

NO. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**GREENBRIER COUNTY COALITION
AGAINST GAMBLING EXPANSION;
and CABELL COUNTY COALITION
AGAINST GAMBLING EXPANSION,
unincorporated associations,**

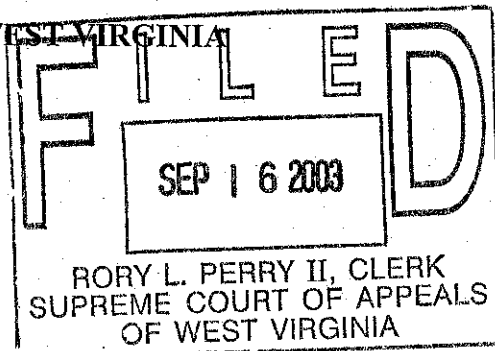
PETITIONERS,

vs.

ORIGINAL JURISDICTION

**WEST VIRGINIA LOTTERY COMMISSION;
and ITS DIRECTOR, JOHN MUSGRAVE,**

RESPONDENTS.



PETITION FOR WRIT OF MANDAMUS

The petitioners state and allege as follows:

A. Jurisdiction, Venue, and Parties

1. The jurisdiction of this Court is invoked by the *W. Va. Const.*, Art. VIII, § 3; the *W. Va. Code* § 53-1-1, *et seq.*, and this Court's Rule 14.
2. Petitioner Greenbrier County Coalition Against Gambling Expansion is an unincorporated association composed of citizens, taxpayers, voters and residents of the State of West Virginia and Greenbrier County, West Virginia. Its members are too numerous to be properly or conveniently joined as individual plaintiffs. It sues by and through its member, Paula McLaughlin, who shall adequately represent the Coalition as a class. There are common questions of law and fact, and the legal and equitable relief sought is common to the class.

Individual actions by class members would risk varying adjudications which could impose inconsistent or conflicting legal duties upon the defendants. Petitioner Paula McLaughlin as well sues as a citizen, resident, taxpayer and voter of Greenbrier county, West Virginia, and of the State of West Virginia. Rule 23, W. Va. Rules of Civil Procedure, and petitioners' compliance with it, are hereby alleged.

3. Petitioner Cabell County Coalition Against Gambling Expansion is an unincorporated association composed of citizens, taxpayers, voters and residents of West Virginia and Cabell County, West Virginia. It sues by and through its member, Brian Trippett. The class allegations of Paragraph 2 above are hereby reincorporated and alleged by reference. Petitioner Brian Trippett as well sues as a citizen, resident, taxpayer and voter of Cabell County, West Virginia, and of the State of West Virginia. Rule 23, W. Va. Rules of Civil Procedure, and petitioners' compliance with it, are hereby alleged.

4. Respondent West Virginia Lottery Commission is a public agency of the State of West Virginia created by the *W. Va. Code* § 29-22-4, and charged under the *W. Va. Code* § 29-22-2 "to implement a state-operated lottery." By the *W. Va. Code* § 29-22A-2(g), the "primary responsibility for the control and regulation of any video lottery games and video lottery terminals ... rests with the Commission."

5. Respondent John Musgrave is the Director of the Commission and by the *W. Va. Code* § 29-22-2 "holds broad authority to administer the (lottery) system," and by the *W. Va. Code* § 29-22-3(b) is charged "to provide the management and administration necessary to direct the State Lottery office" which is located in Charleston, Kanawha County, West Virginia

B. Facts and Allegations

6. The respondent West Virginia Lottery Commission and its Director and over 1,300 private corporate manufacturers, operators and retailers, have been and presently are under color of the *W. Va. Code* § 29-22A-1, *et seq.*, and § 29-22B-1, *et seq.*, illegally conducting video poker, video blackjack and similar video gambling games statewide, with the private entities predominating.

COUNT I

(Illegal Advertising And Promotion)

7. The *W. Va. Code* §§ 29-22B-702(13) and 706(12) mandate “no video lottery advertising or promotional activities.”

8. Despite these statutory bans, various “operators” and “retailers,” for just a few instances, on large conspicuous signs at the entries to their establishments openly advertise and promote their video gambling machines inside, with such signs having been prepared by the respondent Commission itself. Not only do such advertising and promotion violate the *W. Va. Code* §§ 29-22B-702(13) and 706(12), they are statutory crimes by the *W. Va. Code* §§ 29-22B-1713, punishable by one (1) to ten (10) years’ imprisonment.

9. States the *W. Va. Code* § 29-22B-404:

Neither the commission nor the director may conduct video lottery advertising or promotional activities to promote or advertise limited video lottery.

10. However, both the Commission and its Director during 2003 have for example, massively advertised and promoted video gambling games such as video “Keno” by mailing out to more than 215,000 residents throughout the State advertising brochures with free “Keno” gambling coupons enclosed to entice them to patronize these video gambling machines.

11. Various other forms of such illegal advertising and promotion have also been engaged in by them, including giving away at promotion events free telephone calling cards to such hoped-for gamblers. These acts are criminal violations of the *W. Va. Code* § 29-22B-1713, with each punishable by one (1) to ten (10) years' imprisonment, as well as distinct violations of the *W. Va. Code* § 29-22B-404.

COUNT II

(Postings of "Rules of Play," "Odds and Probabilities" and "House Percentage")

12. The *W. Va. Code* § 29-22B-403(5) requires "the mandatory posting of ... the rules of play and the odds or house percentage of each video lottery game."

13. The *W. Va. Code* § 29-22B-907(1) mandates that "(all) information required by this section must be displayed under glass or another transparent substance: (1) the rules of play for each game shall be displayed on the video lottery terminal face or screen...."

14. The *W. Va. Code* § 29-22A-6(a)(12) mandates that "rules of play for each game shall be displayed on the video lottery terminal face or screen.... All information ... shall be displayed under glass or another transparent substance."

15. None of these video gambling machines posts the actual "odds" of a player winning any hand of their main game of "poker" or such games, of the "house percentage" of the monies wagered. Nor do any of these machines post anything like complete or accurate "rules of play," as more particularly described and alleged below. These statutory violations are as well criminal violations of the *W. Va. Code* §§ 29-22A-16(h) and 29-22B-1713, punishable by one (1) to ten (10) years' imprisonment.

COUNT III

("Standard Probability")

16. The *W. Va. Code* §§ 29-22A-6(c)(1) and 29-22B-910(1) mandate that "(v)ideo lottery games shall pay out no less than eighty percent and no more than ninety-five percent of the amount wagered. The theoretical payout percentage shall be determined using standard methods of probability theory."

17. None of these machines post these "standard methods of probability theory" as required by the *W. Va. Code* §§ 29-22A-6(a)(12), 29-22B-403(5) and 907(1). Each such statutory violation is as well a crime under the *W. Va. Code* §§ 29-22A-16(h) and 29-22B-1713, punishable by one (1) to ten (10) years' imprisonment.

18. In the standard draw poker game there must be at least two players, both of whom are dealt five cards in the first round and draw replacement cards in the second one, with an initial "ante," or small down payment, and with bets at the end of the deal and at the end of the draw, with each player free to "fold" at each round. None of that is so here.

19. Only the solitary player who inserts, say, \$20.00 into the machine is dealt and draws cards. There is no first and second round of betting on a promising hand or folding on an unpromising one. The player, however, whatever his or her initial hand may be, must play it to the end regardless.

20. What the player actually plays against is not another player or players, but rather a set schedule of potential "payouts" listed on the video (TV-like) screen. However, the actual and mathematically certain "probabilities," or "odds," for each of these standard poker hands are not posted on the video screen, but rather much lower, non-standard, rigged "odds" upon which the potential "payouts" are based.

21. For example, "the standard probability" of a player who is dealt a pair of "8's" to draw another "8" for "three of a kind" is 1 in 16. So by "standard probability," the player who bet \$20.00 must be paid \$320.00 ($\$20.00 \times 16$). But by the machines' rigged odds of 1 in 3, [s]he is paid only \$60.00 ($\20.00×3).

22. For another example, the standard probability that a player will "hit" a straight flush (5 cards of the same suit in a row) are 1 in 40,000. But such a player who inserts \$20.00 is not paid \$800,000.00 ($\$20.00 \times 40,000$), but rather by 1 in 250 rigged odds, or \$5,000.00 ($\20.00×250).

23. Even should it somehow be held that the machine does not have to "pay out" by "standard probability," the *W. Va. Code* §§ 29-22A-6(a)(12), 29-22B-403(5) and 29-22B-907(1) still require the posting of such "standard probability odds" on the video screen so the player may fairly know his or her true odds to win or lose.

24. Of course, the defendants do not do that, either, because if they did, many a player once made so aware, would be sure to quit playing or resort to a standard poker game somewhere else.

25. Each lack of posting of such "standard probability" is a crime under the *W. Va. Code* §§ 29-22A-16(h) and 29-22B-1713, punishable by one (1) to ten (10) years' imprisonment.

COUNT IV

("House Percentage")

26. Another unvarying rule of any standard poker game is that the "house percentage," or "take" is always taken or "raked" from the "pot" at the end of the hand, never while the hand is in play.

27. Here, however, the “house percentage” is extracted by drastically lowering the amount of the “pot” or “payout” itself as noted above. Despite the *W. Va. Code* § 29-22B-403(5), *inter alia*, requiring that the “house percentage” be posted, this is never done on any of these machines. These violations of the *W. Va. Code* § 29-22B-403(5) are as well criminal violations of the *W. Va. Code* § 29-22B-1713, punishable by one (1) to ten (10) years’ imprisonment.

28. For the defendants know that the required postings on the video screens of how much the “house percentage” truly is would deter many people from playing these machines.

29. Since the machine takes around 9% of the total recycled monies successively wagered, by certain mathematical fact the formula of the “gambler’s ruin” developed in the 17th century and relied on by expert statisticians today, infallibly shows how such a “house percentage” will soon clean out the most skilled gambler due to the cumulative, depleting effect, i.e., $91\% \text{ of } 1.00 = 91\text{¢} \times 91\% = 80\text{¢} \times 91\% = 70\text{¢} \times 91\% = 60\text{¢}$, etc. (approx.) so on down to zero.

COUNT V

(Player “Not Permitted to Benefit From Any Personal Skill”....)

30. The most malignantly deceitful practice of the defendants is their unvarying state-wide practice to hide from players of these machines the fact that no gambling knowledge or skill of any player can win or cut his or her losses. For by the *W. Va. Code* § 29-22B-332(5), “in any event, the player is not permitted to benefit from any personal skill, based upon a knowledge of probabilities” when [s]he makes the key decision (in standard poker) on how many replacement cards to draw during a “hand.”

31. Yet, incredibly, by the *W. Va. Code* § 29-22B-330 “‘video lottery’ does not include a lottery game ... which does not utilize an interactive electronic terminal device allowing input by an individual player.”

32. But, as provided by the above *W. Va. Code* § 29-22B-332(5) (“player ... not permitted to benefit from any personal skill (or) knowledge”), such “interactive ... input by an individual player” is insidiously false and futile.

33. The uninformed and unwary player multiplied by numerous such players statewide are deceived and duped out of his or her money while avidly and vainly trying to affect the outcome of the “game” by drawing replacement cards with his or her last few dollars, in multiple violations of the *W. Va. Code* §§ 29-22A-6(a)(12), 29-22B-403(5) and 29-22B-907(I), and in multiple criminal violations of the *W. Va. Code* § 29-22A-16(h) and the *W. Va. Code* § 29-22B-1713, punishable by one (1) to ten (10) years’ imprisonment.

COUNT VI

(Lack of Addiction Warnings and Treatment Notices)

34. The *W. Va. Code* § 29-22B-907(4) mandates the posting on the machine of “a label prominently displaying information on how to locate and contact persons or organizations available for help, assistance or treatment of persons who may have a gambling addiction, together with the telephone number 1-800-GAMBLER.”

35. While a number of the machines post the solitary “1-800-GAMBLER” telephone number in vacuo, none of them post the required “information on how to locate and contact persons or organizations available for help, treatment, assistance of treatment of persons who may have a gambling addiction” which must be posted “together” with the “800” telephone number.

36. Each of these numerous violations of the *W. Va. Code* § 29-22B-907(4) is as well a criminal violation of the *W. Va. Code* § 29-22B-1713 punishable by one (1) to ten (10) years’ imprisonment.

COUNT VII

(“Reduction of Gambling”)

37. The *W. Va. Code* § 29B-22-1112, under the heading “Reduction of Gambling,” mandates “conspicuously posting ... and disseminat(ing) the telephone numbers of state approved providers of problem gambling information, treatment and referral support services and further conspicuously posting the following: ‘CAUTION Gambling and playing this machine can be hazardous to your health, your finances and your future.’”

38. No such “telephone numbers of state approved providers of problem gambling information, treatment and referral support services” are so posted on any of these machines. Each such violation of the *W. Va. Code* § 29-22B-1112 is as well a crime under the *W. Va. Code* § 29-22B-1713, punishable by one (1) to ten (10) years imprisonment.

39. While some of these “retailer” bars and beer joints and restaurants do post the above-noted “CAUTION” warning on the wall, many others do not post such warnings at all and so are in violation of the *W. Va. Code* § 29-22B-1112, which are also criminal violations of the *W. Va. Code* § 29-22B-1713, punishable by one (1) to ten (10) years imprisonment.

40. Critically, the clear purpose of statutory heading of the *W. Va. Code* § 29-22B-1112, “Reduction of Gambling” is violated fundamentally because the required “CAUTION” warning “together” with the required “problem gambling ... treatment and support ... services” notice and admonition are largely intended and designed to “reduce” such gambling, much like similar warnings on cigarette packs, alcohol containers and dangerous medicative drugs.

41. The omission of either component of the *W. Va. Code* § 29-22B-1112 -- the “CAUTION” warning or the “problem gambling” admonition -- undermines the declared legislative purpose: “Reduction of Gambling.”

42. In any event, for all of these gambling sites which post no “problem gambling” admonition and for the numerous others which omit the “CAUTION” warning, criminal violations under the *W. Va. Code* § 29-22B-1713, as well as violations of the *W. Va. Code* § 29-22B-1112, are pervasively manifest.

43. The ubiquitous absence of the required “problem gambling” warning of the *W. Va. Code* § 29-22B-1112 effectuates the statutory warning that “playing this machine can be hazardous to your health, your finances and your future.” For merely because an incipiently or chronically “problem gambl(er)” may for a while “afford” to play the video machine does not at all mean that [s]he can regularly afford a psychiatrist clinically to treat the addiction caused or worsened by it.

44. In this respect, the *W. Va. Code* § 29-22A-17 provides that a pathological or “problem gambler” may receive such clinical treatment free of charge from a special program at the State Department of Health and Human Resources, but no such notices are posted on the video screen or on the adjoining wall.

COUNT VIII

“Public Good,” “Honesty,” “Public Health and Welfare”

45. The *W. Va. Code* § 29-22A-10(b) provides that “the Commission shall establish procedures to ensure the ... honesty and integrity of the lottery ... system.”

46. The *W. Va. Code* §§ 29-22A-9(a)(2) and 29-22B-701(2) require the Commission and the Director to “(c)onduct all video lottery activities and functions in a manner which does not pose a threat to the public health, safety or welfare of the citizens of this state....”

47. The *W. Va. Code* § 29-22-9(a) mandates that “lottery shall be operated ... consonant with the public good.”

48. The respondent Commission and Director, by their legal and criminal violations recounted in paragraphs 7 through 44 above, have been and are violating the *W. Va. Code* §§ 29-22-9(a), 29-22A-9(a)(2), 20-22A-10(b), and 29-22B-701(2).

COUNT IX

(Gambling Devices and Games Not “Owned, Operated and Controlled” by the State)

49. The *W. Va. Const.*, Art. VI, § 36, states that “The legislature shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this State; except that the legislature may authorize lotteries which are regulated, controlled, owned and operated by the State of West Virginia in the manner provided by general law....” In fact and in law, the private “manufacturers” and “operators” and “retailers” “own, operate” and mainly “control” these so-called video lotteries, with the State alone, as noted, constitutionally authorized to do so. Indeed, as shown above as well, neither the Lottery Commission and its Director, nor the State otherwise, apart from not owning, operating and controlling any of these machines and their related tangible devices, mainly “regulate” them because even their so-called centralized “software” at the “lottery” office in Charleston is as well mainly “programmed” by the private manufacturers. The *W. Va. Code* §§ 29-22A-1, *et seq.*, and 29-22B-1, *et seq.*, are thus in violation of the *W. Va. Const.*, Art. VI, § 36, both on their face and as applied.

COUNT X

(Video Gambling Games Not "a Lottery")

50. Even if these private manufacturers, operators and retailers which obviously "own, operate and control" this so-called "video lottery" should somehow be held not to do so, it is the game, not the name, which controls.

51. These so-called "video lotteries" are inescapably not "lotteries" within the meaning of *W. Va. Const.*, Art. VI, § 36, but are rather hardcore, head-on gambling machines and games which since 1992 under the controlling decisional law of this state are not a "lottery," and "have no relation whatsoever to a lottery...." The *W. Va. Code* §§ 29-22A-1, *et seq.*, and 29-22B-1, *et seq.*, are thus in violation of the *W. Va. Const.*, Art. VI, § 36, both on their face and as applied.

COUNT XI

(State, Not Private Interests, Mainly Benefit)

52. By the *W. Va. Const.*, Art. VI, § 36, the citizens of the State of West Virginia through their Lottery Commission and Director are alone to receive the profits from such so-called "video lotteries," while the *W. Va. Const.*, Art. X, § 6 forbids the granting of unearned and unrepaid state aid to private corporations and private persons and entities in the economic marketplace.

53. The fair and reasonable value of the goods and services rendered to the State of West Virginia for the operation of these so-called "video lotteries" for the past twelve (12) months by these manufacturers, operators and retailers in no manner and to no extent reaches or even remotely approaches the \$512 million paid by the State to them under the guise and ruse of "arm's length" market transactions, with the State having received \$369 million.

54. All such State monies received by the defendants for such goods and services beyond their fair and reasonable market value were thus taken by them in violation of the *W. Va. Const.*, Art. VI, § 36 and Art. X, § 6.

55. The manufacturers, operators and retailers accordingly must be required by the Commission and Director to render full and accurate accountings for all such monies claimed to represent the fair and reasonable market value of such goods and services for this State gambling enterprise, and disgorge and rebate for the use and benefit of the State of West Virginia all of the monies received by them beyond such fair and reasonable amounts for so-called "lottery" goods and services, plus interest.

56. The *W. Va. Code* §§ 29-22A-1, *et seq.*, and 29-22B-1, *et seq.*, which require or allow such excessive and unconstitutional payments of unearned and otherwise equitably unmerited State monies to these private entities is unconstitutional and void under the *W. Va. Const.*, Art. VI, § 36 and Art. X, § 6.

COUNT XII

(Illegal Sale of Alcohol at State's Gambling Places)

57. Should these so-called "video lotteries" be deemed owned, operated, controlled and regulated by the State as required by the *W. Va. Const.*, Art. VI, § 36, the retail establishments at which such gambling occurs are "public places" where alcohol may not be sold and consumed under the *W. Va. Const.*, Art. VI, § 46.

58. The *W. Va. Code* § 29-22B-328, by requiring that these video machines be placed only where alcohol is sold and consumed, is in violation of the *W. Va. Const.*, Art. VI, §§ 36 and 46, which disallow the sale and drinking of alcohol at places where these gambling games are played.

COUNT XIII

(Statewide Criminal Gambling Enterprise and Public Nuisance)

59. Since the Commission and its Director and their agent-manufacturers, operators and retailers constitutionally and statutorily under their "control," *W. Va. Const.*, Art. VI, § 36 and *W. Va. Code* § 29-22A-2(g), have by their pervasive illegal and criminal conduct stripped and divested themselves of any colorable benefit, protection or pretense of law, their combined and pervasive illicit activities comprise a statewide gambling enterprise and statewide public nuisance at common law.

60. Since they have not adhered to the letter of the law by which they are privileged to operate, and have not conducted their business precisely as permitted by that legal letter and substance, they have forfeited any claim to legality in this matter.

61. Every single one of their numerous acts beyond the pertinent statutory law brings them under the full force of the applicable criminal penalties, and moves them from narrow protected legality to unprotected broad lawlessness, rendering this statutorily illegal and criminal gambling enterprise onerous to the criminal common law as well, and condemning it as a statewide public nuisance which must be enjoined and abated.

(Mandamus Allegations)

62. The respondents have clear legal duties to conform their conduct to the constitutional and legal requirements alleged and described above, and the petitioners have clear legal rights for them to do so.

63. The petitioners have no adequate or equally expeditious or convenient remedy in this matter other than in mandamus.

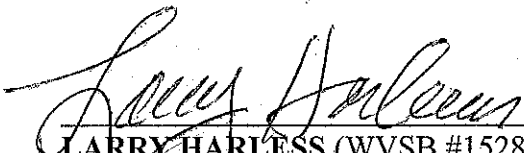
64. The granting of the requested writ of mandamus would be in the public interest.

C. Prayer For Relief

WHEREFORE, the petitioners pray that this Court:


1. Issue a rule directing the respondents to show cause, if any they can, why a writ of mandamus should not be awarded to petitioners;
2. Refer this matter to a Special Commissioner under this Court's Rule 14, to a circuit judge or otherwise, for the taking of evidence;
3. Allow the parties to file additional briefs after the taking of evidence;
4. Award petitioners a writ of mandamus requiring the respondents to cease and desist from further operation of such video gambling under color of the *W. Va. Code* §§ 29-22A-1, *et seq.*, and the *W. Va. Code* §§ 29-22B-1, *et seq.*; and requiring the complete shutdown of any and all legal bona fide lottery games until such time as they are in and remain in full compliance with such legal requirements;
5. Order the respondents to pay the petitioners' costs, expenses and reasonable attorney fees associated with this proceeding; and
6. Grant such other and further relief as is proper and just.

**GREENBRIER COUNTY COALITION
AGAINST GAMBLING EXPANSION;
and CABELL COUNTY COALITION
AGAINST GAMBLING EXPANSION,
unincorporated associations,
By Counsel**


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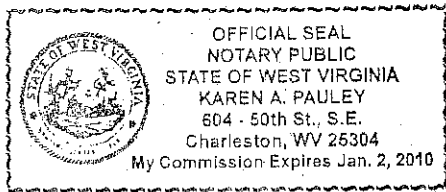
VERIFICATION OF PETITION

LARRY HARLESS, being first duly sworn, hereby says that the facts, allegations and exhibits contained in the foregoing Petition for Writ of Mandamus are true to the extent of his personal knowledge and, so far as they are based on information, he believes them to be true.


LARRY HARLESS

Taken, subscribed and sworn to before me this 16th day of September, 2003.

My commission expires Jan. 2, 2010.




NOTARY PUBLIC