

DOCKET NO. \_\_\_\_\_

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

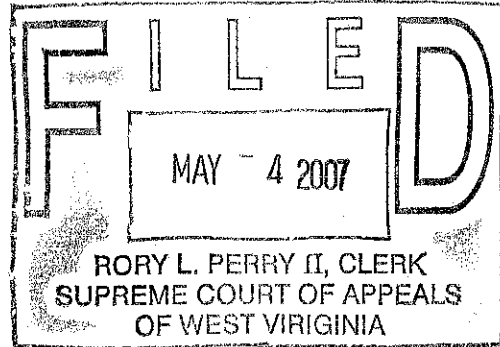
WEST VIRGINIA FAMILY  
FOUNDATION, INC. a West Virginia Corporation.

Petitioner,

v.

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

Respondent.



**PETITION OF THE WEST VIRGINIA FAMILY FOUNDATION,  
FOR WRIT OF MANDAMUS**

The Petitioner, West Virginia Family Foundation, Inc., by and through counsel, Barry L. Bruce, Barry L. Bruce & Associates, L.C., respectfully petition this Honorable Court for Writ of Mandamus. In support of this Petition, Petitioner states as follows:

**I. PARTIES**

Petitioner is the West Virginia Family Foundation, Inc., a West Virginia corporation being a conservative Christian organization located in Charleston, West Virginia.

Respondent is John C. Musgrave, Director of the West Virginia State Lottery Commission. Respondent Musgrave and/or the West Virginia Lottery Commission have taken steps to promulgate rules and regulations under West Virginia Code §29-22C-1, *et seq.*, "West Virginia Lottery Racetrack Table Games Act," to implement the lottery authorized thereunder.

## II. ISSUES PRESENTED

A. West Virginia Code §29-22C-1, *et seq.*, “West Virginia Lottery Racetrack Table Games Act,” is unconstitutional because it does not meet the requirements of the West Virginia Constitution, Article VI, Section 36 exception that the State must “own the lottery” for any lottery to be constitutional.

B. West Virginia Code §29-22C-1, *et seq.*, “West Virginia Lottery Racetrack Table Games Act,” is unconstitutional because it does not meet the requirements of the West Virginia Constitution, Article VI, Section 36 exception that the State must “operate the lottery” for any lottery to be constitutional.

C. West Virginia Code § 29-22C-1, *et seq.*, “West Virginia Lottery Racetrack Table Games Act,” is unconstitutional because table games as authorized by said Act were not contemplated when the amendment to Article VI, Section 36 of the West Virginia Constitution was passed.

## III. RELIEF REQUESTED

Wherefore, because the West Virginia code § 29-22C-1, *et seq.*, “West Virginia Lottery Racetrack Table Games Act,” is unconstitutional Petitioner seeks a Writ of Mandamus holding:

- (a) That West Virginia Code § 29-22C-1, *et seq.*, “West Virginia Lottery Racetrack Table Games Act,” is unconstitutional ;
- (b) That the operation of any table games authorized under West Virginia Code § 29-22C-1, *et seq.*, “West Virginia Lottery Racetrack Table Games Act,” be prohibited;
- (c) That any activities by the West Virginia Lottery Commission to implement the table games authorized under West Virginia Code § 29-22C-1, *et seq.*, “West Virginia

Lottery Racetrack Table Games Act," be prohibited;

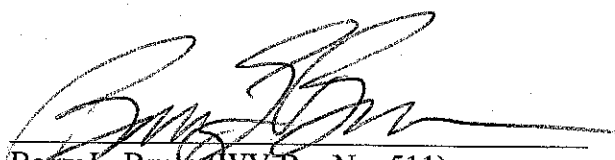
Pursuant to the West Virginia Rules of Appellate Procedure, Petitioner requests oral argument on their position. Further, Petitioner respectfully directs this honorable Court's attention to the Memorandum of Law in Support of its Petition. Should this Court issue a "Rule to Show Cause," a list of those persons and/or entities to be served has been submitted with this Petition, as required by West Virginia Rule of Appellate Procedure, Rule 14(a). Finally, Petitioner respectfully directs this Court to their Motion for Expedited Consideration Due to Exigent Circumstances, which is submitted with this Petition.

Respectfully submitted,

WEST VIRGINIA FAMILY FOUNDATION, INC.,

Petitioner,

By Counsel.



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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.

MEMORANDUM OF LAW IN SUPPORT OF  
PETITION OF THE WEST VIRGINIA FAMILY FOUNDATION, INC.  
FOR WRIT OF MANDAMUS

Respectfully submitted,

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**TABLE OF CONTENTS**

I.STATEMENT OF THE CASE .....1

II.ARGUMENT ..... 2

A. West Virginia Code § 29-22-C-1, *et seq.*, “West Virginia Lottery Racetrack Table Games Act,” is unconstitutional because it does not meet the requirements of the West Virginia Constitution, Article VI, Section 36 exception that the State must “own the lottery” for any lottery to be constitutional. .... 2

1. There is no general intellectual property right, “intellectual property” is an umbrella term ..... 7

2. The assertion of exclusive intellectual property rights by the State to prevent operation of certain types of games is a patent-like property right .....11

3. The intellectual property right asserted by the Table Games Act would be preempted under the Supremacy Clause as inconsistent with Federal Patent law .....14

B. West Virginia Code § 29-22C-1, *et seq.*, “West Virginia Lottery Racetrack Table Games Act,” is unconstitutional because it does not meet the requirements of the West Virginia Constitution, Article VI, Section 36 exception that the State must “operate the lottery” for any lottery to be constitutional ..... 17

1. West Virginia Constitution Article VI, §36 is clear and unambiguous on its face that the State must operate the lottery authorized thereby ..... 17

2. The Table Games Act is clear and unambiguous on its face that the State of West Virginia is delegating the mandate under the lottery amendment that the State of West Virginia must operate any lottery authorized by the lottery amendment ..... 18

3. Applying General Rules of Statutory Construction, the Term “Operate” Means More than Mere Regulatory Control ..... 20

4. The Court Should Give Effect To Every Term in a Statute ..... 27

C. West Virginia Code § 29-22C-1, *et seq.*, “West Virginia Lottery Racetrack Table Games Act,” is unconstitutional because table games as authorized by said Act were not contemplated when the amendment to Article VI, Section 36 of the West Virginia Constitution was passed. . . . . 28

IV. CONCLUSION . . . . . 32

## TABLE OF AUTHORITIES

### CASES

<u>Bonito Boats, Inc. v. Thunder Craft Boats, Inc.</u> , 9 USPQ2d 1847 (U.S. 1989) .....	15, 16
<u>Brotherton v. Blakenship</u> , 157 W. Va. 100, 207 S.E.2d 421 (1973) .....	3
<u>Contractors Ass'n of W. Va. v. W. Va. Dep't. of Pub. Safety</u> , 189 W. Va. 685, 434 S.E.2d 357 (1993) .....	3
<u>Crockett v. Andrews</u> , 153 W. Va. 714, 172 S.E.2d 384 .....	19
<u>Dowling v. United States</u> , 226 USPQ 529 (U.S. 1985) .....	11
<u>In re Patent &amp; Trademark Services Inc.</u> , 49 USPQ2d 1537 (TTAB 1998) .....	7, 8, 10
<u>In re Advisory Opinion to the Governor (Casino)</u> , 856 A.2d 320 (R.I. 2004) .....	19, 20, 21, 22, 23
<u>In re Advisory Opinion to the Governor (Casino II)</u> , 885 A.2d 698 (R.I. 2005) .....	21, 22, 23, 24
<u>Mayers v. Barte</u> , 167 W. Va. 194, 279 S.E.2d 406 (1981) .....	2
<u>Pauley v. Kelly</u> , 162 W. Va. 672, 255 S.E.2d 859 (1979) .....	3, 20
<u>Perfect 10 Inc. v. CCBill LLC</u> , 82 USPQ2d 1161, at 1172 (9 <sup>th</sup> Cir. 2007) .....	8
<u>Randolph County Bd. of Educ. v. Adams</u> , 196 W. Va. 467, S.E.2d 150, 163 (1995) .....	31
<u>State v. Elder</u> , 152 W. Va. 571, 165 S.E.2d 108 (1968) .....	3

<u>State ex rel. Cities of Charleston &amp; Huntington v. W. Va. Econ. Dev. Auth.</u> , 214 W. Va. 277, 588 S.E.2d 655 (2003) . . . . .	17, 28, 30, 31
<u>State ex rel. Forbes v. Caperton</u> , 198 W. Va. 474, 481 S.E.2d 780 (1996) . . . . .	18, 20, 27
<u>State ex rel. Mountaineer Park, Inc. v. Polan</u> , 190 W. Va. 276, 438 S.E.2d 308 (1993) . . . . .	3, 28, 29, 30, 31
<u>T. Weston v. Mineral County</u> , 683 S.E.2d 167 (W. Va. 2006) . . . . .	27
<u>University of Colorado Found. v. American Cyanamid Co.</u> , 68 USPQ2d 1120 (Fed. Cir. 2003) . . . . .	15
<u>W. Va. Bd. of Educ. v. Hechler</u> , 180 W. Va. 451, 376 S.E.2d 839 (1988) . . . . .	2
<u>W. Va. Citizens Action Group, Inc. v. Daley</u> , 174 W. Va. 299, 324 S.E.2d 713 (1984) . . . . .	2

**OTHER AUTHORITIES**

U.S. CONST., art. VI, paragraph 2 . . . . .	16
R. I. CONST., art 6, § 15 . . . . .	19
W. Va. CONST. amend VI, § 36 . . . . .	1, 17
W. Va. CONST., art. VII, § 3 . . . . .	1
11 U.S.C. § 101(35A) . . . . .	9
15 U.S.C. § 6(d) . . . . .	9
17 U.S.C. § 102 . . . . .	12
17 U.S.C. § 106 . . . . .	12
19 U.S.C. § 304 . . . . .	8
19 U.S.C. § 2411(d)(3)(F) . . . . .	9
19 U.S.C. § 2901(b) . . . . .	9
26 U.S.C. § 170(m)(9) . . . . .	8
35 U.S.C. § 271(a) . . . . .	13
35 U.S.C. § 101 . . . . .	13
35 U.S.C. § 102 . . . . .	13
35 U.S.C. § 103 . . . . .	13
35 U.S.C. § 111(a) . . . . .	14
35 U.S.C. § 115 . . . . .	14

W. Va. Code § 29-22-9(a) .....	28
W. Va. Code § 29-22-9(c) .....	28,31
W. Va. Code § 29-22A-1 <i>et seq.</i> .....	28, 30
W. Va. Code § 29-22B-1 <i>et seq.</i> .....	28, 30
W. Va. Code § 29-22B-1101 - 1110 .....	24
W. Va. Code § 29-22B-1405 .....	22
W. Va. Code § 29-22C-1 <i>et seq.</i> .....	1, 2, 17, 32
W. Va. Code § 29-22C-2(b)(6) .....	5
W. Va. Code § 29-22C-2(b)(9) .....	19
W. Va. Code § 29-22C-3(b)(22) .....	23
W. Va. Code § 29-22C-3(b)(18) .....	18
W. Va. Code § 29-22C-3(b)(32) .....	5
W. Va. Code § 29-22C-4 .....	18
W. Va. Code § 29-22C-4(c) .....	23
W. Va. Code § 29-22C-8(d) .....	25
W. Va. Code § 29-22C-8(e)(1) .....	25
W. Va. Code § 29-22C-8(e)(2) .....	25
W. Va. Code § 29-22C-8(j) .....	23
W. Va. Code § 29-22C-9 .....	4, 5
W. Va. Code § 29-22C-10(b)(3) .....	24
W. Va. Code § 29-22C-10(b)(4) .....	25
W. Va. Code § 29-22C-11 .....	25
W. Va. Code § 29-22-17(b) .....	22
W. Va. Code § 29-22C-20 .....	25
W. Va. Code § 29-22C-21 .....	25
W. Va. Code § 29-22C-21(b)(3) .....	25
W. Va. Code § 29-22C-26 .....	22
 W. Va. Rule of Appellate Procedure 14(a) .....	 1
 Paul Goldstein, et al., <u>Copyright, Patent, Trademark and Related State Doctrines, Cases and Materials on the Law of Intellectual Property</u> (3d ed., The Foundation Press, Inc. 1993) .....	 10.
 BLACK'S LAW DICTIONARY .....	 4, 10, 29

APPENDIX

APPENDIX I

Curriculum Vitae of Michael Mann, Esq. .... 5

APPENDIX II

Report of Michael Mann, Esq. .... 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

APPENDIX III

Affidavit of Betty Crookshanks ..... 29

APPENDIX IV

Affidavit of William Wooten ..... 29

APPENDIX V

1986 Article *Charleston Gazette* ..... 30

APPENDIX VI

Transcript of Hearing of the House Judiciary Committee on House Bill 2718 ..... 6, 7, 26

## STATEMENT OF THE CASE AND JURISDICTION

On November 6, 1984, the State of West Virginia ratified an amendment to Article VI, Section 36 of the West Virginia Constitution. Said amended Section reads as follow:

The legislature shall have no power to authorize lotteries or gift enterprises 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 and may authorize state-regulated bingo games and raffles for the purpose of raising money by charitable or public service organizations or by the State Fair of West Virginia for charitable or public service purposes: Provided, that each county may disapprove the holding of bingo games and raffles within that county at a regular, primary or special election but once having disapproved such activity, may thereafter authorize the holding of bingo games and raffles by majority vote at a regular, primary or special election held not sooner than five years after the election resulting in disapproval; that all proceeds from the bingo games and raffles be used for the purpose of supporting charitable or public service purposes; and that the legislature shall provide a means of regulating the bingo games and raffles so as to ensure that only charitable or public service purposes are served by the conducting of the bingo games and raffles.

West Virginia CONST. art IV, § 36 (hereinafter the "Lottery Amendment"). Upon ratification of said amendment, the West Virginia Legislature enacted the State Lottery Act. After two Acts enacted by the West Virginia Legislature involving video lotteries, on March 8, 2007 the West Virginia Legislature passed House Bill 2718, codified in West Virginia Code § 29-22C-1, *et seq.* (hereinafter "Tables Games Act"), legalizing the operation of casino-style table games at four already existing racetracks in West Virginia. Petitioners assert that the Table Games Act is unconstitutional.

This Court has original jurisdiction over mandamus petitions. W. Va. CONST. art. VII, § 3, West Virginia Rule of Appellate Procedure, Rule 14(a). This Court has consistently held that "[m]andamus may be used to attack the constitutionality or validity of a statute or ordinance." Syl. pt. 4, W. Va. Bd. of Educ. v. Hechler, 180 W. Va. 451, 376 S.E.2d 839 (1988). See also West

Virginia Citizens Action Group, Inc. v. Daley, 174 W. Va. 299, 302, 324 S.E.2d 713, 717 (1984), Mayers v. Barte, 167 W. Va. 194, 279 S.E.2d 406 (1981) (“We have in the past held that mandamus may be used to attack the validity of a statute or ordinance”). “The trend in this Court has been to enlarge the scope of mandamus . . . especially when there is an urgent question of public policy or where there is no reason for delaying adjudication of the issue by the highest court of the State.” Daley, supra at 302 (quoting Walls v. Miller, 162 W. Va. 563, 566, 251 S.E.2d 491, 495 (1978)). “Mandamus will not be denied on the ground that there is another remedy unless such other remedy is equally convenient, beneficial, and effective.” Daley, supra at 302 (quoting Syl. pt. 5, Hardin v. Foglesong, 117 W. Va. 544, 186 S.E. 308 (1936)).

Traditionally, in order to invoke mandamus, “the relator must show (1) a clear right to the relief sought; (2) a legal duty on the part of the respondent to do the thing the relator seeks; and (3) the absence of another adequate remedy.” Mayers, supra at 198. However, it is not necessary to decide “whether these three elements coexist in the case now before us, because the petitioners are challenging the constitutionality of [West Virginia Code § 29-22C-1, *et seq.*]. It has been established that ‘mandamus may be used to attack the constitutionality or validity of a statute or ordinance.’” Hechler, supra at 456 (quoting Daley, supra).

### ARGUMENT

- A. **West Virginia Code § 29-22C-1, *et seq.*, “West Virginia Lottery Racetrack Table Games Act,” is unconstitutional because it does not meet the requirements of the West Virginia Constitution, Article VI, Section 36 exception that the State must “own the lottery” for any lottery to be constitutional.**

The West Virginia Constitution, Article VI, Section 36 ( the “Lottery Amendment”) is clear and unambiguous on its face:

This Court has ruled in State v. Elder, 152 W. Va. 571, 165 S.E.2d 108 (1968), at Syllabus Point 2, that “[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” In Brotherton v. Blankenship 157 W. Va. 100, 108, 207 S.E.2d 421 (1973), the Court ruled, “questions of constitutional construction are in the main governed by the same general rules as those applied in statutory construction;” and in Contractors Association of West Virginia v. W. Va. Department of Public Safety, 189 W. Va. 685, 691, 434 S.E.2d 357, 363 (1993) the Court found, “[t]herefore, if the language in a constitutional provision is clear and without ambiguity, the plain meaning is to be accepted.”

The exception contained in the Lottery Amendment requires any lottery in this state to be regulated, controlled, owned, and operated by the State of West Virginia. This amendment was voted on and accepted by the voting residents of the State of West Virginia on November 6, 1984. The words “regulated,” “controlled,” “owned,” and “operated” are clear on their face. The legislature did not deem it necessary to include in the amendment definitions for the aforementioned four (4) words.

This Court has stated in Pauley v. Kelly, 162 W. Va. 672, 699, 255 S.E.2d 859, 874 (1979) and Contractors, *supra*, at 692,

There are four traditional methods of judicial definitions of words used in statutes and constitutions and not specifically defined in them: dictionary definitions current at the time, and those now extant; pronouncements by courts; reliable extra-judicial commentary and definitions set or [inferred] from debates and proceedings of the bodies that drew the documents.

This Court has stated in State ex rel Mountaineer Park v. Polan, 190 W. Va. 276, 280, 438 S.E.2d 308, 312 (1993), “[w]hen, as here, the Court is called upon to either interpret or construe an exception to a constitutional provision, such exception must be strictly construed and limited to

objects fairly within their terms.”

Thus, any defining of the terms “regulate,” “control,” “own,” and “operate” must be construed narrowly and to a meaning that existed at the time of the 1984 amendment; specifically of interest to the instant action is the definition of the word “own.”

By following the above cases to determine the meaning of “own” under the Lottery Amendment, we only have the dictionary to consult. Petitioners are unaware of any pronouncements by this Court or reliable extrajudicial comments or definitions from the proceedings of the bodies that drew the documents.

Black’s Law Dictionary, 1130 (7th ed. 1999) defines “own” as “to have or possess as property; to have legal title to.”

It is important to define “own” under the amendment because that is the definition the legislature is required to use in formulating the general laws which govern approved lotteries. The amendment does not give the right to the legislature to redefine the words “regulate,” “control,” “own,” and “operate.” If the legislature wanted any other definition of these words than their plain meaning, they were obligated to so define the words in the amendment. There is no evidence of any other meaning anywhere.

West Virginia Code § 29-22C-9, “State ownership of table games” states:

All table games authorized by this article shall be West Virginia lottery games owned by the State of West Virginia. A racetrack table games license granted to a pari-mutuel racetrack by the commission pursuant to this article shall include the transfer by the commission to the racetrack limited license rights in and to the commission’s intellectual property ownership of the West Virginia lottery games which includes granting licensees limited lawful authority relating to the conduct of lottery table games for consideration, within the terms and conditions established pursuant to this article and any rules promulgated under this article.

This section claims the State of West Virginia outright owns table games as defined in West Virginia Code §29-22C-3(b)(32) and authorizes the commission's transfer of its intellectual property right to satisfy the requirements of the Lottery Amendment that the State must own the lottery.

Petitioners, in an attempt to ascertain whether the State could actually create an intellectual property right in "table games played for consideration," consulted an expert in the field of intellectual property: Mr. Michael A. Mann, Esq., an intellectual property lawyer from South Carolina. See Curriculum Vitae attached as Appendix I.

Mr. Mann was asked to opine on the following issue: Can the state of West Virginia declare by statute that it owns intellectual property rights in known table games played for money in West Virginia? Succinctly stated, his response was NO. Mr. Mann's conclusion was based on three basic arguments: (1) There is no general intellectual property right; Intellectual Property is an umbrella term; (2) The assertion of exclusive intellectual property rights by the State to prevent operation of certain types of games is a patent like intellectual property right; and (3) The intellectual property right asserted by the statute would be preempted under the Supremacy Clause as inconsistent with Federal Patent law. Mr. Mann's arguments are summarized below and his complete report, including exhibits thereto is attached hereto as Appendix II.

The Table Games Act provides, at §29-22C-2(b)(6), that "[t]he Legislature finds that the lottery authorized by the provisions of this article is the exclusive intangible intellectual property of the State of West Virginia as are the other versions of the lottery authorized under this chapter."

Further, at §29-22C-9, the Table Games Act states:

All table games authorized by this article shall be West Virginia lottery games owned by the State of West Virginia. A racetrack table games license granted to a pari-mutuel racetrack by the commission pursuant to this article shall include the transfer

by the commission to the racetrack limited license rights in and to the commission's intellectual property ownership of the West Virginia lottery games which includes granting licensees limited lawful authority relating to the conduct of the lottery table games for consideration, within the terms and conditions established pursuant to this article and any rules promulgated under this article.

The Table Games Act has the effect of declaring the state lottery and various table games to be the intellectual property of the state. The table games authorized to be played under the Act are known, pre-existing, games (such as baccarat, roulette, poker, and blackjack) played for money. Of interest to Mr. Mann is the fact that "there is no explanation in the bill as to what type of intellectual property rights the state would have (patent-like rights for example), the extent of those rights, and when they expire. Indeed, there is no definition of intellectual property itself in the bill." See Appendix II at 1.

Moreover, in the testimony before the committee considering the House Bill 2718, which would become the Table Games Act, the counsel for the House Judiciary Committee, Joseph Altizer, stated that the bill, if enacted, would give the state "ownership of the operation of the games themselves." Counsel Altizer elaborated further on the nature of the claimed intellectual property rights, stating:

- "It's not like we're going to outlaw free blackjack at your house. We're outlawing anybody else conducting these games [for consideration] unless they have a license from the state to conduct these games, cause that's our intellectual property."
- "What that state owns if I may is the right to operate these types of games for consideration."
- "We are saying that nobody else in the state can own this intellectual property right of operating these games for consideration in West Virginia except for the state under the conditions of this article." "We have, what we've done, those games exist throughout the world and what we have done, is saying, even though they don't exist in West Virginia right now, they're unlawful in West Virginia, and we are authorizing those games for limited use in West Virginia for consideration under this act."

- “But we haven’t provided for any such expiration herein for this type of intellectual property.”
- [In response to a question about whether the State of West Virginia could declare that it owned the intellectual property in basketball, the state representative stated: “Well, I would suggest because that’s already a lawful activity and it’s been going on for many, many years ...”
- “Well I think the elements of the lottery has been defined in our code and I think our court did in the City of Charleston suit as well, provides that, what a lottery is, is the chance for consideration with a prize, so and we’re defining these games to be a lottery game, which we have to have those elements: it has to be controlled and predominately by chance; it has to be consideration, you know, bet, money, monetary, and then the prize, which would be doubling your money, or whatever, based on whatever odds or the design of the game is. So that is what’s we’re relating to is, the lottery activity of these games, in this state, meeting these three elements is what we assert our proprietary, intellectual property interest against.”

See Appendix II at 2.

Based on the very words of House Judiciary Counsel, it appears that the drafters of the Table Game Act intend “that the intellectual property interest that would be asserted by the State of West Virginia (1) gives the state the exclusive right to operate a game (2) in perpetuity, provided that (3) the game is (i) based predominately on chance, (ii) requires consideration to be paid in order for the player to play it, (iii) pays a prize which exceeds the amount of consideration, and (iv) was illegal to be played in West Virginia before it was subject to the claim by the State of West Virginia of intellectual property rights in the game.” Id.

1. There is no general intellectual property right, “intellectual property” is an umbrella term

Mr. Mann’s analysis of the flawed logic of the legislature begins with an analysis of the definition of “intellectual property.”

“Intellectual Property” is defined in only one court decision addressing an issue involving intellectual property, namely, *In re Patent & Trademark Services, Inc.*, in which the court took judicial notice of a dictionary definition of “intellectual property” by holding that intellectual property is property “that results from original

creative thought such as patents, copyright material and trademarks.”<sup>1</sup> In another case, the court noted the absence of a definition of intellectual property in the relevant federal statute at issue, and, in view of varying definitions of intellectual property from state to state in connection with activities taking place in interstate commerce, concluded that “intellectual property” meant “federal intellectual property.”<sup>2</sup>

Appendix II at 3.

Mr. Mann goes on to note the definitions of “intellectual property” in various federal statutes.

The phrase “intellectual property” is defined in various federal statutes such as follows:

26 USC section 170(m)(9)

(9) Qualified intellectual property

For purposes of this subsection, the term “qualified intellectual property” means property described in subsection (e)(1)(B)(iii) (other than property contributed to or for the use of an organization described in subsection (e)(1)(B)(ii)).

(e) Certain contributions of ordinary income and capital gain property (1)(B) in the case of a charitable contribution—

(iii) of any patent, copyright (other than a copyright described in section 1221 (a)(3) or 1231 (b)(1)(C)), trademark, trade name, trade secret, know-how, software (other than software described in section 197 (e)(3)(A)(i)), or similar property, or applications or registrations of such property, ..

19 USC section 304

In conducting such negotiations, the President shall consult with persons representing diverse interests in the United States in investment.

“(3) The objectives of the United States in any negotiations conducted under subsection (a)(1)(C) to improve the protection of intellectual property rights include—

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<sup>1</sup> “...we take judicial notice of the fact that the phrase “intellectual property” is defined in the Random House compact Unabridged Dictionary (Special Second Edition 1996) as Law. Property that results from original creative thought, as patents, copyright material, and trademarks.” *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537 at 1538 (TTAB 1998)

<sup>2</sup> *Perfect 10 Inc. v. CCBill LLC*, 82 USPQ2d 1161, at 1172 (9<sup>th</sup> Cir. 2007)

“(A) the recognition and adequate protection of intellectual property, including copyrights, patents, process patents, trademarks, mask works, and trade secrets...

11 USC section 101 (35A)

(35A) “intellectual property” means—

- (A) trade secret;
- (B) invention, process, design, or plant protected under title 35;
- (C) patent application;
- (D) plant variety;
- (E) work of authorship protected under title 17; or
- (F) mask work protected under chapter 9 of title 17;...

19 USC section 2411 (d)(3)(F)

F(i) For the purposes of subparagraph (B)(i)(II), adequate and effective protection of intellectual property rights includes adequate and effective means under the laws of the foreign country for persons who are not citizens or nationals of such country to secure, exercise, and enforce rights and enjoy commercial benefits relating to patents, trademarks, copyrights and related rights, mask works, trade secrets, and plant breeder’s rights.

19 USC 2901(b)

(10) Intellectual property

The principal negotiating objectives of the United States regarding intellectual property are—

- (A) to seek the enactment and effective enforcement by foreign countries of laws which—
  - (i) recognize and adequately protect intellectual property, including copyrights, patents, trademarks, semiconductor chip layout designs, and trade secrets...

15 USC Section 6(d)

“(d) Intellectual Property Rights.—This Act does not affect, abrogate, amend, or alter any right in a patent, copyright, semiconductor mask work, trade secret, trade name, trademark, or service mark, under any Federal or State law.

Appendix II at 3-4.

Further, Mr. Mann notes that “[d]ictionary definitions of intellectual property (other than cited above in *In re Patent & Trademark Services*) are mostly non-existent. The phrase is not defined in the Oxford English Dictionary, 1987 Edition, or in Black’s Law Dictionary, Sixth Edition.” Appendix II at 4. The term is defined in the Seventh Edition of Black’s Law Dictionary as:

1. A category of intangible rights protecting commercially valuable products of the human intellect; the category comprises primarily trademark, copyright, and patent rights, but also includes trade-secret rights, publicity rights, moral rights, and rights against unfair competition.
2. A commercially valuable product of the human intellect, in concrete or abstract form, such as copyrightable work, a protectable trademark, a patentable invention, or a trade secret.

Appendix II at 4.

Mr. Mann then cites to Stanford Law Professor Paul Goldstein’s book, *Copyright, Patent, Trademark and Related State Doctrines, Cases and Materials on the Law of Intellectual Property*<sup>3</sup>, wherein, at part One, Intellectual Property Law In Context, Section I, The Nature and Functions of Intellectual Property Law, Professor Goldstein writes:

The principal object of intellectual property law in the United States is to attract private investment to the production of various forms of information. The method employed is a grant of property rights enabling individuals and businesses to appropriate to themselves the value of the information they produce.” He then proceeds to describe patent law, trademark law, copyright law and right of publicity that give celebrities the ability to capture the value of their celebrity in the marketplace. He identifies no specific type of property law as “intellectual property law” and does not define the term.

Appendix II at 5.

Mr. Mann summarizes as follows:

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<sup>3</sup> Revised third edition, by Paul Goldstein, Stella W. and Ira S. Lillick Professor of Law, Stanford University, University Casebook Series, The Foundation Press, Inc. 1993

In short, while there may be some common characteristics across all types of intellectual property (intellectual property is intangible personal property originating from the mind), there is no generalized property right known as “intellectual property right.” Instead, it is an umbrella term that defined only by way of examples of various types of intellectual property, each of which is distinct. Commonly in the United States, the term includes patents, trademarks, copyrights, trade secrets and rights of publicity. These are the types of intellectual property in which an owner can assert exclusive rights against others (as opposed to know-how which is also a form of intellectual property but in which no exclusive rights can be claimed).

Importantly, although there is no generalized intellectual property, each type of property that is intellectual property is unique and well-defined in and of itself. In *Dowling v. United States*, the US Supreme Court stated: “a copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections.”<sup>4</sup> [Emphasis supplied.]

The bill is intended to claim “intellectual property” rights for the State of West Virginia in lottery games and other, known table games of chance played for money. Since there is no intellectual property right in the abstract, this claim of rights must correspond to one or more of the existing types of intellectual property rights.

Appendix II at 5-6.

2. The assertion of exclusive intellectual property rights by the State to prevent operation of certain types of games is a patent-like property right

As previously stated, nowhere in the Table Games Act does the legislature define exactly what type of intellectual property right it is claiming. As discussed above, there is no such thing as a general “intellectual property right.” Therefore, Mr. Mann looked to the discussions before the House to ascertain what type of intellectual property right was being claimed. He notes that “Counsel Altizer, in his responses to questions from the House Judiciary Committee, characterizes the so-called intellectual property right generally and, in that characterization, show it to be patent-like rather than similar to trademark rights, copyrights, or trade secret rights.” Appendix II at 6.

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<sup>4</sup> *Dowling v. United States*, 226 USPQ 529, at 533 (U.S. 1985)

Moreover, by process of elimination, it becomes clear that patent-like rights are the only conceivable type of intellectual property right which could possibly be claimed under the Table Games Act. Id.

As stated by Mr. Mann:

Rights of publicity (and other intellectual property rights sometimes listed in the definitions of intellectual property) simply do not apply to the purported owner of the right in this bill, namely the State of West Virginia.

In addition to rights of publicity and other peripheral intellectual property types, trademark, trade secret and copyrights are easily dismissed as inconsistent with the type of intellectual property right that the bill would give rise to. For example, regardless of the assumption that known games of chance are not legally playable for consideration in West Virginia at the present, these games and their rules of play are still well known; they are not secrets. Thus, there can be no trade secrets in these games on which the State of West Virginia can base its intellectual property claim. Furthermore, there are no trademark rights in the names of these games; the names for these games have been well-known for a long time by the public and are not source-indicating. These names are thus generic terms and not marks (unlike Monopoly or Trivial Pursuit, which are trademarks). Blackjack, for example, is a game and not a brand. Thus, no claim of intellectual property rights can be based on trademark law.

Also, copyrights do not apply to procedures, methods or ideas but rather only the expression of those ideas, such as an original game board design or the style in which the rules of play are written.<sup>5</sup> In addition, copyrights are given for original works of authorship and there is no indication that the State of West Virginia is claiming that it is the author (originator) of the game boards, the rules of instruction, the game pieces or any related graphics associated with these table games. Moreover, once someone purchases a game, the owners of the copyrights in the game's copyrightable subject matter do not have the authority to prohibit playing of the games themselves for money.<sup>6</sup>

Appendix II at 6-7.

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<sup>5</sup> (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work. 17 USC Section 102

<sup>6</sup> The owner of copyrights can prohibit the "public performance" of a work of authorship under 17 USC section 106 but games themselves are not works of authorship under 17 USC section 102 so playing a table game in public or at a public facility is not an infringement of the copyright owner's rights in the works of authorship.

Mr. Mann goes on to describe how patent rights, as opposed to the other intellectual property rights discussed above, are most similar to the intellectual property rights asserted in the Table Games Act.

Patent rights, on the other hand, provide exclusive rights similar to those in the bill. The rights in the bill would allow the owner of the right to exclude (and therefore, to license) others to use game hardware in accordance with rules of play. Patent rights allow the owner the exclusive right to make, use, sell, offer to sell, and import for sale the patented invention.<sup>7</sup> A patent is granted for useful machines, articles of manufacture, compositions of matter and methods for making and using these.<sup>8</sup> A deck of cards, a roulette wheel, and a game board are all articles of manufacture; a slot machine is a machine. A card game is a method of using a deck of cards. A card game and other games of chance involving rules and any associated game equipment are clearly patentable subject matter and may be patented if they meet the tests of novelty and non-obviousness in view of the prior art<sup>9</sup>. Indeed many such games are patented. The US Patent and Trademark Office maintains a classification system that includes several classes for game inventions such as class 473, the description of which is attached. An example of a patented game of chance is US 7,204,488, for an Alphabetic Roulette Wheel, a copy of which is attached. The owner of this patent has the right to exclude others from playing this game in the US. He can use those rights to license others to conduct the playing of the game in the US.

Appendix II at 7.

Although patent rights are most similar to the type of intellectual property rights claimed by the Table Games Act, said asserted rights simply do not meet the elements necessary for patent protection. As stated by Mr. Mann:

In order to have patent rights in a game, the patent owner must have applied for a

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<sup>7</sup> 35 USC section 271(a) Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.

<sup>8</sup> 35 USC section 101 Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

<sup>9</sup> 35 USC section 102 and 103

patent<sup>10</sup> and must believe he or she is the inventor of that game in order to be able to file that application. An oath or declaration is required before the application is filed in which the applicant states that he believes himself to be the sole and original inventor<sup>11</sup>.

Here, of course, with table games decades old, perhaps millennia old, there are no currently-valid patent rights on known games of chance such as poker, blackjack, roulette and baccarat. A check of issued patents and published patent applications reveals no patents on games of chance owned by the State of West Virginia.<sup>12</sup>

Appendix II at 7-8.

The result of Mr. Mann's analysis, of course, indicates that the State of West Virginia simply cannot assert an ownership interest in any intellectual property right, should such an intellectual property right even exist, allegedly derived from the Table Games Act.

3. The intellectual property right asserted by the Table Games Act would be preempted under the Supremacy Clause as inconsistent with Federal Patent law

Finally, Mr. Mann concludes that any alleged intellectual property right claimed by the State of West Virginia via the Table Games Act would be preempted as inconsistent with Federal Patent law.

Pre-emption of state law in view of federal law takes several forms. Congress may expressly pre-empt inconsistent state law; Congress may "occupy a given field" and thus pre-empt state law in the field; and when compliance with both state law and federal law is impossible, the conflicting state law is pre-empted. Whatever the form

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<sup>10</sup> 35 USC section 111 (a) In General.—

(1) Written application.— An application for patent shall be made, or authorized to be made, by the inventor, except as otherwise provided in this title, in writing to the Director.

(2) Contents.— Such application shall include—

(A) a specification as prescribed by section 112 of this title;

(B) a drawing as prescribed by section 113 of this title; and

(C) an oath by the applicant as prescribed by section 115 of this title.

<sup>11</sup> 35 USC Section 115 The applicant shall make oath that he believes himself to be the original and first inventor of the process, machine, manufacture, or composition of matter, or improvement thereof, for which he solicits a patent;

<sup>12</sup> The University of West Virginia owns two issued patents both related to instrumented anatomy for research.

of pre-emption, state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.<sup>13</sup>

Article I, §8, cl. 8, of the Constitution give Congress the power “[t]o pomote [sic] the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Congress established the U S Patent and Trademark Office and the laws governing patents at 35 USC Section 100 et seq.

Patent-like intellectual property rights granted by state law are pre-empted by the Supremacy Clause of the US Constitution.<sup>14</sup> In *Bonito Boats*, the State of Florida sought to prevent unfair competition among boat builders who copied boat hull designs of competitors by a direct molding process. The inventors of the original boat hull designs did not have patents on their designs and the designs were sold in commerce in some cases for several years prior to being copied. The state law would have prevented this form of copying for an unlimited number of years by making it unlawful to knowingly sell a boat with a hull duplicated in accordance with the direct molding process. The US Supreme Court found that the state law interfered with the careful balance achieved by the patent laws passed by Congress particularly since it gave exclusive rights to inventions that had entered the public domain according to federal law. It noted that the patent laws force inventors to choose between applying for a patent for their inventions or dedication of the invention to the public at large; i.e., to the public domain. According to the court:

The attractiveness of such a bargain, and its effectiveness in inducing creative effort and disclosure of the results of that effort, depend almost entirely on a backdrop of free competition in the exploitation of unpatented designs and innovations....State law protection for techniques and designs whose disclosure has already been induced by market rewards may conflict with the very purpose of the patent laws by decreasing the range of ideas available as the building blocks of further innovation. The offer of federal protection from competitive exploitation of intellectual property would be rendered meaningless in a world where substantially similar state law protections were readily available. To a limited extent, the federal patent laws must determine not only what is protected, but also *what is free for all to*

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<sup>13</sup> *University of Colorado Foundation Inc., v. American Cyanamid Co.*, 68 USPQ2d 1120, at 1125 (Fed. Cir. 2003)

<sup>14</sup> *Bonito Boats Inc. v. Thunder Craft Boats, Inc.* 9 USPQ2d 1847 (U. S. 1989)

use.<sup>15</sup> [Emphasis supplied.]

Importantly in the present context, the U S Supreme Court went on to say that “publicly known design and utilitarian ideas which were unprotected by patent occupied much the same position as the subject matter of an expired patent,” that is, they are in the public domain and available for anyone to use.

That there is a conflict between the West Virginia bill and US Patent laws is clear from the foregoing but also clear from the following example. Suppose the owner of newly issued US Patent 7,204,488 for an alphabetic roulette wheel wishes to license someone in West Virginia to provide such a game for play in the state for consideration. Assuming no other impediment to the licensee existed (such as the lack of a business license, for example), who would have the exclusive right to license the alphabet roulette game for such purpose in West Virginia: the State of West Virginia or the patent owner? The bill would purport give exclusive rights to the state, divesting the patent owner of rights granted by the US government.

The court in *Bonito Boats* concluded that “allowing states to create patent-like rights in various products in public circulation would lead to administrative problems of no small dimension.”<sup>16</sup> It described the fact that the public knows what is patented and what is not based on the process of getting a patent, the duration of patents and patent marking requirements. There are no patent rights until the patent issues and, once it expires, the patent rights expire and the invention is unprotected and available to all to copy and use. The Florida statute limited the ability of the public to exploit otherwise unprotected ideas, and that “the states are simply not free in this regard to offer equivalent protections to ideas which Congress has determined should belong to all to copy and use.” The Florida statute is “aimed directly at the promotion of intellectual [property] creation by substantially restricting the public’s ability to exploit ideas which the patent system mandates shall be free for all to use...It thus enters a field of regulation which the patent laws have reserved to Congress.”<sup>17</sup>

Under the Supremacy Clause of the US Constitution<sup>18</sup>, state law that conflicts with federal law is preempted and thus without effect.<sup>19</sup>

Accordingly, in my opinion, the bill, as explained by the comments of the

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<sup>15</sup> i.b.i.d. at 1852

<sup>16</sup> i.b.i.d. at 1856

<sup>17</sup> i.b.i.d. at 1858

<sup>18</sup> Article VI, paragraph 2

<sup>19</sup> *Bonito Boats*, *supra* at 1859 and *University of Colorado Foundation*, *supra* at 1125

representative of the West Virginia lottery commission, would be preempted by the Supremacy Clause of the US Constitution in view of the US patent laws.

Appendix II at 8-9.

As Mr. Mann has explicitly demonstrated, the State of West Virginia cannot create an intellectual property right in table games; therefore, there is no ownership interest in the declared table games. The statute must fail on constitutional grounds for lack of the required element of “ownership.”

This Court in State of West Virginia, ex rel. Cities of Charleston and Huntington, vs W. Va. Economic Development Authority, 214 W. Va. 277, 293 (2003), examined the issue of ownership under the Racetrack Video Lottery Act and the Limited Video Lottery Act and ruled, “[f]inally the lottery commission is considered to own the main logic boards and all erasable, programmable read-only memory chips.”

Under the above analysis, the State must demonstrate ownership of something more than a mere right to license, and it cannot; therefore, West Virginia Code §29-22C-1, *et seq.*, is unconstitutional.

**B. West Virginia Code § 29-22C-1, *et seq.*, “West Virginia Lottery Racetrack Table Games Act,” is unconstitutional because it does not meet the requirements of the West Virginia Constitution, Article VI, Section 36 exception that the State must “operate the lottery” for any lottery to be constitutional.**

1. West Virginia Constitution Article VI, §36 is clear and unambiguous on its face that the State must operate the lottery authorized thereby.

The West Virginia Constitution states in Article VI, § 36 (the “Lottery Amendment”, that:

The legislature shall have no power to authorize lotteries or gift enterprises 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. . . .

The West Virginia Supreme Court of Appeals stated in State ex rel. Forbes v. Caperton, 198 W. Va. 474, 480, 481 S.E.2d 780, 786 (1996) that “[c]lear and unambiguous language is itself the best expression of the framer's intent.” (citing Randolph County Bd. of Ed. v. Adams, 196 W. Va. 9, 467 S.E.2d 150 n.8 (1995)) (citations omitted).

The Lottery Amendment is clear on its face that the State of West Virginia must operate any lottery authorized by said amendment. No where in the West Virginia Constitution does it permit the State to assign the operation of the lottery to a private party and the term “operate” does not allow for such an assignment. Further, nowhere does the West Virginia Constitution provide that an agent of the State of West Virginia may operate the lottery authorized thereby which is exactly what the Table Games Act does. The West Virginia Constitution clearly and unambiguously states that the State of West Virginia must operate any lotteries in this State and the plain meaning of the word “operate” must be applied. The Table Games Act does not provide for the State of West Virginia to operate said lottery, therefore, the Table Games Act is unconstitutional.

2. The Table Games Act is clear and unambiguous on its face that the State of West Virginia is delegating the mandate under the Lottery Amendment that the State of West Virginia must operate any lottery authorized by the Lottery Amendment.

West Virginia Code § 29-22C-3(b)(18) defines “License” as:

Any license applied for or issued by the commission under this article, including, but not limited to:

(A) A license to act as agent of the commission in *operating* West Virginia Lottery table games at a licensed racetrack;

(B) A license to supply a racetrack licensed under this article to *operate* table games with table gaming equipment or services necessary for the operation of table games;

...  
(D) A license to provide management services under a contract to a racetrack licensed under this article to *operate* table games.

(Emphasis added). Further, West Virginia Code § 29-22C-4 states:

In addition to the duties set forth elsewhere in this article . . . the commission shall:

...

(2) Enter into licensing agreements with facilities eligible to *operate* West Virginia Lottery table games for the state, providing criteria and guidelines for preservation of the state's ownership, operation and control interest as provided by general law herein

Finally, West Virginia Code § 29-22C-2(b)(9) states:

[t]he Legislature finds that the granting of licenses pursuant to the provisions of this article while maintaining all ownership rights and exercising control through strict *regulation* of all West Virginia lottery table games authorized by the provisions of this article constitutes an appropriate exercise by the Legislature of the power granted it by the Constitution pursuant to the provisions of section thirty-six, article VI of the Constitution of West Virginia.

(Emphasis added).

“Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.” Syl. pt. 2, Crockett v. Andrews, 153 W. Va. 714, 172 S.E.2d 384 (1970).

The Rhode Island Supreme Court faced a similar analysis upon passage of an act (hereinafter “Rhode Island Act”) that would allow Harrah’s to operate a casino in Rhode Island. The Rhode Island Constitution provides that lotteries are prohibited “except lotteries *operated* by the state.” R.I. CONST. art. 6, § 15 (emphasis added). Under the Rhode Island Act, the Lottery Commission would have the responsibility of “‘licensing, regulating and enforcing the system of casino gaming,’ and ‘supervising all gaming operations.’” In re Advisory Opinion to the Governor (Casino), 856 A.2d 320 (R.I. 2004) (quoting proposed R.I. Gen. Law §§ 41-9.1-4(1) and 41-9.1-5(a)). The Rhode Island Supreme Court concluded that “[c]learly and unambiguously, the Lottery Commission would serve in a regulatory capacity. Equally clearly and unambiguously, the plain language of § 41-9.1-9(a) of the Casino Act, which provides that the proposed casino would be ‘operated by [Harrah’s],’ assigns

Harrah's operational control of the proposed casino." Casino, 856 A.2d at 331 (quoting proposed R.I. Gen. Law § 41-9.1-9(a))

The plain language of the Table Games Act delegates the State of West Virginia's duty to operate any lotteries authorized by the Lottery Amendment to the various licensed racetracks. This delegation is achieved by the Lottery Commission's granting licenses to four racetracks operating in the State of West Virginia (hereinafter "licensed table games operators"). The unambiguous language of the Table Games Act gives the various licensed table games operators the right to "operate" the state lottery authorized by said Act and the State of West Virginia merely retains regulatory control. Therefore, the Table Games Act is unconstitutional because it unambiguously provides for entities, other than the State of West Virginia as required by the Lottery Amendment, to operate the lottery authorized thereby.

3. Applying General Rules of Statutory Construction, the Term "Operate" Means More than Mere Regulatory Control.

To the extent that this Court finds that the word "operate" is ambiguous in the Lottery Amendment, the general rules of statutory construction apply. "[I]f the language of the constitutional provision is ambiguous, then the 'ordinary principles employed in statutory construction must be applied to ascertain such intent.'" Forbes, *supra* (citations omitted). "Furthermore, although this Court is vested with the authority 'to construe, interpret and apply provisions of the Constitution, . . . [it] may not add to, distort or ignore the plain mandates thereof.'" Forbes, 198 W. Va. at 480 (quoting State ex rel. Bagley v. Blankenship, 161 W. Va. 630, 643 (1978)). The West Virginia Supreme Court of Appeals stated in Pauley v. Kelly, 162 W. Va. 672, 699, 255 S.E.2d 859 (1979) that:

There are four traditional methods of judicial definitions of words used in statutes

and constitutions and not specifically defined in them: dictionary definitions current at the time, and those now extant; pronouncements by courts; reliable extra-judicial commentary; and definitions set or [inferable] from debates and proceedings of the bodies that drew the documents.

a. Dictionary Definitions Current at the Time and Pronouncements by Courts

The Rhode Island analysis shows both the dictionary definition of the word operate and a pronouncement by a high court.

In In re Advisory Opinion to the Governor (Casino), 856 A.2d 320 (R.I. 2004) and In re Advisory Opinion to the Governor (Casino II), 885 A.2d 698 (R.I. 2005), the Rhode Island Supreme Court conducted an extensive analysis of what it would require to *operate* a casino. Based on the persuasive authority as given in Rhode Island, the State of West Virginia will not operate the table games under the Table Games Act and the Act is therefore unconstitutional as the term “operate” is commonly understood.

In finding that the Rhode Island Casino Act was unsound, the Rhode Island Supreme Court began with an analysis of the different definitions of “operate” and “regulate.” Casino at 331. According to the Rhode Island Supreme Court, with reliance on Black’s Law Dictionary, “regulate” means “to adjust by rule, method or established mode; to direct by rule or restriction; to subject to governing principles or laws.” Id. at 331 (quoting Black’s Law Dictionary 1286 (6th ed. 1990)). According to the Rhode Island Supreme Court, “operate” means “to perform a function’ and ‘operation’ [is] ‘[e]xertion of power.’” Casino 856 A.2d at 331 (quoting Black’s Law Dictionary 1091, 1092 (6th ed. 1990)). “[R]egulate’ indicates the mere ability to enforce conformance with a given set of rules, the use of the word ‘operate’ denotes control over all aspects of an organization’s functioning.” Casino 856 at 331. The Rhode Island Supreme Court concluded that “operate” means “the power to make decisions about all aspects of the functioning of a business

enterprise.” Casino, 856 A.2d at 331.

The Rhode Island Supreme Court stated,

Although the Lottery Commission would be endowed with a host of powers under the Casino Act, it is clear that Harrah’s would have operational control over the lottery facility. Under the Casino Act, Harrah’s would make day-to-day decisions having to do with the functioning of the proposed casino while the Lottery Commission merely would enforce the applicable regulations.

Casino at 331-32.

In expansion of its analysis of the definition of “operate” versus “regulate,” the Rhode Island Supreme Court cited several examples, in both Casino and Casino II, of the Rhode Island Act which further indicated that, as written, it would be Harrah’s which operated the lottery authorized thereunder and not the State of Rhode Island.

In Casino, the Rhode Island Supreme Court cited the daily revenue of the casino going directly to Harrah’s rather than in trust for the State as an indication that Harrah’s and not the State of Rhode Island would be operating the lottery. Id. at 332. The lottery authorized by the Table Games Act does the exact same thing. Under West Virginia Code § 29-22C-26 the table games operators would be required to submit money to the State once a week. There is no requirement in the Table Games Act that the funds collected by the table games operators be held in trust for the State. Curiously, the State Lottery of West Virginia’s funds from the sale of lottery tickets are held in trust. W. Va. Code §29-22-17(b). The same is true for the funds generated by video lotteries in West Virginia. W. Va. Code §29-22B-1405. That the Table Games Act does not contain the same provision is further evidence that the lottery authorized by the Table Games Act is not operated by the State.

In Casino II the Rhode Island Supreme Court discussed whether the State of Rhode Island

or Harrah's, was given authority to decide what games could be played at the casino under the Rhode Island Act. The Rhode Island Act provided broad power to the casinos over what games could be played in the Rhode Island casinos because the Rhode Island Act allowed Harrah's to essentially implement any game played at any other casino. Id. The Rhode Island Supreme Court ultimately found that the Rhode Island Act gave Harrah's too much control over what games were played at the casino concluding "[t]his is clearly inconsistent with the constitutional requirement that the state have 'the power to make decisions about all aspects or the functioning of [the casino].'" Id. at 704 (quoting Casino, 856 A.2d at 331) (alteration in original).

The Table Games Act gives the State of West Virginia no power to implement or direct what games are actually implemented and played at the facilities owned by the table game operators. The State of West Virginia merely has the power to regulate and approve a list of games to be played. See W. Va. Code §§ 29-22C-4(c) & 29-22C-3(b)(22). The Table Games Act is different from the Rhode Island Act in that in West Virginia the State defines the games from which the licensed table games operators can choose to operate. However, so long as the games operated at a licensed table games operator are from those authorized by West Virginia, West Virginia has no more say in the implementation of those games other than approval of certain rules and regulations.

The Table Games Act allows casinos to implement an "unlimited" number of West Virginia table games so long as the table games operator has a license. W. Va. Code § 29-22C-8(j). The State of West Virginia has absolutely no control over the number of West Virginia table games that are operated by the licensed table games operators. "This is clearly inconsistent with the constitutional requirement that the state have 'the power to make decisions about all aspects or the functioning of [the casino].'" See Casino II, 885 A.2d at 704 (quoting Casino, 856 A.2d at 331)

(alteration in original). In the Limited Video Lottery Act, a licensee is limited as to the number of video lottery terminals it may maintain. See W. Va. Code §§ 29-22B-1101 - 1110. This is further evidence that the State of West Virginia is not operating the lottery authorized by the Table Games Act.

Also, the Rhode Island Act allowed the casino to determine who would receive credit at the casino. Casino II, 885 A.2d 704. The Table Games Act merely allows the State of West Virginia to place “parameters” around the rules for extending credit. W. Va. Code § 29-22C-21(b)(3). However, ultimately, it would be the licensed table games operators, not the State of West Virginia, who determines to whom credit is extended. This, again, indicates that it is the licensed table games operators and not the State of West Virginia that will be operating the lottery authorized by the Table Games Act in West Virginia. Casino II discussed other aspects of the Rhode Island Act that are not applicable to the West Virginia Table Games Act at issue and are not fatal to Petitioners’ analysis.

In further support of Petitioners’ contention that the State of West Virginia will not be operating the table games authorized under the Table Games Act, the Table Games Act provides that the licensed table games operators will have control over the security in the facilities where the licensed table games operators will operate said games. W. Va. Code § 29-22C-10(b)(3). The State will merely enact specifications and requirements under which the security should be implemented.

Also, the Table Games Act provides that

- (a) Notwithstanding anything to the contrary contained elsewhere in this article, a racetrack licensee may, as agent of the commission, in the exercise of its business judgment, determine and establish with the approval of the commission, with respect to West Virginia lottery table games, the following:
  - (1) Minimum and maximum wagers;
  - (2) Advertising and promotional activities, and the offering of any complimentary to a player, subject to the standards provided in section twenty-three of this article and rules of the commission;

- (3) Hours of operation;
- (4) The days during which games may be played; and
- (5) Currency denominations accepted by any mechanical or electronic bill acceptors.

W. Va. Code § 29-22C-21. Further, the licensed table games operators will be responsible for maintaining the records associated with the lottery authorized by the Table Games Act. W. Va. Code § 29-22C-11.

Based upon plain meaning of the term “operate” and the foregoing analysis, the delegation of the operation of the lottery in the Table Games Act does not comply with the clear and unambiguous mandate established by the Lottery Amendment. It is clear that the day-to-day operation of the table games will not be operated by the State but rather be operated by the various licensed table games operators authorized to operate table games under the Table Games Act. Collections of moneys, employment of personnel and actual implementation of the various games will be done directly by the licensed table games operators. See the Table Games Act. The State will only have a *regulatory* presence in the operation of the games in the form of enforcing rules and regulations promulgated by the Table Games Act and later by the West Virginia Lottery Commission.

Throughout the Table Games Act, the Legislature gave the racetracks authority to operate these games. Further evidence that the games are operated by the racetracks and only regulated by the State of West Virginia are all of the provisions which merely require the approval of the Lottery Commission. See W. Va. Code §§ 29-22C-20, 29-22C-21, 29-22C-8(d), 29-22C-8(e)(1) & (2), 29-22C-10(b)(4). The Table Games Act mainly provides parameters within which the licensed table games operators may operate the table games. The main day-to-day control over the operation of the table games will be done by the racetracks and not by the State.

- b. Definitions set or [inferable] from debates and proceedings of the bodies that drew the documents

During the West Virginia House of Delegates House Judiciary Committee meeting held on February 8, 2007, the Counsel for the House Judiciary Committee, Joseph Altizer, stated, “what the state really owns here is the ability to operate the specific games and the operation of the facility associated with those games [the State of West Virginia is] assigning.” West Virginia Amendment to the State Lottery Act: Hearing on HB 2718 Before the House Judiciary Comm. 2007 Leg., 78th Sess. (W. Va. 2007) (statement of Attorney Joseph Altizer, counsel for the House Judiciary Comm.) Attached hereto as Appendix VI. Further, Mr. Altizer stated that he felt that the State could be held liable only if “the operation of one of those games, was conducted in a way that harms somebody when the state owns the right to operate that game.” Id. Mr. Altizer further stated, regarding liability, that the “facility and everything is going to be in the positions because of the ability to conduct those operations under the license.” Id.

Based on these excerpts, it is again clear that the State of West Virginia will not be operating the table games authorized under the Table Games Act. Mr. Altizer clearly said that the State of West Virginia is assigning its right to operate the table games. Also, Mr. Altizer acknowledged that the State of West Virginia could face a certain amount of liability if the licensed table games operator operated the table games in a manner that harmed someone else. The State of West Virginia would face liability not because it operated those games, but because it claims that it *owns* the right to operate the games. Finally, Mr. Altizer, though it is difficult to decipher the final excerpt, essentially stated that the licensed table games operators were going to have their facilities in place due to their license to “conduct those operations.” This is further evidence that the State of West Virginia will not operate the table games authorized under the Table Games Act.

4. The Court Should Give Effect To Every Term in a Statute.

As stated previously, the rules of statutory construction apply to interpretations of ambiguous constitutions. See Forbes, supra. “A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of a statute.” Syl. pt. 2, T. Weston v. Mineral County, 638 S.E.2d 167 (W. Va. 2006) (quoting Syl. pt. 3, Meadows v. Wal-Mart Stores, Inc., 207 W. Va. 203 (1999)). “It is presumed that each word in a statute has a definite meaning and purpose.” T. Weston, 638 S.E.2d at 172 (quoting Syl. pt. 3, United Steelworkers of America, AFL-CIO, CLC v. Tri-State Greyhound Park, 178 W. Va. 729 (1987)) (citations omitted). The Lottery Amendment would not have included a requirement that State lotteries be both operated and regulated by the State if it did not intend it to be so. As previously discussed to “operate” and to “regulate” are vastly different terms. This fact is made more apparent by the fact that the West Virginia Legislature, in 1984, included both terms in the Lottery Amendment. The Lottery Amendment does not allow the State of West Virginia to “operate” by virtue of “regulation” or vice versa. Therefore, this Court must give effect to every word in the Lottery Amendment and require that the State of West Virginia operate any lottery authorized in the State of West Virginia. The Table Games Act has failed to do so, therefore, the Table Games Act is unconstitutional.

The Lottery Amendment is clear and unambiguous on its face in its requirement that the State of West Virginia and not the licensed table games operators must operate any lottery in the State of West Virginia. The Table Games Act is clear and unambiguous on its face that it is the licensed table games operators and not the State of West Virginia which will be operating the lottery authorized by said Act. Further, the rules of statutory construction clearly define the term operate to mean more than mere regulation. The Table Games Act provides for mere regulation rather than

operation. Finally, the West Virginia Legislature would not have include both the words “operate” and “regulate” if it did not mean to give full force and effect to those terms. The State of West Virginia cannot “operate” the lottery authorized by the Table Games Act by virtue of issuing licenses for said operation. Therefore, the Table Games Act is unconstitutional.

**C. West Virginia Code § 29-22C-1, et seq., “West Virginia Lottery Racetrack Table Games Act,” is unconstitutional because table games as authorized by said Act were not contemplated when the amendment to Article VI, Section 36 of the West Virginia Constitution was passed.**

As originally enacted, Article VI, § 36, of the Constitution of the State of West Virginia prohibited lotteries, stating: “the legislature shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this State.” See State ex rel. Cities of Charleston and Huntington v. W. Va. Econ. Dev. Grant Comm., 214 W. Va. 277, 287, 588 S.E.2d 655, 665 (2003). On November 6, 1984, the voters of the State of West Virginia ratified an amendment to Article VI, § 36, allowing the legislature to “authorize lotteries which are regulated, controlled, owned and operated by the State of West Virginia in the manner provided by general law.” Id. (quoting State ex rel. Mountaineer Park v. Polan, 190 W. Va. 276, 438 S.E.2d 308 (1993)) (superceded by statute). Since the 1984 Amendment to Article VI, § 36, the legislature has passed general laws expanding the State run lottery from a “preprinted instant winner type lottery” to an “on-line game” to “racetrack video lottery” to “limited video lottery.” See Mountaineer, supra at 278, W. Va. Code §§ 29-22-9(a), 29-22-9(c), 29-22A-1, et seq., 29-22B-1, et seq. Now the legislature has authorized casino-style table games as the next evolution of state-run lottery. Certainly, as evidenced by the plain language of the Lottery Amendment as well as the attached affidavits of legislators who participated in debate over the Lottery Amendment, casino-style table games were not the type of lottery contemplated by the

electorate of the State of West Virginia when they ratified the Lottery Amendment.

As an initial matter, “[t]he fundamental principle in constitutional construction is that effect must be given to the intent of the framers of such organic law and of the people who ratified an adopted it. . . .” *Mountaineer, supra* at 279. “Simply put, the object of constitutional construction and interpretation is to give effect to the intent of the people in adopting it. *Id.* at 280 (citations omitted). Finally, when the court is called upon to either interpret or construe an exception to a constitutional provision, such exception must be ‘strictly construed and limited to objects fairly within their terms.’” *Id.*

When the issue of amending the State Constitution was put to the voters in 1984, the proposed amendment was summarized on the ballot as follows: “To amend the State Constitution to permit the Legislature to pass law authorizing state operated and controlled lotteries.” *Id.* at 281. Nowhere in the Lottery Amendment are casino-style table games mentioned. Strictly construing the Lottery Amendment, it is clear from its plain language that casino-style table games were not a type of lottery contemplated by the drafters of the Lottery Amendment, or by the voters who ratified the same.<sup>20</sup>

In further support of the proposition that the Lottery Amendment did not contemplate casino-style table games, Petitioners offer the attached affidavits of Betty Crookshanks and William R. Wooten (attached hereto as Appendix III and Appendix IV, respectively). Both affiants were members of the West Virginia Legislature in 1983 when the bill which lead to the Lottery Amendment was passed. Neither Ms. Crookshanks nor Mr. Wooten believe that casino-style table

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<sup>20</sup>Lottery is defined as “a method or raising revenues, esp. state-government revenues, by selling tickets and giving prizes (usu. large cash prizes) to those who hold tickets with winning numbers that are drawn at random.” BLACK’S LAW Dictionary 959 (7th ed. 1999).

games were contemplated or included in the Lottery Amendment. Furthermore, in a 1986 article in the Charleston Gazette, several members of the West Virginia Legislature, including then House Speaker Joseph Albright, and then House Judiciary Chairman (and current U.S. District Court Judge) Robert C. Chambers, were quoted as being of the opinion that casino-style table games were not contemplated by the Lottery Amendment and that another Constitutional amendment would be necessary to authorize such games in West Virginia. A copy of said article is attached hereto as Appendix V.

Additionally, this Court has previously expressed concern about what exactly was intended by the voters when ratifying the Lottery Amendment. In footnote 22 of the Mountaineer case, this Court stated:

While we recognize that the voters, upon ratifying the amendment to article VI, section 36 of the West Virginia Constitution, authorized the legislature to pass laws establishing a state-run lottery, we question whether the voters were approving video lottery operations. There is nothing in the record before us which indicates that electronic video lottery was contemplated or even existed at the time voters approved the lottery amendment in 1984.

Mountaineer, *supra* at n22. As this Court is well aware, the Mountaineer case involved, *inter alia*, the question of whether electronic video lotteries fell within the definition of lotteries under the Lottery Amendment. The Court did not answer that question, however. Rather the Court in Mountaineer held that the Lottery Commission acted without constitutional or statutory authority when it expanded the lottery into video lottery machines. Mountaineer, *supra* at 286.

Subsequent to Mountaineer, the legislature enacted the Racetrack Video Lottery Act, West Virginia Code §§ 29-22A-1, *et seq.*, and the Limited Video Lottery Act, West Virginia Code §§ 29-22B-1, *et seq.* Constitutional challenges to both acts were brought in State ex rel. Cities of Charleston and Huntington v. West Virginia Economic Development Grant Committee, 214 W. Va.

277, 588 S.E.2d 655 (2003). This Court found that the video lottery games authorized by each act fell within the term “lotteries” as contemplated by the Lottery Amendment. Curiously, the Court did not expressly find, on its own, that video lottery games were “lotteries,” rather, it relied on the legislative findings of each act which contained the finding that “limited video lottery games authorized by this article are ‘lotteries’ as that term is commonly understood and as that term is used in West Virginia Constitution, article VI, section thirty-six, the video lottery games authorized by this article being lottery games which utilize advance computer technology.” *Id.* at 291.

Petitioners are mindful that 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.” Randolph County Bd. of Educ. v. Adams, 196 W. Va. 9, 467 S.E.2d 150, 163 (1995). It could be argued, as it was by the proponents of expanding the lottery in the Mountaineer and Cities cases, that casino-style table games are simply the next evolution in state-run lotteries. However, the difference between the new technology which allowed for the advent of video lotteries and the games authorized by the act at issue herein, is that casino-style table games have been in existence for decades and longer. These are not games derived from some new technology. Interestingly, in the legislation subsequent to ratification of the Lottery Amendment, the legislature enacted a statutory provision allowing the Lottery Commission to “proceed with operation of such additional lottery games, including the implementation of games utilizing a variety of existing or future technological advances at the earliest feasible date.” Mountaineer, *supra* at n17 (quoting West Virginia Code § 29-22-9(c)). “The legislature also provided that the Lottery Commission could operate lottery games using ‘electronic computers and electronic computer terminal devices and systems.’” *Id.* Via the above quoted language, the legislature gave themselves the mechanism to

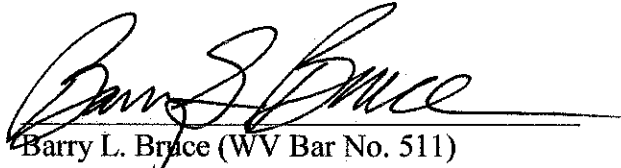
expand into electronically based lotteries. Presumably, the legislators who drafted and approved the Lottery Amendment were aware of the existence of casino-style table games at issue herein at the time said amendment was drafted. It is logical to assume that if expansion of the lottery into casino-style table games was contemplated by these drafters, they would have provided a mechanism for such expansion as well. As it stands, the Lottery Amendment, and the subsequent enacting legislation, are conspicuously silent on the issue of casino-style table games. The silence is deafening.

As evidenced by the plain language of the Lottery Amendment as well as the attached affidavits of legislators who participated in debate over the Lottery Amendment, casino-style table games were not a type of lottery contemplated by the electorate of the State of West Virginia when they ratified the 1984 amendment to Article VI, § 36. As such, casino-style table games are not authorized by the West Virginia Constitution, and the challenge act should be declared unconstitutional.

### CONCLUSION

Based on the foregoing, it is clear that the Table Games Act is unconstitutional. The State of West Virginia will have no ownership interest in the table games at issue as is required by the Lottery Amendment. Further, the Table Games Act provides for entities other than the State of West Virginia to operate said table games, in direct violation of the Lottery Amendment. Finally, the casino-style table games authorized by the Table Games Act are not the type of lottery that was contemplated, or voted on, by the electorate of the State of West Virginia when the Lottery Amendment was ratified. As such, Petitioners respectfully assert that the Table Games Act, West Virginia Code § 29-22C-1, *et seq.*, is unconstitutional, and hereby respectfully request this Court to enter an order declaring the same unconstitutional.

Respectfully submitted,  
PETITIONERS,  
By Counsel



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