

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
CONSOLIDATED NOS. 31540, 31541, AND 31564

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

Petitioners,

v.

WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY,  
a public corporation,

Respondent.

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.

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,

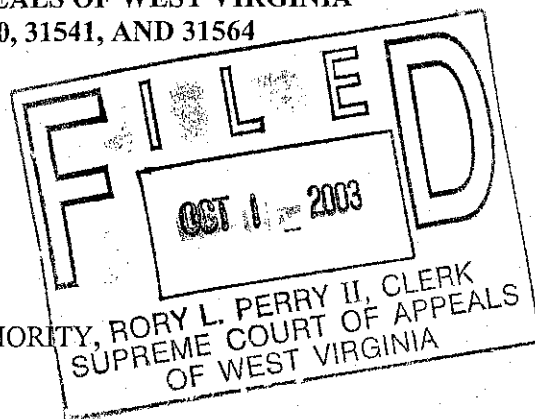
Respondents.

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AMICUS CURIAE BRIEF ON BEHALF OF  
THE WEST VIRGINIA AMUSEMENT AND  
LIMITED VIDEO LOTTERY OPERATORS ASSOCIATION, INC.

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## I. INTRODUCTION

The West Virginia Amusement and Limited Video Lottery Operators Association, Inc., (WVALVOA) is an incorporated association that represents a majority of persons licensed as "operators" under the Limited Video Lottery Act codified in Article 22B, Chapter 29 of the West Virginia Code.

There are currently 34 operators and 1,314 retailers licensed under the Limited Video Lottery Act. Under the provisions of the Act, an operator obtains and maintains video lottery terminals used in the limited video lottery program owned and operated by the State, and a retailer is the proprietor of the retail location in which terminals are placed.<sup>1</sup> According to terms of the Act, the operator and retailer share the portion of the revenue not retained by the State.<sup>2</sup>

The purpose of this brief is to share the perspective of the operators regarding the constitutional challenge to the continued operation of Limited Video Lottery. The operators have a fundamental interest in the outcome. According to the Lottery Commission's Chief Financial Officer, Mr. Virgil Helton, operators and the 238 people they employ -- as well as approximately 3,500 people employed by retailers -- would be unemployed if the Act is declared unconstitutional.<sup>3</sup>

This brief will demonstrate that Limited Video Lottery is (1) of the type authorized by the Constitution; (2) is owned, operated, controlled and regulated by the state; (3) is supported by the people; and (4) benefits the state while requiring considerable expense and risk from operators.

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<sup>1</sup> W. Va. Code 29-22B-1 et seq. A retailer may be a direct permittee and obtain terminals without the services of an operator, but in most instances, a retailer finds it more convenient and affordable to obtain terminals through an operator.

<sup>2</sup> W.Va. Code Section 29-22B-706 requires an operator to distribute between forty and fifty percent of the operator's share with the retailer.

<sup>3</sup> Affidavit of Virgil T. Helton, attached to Submission of Evidence by Respondents the West Virginia Lottery Commission and John C. Musgrave

## II. ARGUMENT

### A. Limited Video Lottery is Authorized by the West Virginia Constitution

It has been argued that video lottery is not a lottery within the meaning of Article VI, Section 36 of the West Virginia Constitution, and that voters who ratified the Lottery Amendment in 1984 were not approving video lottery operations.<sup>4</sup>

However, the voters authorized the Legislature to pass the specific laws which would establish a State-run lottery. The wording of Article VI, Section 36 does not define lottery, and instead allows the Legislature to establish the State lottery "by general law." The wisdom of the drafters of the provision is evident, because no one could have foreseen the enormous and rapid changes in technology that have made state video lottery programs possible.

In 1984 the fax machine was a novelty. There were no cell phones. The internet, e-mail and the world wide web were the province of a highly select few scientists. There was no such thing as a state-operated video lottery anywhere in the United States.<sup>5</sup>

More on point, the power and price of computer technology were vastly different in 1984. In 1984, Apple Corporation introduced the first personal home computer with a graphic interface, i.e., the ability to present video as well as text. The Apple "Macintosh" was powered by a central processing unit (CPU) that ran at 8 megahertz and had no hard drive to store memory. Its graphic interface was in black and white. It sold for \$2,495.<sup>6</sup> By way of contrast, today's Apple "I-Mac"

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<sup>4</sup> Brief of Petitioners In Support of Petition for Writ of Mandamus, pp. 2 and 3.

<sup>5</sup> South Dakota began the first video lottery program in the nation on October 16, 1989, five years after ratification of the Lottery Amendment in West Virginia. *See*, <[http://www.sdlottery.org/history\\_of\\_lottery.asp](http://www.sdlottery.org/history_of_lottery.asp)>.

<sup>6</sup> *See*, the history of Apple Computer, Inc. at <<http://www.apple-history.com>>.

is powered by a CPU running at more than 1,000 megahertz with a storage capacity of 80 megabytes. Its graphic interface includes thousands of pixels with millions of colors. It sells for \$1,299.<sup>7</sup> Thus, a personal computer is available today with more than a hundred times the computing power, vastly improved graphics and infinitely more storage capacity for less than half the price of what was available in 1984.

Similarly, the video lottery terminals and programs used by the West Virginia Lottery Commission make use of advanced CPUs, color graphics and storage. They sell for approximately \$10,000. Even if it had been possible to develop a state controlled video lottery system in 1984, the price would have been prohibitive. The voters who ratified the amendment to Article VI, Section 36 of the West Virginia Constitution in 1984 authorizing a state lottery could not have conceived of the upcoming advance in technology that would make a state video lottery system possible. However, the drafters of the Lottery Amendment were sufficiently prescient that they worded the amendment to authorize the Legislature to develop the State lottery "in the manner provided by general law" and thus take advantage of technological changes.

The Constitution sets the framework for governmental structure, and not the particulars. If the drafters of the Amendment had wanted to freeze our State lottery games to those of the type prevalent in 1984, they could have done so.

Arguments of such "original intent" have been made to this Court before. When a party argued that certain highway funds were not consistent with Article VI, Section 52, of the West Virginia Constitution, the Court looked to circumstances not present when the provision was ratified. The Court noted that when the provision was adopted, "the interstates did not exist, nor

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<sup>7</sup> See, home page for Apple Computer, Inc. at <<http://store.apple.com>>.

did the powerful cars which have since developed,” and that “new and changing conditions not existing at the time the Constitution was adopted should be looked to and applied . . . .”<sup>8</sup>

Similarly, when a local county board of education attempted to force parents to pay for public school books because provision for free textbooks was not common when the Constitution was ratified, the Court characterized its argument as “the notion that because something was not done at the time the Constitution was adopted, the present occurrence of an unforeseen event could not fit within the framers intent.”

This Court rejected such a view. Writing for the Court, Justice Cleckley said: “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 set 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’: to do otherwise would force us to subject 20<sup>th</sup> Century needs to 19<sup>th</sup> Century foibles.”<sup>9</sup>

To accept the argument that the only “legal” lotteries were those which existed at the time of the ratification of the Lottery Amendment would consign us to the world of 1984. Would the petitioners also maintain that freedom of the press under the First Amendment should be limited to the form of “press” in existence at the time of its ratification in 1791 and not to later technological advances such as radio, television, movies and the internet? “1984” indeed.<sup>10</sup> The drafters of the

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<sup>8</sup> *Contractors Association of West Virginia v. West Virginia Department of Public Safety*, 434 S.E.2d 357, 361 (W. Va. 1993).

<sup>9</sup> *Randolph County Board of Education v. Adams*, 467 S.E.2d 150, 163 (W. Va. 1995).

<sup>10</sup> See, George Orwell’s 1949 novel “1984” in which the party slogan was: “Who controls the past, controls the future: who controls the present controls the past.” Much like the party in the novel, certain of the petitioners seek to control the future through the past.

Amendment wisely gave the Legislature the authority to “establish” the lottery, allowing it to take advantage of the benefits to the social welfare made possible by advances in technology.

**B. Limited Video Lottery is Regulated, Controlled, Owned and Operated by the State**

Article VI, Section 36 of the West Virginia Constitution provides in part 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...” Lottery games conducted pursuant to the Limited Video Lottery Act, West Virginia Code Section 29-22B-1 et seq., meet all four of these criteria, in that they are regulated, controlled, owned and operated by the state.

**1. Limited Video Lottery is State Owned and Operated.**

It is maintained that video lottery is not owned and operated by the State because of the involvement of the private sector, but this contention is succinctly and effectively refuted by the Lottery Commission in its brief where it noted that a “lottery is not a tangible thing that can be owned in the same sense that a shirt or building can be owned” and 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>11</sup>

An analogy with a well-known business may help to make this point. America Online (“AOL”) is the world’s leading internet service provider, and is owned by its stockholders, including its founder Steve Case.<sup>12</sup> It would certainly come as a surprise to Mr. Case and all of Wall Street

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<sup>11</sup> Respondents’ Memorandum In Opposition to Petition for Writ of Mandamus at page 7.

<sup>12</sup> For further explication of the history and operation of America Online, see the corporation’s website at: <http://www.corp.aol.com/whoweare/history.html>

if someone tried to maintain that the company is owned by anyone with a personal computer and a modem.

Ownership and operation of limited video lottery by the state of West Virginia is much like ownership and operation of AOL. In each case, individuals having a computer-operated device connect by modem to a central location that has total ownership and control of the function. Without an internet service provider like AOL, the owner of the PC has no access to the internet. Without the West Virginia Lottery Commission, the owner of a video lottery device has no access to the state lottery.

Indeed, the operation and control of video lottery far exceeds the analogous operation and control of internet access by AOL.

A subscriber to AOL is free to choose the personal computer of his or her own choice, but the operator of limited video lottery is required to choose only those terminals approved by the Lottery Commission, which also must license the manufacturers of the terminals.<sup>13</sup> A subscriber to AOL has complete access to the workings of his or her personal computer, but the operator of a video lottery terminal is prohibited from access to the logic board on the terminal.<sup>14</sup> A subscriber to AOL is free to acquire and sell as many PCs as may be available, but an operator of limited video lottery may acquire only as many terminals as authorized by the Lottery Commission.<sup>15</sup> And finally,

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<sup>13</sup> W. Va. Code Section 29-22B-501(c)

<sup>14</sup> W. Va. Code Section 29-22B-904

<sup>15</sup> W. Va. Code Section 29-22B-1110

a subscriber to AOL can retain his or her personal computer after canceling the subscription, but a video lottery terminal not a part of the state owned and operated system is considered contraband.<sup>16</sup>

**2. Limited Video Lottery Is Controlled and Regulated by the State.**

Article VI, Section 36 authorizes state lotteries that are regulated, controlled, owned and operated by the State of West Virginia in the manner provided by general law. As previously discussed, Limited Video Lottery is owned and operated by the State. It is also subject to complete control and regulation by the State. Indeed, Limited Video Lottery is by far the most regulated form of lottery conducted by the state in several respects, to wit:

**•Statutory Cap on Total Number of Terminals Statewide**

The Legislature has placed a statewide total cap of 9,000 terminals under the Limited Video Lottery Act.<sup>17</sup> There is no such cap with respect to Racetrack Video Lottery or traditional lottery.

**•Statutory Maximum of Terminals Per Location**

The Legislature has placed a cap under the Limited Video Lottery Act of five terminals for most locations and ten terminals for fraternal organizations.<sup>18</sup> The Legislature has not imposed an absolute cap per location for Racetrack Video Lottery, and none exists on terminals for traditional lottery.

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<sup>16</sup> W. Va. Code Sections 29-22B-1801 through 1806

<sup>17</sup> W. Va. Code Section 29-22B-1101(a).

<sup>18</sup> W. Va. Code Section 29-22B-1101(c)

**•West Virginia Residency Required**

The Legislature requires all operators and retailers of Limited Video Lottery to be controlled by West Virginia residents, and establishes a strict test for such residency.<sup>19</sup> Neither Racetrack Video Lottery nor traditional lottery contains a similar restriction.

**•Ban on Advertising**

The Legislature has banned all advertising or promotion with respect to Limited Video Lottery.<sup>20</sup> The law permits advertising for Racetrack Video Lottery with written prior approval of the Lottery Director.<sup>21</sup> Anyone in this state with access to television, radio or newspaper knows that advertising for traditional lottery is commonplace.

**•Age Restrictions**

The Legislature permits Limited Video Lottery only in “adult-restricted facilities” and prohibits “access to” as well as play by persons under twenty-one, such that facilities such as restaurants open to the general public, must place terminals in a separate room and out of sight of those underage.<sup>22</sup> The law permits play for Racetrack Video Lottery and traditional Lottery at age eighteen. By way of even starker contrast, traditional lottery is in plain view in such public places frequented by minors throughout the state, including conveniences stores, malls and supermarkets.

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<sup>19</sup> W. Va. Code 29-22B-327

<sup>20</sup> W. Va. Code 29-22B-702(13). The Legislature also bans the use of the words “video lottery” in name, directions or advertising outside the retailer’s establishment in W. Va. Code Section 29-22B-702(14).

<sup>21</sup> W. Va. Code Section 29-22A-9

<sup>22</sup> W. Va. Code Section 29-22B-702(8)

### C. The People of West Virginia Support Limited Video Lottery

Certain Petitioners maintain that the issue of video lottery -- and various other forms of lottery as well -- should be submitted to the people for a vote. However, it is clear that a majority of the people of West Virginia support limited video lottery and its benefits. In addition to the expression of the public will by the enactment of the Limited Video Lottery Act in 2001 by a majority of the Legislature and approval by the Governor, the public itself has endorsed it at the ballot box as well. S.J.R. 3, the Amendment to Article VI, Section 36 of the Constitution permitting a state lottery, was ratified by an overwhelming majority in the general election held November 6, 1984. Of the 656,810 votes cast, the vote on the proposal was 437,357 in favor and 219,453 opposed, meaning that it was approved by 67 percent of those voting.<sup>23</sup> Further, a majority of voters supported the measure in 54 of the state's 55 counties.<sup>24</sup>

Proponents of S.J.R. 3 intended to leave further action to the Legislature, and did not intend to require approval of lottery with a second vote after ratification. On the contrary, the advocates of the measure intended a single statewide ratification of the Constitutional Amendment to suffice. As the proposed Amendment was being considered in the House of Delegates, a motion was offered to provide that the voters in any county could disapprove of state lotteries within that jurisdiction. The proposal was defeated by a vote of 24 to 76.<sup>25</sup>

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<sup>23</sup> General Election Returns for 1984, West Virginia Blue Book (1985), page 700.

<sup>24</sup> *Ibid.* The measure was defeated only in Grant county, where it lost by only 183 votes.

<sup>25</sup> The proposed amendment would have read: "Provided, however, That upon the ratification of this amendment by the voters, any county which by a majority of the votes cast therein rejects this amendment, such vote shall be a disapproval of state operated lotteries or gift enterprises for that county as if the same had been disapproved at a regular, primary or special election as hereinbefore provided." Journal, West Virginia House of Delegates, February 1, 2003, page 312.

The people of this state have also shown their approval for limited video lottery specifically. In running for Governor in the year 2000, then-candidate Bob Wise challenged the incumbent and made the issue central to his campaign, despite its potential for controversy.<sup>26</sup>

The voters had a clear choice. As Governor, Congressman Wise would legalize video lottery games and make them a part of the state system. If reelected, Governor Underwood would not. The voters spoke, and on election day in the year 2000, Bob Wise defeated the incumbent.<sup>27</sup>

**D. The State is the Chief Beneficiary of Limited Video Lottery with Operators Required to Make Considerable Investment and Assume Risk.**

Petitioners have suggested that those in the private sector involved in both racetrack and limited video lottery “rake in” millions of dollars, but have ignored entirely the costs and benefits involved.

**1. Investment**

Before making a penny from limited video lottery, an operator must make an enormous investment in capital and labor. For example, an operator with only 100 terminals must make an initial investment of almost \$2 million.

The terminals and other equipment are expensive. Each terminal costs approximately \$10,000,<sup>28</sup> so the investment in terminals alone is more than \$1 million. In order to connect to the

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<sup>26</sup> In a study of the issues separating the Democratic and Republican candidates for Governor, *The Charleston Gazette* characterized Wise’s proposal to legalize video lottery and use the proceeds to fund Promise scholarships as one of the most divisive in the campaign. “Issues 2000: The Race for Governor Analysis”, *The Charleston Gazette*, October 22, 2000, page 1A

<sup>27</sup> “Wise Ousts Underwood”, *The Charleston Gazette*, November 8, 2000, page 19A

<sup>28</sup> Survey of companies that currently hold a manufacturer’s license under the Limited Video Lottery Act. Manufacturer’s information is contained on the Limited Video information page section of the West Virginia Lottery website: <<http://www.state.wv.us/lottery>>.

Lottery Commission's central computer, the operator must obtain a "clerk validation terminal" (CVT) at a cost of approximately \$2,500 each, for each location. Assuming an average of three terminals per location,<sup>29</sup> this adds another \$85,000 in initial investment by the operator in this example.

The state itself also requires considerable up-front expense for an operator to have the right to obtain a terminal. An operator must bid for the right for each terminal, and the current bid requirement is a minimum of \$3,000 per terminal,<sup>30</sup> adding another \$300,000 to the initial investment by the operator in this example. The State also requires an annual fee of \$1,000 per terminal, payable at the outset, adding yet another \$100,000 to the initial investment in this example.<sup>31</sup>

The subtotal of the mandatory investment in the example is nearly \$1.5 million. Because of the statutory limitation of 5 terminals per location (or 10 at a fraternal), an operator must necessarily have vehicles and other equipment to travel between them for servicing. The operator must also maintain a warehouse, office space, telephones and other standard business equipment, quickly raising the estimate for the initial investment to \$2 million or more.

## 2. Risk

The Limited Video Lottery Act places the burden of risk on operators and the other private sector participants, rather than on the State.

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<sup>29</sup> Each location may have from 1 to 5 terminals, except for fraternal organizations which may have 10.

<sup>30</sup> The Lottery Commission has conducted bids on a quarterly basis. The initial minimum bid was \$2,000 per terminal, but quickly rose to \$3,000 where it has remained to include the next bid scheduled for November 14, 2003. <<http://www.state.wv.us/lottery>>.

<sup>31</sup> WV Code Section 29-22B-1103

The Act specifically requires all applicants – operators, retailers, manufacturers and technicians – to bear “all risk” of adverse public notice, embarrassment, criticism, damages or financial loss resulting from any information provided to the Lottery Commission, and also requires them to expressly waive all liability against the Lottery Commission and the State.<sup>32</sup>

The Act also requires applicants to hold the Lottery Commission and the State harmless from any and all claims that may be asserted – not only against the license holder, but also against the Lottery Commission and the State itself – arising from the license holder’s participation in limited video lottery.<sup>33</sup>

### **3. Distribution of Revenue**

The state is by far the greatest recipient of revenue obtained from limited video lottery. The Limited Video Lottery Act establishes a schedule for the distribution of proceeds, which varies quarterly depending on the average statewide play per terminal.<sup>34</sup> Under the schedule, the state’s share always exceeds that of operators, and the maximum that could be received by an operator is 41.16 percent, compared to 51 percent for the state.<sup>35</sup>

Further, the distribution of revenue does not include other payments made to the State by operators under the Act, including the bid fee for terminals, an annual renewal fee of \$10,000 and

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<sup>32</sup> W. Va. Code Section 29-22B-516

<sup>33</sup> W. Va. Code Section 29-22B-701

<sup>34</sup> W. Va. Code Section 29-22B-1408

<sup>35</sup> The schedule is set forth in WV Code Section 29-22B-1408. The state receives the first two percent of income for operational expenses of the Lottery Commission. The remaining 98 percent is divided among the state, counties, cities, operators and retailers in most cases (most retailers share equally in the amount distributed to operators), using a formula based on the average daily amount of income per terminal for the preceding quarter.

an annual license fee of \$1,000 per terminal.<sup>36</sup> It also does not include many other state and local taxes and other fees regularly collected by the State from operators and other businesses.

#### 4. Additional Benefits to State

The Administration will undoubtedly provide this Court with detail on the direct benefits to the State from State lottery games, including Limited Video Lottery and its contribution to the Promise scholarship program and other valuable State programs.

In addition to direct revenues to the state from operators and retailers, the state obtains enormous indirect benefits as well.

As previously stated, operators alone currently employ 238 people, and retailers employ 5,018 people, of which it is estimated that 70 percent -- or 3,500 people -- derive their income from limited video lottery.<sup>37</sup> These employees in turn contribute to the State's revenue stream as taxpaying citizens. As the Lottery Commission noted, these employees stand to lose their jobs which would result in additional loss of revenue -- and enhanced burdens -- to the state.

Operators and retailers are small businesses and, by definition, are West Virginia residents. The revenue generated in the State remains in the State. The average operator employs 7 people, and the average retailer is the classic "Mom and Pop" business with approximately 3 people.<sup>38</sup> Many of the retailers are long-standing anchors of their communities -- including restaurants,

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<sup>36</sup> WV Code Section 29-22B-1103

<sup>37</sup> Affidavit of Virgil T. Helton, attached to Submission of Evidence by Respondents the West Virginia Lottery Commission and John C. Musgrave

<sup>38</sup> *Ibid.* The 34 operators employ 238 people, for an average of 7 employees; and the 1,314 retailers employ 5,018 people for an average of 3.8 employees.

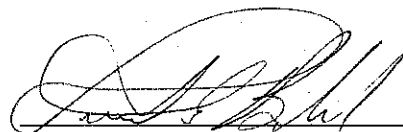
fraternal organizations and social clubs – whose benefit to the welfare of the State cannot be measured only in dollars.

### III. CONCLUSION

This Court should reject the Petitioners' contention that video lottery, including Limited Video Lottery, is unconstitutional, and should instead determine – as requested by the Administration and so many interested citizens, labor organizations and businesses – that it is indeed constitutional. Limited Video Lottery – like Racetrack Video Lottery and the other types of lottery authorized by the Legislature – falls squarely within the provisions of Article VI, Section 36 of the Constitution. Limited Video Lottery is manifestly owned, operated, controlled and regulated by the State, which is its chief beneficiary. For the Court to hold otherwise would deprive the people of the clear expression of their will and would irreparably harm not only the thousands of people who depend on video lottery for their livelihood, but also deprive the public at large of the many valuable programs it supports.

THE WEST VIRGINIA AMUSEMENT AND  
LIMITED VIDEO LOTTERY OPERATORS  
ASSOCIATION, INC.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 1<sup>st</sup> day of October, 2003, counsel for *amicus curiae* West Virginia Amusement and Limited Video Lottery Operators Association, Inc., served a true and accurate copy of the **Amicus Curiae Brief on Behalf of the West Virginia Amusement and Limited Video Lottery Operators Association, Inc.** upon counsel of record by depositing true copies thereof into the United States Mail, postage prepaid, in envelopes addressed as follows:

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