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30 minutes

To be argued by:
Cornelius D. Murray, Esq.

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.

BRIEF OF APPELLANTS-RESPONDENTS IN ACTION NO. 1

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Dated: October 1, 2004

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PRELIMINARY STATEMENT

This Brief is respectfully submitted on behalf of Joseph Dalton, *et al.*, the Plaintiffs in Action No. 1, who have been denominated as Appellants-Respondents for purposes of this appeal.[1] They are a broad coalition of citizen taxpayer-voters, state legislators and various not-for-profit organizations opposed to the spread of gambling throughout the State. In this case, they seek a declaratory judgment that Parts B, C and D of Chapter 383 of the Laws of 2001 are unconstitutional and that the Defendants, denominated as Respondents-Appellants for purposes of this appeal, who are various State officials, racetrack operators and/or gambling casino management companies, should be permanently enjoined from engaging in any further activities to implement the provisions of Parts B, C and D.

The essence of Plaintiffs' argument is that Article I, § 9 of the New York State Constitution prohibits the Legislature from enacting laws authorizing the types of gambling purportedly allowed by Part B (Indian casino gambling), Part C (video lottery terminals at racetracks) and Part D (participation by the State in a multistate lottery). They also contend that the manner in which this legislation was enacted violated Article III, § 14 of the Constitution, which prohibits the Legislature from passing any bill that has not been on its members' desks for at least three days unless the Governor delivers to them a so-called "Message of Necessity" certifying the facts which the Governor believes necessitate an

[1] This case has been consolidated with another case that is virtually identical, *Mrs. Lee Karr v. Pataki, et al.*, Action No. 2, which also originated in Supreme Court, Albany County. Both cases were argued together and filed together at both Supreme Court and the Appellate Division, Third Department.

immediate vote. In this case, Plaintiffs contend that the Message of Necessity delivered by the Governor failed to satisfy those requirements.

In July, 2003, Supreme Court, Albany County (Teresi, J.) upheld the constitutionality of Parts B, C and D, and entered an Order dismissing the Complaint, although, technically, rather than dismissing the Complaint, that Court should have probably entered a judgment declaring Parts B, C and D constitutional. *See* Siegel, *New York Practice* at 705 (3d Ed. 1999). In any event, in July 2004, the Appellate Division, Third Department modified Supreme Court's Order by (a) reversing so much thereof as upheld the constitutionality of Part C (video lottery terminals at racetracks) and (b) declaring Part C unconstitutional. The Appellate Division did, however, affirm that part of Supreme Court's ruling upholding the constitutionality of Parts B (Indian casino gaming) and D (the State's participation in a multistate lottery) and the Governor's Message of Necessity.

The parties have cross-appealed to this Court. The Plaintiffs contend that the Courts below erred in upholding the constitutionality of Parts B and D and the Governor's Message of Necessity. Defendants, on the other hand, contend that the Appellate Division erred in declaring Part C unconstitutional.

In this initial Brief, Plaintiffs will address only the constitutionality of Parts B and D and the Message of Necessity. Since the Appellate Division declared Part C unconstitutional, albeit on narrower grounds than Plaintiffs would have preferred, they will await the filing of their adversaries' briefs before addressing that issue.

JURISDICTION OF THE COURT

This Court has jurisdiction to decide the aforementioned cross-appeals, since the Appellate Division order appealed from directly involves "the construction of the Constitution of the State." N.Y. Const. art. VI, § 3(b)(1). *See also* CPLR § 5601(b)(1).

STATEMENT PURSUANT TO 22 N.Y.C.R.R. 500.1

Plaintiff New Yorkers for Constitutional Freedom, Ltd. is a not-for-profit corporation with no parents, subsidiaries or affiliates.

QUESTIONS PRESENTED

1. Given the provisions in art. I, § 9(1) of the Bill of Rights of the New York Constitution prohibiting the Legislature from authorizing gambling and directing it to pass laws to prevent it, could the Legislature nevertheless enact legislation (L. 2001, ch. 383, Part B) empowering the Governor to enter into compacts with Native American (Indian) tribes, authorizing them to operate Las Vegas-style gambling casinos in this State on the theory that the federal Indian Gaming Regulatory Act ("IGRA") gave the New York State Legislature the power to pass a law in violation of this State's own Constitution?

Both Supreme Court and the Appellate Division, Third Department answered the question in the affirmative.

2. Even assuming, *arguendo*, that the Legislature could authorize the Governor to enter into such Compacts, was §2 of Part B an unlawful delegation of authority because:

- it gave the Governor the power to enter into Compacts with tribes yet to be determined
- in unspecified locales within Ulster and/or Sullivan Counties
- without specifying what the terms of the Compact should be?

Supreme Court did not address this issue and the Appellate Division upheld the delegation of power.

3. Does Part D of Chapter 383, purporting to authorize the State Division of the Lottery to participate in a multi-state lottery, violate art. I, § 9 of the Constitution which allows for a limited exception to the general prohibition against lotteries, provided that such lotteries are operated by the State and the net proceeds therefrom are dedicated exclusively to aiding education in this State, when:

> (a) the governing agreement among the states participating in the multistate lottery does not give New York control over the operation of the multistate lottery; and
>
> (b) proceeds from its operation fund centralized operations serving all states and support programs in other states having nothing whatsoever to do with education in the State of New York?

Both Supreme Court and the Appellate Division upheld the constitutionality of Part D.

4. Were Parts B, C and D of Chapter 383 of the Laws of 2001 unconstitutionally enacted because the bill that became Chapter 383 was passed by the Legislature without the three-day waiting period required by art. III, § 14 of the Constitution, and the Governor's Message of Necessity, which requires that he certify the facts which, in his opinion, necessitated an immediate vote, merely:

- stated that the bill was necessary to enact certain provisions of law; and
- noted that the leaders of both houses of the Legislature had requested the Message of Necessity because the bill had not met the three day "aging" requirement?

Both Supreme Court and the Appellate Division below upheld the Message of Necessity.

FACTS, CONSTITUTIONAL AND STATUTORY BACKGROUND AND PROCEDURAL HISTORY

The Constitutional Prohibition Against Gambling

Article I of the N.Y. State Constitution is entitled "Bill of Rights." It operates as a restriction on the powers of the State Government. Section 9(1) of Article I provides, in pertinent part, as follows:

> … except as hereinafter provided, ***no lottery*** or the sale of lottery tickets, pool-selling, bookmaking, ***or any other kind of gambling***, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, ***shall hereafter be authorized or allowed within this state;*** and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section. (emphasis supplied)

In addition to the exceptions contained in subdivision (1) of Article I, § 9 with respect to a State-operated lottery and horseracing, subdivision (2) of Article I, § 9 carves out some additional limited exceptions to the prohibitions against the Legislature's authorization of gambling, permitting it to allow certain non-commercialized "games of chance," to be operated exclusively for the benefit of bona fide religious, charitable or not-for-profit organizations such as volunteer fire departments. Subdivision (2) further provides, however, that no person involved in any such gambling shall derive any remuneration for

participating in the management or operation of such gambling. By its terms, § 9(2) further requires that even when such gambling is conducted, it can only be after it has first been specifically approved by the voters of the affected municipality, where such gambling is to occur, and even then such gambling is to be conducted pursuant to strict rules and regulations governing such operation. *See also* General Municipal Law, Article 9-A, § 185 *et seq.* 9 N.Y.C.R.R. § 5602.1 *et seq.* Those provisions empower the New York State Racing and Wagering Board to regulate any such games of chance. Finally, Article I, § 9, subdivisions (1) and (2), respectively, direct the Legislature to pass laws to prevent offenses against the prohibitions in subdivision (1) and the limited exceptions specified in subdivision (2).

The Genesis of this Lawsuit and Prior Litigation with Respect to Indian Casino Gaming and the Indian Gaming Regulatory Act

Although the legislation here at issue was not passed until October, 2001, this case had its origins back in 1999, when Governor Pataki tried to negotiate an amendment to a Compact with the St. Regis Mohawk Tribe, purporting to allow that Tribe to operate electronic gaming devices at a so-called "Class III" Las Vegas-style commercial gambling casino the Tribe had established at its Akwesasne reservation in upstate New York. That Compact had originally been unilaterally entered into with the Tribe in 1993 by Governor Pataki's predecessor in office, Governor Mario Cuomo, without legislative authorization and purportedly under the auspices of the federal Indian Gaming Regulatory Act (Public Law 100-197, codified at 25 U.S.C. § 2701 *et seq.* and 18 U.S.C. § 1166-1168) ("IGRA").

The Indian Gaming Regulatory Act ("IGRA")

IGRA was enacted in 1988 by Congress pursuant to the power vested in it by the Indian Commerce Clause in Art. I, § 8, cl. 3 of the U.S. Constitution in order "to provide a statutory and regulatory basis for the operation and regulation of gaming by Indian tribes." ***Seminole Tribe of Florida v. Florida***, 517 U.S. 44, 47-48 (1996) ("***Seminole Tribe***"). It divides gaming on Indian lands into three classes – I, II and III, providing a different regulatory scheme for each. *Id.* [2] At issue in this litigation is the highly sophisticated Las Vegas-style casino gambling that comes under Class III, as defined in IGRA. ***Saratoga County Chamber of Commerce v. Pataki***, 293 A.D.2d 20, 21 (3d Dep't 2002), *aff'd*, 100 N.Y.2d 801 (2003), *cert den*, _____ U.S. _____, 124 S.Ct. 570 (2003). *See also* ***Seminole Tribe***, *supra* at 48.

Class III gaming for Indian tribes on Indian lands is prohibited by IGRA unless, *inter alia*, such gambling is conducted in conformance with a so-called Tribal-State Compact entered into by an Indian tribe and the State in which such lands are located. ***Seminole Tribe***, *supra* at 48-49. 25 U.S.C. § 2710(d)(1). Section 23 of IGRA, codified at 18 U.S.C. § 1166, makes all State laws, including criminal laws, that prohibit Class III gambling applicable to Indian lands unless such gambling is conducted under the auspices of a valid Tribal-State Compact entered into pursuant to IGRA.

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[2] Class I and Class II gaming are not subject to direct state control and enforcement. *See* 25 U.S.C. § 2710(a) and (b). With respect to Class III gaming, however, a state plays a more important role. *See* 25 U.S.C. § 2710(d). *See also* 18 U.S.C. § 1166(c).

Nothing in IGRA ***requires*** a State to enter into a Compact. Notably, IGRA § 11(d)(3)(B), codified at 25 U.S.C. § 2710(d)(3)(B), provides that a State ***may*** enter into a Compact with a Tribe, but there is clearly no obligation to do so. ***Ponca Tribe of Oklahoma v. Oklahoma***, 37 F.3d 1422, 1434 (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) (IGRA does not force states to compact with Indian tribes). *See also*, Conferences of Western Attorneys General, *American Indian Law Deskbook*, at 346 (2d Ed. 1998). *See also* ***Yavapai-Prescott Indian Tribe v. Arizona***, 796 F.Supp. 1292, 1297 (D. Ariz. 1992) (IGRA does not force a state to enter into a Compact).[3]

Even though Article I, § 9 of the State Constitution prohibits gambling subject to certain exceptions not applicable to this case, and even though IGRA does not require a State to enter into a casino gaming Compact, Governor Cuomo, nevertheless, signed the original Compact in 1993, and Governor Pataki tried to amend it in 1999.

In September 1999, many of the very same individuals who are Plaintiffs in the current case brought an action challenging the validity of the Compact with the St. Regis Mohawk Tribe, contending that the Governor had violated New York's constitutional separation of powers by entering into such an agreement without legislative authorization, and that such Compact violated, as well, Article I, § 9 of the New York Constitution which prohibits commercial gambling and directs the Legislature to pass laws to prevent it. They

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[3] In ***Saratoga County Chamber of Commerce v. Pataki***, 100 N.Y.2d 801 (2003), the Governor conceded to this Court that IGRA does not require a State to enter into a Compact. *See* pages 16 and 17 of the State Appellant's Reply Brief dated February 6, 2003 submitted to this Court in ***Saratoga***, *supra*, and appended as Appendix "A" to this Brief.

also argued that IGRA did not provide the Governor with a means to circumvent the Constitutional prohibition. *See* ***Saratoga County Chamber of Commerce v. Pataki***, 100 N.Y.2d 801 (2003) , *cert den,* _____ U.S. _____, 124 S.Ct. 570 (2003) ("***Saratoga***").

In ***Saratoga***, this Court ultimately ruled that (a) the Tribe was not an indispensable party to that litigation which would have required dismissal of the Complaint, and (b) the Governor had violated the State's constitutional separation of powers by acting without legislative authorization. Accordingly, it declared the 1993 Compact illegal. It left open the question of whether, assuming he did have legislative authority, such compacts would nevertheless violate Article I, § 9 of the Constitution. *Id.* at 825. That is one of the questions to be resolved in this case.

The Legislation at Issue
(Chapter 383 of the Laws of 2001)

In the early fall of 2001, while the ***Saratoga*** case was still *sub judice*, the Legislature passed Senate Bill 5828, Assembly Bill 9459, and Governor Pataki thereafter signed it into law as Chapter 383 of the Laws of 2001.[4] It was an omnibus 81-page bill, containing 27 discrete parts, Parts A-AA, inclusive, addressing a multitude of different issues, only three of which are germane to this case.

Part B of Chapter 383 purports to authorize the Governor to enter into Indian casino gaming compacts (other than the one at issue in ***Saratoga***) with Indian tribes to permit casino

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[4] A copy of the bill as presented to the Legislature, in printed form, is in the Record on Appeal [R. 71-151]. References to members or letters in parentheses preceded by "R." refer to the corresponding pages of the Record on Appeal.

gambling even "off the reservation" and without any opportunity for localities to approve or disapprove them. The legislation calls for up to three casinos to be operated by the Seneca Nation of Indians in Western New York pursuant to an earlier Memorandum of Understanding the Governor had negotiated with the Senecas [R. 156-162]; and up to three additional Compacts with yet to be named tribes in Ulster and Sullivan Counties. *See* Executive Law, § 12.

Part C of Chapter 383, under the guise of aiding education, authorizes the State Division of the Lottery to license racetracks to install video lottery terminals (a/k/a slot machines) at those facilities and divert part of the money realized therefrom to enhance horse racing purses and horse breeding funds. *See* Tax Law, §§ 1612(a)(5)(a), (b), and 1617-a.

Part D of Chapter 383 authorizes the Division of the Lottery to participate in a multi-state lottery, and allows the pooling of bets and the interstate transfer of sales and prize money to other states. *See* Tax Law, §§ 1604, 1612(a)(3), and 1617. The other states' participating lotteries, however, are not exclusively dedicated to the cause of education in this state [R. 464-468] and the governing agreement among the participating states does not allow New York State to control the multi-state operation [R. 739-740].

The "Middle of the Night" Adoption of the Legislation Supported By Powerful Lobbyists and the Message of Necessity

Despite the highly controversial provisions of Chapter 383 of the Laws of 2001, there were no public hearings, nor any opportunity for the public at large to react or comment on

its implications before enactment. Indeed, this 81-page bill was passed by the Legislature late at night, virtually "sight unseen" shortly after it had been introduced, and while it was still "hot off the press." *See* Affidavit of Assemblyman William Parment, sworn to May 30, 2002, ¶ "16" (the "Parment Affidavit") [R. 697]. *See also* Gallagher, J., "Gambling Deal Marks Flawed Process," Albany *Times-Union*, October 29, 2001 [R. 881].

While the rank and file members of the Legislature had no input on this bill, high powered and highly paid lobbying interests had a great deal to say. The lobbyist for Park Place Entertainment, an Intervenor-Defendant in this case, whose firm was reported to have received over $300,000 from interests favoring gambling, said, "This is probably the biggest lobbying effort I have ever seen, and I have been around a long time." New York *Times*, November 1, 2001 at D1 [R. 883].

Huge amounts of money were expended by special interests groups to get this bill passed. The aforementioned New York *Times* article described the effort as "one of the broadest, most expensive campaigns in state history." *See also* Parment Affidavit, ¶¶ 29-34, inclusive [R. 700-702]. *See also* Odato, J., "Lobbying in Albany Hits a Record in 2001," Albany *Times-Union*, March 21, 2002 [R. 1261-1262]. This article notes that over $3.1 million was spent on lobbying by gambling interests, including the Seneca Nation of Indians, that supported a bill that was "rushed to passage in a late night session in October, 2001." *Id.* The same article referred to a $143,000 payment by the New York Racing Association, one of the Defendants herein, which, according to the article, "wanted, and got, a law allowing video lottery terminals at tracks." *Id.*

In the late evening of October 24, 2001, while the Legislature was in session, the Democratic majority in the Assembly met during recess and was told by the party leadership that when the members went back into session that evening, a bill (Assembly No. 9549 [R. 71-151]), that they had not seen before, would be placed on their desks, and they would be given an opportunity to explain their vote, but not debate it. *See* Parment Affidavit, ¶¶ 15-16 [R. 696-697].

The bill was, in fact, subsequently distributed to the members and a vote was ultimately taken and the bill passed that very night. The same "rush to judgment" occurred in the Senate, with the bill passing the same night it was introduced. *See* Affidavit of Senator Frank Padavan at ¶ 18, sworn to May 30, 2002 (the "Padavan Affidavit") [R. 473].

Article III, § 14, of the New York State Constitution, however, requires that no bill can be passed by either house of the Legislature until it has first been on the members' desks in printed form for at least three legislative calendar days. There is an exception within Article III, § 14, that allows an immediate vote, provided, however, that the Governor shall certify, in writing, the facts that necessitate an "immediate vote," a certification that is commonly referred to as a "message of necessity."

The purpose for such a requirement is obvious. In 1972, the New York State Court of Appeals stated that "the clear purpose of this provision [Article III, § 14] is to prevent hasty and careless legislation, to prohibit amendments at the last moment, and to ensure that the proposed legislation receives adequate publicity and consideration." ***Schneider v.***

Rockefeller, 31 N.Y.2d 420, 434 (1972), *citing* ***People ex rel. Hatch v. Reardon***, 184 N.Y. 431, 439 (1906), *aff'd* 204 U.S. 152 (1907).

Here, however, the only "facts" cited by the Governor to justify waiver of the three-day requirement were that "these bills [*sic*] are necessary to enact certain provisions of law" and that legislative leaders had requested it [R. 155-156]. A transcript of the proceedings in the Assembly reveals no vote was ever taken to accept the Message of Necessity [R. 664-665]. The Record further reveals that in the Senate, the Governor's message was not even read [R. 370].

In January, 2002 Plaintiffs brought suit in Supreme Court, Albany County challenging the constitutionality of Parts B, C and D of Chapter 383 and asking a permanent injunction against their implementation. As previously mentioned, it also challenged the Governor's Message of Necessity that accompanied the proposed legislation.

The Defendants (Respondents-Appellants)

The Defendants in this case include a number of state officials and/or bodies, including the Governor, the State Racing and Wagering Board, the Commissioner of Taxation and Finance and the Division of the Lottery. Then-Comptroller Carl McCall was also originally named as a party Defendant, but by stipulation dated November 21, 2002, he was dropped from the case [R. 33-35].

The Defendant State Racing and Wagering Board is referred to in an Indian Casino Gaming Compact entered into by the State with the Seneca Indian Nation (the "Senecas" and/or the "Tribe") pursuant to the legislation challenged herein, which Compact was

negotiated subsequent to the commencement of this litigation. In that Compact, the State Racing and Wagering Board is designated as the State organization responsible for ensuring that the Senecas comply with the terms of the Compact. *See* Paragraphs 1(bb) and 6(a) of that Compact [R. 716-718].

The State Racing and Wagering Board is also responsible for licensing employees at racetracks involved in the operation of video lottery gaming. *See* Tax Law, § 1617-a(a), as added by Section 1 of Part C of Chapter 383 of the Laws of 2001.

The Division of the Lottery within the Department of Taxation and Finance is responsible for supervising the administration of the New York State Lottery that is authorized pursuant to Article I, § 9 of the New York Constitution and is charged under Part C of Chapter 383 with the responsibility for overseeing the operation of video lottery terminals at racetracks. It is also the state agency responsible for administering the multi-state lottery authorized pursuant to Part D of Chapter 383, challenged in this litigation. *See* Tax Law §§ 1604 and 1612, as amended by Part D of Chapter 383.

The Defendant New York Racing Association and the other Defendant racetracks are also identified in the legislation as the operators of tracks where video lottery terminals may be installed. *See* Tax Law, § 1617-a, as added by Section 1 of Part C of Chapter 383.

The Intervenor Defendant-Respondent, Park Place Entertainment

After this case was commenced, Park Place Entertainment ("Park Place") intervened as a Defendant. In a Memorandum of Law submitted below, Park Place described itself as

"one of the world's largest gaming companies" that "has been working with the St. Regis Mohawk Tribe to bring a casino to Sullivan County" at Monticello in the Catskills [R. 312]. Park Place is interested, however, in defending only Plaintiffs' challenge to Part B of Chapter 383, authorizing Indian casino gaming. It claims to have already spent "millions of dollars in preparation for the construction and operation of this [the St. Regis Mohawk-Monticello] project" [R. 312].

Consolidation with Another Case

A case very similar to the present one, entitled ***Mrs. Lee Karr v. Pataki, et al.***, was filed in Supreme Court, Albany County (Index No. 718-02), raising virtually the same issues as this case. By Order dated October 30, 2002, that case was consolidated with the current one [R. 28].

The Decision by Supreme Court

In its July 17, 2003 decision [R. 10-20], Supreme Court upheld the constitutionality of Parts B, C and D of Chapter 383 of the Laws of 2001. It rejected Plaintiffs' argument that the legislation had been enacted in violation of Article III, § 14, with respect to the adequacy of the Governor's message of necessity. The lower court relied on ***Finger Lakes Racing Association v. New York State Off-Track Pari-Mutuel Betting Commission***, 30 N.Y.2d 217 (1972), where, unlike the case at bar, the Message of Necessity contained a statement to the effect that since the Legislature had already decided to adjourn, the Governor felt it was necessary for the bill in question to be acted upon immediately. There was no similar statement in the instant case [R. 155].

As for the constitutionality of Indian casino gaming, Supreme Court below relied on the *dissenting* opinion in this Court in ***Saratoga County Chamber of Commerce v. Pataki,*** 100 N.Y.2d 801 at 893 (2003), *aff'd* ____ U.S. ____, 124 S.Ct. 570 (2003) ("***Saratoga***"), without any independent analysis [R. 15]. In ***Saratoga***, however, a majority of this Court declined to address the issue of whether the Legislature could authorize the Governor to enter into Compacts with Indian tribes to allow casino gambling despite the prohibitions in Art. I, § 9 of the Constitution. It chose instead to decide the case on the narrower grounds that the Governor had violated the "separation of powers" in negotiating a compact without legislative authorization. It specifically noted that it was not ready to embrace either the dissent in that case favoring the constitutionality of legislation authorizing casino gaming, nor the concurring opinion which would have gone further and declared such gambling unconstitutional even had it received legislative authorization. Instead, the majority clearly requested further analysis by the lower courts on that issue. *Id.*, at 825. In this case, however, Supreme Court declined that invitation, simply relying on the dissent in ***Saratoga*** without any elaboration or explanation.

Next, Supreme Court upheld the constitutionality of Part C of Chapter 383, allowing the installation of video lottery terminals (VLTs) by the Division of the Lottery at racetracks, invoking the familiar principle that statutes are presumptively valid [R. 16]. The court, however, did not mention the equally familiar principle that exceptions to Constitutional proscriptions, such as those carved out of the broad prohibition against gambling embodied in Article I, § 9 of the Constitution, are to be "strictly construed." ***Ramesar v. State of New***

York, 224 A.D.2d 757, 759 (3d Dep't 1996), *lv to app denied*, 88 N.Y.2d 811 (1996). Moreover, the court made only an oblique reference to Plaintiffs' principal argument that under the bill, racetracks were authorized to divert revenues from the operation of the VLTs to enhance purses and contribute to their breeding funds, even though Article I, § 9 specifies the exclusive purpose of the exception permitting a lottery operated by the State is to aid education within the State. The court said that it was up to the Legislature to define "net proceeds," implying that using revenues to enhance purses and breeding funds was a legitimate deduction before education received anything [R. 18].

Finally, Supreme Court ruled in favor of the constitutionality of Part D of Chapter 383, allowing the Division of the Lottery to participate in a multi-state lottery, reiterating its prior reliance on the presumption of statutory validity [R. 19] and holding that the State retains sufficient control over its operations within the State, such that it did not run afoul of Article I, § 9's requirement that a lottery be operated by the State and that the net proceeds be used exclusively for education within the State. *Id.* In so ruling, the court implicitly rejected Plaintiffs' arguments that money derived from the sale of tickets in New York State could be used to underwrite the centralized operation of the multi-state lottery, the proceeds from which are used to fund causes in other states having nothing to do whatsoever with education in New York State.

The Plaintiffs in both this action (Action No. 1) and in the consolidated action (Action No. 2), thereafter appealed to the Appellate Division, Third Department [R. 4-9].

The Appellate Division Decision

In July, 2004, the Third Department modified Supreme Court's order by declaring that Part C (video lottery terminals at racetracks) was unconstitutional, but otherwise it affirmed Supreme Court's determination with respect to the constitutionality of Part B (Indian casino gaming), Part D (the multi-state lottery) and the Governor's Message of Necessity [R. 2996-3046].

With respect to Part B, the Appellate Division traced the legislative history of IGRA [R. 3005-3011], and New York's Constitutional prohibitions against gambling [R. 3011-3015]. It noted that while IGRA does not force a state to enter into a casino gaming compact with an Indian tribe, it affords states the opportunity to do so, by giving a state "a power that it otherwise lacks" [R. 3020]. It went on to distance itself from its own prior decision in ***Saratoga*** where, in May 2002, it had opined that "the commercialized Las Vegas-style gambling authorized by the [Tribal-State Compact between the St. Regis Mohawk Tribe and the State of New York] is the ***antithesis*** of the "highly restricted" and "rigidly regulated" forms of gambling permitted by the New York Constitution and statutory laws [emphasis supplied]. ***Saratoga***, *supra*, 293 A.D.2d 20, 24 (3d Dep't 2002); *aff'd* 100 N.Y.2d 801 (2003). In a footnote to its opinion in the present case, it stated that its language in ***Saratoga*** was only dictum and not central to its holding that the Governor had violated the separation of powers in entering into a compact with the St. Regis Mohawks [R. 3018].

The Appellate Division went on to hold that even in situations where, under Part B of Chapter 383, the Governor would be able to negotiate compacts with Indian tribes to conduct

gaming on lands in the Catskills and/or Western New York that were not, at the time of the legislation's enactment - and, in the case of the Catskills, still are not "Indian lands" - the Governor could nevertheless act even though Federal law requires in such circumstances that a State's governor must make an independent determination that such gambling would not adversely affect the "surrounding communities" [R. 3021]. The Appellate Division, in effect, held that even though under the New York Constitution, such gambling could not be conducted on non-Indian lands immediately surrounding the protected enclave, the Governor could make a determination that such activities would not adversely affect such surrounding communities. *Id.*

It also rejected Plaintiffs' arguments that Part B constituted an unlawful delegation of powers even though it authorized the Governor to negotiate a Compact for three casinos in Sullivan and/or Ulster Counties with yet to be identified tribes and without any specification as to location within those counties or what the terms of the Compact should provide.

With respect to Part C, as previously indicated, the Court ruled in favor of Plaintiffs by declaring Part C unconstitutional. Accordingly, they will reserve any comments with respect thereto until they file their next brief after Defendants have filed theirs.

With respect to Part D (a multi-state lottery), the Appellate Division rejected Plaintiffs' argument that the proceeds of the operation of the multi-state lottery benefited other states in violation of Article I, § 9 or that New York State had lost control of the operation by virtue of the agreements it had entered into with other state jurisdictions [R. 3042, 3043].

The Appellate Division also held that the Governor's Message of Necessity, albeit brief, satisfied the requirements of Article III, § 14 of the Constitution with respect to the Governor's obligation to certify to the Legislature the facts necessitating an immediate vote, as required whenever proposed legislation has not "aged" for three days before being voted on. The Appellate Division held that by merely noting that the legislative leaders had requested the Message of Necessity because the bill had not yet properly aged, the Governor had satisfied the requirements of Article III, § 14 [R. 2999].

The Plaintiffs (Appellants-Respondents) in both Actions No. 1 and No. 2 have now appealed to this court [R. 2987-2989; 2981-2982].

SUMMARY OF ARGUMENT

A. New York's Public Policy Against Gambling and its Constitutional History

Article I, § 9 of the N.Y. Constitution unequivocally forbids the Legislature from authorizing commercialized gambling and mandates the Legislature to pass laws to prevent it. This provision was adopted to "protect(…) the family man of meager resources from his own imprudence at the gaming tables." ***International Hotels Corp. v. Golden***, 15 N.Y.2d 9, 15 (1964). The reasons for the prohibition are deeply rooted in our public policy and have a long history. Lincoln, *A Constitutional History of New York*, 33-50 (1906) [R. 606-623]. *See also* ***Saratoga County Chamber of Commerce v. Pataki***, 100 N.Y.2d 801, 826-831 (2003) (George Bundy Smith, J., concurring in part and dissenting in part).

The concerns of the framers were so strong that the prohibitions were placed in our Constitution's Bill of Rights, forbidding the Legislature itself from authorizing gambling. These prohibitions and concerns are not some quaint, anachronistic vestige of a bygone prudish morality. They apply with equal force today. Indeed, in 1996, the New York State Council on Problem Gambling concluded that "New York has the highest lifetime prevalence rate of compulsive gambling in the country" [R. 1377].

In 2002, after the legislation here at issue was enacted, the New York State Senate Standing Committee on Racing, Gaming and Wagering, commenting on the prevalence rate of compulsive gambling, observed:

> … these numbers may grow further because of the recently

> authorized increase in the number of casinos and video lottery terminals that may be established in this State. In addition, recent studies on problem and compulsive gambling also divulge that three forms of gambling presented the greatest risk to New Yorkers. They are: ***state-sponsored lottery games***, sports betting, and ***casino gambling*** (emphasis supplied) [R. 1377].

The same Report also stated that "… a Harvard University study … found that the sharpest increase in compulsive gambling has occurred among teenagers. This troubling statistic is exacerbated by the casino industry's aggressive advertising campaign that is reportedly aimed at young people. In western New York, a Canadian casino has bought space on billboards immediately across the street from several area high schools." *Id.* at 47.

The problems associated with gambling should come as no surprise. Early in his first term, by Executive Order No. 36.1, Governor Pataki appointed the New York Task Force on Casino Gambling to assess the potential effects of a proposed constitutional amendment to authorize casino gaming. On August 30, 1996, the Task Force issued its Report to the Governor (the "Report"). A few quotations from the Summary at the very beginning of the Report are relevant to this issue. The Task Force noted that "… there is no question that casino legalization will impose significant burdens on the infrastructure of its hosts. Additionally, casino legalization could negatively affect … rates of prevalence of pathological gambling" [Report at i].

In a separate subsection dealing specifically with the subject of "Pathological Gambling," the Task Force stated:

> It is clear that the State's population includes problem and

> pathological gamblers, and their number could increase with the expansion of casino gambling. While difficult to quantify, the costs of problem gambling are quite real. Like any other addiction, pathological gambling can destroy family relations and lead otherwise law-abiding people to commit crimes. At a public hearing, the Task Force heard compelling testimony from compulsive gamblers that dramatically demonstrated the nature of the problem. Moreover, compulsive gambling imposes costs on society, not the least of which are the costs of treatment and rehabilitation programs. If we choose to expand gambling opportunities, New York has a moral and economic obligation to implement measures that will limit any increase in problem gambling and afford effective treatment to those for whom gambling is not a form of entertainment, but a disease … The Task Force is concerned … that the problems associated with gambling extend beyond those individuals who are "addicted to gambling."

[Report at xi]

Thereafter, the Report's Summary dealt with the subject of "Casinos and Crime."

The Task Force noted that:

> With the advent of legalized casino gambling, pathological gamblers will likely commit additional income-generating crimes. Research indicates a relationship between pathological gambling and economically motivated crimes, such as embezzlement, check forgery and tax evasion … It is reasonable to conclude … that if the number of compulsive gamblers grows with expanded casino gambling, some increase in offending can be expected.

[Report at xiii].

The Task Force also dealt with the subject of "Organized Crime." The Report stated:

> There is a continuing threat that organized crime can infiltrate casino gaming and related ancillary services … Today, casinos are particularly susceptible to money-laundering, but

> ancillary services [supplier companies providing cleaning, food, laundry and trash-hauling] may be most vulnerable to organized crime influences. Casinos are also vulnerable to organized crime through mob control of unions, as experienced in Nevada and New Jersey. Legalized gambling will always be targeted for exploitation by organized crime, and regulatory and law enforcement officials will have to maintain a consistent vigil.

[Report at xiv]

The issue before this Court, therefore, is how the types of gambling purportedly authorized by Chapter 383 of the Laws of 2001 can be upheld, given the prohibitions in Article I, § 9 of the Constitution and the strong public policy reasons that underlie them. To be sure, since our Fifth and current Constitution was adopted in 1938, there have been a few very specific, narrow exceptions carved out of the otherwise blanket prohibitions against gambling. They are:

- pari-mutuel betting on horse racing (pursuant to a Constitutional amendment in 1939);

- lotteries operated by the State, the net proceeds of which shall be applied exclusively to or in aid of education in the State (as amended in 1966);

- bingo (in 1957) and other specified "games of chance" (in 1975) conducted by bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighters and similar non-profit organizations and only if authorized by a majority vote of the electors in the affected municipality where the gambling is to take place, and then only for limited prize amounts.

None of these exceptions, however, applies to this case.

B. The Applicable Standard of Review of the Constitutionality of Chapter 383

It is a well-accepted tenet of statutory construction that exceptions to constitutional prohibitions must be strictly construed to ensure that they do not consume the rule itself, and this rule has been applied specifically to gambling. ***Ramesar v. State of New York***, 224 A.D.2d 757, 759 (3d Dep't 1996), *lv to app den*, 88 N.Y.2d 811 (1996); ***Molina v. Games Management Services***, 58 N.Y.2d 523, 529 (1983). *See generally*, McKinney's Cons. Laws of N.Y., Book I, Statutes, § 271; 62 N.Y.Jur.2d Gambling, § 9 at 18 *et seq*. The Attorney General agrees. 1984 N.Y. Op. Atty. Gen. 11; 1984 WL 18643 (N.Y. A.G.).

C. Part B of Chapter 383 (Indian Casino Gambling)

Part B of Chapter 383 purports to allow the Governor to negotiate compacts with Indian tribes authorizing them to operate major multi-million dollar so-called "Class III" commercialized Las Vegas style gambling casinos on a grand scale far beyond anything contemplated by the limited exceptions carved out of Article I, § 9. The Legislature has authorized the Governor to negotiate a compact with the Seneca Nation of Indians in Western New York allowing them to operate three casinos. In addition, the Governor is authorized to negotiate with yet to be identified tribes to operate three more Class III gaming casinos in the Catskills (Sullivan and Ulster Counties). When the statutory language of Part B of Chapter 383 (Executive Law § 12) is juxtaposed to the language in Article I, § 9 of the Constitution, however, there is simply no way the two can be reconciled.

Remarkably, the courts below nevertheless upheld Part B on the theory that in enacting the federal Indian Gaming Regulatory Act ("IGRA"), Congress somehow gave the New York State Legislature power to violate New York's own Bill of Rights by permitting that which it is specifically prohibited from authorizing. The Appellate Division has not only misread IGRA, but our Federal and State Constitutions as well, adopting a flawed analysis that is antithetical to the most fundamental concepts of federalism and the corollary principle of dual sovereignty that are an integral part of our Nation's Constitutional blueprint (see ***Federal Maritime Commission v. South Carolina State Ports Authority***, 573 U.S. 743, 751 [2002]).

It is true that pursuant to the powers vested in it by the Indian Commerce Clause of the U.S. Constitution (Art. I, § 8, cl. 3), Congress could pass a law permitting Indian tribes to operate commercialized gambling casinos on their reservations regardless of state laws. That is not, however, what Congress did when it enacted IGRA. In fact, quite to the contrary, IGRA provided that state laws prohibiting the type of "Class III" gambling casinos at issue here would apply to Indian land and that the only way for a tribe to get out from under such prohibition would be for it to enter into a compact with the State in which it was located, permitting it to engage in such activity. This, the Appellate Division erroneously concluded, gave the New York State Legislature power to authorize the Governor to enter into such compacts regardless of our State Constitution's restrictions on the authorization of gambling.

The Appellate Divisions' analysis broke down because it was too narrowly focused, holding that, because of IGRA preemption, the N.Y. State Constitution could not be read to

prohibit gambling on Indian lands. That is not the issue. IGRA itself prohibits Class III gaming by tribes unless they enter into a Compact with a state to allow it. The real question, therefore, is whether IGRA can be read to require New York to pass laws to ***allow*** it. The Appellate Division itself conceded, as did the State in the courts below, that nothing in IGRA compels a state to enter into a casino gambling compact with an Indian tribe. Indeed, if IGRA were to so provide (which it does not), it would be unconstitutional. *See* ***New York v. United States***, 405 U.S. 144 (1992); ***Printz v. U.S.***, 521 U.S. 848 (1997) (Congress cannot force states to enact laws to carry out federal policy).

It is axiomatic that a State Government possesses only such power as is afforded it under its own Constitution. Congress cannot, therefore, rewrite a State's Constitution, nor give to a state additional powers that state does not possess under its own Constitution or which, as is the case here, are in direct conflict with its Constitution. This Court has already decided that IGRA does not preempt State constitutional law with respect to whether "state actors" have the authority to negotiate a casino gaming compact with a tribe. ***Saratoga***, *supra* at 822. In this particular case, the People of the State of New York, speaking through their own Constitution, have inserted into the Bill of Rights a provision prohibiting the Legislature from enacting laws permitting gambling, except in certain limited circumstances not applicable here. To rule that Congress could nevertheless somehow enable New York's legislature to authorize such gambling stands the Tenth Amendment to the U.S. Constitution on its head. The Federal Government, not the State, is a government of "delegated" powers,

having received its powers from the States at the time of the adoption of the Constitution, not *vice versa*. Powers not delegated are reserved to the States. U.S. Const, amend. X.

Perhaps because the issue here is gambling rather than some other right protected by the New York State Constitution's Bill of Rights, the courts below did not fully appreciate the implications of their decision. Could New York, for example, agree to a provision in a Compact with a tribe that in addition to Indians only non-Indian white males could gamble on the reservation because of that tribe's own customs and culture, notwithstanding the provisions of Article I, § 11 of our State Constitution's Bill of Rights (prohibiting discrimination on the basis of color and requiring equal protection under the law)? The Appellate Division apparently seems to think so, because it ruled that the Legislature was not bound by another provision in our Constitution's Bill of Rights. It is respectfully submitted that the court was, quite simply, wrong. IGRA did not suspend our State's Constitution.

There is a second, separate and distinct reason why Part B is unconstitutional. It purports to allow the Governor to enter into compacts on land that is, in fact, not "Indian land." There are, for example, no Indian reservations in either Sullivan or Ulster Counties. The only way, under IGRA, gambling could occur on such land would be if in the future the U.S. Secretary of the Interior were to acquire title to such land, now sovereign soil of the State of New York, and hold such land in trust for the Tribe. Under such circumstances, however, IGRA itself provides that the Governor would then have to agree that any gambling by Indians on such land "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1).

The "surrounding community," of course, would be sovereign soil of the State of New York, where, for the reasons previously stated, there is a strong public policy against such gaming. Obviously, it is the citizens from these "surrounding communities" who would presumably be patronizing the enclaves created by land into trust arrangements under IGRA. Given New York's strong public policy against commercialized gambling, the Governor, acting as a state official under state law, could not, consistent with his solemn Constitutional duty to carry out the policies of the State as determined by the People and the Constitution, make a determination that is directly contrary to such policy.

Finally, Part B constitutes an unlawful delegation of authority to the Governor, empowering him to enter into compacts with yet to be determined tribes authorizing them to operate casinos in yet to be determined locations in Sullivan and/or Ulster Counties without the affected localities having any "say" in the matter. *See* Executive Law, § 12(b). Moreover, that provision contains absolutely no guidance as to what the terms of the Compacts should be despite the fact that this very Court, in ***Saratoga***, made it clear that the Governor could not enter into compacts without legislative guidance concerning the critical policy decisions that IGRA requires a State to make. *Id.* at 821-823.

D. Part D of Chapter 383 (The Multistate Lottery)

Insofar as Part D of Chapter 383 (authorizing a multistate lottery) is concerned, it is obvious that here, as well, the Legislature impermissibly expanded the limited exceptions carved out of Article I, § 9's prohibitions against gambling. Article I, § 9 does permit a lottery ***operated by the State*** provided the net proceeds are dedicated ***exclusively to***

education in the State. Part D, however, authorizes the State to enter into a multi-state lottery which the State has now done. The terms of the Agreement the State has entered into with at least eight other sister states make it clear that New York does not control the operation or have the authority, by itself, to direct the operation of the multistate lottery. Indeed, New York courts would have no jurisdiction to resolve disputes between New York State and other participating states. Moreover, there is no dispute that proceeds from the sale of tickets in New York are used to finance a centralized operation that sustains all the other lotteries in the other states, the proceeds of which are not dedicated to education in this State. Given the rule that exceptions to a prohibition must be narrowly construed and rigidly enforced, the provisions of Part D simply do not pass Constitutional muster.

E. The Message of Necessity

Finally, Plaintiffs (Appellants-Respondents) will show that the Message of Necessity sent by the Governor to the Legislature failed to satisfy even the "minimalist" standards imposed by Article III, § 14 of the Constitution. The result is that an important and highly controversial piece of legislation, 81 pages in length, was rammed through the Legislature in the middle of the night without any hearings or opportunity for meaningful debate. The Governor is required, however, under Article III, § 14 to certify to the Legislature the facts which, in his opinion, necessitate an immediate vote. This requirement was obviously designed to prevent the hasty consideration of important bills and afford legislators an opportunity to review their content, but once again the exception has consumed the rule, Governors, over the years, have taken increasing liberties with the requirements of Article

III, § 14. Indeed, those provisions are now "honored more in the breach than in the observance." Shakespeare, *Hamlet*, act I, s. iv.

What was obviously intended to be a rare circumstance in the event of a bona fide emergency, has now become an all-too-common practice. In the instant case, the Governor has pushed the envelope beyond the breaking point. The only facts he certified as necessitating an immediate vote were that "these bills [*sic*] are necessary to enact certain provisions of law" and that "because the bills have not been on your [the legislators'] desks in final form for three calendar legislative days, the leaders of your Honorable bodies have requested this message to permit their immediate consideration" [R. 154-155].

This message cited no facts other than what were already self-evident truisms. Of course the bill was necessary to enact certain provisions of law and, of course, it could not be considered without a Message of Necessity, which is why the Legislature's leaders would have had to request a Message of Necessity before they could consider the bill. The Governor might as well have said "two plus two equal four." The Governor's tautological statements were not facts that informed the Legislature of anything more than what the law already required. They make a mockery and farce of what was meant to be an important Constitutional requirement. To uphold this message would turn Article III, § 14 into a "dead letter" setting a precedent that will only result in future, perfunctory meaningless exaltations of form over substance. The two Plaintiff legislators, Assemblyman Parment and Senator Padavan, are entitled to something more than what the Governor gave them. Indeed, to add insult to injury, after certifying on October 24, 2001 that the bill was so important that it

required an immediate vote rather than waiting three days [R. 154-155], the Governor did not sign the bill until October 29, 2001, some five days later.

F. The Process for Amending the Constitution

In summary, the recurrent theme of Plaintiff's Complaint in this case is that there is a straightforward process to amend the Constitution as set forth in Article XIX thereof. If the Governor and the other Defendants wish to expand the exceptions to the Constitutional prohibitions against gambling, which must be strictly construed, they should use the process specified by the Constitution as has been done four times since the absolute ban on gambling was inserted in our Constitution of 1938. *See* ***Saratoga***, 100 N.Y.2d 801, 833 (George Bundy Smith, J., concurring in part and dissenting in part). That process ensures that the People of the State of New York will be able to exercise their voice, as is their birthright as citizens, before the Constitution is amended. ***Matter of King v. Cuomo***, 81 N.Y.2d 247, 253-254 (1993). Instead, the Governor and the State Defendants have attempted an end run around the Constitution, abusing the Message of Necessity process by surreptitiously passing a bill in the middle of the night, without any meaningful debate and without any opportunity for the People to be heard. In so doing, they have violated both the spirit and the letter of the Constitution.

ARGUMENT

POINT I

Part B of Chapter 383 of the Laws of 2001 Empowering the Governor to Enter Into Compacts with Indian Tribes Authorizing Them to Operate Commercialized Gambling Casinos Violates Article I, § 9 of the New York State Constitution

A. Article I, § 9 Unequivocally Prohibits the Legislature from Authorizing the Types of Casino Gambling Contemplated by Part B of Chapter 383

The language of Article I, § 9(1), embodied in the Bill of Rights of the State Constitution, is a check on the Legislature itself. It provides, in pertinent part, that:

> … 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.

In ***Matter of King v. Cuomo***, 51 N.Y.2d 247 (1993), this Court stated:

> When language of a constitutional provision is plain and unambiguous, full effect should be given to "the intention of the framers * * * as indicated by the language employed" and approved by the People (***Settle v. Van Evrea***, 49 N.Y. 280, 281 [1872]; *see also* ***People v. Rathbone***, 145 N.Y. 434, 438). In a related governance contest, this Court found "no justification * * * for departing from ***the literal language of the constitutional provision"*** (***Anderson v. Regan***, 53 N.Y.2d 356, 362 [emphasis added]). As we stated in ***Settle v. Van Evrea***:
>
> "[I]t would be dangerous in the extreme to extend the operation and effect of a written Constitution by construction

> beyond the fair scope of its terms, merely because a restricted and more literal interpretation might be inconvenient or impolitic, or because a case may be supposed to be, to some extent, within the reasons which led to the introduction of some particular provision plain and precise in its terms.
>
> "That would be ***pro tanto*** to establishing a new Constitution and do for the people what they have not done for themselves" (49 N.Y. 280, 281, *supra*)."

81 N.Y.2d at 253.

It is difficult to imagine how any language could be more explicit than Article I, § 9. It prohibits the Legislature from authorizing gambling. While subdivision (1) does contain two exceptions, one for a state-operated lottery to benefit education and another for horse racing, neither applies to casino gambling.

Nor can Defendants derive any solace from the further exceptions contained in § 9(2) of Article I. Those exceptions allow so-called "games of chance" to be conducted within municipalities throughout the State under the following very limited circumstances:

> (1) The majority of qualified voters in any municipality must approve such gambling at either a general or special election before it can be conducted within its borders;
>
> (2) Such games of chance must be operated only by bona fide religious, charitable or non-profit organizations like veterans, volunteer firefighters, etc.;
>
> (3) No person except a bona fide member of such organization shall participate in the management or operation of such gambling;

(4) No person shall receive any remuneration for participation in the management or operation of such games or gambling; and

(5) The Legislature must pass laws to ensure that there is no commercialized gambling.

In this case, however, Part B of Chapter 383, adding a new § 12 to the Executive Law, makes no pretense about trying to meet any of the conditions specified in § 9(2), even though they must satisfy all of them. Both subdivision (a) of Executive Law § 12 (authorizing the Governor to enter into compacts with the Seneca Nation of Indians pursuant to an earlier Memorandum of Understanding he had negotiated with that tribe) and subdivision (b) of § 12 (authorizing the Governor to compact with other yet-to-be-identified tribes in Ulster and Sullivan Counties) begin with the language "Notwithstanding any other law." There have, however, been no general or special elections. Indeed, pursuant to the power purportedly vested in the Governor by Executive Law § 12(a), the Governor has, in fact, already entered into a compact with the Senecas [R. 713, *et seq.*]. Such compact provides for the operation by the Senecas of a temporary casino in the City of Niagara Falls at the site of the former Niagara Falls Convention Center, title to which was transferred by the State, through the Empire State Develompent Corporation, to the tribe [R. 725]. That casino is now operational, having opened on December 31, 2002, now almost two years ago.[5]

[5] The Senecas opened the casino notwithstanding the pendency of this lawsuit, and with full knowledge of the risks inherent therein, should Plaintiffs prevail. This addresses one of the concerns that had been expressed by the dissenting opinion in this Court in ***Saratoga*** to the effect that in that case the St. Regis Mohawk tribe had no inkling at the time it entered into the Compact that it might be vulnerable to Constitutional attack. *Id.* at 836.

At no time did the qualified voters of the City of Niagara Falls ever approve the gambling called for pursuant to this Compact in either a general or special election. Nor was there ever any intention to put such matter to a vote.

The legislation here at issue also does not satisfy the second requirement enumerated above, and contained in § 9(2) of Article I of the Constitution. Indian tribes are not bona fide religious, charitable or not-for-profit organizations. They are, in fact, separate, distinct sovereign entities, as the very first WHEREAS clause in the preamble to the Compact between the State and the Senecas attests (the Senecas are "a sovereign Indian nation") [R. 773]. Indeed, for nearly two centuries, Indian tribes have been regarded as sovereign entities with the right of self-government. ***Santa Clara Pueblo v. Martinez***, 436 U.S. 49, 56 (1978). ***Cherokee Nation v. Georgia***, 30 U.S. (5 Pet.) 1 (1831). ***Worcester v. Georgia***, 31 U.S. (6 Pet.) 515, 519 (1832). *See generally*, Canby, *American Indian Law*, 68 *et seq.* (West Publishing Co., St. Paul, Minn., 1998).

Nor does Chapter 383 satisfy the third, fourth and fifth criteria set forth above with respect to qualifying for an exemption to the prohibitions against gambling under Article I, § 9(2) – namely, that only members of the non-profit organization can be involved in

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Indeed, when Plaintiffs earlier sought a preliminary injunction against the State's participation in the Senecas' plans to expend tens of millions of dollars to convert the former Niagara Falls Convention Center into a temporary casino, the Assistant Attorney General assigned to this case opposed the application for an injunction, representing to the Court below that there would be no irreparable injury to Plaintiff, and that the Senecas were taking all the risks, as he was subsequently quoted in the paper as saying. *See* Odato, J., "Courts Want to Hear State Side of Seneca Deal," Albany *Times-Union*, September 18, 2002 at B2 [R. 1310]. Beth Kelly, a spokeswoman for the Senecas, also acknowledged that the Tribe would be taking "a certain amount of risk" but that the Tribe was going to proceed in any event. *See* Precious, T., "Senecas Plan to Start Work Today on Site of their Casino," Buffalo *News*, September 18, 2002 [R. 1311.

management, that they must receive no money for such management, and the gambling must not be "commercial." The operation of Class III gambling casinos under IGRA involves the management of such operation by outside entities, rather than by the Tribe itself. 25 U.S.C. § 2710(9). Such management companies are also handsomely paid.[6] Indeed, Intervenor-Defendant, Park Place Entertainment, admits that the reason it sought to intervene in this case was because "Park Place has expended millions of dollars in preparation for the construction and operation of this project [a gaming facility to be operated by the St. Regis Mohawk Tribe in Sullivan County pursuant to Executive Law § 12(b)] that it expects to ***manage*** on behalf of the Mohawks" (emphasis supplied) [R. 312-313]. Park Place admits as well that it "entered into an agreement with the St. Regis Mohawks, giving Park Place the exclusive development and ***management*** rights for the Mohawks' future casinos in New York State (emphasis supplied) [R. 312].

There is, therefore, no doubt that the gambling contemplated under IGRA is "commercialized," whereas Article I, § 9(2) permits only non-commercialized gambling. Not even the State Defendants argue otherwise. In its brief to the Appellate Division in this case, appended hereto as Appendix "B", the State conceded this very point at page 1, where it stated that the "challenged parts of the legislation authorized the Governor to enter into

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[6] *Time* Magazine's December 16, 2002 and December 23, 2002 editions contain a blistering expose of Indian gaming, entitled "Indian Casinos: Wheel of Misfortune," co-authored by Donald Barlett and James C. Steele, who twice before have been awarded the Pulitzer Prize while working at the Philadelphia *Inquirer*. The overall theme of these articles is that IGRA, while it may have been meant to benefit Indian tribes, has instead failed to help the vast majority of Indians while lining the pockets of management companies and other non-Indian interests [R. 1282-1305]. *See also* Safire, "Tribes of Gamblers," *New York Times*, December 12, 2002 at A-39 [R. 1306].

compacts with Indian tribes to operate up to six new Class III ***commercial*** gambling establishments" (emphasis supplied). Even the Appellate Division, in its opinion below, characterized the Indian casino gaming authorized by Part B as "commercial" [R. 3020].

Indeed, it would be disingenuous, to put it charitably, for the Defendants here to argue that the gambling contemplated under Part B is anything other than commercial. The Record on Appeal also contains copies of relevant pages of a Memorandum of Law dated February 14, 2001, which the State submitted to the lower court in ***Saratoga*** [R. 1353-1356]. There, the State, in its Table of Contents on page (i) of the Memorandum, used the following headnote to Point II-C: "Federal law requires New York to allow federally-recognized tribes to conduct ***commercial*** gambling on Indian lands" (emphasis supplied) [R. 1354]. On Page 8 of the same Memorandum of Law, the State repeated the header [R. 1355], and on page 9, it stated that: "New York … may not refuse to enter into a compact with the St. Regis tribe because the Tribe wishes to conduct such ***commercial*** gaming" (emphasis supplied) [R. 1356]. The commercial aspect of such gaming obviously explains, as well, the massive lobbying effort made by so many for-profit enterprises to see that Chapter 383 was enacted [R. 700-702; 881-884].

Congress itself viewed Indian casino gaming under IGRA as "commercial" as the legislative history reveals. In Sen. Report 100-446, reprinted in 1998 U.S. Code, Cong. and Administrative News (U.S.C.C.A.N.), Senator Daniel Evans, one of the sponsors in the U.S. Senate of the bill that became IGRA, referred to Indian casino gaming as "commercial" three different times, twice at 1998 U.S.C.C.A.N. 3093, and once at 3105-06 [R. 339, 352].

Since the commercialized gambling contemplated by Chapter 383 does not fit within the limited not-for-profit exceptions under subdivision (2) of Article I, § 9 of the Constitution, the next subpoint (I-B) will discuss why IGRA does not enable the Legislature to circumvent the prohibitions in Article I, § 9.

B. IGRA, By Its Very Terms, Does Not – And Could Not – Give the New York Legislature the Power to Pass a Law that New York State's Constitution Prohibits It From Enacting

Despite the fact that Article I, § 9 of the N.Y. Constitution clearly prohibits the Legislature from authorizing commercialized casino gambling and affirmatively directs the Legislature to pass laws preventing it (Point I-A, *supra*), the Legislature did precisely the opposite in enacting Part B of Chapter 383 of the Laws of 2001.

In upholding that legislation, the Appellate Division nevertheless reasoned that IGRA preempted the field of Indian gaming [R. 3000], that states like New York "do not have the authority to regulate Class III gaming on Indian lands" [R. 3019], and that the only way they could do so was through the compacting process provided for under IGRA (*Id.*), thereby affording a state some "opportunity to assert authority over gaming on Indian lands, a power the state otherwise lacks" [R. 3020]. Then, despite conceding that IGRA does not compel a State to enter into a compact [R. 3020], the Appellate Division concluded that Part B gave the Legislature the power to authorize such gambling notwithstanding Art. I, § 9 of the Constitution by ***extending*** state regulatory authority to commercialized casino gambling on Indian land – where such authority would not otherwise exist" (emphasis supplied) [R. 3020].

The Appellate Division misread IGRA and missed the point. IGRA does, in fact, make the prohibitions in Article I, § 9 applicable to Indian lands. *See* IGRA, § 23, codified at 25 U.S.C. § 1166(a). The U.S. 2d Circuit Court of Appeals has held that under this provision, "gambling activity that violates state … law 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). Even if, however, § 23 did not exist, Indian gaming still could not occur until and unless a tribe enters into a compact with a State. Section § 11(d)(1)(C) of IGRA, codified at 25 U.S.C. § 2710(d)(1)(C) is a separate provision requiring a compact as a precondition of Class III Indian gaming. Thus, the issue here is not whether Article I, § 9 ***prohibits*** Indian gaming. Under IGRA it clearly does by virtue of IGRA's assimilation of state laws on gambling, making them applicable to tribes. Rather, the issue is whether Art. I, § 9 prevents the New York State legislature from then passing a law to ***allow*** it. It is clear that it does. This Court has already held that it is the State's Constitution, not IGRA, that determines whether "state actors" can bind the State to a casino gaming Compact. ***Saratoga***, *supra* at 822. A federal district located here in New York agrees. ***Catskill Development LLC v. Park Place Entertainment Corp.***, 217 F.Supp.2d 423, 442-443 (S.D.N.Y. 2002) (citing this very case as the one that will ultimately determine the legality of Indian casino gaming in New York).

It is axiomatic that the New York State Legislature cannot take an action directly contrary to its own Constitution. ***Blue Cross and Blue Shield v. McCall***, 89 N.Y.2d 160, 163, 170 (1996); ***Matter of New York Public Interest Research Group v. New York State***

Thruway Authority, 77 N.Y.2d 86 (1990). ***Matter of King v. Cuomo***, 81 N.Y.2d 247 (1993).

This is certainly true where, as here, the State Constitutional prohibition in question is part of our State's Bill of Rights. The prohibitions against commercialized gambling are so deeply rooted in our culture that the People of the State of New York saw fit to incorporate the prohibitions into the Bill of Rights, restricting the Legislature from passing laws to permit it. It is beyond question that the Legislature, via the IGRA compacting process, could not negotiate away some other important civil right protected by Article I of the Constitution by, for example, agreeing that no woman could gamble at a tribal casino because that tribe doesn't allow women the same rights as men. The Appellate Division below, however, held in effect that our Constitution and, in particular, the Bill of Rights, does not apply when the Governor negotiates compacts with Indian tribes under IGRA! That cannot be.

The Appellate Division's conclusion is a classic *non sequitur*. If, as is indeed the case, IGRA allows but does not require a state to negotiate a gambling compact with an Indian tribe, then Federal law does not supersede or preempt New York's Constitutional provision forbidding the Legislature from passing a law authorizing such gambling.

Indeed, the State itself conceded to this very Court in ***Saratoga*** that IGRA does not require a state to enter into a compact with the Tribe. *See* Appendix "A" to this Brief. The Appellate Division agrees, citing a number of Federal cases on that very point [R. 3020]. ***Ponca Tribe of Oklahoma v. State of Oklahoma***, 37 F.2d 1422, 1432-1435 (1994), *rev'd on*

other grounds, 517 U.S. 1129 (1996); ***Yavapai-Prescott Indian Tribe v. State of Arizona***, 796 F.Supp. 1292, 1297 (D. Ariz. 1992). ***See*** Point I-C, *infra* at 43, 47.

If IGRA were to be read as ***requiring*** a state to enter into a compact with an Indian tribe, it would violate the Tenth Amendment to the U.S. Constitution. *See* ***New York v. United States***, 505 U.S. 144, 178 (1992); ***Printz v. United States***, 521 U.S. 898, 926 (1997); ***Alden v. Maine***, 527 U.S. 706, 752 (1999) (Congress cannot use states as their instrumentalities by commandeering them to enact laws to carry out Federal policies). Congress cannot give a state power that it does not already possess under its own State Constitution. While Congress can preempt a state from exercising a state's power where such exercise would conflict with a legitimate exercise of federal authority by Congress, Congress cannot confer upon a state a power that state is precluded from exercising under its own Constitution.

To summarize, § 23 of IGRA makes it clear that state laws prohibiting Class III gaming are applicable to Indians. 25 U.S.C. § 1166(a). Another provision in IGRA reaffirms the illegality of Class III gaming by a tribe in the absence of a compact with the State. Section 11(d)(1)(C) provides that such gaming by a tribe can be conducted only if, *inter alia*, it is "in conformance with a Tribal-state compact entered into by the Indian tribe and the State." 25 U.S.C. § 2710(d)(1)(C). IGRA, therefore, does not preempt the prohibitions in Art. I, § 9, rather it assimilates them.

While it is true that those prohibitions can be lifted, that can be accomplished only ***if*** a tribe enters into a compact under IGRA with the State. 25 U.S.C. § 1166(c). Nothing in

IGRA, however, mandates a state to enter into a compact. IGRA ***allows***, but does not ***require***, a state to enter into a compact. While the door is therefore open for states in general to play a role in authorizing Indian gaming, that cannot occur in a state like New York where its own Constitution prohibits its Legislature from authorizing such gaming. Moreover, given the 11th Amendment to the U.S. Constitution, a tribe could not bring suit under IGRA to force a state to negotiate such a compact. ***Seminole Tribe of Florida v. State of Florida***, 517 U.S. 44 (1996).

The Appellate Division, therefore, went astray in its analysis. It approached the issue in this case from the wrong direction, focusing on whether IGRA preempts Article I, § 9 (which it does not) rather than on whether this State's Constitution prohibits the Legislature from authorizing commercialized gambling, which it unequivocally does. The Appellate Division's conclusion that IGRA affords some control over Indian gaming that New York presently lacks may not be reconciled with the clear and unequivocal mandate of the N.Y. Constitution that the Legislature pass no laws authorizing such gambling. The ends cannot justify the means. Whatever benefits might arguably be derived from authorizing commercialized gambling by Indian tribes, "the Legislature, even with the Executive's acquiescence, cannot place itself outside the express mandate of the Constitution." ***Matter of King v. Cuomo***, 81 N.Y.2d 247, 254 (1993).

C. Neither the U.S. Supreme Court's 1987 Decision in the *Cabazon* Case Nor the Second Circuit's 1990 Decision in the *Mashantucket* Case Can Be Interpreted as Requiring New York State to Negotiate a Compact in Violation of Its Own Constitution

Both the dissent in ***Saratoga*** (801 N.Y.2d at 841 *et seq.*) and the Appellate Division in the current case placed considerable emphasis on two decisions, ***California v. Cabazon Band of Mission Indians***, 480 U.S. 202 (1987) ("***Cabazon***"), and ***Mashantucket Pequot Tribe v. Connecticut***, 913 F.2d 1024 (2d Cir. 1990), *cert. den.*, 499 U.S. 975 (1991) ("***Mashantucket***"). In ***Saratoga***, the majority of this Court also indicated that it wanted to hear more from the lower courts about ***Cabazon***. ***Saratoga***, *supra* at 825. For the reasons hereinafter set forth, it is respectfully submitted that neither ***Cabazon*** nor ***Mashantucket*** can be cited for the proposition that Congress can enact a law enabling a state legislature to pass legislation that violates that state's own Constitution.

(i) *Cabazon*

Cabazon was handed down by the Supreme Court in 1987, before the enactment of IGRA. In ***Cabazon***, the Court ruled that a state like California, which regulated gambling rather than completely prohibited it, could not prevent Indian tribes from operating bingo parlors under a federal statute, commonly referred to as Public Law 280, codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360. Public Law 280 gave California, and six other specifically designated states (not including New York), jurisdiction over offenses committed by Indians on Indian land. ***Cabazon***, *supra* at 207. The ***Cabazon*** court went to great lengths to observe that state statutes which may appear to be criminal / prohibitory are

really civil / regulatory in nature, holding that in such cases they could not be applied by states to Indians under Public Law 280.

IGRA, however, passed the year after ***Cabazon*** was handed down, changed all that. It prohibits Class III gaming by Indian tribes *unless* a state enters into a compact with a tribe to permit it. ***Seminole Tribe of Florida v. Florida***, 517 U.S. 44, 48 (1996). *See also* 25 U.S.C. § 2710(b)(1)(C). Indeed, § 23(a) of IGRA, codified at 18 U.S.C. § 1166, states that "***all*** state laws pertaining to the ... 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). The only exception with respect to Class III gaming is ***if*** a tribe and a state enter into a compact pursuant to IGRA. 18 U.S.C. § 1166(c)(2). The legislative history unequivocally confirms that in adopting IGRA Congress no longer intended the civil-regulatory / criminal-prohibiting distinction under Public Law 280, as interpreted by the Supreme Court in ***Cabazon***, to apply to Class III gaming. While it may still apply to Class II gaming, even there Congress intended the distinction to be "markedly different" from how it was applied in ***Cabazon***. 1998 U.S.C.C.A.N. 3076 [R. 323]. ***Cabazon***, decided before IGRA was enacted, moreover, dealt with bingo and card games which, under IGRA, would be considered Class II, as distinguished from Class III gaming. *See* 25 U.S.C. § 2703(7)(A)(i) and (ii). The civil/regulatory versus criminal/prohibitory distinction has absolutely no continuing relevance to Class III gaming since the *only* way Class III gaming can now be permitted is *if* there is a valid Compact between a state and an Indian tribe. 1998

U.S.C.C.A.N. 3076 [R. 323]. *See also* 18 U.S.C. §1166. In New York, however, Article I, § 9 of the Constitution prohibits the State from entering into such a Compact. There is, therefore, no longer any doubt - ***Cabazon*** to the contrary notwithstanding – that no Indian tribe may conduct Class III gaming unless, pursuant to IGRA, it has entered into a compact with a state to permit such gaming.

That, however, does not mean that a state is *required* by IGRA to enter into a Compact to permit tribes to engage in Class III gaming. Far from it! It is clear from the language of the statute itself and the cases interpreting it, that Congress did not intend IGRA to force states to enter into a compact. Section 11(d)(3)(B) of IGRA provides that a state "may" – as opposed to "shall" – enter into a Compact with an Indian tribe. 25 U.S.C. § 2710(b)(3)(B). As previously stated *supra* at 41, the Courts have consistently ruled that states are not obligated to enter into a compact under IGRA. ***Ponca Tribe of Oklahoma v. Oklahoma***, 37 F.3d 1422, 1434 (10th Cir. 1994), *vacated and remanded on other grounds*, 517 U.S. 1129 (1996); ***Cheyenne River Sioux Tribe v. South Dakota***, 3 F.3d 273, 271 (8th Cir. 1993); ***Yavapai-Prescott Indian Tribe v. Arizona***, 796 F.Supp. 1292, 1296-1298 (D. Ariz. 1992). The Governor agrees with this as his Reply Brief to the Court of Appeals in ***Saratoga***, *supra*, cited these very same cases for the very same proposition. *See* Appendix "A" to this Brief.

Moreover, the U.S. Supreme Court has also made it abundantly clear that under IGRA, tribes may not bring suit to compel a state to negotiate – let alone execute – a compact. Otherwise, Congress would be violating the sovereign immunity states enjoy

under the 11th Amendment to the U.S. Constitution. ***Seminole Tribe of Florida v. Florida***, 517 U.S. 44 (1996).

If, therefore, New York State's Constitution prohibits commercialized gambling, as it most certainly does, and if IGRA does not require a state to enter into a contract with a tribe to permit commercialized gambling, as the Governor has conceded and as the courts have so ruled, this begs the question as to what basis the Legislature can claim for the power to enact laws to promote commercialized gambling in the face of Article I, § 9, which mandates that it pass laws to prevent such gambling. The answer, of course, is that it has none since it is axiomatic that the Legislature derives its power from the Constitution, which its members are sworn to uphold, and, therefore, it cannot fashion out of whole cloth an implied or inherent power that directly contravenes that which the Constitution explicitly prohibits. ***Blue Cross and Blue Shield v. McCall***, 89 N.Y.2d 160, 163, 170 (1996); ***Matter of New York Pub. Interest Research Group v. New York State Thruway Authority***, 77 N.Y.2d 86 (1990); ***Matter of King v. Cuomo***, 81 N.Y.2d 247, 253 (1993).

(ii) *Mashantucket*

As previously mentioned, the dissenting opinion in this Court in ***Saratoga*** had also cited ***Mashantucket Pequot Tribe v. Connecticut***, 913 F.2d 1024 (2d Cir. 1990), *cert denied,* 499 U.S. 975 (1991) as support for the proposition that notwithstanding Article I, § 9 of the Constitution, the legislature could pass a law authorizing Indian casino gaming. ***Saratoga***, *supra* at 842. Plaintiffs respectfully submit, however, that ***Mashantucket*** no longer has any relevance in light of a multitude of cases that have been handed down by the U.S. Supreme

Court since it was decided over a decade ago. Those decisions make it abundantly clear that even if IGRA were intended by Congress to require states to enter into compacts – which it does not (see Point I-B, *supra*) – Congress would not have had the Constitutional authority to do so.

In ***Mashantucket***, the Indian tribe in question had brought suit under IGRA to compel the State of Connecticut to negotiate a Compact in good faith with the Tribe. ***Mashantucket***, *supra* at 1025. That, of course, was before the U.S. Supreme Court ruled that states were immune from precisely such suits under the 11th Amendment. ***Seminole Tribe of Florida v. Florida***, 517 U.S. 44 (1996).

The Court's analysis in ***Mashantucket***, moreover, was predicated on ***Cabazon***, *supra*, which, as previously noted, was a pre-IGRA case involving what would now be Class II gaming under IGRA that turned on the distinction between criminal / prohibitory and civil / regulatory statutes – a distinction that is no longer germane to Class III gaming after IGRA (*supra* at 43-44). *See also* 18 U.S.C. § 1166 (now all state laws, both civil and criminal, pertaining to gambling apply to Indian tribes).

More importantly, however, ***Mashantucket*** preceded a series of decisions later in the decade from the U.S. Supreme Court which discussed in great detail the issues of federalism, states' rights, state sovereignty, the 10th and 11th Amendments to the U.S. Constitution, and the limitations on the power of Congress over the States. The lead case, ironically enough, is ***New York v. United States***, 505 U.S. 144 (1992), in which the U.S. Supreme Court ruled that even where the power of the Federal Government to regulate is exclusive – as it is with

Indians under the Indian Commerce Clause[7] - Congress cannot exercise that power by commandeering state officials as its instrumentalities to carry out Federal policy. *Id.* at 178. In ***New York***, the issue was whether Congress, in the exercise of its power under the Commerce Clause, could impose upon states the obligation of either regulating radioactive waste or taking title to it, either directly or by ***entering into compacts with neighboring states*.** There is no discernible difference with respect to requiring a Compact with another state as opposed to an Indian tribe. The Court in ***New York v. United States*** ruled that it could not impose those obligations directly on a state, even if the state were willing to go along, noting that:

> The Constitutional authority of Congress cannot be expanded by the "consent" of the Government unit whose domain is thereby narrowed, whether that unit is the executive branch *or the states* (emphasis supplied).

New York v. United States, *supra* at 182.

New York signaled the renaissance of state sovereignty, explicitly recognized in the language of the 10th Amendment to the U.S. Constitution which, the Court noted, provides that powers reserved by the 10th Amendment to the States exist for the protection of individuals, and not states or state officials. *Id.* at 181. It is the individual Plaintiffs in this case who are attacking the authority of New York State officials to invoke IGRA as a way to circumvent this state's own Constitutional proscriptions. These officials have taken the vote away from the Plaintiff voters by enacting laws to carry out a Federal policy, contrary to the State's own Constitution and the wishes of its citizens. ***New York***, *supra* at 182. The

[7] *See* ***U.S. v. Mazurie***, 419 U.S. 554, 557 (1975).

decision in ***New York v. United States*** means that New York State, even if its Legislature wanted to, cannot enact a statute that violates its own Constitution, just so the Federal government can implement a contrary policy. The Supreme Court went out of its way to emphasize that "no member of the Court has ***ever*** suggested that … no matter how powerful the federal interest involved … the Constitution [gave] Congress the authority to require the state to regulate" to carry out a federal policy or program (emphasis supplied). *Id.* at 178.

The decision by the U.S. Supreme Court in ***New York v. United States*** was a reaffirmation of the principle that underlies the 10th Amendment - power flows to the Federal government from the states, not *vice versa*. Congress cannot empower state officials to do that which their own state constitutions prohibit. This is also precisely why IGRA has been upheld as not violating the 10th Amendment, since the courts have recognized that it does *not* require states to enter into compacts. *See* ***Ponca Tribe of Oklahoma v. Oklahoma***, 37 F.3d 1422, 1433 (10th Cir. 1994), *citing* ***New York v. United States***, *supra*. *See also* ***Cheyenne River Sioux v. South Dakota***, 3 F.3d 273, 281 (8th Cir. 1993) ("IGRA does not force states to compacts with Indian tribes regarding Indian gaming and does not violate the 10th Amendment") (also citing ***New York v. United States***); ***Yavapai-Prescott Indian Tribe v. Arizona***, 796 F.Supp.2d 1290, 1296-98 (D. Ariz. 1992).

The reasoning in ***New York*** was reaffirmed by the Supreme Court five years later in ***Printz v. United States***, 521 U.S. 848 (1997), where it struck down a federal statute that imposed duties on state officials in order to implement the provisions of the Brady Handgun Act. Citing ***New York v. United States***, *supra*, it ruled that "such commands are

fundamentally incompatible with our Constitutional system of dual sovereignty." ***Printz***, *supra* at 935. The Court went on to say: "We adhere to the principle today, and conclude, categorically, as we concluded categorically in ***New York v. United States***: the Federal government may not compel the State to enact or administer a Federal regulatory program." *Id.* at 933. *See also* ***Reno v. Condon***, 528 U.S. 141, 149 (2000) (a prohibition against states may be imposed by Congress so as to prevent them from interfering with general Federal policy, as distinguished from imposing an *affirmative* duty on a state, which is prohibited under the principles enunciated in ***New York v. United States***).

In ***Reno v. Condon***, *supra*, the Court explained its prior holdings in both ***New York*** and ***Printz***:

> In ***New York***, Congress commandeered the State legislative process by requiring a state legislature to enact a particular kind of law. We said: While Congress has substantial powers to govern the Nation directly, including in areas that have been of concern to the states, the Constitution has never been understood to confer upon Congress the ability to require the states to govern according to Congress' instructions (citations omitted).
>
> In ***Printz***, we invalidated a provision of the Brady Act, which commanded "state and local enforcement officers to conduct background checks on prospective handgun purchasers," 521 U.S. at 902. We said: "We held in ***New York*** that Congress cannot compel the states to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the states to address particular problems, nor command the State's officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. 521 U.S. at 985.

528 U.S. at 149.

The above language makes it abundantly clear that Congress cannot – and in enacting IGRA could not and did not – compel a state to pass a law otherwise violative of its own Constitution, in order to carry out a federal policy, *i.e.*, the promotion of Indian gaming.

Even if ***Mashantucket***, *supra*, were otherwise applicable, Judge George Bundy Smith's analysis of IGRA in his opinion in ***Saratoga*** makes it clear why IGRA still would not require New York to negotiate a Compact with an Indian tribe. The ***Mashantucket*** court discussed the applicability of § 2(5) of IGRA, codified at 25 U.S.C. § 2701(5), in which Congress found that:

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands *if the gaming activity is not specifically prohibited by Federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity.* (emphasis supplied)

Mashantucket, 913 F.2d at 1029.

The Court in ***Mashantucket*** found, however, that Connecticut's laws were only civil / regulatory rather than criminal / prohibitory in nature, and therefore, did not prevent Connecticut from negotiating a compact with Indian tribes. *Id.* at 1031.

Judge Smith also referred to the above-cited statute (25 U.S.C. § 2710[5]) in his opinion in ***Saratoga***, *supra* at 828-829, noting that in New York State, unlike Connecticut, the proscriptions against commercial gambling are set forth not just in the criminal law (Penal Law, Art. 225), but in our Constitution as well (Art. I, § 9). *Id.* at n. 3. Judge Smith undertook a detailed analysis of the evolution of New York's long-standing public policy

against commercial gambling that is now embodied in Article I, § 9. It is clear, therefore, that unlike Connecticut, whose Constitution contains no similar prohibitions against gambling, New York State has a long-standing historical aversion to it. Thus, even under the now obsolete reasoning of ***Mashantucket***, New York State, as opposed to Connecticut, still comes down on the criminal / prohibitory rather than civil / regulatory side of the fence, such that IGRA does not give New York authorities the power to negotiate commercial gambling compacts with Indian tribes in derogation of New York's Constitutional restrictions on gambling.

Finally, with respect to ***Mashantucket***, it should be noted that a year after it was decided the Second Circuit had a chance to revisit IGRA in another case where, citing subsections (a) and (b) of § 23 of IGRA, codified at 18 U.S.C. § 1166, it stated: "Under the foregoing provisions, gambling activity that violates state licensing, regulatory or prohibitory law is punishable *even though* it may not violate Federal law." (emphasis added) ***U.S. v. Cook***, 922 F.2d 1026, 1035 (2d Cir. 1991); *cert denied sub nom.* ***Tarbell v. United States,*** 500 U.S. 941 (1991).

Contrary, therefore, to the Governor's position, IGRA was not intended by Congress to function as some form of nationwide, Federal regulatory bulldozer knocking aside State Constitutional prohibitions on gambling in the process. It reflected, rather, Congressional recognition of the concerns states might have within their own territories with respect to Indian gaming. Thus, it allowed such gaming to occur only if it did not run afoul of a state's

criminal laws and public policy against gambling. 25 U.S.C. § 2701(5).[8] It is unequivocally clear that New York is just such a state. *See* New York Constitution, Article I, § 9; ***Ramesar v. State of New York***, 224 A.D.2d 757, 759 (1st Dep't 1996), *lv denied*, 88 N.Y.2d 811 (1996). ***Matter of New York Racing Association v. Hoblock***, 270 A.D.2d 31, 33-34 (1st Dep't 2000). ***Saratoga***, *supra* at 826 *et seq.* (George Bundy Smith, J., concurring in part and dissenting in part). *See also* ***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).

In light of ***New York v. United States*** and its progeny, all decided by the U.S. Supreme Court, after the 1990 decision by the Second Circuit in ***Mashantucket***, *supra*, ***Mashantucket*** cannot be read for the proposition that Congress shall require the State of New York to pass laws promoting commercialized gambling, contravening the unequivocal mandate of Article I, § 9 of the New York State Constitution, which directs our Legislation to pass laws preventing it.

D. Given New York's Constitutional Prohibitions and Public Policy Against Commercialized Gambling, the Governor Cannot Concur that Off-Reservation Casinos Will Not Detrimentally Affect the Surrounding Community, Which Concurrence Is Required Under IGRA Before Such Gaming Can Legally Take Place

Even assuming, *arguendo*, that IGRA generally superseded New York's constitutional prohibitions against commercial gambling, there is one important aspect in

[8] The legislative history indicates that when it enacted IGRA, Congress was, in fact, concerned about protecting a State's governmental interest as to how Class III gaming under IGRA might affect that State's public policy, safety and law. *See* 1988 U.S.C.C.A.N. 3076, 3083 [R. 323, 330]. In opting for IGRA, Congress rejected a competing bill, S.1303, that would have allowed for direct federal licensure of Class III gaming by

which it does not under any circumstances. That occurs when Indian tribes seek to enter into compacts with states to conduct Class III gaming on land that is not part of their existing Indian reservation. In such circumstances, IGRA itself provides that no Class III gaming can occur on such land unless the U.S. Secretary of the Interior takes such land into trust and the Governor of the state in which the gaming activity is to be conducted concurs with the Secretary that "a gaming establishment on such newly-acquired land will not be detrimental to the surrounding community." 25 U.S.C. § 2719(a) and 2719(b)(1)(A). The Secretary of the Interior, by letter dated November 12, 2002, addressed to Governor Pataki, has also indicated that this requirement applies not just to land taken into trust, but to all land acquired after October 17, 1988, the effective date of IGRA [R. 1345-1352].

Part B of Chapter 383, however, makes reference to the siting of up to three casinos in the Catskills (Sullivan and Ulster County). *See* Executive Law § 12(b) as amended by Section 2 of Part B of Chapter 383 of the Laws of 2001. Indeed, Park Place Entertainment indicates that it seeks to manage a casino for the St. Regis Mohawk Tribe (whose Akwesasne reservation is located far away in Northern New York) pursuant to a land into trust application at what is now Kutsher's Hotel in Monticello, Sullivan County [R. 311-312]. This means that Park Place seeks to manage a casino on what is now non-Indian land in the heart of the Catskills for an Indian tribe whose reservation is located several hundred miles away on the Canadian border! Moreover, the local municipality will be given no "say" in

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Indian tribes without any State involvement. *Id.* at 3097 [R. 343-345].

the matter. There is, however, no current "Indian" land in either Sullivan or Ulster Counties. *See* Affirmation of James Shannon, dated June 7, 2002 [R. 921 *et seq.*].

Since, even under IGRA, no casinos can be approved on "land into trust" lands or on land acquired after October 17, 1988 without the Governor's concurrence that there will be no "detrimental effect on the surrounding community," there is no conceivable way that the Governor could make such a finding, consistent with his oath of office, the unequivocal prohibitions against ***commercialized*** gambling embodied in Article I, § 9 of the Constitution, and the public policy of this State, as recognized by the Appellate Division [R. 3014]. It could not be more obvious that under such circumstances, Congress clearly did not intend to impose gambling on such land if it would adversely affect the surrounding community.

This was, in fact, precisely what the concern that the National Governors Association ("NGA") identified in their policy paper EDC-6,[9] on Indian gambling under IGRA, where they stated that:

> ... gambling activities conducted under IGRA ... are designed to attract non-tribal patrons. ***The effects of these activities are felt far beyond the geographic boundaries of the reservations*** (emphasis supplied) [R. 1366].

The adverse social consequences of gambling to the community are the very reasons why the New York State Constitution prohibits gambling to begin with. *See* Affidavit of Senator Frank Padavan, sworn to May 30, 2002 at ¶¶ 9-14, inclusive [R. 579-581]. *See also*

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[9] That policy stated that "The Governors firmly believe that ***it is an inappropriate breach of state sovereignty, and inconsistent with the intent of the Indian Regulatory Act, for the Federal government to compel states to negotiate tribal operation of gambling activities that are not available to others in the state*** (emphasis supplied) [R. 1366]. Governor Pataki was Chairman of NGA's Committee on Economic Development and Commerce [R. 1365].

Lincoln, Charles, *A Constitutional History of New York*, 33-50 (1906), appended as Exhibit "B" to the Padavan Affidavit [R. 606-623]. "The New York constitutional provisions [against gambling] were adopted with a view toward protecting the family man of meager resources from his own imprudence at the gaming tables." ***International Hotels Corp. v. Golden***, 15 N.Y.2d 9, 15 (1964).

While the Appellate Division opined that the decision as to whether the community was adversely affected lay with the Governor under IGRA [R. 3021], the point is that the Governor is acting in his capacity as a New York State official, not as a "free agent" vested with some independent power conferred on him by Congress. In ***Confederated Tribes of Siletz Indians of Oregon v. United States***, 110 F.3d 688 (9th Cir. 1997), the question presented concerned the legality of the Governor's refusal to concur with the Secretary's proposed approval of a land into trust application. Significantly, the Court held that:

> When a Governor exercises authority under IGRA, ***the Governor is exercising state authority***. If the Governor concurs, or refuses to concurs, it is as state executive, ***under the authority of state law***. The concurrence (or lack thereof) is given effect under Federal law, but the authority to act is provided by State law (emphasis supplied).

Id. at 697.

Obviously, this means that the Governor is supposed to apply State law in determining whether or not the gambling would adversely affect the surrounding community. There is no question, however, given New York's Constitutional proscriptions against gambling, that as a matter of New York law the type of commercialized Las Vegas-style

Indian casino gaming that would occur pursuant to a "land into trust" arrangement on what has been historically non-Indian land, would violate New York constitutional policies. The Governor, therefore, could not make the finding required under IGRA to permit such gaming. 25 U.S.C. § 2719(b)(1)(A).

The undeniable facts are, moreover, that with the exception of a possible casino on what is already Seneca reservation land, Executive Law § 12(a) and (b) contemplate five additional casinos on what, at the time of the enactment of this legislation, was not Indian land – one in Niagara Falls, one in Buffalo [R. 724-725] and three in the Catskills. Accordingly, there can be no question under any circumstances that the Legislature intended to pass laws to allow such gaming to occur on what was, at the time, undisputedly sovereign soil of the State of New York. The attempt by the Legislature to pass such a law clearly runs afoul of its Constitutional mandate to pass laws to prevent commercialized gambling. New York Constitution, Art. I, § 9(2).

Accordingly, given this State's Constitutional and public policy proscriptions against commercialized gambling, and given the fact that the determination he must make pursuant to § 2719(b)(1)(A) is in his capacity as a State official, the Governor cannot make the certification required under IGRA that such gaming "would not adversely affect the surrounding community."

E. The Provisions of Part B of Chapter 383 Giving the Governor the Authority to Enter Into Compacts With Unnamed Tribes in the Catskills Are An Unlawful Delegation of Power

In ***Saratoga***, the Third Department made it clear that even if IGRA were otherwise a sufficient basis for the State to pass laws authorizing casino gaming, such could not be the case if there was absolutely no legislative guidance as to the terms of any Compact. 293 A.D.2d 20, 28 (3d Dep't 2002), *aff'd* 100 N.Y.2d 801 (2003).

In affirming the Appellate Division's decision in ***Saratoga***, this Court observed that the Governor had violated the separation of powers doctrine by entering into a Compact without any legislative guidance even though critical policy decisions were the prerogative of the Legislative rather than the Executive Branch. ***Saratoga***, *supra* at 821-22. This Court went on to note the specific policy choices which a State would have to make under IGRA, referring specifically to 25 U.S.C. § 2710(d)(3)(C), including the interplay of civil and criminal laws and related jurisdictional issues, assessments to defray the cost of regulation, taxation, contractual remedies, and operational standards. ***Saratoga***, *supra* at 822-23.

In the case at bar, however, Executive Law § 12(b) gives the Governor the authority to enter into compacts in Ulster and Sullivan Counties with Indian tribes without even naming who these tribes should be, let alone where, within that vast expanse, such casinos should be located.[10] There is, moreover, absolutely no guidance whatsoever with respect to the policy choices referred to in IGRA and noted by this Court in ***Saratoga***, *supra*. The Legislature, by contrast, in adopting Executive Law § 12(a), at least referred the Governor to

[10] Nor do local governments have any "say" as to their location. *See* N.Y. Const., art. I, § 9(2).

a Memorandum of Understanding to be guided by with respect to what the terms ought to be concerning the Compact with the Senecas in Western New York.

There is no question, therefore, that Executive Law § 12(b), added by § 2 of Part B of Chapter 383, constitutes an unlawful delegation of power as the Legislature has given the Governor virtual *carte blanche* to do whatever he wishes. This violates the doctrine of the separation of powers. ***Saratoga***, *supra* at 821-823. *See also* ***American Greyhound Racing Inc. v. Hull***, 146 F.Supp.2d 1012, 1029 (D. Ariz. 2001), *rev'd on other grounds*, 305 F.3d 1015 (9th Cir. 2002). *See also* ***Barto v. Himrod***, 8 N.Y. 483 (1853).

For this and all the other foregoing reasons, it is clear that L. 2001, ch. 383, Part B is unconstitutional and the State Defendants should be permanently enjoined from taking any further steps, including the expenditure of taxpayer funds, to implement it.

Our Constitution should not be sacrificed on the altar of a perceived economic expediency.

POINT II

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

The New York State Constitution, Article I, § 9(1) provides in pertinent part as follows:

> … except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, ***except lotteries operated by the state*** and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, ***the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe*** … shall hereafter be acknowledged or allowed within this State … (emphasis supplied)

In enacting Part D of Chapter 383 of the Laws of 2001, however, the Legislature added a new § 1617 to the Tax Law, which reads as follows:

> § 1617. Joint, multi-jurisdiction, and out-of-state lottery. The director [of the Division of the Lottery] may enter into an agreement with a government-authorized group of one or more other jurisdictions providing for the operation and administration of a joint, multi-jurisdiction, and out-of-state lottery, except the director may not agree to participate in the games of more than one such group at any single time. Such a joint, multi-jurisdiction, and out-of-state lottery game or games may include a combined drawing, a combined prize pool, the transfer of sales and prizes monies to other jurisdictions as may be necessary, and such other cooperative arrangements as the director deems necessary or desirable.

On May 15, 2002, pursuant to Part D of Chapter 383, New York State began participating in the Mega Millions multi-state lottery game with nine other states pursuant to

an "Amended and Restated Multi-State Lottery Agreement, with attachments ("Lottery Agreement"), a copy of which is annexed to the Affidavit of William Parment as Exhibit "B" [R. 737-813].

Plaintiffs contend that said Agreement authorizes a lottery that is not, in fact, ***operated by the State*** as required by Article I, § 9 of the Constitution, which must be "strictly construed." Second, the "net proceeds" from the operation of such a multi-state lottery are not, and cannot, be dedicated ***exclusively*** to education within the State.

Supreme Court, nevertheless, upheld Part D, concluding, without any analysis that:

> … the record establishes that the State of New York indeed operates the multi-state lottery within this State and retains sufficient control of all aspects under the Mega Millions Agreement to make this agreement consistent with Article I, § 9 of the State Constitution and the Court … declines to invalidate the act of the Legislature in determining what constitutes "net proceeds" [R. 19].

The Appellate Division affirmed. After reviewing the multi-state agreement, it concluded that: "… New York had [not] ceded control of the multistate lottery" [R. 3042], that "… nothing in the NY Constitution mandates that the lottery be operated exclusively by New York" [R. 3044], that New York had not sacrificed its sovereignty by entering into the Agreement [R.3044], and it rejected Plaintiffs' argument that the "net proceeds from the multistate lottery [were] not devoted exclusively to or in aid of education in this state" [R. 3044].

For the reasons hereinafter set forth, it is respectfully submitted that both lower courts erred.

A. The Multi-State Lottery Is Not Operated By New York State

Article I, § 9 provides a limited exception to its prohibition against gambling by allowing lotteries "operated by the state." It is axiomatic that a "multi-state" lottery will necessarily be operated by several states, rather than be operated by New York State as required by the Constitution. There is no question that exceptions to Constitutional prohibitions must be strictly construed to ensure that the exceptions do not consume the rule. This is true, in particular, with reference to the 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). *See generally*, McKinney's Cons. Laws of N.Y., Book I, Statutes, § 271; 62 N.Y.Jur 2d Gambling, § 9 at 18 *et seq.* The Attorney General's office itself concluded over 18 years ago that exceptions to the Constitutional prohibitions against gambling embodied in Article I, § 9 of the State Constitution must be narrowly construed. Specifically, it stated, with reference to the extent to which a lottery can be operated by the State as an exception to the general prohibition, that:

> … an exception to a general policy spelled out in a constitution or a statute must be given a narrow interpretation, in order to avoid the danger of the exception being so broad as to swallow the rule. The Constitutional grant to the State to establish a lottery is framed in Art. I, § 9 as an exception to the anti-gambling policy banning lotteries, bookmaking, pool selling, and "any other type of gambling, except lotteries operated by the State and the sale of lottery tickets in connection therewith, as may be authorized and prescribed by the Legislature …"

> Therefore, "lottery," as it is used in the exception quoted, must be given a narrow interpretation.

1984 N.Y. Op. Atty. Gen 11; 1984 WL 186643 (N.Y.A.G.).

Section 4.2 of the Multi-State Lottery Agreement, however, provides that a "simple majority vote of all Party Lotteries[11] which are signatories to this Agreement is **required to allow any action** by the Party Lotteries." (emphasis supplied) [R. 739] The Lottery Agreement also provides that each Party Lottery shall have one vote (§ 4.1). There is absolutely no doubt that, as one vote among ten, with six necessary to take any action, New York lacks the control necessary to claim that it in fact operates the lottery. Additionally, the Lottery Agreement provides that many aspects of the operations of the multi-state lottery, including legal, finance, operations, marketing and public relations are carried out by committees appointed by the various Party Lotteries (§ 10.1); as New York will only be appointing one-tenth of the committee members (§ 10.1) it cannot claim to control those operations [R. 740].

While it would be impractical and cumbersome to list every aspect that involves control by other states over the operation of the multi-state lottery, some examples include:

> (1) the Michigan Bureau of State Lottery has control over the operating expense reports and funds redistribution [Finance and Operations Procedures for Mega Millions Attachment § 1.1];
>
> (2) the Virginia State Lottery will have possession of the grand prize funds and be responsible for its transfer [§§ 3 & 6.1];

[11] The individual State lotteries are referred to as "Party Lotteries" in the Lottery Agreement [R. 737].

> (3) the Party Lottery with the most grand prize winners will purchase the securities necessary to fund any installment prizes [§ 4.2]; and
>
> (4) the Georgia State Lottery will operate the actual drawing of the multi-state lottery numbers [Mega Millions On-line Drawing Procedure Attachment - - Georgia State Lottery referred to therein as "GLC", for Georgia Lottery Corporation].

The Lottery Agreement provides that "[n]o party lottery shall be responsible for the negligent acts or omissions of the officers, appointed officials, employees or agents of any other Party Lottery." (§ 9.6) The Lottery Agreement also provides that "all claims arising out of Mega Millions must be pursued only against the state of ticket purchase, and litigation, if any, shall only be maintained against the Party Lottery of the state of ticket purchase and within the state of purchase as the sole and exclusive remedy of Claimant." (§ 9.5) Finally, § 9.4 states that the "Agreement does not waive the defense of Sovereign Immunity . . . nor does this Agreement pledge the credit (if applicable) of the respective states in relation to such disputed claims." When considered *in toto* it is clear that if a New York lottery player has a dispute over the grand prize, say for example, due to the negligence of the Georgia State Lottery in conducting the draw, the New York player will have no effective recourse because he/she may only sue New York, which will not be liable for the Georgia State Lottery's negligence and New York will not have possession of the grand prize funds, as detailed *supra*.

In ***Tichenor v. Missouri State Lottery Comm'n***, 742 S.W.2d 170 (Mo. 1988), a citizen taxpayer challenged that state's participation in a multi-state lottery, given that state's Constitutional provision allowing the Legislature to establish "a Missouri State Lottery."

While the court in ***Tichenor*** rejected the plaintiff's argument on the merits, importantly, unlike our Constitution, there was no language requiring that said lottery be "operated by the State." Even more significant, however, was the majority's rejection of a "strict construction" analysis, opting instead in favor of a more "liberal" construction advocated by the State. *Id.* at 173. The dissent harshly criticized the majority for "refusing to follow the long-accepted rule of construction that exceptions to general prohibitions must be narrowly construed." *Id.* at 179. That "long accepted rule" does apply in New York (*supra* at 65).

On March 25, 2002, the Attorney General of South Carolina opined that South Carolina must decline an invitation to join the "Big Game" (the predecessor to Mega Millions [R. 450-459]). Unlike the Missouri court in ***Tichenor***, *supra*, a case which the South Carolina Attorney General specifically distinguished, he adopted a "literal" as opposed to "liberal" construction of South Carolina's Constitutional requirement that only the State conduct a lottery [R. 452-453, 458]. The South Carolina Attorney General concluded that "… where South Carolina participates in a multi-state lottery, 'the State' ceases to be the entity 'conducting' that lottery" [R. 454]. The South Carolina Constitution provided that "[o]nly the State may conduct lotteries", and the South Carolina Attorney General cited ***United States v. Grezo***, 566 F.2d 854, 860 (2d Cir. 1977), in which the court held that "conduct" is synonymous with "operate." *see also Bantam Collegiate Roget's Thesaurus* at 468 (1991). The South Carolina Attorney General also noted:

> The monies collected to pay the multi-state game are derived from the various states participating. This is what to many makes a jackpot so much larger and the lure of these games

> so much more attractive than ordinary state-run lottery games. ***To argue that the multi-state game can be separated into the "South Carolina portion" thereof, to ensure compliance with the Constitution would be rather disingenuous.*** (emphasis supplied) [R. 455].

Given the way the Mega Millions will operate, as detailed *supra*, New York State will have necessarily ceded control over such critical issues as budgeting and expenditures, financial settlements, advertising and legal matters. It is, therefore, obvious that this is not a lottery "operated by the State," as required by Article I, § 9 of the State Constitution.

It is equally well-settled that when a State participates in a multi-state agreement or compact, it has yielded an essential element of its own sovereignty. ***Hess & Walsh v. Port Auth. Trans-Hudson Corp.***, 513 U.S. 30, 40 (1994). In ***Hess***, *supra*, the U.S. Supreme Court cited with approval the following language:

> An interstate compact, by its very nature, shifts a part of a state's authority to another state or states, or to the agency that several states jointly create to run the compact. Such an agency under the control of special interests or gubernatorially appointed representatives is two or more steps removed from popular control, or even of control by a local government. M. Ridgeway, *Interstate Compacts: A Question of Federalism*, 300 (1971).

513 U.S. at 42.

The Supreme Court in ***Hess***, *supra*, went on to note:

> In sum, within any single State in our representative democracy, voters may exercise their political will to direct state policy; ***bistate entities created by compact, however, are not subject to the unilateral control of any one of the States that compose the federal system.*** (emphasis supplied)

513 U.S. at 42.

There are, moreover, a host of decisions holding that where the State of New York delegates a number of governmental functions to another entity, that entity is not the State. ***Grace & Co. v. State Univ. Constr. Fund***, 44 N.Y.2d 84, 88 (1978); ***Collins v. Manhattan & Bronx Surface Transit Operating Auth.***, 62 N.Y.2d 361, 365 (1989); ***Braun v. State of New York***, 203 Misc. 563 (Ct. of Cl. 1952).

The Appellate Division's attempt to distinguish these cases is based on the argument that here no separate entity was created [R. 3044]. The problem, however, is that the State cannot have it both ways. On the one hand, it argues that it has not delegated away control and that it, rather than some other entity, operates the multi-state lottery, but it fails to explain how it retains control when New York's own courts are unable to resolve claims involving negligent acts or omissions by lottery officials in other states [R. 740]. Indeed, no state has waived its sovereign immunity, and no New York ticket purchaser can sue any other state. It would certainly come as a great shock to a New York citizen purchasing what he thought was a winning lottery ticket in New York to learn that because of the alleged negligent act of a Georgia state lottery employee in drawing the ticket, some different numbers were ultimately selected and that he (the New Yorker) had no recourse under the agreement. Resolution of disputes in fora other than New York courts is hardly consistent with the notion that New York State controls the lottery.

To summarize, given New York's well-accepted canons with respect to statutory construction, requiring that exceptions to broad prohibitions be narrowly and strictly construed, the language in Article I, § 9 of our Constitution, carving out an exception to the

general prohibition against gambling to allow a lottery operated by the State, does not permit New York to participate in the multi-state lottery. This is especially true where, as is here the case, the participating states pool bets and transfer sales and prize money among them, essential functions are delegated to a central operation, and disputes are not resolved by New York courts. The State has necessarily surrendered control of the operation of the lottery and no longer has the power to completely "operate" or "control" it.

B. The Net Proceeds Are Not Devoted "Exclusively" To Education In This State

Even aside from the fact that Mega Millions is not a lottery operated by the State, there is a separate, independent reason why it, and the legislation that enables it, are unconstitutional. The exception in Article I, § 9 of the State Constitution allowing lotteries operated by the State also requires that the net proceeds therefrom be dedicated ***exclusively*** to the cause of education in this State.

Here, however, under § 5 of the Lottery Agreement, the central operation of the Mega Millions will be funded by sales money transferred to it by each state to promote lotteries that will function in other states besides New York. Such funds can be used, for example, for any purpose (having nothing to do with education) that a state's local governmental entity may wish (*e.g.*, Massachusetts)[12] [R. 464-468]. It is simply inconceivable that the narrow, limited exception carved out of the Constitution to permit the State of New York to operate a lottery was ever intended to allow the diversion of proceeds

[12] Even though some other states use their lottery proceeds towards education in those states, that is not education in the State of New York.

from the sale of tickets to go toward funding an operation that promotes lotteries in other states dedicated to causes that have nothing whatsoever to do with education in the State of New York.

On this issue, the South Carolina Attorney General noted:

> If we view the multi-state game as a single lottery with multi-state participants - as indeed it is - a strong case can be made that the proceeds from that lottery are being given to other participating states which are obviously using those proceeds for purposes other than South Carolina education. Therefore, where a multi-state game is involved, the spirit, as well as the letter, of the Constitutional mandate … that the particular lotteries must be used only for South Carolina education - may very well be contravened [R. 457].

Supreme Court relied on the State's argument that the "***net*** proceeds" from the operation of the multi-state lottery are being used towards education in New York State [R. 19]. Significantly, however, it ignores the fact that the costs which can be deducted before "net proceeds" are determined are those costs necessarily incurred in operating or promoting ***New York's*** lottery, not those of other states. Here, however, the money derived from the sale of tickets in New York State will necessarily go toward funding a centralized operation that serves other lotteries besides New York's, and the proceeds of those lotteries go elsewhere (Lottery Agreement, § 5). Importantly, under the Lottery Agreement the states share the operating expenses equally (§ 1.1), not according to the actual percentage of their participation. So if New York sales should account for less than one-tenth of any given draw it will necessarily be paying more than its share of the operating expenses.

No matter how the State Defendants try to "spin it", their arguments boil down to the fact that the State Lottery Division may, under their interpretation, spend money to fund a central administrative apparatus that operates to promote causes unrelated to education in this State. That is where the legislation challenged herein and the Lottery Agreement run afoul of New York State's constitutional prohibition. To countenance such action is to ignore the "narrow interpretation" which must be imparted to the language excepting a state-operated lottery to benefit education in New York State from the broad prohibitions in Article I, § 9 of the State Constitution otherwise applicable to lotteries. The lower court's extraordinary deference to the Legislature, allowing that body to, in effect, self-validate any expense by defining "net proceeds" any way it wishes, opens wide the door to other potential uses and/or abuses never envisioned by the framers of the Constitution.

Given the strict construction standard that applies to any exception to a broad Constitutional prohibition, Part D of Chapter 383 of the Laws of 2001 does not pass muster as the multi-state lottery is not operated by New York State, nor do the net proceeds go exclusively towards education in New York State. It is, therefore, unconstitutional.

POINT III

Parts B, C and D of Chapter 383 of the Laws of 2001 Were Adopted in Violation of Article III, § 14 of the New York Constitution

> "Some day a legislative leadership with a sense of humor will push through both houses resolutions calling for the abolition of their own legislative bodies and the speedy execution of the members. If read in the usual mumbling tone by the clerk and voted on in the usual uninquiring manner, the resolution will be adopted unanimously."

Moscow, Warren; *Politics in the Empire State* (Alfred A. Knopf, 1948), reprinted in *The New York State Legislative Process: An Evaluation and Blueprint for Reform* at 27, Brennan Center for Justice at N.Y.U. School of Law (2004) (the "BCJ Report").

A. Introduction

Even if, despite the arguments set forth in Points I and II, *supra*, Parts B, C, and D of chapter 383 were otherwise valid, they are nevertheless unconstitutional because they were enacted in violation of Article III, § 14 of the Constitution.

B. The Governor's Message of Necessity Cited No Facts To Justify An Immediate Vote

Article III, § 14 of the New York State Constitution provides in pertinent part:

> No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, ***unless the governor, or the acting governor, shall have certified, under his or her hand and the seal of the state, the facts which in his or her opinion necessitate an immediate vote thereon,*** in which case it must nevertheless

> be upon the desks of the members in final form, not necessarily printed, before its final passage … (emphasis supplied)

While Governors, past and present, may have pushed the envelope in meeting the minimal requirements of Article III, § 14 of the Constitution,[13] in the instant case the Governor has utterly disregarded them, ripping the envelope to shreds. His message that "these bills [*sic*] are necessary to enact certain provisions of law" [R. 154] was totally devoid of any facts certifying a necessity justifying a waiver of the three-day requirement embodied in Art. III, § 14. He might as well have said "a law can't become a law unless you pass it." Any conclusion except that the Governor violated the requirements of Article III, § 14 would effectively declare this provision to be a "dead letter."

The Legislature's haste in October, 2001 to pass an 81-page bill, virtually sight unseen (*see* Parment Affidavit, ¶ 27 [R. 700]), should be contrasted with what occurred this year when, for the 20th consecutive year, in what has become an annual rite of spring, the Governor and the Legislature failed to adopt a budget on time, missing the Constitutionally mandated deadline of April 1 by more than four months – a new albeit dubious record. Plaintiffs contend that the Governor's and legislative leaders' claim that a bill authorizing casino gambling, video lottery terminals and an interstate lottery somehow was so necessary that the Legislature could not wait for three days to debate the bill has a very hollow,

[13] It is clear that what was intended to be an exceptional, rare practice has become the norm. "From 1997 through 2001, a Message of Necessity was requested and obtained for at least one chamber's vote on 26.9% of the major legislation passed." *The New York State Legislative Process: An Evaluation and Blueprint for Reform* at 27, Brennan Center for Justice at N.Y.U. School of Law (2004).

disingenuous ring when something as important as the State Budget could be deferred for more than four months beyond the Constitutionally mandated deadline for passage.

The Court of Appeals has held that the requirements of Article III, § 14 are "not directory, but mandatory, as is obvious from the form of the command, which prohibits a bill from becoming a law without compliance therewith." ***People ex rel. Hatch v. Reardon***, 184 N.Y. 431, 439 (1906); *aff'd* 204 U.S. 152 (1907). If, therefore, the Governor had submitted no message at all, clearly a bill could not have been passed without waiting three days. ***Franklin Nat'l Bank of Long Island v. Clark***, 26 Misc.2d 724 (Sup. Ct. N.Y. Co. 1961). The "facts" he did certify were nothing more than a truism, i.e. true whether the bills were passed after sitting on the legislators desks for three days or pursuant to any conceivable Message of Necessity. The message was, in fact, no message, and insulted the intelligence of the Plaintiff legislators. See Affidavit of Assemblyman William Parment, sworn to May 30, 2002 at ¶ 2 [R. 693-694]. They are entitled to have the Executive Branch perform its constitutional obligations so that they can perform theirs. *See* ***Winner v. Cuomo***, 176 A.D.2d 60 (3d Dep't 1992), cited with approval, ***Silver v. Pataki***, 96 N.Y.2d 532, 537 (2001).

The Appellate Division, therefore, was in error when, in rejecting Plaintiffs' message of necessity argument, it observed that the Legislature accepted it and passed the bill anyway [R. 2999]. In ***Winner***, *supra*, like the case at bar, ***individual*** legislators successfully brought an action objecting to the manner in which budget bills had been passed because the Governor had failed to submit them timely to the Assembly. The Court in ***Winner*** held that

the right to receive those bills in timely fashion was an "individual" legislator rather than "institutional" legislative right.

The object of Article III, § 14 "is 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. (***People ex rel. Hatch v. Reardon***, 184 N.Y. 431 [1906])" ***Schneider v. Rockefeller***, 31 N.Y.2d 420, 434 (1972). Prior to the 1938 Constitutional Convention, what is now Article III, § 14 only required the governor to certify "the necessity" of [a bill's] immediate passage" without any requirement to state the facts underlying such necessity. The framers of the 1938 amendment obviously had a reason for changing that requirement. Significantly, in explaining why Art. III, § 14 was amended at the Constitutional Convention of 1938 to require the Governor to state the facts to justify an immediate vote, Senator Fearon stated that:

> It provides first that instead of the Governor certifying as to the necessity for the immediate passage, which is exactly what he does, any Governor does: He has a printed form in which he certifies to the necessity for the immediate passage; under the new proposal the Governor will certify the facts which, in his opinion, necessitate an immediate vote on the bill, not necessarily its passage, but an immediate consideration of it and an immediate vote upon it. And it is the hope of the members of the committee that if the Governor is required to certify facts which in his opinion constitute an emergency, it will not fall into a pro forma signing of a printed message which reads, in effect, 'I hereby certify the necessity for the immediate passage of bill No. so and so.'

Rev. Record, Constitutional Convention of State of New York, 1938, Vol. 2, p.1435.

That is essentially, however, what happened in this case. The Message of Necessity shows nothing but contempt for what was to be a meaningful Constitutional reform. It would exalt form over substance to allow the requirements of Article III, § 14 to be circumvented by the Governor's empty recitation of a truism.

Additionally, it is well settled that the 'words employed in the Constitution are to be taken in their natural and popular sense.' ***Rathbone v. Wirth***, 40 N.Y.S. 535, 556 (3d Dept. 1896); *aff'd* 150 N.Y. 459 (1896). A "fact" is defined as "a thing done; an action performed or an incident transpiring; an event or circumstance". Black's Law Dictionary at 591 (6th ed. 1990). The plain meaning of the words used in Article III, § 14 inevitably lead to the conclusion that the "facts" must relate to the incident, event or circumstance at that particular time, e.g., the impending expiration of a law, the impending end of appropriations for the support of the government, that the legislative session will cease in less than three days, necessitating an immediate vote - as distinguished from the recounting of an elementary maxim of democratic procedure. Significantly, to hold that Article III, § 14 was satisfied in this perfunctory manner, where there was a total absence of any substantive facts relating to the necessity for an immediate vote, would violate the well established rule that:

> … a statute should be construed so as to give effect, if possible, to all of its provisions, but in interpreting the Constitution the rule is more rigidly applied, and the fundamental law, as solemnly expressed in a written instrument, is to be considered as a whole, complete in itself, and force and effect must be given to every provision contained in it. ***Newell v. People***, 7 N.Y. 9; ***People v. Rathbone***, 145 N. Y. 434, 40 N.E. 395.

Smith v. Board of Supervisors of St. Lawrence County, 148 N. Y. 187, 193 (1896).

This is not a case where the Plaintiffs are asking the Court to set aside the legislation because it disagrees with the facts cited by the Governor. Had the Governor cited any fact that, in his opinion, justified an immediate vote, Plaintiffs concede that the Governor would have satisfied the Constitutional mandate and it would be beyond the power of the Court to substitute its opinion for the Governor's as to whether those facts justified a waiver of the three-day requirement.

Had the Governor, for example, stated that the bill was necessary to support education, or stimulate the economy, or provide important services, that would have sufficed. *See*, for example, copies of other Messages of Necessity appended to the Affirmation of Randy Mastro, Esq. dated April 4, 2002 [R. 398-419], which contain messages of necessity for other bills, all of which provide at least some rationale for an immediate vote. Note also that all messages of necessity contain a standard boilerplate: "Because the bills have not been on your desks in final form for three calendar legislative days, the Leaders of your Honorable Bodies have requested this message to permit immediate consideration of these bills." Obviously such boilerplate contains no additional facts that would justify an immediate vote in this case.[14] The unalterable fact remains that the Governor's bald statement in this particular message of necessity that "these bills are necessary to enact certain provisions of law" contained no facts indicating the need for an immediate vote and, therefore, failed to comply with Article III, § 14 of the Constitution.

[14] If the boilerplate were, by itself, sufficient to satisfy the requirements of Art. III, § 14, then, of course, there would be no need for the additional statements contained in every message of necessity, not just Chapter 383. *See* Mastro Affirmation, Exhibits "L" and "M" [R. 398-414]. In fact, the amendment to Art. III, § 14 was adopted at the 1938 Constitutional Convention to eliminate boilerplate messages of necessity. *See* remarks of

The necessary result is that Parts B, C and D of Chapter 383 of the Laws of 2001 are, therefore, unconstitutional, null and void. ***Franklin Nat'l Bank of Long Island v. Clark***, 26 Misc.2d 724 (Sup. Ct. N.Y. Co. 1961).

Reliance by the Courts below on ***Finger Lakes Racing Ass'n. v. New York State Off-Track Pari-Mutuel Betting Comm'n.***, 30 N.Y.2d 207 (1972) is misplaced [R. 13-14; 2999]. In ***Finger Lakes***, the Governor's message of necessity noted that the legislative leaders had requested a message of necessity "to permit consideration of the bill *prior to your anticipated final adjournment*" (emphasis supplied). The Court in ***Finger Lakes*** noted that the imminence of adjournment, accompanied by a general description of the bill, satisfied Article III, § 14, stating:

> The time sequence shows the bill could not have been considered by the Legislature unless a certificate [message of necessity] had been given ... The request by the leaders of both houses to the Governor for a certificate shortening the time to permit consideration of the bill before adjournment was to make legislative action possible.

Id. at 219.

In other messages of necessity, either there was a valid purpose stated, *i.e.*, the need to extend certain provisions of law that were otherwise expiring or to support government (*see* Exhibit "L" of Affirmation of Randy Mastro, Esq., dated April 4, 2002 [R. 398 *et seq.*], or there was a recognition of pending adjournment (***Finger Lakes***, *supra*).[15] In the case at

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Sen. Fearon, *supra* at 77.

[15] If the signatures by the Governor on all the Messages of Necessity referred to by Mr. Mastro seem remarkably similar [R. 398-419], there is a reason. The Message has become such a frequent occurrence, an autopen is used to generate the Governor's signature. *See*, *The New York State Legislative Process: An Evaluation and Blueprint for Reform* at 27, Brennan Center for Justice at N.Y.U. Law School (2004).

bar, by contrast, there was neither. The Governor's message of necessity says only that the "bills are necessary to enact certain provisions of law," which is a self-evident truism that applies to all bills, not just those passed without a three-day waiting period. His only reference is to the fact that the leadership had requested the bills. The mere fact that legislative leaders, as opposed to the Governor, requested a bill was no justification to waive the three-day requirement. It is the Governor who must give a reason for waiving the three-day requirement in any event (***Finger Lakes***, *supra* at 29), not the Legislature or its leaders. In ***Finger Lakes***, the Governor, realizing that the Legislature had decided to adjourn, understood that a bill he wanted could not be acted upon without a Message of Necessity. That was specifically set forth in the Message of Necessity in ***Finger Lakes***. That, however, is not the case here, since the Message of Necessity makes no reference whatsoever to any impending adjournment.

A transcript of the proceedings in the Senate [R. 370] reveals that the message of necessity was not even read to the members. The Legislature cannot be expected to accept the Governor's message if it isn't even read to them. Since the whole point of Article III, § 14 is to prevent the adoption of hasty, ill-conceived legislation (***Schneider v. Rockefeller***, 31 N.Y.2d 420, 434 [1972]), individual legislators are entitled to know why the Governor thinks immediate action on a bill is so imperative that waiver of the three-day requirement is justified. They obviously cannot make an informed judgment when all they are told is that the Governor has issued a message of necessity, but are not advised of its contents.

In this case, where the message of necessity contained no facts other than that the bill

was necessary to enact certain provisions of law and that the legislative leaders had requested a waiver of the three-day requirement, where there was no mention of impending adjournment, where the message was not even read to the members of the Senate, and where there were no constitutional or statutory deadlines to meet, even the minimal requirements of Article III, § 14 of the Constitution have not been satisfied.

The Appellate Division ignored the purpose for the change in the wording of the 1938 amendment to Art. III, § 14, which required the Executive Branch to cite "facts" necessitating an immediate vote. That change was designed to impose a substantive obligation on the Governor so that legislators could make an informed judgment on any proposed legislation. To allow the Governor to satisfy that obligation without really saying anything of substance completely frustrates the framers' objective and the will of the People who adopted it. What good does it do if, after all the hard work undertaken to effectuate a change in the Constitution, the Courts do not enforce it?

C. If The Courts Were To Ignore The Requirements of Article III, § 14, It Would Legitimize A Practice That Has Made New York's Legislative Process A National Disgrace

Chapter 383 was rammed through the Legislature in the middle of the night, sight unseen by rank and file legislators, after a clandestine backroom deal had been struck by powerful, monied lobbying interests with the Governor, the Senate Majority Leader and the Speaker of the Assembly. *See* Affirmation of Assemblyman William Parment sworn to May 30, 2002 ¶¶ "14" - "22," inclusive [R. 696-699]. Assemblyman Parment laments that the process has become so secretive and closed that it invites "disdain and ridicule" for the

institutions of government. *Id*. [R. 699]. This "three men in a room" manner of legislating is precisely why New York State has gained a reputation as the proverbial "poster child" for dysfunctional government. *See* BCJ Report at 6. *See also*, McKinley, J. "Before Bills Move In Albany, Three Leaders Cut Deals In Secret: The Albany Syndrome," New York *Times*, October 21, 2002 at A1. *See also*, Pérez-Peña, R. "Lax New York Rules Make Big Money Talk", New York *Times*, October 22, 2002 at A1; *see also;* McKinley, J. "System Defies Even A Governor Who Promised To Reform It." New York *Times*, October 22, 2002 at B2 [R. 1272-1281]. *See also* Cooper, M., "Calls Increase for Overhaul in Albany," New York *Times*, September 29, 2004 at B-1

The lobbyist for Defendant Intervenor, Park Place Entertainment, which seeks to reap millions from the proposed management of a casino for the St. Regis Mohawk Tribe in the Catskills,[16] blatantly bragged in the New York *Times* that "this was probably the biggest lobbying effort I've ever seen, and I've been around a long time." "Casino Bill was Passed after Big Push by Lobbyists." New York *Times*, November 1, 2001 [R. 883-884].

Another commentator noted that "the deal [the agreement to pass Chapter 383] was crafted in private, with no public hearings or other opportunities for citizens to be heard." *See* Gallagher, J. "Gambling Deal Marks Flawed Process." Albany *Times Union*, October 29, 2001 [R. 881]. A State Senator from Buffalo who represents a district where two casinos are to be located under the legislation commented: "I didn't run for this chamber not to have any voice in an issue that is of such concern to the community I represent." (*Id*.)

[16] *See* ¶ "9" of Affirmation of Randy Mastro, Esq. dated April 4, 2002 [R. 312].

Assemblyman John Flanagan, the ranking minority member on the Assembly Ways and Means Committee, said "I'm beyond astounded that disrespect [for minority party legislators] has sunk to this level." *Id*.

The Temporary Commission on Lobbying issued its Annual Report for the year 2001 in March, 2002 and noted that money spent in lobbying reached a record level in Albany in the year 2001. The report noted that more than $3.1 million was spent by gambling interests, including the Seneca Nation of Indians, and that $143,000 was spent by the New York Racing Association "which wanted, and got, a law allowing video lottery terminals at racetracks." *See* Odato, J. "Lobbying In Albany Hits A Record In 2001." Albany *Times Union*, March 21, 2002 at A 1 [R. 1261-1262].

The foregoing illustrates just how unseemly the legislative process has become in the eyes of the public and even rank and file legislators. Rejecting the Executive's and the legislative leaders' attempt here to insult those lawmakers by sending them a bogus message of necessity that shows nothing but contempt for the requirements of the Constitution would help put an end, at least in part, to a process that has become so disreputable. It would remind the Executive Branch and those leaders in the Legislature that the New York State Constitution, and, in particular Article III, Section 14, means what it says, and that they, like the rest of us, are bound by the law.

The modern world of television has exposed on 11 p.m. news shows the embarrassing rituals of the Legislature, passing bills in the middle of the night that have not even been read by bleary-eyed members slumped in their chairs, many of them literally

asleep at their desks. Few, if any, have a clue as to what they have just enacted. This disgraceful spectacle has now become an annual rite of legislative adjournment. It makes a mockery of representative democracy. Is this what has become of Article III, § 14 of the Constitution? A judicial imprimatur on this non-Message of Necessity would ignore the reforms of the 1938 Constitutional Convention and only reinforce the widespread cynicism, disillusion and skepticism about what is perceived to be a "dysfunctional" State government. *See* Benjamin, E., "Fight for Reform Picks Up Steam Across State," Albany *Times Union*, A-1, September 30, 2004.

Even if this means that the Court will have to declare laws unconstitutional, the words of Chief Judge Breitel, penned over a quarter of a century ago in ***Flushing National Bank v. Municipal Acceptance Corporation***, 40 N.Y.2d 731 (1976) are especially pertinent:

> ... The Court has no choice in the performance of its judicial and Constitutional function ... With full awareness of the practical consequences, it must apply constitutional policy and law to difficult questions ... Incantations of ... "financial emergency" [cannot] suspend constitutional provisions. Neither life nor law is that easy. *Id.* at 738.

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.

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Respectfully submitted,

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