



No. 31540

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

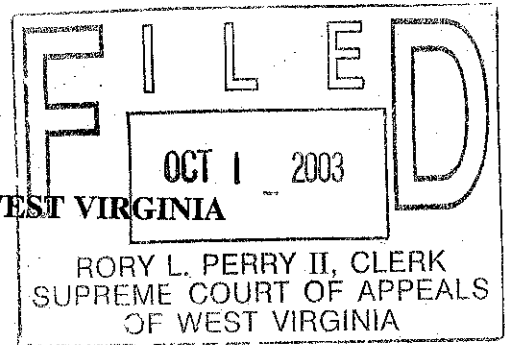
STATE OF WEST VIRGINIA, *ex rel.*  
ITS CITIES OF CHARLESTON AND HUNTINGTON  
AND ITS COUNTIES OF OHIO AND KANAWHA,

Petitioners,

v.

WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY,  
a public corporation,

Respondent.



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No. 31541

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

Petitioners,

v.

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

Respondents.

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No. 31564

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.

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**BRIEF OF RESPONDENTS**  
**THE WEST VIRGINIA LOTTERY COMMISSION AND JOHN C. MUSGRAVE**

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THOMAS R. GOODWIN (WV Bar # 1435)  
Special Assistant Attorney General  
JOHNNY M. KNISELY II (WV Bar # 4968)  
GOODWIN & GOODWIN LLP  
300 Summers Street, Suite 1500  
P.O. Box 2107  
Charleston, WV 25328-2107  
(304) 346-7000

*Counsel for Respondents*  
*West Virginia Lottery Commission*  
*and John C. Musgrave*

Respondents the West Virginia Lottery Commission and John C. Musgrave respectfully submit their Brief in these consolidated original proceedings in mandamus. For the reasons stated and shown below, the writ should be denied in No. 31564. Moreover, to the extent that the constitutionality of the Racetrack Video Lottery Act, W.Va. Code § 29-22A-1 *et seq.*, and Limited Video Lottery Act, W.Va. Code § 29-22B-101 *et seq.*, may be at issue in Nos. 31540 or 31541, the Court should resolve each such issue in favor of the Acts' constitutionality.

### **I. Kind of Proceeding**

Each of these three cases purports to seek extraordinary relief in the form of a writ of mandamus. The issues presented concern (i) a recent enactment of the Legislature providing for economic development grants funded through revenue bonds and (ii) the legality of certain operations of the West Virginia Lottery. These issues are connected only because proceeds of the Lottery are pledged by statute to repay the bonds.

### **II. Facts**

Government-owned lotteries date from colonial times, where they were viewed as a form of voluntary taxation of those who chose to play. *See State ex rel. Clark v. State Canvassing Board*, 119 N.M. 12, 888 P.2d 458, 463 (1995); *State ex rel. Stephan v. Finney*, 254 Kan. 632, 867 P.2d 1034, 1051 (1994) (McFarland, J., dissenting on other grounds).

By the time of the Civil War, however, lotteries had fallen out of favor, and our State's Framers adopted a constitutional ban against lotteries without debate. West Virginia's 1863 Constitution provided that "no 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. Polan*, 190 W.Va. 276, 438 S.E.2d 308, 312-313 (1993) (quoting Art. XI, § 1 of 1863 Constitution). This absolute proscription of lotteries persisted for over 120 years.

In 1984, the State’s fundamental law took a decided turn with the approval by the voters of a constitutional amendment authorizing the State to conduct lotteries.

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

The legislature shall have no power to authorize lotteries or gift enterprises<sup>[1]</sup> 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.

At the ensuing legislative session, an enabling statute was passed, W.Va. Code § 29-22-1 *et seq.*, and the State Lottery was born.

In 1990, the Respondent Commission began a pilot project at the Mountaineer Park racetrack to study video lottery. It believed the project to be authorized by the version of the Lottery Act then in effect, which, as is discussed below, directed the Commission to “proceed with operation of ... additional lottery games, including the implementation of games utilizing a variety of existing or future technological advances at the earliest feasible date” and to use “electronic computers and electronic computer terminal devices and systems.” W.Va. Code § 29-22-9(c) (1990).

Three years later, this Court held that the Commission was wrong, and that video lottery could not be conducted until and unless the Legislature provided by general

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<sup>1</sup> The term “gift enterprise” refers a scheme by which a merchant induces purchases of his goods by appending to the sale a chance to win additional merchandise. *E.g.*, *Long v. State*, 73 Md. 527, 21 A. 683, 684 (1891); *Bell v. State*, 37 Tenn. 507 (1857). To Respondents’ knowledge, this Court has never applied or discussed the Constitution’s prohibition of gift enterprises, and the consolidated cases provide no opportunity to do so now.

law for it. *Mountaineer Park*, 438 S.E.2d at 315. The Court recognized, however, that “[t]he 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 the *Mountaineer Park* decision 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*).

The Limited Video Lottery Act followed seven years later. Its purposes were twofold: (i) to raise revenues for public purposes and (ii) to eliminate pervasive illegal gambling on over 13,000 “gray” video poker machines. See *Club Ass’n of West Virginia v. Wise*, 156 F.Supp.2d 599, 607-608 (S.D.W.Va. 2001) (discussing events leading to enactment of Limited Video Lottery Act), *aff’d*, 293 F.3d 723 (4<sup>th</sup> Cir. 2002).<sup>2</sup> The Act changed state law to outlaw video poker machines *per se*, effective January 1, 2002, without any requirement for proof of their use for illegal gambling. W.Va. Code § 29-22B-1801. In addition, the Act authorized the placement of up to 9,000 video lottery terminals in private clubs and other establishments off-limits to minors, and it prescribed licensing and permitting requirements to maintain state control of the terminals and the revenues generated. W.Va. Code §§ 29-22B-501 through -518, -1101.

The State has now conducted video lottery for nine years at racetracks and for two years at restricted access, adult-only sites. It does so in the manner prescribed by the Legislature. See *Musgrave Aff.* ¶ 16. Every video lottery terminal is controlled by a central computer owned by the State of West Virginia. All game and control software is

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<sup>2</sup> The *Club Association* litigation involved a wide-ranging constitutional challenge to the Limited Video Lottery Act brought soon after the Act’s passage. The case was dismissed by the District Court for lack of federal jurisdiction, which dismissal was affirmed on appeal.

licensed to the Respondent Commission. All EPROMs<sup>3</sup> – the hardware chips on which the software is installed and resides – are owned by the Lottery. Indeed, Lottery officials retrieve and retain the EPROMs before any machine is destroyed or removed from the State. *Id.*

The control over video lottery operations that Respondents derive from these proprietary interests is further secured by many other statutory requirements. For example, each video lottery act contains licensing requirements with full background investigations of applicants (W.Va. Code §§ 29-22A-7, 29-22B-501 *et seq.*); all hardware specifications and software requirements are determined by the Commission or prescribed by law (W.Va. Code §§ 29-22A-6, 29-22B-901 *et seq.*); all hardware is subject to testing for compliance by the Commission (W.Va. Code §§ 29-22A-5, 29-22B-801 *et seq.*); all terminals are monitored from Lottery headquarters, and malfunctioning units can be remotely disabled by the Lottery (W.Va. Code §§ 29-22A-6, 29-22B-908); the Lottery has a key to every terminal cabinet, and each opening of the cabinet must be recorded in a maintenance log (W.Va. Code §§ 29-22A-11, 29-22B-1302, -1303).

On August 25, 2003, two cities and two counties filed a mandamus petition in this Court seeking expedited resolution of all issues relating to the legality and constitutionality of the issuance of revenue bonds pursuant to W.Va. Code § 29-22-18a(d)(1). *State ex rel. Cities of Charleston and Huntington v. West Virginia Economic Development Authority*, No. 31540. Among these issues is the constitutionality *vel non* of the operation of the lottery games authorized by the Racetrack and Limited Video Lottery Acts. *Id.*, Petition for Relief by Writ of Mandamus, at 2 (Issues A and B). These

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<sup>3</sup> EPROM is an acronym for “erasable, programmable read-only memory.” See W.Va. Code §§ 29-22A-2(b), 29-22B-202.

issues have arisen because video lottery revenues are dedicated to provide debt service for the contemplated revenue bonds. W.Va. Code § 29-22-18a(d).

This Court granted expedited review of No. 31540 by order entered September 10, 2003, and further ordered that the case be consolidated with *State ex rel. Lewis v. West Virginia Economic Development Grant Committee*, No. 31541. The latter action involves other challenges to the legality of the contemplated use of the proceeds of the revenue bonds. Petitioners in *Lewis* are represented by the same counsel as petitioners in the third case before the Court, *Greenbrier County Coalition Against Gambling Expansion v. West Virginia Lottery Comm'n*, No. 31564. This third case was filed on September 16, and was consolidated with Nos. 31540 and 31541 by this Court's order of September 23, 2003. The *Greenbrier County Coalition* case is directed squarely at the legality of video lottery, and its allegations are the primary subject of this Brief.

The legality of video lottery is a question of considerable moment. For the fiscal year ending June 30, 2004, Respondents estimate that video lottery operations under the Racetrack Video Lottery Act and Limited Video Lottery Act will produce \$378 million in net revenue, or over \$1 million daily.<sup>4</sup> Helton Aff. ¶¶ 18, 19.

Additional facts relevant to particular issues will be stated below where appropriate.<sup>5</sup>

### **III. The Issues Presented**

1. Whether this Court possesses original jurisdiction to issue an injunction against Respondents.

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<sup>4</sup> Of this sum, only \$19 million is currently appropriated for debt service for the economic development revenue bond issue that precipitated these lawsuits. W.Va. Code § 29-22-18a(b)(3).

<sup>5</sup> In this Brief, Respondents have attempted to respond to the substance of all factual allegations made against them in the consolidated cases, in particular the *Greenbrier County Coalition* petition. To the extent, however, that some particular allegation is not specifically addressed in this Brief, it is denied.

**Response:** No.

2. Whether operations pursuant to the Racetrack Video Lottery Act and the Limited Video Lottery Act are authorized by the exception for lotteries owned, operated, regulated, and controlled by the State set forth in W.Va. Const. Art. VI, § 36.

**Response:** Yes.

3. Whether, if video lottery does not fall within the exception for "lotteries" set forth in art. VI, § 36, it also and consequently falls outside the prohibition of "lotteries" set forth in the same sentence of the same section.

**Response:** Yes.

4. Whether the method by which the Legislature has provided, by general law, for the State to own, operate, regulate, and control the lottery is irrational and without bearing on a legitimate State purpose.

**Response:** No.

5. Whether either video lottery act causes alcohol to be consumed in a "public place," in violation of W.Va. Const. Art. VI, § 46.

**Response:** No.

6. Whether either video lottery act grants the credit of the State to private interests, in violation of W.Va. Const. Art. X, § 6.

**Response:** No.

7. Whether, absent any showing of a resulting injury in fact to one of their members, Petitioner Coalitions possess standing to assert claims that Respondents have not properly enforced the Acts.

**Response:** No.

8. Whether any of Petitioner Coalitions' "compliance" claims has legal and factual merit and, if so, whether extraordinary relief by way of mandamus is necessary and appropriate.

**Response:** No.

#### IV. Points and Authorities Relied Upon

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**V. Argument**

**A. Mandamus Standard**

Each of the consolidated cases purports to seek a writ of mandamus. This extraordinary writ issues 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). Petitioner Coalitions cannot meet this high standard.

#### B. Injunctions are not Within this Court's Original Jurisdiction

First of all, not all of the relief the Coalitions seek sounds in mandamus. As regards their constitutional claims, they seek an order requiring Respondents to “cease and desist” from conducting video lottery – *i.e.* an injunction. Petition at 15.<sup>6</sup> But neither the Constitution (*see* art. VIII § 3) nor statute (*see* W.Va. Code § 53-5-1 *et seq.*) confers a general original jurisdiction in this Court to issue injunctions. *See State ex rel. McGraw v. Telecheck Services, Inc.*, \_\_\_ W.Va. \_\_\_, 582 S.E.2d 885, 894 n.13 (2003).

#### C. The Constitutional Claims Lack Merit

The claims raised by the Petitioner Coalitions can be easily divided into two groups: constitutional challenges to video lottery on the one hand, and fact-bound questions concerning Respondents' compliance with the video lottery statutes on the other. Respondents will begin with the constitutional issues. As Respondents will demonstrate, the Legislature acted within its constitutional authority in enacting each video lottery act.

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<sup>6</sup> Even as to their claims aimed at ending supposed noncompliance with the video lottery acts, the Coalitions seek not just an order compelling compliance, but also an injunction-like “complete shutdown” of the lottery until compliance is achieved.

*i. Principles of Constitutional Adjudication*

A few background points concerning constitutional adjudication warrant mention at the outset. The first of these is that an enactment's invalidity must be clearly demonstrated; doubt is always resolved in favor of its validity. "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)). Consequently, "courts ordinarily presume that legislation is constitutional, and the negation of legislative power must be shown clearly[.]" *Id.*

The Court must also accept the factual findings of the Legislature in almost any case:

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. Whenever the determination by the legislature is in reference to open or debatable questions concerning which there is a reasonable ground for difference of opinion, and there is probably basis for sustaining the conclusion reached, [the legislature's] findings are not subject to judicial review.

*State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351, 359 (1965).

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

This Court has long adhered to a broad definition of the term "lottery":

"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)); *accord*, *Opinion of the Justices*, 795 So.2d 630, 635 (Ala. 2001) (this three-element test is grounded on a “vast number of authorities” and is “accepted by the overwhelming majority of jurisdictions”).

Because of the breadth of this definition, lotteries can take many forms; there is no single paradigm. “An essential element of a lottery is awarding a prize by chance, but the exact method adopted for application of chance to the distribution of a prize is immaterial.” Syl. pt. 4, *Video Consultants of Nebraska, Inc. v. Douglas*, 219 Neb. 868, 367 N.W.2d 697 (1985). This Court’s precedents attest to the wide variety of arrangements that can meet the test. *See Wassick*, 191 S.E.2d 283 (pinball machine awarding free plays is a lottery); *State v. Greater Huntington Theatre Corp.*, 133 W.Va. 252, 55 S.E.2d 681 (1949) (movie theater’s weekly “give away” night, in which cash prizes were awarded to registered patrons of the theater, was a lottery); syl. Pt. 5, *Hudson* (punch board is a lottery). Video gaming machines are one of the many forms a lottery can take. *Opinion of the Justices*, 795 So.2d at 643 (video poker machines were a “lottery” under the three-element test); *United States v. Marder*, 48 F.3d 564, 568-569 (1<sup>st</sup> Cir. 1995) (video poker machine that paid off in cash was a lottery, inasmuch as chance predominated over a player’s skill; applying Massachusetts law).

The Coalitions’ primary out-of-state authority, *Poppen v. Walker*, 94 S.D. 477, 520 N.W.2d 238 (1994), actually supports Respondents’ position. Although the South Dakota Court held that video lottery was not authorized by its constitution, the facts there were decidedly different. Unlike West Virginia’s constitution, South Dakota’s

prohibited both lotteries *and* “games of chance.” The state’s voters later approved an amendment allowing a state “lottery,” but left the “games of chance” prohibition intact. Given that circumstance – which is not present here – 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.

*Poppen*, 520 N.W.2d at 244 (emphasis added; 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.

Petitioners place great reliance on some cautiously worded *dicta* in *Mountaineer Park*, 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 immediately so provided. See *Paxton*, 451 S.E.2d at 783 n.12 (the Legislature “subsequently changed” the result of *Mountaineer Park*).<sup>7</sup>

Moreover, the conformity of video lottery to the 1984 amendment of art. VI, § 36 does not depend on whether voters actually foresaw that particular species of lottery. Constitutions are built to last. The authors of the First Amendment could not have foreseen the Internet, yet the First Amendment survives and applies to the Internet. In Justice John Marshall’s words, a Court conducting judicial review of a statute must “never forget that it is a *constitution* [it is] expounding.” *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (emphasis in original). Justice Cleckley put it this way for this Court:

Implicit in the Board’s argument is the notion that because something was not done at the time the Constitution was adopted, then the present occurrence of an unforeseen event could not fit within the framers’ intent. Essentially, the Board is inviting this Court to adopt a static view of the West Virginia Constitution. Reasonable construction of our Constitution does not require static doctrines but instead permits evolution and adjustment to changing conditions as well as to a varied state of facts. Because it is a framework for governmental structure, a constitution is necessarily general to allow for needed flexibility. This is the essence of a “living” constitution[.]

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<sup>7</sup> 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 stated, in a single sentence without any further explanation, that use of a video poker machine did not violate a criminal statute generally prohibiting lotteries (W.Va. Code § 61-10-11). The Court did not address, much less overrule, any of its precedents adhering to the broad, three-factor test for a “lottery.” Moreover, another criminal statute, § 61-10-1, is addressed specifically to gambling machines and devices and the circumstances under which the use of a particular machine is lawful or unlawful. The Court may well have concluded that, for purposes of the criminal law, the Legislature intended § 61-10-1 to be the first and last word on that subject.

*Randolph County Bd. of Education v. Adams*, 196 W.Va. 9, 467 S.E.2d 150, 163 (1995) (footnote and citation omitted); *see also id.*, 467 S.E.2d at 163 n.18 (“To adopt the view that the Constitution is static ... is to insist that the Constitution was created containing the seeds of its own destruction.”) (quoting *United States v. Calistan Packers*, 4 F.Supp. 660, 661 (N.D.Cal. 1933)).

Thus, constitutions adapt – and the meanings of their words evolve – to meet technological and societal change. The mental concept generated by the word “lottery” has evolved in the past and doubtless will continue to do so. An Elvis-themed scratch-off instant lottery ticket would have been an object of wonder to the player of a colonial lottery, just as “traditional” paper tickets would have been decidedly unfamiliar to the Roman soldiers who “cast lots” for Jesus’ cloak.<sup>8</sup>

The ultimate and controlling question, therefore, is whether a given game or system authorized by Legislative enactment meets the living definition of a “lottery,” and not what types of “lottery” were familiar to those who framed or amended the Constitution. *See Jackson v. Georgia Lottery Comm’n*, 228 Ga.App. 239, 491 S.E.2d 408, 413-414 (1997) (broad terms of state constitutional amendment, and not the kinds of games anticipated by voters, determined whether state lottery games were lawful). Because the games authorized by and conducted under the Racetrack and Limited Video Lottery Acts meet that well-established definition, they are constitutional.

Although foreseeability is thus not the deciding criterion, it bears mention that foreseeing video lottery in 1984 did not require one to be a visionary or clairvoyant.

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<sup>8</sup> “They [the soldiers] said therefore among themselves, Let us not rend it [Jesus’ cloak], but cast lots for it, whose it shall be: that the scripture might be fulfilled, which saith, They parted my raiment among them, and for my vesture they did cast lots. These things therefore the soldiers did.” John 19:24 (King James version).

Computerized video games were well established by 1984, even if they were crude by today's standards.<sup>9</sup> Indeed, video lottery was actually and lawfully operated in Nebraska as early as 1983. *Video Consultants*, 367 N.W.2d at 873-874 (holding that video lottery fit the common-law three-element definition, that the sale of a ticket or card is not indispensable, and that the method of distributing prizes is "immaterial" to the analysis).

Moreover, the members of the 1985 Legislature – the first to meet after the passage of the operative amendment – most definitely foresaw the use of computers and technological advances to conduct lotteries. In its initial enactment, the Lottery Act commanded:

The commission shall proceed with operation of such additional lottery games, including the implementation of games utilizing a variety of existing or future technological advances at the earliest feasible date. The commission may operate lottery games utilizing electronic computers and electronic computer terminal devices and systems, which systems must include a central site system of monitoring the lottery terminals utilizing direct communication systems, or other technological advances and procedures, ensuring honesty and integrity in the operation of the lottery.

W.Va. Code § 29-22-9(c). In addition, the Act plainly contemplated that *some* form of "video" technology would be used, and that ticketless lotteries would be conducted as well. *See* W.Va. Code § 29-22-9(b)(3) (1985) ("Electronic video lottery systems must include a central site system of monitoring the lottery terminals utilizing an on-line or dial-up inquiry."); W.Va. Code § 29-22-9(b)(4) (1985) ("In a lottery utilizing a ticket, each ticket shall bear a unique number distinguishing it from each other ticket.").

Finally, even if the video lottery games authorized by the Legislature were not "lotteries," the statutes would nonetheless have been lawfully enacted. Why?

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<sup>9</sup> Among these early video games was poker. *See Buzzo v. City of Fairmont*, 181 W.Va. 87, 380 S.E.2d 439 (1989) (involving 1985 seizure of video poker machines); 60 Op. Atty. Gen. 84 (1983) (video poker machines were not *per se* illegal under W.Va. Code § 61-10-1).

Because the categories of games within the Constitution's general prohibition and specific authorization of "lotteries" – be they many or few, broad or narrow – are nonetheless *coextensive*. The same word in the same sentence must have the same meaning. Hence, 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.

If there is no constitutional prohibition, then the Legislature retains its plenary power to make whatever laws it sees fit to enact:

The powers of a state Legislature are not to be confused with those of Congress. The Federal Constitution is a grant of power, while a state Constitution is a restriction of power. In other words, we look to the Federal Constitution to see what Congress may do. We look to a state Constitution to see what the Legislature may not do.

*State Road Comm'n v. Kanawha County Court*, 112 W.Va. 98, 116 S.E. 815, 817 (1932).

In sum, art. VI § 36 either permits the Legislature to authorize video lottery, or does not prevent the Legislature from authorizing video lottery. The result in this case is the same in either event.<sup>10</sup>

### *iii. The State "Owns, Operates, and Controls" 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, operate, and control the

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<sup>10</sup> The ensuing constitutional regime would be quite different, however. If this Court were to hold that "lottery" as used in art. VI, § 36 is a narrow concept limited to paper ticket drawings and the like, then the Legislature would be (and in principle already is) empowered to authorize any and all gambling not fitting within that narrow definition, and without any necessity for state ownership, operation, and control.

Thus, although the result in this specific case does not depend on the Court's choice of a broad or narrow construction, Respondents submit that the broad construction of "lottery" is both preferable as a matter of public policy and correct as a matter of law.

lottery.<sup>11</sup> This argument ignores legislative findings to the contrary (§§ 29-22A-2(b), 29-22B-202); the state's ownership of the logic boards, computer chips, and software without which a video lottery terminal cannot work; and the control of every video lottery terminal through a state-owned and state-operated central computer. *Musgrave Aff.* ¶ 16. Without the function provided by this state property, a video lottery terminal is simply a colorful – but useless – box.

Moreover, the Constitution does not require ownership, operation, or control in some absolute or inflexible sense, but rather simply “in the manner provided by general law[.]” Unlike the situation when *Mountaineer Park* was decided, general laws providing for video lottery *have been enacted*, and Respondents exercise their statutory powers and responsibilities in the manner prescribed by the Legislature.<sup>12</sup> *Musgrave Aff.*

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<sup>11</sup> The Coalitions appear to concede that the State at least “regulates” video lottery. Petition ¶ 49.

<sup>12</sup> The Racetrack Video Lottery Act provides:

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.

W.Va. Code § 29-22A-2(b). The Limited Video Lottery Act contains very similar findings:

The Legislature further finds and declares that:

(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;

¶ 16. The Court's inquiry can (and should) end there. *See State ex rel. Ohio County Comm'n v. Samol*, 165 W.Va. 714, 275 S.E.2d 2, 4 (1980) ("Absent a claim that legislative findings are irrational or have no bearing on a legitimate State purpose, they are not subject to judicial investigation.").

At any rate, the Legislature's 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.<sup>13</sup> 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.<sup>14</sup> Ownership of an enterprise is largely a question of control, and Respondents strictly control video lottery.

The Petitioner Coalitions also allege that Respondents do not "operate" and "control" video lottery. Again, what the Constitution requires the State to operate

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(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 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; 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.

<sup>13</sup> The Legislature recognized as much in defining "lottery" as "systems or games." *See* W.Va. Code §§ 29-22-3(c), 29-22A-3(o), 29-22B-317.

<sup>14</sup> Respondents' controlled use of private persons and property to achieve their legislatively prescribed mission is not peculiar to video lottery. Indeed, the original Lottery Act provided for the rental or lease of property by the Commission (§ 29-22-5(a)(10)), the licensing of private persons as sales agents (§ 29-22-10), and the procurement of goods and services from private vendors (§ 29-22-23).

Moreover, the very use of the word "regulated" in art. VI, §36 demonstrates that the constitutional amendment does not require the State to perform every task related to the lottery for itself.

and control is the intangible "lottery," and not the "machines and their related tangible devices" as suggested by the Coalitions. Petition ¶ 49. At any rate, surely the most fundamental form of control is a proprietary interest in the essential physical components of video lottery. Moreover, it makes no analytical difference that licensees and permittees assist in the operation of video lottery, because they do so *for* the Lottery.

*iv. The Wisdom of Permitting Video Lottery is a Legislative Question*

The Coalitions 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.

The Coalitions' 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 extraordinarily contentious, and views similar to Petitioners' were fully (and loudly) aired. *See Club Association*, 156 F.Supp.2d at 607 ("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.<sup>15</sup> "Courts are not concerned with questions relating to the policy of a legislative enactment. Questions relating to policy are solely for the legislature." *Appalachian Power*, 143 S.E.2d at 357. "The judiciary can only arrest the execution of a statute when it conflicts with the

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<sup>15</sup> 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 Association*, 156 F.Supp.2d at 606-608.

constitution. It cannot run a race of opinions upon points of right, reason and expediency with the lawmaking power.” *State Road Comm’n*, 163 S.E. at 816 (quotation omitted).

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).

***v. Video Lottery Does Not Cause Alcohol to be Consumed in “Public Places”***

The Coalitions next posit that video lottery conflicts in some fashion with W.Va. Const. Art. VI, § 46, which prohibits the consumption of intoxicating liquors “in a saloon or other public place.” The Coalitions do not explain why, if this supposed conflict were real, it is the lottery, and not the drinking, that would be required to cease.

But the supposed conflict is not real. Any person who desires to sell liquor for consumption on the premises must obtain a license from the Alcohol Beverage Control Commission. *See* W.Va. Code §§ 60-7-1 *et seq.* Premises so licensed do not constitute a “public place.” W.Va. Code § 60-1-5.

Moreover, video lottery terminals are not displayed in “public places” in the ordinary sense of that term. Persons uninterested in or offended by video lottery, or who simply wish not to observe it, need not worry about stumbling across it on their daily rounds. One may avoid racetrack video lottery by staying away from racetracks. Limited video lottery terminals are located only within “[r]estricted access adult-only facilit[ies].” *See* W.Va. Code § 29-22B-328. These facilities are either private clubs or certain (though not all) Class A nonintoxicating beer licensees. Beer licensees must maintain a

separate room, the interior of which is not visible to persons outside, for video lottery terminals, as must private clubs if children are regularly admitted therein.<sup>16</sup>

In short, there is no conflict between video lottery and art. VI, § 46.

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

Finally, Petitioner Coalitions 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 arising from video lottery that is due to any private entity and 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).

D. The “Compliance” Claims Are Meritless and Should Be Rejected

*i. The Coalitions Lack Standing to Bring The Compliance Claims*

Petitioner Coalitions assert in several claims that Respondents have failed or refused to enforce various statutory requirements of the Racetrack and Limited Video Lottery Acts. Neither their petition nor any evidence of record demonstrates that even a single member of the either Coalition has standing to bring any such claim.

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

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<sup>16</sup> The greater leeway afforded private adult-only clubs explains why the Coalitions' affiant, Mr. Young, reported that two of the establishments he visited had no separate, enclosed area for limited video lottery terminals. *See* Rose Aff. ¶ 11 (Neighborhood Diner, Sportsman Bar, and Mulberry's Bar each have a private club liquor license and do not admit minors).

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).

Failures to enforce the law – which Respondents deny – could cause injury in *fact* only to a player of video lottery games. No member of Petitioner organizations is identified as such a player.<sup>17</sup> *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).

As Respondents noted above, the writ of mandamus will not issue absent a showing of “a clear legal right *in the petitioner* to the relief sought[.]” Syl. pt. 1, *State ex rel. DHHR*, 532 S.E.2d 358 (emphasis added). Given this high threshold for extraordinary relief, the standing requirement should be strictly enforced, and the compliance claims should be rejected without further analysis. Respondents will nevertheless address these claims and demonstrate their insubstantiality.

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<sup>17</sup> Moreover, the Coalitions' only affiant/witness, Franklin Young, is a resident of Jackson County, and not Greenbrier or Cabell. Hence, he cannot be a member of either alleged organization. See Petition ¶¶ 2, 3.

**ii. Illegal Advertising**  
(Count I)

No advertising of Limited Video Lottery is permitted, and none is engaged in by Respondents. Musgrave Aff. ¶ 8. Where a limited video lottery licensee has unlawfully advertised these games, and the violation has been discovered by or brought to Respondents' attention, the licensee has been warned or penalized. *Id.* ¶ 5 & Exh. A at 1.

The Limited Video Lottery Act is the only one of the three lottery statutes that categorically prohibits advertising. The keno-style "Travel" game has been advertised, but it is *not* video lottery. Instead, it is a game governed and authorized by the original Lottery Act. See W.Va. Code §§ 29-22-9(a)(5), 29-22A-3(aa), 29-22B-330; Musgrave Aff. ¶ 13. The Lottery Act simply does not prohibit advertising the games operated thereunder. Musgrave Aff. ¶ 6.

Finally, and although the Coalitions' petition does not cite the Racetrack Video Lottery Act in its Count I, Respondents note that advertising of these games is also expressly contemplated and permitted by the governing statute. See W.Va. Code § 29-22A-9(f)(12) (licensed racetrack may advertise video lottery with the "prior written approval" of the Lottery Director). Respondents themselves have rarely if ever undertaken such advertising, even though the Racetrack Video Lottery Act does not prohibit them from doing so. Musgrave Aff. ¶ 7.

**iii. Posting of Rules, Odds, and House Share**  
(Count II)

The Limited Video Lottery Act requires the posting of "the rules of play and the odds or house percentage" of each game. W.Va. Code § 29-22B-403(5).

Respondents have complied with this directive. Musgrave Aff. ¶ 11. The Act *does not* require that the odds or house percentage be posted *on* the machines. Compare § 403(5) with W.Va. Code § 29-22B-907. Documents containing the house percentages are generally posted behind the cashier's station at each location. Musgrave Aff. ¶ 11.<sup>18</sup>

Both video lottery acts further require that the "rules of play" be posted on the face of each terminal or on the video screen itself. W.Va. Code §§ 29-22A-6(a)(12), 29-22B-907(1). Respondents have complied with this directive. Musgrave Aff. ¶ 10.

***iv. Standard Probability***  
(Count III)

Each video lottery act requires that a terminal pay out between eighty and ninety-five percent of the amounts wagered. A terminal or game's conformity to this requirement is determined through testing and application of "standard methods of probability theory." W.Va. Code §§ 29-22A-6(c)(1), 29-22B-910(1). Respondents comply with this directive. Musgrave Aff. ¶ 12. This testing method in no wise requires a one hundred percent payout, as Petitioner Coalitions appear to suggest.

Moreover, and again, neither video lottery act – and in particular none of the statutory provisions cited by the Coalitions at ¶ 23 of their petition – requires the posting of odds or a house percentage on the video screen itself.<sup>19</sup>

***v. House Percentage***  
(Count IV)

Invoking the "unvarying rule[s] of any standard poker game," the Coalitions next complain that the Lottery's share ought not be "raked from the pot" until

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<sup>18</sup> Section 403(5) uses the disjunctive ("odds *or* house percentage") as the optional methods of presenting this information. Respondents require the posting of house percentages rather than odds. Rose Aff. ¶ 6.

<sup>19</sup> Indeed, the Racetrack Video Lottery Act does not require the posting of payout or house percentages at all.

the end of the game. Petition ¶ 26. Respondents are not sure what the Coalitions are getting at; Respondents are quite sure, however, that their duties are to comply with the laws passed by the Legislature, and not with the pronouncements of self-appointed keepers of the rules of poker.

Yet again the Coalitions repeat their assertion that the house percentage must be posted on each machine. Petition ¶¶ 27-28. Again they are wrong.

*vi. Personal Skill Not a Factor*  
(Count V)

Lotteries are games of chance, or at least predominantly of chance. However, interactive games that permit the player to make choices affecting the likelihood of success introduce a subordinate element of skill. In order to equalize the prospects for all players – and to further entrench chance as the overwhelmingly predominant factor – the Limited Video Lottery Act requires that the terminals inform players of their statistically best options. W.Va. Code § 29-22B-332(5) provides:

In the case of a video lottery game which allows the player an option to select replacement symbols or numbers or additional symbols or numbers after the game is initiated and in the course of play, [the game must] either: (A) Signal[] the player, prior to any optional selection by the player of randomly generated replacement symbols or numbers, as to which symbols or numbers should be retained by the player to present the best chance, based upon probabilities, that the player may select a winning combination; (B) signal[] the player, prior to any optional selection by the player of randomly generated additional symbols or numbers, as to whether the additional selection presents the best chance, based upon probabilities, that the player may select a winning combination; or (C) randomly generate[] additional or replacement symbols and numbers for the player after automatically selecting the symbols and numbers which should be retained to present the best chance, based upon probabilities, for a winning combination, so that in any event, the player is not permitted to benefit from any personal skill, based upon a knowledge of probabilities, before deciding which optional numbers or symbols to choose in the course of video lottery game play[.]

The Coalitions bizarrely condemn the “hid[ing]” of this information as “[t]he most malignantly deceitful practice of” Respondents. This criticism is sorely misplaced, for at least three reasons.

First and most fundamentally, *nothing* in the Act requires Respondents to notify players that, by virtue of § 29-22B-332(5), all players wind up with an equal chance at winning. Second, any player so skilled at poker as to be able to always make the best choice will quickly discern that the machine’s picks invariably match his own; hence, it is quite difficult to fathom how he would be *deceived*. Finally, no player is bound by the machine’s advice. He is perfectly free to buck the odds and play a hunch.

***vii. Addiction Warnings and Treatment Notices – Reduction of Gambling***  
(Counts VI and VII)

The Limited Video Lottery Act requires that Respondents post on each machine information about how to obtain assistance or treatment for gambling addiction. W.Va. Code § 29-22B-907(4). Respondents comply with this directive. Musgrave Aff. ¶ 14. Contrary to the Coalitions’ assertions, the help number 1-800-GAMBLER is not posted “*in vacuo*.” Players are informed not just of the number but of its purpose: “Call ... if you need *confidential help* with a *gambling problem*.” (emphasis added). In addition, every location posts a bright yellow card (which is designed to hang from the ceiling but which may be posted in another conspicuous place) with this blunt message: “CAUTION: Gambling and playing this machine can be hazardous to your health, your finances and your future.” Musgrave Aff. Exh. B. Respondents have fully complied with the law.

*viii. Public Good, Etc.*  
(Count VIII)

Count VIII alleges generally that video lottery is not being conducted for the "public good," with "honesty and integrity," and in furtherance of the "public health and welfare." Such allegations, which are untrue and which Respondents deny,<sup>20</sup> are simply too amorphous to warrant relief in mandamus, which will lie only to compel performance of a clear ministerial duty.<sup>21</sup>

*ix. Criminal Enterprise and Public Nuisance*  
(Count XIII)

Count XIII is a cumulative count embracing all that went before it, and the mere combination of numerous claims with no merit into a single claim with no merit avails the Coalitions nothing. Moreover, because the Legislature has specifically authorized Respondents to undertake video lottery operations, those operations cannot constitute a public nuisance, even if similar undertakings would be a nuisance in the absence of such legislative blessing. *See generally* 58 Am.Jur.2d Nuisances, § 448.<sup>22</sup>

In sum, none of the Coalitions' claims of noncompliance with the video lottery acts is legally or factually meritorious.

*x. Mandamus Will Not Issue Unless Necessary*

Finally, Respondents note that the Coalitions have produced *no* evidence that Respondents have failed to promptly enforce the requirements of either video lottery act upon learning of even a single violation thereof. Moreover, Respondents have

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<sup>20</sup> *See generally* Respondents' Submission of Evidence herein.

<sup>21</sup> In addition, Respondents note that the particular statutory duties described in ¶ 46 of the Coalitions' petition are assigned to video lottery licensees and permittees, and not to Respondents.

<sup>22</sup> The petition's reference to a "criminal" enterprise, doubtless chosen for its attention-getting qualities, is a baseless and undeserved insult to Respondents and to the Lottery employees who work to *prevent* illegal gambling and other violations of the law.

produced affirmative evidence that they do so enforce the law. Musgrave Aff. ¶ 5 & Exh. A. Accordingly, even if the Coalitions had demonstrated isolated violations of the law at particular establishments – and they have not – they would not have demonstrated an entitlement to mandamus. Extraordinary writs do not lie to compel a performance that is routinely and willingly rendered.

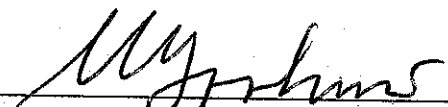
#### VI. Conclusion

The writ of mandamus prayed for in No. 31564 should be denied. To the extent the constitutionality of the Racetrack Video Lottery and Limited Video Lottery Acts prove pertinent to the Court's analysis in No. 31540 or 31541, the Court should confirm that the Acts comport with the Constitution of the State of West Virginia.

Respectfully submitted,

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

By counsel,

  
THOMAS R. GOODWIN (WV Bar # 1435)  
Special Assistant Attorney General  
JOHNNY M. KNISELY II (WV Bar # 4968)  
GOODWIN & GOODWIN LLP  
300 Summers Street, Suite 1500  
P.O. Box 2107  
Charleston, WV 25328-2107  
(304) 346-7000

**CERTIFICATE OF SERVICE**

I, Thomas R. Goodwin, counsel for the Respondents West Virginia Lottery Commission and John C. Musgrave, certify that service of the foregoing "Brief of Respondents The West Virginia Lottery Commission and John C. Musgrave" was made this 1st day of October, 2003, by placing true and correct copies thereof in the United States Mail, addressed as follows:

Stephen B. Farmer, Esq.  
Farmer, Cline & Arnold, PLLC  
Second Floor, 7 Players Club Drive  
P.O. Box 3842  
Charleston, WV 25338

Robert P. Fitzsimmons, Esq.  
Fitzsimmons Law Offices  
1609 Warwood Avenue  
Wheeling, WV 26003

William Herlihy, Esq.  
Spilman Thomas & Battle  
300 Kanawha Boulevard E.  
Charleston, WV 25301

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

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

Stuart Calwell, Esq.  
The Calwell Practice, PLLC  
405 Capitol Street, Suite 607  
P.O. Box 113  
Charleston, WV 25321

Katherine A. Schultz, Esq.  
Senior Deputy Attorney General  
State Capitol Complex  
Building 1, Room 435  
Charleston, WV 25305

Rudolph L. DiTrapano, Esq.  
Sean P. McGinley, Esq.  
Richard S. Han, Esq.  
DiTrapano, Barrett & DiPiero, PLLC  
604 Virginia Street, East  
Charleston, WV 25301

Thomas P. Maroney, Esq.  
Thomas P. Maroney, L.C.  
608 Virginia Street, East  
Charleston, WV 25301

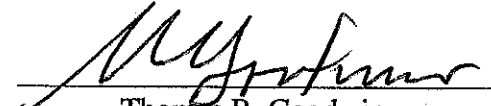
Louis S. Southworth, II, Esq.  
Wendel B. Turner, Esq.  
Jackson Kelly PLLC  
P.O. Box 553  
Charleston, WV 25322-0553

Thomas A. Heywood, Esq.  
Bowles Rice McDavid Graff & Love, PLLC  
P.O. Box 1386  
Charleston, WV 25325-1386

Richard E. Boyle, Jr., Esq.  
Kay, Casto & Chaney PLLC  
1600 Bank One Center  
Charleston, WV 25301

Roger D. Hunter, Esq.  
Neely & Hunter  
159 Summers Street  
Charleston, WV 25301

Nancy E. Trudel, Esq.  
West Virginia High Technology Consortium Foundation  
1000 Technology Drive, Suite 1000  
Fairmont, WV 26554

  
Thomas R. Goodwin