoga County***.

The Appellate Division, therefore, misread this Court's decision in ***Saratoga County.*** There, this Court held that the Governor could not act unilaterally in the absence of legislation authorizing him to enter into compacts because he needed guidance on critical policy decisions from the Legislature. It exalts form over substance, however, to simply enact a law giving the Governor power to negotiate a compact without giving him any guidance as to what those compacts should contain. Executive Law § 12(b) is, therefore, unconstitutional.

I. There Are Ways to Legalize Commercialized Class III Gaming By Indian Tribes; Chapter 383 of the Laws of 2001, However, Is Not One Of Them

If Respondents are intent upon legalizing commercialized Class III Indian gaming in this State, they have gone about achieving that objective in the wrong fashion. They could ask Congress to amend IGRA to deprive states of any role in deciding whether to permit such gaming. Or they could ask the People of the State of New York to amend the Constitution. Instead, they have enacted a law that defies the Constitution and now ask this Court to turn the Constitution inside out, imparting to it an interpretation that would allow them to do precisely what the Constitution clearly, specifically and unequivocally forbids.

POINT II

Part C of Chapter 383, Allowing the Installation of Video Lottery Terminals at Racetracks for the Purpose of Aiding the Horse Racing Industry Is Not A Permitted Use of the Lottery Authorized by the Constitution

A. Introduction

The next issue in this case is whether Part C of Chapter 383 of the Laws of 2001, authorizing the State Division of the Lottery to install so-called video lottery terminals ("VLTs") at certain racetracks within the State is constitutional given that a specified percentage of the proceeds from the operation of the VLTs is earmarked directly for horseracing purses and breeding funds which have absolutely nothing whatsoever to do with education. The Lottery was intended to benefit education ***exclusively.*** Plaintiffs-Appellants contend that this scheme devised by the Governor and the legislative leaders was nothing more than a transparent attempt to bail out a dying horseracing industry under the guise of aiding education.[12] Under Article I, § 9 of the Constitution, horse racing is supposed to provide a reasonable sum for the support of government, not the other way around. Here, the Legislature got it backwards, enacting legislation providing for the government to support horseracing.

[12] One can only speculate why, otherwise, the New York Racing Association, for example, would contribute $143,000 to the lobbying effort to get this legislation enacted [R. 1261-1262].

For the reasons hereinafter set forth, Plaintiffs-Appellants submit that the Appellate Division correctly declared Part C of Chapter 383 unconstitutional because of the improper diversion of revenues to racetrack purses and breeding funds. They also submit, however, that their other arguments, rejected by the Appellate Division, provide separate, discrete and independent bases for invalidating Part C.

The Appellate Division correctly concluded that this diversion of funds violated the narrow exception carved out of the general prohibitions against gambling in Article I, § 9 of the New York Constitution to allow a state-operated lottery, provided that the net proceeds derived therefrom are used ***exclusively*** for education within the State. The Court properly rejected the State's and the various racetracks' arguments that this diversion was simply part of a legitimate vendor's fee and, therefore, a proper expense that could be deducted before net proceeds were to be distributed to education. The Court concluded that the relationship between education and such expenditures was simply too attenuated to pass constitutional muster. ***Dalton v. Pataki***, 11 A.D.3d 62, 101 (3d Dep't 2004) ("***Dalton***"). *See* Point II-B, *infra*.

The Court rejected, however, Appellants' other arguments. The first was that Part C unconstitutionally deprived certain Plaintiffs of equal protection under the law by virtue of the fact that they resided in certain areas of the State where VLTs could be installed at racetracks without any opportunity for their local legislative body to approve or disapprove their installation, whereas in other counties VLTs could only be operated if the local legislature first approved their installation. Supreme Court never even addressed the equal

protection argument and the Appellate Division rejected it with very little analysis, citing cases standing for the general proposition that people in different parts of a state can be treated differently without necessarily implicating the equal protection clause. ***Dalton***, *supra* at 97. *See* Point II-C, *infra*.

The Court also erroneously rejected Plaintiffs-Appellants' argument that the VLTs were not a valid form of a lottery, but were instead illegal "slot machines," that could not be played as part of the Lottery. *Id.* at 95-96. *See* Point II-D, *infra*.

Even if the VLTs are not illegal slot machines, the latest iteration of those devices, so-called "video poker" VLTs, installed less than six weeks after the Appellate Division ruled last July, are being represented to the public as interactive games in which the skill of the player can affect the outcome. This is completely inconsistent with the notion of a lottery in which the State itself argues that skill cannot affect a game's outcome which is supposed to be totally dependent on random chance in order that all players have an equal chance of winning. While the Attorney General has given assurances to Appellant's counsel that the video poker VLTs are, in fact, not dependent on skill, they have all the outward appearances of being interactive and are presented to the betting public as if they were. They are intended to deceive players into believing they can use their skill to improve the odds of winning, even though the devices are intentionally programmed to prevent that from occurring. This is a gross deception of the public on a truly massive scale. *See* Point II-E, *infra*.

Finally, the Court below properly rejected the State's argument that any specific provisions of Part C of Chapter 383 that are unconstitutional should be severed in order to save the remainder of the legislation. It is clear that the portion of the statute the Court found unconstitutional tainted the rest of the statute and defeated one of its primary purposes. That is why the Appellate Division acted properly in declaring all of Part C unconstitutional. *See* Point II-F, *infra*.

B. The Diversion of VLT Proceeds to Horseracing Purses and Breeding Funds Violates the Lottery Exception to the Antigambling Provisions of the Constitution Since the Lottery Was Intended to Benefit Education Exclusively

Part C involves a blatant money-laundering scheme that entails the operation at certain racetracks of so-called video lottery terminals, which are nothing more than a euphemism for "slot machines." Under this scheme devised by the legislative leaders and supported by high-priced lobbyists, the Division of the Lottery may license certain racetracks to install VLTs. Unlike other lottery games operated by the State, the racetracks a/k/a "racinos" will be the sole outlets for the operation of these machines. Then, as their exclusive "vendor's fee" and/or "commission," the tracks are to receive no less than 12% nor more than 25% of the total amount wagered at the vendor track after payout for prizes before any proceeds go to education. *See* Tax Law § 1612(a)(5)(a), as added by § 2 of Part C of Chapter 383 of the Laws of 2001. In turn, approximately half of the vendor's fee is then supposed to be passed directly through to (i) the owners of racehorses, by enhancing the purses at the track, and (ii) the breeding fund for the manner of racing conducted at such

track. *See* Tax Law § 1612(a)(5)(b), as added by § 2 of Part C of Chapter 383 of the Laws of 2001.[13]

The State argues that racetracks will incur much higher costs for staff, security, and space than ordinary lottery vendors, such that a 29% vendor fee is appropriate. (State Br., p.74-75). Of course, this ignores the fact that the additional costs are only incurred because of the Legislature's decision to make racetracks the exclusive operators of VLTs; had the VLTs been widely distributed among numerous outlets across the state, as has been done with other lottery devices, there would be no exorbitant administrative costs and the return to education would have been increased.

The court below correctly held that the VLT revenue reinvestment provision, which required racetracks to contribute a set percentage of their take from VLTs to race purses and breeding funds, violated the limited exception of Article I, § 9 of the New York Constitution authorizing state-run lotteries, "the net proceeds of which shall be applied **exclusively** to or in aid or support of education in this state." (emphasis supplied) ***Dalton***, 11 A.D.3d at 97-102.

The State argues, however, that the required contribution to race purses and breeding funds is actually an attempt to maximize lottery proceeds. (State Br., p.68). Specifically, the State underscores the fact that "[t]he VLT lottery is unique in that VLTs will be operated only at racetracks in the State. The VLTs and the tracks thus have a symbiotic relationship:

---

[13] In May, 2003 the Legislature further amended Tax Law § 1612 to provide that the tracks' share shall amount to 29%, while adjusting the amount to be paid to breeding funds and purses. *See* L. 2003, ch. 63, Part W, amending Tax Law, § 1612(b) and adding subdivision (c).

To maximize lottery proceeds for education, the health and vitality of these tracks is essential." (State Br., p.68).[14] This is "bootstrapping" at its worst. The State places the VLTs only at racetracks, thereby manufacturing the artificial necessity to ensure their "health and vitality" so that they, in turn, can support education.

This argument turns the exceptions to the constitutional prohibitions against gambling in Article I, § 9 inside out. Pari-mutuel wagering on horse racing was allowed as an exception to those prohibitions provided that "… the state shall derive a reasonable revenue for the support of government" from such horseracing. N.Y. Const. Art. I, § 9. Now, however, the State argues that instead of racing supporting government, it should be the other way around - government needs to support racing so that VLTs can be successful.

The State's circular rationalization that the exorbitantly high vendor's fees paid to racetracks are necessary because the tracks will be the exclusive outlets for VLTs is totally disingenuous. Just last month, January, 2005, the Governor submitted a Budget Bill to the Legislature, S. 993, A. 1923, the relevant portions of which are appended hereto as Appendix "B". Section 9 of the Bill would add a new section to the Tax Law, authorizing the installation of video lottery terminals at up to eight new venues, to be awarded pursuant to proposals to be submitted by "any entity," including but not limited to off-track betting parlors. This proposed expansion of VLT gaming to venues other than racetracks directly

[14] *See also*, Brief of Standardbred Owners Association at 16, discussing the "symbiotic" relationship between improved sporting facilities and VLTs. The Lottery, however, was established to support education, not racetracks.

contradicts the very arguments with respect to exclusivity the State has advanced in its Brief to justify the fees paid to tracks because they are the "exclusive" outlets for VLTs.

These arguments are contradictory in another respect as well. While the State emphasizes the imperative for maintaining the racetracks' "health and vitality" by installing VLTs only at racetracks, this rationale is belied by the language just released in the Governor's "2005-06 New York State Executive Budget: Financial Plan" where he laments the decline in receipts from pari-mutuel wagering resulting from the competition of VLTs, stating at p. 371:

> Negative impacts of recent passage of no-smoking laws, ***competition from casinos and VLTs being added to tracks*** and the unfavorable fallout from NYRA's legal entanglements may have contributed to the decline in handle (emphasis supplied).

Indeed, while arguing to this Court that VLTs as necessary to help racetracks, he admits in his Executive Budget that the VLTs have actually hurt the traditional Lotto game that for years was the centerpiece of New York State's lottery, noting:

> The continuing drop in Lotto sales reflects the increased competition from other gambling options ***(e.g., casinos and VLTs)*** and continued cannibalization by the Mega Millions game. *Id.* at 431 (emphasis supplied).

In addition to these obviously contradictory arguments, the cases cited in the State's Brief, which upheld the legitimacy of requiring payments to breeding funds as part of pari-mutuel betting on horse races authorized by Article I, § 9 of the Constitution, are distinguishable on their face. Purses and breeding funds are directly related to horse racing,

but have nothing to do with the support of education. They are not "costs" directly related to the operation of VLTs by the racetrack vendors and, therefore, they are not a legitimate expense that can be deducted from revenues that are otherwise required to be dedicated to education.

The breeding funds which benefit from Part C are quasi-governmental public benefit corporations that must, by law, make annual distributions of their assets to a variety of entities and individuals, including state agricultural societies, county or town agricultural societies, 4-H societies, the New York State Department of Agriculture and Markets, New York breeding farms and as awards to "the owners of eligible stallions." *See* Racing, Pari-Mutuel Wagering and Breeding Law § 332.

The money the horse owners and breeders receive under Part C is effectively "laundered" by running it through the racetracks first as a commission that then gets immediately passed through to them. While the State implies that the "commission" received by the racetracks is akin to the vendor's fee paid to traditional lottery agents [R. 305], this ignores the fact that neither horse owners nor breeding funds are lottery agents and do not sell lottery tickets. While a convenience store that dispenses traditional lottery tickets in this State should properly receive a vendor's fee that covers the cost of handling and selling such tickets, that is far different from suggesting that the fee should also be a function of other costs borne by the store that are unrelated to such handling and selling. Here, by contrast, the Legislature has directed that part of the fee be redirected to the owners of winning racehorses or to breeding funds, neither of which has anything to do with the costs

of operating VLTs. The arguments advanced by the State, the racetracks, and the *amici* with respect to the cost of the installation of the VLTs are, therefore, irrelevant insofar as they are involved to justify payments to purses and breeding funds which are unrelated to such costs. The Appellate Division rejected this flimsy rationale, noting that such expenditures have nothing to do with education. ***Dalton***, 11 A.D.3d at 99. To conclude otherwise would have made a farce of the exceptions to the prohibitions against gambling that are to be "narrowly" construed. ***Molina v. Games Management Services***, 58 N.Y.2d 523, 527 (1983). ***Matter of New York Racing Ass'n v. Hoblock***, 270 A.D.2d 31, 33-34 (1st Dep't 2000); ***Saratoga***, *supra*, 293 A.D.2d at 24.

The provisions calling for diversion of VLT proceeds to the breeding funds and purses establish beyond a shadow of a doubt that the intent of Part C was to benefit the horse racing industry and agriculture rather than education.[15] The remarks of no less a figure than Senator Joseph Bruno, Majority Leader of the Senate, prove that very point. Senator Bruno, speaking in favor of the proceedings in the Senate in conjunction with the passage of Chapter 383 of the Laws of 2001, stated:

> We hope that the VLTs will enhance racing here in New York State, because many of the quality horses race elsewhere because the purses are larger. Agriculture is the largest industry still, or second largest, in New York State, and horse racing helps keep us in the forefront … While many of us have differences of opinion over whether or not we feel that it is appropriate for the State to be legalizing additional

[15] While this Court has been inundated with briefs from racetracks and related *amici*, it speaks volumes that not a single educational entity has come forward as an *amicus* to defend this scheme.

> gambling, I don't believe that we necessarily have a choice as relates to the citizens, because the citizens of this State are participating in various places as they see fit [R. 371-372].

The only reason given in the Memorandum in Support is that Part C will "provide the State of New York with the much-needed new source of revenue while promoting local economic development." There is no mention of education. *See* Bill Jacket for Part C of Chapter 383 [R. 364]. Interestingly, while the State attempts to deny the obvious, claiming that the benefits to horse racing are simply a means of maximizing VLT revenues (State Br., p.69), the *amicus* brief of the Standardbred Owners and Breeders Associations is much more forthright - - detailing the historical decline of racetracks and conceding that it was in light of this "crisis" in racing that Part C was enacted. (pp. 7-9).

In the Assembly, Assemblyman Townsend made it clear that he and Senator Spano worked together to get through both houses of the Legislature the authorization for video lottery terminals at racetracks "to help save the racing industry," exclaiming further that "it's a good day for the racing industry, for the people involved in the harness racing and flat track racing and all of the ancillary businesses that thrive around race tracks and help our local community survive" [R. 674-675]. What happened to education, which is what the Lottery is supposed to be about? To allow the Lottery exception intended to benefit education to be perverted in such fashion to help the horse racing industry, agriculture, and 4-H societies, invites the question of what other industries could be saved under the guise of

aiding education. How about the liquor industry? The tobacco industry? The bailout possibilities are endless. [16]

In their respective briefs, the State and the racetracks urge extreme judicial deference, in effect asking the courts to turn a blind eye to whatever the Legislature decides to set as an appropriate vendor's fee before "net proceeds" are distributed to education. *See*, for example, Point III of Brief of New York Thoroughbred Horsemen's Association. *See also*, Yonkers Racing Association Brief, Point IV; Standardbred Owners Association Brief at 10. Article I, § 9 of the Constitution, however, does not tie the hands of the Court such that it cannot review the Legislature's actions to ensure that funds are not being improperly diverted from education under the guise of being legitimate expenses. It must be remembered that the Lottery is an exception to an otherwise broad constitutional prohibition against gambling and in such cases the exceptions allowed are to be narrowly construed and rigidly enforced. In this case, the issue is not just the amount of the vendor's fee, but rather what it is for. As previously stated, purses and breeding funds are not related to education.

The court below rightly held that to adopt the State's position, that the Legislature has unlimited discretion in determining net proceeds (State Br., p.74), "would defeat the requirement that the amendment authorizing state-run lotteries be construed narrowly, as an exception to the general ban on gaming." (internal citations omitted) ***Dalton***, 11 A.D.3d at 99. Even the *amicus* brief of the Standardbred Owners and Breeders Associations

[16] Taking the State's argument to its logical conclusion, the State would be free to underwrite the construction of new sports stadiums with exclusive rights to certain lottery devices, even if the net proceeds for education were only a fraction of 1% of the total revenue. This is a classic example of the tail wagging the dog. If this scheme were upheld by this Court, it would establish a dangerous precedent, inviting imaginative legislators to

recognizes the absurdity of the State's position, stating that the Appellate Division's concern regarding the improper use of lottery proceeds was understandable, conceding that such a problem may be remedied by judicial declaration when appropriate. (pp.11-12). Appellants-Respondents respectfully suggest that this Court should reject the State's attempt to create a huge loophole that would defeat the whole purpose of the Lottery exception contained in Art. I, § 9, which is supposed to be narrowly construed. ***New York Racing Association v. Hoblock***, 270 A.D.2d 31, 33-34 (1st Dep't 2000), *citing* ***International Hotels Corp. v. Golden***, 18 A.D.2d 45, 49 (1st Dep't 1963), *rev'd on other grounds*, 15 N.Y.2d 9 (1964). Otherwise, the Lottery could be used for a multitude of purposes for which it was never intended by allowing fees, established by the Legislature at whatever amount it deems appropriate, to be paid to vendors that are a part of a particular economic sector in financial distress, regardless of whether that sector has anything to do with education. The exception would consume the rule. If payments to horse breeding funds and horse racing purses can legitimately be paid out before "net proceeds" are collected within the meaning of Art. I, § 9 of the N.Y. Constitution, what is next?

---

conjure up other perversions of the Lottery to finance their grandiose schemes.

C. Part C of Chapter 383 Violates Plaintiffs' Rights to Equal Protection Under The Law[17]

Inexplicably, under Part C of Chapter 383, residents residing in some localities where VLTs may be installed are given the right to approve, via their local legislatures, the installation of video lottery terminals before they can be placed at racetracks within their communities. *See* Tax Law, § 1617-a(a). At other locations, however, people have no choice. For example, a resident of Sullivan County [R. 549], where the Monticello racetrack is located, would have no opportunity via the local legislature to challenge the installation of VLTs. This is a blatant violation of that resident's rights to equal protection under the law, since there is no conceivable or rational justification to treat him differently from residents in other localities whose local legislatures have a right to challenge the installation of VLTs. As the Supreme Court has held, "for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure." ***Illinois State Board of Elections v. Socialist Workers Party***, 440 U.S. 173, 184 (1979). This Court has recognized that an attempt to deny certain individuals the fundamental right to vote will be subject to strict scrutiny. ***Longway v. Jefferson County Bd. of Supervisors***, 83 N.Y.2d 17, 22 (1993). While the Appellate Division rejected Appellants-Respondents' challenge on equal protection grounds, the court failed to apply a

[17] At page 36 of its Brief, the Finger Lakes Racing Association suggests that this argument was waived because Plaintiffs-Appellants failed to brief it. That is simply wrong. Since the Appellate Division ruled that VLTs were unconstitutional, Plaintiffs were not the Appellants on that issue and were not required to address that issue in their opening brief, a point which, in fact, Plaintiffs made in their October, 1. 2004 brief at 2.

strict scrutiny standard; the State, moreover, has never even attempted to show how Part C would satisfy a strict scrutiny test.

The Appellate Division relied on three cases (11 A.D.3d at 97), none of which is dispositive of the arguments advanced by Plaintiffs-Appellants. ***City of New York v. State of New York***, 76 N.Y.2d 479 (1990) dealt only with the question of whether legislation authorizing an informational referendum by the residents of Staten Island to gauge their interest in seceding from New York City would deprive other New York City residents of equal protection. This Court noted that the outcome of the vote would have no legal or binding effect on the residents of the rest of the City and concluded that there was no violation of the rights to equal protection of those other residents. *Id.* at 486-487. In the present case, however, the issue concerns a matter that would immediately and directly affect Plaintiffs - namely, whether or not there would be VLTs in the localities where they lived.

The second case cited by the Appellate Division, ***Town of Lockport v. Citizens for Community Action***, 430 U.S. 259 (1997) ("***Town of Lockport***") is equally inapposite. There, the issue was whether a requirement in the Bill of Rights of the New York State Constitution, Article IX, § 1(h)(1), giving non-city residents of a county the right to vote as a discrete unit before powers to a city within the county could be changed. City residents who outnumbered the non-city residents and who approved such change challenged the provision on equal protection grounds. In upholding the State Constitution, the Supreme Court ruled that since existing discrete governmental entities' powers might be affected, the people in such areas had a right to vote separately. The Court recognized that the outcome of the vote

might affect residents outside the city differently from those within, thereby providing the rationale for separate approvals by each constituency. *Id.* at 273. In the instant case, however, the Plaintiffs in one area of the state, *e.g.*, Monticello, have the same interest as residents in other areas of the state, *e.g.*, Saratoga, as to whether there should be VLTs in their localities. The Monticello resident would have no "say" but the Saratogian would. It is clear, therefore, that ***Town of Lockport***, *supra*, relied upon by the Appellate Division, actually supports Plaintiffs-Appellants' position because it ensures that each voter gets to have a voice as to how certain legislation would affect him/her. Indeed, ***Town of Lockport*** supports the notion of separate votes by affected localities, the very argument advanced by Plaintiffs-Appellants in this litigation.

The final case relied on by the Appellate Division, ***Matter of Roosevelt Raceway v. County of Nassau***, 18 N.Y.2d 30 (1966), *app dsmd*, 385 U.S. 453 (1967), is also totally inapplicable. In that case, this Court rejected a challenge on equal protection grounds to a higher tax on harness tracks than "flat" tracks. This Court has long afforded the State broad latitude in imposing different taxes on different types of activities in the context of equal protection challenges. ***Port Jefferson Health Care Facility v. Wing***, 94 N.Y.2d 284 (1999); *cert denied* 530 U.S. 1276 (1999). The case at bar, however, is completely different. It involves an individual citizen's right to vote - a right so fundamental that any significant infringement on it must pass a "strict scrutiny" test. ***Storer v. Brown***, 415 U.S. 724, 729 (1974). Rather than imposing a strict scrutiny test, the Appellate Division merely speculated that allowing one citizen the right to vote while denying it to another in a different locality

could be justified by a legislative conclusion that while the racetracks that needed no further approval "had prior attendance records that would benefit the most from the installation of VLTs, the need for assistance at other tracks was not as critical, even though those tracks could benefit from the additional business that VLTs would bring." ***Dalton***, *supra* at 97. That may sufficiently explain why the tracks were not denied equal protection but it hardly explains why the voters were not.

This was hardly the appropriate test when something as fundamental as the right to vote was implicated. As this Court held in ***Longway v. Jefferson County Board of Supervisors***, 83 N.Y.2d 17 (1993) ("***Jefferson County***"), any exclusion from the right to vote "will be carefully scrutinized and thus must be articulated carefully," citing ***Carrington v. Rash***, 380 U.S. 89, 96 (1965) ("States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State"). ***Jefferson County***, *supra* at 22.

McGowan v. State of Maryland, 366 U.S. 420 (1961) relied upon by the Finger Lakes Racing Association in their Brief at 38 is not applicable. While that case held that "territorial uniformity is not a constitutional prerequisite" (*Id.* at 427), that case involved economic discrimination (the right to sell goods in one area of the state but not another) rather than the right to vote, which, as previously indicated, is far more fundamental.

There is, therefore, no constitutionally adequate justification for the attempt by the Legislature in enacting Part C of Chapter 383 of the Laws of 2001 to deprive certain Plaintiffs in this case of the right to approve or disapprove the installation of VLTs in their

communities when, under the very same legislation, other citizens are given that very same right.

D. Under The Appellate Division's Own Reasoning, The Video Lottery Terminals Purportedly Authorized by Part C of Chapter 383 Are In Reality "Slot Machines" And Can Not Function as a Lottery

The Appellate Division spent considerable time explaining why VLTs were not slot machines and could, therefore, be used as part of the Lottery (***Dalton***, *supra* at 94 *et seq.*). The VLTs, however, are illegal because they are, in fact, slot machines, notwithstanding the State's arguments to the contrary (State's Brief, Point II-B at pp. 65, *et seq.*) and the decision by the Appellate Division.

The Request for Proposals (RFP) issued by the New York State Lottery to vendors to submit proposals for the implementation and operation of a central system to support VLTs describes how the VLTs will operate and proves that they are "slot machines."

> To play video lottery a player ***shall insert paper currency, a cash voucher or other Lottery-approved representative of value*** into a video lottery terminal, entitling the player to purchase one or more electronic instant lottery tickets. The player determines the amount to be wagered or the price of the electronic instant lottery ticket to be purchased. With respect to each offered series, the player makes a choice by touching the dedicated display, a panel of buttons designated for such purposes, or some other similar interface, selecting the game identifier they wish to play … Upon completion of play at a video lottery terminal, the player may cause the printing of an electronically encoded instrument which may be used for wagering at another video lottery terminal or presented for verification and payment at the validation terminal in the racing location (emphasis supplied) [R. 917].

Compare that description to the definition of a "slot machine" in New York Penal Law § 225.00(8), which states in part:

> "Slot machine" means a gambling device which, ***as the result of the insertion of a coin or other object*** operates either completely automatically or with the aid of some physical act by the player, in such a manner that depending upon elements of chance, it may eject something of value … (emphasis supplied).

The Penal Law definition of "slot machine" clearly encompasses the operation contemplated for VLT's, requiring the insertion of something of value and then ejecting a credit slip, *i.e.*, "something of value" if the person playing wins. The RFP calls for the creation of a system which, to the player, will be indistinguishable from a traditional slot machine. There will be no lottery tickets dispensed to the players, no drawings and no role for the player other than to insert money and press a button or pull a lever.

The player engages in "some physical act" by touching "a panel of buttons or some other similar interface." "Depending upon the elements of chance," the VLT "may eject something of value." Here, that "value" or winnings would take the form of an "electronically encoded instrument" which may be used for continued wagering at another VLT or may be "cashed in" at the validation terminal. It is hard to conceive of any device matching the description of slot machines more perfectly than VLTs.

After juxtaposing the State Lottery Division's RFP for VLTs and the definition of a "slot machine," it becomes clear, therefore, that VLTs are, in fact, "slot machines." The Appellate Division, nevertheless, thought it had found a way around the problem. While a VLT might otherwise be a "slot machine" and, therefore, a type of "gambling device" within

the meaning of Penal Law § 225.00(7), (8), the Appellate Division concluded that a VLT would not be such a device if used as part of a "lottery," relying on that part of the language in Penal Law § 225.00(7) that excludes from the definition of a "gambling device" other "items used in the playing phases of lottery." ***Dalton***, *supra* at 94.

The problem with that analysis by the Appellate Division is that the term "lottery" as used in Penal Law § 225.00(7) does not mean "the Lottery" referred to in Article 34 of the Tax Law and operated by the State Division of the Lottery to aid education. No, indeed! Quite to the contrary, the term "lottery" as used in Article 225 of the Penal Law means an "unlawful gambling scheme." Penal Law § 225.00(10). That is clearly not the State Lottery. Thus, the only time a "slot machine" would not be a "gambling device" would be if it were used as part of an unlawful "lottery" as defined in Penal Law § 225.00(7). Since a VLT otherwise fits the definition of a slot machine, and it is not being used as part of an otherwise unlawful lottery, it is, in fact, a "slot machine." If a VLT is a "slot machine," it is a "game of chance" because of the amendment to § 186(3) of the General Municipal Law, made by § 5 of Part B of Chapter 383. ***Dalton***, *supra* at 95. If it is a "game of chance," it may not be used as part of the Lottery if games of chance are prohibited from being used in the Lottery by virtue of General Municipal Law § 186(3). *See* ***Dalton***, *supra* at 94-95.

The high courts of other states, which have examined VLTs, determined they are not lotteries under any reasonable definition of that term. *See* ***Poppen v. Walker***, 520 N.W.2d 238 (S.D. 1994) (holding that VLTs are not lotteries, since there is no ticket or drawing and the game involves only a contest between the player and a machine); ***Johnson v. Collins***

Entertainment Co., 508 S.E.2d 575 (S.C. 1998) (holding that VLTs are not lotteries as they did not involve a drawing and ticket). *See also* ***Crochet v. Priest***, 931 S.W.2d 128 at 132-133 (Ark. 1996) (concerning whether voters, in reading an initiative to amend their State Constitution, would be able to determine that "video terminal games" really describe what are "more commonly known as slot machines"). "Video terminal games" is "misleading" because it does not "evoke images" of "currently illegal gambling, where the term 'slot machine' does." *Id.*

Furthermore, the Appellate Division's reliance on ***Trump v. Perlee***, 228 A.D.2d 367 (1st Dep't 1996) is misplaced (11 A.D.3d at 96). In ***Trump***, the Court ruled that Quick Draw qualified as a lottery. That has nothing whatsoever to do with the question in this case as to whether a VLT is a slot machine. The fact that the slot machine may be operated in such a fashion that the results are randomly drawn and players compete against other players does not obscure the fact that it is a device operated by the insertion of something of value and, if the player wins, something of value is ejected. That latter aspect is what makes it a "slot machine." *See* Penal Law, § 225.00(8). Equally irrelevant is any comparison of a VLT with the Lottery's "scratch-off" game which has not, insofar as Appellant-Respondents' counsel knows, ever been the subject of a legal challenge [R. 17]. The State's arguments against classification as a slot machine are remarkably similar to the ones put forth ***Black North Assocs. v. Kelly* ("*Kelly*")**, 281 A.D.2d 974 (4th Dep't 2001), which were ultimately rejected by the court.

The attempt by the Legislature and the Governor to sanitize and legitimize these slot machines by euphemistically referring to them as video lottery terminals is nothing more than an exercise in semantics. "What's in a name? That which we call a rose by any other name would smell just as sweet." William Shakespeare, ***Romeo and Juliet***, II, ii, 42. Were the Court to hold that VLTs are not slot machines, even though they perfectly match the definition in the Penal Law, the result would be a clear victory of form over substance. The clear losers would be the rule of law under the Constitution, and ultimately, the People.[18]

E. While the State Argues Here That the VLTs Are Not Games Involving Skill, It Is Deceiving the Betting Public Into Thinking Precisely The Opposite

Approximately 20 years ago, the New York Attorney General's Office provided a formal opinion to the Division of the Lottery, arriving at the conclusion that proposed video gambling devices could not be properly deemed lotteries. 1981 Op. Atty. General N.Y. 68, 1981 WL 145788 at *7 (September 8, 1981). The Attorney General observed that VLTs were "fundamentally like slot machines." *Id.* at 10.

Three years later, the Attorney General, in a subsequent opinion letter, concluded that Constitutional exceptions permitting lotteries must be narrowly construed. He reasoned that the "Constitution must be interpreted so as to give effect to the intent of the framers" and that the legislative history of the amendment and statutory enactment made clear that "only a

[18] By contrast, regarding a ballot initiative to introduce VLTs at Ohio racetracks, testimony before the Ohio Senate Ways and Means Committee referred to VLTs as exactly what they are; "slot machines." Lee Leonard, *Video Lottery Terminals Would Ruin Lives, Ex-Gambler Says,* the Columbus *Dispatch*, June 6, 2001. *See* Affirmation of James Shannon, dated June 7, 2002 at Exhibit "C" [R. 931].

traditional lottery, essentially based on the drawing of a ticket, was considered … 'authorized and prescribed.'" 1984 N.Y. Op. Atty. General 11 at 7.

The Appellate Division sought to distinguish the Attorney General's prior opinions, however, noting that unlike the VLTs at issue in this case, those opinions addressed "proposed video games such as computer poker and blackjack," and that such games "involved a single player pitting his or her skill against a machine." ***Dalton***, 11 A.D.3d at 96. *See also* Brief of Defendant-Respondent Finger Lakes Racing Association at 24; Brief of Yonkers Racing Association at 20. Indeed, the State and the *amici* have gone to considerable lengths in their briefs to impress upon the Court the modern technological sophistication of the VLTs and how they operate, arguing that despite the electronic enhancements, they are still fundamentally a lottery.

They have omitted one very salient point, however. On August 13, 2004, less than six weeks after the Appellate Division ruled in this case, the Lottery, for the very first time, installed video poker VLTs at Saratoga Equine Sports Center. *See* Crowe, K., *Video Poker Joins Racino Games*, Albany *Times-Union*, August 13, 2004 at B-7 (article annexed as Appendix "C"). Those games all have the outward appearance of being interactive so that the skill of the player would affect the game's outcome. *See* Crowe, K., *Racino Revenue Boost May Be in the Cards*, Albany *Times-Union*, August 18, 2004 at B-1 (attached as Appendix "D") ("The poker VLTs are based on five-card draw poker, in which the bettor

gets to first see the cards dealt, then pick which ones to hold before taking a second spin for the final hand").[19]

An interactive game in which the skill of the player would affect the outcome is inconsistent with the New York State Lottery, however, since in a lottery every player is supposed to have an equal chance of winning based upon a randomly selected event. *See* State's Brief at 60-61 ("The only choice the player has that affects the game's ultimate outcome is the type of ticket to be purchased … Once the player makes the choice and if a winner the prize amount, is a matter of chance … (N)othing they can do affects their chances of winning"). *See also* Brief of Finger Lakes Racing Association at 22 ("player has no ability to affect the outcome").

After the State Lottery Division installed this game at Saratoga subsequent to the Appellate Division's decision, and after the undersigned counsel for Appellants learned of this in the newspaper (Appendices "C" and "D"), he called one of the Assistant Attorneys General assigned to this case to inquire how such an interactive video poker game could be reconciled with what the State had argued to the court below (and, as it turns out, what it now is arguing here - *see* State's Brief at 60-61). The Assistant Attorney General did look into the matter and called back to advise that while the games do appear to be interactive, their outcomes are, in fact, preprogrammed and predetermined so that the video poker player's decision to hold or draw will have absolutely no effect on the game's outcome and thus the games are not affected by skill. While I am certain that the Assistant Attorney

[19] While these video poker VLTs were not part of the formal Record on Appeal, that is only because they did

General was absolutely truthful and did not realize that the Lottery had actually installed these games until after he was advised by the Appellants' counsel, the fact, nevertheless, is that the betting public is clearly being deceived by such a scheme.[20]

It is time for this deception and doubletalk to cease. On the one hand, the State is telling this Court, as it did the court below, that the VLTs are not really games in which players pit their skill against a machine. Based on the Assistant Attorney General's representations, that is undoubtedly true.[21] Yet bettors are being duped into believing precisely the opposite. The Appellate Division undoubtedly had no idea at the time it handed down its decision what the Lottery was about to do. Even if the video poker VLT games are not based on skill, their installation by the Division of the Lottery to induce bettors to play under the misconception that they can affect the game's outcome is a massive perpetration of fraud on the betting public! The proverbial deck is stacked against them, and they don't even know it.[22]

---

not become operational until after the Appellate Division had already rendered its decision in this case.

[20] Dorothy Bradshaw, a patron of the racino, is quoted in the newspaper article regarding the difference between video poker machines and other VLTs. She said, "You've got to think" (see Appendix "D"). Unfortunately, Mrs. Bradshaw has been deceived. You don't have to think. The State just wants you to believe that to induce you to play on the erroneous assumption that you can outsmart the machine.

[21] Appellants' counsel wishes to emphasize that this is ***NOT*** an attack on the integrity of anyone in the Attorney General's office who worked on this case. These remarks are directed at the Division of the Lottery and the racetracks where video poker VLTs have been installed. They are taking advantage of the public which can not be blamed for its growing cynicism and distrust of government agencies that are supposed to protect them rather than cheat them.

[22] Perhaps the most disturbing observation is advanced in the Brief of Defendant-Respondent Finger Lakes Racing Association which cavalierly dismisses the concerns about confusing the public with the blithe observation that these "are arguments for the Legislature and the court of public opinion." (*Id.* at 23)

F. Once the Appellate Division Found the Revenue Diverting Provisions of Part C of Chapter 383 Were Illegal, It Acted Appropriately In Declaring All of Part C Unconstitutional Rather Than Trying to Sever Its Offending Provisions

In the event that this Court upholds the decision below finding Part C unconstitutional, the State argues that this Court should overturn the Appellate Division's refusal to sever the offending provision (State Br., p.76-78). The State's argument lacks any merit. If the tracks received no fee whatsoever, they would not participate in the program, thereby completely defeating the statute's purpose.

In arguing for severance the State's Brief cites [p.76] the same test considered by the court below, *i.e.*, whether:

> 'the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots.' (internal citations omitted).

11 A.D.3d at 101.

The State fails to recognize that, as the Appellate Division correctly held [*Id*. at 102], the severance of the mandated payments to race purses and breeding funds would not cure the constitutional defect. This court has held that when an unconstitutional provision is inextricably interwoven with other parts of a regulatory scheme, it is inappropriate to judicially excise it even if a severability clause exists. ***New York State Superfund Coalition,***

Inc. v. New York State Dep't of Environmental Conservation, 75 N.Y.2d 88 (1989); ***Burrows v. Board of Assessors for the Town of Chatham***, 64 N.Y.2d 33, 37 (1984).

In the present case the only way to remove the constitutional infirmity altogether would be to strike out both the mandated payments and vendor fee provisions. It is inescapable that the Legislature would have rejected a statute that had no provision for vendor fees whatsoever. The State's response is to invite this Court to judicially legislate a remedy, by directing the vendors to turn over to the State that portion of the vendors fee that was to be used for race purses and breeding funds. (State Br., p.77). This Court has recognized that it does not have the power to legislate judicially. ***Erie County Agricultural Soc. v. Cluchey***, 40 N.Y.2d 194, 201 (1976); ***Metropolitan Life Ins. Co. v. Boland***, 281 N.Y. 357, 361 (1939).

Based upon all the foregoing reasons, this Court should affirm the Appellate Division's holding that the invalid portion of the statute cannot be severed from the remaining provisions and that the entirety of Part C of chapter 383 is unconstitutional.

POINT III

Part D of Chapter 383 Authorizing New York State's Participation in a Multi-State Lottery Violates Article I, § 9 of the New York State Constitution

A central issue with respect to the validity of the Mega Millions multi-state lottery entered into pursuant to Part D of Chapter 383 of the Laws of 2001 is whether or not it is "***operated*** by the State" as required by Article I, § 9(1) of the New York State Constitution. Such a determination must be made in accordance with the well-settled rule that exceptions to constitutional prohibitions must be strictly construed to ensure that the exceptions do not consume the rule. This is especially true when considering prohibitions against gambling. ***Ramesar v. State of New York***, 224 A.D.2d 757, 759 (3d Dept 1996), *lv to app den.*, 88 N.Y.2d 811 (1996); ***Molina v. Games Management Services***, 58 N.Y.2d 523, 529 (1983). The State's opposition brief (State Br., pp.80-81), as well as the decision of the Appellate Division below (11 A.D.3d at 103-104), gloss over the true extent of the State's abrogation of its own authority with respect to the central operations of the Mega Millions game, erroneously describing vital functions as mere administrative tasks.

At page 81 of its Brief, the State argues that New York State "retains its sovereignty in entering into the [multi-state lottery] agreement and cannot be held responsible for the negligence of other participating states." That is precisely the point. Those other participating states are critical to the functioning of the multi-state lottery, and yet this State disclaims any responsibility for their actions while it contends at the same time that it "operates" the Lottery. The State cannot have it both ways.

The Appellate Division held that the language in Article I, §9(1) of the New York Constitution that a lottery be "operated by the state" only required that it be "supervised or controlled by the state." *Id*. at 104. How can it "control" what it disclaims responsibility for? The State has adopted this position in its brief (State Br., p.81), highlighting the fact that the other contracting states accepted all of New York's suggested changes before New York joined Mega Millions and that New York retains the right to withdraw from Mega Millions either by operation of law or after six months' notice (State Br., p.82). It is self-evident that the voluntary acceptance of these changes by the other participating states, or for that matter the extent of the State's negotiating power before signing the Agreement, has no bearing on its level of control afterwards, which in this case is merely one vote among ten, with six necessary to take any action [R.739]. This would be akin to a single Judge of this Court claiming to control the outcome of all cases that come before it. Just because the State of New York has, until now, voted with the majority of other Party Lotteries does not support a finding that it controls the Mega Millions lottery. Left unanswered is what happens when the other states do not go along with New York State. The State fails to explain how its option to withdraw translates into affirmative control over Mega Millions operations; as New York's participation is not necessary for the continued operation of Mega Millions by the other states, the ability to withdraw does not provide any support for the State's position. The concept of withdrawal is antithetical to the concept of control.

A central premise of the Appellate Division's holding below on the Mega Millions issue was the erroneous classification of those functions carried out by other Party Lotteries

as "administrative functions" similar to those already carried out by private contractors for other New York lottery games. 11 A.D.3d at 104. The State makes this same argument (State Br., pp.81, 83). Such a position defies reality and common sense. Among the wide range of responsibilities delegated to other Party Lotteries are the possession of the lottery prize funds and selection of the winning numbers [R.748-749, 768], inescapably two of the most important and critical aspects of a lottery. Significantly, the State failed to counter the Plaintiffs' argument (Pl. Br., p.67), that should a New York lottery player be wronged as a result of the negligence of the Party Lottery having control over these critical aspects of the Mega Million game, the New York player would have absolutely no recourse - - nor would the State aside from the option to withdraw from Mega Millions. Leaving New York bettors in the lurch by telling them, in effect, that there is nothing New York State can do for them is hardly consistent with the State's simultaneous argument that it "controls" the Lottery. This critical fact distinguishes this from other New York State lottery games in which functions have been delegated to private contractors; in that instance the private contractor is subject to the jurisdiction of the courts of the State of New York and the State maintains exclusive and undiluted authority over the actions of such contractors.

While the State refers to the role of other participating states as the performance of mere "administrative functions," there is no way the State of New York can control, by itself, what those other states do. The States' arguments are thoroughly disingenuous. The other states are equal partners with New York State, not subcontractors. New York State

simply cannot claim that it "operates" the Lottery unless it also acknowledges that it is not the sole operator.

At page 81 of its Brief, the State makes the argument, also relied upon by the Appellate Division, that "nothing in the Constitution mandates that the Lottery be operated ***exclusively*** by the State" (emphasis supplied). ***Dalton***, *supra* at 105. If true, that means that there would be nothing wrong with New York State participating with another entity to jointly operate the Lottery! If, as the State argues, it is permissible under Article I, § 9 to partner with another State, there is nothing to prevent it from partnering with other entities that are not states, nor in giving some of its ticket sales to produce a jackpot awarded to individuals purchasing tickets from a for-profit partner operating in another jurisdiction - say, in Texas or any of a multitude of jurisdictions around the country, not to mention the globe! Where will it end?

The State rationalizes its actions here in much the same way it did with respect to VLTs, seeking to create a huge loophole by defining "net proceeds" any way it wishes. In addition, just as is the case with Indian casino gaming and VLTs, the Legislature and the Governor, in their desperate quest to find new sources of revenue, have gone to extraordinary lengths to find loopholes in the Constitution that do not exist, urging tortured interpretations upon the Judiciary to help them get around their obligation to uphold it.

While the Respondents constantly remind this Court of the general tenet of statutory construction that laws are presumptively constitutional,[23] they ignore the equally well-settled

[23] *See*, for example, Point I of Brief of Yonkers Racing Corporation.

rule that exceptions to broad constitutional prohibitions must be narrowly construed to ensure they don't consume the rule. In this case, Parts B, C and D of Chapter 383 of the Laws of 2001 all fail to meet that test.

POINT IV

Chapter 383 of the Laws of 2001 Was Adopted in Violation of Article III, § 14 of the New York Constitution

In its exhaustive report, *The New York State Legislative Process: An Evaluation and Blueprint for Reform*, the Brennan Center for Justice at N.Y.U. School of Law (2004) determined that the State of New York enjoys the dubious distinction of having the most dysfunctional government of any state in the nation. ***Id***. at 39. Article III, § 14 of the New York State Constitution, requiring a three day waiting period before the Legislature can enact a law unless the Governor delivers a Message of Necessity setting forth the facts which he believes justify a waiver of the waiting period, was meant to provide one of the procedural safeguards against such dysfunctionality. It was adopted "to prevent hasty and careless legislation, to prohibit amendments at the last moment, and to insure that the proposed legislation receives adequate publicity and consideration" [***Schneider v. Rockefeller***, 31 N.Y.2d 420, 434 (1972)]. As Justice Cannizzaro of the Supreme Court, Albany County, so eloquently noted in a recent decision:

> We are the people's government, made for the people, by the people and answerable to the people . . . Consequently, inasmuch as government is the people's business, it necessarily follows that its operation should at all times be open to public view. Openness, accountability and transparency are as essential to honest governmental administration as freedom of speech is to representative government.

Buono v. Brodsky, No. 8031-04, slip op. at 8 (Sup. Ct. Albany Co. 2004).

Unfortunately, those lofty goals are more elusive when Government officials ignore the Constitutional mandates that were put in place to achieve them. This is such a case. The Governor simply ignored Article III, § 14, delivering to the Legislature a Message of Necessity that was devoid of any facts whatsoever.

The State and Park Place continue to stress the fact that Chapter 383 of the Laws of 2001 was enacted following the events of September 11, 2001, and argue that this horrific event necessitated immediate passage. Perhaps, but the Governor did not cite these facts in his Message of Necessity. Such arguments are, moreover, intellectually dishonest, ignoring: (1) the Governor's delay of four days in signing the bill once it had been passed by the Legislature [R. 354], (2) the fact that if the necessity was so great the Legislature surely could have stayed in session for three days, and (3) the reality that none of the 27 separate provisions of Chapter 383 would be affected in the least by a delay of three days. It would seem self-evident that a rare and momentous change in the law, such as that wrought by Chapter 383, provides greater justification for openness, debate and considered deliberation than that given to a more mundane example of legislation which may have little or no impact on the general public. The horrific events of 9/11, tragic though they were, did not amend the Constitution.

The State also argues that "the bill recites its own necessity by stating 'This act enacts into law major components of legislation relating to issues deemed necessary for the [S]tate." (State Br., p.88). The Message must exist independently of the bill. Otherwise, Article III, § 14 would be meaningless. Moreover, such a statement lack facts as to ***why*** it is

necessary, it is clear that under Article III, § 14 it is the constitutional duty of the Governor to state the facts that require an immediate vote in his Message of Necessity and that any bootstrapping, "self-validating" statements by the Legislature cannot be imputed to the Governor for this purpose.

The State emphasizes that the "Message of Necessity was accepted as reasonable and sufficient by the Legislature, and the Legislature never suggested otherwise." (State Br., p.92).[24] This line of reasoning was firmly rejected by the unanimous opinion of this Court in ***New York State Bankers Ass'n v. Wetzler***, 81 N.Y.2d 98 (1993) ("***NYS Bankers***"), which is remarkably analogous to the instant matter. In ***NYS Bankers*** this Court was faced with a clear violation of Article VII, § 4 of the New York Constitution governing adoption of the budget. The State argued in ***NYS Bankers*** that "the purpose of article VII, § 4 -- harmony between the legislative and executive branches in implementing the budgetary process -- was achieved inasmuch as the Governor and the Legislature both acted to show their approval..." *Id*. at 104. The State went on to argue that as the Governor and Legislature could have enacted the measure constitutionally and "the desired result has been achieved . . . there is no cause for complaint. The violation, therefore, is of no moment." *Id*. In dismissing the importance of the Legislature and Governor's concurrence, this Court emphasized that Article VII, § 4 was part of a constitutional scheme governing the interaction of the Legislature and the Governor and, importantly, constituted an exception to normal

[24] Park Place goes so far as to claim that "a majority of legislators found sufficient facts stated to justify the necessity of immediate action on Chapter 383" (Int. Br., p.69), which is clearly erroneous given the fact that the Message of Necessity was not even read to the members of the Senate [R. 370].

procedure. *Id*. This Court held that to approve a clear violation of the Constitution would be to "disparage the very foundation of the People's protection against abuse of power by the State – the tripartite form of government established in the Constitution." *Id*. at 105. *See also* ***King v. Cuomo***, 81 N.Y.2d 247, 253 (1993) ("Courts do not have the leeway to construe their way around a self-evident constitutional provision by validating an inconsistent 'practice and usage of those charged with implementing the laws.'")

While it may be true, as the State points out at page 93 of its brief, that "[Appellants-Respondents] cannot point to a single case invalidating legislation based upon a challenge to the substance of a message of necessity," none of the previous challenges dealt with such a blatant and wholesale disregard for the requirements of Article III, § 14. As detailed in Point III of Appellants-Respondents' main brief, those messages of necessity previously reviewed by the courts contained some factual basis, no matter how minimal. Putting the cart before the horse, the State argues that "this Court has made clear that courts should not second-guess the facts that, in the Governor's opinion, support a Message of Necessity" (State Br., p.89), without first establishing that the present Message of Necessity contains any facts to second-guess. That is the critical distinction in this case. Plaintiffs-Appellants are not asking this Court to substitute its judgment for the Governors. The Governor has made no judgment at all. The Plaintiff legislators were entitled to know why, in the Governor's judgment, these bills were "necessary" to enact certain provisions of law. He never told them.

The State, nevertheless, appears to argue that this is a nonjusticiable issue, quoting

this Court's decision in ***Finger Lakes Racing Ass'n. v. New York State Off-Track Pari-Mutuel Betting Comm'n.***, 30 N.Y.2d 207, 220 (1972) ("***Finger Lakes***"), that "a court should not intervene to nullify an act of the Governor addressed to legislative action which literally and reasonably conforms with constitutional requirements (internal citations omitted)." (State Br., p.89). Of course, the State failed to quote the beginning qualifier of the relevant sentence, i.e. "Normally a court …" (*Id*.). In ***Finger Lakes*** this Court did review the merits of the claim and held that "[t]he facts supporting [the Governor's] opinion ... are rational and reasonable." (*Id*. at 219). ***See also Board of Education v. City of New York***, 41 N.Y.2d 535, 538 (1977) (citing, *inter alia*, ***Finger Lakes*** for the proposition that "[w]hile in general the courts will not interfere with the internal procedural aspects of the legislative process, judicial review may be undertaken to determine whether the Legislature has complied with constitutional prescriptions as to legislative procedures."). Park Place also argues that this is a nonjusticiable issue, citing to a number of cases which are clearly distinguishable. (Park Place Br., p.67, n.51). Only one of the cases cited by Park Place involve a procedural mandate required by the New York State Constitution, that being ***Saxton v. Carey***, 44 N.Y.2d 545 (1978). In ***Saxton*** this Court was asked to review the level of itemization required by Article VII, §§1-7 of the New York State Constitution. ***Id***. Unlike the present case, in which the Governor completely failed to provide any facts as required, in ***Saxton*** this Court noted that the budget at issue was undeniably itemized to "a considerable extent." ***Id***. at 549. In light of that crucial fact, this Court held that it need not evaluate the level of itemization; it is clear that ***Saxton*** does not purport to stand for the proposition that a

budget devoid of any itemization would be beyond judicial review.

The State attempts to trivialize the failure to comply with Article III, § 14, stating that "[b]oth legislative plaintiffs in this case spoke and voted against the legislation" (State Br., p.92) and by pointing out repeatedly that the Legislature did not object to the Message of Necessity. This issue was also addressed in ***NYS Bankers***, *supra*, where the State argued that the court's invocation of Article VII, § 4 "amount[ed] to a 'purely technical judicial roadblock into the consensual budget process' and where 'the Governor and Legislature are in agreement . . . it makes absolutely no sense to apply section 4 to forbid the change simply because it may technically have been added by the Legislature." 81 N.Y.2d at 103. In response this Court held that:

> the very point of plaintiff's argument on the merits ... is that the constitutional violation is a matter of substance which cannot be ignored as trivial. We have found no authority for forestalling a determination on the merits of a constitutional question by dismissing it as nonjusticiable for reasons of alleged triviality.

Id.

Finally, the State argues that if this Court should determine that Article III, § 14 was violated, any relief should be prospective only. This argument is without merit. The two cases cited by the State, ***King v. Cuomo***, 81 N.Y.2d 247 (1993) and ***Campaign for Fiscal Equity v. Marino***, 87 N.Y.2d 235 (1995), are easily distinguishable from the instant matter. In both ***King*** and ***Fiscal Equity***, the practice of the Legislature in recalling bills from the Governor's desk before he acted on them, had been in use for a long time and no prior court

had determined that it was constitutionally invalid. Thus, granting only prospective relief was appropriate. Here, however, no one questions the fact that Article III, § 14 requires a Message of Necessity. All that is at issue here is the validity of this particular Message of Necessity which, unlike past messages, contains absolutely no facts to justify waiver of the three day writing requirement. There is no reason, therefore, to let the Governor and/or the Legislature "off the hook" because they both knew full well what was required of them.

In conclusion, it is clear that the Governor's Message of Necessity with respect to L. 2001, ch. 383 that "these bills are necessary to enact certain provisions of law" merely restated rather than answered the one question Article III, § 14 required him to answer: ***Why?***

CONCLUSION

The Order of the Appellate Division should be modified by reversing so much thereof as declared Parts B and D of the Laws of 2001 constitutional and by declaring said Parts unconstitutional, and as so modified, said Order should otherwise be affirmed.

DATED: February 10, 2005

Respectfully submitted,

O'CONNELL AND ARONOWITZ
By:

_____
Cornelius D. Murray, Esq.
Attorneys for Appellants-Respondents in Action No. 1
Office and P.O. Address
54 State Street
Albany NY 12207-2501
(518) 462-5601

G:\DATA\ATTORNEY\CDM\Saratoga Gambling 2005\MLgambling-CM.doc