

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

CONSOLIDATED NOS. 31540, 31541, and 31564

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

Petitioners,

v.

WEST VIRGINIA ECONOMIC DEVELOPMENT
AUTHORITY, a public corporation, *et al.*

Respondents.

and

WEST VIRGINIA RACING ASSOCIATION,

Intervenor.

**BRIEF OF INTERVENOR
WEST VIRGINIA RACING ASSOCIATION**

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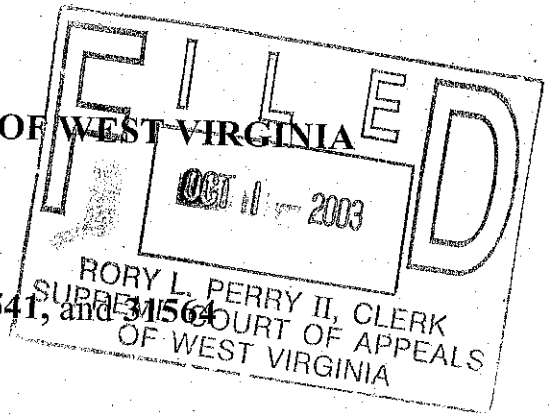
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The West Virginia Racing Association (hereinafter "Racing Association"), Intervenor, files its brief in compliance with this Court's Orders of September 10, 2003 and September 23, 2003. As explained more fully below, the regulated and restricted video lottery established by the West Virginia Legislature is constitutional, and thus the writ of mandamus sought by the City of Charleston, *et al.*, should be issued against the Economic Development Authority to issue the revenue bonds in question, and the writ sought by the Greenbrier County Coalition Against Gambling Expansion, *et al.* (hereinafter "Greenbrier petitioners"), against the West Virginia Lottery Commission, and the writ sought by Rev. Jim Lewis, *et al.*, against the West Virginia Economic Development Grant Authority, should be denied.

I. STATEMENT OF THE CASE

These consolidated cases seek a determination, *inter alia*, of whether video lottery is permissible under *West Virginia Constitution* Art. VI, § 36. First, the Cities of Charleston and Huntington and the Counties of Ohio and Kanawha seek a writ of mandamus ordering the West Virginia Economic Development Authority to issue revenue bonds to be repaid through revenues from video lottery. *W. Va. Code* § 29-22-18a(d). Second, petitions filed in Case Nos. 31541 and 31564 seek a writ of mandamus ordering the West Virginia Economic Development Authority and others to not issue those same bonds and other tangential relief. All three petitions implicitly address the same issue: the constitutionality of statutory video lottery regulations enacted by the West Virginia Legislature. If constitutional, then the bonds should be issued; if the Legislature's regulation and restriction of video lottery somehow is unconstitutional, the bonds may not be issued, and most, if not all of the approved economic development projects will be terminated

permanently, and the State of West Virginia will be deprived forever of hundreds of millions, and potentially billions of dollars in revenue.

Intervenor West Virginia Racing Association represents four pari-mutuel racing facilities, each licensed by both the West Virginia Racing Commission, pursuant to *W. Va. Code* §§ 19-23-1 to 19-23-30, and the West Virginia Lottery Commission, pursuant to *W. Va. Code* §§ 29-22A-1 to 29-22A-19 (hereinafter collectively "licensees"). The four members of the West Virginia Racing Association are Mountaineer Park, whose racetrack is located near Chester, West Virginia; PNGI Charles Town Gaming, LLC, whose racetrack is located in Charles Town, West Virginia; Wheeling Island Gaming, LLC, whose racetrack is located in Wheeling, West Virginia; and Racing Corp. of West Virginia, whose racetrack is located in Cross Lanes, West Virginia. These four pari-mutuel racing facilities are licensed by the state to provide video-lottery entertainment to out-of-state tourists and West Virginians, and thus, these licensees and their approximately 4700 employees (not to mention the families of these 4700 employees) all are directly affected by the determination of the constitutionality of video lottery, as they will lose their jobs and livelihoods if it is determined video lottery is impermissible.

II. STATEMENT OF FACTS

West Virginia racetrack video lottery is a stable, well-regulated component of the West Virginia lottery system. It is, by far, the largest single contributor to lottery revenues to the State of West Virginia. And in fact the State of West Virginia relies heavily on the hundreds of millions of dollars in lottery revenues that fund and support the maintenance and improvement of education, state parks and the infrastructure of the State, as well as funds for general

appropriation. *W. Va. Code* § 29-22-18. Concomitantly, the substantial revenues the State receives from video lottery allows the State to provide essential services, yet still keep taxes much lower than otherwise would be possible.

The chart below reflects the most-recent annual revenues received by state and local governments of West Virginia, as well as the number of people currently employed, both directly or indirectly, by or as a result of these licensed racetracks, and the capital expenditures made since July 1994:

Vendor	Direct Employment as of 7/1/2003	Indirect Employment Associated with Racetracks	Capital Investments in Physical Plant Facilities Since 7/1/1994	Current Annual Tax Revenue to State Governments (ending 6/30/03)	Current Annual Tax Revenue to Local Governments (ending 6/30/03)
Mountaineer Park, Inc.	1,713	3,640	\$193 million	\$82 million	\$4.8 million
Charles Town Races	1,178	900	\$175 million	\$100 million	\$4.7 million
Wheeling Island Gaming	1,044	100	\$170 million	\$48 million	\$2.9 million
Racing Corp.	692	100	\$65 million	\$21 million	\$1.2 million
Total	4,627	4,740	\$603 million	\$251 million	\$13.6 million

In 1984, a statewide referendum approved a constitutional amendment that created an exception to the *West Virginia Constitution's* prohibition of lotteries or gift enterprises. The constitutional amendment provides, in relevant part: "the legislature may authorize lotteries which are regulated, controlled, owned and operated by the State of West Virginia" *W. Va. Const.*

art. VI, § 36. The amendment left to the discretion of the Legislature to determine the specific manner regulation, control, ownership, and operation may take. Id.

At the following legislative session in 1985, the West Virginia Legislature adopted the State Lottery Act (*W. Va. Code* §§ 29-22-1 to -28), authorizing a lottery initially consisting of scratch-off tickets, but also authorizing electronic video lottery systems that were monitored from a central locale. Specifically, in *W. Va. Code* § 29-22-9(b)(2), the Legislature provided:

“Electronic video lottery systems must include a central site system of monitoring the lottery terminals utilizing an on-line or dial-up inquiry[.]”

Further, *W. Va. Code* § 29-22-10(c) directed the state lottery commission to implement games utilizing existing or future technological advances *at the earliest feasible date*:

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

An unintended consequence of the implementation of lotteries in West Virginia and elsewhere was to cause the national pari-mutuel racing industry to experience a serious decline. Locally, the national decline raised immediate issues concerning the survival of pari-mutuel racing in less lucrative racing markets, including West Virginia.¹ As part of the effort to save the jobs of those employed in the pari-mutuel racing and associated tourism businesses, in the late 1980s the

¹ As noted above, West Virginia has four pari-mutuel racetrack licensees: thoroughbred horse racetracks at Mountaineer Park in Hancock County and Charles Town Racetrack in Jefferson County, and greyhound racetracks at Wheeling Downs in Ohio County and Tri-State Greyhound Park in Kanawha County.

West Virginia Lottery Commission and West Virginia's licensed racetracks began discussions concerning whether a lottery product could be developed to complement and help save the thousands of local jobs dependent upon the pari-mutuel racing industry in West Virginia. The West Virginia Lottery Commission determined that a pilot project should be instituted at Mountaineer Park Racetrack (the track most at risk of closing due to declining revenues) using electronic video lottery terminals that would offer casino-style keno, poker and line-game themes.

Thereafter, a legal test case was designed and instituted to test the constitutionality of the video lottery program at Mountaineer Park. *State ex rel. Mountaineer Park v. Polan*, 190 W. Va. 276, 438 S.E.2d 308 (1993). In *Polan*, this Court determined the video lottery program, as then constituted, was constitutionally infirm because the Legislature had failed to provide standards for implementing and regulating video lottery. However, this Court did *not* conclude video lottery was *per se* unconstitutional; to the contrary, the Court even allowed the racetrack video lottery to continue unabated by staying the *Polan* decision three separate times to allow the Legislature to enact constitutionally sufficient regulations for racetrack video lottery. The Legislature then enacted the West Virginia Racetrack Video Lottery Act (W. Va. Code §§ 29-22A-1 to -19) (1994) (hereinafter "Racetrack Video Lottery Act" or "Act"), which was carefully designed to meet the Court's directions in *Polan*. Once enacted, there was no remaining constitutional infirmity to racetrack video lottery. Nevertheless, the Greenbrier petitioners now seek extraordinary relief in this Court even though the clear constitutionality of the racetrack-video-lottery legislation went unquestioned for the past ten years.

In passing the Racetrack Video Lottery Act, the Legislature specifically found that the

racing facilities are critical to the State of West Virginia economically because they promote valuable tourism and significantly contribute economic benefits to the State:

[The] pari-mutuel racing facilities in West Virginia provide a valuable tourism resource for this state and provide significant economic benefits to the revenues; that this valuable tourism resource is threatened because of a general decline in the racing industry and because of increasing competition from racing facilities and lottery products offered by neighboring states; and that the survival of West Virginia's pari-mutuel racing industry is in jeopardy unless modern lottery games are authorized at the racetracks.

W. Va. Code § 29-22A-2(e).²

After implementing the Racetrack Video Lottery Act in 1994, video lottery terminals were made available at the four licensed racetracks subject to local referendums, with three licensees operating 1,200 video lottery machines by September 1994, and the fourth licensee operating video gaming beginning in September 1997. According to the West Virginia Lottery, as of June 30, 2002, "the West Virginia Lottery Commission had approved 10,900 terminals for play at the four racetracks in the State. Racetrack Video Lottery sales were 70 percent of total 2002 sales." Aff. of Rev. Lewis at Ex. 1, p.5. In recent years, there has been a substantial increase in video lottery sales, which has contributed significantly to the overall fiscal increases. See Lewis Ex. 1 at 7 ("Sales in fiscal year 2002 increased 42 percent to \$849 million from \$597 million in fiscal year 2001. More importantly, income before nonoperating distributions increased 68 percent from \$189 million in fiscal year 2001 to \$316 million in fiscal year 2002. These increases are primarily due to the popularity of video lottery games.")

In 2002, the Legislature amended the State Lottery Act and directed the Development

² Subsequently, in 2001, the Limited Video Lottery Act was passed, W. Va. Code § 29-22B-101 to § 29-22B-1903, permitting video lottery at locations other than licensed racetracks.

Authority to issue revenue bonds to provide funding for constructing, equipping, improving or maintaining certain projects defined in the statute. *W. Va. Code* § 29-22-18a(d) (Supp. 2002). Portions of Section 29-22-18a(d) were found to be unconstitutional. *West Virginia Citizens Action Group v. West Virginia Econ. Dev. Auth.*, 580 S.E.2d 869 (W. Va. 2003). Subsequently, the Legislature amended the statute to correct the impairments. *W. Va. Code* § 29-22-18a(d). On August 20, 2003, the Economic Development Grant Committee certified government sponsored economic development projects. On August 21, 2003, Governor Wise issued an Executive Order directing the West Virginia Economic Development Authority ("hereafter "Development Authority or "Respondent") to issue revenue bonds. The Development Authority voted not to issue the bonds. The instant petitions seeking mandamus relief then were filed seeking a determination of the constitutionality of issuing the revenue bonds, and other tangential matters related to the constitutionality of racetrack video lottery and limited video lottery.

III. ISSUE PRESENTED

Whether the Racetrack Video Lottery Act, W. Va. Code § 29-22A-1 to § 29-22A-19 is constitutional on its face as a lottery which is regulated, operated, owned, and controlled by the State of West Virginia, in accordance with Article VI, § 36 of the West Virginia Constitution.

The answer to this constitutional query should be answered in the affirmative.

IV. ARGUMENT

A. STANDARD OF REVIEW

This Court has original jurisdiction over these petitions seeking mandamus relief.

“A writ of mandamus will not issue unless three elements coexist—(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.’ Syllabus Point 2, *State ex rel. Kucera v. Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969).” Syl. Pt. 4, *Delardus v. County Court of Monongalia County*, 158 W. Va. 1027, 217 S.E.2d 75 (1975).

Syllabus point 5, *State ex rel. Mountaineer Park, Inc. v. Polan*, 190 W. Va. 276, 438 S.E.2d 308 (1993). A writ of mandamus is a proper procedure to follow to compel public officers to perform non-discretionary duties when those officers refuse to take such action because of certain unresolved questions respecting the constitutionality of the designated act. *State ex rel. County Court v. Demus*, 148 W. Va. 398, 135 S.E.2d 352 (1964).

In determining whether to award mandamus relief in this case, this Court will need to address the central issue: *Is video lottery constitutional?* It is this important question – the answer to which will affect not only whether the revenue bonds in this case are permissible, but also will determine the future of thousands of jobs of West Virginians who work at pari-mutuel racetracks, among others, as well as hundreds of millions of dollars in revenue relied upon by the State as a critical funding source for education and infrastructure and other important developments in the State. If this Court determines video lottery is constitutional, then a writ of

mandamus should be ordered against the Economic Development Authority to release the bonds at issue.

As this Court has articulated previously, the standard for reviewing the constitutionality of a statute is as follows:

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 a reasonable doubt.

Syllabus point 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965).

Therefore, petitioners bear this difficult burden of proving beyond a reasonable doubt that the Racetrack Video Lottery Act is unconstitutional. *West Virginia Trust Fund, Inc. v. Bailey*, 199 W. Va. 463, 473, 485 S.E.2d 407, 417 (1997).

B. THE RACETRACK VIDEO LOTTERY ACT WAS ENACTED BY THE WEST VIRGINIA LEGISLATURE IN ACCORDANCE WITH THIS COURT'S GUIDANCE IN STATE EX REL. MOUNTAINEER PARK V. POLAN THAT VIDEO LOTTERY GAMES COULD BECOME A PART OF THE LOTTERY SYSTEM

As discussed above, the Court in *Polan* found that, "because the legislature has not enacted general laws for the regulation, control, ownership and operation of electronic video lottery, and because the legislature failed to prescribe adequate standards in the State Lottery Act

to guide the Lottery Commission in the exercise of the power conferred upon it with respect to electronic video lottery, the Lottery Commission was without authority under the *Constitution* to establish electronic video lottery." *Polan*, 190 W. Va. At 285-86, 438 S.E.2d at 317-18.

This Court suggested in *Polan*: "The legislature in subsequent legislation could, of course, amend this statute to clearly state that video gambling devices are part of the lottery system." *Polan*, 190 W. Va. at 285, 438 S.E.2d at 317. In response to *Polan*, the Legislature did not merely amend the statute, but with great effort and in comprehensive detail made video lottery games a part of the lottery system when it enacted the Racetrack Video Lottery Act, W. Va. Code §§ 29-22A-1 to 29-22A-19.

First, the Legislature "[found] and [declared] that the limited video lottery games authorized by [the Racetrack Video Lottery Act] are 'lotteries' as that term is commonly understood and as that term is used in the West Virginia Constitution, article VI, section thirty-six, the video lottery games being lottery games which utilize advanced computer technology." W. Va. Code § 29-22A-2(a). The Legislature, in support of the foregoing finding and declaration, articulated why these video lottery games are "lotteries" under the laws of the State of West Virginia. Although article VI, section 36 of the West Virginia Constitution does not define "lottery," this Court has defined the term on several occasions: "The essential elements of a lottery are consideration, prize and chance; and any scheme or device, by which a person, for a consideration, is permitted to receive a prize or nothing, as may be determined predominantly by chance, is a lottery." Syllabus point 1, *State v. Wassick*, 156 W. Va. 128, 191 S.E.2d 283 (1972) (quoting syllabus point 4, *State v. Hudson*, 128 W. Va. 655, 37 S.E.2d 553 (1946)). The Legislature was very mindful of this Court's definition when it enacted the Racetrack Video

Lottery Act in 1994, and carefully articulated why these video lottery games fall within the definition of "lottery" beyond factual dispute. First, individuals must provide consideration in the form of cash or coins to operate these video lottery games, W. Va. Code § 29-22A-3(y)(2), (aa). There is an opportunity to win a prize in the form of cash or a prize. W. Va. Code § 29-22A-3(y)(3), (aa). Finally, the winning of cash or a prize is determined predominantly by chance, W. Va. Code § 29-22A-3(y)(4), (aa).

Far from finding video lottery unconstitutional or illegal, after *Polan* was decided, Mountaineer Park obtained from this Court a stay of the effective date of that decision until the middle of the 1994 Legislative Session in order to give the Legislature the opportunity to correct the statutory infirmity identified by the Court. When the Legislature failed to act by the stay deadline, Mountaineer Park obtained from this Court additional successive extensions of the stay until the Legislature adopted the West Virginia Racetrack Video Lottery Act during the First Extraordinary Session of the 1994 Legislature. The Racetrack Video Lottery Act satisfied the Court, and no action to challenge the Racetrack Video Lottery Act was taken by the Court or any other party after the expiration of the last stay of *Polan*.

The significance of the message in the *Polan* court's guidance and direction to the Legislature, coupled with the actions of the Legislature and Court thereafter, should not be overlooked: The *Polan* court, despite its concerns about the newness of electronic video lottery, did not believe electronic video lottery to be unconstitutional. If it did believe electronic video lottery to be unconstitutional, it would have told the Legislature that it needed to amend the West Virginia Constitution and seek ratification by the voters of West Virginia, rather than simply instructing the Legislature that it could amend the statutes to make video-gambling devices

comport with article VI, section 36 of the West Virginia Constitution. This is precisely what the Legislature did when it enacted the Racetrack Video Lottery Act, to the apparent satisfaction not only of this Court, but, at least until the last month, to everyone else's as well.

C. VIDEO LOTTERY IS REGULATED, OWNED, OPERATED, AND CONTROLLED BY THE STATE; THEREFORE THE RACETRACK VIDEO LOTTERY ACT IS CONSTITUTIONAL

1. **The West Virginia Constitution does not require the state to hold title to each individual lottery device, but by its terms expressly empowers the Legislature to enact laws defining what constitutes "regulated, controlled, owned and operated"**

Article 6, section 36 of the West Virginia Constitution allows, in pertinent part, 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**

W. Va. Const. art VI, § 36 (emphasis added).

In response to the foregoing constitutional fiat, the West Virginia Legislature, in enacting the Racetrack Video Lottery Act, made findings and declarations on the issue of regulation, control, ownership, and operation:

(a) The Legislature finds and declares that the limited video lottery games authorized by this article are "lotteries" as that term is commonly understood and as that term is used in the West Virginia Constitution, article VI, section thirty-six, the video lottery games authorized by this article being lottery games which utilize advanced computer technology; and that the Constitution grants to the Legislature the authority to establish, by general law, the manner of regulation, control, ownership and operation of lottery games in the state of West Virginia.

(b) The Legislature further finds and declares that the state can control, own and operate a video lottery by possessing a proprietary interest in the main logic

boards, all erasable, programmable read-only memory chips used in any video lottery equipment or games, and software consisting of computer programs, documentation and other related materials necessary for the video lottery system to be operated. The state may acquire a proprietary interest in video lottery game software, for purposes of this article, through outright ownership or through an exclusive product license agreement with a manufacturer whereby the manufacturer retains copyrighted ownership of the software but the license granted to the state is nontransferable and authorizes the state to run the software program, solely for its own use, on the state's central equipment unit and electronic video terminals networked to the central equipment unit.

(c) The Legislature further finds and declares that the state can control and regulate a video lottery if the state limits licensure to a limited number of video lottery facilities located at qualified horse or dog racetracks, extends strict and exclusive state regulation to all persons, locations, practices and associations related to the operation of licensed video lottery facilities, and provides comprehensive law enforcement supervision of video lottery activities.

W. Va. Code § 29-22A-2.

W. Va. Const., Art. VI, § 36, authorizes lotteries "regulated, controlled, owned and operated by the State of West Virginia in the manner provided by general law" That "general law," as it relates to the members of the West Virginia Racing Association is the Racetrack Video Lottery Act, whereby the legislature, in section 29-22A-2, set forth "the manner" of the State's regulation, control, ownership, and operation of video lottery. W. Va. Code §29-22A-2(a)-(c). It is beyond cavil that, where the phrases and terms pertaining to the same subject matter are used in both the Constitution and the Racetrack Video Lottery Act, they should be interpreted in the same way in both the Constitution and the Act. *See State v. City Betterment Corp.*, 250 N.W.2d 601 (Neb. 1977) (same word used in both Nebraska Constitution and Nebraska Lottery Statute must be consistently interpreted).

This Court stated that, in reviewing statutes, "every reasonable construction must be resorted to by a court in order to sustain constitutionality and any doubt must be resolved in favor

of the constitutionality of the legislative act in question." *Contractors Ass'n v. Dep't of Public Safety*, Slip Op. No. 21519 (W. Va. Sup. Ct., March 25, 1993). Given that the Constitution itself empowers the Legislature to determine the manner of regulation, control, ownership and operation of video lottery by the State, this Court should find no constitutional infirmity with respect to the Legislature's findings and declarations, especially when read *in pari materia* with the statutory provisions enacted by the Legislature comprehensively and exhaustively delineating the state's dominion, control, and regulation of the administration of video lottery, as described below.

2. Video lottery is regulated, controlled, owned and operated by the State of West Virginia

Video lottery is regulated extensively, comprehensively, and exhaustively by the State of West Virginia. W. Va. Code § 29-22A-1 to § 29-22A-19; W. Va. Code § 29-22B-101 to § 29-22B-1903. Video lottery is also controlled, owned and operated by the State of West Virginia because the State owns and controls the *exclusive* means of implementing video lottery in the State. Thus, the Legislature's enactment of general laws regulating, controlling, owning and operating video lottery is permissible under the Constitution.

Indeed, there can be no question that video lottery is regulated extensively and comprehensively and controlled by the State. The Legislature has detailed exhaustively the standards, specifications, operational procedures and financial allocations with respect to racetrack video lottery, and these regulations are comprehensive and specific, and they minutely detail all aspects of video lottery. For example:

- The Lottery Commission selects the games and approves or disapproves of the video lottery terminals, W. Va. Code § 29-22A-5;
- The State sets the pay out rate for video lottery games, W. Va. Code § 29-22A-6(c)(1) (providing that the pay out be a minimum of 80% and a maximum of 95%);
- The Director of the Lottery Commission establishes the price for each lottery as well as the prize, leaving the selection of the winner to chance. W. Va. Code § 29-22-9(b)(9), (b)(6).
- The Lottery Commission determines the percentage of winners and the method of payment to the winners;
- The State Lottery Act requires all lottery machines and equipment to be inspected regularly, W. Va. Code § 29-22-9(b)(8);
- The Lottery Commission issues licenses and permits to all entities and persons involved in the operation of video lottery and determines the fee for the licenses and permits. W. Va. Code § 29-22A-7 to -8.
- The Lottery Commission has the authority to issue, suspend or revoke licenses and permits under the Racetrack Video Lottery Act. W. Va. Code § 29-22A-15.
- The license is not assignable or transferable. W. Va. Code § 29-22-10(a)(8); W. Va. Code § 29-22A-8(l).
- The Legislature found and declared that "participation in a video lottery by a licensee or permittee under this article shall be deemed a privilege conditioned upon the proper and continued qualification of the licensee or permittee." W. Va. Code § 29-22A-2(d).
- The Lottery Commission maintains a central site system capable of monitoring the operation of each video lottery game or video lottery terminal which can be immediately disabled and caused not to operate at the direction of the director of the Lottery Commission. W. Va. Code § 29-22A-6(h).
- The Racetrack Video Lottery Act identifies the specific job duties for persons working with video lottery, including: (a) video lottery license and permit holders; (b) manufacturers; (c) service technicians; (d) validation managers; (e) floor attendants; (f) licensed racetracks. W. Va. Code § 29-22A-9(a)-(f).
- The Racetrack Video Lottery Act sets forth how the net terminal income is to be distributed. W. Va. Code § 29-22A-10, -10a, -10b, -10c.
- The Lottery Commission approves or disapproves the number and location of video lottery terminals and security cameras. In fact, a racing facility cannot even move a video lottery terminal from one location within the facility to another without the approval and supervision of the Lottery Commission. W. Va. Code § 29-22A-12.

The foregoing are just a few examples of the exhaustive regulation and control the State has over video lottery games and video lottery terminals.

In *Polan*, this Court determined that the general State Lottery Act was insufficient to

satisfy the constitutional requirement that the State "regulate, control, own and operate" video lottery games. *Polan*, 438 S.E.2d at 315. The *Polan* Court held that additional legislation was needed to meet the constitutional standard. However, the *Polan* situation differs greatly from the case at bar. Prior to 1994, there was no act devoted specifically to video lottery—currently, there are two different legislative acts devoted to video lottery: the Racetrack Video Lottery Act and the Limited Video Lottery Act. In *Polan*, there was not even a definition of video lottery, and there was only one specific reference to video lottery in the legislation. See *Polan*, 438 S.E.2d at 315-16. By contrast, in the instant matter, the Legislature has prescribed comprehensive, detailed, and more than adequate standards in the more recent video lottery acts to guide the Lottery Commission.

The Racetrack Video Lottery Act specifically states that the "primary responsibility for the control and regulation of any video lottery games and video lottery terminals operated pursuant to this article rests with the commission." W. Va. Code § 29-22A-6(g).

In addition to being regulated comprehensively by the State, the Legislature has ensured that video lottery is controlled, owned and operated by the State of West Virginia. When the Legislature enacted the Racetrack Video Lottery Act in 1994, W. Va. Code §§ 29-22A-1 to -19, the Legislature defined video lottery as: "lottery games which utilize advanced computer technology," W. Va. Code § 29-22A-2(a) (see also W. Va. Code § 29-22B-201 (Limited Video Lottery Act)), and more specifically stated that the State can:

control, own and operate a video lottery by possessing a proprietary interest in the main logic boards, all erasable, programmable read-only memory chips used in any video lottery equipment or games, and software consisting of computer programs, documentation and other related materials necessary for

the video lottery system to be operated. The state may acquire a proprietary interest can be accomplished through actual ownership of the software or through an exclusive product license agreement with a manufacturer whereby the manufacturer retains copyrighted ownership of the software but the license granted to the state is nontransferable and authorizes the state to run the software program, solely for its on use, on the state's central equipment unit and electronic video terminals networked to the central equipment unit.

W. Va. Code § 29-22A-2(b); *see also* W. Va. Code § 29-22B-202 (Limited Video Lottery Act).

Thus, the foregoing statutory provision defines "control, own and operate" to include the State's proprietary interest in the memory chips and software that runs the video lottery machines and terminals. As this Court has held repeatedly, legislatively-enacted definitions are to be given great deference.³ *State ex rel. Appalachian Power*, 143 S.E.2d at 359. Thus, the legislation ensures the State has exclusive control, ownership and operation of video lottery games and video lottery terminals, in compliance with the Constitution.

Clearly, no other entity has control, ownership or operation held by the State. The Association's members are *licensed agents* of the State's Lottery Commission. The Lottery Commission has the authority to issue, suspend and revoke the licenses. "A license or permit is a privilege personal to the license or permit holder and is not a legal right. A license or permit granted or renewed pursuant to this article may not be transferred or assigned to another person, nor may a license or a permit be pledged as collateral." W. Va. Code § 29-22A-8(l).

³ Prior to enactment of the Racetrack Video Lottery Act, the President of the West Virginia Senate sought advice from the Attorney General regarding whether the State must own the video lottery equipment. Although the Attorney General determined that "the Constitution dictates that the State must own the devices of the lottery system," that advice was issued prior to the enactment of the Racetrack Video Lottery Act and therefore the Attorney General did not have the benefit of the Legislature's more recent explanation of these terms.

Licensees are *authorized agents for the State* to put video lottery games or terminals into play and if the licensee puts such games into play without the authority of the Commission, that person is guilty of criminal offense subject to confinement in jail and monetary penalties. W. Va. Code § 29-22A-16.

The Racing Association's licensed members all are bound by the comprehensive regulatory provisions of the Act, as well as the exhaustive rules and regulations of the Lottery Commission. Without the memory chip and software and a license issued by the State, no licensed agent can provide video lottery. The video lottery is operated and controlled from and by the central site system of the State. W. Va. Code § 29-22A-6(h). Thus, the licensees do not regulate, control, own or operate the video lottery games or terminals; those function all are performed by the State of West Virginia.

In the context of a lottery system using electronic communication and controls, the constitutional requirement of State regulation, control, ownership and operation is satisfied by the State's ownership and operation of the system and the State's absolute control through licensing of use of lottery devices under the Racetrack Video Lottery Act. Moreover, it is very important to note that these video lottery games, like the multi-state Powerball lottery that is offered in West Virginia, is controlled by the lottery commission's central control computer. W. Va. Code § 29-22A-3(y)(1). The licensees have absolutely no control over the odds and probabilities of these video lottery games—the games are controlled and operated by the lottery commission.

Significantly, if the Legislature's "manner" of implementing video lottery using a system of State ownership and control, including the roles for private entities in supplying services and devices, is determined not to meet required constitutional standards, the entire lottery program

would be impacted. The regular scratch-off and on-line lottery games are also based on state control and ownership through regulation of private parties who provide dispensing devices, hardware and software, and services to the regular lottery. A finding that such a system is unconstitutional would shut down the entire lottery, which has been in operation since 1985, and would cut off the revenue stream that supports existing bonds that were sold to provide funds for school-building construction and the original arts, science, and education development projects.

W. Va. Code § 29-22-18(h)-(i).

D. ARGUENDO, IF VIDEO LOTTERY IS NOT "LOTTERY" WITHIN THE MEANING OF THE WEST VIRGINIA CONSTITUTION, THEN IT IS NOT PROSCRIBED BY THE WEST VIRGINIA CONSTITUTION, WHICH PLACES CONSTRAINTS ONLY ON LOTTERY-TYPE GAMBLING

The Greenbrier petitioners argue that video lottery, notwithstanding this Court's definition of "lottery," as well as the Legislature's compliance with this Court's direction in *Polan* that it "could, of course, amend this statute to clearly state that video gambling devices are part of the lottery system," *Polan*, 190 W. Va. at 285, 438 S.E.2d at 317, is not lottery, but gambling. (Greenbrier Pet. Writ of Mandamus at 12.) The law of West Virginia is clear, however, that video lottery is lottery separate from gambling under the constitution and the laws of West Virginia. However, assuming arguendo that the video lottery games are not lottery within the meaning of article VI, section 36 of the West Virginia Constitution, then video lottery must be viewed as gambling, *see, e.g., Polan*, 190 W. Va. 284 n.20, 438 S.E.2d at 316 n.20 (video poker is "gambling"), a conclusion that still not win the day for the Greenbrier petitioners, as explained below.

The Constitution of West Virginia is a restriction of power rather than a grant thereof; therefore, the legislature has the authority to enact any measure not inhibited thereby. Syllabus point 1, *Foster v. Cooper*, 155 W. Va. 619, 186 S.E.2d 837 (1972); *Robertson v. Hatcher*, 148 W. Va. 239, 250, 135 S.E.2d 675, 682-82. In fact, the "legislature has almost plenary power, having the authority to enact any measure not restricted by the constitution." *Foster v. Cooper*, 155 W. Va. at 622, 186 S.E.2d at 238. All lottery is gambling, but not all gambling is lottery, *State ex rel. Gabalac v. New Universal Congregation of Living Souls*, 379 N.E.2d 242 (Ohio Ct. App. 1977), and article VI, section 36 of the West Virginia Constitution places a limitation on lottery, only, not on all gambling. See, e.g., *Johnson v. Collins Entertainment Co., Inc.*, 508 S.E.2d 575, 577-78 (S.C. 1998) (Stating that the state constitution, by referring to lotteries only, did not "prohibit games of chance or gambling *per se*," which is broader in scope, and that "[t]he framers of [the South Carolina] Constitution clearly distinguished between 'lottery' and 'gambling or betting on games of chance.'"). If the framers of the West Virginia Constitution wanted to prohibit or limit all forms of gambling it would have said so clearly instead of using the narrower term "lottery" when it drafted this constitutional provision. See *State ex rel. Trent v. Sims*, 138 W. Va. 244, 77 S.E.2d 122 (1953) (The doctrine *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another, applies to constitutional provisions.). Therefore, the Legislature, while it may be limited by article VI, section 36 of the West Virginia Constitution in what it can legislate in the way of lottery, is not subject to the same limitation when it enacts legislation with respect to non-lottery gambling.

In Ohio, the court of appeals was asked to interpret its constitutional provision on lotteries. *State ex rel. Gabalac v. New Universal Congregation of Living Souls*, 379 N.E.2d 242

(Ohio Ct. App. 1977) The Ohio constitutional provision in effect at the time was very similar to article 6, section 36 of the West Virginia Constitution, and read as follows:

Lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State, Except that the General Assembly may authorize an agency of the state to conduct lotteries, to sell rights to participate therein, and to award prizes by chance to participants, provided the entire net proceeds of any such lottery are paid into the general revenue fund of the state and the General Assembly may authorize and regulate the operation of bingo to be conducted by charitable organizations for charitable purposes.

Ohio Const. art. XV, § 6 (in effect from Nov. 4, 1975 to Jan. 1, 1988). Similar to the law in West Virginia, the Ohio courts view "lottery is a species of gambling. The term 'gambling' is broader and encompasses more than the term "lottery." *Gabalac*, 379 N.E.2d at 244. The *Gabalac* court concluded that the Ohio constitution "prohibits only one type of gambling namely, lotteries. Therefore, the legislature can pass laws, legalizing other forms of gambling." *Id.* at 244. As further support for its conclusion, the *Gabalac* court gave as an example the Ohio legislature's enactment of Ohio's Horse Racing Law, R.C. Chapter 3769, which permits non-lottery type gambling. *Id.*

E. THE RACETRACK VIDEO LOTTERY ACT IS AN EXCEPTION TO THE GENERAL PROHIBITION AGAINST GAMBLING IN THE WEST VIRGINIA CODE

As noted in *Polan*, there is a general prohibition against gambling in West Virginia. *Polan*, 190 W. Va. 284, 438 S.E.2d at 316 (citing W. Va. Code §§ 61-10-1 to 61-10-31). However, since the enactment of those general anti-gambling statutes, the West Virginia Legislature enacted the Racetrack Video Lottery Act. Under every principle of statutory construction, the video-lottery games implemented under the Racetrack Video Lottery Act must

be held valid. The Legislature, when it enacted the Racetrack Video Lottery Act, was well aware of the general anti-gambling statutes on the books and intended the two statutory schemes to exist symbiotically: one as a general prohibition against gambling, the other as an exception to this general prohibition. "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled. Syllabus point 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984); accord Syllabus point 2, *State ex rel. Brandon L. v. Moats*, 209 W. Va. 752, 551 S.E.2d 674 (2001); see also *Wiley v. Toppings*, 210 W. Va. 173, 175, 556 S.E.2d 818, 820 (2001) ("When faced with two conflicting enactments, this Court and courts generally follow the black-letter principle that 'effect should always be given to the latest . . . expression of the legislative will. . . . [T]he statute which is more recent . . . prevails.").

Any perceived conflict between the Racetrack Video Lottery Act and West Virginia's general anti-gambling statutes can very easily be reconciled. "Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syllabus point 3, *Smith v. State Workmen's Compensation Com'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975); see also Syllabus Point 4, *State ex rel. Graney v. Sims*, 144 W. Va. 72, 105 S.E.2d 886 (1958) ("The repeal of a statute by implication is not favored, and where two statutes are in apparent conflict, the Court must, if reasonably possible, construe such statutes so as to give effect to each."). Given the well-established principles of statutory construction, coupled with the Legislature's intent to enact the Racetrack Video Lottery Act notwithstanding the general anti-gambling statutes, there can be no doubt that Racetrack Video Lottery Act is both constitutional and otherwise lawful.

F. THE REGULATION OF RACETRACK VIDEO LOTTERY IS CONSTITUTIONAL

The Legislature, by enacting the Racetrack Video Lottery Act, carefully devised a comprehensive statutory plan in compliance with the state Constitution and with the Court's previous instructions. It is worth reemphasizing that Article VI, § 36 of the *West Virginia*

Constitution explicitly allows the Legislature to,

“authorize lotteries which are regulated, controlled, owned and operated by the State of West Virginia *in the manner provided by general law*[.]”

Again, article VI, § 36 does not in any way limit or proscribe the precise manner by which the Legislature may, by general law, regulate, control, own and operate lotteries, but clearly leaves the “manner” of the provision of general law to the Legislature.

As explained above, the racetrack video lottery is regulated, controlled, owned and operated by the State of West Virginia. Moreover, as this Court held in *Polan, supra*, the Legislature must provide for the regulation, *etc.*, of the machines “by general law.” That regulation requirement was met in the enactment of Racetrack Video Lottery Act, *W.Va. Code* § 29-22A-1, *et seq.*

As part of the comprehensive statutory regulation of the racetrack video lottery encompassed within the Racetrack Video Lottery Act, *W.Va. Code* §§ 29-22A-10 and 29-22A-10b regulate, *inter alia*, how “gross terminal income”⁴ and “net terminal income”⁵ is accounted

⁴ *W.Va. Code* § 29-22A-3(m) defines “gross terminal income” as follows:

“(m) ‘Gross terminal income’ means the total amount of cash, vouchers or tokens inserted into the video lottery terminals operated by a licensee, minus the total value of coins and tokens won by a player and

for, collected and distributed. The licensed racetracks ("licensees")⁶, obviously, have an interest in a percentage of the revenue generated, and that percentage was defined statutorily by the Legislature in its considered judgment.⁷ However, the Court should also be aware that, by statute, the licensees do not get any offset for the costs and expenses they incur prior to the

game credits which are cleared from the video lottery terminals in exchange for winning redemption tickets."

⁵ *W.Va. Code* § 29-22A-3(q) defines "net terminal income" as follows:

"(q) 'Net terminal income' means gross terminal income minus an amount deducted by the commission to reimburse the commission for its actual costs of administering racetrack video lottery at the licensed racetrack. No deduction for any or all costs and expenses of a licensee related to the operation of video lottery games shall be deducted from gross terminal income."

⁶ The licensees are those racetracks licensed by the State of West Virginia to conduct thoroughbred or greyhound racing meetings and who are permitted to conduct video lottery terminals authorized by the West Virginia Racing Commission:

"(n) 'License' or 'video lottery license' means authorization granted by the commission to a racetrack which is licensed by the West Virginia racing commission to conduct thoroughbred or greyhound racing meetings pursuant to article twenty-three, chapter nineteen of this code permitting the racetrack to operate video lottery terminals authorized by the commission."

W.Va. Code § 29-22A-3(n). For permit and license requirements, *see generally W.Va. Code* § 29-22A-7.

⁷ The Racetrack Video Lottery Act regulates the revenues as follows: 34% of the gross terminal revenues (minus lottery commission administrative costs) is distributed to the State of West Virginia, as specified in the Racetrack Video Lottery Act and otherwise by the Legislature; of the remaining 66% of such revenues, *net of prizes and administrative expenses of the lottery commission*, the allocation is as follows: 47% to the licensees until the point that revenues reach the 2001 "benchmark," after which the licensees receive only 42%; 19% is designated by the Legislature to be received by local county governments and entities associated with the racing industry.

determination of the net terminal income, but are allotted only a set percentage of the net terminal income, and the set percentage is deemed expressly by the Legislature, in its considered judgment, to be in lieu of all lottery agent commissions and is considered to cover all costs and expenses required to be expended by the licensees in connection with racetrack video lottery.⁸

In Count XI of the Greenbrier petitioners' Petition, it is asserted, albeit vaguely, that the Legislature's regulation of Racetrack Video Lottery is "unconstitutional" in the manner in which "profits" from the video lotteries are received and regulated. Petition at 12, ¶ 52. The vagueness of the allegation notwithstanding, the Greenbrier petitioners' assertion that Art. VI, § 36 of the *West Virginia Constitution* mandates how the "profits" derived from "video lotteries" are to be received is contradicted by § 36 itself, which simply, and clearly, does not address "profit distribution," and, to the contrary, expressly leaves to the Legislature to make provision for "the manner" in which video lotteries are regulated through enactment of "general law," exactly what the Legislature did when it enacted the Racetrack Video Lottery Act (*W.Va. Code* § 29-22A-1, *et seq.*). Thus, because the *Constitution* expressly grants discretion to the Legislature to determine the manner in which racetrack video lottery revenues (and all other aspects of racetrack video lottery) are regulated, the Greenbrier petitioner's assertions that the manner in which the Legislature has chosen to regulate the revenue from racetrack video lottery somehow violates Art. VI, § 36 of the *Constitution* clearly is erroneous, and the Petition should be denied.

Yet more bizarre is the assertion that Art. X, § 6 of the *West Virginia Constitution* somehow disallows the comprehensive statutory regulation of video lottery that includes a

⁸ *W.Va. Code* § 29-22A-10(c) ("The licensed racetrack's share is in lieu of all lottery agent commissions and is considered to cover all costs and expenses required to be expended by the licensed racetrack in connection with video lottery operations." (Emphasis added)).

percentage allocation of the net terminal income to the licensees. Again, that constitutional provision does not and can not be strained to suggest a disallowance of the Legislature's comprehensive regulation of racetrack Video Lottery, or the manner in which the Legislature regulates net terminal income.

The constitutional provision at issue, Article X, § 6, is entitled "Credit of state not to be granted in certain cases" and states as follows:

"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. The *investment of state or public funds* shall be subject to procedures and guidelines heretofore or hereafter established by the Legislature for the prudent investment of such funds."

(Emphasis added).

The comprehensive regulatory plan devised by the Legislature, including, *inter alia*, the method for how the net terminal income is regulated, simply does not fall within the purview of Article X, § 6. The "credit of the state" is not implicated, because the State is not extending credit to the licensees. Similarly, the State clearly is not responsible for any "debt or liability" of the licensees, so that provision is inapplicable as well. And how the net terminal income is regulated under the Racetrack Video Lottery Act is unrelated to how the state manages its investments.⁹ Thus, the vague, unsupported assertions of the Greenbrier petitioners concerning Art. X, § 6 are unavailing, and the Petition's arguments should be rejected.

⁹ Even if the provisions of the Racetrack Video Lottery Act regulated net terminal income were in some unforeseen or tangential way related to how the state manages its investments, then the Act itself, with its allowance to the Legislature the discretion to establish "procedures and guidelines" for such investments, would constitute such discretionary "procedures and guidelines" duly established by the Legislature, and therefore would be constitutional. *West Virginia Constitution* Art. X, § 6.

In any event, as noted above, it is beyond cavil that well-established black-letter rules of statutory and constitutional construction place an extremely high burden on the Greenbrier petitioners. In *Tweel v. West Virginia Racing Commission*, 138 W.Va. 531, 548-49, 76 S.E.2d 874, 884 (1953), this Court held that "every presumption" must be made in favor of the constitutionality of an Act, and even a "reasonable doubt" as to its constitutionality is insufficient to invalidate an act of the Legislature:

"Another principle applicable in the determination of questions of constitutionality of legislative enactments, consistently followed by this Court, and as well by the United States Supreme Court, is: **Every presumption is to be made in favor of the constitutionality of a statute, and it can never be declared unconstitutional except when it is clearly and plainly so. A reasonable doubt as to its unconstitutionality must be resolved in favor of the validity of the law.**" 17 M.J., Statutes, § 29. See scores of cases cited to text. In *Booten v. Pinson*, 77 W.Va. 412, 89 S.E. 985, L.R.A.1917A, 1244, it was held: '6. Unless the question is free from doubt, it is the duty of courts to uphold legislative acts as constitutional.'"

(Emphasis added). Indeed, when the constitutionality of a statute is called into question, this Court has held that "the general powers of the legislature, within constitutional limits, are almost plenary[,] and before this Court will negate an act of the Legislature, its unconstitutionality "must appear beyond reasonable doubt":

"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."

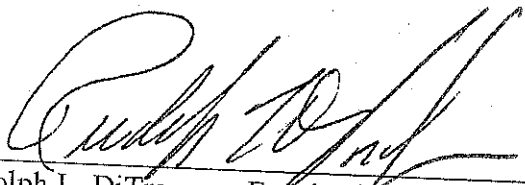
Syllabus Point 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965) (emphasis added).

The vague assertions of unconstitutionality in the Greenbrier petitioners' Petition do not come close to meeting the high standard of "clearly and plainly" unconstitutional beyond a reasonable doubt. *Tweel, supra; State ex rel. Appalachian Power Co. v. Gainer, supra*. Because the standard for showing the Racetrack Video Lottery Act is unconstitutional is unmet, the Petition as it relates to the Act's constitutionality should be denied.

V. CONCLUSION

For the foregoing reasons, Intervenor West Virginia Racing Association respectfully requests this Court grant the Petition for Writ of Mandamus requested by the City of Charleston, et al., and deny the Petitions for Writ of Mandamus of the (a) the State of West Virginia ex rel. Rev. Jim Lewis and John Cooney, and (b) Greenbrier County Coalition Against Gambling Expansion and Cabell County Coalition Against Gambling Expansion on the grounds that the West Virginia Racetrack Video Lottery Act is neither unconstitutional nor unlawful.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Richard S. Han, Esquire, and the law firm of DiTrapano, Barrett & DiPiero, PLLC do hereby certify that I have served a true and exact copy of the foregoing **Brief of Intervenor West Virginia Racing Association** on this **1st day of October, 2003**, via first class mail, postage prepaid and mailed to the following:

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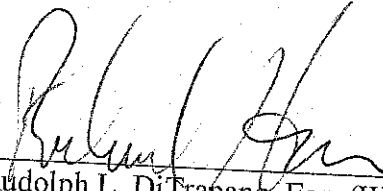
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