WHITE PAPER REGARDING
THE CONSTITUTIONALITY OF LEGISLATION AUTHORIZING CONVERSION OF VIDEO LOTTERY TERMINAL FACILITY TO CASINO

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EXECUTIVE SUMMARY

Legislation authorizing video lottery terminal ("VLT") facilities in Yonkers and Queens to operate as casinos would be constitutional. The Legislature has plenary constitutional power to select what seven facilities can operate as casinos in New York State pursuant to Article I, § 9 of the New York Constitution. And because such legislation would not confer monopolistic benefits on any single entity—indeed, four casino licenses have already been awarded to different entities—the conversion of two VLT facilities to casinos would not violate the Exclusive Privileges Clause. N.Y. Const. art. III § 17.

Such legislation is wholly consistent with *Hotel Dorset Company v. Trust for Cultural Resources of City of New York*, 46 N.Y.2d 358 (1978), where the Court of Appeals concluded that legislation that then conferred benefits on one entity—the Museum of Modern Art—was constitutional where the legislation provided that other entities could qualify for the same benefits. So, too, would VLT/casino legislation be constitutional because it could be written not to confer an impermissible monopoly, but to allow multiple potential entities, including the VLT facilities in Yonkers and Queens, to be the recipients of two of seven licenses that the Constitution provides—four which have already been issued and one which would remain available.

Further, such legislation is consistent with *Matter of Union Ferry Co. of Brooklyn*, 98 N.Y. 139 (1885), where the Court of Appeals ruled that a law granting exclusive use of land to a ferry company was constitutional because any exclusive privilege the ferry company realized resulted from the fact that land is a limited resource, not from any granted right to exclude competitors. That same reasoning should apply to VLT/casino legislation, as casino licenses are a limited resource—there may only be a maximum of seven—by constitutional design; as in

Union Ferry, any exclusivity flows from realities beyond the Legislature's control. Finally, the legislation would not contravene New York's Home Rule protections because casino gambling is undoubtedly an issue of state—not uniquely local—concern.

INTRODUCTION

The purpose of this memorandum is to evaluate the constitutionality of legislation that would allow two facilities currently operating video lottery terminals ("VLTs") in Yonkers and Queens to operate as full-fledged casinos. Although we do not opine on the constitutionality of any particular piece of legislation, there are two constitutional doctrines which would likely be implicated by any bill that would allow VLTs to convert. The first is the Exclusive Privileges Clause, which prohibits the New York State Legislature from awarding exclusive privileges to single entities. N.Y. Const. art. III, § 17. The second is the constitutional guarantee of home rule, which prohibits the Legislature from enacting legislation regarding matters that are particularly local in nature. N.Y. Const. art. IX, § 1.

Although both of these doctrines limit the Legislature's power in certain instances, legislation authorizing VLTs to operate as casinos can readily be drafted in a constitutional manner. The Exclusive Privileges Clause prohibits legislation if two conditions are met. First, although the clause prohibits a law from vesting privileges in only a single entity, legislation could be easily drafted to avoid such a concern by allowing a multitude of entities (whether in existence or not) to benefit from the legislation in the future. Second, legislation granting a license to a facility to engage in casino gambling would not likely violate the clause because the Legislature has the power to grant privileges that are, by their nature, scarce resources like specific plots of real estate. That power is at its zenith in the casino gambling context, where the Constitution itself expressly vests in the Legislature the power to "authoriz[e] and prescribe[]" seven casino facilities in New York State, N.Y. Const. art. I, § 9(1). The home rule doctrines

will likewise not limit the Legislature's power to provide for the conversion of VLT facilities to casinos. Those doctrines are inapplicable when dealing with matters of state concern, which casino gambling is. Further, any conflicting local law disallowing casino gambling in an area would be preempted by a state law to the contrary.

In sum, legislation authorizing the conversion of VLT facilities in Yonkers and Queens to full casino gaming facilities can be drafted in a way consistent with the Legislature's power under the casino gambling amendment and any limitations on that power the Exclusive Privileges and Home Rule Clauses impose.

BACKGROUND

Although throughout most of New York's history casino gambling was illegal, a 2013 amendment to the New York State Constitution revised that longstanding prohibition. That year, the New York State Legislature passed both an amendment to Article I, Section 9 of the State Constitution (later ratified by voters), and a statute legalizing casino gambling in New York State, *see* New York Racing, Pari-Mutuel Wagering & Breeding Law ("PML") §§ 1306, 1311. The constitutional amendment authorized the Legislature to provide for "casino gambling at no more than seven facilities as [it may] authorize[] and prescribe[]." N.Y. Const. art. I, § 9(1).[1] It

[1] The relevant constitutional provision reads in full:

> [E]xcept as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except [1] 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, except [2] 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, and except [3] casino gambling at no more than seven facilities as authorized and prescribed by the legislature 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.

N.Y. Const. art. I, § 9(1).

expressly delegated to the Legislature the task of implementing statutes to govern casino gambling, which the Legislature did the same day it passed the amendment.

In that legislation, the Legislature authorized the "New York state resort gaming facility location board . . . [to] select, following a competitive process," up to four entities to apply to the New York Gaming Commission for "gaming facility licenses." PML § 1306. The Legislature authorized the Commission to award such licenses for a period of ten years but prohibited the Commission from awarding any licenses in New York City, PML § 1311, as well as in Putnam, Rockland, and Westchester Counties, PML §§ 1310(2)(a)(1), 1311. At present, four casinos operate in New York State. The Legislature has constitutional authority to authorize three more, but under current statutory law, the Gaming Commission may not issue new gaming facility licenses.

LEGAL ANALYSIS

We assess whether any legislation permitting two VLTs to convert to casino gaming facilities can be constitutional and specifically whether the Exclusive Privileges Clause or New York's home rule protections would impact the constitutionality of any such legislation. Obviously, this analysis will turn on the exact language enacted into law. But we believe that if the legislation is drafted to address these two doctrines, then it should be constitutional.

I. Preliminary Analysis: Deference Owed to the Legislature and the Constitution's Casino Gambling Clause.

At the outset, we note that in New York State, courts "will upset the balance struck by the Legislature and declare [an act] unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that [] every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Cohen v. Cuomo*, 19 N.Y.3d 196, 201-02 (2012) (internal quotation and

citations omitted). This means that the legislative findings are of critical importance in any legislation that is ultimately adopted and should be used to address any concerns because courts typically defer to them.

Additionally, it is important to note that the casino gambling amendment leaves almost everything to do with "authoriz[ing] and prescribe[ing]" "casino gambling" up to "the legislature," N.Y. Const. art. I, § 9(1), meaning that the Legislature's power is at its strongest in granting casino gaming rights. Nothing in the constitutional amendment precludes issuing a gaming license to any particular entity or in any particular location. And in fact, the casino gambling amendment itself contemplates that casino gaming licenses will be legislatively-granted exclusive privileges because the amendment limits the amount of licenses available to seven.

Moreover, although the Legislature initially authorized casino gambling by delegating the selection process to the Gaming Commission, nothing in the Constitution requires such delegation. The Commission is itself a creature of statute—one without any specified constitutional role here—and can only act as the Legislature allows. *See In re Fifth Ave. Coach Lines, Inc.*, 18 N.Y.2d 212, 229 (1966) ("It is clear that the Legislature may withdraw the jurisdiction of a regulatory agency . . . ."); *Village of Mamaroneck v. Pub. Serv. Comm'n*, 208 A.D. 330, 340 (3d Dep't) ("The Public Service Commission derived its authority from the Legislature. It was a delegated power . . . analogous to a revocable power of attorney."), *aff'd* 238 N.Y. 588 (1924); *People v. Fish*, 34 N.Y.S. 1013, 1013 (Gen. Term. 2d Dep't 1895) ("[L]ocal boards get their power to legislate from the legislature, and such conferred power is subordinate to the power of the legislature, for the legislature may revoke it or limit it or override it at will."); *see also City of Arlington v. F.C.C.*, 569 U.S. 290, 297 (2013) (explaining "agencies

charged with administering congressional statutes" have "their power to act and how they are to act [] authoritatively prescribed by Congress"); *cf. Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980) (A regulation cannot "run counter to the clear wording of a statutory provision."). The Legislature is also free to adopt legislation that differs from prior statutes. *See Rieseberg v. State*, 243 N.Y.S.2d 887, 892 (Ct. Cl. 1963) ("[E]xcept as limited by the Constitution, the power of the Legislature to enact laws is absolute, plenary and unlimited"). It does so all the time. *See, e.g.*, Racing, Pari-Mutuel Wagering & Breeding L. ("PML") § 1370 (providing gaming inspector general with certain powers "notwithstanding any law to the contrary"); PML § 1340 (enacting legislation, "[n]otwithstanding any law to the contrary . . . ."); Parks Recreation & Hist. Preservation L. § 39.17 (same); Public Health L. § 230-a (same).[2] In sum, the casino gambling amendment adopted in 2013 expressly states that the Legislature is responsible for the Clause's implementation.

II. The Exclusive Privileges Clause Does Not Prohibit the Legislature from Authorizing an Existing Video Lottery Terminal Facility to Operate as a Casino.

Article III, Section 17 of the New York Constitution provides that "[t]he Legislature shall not pass a private or local bill in any of the following cases," including, relevantly, "[g]ranting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever." N.Y. Const. art. III, § 17. For a law to violate the Exclusive Privileges Clause, it must (1) "be directed at a single entity," and (2) "confer a privilege upon the single entity to the exclusion of all others. Both elements—singleness and exclusivity—must be present.

[2] For the same reasons, laws requiring competitive processes in procurement of public contracts, Gen. Mun. L. § 100, *et seq*., are not relevant. Those processes are purely constructs of statute and apply only to the extent the Legislature provides.

Otherwise, all legislation directed at a single entity would be invalid." *Consumers Union of U.S., Inc. v. State*, 5 N.Y.3d 327, 360-61 (2005).[3]

As long as legislation allowing VLTs to convert to casinos would, on its face, be "applicable to *any* institution which can meet the specifications," then the singleness element of the Exclusive Privileges Clause analysis would not be violated. *See Hotel Dorset Company v. Trust for Cultural Resources of City of New York*, 46 N.Y.2d 358, 369 (1978) (emphasis added). The legislation would therefore not be *exclusive* on its face. And even if a statute were exclusive on its face (and we believe that legislation can be drafted such that it is not), the mere fact that a statute results in the award of a privilege to a single entity does not alone render that statute unconstitutional, particularly where the privilege awarded is exclusive by its very nature. *See Matter of Union Ferry Co. of Brooklyn*, 98 N.Y. 139, 153 (1885). Casino licenses are scarce resources by constitutional design and therefore meant to be exclusive. As long as legislation does not restrict any entity meeting the statutorily-prescribed qualifications from seeking a gaming facilities license, the legislation is not unconstitutionally exclusive. Consequently, we believe that a challenge to that legislation based on the Exclusive Privileges Clause should fail.

A. Authorizing VLT Facilities to Operate as Casinos Would Not Violate the "Singleness" Requirement Of the Exclusive Privileges Clause.

In order for a statute to offend the singleness prong of the Exclusive Privileges Clause, the legislation must be "directed at a single entity." *Greater N.Y. Taxi Ass'n v. State*, 21 N.Y.3d

[3] New York's Exclusive Privileges Clause appears to have no analogue in the federal system. Congress has long enacted private bills, including those that appear to confer exclusive rights. *See, e.g.*, *Evans v. Joran*, 13 U.S. (9 Cranch) 199 (1815) (upholding a private bill restoring patent protection to a flour mill); *McClurg v. Kingsland*, 42 U.S. (1 How.) 202 (1843) (upholding a congressional act restoring an invention to protected status). *See generally Golan v. Holder*, 565 U.S. 302, 322-23 (2012) (discussing private bills in the copyright and patent contexts); *Blanchard v. Sprague*, 3 F. Cas. 648, 650 (No. 1,518) (C.C.D. Mass. 1839) (Story, J.) ("I never have entertained any doubt of the constitutional authority of congress" to "give a patent for an invention, which . . . was in public use and enjoyed by the community at the time of the passage of the act.").

289, 307 (2013) (quoting *Consumers Union*, 5 N.Y.3d at 361). The statute need not specifically *name* the single entity to which it applies; rather, a law is impermissibly private if it is written so that it cannot possibly apply to any other person or entity. In *Hotel Dorset Company v. Trust for Cultural Resources of City of New York*, 46 N.Y.2d 358 (1978), for instance, the Court of Appeals faced a challenge to a statute that provided various financial and tax benefits that, through very targeted requirements in the law, only applied to New York City's Museum of Modern Art ("MOMA"). Even though no other entity in New York State could at that time avail itself of the law's benefits, the Court of Appeals held that the law did *not* constitute a private bill: "Although the statutory specifications fit the present statistics applicable to the Museum of Modern Art" only, "there is no showing that other institutions could not, in time, meet them also." 46 N.Y.3d at 369. Over the dissent's objection that "[t]he Legislature was . . . patently aware that the bill before it was to benefit *only* the Museum of Modern Art," *id.* at 378 (Breitel, C.J., dissenting) (emphasis added), the Court of Appeals held that the legislation was facially "applicable to any institution which can meet the specifications," regardless of whether MOMA "was selected especially for initial help," *id.* at 369 (majority opinion). The legislation therefore was not unconstitutional under the Exclusive Privileges clause.

The singleness or private bill requirement is thus somewhat functional, as it looks beyond whether a bill is *facially* applicable to single person or entity, but rather at how the bill functions. In *Matter of Mayor of City of N.Y. [Elm St.]*, 246 N.Y. 72 (1927) (Cardozo, J.) ("*Elm St.*"), the Court found unconstitutional a law that allowed a lawsuit previously dismissed as time-barred to be reinstated "as if the same had not been barred by any statute of limitations." *Id.* at 75. The law was written to apply to one case only: that in which a company "awoke from its lethargy" 23 years after it was supposed to collect on a contract and found itself time-barred from bringing

suit. *Id.* at 74. As the *Hotel Dorset* Court explained, the law at issue in *Elm St.* awarded a benefit based on "events which had already taken place." 46 N.Y.2d at 374. No other lawsuit could ever qualify for the benefits bestowed by the law in question, and thus the law was unquestionably a private bill. By contrast, if there had been the *potential* for more than one entity to qualify for the law's benefit because of changes in conditions over time, then the law would not be private. *See id.*; *see also Greater N.Y. Taxi Ass'n*, 21 N.Y.3d at 308 (finding no issue where "the number of persons who are able to obtain [the] licenses [under the statute] will likely vary over time" as more people were able to meet the licensing requirement).

In light of these precepts, although a law authorizing only one specific VLT facility to operate as a casino would be a private bill, a law that is facially applicable to potentially more than one VLT facility would not constitute a private bill within the meaning of the Exclusive Privileges Clause. In other words, it would be constitutional to pass a law that would not limit which entity can *qualify* for the law's benefit. Such a law, as with that addressed in *Hotel Dorset*, would be "applicable to any institution which can meet the specifications," 46 N.Y.2d at 369. Because the law's "requirements for entitlement [would not] consist[] of events which [have] already taken place," such legislation would not fail the singleness prong of the Exclusive Privileges Clause. *See id.* at 368, 374.

B. Authorizing a Specific VLT Facility to Operate as a Casino Likely Would Not Count as "Exclusive" Within the Meaning of the Exclusive Privileges Clause.

Even if legislation violated the singleness requirement, it would not run afoul of the Exclusive Privileges Clause as long as it does not, in fact, bestow exclusive privileges as the case law defines "exclusivity." The Clause's exclusivity prong derives from the Clause's overall purpose: to prevent the Legislature from awarding statewide monopolies, "not merely privileges and franchises not possessed by others, but the right to exclude others from the exercise or

enjoyment of like privileges or franchise." *Matter of Union Ferry Co. of Brooklyn*, 98 N.Y. 139, 150 (1885); *Consumers Union of U.S., Inc. v. State*, 5 N.Y.3d 327, 361 n.27 (2005) ("The 1938 Constitutional Convention expressly endorsed *Union Ferry's* reasoning that the Exclusive Privileges Clause was aimed at monopolies." (citation omitted)). A statute runs afoul of the exclusivity prong of the Clause where the statute *itself* "precludes the granting of a similar privilege, immunity or franchise to another." *See Blaikie v. Lindsay*, 49 Misc. 2d 612, 621 (Sup. Ct. N.Y. Cty. 1966); *accord Union Ferry Co.*, 98 N.Y. at 150-52 ("An act" may offend the Clause if "it shuts out or excludes others from enjoying a similar privilege or franchise."); *Consumers Union*, 5 N.Y.3d at 361.

In *Consumers Union*, by way of example, the Court of Appeals addressed a challenge to a statute that converted Empire Blue Cross and Blue Shield—a then-non-profit entity that played a "critical role in New York's health care delivery system," *id.* at 340—into a "for-profit corporation" in order to pull the company out of dire financial straits. *Id.* at 337; *id.* at 341 ("Empire's future looked bleak"). Even though the law "applies only to Empire," the Court held that it did not violate the Exclusive Privileges Clause because the statute itself did not "authorize Empire to prevent others from seeking" the same treatment, nor did the law "promise Empire that other not-for-profits w[ould] not be granted similar rights." *Id.* at 361. Nothing in the statute itself purported to tie the Legislature's hands from being able to grant the same benefit (conversion to for-profit status) to another entity. *Id.* Thus, Empire's non-profit-to-for-profit conversion did not confer an unconstitutional "exclusive" benefit. *Id.*

Similarly, even when a statute that confers on an entity privileges that, by their very nature, result in *de facto* exclusivity, such a law does *not* violate the Exclusive Privileges Clause. Indeed, when "it is impossible that the right or power should be possessed or employed by more

than one party," such exclusivity is simply incidental and a law resulting in such exclusivity is constitutional. *Union Ferry Co.* 98 N.Y. at 154; *see also United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945) (Hand, J.) (explaining that monopoly, in antitrust law, requires " that there must be some 'exclusion' of competitors" and "that the growth [to monopoly scale] must be something else than 'natural' or 'normal'"). In *Union Ferry*, for instance, the challenged law at issue condemned land along the East River in order to expand capacity for ferry services between Manhattan and Brooklyn, which at the time were operated solely by the Union Ferry Company. *See* 98 N.Y. at 148. The plaintiffs in *Union Ferry* challenged that statute on the ground that it violated the Exclusive Privileges Clause because only the recipient of the condemned land could benefit from it. The Court of Appeals, however, held that the ferry route, although exclusive as a matter of fact, was not of "the nature of the exclusiveness contemplated by the Constitution." *Id.* at 153.

The Court explained that the Clause is inapplicable when "the exclusiveness is not produced by the grant, but results from the nature of the thing granted, *and to this extent every grant . . . of the right to acquire real estate[] is exclusive.*" *Id.* at 154 (emphasis added). When a "toll-bridge is authorized to be erected at a particular locality, the right to that particular bridge is necessarily exclusive" because no one else can build there. *Id.* By contrast, a statute would be unconstitutional if the Legislature not only authorized a bridge over a river at a particular spot, but also made it illegal "to erect any bridge or establish any ferry within three miles of th[at] place . . . or to cross the river within three miles of the bridge without paying [a] toll." *Id.* at 151-152 (collecting cases). Such an exclusive statute would result in the very evil—legislatively conferred monopolies—for which the Clause exists. At bottom, though, the Exclusive Privileges Clause does not prevent the Legislature from conferring privileges that by "the[ir] inherent

nature," are limited. *See id.* at 154; *Long Sault Dev. Co. v. Kennedy*, 212 N.Y. 1, 30 (1914) (Collin, J., dissenting) (if "the operation of physical laws" led to unconstitutional exclusivity, that would "invalidate every franchise for the construction of a dam in the waters of the state"); *see also Consumers Union*, 5 N.Y.3d at 361 & n.27.

Legislation allowing a VLT to convert to a casino would not prohibit any other entity from seeking casino licenses in New York State. Indeed, four other casinos exist in New York, so even if the Legislature allowed two VLTs to operate as casinos, it would still be able to issue one more license. *See* N.Y. Const. art. I, § 9 (authorizing the Legislature to permit seven casino facilities in New York State); *see* PML § 1306 (authorizing four casinos). Likewise, the legislation need not (and should not) prohibit other VLT entities from applying for a gaming license after the initial license's term expires.

Even if a statute grants a right to a single entity is a private bill (*see supra* Pt. I), a private bill on its own is not unconstitutional. The private bill must also be exclusionary *on its face*. And a bill bestowing upon a single entity the right to do something but not expressly prohibiting any other parties from doing that same thing is not unconstitutionally exclusionary. Granting an entity the right to operate a casino in New York does not itself exclude any other party from operating a casino in New York.

And given the holding and reasoning of *Union Ferry*, it is of no moment that the number of gaming facility licenses in this State is limited. Article I, Section 9 expressly limits the number of casinos in New York State to seven. Much like land or other rarified resources, the number of casino licenses that can exist in New York is simply "the nature of the thing [to be] granted," *Union Ferry Co.*, 98 N.Y. at 154, and consequently, granting one of the seven licenses contemplated by the Constitution should not, itself, violate the Exclusive Privileges Clause. *See*

Consumers Union, 5 N.Y.3d at 361. The fact that the number of casino licenses is capped in this State does not make a statute conferring one of those rare licenses unconstitutional, just as the fact that a plot of land is unique does not prohibit the Legislature from bestowing property rights on single entities. *Union Ferry Co.*, 98 N.Y. at 153. Even though only one entity at a time can use that land or can use a gaming license, such use does not constitute the type of unconstitutional monopoly the Exclusive Privileges clause was meant to forestall. The Legislature remains free to authorize other casinos, and any entity who wishes may still "seek[]" the "similar right[]" to operate a casino in New York. *Consumers Union*, 5 N.Y.3d at 361.

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In sum, legislation can be drafted that would not violate the Exclusive Privileges Clause, especially if the bill on its face neither applies to a single entity nor prohibits other entities from seeking its benefits. Likewise, it need not confer an exclusive right on the face of the statute.[4]

III. The Constitution's Guarantee of Local Home Rule Does Not Prohibit the Legislature from Authorizing an Existing Video Lottery Terminal to Operate as a Casino.

The Constitution protects the rights of localities to home rule based on the principle that "[e]ffective local self-government and intergovernmental cooperation are purposes of the people of the state." N.Y. Const. art. IX, § 1; *see also Kelley v. McGee*, 57 N.Y.2d 522, 535 (1982) ("The comprehensive home rule amendments of 1963 (set forth as article IX of the Constitution) evince a recognition that essentially local problems should be dealt with locally and that effective

[4] Even if a court were inclined to hold to the contrary, there is a further argument that the Exclusive Privileges Clause should not even control this general question where a specific constitutional provision—Article I, § 9—gives the Legislature broad authority. The Constitution expressly empowers the Legislature to "authorize[] and prescribe[]" "seven facilities" where "casino gambling" may occur. N.Y. Const. art. I, § 9(1). There are no limitations in this section on how the Legislature may so authorize and prescribe, and a court should not lightly infer that the framers of the later-in-time 2013 Amendment intended that it be limited by the far-earlier-in-time Exclusive Privileges Clause.

local self-government is the desired objective."). Article IX of the New York Constitution (as amended in 1963) defines "the rights, powers, privileges and immunities granted to" local governments and sets forth a "two-part model for home rule." *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 428-29 (1989); *see Baldwin Union Free Sch. Dist. v. Cty. of Nassau*, 22 N.Y.3d 606, 614 (2014). First, the Constitution affirmatively authorizes municipalities to enact local laws to manage their affairs. N.Y. Const. art. IX, § 1. More specifically, a local government has the power to adopt "any general law relating to its property, affairs or government," N.Y. Const. art. IX, § 2(c)(i); *Adler v. Deegan*, 251 N.Y. 467, 486 (1929), or to adopt laws in ten specified areas, including in relevant part those laws relating to "the government, protection, order, conduct, safety, health and well-being of persons or property therein." N.Y. Const. art. IX, § 2(c)(10); *see also id.* § 2(c)(1)-(9). The State Legislature may also confer additional powers on local governments. N.Y. Const. art. IX, § 2(b)(3).

In addition to these affirmative grants of power to local governments, the State Constitution imposes "limitations on State intrusion into matters of local concern." *Kamhi*, 74 N.Y.2d at 428-29. Under Article IX, Section 2(b)(2), the Legislature may "act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of [the locality's] legislative body or on request of its chief executive officer concurred in by a majority of such membership, or (b), except in the case of the city of New York, on certificate of necessity from the governor . . . ." N.Y. Const. art. IX, § 2(b)(2). In other words, while the Legislature may freely regulate the property, affairs or government of localities by enacting "general law[s]," the Legislature is generally limited in its ability to enact special laws pertaining to only some, not all, local

governments. This so-called "Municipal Home Rule Clause" thus grants local governments considerable autonomy when it comes to local affairs.[5]

Despite Article IX's affirmative grant of authority to local governments and concurrent limitations on the power of the State Legislature to enact laws treading on local affairs, the power of local governments is significantly curtailed by *inter alia* the State concern and preemption doctrines. The Constitution's protection of local home rule, therefore, does not significantly hamper the State Legislature's ability to legislate in areas that "relate to life, health, and the quality of life [of the People of the State]." *Wambat Realty Corp. v. State of New York*, 41 N.Y.2d 490, 495 (1977).

A. Casino Gaming And Resulting Economic Development Relates to a Matter of Substantial State Concern.

Where the state has a "substantial interest" in the subject matter and "the enactment . . . bear[s] a reasonable relationship to the legitimate, accompanying substantial State concern," the Legislature may act even if its action interferes with issues of local concern. *See City of New York v. Patrolmen's Benevolent Ass'n*, 89 N.Y.2d 380, 391 (1996); *see also Adler*, 251 N.Y. at 491 (Cardozo, J., concurring) ("[I]f the subject be in a substantial degree a matter of state concern, the Legislature may act, though intermingled with it are concerns of the locality."); *Matter of Kelley v. McGee*, 57 N.Y.2d 522, 538 (1982) ("It is well established that the home rule provisions of article IX do not operate to restrict the Legislature in acting upon matters of State concern."). In determining "what constitutes a substantial state interest," courts look to the "stated purpose and legislative history of the act in question." *Greater N.Y. Taxi Ass'n*, 21 N.Y.3d at 302 (citation omitted). The "Home Rule section of the State Constitution" does not

[5] "The scope of this power and the procedures for implementing it are set out in the Municipal Home Rule Law." N.Y. Div. of Local Gov't Servs., *Adopting Local Laws in New York State* (May 1998, reprinted 2015), https://www.dos.ny.gov/lg/publications/Adopting_Local_Laws_in_New_York_State.pdf.

"require an examination into the reasonableness of the distinctions the legislature has made," even "where the legislature has enacted a law of statewide impact on a matter of substantial state concern but has not treated all areas of the state alike." *Empire State Chapter of Associated Builders & Contractors, Inc. v. Smith*, 21 N.Y.3d 309, 313 (2013); *see also All Am. Crane Serv. Inc. v. Omran*, 58 A.D.3d 467, 467 (1st Dep't 2009) (Enactments are "presumed to be supported by facts known to the legislative body."); *Billie Knitwear v. N.Y. Life Ins. Co.*, 22 N.Y.S.2d 324, 326 (N.Y. Sup. Ct. N.Y. Cty. 1940) (Where the Legislature makes "conclusions and findings of fact essential to the validity of a statute," such findings will be "considered presumptively true, in the absence of a showing to the contrary.").

The State concern doctrine was derived from *Adler v. Deegan*, which involved the power of the Legislature to enact a law requiring multiple dwelling units to comply with minimum standards for sanitation, fire-prevention, light, and air. *Adler*, 251 N.Y. at 473; *see also Town of Brookhaven v. Parr Co.*, 350 N.Y.S.2d 529, 532 (Sup. Ct. Suffolk Cty. 1973), *aff'd as modified*, 47 A.D.3d 554 (2d Dep't 1975). The law would have applied only to New York City, but did not fit any of the criteria for special legislation. Noting that the Constitution's "Home Rule Amendment did not create a multitude of city states," the Court of Appeals upheld the law as a valid exercise of State legislative power, because it addressed a "state concern"—the "life, health, and safety of the inhabitants of the city of New York." *Adler*, 251 N.Y. at 483. Such a concern mattered not just to the City but was also "the concern of the whole State." *Id*.

Similarly, New York's constitutional commitment to local or home rule does not prevent the Legislature from enacting legislation to convert a facility that offers VLTs into a casino. Although such legislation would relate to the local affairs of those localities, under the state concern doctrine, because the legislation would also relate to a matter of substantial state

concern, the Legislature would be allowed to act. *See, e.g.*, *City of New York v. State*, 94 N.Y.2d 577, 590 (2000) ("[W]here State interests are involved 'to a substantial degree, in depth or extent' the State may freely legislate without home rule approval, notwithstanding the legislation's impact on local concerns.").

Indeed, the regulation of casinos and gambling has long been a substantial state concern and thus one about which the Legislature is expressly authorized to enact legislation. New York's second Constitution, ratified in 1821, provided: "No lottery shall hereafter be authorized in this state; and the legislature shall pass laws to prevent the sale of all lottery tickets within this state, except in lotteries already provided for by law." N.Y. Const. of 1821, art. VII, § 11. The third and fourth State Constitutions, ratified in 1846 and 1894, respectively, also prohibited gambling. *See* N.Y. Const. of 1846, art. I, § 10; N.Y. Const. of 1894, art. I, § 9. The current Constitution, approved in 1938, maintained a general prohibition on gambling but authorized state lotteries and "pari-mutuel betting on horse races," N.Y. Const. art. I, § 9(1), as well as locally authorized bingo, lotto, and other games in which prizes are awarded based on chance, conducted by "bona fide religious, charitable or non-profit organizations," *id.* at § 9(2). The Constitution further provides that the Legislature must pass laws to "ensure that such games are rigidly regulated to prevent commercialized gambling." *Id.* And New York's 2013 constitutional amendment to authorize casino gambling confirms that gambling remains a matter of State and not purely local concern. The amendment *expressly* authorized the Legislature to enact legislation providing for specific gaming facilities in New York State. N.Y. Const. art. I § 9.

New York courts have also emphasized the State's interest in regulating casinos. In *Saratoga County Chamber of Commerce v. Pataki*, the Third Department, which addressed

whether the Governor could negotiate and agree to gaming compacts without legislative authorization, explained that the negotiation of such compacts involves "numerous collateral issues affecting the health and welfare of *State* residents" and "implicate[s] policy choices lying *squarely within the province of the Legislature*." 293 A.D.2d 20, 25-26 (3d Dep't 2002), *aff'd as modified*, 100 N.Y.2d 801 (2003) (emphasis added). Likewise, in *Dalton v. Pataki*, which reviewed the constitutionality of a statute authorizing the use of VLTs, the Court of Appeals noted that the State has an "interest[] in ensuring that its law and public policy [on gambling] are adhered to." 5 N.Y.3d 243, 282 (2005).[6] In sum, there can be no doubt the State has an interest in regulating and overseeing casinos and other gambling activities in New York.

Because gambling is an area of "substantial state concern," and because New York has not "surrendered the power" to enact laws in this area, *Adler*, 251 N.Y. at 489-90, legislation permitting VLT facilities to operate as full-blown casinos does not violate the Constitution's protections of local home rule. As the Court of Appeals has explained, the "Home Rule provisions of the Constitution were never intended to apply to legislation like this. They were intended to prevent unjustifiable state interference in matters of *purely* local concern." *Empire State Chapter of Associated Builders & Contractors*, 21 N.Y.3d at 319 (emphasis added). Casinos, which may attract residents from across the State, affect economic development of numerous towns and counties, and affect Statewide tax revenues, are not matters of "purely local concern." Consequently, legislation granting gaming facility licenses to VLT facilities, pursuant

[6] Federal law, too, recognizes as a matter of fact that the State has substantial governmental interests in regulating casino gaming. The Indian Gaming Regulatory Act ("IGRA") acknowledges a "*State's* governmental interests" with respect to gambling, and particularly to the interplay of gaming on Indian lands with "the State's public policy, safety, law and other interests, as well as impacts [of Indian gaming] on the State's regulatory system, including its economic interest in raising revenue for its citizens." S. Rep. No. 446, 100th Cong., 2d Sess., at 13 (emphasis added).

to Article I, Section 9 of the New York Constitution, "bear[s] a reasonable relationship to the legitimate, accompanying substantial State concern." *City of New York*, 94 N.Y.2d at 590.[7]

In sum, because gambling is a quintessential area of state concern, no home rule doctrines would likely prohibit the Legislature from providing gaming facility licenses to VLTs in New York State.

B. Any Contrary Local Limitations On Gambling Will Be Preempted.

Many local laws, including by way of example the City Code of Yonkers, New York, have their own provisions against gambling. The Yonkers code, for example, appears on its face to prohibit anyone except "authorized providers" from operating games of chance. Authorized providers are defined in essence as non-profits: "any bona fide religious or charitable organization or bona fide educational or service organization or bona fide organization of veterans or volunteer firemen." Yonkers City Code § 34-5. Only an organization "formed primarily for the purpose of conducting games of chance and the distribution of the proceeds thereof to itself or any other organization and which does not devote at least 75% of its activities" to certain non-profit activities can offer games of chance. *Id*. Consequently, the Yonkers City Code would not generally permit casinos to operate games of chance, so a State statute allowing a casino would likely run afoul of Yonkers law.

[7] The State has yet another substantial State concern at play to justify permitting VLTs to convert to casinos: the Statewide interest in taxation and tax revenue. Under Article XVI, Section 1 of the State Constitution, the power to tax is a state power only. *See also Expedia, Inc. v. City of N.Y. Dep't of Fin.*, 22 N.Y.3d 121, 126 (2013) ("In New York, local governments lack an independent power to tax. The State Constitution vests the taxing power in the state legislature and authorizes the legislature to delegate that power to local governments."). Moreover, even statutes treating a limited class of local entities different for tax purposes qualify as a general law, not a specific law. *See Hotel Dorset*, 46 N.Y.2d at 372-73. Each casino that operates in this State confers substantial tax revenue for public benefit. The power to impose State taxes on casino gambling is inherently a matter of statewide concern and imposing these taxes on new gambling casinos in New York State violates no precept of home rule.

Yet no city code would impede a state legislative attempt to bring casino gaming to any particular locality because any such local laws—including express limitations on gambling, zoning regulations, or local environmental regulations—are likely to be preempted by State law. *See, e.g.*, *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989) ("The preemption doctrine represents a fundamental limitation on home rule powers."). "Broadly speaking, State preemption occurs in one of two ways—first, when a local government adopts a law that directly conflicts with a State statute and second, when a local government legislates in a field for which the State Legislature has assumed full regulatory authority." *DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 95 (2001) (internal citations omitted). State laws regulating alcohol sales, *see People v. DeJesus*, 54 N.Y.2d 465, 468-70 (1981), the minimum wage, *see Wholesale Laundry Bd. of Trade, Inc. v. City of New York*, 17 A.D.2d 327, 329 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 998 (1963), sex offender residency restrictions, *see People v. Diack*, 24 N.Y.3d 674, 686 (2015), and the taxation and expenditure of funds for roadway improvements, *Albany Area Builders*, 74 N.Y.2d at 377-78, have all been found to preempt local laws.

First, under the doctrine of conflict preemption, a local law is preempted by a State law when a "right or benefit is expressly given . . . by . . . State law which has then been curtailed or taken away by the local law." *Jancyn Mfg. Corp. v. Suffolk Cty.*, 71 N.Y.2d 91, 97 (1987). "Put differently, conflict preemption occurs when a local law prohibits what a State Law explicitly allows, or when a State Law prohibits what a local law explicitly allows." *Chwick v. Mulvey*, 81 A.D.3d 161, 168 (2d Dep't 2010). "The crux of conflict preemption is whether there is 'a head-on collision between the . . . ordinance as it is applied' and a State statute." *Id.* (quoting *Matter of Lansdown Entertainment Corp. v. N.Y.C. Dep't of Consumer Affairs*, 74 N.Y.2d 761, 764 (1989)).

If a local law would prohibit casinos where the state legislation authorizes a casino, a conflict preemption issue would arise. State law would win any such conflict, for a municipality may not enact a local law "inconsistent with the provisions of the constitution or . . . with any general law," Municipal Home Rule Law § 10(1)(i),(ii). The PML even contains a provision explicitly providing that the PML supersedes any conflicting local land use laws. *See* PML § 1366 ("Notwithstanding any inconsistent provision of law, gaming authorized at a location pursuant to this article shall be deemed an approved activity for such location under the relevant city, county, town, or village land use or zoning ordinances, rules, or regulations."). In fact, the New York Court of Appeals has recognized this very provision as "clearly preempt[ing] home rule zoning powers." *Wallach v. Town of Dryden*, 23 N.Y.3d 728, 748 (2014) (citing PML § 1366 as example of "other statutes that clearly preempt home rule zoning powers"). Under the conflict preemption doctrine, then, State law would preempt any conflicting local legislation restricting or prohibiting casinos.

Second, under the doctrine of field preemption, "[w]here the State has preempted an entire field, a local law regulating the same subject matter is inconsistent with the State's interests if it either (1) prohibits conduct which the State law accepts or at least does not specifically proscribe, or (2) imposes restrictions beyond those imposed by the State law." *Vatore v. Comm'r of Consumer Affairs*, 83 N.Y.2d 645, 649 (1994) (internal citations omitted). Thus, local law may be preempted even in the absence of an express conflict between the State and local law. *See Lansdown Entm't Corp. v. N.Y.C. Dep't of Consumer Affairs*, 74 N.Y.2d 761, 765 (1989) ("Where a State law indicates a purpose to occupy an entire field of regulation, as exists under the Alcoholic Beverage Control Law, local regulations are preempted regardless of whether their terms conflict with provisions of the State statute or only duplicate them."). Field

preemption arises in three circumstances. "First, an express statement in the state statute explicitly avers that it preempts all local laws on the same subject matter." *Chwick*, 81 A.D.3d at 169. Second, the Legislature may "articulate its intent to occupy a field," either expressly or "by implication." *DJL Rest. Corp.*, 96 N.Y.2d at 95. Third, the Legislature may demonstrate its intent to preempt by enacting "a comprehensive and detailed regulatory scheme." *Chwick*, 81 A.D.3d at 169-70.

The PML and the proposed legislation likely constitute a "comprehensive and detailed regulatory scheme," evincing the intent of the Legislature to occupy the field of casino regulation. Even if a locality passed a law that did not expressly conflict with state law, but that regulated casinos, such a law would have an impact on casino regulation that is more than "merely incidental," *Lansdown Entm't Corp.*, 74 N.Y.2d at 763-64, and instead "would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns," *Jancyn Mfg. Corp.*, 71 N.Y.2d at 97. Accordingly, any local law regulating gaming and casinos would likely be found to be preempted by the State regulatory scheme.

CONCLUSION

Legislation authorizing two VLT facilities to be converted into casino gambling facilities can be written to be consistent with New York's Constitution. Such legislation should neither violate the Exclusive Privileges Clause nor contravene any precept of the New York State Constitution's guarantee of local home rule.