

## **PRELIMINARY STATEMENT**

Defendants State of New York, George E. Pataki, as Governor of the State of New York, Eliot Spitzer, as Attorney General of the State of New York, the New York State Racing and Wagering Board, and the New York State Division of the Lottery (collectively, the “State Defendants”), by their attorney, Eliot Spitzer, Attorney General of the State of New York, respectfully submit this memorandum of law in support of their motion to dismiss plaintiff’s September 8, 2005 complaint (the “Complaint”) in its entirety as against them.

The New York Court of Appeals (the “Court of Appeals”) and federal courts in various jurisdictions have rejected the vast majority of the contentions plaintiff raises in the Complaint, in which he seeks a declaratory judgment that: (i) the provision of the New York State Constitution (the “State Constitution”) and the implementing state statutes prohibiting gambling are “irrational and anticompetitive” and unconstitutional, and are therefore “null and void”; and (ii) that he may operate video slot machines, poker tournaments, bingo, keno, and other types of gaming for profit. Complaint ¶¶ 13, 52.

New York’s prohibition of the types of gambling activities in which plaintiff wishes to engage does not violate the Equal Protection or Due Process Clauses, or the First Amendment. And, New York’s prohibition of most forms of gambling does not violate the federal antitrust laws. Because all of the legal theories plaintiff advances to support these contentions lack merit as a matter of law, the Complaint should be dismissed in its entirety as against the State Defendants.

## **RELEVANT BACKGROUND**

### **A. New York State’s Prohibition Of Gambling**

The State Constitution generally prohibits gambling, subject to limited exceptions:

[E]xcept 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.

N.Y. Const. art. I, § 9(1).<sup>1</sup> The State Constitution also contains a limited exception for bingo games operated by not-for-profit organizations. See N.Y. Const. art. 1, § 9(2).

In furtherance of the State Constitution’s prohibition of gambling, the New York Penal Law (the “Penal Law”) prohibits promoting gambling, see Penal Law §§ 225.05, 225.10, possession of gambling records, see id. §§ 225.10, 225.20, 225.25, and possession of gambling devices, see id. § 225.30 (but provides a defense to a prosecution for possessing such devices under certain limited circumstances, see id. § 225.32). Also, the New York General Obligations Law contains the following prohibition: “All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful.” N.Y. General Obligations Law (“Gen. Oblig. Law”) § 5-401.<sup>2</sup>

Pursuant to the State Constitution, the State Legislature has created the New York State Division of the Lottery, which oversees the New York State Lottery (the “Lottery”). New York Tax Law (“Tax Law”) § 170 and article 34. The State -- through its Racing and Wagering Board -- also

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<sup>1</sup> This provision of the State Constitution is cited as “Article I Section 9(1).”

<sup>2</sup> In his Complaint, plaintiff cites Gen. Oblig. Law § 5-401 and the various Penal Law provisions described above as sections of the “New York Criminal Law.” Complaint ¶¶ 17-19, 37, 18, and Wherefore Clause ¶ 3. Those statutes and Article I Section 9(1) are referenced in this memorandum, collectively, as the “Challenged Provisions.”

regulates pari-mutuel wagering at racetracks. See New York Racing, Pari-Mutuel Wagering and Breeding Law § 101. Finally, the State Legislature has recently authorized video lottery terminals (“VLTs”) at certain racetracks. See Tax Law §§ 1612, 1617-a.

**B. The Court Of Appeals’ Decision In Dalton**

In May 2005, the Court of Appeals decided Dalton v. Pataki, 5 N.Y.3d 243, 802 N.Y.S.2d 72, cert. denied, No. 05-361, 74 U.S.L.W. 3162, 74 U.S.L.W. 3318, 74 U.S.L.W. 3322, 2005 WL 3144148, 2005 WL 3144149 (Nov. 28, 2005), holding, among other things, that:

- VLTs are lotteries, not slot machines, within the meaning of Article I Section 9(1) (Dalton, 5 N.Y.3d at 263-65, 802 N.Y.S.2d at 84-85);
- the New York statute permitting certain race tracks, but not others, to own and operate VLTs does not violate the Equal Protection Clause (id., 5 N.Y.3d at 265, 802 N.Y.S.2d at 85-86); and
- the State’s participation in “Mega Millions” does not violate Article I Section 9(1) because “New York retains sufficient control over the sale of Mega Millions tickets so that it operates the lottery within the state” (id., 5 N.Y.3d at 271-72, 802 N.Y.S.2d at 89-90).

**C. Plaintiff’s Complaint**

Plaintiff, an attorney acting pro se, filed this action on September 8, 2005. Complaint ¶ 1. In his Complaint, plaintiff alleges that the “prohibition of gambling in New York” is “illegal,” and that Article I Section 9(1) is “irrational and unlawful” and has been “selective[ly] enforce[d].” Complaint ¶ 2. Plaintiff asks the Court to issue a declaratory judgment:

[T]hat, subject to reasonable regulation and taxation,

(i) the Plaintiff may lawfully purchase and own one or more current-model video slot machines (either for non-gambling use, or for gambling use);

(ii) the Plaintiff may lawfully set up local poker tournaments, bingo, keno and other types of lottery games in New York while

charging an entrance fee and obtaining a profit therefrom (with the intention of providing low-cost social gathering places for residents being isolated from each other by the computer and internet); and

(iii) the laws in New York prohibiting gambling are irrational and anti-competitive, and are null and void in light of: (a) the growth of Indian casinos (in New York and adjoining states) mandated by federal law; (b) internet online casinos and poker games and poker tournaments involving millions of players in the United States; (c) New York's Gambling Policy of licensing racetracks to use VLT-type slot machines (with instant win feature, identical to regular slot machines) to attract and hold racetrack customers; (d) the establishment, throughout all of New York State, of off-track horserace betting parlors with simulcast capability to enable any adult to bet on the outcomes of horse races without having to attend a racetrack; (e) NYC's efforts to license casino cruises that come in and out of New York's harbor; (f) the New York Lottery with its 6% commission of lottery pool moneys given to 17,000 for-profit gas stations, grocery stores, newspaper stands and other lottery agents throughout the state; and (g) the current expansion of the Foxwoods Indian casino in Connecticut into non-Indian areas of gambling (e.g., 2004 purchase of Pennsylvania's Pocono Downs racetrack, to convert into a "racino" – a racetrack with slot machines) with the money the Foxwoods Indian tribe (Pequot) has have obtained from gambling New Yorkers; as well as (h) Pennsylvania's current actions to permit 61,000 slot machines to be installed at various places throughout Pennsylvania.

Complaint ¶ 13.

Plaintiff purports to state four causes of action. In his first cause of action, he seeks a declaration "that it is lawful under New York law for the Plaintiff to purchase and use recently-manufactured slot machines," both for gambling and non-gambling uses. Complaint ¶ 14; see id. ¶¶ 20. In his second cause of action, he seeks a declaratory judgment "that it is lawful under New York law for the Plaintiff to set up, own, and operate . . . for-profit, low-fee poker games . . . and . . . for-profit, any-fee poker-game[s]." Complaint ¶ 27; see id. ¶¶ 28-36A. Plaintiff's third cause of action "alleges that the Plaintiff is entitled to a declaratory judgment that the New York

laws prohibiting lotteries” – Article I Section 9(1) and the General Obligations and Penal Law provisions described above – “are void and unenforceable as written.” Complaint ¶ 37; see id. ¶¶ 38-50A. Finally, plaintiff seeks “a declaratory judgment that” Article I Section 9(1), “to the extent that it prohibits gambling, is irrational, anti-competitive, unconstitutional, null and void, and that the Plaintiff has the right to establish and conduct any type of gambling business in New York, and to own, purchase, lease, and/or possess any type of slot machines or other gambling equipment or software for non-gambling or for gambling use, subject to reasonable regulation and taxation.” Complaint ¶ 51. Plaintiff advances several different legal theories to support these causes of action. See Complaint ¶¶ 26A, 36A, 50A, 52A.<sup>3</sup>

## **ARGUMENT**

### **POINT I**

#### **NEW YORK LAW PROHIBITS THE ACTIVITIES PLAINTIFF ALLEGES ARE PERMITTED**

In his first and second causes of action, plaintiff contends that certain gambling-related activities are lawful in New York. These contentions lack merit as a matter of law. In his first cause of action, plaintiff seeks a declaratory judgment that New York law permits him to “purchase and own one or more current-model video slot machines.” Complaint ¶ 13(i). No such declaratory judgment should issue because the Penal Law provides that:

A person is guilty of possession of a gambling device when, with knowledge of the character thereof, he or she manufactures, sells, transports, places or possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody or use of:

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<sup>3</sup> The paragraph after Complaint ¶ 52 is numbered “50A,” but, as there is another paragraph numbered “50A,” it appears that this paragraph should be numbered “52A.”

1. A slot machine, unless such possession is permitted pursuant to article nine-A of the general municipal law . . . .<sup>4</sup>

Penal Law § 225.30(a). Penal Law § 225.32 carves out an affirmative defense for possession, for non-gambling purposes, of antique slot machines or slot machines over 30 years old in one's home Id. § 225.32(1,3).<sup>5</sup> Additionally, the Penal Law does not prohibit possession of slot machines pursuant to a gaming compact under the federal Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21; 18 U.S.C. §§ 1166-68. See Penal Law § 225.30(b).<sup>6</sup> Because plaintiff's requested ownership and use on its face falls within the statutory prohibition, plaintiff is not entitled to the requested declaratory judgment in his first cause of action.

The same is equally true of plaintiff's request in his second cause of action for a declaratory judgment that he may "lawfully set up local poker tournaments, bingo, keno and other types of lottery games in New York while charging an entrance fee and obtaining a profit therefrom." Complaint ¶ 13(2). Penal Law sections 225.05, 225.10, and General Obligations Law section 5-401, discussed above, prohibit such gambling activities. Thus, plaintiff is also not entitled to the declaratory judgment he requests in his second cause of action.

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<sup>4</sup> New York General Municipal Law ("Gen. Mun. Law") article 9-A permits, as a local option, cities and towns to authorize certain forms of gaming "for the promotion of bona fide charitable, educational, scientific, health, religious and patriotic causes and undertakings." Gen. Mun. Law § 185; see id. §§ 185 - 195-r.

<sup>5</sup> The "safe harbor" provision also provides a defense for, broadly speaking, research and development and shipment through New York of slot machines that will not be used in New York, in sealed containers. Penal Law § 225.32(2, 4). Penal Law section 225.32 does not apply here.

<sup>6</sup> For the reasons stated in Point II.A, below, that aspect of Penal Law § 225.30 is constitutional.

## POINT II

### THE CHALLENGED PROVISIONS ARE CONSTITUTIONAL

At base, plaintiff's Complaint is animated by the premise that the Challenged Provisions are obsolete because of the advent of Indian casinos, internet gambling, the Lottery, off-track betting, and off-shore gambling. Complaint ¶¶ 13(iii), 24, 50. That is a policy judgment that must be addressed – if at all – by amending the State Constitution and the challenged statutes. The courts simply cannot declare provisions of the State Constitution and the challenged statutes to be “unconstitutional” because, according to plaintiff, they no longer reflect optimal public policy.

Recognizing this fact, plaintiff refers to several federal constitutional provisions and claims that these provisions render the Challenged Provisions unconstitutional. To the extent that he asserts such challenges, plaintiff bears a heavy burden, because, “[l]egislative enactments are entitled to a strong presumption of constitutionality. While the presumption is not irrefutable, parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt.” Dalton, 5 N.Y.3d at 255, 802 N.Y.S.2d at 78 (citations and internal quotation marks omitted). A fortiori, a provision of the State Constitution itself should be reviewed under a similar standard. As a matter of law, plaintiff cannot carry that heavy burden here.

#### **A. Plaintiff Cannot State A Cause Of Action Based On A Purported Violation Of The Equal Protection Clause.**

To the extent plaintiff alleges that prohibiting him from owning or operating various types of gambling enterprises violates the Equal Protection Clause of the United States Constitution, that contention lacks merit.<sup>7</sup> Plaintiff has not alleged – and cannot allege – that any difference in how

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<sup>7</sup> Although plaintiff also attacks Article I Section 9(1) as unconstitutional under the State Constitution, see Complaint ¶ 26A(b), (c), one provision of the Constitution cannot violate another

he is treated under the law is based on a suspect or semi-suspect classification, such as race, gender, or religion. Thus, his challenge must fail unless the statute fails the rational basis standard of review. See, e.g., United States v. Williams, 124 F.3d 411, 421-22 (3d Cir. 1997) (rational basis review, rather than higher standard, applied to equal protection challenge to state ban on some, but not other, forms of gambling). As the Court of Appeals has held:

When reviewing using a rational basis standard, “a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification . . . [I]ndeed, a court may even hypothesize the motivations of the State Legislature to discern any conceivable legitimate objective promoted by the provision under attack” (Port Jefferson Health Care Facility v. Wing, 94 N.Y.2d 284, 290-291, 704 N.Y.S.2d 897, 726 N.E.2d 449 (1999) (citations and internal quotation marks omitted)).

Dalton, 5 N.Y.3d at 265-66, 802 N.Y.S.2d at 86. A statute does not violate the Equal Protection Clause merely because the government chooses to prohibit some, but not all, similar harmful activity. See, e.g., City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (in using their police powers, “[l]egislatures may” adopt “regulations that only partially ameliorate a perceived evil”). Applying this standard here, the Challenged Provisions are constitutional as a matter of law.

Both the federal courts and the Court of Appeals have considered and rejected contentions that gambling prohibitions violate the Equal Protection Clause by permitting certain operators, but not others, from operating gambling establishments. For example, in Artichoke Joe’s California Grand Casino v. Norton, 353 F.3d 712 (9th Cir. 2003), the Ninth Circuit rejected an equal protection

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provision of the same document. In any event, the standards for due process and equal protection claims are the same under the United States and State Constitutions. See Igoe v. Pataki, 182 Misc. 2d 298, 310, 696 N.Y.S.2d 355, 364 (Sup. Ct. N.Y. County), aff’d, 265 A.D.2d 151, 696 N.Y.S.2d 426 (1st Dep’t 1999), aff’d as modified, 94 N.Y.2d 577, 709 N.Y.S.2d 122 (2000).

challenge to a provision of the California Constitution that permits casino-style gaming only in Indian country. Id. at 714. First, the court held that a distinction between activities “in Indian country” and elsewhere was subject to rational basis review. Id. at 734-36. Applying the rational basis standard, the Ninth Circuit affirmed that the provision of the California Constitution (and IGRA, which the plaintiffs also challenged on equal protection grounds) granting casinos located in Indian country – but not others – the right to operate gambling casinos is rationally related to “two legitimate state interests”:

The first is the regulation of “vice” activity – a function that lies at the heart of a state’s police powers – by permitting certain forms of gambling only on the lands of sovereign tribal entities that enter into government-to-government compacts with the State. The second is to promote cooperative relationships between the tribes and the State by fostering tribal sovereignty and self-sufficiency.

Artichoke Joe’s, 353 F.3d at 737. The court went on to cite numerous cases in which the courts had held that the Equal Protection Clause permits states to allow certain types of individuals or localities to conduct “vice” activities but prohibit others from engaging in such activities. See id. at 737-39 (compiling cases). In all such cases, the courts recognized “a distinction between vice activities and generic economic enterprises,” and found that the states have wide latitude under the Equal Protection Clause in regulating the former as they see fit. Id. at 739.

Likewise, in Helton v. Hunt, 330 F.3d 242 (4th Cir. 2003), the Fourth Circuit rejected an equal protection challenge to a North Carolina statute that permitted certain, but not other, gambling machines. The court reasoned that such a prohibition was rationally related to the state’s “paramount interest in the health, welfare, safety, and morals of its citizens,” and that, because the “regulation of lotteries, betting, poker, and other games of chance touch all of the above aspects of the quality of life of state citizens,” regulating “gambling lies at the heart of the state’s police

power.” Id. at 246 (citations and internal quotation marks omitted). The court explained that “there is no mandate that a state must address its problems wholesale,” and that the state “has a legitimate interest in restricting the number of gaming machines in the state as a means of limiting the impact of gambling on the lives of its citizens or as a prelude to banning such a practice altogether.” Id.

Finally, in Williams, the Third Circuit rejected a claim that a “Pennsylvania statute violates the Equal Protection Clause because it prohibits some forms of gambling while other state laws authorize other forms of gambling such as the state lottery.” Id. at 421. The court reasoned that:

In prohibiting certain gambling, but not others, Pennsylvania lawmakers could have rationally concluded that the prohibited activities are particularly undesirable – because they have an increased tendency to encourage self-destructive behavior, because they are especially susceptible to the dishonest practices and organized crime connections that have historically plagued the gambling business, or for other reasons.

Id., 124 F.3d at 423.

The Court of Appeals has reached a similar result in at least two cases. First, in Dalton, it rejected a claim that a state statute that effectively permits certain race tracks – but not others – to operate VLTs violates the Equal Protection Clause. The Court of Appeals reasoned that the challenged provision is constitutional because, “[i]t would have been rational for the Legislature to determine that certain race track communities were in greater need of the potential revenue that would be generated by the video lottery than others.” Id., 5 N.Y.3d at 266, 802 N.Y.S.2d at 86. Second, in Albert Simon, Inc. v. Myerson, 36 N.Y.2d 300, 367 N.Y.S.2d 755 (1975), the Court of Appeals ruled that a New York City ordinance banning certain types of pinball machines and other gaming devices was “reasonably related to a proper governmental purpose, here the prevention of

evils associated with gambling.” Id., 36 N.Y.2d at 303, 367 N.Y.S.2d at 757. That was true even though certain other types of pinball machines were permitted. See id.

Here, to the extent plaintiff alleges that permitting some – but not other – forms of gambling somehow violates the Equal Protection Clause, such an allegation lacks merit as a matter of law. Plaintiff seeks to find an equal protection violation in alleged state policies permitting Indian casinos, video lottery terminals at racetracks, off-track betting, and the Lottery – but not plaintiff – to operate various types of games and gambling establishments. Complaint ¶ 13(iii). Each of these contentions lacks merit as a matter of law.

There are several reasons why plaintiff is not similarly situated to Indian casinos as a matter of law, and why, in any event, any difference in treatment is rationally related to a legitimate state interest. First, as shown above, the government has a legitimate interest in “promot[ing] cooperative relationships between the tribes and the State by fostering tribal sovereignty and self-sufficiency.” Artichoke Joe’s, 353 F.3d at 737. Permitting gambling casinos to Indian tribes on Indian lands (as defined in IGRA), but not elsewhere, is rationally related to this legitimate interest.

Second, the State has a legitimate interest in restricting “‘vice’ activity – a function that lies at the heart of a state’s police powers – by permitting certain forms of gambling only on the lands of sovereign tribal entities that enter into government-to-government compacts with the State.” Id. Maintaining the prohibition of casinos (including slot machines, poker games, and “policy” games) and private lotteries, but permitting certain of these activities in conformance with IGRA, is rationally related to those interests.

For these same reasons, the distinction between video lottery terminals, off-track betting, and the Lottery, on the one hand, and plaintiff’s proposed private operation of slot machines, poker

tournaments, and “policy” games, on the other hand, is entirely rational. The State has a legitimate interest in limiting the scope and prevalence of gaming activities. It also has a legitimate interest in limiting such activities to fixed locations – such as racetracks, OTB parlors, or licensed vendors – that are regulated by State and local governments. Finally, it has a legitimate interest in limiting gaming to government-supervised or run activities, such as video lottery terminals or OTB parlors, and prohibiting purely private gambling, where organized crime has historically played a prominent role. See Artichoke Joe’s, 353 F.3d at 737; Helton, 330 F.3d at 246; Williams, 124 F.3d at 421-23.

Finally, as the Court of Appeals held in Dalton, IGRA “preempts even our constitutional ban” on gambling. Dalton, 5 N.Y.3d at 260 n.5, 802 N.Y.S.2d at 82 n.5; see also id., 5 N.Y.3d at 258, 802 N.Y.S.2d at 80 (IGRA was “intended to expressly preempt the field in the governance of gaming activities on Indian lands”) (citation and internal quotation marks omitted). Given this preemption, it is entirely rational for sovereign tribal entities subject to IGRA – over whom the United States Congress has jurisdiction to determine the manner and method of gaming – to be treated differently from plaintiff.

**B. Plaintiff Cannot Assert A Claim Based On Selective Enforcement.**

Plaintiff’s selective enforcement claim lacks merit as a matter of law for several distinct reasons. To prove a claim of selective enforcement, a plaintiff must demonstrate that he or she:

(compared with others similarly situated) is selectively treated and second, such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.

Bower Assocs. v. Town of Pleasant Valley, 2 N.Y.3d 617, 631, 781 N.Y.S.2d 240, 248 (2004).

Here, plaintiff cannot allege that the Challenged Provisions draw any suspect classification. Nor is

plaintiff similarly situated to the other individuals he identifies in his complaint, and any difference in treatment is rationally related to a legitimate state interest. See Point II.A, supra. That by itself dooms plaintiff’s selective enforcement claim. See Bower Assocs., 2 N.Y.3d at 631, 781 N.Y.S.2d at 248.

In addition, plaintiff does not have standing to assert a selective enforcement claim. Plaintiff has not alleged – and cannot allege – that, at present, he has been subjected to enforcement proceedings. Absent such actions, plaintiff lacks standing to assert a selective enforcement claim. See New Creation Fellowship v. Town of Cheektowaga, No. 99-CV-460A(F), 2004 WL 1498190, at \*20 and n.35 (W.D.N.Y. July 2, 2004). Moreover, to assert a selective enforcement claim, a plaintiff must allege discriminatory treatment based either on a suspect classification or on “malicious or bad-faith intent to injure.” Bower Assocs., 2 N.Y.3d at 631, 781 N.Y.S.2d at 248. As shown above, plaintiff cannot establish the former. Nor can he establish “malicious or bad-faith intent to injure,” for the simple reason that there is no enforcement action against him. Thus, plaintiff lacks standing to assert selective enforcement.

Plaintiff’s claim that the State has “excluded” him “from participation in the gambling industry through special legislation granting participation rights to a limited number of New York residents or businesses or Indian tribes” (Complaint ¶ 26A(a)) appears to be a variation of his equal protection and selective enforcement claims, and is subject to dismissal for the same reasons that those claims are meritless as a matter of law. To the extent plaintiff attempts by this allegation to state a cause of action under State Constitution article III, section 17(12) – the “exclusive privilege”

clause of the State Constitution<sup>8</sup> – such a claim would also lack merit as a matter of law. To state a cause of action under that clause, a plaintiff must show that the challenged bill is “directed at a single entity” and “confer[s] a privilege upon the single entity to the exclusion of all others. Both elements – singleness and exclusivity – must be present.” Consumers Union of U.S., Inc. v. State of New York, 2005 N.Y. Slip Op. 05201, at 37, 5 N.Y.3d 327, --- N.Y.S.2d ----, 2005 WL 1432208 (June 20, 2005). Here, plaintiff does not and cannot allege that the Challenged Provisions “confer a privilege on a single entity.” To the contrary: Plaintiff alleges that the purported “special legislation” grants “participation rights” to multiple persons. Complaint ¶ 26A(a). Thus, plaintiff’s own allegations defeat his “special legislation” claim to the extent it is based on the exclusive privilege clause of the State Constitution.

For all of these reasons, plaintiff’s equal protection, selective enforcement, and “special legislation” claims are subject to dismissal as a matter of law.

**C. Plaintiff Cannot State A Cause of Action Under The Substantive Component Of The Due Process Clause.**

The substantive rights protected under the Due Process Clause are extremely limited:

the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.

Albright v. Oliver, 510 U.S. 266, 271-72 (1994) (citation and internal quotation marks omitted).

Such rights are described as “fundamental rights.” Leebaert v. Harrington, 332 F.3d 134, 140 (2d

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<sup>8</sup> That clause provides as follows: “The legislature shall not pass a private or local bill . . . [g]ranting to any private corporation, association, or individual any exclusive privilege, immunity, or franchise whatsoever.” N.Y. Const. art. III, § 17(12).

Cir. 2003). “Rights are fundamental when they are implicit in the concept of ordered liberty, or deeply rooted in this Nation's history and tradition.” Id. Absent such a fundamental right, there can be no substantive due process violation:

As we have put it, the Due Process Clause affords only those protections “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934) (Cardozo, J.). Our cases reflect “continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society. . . .” Griswold v. Connecticut, 381 U.S. 479, 501, 85 S. Ct. 1678, 1690, 14 L. Ed.2d 510 (1965) (Harlan, J., concurring in judgment).

Michael H. v. Gerald D., 491 U.S. 110, 122-23 (1989).

Here, plaintiff’s allegations implicate no “fundamental” right. As the Third Circuit has held, there is no fundamental right to engage in gambling activities. See Williams, 124 F.3d at 422; see also Medina v. Rudman, 545 F.2d 244, 249 (1st Cir. 1976) (“a person’s interest in participating in the ownership of a pari-mutuel greyhound racetrack is” not a “‘fundamental’ or ‘natural’ right”). Thus, plaintiff’s substantive due process claim must be rejected as a matter of law.

To the extent plaintiff contends that the Challenged Provisions could nevertheless violate the substantive component of the Due Process Clause if it is utterly irrational, such a contention would fail under the analysis of the Court of Appeals in Albert Simon. In Albert Simon, the Court ruled that a New York City ordinance banning certain types of pinball machines and other gaming devices did not violate the Due Process Clause because it is “reasonably related to a proper governmental purpose, here the prevention of evils associated with gambling.” Id., 36 N.Y.2d at 303, 367 N.Y.S.2d at 757; accord Wnek Vending & Amusements, Inc. v. City of Buffalo, 96 Misc. 2d 983,

991-92, 410 N.Y.S.2d 255, 260 (Sup. Ct. Erie County 1978) (affirming, as against due process challenge, city ordinance banning certain types of pinball machines as unlawful gaming devices).

Here, as discussed in Point II.A, supra, the prohibition on operation of private slot machines, poker tournaments, and private lotteries is rationally related to several legitimate state interests. First, limiting gambling within the State is itself a legitimate state interest. Second, prohibition of such activities also makes regulation of gambling easier, by confining it to fixed and well-defined locations. Finally, prohibiting these activities furthers the legitimate state interest in protecting the public from organized crime, which has historically insinuated itself into private gambling activities.<sup>9</sup> See Artichoke Joe's, 353 F.3d at 237; Helton, 330 F.3d at 246; Williams, 124 F.3d at 421-23. Thus, the prohibition of private slot machines, poker tournaments, and lotteries is rationally related to several legitimate state interests.

**D. The Challenged Provisions Do Not Affect Plaintiff's Right To Commercial Speech.**

None of the provisions plaintiff challenges affects his right to commercial speech under the First Amendment. Commercial speech claims generally arise where the government imposes restrictions on the dissemination of information. See Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 563 (1980). However, "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). Stated differently, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely

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<sup>9</sup> The State Defendants have no reason to believe, and do not assert, that plaintiff's proposed operations have any ties to organized crime, but the relief plaintiff seeks would open the door to operation of private gambling establishments which could have such ties.

because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949). It is also well-established that “[t]he government may ban . . . commercial speech related to illegal activity.” Central Hudson, 447 U.S. at 563-64.

It is unclear how the Challenged Provisions affect any right to engage in commercial speech that plaintiff might have. See Complaint ¶¶ 26A(c), 45. To the extent he claims that the Challenged Provisions deny him the right “to engage in a lawful business,” see id. ¶ 45, his claim fails because engaging in a profession is not, in and of itself, speech. See Ohralik, 436 U.S. at 456. Moreover, even if operating a lottery or other gambling business might somehow constitute commercial speech, plaintiff’s argument fails because the businesses he describes are not lawful businesses under New York law. See supra Point I. Under Central Hudson, alleged speech cannot be protected as commercial speech unless it “concern[s] lawful activity.” Id., 447 U.S. at 566. Thus, any commercial speech concerning plaintiff’s proposed slot machines, poker games and private lottery concerns unlawful activity and therefore cannot be protected commercial speech. See id. at 563-64.

### POINT III

#### PLAINTIFF CANNOT STATE A CAUSE OF ACTION UNDER THE FEDERAL ANTITRUST LAWS

Plaintiff cannot state a cause of action under the federal antitrust laws. Plaintiff alleges that the State Defendants “enforc[e] an illegal monopoly over gambling activities in favor of defendants and selected other persons,” and invokes “the right to compete in business under federal antitrust laws.”<sup>10</sup> Complaint ¶ 26A(d, g). That allegation does not state a cause of action under the federal

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<sup>10</sup> Plaintiff also invokes New York General Business Law § 340 (the “Donnelly Act”) (Complaint ¶ 26A(g)) – the State’s own antitrust law – in his antitrust claim. Obviously, the State

antitrust laws. As the Supreme Court has repeatedly held, “a ‘state statute is not preempted by the federal antitrust laws simply because the state scheme may have an anticompetitive effect.’” Fisher v. City of Berkeley, 475 U.S. 260, 264 (1986) (quoting Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982)). The reason for this rule is that “the function of government may often be to tamper with free markets, correcting their failures and aiding their victims.” Id. Thus:

a state statute should be struck down on pre-emption grounds “only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.”

Id. (quoting Rice, 458 U.S. at 661). In this context, “authorization” of actions in violation of the antitrust laws means more than “permitting” such acts. Rather, authorization in this context means state action shielding private entities from federal antitrust liability. See generally FTC v. Ticor Title Ins. Co., 504 U.S. 621, 635 (1992). Any other state action – including mandating or authorizing conduct that is “anticompetitive” – is not preempted by the Sherman Act. See Fisher, 475 U.S. at 266-72.

Applying these principles here, plaintiff’s antitrust allegations do not state a cause of action as a matter of law. At most, plaintiff alleges that the State has acted in anticompetitive fashion by: (i) prohibiting certain types of gambling; and (ii) permitting the Lottery, racetracks, and Indian casinos, but not others, to engage in certain gaming or wagering activities. Complaint ¶¶ 13(iii), 26A(g), 51-52. Those allegations fall far short of a claim that the Challenged Provisions compel or place irresistible pressure on private parties to violate the antitrust laws, or shield private parties

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Constitution cannot violate the Donnelly Act, which is a State statute.

from liability for antitrust violations. Accordingly, to the extent plaintiff attacks the Challenged Provisions under the federal antitrust laws, such causes of action are subject to dismissal.

#### **POINT IV**

##### **THE LOTTERY IS AUTHORIZED UNDER ARTICLE I SECTION 9(1)**

The Lottery is entirely consistent with Article I Section 9(1), which authorizes lotteries “operated by the state.” Plaintiff alleges that the Lottery violates that constitutional provision because the State has delegated to private vendors the sale of Lottery tickets. Complaint ¶ 46. The Court of Appeals rejected a similar contention in Dalton. In Dalton, the plaintiffs challenged the State’s participation in Mega Millions, contending that such participation improperly delegated to other states the administration of that lottery. The Court of Appeals rejected that contention, finding that Mega Millions was still a “lottery operated by the state and the sales of lottery tickets in connection therewith as may be authorized and prescribed by the legislature.” Article I Section 9(1). The Court of Appeals reasoned that, so long as the State retained ultimate control over its portion of Mega Millions, Article I Section 9(1) permits the State to share with other entities the operation of lotteries pursuant to that provision. Dalton, 5 N.Y.3d at 271, 802 N.Y.S.2d at 89-90. The Court further reasoned that New York’s retention of “the authority to specify where and in what manner the lottery tickets may be sold,” as well as “the power to license ticket agents and determine the manner and amount of compensation due to such agents,” sufficed under Article I Section 9(1). Id.

So, too, here: Plaintiff does not contest that the State sets odds, selects winning numbers, and retains ultimate control over the manner and price of the sale of lottery tickets and the licensure and payment of agents. See Tax Law § 1604. That is all Article I Section 9(1) requires. In short, the Legislature’s decision to license private parties to sell Lottery tickets falls within the

Legislature's authority to "authorize[ ] and prescribe[ ]" the "sale of lottery tickets," and in no way means that the Lottery is no longer "operated by the State." See Dalton, 5 N.Y.3d at 270-72, 802 N.Y.S.2d at 89-90.

### CONCLUSION

For all of the foregoing reasons, the State Defendants respectfully request that the Court dismiss the Complaint as against them, in its entirety, and grant such other and further relief as the Court deems just and proper under the circumstances.

Dated: New York, New York  
December 14, 2005

ELIOT SPITZER  
Attorney General of the State of New York  
Defendant Pro Se and Attorney for Defendants  
State of New York, Governor Pataki, New York  
State Racing and Wagering Board, and  
New York State Division of the Lottery  
By:

---

LEWIS A. POLISHOOK  
Assistant Attorney General  
120 Broadway, 24th Floor  
New York, New York 10271  
(212) 416-8372

EUGENE BENGER  
LEWIS A. POLISHOOK  
Assistant Attorneys General  
Of Counsel



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