

CONSOLIDATED
DOCKET NOS. 31540 and 31541

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,

Docket No. 31540

v.

WEST VIRGINIA ECONOMIC
DEVELOPMENT AUTHORITY,
a public corporation,

Respondent.

AND

STATE OF WEST VIRGINIA EX REL.
REV. JIM LEWIS and JOHN COONEY

Petitioners,

Docket No. 31541

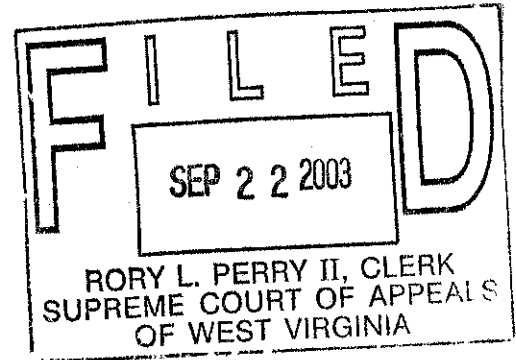
v.

WEST VIRGINIA ECONOMIC DEVELOPMENT
GRANT COMMITTEE; WEST VIRGINIA ECONOMIC
DEVELOPMENT AUTHORITY; CITY OF CHARLESTON;
KANAWHA COUNTY COMMISSION; CITY OF
HUNTINGTON; AND OHIO COUNTY COMMISSION,

Respondents.

MOTION OF SCHOOL BUILDING AUTHORITY OF WEST VIRGINIA
FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The School Building Authority of West Virginia (the "School Building Authority" or "Authority"), by and through counsel, respectfully moves this Honorable Court for leave to file an amicus curiae brief in these consolidated mandamus proceedings because these proceedings directly affect the School Building Authority's revenues and its public mission in support of modern and



efficient elementary and secondary school facilities throughout West Virginia. As more fully summarized below, these proceedings inter alia raise constitutional challenges to limited video lottery proceeds obtained by the West Virginia Lottery Commission (the "Lottery Commission") under the Limited Video Lottery Act, W.Va. Code §29-22B-1 et seq. (The "Limited Video Lottery Act"). For Fiscal Years 2002, 2003 and 2004, the Legislature appropriated up to \$20,000,000 (\$20 Million) annually of such limited video lottery proceeds to the School Building Authority for what is sometimes referred to as the Authority's "pay-as-you-go" school construction fund under W. Va. Code §18-9D-6 (the "SBA Pay-As-You-Go School Construction Program").

Thus, if the Limited Video Lottery Act is determined to be unconstitutional, such a determination would directly, adversely and significantly affect and impair the ability of the SBA Pay-As-You-Go School Construction Program. Such a determination therefore would directly, adversely and significantly affect and impair the State's and the School Building Authority's ability to provide a "thorough and efficient system of free schools" as mandated by Article XII, § 1 of the Constitution of West Virginia and by this Honorable Court in various decisions including Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979).

In support of this Motion, and without limitation of its ultimate legal and factual arguments, the School Building Authority by and through counsel states as follows:

1. The School Building Authority was created in 1989 when the Legislature enacted W. Va. Code § 18-9D-1 et seq. (as amended from time to time, the "SBA Enabling Legislation"). The Authority is a public entity that plays a key role in the State's efforts to provide a

"thorough and efficient system of free schools" as mandated by Article XII, § 1 of the Constitution of West Virginia and by Pauley v. Kelly, supra, and related decisions of this Court, by providing funding for modern, efficient elementary and secondary school facilities throughout the State.

2. The SBA Pay-As-You-Go School Construction Program has received an annual appropriation from the Legislature of a portion of the limited video lottery proceeds obtained by the West Virginian Lottery Commission (the "Lottery Commission") under the Limited Video Lottery Act for each of Fiscal Years 2002, 2003 and 2004; and the total amount of limited video lottery proceeds received by the Lottery Commission determines whether the Authority receives the full amount appropriated in any such Fiscal Year.
3. In Fiscal Year 2002, the Authority received \$18,765,000, that is, less than the maximum appropriation of up to \$25 Million. For Fiscal Year 2003, the Authority received the full \$20 million appropriation. For Fiscal Year 2004, the Legislature again has appropriated up to \$20 Million, and, as noted above, whether the Authority receives the full amount will depend on the total amount of limited video lottery proceeds received by the Lottery Commission for the Fiscal Year.
4. These appropriated limited video lottery proceeds were appropriated for Fiscal Year 2002, 2003 and 2004 will total \$58,765,000 assuming the full \$20 Million is received for Fiscal Year 2004, and will build or renovate a substantial number of modern and efficient school facilities for a substantial amount of students attending public schools in West Virginia.

5. These consolidated mandamus proceedings raise the issue of whether the Limited Video Lottery Act is constitutional on its face "as a lottery which is regulated, operated, owned and controlled by the State of West Virginia, in accordance with Article VI, §36 of the West Virginia Constitution". See, e.g., Petition of State of West Virginia Ex Rel. Its Cities of Charleston and Huntington and Its Counties of Ohio and Kanawha, West Virginia, filed in Docket No. 31540 (the "Petition in Docket No. 31540"), at page 2.
6. These consolidated proceedings also raise the constitutional issue of whether the State excess lottery revenue fund created by West Virginia Code §29-22-18a, as amended, "is constitutional because it does not violate the separation of powers of the West Virginia Constitution and it does not improperly delegate the Legislature's powers to an administrative agency." (See Petition in Docket No. 31540, at page 3.)
7. If the Limited Video Lottery Act or the State excess lottery revenue fund is deemed to be unconstitutional in these proceedings, or both, such determination would have a direct, significant and adverse effect on the School Building Authority.
8. In turn, such a determination of unconstitutionality would directly and adversely affect and impair the ability of the State of West Virginia to fulfill its duties under the West Virginia Constitution to provide the children of the State of West Virginia with a "thorough and efficient" education as required by Article XII, §1 of the West Virginia Constitution and as mandated by this Court in Pauley v. Kelly, supra

9. Furthermore, if the Limited Video Lottery Act or the State excess lottery revenue fund, or both, were determined to be unconstitutional, there would be at least two additional adverse and significant public consequences because of the adverse impacts on the SBA Pay-As-You-Go School Construction Program. First, that Program creates substantial direct employment in the construction industry in West Virginia, and these construction jobs involve the payment of "prevailing wages". Relatedly, this economic activity from construction has an indirect economic benefit that is significant. These direct and indirect employment and economic benefits of the SBA Pay-As-You-Go School Construction Program would be lost in the event of such a determination of unconstitutionality.
10. In analyzing the significant constitutional questions presented in this case, including those referenced in this Motion, this Honorable Court needs to consider the relationship of these questions to the mandate of Article XII, §1 that the State shall provide a "thorough and efficient" system of free schools), as well as the direct legal and factual considerations that bear on the interpretation of Article are raised by the issues presented.
11. Finally, Rule 19 of the West Virginia Rules of Appellate Procedure specifically provides that the State of West Virginia or "agency" thereof shall have the right to file an amicus curiae brief without leave of the Court. For purposes of this Motion, the School Building Authority should be considered to fall within Rule 19 of the Rules of Appellate Procedure.

Respectfully submitted,

SCHOOL BUILDING AUTHORITY OF
WEST VIRGINIA, by counsel

A handwritten signature in cursive script, appearing to read "Roger D. Hunter", written over a horizontal line.

Roger D. Hunter (WVSB#1828)

MEELY & HUNTER

159 Summers Street

Charleston, WV 25301-2134

Telephone (304) 343-6500

Facsimile (304) 343-6528

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel. Cities of Charleston
And Huntington and Its Counties of Ohio and Kanawha,
West Virginia,

Petitioners

v.

Docket No. 31540

West Virginia Economic Development Authority,
Respondent

AND

State of West Virginia ex rel. Rev. Jim Lewis
and John Cooney,

Petitioners

v.

Docket No. 31541

West Virginia Economic Development Grant Committee;
West Virginia Economic Development Authority; City of
Charleston; Kanawha County Commission; City of Huntington;
and Ohio County Commission,

Respondents

Counsel for Petitioners in Docket No. 31541:

Larry Harless, Esq.
Route #2, Box 186C
Cottageville, WV 25239

CERTIFICATE OF SERVICE

I, Roger D. Hunter, Neely & Hunter, counsel for the School Building Authority of West Virginia, do hereby certify that service of the foregoing "Motion of the School Building Authority of West Virginia for Leave to File an Amicus Curiae Brief" has been made by depositing a true copy of the same in the United States Mail, postage prepaid, addressed to the following counsel (identified this date as the parties to whom service of said Motion should be made, according to the Office of the Clerk, Supreme Court of Appeals of West Virginia) at the following addresses:

Counsel for Petitioners in Docket No. 31540:

Stephen B. Farmer, Esq.
Farmer, Cline & Arnold, PLLC
P.O. Box 3842
Charleston, WV 25338

**Counsel for Respondent West Virginia Economic Development Authority
In Docket No. 31540:**

Silas Taylor, Esq.
Senior Deputy Attorney General
Office of the Attorney General
State Capitol, Room 26E
Charleston, WV 25304

Counsel for Intervenor West Virginia Lottery Commission and John Musgrave:

Thomas R. Goodwin, Esq.
Goodwin & Goodwin, LLP
PO Box 2107
Charleston, WV 25328-2107

Counsel for Petitioners in Docket No. 31541:

Larry Harless, Esq.
Route #2, Box 186C
Cottageville, WV 25239

Counsel for Amicus Curiae Affiliated Construction Trades Foundation, AFL-CIO:

Stuart Calwell, Esq.
The Calwell Practice, PLLC
405 Capitol Street, Suite 607
Charleston, WV 25301

Vincent Trivelli, Esq.
The Calwell Practice, PLLC
178 Chancery Row
Morgantown, WV 26505

Counsel for Amicus Curiae West Virginia Labor Federation:

Thomas P. Maroney, Esq.
608 Virginia Street East
2d Floor
Charleston, WV 25301



Roger D. Hunter, WWSB# 1828
Neely & Hunter
159 Summers Street
Charleston, WV 25301-2134
Telephone (304) 343-6500
Facsimile (304) 343-6528