

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*

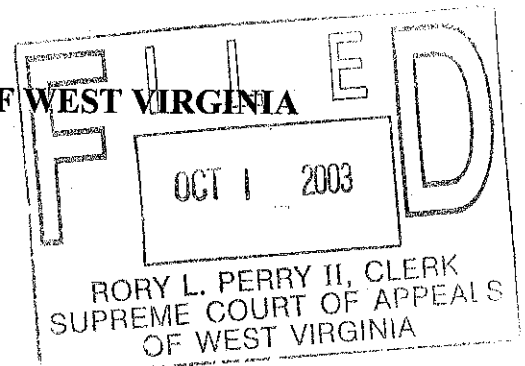
AND

Greenbrier County Coalition Against Gambling  
Expansion and Cabell County Coalition Against  
Gambling Expansion, *Petitioners*

vs.

No. 31564

West Virginia Lottery Commission and Its Director,  
John Musgrave, *Respondents*



**MEMORANDUM OF LAW OF  
THE WEST VIRGINIA BUSINESS ROUNDTABLE,  
THE WEST VIRGINIA BUSINESS AND INDUSTRY COUNCIL, AND  
THE WEST VIRGINIA HOSPITALITY AND TRAVEL ASSOCIATION, INC.,  
AS AMICUS CURIAE, IN SUPPORT OF THE CONSTITUTIONALITY  
OF VIDEO LOTTERY  
AND THE ECONOMIC DEVELOPMENT GRANT PROGRAM**

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**THE WEST VIRGINIA BUSINESS ROUNDTABLE,  
THE WEST VIRGINIA BUSINESS AND INDUSTRY COUNCIL, AND  
THE WEST VIRGINIA HOSPITALITY AND TRAVEL ASSOCIATION, INC.,  
AS AMICUS CURIAE, IN SUPPORT OF THE CONSTITUTIONALITY  
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The West Virginia Business Roundtable (“Roundtable”) is a non-profit, non-stock trade association comprised of the State’s leading business, education and economic development Chief Executive Officers. It is dedicated to advocating public policies that improve the State’s economy. It is actively engaged with the State’s policymakers, economic development officials, and business and labor organizations to improve the State’s economic competitiveness.

The West Virginia Business and Industry Council (“BIC”) is a non-profit voluntary organization of business and industry trade associations, local chambers of commerce, and associated member companies which collectively embraces a majority segment of business and industry in West Virginia. BIC advocates economic development programs to enhance the investment and job creation climate in the state.

The West Virginia Hospitality and Travel Association, Inc. (“WVHTA”) is a non-profit, non-stock trade association comprised of West Virginia businesses involved in the tourism and hospitality industry. The WVHTA was created through the consolidation of the West Virginia Hotel & Motel Association, West Virginia Restaurant Association, West Virginia Travel Industry Association and West Virginia Convention & Visitor’s Bureau

Association. The WVHTA has evolved into the “voice” for the West Virginia businesses & organizations involved in the hospitality and travel industry.

These three business groups will hereafter be referred to jointly as “the Business and Tourism Groups.” The Business and Tourism Groups are directly concerned with the impact on state and local government services and on the economy of the State, should video lottery not continue to be a viable West Virginia Lottery Commission product, or should Economic Development Grants not be allowed.

The Business and Tourism Groups are convinced that video lottery games conducted by the West Virginia Lottery Commission are (1) lottery games, and (2) sufficiently regulated, controlled, owned and operated by the State of West Virginia so as to fall within the exception to the constitutional prohibition of lotteries, as set out in Article VI, Section 36 of the West Virginia Constitution, which provides as follows:

The Legislature shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this state; except that the Legislature may authorize lotteries which are regulated, controlled, owned and operated by the State of West Virginia in the manner provided by general law, either separately by this state or jointly or in cooperation with one or more other states....  
[Emphasis added]

However, even were this Court to determine that video lottery is not a “lottery” as contemplated by our Constitution, then there is no provision in the West Virginia Constitution which prohibits the legislature from authorizing those “non-lottery” games, as it has done with the Racetrack Video Lottery Act, W. Va. Code § 29-22A-1, et seq., and the Limited Video Lottery Act, W. Va. Code § 29-22B-1, et seq.

Because the issues related to video lottery will be fully argued by intervenors, the West Virginia Lottery Commission and the West Virginia Racing Commission, the Business and Tourism Groups will focus their analysis in this amicus brief on constitutional issues related to the Economic Development Grant Program. However, the Business and Tourism Groups wish first to reiterate for this Court the financial significance of video lottery to the State of West Virginia.

Since their inception, state-operated video lottery programs have produced over 64 million dollars in tourism development grants. With the required match from the tourism partners, a total of 129 million dollars has been spent to promote West Virginia. The cooperative tourism grant program is critical to the tourism industry and the State of West Virginia. The tourism industry, and the State of West Virginia, have benefited since the inception of this program through the growth of visitors to West Virginia, which has now reached over 22 million visitors per year. This translates to direct total annual spending by tourists in West Virginia of 3.1 billion dollars and a total economic impact of 4.86 billion dollars.

More importantly, the state budget for the current fiscal year, 2004, includes almost 420 million dollars from the lottery. Of this amount, 41 million dollars comes from the traditional and on-line games with the balance of nearly 380 million dollars, coming from video lottery. In addition, county and municipal budgets will receive almost 18 million dollars from video lottery. Affidavit of Virgil Helton. These funds are supporting the current budgets for Tourism, Department of Natural Resources, Department of Education,

Education and Arts, Culture and History, Library Commission, Educational Broadcasting Authority, senior citizens programs, Higher Education Policy Commission for the State's colleges and universities, Promise Scholarship program, Infrastructure Council for water and sewer development, School Building Authority, teacher and state employee salaries, and other important state and local public purposes.

It is significant that the nearly 400 million dollars that state and local governments would lose without video lottery cannot be made up from traditional taxing sources. Our state income tax is virtually a flat tax without deductions and at a high rate. Our corporate net income tax is one of the highest in the country. Our franchise and severance taxes are high when compared with other states. Our 6% sales tax is also high when compared with neighboring states. In short, there is no feasible replacement for these funds. In summary, video lottery is contributing nearly 400 million dollars to state and local budgets this year, and without video lottery, the funds budgeted for this fiscal year would simply not be there.

**A. WEST VIRGINIA CODE § 29-22-18a(d), AS AMENDED, IS CONSTITUTIONAL IN ALL RESPECTS**

Petitioners Cities of Charleston and Huntington and Counties of Ohio and Kanawha question "[w]hether the State Excess Lottery Revenue Fund created by W. Va. Code § 29-22-18a(d), as amended, is constitutional because it does not violate the separation of powers clause of the West Virginia Constitution and it does not improperly delegate the Legislature's powers to an administrative agency." Petitioners Cities and Counties at 2. This Court, in

State ex rel. W. Va. Citizens Action Group v. W. Va. Econ. Dev. Grant Comm., 580 S.E.2d 869 (W.Va. 2003), although finding certain provisions of West Virginia Code § 29-22-18a(d) unconstitutional with respect to the aforementioned constitutional provisions, nonetheless provided that "[a]ssuming that the Legislature desires to proceed with this statutory approach of encouraging economic development, it is incumbent upon the Legislature to amend the subject legislation to provide for the executive appointment of the members of the Grant Committee without use of a submitted list of nominees from the presiding officers of the two houses of the Legislature and to further provide the necessary guidance in the form of legislative standards that will enable the Committee to perform its statutory task of reviewing and selecting among the submitted project applications in accord with the announced legislative objective of economic development." *Id.* at 894. During the Second Special Session of 2003, the West Virginia Legislature, heeding the advice and direction of this Court, did just that.

**1. WEST VIRGINIA CODE § 29-22-18a(d) NOW PROVIDES EXCLUSIVELY FOR THE EXECUTIVE APPOINTMENT OF ALL APPOINTED GRANT COMMITTEE MEMBERS**

In W. Va. Econ. Dev. Grant Comm., this Court concluded "that the appointment mechanism for the Grant Committee violates the separation of powers provision of the state constitution [W. Va. Const. Art. V, § 1], and the appointments provision of the state constitution [W. Va. Const. Art VII, § 8]." *Id.* at 875. Specifically, this Court found "the provisions of West Virginia Code § 29-22-18a(d)(3) that direct the presiding officers of each

house of the Legislature to submit a list of prospective candidates to the Governor for the chief executive's selection of certain members of the West Virginia Economic Grant Committee" (*Id.* at Syl. Pt. 2), unconstitutionally "injected [the Legislature] into the appointment process - a function indisputably reserved to the executive branch of government." *Id.* at 881. However, this Court provided clear direction as to how the Legislature, should it so desire, could remedy the constitutional deficiencies of West Virginia Code § 29-22-18a(d).

Accordingly, the Legislature, during the Second Special Session of 2003, amended West Virginia Code § 29-22-18a(d) to provide that:

For the purpose of certifying the projects that will receive funds from the bond proceeds, a committee is hereby established and comprised of the governor, or his or her designee, the secretary of the department of tax and revenue, the executive director of the West Virginia development office and six persons appointed by the governor: *Provided*, That at least once citizen member must be from each of the state's three congressional districts.

W. Va. Code § 29-22-18a(d)(6). Ergo, by amending the statute to provide that all persons appointed to the Grant Committee be so appointed by the Governor, the Legislature removed itself from the appointment process, thereby leaving that function indisputably to the executive branch of government. Consequently, the appointment mechanism for the Grant Committee no longer violates either the separation of powers provision (W. Va. Const. Art. V, § 1) or the appointments provision (W. Va. Const. Art. VII, § 8) of the West Virginia Constitution.

**2. WEST VIRGINIA CODE § 29-22-18a(d) PROVIDES ADEQUATE AND DEFINITIVE GUIDELINES AND STANDARDS TO GUIDE THE GRANT COMMITTEE IN THE EXERCISE OF ITS STATUTORILY MANDATED DUTIES**

This Court, in W. Va. Econ. Dev. Grant Comm., further concluded that West Virginia Code § 29-22-18a(d) "extend[ed] discretion to the executive branch in contemplation of an expenditure of public funds with only a broad statement of legislative intent and insufficient legislative guidance for the execution of that legislative intent . . ." Id. at Syl. Pt. 5. Consequently, this Court held that West Virginia Code § 29-22-18a(d) had "wrongfully delegated its powers to legislate in violation of Article six, section one of the West Virginia Constitution." Id. This Court then expounded that "the Legislature must articulate with sufficient clarity its public policy objectives to permit the executive department to effectuate those policy objectives and to educate the public as to the Legislature's intentions." Id. at 886.

In an effort to remedy the constitutional deficiencies of West Virginia Code § 29-22-18a(d), the Legislature, in addition to correcting the appointment mechanism discussed above, provided explicit and definitive standards by which the Grant Committee was to exercise its statutorily specified duties. To articulate its public policy objectives with sufficient clarity, the Legislature amended West Virginia Code § 29-22-18a(d) by adding thereto the following explicit provisions:

(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;
- (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;
- (D) Whether the project will promote economic development in the region and the type of economic development that will be promoted;
- (E) The type of capital investments to be made with bond proceeds and the useful life of the capital investments; and
- (F) Whether the project is in the best interest of the public.

...

(11) The Committee may not certify a project unless the committee finds that the project is in the public interest and the grant will be used for a public purpose. For purposes of this subsection, projects in the public interest and for a public purpose include, but are not limited to:

- (A) Sports arenas, fields, parks, stadiums and other sports and sports-related facilities;
- (B) Health clinics and other health facilities;
- (C) Traditional infrastructure, such as water and wastewater treatment facilities, pumping facilities and transmission lines;
- (D) State-of-the-art telecommunications infrastructure;
- (E) Biotechnical incubators, development centers and facilities;
- (F) Industrial parks, including construction of roads, sewer, water, lighting and other facilities;
- (G) Improvements at state parks, such as construction, expansion or extensive renovation of lodges, cabins, conference facilities and restaurants;
- (H) Railroad bridges, switches and track extension or spurs on public or private land necessary to retain existing businesses or attract new businesses;

(I) Recreational facilities, such as amphitheaters, walking and hiking trails, bike trails, picnic facilities, restrooms, boat docking and fishing piers, basketball and tennis courts, and baseball, football and soccer fields;

(J) State-owned buildings that are registered on the national register of historic places;

(K) Retail facilities, including related service, parking and transportation facilities, appropriate lighting, landscaping and security systems to revitalize decaying downtown areas; and

(L) Other facilities that promote or enhance economic development, educational opportunities or tourism opportunities thereby promoting the general welfare of this state and its residents.

This Court has previously recognized that "[t]he delegation by the legislature of broad discretionary powers to an administrative body, accompanied by fitting standards for their exercise, is not of itself unconstitutional." State ex rel. West Virginia Housing Development Fund v. Copenhaver, 153 W. Va. 636, 649, 171 S.E.2d 545, 553 (1969)(quoting Syl. Pt. 8, Chapman v. Huntington, W. Va. Hous. Auth., 121 W. Va. 319, 3 S.E.2d 502 (1939)). As demonstrated above, West Virginia Code § 29-22-18a(d), as amended, now sets forth such guidelines and "fitting standards" to guide the Grant Committee in the exercise of its judgment and discretion in selecting projects to be funded. Moreover, just as this Court held in State ex rel. Marockie v. Wagoner (Wagoner II), 191 W. Va. 458, 446 S.E.2d 680 (1994), the entirety of the amended legislative act, as well as the numerous detailed provisions set forth in West Virginia Code §§ 29-22-18a(d)(8) & (11) provides adequate and definitive standards for the Grant Committee to select which economic development projects are to receive public funds.

Hence, the necessary legislative guidance has been provided in the cumulative provisions of West Virginia Code § 29-22-18a(d). Consequently, the subject legislation no longer wrongfully delegates legislative powers in violation of Article VI, Section 1 of the West Virginia Constitution.

**B. WEST VIRGINIA CODE § 29-22-18a(d) DOES NOT VIOLATE EITHER THE "PUBLIC PURPOSE" DOCTRINE OR ARTICLE TEN, SECTION 6 OF THE WEST VIRGINIA CONSTITUTION**

In another mandamus Petition, Petitioners the Rev. Jim Lewis and Mr. John Cooney seek to challenge the propriety and constitutionality of the legislative plan set forth in West Virginia Code § 29-22-18a(d). This "plan" provides for the distribution of public grant moneys by the Grant Committee to encourage and assist with the construction and development of economic development projects within the State of West Virginia. Petitioners argue, just as was argued in W. Va. Econ. Dev. Grant Comm., that such grants violate both the "public purpose" doctrine and Article X, Section 6 of the West Virginia Constitution ("The credit of the state shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the state ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person."). In previously addressing these exact issues, this Court has dispositively held that "we wish to make clear [] that we find no constitutional infirmities with regard to the overall legislative plan [set forth in West Virginia Code § 29-22-18a(d)] for seeking economic development with the aid of the Grant Committee." Id. at 875.

**1. WEST VIRGINIA CODE § 29-22-18a(d) SERVES A VALID PUBLIC PURPOSE**

With regard to allegations that the subject legislation violates the "public purpose" doctrine, this Court has previously and dispositively held, in general, that the subject legislation and contemplated economic development projects satisfy the public purpose doctrine. See W. Va. Econ. Dev. Grant Comm., 580 S.E.2d at 892-894. Although recognizing that the subject legislation may confer some incidental benefit upon private individuals or corporations, this Court stated that "the realization of incidental benefits by private entities as a result of legislative efforts does not render the legislation unconstitutional for lack of a public purpose." Id. at 892. "Economic development plans devised to provide gainful employment, improve living conditions, attract industry and advance the economy, like the plan at issue here, in which the public benefits greatly outweigh the incidental benefit to a private person or corporation have been upheld." Id. (quoting State ex rel. Brown v. City of Warr Acres, 946 P.2d 1140, 1148 (Okla. 1997)).

This Court noted in W. Va. Econ. Dev. Grant Comm. that it has, on numerous occasions, upheld various legislative acts "against public purpose challenges, despite the existence of incidental benefits to private interests." Id. at 893 (citations omitted). Moreover, the allegation that commercial development, with respect to "public purpose" and constitutional scrutiny, is somehow distinguishable from industrial development, is yet again before this Court without any apparent reasonable basis therefor. This Court has on at least two occasions addressed and concluded that the advancement of the economic interests of

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this State through commercial development, as opposed to industrial development, is both proper and worthwhile. See W. Va. Econ. Dev. Grant Comm., 580 S.E.2d at 891; See also State ex rel. Ohio County Commission v. Samol, 165 W. Va. 714, 275 S.E.2d 2 (1980) ("It does not require any lengthy discussion to realize that the renovation, expansion or creation of existing or new commercial projects gives much the same economic benefit to a community as would comparable activities in the industrial area. Each serves to create or maintain employment and enhance tax revenues, and thereby operates to benefit the community and public in general.").

Accordingly, this Court has previously concluded that "we find that the Legislatively declared objective of economic development is a valid 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 [West Virginia Code § 29-22-18a(d)] on public purpose grounds." Id. at 893.

**2. WEST VIRGINIA CODE § 29-22-18a(d) IN NO WAY IMPLICATES THE CREDIT OF THE STATE, IN VIOLATION OF ARTICLE TEN, SECTION 6 OF THE WEST VIRGINIA CONSTITUTION**

With respect to whether the legislative plan set forth in West Virginia Code § 29-22-18a(d) violates Article X, Section 6 of the West Virginia Constitution, this Court, in W. Va. Econ. Dev. Grant Comm., conclusively held that "we find no constitutional impediment to the statute under consideration based on sections four and six of Article ten of our state constitution given long standing precedent governing the use of the "special revenue" source

of funding . . . ." Id. at FN41. As this Court duly noted, the bonds are required to be repaid solely from the Economic Development Project Fund, being a special revenue fund, and therefore the credit of the State (the impetus of W. Va. Const. Art. 10, Section 6) is not implicated. See Id. at 891. Subsequently, this Court found that "[a]s the provisions of the subject legislation make clear, there is no assumption by the state of any debt or liability of any political subdivision, county, city, township, corporation, or person." Id.

Therefore, in addition to holding that the subject legislation and desired economic development satisfies the "public purpose" doctrine, this Court has dispositively held that said legislation, by virtue of the use of the "special revenue fund" doctrine, is in no way violative of Article ten, section 6 of the West Virginia Constitution. See Id.

**C. PETITIONERS THE REV. JIM LEWIS AND JOHN COONEY EGREGIOUSLY MISREPRESENT CERTAIN PROVISIONS OF WEST VIRGINIA CODE § 29-22-18a(d) IN AN ATTEMPT TO CREATE LEGAL AND CONSTITUTIONAL INFIRMITIES WITH RESPECT THERETO**

Petitioners the Rev. Jim Lewis and John Cooney also attempt to persuade this Court that West Virginia Code § 29-22-18a(d)(9) imposes a mandatory duty upon the Grant Committee and the West Virginia Economic Development Authority to "require" all private persons and entities receiving an economic benefit from the grant program to repay the State monetary compensation in an amount equal to such economic benefit. Contrary to the plain language of the subject statute, the Petitioners claim that the statutory provision, if not explicitly, then at least impliedly, requires such action. Petitioners are correct only in so far

as the statute mandates that grants may not be awarded directly to "[t]he project of an individual or private person or entity," with said projects being only eligible to receive low-interest loans. W. Va. Code § 29-22-18a(d)(9).

In contradiction of Petitioners claims and cited authority, this Court has already held that the subject legislation, and the contemplated proposed economic development funding program set forth therein, do not violate either the "public purpose" doctrine or Article ten, § 6 of the West Virginia Constitution. See W. Va. Econ. Dev. Grant Comm., 580 S.E.2d at 891. Even Petitioners recognize that "[t]his Court has already conclusively spoken on the identity of direct monetary award, or grant, with an indirect, in-kind economic benefit." See Brief in Support of Petition for Writ of Mandamus (Petitioners the Rev. Jim Lewis and John Cooney) at 4. Consequently, with respect to such grants, no constitutional infirmities are even alleged or exist.

Should a grant be awarded to a private person or entity, or should a private person or entity benefit at a level beyond the "incidental," then by law, such private persons or entities are required to pay back such monetary awards with interest. See W. Va. Code § 29-22-18a(d)(9). However, Petitioners have failed to specifically allege that such an "illegal" grant award has been made. Therefore, Petitioners allegation that the Grant Committee and the West Virginia Economic Development Authority have violated the provisions of West Virginia Code § 29-22-18a(d)(9), are simply unsupported by law.

Moreover, said Petitioners allege that the provisions of West Virginia Code § 29-22-18a(d)(8) require the Grant Committee to ensure certain levels of "adequate" compensation and benefits by each project applicant. See Amended Petition for Writ of Mandamus (Petitioners the Rev. Jim Lewis and John Cooney), ¶ 12. However, the statutory provision explicitly states that "the committee shall take into consideration" certain definitive evaluating criteria, which criteria includes a "consideration" of the compensation and benefits to be paid with respect to proposed economic development projects. West Virginia Code § 29-22-18a(d)(8). Accordingly, the subject legislation simply does not "require" certain minimum levels of compensation or benefits to be provided by project applicants, only that it is to be a consideration to be used by the Grant Committee in evaluating and choosing which projects are to received funding. Consequently, any and all legal and/or constitutional violations alleged by said Petitioners as a result thereof, fails for lack of alleging a claim upon which relief may be granted. This same analysis and result applies equally and fully to Petitioners further allegation that the statute also "requires" that some "minimum" level of "leverage funds" be present before a project can be selected to receive funding.

**D. REMAINING COUNTS OF PETITIONERS THE REV. JIM LEWIS AND JOHN COONEY PETITION FOR WRIT OF MANDAMUS LACK ANY LEGAL OR CONSTITUTIONAL SUPPORT AND FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

Finally, Petitioners the Rev. Jim Lewis and John Cooney allege that subsidizing private retail, service and entertainment enterprises with public moneys denies competing private enterprises equal protection of the laws, due process of law and constitutes an

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unconstitutional "taking" of private property without compensation. See Brief in Support of Petition for Writ of Mandamus (Petitioners the Rev. Jim Lewis and John Cooney) at 11. Furthermore, the Petitioners allege that "this State 'grant' program systematically discriminates against women. See Amended Petition for Writ of Mandamus (Petitioners the Rev. Jim Lewis and John Cooney), ¶ 21. On all of the aforementioned counts, Petitioners fail to provide any substantive legal or constitutional basis for their allegations and, consequently, fail to state a claim upon which relief can be granted.

In support of their allegations that the State grant program denies competing private enterprises equal protection of the laws, due process of law and constitutes an unconstitutional "taking" of private property without compensation, Petitioners rely upon Alabama Supreme Court opinion, Brown v. Longiotti, 420 So.2d 71 (Ala. 1982), and Justice Richard Neely's concurring opinion in State ex rel. Ohio County Commission v. Samol, 165 W. Va. 714, 275 S.E.2d 2 (1980). However, the actual "opinion" in Samol clearly establishes, in direct contradiction to Petitioners cited authority and representation of such authority, that the bond mechanism for assisting commercial development at question therein, did not violate the relevant constitutional provisions related to equal protection of the laws, due process of law and unconstitutional "takings" of private property without compensation. Directly to the point, this Court, in Samol, stated: "The argument based on Article III, Sections 9 and 10 [of the West Virginia Constitution] relating to due process and equal protection was also rejected in Demus, since there was no taking of property without

compensation nor any discriminatory feature in the bond mechanism.” Samol at 716, 275 S.E.2d at 4.

With respect to Petitioners claim of sexual discrimination, said Petitioners not only lack standing for bringing such a claim, but fail to specifically allege any action by the Grant Committee or the West Virginia Economic Development Authority that even implicates the State therein. Relying solely upon gross generalities and hyper-extenuated “factual conclusions,” Petitioners fail to provide any legal basis or justification for making such egregious allegations. Consequently, Petitioners claim of sexual discrimination simply fails for failure to state a claim upon relief can be granted.

#### **E. CONCLUSION**

For the reasons more fully stated above, the Business and Tourism Groups, by counsel, ask this Court to hold that video lottery games conducted by the West Virginia Lottery Commission are lottery games, which are sufficiently regulated, controlled, owned and operated by the State of West Virginia so as to fall within the exception to the constitutional prohibition of lotteries, and that the provisions of West Virginia Code § 29-22-18a(d), in their entirety, as well as the contemplated economic development grant program, do not violate any constitutional provisions.

This Court should therefore issue the writ of mandamus requested in Case No. 31540, and deny the writs requested in Case Nos. 31541 and 31564.

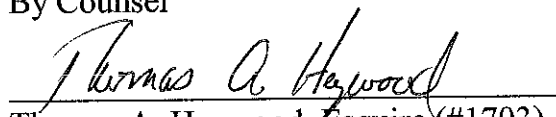
Respectfully submitted,

THE WEST VIRGINIA BUSINESS  
ROUNDTABLE; THE WEST VIRGINIA  
BUSINESS AND INDUSTRY  
COUNCIL; AND THE WEST VIRGINIA  
HOSPITALITY AND TRAVEL  
ASSOCIATION, INC.



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CERTIFICATE OF SERVICE

I, Wendel B. Turner, as counsel, hereby certify that I served the foregoing MEMORANDUM OF LAW OF THE WEST VIRGINIA BUSINESS ROUNDTABLE, THE WEST VIRGINIA BUSINESS AND INDUSTRY COUNCIL, AND THE WEST VIRGINIA HOSPITALITY AND TRAVEL ASSOCIATION, INC., AS AMICUS CURIAE, IN SUPPORT OF THE CONSTITUTIONALITY OF VIDEO LOTTERY AND THE ECONOMIC DEVELOPMENT GRANT PROGRAM upon the following Respondents by mailing a true copy thereof to them by United States Mail, First Class, postage prepaid, on this the 1<sup>st</sup> day of October, 2003, addressed as follows:

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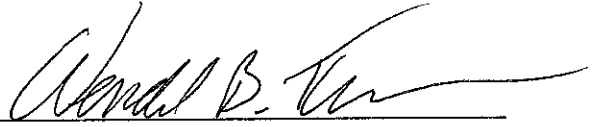
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A handwritten signature in cursive script, appearing to read "Wendel B. Turner", written over a horizontal line.

Wendel B. Turner