

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia, ex rel.
its cities of Charleston and
Huntington and its counties
of Ohio and Kanawha, West Virginia

Petitioners,

v.

West Virginia Economic
Development Authority,
a public corporation,

Respondent,

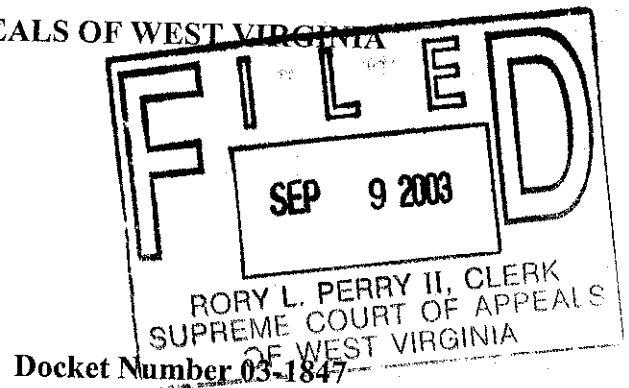
Memorandum of Law of the Affiliated Construction Trades Foundation, a division
of the West Virginia State Building and Construction Trades ACT, AFL-CIO in
Support of Its Motion to Intervene and in the Alternative for Leave of this Court to
File a Brief as Amicus Curiae

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I. Introduction

On or about August 25, 2003 the Petitioners filed a *Motion for Expedited Consideration Due to Exigent Circumstances*, and a *Petition of the State of West Virginia, ex., rel., its Cities of Charleston and Huntington and its Counties of Ohio and Kanawha, West Virginia for Relief by Writ of Mandamus from the August 21, 2003 Refusal by the West Virginia Economic Development Authority to Honor its Non-Discretionary Duty to Issue Revenue Bonds Pursuant to Executive Order 19-03*.

These matters essentially arise out of two actions: the filing on or about August 1, 2003 by Mr. Larry Harless, on behalf of Greenbrier County Coalition Against Gambling Expansion and Cabell County Coalition Against Gambling Expansion, a Notice of Civil Action under the West Virginia Code section 55-17-1 *et seq.*¹; and the refusal of the Respondent, the West Virginia Economic Development Authority ("Authority") to "issue any bonds because it has determined that it is impossible to successfully market any bonds mandated by statute which are to be repaid from the revenue stream from the West Virginia Commission video lottery games" (*Petition* page 2 - 3) given the potential of a lawsuit by Mr. Harless on behalf of his clients.

The Petitioners in the instant matter seek a *Writ of Mandamus* holding that three Acts of the Legislature are Constitutional on their face (the Racetrack Video Lottery Act, W. Va. Code section 29-22A-1 *et seq.*; the Limited Video Lottery Act, W. Va. Code

¹ The *Notice* includes an apparent draft *Complaint* requesting that the Circuit Court of Kanawha County order the West Virginia Lottery Commission, and its Director John Musgrove, to conform their conduct to the legal requirements of law and be enjoined from conducting "video 'gambling'" operations under West Virginia Code sections 29-22A-1 *et seq.* and 29-22B-1 *et seq.* and to fully comply with all legal requirements of any legally permissible lotteries. (See *Petition*, Exhibit A).

section 29-22B-1, *et seq.*; and the State Excess Revenue Fund, W. Va. Code section 29-22-18a(d)) and that this Court issue an Order that the Respondent issue the revenue bonds "as directed by the Governor forthwith." It appears from the *Petition* and its *Memorandum of Law of Relevant Authorities in Support of Petition for a Writ of Mandamus*, that the granting of the *Writ* by this Court will be sufficient to create a market for the bonds at issue - without regard to the Harless lawsuit.

The Affiliated Construction Trades Foundation, a division of the West Virginia State Building and Construction Trades ACT AFL-CIO ("ACT") filed a *Motion of the Affiliated Construction Trades Council a division of the West Virginia State Building and Construction Trades ACT, AFL-CIO to Intervene or in the Alternative for Leave of this Court to File a Brief as an Amicus Curiae*. This is ACT's *Memorandum of Law in Support* of that *Motion*.

II. Argument

ACT will briefly address the following issues.

- ACT Should be Permitted to Intervene Pursuant to Rule 22 of the West Virginia Rules of Appellate Procedure or In the Alternative ACT Should be Permitted to file a Brief as Amicus Curiae Pursuant to Rule 19 of the West Virginia Rules of Civil Procedure

- A Writ of Mandamus is the Proper Vehicle for Considering the Constitutionality of the Act at Issue Even in the Context of a "Friendly" Lawsuit

Of course, should the Court Grant ACT's *Motion*, ACT is prepared to fully Brief the issues raised by the *Petition* in accordance with any schedule Ordered by this Court.

A. ACT Should be Permitted to Intervene Pursuant to Rule 22 of the West Virginia Rules of Appellate Procedure or In the Alternative ACT Should be Permitted to file a Brief as Amicus Curiae Pursuant to Rule 19 of the West Virginia Rules of Civil Procedure

As this Court is well aware, Rule 22 of the West Virginia Rules of Appellate Procedure provides, in relevant part, that "anyone shall be permitted to intervene in an original jurisdiction proceeding before this Court....only when... (2) the representation of the applicant's interest by the existing parties is or may be inadequate and the applicant is or may be bound by judgment in this action."

As discussed briefly in the attached *Motion* by ACT, the Petitioner's interest in this matter may overlap with that of ACT - both are interested in economic development. However, the interests of ACT and the impact on ACT and its members are broader than those represented by the Petitioners in that ACT's members reside and work in all of this State's counties and in surrounding areas and therefore the impact on ACT and its members is state-wide and encompasses all of the certified projects. In addition, ACT can bring a perspective to these matters that may not be adequately represented by the Petitioners - the interest of the working men and women of this State who are seeking employment and who risk being denied employment at certified projects.

Rule 22 also provides that in matters in which neither the underlying statute involved confers an unconditional right to intervene or in which the applicant is not bound by the outcome or where the applicant interest may be represented by existing parties, "Intervention may be permitted in other cases in the discretion of the Supreme Court." Given the importance of the issues raised in the *Petition* for this State, its residents and the members of ACT, the Court would benefit from a broad range of perspectives on the issues before it. ACT, therefore, urges this Court to use its discretion to permit ACT to intervene in this matter.

In the alternative ACT urges this Court to permit ACT to file a brief as *amicus curiae* pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure. Rule 19 provides, in relevant part, that a "brief of an amicus curiae may be filed by leave of the Court granted on motion" and shall "identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable." Due to the interests and perspective of ACT and the potential impact on its members, as discussed above, ACT urges this Court, in the alternative, to permit it to file a brief as *amicus curiae*. As the Court is aware, it granted a similar request by ACT during the Court's consideration of related matters in *State of West Virginia ex rel. West Virginia Citizen Action Group v. West Virginia Economic Development Grant Committee, et al*, W.Va., 580 S.E.2d 869 (2003). ACT urges this Court to do so again.

B. A Writ of Mandamus is the Proper Vehicle for Considering the Constitutionality of the Act at Issue Even in the Context of a "Friendly" Lawsuit

The Petitioners urge this Court to undertake expedited consideration of this matter, issue an expedited Scheduling Order and to issue an Order to Show Cause to certain entities pursuant to its *Petition for a Writ of Mandamus*. ACT generally concurs with the position of the Petitioners and will not take the Court's time to repeat or rephrase the arguments here.

ACT would, however, urge this Court to consider, should it look to an additional basis on which to review this matter, that it has long recognized that mandamus is an appropriate vehicle for it to consider what are essentially advisory opinions or friendly

lawsuits - in lawsuits such as the instant matter² - including, importantly, situations concerning the issues surrounding the marketing of bonds.

This Court, in 1999, in *State of West Virginia ex rel. V. Honorable Cecil H. Underwood et al.*, 206 W.Va. 258, 263, 524 S.E.2d 179, 184 quoted from and in essence renewed its 1976 holding in *Alsop v. McCartney*, 159 W.Va. 829, 834-35, 228 S.E.2d 278, 281 as follows:

Experience dictates that there are occasions on which courts must undertake something in the nature of advisory opinions. We have done this in cases involving elections because of the expense attendant upon campaigns and the deleterious effect on representative government which uncertainty in elections causes. State ex rel. Maloney v. McCartney, W.Va., 223 S.E.2d 607 (1976). Similarly we have rendered essentially advisory opinions when it was necessary to permit bond counsel to authorize the marketing of bonds for public authorities. State ex rel. City of Charleston v. Coghill, W.Va., 207 S.E.2d 113 (1973)³. The need for certainty before the investment of enormous amounts of human effort and before the investment of vast sums of money has led us to an Ad hoc reappraisal of the common law requirement of a true adversary 'case or controversy' as a condition precedent to court review.⁴

² In this regard ACT notes that the Petitioners in essence argue that the instant case is not one where the *Alsop* line of cases need be followed. (*Memorandum* at page 7). Instead, Petitioners argue that in the instant matter they meet the three pronged test for the issuance of a Writ of Mandamus. ACT presents this argument as an additional and/or an alternative basis on which this Court could review this matter.

³ In *Charleston*, this Court was presented with a situation in which a Clerk of the City of Charleston refused to publish a notice inviting proposals in purchasing or leasing space in certain proposed off-street parking. This Court stated (at 115, 878-879):

The purpose of this litigation is to test the validity under the State and Federal Constitutions of the enabling legislation, Code, 8-16-4a, in order to facilitate the preparation of plans and orderly financing for a project in Charleston. In similar cases this Court has permitted an action in mandamus to be used as a vehicle for testing the constitutionality of a statute. *State ex rel. State Building Commission v. Moore*, W.Va., 184 S.E.2d 94 (1971); *State ex rel. County Court v. Demus*, 148 W.Va. 398, 135 S.E.2d 352 (1964); *State ex rel. County Court v. Bane*, 148 W.Va. 392, 135 S.E.2d 349 (1964).

⁴ In her dissenting opinion in *Frantz v. Palmer*, 211 W.Va. 188, 564 S.E.2d 398 (2001) Justice Davis discusses the history of this Court's rulings regarding advisory or friendly lawsuits. It is worth noting in this regard that the Court's and its Justices' stated concerns regarding undertaking such lawsuits, at least in part, are based on whether the matter before it involved a hypothetical. (*see Charleston, supra*, Haden. J. dissenting; *State of West Virginia ex rel. ACF Industries, Inc. v. Vieweg*, 204 W. Va. 525, 533 n. 13, 514 S.E.2d 176, 184 n. 13 (1999)) or academic dispute (*Mainella v. Board of Trustees of Policemen's Pension or Relief Fund of the City of Fairmont*, 126 W.Va. 183, 185-186, 27 S.E. 486, 487-488 (1943)). The issues

This Court, in *Alsop*, goes on to state that, "it must appear conclusively that every issue which could be raised in a proceeding to settle rights was raised." The Court can ensure that all issues are raised by permitting parties, such as ACT, to intervene, thereby obtaining the broadest possible number of issues and perspectives thereon before the Court.

III. Conclusion

It has long been the law of this State that Acts of the Legislature are always presumed to be constitutional and that the Courts will read legislation in any reasonable way to find it constitutional. It is also the law that potential or actual unconstitutional actions or applications of a public entity will not be upheld simply because the legislation itself meets the constitutional standard.

For example in *Charleston, supra* 118, 883-883, this Court stated:

Acts of the Legislature are always presumed to be constitutional, and this Court will interpret legislation in any reasonable way which will sustain its constitutionality. State ex rel. West Virginia Housing Development Fund, *Supra*⁵. The fact that an act is constitutional on its face does not mean that under color of its authority, a municipality may do things that are unconstitutional.

That is, in large part, the distinction between the issues brought to this Court by way of this *Petition*, and those that may make their way here by way of Mr. Harless' potential lawsuit. The Petitioners ask this Court to review the statutes at issue and to determine if the Racetrack Video Lottery Act, W.Va. Code section 29-22A-1 *et seq.* and

brought to this Court by the Petitioners are in no way hypothetical or academic; they are matters that involved real funds, real projects and real jobs.

⁵ *State ex rel. West Virginia Housing Development Fund v. Copenhaver*, 153 W.Va. 636, 171 S.E. 2d 545 (1969).

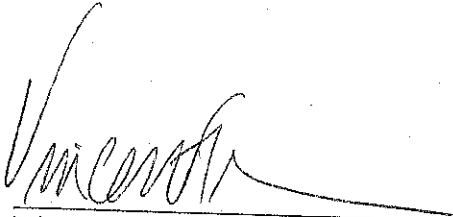
the Limited Video Lottery Act., W.Va. Code section 29-22B-1 *et seq.* are constitutional on their face. They further ask this Court to determine if the State Excess Lottery Fund created by W.Va. Code section 29-22-18a (d) is constitutional. The issues raised by the proposed lawsuit by Mr. Harless concern whether the actions by the West Virginia Lottery Commission and its Director conform with the law of this State (proposed Counts 1, 3, 4, 5, 6, 8, and 10) or with the State's Constitution (proposed Counts 1 and 5). The proposed lawsuit also raises an issue of Constitutional interpretation (Count 2). Even proposed Count 7 (paraphrased by the Petitioners on page 2 of their *Memorandum*) questions whether the video lotteries conducted pursuant to the laws at issue are lotteries or are conducted in a manner in which they are "owned, operated, controlled and regulated" by the State of West Virginia as required by Article VI section 36 of the Constitution of the State of West Virginia.

This Court then, should it accept the *Petition*, could consider the constitutionality of the statutes raised therein, on an expedited basis, thereby setting the framework in which the Authority would act and not reach the issues that may be raised by Mr. Harless on behalf of the potential Plaintiffs included in his notice.

ACT is a labor organization that has a direct interest in the issue brought to this Court by the instant matter. Its interest is not academic but based on real jobs for real citizens of this State. The issues raised by the Petitioners are of critical importance to ACT and its members. ACT, therefore, respectfully requests that this Court accept the *Petition*, Grant its Motion to Intervene and consider the *Petition* on an expedited basis.

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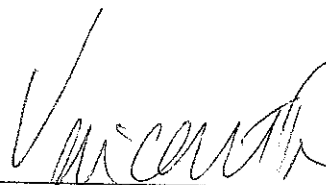
CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that service of **Motion of the Affiliated Construction Trades Foundation, a division of the West Virginia State Building and Construction Trades ACT, AFL-CIO to Intervene or in the Alternative For Leave of This Court to File a Brief as Amicus Curiae, and Brief of the Affiliated Construction Trades Foundation as an Amicus Curiae** have been made by depositing true and exact copies thereof in the U.S. Mail, postage pre-paid on September 9, 2003 to the following:

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