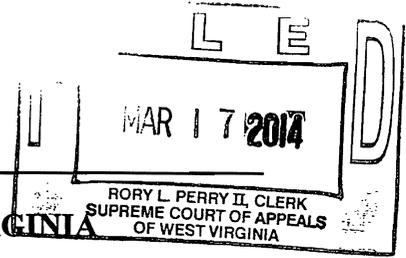


No. 13-1325



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**PNGI CHARLES TOWN GAMING, LLC  
d/b/a Hollywood Casino at Charles Town Races,**

**Plaintiff Below / Petitioner,**

**v.**

**STATE OF WEST VIRGINIA RACING  
COMMISSION,**

**Defendant Below / Respondent.**

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**BRIEF OF PETITIONER**

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## **I. ASSIGNMENTS OF ERROR**

A. The trial court erred in holding that the Racing Commission lawfully enacted procedural rules that diminish a licensee's fundamental property rights without legislative approval.

B. The trial court erred in holding that the Racing Commission lawfully expanded its own powers, through procedural rules, to include the power to "stay" ejections prior to a hearing on the merits.

## **II. STATEMENT OF THE CASE**

The fundamental question posed by this appeal is, can a state agency use procedural rules to alter substantive rights without legislative approval? The Administrative Procedures Act exists to prevent such a result. However, the circuit court held that the Racing Commission's new rules are merely procedural, and not substantive. In doing so, it held that a state agency, under the guise of procedural rules, can (a) impose the burden of proof on a non-appealing party, (b) require the non-appealing party to prove compliance with a regulatory standard authorizing ejections that is narrower than the common law right, and (c) give itself the power to "stay" ejections pending appeal, even though the Legislature has never authorized such actions by statute or legislative rule.

Simply put, the circuit court misapplied the Administrative Procedures Act by finding the Racing Commission's new rules to be merely procedural and not substantive. This Court must correct the error and require the Racing Commission to obtain legislative approval of its new rules.

### III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

#### A. Background

PNGI Charles Town Gaming, LLC (“PNGI”) owns and operates Hollywood Casino at Charles Town Races, a thoroughbred racetrack and casino near Charles Town, West Virginia. PNGI is a racing association licensed by the West Virginia Racing Commission (“Racing Commission”). The Racing Commission does not own any racetracks in West Virginia. It is a state agency that supervises horse race meetings within the state and issues licenses and permits to persons involved in the holding or conducting of horse race meetings.

Prior to this Court’s November 18, 2011, opinion in *PNGI Charles Town Gaming, LLC v. Reynolds*, 229 W. Va. 123, 727 S.E.2d 799 (2011), the question of whether a permit holder had a right to appeal his or her ejection by a racing association was unsettled. In *Reynolds*, the Court held that “an ejection of a permit holder by a racing association is subject to review by the West Virginia Racing Commission as set forth in West Virginia Code § 19-23-6 (2007 & Supp. 2011) and 178 C.S.R. § 1-4.7 [(effective April 6, 2007) (now codified at 178 C.S.R. § 1-6.1)].” *Reynolds*, 229 W. Va. 123, 132-133, 727 S.E.2d 799, 808-09. However, the existing racing-related statutes and regulations provided no procedural or substantive standards for the Racing Commission’s review of such ejections.

In the wake of *Reynolds*, the Racing Commission rushed to amend Series 6, Title 178 of the West Virginia Code of State Rules to create not only a new process for the appeal hearings, but also new substantive standards of proof for ejection appeals. While most of the amendments to Series 6 are procedural in nature, dealing with such matters as the contents of appeal petitions, locations of hearings, subpoenas, and the like, two amendments are not. In the new 178 C.S.R. § 6-4.7.d, the Racing Commission placed the burden of proof on the non-

appealing party to prove that the challenged ejection was based on “improper” conduct or “objectionable” behavior by the ejected party. Additionally, in 178 C.S.R. § 6-4.3, the Racing Commission bypassed W. Va. Code § 19-23-16(c) by giving itself the power to stay an ejection by a racing association pending an appeal. Because these rules directly affect substantive property rights, privileges and interests, both 178 C.S.R. § 6-4.7.d and 178 C.S.R. § 6-4.3 require legislative approval under the West Virginia Administrative Procedures Act (“APA”).

### **B. Procedural History**

On January 19, 2012, the Racing Commission published its proposed amendments and received public comments. (Joint Appendix, hereafter “JA” at 441) During the comment period, PNGI pointed out that the proposed rules altered existing substantive law and would require legislative approval. (JA 46) The Racing Commission disagreed, insisting that the new rules were merely procedural. (JA 77-78) It filed the final amendments to Series 6, Title 178 of the Code of State Rules with the Secretary of State’s office on March 22, 2012, establishing an effective date of Saturday, April 21, 2012. (JA 30)

Almost immediately, the Racing Commission began issuing the first notices of appeals for racing association ejections under the new rules. (JA 96-121) Before the first hearing, PNGI filed a Petition for Writ of Prohibition and Complaint for Declaratory Judgment in the Circuit Court of Kanawha County. (JA 1) PNGI again argued the rules were not properly promulgated under the Administrative Procedures Act, and that the Court should prohibit the Racing Commission from holding hearings under the new rules. (*Id.*) PNGI moved to stay all ejection appeals before the Racing Commission until the Circuit Court adjudicated the merits of PNGI’s complaint. (JA 11) The Racing Commission filed a Memorandum in Opposition to PNGI’s Request for a Stay, Petition for Writ of Prohibition and Complaint for Declaratory

Judgment on May 1, 2012. (JA 81) The following day, the Circuit Court denied PNGI's request to stay the ejection appeal hearings and dismissed the entire case from its docket, noting that PNGI's writ of prohibition, injunction, and declaratory judgment action were "premature." (JA 355)

Within ten days of that final order, PNGI filed a motion to alter or amend. (JA 360) The motion lay dormant for more than six months before the lower court required the Racing Commission to file a written response. (JA 375) The Racing Commission filed its response on January 2, 2013. (JA 376) A hearing was held on February 27, 2013, after which the lower court granted PNGI's motion and reinstated the declaratory judgment claim on the docket. (JA 395)

The Court ordered the parties to file cross motions for summary judgment. (JA 398) On November 14, 2013, the trial court entered its final order granting summary judgment to the Racing Commission. (JA 522) The court reasoned that the new rules were procedural and not substantive, and thus did not require approval of the Legislature under the APA. (JA 522-541)

Since it began hearing ejection appeals in May 2012, the Racing Commission has fully adjudicated eleven appeals of permit holders excluded by PNGI. In every case, the Racing Commission found that PNGI met its burden of proving improper or objectionable conduct, yet it ordered reinstatement of the permit holders in every case. Among the persons reinstated were Robert Bir, who repeatedly neglected horses stabled on PNGI's property. Mr. Bir was reinstated after less than a year of exclusion. A few months after his reinstatement, he was arrested for animal cruelty, and he has since been ejected for a second time. Billy Ray Davis and Cliff

Tuomisto were trainers caught on video assisting a suspended trainer to race his horses at PNGI's racetrack. Despite the clear and convincing evidence of the fraud and collusion, Tuomisto and Davis were both reinstated. Similarly, Stephen Pollard, a licensed trainer, allowed a person who couldn't obtain a trainer's license to train and enter a horse in Pollard's name. The unlicensed trainer was so neglectful in caring for the horse that the horse's tongue fell off, likely due to an improperly applied tongue tie. Pollard was reinstated despite a finding of fraudulent activity and the aggravating animal cruelty. These cases are but a few that highlight the problem with allowing the Racing Commission to set its own rules and standards for reviewing ejection appeals. The Legislature has had no opportunity to review these standards, which essentially give the Racing Commission limitless discretion to reverse or modify any ejection by a racetrack. These results, and the Racing Commission's power grab, simply cannot be what the Legislature intended. Accordingly, PNGI appeals the final order of the circuit court. (JA 543)

#### **IV. SUMMARY OF ARGUMENT**

The circuit court's final order granting summary judgment to the Racing Commission should be reversed because the lower court misapplied the West Virginia Administrative Procedures Act (APA) in concluding that the Racing Commission's burden of proof and stay rules were merely procedural. The burden of proof rule needs legislative approval because (1) it requires the non-appealing party to prove it acted lawfully in order to have its ejection upheld, which is inconsistent with fundamental due process; and (2) it requires proof of "improper" or "objectionable" conduct, even though the common law permits exclusions for any lawful reason or no reason. The Racing Commission's "stay" rule requires legislative approval because it expands the Racing Commission's power beyond the legislative grant, and because the

“stays” are actually injunctions that nullify a racing association’s substantive property rights for weeks or months prior to final adjudication of the appeal.

While the State Legislature can limit a racing association’s right to exclude, a state agency cannot. Certainly, a state agency cannot use procedural rules to diminish substantive rights. The Legislature did not empower the Racing Commission to establish new, higher standards for upholding permit holder ejections than the common law allows, and it did not grant the Racing Commission to the power to reinstate ejected parties pending their appeals. In reviewing the Racing Commission’s burden of proof and stay rules, the lower court failed to look past the form of the rules and consider their impact on the rights, privileges and interests of racing associations. For these reasons, the circuit court’s judgment must be reversed.

#### **V. STATEMENT REGARDING ORAL ARGUMENT**

Rule 20 oral argument is appropriate in this case because it presents issues of first impression and issues involving the separation of powers. This Court has not previously considered whether procedural rules establishing burdens of proof inconsistent with existing law are, in fact, legislative rules under the Administrative Procedures Act. Nor has the Court considered whether state agencies have the inherent power, pending an appeal, to force private landowners to readmit—and do business with—persons whom they have excluded from their premises. The case also involves separation of powers issues of fundamental public importance, namely the extent to which executive branch agencies can use their procedural rulemaking authority to alter existing law without legislative approval.

#### **VI. ARGUMENT**

##### **A. STANDARD OF REVIEW**

This Court's standard of review concerning summary judgments is well settled. “Upon appeal, ‘[a] circuit court's entry of summary judgment is reviewed de novo.’ *Perrine v. E. I. du Pont de Nemours & Co.*, 225 W. Va. 482, 506, 694 S.E.2d 815, 839 (2010) (quoting Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)).

## **B. ANALYSIS**

The circuit court’s summary judgment order should be reversed because the lower court misapplied the Administrative Procedures Act. The APA classifies rules as legislative, procedural, or interpretive. W. Va. Code § 29A-1-2(i). Legislative rules require legislative approval before such rules become effective, whereas procedural and interpretative rules do not require legislative approval. W. Va. Code § 29A-1-2(c),(d). The APA provides that “[e]very rule which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule.” W. Va. Code § 29A-1-2(d).

The Racing Commission’s new burden of proof rule for ejection appeals, 178 C.S.R. § 6-4.7.d, and its “stay” rule, 178 C.S.R. § 6-4.3, both fall within the statutory definition of “legislative” rules, not a procedural rules, because when effective, they are determinative on issues affecting property rights, privileges and interests, namely a property owner’s common law right of exclusion. Truly procedural rules exist to protect substantive rights, not emasculate them. Because the challenged provisions effective curtail a property owner’s fundamental property rights, they must be approved by the Legislature to become effective. Only the Legislature or this Court can alter the substantive law of this state.

As discussed below, both of the challenged rules exceed the Racing Commission’s lawful rulemaking powers. Therefore, the lower court should have entered

summary judgment in favor of PNGI nullifying the rules and required the Racing Commission to submit them for legislative approval.

**1. The circuit court erred in concluding that the Racing Commission’s rule regarding the burden of proof is not a legislative rule.**

The Racing Commission’s challenged burden of proof rule is substantive in nature, not merely procedural under the APA. The rule provides in pertinent part:

In any hearing on an appeal by a permit holder of an ejection by an association, the association shall have the burden of proving by a preponderance of the evidence that the permit holder acted improperly or engaged in behavior that is otherwise objectionable pursuant to 178 CSR 1, § 6.2. or 178 CSR 2, § 6.2.

178 C.S.R. § 6-4.7.d (emphasis added). The APA provides that “[e]very rule which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule.” W. Va. Code § 29A-1-2(d). The APA provides that “[t]he court shall declare [an agency] rule invalid if it finds that the rule violates constitutional provisions or exceeds the statutory authority or jurisdiction of the agency . . . .” W.Va. Code § 29A-4-2. As explained below, the burden of proof rule requires legislative approval for two reasons: (1) The rule reverses the traditional burden of proof to the non-appealing party in a manner inconsistent with due process; and (2) the rule establishes a new standard of proof inconsistent with existing fundamental rights of every landowner to exclude persons.

**a. The burden of proof rule allocates the burden to the non-appealing party in violation of fundamental due process.**

Ejection appeal proceedings are civil in nature because they are disputes between private actors involving the exercise of common law property rights. "It is a well-established rule of law that in civil actions the party seeking relief must prove his right thereto[.]" *Boury v.*

*Hamm*, 156 W. Va. 44, 52, 190 S.E.2d 13, 18 (1972); *In re Tax Assessment of Foster Foundation's Woodlands Ret. Cmty.*, 223 W. Va. 14, 29, 672 S.E.2d 150 (2008). “Therefore, when a plaintiff comes into court in a civil action . . . [t]he burden of proof, meaning the duty to establish the truth of the claim . . . , rests upon him from the beginning, and does not shift, as does the duty of presenting all the evidence bearing on the issue as the case progresses.” *Burk v. Huntington Dev. & Gas Co.*, 133 W. Va. 817, 830, 58 S.E.2d 574, 581 (1950), modified on other grounds, *Foster v. City of Keyser*, 202 W. Va. 1, 501 S.E.2d 165 (1997) (emphasis added). Moreover, the United States Supreme Court has stated, “the burden of proof is an essential element of the claim itself; one who asserts a claim is entitled to the burden of proof that normally comes with it.” *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 21 (2000). In an appeal hearing, the ejected permit holder is the party asserting a claim – *i.e.*, claiming that their ejection was unlawful or improper, and they should be reinstated.

Undoubtedly, the ejected permit holder is the party seeking relief in an appeal hearing. After all, there is no rule requiring racetracks to obtain Racing Commission approval before ejecting someone. As such, the ejected permit holder should bear the burden of proving his or her entitlement to relief from an allegedly wrongful ejection. *See Boury*, 156 W. Va. at 52, 190 S.E.2d at 18. The Racing Commission’s burden of proof rule ignores well-established West Virginia law and completely flips the burden of proof in order to ensure that more ejected permit holders are reinstated. West Virginia law mandates that the burden of proof lie with the party seeking relief. The burden of proof should not lie with the non-appealing party to prove that it complied with the law or acted within its legal rights.

In addition to being contrary to West Virginia law, the burden of proof rule requires legislative approval because the burden of proof is a substantive law, not a procedural

law. Although no direct authority exists in West Virginia, the United States Supreme Court has consistently held, in contexts other than administrative hearings, that the burden of proof is substantive, not procedural. See e.g., *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 20-21, 120 S. Ct. 1951, 1955 (2000) (“Given its importance to the outcome of cases, we have long held the burden of proof to be a “substantive” aspect of a claim.”); *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446, 79 S.Ct. 921 (1959) (stating that “[u]nder the Erie rule, presumptions (and their effects) and burden of proof are substantive”); *Garrett v. Moore–McCormack Co.*, 317 U.S. 239, 249, 63 S.Ct. 246 (1942) (stating in an admiralty case that the right of the party to be free from the burden of proof “inhered in his cause of action” and “was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure”).

In the context of administrative hearings, the United States Supreme Court in *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994) was faced with the issue of whether the Department of Labor’s “true doubt rule” conflicted with § 7(c) of the Administrative Procedures Act. The Department of Labor’s “true doubt rule” essentially shifted the burden of persuasion to the party opposing the benefits claim so that when the evidence is evenly divided, the benefits claimant wins. On the other hand, § 7(c) of the Administrative Procedures Act stated that “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” The Supreme Court held that, by placing the burden of persuasion on the party opposing a benefits award, the true doubt rule violates § 7(c)’s requirement that the burden rest with the party seeking the award. *Id.*, at 268. In invalidating the true doubt rule, the Supreme Court specifically stated that “the assignment of the burden of proof is a rule of substantive law . . . .” *Id.*, at 271 (citing *American Dredging Co. v. Miller*, 510 U.S. 443, 454, 114 S.Ct. 981, 988 (1994)).

The Supreme Court's precedent is clear and directly on point in this case. The burden of proof is substantive because the party who has the burden of proof will win or lose based on whether the burden of proof is met. In every trial, hearing or proceeding, the question is asked whether the party with the burden of proof has met that burden. If the party has met their burden, then that party prevails. If the party has not met their burden, then that party fails.

Here, if the non-appealing party puts forth no evidence, then the ejected permit holder will prevail, even if the ejection was based on improper conduct or objectionable behavior. Moreover, if the evidence is evenly divided, then the ejected permit holder will prevail each and every time because the racing association has the burden of proof. In essence, the amendment sets up a presumption that every ejection is improper unless proven otherwise by the racing association. By analogy, 178 C.S.R § 6-4.7.d is comparable to creating a presumption that all persons charged with a crime are guilty, until proven innocent. For example, a person charged with wrongdoing or unlawful behavior (the racing association in this case) bears the burden of proof that their conduct was within their legal rights. Obviously, such presumption is contrary to the most fundamental principles of due process in the criminal context.

Because 178 C.S.R § 6-4.7.d is determinative on issues affecting private rights, privileges or interests, it is a "legislative rule" requiring legislative approval. W.Va. Code § 29A-1-2(d). A "legislative rule" that does not have legislative approval is null and void. W.Va. Code § 29A-1-3. 178 C.S.R § 6-4.7.d is substantive, not procedural; thus, it should have been submitted to the Legislature for approval. The circuit court's conclusion that the rule is merely procedural is erroneous. The rule should have been declared ineffective until such time as the Legislature approves the rule.

**b. The burden of proof rule imposes a standard inconsistent with existing substantive law.**

The second reason the Racing Commission's burden of proof rule should be invalidated is that it establishes a burden of proof higher than what the common law requires, greatly diminishing the racetracks' common law exclusion right. As this Court recognized in *Reynolds*, "[t]he concept of allowing a licensed racing association like CTR&S to eject a person from its grounds undoubtedly arises from the common law." *Reynolds*, 229 W.Va. 123, 727 S.E.2d 799 (2011). Under the common law, property owners, including racetracks, have a right to exclude persons for any reason or no reason, as long as they do not exclude for an unlawful reason. *See Brooks v. Chi. Downs Ass'n*, 791 F.2d 512, 513 (7th Cir. 1986) (holding that "under Illinois law the operator of a horse race track has the absolute right to exclude a patron from the track premises for any reason, or no reason, except race, color, creed, national origin, or sex"); *see Martin v. Monmouth Park Jockey Club*, 145 F.Supp. 439, 440 (D.N.J. 1956), *aff'd*, 242 F.2d 344 (3d Cir. 1957) ("Although it is intensely regulated, the defendant Club is a private organization. Nothing is more elementary than its right as a private corporation to admit or exclude any persons it pleases from its private property, absent some definite legal compulsion to the contrary."). With regard to racetracks, the Legislature has done nothing to diminish that common law right, other than to give excluded persons an undefined right to "appeal" their ejections.

The right to exclude is an inherent right of property ownership. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (Marshall, J.) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); *see White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908) (Holmes, J. concurring) ("The notion of property ... consists in the right to exclude others from

interference with the more or less free doing with it as one wills.”). That right is not derived from any statutory grant of power by the state. However, the right is recognized in the West Virginia Code, *see, e.g.*, W.Va. Code § 61-3B-3 (2010 Repl. Vol.) (“It is an unlawful trespass for any person to knowingly, and without being authorized, licensed or invited, to enter or remain on any property, other than a structure or conveyance, as to which notice against entering or remaining is either given by actual communication to such person...”)<sup>1</sup>, and in the West Virginia Code of State Rules. Specifically, 178 C.S.R. § 1-6.2 (effective July 10, 2011) reads: “The stewards<sup>2</sup> or the association have the power to suspend or exclude from the stands and grounds persons acting improperly or whose behavior is otherwise objectionable. The stewards shall enforce the suspension or exclusion.” 178 C.S.R. § 1-6.2 (effective July 11, 2011).<sup>3</sup> Clearly, this rule does not purport to restrict in any way the common law right to exclude. In fact, as other courts have recognized, a broad rule authorizing racing associations to eject any person deemed “objectionable” substantially declares and preserves the common law right. *See Tamelleo v. N.H. Jockey Club, Inc.*, 102 N.H. 547, 163 A.2d 10, 13 (1960) (regulation authorizing licensed racetrack to eject any person the licensee deems objectionable is

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<sup>1</sup> When PNGI ejects persons from its property, it relies on the criminal statute, not on 178 C.S.R. § 1-6.2. (*See, e.g.* JA 99)

<sup>2</sup> The stewards are state employees who are essentially the referees of the race meets. They, too, have the power to eject patrons or permit holders, but only for specified reasons (rules violations, objectionable or improper behavior, *etc.*). The stewards do not own the racetrack, so their power to exclude is statutory, not based on any common law right. As state actors, they cannot deprive people of property rights without due process. Racing associations, on the other hand, are private actors. They have a right to exclude derived from their ownership of property. The mere fact that a person holds a racing permit does not entitle him or her to race at any particular racetrack any time he or she chooses. Racetrack management has wide discretion to determine who will or will not be permitted to race at its property. It exercises its exclusion right to protect its business by preserving the integrity of racing at its facility. Racetracks are businesses, and even though the state may issue a permit to racing participant, that person’s presence could be deemed so harmful to the business that the racetrack will exclude the person from racing. Such decisions do not affect the validity of the permit holder’s permit. The permit holder is free to (and often does) race at other racetracks inside and outside of West Virginia.

<sup>3</sup> The Racing Commission incorrectly interprets Rule 6.2 as a legislative grant of power to racing associations of the right to eject persons from their private property.

“substantially declaratory of the common law which permits owners of private enterprises to refuse admission or to eject anyone whom they desire”). The legislative rule does not state that racing associations may only exclude persons for certain enumerated reasons. It does, on the other hand, acknowledge in broad terms the existence of the common law right. By placing the burden on racing associations to prove that they are ejecting permit holders for “objectionable” behavior or “improper” conduct, the Racing Commission is effectively amending legislative Rule 6.2 to read, “A racing association may *only* exclude from the stands and grounds persons who are acting improperly or whose behavior is otherwise objectionable.” Such an amendment would certainly need legislative approval. Therefore, any “procedural” rule that has the same effect would also require legislative approval.

The appeal right recognized in *Reynolds* was undefined. Neither the existing statutes, rules, nor the *Reynolds* opinion established a standard of review. Instead of submitting proposed new standards to the Legislature for its approval, the Racing Commission proceeded to implement its own standards which presume every ejection to be unlawful unless proven otherwise. The Racing Commission has given itself absolute discretion to reverse or modify any ejection with which it disagrees.<sup>4</sup> The Racing Commission could have lawfully avoided legislative approval by promulgating truly procedural rules that left the substantive common law unchanged and placed the burden of proof on the *ejected* party to prove that the racing association ejected him or her for some illegal reason. It could have provided that, absent proof of illegality, the ejection would be upheld. Such a standard would have been consistent with the common law and the Rules of Racing. However, it chose not to do so. Instead, the Racing

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<sup>4</sup> Since it began hearing ejection appeals in May 2011, the Racing Commission has modified nine of eleven permit holder ejections by PNGI. In every case, it has found that PNGI met its burden of showing improper or objectionable conduct by the permit holder. The Racing Commission has reinstated an animal abuser

Commission created a new, narrower standard for ejections that requires racing associations to prove that some objectionable conduct was committed. The end result is that the state has – through a supposedly *procedural* rule -- thwarted the exercise of fundamental property rights. Its rules are legislative in nature and require legislative approval. The circuit court’s order should therefore be reversed.

2. **The circuit court erred in concluding that the Racing Commission’s stay rule was not substantive and did not exceed the Racing Commission’s lawful powers.**
  - a. **The “stay” rule exceeds the Racing Commission’s lawful powers.**

The Racing Commission’s “stay”<sup>5</sup> rule violates the APA by exceeding the Racing Commission’s statutory powers. Administrative agencies have only those powers specifically granted by the Legislature. *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 727, 591 S.E.2d 277 (2003). Their powers are “dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.” *McDaniel*, 214 W. Va. at 727; Syl. pt. 3, *Mountaineer Disposal Serv., Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973); accord Syl. pt. 3, *Appalachian Reg’l Health Care, Inc. v. West Virginia Human Rights Comm’n*, 180 W. Va. 303, 376 S.E.2d 317 (1988).

The Legislature has not granted the Racing Commission the power to “stay” ejections of racing associations. Under existing law, the Racing Commission has only been granted the power to stay decisions of the racing stewards and judges. In fact, the West Virginia Code is explicit about what types of proceedings the Racing Commission may and may not stay:

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<sup>5</sup> As explained in Section B.2. below, the term “stay” is a misnomer. The Racing Commission’s “stay” power is actually an injunctive power to reinstate permit holders.

A demand for hearing shall operate automatically to stay or suspend the execution of any order suspending or revoking a license, but a demand for hearing shall not operate automatically to stay or suspend the execution of any order suspending or revoking a permit. Upon the written request of any permit holder who has been adversely affected by an order of the stewards or judges, a stay may be granted by the Racing Commission, its chairman, or by a member of the commission designated by the chairman. A request for a stay must be filed with the Racing Commission's executive director no later than the deadline for filing a written demand for a hearing before the commission.

W. Va. Code § 19-23-16(c) (2011). The Legislature clearly did not see fit to empower the Racing Commission to “stay” ejections. The Racing Commission has unilaterally expanded its statutory “stay” power to apply to ejections without legislative approval. In light of section 19-23-16(c), the Racing Commission cannot be heard to argue that the power to stay proceedings is an inherent power it may exercise at will. It is well established in West Virginia jurisprudence that “[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted . . . .” Syl. Pt. 2, in part, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108, 109 (1968). If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.” *Appalachian Power Co. v. State Tax Dep't*, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995). “Rules and Regulations of [an administrative] Commission must faithfully reflect the intention of the legislature; when there is clear and unambiguous language in a statute, that language must be given the same clear and unambiguous force and effect in the Commission's Rules and Regulations that it has in the statute.” Syl. Pt. 2, *Chico Dairy Co., Store No. 22 v. W. Virginia Human Rights Comm'n*, 181 W. Va. 238, 239-40, 382 S.E.2d 75, 76-77 (1989) (citing Syl. pt. 4, *Ranger Fuel Corp. v. West Virginia Human Rights Commission*, 180 W.Va. 260, 376 S.E.2d 154 (1988)). Absent an amendment to West Virginia Code § 19-23-16(c), the Racing Commission has no power to stay any proceedings other than

those enumerated in this section. Section 4.3 of the challenged Rule is therefore invalid in its entirety.

The case of *Chico Dairy Co., Store No. 22 v. W. Virginia Human Rights Comm'n*, 181 W. Va. 238, 382 S.E.2d 75 (1989) is instructive. There, the West Virginia Human Rights Commission adopted a rule which defined “handicapped person,” for purposes of Human Rights Act, to include persons who did not in fact have a “handicap” as defined by Human Rights Act. The rule did not receive legislative approval. This Court found that the rule was a “legislative” rule and, because it did not receive Legislative approval, found the rule invalid. The Court reasoned that the rule “expressly extends the statutory definition of ‘handicap’ so as to form a basis for the imposition of civil sanctions under the Act, as was done in this case; the rule confers a right not provided by law; and the rule affects private rights and purports to regulate private conduct.” *Chico Dairy Co.*, 181 W. Va. at 244, 382 S.E.2d at 81.

Like the rule invalidated in *Chico Dairy Co.*, 178 C.S.R. § 6-4.3 extends a statutory provision, confers a right not provided by law, affects private rights, and purports to regulate private conduct. 178 C.S.R. § 6-4.3 extends W. Va. Code § 19-23-16(c) to include the power to stay ejections by racing associations. Under *McDaniel*, the Racing Association only has powers specifically provided by statute. Because W. Va. Code § 19-23-16(c) only permits the Racing Commission to stay ejections by stewards or judges, 178 C.S.R. § 6-4.3 confers a right to the Racing Commission not provided by statute.

**b. The “stay” rule is substantive, not merely procedural.**

In addition to exceeding the Racing Commission’s lawful powers, the stay rule is also invalid under the APA because it, too, is a legislative rule. The stay rule is one “which,

when effective, is determinative on an[] issue affecting private rights, privileges or interests,” W.Va. Code § 29A-1-2(d) (2007 Repl. Vol.) as it forces racing associations to readmit ejected parties for an indefinite period of time while their appeals are pending. Because the rule will determine the scope of a racing association’s property right, it is legislative in nature.

The term “stay” is a misnomer. A stay typically refers to an agency’s or a court’s decision to stop its own proceedings (or those of a lower tribunal) pending review. A stay is intended to preserve the status quo. Unlike the stewards, who are state agents, racing associations are a private actors, and their decisions are not “rulings” or “orders” of the state which can be “stayed.” Exclusion decisions, pursuant to W.Va. C.S.R. § 178-1-6.1 are subject to “appeal” but not stay. A “stay” of an ejection is actually an early reinstatement, and it is an intrusion on the substantive property rights of the racing association.

As explained above, the racing association has a common law right, although not unfettered, to eject a person from its grounds. See *PNGI Charles Town Gaming, LLC v. Reynolds*, 229 W. Va. 123, 727 S.E.2d 799 (2011). The Racing Commission’s “stay” rule permits the Racing Commission to reinstate parties ejected by the racing association for months while their appeals are being heard and decided. This forces the racing associations to allow persons on their property whom they have deemed harmful to their business or even dangerous to others. The “stays” could last for months prior to the appeals being heard, briefed, decided by the hearing examiner and finally voted on by the Racing Commission. The rule not only exceeds the Racing Commission’s powers, it infringes upon the fundamental rights, privileges and interest of racing associations in managing their properties and businesses. The Racing Commission cannot give itself new powers that are “determinative on any issue affecting private

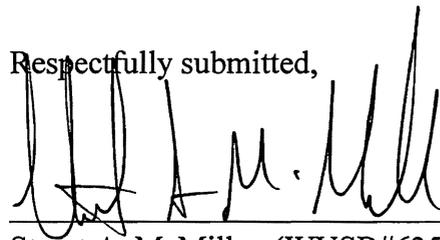
rights, privileges or interests” absent legislative approval. W.Va. Code § 29-1-2(d). Therefore, the “stay” rule should have been declared legislative, not procedural.

### C. CONCLUSION

The Racing Commission might have avoided legislative approval by drafting truly procedural rules that do not alter the substantive rights of racing associations. It could have placed the burden of proof on appealing party, the ejected permit holder. It could have required that the permit holder prove, by a preponderance of the evidence, that the racing association acted unlawfully in ejecting them. It could have omitted the stay rule, given the absence of any express power to reinstate ejected parties or to stay racing association ejections pending appeal. The Racing Commission chose not to draft such rules. Instead, it chose to usurp the power of the Legislature and revise the substantive law of racetrack ejections. It is the duty of the courts to correct such abuses.

Accordingly, PNGI requests that this Court reverse the circuit court’s order and enter judgment in PNGI’s favor declaring the challenged provisions null and void under the West Virginia Administrative Procedures Act.

Respectfully submitted,



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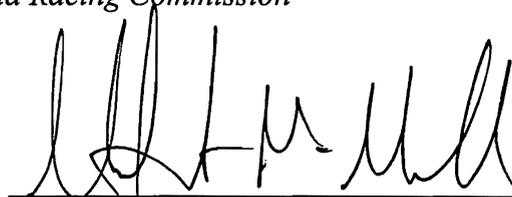
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**CERTIFICATE OF SERVICE**

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