

No. 032055

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,

v.

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

Respondents.

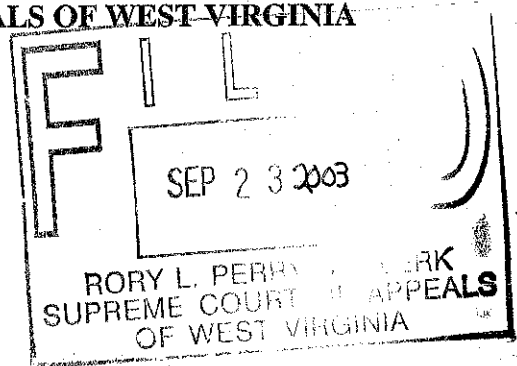
**RESPONDENTS' MEMORANDUM IN OPPOSITION TO
PETITION FOR WRIT OF MANDAMUS**

As requested by this Court, Respondents, The West Virginia Lottery Commission and John C. Musgrave, respectfully submit this Memorandum in Opposition to the Petition for Writ of Mandamus in the above-styled case. As Respondents will show below, no rule should issue, and the petition should be denied. Respondents refer the Court to their Memorandum in Opposition to Motion for Taking Evidence for a description of the background and procedural posture of this action, and the remainder of this memorandum will assume familiarity with that description.

Mandamus Standard

Mandamus will lie only to compel the performance of a ministerial, nondiscretionary act. *State ex rel. Judy v. Kiger*, 153 W.Va. 764, 172 S.E.2d 579, 581-582 (1970).

A writ of mandamus will not issue unless three elements coexist – (1) a clear legal right in the petitioner to the relief sought; (2) a



legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Syl. pt. 1, *State ex rel. Department of Health and Human Resources v. Hill*, 207 W.Va. 358, 532 S.E.2d 358 (2000) (quotations omitted). Petitioners cannot meet this high standard, for a variety of reasons.

Petitioners Lack Standing

The petition does not demonstrate that any member of the petitioner associations has standing to bring any of the claims.

The question of standing to sue is whether the litigant has alleged such a personal stake in the outcome of the lawsuit so as to present the court with a justiciable controversy warranting judicial resolution of the dispute. In order to have standing to sue, a party must allege an injury in fact, either economic or otherwise, which is the result of the challenged action and show that the interest he seeks to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit.

Snyder v. Callaghan, 168 W.Va. 265, 284 S.E.2d 241, 248 (1981) (citations omitted).

Petitioners identify themselves as “citizens, taxpayers, voters and residents” of Greenbrier and Cabell Counties. Citizenship and its ordinary attributes, like residence and eligibility to vote, do not generally create standing. Status as a taxpayer can sometimes confer standing, but only where the acts complained of could *harm* the plaintiff *in his capacity as a taxpayer*. *E.g., Tug Valley Recovery Center, Inc. v. Mingo County Comm’n*, 164 W.Va. 94, 261 S.E.2d 165 (1979) (each property owner in a taxing district has standing to challenge underassessment of any property in district, because proper assessment could ultimately lower plaintiff taxpayer’s own tax). Here, by contrast, video lottery *relieves* the burden on the taxpaying public by generating over \$1

million a day in revenues used for worthwhile public purposes. Petitioners therefore cannot have taxpayer standing.

Petitioners' lack of standing is even more starkly apparent as regards their claims that Respondents are not enforcing statutes designed for the protection of players of video lottery games. Such failures to enforce the law – which Respondents deny – could in any event only cause injury-in-fact to a player of video lottery games. No member of Petitioner organizations is identified as such a player. *Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720, 742-743 (1998) (persons generally lack standing to vindicate the rights of third parties); *Guido v. Guido*, 202 W.Va. 198, 503 S.E.2d 511, 515 (1998) (litigant lacked standing to challenge court orders affecting his parents); *West Virginia AAA Statewide Ass'n v. Public Service Comm'n*, 186 W.Va. 287, 412 S.E.2d 481, 483 n.3 (1991) (entity not subject to PSC tariff had no standing to raise procedural issues concerning how that tariff was increased, and no standing to challenge PSC orders on behalf of those who were subject to them).

Because Petitioners lack standing, their petition ought to be denied.

The “Compliance” Claims Could Be Heard by a Circuit Court in Due Course

As Respondents discussed in their response to Petitioners' motion to take evidence, many of the issues raised do not involve the constitutionality *vel non* of video lottery, but rather the way Respondents are enforcing the law. Even if Petitioners had standing to assert these claims – and again they do not – they could bring them in Circuit Court and be heard in due course. There is no reason for this Court to exercise jurisdiction of such fact-bound issues at this time.

The Constitutional Claims Lack Merit

Video Lottery is a "Lottery" Authorized by the Exception in Art. VI § 36

Article VI, § 36 of the Constitution provides, in pertinent part:

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, either separately by this State or jointly or in cooperation with one or more other States.

This Court has long adhered to a broad definition of the term "lottery." In a case in which mere free games on a pinball machine were held to be prohibited by W.Va. Code § 61-10-11, the Court held:

"The essential elements of a lottery are 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 predominately by chance, is a lottery."

Syl. pt. 1, *State v. Wassick*, 156 W.Va. 128, 191 S.E.2d 283 (1972) (quoting syl. pt. 4, *State v. Hudson*, 128 W.Va. 655, 37 S.E.2d 553 (1946)).

Petitioners place great reliance on some cautiously worded *dicta* in *State ex rel. Mountaineer Park v. Polan*, 190 W.Va. 276, 438 S.E.2d 308 (1993), but they ignore the case's holding. In *Mountaineer Park*, this Court held simply that video lottery could not be conducted until and unless the Legislature provided by general law for it. *Mountaineer Park*, 438 S.E.2d at 315. "The legislature in subsequent legislation could, of course, amend this statute to clearly state that video gambling devices are part of the lottery system." *Id.* at 317 (emphasis added). The Legislature immediately responded to by enacting the Racetrack Video Lottery Act, W.Va. Code §§ 29-22A-1 *et seq.* See

Paxton v. Dep't of Tax and Revenue, 192 W.Va. 213, 451 S.E.2d 779, 783 n.12 (1994) (noting that Legislature had "subsequently changed" the result of *Mountaineer Park*).¹

Petitioners' primary out-of-state authority, *Poppen v. Walker*, 94 S.D. 477, 520 N.W.2d 238 (1994), actually supports Respondents' position here. Unlike West Virginia's, South Dakota's Constitution prohibited both lotteries and "games of chance." South Dakota's voters later approved an amendment allowing a state lottery but left the "games of chance" prohibition intact. In these circumstances, the South Dakota court gave "lottery" a narrow construction. It explained its reasons:

Under the constitutional mandates and statutes prohibiting lotteries as a matter of public policy, the courts [have] developed a broad definition of the term "lottery" in order to dissuade all sorts of ingenious attempts to circumvent the prohibition. Absent any statutory definition, courts generally hold that any enterprise, whether it be a plan, scheme, game or other artifice, is a "lottery" if the three elements of chance, prize and consideration are present. This broad definition is used especially when the issue is whether a scheme, plan or device falls *under a constitutional provision in which the only prohibition is against a lottery*. ...

Diverse plans, schemes, and games of all sorts have been found to be lotteries under the broad organic law definition, including: slot machines; pyramid schemes; wheels of fortune; sales promotion schemes; "tailor clubs"; bingo; punch boards; pinball machines; and theatre bank nights.

* * *

When a constitution prohibits both games of chance and lotteries, the question arises as to the distinction between the two terms. When both terms are used, the term "lottery" has a narrower meaning in that it is a special form of game of chance.

¹ Moreover, Petitioners read far too much into *United States v. Dobkin*, 188 W.Va. 209, 423 S.E.2d 612 (1992), in which this Court held, in a single sentence without any further explanation, that use of video poker machine did not violate a *criminal* statute prohibiting lotteries (W.Va. Code § 61-10-11). The Court did not cite or distinguish *Wassick* in this regard. Perhaps the Legislature's 1970 amendment of W.Va. Code § 61-10-1, which occurred after the events underlying *Wassick*, persuaded the Court that questions as to the legality of a given machine should turn on application of the new § 61-10-1 proviso. At any rate, because § 61-10-11 is a penal statute, it necessarily must be construed most strictly in favor of the accused.

Poppen, 520 N.W.2d at 244 (citations omitted).

Thus, under the *Poppen* court's reasoning, West Virginia's constitutional prohibition of (and subsequent voter-approved exception for) "lotteries" should be given the broad definition. Because this Court has already embraced the broad definition in its own precedents, the result is clear: the Legislature had the power to authorize video lottery operations under art. VI § 36.

But even if the video lottery games authorized by the Legislature were not "lotteries," they would nonetheless be lawfully enacted. Why? Because the categories of games within the Constitution's general prohibition and specific authorization – be they many or few, broad or narrow – are nonetheless *coextensive*. In other words, if video lottery is a lottery, then the Constitution *authorizes* the Legislature to provide by general law for the State to operate it. On the other hand, if video lottery is not a "lottery" in the first place, then the Constitution *does not prohibit* the Legislature from permitting it.

"The generally applicable fundamental principle is that the powers of the legislature are almost plenary: 'The Constitution of West Virginia being a restriction of power rather than a grant thereof, the legislature has the authority to enact any measure not inhibited thereby.'" *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 408 S.E.2d 634, 640 (1991) (quoting syl. pt. 1, *Foster v. Cooper*, 155 W.Va. 619, 186 S.E.2d 837 (1972)).

In sum, art. VI § 36 either permits the Legislature to authorize video lottery, or does not inhibit the Legislature from authorizing video lottery. The result is the same in either event.

The State "Owns" Its Video Lottery Operations

Petitioners also argue that the two Video Lottery Acts violate the Constitution because they do not require the State to "own" the lottery. This argument ignores legislative findings to the contrary (§§ 29-22A-2(b), 29-22B-202) and the state's ownership of the logic boards, computer chips, and software without which a video lottery terminal cannot work.

The Constitution does not require "ownership" in some absolute or inflexible sense, but rather simply "in the manner provided by general law[.]" General laws have been passed, and Respondents exercise ownership in the manner prescribed by the Legislature. The inquiry can and should end there.

At any rate, the Legislature's ownership scheme is a perfectly rational one. A lottery is not a tangible thing that can be "owned" in the same sense that a shirt or a building can be owned. It is instead akin to an enterprise or business, which one may "own" notwithstanding that the enterprise rents office space, obtains only licenses to intellectual property, and hires all help through a temporary agency. Ownership of an enterprise is control, and Respondents strictly control video lottery.

The Wisdom of Permitting Video Lottery is a Legislative Question

Petitioners also assert that "policy, morality and value" call for a public referendum on video lottery, and they submit what they deem to be a "brilliant[]" law review article on the evils of video poker machines. Memorandum in Support of Petition for Writ of Mandamus, at 10-11. These arguments and opinions are superfluous.

Petitioners' conception of good public policy is beside the point. A majority of the Legislature, along with the Governor, approved the passage of both video

lottery acts. Legislative debate over the Limited Video Lottery Act was particularly contentious, and views similar to Petitioners' were fully aired. See *Club Ass'n of West Virginia v. Wise*, 156 F.Supp.2d 599, 607 (S.D.W.Va. 2001) ("Few legislative sessions have ever been so dominated by one polarizing issue.") (quotation omitted). The Legislature resolved the rancorous public policy debate, and it is not this Court's task to reopen it.² "Courts are not concerned with questions relating to the policy of a legislative enactment. Questions relating to policy are solely for the legislature." *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351, 357 (1965). This rule holds even if the Legislature's choice proves to have unintended ill effects. If the passage of a statute "causes an undesirable result, the remedy lies with the Legislature, whose action has produced it, and not the courts." *Verizon West Virginia, Inc. v. West Virginia Bureau of Employment Programs*, ___ W.Va. ___, ___ S.E.2d ___, slip op. at 39 (June 12, 2003) (quotation omitted).

Video Lottery Does Not Grant the Credit of the State to Private Interests

Finally, Petitioners assert that the video lottery statutes grant the credit of the State to private interests, in violation of W.Va. Const. art. X § 6. This claim is clearly without merit. Respondents should first state that they deny the factual premise of the claim – *i.e.* that the Lottery does not receive its fair share of video lottery proceeds. But more fundamentally, Petitioners can identify no State obligation due to any private entity

² Moreover, the difficult public policy questions involved much more than a simple choice between video lottery and no video lottery. The Racetrack Video Lottery Act was also motivated by a desire to promote tourism and to assure the survival of the state's pari-mutuel racing industry. See W.Va. Code § 29-22A-2(e). An exceedingly important purpose of the Limited Video Lottery Act was the *elimination* of pervasive illegal gambling on over 13,000 "gray" video poker machines. *Club Ass'n of West Virginia*, 156 F.Supp.2d at 606-608. Finally, both Acts provide the State with significant revenues essential to its continued operation. *Id.* at 605, 608.

that will be satisfied from compulsory tax payments. Accordingly, art. X § 6 is not implicated, let alone violated. *See State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee*, ___ W.Va. ___, 580 S.E.2d 869, 891 (2003).


Conclusion

No rule to show cause should issue, and the petition should be summarily denied.

Respectfully submitted,

THE WEST VIRGINIA LOTTERY COMMISSION, and
JOHN C. MUSGRAVE,

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CERTIFICATE OF SERVICE

I, Thomas R. Goodwin, Special Assistant Attorney General and one of counsel for the Respondents, certify that service of the foregoing "Respondents' Memorandum in Opposition to Petition for Writ of Mandamus" was made this 23rd day of September, 2003, by placing a true and correct copy thereof in the United States Mail, postage prepaid, addressed as follows:

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