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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,

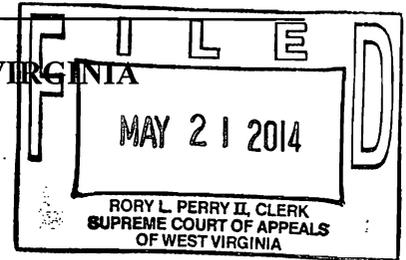
**Plaintiff Below / Petitioner,**

v.

STATE OF WEST VIRGINIA RACING  
COMMISSION,

**Defendant Below / Respondent.**

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REPLY BRIEF OF PETITIONER

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***Counsel for Petitioner:***

STUART A. MCMILLAN (WV Bar #6352)  
Bowles Rice LLP  
600 Quarrier Street  
Post Office Box 1386  
Charleston, West Virginia 25325  
(304) 347-1110  
smcmillan@bowlesrice.com

BRIAN M. PETERSON (WV Bar #7770)  
Bowles Rice LLP  
101 South Queen Street  
Martinsburg, West Virginia 25401  
(304) 264-4223  
bpeterson@bowlesrice.com

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## I. ARGUMENT SUMMARY

Contrary to the Racing Commission's representations, PNGI is not attempting to "upend" or re-litigate *Reynolds*. *Reynolds* recognized the racing associations' common law right to eject. *PNGI Charles Town Gaming, LLC v. Reynolds*, 727 S.E.2d 799, 807 (W.Va., 2011) ("The concept of allowing a licensed racing association like [PNGI] to eject a person from its grounds undoubtedly arises from the common law.") *Reynolds* held that the Legislature, through a properly-promulgated legislative rule,<sup>1</sup> modified the common law by making ejections of permit holders "subject to review" by the Racing Commission. *Id.* at Syl. Pt. 3. *Reynolds* however, did not prescribe standards for those reviews. It certainly did not empower the Racing Commission to ignore the Administrative Procedures Act in creating such standards without legislative approval. It did not give the Racing Commission limitless discretion to overturn ejections for any reason. It did not empower the Racing Commission to allocate the burden of proof to the non-appealing party. It did not grant the Racing Commission the authority to "stay" ejections. All of these powers affect the existing common law property rights of racing associations. Therefore, PNGI requests this Court to ensure that the Legislature is afforded the opportunity to review and approve those rules directly affecting the free exercise of property rights recognized by this Court.

For decades before the *Reynolds* decision, the Racing Commission worked together with the racing associations to police the sport of thoroughbred racing. The legislative regulations governing thoroughbred racing acknowledge that the owners of racetracks are well-suited to police their own grounds by affirming their broad, independent power to exclude persons deemed harmful to the integrity of the sport. However, the source of that power was

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<sup>1</sup> 178 W.Va. Code of State R. 1, § 6.1 (effective July 10, 2011), formerly codified at § 178-1-4.7 (effective April 6, 2007).

never the regulations themselves – instead it was the common law. *See Reynolds*, 229 W. Va. at 131, 727 S.E.2d at 807. While the Legislature can modify the common law by clear and specific statutory language, it cannot do so by broad grants of “plenary power” to a state agency. As Justice Benjamin (joined by Justice Ketchum) notes in the dissenting opinion in *Reynolds*, “[t]he underlying basis for the power of the Racing Commission to act, the police powers of the state, does not give the Racing Commission the constitutional authority, through either the licenses or permits it issues, to reach so far into the manner by which [PNGI] conducts its business or to contravene the business and property rights of [PNGI], a private business.” *PNGI Charles Town Gaming, LLC v. Reynolds*, 727 S.E.2d 799, 814 (W.Va., 2011) (Benjamin, J. and Ketchum, J. dissenting) The Legislature has never provided, through statute or regulation, any standards for determining when a racetrack’s common law right to exclude can be infringed by the Racing Commission. Instead of drafting a new set of standards for the Legislature to review and approve, the Racing Commission simply enacted a new standard-less scheme that flips the burden of proof to the non-appealing party and gives the Racing Commission unfettered discretion to reverse or modify any ejection. However, under state law, only the Legislature has the power to abrogate a common law right in this manner. Syl. Pt. 2, *Reynolds*. It is undisputed that every ejection appeal can potentially result in the diminishment of the property rights of the racetrack owner. Therefore, it is imperative that the Legislature establish the standards for upholding these rights, not a state agency.

The Racing Commission’s motive for establishing its skewed system of appellate review is clearly revealed in its brief. The Racing Commission argues that tilting the playing field in favor of the permit holders is justified because they are “disadvantage[d],” of “limited education” and “[in]experience[d] in appearing before a government agency,” while the

racetracks are flush with “gambling revenues” and “represented by legal counsel in every single ejection appeal.” (Respondent’s Br. at 22) Clearly, the Racing Commission’s intention is to codify its biases into the very regulations governing appeals so that racing associations can never freely exercise their property rights. As the Commission’s response brief confirms, it has reinstated ejected permit holders over PNGI’s objection in nearly every case reviewed since *Reynolds*. The Administrative Procedures Act exists to prevent agencies from abusing the rulemaking process in such a manner. Substantive law may be created only by the Legislature. This Court cannot countenance the Racing Commission’s unilateral enactment of a scheme, which, by its own admission, favors the permit holders at the expense of the racing association where fundamental property rights are at stake.

Forcing a property owner to prove by a preponderance of evidence that each exclusion was motivated by “improper” or “objectionable” conduct is, standing alone, a fundamental alteration of the common law right to eject. It is no different than stating that a person has the right to free speech, but only if the speaker first proves his speech is proper in the eyes of the State. Similarly, giving the Racing Commission the power to stay an ejection without a thorough analysis of the circumstances surrounding that ejection presupposes that the racing association must affirmatively validate each of its ejections. Procedural rules cannot diminish substantive rights, they can only protect them. Because of their effect on the right to exclude, the Racing Commission’s challenged rules are substantive. As such, they must be approved by the Legislature in order to take effect.

Given the absence of any substantive standards for upholding exclusions, a reasonable reaction to *Reynolds* would have been for the Racing Commission to draft standards and submit them to the Legislature for approval. The Racing Commission could have, for

example, required the ejected party to prove, by a preponderance of the evidence, that the racing association acted arbitrarily or illegally in exercising its common law exclusion right. Once the Legislature approved those substantive standards, the Racing Commission could have enacted its own procedural rules consistent with those standards. Instead, the Racing Commission created *de facto* substantive standards in the guise of procedural rules that flip the burden of proof to the non-appealing party, and give the Commission unfettered discretion to reverse any ejection for any reason at any point in the appeal process. Only the Legislature can restrict a common law right to this extent. The Circuit Court erred in finding that the challenged rules were merely procedural. Therefore, its final judgment order should be reversed.

**A. 178 C.S.R. § 6-4.7.d is a Substantive, Legislative Rule.**

*1. The Burden of Proof is Always a Substantive Aspect of a Claim.*

The first of the two challenged rules, 178 C.S.R. § 6.4.7.d, shifts the burden of proof from the appealing permit holder to the defending racing association during ejection appeals. 178 C.S.R. § 6-4.7.d. The relevant state and federal court authorities hold that the burden of proof is substantive. *See, e.g., Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446, 79 S. Ct. 921, 927, 3 L. Ed. 2d 935 (1959); *State v. Fletcher*, 717 P.2d 866, 871 (Ariz. 1986) (“The burden of proof is considered substantive.”); *In re Guardianship of Jeremiah T.*, 976 A.2d 955, 960-61 (Me. 2009) (stating the burden of proof is substantive). Those cases holding the burden of proof to be procedural most often do so in the context of choice-of-law issues. Such cases fundamentally conflict with the precedent from the United States Supreme Court and other jurisdictions that hold the burden of proof is substantive in other contexts.

The cases holding that the burden of proof is substantive should be considered the most persuasive by this Court because the reasoning used in those cases is more applicable to the burden created by 178 C.S.R. § 6-4.7.d. While the Racing Commission argues that ejection

appeals are administrative rather than civil in nature, the reasoning is unpersuasive. Ejection appeals involve the competing rights of two private actors, namely the permit holder and the racetrack owner. Essentially, these are property disputes. The State is not a party to these appeals as it is in administrative proceedings. Therefore, the cases discussing the burden of proof in civil cases are more relevant to ejection appeals.

The United States Supreme Court has said that “[i]n earlier times, burden of proof was regarded as ‘procedural’ for choice-of-law purposes. . .” *Am. Dredging Co. v. Miller*, 510 U.S. 443, 454, 114 S. Ct. 981, 988, 127 L. Ed. 2d 285 (1994) (additional citations omitted). “For many years, however, it has been viewed as a matter of substance [.]” *Id.* citing *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 212, 60 S.Ct. 201, 203, 84 L.Ed. 196 (1939). The *Miller* Court emphasized that when the right to be free of the burden of proof is an inherent aspect of a cause of action, then it is a substantive part of that action and cannot be considered a mere form of procedure. *Id.*

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Under West Virginia law, it is clear that allocation of the burden of proof (particularly the burden of persuasion)<sup>2</sup> to the party seeking relief is a basic tenet of our jurisprudence. In *In re Tax Assessment of Foster Found's Woodlands Ret. Cmty.*, 223 W. Va. 14, 29, 672 S.E.2d 150, 165 (2008), the Court explained that “[r]equiring the party bringing a claim

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<sup>2</sup> In *Mayhew v. Mayhew*, 205 W.Va. 490, 497 n. 15, 519 S.E.2d 188, 195 n. 15 (1999), the Court explained that

[a]s a general matter, the burden of proof consists of two components: burden of production and burden of persuasion. The burden of persuasion requires the party upon whom it is placed, to convince the trier of fact ... on a given issue. When a party has the burden of persuasion on an issue, that burden does not shift. The burden of production merely requires a party to present some evidence to rebut evidence proffered by the party having the burden of persuasion. The term burden of production is also used to refer to either party presenting some evidence on a matter.

for relief to bear the burden of persuasion ... is consistent with our jurisprudence. '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)." The court went on to state that

when a plaintiff comes into court in a civil action he must, to justify a verdict in his favor, establish his case .... The 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).

*In re Tax Assessment of Foster Found.'s Woodlands Ret. Cmty*, 223 W. Va. at 29, 672 S.E.2d at 165 (emphasis added).

West Virginia Code § 19-23-6 and 178 C.S.R. § 1-6.1 gives a permit holder the ability to challenge a racing association's ejection with an administrative hearing before the Racing Commission. Shifting the burden of proof (not merely the burden of production) from the permit holder to the racing association fundamentally changes the nature of those hearings. Under the new rule, it is presumed that any ejection is not proper unless proven by a preponderance of evidence. The burden created by 178 C.S.R. § 6-4.7.d dictates that each hearing will require the racing association to affirmatively validate its decision to eject; this is in stark contrast from the right to **appeal** that is granted to the permit holder by 178 C.S.R. § 1-6.1. The shifted burden effectively diminishes the right to eject.

This new burden is certainly not consistent with the right to appeal that was contemplated in *Reynolds*. *Reynolds* explained that each term defined by § 178-1-2.7 of the West Virginia Code of State Rules should have the meaning ascribed by that term, "unless the

context clearly requires a different meaning [.]” *Reynolds*, 229 W. Va. at 136, n. 24 (emphasis removed); W. Va. C.S.R. § 178–1–2. This reasoning necessitates that an appeal be treated as a true appeal – a process whereby the appellant seeks to prove the ruling below was not legally valid.

From a practical standpoint, the burden created by 178 C.S.R. § 6-4.7.d means that racing associations cannot eject a permit holder without an adjudicatory hearing and the presentation of documentary and testimonial evidence. Suggesting the racing association should always bear this burden because it is bigger and has access to more resources is insulting, prejudiced, and unfair. Such a values-based rationale further underscores why these rules should go to our Legislature for approval.

2. *Even if this Court Holds That Not Every Burden of Proof is Substantive, The Burden of Proof Created by 178 C.S.R. § 6-4.7.d is Substantive Because it is Inseparably Connected with the Substantive Rights of the Parties.*

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Even if this Court is not willing to say that burdens of proof are categorically substantive, it should still rule that the present burden is a substantive one. Some cases hold the burden of proof is always substantive; whereas, others find the burden of proof to be procedural. A third category of courts have declined to create such bright line rules. These jurisdictions opt to treat burdens of proof as substantive when the burden “is inseparably connected with the substantive rights of the parties.” *In re Estate of Reardon*, 25 A.D.2d 370, 269 N.Y.S.2d 635, 637 (1966); *see also State v. Drej*, 2010 UT 35, 233 P.3d 476, 486 (“procedural rule may be so intertwined with a substantive right that the court must view it as substantive.”) In other words, these jurisdictions treat the burden of proof as substantive when it is intertwined with the proposed remedy. *See Kabo v. Summa Corp.*, 523 F. Supp. 1326, 1331 (E.D. Pa. 1981).

One of the only West Virginia cases to mention the issue contemplates that the burden of proof is both substantive and procedural. *See Burnside v. Burnside*, 194 W. Va. 263, 268, 460 S.E.2d 264, 269, n. 6 (1995) (“It is important to underscore that presumptions and the allocation of burdens of proof are as much substantive as procedural and evidentiary law.”)

Here, the racing association’s exercise of the right to eject is fundamentally intertwined with the reversed burden of proof. As the Arizona Court of Appeals explained:

The racetrack proprietor must be able to control admission to its facilities without risk of a lawsuit and the necessity of proving that every person excluded would actually engage in some unlawful activity.

*Nation v. Apache Greyhound Park, Inc.*, 119 Ariz. 76, 78, 579 P.2d 580, 582 (Ct. App. 1978). By placing the burden of proof on the racetrack to show every exclusion is based on improper or objectionable conduct, the Racing Commission chills the free exercise of that right.

The inseparable connection between the burden of proof and the right to eject is comparable to the connection that existed in *State v. Drej*, 2010 Utah 35, 233 P.3d 476, 486. In *Drej*, the Court analyzed the interplay between a burden of proof and that burden’s effect on a substantive claim. The burden in that case affected a special mitigation statute enacted by the Utah Legislature. The Court acknowledged that “[g]enerally, the influence on the judicial process will lead to the conclusion that a statute is procedural.” *Drej*, 233 P.3d at 485. However, the Court went on to say that “[a]t times, the procedures attached to the substantive right cannot be stripped away without leaving the right or duty created meaningless.” *State v. Drej*, 233 P.3d at 486. There, the burden of proof allocated in connection with the special mitigation statute was inextricably connected to the right to plead special mitigation in the first place. *Id.*

The reasoning used in *Drej* is applicable here. If the burden of proof is considered by this Court to be a procedural element, 178 C.S.R. § 6-4.7.d adds a procedure to the common law right of ejection that makes the right meaningless. Requiring the racing association to affirmatively validate each of its ejections essentially strips the racing association of its right to eject. Essentially, a racing association can only eject persons for reasons it believes the Racing Commission will agree with based on its set of standards. As such, the rule fundamentally changes the right of ejection and is a legislative rule. *See* W. Va. Code § 29A-1-2 (“Every rule which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule.”)

**B. Placing the Burden of Proof on the Racing Association is Inconsistent with West Virginia’s Substantive Law and Public Policy.**

The plaintiff has the burden of proving his claim in most civil actions. *See 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).

The Racing Commission contends that this general rule should not apply because “[i]t is an accepted rule of administrative law that ‘an agency with rulemaking authority has the discretion to allocate the burden of proof in an administrative hearing if the authorizing statute is silent regarding the issue, as long as the chosen allocation is consistent with the legislative scheme.’” (Respondent’s Brief at 18)

The only decisional law Respondent cited in support of its argument is *Bunce v. Secretary of State*, 239 Mich. App. 204, 217, 607, N.W.2d 372, 278 (Mich. Ct. App. 1999), a decision reached pursuant to Michigan law. However, Michigan’s Administrative Procedure Act does not distinguish between procedural rules and legislative rules in the same way as West Virginia’s Administrative Procedure Act. *See* Mich. Comp. Laws § 24.207. In fact, to the extent

that Michigan law recognizes a difference between procedural rules and legislative rules, both types of rules have legal force. *See* Op. Atty. Gen. 1968, No. 4614, p. 231 (“Administrative rules, by contrast, which include legislative and procedural rules, have legal force, while interpretative rules are merely the agency’s opinion of the meaning of the statute or properly adopted administrative rule.”). This is a stark contrast to West Virginia’s treatment of administrative procedure because West Virginia only gives legal force to legislative rules. *See* W. Va. Code § 29A-1-2.

“When a statute is silent, the burden of proof is normally allocated to the party initiating the proceeding and seeking relief.” *Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 452 (4th Cir. 2004) *aff’d*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005); *see also Edison v. Dep’t of Army*, 672 F.2d 840, 842 (11th Cir. 1982) (applying the “traditional rule imposing the burden of proof on the plaintiff” when the statute is silent as to who bears the burden); *Cordrey v. Euckert*, 917 F.2d 1460, 1466 (6th Cir. 1990) (declining to “reverse the traditional burden of proof” when the subject statute was silent).

As this Court previously held in Syllabus 2 of *Reynolds*, “[o]ne of the axioms of statutory construction is that a statute will be read in context with the common law unless it clearly appears from the statute that the purpose of the statute was to change the common law.” Syl. Pt. 2, *Smith v. W. Va. State Bd. of Educ.*, 170 W.Va. 593, 295 S.E.2d 680 (1982); *see also Morningstar v. Black and Decker Mfg. Co.*, 162 W.Va. 857, 874, 253 S.E.2d 666, 675 (1979) (stating that “the legislature may alter or amend the common law”).

Here, the Racing Commission’s refusal to follow the common law rule violates PNGI’s right of ejection. As explained above, the proposed burden completely transforms PNGI’s right of ejection so PNGI can only eject patrons if it can convince the Racing

Commission to uphold the ejection during the prescribed hearing. As the Seventh Circuit explained, sound public policy supports the common law right of exclusion:

[P]roprietors of amusement facilities, whose very survival depends on bringing the public into their place of amusement, are reasonable people who usually do not exclude their customers unless they have a reason to do so. What the proprietor of a race track does not want to have to do is **prove** or **explain** that his reason for exclusion is a **just** reason.

*Brooks v. Chicago Downs Ass'n, Inc.*, 791 F.2d 512, 517 (7th Cir. 1986) (emphasis in original).

Even in cases involving the New York Racing Association, which is a state-created non-profit entity commonly regarded as a state actor, *see Galvin v. New York Racing Ass'n*, 70 F.Supp.2d 163, 173 (E.D.N.Y. 1998), the courts have required the permit holder to bear a burden of proof in ejection appeals. In *Jacobson v. New York Racing Ass'n, Inc.*, 33 N.Y.2d 144, 305 N.E.2d 765 (1973) the New York Court of Appeals placed a “justification” standard on permit holder exclusions made by the New York Racing Association, requiring that the decision to exclude be based on “reasonable discretionary business judgment.” *Jacobson*, 33 N.Y.2d at 150. However, the “heavy burden” was then placed on the excluded party to show the exclusion was based on “motives other than those relating to the best interests of racing generally.” *Id.* Thus, even in cases where the state is essentially the property owner, the courts place the ultimate burden of persuasion on the permit holder. In contrast, under West Virginia rules, where the racetrack is a private party, it bears the entire burden of proof.

Under the current rule, PNGI’s right to eject is automatically infringed whenever an appeal is filed due to the allocated burden of proof. If PNGI does not act to present evidence, it will lose its ejection right in every case. The ejected permit holder, on the other hand, loses

nothing if he remains silent and presents no evidence at all.<sup>3</sup> The permit holder's only property right – his right in his permit – is wholly unaffected by the outcome of the appeal. Win or lose, the permit holder can continue racing in West Virginia and in other states.

Respondent argues that *Foxboro Harness Inc. v. State Racing Commission*, 42 Mass. App. Ct. 82, 674 N.E.2d 1322 (Mass App. Ct. 1997) is of significance because another state racing commission has the authority to review permit holder ejections. However, the only language from *Foxboro* that addressed the validity of the burden of proof did so in a footnote which said that the racing association failed to challenge the burden that had been placed on it. Specifically, the Court said,

Foxboro implies, but does not directly argue, that the commission should have placed the burden of proof on Beauregard. During the hearing, **Foxboro did not object to the allocation of the burden of proof.** Thus, it has waived the issue. Moreover, Foxboro has not alleged that it suffered any harm as a result of bearing the burden of proof.

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*Id.*, 42 Mass. App. Ct. at 86, n. 5 (emphasis added). The Petitioner's failure to challenge the burden of proof that was placed on it in that case is not instructive here.

Accordingly, this Court should consider the proposed burden to violate both the substantive law and public policy of West Virginia. Such a change in the law should not be allowed unless explicitly approved by the West Virginia Legislature.

**C. 178 C.S.R. § 6-4.3 (Permitting “Stays” of Ejections) is a Legislative Rule that Fundamentally Changes PNGI’s Right to Eject and the Permit Holders’ Right to Appeal.**

178 C.S.R. § 6-4.3 gives the Racing Commission the power to stay a racing association's ejection of a permit holder. This self-granted power, like the provision shifting the

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<sup>3</sup> In the ejection appeal of Cliff Tuomisto and Billy Ray Davis, the permit holders did not appear at the hearing in person, and their attorneys presented no evidence in their case in chief. They nevertheless won their appeals and were reinstated over the objection of PNGI.

burden of proof, fundamentally changes the nature of PNGI's right to eject and the permit holder's right to appeal. While the Racing Commission argues that stays are an "extraordinary remedy," the possibility of such stays modifies the rights of ejection and appeal by presupposing that the permit holder can be reinstated without having to affirmatively present his or her case. Consequently, if the permit holder simply pleads the ejection was improper, that ejection can be summarily reversed pending final adjudication (which often takes months).

178 C.S.R. § 6-4.3 explains that, in order to be granted a stay, the permit holder must only provide his or her identification information along with "[a] statement of the justification for the stay" and "[a] sworn, notarized statement that the permit holder requesting the stay has a good faith belief that the stay request is meritorious and is not taken merely to delay the effect of the ejection imposed by the association." 178 C.S.R. § 6-4.3. In short, ejections of permit holders can be stayed when the permit holder has provided nothing more than a self-serving statement arguing the ejection is improper.

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The Racing Commission argues that its "plenary power" gives it the inherent right to create a rule allowing it to reinstate ejected permit holders prior to adjudication of their appeals. If the power to stay were inherent, then the Legislature would have no reason to dictate, as it does in W. Va. Code § 19-23-16(c), which types of proceedings the Racing Commission has the discretion to stay. The new "stay" power the Racing Commission conferred upon itself fundamentally affects the exercise of the right to eject, and is thus "determinative on any issue affecting private rights, privileges or interests." W. Va. Code § 29A-1-2. Therefore, it is a legislative rule that should have been approved by the West Virginia Legislature.

## **II. Conclusion**

To decide this case, the Court must look to the effect of the Racing Commission's new ejection appeal rules. Both of the challenged rules directly affect the substantive rights of

racing associations. Accordingly, these are substantive rules that require the West Virginia Legislature's approval. The lower court erred in concluding that the rules were merely procedural. Accordingly, this Honorable Court should reverse the order of the Circuit Court of Kanawha County and declare 178 C.S.R. § 6-4.7.d and 178 C.S.R. § 6-4.3 to be void.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stuart A. McMillan", written over a horizontal line.

Stuart A. McMillan (WVSB#6352)

Brian M. Peterson (WVSB#7770)

Bowles Rice LLP

600 Quarrier Street

Charleston, WV 25301

(304) 347-1110 Phone

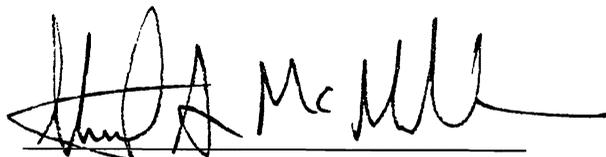
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*Counsel for Petitioner*

## CERTIFICATE OF SERVICE

I, Stuart A. McMillan, counsel for the Petitioner, hereby certify that I served a true copy of the foregoing upon counsel for the Respondent, via electronic mail and U.S. Mail, postage prepaid, on this 21st day of May 2014:

Kelli D. Talbott, Esquire  
Senior Deputy Attorney General  
812 Quarrier Street  
Second Floor  
Charleston, West Virginia 25301  
(304) 558-2131  
(304) 558-4509 Facsimile  
Kelli.D.Talbott@wvago.gov  
*Counsel for Respondent West Virginia Racing Commission*

A handwritten signature in black ink, appearing to read "Stuart A. McMillan", written over a horizontal line.

Stuart A. McMillan, Esquire