

No. 071406

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

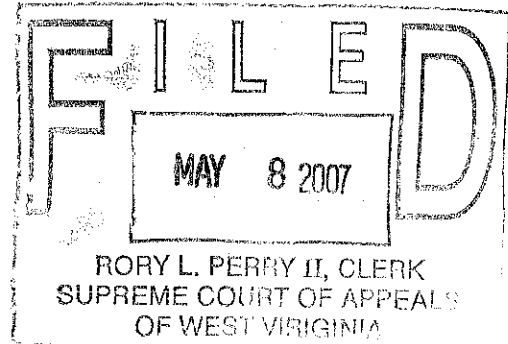
WEST VIRGINIA FAMILY FOUNDATION, INC.,
A West Virginia corporation,

Petitioner,

v.

JOHN C. MUSGRAVE,
Director, West Virginia Lottery Commission,

Respondent.



**RESPONDENT'S MEMORANDUM IN OPPOSITION TO
PETITIONER'S MOTION FOR EXPEDITED CONSIDERATION**

Respondent John C. Musgrave, as Director of the West Virginia Lottery ("the Lottery"), respectfully submits this memorandum in opposition to Petitioner's "Motion for Expedited Consideration." As the Lottery will show below, Petitioner's request is unsound and should be denied.

This case presents Petitioner's constitutional challenge to a recent enactment of the Legislature – the West Virginia Table Games Act, W.Va. Code § 29-22C-1 *et seq.* In support of its request for expedited consideration, Petitioner posits that there is "extreme time sensitivity" afoot here, but it falls woefully short of demonstrating any such thing. The only "deadline" it identifies is June 9, 2007, on which date special local option elections will be held in four counties, asking the citizens in the affected communities whether to approve Lottery table games at licensed racetracks.

As an initial matter, it is a rather jarring notion that the mere holding of an election – the basic expression of the democratic will – could harm anyone, much less threaten such calamity that the parties and this Court must rush to judgment on

constitutional questions. Indeed, the very opposite is true. The June 9 elections could *moot* those constitutional questions. No court should address a constitutional issue unless it is necessary, much less hasten to do so. *See Davis v. Mound View Health Care, Inc.*, 220 W.Va. 28, 640 S.E.2d 91, 92-93 & n.2 (2006) (collecting cases). We cannot know whether it will be necessary until the votes are counted – on June 9, and not before.

Petitioner also frets about the expense of the Lottery's promulgation of rules for the newly authorized games, which it posits will cause "detriment to the taxpayers" of the state if those efforts prove wasted. It makes no attempt to quantify this "detriment."¹

The Lottery should also note that Petitioner is a *non-profit corporation*. *See* <http://www.wvfamily.org/donate.html> (reporting that Petitioner is an I.R.C. § 501(c)(4) tax-exempt organization). Hence, even if it had demonstrated any palpable harm to taxpayers from the Lottery's preparation of rules, it does not appear that such harm would be visited upon the Petitioner.

Finally, the challenged statute was passed two months ago (and it had been introduced as a bill at the end of January). Petitioner could have filed this lawsuit whenever they saw fit, and announced that they intended to do so by mid-April. *See* http://www.wvfamily.org/news/WVFF_Table_Game_Suit_4-9-07.html. The promised challenge did not surface, however, until Friday afternoon, May 4. Accordingly, any "extreme time sensitivity" is largely of Petitioner's own making, and it ought not be permitted to compel the Lottery or this Court to address the issues they raise at breakneck speed.

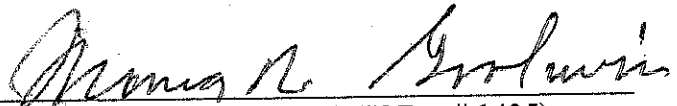
¹ It warrants mention that a much more significant expense caused by the Act – the cost of holding the special local elections – will here be borne not by the public, but by the licensed racetracks that requested the elections. W.Va. Code § 29-22C-7(e).

Should the questions posed by Petitioner ripen for constitutional adjudication, the Lottery is confident that this Court's typical prompt attention to matters on its original jurisdiction docket will provide both an ample and fair opportunity for those questions to be resolved. Petitioner's motion should be denied.

Respectfully submitted,

JOHN C. MUSGRAVE,

By counsel,




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CERTIFICATE OF SERVICE

I, Thomas R. Goodwin, Special Assistant Attorney General, certify that I served the foregoing "Respondent's Memorandum in Opposition to Petitioner's Motion for Expedited Consideration" this 8th day of May, 2007, by facsimile to (304) 645-4183 and by placing a true and correct copy thereof in the United States Mail, postage prepaid and addressed as follows:

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