

No. 071406

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**WEST VIRGINIA FAMILY FOUNDATION, INC.,**

A West Virginia corporation,

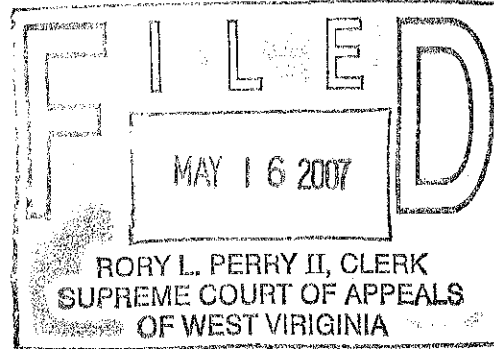
Petitioner,

v.

**JOHN C. MUSGRAVE,**

Director, West Virginia Lottery Commission,

Respondent.



**RESPONSE TO PETITION FOR WRIT OF MANDAMUS**

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As directed by the Court pursuant to W.Va. R. App. P. 14(b), Respondent John C. Musgrave, as Director of the West Virginia Lottery (“the Lottery”), respectfully submits this response to the West Virginia Family Foundation, Inc.’s petition for a writ of mandamus.

**Introduction and Summary**

The reasons that the petition should be denied can be briefly stated. Petitioner wrestles with irrelevant questions and studiously averts its eyes from the pertinent ones, because the answers to the pertinent questions are already well established. *Any* scheme or device through which a chance to win a prize is exchanged for consideration is a “lottery.” That has been the law for many decades. And “any” means *any*. Whether the “scheme or device” is a scratch-off ticket, video poker terminal, pay-off pinball machine, punch board, theater give-away night, or a casino-style table game, “any” means *any*. The Constitution of West Virginia expressly grants the Legislature the power to determine which of these myriad potential forms of lottery the

state may and should conduct. In the West Virginia Racetrack Table Games Act, W.Va. Code § 29-22C-1 *et seq.*, the Legislature made such a choice, and that choice must be respected even if it is disagreed with.

Moreover, any lottery created by the Legislature is just that – a creation of the Legislature. That the Legislature could logically find that its own creation is the State’s property should be beyond cavil. Finally, the Constitution grants the Legislature full authority to prescribe the manner in which the State will regulate, control, own, and operate any lotteries it creates. This the Legislature has done

### **The Relevant Facts**

Article VI, § 36 of the Constitution authorizes the State to conduct such lotteries as the Legislature may create. It provides, in pertinent part:

The legislature shall have no power to authorize lotteries or gift enterprises<sup>[1]</sup> for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this State; except that the legislature may authorize lotteries which are regulated, controlled, owned and operated by the State of West Virginia in the manner provided by general law, either separately by this State or jointly or in cooperation with one or more other States.

Pursuant to the grant of authority in this section’s second clause, the Legislature has enacted the State Lottery Act, W.Va. Code § 29-22-1 *et seq.*; the Racetrack Video Lottery Act, § 29-22A-1 *et seq.*; the Limited Video Lottery Act, W.Va. Code § 29-22B-101 *et seq.*; and the West Virginia Racetrack Table Games Act, W.Va. Code § 29-22C-1 *et seq.* (the “Table Games Act” or the “Act”).

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<sup>1</sup> The term “gift enterprise” refers a scheme by which a merchant induces purchases of his goods by appending to the sale a chance to win additional merchandise. *E.g.*, *Long v. State*, 73 Md. 527, 21 A. 683, 684 (1891); *Bell v. State*, 37 Tenn. 507 (1857). To Respondents’ knowledge, this Court has never applied or discussed the Constitution’s prohibition of gift enterprises, and this case provides no opportunity to do so.

In the Table Games Act, the Legislature opted to begin offering a lottery in the form of casino-style table games. These games will be offered at the four licensed parimutuel racetracks that already offer video lottery under the Racetrack Video Lottery Act, if (i) voters in the county in which the particular racetrack is located approve, and (ii) the Act's conditions for licensure are satisfied.

In reaching the decision to offer this form of lottery, the Legislature cited the importance of the racing and breeding industries to the State's economy, observing that operation of table games will "preserve and protect" those industries, "preserve and enhance" tourism, and "indirectly benefit other segments of the economy of this state." § 29-22C-2(b)(1). Accordingly, the Legislature concluded that "it is in the best interest of the State of West Virginia for the state to operate a lottery in the form of table games." § 29-22C-2(b)(4). It also specifically found that the games authorized by the article are "lotteries" according to the longstanding common law of West Virginia, and that ownership and operation of any lottery is the exclusive right of the state. § 29-22C-2(b)(2), (5). The Legislature further concluded that the lottery table games to be authorized by the new enactment – and indeed all lottery games offered by the state – are the state's "exclusive intangible intellectual property," § 29-22C-2(b)(6); *see also* § 29-22C-9 (declaring that the authorized games are "owned by the State of West Virginia" and that a racetrack may obtain only "limited license rights in and to the commission's intellectual property ownership" of lottery games).

As for how to offer the games, the Legislature found that conducting the lottery through licensees was "the most effective manner" of achieving its aims, and that "recognized princip[le]s of ownership allow an owner to maintain ownership while

operating an enterprise through agents and licensees.” § 29-22C-2(b)(3), (7). It therefore determined that granting licenses while “maintaining all ownership rights and exercising control through strict regulation” was an appropriate exercise of its constitutional grant of authority. § 29-22C-2(b)(9).<sup>2</sup>

After making these findings, the Legislature fashioned a comprehensive statutory and regulatory system through which state ownership would indeed be retained and state control would indeed be strictly exercised. No one may obtain a proprietary right to the State’s lottery. Any non-employee of the Lottery will perform his, her, or its role as a mere licensee. *See* §§ 29-22C-6(b), 8, 12, 13, 14. In this regard, the Legislature’s licensing requirement casts a very broad net. A racetrack’s license does not thereby render its employees eligible to participate in conducting lottery table games. Instead, the employees themselves must be direct licensees of the State of West Virginia, and the licensing procedure is a thorough one, requiring, among other things, that the employees submit to fingerprinting and criminal background checks. § 29-22C-13. The same goes for vendors of gambling equipment and services. The racetrack’s license does not empower its vendors to sell it such equipment and services; instead, each vendor must again be a direct licensee of the State of West Virginia by satisfying rigorous statutory criteria. § 29-22C-12. Finally, the licensed racetrack cannot delegate any management services to a third party without that third party also obtaining direct licensure from the Lottery. Once more, the proposed managers must submit fingerprints and undergo a criminal background check. § 29-22C-14.

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<sup>2</sup> Recognizing the prospect of potential liability as principal for the conduct of its agents in the conduct of lottery table games, the Legislature also required that any racetrack licensee hold the state harmless from any claim arising from the agent’s acts or omissions as the state’s agent. § 29-22C(a)(3).

Once the racetracks, employees, suppliers, and managers are all licensed, will they then be free to conduct table games as they see fit? Absolutely not. The Legislature has insisted on continuous and thorough control and oversight of the games by the Lottery. For example, no table game can be played without the Lottery's approval of the rules of play, which rules the Lottery is empowered to modify or reject outright. § 29-22C-4(a)(3). Licensed racetracks must have Lottery-approved internal control systems, and the Lottery is empowered to hire sufficient staff to ensure "continuous compliance" with the Table Games Act and all rules of the Lottery thereunder. §§ 29-22C-4(a)(4), (5). The Lottery may enter a racetrack licensed to conduct lottery table games at any time and without notice. § 29-22C-4(b)(3). Indeed, each racetrack licensee must provide the Lottery, free of charge, with suitable on-premises office space to permit the Lottery to perform the strict oversight called for by the statute and implementing rules. § 29-22C-8(l).

Even the patronage of the racetracks is subject to Lottery oversight and control. The Lottery may, for cause, bar any person from entering a table games area or the racetrack grounds at all, and may also bar persons from participating in any capacity in the play of a lottery table game. § 29-22C-4(b)(4). In any dispute between a racetrack licensee and a table games player over whether the player is a winner, the Lottery is the final and binding arbiter. § 29-22C-20(d).

The Lottery must arrange with the West Virginia State Police to provide law enforcement services specific to gaming, and the cost will be borne by the Lottery as an administrative expense. § 29-22C-24. The State Police and the Lottery's agents further have extensive power, without notice or warrant, to inspect the premises where

lottery table games are played, to inspect and seize equipment, books, records, or documents, and to inspect the person of any of the Lottery's licensees. § 29-22C-25. "Anything of value" – expressly including *the racetrack itself and all of its property* – is subject to forfeiture to the state if used as a bribe to affect the outcome of a game or in exchange for a violation of the Act. § 29-22C-30.

The state's proceeds from lottery table games are earmarked for a variety of worthwhile public purposes, including but not limited to senior services, support of counties and municipalities, and accelerating the reduction of unfunded liabilities and bonded indebtedness. § 29-22C-27.

This statutory scheme is comprehensive and detailed in and of itself, but it will not stand alone. In addition, and pursuant to a specific grant of authority (§ 29-22C-4(b)(5)), the Lottery is in the process of developing detailed legislative rules to describe how it will conduct the games. Proposed rules have not yet been filed with the Secretary of State, but they should be filed shortly.<sup>3</sup>

In conjunction with its preparation of proposed rules, the Lottery has also already registered a lottery table games service mark with the Secretary of State pursuant to W.Va. Code § 47-2-1 *et seq.*, for use at licensed racetracks to identify table games equipment as part of the state-owned lottery enterprise. A copy of the certificate of registration, application therefor, and several versions of mark itself are included in an appendix to this memorandum.

Finally, rather than simply authorizing lottery table games outright, the Legislature called for local option elections regarding whether table games should be

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<sup>3</sup> The Act permits these rules to be promulgated as emergency rules so long as they are proposed before September 1, 2007. § 29-22C-4(b)(5).

played in the communities that host the racetracks. § 29-22C-7. Special elections are currently scheduled for June 9, 2007, in each affected county. The results of these elections cannot be known at this time.

Petitioner filed this action challenging the constitutionality of the Act on Friday, May 4, 2007.<sup>4</sup> This response is now timely filed pursuant to this Court's order of May 10, 2007.

### Discussion of Law

#### i. Principles of Constitutional Adjudication

A majority of both houses of the Legislature, along with the Governor, approved the passage of the Table Games Act. Debate over the social, political, and economic desirability of lottery table games was thoroughly aired. In the end, the Legislature resolved the public policy debate, and the Governor endorsed that resolution. It is not this Court's task or role to reopen it. "Courts are not concerned with questions relating to the policy of a legislative enactment. Questions relating to policy are solely for the legislature." *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351, 357 (1965). This rule holds even if the Legislature's choice proves to have been a poor one. If the passage of a statute "causes an undesirable result, the remedy lies

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<sup>4</sup> The Lottery should make several observations about the appendices to the petition. First, Petitioner's Appendix VI is by no means an official transcript of a legislative committee meeting, but rather was prepared unofficially by Petitioner and is not even certified as accurate by whoever transcribed it. Although it makes no difference in the result the Court should reach, the Lottery does not concede Appendix VI's accuracy, completeness, or relevance.

Petitioner's Appendix II is also of dubious value. It is unsworn and hence is apparently not offered as evidence. Moreover, it could not be so offered: "expert" opinions regarding the law are not evidence. *Jackson v. State Farm Mutual Automobile Insurance Co.*, 215 W.Va. 634, 600 S.E.2d 346, 356-357 (2004). At best, it is an *amicus curiae* brief filed without leave of court.

The remainder of Petitioner's appendices consists of either hearsay or declarations by individual legislators about their long-ago expectations. Because art. VI, § 36 was passed by the full legislature and approved by the public at large, these individual declarations cannot possibly overcome the well-established meaning of the words actually proposed to and ratified by the people.

with the Legislature, whose action has produced it, and not the courts.” *Verizon West Virginia, Inc. v. West Virginia Bureau of Employment Programs*, 214 W.Va. 95, 586 S.E.2d 170, 189 (2003) (quotation omitted).<sup>5</sup>

An enactment’s invalidity must be clearly demonstrated; doubt is always resolved in favor of its validity. “The generally applicable fundamental principle is that the powers of the legislature are almost plenary: ‘The Constitution of West Virginia being a restriction of power rather than a grant thereof, the legislature has the authority to enact any measure not inhibited thereby.’” *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 408 S.E.2d 634, 640 (1991) (quoting syl. pt. 1, *Foster v. Cooper*, 155 W.Va. 619, 186 S.E.2d 837 (1972)). Consequently, “courts ordinarily presume that legislation is constitutional, and the negation of legislative power must be shown clearly[.]” *Id.*

Application of these principles to the state’s lottery statutes is to plow ground that this Court has plowed before. In the course of upholding both video lottery acts, this Court quoted Justice John Marshall’s nearly two-century-old, albeit timeless, expression of this basic principle of judicial review and temperament:

“The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.”

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<sup>5</sup> Moreover, the public policy questions involved much more than a simple choice between lottery table games and no lottery table games. As was discussed above, the legislature also considered matters such as the importance of thoroughbred racing and breeding to the state’s economy, and the opportunity presented by table games revenue to fund worthwhile public services and reduce unfunded public liabilities.

*State ex rel. Cities of Charleston and Huntington v. West Virginia Economic Development Authority*, 214 W.Va. 277, 588 S.E.2d 655, 664 (2003) (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810)). Indeed, it is the “*duty* [of a court] to find a proper basis for upholding the validity of a legislative enactment when its constitutionality is challenged.” *Id.* (emphasis added; quotation omitted).

The Court must also accept the factual premises that motivated the Legislature to act:

Since the determination of questions of fact on which the constitutionality of statutes may depend is primarily for the legislature, the general rule is that the courts will acquiesce in the legislative decision unless it is clearly erroneous, arbitrary, or wholly unwarranted. Whenever the determination by the legislature is in reference to open or debatable questions concerning which there is a reasonable ground for difference of opinion, and there is probably basis for sustaining the conclusion reached, [the legislature’s] findings are not subject to judicial review.

*Appalachian Power*, 143 S.E.2d at 359. This rule should carry special force here, where the very language of the Constitution entrusts the Legislature with the task of making the necessary factual determinations and prescriptions “in the manner provided by general law.”

#### ii. The Extraordinary Writ of Mandamus

Mandamus will lie only to compel the performance of a ministerial, nondiscretionary act. *State ex rel. Judy v. Kiger*, 153 W.Va. 764, 172 S.E.2d 579, 581-582 (1970).

A writ of mandamus will not issue unless three elements coexist – (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Syl. pt. 1, *State ex rel. Department of Health and Human Resources v. Hill*, 207 W.Va. 358, 532 S.E.2d 358 (2000) (quotations omitted); *City of Charleston*, 588 S.E.2d at 661.

iii. Petitioner Does Not Even Attempt to Demonstrate Standing

The instant petition falls far short of meeting even the first element of the above test. The petition makes no effort to demonstrate any right *in the petitioner* to complain of prospective operation of lottery table games. The only thing Petitioner says in description of itself is that it is “a conservative Christian organization located in Charleston[.]” Petition at 1.

The question of standing to sue is whether the litigant has alleged such a personal stake in the outcome of the lawsuit so as to present the court with a justiciable controversy warranting judicial resolution of the dispute. In order to have standing to sue, a party must allege an injury in fact, either economic or otherwise, which is the result of the challenged action and show that the interest he seeks to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit.

*Snyder v. Callaghan*, 168 W.Va. 265, 284 S.E.2d 241, 248 (1981) (citations omitted).

Hence, citizenship and its ordinary attributes, like residence and eligibility to vote, do not generally create standing. Mere disagreement with someone or something, even on religious grounds, is similarly not enough. If it were, the standing inquiry would be sapped of all substance. The Courts are not and should not be debating societies, however willing or zealous the debaters, and no matter how intriguing the point at issue. The debating society of government is the *legislative* branch. Those who, like Petitioner, have *only* a policy-based interest in an issue must find their remedy at the legislature (and ultimately at the ballot box).

Petitioner did briefly refer to an unquantified “detriment” to taxpayers in its motion to expedite, so the Lottery will briefly address that standing theory as well. Status as a taxpayer can sometimes confer standing, but only where the acts complained of could *harm* the plaintiff *in his capacity as a taxpayer*. *E.g., Tug Valley Recovery Center, Inc. v. Mingo County Comm’n*, 164 W.Va. 94, 261 S.E.2d 165 (1979) (each property owner in a taxing district has standing to challenge underassessment of any property in district, because proper assessment could ultimately lower plaintiff taxpayer’s own tax). It is unlikely that anyone opposed to the Table Games Act would have standing *as a taxpayer* to challenge the Act. Why? Because operation of lottery table games imposes no tax or other economic burden on someone who chooses not to play; indeed, it very likely will *relieve* the tax burden on non-players by providing a source of state revenue from which they will benefit and to which they need not contribute. At any rate, our Petitioner here is a tax-exempt 26 U.S.C. § 501(c)(4) organization. *See* <http://www.wvfamily.org/donate.html> (viewed 13 May 2007).

Finally, even if we assume for the sake of argument that there are persons who may suffer injury-in-fact if lottery table games come to be, Petitioner cannot ground standing on potential injuries to those third parties. *See Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720, 742-743 (1998) (persons generally lack standing to vindicate the rights of third parties); *Guido v. Guido*, 202 W.Va. 198, 503 S.E.2d 511, 515 (1998) (litigant lacked standing to challenge court orders affecting his parents); *West Virginia AAA Statewide Ass’n v. Public Service Comm’n*, 186 W.Va. 287, 412 S.E.2d 481, 483 n.3 (1991) (entity not subject to PSC tariff had no standing to raise procedural issues

concerning how that tariff was increased, and no standing to challenge PSC orders on behalf of those who were subject to them).

iv. W.Va. Code § 29-22C-1 et seq. Creates a “Lottery”

In responding to the petition, the Lottery will begin where the Petitioner ends, with the logical first inquiry: does the Table Games Act create a “lottery?” The answer is easy – it does.

This Court has long adhered to a very broad (and very common) definition of the term “lottery.” The essence of the term is captured in this seventy-year-old syllabus point: “The word ‘lottery’ is commonly understood to mean ‘a scheme for the distribution of prizes by chance.’” Syl. pt. 1, *State v. Matthews*, 117 W.Va. 97, 184 S.E. 665 (1936) (quoted as syl. pt. 6, *City of Charleston*). The Court has elaborated on this syllabus point, but has not narrowed it:

“The essential elements of a lottery are consideration, prize and chance; and *any scheme or device*, by which a person, for a consideration, is permitted to receive a prize or nothing, as may be determined predominately by chance, is a lottery.”

Syl. pt. 7, *City of Charleston* (emphasis added; quoting syl. pt. 4, *State v. Hudson*, 128 W.Va. 655, 37 S.E.2d 553 (1946)); syl. pt. 1, *State v. Wassick*, 156 W.Va. 128, 191 S.E.2d 283 (1972) (same); *accord*, *Opinion of the Justices*, 795 So.2d 630, 635 (Ala. 2001) (this three-element test is “accepted by the overwhelming majority of jurisdictions, as well as the United States Supreme Court”) (quoted in *City of Charleston*, 588 S.E.2d at 667).

Because of the breadth of this definition, lotteries can take many, many forms; there is no single paradigm. “An essential element of a lottery is awarding a prize by chance, but the exact method adopted for application of chance to the distribution of a

prize is immaterial.” Syl. pt. 4, *Video Consultants of Nebraska, Inc. v. Douglas*, 219 Neb. 868, 367 N.W.2d 697 (1985). This Court’s precedents attest to the wide variety of arrangements that can meet the test. See *Wassick*, 191 S.E.2d 283 (pinball machine awarding free plays is a lottery); *State v. Greater Huntington Theatre Corp.*, 133 W.Va. 252, 55 S.E.2d 681 (1949) (movie theater’s weekly “give away” night, in which cash prizes were awarded to registered patrons of the theater, was a lottery); syl. pt. 5, *Hudson* (punch board is a lottery).

Moreover, the conformity of West Virginia Lottery table games to art. VI, § 36 does not depend on whether voters who approved it actually anticipated that a subsequent Legislature might create that particular species of lottery. Constitutions are built to last. In (yet again) Justice John Marshall’s timeless words, a Court conducting judicial review of a statute must “never forget that it is a *constitution* [it is] expounding.” *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (emphasis in original). Justice Cleckley put the same point this way for this Court:

Implicit in the Board’s argument is the notion that because something was not done at the time the Constitution was adopted, then the present occurrence of an unforeseen event could not fit within the framers’ intent. Essentially, the Board is inviting this Court to adopt a static view of the West Virginia Constitution. Reasonable construction of our Constitution does not require static doctrines but instead permits evolution and adjustment to changing conditions as well as to a varied state of facts. Because it is a framework for governmental structure, a constitution is necessarily general to allow for needed flexibility. This is the essence of a “living” constitution[.]

*Randolph County Bd. of Education v. Adams*, 196 W.Va. 9, 467 S.E.2d 150, 163 (1995) (footnote and citation omitted); see also *id.*, 467 S.E.2d at 163 n.18 (“To adopt the view that the Constitution is static ... is to insist that the Constitution was created containing

the seeds of its own destruction.”) (quoting *United States v. Calistan Packers*, 4 F.Supp. 660, 661 (N.D.Cal. 1933)).

Indeed, this principle has been specifically applied to the very constitutional provision at issue in this case.

The legal issue before the Court is not whether the voters in 1984 had “video poker-type” machines in their conscious minds when they approved of state-run lotteries. Rather, the issue is whether the language that the voters approved created enough constitutional “elbow room” to allow the Legislature to create the current system. As the majority opinion demonstrates – it does.

*City of Charleston*, 588 S.E.2d at 674 (Starcher, J., concurring and lamenting).

The ultimate and controlling question, therefore, is whether a given game or system authorized by Legislative enactment meets the living (and again *longstanding*) definition of a “lottery,” and not what types of “lottery” might have been foreseen by those who framed or amended the Constitution. See *Jackson v. Georgia Lottery Comm’n*, 228 Ga.App. 239, 491 S.E.2d 408, 413-414 (1997) (broad terms of state constitutional amendment, and not the kinds of games anticipated by voters, determined whether state lottery games were lawful).

The games authorized by the Table Games Act plainly feature chance, consideration, and prize. They are “lotteries.”

v. If W.Va. Code § 29-22C-1 et seq. Did Not Create a State-Controlled “Lottery,” Then Art. VI, § 36’s Coextensive Prohibition of “Lotteries” Could Not Reach It

But even if the table games authorized by the Legislature were not “lotteries,” they would nonetheless be lawfully enacted. Why? Because the categories of games within the Constitution’s general prohibition and specific authorization – be they many or few, broad or narrow – are nonetheless *coextensive*. The same word in the same

sentence must have the same meaning. Hence, if lottery table games are a “lottery,” then the Constitution *authorizes* the Legislature to provide by general law for the State to operate it. On the other hand, if the games are not a “lottery” in the first place, then the Constitution *does not prohibit* the Legislature from permitting it.

In the absence of an applicable constitutional prohibition (like the one against most “lotteries”), the Legislature retains plenary power to make whatever laws it sees fit to enact:

The powers of a state Legislature are not to be confused with those of Congress. The Federal Constitution is a grant of power, while a state Constitution is a restriction of power. In other words, we look to the Federal Constitution to see what Congress may do. We look to a state Constitution to see what the Legislature may not do.

*State Road Comm'n v. Kanawha County Court*, 112 W.Va. 98, 116 S.E. 815, 817 (1932); *accord, Lewis*, 408 S.E.2d at 640.

In sum, art. VI § 36 either *permits* the Legislature to authorize lottery table games, or *does not inhibit* the Legislature from authorizing lottery table games. The result is the same in either event.<sup>6</sup>

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<sup>6</sup> The ensuing constitutional regime would be quite different, however. If this Court were to hold that “lottery” as used in art. VI, § 36 is a narrower concept limited to paper ticket drawings and perhaps new technological advances like computerized video poker machines, then the Legislature would be (and in principle already is) empowered to authorize any and all gambling not fitting within that narrow definition, and *without any necessity for state ownership, operation, regulation, or control*.

Thus, although the result in this specific case does not depend on the Court’s choice of a broad or narrow construction, Respondent submits that this Court’s longstanding, broad construction of “lottery” is both preferable as a matter of public policy and correct as a matter of law, because it ensures the continuation of strict state control into the future.

vi. The State Can and Does Own What It, and Only It, Can Create and Own

Petitioner expends most of its effort in an elaborately convoluted and confused attempt to demonstrate that the state will not “own” the lottery described in the Table Games Act. This attempt is self-evidently specious.

No lottery may lawfully exist in West Virginia unless it is created by the Legislature. The Table Games Act created a lottery, and the Legislature could surely and logically find that *its own creation* is the State’s property. Moreover, the Constitution does not direct this Court to consult a dictionary or a South Carolina trademark lawyer to ascertain how the State should “own” its lotteries. To the contrary, the people provided in art. VI § 36 that legislatively authorized lotteries were to be owned “in the manner provided by general law.” The Legislature has prescribed a perfectly rational manner in which to do so, and made perfectly rational findings that the State will own what the Legislature has made.

As this Court’s ruling in *City of Charleston* emphasizes, these findings carry great weight and cannot simply be ignored.<sup>7</sup> “This Court reviews legislative findings with great deference.” 588 S.E.2d at 669. “Even the legislative finding of a juristic fact is entitled to great weight and serious consideration.” *Id.* (quotation omitted). See *State ex rel. Ohio County Comm’n v. Samol*, 165 W.Va. 714, 275 S.E.2d 2, 4 (1980) (“Absent a claim that legislative findings are irrational or have no bearing on a legitimate State purpose, they are not subject to judicial investigation.”).

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<sup>7</sup> Petitioner characterizes this Court’s acceptance of legislative findings in *City of Charleston* as “curious[.]” Memorandum at 31. Of course there was nothing “curious” or otherwise remarkable about the Court’s analytical process. To the contrary, the Court was strictly faithful to (i) its general duty to respect legislative findings and (ii) the particular language of the constitutional provision at issue, which bestows specific authority on the Legislature to prescribe the manner in which the state will regulate, control, own, and operate authorized lotteries.

Under this standard, the Legislature's findings are beyond unassailable. In art. VI, § 36, the grammatical object of "own[]" is "lotteries." A lottery is not a tangible thing that can be "owned" in the same sense that a shirt or a building can be owned. It is instead akin to an enterprise or business, which one may "own" notwithstanding that the enterprise rents office space and equipment, and hires all help through a temporary agency. Ownership of an enterprise is the power to control it, and the Lottery will strictly control lottery table games under the comprehensive scheme prescribed in the Act.

Finally, "[a] plain reading of W.Va. Const., Art. VI, § 36 indicates that the exception for authorized lotteries does not require lotteries that are regulated, controlled, owned and operated by the State in an absolute sense, but rather 'in the manner provided by general law.'" *City of Charleston*, 588 S.E.2d at 669. A general law has been passed, and the Lottery will exercise ownership in faithful adherence to the manner prescribed by the Legislature. The inquiry can and should end there.

Petitioner does not squarely address any of these relevant points; instead, it seeks to quibble with the Legislature's characterization of the State's property interest in a lottery as an "intellectual" one. It is difficult to see how Petitioner's quibbling could make any difference – the Constitution requires merely that the State own any lottery "in the manner provided by general law," and not that its choice of words comport with some particular lawyer's tastes or with out-of-context definitions from the federal tax or bankruptcy code.

At any rate, the Legislature chose rational and clear words that describe just what it was creating. Conducting a "lottery" will generally involve the use of some tangible things, be they tickets, computers, cards, or dice, but the essence of a "lottery"

itself is the three-element *test* described above. A test is a concept, and not a tangible thing. Because concepts exist only in the mind, it was no great linguistic leap – or in fact any leap at all – for the Legislature to label the State’s conceptual right as an “intangible intellectual” one. Are there other property rights that can similarly be called “intangible” and “intellectual”? Of course there are, but their existence in no way detracts from the property right created by the Legislature and held by the State here.<sup>8</sup>

Indeed, state law is a primary source – perhaps *the* primary source – of property rights. See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (observing that property rights arise from sources independent of the Constitution, such as state law). Moreover, property is neither a static notion nor one that is necessarily uniform from one state to the next. The West Virginia Legislature can create a property right without the approval of Petitioner or of Mr. Mann, Esq., of South Carolina.

Petitioner also seeks to confuse the issue by suggesting that the State has seized and confiscated well-known casino games themselves. In the Act, the Legislature does not claim to have invented poker, blackjack, or baccarat, or that the State would own any of those games *as games*, in an “intellectual” or any other fashion. Instead, the state owns the *lottery* created by the Act, that is, an enterprise that provides a chance for a prize in exchange for consideration. The particular game used to provide the “chance” element of a lottery is essentially irrelevant – whether it be poker on a scratch-off ticket, poker on a video screen, or poker on a table.<sup>9</sup>

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<sup>8</sup> Moreover, a common thread among the various types of intellectual property identified by Petitioner is that they are owned because they were *created by their owner* – which is precisely the case with the lottery at issue here.

<sup>9</sup> The Lottery has issued poker-themed scratch-off tickets since 1987, and has also used dice and roulette themes on paper tickets. In addition, it bears mention that the Legislature has *not* limited lottery table games to well-established versions of “known” games, as Petitioner

Having erroneously posited that the State cannot own its lottery unless it fits within some pigeonhole of Mr. Mann's concept of "intellectual property," Petitioner proceeds on a path that leads to a truly farcical conclusion – Petitioner asserts that not only may the State not own its lottery, but that its lottery (and apparently many or all others) is illegal and preempted under *federal patent law*.

To get to this astonishing proposition, Petitioner must first posit that the State's asserted exclusive right to own lottery table games is "patent-like." Petitioner is wrong. The State's interest in the lotteries it owns is an ordinary property right. But its power to preclude others from conducting similar lotteries rests not on its *property* (as power based on a patent might), but rather on its *sovereignty*. The State's prohibition of lotteries is an exercise of its police power, and one specifically assigned to it in the Constitution itself. *See* art. VI, § 36 ("The legislature ... shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this State[.]").

The Legislature is empowered to provide by general law for the manner in which the State will own any lottery. The Legislature created a lottery for the State of West Virginia. The Legislature found that this lottery will be the State's "exclusive intangible intellectual property." The Legislature has done the job assigned it in the Constitution.

The State of West Virginia owns the lottery created by the Table Games Act.

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suggests. Instead, the Lottery may expressly authorize "any variation of the listed games similar in design or operation." § 29-22C-3(b)(32).

vii. The State May Operate Lotteries Through or With the Assistance of Agents  
If the Legislature So Chooses and Provides

Petitioner also alleges that Respondent will not “operate” lottery table games. Again, what the Constitution requires the State to operate is the intangible “lottery.” Again, the Constitution does not require the State to operate a lottery “in an absolute sense, but rather ‘in the manner provided by general law.’” *City of Charleston*, 588 S.E.2d at 669.<sup>10</sup> Moreover, it makes no analytical difference that licensees will assist in that operation, because the licensees do so as agents *for* the Lottery. *See* § 29-22C-8(j) (racetrack license permits it to “act as an agent of the commission in operating” the games).

At any rate, the Lottery will not operate lottery table games solely through the efforts of agents. The Act contemplates a number of important duties that the Lottery will perform directly, including things so basic as deciding whether a player has won and deciding who should be barred from playing the games at all. The Lottery will also *be there*, in office space provided by the licensee racetracks, to monitor the games and its licensee-agents’ performance, and its aforementioned service mark<sup>11</sup> will constantly remind licensees and players alike just whose lottery they are playing. The Lottery submits that the “manner” in which the Legislature has thus authorized it to operate lottery table games is substantively equivalent to what this Court unanimously approved in *City of Charleston*.

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<sup>10</sup> This constitutional language and directly governing precedent suffice in and of themselves to conclusively distinguish the nonbinding Rhode Island advisory opinions relied upon by Petitioner.

<sup>11</sup> The Lottery assumes that even Mr. Mann, Esq., would agree that its service mark is “intellectual property.”

Finally, if, as Petitioner apparently contends, the state must “operate” lotteries directly, without any support from non-employee agents or licensees, then one must wonder what the people had in mind when they also directed the Legislature to “regulate” authorized lotteries. Sovereign states do not generally “regulate” themselves.

In the Table Games Act, the Legislature has properly provided by general law for the manner in which the Lottery will operate the authorized games.

**Conclusion**

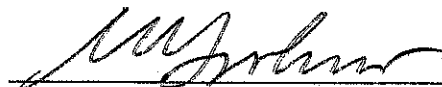
The Table Games Act is plainly constitutional, and Petitioner has no standing to assert otherwise in the first place. If the actions of our state’s elected officials displease Petitioner, its remedy is at the ballot box, and not in this Court.

No rule to show cause should issue, and, pursuant to W.Va. R. App. P. 14(c), the Court should deny the petition with prejudice.

Respectfully submitted,

JOHN C. MUSGRAVE,

By counsel,



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THOMAS R. GOODWIN (WV Bar # 1435)  
JOHNNY M. KNISELY II (WV Bar # 4968)  
Special Assistant Attorneys General  
GOODWIN & GOODWIN, LLP  
300 Summers Street, Suite 1500  
Charleston, WV 25301  
(304) 346-7000

**CERTIFICATE OF SERVICE**

I, Thomas R. Goodwin, Special Assistant Attorney General, certify that I served the foregoing "Response to Petition for Writ of Mandamus" and the Appendix thereto this 16th day of May, 2007, by facsimile to (304) 645-4183 and by placing a true and correct copy thereof in the United States Mail, postage prepaid and addressed as follows:

Barry L. Bruce  
BARRY L. BRUCE & ASSOCIATES, L.C.  
101 W. Randolph Street  
P.O. Box 388  
Lewisburg, West Virginia 24901

  
\_\_\_\_\_  
Thomas R. Goodwin

No. 071406

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

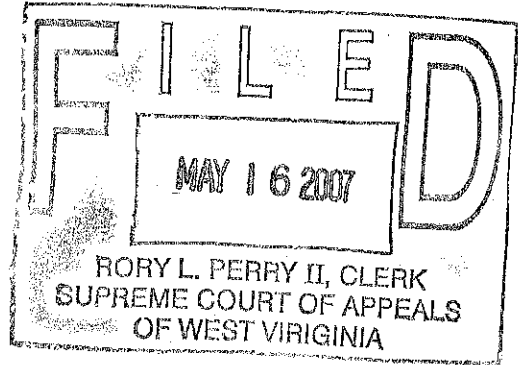
**WEST VIRGINIA FAMILY FOUNDATION, INC.,**  
A West Virginia corporation,

Petitioner,

v.

**JOHN C. MUSGRAVE,**  
Director, West Virginia Lottery Commission,

Respondent.



**APPENDIX TO**  
**RESPONSE TO PETITION FOR WRIT OF MANDAMUS**

THOMAS R. GOODWIN (WV Bar # 1435)  
JOHNNY M. KNISELY II (WV Bar # 4968)  
Special Assistant Attorneys General  
GOODWIN & GOODWIN, LLP  
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(304) 346-7000

*Counsel for Respondent*  
*John C. Musgrave*

# State of West Virginia



## Certificate

*I, Betty Ireland, Secretary of State of the State of West Virginia, hereby certify that*

An application and true copies of a service mark have been filed in my said office.

The name and address of the organization claiming ownership of said mark is:

**State Lottery Commission, a West Virginia governmental agency located at:  
312 MacCorkle Avenue, SE, Charleston, WV 25314**

The date claimed for the first use of the mark anywhere is: **02/13/2007**

The date claimed for the first use of the mark in this state is: **02/13/2007**

The class of goods or services is: **#43**

The description of the services in connection with which the mark is used:

**The mark is used to identify intangible personal property rights granted to licensees under the new West Virginia Racetrack Table Games Act.**

The mark consists of words or letters only, without regard to typography. The mark being:

**The words "West Virginia Lottery Table Game"**

The date of registration being: **03/28/2007** for the term of 10 years.

The issued WV serial # being: **1007135**

The application is found to conform to the requirements of Chapter 47 of the West Virginia Code.

Therefore, I hereby issue this

### SERVICE MARK



*Given under my hand and the  
Great Seal of the State of  
West Virginia on*

**MARCH 28, 2007**

*Betty Ireland*

*Secretary of State*

Betty Ireland  
 Secretary of State  
 State Capitol, W-139  
 1900 Kanawha Blvd. East  
 Charleston, WV 25305-0770

Penney Barker, Manager  
 CORPORATIONS DIVISION  
 Tel: (304) 558-8000  
 Fax: (304) 558-8381  
 Hours: 8:30 a.m. - 4:30 p.m. ET



## WEST VIRGINIA APPLICATION FOR TRADEMARK OR SERVICE MARK

1.  NEW APPLICATION, MARK NOT PREVIOUSLY REGISTERED IN WEST VIRGINIA  RENEWAL; MARK REGISTERED LAST ON (DATE) \_\_\_\_\_

FILED

### Applicant Information

MAR 28 2007

2. Name of Applicant: State Lottery Commission
3. Business Address: 312 MacCorkle Avenue, SE  
Charleston WV 25314
4. If applicant is corporation or partnership, state of organization: A governmental agency of the State of W.Va.
5. If applicant is partnership, names of general partners: \_\_\_\_\_

IN THE OFFICE OF  
 SECRETARY OF STATE

### Goods or Services

6. The mark is used on or in connection with the following goods or services (see instructions):

G=Goods S=Services	Description of Goods or Services	Mode or Manner Used	Class of Goods or Services
S	"West Virginia Lottery Table Game"	Logo will appear on all gaming tables at racetracks licensed to have table games	43

Mark to be Protected

7. The mark for which the application is made consists of: (check one)

- a graphic symbol only
- a graphic symbol including words or letters
- words or letters in a specific typography
- words or letters only, without regard to typography

8. Brief description of the mark: The words describe the intangible personal property rights that will be granted to licensees under the new West Virginia Racetrack Table Games Act, W.Va. Code §29-22C-8.

9. This mark was first used anywhere on: 2 / 13 / 2007; and in West Virginia on: 2 / 13 / 2007.

10. A drawing or representation of the mark is attached in the size and format shown, marked Attachment 1, and, three specimens showing the mark as actually used are attached, marked Attachment 2, 3 and 4.

Filing with the U. S. P. T. O.

11. An application to register this mark, or portions or a composite of this mark has been filed by this applicant (or a predecessor in interest) with the United States Patent and Trademark Office: (check one, if yes, all detailed information is required, attach sheet if more than one application has been filed).

NO -- an application has not been filed

YES -- the specifics of the application(s) are: If more than one filing for this mark or portions or near matches of this mark have been made, attach a separate sheet listing the specifics for each application.

Date filed with USPTO: \_\_\_\_\_ Serial No. \_\_\_\_\_

Status:  PENDING  APPROVED (DATE \_\_\_\_\_)  REFUSED/OTHER (REASON \_\_\_\_\_)

Verification

12. I, as applicant or authorized representative of the applicant, hereby certify that: (1) the applicant is the owner of the mark for which this application is made; (2) the mark is in use; (3) to my knowledge, no other person has registered, either federally or in this state, or has the right to use this mark either in the identical form thereof or in such near resemblance to it as to be likely, when applied to the goods or services of that other person, to cause confusion, or to cause mistake, or to deceive; and (4) the information contained in this application is true, to the best of my knowledge.

3-19-2007  
DATE SIGNED

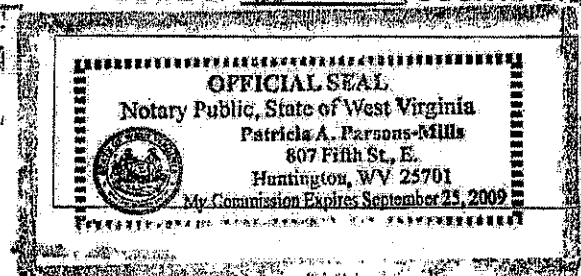
John C. Musgrave  
NAME OF PERSON SIGNING (TYPE OR PRINT)

[Signature]  
SIGNATURE

TITLE OF MEMBER OR OFFICER SIGNING IF OTHER THAN INDIVIDUAL APPLICANT

Director, West Virginia Lottery

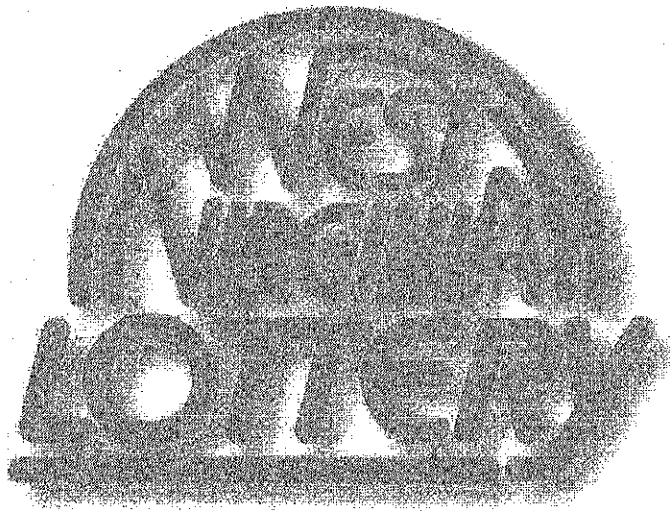
13. STATE OF WV COUNTY OF Kanawha



Acknowledged before me this 19 day of March, 2007

[Signature]  
NOTARY PUBLIC

My commission expires: September 25, 2009



*Table Game*

TM





Attachment 1  
Black & White

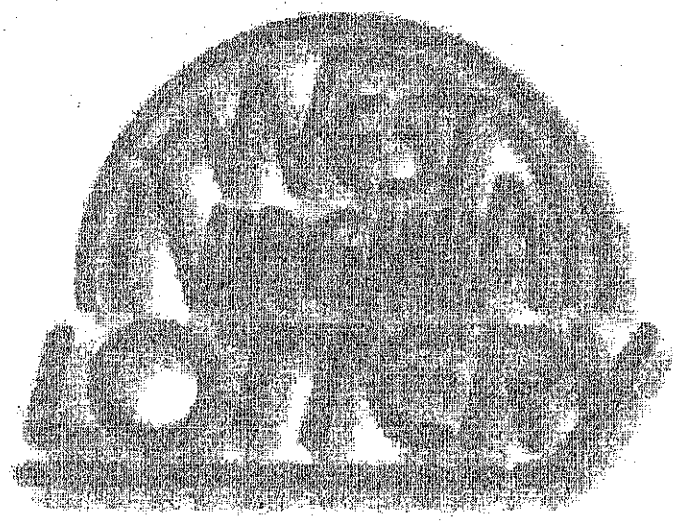


— Emerald Green  
box

— Gold letters

— Gold letters

Attachment 2  
Black & White



Gold letters

*Table Game*

- Gold letters

TM



— Gold outline

— Gold letters

— Gold letters

TM

Emerald Green box

Gold outline  
(inside green box)

Gold letters

Attachment 4  
Black & White



Gold letters