

DOCKET NO. 031847

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

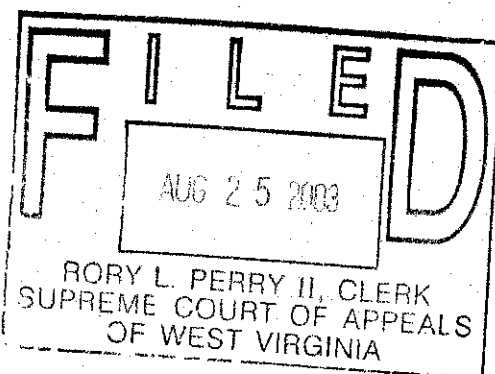
STATE OF WEST VIRGINIA EX REL.
ITS CITIES OF CHARLESTON AND
HUNTINGTON AND ITS COUNTIES
OF OHIO AND KANAWHA, WEST VIRGINIA,

Petitioners,

v.

WEST VIRGINIA ECONOMIC
DEVELOPMENT AUTHORITY,
a public corporation,

Respondent.



**PETITION OF 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**

The Petitioners, State of West Virginia ex rel. its Cities of Charleston and Huntington and its Counties of Ohio and Kanawha, West Virginia ("Petitioners"), by and through counsel, respectfully petition this Honorable Court for a Writ of Mandamus. In support of this Petition, Petitioners state as follows:

I. PARTIES

The Petitioners are cities and counties of the State of West Virginia who are entitled to receive funds for specific economic development projects duly certified by the West Virginia Economic Grant Committee pursuant to W.Va. Code § 29-22-18a(d) (2003) from the sale of revenue

bonds which the West Virginia Economic Development Authority is required to issue pursuant to W.Va. Code § 29-22-18a(d)(1) and Executive Order 19-03, executed by the Governor of West Virginia on August 20, 2003.

The Respondent, the West Virginia Economic Development Authority, is a public corporation and government instrumentality created by statute. Pursuant to W.Va. Code § 29-22-18a(d)(1), "the Economic Development Authority . . . shall, by resolution . . . and upon the direction of the Governor, issue revenue bonds of the Economic Development Authority . . . to pay for all or a portion of the costs of constructing, equipping, improving or maintaining projects." On August 21, 2003, the Governor, by Executive Order 19-03, directed the Economic Development Authority to issue revenue bonds pursuant to W.Va. Code § 29-22-18a(d)(1). On August 21, 2003, the West Virginia Economic Development Authority voted 8-1 to refuse to exercise its non-discretionary duty to issue the revenue bonds, citing potential constitutional challenges to three Acts of the Legislature as grounds for its refusal, thereby creating the potential for irreparable harm to the Petitioners. It is from this refusal to perform a non-discretionary affirmative act that Petitioners' challenge arises.

II. ISSUES PRESENTED

A. Whether the Racetrack Video Lottery Act, W.Va. Code § 29-22A-1, et seq. 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.

B. Whether the Limited Video Lottery Act, W.Va. Code § 29-22B-1, et seq. 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; and

C. Whether the State Excess Lottery Revenue Fund created by W.Va. Code § 29-22-18a(d), as amended, is constitutional because it does not violate the separation of powers clause of the West Virginia Constitution and it does not improperly delegate the Legislature's powers to an administrative agency.

III. RELIEF REQUESTED

WHEREFORE, because the Respondent was without statutory or constitutional authority to refuse to honor the Governor's Executive Order No. 19-03 by refusing to issue revenue bonds and because this decision was arbitrary, capricious and constitutes a clear violation of its non-discretionary legal duty, and because there is no other adequate remedy at law, Petitioners seek a Writ of Mandamus holding:

- (a) That the Racetrack Video Lottery Act, W.Va. Code § 29-22A-1, et seq. 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;
- (b) That the Limited Video Lottery Act, W.Va. Code § 29-22B-1, et seq. 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;
- (c) That the State Excess Lottery Revenue Fund created by W.Va. Code § 29-22-18a(d), as amended, is constitutional because it does not violate the separation of powers clause of the West Virginia Constitution and it does not delegate the Legislature's powers to an administrative agency; and

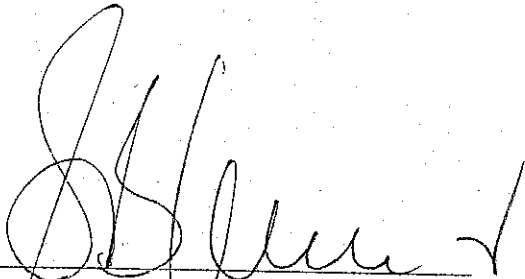
- (d) That a Writ of Mandamus shall lie in favor of Petitioners ordering Respondent to issue the revenue bonds as directed by the Governor forthwith.

In closing, Petitioners request oral argument on this position pursuant to Rule 12 of the West Virginia Rules of Appellate Procedure. Petitioners also respectfully direct this 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 Rule 14(a) of the Rules of Appellate Procedure. Finally, Petitioners respectfully direct this Court to their Motion for Expedited Consideration Due to Exigent Circumstances, which is submitted with this Petition.

THE CITIES OF CHARLESTON AND
HUNTINGTON, AND THE COUNTIES OF
OHIO AND KANAWHA, WEST VIRGINIA,

Petitioners,

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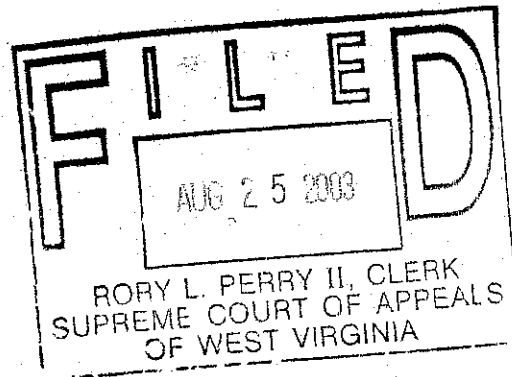
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DEVELOPMENT AUTHORITY,
a public corporation,

Respondent.



MEMORANDUM OF LAW AND CITATION
OF RELEVANT AUTHORITIES IN SUPPORT OF
PETITION FOR A WRIT OF MANDAMUS

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DEVELOPMENT AUTHORITY,
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Respondent.

**MEMORANDUM OF LAW AND CITATION
OF RELEVANT AUTHORITIES IN SUPPORT OF
PETITION FOR A WRIT OF MANDAMUS**

**TO: THE HONORABLE JUSTICES OF THE SUPREME
COURT OF APPEALS OF WEST VIRGINIA:**

The City of Charleston, the City of Huntington, Ohio County and Kanawha County, West Virginia ("Petitioners"), by and through their counsel, petition this Court, pursuant to Article VIII, § 3 of the Constitution of West Virginia and W.Va. Code § 51-1-3, to issue a Writ of Mandamus to compel the West Virginia Economic Development Authority ("Respondent") to issue revenue bonds as mandated by W.Va. Code § 29-22-18a(d) (2003) in order to finance certified economic development projects throughout the State of West Virginia, and particularly certified economic development projects sponsored by the Petitioners.

On August 1, 2003, Greenbrier County Citizens Against Gambling and Kanawha County Citizens Against Gambling served notice upon the West Virginia Lottery Commission that a Civil Action will be filed which will put into question:

Whether video lottery games conducted pursuant to the provisions of W.Va. Code § 29-22A-1 *et seq.* (the Racetrack Video Lottery Act) and W.Va. Code § 29-22B-1 *et seq.* (the Limited Video Lottery Act) are prohibited by West Virginia Constitution Article VI, Section 36, which provides: "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"

The threatened litigation will assert: (1) that video lottery games conducted by the West Virginia Lottery Commission are not sufficiently regulated, controlled, owned and operated by the State of West Virginia to fall within the exception to the constitutional prohibition of lotteries; and (2) that video lottery games conducted by the West Virginia Lottery Commission are not lottery games at all and are, therefore, prohibited under other applicable West Virginia law. (Exhibit A). Moreover, the Governor has, by Executive Order dated August 21, 2003, issued pursuant to W.Va. Code §29-22-18a(d)(1) directed the West Virginia Economic Development Authority ("Development Authority") to issue revenue bonds based upon the Economic Development Grant Committee's certifications of certain government sponsored economic development projects on August 20, 2003. (Exhibit B). Portions of W.Va. Code § 29-22-18a(d) were previously found to be unconstitutional by this Court in *State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Authority Grant Committee*, 580 S.E.2d 869 (W.Va. 2003). This statute was subsequently amended by the West Virginia Legislature in a Special Session, but the Development Authority has expressed uncertainty as to whether the statute, as amended, conforms with this Court's directives.

As a result of these issues, the Development Authority has refused the Governor's directive 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 West Virginia Lottery Commission video lottery games.¹

The Petitioners submit that the Respondent should be compelled to issue the revenue bonds, pursuant to statute, because both the Racetrack Video Lottery Act, W.Va. Code § 29-22A-1 *et seq.*; and the Limited Video Lottery Act, W.Va. Code § 29-22B-101 *et seq.* are constitutional. Moreover, the State Excess Lottery Revenue Fund Statute, W.Va. Code § 29-22-18a(d), as amended, is constitutional. Additionally, in order to ensure that the time sensitive economic development opportunities currently available to the Petitioners do not disappear due to lack of timely funding, the Petitioners request an expedited review by this Court. In the absence of expedited review and this Court's granting of the Petition, the Petitioners will suffer irreparable harm.

I. SUMMARY OF ARGUMENT

- A. **This Court Should Compel the West Virginia Economic Development Authority to Issue Revenue Bonds, as Required by W.Va. Code § 29-22-18a(d), Because Both the Racetrack Video Lottery Act, W.Va. Code § 29-22A-1 *et seq.*, and the Limited Video Lottery Act, W.Va. Code § 29-22B-101 *et seq.*, are Constitutional on Their Face.**

This Court must start with the premise that the Legislature considered the Constitution when it enacted the statutes, and did not intend to violate it. *State ex rel. Haden v. Calco Awning and Window Corp.*, 153 W.Va. 524, 528, 170 S.E.2d 362, 365 (1969). A strong presumption of

¹In its regularly scheduled meeting on August 21, 2003, the Development Authority voted 8-1 to refuse to honor the Governor's Executive Order. Petitioners have requested a certified copy of the official Minutes of the Development Authority's Actions which are not yet prepared. Due to the exigent circumstances of this Petition, Petitioners request that they be permitted to supplement the record with the official Minutes once they are provided.

constitutionality attaches to any act of the Legislature. Syl. pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965).

Additionally, when the Legislature acts, it acts as the voice of the people. A legislative declaration of facts of purpose must be accepted by this Court unless the declaration is clearly erroneous, arbitrary, or wholly unwarranted. *Id.* The strong presumption of constitutionality increases when the statute is economic in nature, as are all three acts at issue. As such, this Court should only set aside the funding mechanism if it is arbitrary and irrational. *Verizon W. Va. v. W. Va. Bureau of Employment Programs*, 2003 W. Va. LEXIS 66 at 92-93. Finally, when considering the constitutionality of a statute this Court must look solely to the face of the statute, not to any potential unconstitutional applications. *Id.*

B. The Racetrack Video Lottery Act and the Limited Video Lottery Act Each Create a "Lottery" Within the Scope of Article VI, Section 36 of the West Virginia Constitution.²

"Lottery" is defined under West Virginia common law as a game where chances are unequal in favor of the keeper of the game. *State v. Gaughan*, 55 W.Va. 692, ___, 48 S.E. 210, 212 (1904). It consists of three elements: prize, chance, and consideration. Syl. Pt. 4, *State v. Hudson*, 128 W.Va. 655, 37 S.E.2d 553 (1946). Additionally, when determining whether a game of chance is a lottery, this Court has cautioned that a court must look to the game itself to determine whether it is

²Interestingly, whether one considers a particular form of gaming in West Virginia to be a lottery or some form of gambling would have significance only if the activity were not regulated, controlled, owned and operated by the state. In the absence of such state control, the activity could be constitutionally pursued if it were determined not to be a "lottery." On the other hand, if the activity is regulated, controlled, owned and operated by the state, it is simply not legally significant whether the activity is or is not classified as a "lottery." This is true because, unlike the constitutions of some states, the West Virginia Constitution does not prohibit gambling that is not a lottery. Lottery is a subset of gambling; not all gambling is a lottery.

a game of unequal chances, not merely the name by which it is called or the instruments upon which it is played. *Gaughan*, 48 S.E. at 212.

Video lottery falls within the scope of the Constitution. It is a game of unequal chances, where it is never possible for the player to beat the house over time. W. Va. Code § 29-22B-910. Additionally, the statutes list the three elements of a lottery – prize, chance, and consideration in the definition of a video lottery game. *Id.* The Legislature was aware of the constitution and common law when it drafted the statute, and was careful to stay within the common law definition of “lottery.” Furthermore, video lottery, as authorized by the statutes, is regulated, controlled, owned, and operated by the State of West Virginia which possesses a proprietary interest in the main logic boards and rigorously restricts the number and location of video lottery terminals. *Id.* Considering the degree of deference owed to the Legislature, and the common law definition of lottery as a game of unequal chance, video lottery is constitutional as it is not a clearly erroneous and wholly unwarranted application of Article VI, Section 36 of the West Virginia Constitution.³

C. The State Excess Lottery Revenue Fund Statute, W.Va. Code § 29-22-18a(d), as Amended, is also Constitutional.

Earlier this year, this Court declared portions of the predecessor to W.Va. Code § 29-22-18a to be unconstitutional because: it violated the separation of powers clause of the Constitution by giving the Legislature post-enactment control over the executive branch; and the Legislature improperly delegated its authority to an administrative agency without sufficient guidance or goals.

State ex rel. W.Va. Citizens Action Group v. W.Va. Econ. Dev. Grant Comm., 580 S.E.2d 869 (W.

³“Lottery” is defined in W.Va. Code § 29-22A-3(o) to mean “the public gaming systems or games established and operated by the state lottery commission” and in § 29-22B-317 to mean “the public gaming systems or games regulated, controlled, owned and operated by the state lottery commission as provided in this article [§ 29-22B-1 et seq.], and in articles 29-22-1 et seq., 29-22A-1 et seq., and article 29-25-1 et seq.”]

Va. 2003). At a special session of the Legislature, the Legislature amended the statute to reflect the Court's guidance. Now, the power to appoint the economic development grant committee lies solely with the executive branch and the Legislature has provided a clear purpose as well as a list of goals and preferred projects. W.Va. Code § 29-22-18a(d). Therefore, this Court should find these statutes constitutional and should issue a writ of mandamus compelling the Respondent to issue the revenue bonds needed to finance Petitioners' projects.

II. STATEMENT OF THE CASE AND JURISDICTION

Pursuant to Article VII, § 3 of the West Virginia Constitution, W.Va. Code §55-1-3, and Rule 14(a) of the *West Virginia Rules of Appellate Procedure*, this Court has original jurisdiction over petitions in mandamus. Mandamus is the traditional remedy used to attack the constitutionality or validity of a statute. *W.Va. Bd. of Edu. v. Hechler*, 180 W.Va. 451, 456, 376 S.E.2d 839, 844 (1988); *W.Va. Citizens Action Group, Inc. v. Daley*, 174 W.Va. 299, 302, 324 S.E.2d 713, 717 (1984). Moreover, this Court has consistently recognized that mandamus is the proper method of testing the legality and constitutionality of a bond issue before the bonds are actually issued. *State ex rel. Charleston Bldg. Comm'n. v. Dial*, 198 W.Va. 185, 191, 479 S.E.2d 695, 701 (1996); *State ex rel. Lawrence v. Polan*, 192 W.Va. 629, 635, 453 S.E.2d 612, 635 (1994); and *State ex rel. Marockie v. Wagoner*, 190 W.Va. 467, 469, 438 S.E.2d 810, 812 (1993).

However, because mandamus is an extraordinary remedy, available only in limited and exceptional circumstances, this Court has established additional guidelines which a party requesting mandamus must satisfy, before relief will be granted. *State ex rel Charleston Bldg. Comm'n.*, 479 S.E. at 701. A writ of mandamus will not issue unless three things coexist:

1. A clear legal right in the petitioners to the relief sought;
2. A legal duty on the part of the respondent to do the thing which the petitioners seek to compel; and
3. The absence of another adequate remedy.

Syl. pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969). All three elements coexist here.

First, the Petitioners have a clear legal right to the relief sought. In *State ex rel. Blankenship v. Richardson*, this Court considered whether claimants under a worker's compensation statute had a clear legal right sufficient to support a claim for mandamus. 196 W.Va. 726, 732, 474 S.E.2d 906, 912 (1996). It noted that a petitioner will have a clear legal right to mandamus if the relief requested would actually affect the petitioner. *Id.* The Court further explained that the reason for this ruling is that "Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes. The pleadings and evidence must present a claim of legal right asserted by one party and denied by the other before jurisdiction of a suit may be taken." *Id.* at Note 8 (citing, *Mainella v. Board of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W.Va. 183, ___, 27 S.E.2d 489, 487-88 (1943)). Moreover, where the right sought to be enforced is based upon a general statute or affects the public at large, mandamus can be brought by any citizen, taxpayer, or voter. *Smith v. State Bd. of Edu.*, 170 W.Va. 593, 596, 295 S.E.2d 680, 683 (1982).

This is not an academic dispute or request for an advisory opinion. The Petitioners have a clear legal right to the relief they are seeking. First, the right they are seeking to enforce is a public one, as the Legislature has declared it to be in the public good to finance economic development projects, capital improvement projects, and infrastructure in order to promote economic development in West Virginia. W.Va. Code § 29-22-18a(d) (2003). Additionally, the Petitioners

have a clear legal right to this relief because economic development projects affecting Petitioners have already been certified by the Economic Development Grant Committee to receive money from sale of the bonds at issue. This money is urgently needed by the Petitioners in order to begin construction on their economic development projects for the benefit of their communities. They have a clear, legal right to the money provided by the bonds, but they cannot exercise this right until the Respondent issues the bonds. Therefore, Petitioners clearly meet the first prong they must satisfy before this Court will hear their petition for mandamus.

The second requirement is also met by the Petitioners, because the Respondent has a non-discretionary legal duty to issue the bonds upon direction by the Governor. The principle that mandamus is a proper proceeding by which to require a public official to perform a non-discretionary legal duty is well established in West Virginia jurisprudence. *State ex rel. Smith v. Kelly*, 149 W.Va. 381, 385, 141 S.E.2d 142, 145 (1965); *see also, State ex rel. McGraw v. Burton*, 212 W.Va. 23, 569 S.E.2d 99 (2002); *see also, State ex rel. W.Va. Hous. Dev. Fund v. Waterhouse*, 158 W.Va. 196, 212 S.E.2d 724 (1974). It has also been recognized that this principle includes governmental bodies and agencies that refuse to perform non-discretionary duties. *State ex rel. Allstate Ins. Co., v. Union Pub. Serv. Dist.*, 151 W.Va. 207, 218, 151 S.E.2d 102, 109 (1966). The enabling statute for the Development Authority recognizes that it is “a public corporation and government instrumentality.” This Court has repeatedly stated that “[t]he word ‘shall’ in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation.” Syl. pt. 4, *Allen v. State Human Rights Commission*, 174 W.Va. 139, 324 S.E.2d 99 (1984); *see also, Syl. pt. 2, Terry v. Sencindiver*, 153 W.Va. 651, 171 S.E.2d 480 (1969). The statute that governs the Respondent’s duties, W.Va. Code § 29-22-18a(d)(1), states, in pertinent part, that “[t]he West Virginia Economic Development Authority. . .shall, by resolution,

... and upon direction of the governor, issue revenue bonds of the economic development authority ... to pay for all or a portion of the cost of constructing, equipping, improving or maintaining projects.” (emphasis added). The Governor, by Executive Order 19-03 (see Exhibit B), has directed the Economic Development Authority to issue these revenue bonds pursuant to W.Va. Code § 29-22-18a(d)(1) and the Authority has refused.

Consequently, the second requirement has been satisfied because the Respondent is a public entity that has a non-discretionary, legal duty to issue bonds to fund the economic development projects, including those of the Petitioners as certified by the Economic Development Grant Committee and directed by the Governor. The only issue left facing this Court is whether the Petitioners could obtain adequate relief in a lower court.

Due to the urgent nature of the proposed economic development projects, and the importance of this issue to the state at large, the Petitioners could not receive an adequate remedy in a lower court.⁴ The mere existence of a remedy in a lower court will not preclude relief by mandamus in this Court, unless the other remedy is “specific and appropriate to the circumstances of the particular case and requires the performance of the duties sought to be performed.” *State ex rel. Myers v. Straughan*, 144 W.Va. 452, 454, 108 S.E.2d 565, 566 (1959); see also, *Carter v. City of Bluefield*, 132 W.Va. 881, 896, 54 S.E.2d 747, 757 (1949). Additionally, although a writ of mandamus will be denied where another sufficient remedy exists, “if such other remedy is inadequate or is not equally as beneficial, convenient and effective, mandamus will lie.” *State ex rel. Smoleski v. County*

⁴Upon information and belief, at the August 21, 2003 meeting of the Development Authority, underwriters for the bonds notified the Development Authority that the mere Notice of Intent to Sue has made bonds unmarketable. As such, this Court, as the ultimate arbiter of the issues at hand, should consider these issues via extraordinary writ in a manner that establishes precedent so that governments, citizens and Petitioners can proceed with clarity of purpose.

Court of Hancock County, 153 W.Va. 307, 312, 168 S.E.2d 521, 524 (1969). This Court has also noted that “there is a premise. . . in [its] mandamus cases that where the legal issue is of a substantial public policy nature, [it] will accept an original writ of mandamus rather than force the petitioner to try the issue. . . in a lower court.” *Smith*, 295 S.E.2d at 684. This is because, especially where there is an urgent question of public policy or where there is no reason for delay, this Court is in the best position to provide the relief needed. *W.Va. Citizens Action Group, Inc. v. Daley*, 174 W.Va. 299, 302, 324 S.E.2d 713, 716-17 (1984).

Here, this Court is in the best position to provide the relief needed by the Petitioners for a number of reasons. First, time is of the essence. The Petitioners, various cities and other governmental agencies around the state, have created economic development opportunities for their communities throughout West Virginia. (See Exhibit C.) These much needed opportunities will provide thousands of jobs for West Virginians, as well as tax revenues and infrastructure. Unless this issue is resolved quickly, these opportunities will be lost and these projects will go to other states, where there is already funding available.

One example of the urgency of the Petitioners’ individual situations is the Huntington, West Virginia project known as “Pullman Square.” See Exhibit C. This project is seeking to complete Huntington’s downtown transformation and urban revitalization along the river front. It will create, among other things, additional office space and an inter-modal transit facility. The developers have already broken ground on the facility, but unless the City receives the approved funds from the Respondent soon, it will be forced to modify or lose the project for lack of funding.

The Fort Henry Project in Ohio County is another example of a project that has already broken ground, but which will be abandoned if the Ohio County Development Authority does not soon receive the money awarded to it by the Economic Development Grant Committee. See Exhibit

C. Pursuant to this project, the Ohio County Commission is proposing to build, and lease to Cabella's (a national retailer and catalogue merchandiser) not only a store in Wheeling, West Virginia that promises to draw tourists to West Virginia from as far south as Alabama and Georgia, but a distribution center that would employ hundreds of West Virginians. However, unless the Ohio County Development Authority soon (before the end of the year) receives the money awarded to it by the Economic Development Grant Committee, Cabella's will be forced to leave West Virginia and build in another state, causing irreparable harm to Ohio County, its citizens and the State of West Virginia.

A final example of the need for urgency is the project sponsored by the City of Charleston and Kanawha County to build a baseball park in Charleston, West Virginia. See Exhibit C. The City of Charleston is under a very strict time constraint to get the ballpark project underway as soon as possible or the City stands to lose the private sector investment and economic benefits associated with the project and Class A professional baseball. In order to meet the City of Charleston's obligations to secure \$8 million in private sector investment, the Charleston ballpark must be constructed in time for the opening of the 2005 season. To that end, construction must begin in January 2004 – barely four months from now.

Until the state bonds are issued and funding stream secured, the City cannot move forward to purchase the property, do the site preparation needed, or finalize the design for the project – all of which must take place between the time the bonds are issued and construction can begin. If the City cannot secure the promised, certified state funding to begin its pre-construction preparations within the next few months in order to meet the January construction deadline, the project will be jeopardized, along with the \$8 million in private sector investment and the construction and long-term jobs associated with professional baseball in our capitol city.

All of these projects – and probably others – will be lost if this case is delayed. There is simply no time for this case to proceed through the lower courts. A final resolution regarding these grants is needed now. This Court is in the best position to decide whether the bonds can be issued in a timely manner. Any further delay will be fatal. A final determination is essential. Justice delayed will truly be justice denied.

According to the underwriters, there is a cloud hanging over these revenue bonds which makes them unmarketable. This cloud simply cannot be obviated by a lower court because lower courts do not have the power to create precedent. Only this Court has that power. Unless and until this cloud is removed, the bonds will remain unmarketable and the financing will not be available in time to fund these projects.

Uniquely, only this Court can provide Petitioners adequate relief. This Court is the appropriate forum because: (1) it presents an issue of substantial public policy – the very foundations of video lottery, a system that provides this state with over \$338,000,000 per year in revenue;⁵ and (2) the record is complete. Any challenge to the constitutionality of a statute must be based on the statute itself, not on any potential applications of the statute. Therefore, this Court should issue a writ of mandamus compelling the Respondent to issue the revenue bonds to finance the Petitioners' projects and the other projects approved by the Economic Development Grant Committee.

⁵According to the State Lottery, during the fiscal year ending June 30, 2003, Racetrack Video Lottery generated \$261.5 million for distribution as provided in W.Va. Code §§ 29-22-18 and 29-22-18a and Limited Video Lottery generated \$77.3 million for distribution as provided in section 29-22-18a. During the fiscal year ending June 30, 2004, it is anticipated that Racetrack Video Lottery will generate \$280.1 million for distribution as provided in W.Va. Code §§ 29-22-18 and 29-22-18a and that Limited Video Lottery will generate \$97.8 million for distribution as provided in section 29-22-18a.

III. ARGUMENT

This Court should order the West Virginia Economic Development Fund to issue the bonds in time to save the Petitioners' economic development projects because the Racetrack Video Lottery Act, The Limited Video Lottery Act, W.Va. Code § 29-22B-101 *et. seq.*, and the State Excess Lottery Revenue Fund Act, W.Va. Code § 29-22-18a, are constitutional on their face. The first step in examining the constitutionality of any statute is to determine what degree of deference attaches to the decision of the Legislature in enacting the statute.

A. The Racetrack Video Lottery Act, W.Va. Code § 29-22A-1 et seq., the Limited Video Lottery Act, W.Va. Code § 29-22B-101 et seq. and the State Excess Lottery Revenue Fund Act, W.Va. Code § 29-22-18a, Must be Viewed with a Strong Presumption of Constitutionality.

1. Under Separation of Powers, any Act of the Legislature Must be Viewed with a Strong Presumption of Constitutionality.

In addressing any claim that an act of the Legislature is unconstitutional, this Court must begin with the fundamental precept that the powers of the Legislature are plenary. Consequently, the Legislature can legislate on every subject not interdicted by the Constitution itself. *Robertson v. Hatcher*, 148 W.Va. 239, 250-51, 135 S.E.2d 675, 683 (1964); *Robinson v. Charleston Area Med. Center, Inc.*, 186 W.Va. 720, 414 S.E.2d 877 (1991). West Virginia's Constitution is designed to function as a restriction of power, not a grant of power like the Federal Constitution. Consequently the West Virginia Legislature has the power to enact any measure that is not specifically prohibited by the State or Federal Constitutions. *Robertson*, 135 S.E.2d at 682-683; *see also*, Syl. pt 1, *Foster v. Cooper*, 155 W.Va. 619, 186 S.E.2d 837 (1972). This precept creates a test of constitutional restriction to use when evaluating an act of the Legislature, "what the people have not said in the organic law [the Constitution] their representatives shall not do, they may do." *Robertson*, 135

S.E.2d at 682-683 (quoting, *Harbert v. Harrison County Court*, 129 W.Va. 54, 67, 39 S.E.2d 177, 187 (1946)).

If the constitutionality of a statute is questioned, every presumption must be made in favor of constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Syl. pt. 1 *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965); *State ex rel. W.Va. Regional Jail and Correctional Facility v. W.Va. Investment Management Bd.*, 203 W.Va. 413, 420, 508 S.E.2d 130, 137 (1998). “A statute will not be declared to be unconstitutional unless its repugnance to the constitution be plain and palpable.” *State ex rel. Hudon*, 170 S.E.2d at 365.

The West Virginia Legislature possesses the sole power to make laws and is consequently presumed to speak as the voice of the people, “Whether the legislature has a certain power. . . is not to be decided simply by marshalling the reasons for and against and then determining on which side is the weight of argument. The negation of the power must be manifest *beyond reasonable doubt*.” *State Road Comm'n. v. Kanawha County Court*, 112 W.Va. 98, ___, 163 S.E. 815, 817 (1932).

In order to give due deference to the voice of the people, a legislative declaration of facts or purpose should be accepted by this Court unless there is a strong reason for rejecting it. *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 750, 143 S.E.2d 351, 359 (1965) (quoting, Syl. pt. 1, *Glover v. Sims*, 121 W.Va. 407, 3 S.E.2d 612 (1939)). “Since the determination of questions of fact on which the constitutionality of statutes may depend is primarily for the legislature, the general rule is that the courts will acquiesce in the legislative decision unless it is clearly erroneous, arbitrary, or wholly unwarranted.” *Id.* This arises from the presumption that the Legislature, in the

passage of an act, has considered the Constitution, and did not intend to violate it. *State ex rel. Haden*, 170 S.E.2d at 365.

Therefore, when analyzing the Racetrack Video Lottery Act, W.Va. Code § 29-22A-1 *et seq.*, the Limited Video Lottery Act, W.Va. Code § 29-22B-101 *et. seq.*, and subsection (d) of the State Excess Lottery Revenue Fund Statute, W.Va. Code § 29-22-18a, this Court must make every presumption in favor of constitutionality, and resolve any reasonable doubt in favor of the constitutionality. This Court must remember that when the Legislature enacted these statutes, it did so as the voice of the people, and with their guidance and advice. Consequently, considerable deference must be accorded to the Legislature.

2. **The Statutes at Issue are Economic and Must be Viewed with an Even Higher Degree of Deference.**

The level of deference accorded to an act of the Legislature increases considerably when the act is economic in nature. *Gibson v. W.Va. Dep't. of Highways*, 185 W.Va. 214, 217-18, 406 S.E.2d 440, 443-44 (1991). This increased deference results from a recognition that "lawmakers are uniquely charged with responsibility for passing laws designed to cure such serious social concerns." *Verizon W.Va., Inc. v. W.Va. Bureau of Employment Programs*, 2003 W. Va. LEXIS 66, 91. The judiciary is not permitted to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations, especially in regard to economic legislation. *Robinson*, 414 S.E.2d at 883. Consequently, although in any piece of economic legislation that seeks to address a serious financial problem there will always be challenges, given the level of deference to which such legislation is entitled, this Court can only set aside the funding mechanism if it is concluded that it is arbitrary and irrational. *Verizon*, 2003 W. Va. LEXIS 66 at 92-93.

The statutes at issue all represent an attempt by the Legislature to cure serious social concerns such as education, seniors, infrastructure, and economic development. Each is economic in nature. The Legislature drafted each statute following an in-depth study of video lottery use prior to the legislation, and the problems and benefits that could result from legalizing video lottery. *Club Ass'n. of W.Va., Inc. v. Wise*, 156 F. Supp. 2d 599, 606 (S.D. W.Va. 2001). The Racetrack Video Lottery Act was enacted subsequent to this Court's decision in *State ex rel. Mountaineer Park, Inc. v. Polan*, 190 W.Va. 276, 438 S.E.2d 308 (1993) (holding that the State Lottery Commission could not administratively implement racetrack video lottery without prior statutory authority.) Consequently, all this legislation, and the facts and policies underlying it, should be accorded considerable deference by this Court.

3. **The Potential for an Improper Application of the Statutes at Issue Cannot Make the Statutes Unconstitutional.**

The considerable presumption of constitutionality accorded to an economic act of the Legislature should not be altered by the possibility that the statute itself can be applied unconstitutionally. *Verizon*, 2003 W. Va. LEXIS 66 at 38.

Accordingly, a facial challenge to the constitutionality of legislation is the most difficult challenge to mount successfully. The challenger must establish that no set of circumstances exists under which the legislation would be valid; the fact that the legislation might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.

Lewis v. Canaan Valley Resorts, Inc., 185 W.Va. 684, 691, 408 S.E.2d 634, 641 (1991) (citing, *Rust v. Sullivan*, 500 U.S. 173 (1991)); *O'Dell v. Town of Gauley Bridge*, 188 W.Va. 596, 603, 425 S.E.2d 551, 558 (1992). A statute is to be judged to be constitutional, or not constitutional, purely

on its face, not on the basis of any possible unconstitutional situation that may arise. *State ex rel. Huden*, 170 S.E.2d at 366.⁶

This Court recently applied this line of reasoning in *State v. Legg*, 207 W.Va. 686, 536 S.E.2d 110 (2000). In *Legg*, two conservation officers were dispatched to Boone County, West Virginia to ensure that no hunters were taking deer illegally, *Id.* at 112. In order to accomplish this, the officers conducted a “game-kill survey” where they stopped all vehicles on the road and checked them for weapons, game, and licenses. *Id.* These stops were done in accordance with W.Va. Code § 20-7-4 (1994), which allows officers to require the operator of any motor vehicle to stop for a game-kill survey. *Id.* at 115.

In the course of one of these game-kill stops, the officers searched the car of Mr. Legg and discovered a substantial quantity of drugs. *Id.* at 113. Mr. Legg alleged that W.Va. Code § 20-7-4 was unconstitutional because the statute as written allows conservation officers to conduct unreasonable searches and seizures in violation of the Fourth Amendment of the United States Constitution and Article III, Section 6 of the West Virginia Constitution. *Id.* at 115-118. The Court held that although the statute can be, and had been, applied unconstitutionally, that alone does not make the statute unconstitutional. *Id.* This is because the statute must be looked at on its face, and must be interpreted in any reasonable way that will sustain its constitutionality. *Id.* The statute could be interpreted constitutionally because an officer is capable of stopping and searching a vehicle under the act in a way that does not violate the Constitution. *Id.*

Following *Legg*, this Court must evaluate the Racetrack Limited Video Lottery Act, W.Va. Code § 29-22A-1 et seq., the Limited Video Lottery Act, W.Va. Code § 29-22B-101 et. seq., and

⁶As a result, this Court can determine the constitutionality of the statutes on their face, without exhaustive factual inquiry which would necessarily cause undue delay.

the State Excess Lottery Revenue Fund Act, W.Va. Code § 29-22-18a(d) purely on their faces to determine whether they are constitutional. This Court must then consider whether video lottery falls within the exception to the constitutional mandate against unauthorized lotteries, and its associated regulations, or is other gambling that is not prohibited by the West Virginia Constitution.

B. The Racetrack Video Lottery Act, W.Va. Code § 29-22A-1 et seq. and the Limited Video Lottery Act, W.Va. Code § 29-22b-101 et seq. are Constitutional Because They Fall Within the Scope of the Exception for State Lotteries in Article VI, Section 36 of the West Virginia Constitution.

During the first constitutional convention of the State of West Virginia the drafters of the Constitution adopted a strict ban against all lotteries, stating “[n]o lottery shall be authorized by law; and the buying, selling or transferring of tickets or chances in any lottery shall be prohibited.” *State ex rel. Mountaineer Park, Inc. v. Polun*, 190 W.Va. 276, 280-81, 438 S.E.2d 308, 312-313 (1993). This constitutional provision was an attempt by the drafters to distinguish lotteries, a distinct and despised class of games, from gambling, which was not unconstitutional. *Id.* The distinction between the two being, gambling is a game where the chances are equal, and lottery is a game where chances are unequal in favor of the keeper of the game. *State v. Gaughan*, 55 W.Va. 692, ___, 48 S.E. 210, 212 (1904). This dissimilar treatment arose from “our Virginia ancestors [who] were not wholly free from the vice of gambling, but. . . had a supreme contempt for the coward who would not ‘play’ without a guaranteed advantage, making it certain that he would win oftener than he would lose.” *Id.*

This Court has continued to distinguish and define what is meant by the phrase lottery in the West Virginia Constitution. In *State v. Gaughan*, this Court cautioned that:

We must look to the game itself and not the name by which it is called, or the instruments with which, nor the thing in or on which it is played. . . . We must not lose sight of the spirit and intent of the law. There is an old Latin maxim which says ‘*Que hueret in litera*

haeret in cortice, which somewhat liberally translated means, he who considers merely the letter of an instrument goes but skin deep into its meaning.

Id. In *State v. Hudson* and *State v. Greater Huntington Theatre Corp.*, the essential elements of a lottery were defined as consideration, prize, and chance, and “any scheme or device, by which a person, for a consideration, is permitted to receive a prize or nothing, as may be determined primarily by chance is a lottery.” Syl. pt. 4, 128 W.Va. 655, 37 S.E.2d 553 (1946); syl. pt. 3, 133 W.Va. 252, 55 S.E.2d 681 (1949). This definition was further elaborated upon in *State v. Wassick*, 156 W.Va. 128, ___, 191 S.E.2d 283, 286 (1972), where this Court noted any machine that was designed in a way that skill played very little part in the outcome of the game was considered to be a lottery.

1. Lotteries Were Legalized by Constitutional Amendment to Article VI, Section 36 of the West Virginia Constitution, the State Lottery Act, Racetrack Video Lottery Act and the Limited Video Lottery Act.

In the early 1980's, the West Virginia Legislature realized that lotteries could generate substantial, and greatly needed, revenue for the State of West Virginia. In 1984, a constitutional amendment regarding lotteries was placed on the ballot, and approved by a vote of 67% to 33%. It amended “the State Constitution to permit the Legislature to pass laws authorizing state operated and controlled lotteries.” See, Ballot from the General Election, November 6, 1984, Attached, Exhibit D. This amendment, which became Article 6, Section 36 of the West Virginia Constitution, states:

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 enterprises 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 . . .

In April of 1985, the Legislature passed the first of the laws authorized by Article VI, Section 36 of the West Virginia Constitution when it enacted the State Lottery Act. W.Va. Code § 29-22-1 *et seq.* The State Lottery Act plays an important role in the analysis of the Racetrack Video Lottery Act and the Limited Video Lottery Act because it was the first state-run lottery enacted under Article VI, Section 36 of the West Virginia Constitution, and because its constitutionality has never been seriously questioned.

The State Lottery Act was enacted to create a funding source for many essential programs throughout the state, including education, school construction, senior services, and conservation of natural resources. W.Va. Code § 29-22-1 *et seq.*; *Club Ass'n of W. Va., Inc.*, 156 F. Supp. 2d at 605. As a form of economic legislation, the State Lottery Act is entitled to a presumption of constitutionality. It can only be unconstitutional if it is an arbitrary and irrational interpretation of Article VI, Section 36 of the West Virginia Constitution. *Verizon*, 2003 W. Va. LEXIS 66 at 92-93. Furthermore, it is presumed that the Legislature considered the Constitution, and did not intend to violate it when it enacted the State Lottery Act. The Racetrack Video Lottery Act and the Limited Video Lottery Act are merely extensions of the State Lottery Act that possess the same characteristics of constitutionality and validity. *State ex rel. Haden*, 170 S.E.2d at 365.

2. The Racetrack Video Lottery Act and the Limited Video Lottery are Lotteries Under the West Virginia Constitution Article VI, Section 36.

As the Legislature was acting as the voice of the people when it passed the Racetrack Video Lottery Act and the Limited Video Lottery Act, and because any negation of its constitutionally prescribed power must be manifest on the face of the statute, *beyond reasonable doubt*, this Court must conclude that the video lotteries authorized by the Limited Video Lottery Act fall within the

scope of Article VI, Section 36 of the West Virginia Constitution because the games authorized by the statutes are lottery games. *State Road Comm'n.*, 163 S.E. at 817.

This Court has not yet ruled on whether legislatively authorized video lottery is constitutionally permissible; however, the Attorney General has addressed this issue. *1991 W. Va. AG LEXIS 9 (1991)*. And, while Attorney General Opinions do not create precedent for this Court, they are considered persuasive authority. *State v. Conley*, 118 W.Va. 508, ___, 190 S.E. 908, 917 (1937). The Attorney General has said that video lottery games are lottery if they are based on chance, and contain the three traditional elements of a lottery: consideration, chance, and prize. *Id.* In a later opinion, the Attorney General expanded this opinion by stating that the Legislature can authorize video lotteries as long as they are regulated, controlled, owned and operated by the state of West Virginia. *1993 W. Va. AG LEXIS 2 (1993)*. Both conditions are met by the statutes under the Racetrack Video Lottery Act and the Limited Video Lottery Act, all games of unequal chance with varying payouts authorized by the Acts. Under those standards, an authorized video lottery machine may pay out "no less than eighty percent and no more than ninety-five percent of the amount wagered." W. Va. Code § 29-22B-910. Clearly, these are games of unequal chances, in favor of the State of West Virginia.

Furthermore, it is apparent that the Legislature included the three elements of a lottery, consideration, prize, and chance when it created the Racetrack Video Lottery Act and the Limited Video Lottery Act. Video lottery is defined, by statute, as a game utilizing an electronic computer and interactive terminal into which the player "inserts coins or currency as consideration" in order

to receive a cash or non-cash prize, or nothing, "determined wholly or predominantly by chance."

W.Va. Code §§ 29-22A-3(aa) and 29-22B-330.⁷

Additionally, support regarding the constitutionality of video lottery is provided by other states with similar constitutional provisions. Georgia has considered whether similar video lottery games fall within Georgia's constitutional provision regarding lotteries.⁸ Its court held that video lottery games are games of chance, not skill, with unequal chances, and "even [i]f these games, as operated, go beyond the types of lottery games anticipated by the people when voting in favor thereof, they do not exceed the bounds of the constitutional power granted to the General Assembly to enact legislation for the operation of a lottery game." *Jackson v. Georgia Lottery Corp.*, 491 S.E.2d 408 (Ga.App. 1997). Similarly, Alabama's courts have also recognized that video lottery machines are indeed lotteries, and not gambling because no amount of skill will ever determine the

⁷The Racetrack Video Lottery Act defines video lottery as follows: "Video lottery" means a lottery which allows a game to be played utilizing an electronic computer and an interactive computer terminal device, equipped with a video screen and keys, a keyboard or other equipment allowing input by an individual player, into which the player inserts coins, currency, vouchers or tokens as consideration in order for play to be available, and through which terminal device the player may receive free games, coins, tokens or credit that can be redeemed for cash, annuitized payments over time, a noncash prize or nothing, as may be determined wholly or predominantly by chance. "Video lottery" does not include a lottery game which merely utilizes an electronic computer and a video screen to operate a lottery game and communicate the results of the game, such as the game "Travel," and which does not utilize an interactive electronic terminal device allowing input by an individual player. W.Va. Code § 29-22-3(aa).

⁸The constitutional amendment, Ga. L. 1991, p. 2035, §§ 1, revised Art. 1, Sec. II, Par. VIII. of the Constitution of 1983 to provide that the General Assembly may enact legislation providing for the operation and regulation of a lottery by or on behalf of the State and providing for the distribution of the proceeds thereof, which amendment was approved by a majority of qualified voters during the General Election on November 3, 1992.

ultimate outcome of a video lottery game.⁹ They are designed as games of unequal chance where the house eventually always wins based entirely upon chance. *Opinion of the Justices*, 795 So.2d 630, (Ala. 2001). This is the hallmark of a lottery game. *Id.* This is true regardless of the form the lottery game takes: “[w]e must look to the game itself and not the name by which it is called, or the instruments with which, nor the thing in or on which it is played. . . . We must not lose sight of the spirit and intent of the law.” *Gaughan*, 48 S.E.2d at 212.¹⁰ The only question that remains is whether the video lottery terminals authorized by the Video Lottery Acts are regulated, controlled, owned and operated by the State of West Virginia.

⁹Section 65 of the Constitution of Alabama of 1901 now provides: “The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this State of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; and all acts, or parts of acts heretofore passed by the Legislature of this State, authorizing a lottery or lotteries, and all acts amendatory thereof, or supplemental thereto, are hereby avoided.”

¹⁰Moreover, this Court has recognized that when making this determination, it should also interpret the constitution broadly to encompass the realities of contemporary life (i.e., the advances of technology enabling advancement from paper “scratch off” games to computer simulated games):

It is axiomatic that our Constitution is a living document that must be viewed in light of modern realities. Reasonable construction of our Constitution . . . permits evolution and adjustment to changing conditions as well as to a varied set of facts The solution [to problems of constitutional interpretation] must be found in a study of the specific provision of the Constitution and the best method [under current conditions] to further advance the goals of the framers in adopting such a provision.” *Randolph County Bd. of Educ. v. Adams*, 196 W.Va. 9, 467 S.E.2d 150 (1995) (holding that free textbooks are today required by the West Virginia Constitution’s guarantee of a thorough and efficient education, even though they were not required when the Constitution was adopted). *See State ex rel. McGraw v. Burton*, 569 S.E.2d 99 at 112.

3. The State Lottery Act, the Racetrack Lottery Act and the Limited Video Lottery Act Mandate Regulation, Ownership, Operation, and Control of the Lotteries by the State of West Virginia.

On its face, the State Lottery Act confirms that the Legislature was aware of the Constitution and attempted to stay within its scope by creating a lottery system where the lotteries are regulated, controlled, owned, and operated by the State. First, in order to fall within West Virginia's common law definition of lotteries, as games of unequal chances consisting of prize, consideration, and chance, the statute allowed the commission to authorize games. It set the pay out rate in a manner that would result in any excess money being placed in a special revenue fund to finance the Legislature's economic goals. W. Va. Code § 29-22-1 *et seq.* It further mandated that the director of the lottery commission shall establish the price for each lottery, and the prize with the "selection of the winner. . . predicted totally on chance." *Id.* at § 29-22-9. The first type of lottery authorized by the commission was a scratch off ticket, where the player scratched off all, or selected squares of a ticket in an attempt to win a cash prize. *Id.* at 9. Various games soon followed, but each was a game of unequal chance based on the three elements of a lottery, consideration, prize, and chance. *Id.*

Second, the Legislature created a state lottery commission. W. Va. Code § 29-22-3 (2003). The lottery commission has broad powers to select games, the percentage of winners, and the method of payment to the winners. *Id.* at 5. Additionally, the State Lottery Act regulated games by stating that each ticket must bear a unique number and that all lottery machine and equipment must be inspected regularly. *Id.* at 9. In order to satisfy the constitutional element of control, the Act mandated that each lottery sales agent must be licensed and that no lottery using a machine may use machines that dispense coins. *Id.* at 9-10.

These regulations and control over the state lottery were generally accepted as constitutional. When the lottery commission attempted to expand into video lottery under the State Lottery Act, this Court noted that “our legislature . . . has yet to even define electronic video lottery, much less explicitly authorize it.” *State ex rel. Mountaineer Park, Inc. v. Polan*, 190 W.Va. 276, 280, 438 S.E.2d at 317-18 (holding that Article VI, Section 36 of the West Virginia Constitution only authorizes the Legislature to enact laws authorizing lotteries, it does not allow an administrative agency to expand beyond the scope of the Legislature’s delegation).

In 1994, in response to the decision in *Polan*, the West Virginia Legislature enacted the Racetrack Video Lottery Act which authorized video lottery at pari-mutuel racing facilities around the State. W.Va. Code § 29-22A-4. Prior to the enactment of the Racetrack Video Lottery Act, this Court had questioned, in *United States v. Dobkin*, whether video poker was authorized by the State Lottery Act. The enactment of the Racetrack Video Lottery Act removed all doubts when the Legislature explicitly authorized video lottery. *Paxton v. Dep’t. of Tax and Revenue*, 192 W.Va. 213, 451 S.E.2d 779, note 12 (1994) (Noting, In *Polan*, “we discussed the State Lottery Act in relation to whether it authorized what was referred to as “video lottery.” We concluded it did not. This result was subsequently changed by the enactment of the Racetrack Video Lottery Act”); *United States v. Dobkin*, 188 W.Va. 209, 423 S.E.2d 612 (1992).

In creating the Racetrack Video Lottery Act, the Legislature acknowledged that video lottery [is] “lottery games which utilize advanced computer technology” and declared that the State can “control, own and operate a video lottery by possessing a proprietary interest in the main logic boards, all erasable, programmable read only memory chips used in any video lottery equipment or games, and software consisting of computer programs, documentation and other related materials necessary for the video lottery system to be operated.” W.Va. Code § 29-22A-2(a-b).

Moreover, the Legislature declared that the State "can control and regulate a video lottery if the State limits licensure to a limited number of video lottery facilities located at qualified horse or dog racetracks, extends strict and exclusive state regulation to all persons, locations, practices, and associations related to the operation of licensed video lottery facilities, and provide comprehensive law enforcement supervision of video lottery activities." W.Va. Code § 29-22A-2(c).¹¹ The Legislature's determinations of fact are controlling unless clearly erroneous, arbitrary

¹¹When passing the Racetrack Video Lottery Act, the Legislature found and declared:

(a) The Legislature finds and declares that the 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 advanced computer technology; and that the Constitution grants to the Legislature the authority to establish, by general law, the manner of regulation, control, ownership and operation of lottery games in the State of West Virginia;

(b) The Legislature further finds and declares that the State can control, own and operate a video lottery by possessing a proprietary interest in the main logic boards, all erasable, programmable read-only memory chips used in any video lottery equipment or games, and software consisting of computer programs, documentation and other related materials necessary for the video lottery system to be operated. The State may acquire a proprietary interest in video lottery game software, for purposes of this article, through outright ownership or through an exclusive product license agreement with a manufacturer whereby the manufacturer retains copyrighted ownership of the software but the license granted to the State is nontransferable and authorizes the State to run the software program, solely for its own use, on the State's central equipment unit and electronic video terminals networked to the central equipment unit;

(c) The Legislature further finds and declares that the State can control and regulate a video lottery if the State limits licensure to a limited number of video lottery facilities located at qualified horse or dog racetracks, extends strict and exclusive state regulation to all persons, locations, practices and associations related to the operation of licensed video lottery facilities, and provides comprehensive law enforcement supervision of video lottery activities;

(d) The Legislature further finds and declares that since the public has an interest in video lottery operations and since lottery operations conducted pursuant to West

or clearly unwarranted. *State ex rel. Appalachian Power Co.*, 143 S.E.2d at 359.

The State of West Virginia, since 1994, has regulated, controlled, owned and operated video lottery at the State's four racetracks pursuant to the Racetrack Video Lottery Act. This Act requires, among other things:

1. No video lottery games can be played at any racetrack until that racetrack and each person having a controlling interest in that racetrack are approved by the Lottery Commission in its licensing procedure, which includes full background investigations. W.Va. Code §29-22A-7.
2. The specifications for and characteristics of all video lottery terminal hardware are determined by the Lottery Commission. W.Va. Code § 29-22A-6.

Virginia Constitution, article VI, section thirty-six, and under this article represent an exception to the general statutory policy of the State concerning wagering for private gain, participation in a video lottery by a licensee or permittee under this article shall be deemed a privilege conditioned upon the proper and continued qualification of the licensee or permittee and upon the discharge of the affirmative responsibility of each licensee to provide to the regulatory and investigatory authorities established by this article any assistance and information necessary to assure that the policies declared by this article are achieved. Consistent with this policy, it is the intent of this article to preclude the creation of any property right in any license or permit issued by the State under this article, the accrual of any value to the privilege of participation in any video lottery operation, or the transfer of any license or permit, and to require that participation in video lottery operations be solely conditioned upon the individual qualifications of persons seeking such privilege; and

(e) The purpose of this article is to define and provide specific standards for the operation of video lottery games at pari-mutuel racing facilities licensed by the State racing commission pursuant to article twenty-three, chapter nineteen of this code. The Legislature finds and declares that the existing pari-mutuel racing facilities in West Virginia provide a valuable tourism resource for this State and provide significant economic benefits to the citizens of this State through the provision of jobs and the generation of state revenues; that this valuable tourism resource is threatened because of a general decline in the racing industry and because of increasing competition from racing facilities and lottery products offered by neighboring states; and that the survival of West Virginia's pari-mutuel racing industry is in jeopardy unless modern lottery games are authorized at the racetracks.

3. All software requirements which determine game rules, random number selection and the percentage of winners are established by the Lottery Commission. W.Va. Code § 29-22A-6.
4. Hardware and software may not be installed until they have been tested by an independent laboratory selected by the Commission and those test results approved by the Lottery Commission. W.Va. Code § 29-22A-5.
5. A video lottery terminal cannot be used until it goes through an enrollment procedure (including the critical eprom signature test conducted by Lottery security personnel). W.Va. Code § 29-22A-11.
6. The logic unit and eprom in each video lottery terminal are sealed under the supervision of Lottery security personnel, and that seal may not be broken except in the presence of Lottery security personnel. (The logic unit and eprom control game rules and winner selection.) W.Va. Code § 29-22A-11.
7. The central computer unit at Lottery headquarters monitors the status of each terminal and records of all game activity on a daily basis. W.Va. Code § 29-22A-6.
8. Any terminal which is not functioning in accordance with Lottery Commission standards and specifications is disabled by Lottery security personnel from the central computer. W.Va. Code § 29-22A-6.
9. The Lottery Commission controls the location and placement of each video lottery terminal. W.Va. Code § 29-22A-5.
10. The Lottery Commission has established secure ticket validation procedures and record-keeping requirements. W.Va. Code § 29-22A-10.
11. The Lottery Commission controls the transportation and movement of all video lottery terminals. W.Va. Code § 29-22A-14.
12. The Lottery Commission controls the training and licensing of service and validation personnel. W.Va. Code § 29-22A-11.
13. The Lottery Commission has a key to each video lottery terminal, in which is located a maintenance log describing each time the terminal cabinet is opened. (Each time the cabinet is opened, this event is reported in the daily information gathered by the central computer in Charleston.) W.Va. Code § 29-22A-11.

Moreover, each operator is a licensed agent of the Lottery Commission and, as the Lottery Commission's agent, it supplies certain materials and services, but it is under the absolute control of the Lottery Commission.

Clearly, the Racetrack Video Lottery Act – as an extension of the State Lottery Act – meets all the criteria of regulation, operation, ownership and control mandated by the Constitution. As such, the Racetrack Video Lottery Act creates a permissible, constitutional state lottery which has contributed hundreds of millions of dollars annually to the State's budget and created hundreds – probably thousands – of jobs.

In 2001, the West Virginia Legislature expanded video lottery beyond the confines of the racetracks when it passed the Limited Video Lottery Act. This statute is virtually identical to the Racetrack Lottery Act enacted almost a decade earlier with respect to the regulation, operation, ownership and control of video lottery. This Act expanded video lottery to bars, restaurants, and other locations around the state.

Before passing the Limited Video Lottery Act, the Legislature commissioned a two-year study of gaming. *Club Ass'n. of W.Va. Inc.*, 156 F. Supp. 2d at 606. This study determined that there were over 13,000 illegal video poker machines at private establishments across the state generating millions of dollars in illegal and untaxed revenue. *Id.* At the same time, the Legislature was faced with a potentially catastrophic budget shortage. *Id.*

In light of the potential revenue stream available and the budget shortage, the Legislature enacted the Limited Video Lottery Act. The Limited Video Lottery Act is economic in nature. Therefore, the presumption of constitutionality is almost irrebuttable because of the extremely high level of deference that must be accorded to the Legislature. It is also supported by the Legislature's declaration of facts and purpose. Once again, the Legislature's determinations of fact are controlling

unless clearly erroneous, arbitrary, or wholly unwarranted. *State ex rel. Appalachian Power Co.*,

143 S.E.2d at 359. In passing the Limited Video Lottery Act, the Legislature found and declared:

- (1) The Constitution grants to the Legislature the authority to establish, by general law, lotteries which are regulated, controlled, owned and operated by the State of West Virginia; and
- (2) The limited video lottery authorized by this article is a "lottery" as that term is commonly understood and as that term is used in the West Virginia Constitution, article 6, section 36. The limited video lottery authorized as video lottery games in this article is a system of lottery games that utilize advanced computer technology.

W. Va. Code § 29-22B-201.

- (1) The State can control, own and operate a video lottery by possessing a proprietary interest in the main logic boards, all erasable, programmable read-only memory chips used in any video lottery equipment or games, and software consisting of computer programs, documentation and other related materials necessary for the video lottery system to be operated;
- (2) The State may possess a proprietary interest in video lottery game software, for purposes of this article, through outright ownership or through an exclusive product license agreement with a manufacturer whereby (A) the manufacturer retains copyrighted ownership of the software, (B) the product license granted to the State is nontransferable, and (C) the agreement authorizes the State or run the software program, solely for its own use, on the State's central equipment unit and electronic video terminals networked to the central equipment unit; and
- (3) The State can control and regulate a video lottery if the State (A) restricts licensure to a limited number of video lottery terminals at qualified locations, (B) extends strict and exclusive State regulation to all persons, locations, practices and associations related to the operation of licensed limited video lottery facilities, and (C) provides comprehensive law-enforcement supervision of limited video lottery activities.

W. Va. Code § 29-22B-202.

In creating the Limited Video Lottery Act, and in the virtually identical Racetrack Lottery Act, the Legislature found that it could control, own, and operate a video lottery system by possessing a proprietary interest in the main logic boards and other related materials necessary for the video lottery system to be operated. W.Va. Code § 29-22B-203. This is a reasonable way for the Legislature to interpret the constitutional requirement because it ensures that: (1) only games authorized by the State can be played on the video lottery machine; and (2) the proceeds from those games are paid to the State. While the terms regulated, controlled, owned, and operated have not yet been defined by this Court regarding lottery systems, the legislative definitions of these terms should be accepted by this Court as true unless they are clearly erroneous, arbitrary, or wholly unwarranted. *State ex rel. Appalachian Power*, 143 S.E.2d at 359.

Furthermore, the Legislature determined that the state could possess an ownership interest in video lottery games through an exclusive licensing agreement with the manufacturer. W.Va. § 29-22B-203. This is an appropriate definition of the term "ownership," as that term is plainly defined as the legal right of possession. *The American Heritage Dictionary of the English Language (3rd Ed.)* at 1295. Under the system devised by the Legislature, the State of West Virginia possesses the legal right to the lottery software used in the video lottery terminals.

Finally, the Legislature regulated video lottery by: (1) restricting the number and location of video lottery terminals; (2) strictly regulating the persons and locations where video lottery may be operated; and (3) providing law enforcement supervision of video lottery locations. W.Va. Code § 29-22B-203. Video lottery is strictly controlled by the State. Thus, the State Lottery Act, The Racetrack Video Lottery Act, and the Limited Lottery Act all constitute permissible constitutional lotteries operated, owned and controlled by the State of West Virginia.

C. The State Excess Lottery Revenue Fund Created by W.Va. Code § 29-22-18a is Constitutional Because it no Longer Violates the Separation of Powers Clause of the West Virginia Constitution and it no Longer Improperly Delegates the Legislature's Powers to an Administrative Agency.

This Court has confirmed the constitutionality of the composition and grant approval process of the West Virginia Economic Development Fund Grant Committee, created by W.Va. Code § 29-22-18a. *State ex rel. W.Va. Citizens Action Group v. W.Va. Econ. Dev. Grant Comm.*, 580 S.E.2d 869 (W.Va. 2003). However, it found portions of the prior State Excess Lottery Fund Act to be unconstitutional in both the way the West Virginia Economic Development Grant Committee was previously selected, and the process by which it approved grants. *Id.* It further provided that these defects were easily remedied. *Id.* Following this ruling, the State Excess Lottery Fund Act has been amended in accordance with this Court's guidance. W.Va. Code § 29-22-18a(d), as amended, available at 2003 W. V. SB 2007B (2003).

When the State Excess Lottery Fund Act was originally enacted, the nine-person Economic Development Grant Committee was comprised of the governor, or his designee, the executive director of the West Virginia development office, three persons appointed by the governor from a list of five names provided by the president of the Senate, three persons appointed by the governor from a list of five names provided by the speaker of the House of Delegates. *State ex rel. W.Va. Citizens Action Group*, 580 S.E.2d at 874. This Court concluded that the involvement of the Legislature in selecting the committee members, a function that belonged solely to the executive branch, violated separation of powers provision of the West Virginia Constitution because it gave the Legislature the power to both enact and implement the law. *Id.* at 875.

However, this Court also provided that should the Legislature choose to amend the State Excess Lottery Fund Act to cure the defects, "the Legislature should repose the duty of filling the

six positions previously chosen through the legislative submission process exclusively in the executive branch, with or without confirmation by the Senate, as the Legislature shall determine.” *State ex rel. W.Va. Citizens Action Group*, 580 S.E.2d at 883. Following this advice the Legislature amended the State Excess Lottery Fund Act. W.Va. Code § 29-22-18a(d), as amended, available at 2003 W. V. SB 2007B (2003). It now provides that the economic development grant committee consists of the governor, or his designee, the secretary of the department of tax and revenue, the executive director of the West Virginia development office and six persons appointed by the governor. *Id.* This composition is constitutional because the Legislature has no post-enactment control over the economic development grant committee.

Another defect in the original State Excess Lottery Fund Act centered on the Legislature’s delegation of powers to the economic development grant committee. *State ex rel. W.Va. Citizens Action Group*, 580 S.E.2d at 874. In the original State Excess Lottery Fund Act only the broadest statement of legislative intent was present. The statute did not include any standards for the Grant Committee to use in exercising its statutorily prescribed duties. *Id.* at 886. This Court held that this was a clear, and unconstitutional, delegation of the legislature’s authority because “the Legislature must articulate with sufficient clarity its public policy objectives to permit the executive department to effectuate those policy objectives and to educate the public as to the Legislature’s intentions. . . .the Legislature cannot “grant” . . . unbridled authority in the exercise of the power conferred upon . . . [an administrative agency].” *Id.* (citing *Polan*, 438 S.E.2d at 309). The Court noted that this was especially troubling because: the State Excess Lottery Fund Act has a broad purpose; the grants are distributed to both public and private organizations; and the money given by the Act is given in the form of grants, not loans. *Id.*

This Court provided that these defects could be corrected if the Legislature provided the Committee with "sufficient guidance so that the Committee's allocation decisions can be made with a clear understanding of the type of contemplated economic development it should be seeking to fund." *State ex rel. W.Va. Citizens Action Group*, 580 S.E.2d at 887. The State Excess Lottery Fund Act was amended accordingly:

When determining whether or not to certify a project, the committee shall take into consideration the following:

- (A) The ability of the project to leverage other sources of funding;
- (B) Whether funding for the amount requested in the grant application is or reasonably should be available from commercial sources;
- (C) The ability of the project to create or retain jobs, considering the number of jobs, the type of jobs, whether benefits are or will be paid, the type of benefits involved and the compensation reasonably anticipated to be paid persons filling new jobs or the compensation currently paid to persons whose jobs would be retained;
- (D) Whether the project will promote economic development in the region and the type of economic development that will be promoted;
- (E) The type of capital investments to be made with bond proceeds and the useful life of the capital investments; and
- (F) Whether the project is in the best interest of the public.

W.Va. Code § 29-22-18a(d), as amended, available at 2003 W. V. SB 2007B (2003). It now provides guidance as to which types of projects are considered in the public interest, and for a public purpose, and, therefore, eligible to receive grants. *Id.* Appropriate projects are delineated by the Legislature, including sports facilities, health clinics, infrastructure, telecommunications infrastructure, development centers, industrial parks, improvements at state parks, railroads,

recreational facilities, historic preservation, and others. *Id.* Finally, the new statute limits eligibility of the grants to projects that are in the public interest when the grant will be used for a public purpose, *id.* at subsection 29-22-18a(d)(11), and grants may be awarded only to an agency, instrumentality or political subdivision of the State or to an agency or instrumentality of a political subdivision of this State. *Id.* at § 29-22-18a(d)(9). Thus, removing any concern that “public” funds will be diverted to “private” use.

Any challenge now to the constitutionality of West Virginia Economic Development Fund Grant Committee must fail. The power to appoint grant committee members is now vested solely in the governor. The Legislature has eliminated any claim of improper delegation by providing detailed standards for the economic development grant committee to use when selecting grant recipients.

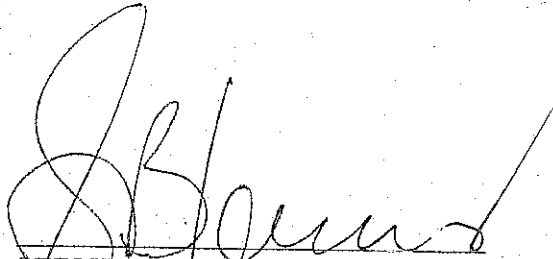
V. CONCLUSION

For the reasons more fully stated above, the Petitioners, by counsel, petition this Court, pursuant to Article VIII, § 3 of the Constitution of West Virginia and W.Va. Code § 51-1-3 to issue a Writ of Mandamus to compel the West Virginia Economic Development Authority (“Respondent”) to fulfill its statutory non-discretionary duty to honor Executive Order 19-03 by issuing revenue bonds for the economic development projects certified by the Economic Development Grant Committee as mandated by W.Va. Code § 29-22-18a(d) (2003) forthwith.

THE CITIES OF CHARLESTON AND
HUNTINGTON, AND THE COUNTIES OF
OHIO AND KANAWHA, WEST VIRGINIA,

Petitioners,

By Counsel:

A handwritten signature in black ink, appearing to read 'S. B. Farmer', written over a horizontal line.

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