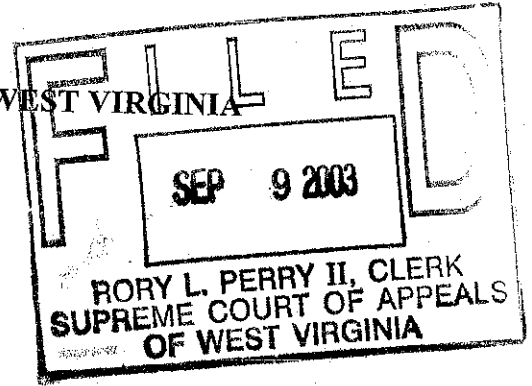


NO. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA
ex rel. REV. JIM LEWIS and
JOHN COONEY,

Petitioners,

vs.

ORIGINAL MANDAMUS

WEST VIRGINIA ECONOMIC
DEVELOPMENT GRANT COMMITTEE,
et al.,

Respondents.

BRIEF OF PETITIONERS IN SUPPORT OF
PETITION FOR WRIT OF MANDAMUS

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**BRIEF OF PETITIONERS IN SUPPORT OF
THEIR PETITION FOR WRIT OF MANDAMUS**

I. STATEMENT OF CASE

This case directly stems from *West Virginia Citizen Action Group v. West Virginia Economic Development Grant Committee*, 580 S.E.2d 569 (W. Va. 2003). Thus, the factual and legal background here are evident to the Court.

Petitioners would, however, refer the Court to the Brief of Petitioners, (Sept. 4, 2002) and petitioners' Petition for Appeal (February 10, 2003) so far as they are consistent with petitioners' present Brief.

II. STATEMENT OF FACTS

8/20/03

Grant winners

The Economic Development Grant Committee voted Wednesday to award \$225.8 million to 50 projects in 27 counties. A pair of projects each in Mingo County and Raleigh County were funded as one. Projects are listed by county:

- ▲ **Barbour**
Belington Industrial Park, \$650,000
- ▲ **Berkeley**
Downtown Martinsburg redevelopment, \$2,750,000
- Eastern WVa. Regional Airport terminal, \$1,266,000
- ▲ **Cabell**
Marshall University biotechnology research park, \$12,500,000
- Pullman Square, downtown Huntington, \$10,600,000
- ▲ **BOGEFI**, a new business, \$990,000
- ▲ **Fayette**
Wolf Creek business-industrial site, \$2,000,000
- ▲ **Greenbrier**
Greenbrier Valley Theater, \$250,000
- ▲ **Hampshire**
Hotel, conference and wellness center, \$5,400,000
- ▲ **Hardy**
Moorefield wastewater treatment plant, \$5,000,000
- Land purchase by local government, \$1,000,000
- ▲ **Harrison**
Charles Pointe conference center, Bridgeport, \$6,000,000
- Clarksburg parking garage, \$4,358,500
- ▲ **Jefferson**
New high school, \$6,000,000
- ▲ **Kanawha**
Charleston baseball park, \$12,000,000
- Clay Center for the Arts and Sciences, \$3,000,000
- Biotechnology business incubator, \$1,500,000
- Expansion of BIDCO business incubator, \$133,000
- ▲ **Lewis**
Stonewall Jackson Resort, \$3,500,000
- New state fire academy at Jackson's Mill, \$2,000,000
- ▲ **Logan**
Chief Logan State Park lodge and recreation center, \$10,000,000
- Man hospital expansion, \$1,000,000

- ▲ **Marion**
I-79 Technology Park expansion, \$14,750,000
- Fairmont parking garage, \$2,000,000
- ▲ **Marshall**
Grand Vue Park construction, improvements, \$2,160,000
- ▲ **Mason**
Point Pleasant Riverfront Park, \$1,200,000
- ▲ **McDowell**
McDowell County Correctional Facility, \$5,200,000
- ▲ **Mercer**
Technology center at Concord College, \$2,000,000
- Upgrades to Bluefield baseball park, \$250,000
- ▲ **Mingo**
Redevelopment authority for two industrial parks, \$4,500,000
- ▲ **Monongalia**
Morgantown public theater and marina, \$13,900,000
- Rockefeller Neurosciences Institute at WVU, \$10,000,000
- Morgantown parking garage, Square at Falling Run, \$5,000,000
- National Biometric Security Project technology development, \$2,300,000
- Chaplin Hill reclaimed mine site, \$1,200,000
- ▲ **Ohio**
Business park anchored by Cabela's, \$35,000,000
- Wheeling Park Commission, expansion of lodge, \$2,500,000
- ▲ **Putnam**
Advantage Valley Partners business park, \$3,228,302
- Development authority business park, \$1,570,000
- Construction, renovation at WV Steel plant, Poca, \$300,000
- Construction of steel building for new business, \$100,000
- ▲ **Raleigh**
X-Quad Commerce Center and Raleigh Memorial Air Industrial Park, \$12,000,000
- ▲ **Randolph**
Tourism developments in Elkins, \$1,500,000
- ▲ **Summers**
Bluestone Dam hydroelectric plant, \$2,500,000
- ▲ **Tucker**
Industrial park infrastructure, \$500,000
- ▲ **Wood**
Electronic Recycling Center for polymer industry, \$4,300,000
- Riverfront Park in Parkersburg, \$3,000,000
- ▲ **Wyoming**
Twin Falls Resort State Park lodge expansion, \$3,000,000

R: retail sales

S: services

E: entertainment

O: no or negligible job creation,

no new tax revenue, and no

economic growth

P: economic benefit to private entities or persons

S, O, P

S, O

S, O

S, O

E, O, P

P

E, O, P

S, O

S, O

P

R, O, P

S, O

S, O, P

S, O, P

P

R, O, P

S, O, P

P

P

P

S, O

III. ARGUMENT

- A. PRIVATE PERSONS AND ENTITIES WHICH DIRECTLY OR INDIRECTLY, IN-KIND OR OTHERWISE, ECONOMICALLY BENEFIT FROM SUCH BOND PROCEEDS MUST BY LOW INTEREST PAY BACK THEIR FINANCIAL EQUIVALENT AS REQUIRED BY THE *W. VA. CODE* § 29-22-18a(d)(9) (2003).

1. The Low-Interest Payback Obligation.

States the *W. Va. Code* § 29-22-18a(d)(9) (2003):

No grant may be awarded to an individual or other private person or entity. Grants may be awarded only to an agency, instrumentality or political subdivision of this state or to an agency or instrumentality of a political subdivision of this state.

The project of an individual or private person or entity may be certified to receive a low-interest loan paid from bond proceeds. The terms and conditions of the loan, including, but not limited to, the rate of interest to be paid and the period of the repayment, shall be determined by the economic development authority after considering all applicable facts and circumstances.

That is, for all funding of projects as may be approved by this Court that economically benefit private persons or entities, such state aid or assistance, direct or indirect, channeled or “laundered” through city halls or county commissions or any instrumentalities of the State or its subdivisions, in the form of nominal or discounted leases or other written or oral contracts, disguised as *gratis* public services or concealed as roundabout future handouts, whatever the form of the private benefit or its timing, and however concealed the device for transfer of private economic benefit from these state funds, the fair, reasonable and “arm’s length equivalent financial value of any such economic benefit to a private person or entity must be

repaid over time to the State, albeit at lower than market interest, as required by the *W. Va. Code* § 29-22-18a(d)(9) (2003).

Please note in this vein that the *W. Va. Code* § 29-22-18a(d)(9) (2003) does not limit the awarding of grant money by the state to the applicant-public grantee, but by its plain terms applies to such a public grantee transferring such public money or its direct or indirect benefit to a private person or entity. “No grant may be awarded” The first grantee may not “award” economic benefits to a second one, except by the obligation that the latter pay back with low interest the financial equivalent, goes the tenor of the statute.

2. **Rent-Free Space, Discounted Leases, etc. = Financial Aid.**

This Court has already conclusively spoken on the identity of a direct monetary award, or grant, with an indirect, in-kind economic benefit. Although the *W. Va. Const.*, Art. XII, § 12, mandates State aid for blind persons, when a statute provided rent-free “vending” space in public buildings through a non-profit corporation for impoverished blind people trying to earn their living by selling snacks, sodas and chewing gum, it was held unconstitutional under the “public purpose” doctrine of the *W. Va. Const.*, Art. X, § 6. *State ex rel. State Bldg. Comm. v. Casey*, 232 S.E.2d 349 (W. Va. 377). Said the Court on this score:

In our opinion, providing space in a building to be used without cost is as much a grant of credit as setting up a fund to be drawn on.

It is obvious that the statute providing for rent-free use of State property ... is an unconstitutional grant of the credit of the State to, or in aid of, the corporation.

(Emp. add.) *Id.* at 355. *In accord: e.g., Brown v. Longiotti*, 420 So.2d 71, 75 (Ala. 1982) (repaid low-interest bonds for K-Mart voided because they “would primarily benefit the individual lessee

through lower rentals”); and *see, e.g., Garisco v. City of Daphne*, 825 So.2d 750 (Ala. 2002) (majority and dissenting opinions: “AIG hoped to induce the City, to subsidize AIG’s commercial project by garnering financial support from the City; this support would allow AIG to lower rental payments by its tenants and would attract ‘quality tenants.’” *Id.* at 756).

3. **W. Va. Code § 29-22-18(a)(d) To Be Construed By Usage And Custom Of Mainstream Law.**

It is suggested that the *W. Va. Code* § 29-22-18a(d)(9) (2003) should be interpreted by settled usage and custom via the broad, perennial mainstream of relevant law which exists here. *Hechler v. McCuskey*, 365 S.E.2d 793 (W. Va. 1987). A long, consistent line of decisions by this Court and almost all other state supreme courts makes clear that public aid for private corporations and persons in the context of economic development must always be repaid by them, albeit at a lower interest rate if they substantially (public benefits greater than public costs) serve the public purpose of overall creating more jobs, economic growth and tax revenues. *See, e.g., Ohio County Comm. v. Samol*, 275 S.E.2d 2 (W. Va. 1980); *State ex rel. County Court v. Demus*, 135 S.E.2d 352 (W. Va. 1964); and *State ex rel. County Court v. Bane*, 135 S.E.2d 349 (W. Va. 1964) and their cited cases.

This virtually universal “payback” obligation of the benefitted private entity is always made explicit in these decisions. For instance, Justice Miller in *Samol, supra*, 275 S.E.2d at 5, notes that:

Many states have some revenue bond financing mechanism whereby the bonds can be issued for funding ... projects designed to benefit the public, to reduce unemployment and increase tax revenues.

Such bonds do not impose any obligation on the issuing authority to redeem the bonds ... but provide that the bonds are to be liquidated from the proceeds of the particular venture. [Emp. add.]

In accord, e.g., Smith v. Industrial Dev. Bd. Of Andalusia, 455 So.2d 839 (Ala. 1984); *Wright v. City of Palmer*, 468 P.2d 326 (Ala. 1984); *Wright v. City of Palmer*, 468 P.2d 326 (Alaska 1970); *Industrial Dev. Auth. Of Pinal Co. V. Nelson*, 109 Ariz. 368, 509 P.2d 705 (1973); *Andres v. First Ark. Dev. Fin. Corp.*, 230 Ark. 594, 324 S.W.2d 97 (1959); *In Re Interrogatory Propounded by Governor*, 814 P.2d 875 (Colo. 1991); *Wilson v. Connecticut Prod. Dev. Corp.*, 167 Conn. 111, 355 A.2d 72 (1974); *Roan v. Connecticut Indus. Bldg. Comm'n*, 150 Conn. 333, 189 a.2d 399 (1963); *In Re Opinion of Justices*, 54 Del. 366, 177 A.2d 205 (1962); *Linscott v. Orange Co. Indus. Dev. Auth.*, 443 So.2d 97 (Fla. 1983); *Nations v. Downtown Dev. Auth. Of Atlanta*, 255 Ga. 324, 338 S.E.2d 240 (1985); *State ex rel. Amemiya v. Anderson*, 56 Haw. 566, 545 P.2d 1175 (1976); *Poter v. Judge*, 112 Ill.App.3d 81, 67 Ill.Dec. 585, 444 N.E.2d 821 (1983); *Hawkins v. City of Greenfield*, 248 Ind. 593, 230 N.E.2d 396 (1967); *Brady v. City of Dubuque*, 495 N.W.2d 701 (Iowa 1993); *Duckworth v. City of Kansas City*, 243 Kan. 386, 758 P.2d 201 (1988); *Hayes v. State Property & Bldgs. Comm'n*, 731 S.W.2d 797 (Ky. 1987); *Farlouis v. LaRock*, 315 So.2d 50 (La.Ct.App.1975); *Common Cause v. State*, 455 A.2d 1 (Me. 1983); *Williams v. Anne Arundel Co.*, 334 Md. 109, 638 A.2d 74 (1994); *Reyes v. Prince George's Co.*, 281 Md. 279, 380 A.2d 12 (1977); *Opinion of the Justice to the House of Representatives*, 368 Mass. 880, 335 N.E.2d 362 (1975); *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981); *City of Gaylord v. Beckett*, 378 Mich. 273, 144 N.W.2d 460 (1966); *Minnesota Energy & Econ. Dev. Auth. v. Printy*, 351 N.W.2d 39

(Minn. 1984); *Board of Supervisors of Lamar Co. v. Hattiesburg Coca-Cola Bottling Co.*, 448 So.2d 917 (Miss. 1984); *State ex rel. Wagner v. St. Louis Co. Port Auth.*, 604 S.W.2d 592 (Mo. 1980); *Fickes v. Missoula Co.*, 155 Mont. 258, 470 P.2d 287 (1970); *Chase v. Douglas Co.*, 195 Neb. 838, 241 N.W.2d 334 (1976); *State ex rel. Brennan v. Bowman*, 89 Nev. 330, 512 P.2d 1321 (1973); *Opinion of the Justices*, 112 N.H. 42, 288 A.2d 697 (1972); *Roe v. Kervick*, 42 N.J. 191, 199 A.2d 834 (1964); *Kennecott Copper Corp. v. Town of Hurley*, 84 N.M. 743, 507 P.2d 1074 (1973); *Village of Deming v. Hosdreg Co.*, 62 N.M. 18, 303 P.2d 920 (1956); *Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d 478, 335 N.E.2d 327, 373 N.Y.S.2d 112, *appeal dismissed*, 423 U.S. 1010, 96 S.Ct. 440, 46 L.Ed.2d 381 (1975); *Gripentrog v. City of Wahpeton*, 126 N.W.2d 230 (N.D. 1964); *Stark Co. v. Ferguson*, 2 Ohio App.3d 72, 440 N.E.2d 816 (1981); *Burkhardt v. City of Enid*, 771 P.2d 608 (Okla. 1989); *Carruthers v. Port of Astoria*, 249 Or. 329, 438 P.2d 725 (1968); *Basehore v. Hampden Indus. Dev. Auth.*, 433 Pa. 40, 248 A.2d 212 (1968); *In Re Advisory Opinion to Governor*, 113 R.I. 586, 324 A.2d 641 (1974); *Nichols v. South Carolina Research Auth.*, 290 S.C. 415, 351 S.E.2d 155 (1986); *Clem. v. City of Yankton*, 83 S.D. 386, 160 N.W.2d 125 (1968); *West v. Industrial Dev. Bd. Of Nashville*, 206 Tenn. 154, 332 S.W.2d 201 (1960); *Atwood v. Willacy Co. Navigation Dist.*, 271 S.W.2d 137 (Tex.Ct.App. 1954); *appeal dismissed*, 350 U.S. 804, 76 S.Ct. 66, 100 L.Ed. 723 (1955); *Utah Technology Fin. Corp. v. Wilkinson*, 723 P.2d 406 (Utah 1986); *Vermont Home Mortgage Credit Agency v. Montpelier Nat'l Bank*, 128 Vt. 272, 262 A.2d 445 (1970); *City of Charlottesville v. DeHaan*, 228 Va. 578, 323 S.E.2d 131 (1984); *Mayor of Lexington v. Industrial Dev. Auth. Of Rockbridge Co.*, 221 Va. 865, 275 S.E.2d 888 (1981); *State ex rel. Hammermill Paper Co. v. LaPlante*, 58 Wis.2d 32, 205 N.W.2d 784 (1973); *Powers v. City of Cheyenne*, 435 P.2d 448 (Wyo. 1967).

4. **Professor Sutherland's Strong Maxims.**

As well, Professor Sutherland has some instructive counsel on whether the *W. Va. Code* § 29-22-18a(d) (2003) should be expansively or restrictively construed. "Where a grant is made at the request of the grantee, it is strictly construed against him.... All doubts are resolved against the grantee." Sutherland, *STATUTORY CONSTRUCTION*, Sec. 63.03 (5th Ed. 1992). Public grants to private persons "result in an unfair advantage to the grantee. For that reason, these grants should be narrowly restricted in favor of the public.... The accepted policy has been . . . to regard all such grants with extreme distrust so that in all its dealings the government will not suffer loss." *Id.*, Sec. 63.04.

Professor Sutherland as well lays it down that:

It is an established principle that legislative grants of ... immunities or benefits should be construed strictly against the claims of the grantee

With respect to rights or benefits granted to private parties, as in the case of ... monetary benefits of any kind, the policy is rooted in mistrust of the practice of government in granting special privileges *Sutherland, Statutory Construction*, § 63.02.

The general rule ... is that statutes granting corporate ... privileges and immunities are strictly interpreted in favor of the public and against the corporation.... *Sutherland, supra*, § 64.05.

In the present context, of course, Professor Sutherland's rather strongly limned maxims mean that the *W. Va. Code* § 29-22-18a(d)(9) (2003) must be construed so that low-interest loans (themselves of substantial benefit) are favored over outright, unrepaid grants to private persons and entities.

5. Avoidance of Unjust and Unconstitutional Results.

Besides the maxim of avoiding unjust or absurd statutory results, *Taylor-Hurley v. Mingo County Board of Education*, 551 S.E.2d 702 (W. Va. 2001), there is the palpable one that a statute should be construed, if possible, to sustain its constitutionality. *Id.* and *SER Simpkins v. Harvey*, 305 S.E.2d 268 (W. Va. 1983). Both of these maxims apply in the present context of numerous small retail, service and entertainment businesses in the Huntington, Charleston, Logan, Beckley, Wheeling, Clarksburg-Fairmont and other regions of the State being effectively slated by the State for economic ruination or extinction due to huge state grants or low-interest loans for the benefit of their much larger competitors, but not to any of them.

This is because all such retail-services-entertainment concerns, large or small, public or private, by sheer definition operate in a fixed, essentially “inelastic” local or regional market which merely reallocates, relocates or shifts around already existing “business,” employment and tax revenues.

For instance, the court in *Burford v. Kroger Co.*, 97-C-1027 (Kan. Co. Cir. Ct. 1997) (J. MacQueen: Memorandum Order) (unappealed) contrasts manufacturing-type activity with commercial-type activity as follows:

[T]he authorities are in general agreement that the use of public revenue bonds to create or enlarge a manufacturing industry which sells its products in a market beyond the geographic confines of the issuing authority returns income from other areas, thus serving to enhance the economy of the community where the bonds are issued.

[Numerous citations omitted] [Emphasis added] *Id.* at 6.

In contrast, public bonds for a "retail enterprise serves little or no public purpose because the business operates in a fixed and essentially inelastic market, creating virtually no new economic activity." [Citations omitted] [Emphasis added] Id.

6. Decisions of Courts in Sister States.

Courts in other states unequivocally concur. Indeed, the South Carolina Supreme Court constitutionally condemned a statute authorizing public revenue bonds to construct a commercial, retail shopping center, for sales of goods and provision of various services in view of the State's ban on grants of public aid or credit to private entities (the same as that of West Virginia) and its public purpose imperatives. *State ex rel. McLeod v. Riley*, 278 S.E.2d 612, 617 (S.C. 1981). Said the court:

The funds here would solve no problems confronted by substantial numbers of the public.... [T]he construction of shopping centers often results in relocation of already existing businesses or importation of national chains to provide services already provided locally.

[Emphasis added] *Id.* In accord: *Ohio County Comm. v. Samol*, 275 S.E.2d 2 (W. Va. 1980) (concurring opinion). *And see, e.g.*, for only a sampling in this vein, David E. Pinsley, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 *U. of Penn. L. Rev.* 265, 308-309 (1963) ("Income from the export of goods . . . to other areas [states] is induced . . . by industry. Manufacturing is a principal form of basic activity . . ., [with] ensuing economic gain."). *See, also*, Mulchay and Guskowski, *The Financing of Corporate Expansion Through Industrial Revenue Bonds*, 57 *Marq. L. Rev.* 201, 207-208 (1974), cited in *Samol, supra*, 275 S.E.2d at 4, n.4 (The authors observe that in Wisconsin, based upon the foregoing rationale, public revenue bonds are not available for "commercial retail enter-

prises"); and see *In re Indenture of Trust*, 437 N.W.2d 430, 435 (Minn. App. 1989), quoting from *City of Pipestone v. Madsen*, 178 N.W.2d 594, 599 (Minn. 1970): The purpose of public revenue bonds "is to prevent . . . unemployment and . . . economic deterioration through industrial growth." [Emphasis added]. In accord: *The Public Purpose of Municipal Financing for Industrial Development*, 70 *Yale L.J.* 789 (1961); and *Note, Legal Limitations on Public Inducements to Industrial Location*, 59 *Col. L. Rev.* 618 (1959).

7. **"Due Process" Violations and Unconstitutional "Takings" Of Properties From Publicly Unsubsidized Retail, Service and Entertainment Enterprises.**

The Alabama Supreme Court as well voided a repaid commercial bond for the retail K-Mart as devoid of any "public purpose" in *Brown v. Longiotti*, 420 So.2d 71 (Ala. 1982). The high court quoted *Smith v. State*, 150 S.E.2d 868 (Ga. 1966), to the effect that under the *U. S. Const.*, Amend. 14, such citizens were denied equal protection, due process of law and unjustly deprived of their monetary properties without compensation for the gratuitous enrichment of a private, commercial enterprise, even though the public bonds were to be fully paid off by the private beneficiary, K-Mart.

Almost certainly, the high Alabama court in *Brown, supra*, was tracking sub silentio the astute concurring opinion in *Samol*, 275 S.E.2d at 9-10:

[T]he West Virginia Constitution, Article III, §§ 9 and 10, provide that property shall not be taken without just compensation.

The private investments of competing businesses made at the going market rate of interest will be . . . confiscated by the State if it subsidizes a new competing commercial, rather than industrial enterprise . . . , when one group of West Virginians seeks to enlist the aid of the State . . . in order to compete against another group of

West Virginia residents who have undertaken all of the risks, expenses, and vexations of the market economy.

[Emphasis added] *Id.* How much more so are the smaller unsubsidized competitors devastated, and the State's citizens prejudiced, when the bonds are not paid off and their proceeds not paid back by the recipient?

That commercial bonds, both directly and indirectly, pit publicly subsidized firms and persons against those not so favored, even to the severe extent of driving the latter to or near economic extinction and personal squalor, is solely due to State action:

[T]he State has moved beyond the sphere of . . . its authority by using its power to help some citizens at the expense of others, rather than promoting genuinely public purposes to benefit the citizenry as a whole.

The State may not use public monies to aid individual interests. . . . That is essentially what occurs [with] tax free bonds.

One class of taxpayers operating in the free market must pay the market rate of interest . . . , while the favored taxpayer, authorized to use tax free bonds for his personal purpose, need pay only a fraction of the market rate because of the tax advantage the investor receives.

[Emphasis added] *Id.* at 9. Here, of course, this huge advantage," if the bond proceeds are not repaid, is not limited to a fraction of the market rate of interest, but rather represents an incredible gift for virtually the enterprise's total investment against which smaller firms cannot possibly compete. (PX-1 & 3: circuit court; and Pet. Updated Exh. 1)

The court in *Kroger, supra*, in its Opinion, pp. 6-7, as well addresses the disastrous and discriminatory evils of "governmental largesse inherent in public revenue bonds" for commercial enterprises:

Where new employment or economic growth results when public revenue bonds are used [for a] retail business, the benefits are almost inevitably the result of giving the funded business a competitive advantage over similar retailers in the area.

[Numerous citations omitted] (Emphasis added)

8. **“More Than Offset The Gains Of Employment ... Intended.”**

The Illinois Supreme Court truly nails this chief and pervasive prejudice to smaller “commercial” competitors like petitioner Cooney in this profound and economically irrefutable conclusion:

In limiting this course of financing to industrial and manufacturing plants, the Legislature might reasonably have determined that the competitive harm suffered by the presence of another local commercial or service business would more than offset the gains of employment and economic development otherwise intended....

[Emphasis added] *Potter v. Judge*, 444 N.E.2d 821, 824 (Ill. 1984), citing and quoting *People ex rel. City of Salem v. McMackin*, 291 N.E.2d 807, 817-18 (Ill. App. 1972).

Please note the Illinois high Court’s careful phrasing: “... more than offset the gains of employment ... intended.” (Emphasis added) This is a cardinal, ineradicable economic reality in the “commercial” sector of the economy which cannot be overstressed. That is, when to the already large competitive advantage of a larger retail, service or entertainment corporation, due to its vastly superior “economy of scale,” is added a huge governmental subsidy in the form of a grant or low-interest loan, the double-barreled effect on smaller firms is devastating to them.

But the permanent negative effect on overall employment is as well devastating to the State’s citizens for decades into the future. For the quantum of customers and

sales or services siphoned off by the publicly subsidized large corporation from its (former or severely weakened) unsubsidized smaller “competitor” can be “handled” and processed with fewer employees than was so for the smaller firm due to the latter’s lesser “economy of scale” and lack of public subsidy.

As the expert witness in *Kroger, supra*, aptly, and accurately, put it as to retail malls or chains, like Kroger:

They essentially do more things with fewer people so that when Kroger builds a store, [it] puts people like Brotherton’s market or Ellie’s Market out of business....

Kroger can only be successful if it manages to achieve economies of scale. Kroger always is able to undersell local stores. That’s why it’s successful. And so everyone who has observed this valley for the last 25 years knows that consistently stores like Kroger’s have put smaller retail stores out of business, and in a number of areas. Not only grocery stores but also small drug stores, along with Kroger’s cooperating in that regard with some of the large drug chains, but the people who sell all of the things that a supermarket had tend to be put out of business.

Therefore, when Kroger builds a store, the inevitable consequence of that is a net reduction in employment. (emp. add.)

Kroger, supra; P.I. Transcript at 30-32.

Consequently – and here is nothing less than a catastrophe for the citizens of this State – the \$150 million or so of their money spent here in the announced name of increased overall employment in the retail-service-entertainment sphere actually is certain – objectively, economically certain – to result in substantially decreased overall employment in this State for decades to come. Thus, these types of projects cannot even meet the relaxed statutory standard “to retain jobs.” *W. Va. Code § 29-22-18a(8)(C)* (2003).

It is, of course, self-evident that an outright, unrepaid grant, or its economic benefit (the same thing) aggravates these losses or curtailments of small businesses, and these extensive and permanent losses of jobs, far more than a low-interest loan to the larger retailer or service provider. Consequently, the *W. Va. Code* § 29-22-18a(d)(9) (2003) must be interpreted and applied to require low-interest private paybacks so as to ameliorate or mitigate these negative economic effects on small businesses and employees, and perhaps save the constitutionality of this huge component of this statutory program which so discriminatorily favors larger firms at the demonstrable expense of smaller ones. *Brown and Smith, supra.*

9. **Low-Interest Paybacks Essential to Avoid or Ameliorate Severe Federal and State Due Process Violations.**

This fundamentally unfair, arbitrary and discriminatory arrangement engineered and funded by the State itself must be held to violate substantive due process under the *U. S. Const.*, Amend. 14, and the *W. Va. Const.*, Art. III, § 10. *Brown and Smith, supra.*

Another dimension of substantive due process violated here is that most of these approved projects, such as retail sales, private and public services, and entertainment, as shown, *supra*, as well as the examples of “public purpose” projects listed in the *W. Va. Code* § 29-22-18a(d)((11)(A)-(K) (2003), are incapable of advancing the legitimate statutory objective of economic development, and thus have no rational relation or connection with that laudable statutory objective. Indeed, many such public subsidies will result in a permanent loss in overall employment, *supra*. Thus is substantive due process thereby violated. *See, e.g., SER Harris v. Calendine*, 233 S.E.2d 318 (W. Va. 1977) and its progeny.

Yet another element of substantive due process violated by the Committee is its denial of the promised statutory benefits such as "job creation" and adequate "wages" and "benefits" to the citizens of this State. *W. Va. Code* § 29-22-18a(8) (2003). The actions of the Committee in approving numerous projects incapable of delivering these statutorily pledged benefits violates substantive due process of law. *SER K.M. v. W. Va. DHHR*, 575 S.E.2d 393, 408 (W. Va. 2002).

10. **Unconstitutional Takings.**

Of course, State action alone through the Committee approving and funding numerous projects with gratuitous confiscatory impacts upon the State-unfunded, smaller firms and persons in the retail sales, services and entertainment sectors is certain to devastate many of them and their owners personally. These effects, of course, are greatly accentuated if the financial equivalent of the private economic benefit is not repaid.

Such confiscation of private properties and monies by this State action without providing the owners just compensation violates the "taking" bars of the *U. S. Const.*, Amend. 14, and of the *W. Va. Const.*, Art. III, §§ 9 and 10. *Brown, Smith, and Samol* concurrence, *supra*.

B. EXTREMELY LOW "COMPENSATION" AND "BENEFITS" VIOLATE THE *W. VA. CODE* § 29-22-18a(d)(8)(C) (2003).

Formal economics aside, surely it may be judicially noticed that retail, service and entertainment concerns pay no or little more than the federal minimum wage of \$5.15 an hour, often with no health insurance and with no or few other employee benefits. It certainly would appear, and it is here alleged, that the numerous approvals of such "projects" thus violate the new

W. Va. Code § 29-22-18a(d)(8)(C) (2003), which required the Committee fairly and rationally to “consider” and ensure adequate employee wages and benefits when entertaining and approving a given project application. “Thousands of new jobs,” always goes the Committee’s refrain, a fully spurious if frayed one, *supra*. But were it so, arguendo, even a slave, let it not be forgotten, has a job.

As this Court is aware, the Committee in *CAG, supra*, in its briefs and otherwise, regaled the retail Wal-Mart, the largest employer in the State, as its model and “prototype” for economic development. But 60% of its employees nationwide are paid so low that they are on food stamps, with many of them on publicly financed Medicaid and “C.H.I.P.,” and as well on publicly subsidized H.U.D. housing.

Add to this decades-into-the-future public subsidization of the large Wal-Mart-like projects involved here the economic fact that neither it nor they can increase overall employment to the slightest extent, and in economic fact decrease it, *supra*, perhaps one may pardonably wonder whether these economically barren corporate retail-service giants are by this “grant” program ushering into our State a new economic Nirvana.

It must be noted as well that such projects fail to meet the “other ... funding requirements of the *W. Va. Code* § 29-22-18a(8)(A) and (B) (2003), and fail to achieve “economic development in the region” under the *W. Va. Code* § 29-22-18a(8)(D) (2003).

C. THIS IS THE SINGLE BIGGEST ANTI-WOMAN, SEXIST OPERATION OF THE STATE IN ITS 140-YEAR HISTORY.

Given the truly disgraceful reality in our State that working women on the average receive only 70% of the pay of their male counterparts, perhaps one could reasonably expect that this huge "grant" program would at least in part positively address this glaring disparity, or at least not exacerbate it. But, whatever the intent, beyond all doubt this program's disparate impact upon present and future working women is as clear as their substandard economic status. *See the W. Va. Human Rights Act, W. Va. Code § 5-11-1, et seq.*

For the majority of employees in the top-heavy retail sales, services and entertainment spheres involved here are women who are systematically and disproportionately subjected to all (and more) of the employment injustices and abuses noted above. Rather than approving most or all of the new or expanded manufacturing projects which applied for this state funding, the Committee, as noted above, mainly opted for developmentally impotent, extremely low-paying, largely benefitless retail-service-entertainment projects.

Apart from the contemporary reality that many women can and do hold the more "heavy-lifting" types of jobs in some manufacturing operations and similar productive enterprises, many other jobs are generated by these plants and similar operations in the fields of "light" production and maintenance, professional, "staff," accounting, clerical and other types of "white collar" employment necessary for the plants' operations.

Of course, many manufacturing-type operations are unionized, and provide higher pay and better benefits accordingly. But even such productive enterprises which are non-union typically pay twice or more the wages of retail-service-entertainment concerns, and almost

universally have adequate health insurance and other benefits, if for no other reason, candidly, than to "keep the union out."

For this impoverished State to borrow and spend "9-figure" money on mainly out-of-state retail-service-entertainment concerns which can only reallocate and relocate, zero-sum style, already existing tax revenues, and actually cause a permanent reduction in overall employment, and devastation among smaller firms galore, is certainly bad enough to qualify as a statewide economic catastrophe.

But to add to that present and future human disaster the locking in for decades to come of our mothers, wives, sisters and daughters into impoverishment, dead-end jobs and economic desperation for many of them and their children, is to compound economic disaster with great human injustice and entrenched sexist discrimination. Such discrimination of equal treatment violates the strong public policy emanating from the *W. Va. Code* § 5-11-1, *et seq.*, the *W. Va. Const.*, Art. 10's equal protection guarantee and such cases as *SER Lambert v. W. Va. State Bd. Of Ed.*, 447 S.E.2d 901 (W. Va. 1994).

As promised by the preamble of the W. Va. Human Rights Act, *W. Va. Code* § 5-11-2:

It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment

The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.

Strange indeed it is that the same state which so proudly adopted this charter of human rights should violate it so flagrantly.

D. THE PROCEEDS FROM THESE BONDS WHICH BENEFIT PRIVATE CORPORATIONS AND PERSONS, IF NOT REPAYED, WOULD RESULT IN THE UNCONSTITUTIONAL SPECTRE OF MOST OF THESE PROJECTS HAVING A MAJOR BENEFIT WHILE THE STATE WOULD DERIVE ONLY A MINOR BENEFIT.

In *CAG*, 580 S.E.2d at 897, the Court declared that “the realization of incidental benefits by private entities ... does not render the legislation unconstitutional for lack of a public purpose,” while clarifying that a project which has as “its primary and dominant purpose the conferring of private benefits, with only ancillary public benefits would be an unconstitutional use of authority....” *Id.* at 893.

It is suggested in this vein that most if not all of these “grants” which benefit private persons or entities, if not repaid, will fall into the second verboten category of “an unconstitutional use of authority” under the public purpose doctrine. *Id.* This is so because such huge monetary amounts (or their benefit), placed on the private-public cost/benefit scales, are bound to tilt them markedly toward private benefit.

While the benefit from a low-interest loan would tilt the scales some, it would not have nearly the extreme effect of the private benefit of an unrepaid grant. Consider: the high South Carolina court in *WDW Properties v. City of Sumter*, 535 S.E.2d 631 (S.C. 2001), for some time nicely weighs in the balance whether a bond repaid by the private beneficiary would result in a greater public or private benefit and then finally opts for the former. Had the bond proceeds been given away, as the Committee intends here, it is suggested that the Court would have summarily rejected the bond as more in favor of private benefit.

Conversely, it is suggested in such bond-voiding cases as *Brown v. Longniotti*, 421 So.2d 71 (Ala. 1982); *Smith v. State of Georgia*, 150 S.E.2d 868 (Ga. 1966); *SER McLeod v. Riley*, 278 S.E.2d 612 (S.C. 1978); *McDonald's Corp. v. DeVenny*, 415 So.2d 1075 (Ala. 1982); and *Anderson v. Baehr*, 217 S.E.2d 43 (S.C. 1975), where these high courts rejected the bonds after some "public purpose" discussion, there would have been little or no such discussion at all if the private beneficiary had not been obligated to repay the bond proceeds.

The upshot here is that if the private entities and persons who economically benefit from these bond proceeds do not have to pay back their financial equivalent, virtually all of these "projects" slide into the constitutionally verboten zone where private benefit outweighs public benefit. *CAG, supra*, 580 S.E.2d at 893.

E. THE CITY AND COUNTY RESPONDENTS ARE BARRED BY THE W. VA. CONST., ART. X, § 6, FROM GIVING AWAY THEIR GENERAL REVENUES OR PROVIDING OTHER AID TO PRIVATE CORPORATIONS AND PRIVATE ENTITIES.

The respondent City of Charleston, Kanawha County Commission, Ohio County Commission and City of Huntington are all respectively using, or intend to use, general public revenue in their jurisdictions for the Charleston ball park, for the Cabella retail project in Ohio County and for the large retail mall in Huntington, all of which public monies extensively benefit the three (3) private corporations involved.

Assuredly, such aid for these private corporations violates the relevant ban of the *W. Va. Const.*, Art. X, § 6. For unlike the "special account" state lottery monies at issue in *CAG, supra*, these general city and county revenues are four-square and clearly barred by the *W. Va. Const.*, Art. X, § 6, and the public purpose doctrine. *See, e.g., Ohio County Comm. v. Samol*, 275 S.E.2d

2 (W. Va. 1980); *State ex rel. County Court v. Demus*, 135 S.E.2d 352 (W. Va. 1964); and *State ex rel. County Court v. Bane*, 135 S.E.2d 349 (W. Va. 1964) and their cited cases.

Significantly, the *W. Va. Code* §§ 13-3C-1, *et seq.*, provides that counties and cities in the state may issue repaid revenue bonds for economic development if they are attended by a sufficient public purpose. *Samol, supra, e.g.*

These respondents simply must be mandated by this Court not to use any general county and city monies or in-kind subsidies for these patently unconstitutional purposes. *See, also*, the *W. Va. Code* §§ 8-13B-1, *et seq.* (financing for “downtown redevelopment districts”).

F. THE STATEWIDE SUBSTANCE AND “APPEARANCE” OF IMPROPRIETY INVOLVED HERE UNDERMINES ESSENTIAL PUBLIC CONFIDENCE IN STATE GOVERNMENT ITSELF, AND THUS VIOLATES THE *W. VA. CONST.*, ART. III, § 2.

“[T]he historical underpinnings of ... sections four and six of article ten of our state constitution ... maintain an illuminating degree of relevance with regard to the favoritism concerns raised by CAG in this action. We cannot but note that the admonitions of our forefathers concerning the potential unfairness involved through the support of some ‘internal improvements’ to the exclusion of others, still have continuing merit today.” *CAG*, 580 S.E.2d at 890, n. 41.

To be sure, the Grant Committee members and top legislators are full throttle continuing their “support of some ‘internal improvements’ to the exclusion of others.” *Id. See, e.g.*, “favoritism ... steering significant funding towards projects or interests [of] benefit to those in positions of particular responsibility and power in either house.” *League of Women Voters of W. Va. v. Tomblin*, 550 S.E.2d 355, 367 (W. Va. 2001).

Indeed, a majority of the counties were excluded from this “economic development” en toto, with a number of them, such as Calhoun, Roane, Wirt and Jackson having the highest (13%-14%) unemployment rates in the State. However, these and similar counties have no members on the Committee or top legislators “steering” it. *Id.*

Of the 17 counties which are due to receive over \$200 million of the \$225 plus million total grant money, all of them are home to Committee members or 12 top legislators (or both), or in the election districts of the latter. “Top legislators” is not used loosely here. It includes less than 10% of the 134 total legislators.

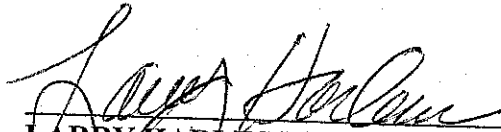
It is the contention of petitioners that this pervasive self-serving and favoritism comprise a statewide appearance of impropriety which seriously undermines essential public confidence in state government itself, and thus violates the *W. Va. Const.*, Art. III, 2. *Graf v. Frame*, 352 S.E.2d 31 (W. Va. 1986) and cited cases.

IV. CONCLUSION

Regardless of how the Court resolves the other individual issues involved here, of paramount importance is for all private corporations and persons who directly or indirectly benefit economically from these State monies to pay back to the State at low-interest over time the financial equivalent of such economic benefit. This arrangement, as required by the *W. Va. Code* § 29-22-18a(d)(9) (2003), will at least mitigate the extreme negative effects of these handouts on the employment and incomes of West Virginians who must work for a living, and who, somehow, are never given a low-interest public loan to shield them from their economic hardships and risks.

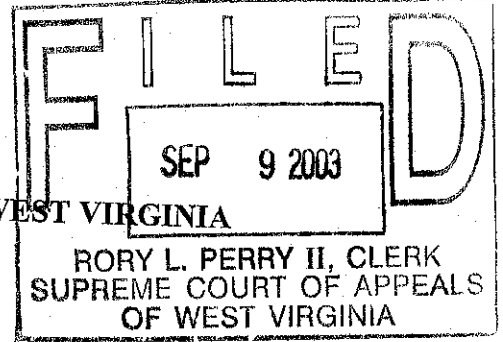
WHEREFORE, the petitioners respectfully request that the writ of mandamus as prayed for be awarded.

STATE OF WEST VIRGINIA
ex rel. REV. JIM LEWIS and
JOHN COONEY,
By Counsel


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NO. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA
ex rel. REV. JIM LEWIS and
JOHN COONEY,

Petitioners,

vs.

ORIGINAL MANDAMUS

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.

**PETITIONERS' MEMORANDUM OF NAMES
AND ADDRESSES UPON WHOM RULE TO
SHOW CAUSE IS TO BE SERVED**

West Virginia Economic Development Grant Committee
State Capitol - West Wing
Room 300
Charleston, West Virginia 25311
c/o Brian Kastick, Chairman

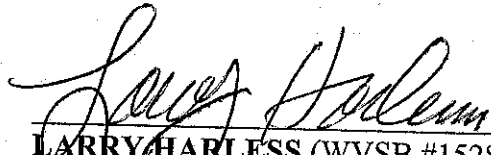
West Virginia Economic Development Authority
160 Association Drive
Northgate Business Park
Charleston, West Virginia 25311

City of Charleston
Virginia and Court Streets
Charleston, West Virginia 25301
c/o Mayor Danny Jones

Kanawha County Commission
Virginia and Court Streets
Charleston, West Virginia 25301
c/o W. Kent Carper, President

City of Huntington
City Hall
Huntington, West Virginia 25701
c/o Mayor David Felinton

Ohio County Commission
Ohio County Courthouse
Wheeling, West Virginia 26003
c/o Timothy P. McCormick, President



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CERTIFICATE OF SERVICE

I, Larry Harless, counsel for the Petitioners, do hereby certify that on this 9th day of September, 2003, a copy of the foregoing Petition for Writ of Mandamus and Brief of Petitioners in Support of Their Petition for Writ of Mandamus was served upon the following by placing the same in the United States first-class mail, postage prepaid, and addressed as follows:

West Virginia Economic Development Grant Committee
c/o Brian Kastick, Chairman
State Capitol - West Wing, Room 300
Charleston, West Virginia 25311

West Virginia Economic Development Authority
160 Association Drive
Northgate Business Park
Charleston, West Virginia 25311

City of Charleston
c/o Mayor Danny Jones
Virginia and Court Streets
Charleston, West Virginia 25301

Kanawha County Commission
c/o W. Kent Carper, President
Virginia and Court Streets
Charleston, West Virginia 25301

City of Huntington
c/o Mayor David Felinton
City Hall
Huntington, West Virginia 25701

Ohio County Commission
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