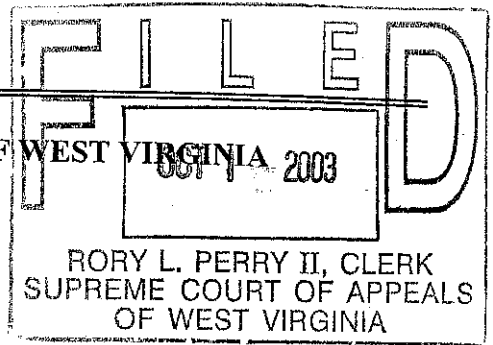


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA ex rel. CITIES OF
CHARLESTON AND HUNTINGTON, etc.,
Petitioners,

vs.

No. 31540

WEST VIRGINIA ECONOMIC DEVELOPMENT
AUTHORITY, A PUBLIC CORPORATION,
Respondent.

AND

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

vs.

No. 31541

WEST VIRGINIA ECONOMIC DEVELOPMENT
GRANT COMMITTEE; et al.,
Respondents.

AND

GREENBRIER COUNTY COALITION AGAINST
GAMBLING EXPANSION, et al.,
Petitioners,

vs.

No. 31564

WEST VIRGINIA LOTTERY COMMISSION, et al.,
Respondents.

**BRIEF OF THE WEST VIRGINIA ECONOMIC
DEVELOPMENT GRANT COMMITTEE
IN RESPONSE TO RULE TO SHOW CAUSE**

WEST VIRGINIA ECONOMIC
DEVELOPMENT GRANT COMMITTEE

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

vs.)

No. 31540

WEST VIRGINIA ECONOMIC DEVELOPMENT
AUTHORITY, A PUBLIC CORPORATION,
Respondent.

AND

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

vs.)

No. 31541

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.

AND

GREENBRIER COUNTY COALITION AGAINST
GAMBLING EXPANSION AND CABELL COUNTY
COALITION AGAINST GAMBLING EXPANSION,
UNINCORPORATED ASSOCIATIONS,
Petitioners,

vs.)

No. 31564

WEST VIRGINIA LOTTERY COMMISSION AND
JOHN MUSGRAVE, ITS DIRECTOR,
Respondents.

**BRIEF OF THE WEST VIRGINIA ECONOMIC
DEVELOPMENT GRANT COMMITTEE,
IN RESPONSE TO RULE TO SHOW CAUSE**

The Petitioners' challenge to the work of the West Virginia Economic Development Grant Committee (hereinafter "EDGC") is a melange of claims that have already been litigated, claims that the Petitioners have no standing to bring, claims based upon statutes that clearly don't apply to the facts of this case, and claims that the Legislature's economic grant development initiatives are based upon an economic overview with which the Petitioners disagree. It is clear that the primary purpose of the Petition is to further delay issuance of bonds and the commencement of work on projects that fall outside the Petitioners' political vision of what is good for West Virginia. To this end, the Petitioners have filed an Amended Petition adding "Count IA," the sole purpose of which appears to be an attempt to alleging *something* that would require the taking of evidence, thus postponing final resolution by this Court.

The Petitioners' attempt to thwart the legislative process, by enlisting the courts as a forum for debate on economic theories and principles, should be rejected.

Because the allegations in the Petition do not always track the arguments in the Petitioners' initial Brief, an integrated response to the two documents is difficult if not impossible. Therefore, the Respondent will break down its argument into two parts: first, a response to the claims in Counts I through VII of the Petition and Count IA of the Amended Petition, and second, a response to the arguments in the Brief.

THE CLAIMS IN THE PETITION AND AMENDED PETITION

1. **Count I, "Private Payback Obligation."**

The gist of the Petitioners' argument, which is not apparent from the face of their Petition but does emerge in their Brief, is that the payback provisions of W. Va. Code § 29-22-18a(d)(9), which apply only to low-interest economic development loans, should be applied to economic development grants as well. This is a re-argument of an issue that Petitioners' counsel lost in State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee, 213 W. Va. 255, 580 S.E.2d 869 (2003) (hereinafter "Grant Committee I"): whether the funding mechanism for economic development grants violates W. Va. Const., art. X, § 6.

With respect to the art. X, §6 claim, this Court wrote that "[l]ike the circuit court, we find that the Legislatively declared objective of economic development is a valid public purpose, deserving of both judicial respect and occasion for the desired economic development to take place. Accordingly, we find no basis for interfering with the subject legislation on public purpose grounds." Id., 213 W. Va. at ___, 580 S.E.2d at 893. Although the Court left the door open for possible challenge of projects certified by the reconstituted EGDC, pursuant to evaluative standards to be crafted by the Legislature, nothing in the Court's opinion suggested that the Court would then reconsider a broad-based art. X, § 6 challenge to the whole of the EGDC's work.

We do note, however, that each of the projects, barring one, had a governmental partner, thereby underscoring the public purpose of such projects. In addition, we further perceive that the Legislature's reposition of broad discretion in the Committee for selecting the list of economic development projects deserving of public funding will meet with increased public acceptance and, therefore, a decreased incidence of challenge and consequent delays in implementing the projects, if the Committee opts to make a full record of its proceedings and decisions for the purpose of evidencing

that its actions are in accord with the public purpose objectives of the subject legislation and the enunciated legislative standards.

Id., 213 W. Va. at ___, 580 S.E.2d at 893-94.

In this case, the Petitioners have not challenged any particular economic development project; they've challenged them *all*. Further, the Petitioners have not challenged any particular legislative standards set forth in W. Va. Code § 29-22-18a(d)(8); they've challenged them *all*.¹ The Respondent respectfully suggests that in light of the Court's decision in Grant Committee I, the Petitioners' Count I challenge to the work of the EDGC was not brought in good faith and should be dismissed.

2. Count IA, "Lack of Requisite Findings."

Count IA of the Amended Petition attempts to impose three extra-statutory requirements on the EDGC: that it make written or on-record findings adequate for court review; that it incorporate those findings into project certifications; and that it assume a duty of "prospective enforcement" of legislative standards for the duration of the projects.²

With respect to the issue of the Committee's findings, the Respondent EDGC has submitted to the Court the transcripts of all its meetings and of the public hearing on August 4, 2003, appended as Exhibits A - E to the Affidavit of Brian M. Kastick. These documents evidence the extraordinary preparation underpinning the Committee members' consideration of the projects submitted for grant

¹The end game here seems to be an evidentiary hearing at which the Petitioners could test fifty different projects (forty-nine grants and one low-interest loan) against the six legislative standards set forth in §29-22-18a(d)(8)(A)-(F) – three hundred discrete issues which could be litigated long enough to drive a stake through the heart of the bond process.

²It is unclear what is meant by "the duration of the project[s]." Until the grant money is spent? Until the bonds are retired? Until the bricks and mortar crumble?

funding, the depth and breadth of expertise and knowledge they brought to the task, and the bases for their decisions. The transcripts speak for themselves.

Nothing in W. Va. Code § 29-22-18a(d) requires the EDGC to make formal “findings,” and there is no case law that would support the imposition of such a requirement. There are two lines of cases upon which the Petitioners may rely, those dealing with zoning boards and those dealing with the Parole Commission. This Court’s most recent zoning board decision is Burkey v. The Bd. of Zoning Appeals of the City of Moundsville ex rel. Thompson, ___ W. Va. ___, 584 S.E.2d 215 (2003), where the Court held in Syllabus Point 3 that “[w]here the power to pass upon special exceptions or conditional uses allowable by a zoning ordinance has been delegated to an administrative body, the body must set forth the factual basis of its determination so that a reviewing court may ascertain whether the administrative decision conforms to the standards in the ordinance for the particular action taken. Syl. pt. 4, Harding v. Board of Zoning Appeals, 159 W. Va. 73, 219 S.E.2d 324 (1975).” The Court’s decision in Burkey was consistent with a long line of precedents, including Dewey v. Board of Zoning Appeals of Greenbrier County, 185 W. Va. 578, 584 n.12, 408 S.E.2d 330, 336 and n.12 (1991); In re Petition of Skeen, 190 W. Va. 649, 651, 441 S.E.2d 370, 372 (1994); Shannondale, Inc. v. Jefferson County Planning and Zoning Comm’n, 199 W. Va. 494, 499, 485 S.E.2d 438, 443 (1997); Henry v. Jefferson County Planning Comm’n, 201 W. Va. 289, 291-92, 496 S.E.2d 239, 241-42 (1997); and American Tower Corp. v. Common Council of the City of Beckley, 210 W. Va. 345, 350-51, 557 S.E.2d 752, 757-58 (2001).

All of these cases are completely inapposite to the situation at bar, since the requirement that zoning boards make clear findings is grounded in *statute*. As this Court pointed out in Burkey, W. Va. Code § 8-24-59 explicitly provides that the rulings of a zoning board “shall be subject to

review by certiorari. . . .” Additionally, W. Va. Code § 8-24-63 explicitly requires that a zoning board’s return to the writ of certiorari “. . . must concisely set forth such facts and data as may be pertinent and present material to show the grounds of the decision or order appealed from.”

Here, in contrast, the economic grant development statutes do not contemplate judicial review of the EDGC’s decisions by certiorari or otherwise; in fact, W. Va. Code § 29-22-18a(d)(12) specifically provides that:

Prior to the issuance of bonds under this subsection, the committee shall certify to the economic development authority a list of those certified projects that will receive funds from the proceeds of the bonds. *Once certified, the list may not thereafter be altered or amended other than by legislative enactment.*

(Emphasis supplied)

Thus, the legal framework underpinning the zoning board cases, the contemplation of judicial review on certiorari, is completely absent from the statutes governing the work of the EDGC. In fact, the language quoted above is the strongest possible indication that the Legislature did not contemplate any judicial review of the substance of the EDGC’s decisions, let alone the cherry-picking type of individual project review the Petitioners would like to have this Court engage in. Simply put, the project list developed by the EDGC, which was given a broad grant of discretionary authority to be exercised pursuant to statutory guidelines, is clearly intended to be an all-or-nothing list subject only to alteration or amendment by the Legislature.

The second line of cases on which the Petitioners may rely begins with Syllabus Point 4 of Tasker v. Mohn, 165 W. Va. 55, 267 S.E.2d 183 (1980), where the Court held that “[d]ue process requires that parole release interview processes include the following minimum standards: * * * (4) A record, which is capable of being reduced to writing, must be made of each parole release

interview to allow judicial review; and (5) Inmates to whom parole has been denied are entitled to written statements of the reasons for denial.” See also Rowe v. Whyte, 167 W. Va. 668, 280 S.E.2d 301 (1981) (written statements must be meaningful); Eads v. Duncil, 196 W. Va. 604, 612-13, 474 S.E.2d 534, 542-43 (1996) (extending rule to parole revocation proceedings); State ex rel. Carper v. West Virginia Parole Bd., 203 W. Va. 583, 590, 509 S.E.2d 864, 871 (1998); and State ex rel. Stollings v. Haines, 212 W. Va. 45, 49, 569 S.E.2d 121, 125 (2002).

These cases are also inapposite to the situation at bar, since the requirement that the Parole Board make written findings is grounded both in statute, W. Va. Code § 62-12-13(j), and in the liberty interests of individuals challenging the State’s right to incarcerate them. No such considerations apply here. As set forth above, the Legislature gave the EDGC a broad grant of discretionary authority, and; nothing contained in § 29-22-18a(d) can be reasonably read to require the Committee to act as a quasi-judicial tribunal whose decisions would be subject to project-by-project judicial review. Further, these Petitioners have no liberty interest in the work of the EDGC, and no personal economic interest that could even arguably trigger a procedural process right in them.

Similarly, nothing in W. Va. Code § 29-22-18a(d) requires the EDGC to put written findings in its project certifications, and no case law—direct, indirect or by analogy—supports the Petitioners’ implicit request that this Court re-write the legislation to impose such a requirement.

Finally, nothing in W. Va. Code § 29-22-18a(d) imposes on the EDGC a duty of “prospective enforcement” of legislative standards for the duration of the projects . . . ,” whatever that is supposed to mean. Each of the projects will go forward pursuant to a Memorandum of Understanding between

the grantee and the Economic Development Grant Authority, and any alleged violations of the provisions of an MOU would be dealt with between the parties thereto.

3. Count II, "Statutory Standards Not Met."

Count II of the Petition actually contains three causes of action and its title is something of a misnomer, since the Petitioners' claim is that the statutory standards of W. Va. Code § 29-22-18a(d)(A), (B) and (C) aren't *adequate*, not that they're not *met*.

First, the Petitioners seek a finding by this Court that the economic theories articulated by then-Justice Richard Neely in his concurring opinion in State ex rel. Ohio County Comm'n v. Samol, 165 W. Va. 714, 720-29, 275 S.E.2d 2, 5-10 (1980), and the "fundamental and inalterable economic laws" articulated by someone named Professor Sutherland, are correct as a matter of law and therefore the yardstick by which any economic development initiatives in West Virginia will be measured. The Respondent respectfully suggests that it is not the role of the judiciary to ascertain fundamental and inalterable economic laws, and the Petitioners simply haven't stated a cause of action here.

Second, the Petitioners seem to claim that W. Va. Code § 29-22-18a(d)(8)(c) requires the EDGC to require an "adequate" (to whom?) compensation-and-benefits package for workers as a condition precedent to an award of grant funding for a project. What the statute actually says is:

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

* * *

(c) The ability of the project to create or retain jobs, considering the number of jobs, the type of jobs, whether benefits are or will be paid, the type of benefits involved and the compensation reasonably anticipated to be paid persons

filling new jobs or the compensation currently paid to persons whose jobs would be retained. . . .

Nothing in the statutory language requires that the EDGC determine a standard of “adequacy” for worker pay, especially for workers who haven’t yet been hired for jobs that haven’t yet been created in workplaces that haven’t yet been built. Again, there’s no cause of action here, and the claim should be dismissed on the ground that this Court cannot re-write the statute to conform to the Petitioners’ notions of what constitutes a “good” job for new or existing workers.

Third, the Petitioners claim that the economic development projects certified by the EDGC—each and every one of them, apparently, since none are specified—fail to meet the requirements of W. Va. Code § 29-22-18a(d)(8)(A) and (B). Again, what the statute says is:

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

(A) The ability of the project to leverage other sources of funding;

(B) Whether funding for the amount requested in the grant application is or reasonably should be available from commercial sources. . . .

It is difficult to respond to this claim in the absence of a single allegation of fact, and in this regard, the Petition brings “notice pleading” to a new level. The real question raised here is whether this Court should re-write the statute to require the EDGC to reject any project that cannot leverage other sources of funding (as presumably unworthy under “fundamental and inalterable economic laws”) and any project where funding should be available from commercial sources (as presumably not in need of a grant). The Respondent respectfully suggests that this is a political questions, not a judicial one, and that this claim should be dismissed.

4. **Count III, "Minor v. Major Private Benefits."**

As was the case with Count I, Count III seeks to have this Court reconsider and reverse its decision in Grant Committee I and find that the funding mechanism for economic development grants violates W. Va. Const., art. X, § 6. The Petitioners cannot claim in good faith that "... most of these approved projects confer[] their major economic benefit upon private entities and persons, with only a minor, ancillary or incidental benefit for the State and its citizens . . .;" without offering a single factual allegation about a single project. What the Petitioners are obviously trying to do is to "plead themselves" within the **Reevaluation of Projects** portion of Grant Committee I, 213 W. Va. at ___, 580 S.E.2d at 893-94, which they apparently see as an opening the Court left itself to examine the merits of all of the projects after the Committee process.

The Court should reject the Petitioners' attempt to circumvent the rulings of the Grant Committee I case by asking the Court to (a) re-write W. Va. Code § 29-22-18a(d)(9) to require repayment of grants as well as low-interest loans, under the rubric of the public purpose doctrine, and then (b) strike down all of the economic development projects certified for grants by the EDGC on the ground that repayment isn't required.

To the extent that Count III can be read as a challenge to the single project which received a low-interest loan as opposed to a grant, a \$2,500,000 loan to the Tri-Cities Power Authority for Project ID #136, a hydroelectric generating facility at Bluestone Dam, the only challenge available to the Petitioners would be one to the terms and conditions of the loan. Such a challenge is premature. As set forth in the affidavit of Brian M. Kastick, Secretary of the Department of Tax and Revenue and Chair of the EDGC (**Exhibit 1**), terms and conditions of the Tri-Cities loan will be set forth in a Memorandum of Understanding between the parties, and until that happens there's nothing

to challenge. Additionally, it is difficult to envision a good-faith challenge even after the matter is ripe; what are the Petitioners going to challenge? An interest rate that they consider to be too low? A repayment schedule that they consider to be too long or too short? Who gets to set the standards for this review?

5. Count IV, "Violations of Substantive Due Process, Equal Protection and Uncompensated 'Takings' Bar."

This is a rehash of Counts I and II dressed up in the language of substantive due process, and sprinkled throughout with inflammatory references to alleged impending "economic extinction or ruination and personal squalor" resulting from the EDGC's actions. Again, the Petitioners invite this Court to revisit and reverse its prior decision in Grant Committee I, and then adopt the theories set forth in then-Justice Neely's concurring opinion in State ex rel. Ohio County Comm'n v. Samol, 165 W. Va. 714, 720-29, 275 S.E.2d 2, 5-10 (1980), as a matter of law.³ Unless this Court wishes to wade into the thicket of "zero-sum" economics and emerge with some kind of yardstick against which to measure every standard set forth in W. Va. Code § 29-22-18a(d)(8)(A)-(F), every public purpose category set forth in § 29-22-18a(d)(11)(A)-(L), and then every project certified for grant funding by the EDGC, it should decline the invitation. As the Fourth Circuit wrote, in a case involving valuation of property for purposes of *ad valorem* taxation, "Try as it might, even Congress is incapable of enacting either a natural law of the market or Plato's ideal." Chesapeake Western Ry. v. Forst, 938 F.2d 528, 532 (4th Cir. 1991), citing Union Pacific R.R. Co. v. State Tax Comm'n of Utah, 716 F. Supp. 528, 543 (D. Utah 1988).

³With all due respect to Justice Neely, his opinion garnered one vote: his own.

Count IV does contain one claim that is new: an equal protection claim brought on behalf of “. . . the publicly unsubsidized petitioner Cooney at his Pet Club and similarly situated persons. . . .” The problem is that the Petitioner Cooney has no standing to make this claim, as he did not apply for an economic development grant or loan for the Pet Club and thus cannot complain about being “publicly unsubsidized.” Additionally, a review of the economic development projects certified by the EDGC⁴ demonstrates that none of those projects will be competing in the marketplace with Petitioner Cooney’s business, since none of them seem to have anything to do with the sale of pets or pet products or services. Thus Petitioner Cooney has suffered no direct harm.

6. Count V, “Anti-Women Sexist Discrimination.”

This is the most astounding claim in the Petition, a cause of action built on a syllogism:

- a. Many of the economic grant projects are retail or services or entertainment concerns; and
- b. Such concerns traditionally hire women as employees; and
- c. Women have average incomes that are lower than men’s average incomes;
therefore
- d. Providing grant funding for projects that will hire women employees will perpetuate the discrimination that already exists; *and*
- e. The solution is to enjoin legislative initiatives that will create new jobs in West Virginia, unless and until this Court fashions an all-purpose remedy to resolve all existing problems of gender-based inequality in the workplace.

⁴A newspaper article listing the projects is reproduced by the Petitioners at page 2 of their Brief.

There are multiple problems with the syllogism, and with the cause of action that rests on its shoulders. First, the Petitioners do not have standing to make their equal protection claim, for the simple reason that they are not members of the protected class whose rights are at stake. If West Virginia's women would rather have no jobs than low-paying jobs, which seems to be the thrust of Count V, they are perfectly capable of bringing a lawsuit on their own behalf without the benevolent offices of the Petitioners to do it for them.

Second, this case is not a proper vehicle for the Court to fashion a prospective remedy for gender-based discrimination in the workplace, since any remedy would constitute an advisory opinion beyond the Court's jurisdiction.

Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes. The pleadings and evidence must present a claim of legal right asserted by one party and denied by the other before jurisdiction of a suit may be taken.

Mainella v. Board of Trustees of Policemen's Pension or Relief Fund of the City of Fairmont, 126 W. Va. 183, 185-86, 27 S.E.2d 486, 487-88 (1943). In this regard, the Petitioners are seeking to have the Court resolve issues involving jobs that haven't yet been created, for workers who haven't yet been hired, about the adequacy of wages that have not yet been established.

Third, the claim in Count V would fail even if the Petitioners had standing to bring it, because it presents political/sociological/economic issues that are beyond judicial resolution. The Court cannot decide the relative value of different types of work and set pay scales binding on everyone. The Court cannot decide as a matter of law that retail jobs are "dead end jobs" unworthy of creation, and that a woman working in a retail facility is little more than a slave.⁵ The Court

⁵In a typical bit of soaring rhetoric about retail, service and entertainment employment, the Petitioners attribute the mantra "thousands of new jobs!" to the EDGC, in order to dash it with the

cannot interfere with economic development initiatives authorized by the Legislature and implemented by the Executive, on the ground that the Court would have done things differently and made other choices.

7. **Count VI, “Counties and Cities Barred From Private Giveaways.”**

This claim does not involve Respondent EDGC, and therefore EDGC will leave it to the county and city respondents to argue the issues articulated in Count VI.

8. **Count VII, “Substance and Appearance of Impropriety.”**

This claim raises an issue that the Court previously decided in State ex rel. The League of Women Voters of West Virginia v. Tomlin, 209 W. Va. 565, 550 S.E.2d 355 (2001), when it upheld the Legislature’s Budget Digest against constitutional attack based on, *inter alia*, the appearance of favoritism to “key” or “powerful” legislators in the selection of projects chosen for Budget Digest funding. The Court found that “. . . indications of favoritism expressly validate [the Court’s requirement of] . . . discussion, debate, and decision prior to final legislative enactment of the budget bill. . . .” Id., 209 W. Va. at 577, 550 S.E.2d at 367. Thus, the question in this case with respect to the favoritism claim is whether the EDGC proceedings were *open*, not what the result was.

As this Court is aware, EDGC proceedings were not only open but also subject to intense media scrutiny and public debate. Many editorials were written about the merits of the different projects submitted for the Committee’s consideration. Citizens expressed their views in meetings both formal and informal, in letters to the editor and in comments to the “vent line.” The Petitioners’ counsel had plenty to say while the process was ongoing and many opportunities to say it.

rejoinder, “even a slave, let it not be forgotten, has a job.” (Petitioners’ Brief at p. 17.)

Additionally, the fact is that the Legislature was excluded from direct participation in the EDGC process by virtue of this Court's rulings in Grant Committee I; the Legislature did not nominate or select any EDGC members and did not participate in the EDGC's deliberations. In short, the petitioners in League of Women Voters had a much stronger argument than the petitioners have in this case.

Finally, this claim presents the same problem as most of the Petitioners' other claims, there is no judicial remedy that the Court could fashion, no rule that it could establish, to cure problems of negative public perception. Should the Court strike down the EDGC's certification of any projects in counties represented by "key" legislators? (The Court will have to determine, as a matter of law, which legislators are "key" and which are not.) Should the Court fashion a judicial amendment to W. Va. Code § 29-22-18a(d)(8), requiring the EDGC to consider, in determining whether or not to certify a project, the degree of power wielded by the legislators in the county?

Obviously, the only remedy for any perception issues arising from the grant certification process is the remedy already adopted by this Court in League of Women Voters: open proceedings, public comment. All of that took place in this case, as is apparent from the transcripts of proceedings appended as Exhibits A-E to the Affidavit of Brian M. Kastick, and therefore the Petitioners' claim must fail.

The Petitioners acknowledge the Court's statement in Court in Grant Committee I that "... the historical underpinnings of [W. Va. Const., art. X, § 4 and W. Va. Const., art. X, § 6] nonetheless maintain an illuminating degree of relevance with regard to the favoritism concerns raised by CAG in this action. We cannot but note that the admonitions of our forefathers concerning the potential unfairness involved through the support of some 'internal improvements' to the exclusion of others,

still have continuing merit today.” *Id.*, 213 W. Va. at ___ n.41, 580 S.E.2d at 890 n.41. The Petitioners cite some of this language in their brief as support for their argument that the work of the EDGC contained “the substance and appearance of impropriety.” In light of the Court’s ultimate holding in Grant Committee I, that the funding mechanism for economic grant development is constitutional, and the absence of any discussion of the favoritism issue in the text of the opinion, Respondent EDGC believes that the Court either decided the appearance of impropriety issue *sub silentio* or found it too insubstantial to merit textual analysis.

THE ARGUMENTS MADE IN THE PETITIONERS’ BRIEF

1. The Low-Interest Payback Obligation.

The operative statute, W. Va. Code § 29-22-18a(d)(9), imposes a payback obligation for low-interest loans, not for grant funding. The Petitioners argue that despite the clear language of § 29-22-18a(d)(9), it should be rewritten or interpreted to require payback of funding for all “. . . projects as may be approved by this Court that economically benefit private persons or entities. . . .”

This argument just will not fly. First, the Court has already upheld the funding mechanism for grants against a public purpose challenge, and therefore this issue has already been resolved. State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Dev. Grant Comm., 213 W. Va. 255, ___, 580 S.E.2d 869, 893 (2003). In this regard, one Justice wrote in his concurring opinion that “. . . [the Petitioner’s] explicit argument that helping to build projects like baseball parks and to refurbish downtown shopping areas with public funds is unconstitutional—because those are not ‘public purposes’—is hogwash.” *Id.*, 213 W. Va. at ___, 580 S.E.2d at 896.

Second, nothing in Grant Committee I indicates that all projects must receive approval from the Court before grant funding may be approved, and in fact the Court seemed to indicate its

disinclination to engage in a wholesale review of the merits of each project in light of “. . . the Legislature’s reposition of broad discretion in the Committee for selecting the list of economic development projects deserving of public funding. . . .” *Id.*, 213 W. Va. at ___, 580 S.E.2d at 894.

Third, the Petitioners’ argument—replete with references to “. . . launder[ing funds] through city halls or county commissions . . .,” and contracts “. . . disguised as gratis public services or concealed as roundabout future handouts . . .,” is a stump speech, not a legal analysis.

Finally, there’s no statutory support for the Petitioners’ claim that the “plain terms” of § 29-22-18a(d)(9) apply to the transfer of funds from a public grantee to its private partners. That’s just not what the statute says, which the Petitioners seem to acknowledge when they conclude their “plain terms” argument by referring to the “tenor” of the statute.

2. Rent-Free Space, Discounted Leases.

The Petitioners argue that this Court has already “conclusively spoken” on the public purpose doctrine in State ex rel. State Bldg. Comm’n v. Casey, 160 W. Va. 50, 232 S.E.2d 349 (1977), while ignoring the Court’s resolution of the public purpose challenge to economic development grant funding in Grant Committee I. This is nothing more than re-argument of an issue that the Petitioners’ counsel has already lost—an issue that a concurring Justice deemed to be “hogwash” — and the Petitioners’ citation to Alabama authority adds nothing to the mix.

3. Usage and Custom of Mainstream Law.

The Petitioners argue that usage and custom of mainstream law, as illustrated by Ohio County Comm. v. Samol, 165 W. Va. 714, 275 S.E.2d 2 (1980), State ex rel. County Court v. Bane, 148 W. Va. 392, 135 S.E.2d 349 (1964), and a two-page string cite of cases from other jurisdictions, compel

the conclusion that “. . . public aid for private corporations and persons in the context of economic development must always be repaid by them. . . .”

The Petitioners totally misconstrue both Samol and Bane. Samol held that government-issued bonds cannot be paid from tax revenues, a proposition with which everyone agrees. Bane held that the nominal buy-back price for a facility, after retirement of government-issued bonds, was not unconstitutional.

More egregiously, the Petitioners completely ignore both State ex rel. Marockie v. Wagoner (Wagoner I), 190 W. Va. 467, 438 S.E.2d 810 (1993), rev'd on other grounds by State ex rel. W. Va. Reg. Jail v. W. Va. Inv. Management Bd., 203 W. Va. 413, 508 S.E.2d 130 (2003), and State ex rel. Marockie v. Wagoner (Wagoner II), 191 W. Va. 458, 446 S.E.2d 680 (1994), not to mention this Court's decision in Grant Committee I, where the Court traced the development of the “special revenue fund” doctrine enunciated in its Marockie precedents and concluded:

Based on all of these factors, we re convinced that the financing mechanism established for payment of the revenue bonds that will be issued in connection with the selected grant projects properly comes within the “special revenue fund” doctrine. Given the Legislature's carefully constructed financing mechanism, we do not find any basis for concluding that the bond repayment schema under consideration can negatively affect the fiscal integrity of the state. We reach this conclusion based on the fact that the bonds will not be satisfied out of general appropriations.

Id., 213 W. Va. at ___, 580 S.E.2d at 890 footnote omitted).

In short, the Petitioners' custom and usage argument is unavailing because this issue has already been decided and the Court's opinion in Grant Committee I has preclusive effect.

4. Professor Sutherland's Strong Maxims.

The Petitioners argue that the so-called “strong maxims” of Professor Sutherland, whoever he may be, should be adopted by this Court in order to construe W. Va. Code § 29-22-18a(d)(9) as having a payback requirement for grant recipients. The fundamental problem with this argument

is that the language of the statute is clear; therefore, it doesn't need to be construed. Additionally, Professor Sutherland's maxims are limited, by their express terms, to "... rights or benefits granted to private parties . . .," and this Court has already resolved the public/private benefit debate in Grant Committee I.

5. Avoidance of Unjust and Unconstitutional Results.

The Petitioners' argument here is a rehash of their counsel's arguments in Grant Committee I. First, the Petitioners urge that the maxim of avoiding unjust or absurd statutory results requires the Court to strike down W. Va. Code § 29-22-18a(d)(11)(A), (I) and (K),⁶ since in the Petitioners' view retail, services and entertainment concerns "serve little or no public purpose" and "creat[e] virtually no new economic activity."

Second, these Petitioners have no standing to make this argument on behalf of "numerous small retail, service and entertainment businesses in the Huntington, Charleston, Logan, Beckley, Wheeling, Clarksburg-Fairmont and other regions of the State. . . ." Petitioner Lewis does not operate a small retail, service or entertainment business. Although Petitioner Cooney is alleged to operate Club Pet in Huntington, he did not apply for either a grant or a low-interest loan and therefore has no standing to challenge the EDGC's selection of other projects for funding.

Third, despite the (apparently) contrary views of a circuit judge in Kansas, Burford v. Kroger Co., 97-C-1027 (Kan. Co. Cir. Ct., 1997), this Court in Grant Committee I has already rejected the Petitioners' counsel's claim that only manufacturing projects are valid economic development projects.

⁶The Petitioners don't actually say this, but if they won the "unjust and absurd results" argument, striking down these portions of §29-22-18a(d) is the only relief that would accomplish their goal of eliminating retail, service and entertainment projects from grant consideration.

6. Decisions of Courts in Sister States.

The Petitioners' "sampling" of opinions that support, at least in part, the views expressed in Burford v. Kroger Co., 97-C-1027 (Kan. Co. Cir. Ct., 1997), is unavailing. As noted earlier, this Court in Grant Committee I has already rejected the Petitioners' counsel's claim that only manufacturing projects are valid economic development projects.

7. Alleged Due Process Violations.

This claim is based upon the concurring opinion of then-Justice Neely in Ohio County Comm'n v. Samol, 165 W. Va. 714, 729, 275 S.E.2d 2, 9-10 (1980), and in particular the following language cited in the Petitioners' brief at page 11:

[T]he West Virginia Constitution, Article III, §§9 and 10, provide that property shall not be taken without just compensation.

The private investments of competing businesses made at the going market rate of interest will be . . . confiscated by the State if it subsidizes a new competing commercial, rather than industrial enterprise . . . , when one group of West Virginians seek to enlist the aid of the State . . . in order to compete against another group of West Virginia residents who have undertaken all of the risks, expenses and vexations of the market economy

First, the Respondent is compelled to point out that the Petitioners' methodology of eliding language in this citation is really disingenuous; there are whole *paragraphs* lost in that innocent little . . . and the Respondents strongly object to this tactic.

Second, as was noted earlier in this Brief, the concurring opinion in Samol garnered only one vote, that of its author.

Third, the concurring opinion in Samol was wholly *dicta*, as the issue in the case was whether the state could subsidize a retail plaza that would compete with businesses in Ohio and Pennsylvania.

Justice Neely said yes to that question, which was why his opinion was a concurrence rather than a dissent. The rest was an interesting discussion about “zero-sum” economics and the like.

Fourth, again the Petitioners have no standing to make this claim, as (a) Petitioner Lewis doesn't have a business, and (b) Petitioner Cooney didn't apply for either a grant or a low-interest loan, and it appears that he's not even a West Virginia resident.⁷ Additionally, neither claim to have suffered the “economic extinction and personal squalor” that is alleged to be the result of the economic development grant initiative.

In any event, the economic development grant initiative does not violate the equal protection guarantees of the West Virginia Constitution because it is economic legislation which bears a rational relationship to a proper governmental purpose. See, e.g., Verba v. Ghaphery, 210 W. Va. 30, 552 S.E.2d 406 (2001); Citizens Bank of Weston, Inc. v. City of Weston, 209 W. Va. 145, 544 S.E.2d 72 (2001); Carvey v. West Virginia State Bd. of Educ., 206 W. Va. 720, 527 S.E.2d 831 (1999).

It is well settled that the guarantee of equal protection of the law is part and parcel of the Due Process Clause of the West Virginia Constitution, art. III, §10. Robertson v. Goldman, 179 W. Va. 453, 369 S.E.2d 888 (1988); Israel v. Secondary Schs. Activities Comm'n, 182 W. Va. 454, 388 S.E.2d 480 (1989). It is equally well settled that “[t]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.” Lewis v. Canaan Valley Resorts, Inc., 185 W. Va. 684, 692, 408 S.E.2d 634, 641 (1991). As this Court has stated on numerous occasions:

⁷Petitioners specifically allege that the Rev. Lewis is a “. . . citizen, resident, taxpayer and voter. . . .” With respect to Mr. Cooney, they allege only that he “. . . sues as the owner and operator of Club Pet located in downtown Huntington. . . .”

In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

Robinson v. Charleston Area Med. Ctr., Inc., 186 W. Va. 720, 414 S.E.2d 877 (1992), Syl. Pt. 1.

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

Pt. 1; West Virginia Pub. Employees Retirement Sys. v. Dodd, 183 W. Va. 544, 396 S.E.2d 725 (1990), Syl. Pt. 2.

In an equal protection challenge, different types of constitutional analyses are utilized depending on the types of rights at issue. There can be no dispute that this case involves economic rights only.

Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate section ten of article III of the West Virginia Constitution, which is our equal protection clause.

Robinson v. Charleston Area Med. Ctr., Inc., *supra*, Syl. Pt. 2. See also Atchinson v. Erwin, 173 W.

Va. 699, 302 S.E.2d 78 (1983), Syl. Pt. 7; Hartsock-Flesher Candy Co. v. Wheeling Wholesale

Grocery Co., 174 W. Va. 538, 328 S.E.2d 144 (1984), Syl. Pt. 4; Gibson v. W. Va. Dept. of

Highways, 185 W. Va. 214, 406 S.E.2d 440 (1991), Syl. Pt. 4.

This Court has characterized the constitutional test in cases affecting only economic rights as "... a *lenient* standard that requires us to determine whether the classification in question 'bears

a reasonable relationship to a proper governmental purpose.'" Albright v. White, 202 W. Va. 292, 503 S.E.2d 860 (1998) (emphasis supplied and citations omitted).

In Courtney v. State Dep't of Health, 182 W. Va. 465, 388 S.E.2d 491 (1989), this Court rejected an equal protection challenge to a statutory scheme which provided less favorable retirement benefits for employees whose jobs were terminated due to a reduction of work force (RIF) than were provided for employees who worked until reaching the normal retirement age. Analyzing the provisions of W. Va. Code §§ 5-16-12(b), (c) and (d), the Court found a rational basis for the Legislature's decision to provide different benefits to the two classes of employees exiting the work force. Where retirement was mandated by age, the State could more easily predict the size of its work force and consequently the Legislature could afford retirees more flexibility in converting annual and sick leave into insurance and retirement benefits. Conversely, where the State was required to terminate employees due to factors beyond its ability to predict, as in the case of a RIF, it was rational for the Legislature not to build as much flexibility into retirement benefits. The Court noted:

[T]he statutory classifications involved in this case result in some financial hardships to the petitioners and other persons similarly situated, that is, those who are terminated from employment due to a 'reduction of work force.' We are not insensitive to the financial plight of the petitioners. However, we do not believe that these statutory classifications are unconstitutional.

Courtney, 182 W. Va. at 472, 388 S.E.2d at 498.

Utilizing the constitutional standard set forth in the cases cited herein, this Court must conclude that the challenged legislation is constitutional. The Court has already found that "... the Legislatively declared objective of economic development is a valid public purpose, deserving of both judicial respect and occasion for the desired economic development to take place." Grant

Committee I, 213 W. Va. at ___, 580 S.E.2d at 893. Further, the Court noted that "[w]hile CAG vigorously challenges the Legislature's objective of advancing the economic interests of this state through commercial development, this Court recognized the worth of commercial development more than twenty years ago. . . ." Id., 213 W. Va. at ___, 580 S.E.2d at 891 (footnote omitted).

In short, although the Court did not address an equal protection challenge in Grant Committee I, it made almost all of the findings that would in fact defeat such a challenge. The only issue *not* addressed was whether all members of the class--being West Virginia businesses -- have been treated equally. The Petitioners' claim appears to be that small businesses have not been so treated because their economies of scale make a grant award unlikely, and thus they are relegated to the marketplace with all of its "risks, expenses and vexations."

This argument has some emotional appeal, but it simply goes too far. The job of the West Virginia Legislature is to look at the economy as a whole, and determine how best to stimulate the state's economy by creating the greatest number of jobs, and the greatest amount of overall economic development, for the greatest number of people in the widest possible geographical area. There's no question that this will present challenges for small businesses who may be in competition with larger concerns, but the fact is that we're all in this together and there's no perfect solution -- no "Plato's ideal."⁸ The Petitioners' first suggested solution, jettisoning the whole attempt, isn't a solution at all but rather an collective throwing up of our hands. Their second suggested solution, that we limit grant funding to industrial and manufacturing concerns, would be just as susceptible of an equal protection challenge as the current initiative is; there are small manufacturers out there without the economies of scale of large manufacturers. Thus, it's back to throwing up our hands.

⁸See page 11, *infra*.

Finally, the Petitioners do not mention this Court's decision in Pendleton Citizens for Community Schs. v. Marockie, 203 W. Va. 310, 507 S.E.2d 673 (1998), where the Court considered an analogous challenge to the School Building Authority's utilization of an "economies of scale" factor in its selection of projects for funding. Notwithstanding the disadvantage which this factor may cause smaller schools to suffer in competing for SBA funds, the Court found that "economies of scale" served multiple *compelling* state interests and upheld the SBA criteria.

8. Offsetting the Gains of Employment.

In this portion of their Brief, the Petitioners build an argument based on a single sentence in Potter v. Judge, 444 N.E.2d 821, 824 (Ill. 1984) (quoting City of Salem v. McMackin, 291 N.E.2d 807, 817-18 (1972), stating that "[i]n limiting this course of financing to industrial and manufacturing plants, the Legislature might reasonably have determined that the competitive harm suffered by the presence of another local commercial or service business would more than offset the gains of employment and economic development otherwise intended . . .," together with the testimony of an expert witness in the Kansas case (a trial court decision) concerning the competitive advantage enjoyed by Kroger Supermarkets and the effect on smaller retail stores.

Look closely at that language in Potter: the court is discussing what the Legislature *might* have determined, not what it *did* determine and not what it was somehow *required* to determine. In fact, the thrust of Potter is that it's the Legislature, not the Judiciary, that makes these types of determinations. Contrary to the Petitioners' claim, there is no ". . . cardinal, ineradicable economic reality in the 'commercial' sector of the economy . . .,"⁹ nor was the Potter court purporting to announce any "cardinal, ineradicable" economic laws.

⁹Petitioners' Brief at p. 13.

The remaining argument here consists of dire predictions of catastrophe based on what the Petitioners term a "self-evident" proposition: that development grants to retail, service and entertainment projects will result in decreased employment and aggravate losses or curtailments of small businesses. The effrontery of this claim is astounding; who do Petitioners think they are to pronounce economic policy for West Virginia? Further, the solution proposed by the Petitioners is unrelated to the harm they prophesy. Assuming *arguendo* that this Court has the authority to rewrite W. Va. Code § 29-22-18a(d)(9) to require repayment of grant funding, how will that increase employment? Or eliminate the competitive advantage enjoyed by companies with better economies of scale?

9. Alleged Severe Federal and State Due Process Violations.

The gist of this argument is that grant funding for the types of projects enumerated in W. Va. Code § 29-22-18a(d)(11)(A)-(K) is violative of substantive due process because such projects "... are incapable of advancing the legitimate statutory objective of economic development. . . ." This is an argument for Crossfire, not for a legal brief. None of the cases cited by the Petitioners have anything to do with the issues before this Court, and therefore the Respondent EDGC will not even attempt to discuss and distinguish them.

10. Unconstitutional Takings.

This is the Petitioners' equal protection argument taken to the next step: small businesses suffering the alleged "gratuitous confiscatory impacts" of the Legislature's economic development grant initiative are suffering a constitutional taking.

As before, the Petitioners have no standing to make this argument, and even if they did, the takings claim is premature. Since the Petitioners treat this argument as a three-sentence "throwaway"

argument, Respondent EDGC will respond in similar fashion. It is impossible to respond to anything so vague and speculative.

11. Extremely Low Compensation and Benefits.

This is a classic strawman argument. First, the Petitioners set up the strawman, making the incredible claim that EDGC considers Wal-Mart to be "... its model and 'prototype' for economic development."¹⁰ Then they knock it down with a scathing attack on Wal-Mart and a gratuitously sarcastic comment about "economically barren corporate retail-service giants ... ushering our State into a new economic Nirvana."

It is unclear just what this argument is even about: the evils of Wal-Mart? The Petitioners go on briefly to state in conclusory fashion that "such projects," presumably meaning economically barren corporate retail-service giants, fail to achieve the economic development requirement of W. Va. Code § 29-22-18a(d)(8)(D), and what Petitioners term the "other funding" requirements of W. Va. Code § 29-22-18a(d)(8)(A) and (B). These are the same arguments that were made in Grant Committee I and rejected by the Court.

12. Anti-Woman Discrimination.

The Petitioners claim that the Legislature's economic development grant initiative is "the single biggest anti-woman, sexist operation of the state in its 140-year history." This allegation is so overblown that it's tempting to just dismiss it as silly; however, the Respondent EDGC will respond on the assumption that these Petitioners are making a good-faith attempt to mount a gender-based discrimination case against W. Va. Code § 29-22-18a(d).

¹⁰Petitioners' Brief at p. 17.

First, the Petitioners obviously no standing to bring this case, as they are not members of the class alleged to be the victim of gender-based discrimination. Additionally, Petitioner Cooney is apparently not even a West Virginia resident, so he has no standing to bring this case on behalf of "... our mothers, wives, sisters and daughters. . . ." ¹¹

Second, the assumptions that underlie the Petitioners' claim have absolutely no basis in the realities of the marketplace. The Petitioners' first assumption is that West Virginia women would be better off having no jobs at all than low paying jobs in the service industry, a paternalistic notion with which most unemployed women would surely disagree. Additionally, the Petitioners argue that the West Virginia Legislature should fund only manufacturing operations, which in turn will afford women jobs "... in the fields of 'light' production and maintenance, professional, 'staff,' accounting, clerical and other types of 'white collar' employment necessary for the plants' operations." ¹² Thus, the Petitioners' second assumption is that West Virginia women would rather be cleaning ladies, file clerks and bookkeepers in plants, than work in the shoe department of a store. The Petitioners' third assumption is that all commercial, service and entertainment jobs created as a result of economic development grants will be "dead end" jobs with low wages, no benefits and no hope of advancement. (This is the Petitioners' Wal-Mart argument, which they seem to have adapted from the excellent book Nickel And Dimed: On (Not) Getting By In America.) This assumption is speculative, premature and downright insulting, in that it seems to discount any possibility of action by female workers to affect their own destiny. Assuming *arguendo* that the jobs created by economic development grants turn out to be the "dead end" jobs envisioned by the

¹¹Petitioners' brief at p. 19.

¹²Petitioners' brief at p. 18.

Petitioners, women could respond by not taking the positions (or by quitting them), by taking steps to form a collective bargaining unit, and/or by filing lawsuits against employers who engage in discriminatory practices.

The Petitioners have seemingly appointed themselves to lead West Virginia's women out of impoverishment, dead-end jobs and economic desperation, by ensuring that only jobs the Petitioners deem "worthy" will be created for them. In this regard, the Petitioners' reach exceeds their grasp for multiple reasons, including in many cases the high cost of advanced education, lack of available and affordable child care, the need for better public transportation, and the difficulty of securing affordable health care coverage. In short, this case just doesn't present an appropriate vehicle for solving the myriad problems facing working people all across the country, including in West Virginia.

Finally, it should be noted that there are women in the West Virginia Legislature. Did the Petitioners think to ask them why they voted for an initiative that was "the single biggest anti-woman, sexist operation of the state in its 140-year history"?

13. Private Benefit v. Public Benefit.

The Petitioners read Grant Committee I very narrowly, suggesting that this Court left the door open for evaluation of every project to determine whether its private benefit outweighs public benefit. Further, the Petitioners claim that virtually every grant project is "constitutionally verboten" because there's no payback requirement.

This argument is difficult to characterize, let alone to respond to. Although the Court has already upheld the grant funding mechanism against constitutional attack, the Petitioners seem to be saying that we should ignore that because the Court failed to take into consideration that the bond

proceeds are being “given away.” But the Court did take that into consideration, because the bonds were no more repayable in Grant Committee I than they are now; the only thing that’s changed is that the Legislature has now added a low-interest *loan* provision to §29-22-18a, which loans *are* repayable.

14. City and County Respondents.

The Petitioners’ arguments concerning the Charleston Ballpark Project, the Ohio County project, and the Huntington Pullman Square Project, state claims (if at all only) against the city and county respondents. Respondent EDGC is not a party to these claims and will not respond.

15. Appearance of Impropriety.

The Petitioners’ final claim is that the work of the EDGC is tainted by an appearance of favoritism to Committee members or “12 top legislators.” This is the same argument that was made by the League of Women Voters when it challenged the constitutionality of the Legislature’s Budget Digest. It was rejected by the Court. State ex rel. The League of Women Voters of W. Va. v. Tomlin, 209 W. Va. 565, 550 S.E.2d 355 (2001).

West Virginia Constitution, art. III, § 2, upon which the Petitioners rely, provides that “[a]ll power is vested in, and consequently derived from, the people. Magistrates are their trustees and servants, and at all times amenable to them.” Respondent EDGC could not agree more. That is why its proceedings were held in the open; why projects were subjected to public scrutiny and comment; and why it was required to, and did, explain the reasoning which guided its selection process. That is what was required by this Court in League of Women Voters and in Grant Committee I, and the West Virginia Economic Development Grant Committee was obedient to the mandate of the Court.

The Constitution requires no more, and no less. The Petitioners’ claim should be rejected.

CONCLUSION

For all of the reasons set forth in this Response, the Petition for Writ of Mandamus should be denied. The Petitioners have articulated no clear legal right on their part to the relief they seek, and no clear legal duty on the part of the Respondent EDGC to adopt the Petitioners' economic theories. The West Virginia Legislature has acted, and its statutory economic development initiatives are constitutional. The West Virginia Executive has acted, and performed its duties faithful to the statutory mandates. It is time for this case to be over.

WEST VIRGINIA ECONOMIC DEVELOPMENT GRANT COMMITTEE

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CERTIFICATE OF SERVICE

I, KATHERINE A. SCHULTZ, Senior Deputy Attorney General, do hereby certify that copies of the within "Brief of the West Virginia Economic Development Grant Committee in Response to Rule to Show Cause" were served on all parties to this consolidated litigation, and on amicus curiae, by first class mail to their respective attorneys, on this 1st day of October, 2003:

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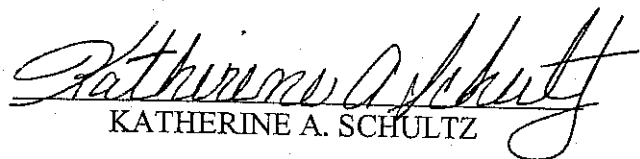
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