

NO. 101503

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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**PNGI CHARLES TOWN GAMING, LLC d/b/a CHARLES TOWN RACES AND SLOTS,**

Petitioner

v.

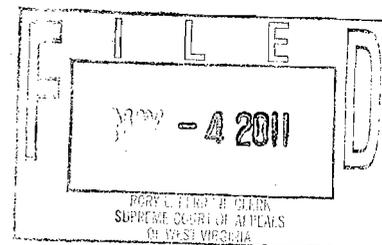
**LAWRENCE REYNOLDS, ANTHONY MAWING, ALEXIS RIOS-CONDE, JESUS  
SANCHEZ, DALE WHITTAKER, LUIS PEREZ, and TONY A. MARAGH**

Petitioners Below, Respondents

and

**WEST VIRGINIA RACING COMMISSION**

Respondent Below, Respondents



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**SUPPLEMENTAL BRIEF OF APPELLANT  
PNGI CHARLES TOWN GAMING, LLC**

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From the Circuit Court of Kanawha County, West Virginia  
Civil Action No. 09-C-688  
Judge Paul Zakaib, Jr.

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This appeal is about a private property owner's right to exclude from its premises those who commit significant and well-documented malfeasance. For over two years, the Circuit Court of Kanawha County has suppressed this fundamental right of PNGI Charles Town Gaming, LLC ("CTR&S") through illegal injunctions. The Circuit Court has not only violated state law prohibiting stays of racing commission decisions, it has extended those illegal stays to CTR&S—a non-party to the underlying case—without following any of the procedural requirements of state law, the West Virginia Rules of Civil Procedure, or the precedents of this Court. The Circuit Court has infringed upon the fundamental property rights of CTR&S for more than two years in order to avoid having the Plaintiff Jockeys serve thirty-day suspensions. These Jockeys continue to race at CTR&S despite full-blown hearings finding them all guilty of corrupt practices. This Court must correct the Circuit Court's clear error by vacating the injunction entered against CTR&S and restoring its common-law property rights.

In response to the Petition for Appeal filed by CTR&S, the Jockeys and the West Virginia Racing Commission raised certain arguments challenging CTR&S's request for appellate relief. Pursuant to the Revised Rules of Appellate Procedure, CTR&S hereby submits this Supplemental Brief to respond to these arguments and to further demonstrate why the Circuit Court of Kanawha County's injunction against CTR&S must be reversed immediately.

## **I. RESPONSE TO ARGUMENTS RAISED BY THE JOCKEYS**

The Jockeys have raised five arguments, four of them procedural and one substantive. None of them justify affirming the Circuit Court's unlawful orders in this case.

**A. CTR&S's Petition was Timely Filed, Contrary to the Jockey's Claim.**

First, the Jockeys claim that CTR&S's appeal petition was untimely because it was not filed within four months of the Circuit Court's *original* TRO orders, entered April 16, 2009. This argument fails for several reasons.

First, the April 16, 2009 TROs expired by their own explicit terms and were never properly extended. On April 16, 2009 at 10:00 a.m., the Circuit Court entered a TRO ordering that "the suspensions of the plaintiffs' racing permits [were] stayed" only until "the conclusion of the de novo hearing before the West Virginia Racing Commission, which will occur within 30 days of the filing of the Request for Hearing, unless extended for good cause shown or by agreement of the parties." (TRO of 4/16/2009 at 10:30 a.m. at p. 2). The *de novo* hearing of the Racing Commission did not occur within 30 days. It began on August 6, 2009, proceeded for three days, was continued until September 21, 2009, and concluded on September 22, 2009. A final order was entered by the Racing Commission on May 21, 2010 -- more than a year after the TROs were issued. The Jockeys made no request for a preliminary injunction hearing, and no request to extend the TRO before it expired. By May 21, the Jockeys had received their due process, lost their case, and their TRO had expired. So, on May 24, 2010, CTR&S filed its motion to confirm the expiration of the TRO.<sup>1</sup> It is well-settled that "[a]n extension of injunction orders is a nullity where they have expired and the parties enjoined had not consented to an extension" 43A C.J.S. Injunctions § 389; *Messall v. Merlands Club, Inc.*, 244 Md. 18, 222 A.2d 627 (1966). Nevertheless, the Circuit Court extended the expired TRO instead of declaring it void as CTR&S requested. This Court must correct that error.

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<sup>1</sup> This motion was styled "Motion to Confirm Expiration of Temporary Restraining Order" rather than "Motion to *Dissolve*..." because the TRO had clearly expired on its face. Knowing that the Plaintiff Jockeys intended to pursue further appeals and might regard the stay as effective, out of an abundance of caution, CTR&S filed the motion to confirm the expiration rather than risk contempt.

Next, even if the Circuit Court did have the authority to “extend” an expired TRO, its order doing so was immediately appealable. The Jockeys argue that the June 3, 2010 order itself was not appealable because it was a mere “extension” of the April, 2009 orders, which were not appealed. However, a restrained party’s failure to immediately challenge a TRO does not waive its right to challenge the order at a later time. In *Camden-Clark Mem’l Hosp. Corp. v. Turner*, 212 W. Va. 752, 759, 575 S.E.2d 362, 369 (2002), this Court held that “[c]learly, agreeing to extend the term of the temporary restraining order does not waive the subject party’s right to contest the temporary restraining order, or any subsequent injunction.” Thus, the appeal is timely filed.

In addition, the Jockeys conveniently fail to mention that the June 3, 2010 order not only granted their motion to extend, but denied CTR&S’s request to declare the TRO expired and void. Under West Virginia law, orders denying motions to dissolve injunctions are immediately appealable at any time. *Gwinn v. Rogers*, 92 W. Va. 533, 115 S.E. 428 (1922) (“An order in a chancery cause refusing to dissolve an injunction is an appealable decree....”); Syllabus Point 11, *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 [1956] (“... the power to grant or refuse or to modify, continue or dissolve a temporary or a permanent injunction ... will not be disturbed on appeal in the absence of a clear showing of an abuse of ... discretion.”) (emphasis added); *Brady v. Smith*, 139 W.Va. 259, 79 S.E.2d 851 (1954) (appeal of order refusing to dissolve temporary injunction; injunction dissolved on appeal); *Huffman v. Chedester*, 126 W.Va. 73, 27 S.E.2d 272 (1943) (temporary injunction granted on filing of complaint and exhibits, answer filed, motion to dissolve denied, denial order appealed); see generally Syllabus 2, *State ex rel. McGraw v. Telecheck Services, Inc.*, 213 W. Va. 438, 445, 582 S.E.2d 885, 892 (2003) (“our longstanding jurisprudence is to the effect that this Court possesses

discretionary appellate jurisdiction to review interlocutory lower court orders in cases in equity relating to preliminary or temporary injunctive relief.”) Because the present appeal challenges the Circuit Court’s refusal to dissolve (*i.e.* “declare expired”) the April 16, 2009 TRO, it was timely filed within four months of the June 3, 2010 order.<sup>2</sup>

**B. The Record on Appeal is Adequate.**

Next, the Jockeys claim the appeal should be denied because the record is incomplete. Pointing to CTR&S’s purported failure to provide “this Court with a transcript of either the April 16, 2009 hearing at which the injunction was granted or the June 3, 2010, hearing at which this injunction was extended for good cause shown[,]” (Jockey’s Br. at p. 6), they claim Rule 4A(c) of the West Virginia Rules of Appellate Procedure requires the transcripts to be included in the record. However, Rules 4 and 4A refer only to “transcripts of testimony.” No one testified at any of the hearings in this case. The hearings were solely oral argument on the parties’ motions. In fact, one of the errors CTR&S has raised was the Jockeys failure to present any sworn evidence or testimony at the hearings to support their request for a TRO. Accordingly, the Jockeys argument that the record is incomplete without transcripts is baseless where no underlying testimony was ever even offered.<sup>3</sup>

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<sup>2</sup> Alternatively, the Jockeys argue that the present appeal should be deemed barred by “laches.” *See* Jockeys’ Resp. Br. at 5 n.2. This doctrine is inapplicable for several reasons. First, as noted above, CTR&S did not delay in pursuing its appeal rights as to the June 3, 2010 order. It timely filed its petition within four months of the entry of the order refusing to declare the TRO expired. Second, the Jockeys offer no authority for applying the doctrine of laches to an appeal of an injunction. Third, even if the laches doctrine were applicable, it would pose no bar to this appeal. CTR&S’s decision not to challenge the April 16, 2009 only *benefitted* the Jockeys, and did not prejudice them in any way. Finally, the Jockeys themselves have unclean hands making laches relief unavailable. They come to the Court having been adjudicated guilty of corrupt practices, seeking equitable relief that would deny the right of appeal of a non-party they themselves dragged into this proceeding. The doctrine of laches does not apply.

<sup>3</sup> Moreover, Rules 4 and Rule 4A (which were in effect at the time of CTR&S’s filing) granted to an appellate petitioner considerable discretion in designating portions of the record that *the petitioner* determined was necessary to enable this Court to render a decision on the matters raised in the petition. *See* W. Va. R. App. Pro. 6, Clerk’s comments (“Under current practice in all cases, the petitioner alone designates the record . . .”).

**C. CTR&S Did Not Waive Its Right to Challenge the Circuit Court's Disregard of Rule 65.**

The Jockeys next argue CTR&S waived its objections to the Circuit Court's failure to follow the mandatory procedures of Rule 65 requiring an evidentiary hearing and bond. They do not dispute that the Circuit Court failed to follow the law. They simply argue that CTR&S did not preserve the errors. This argument is plainly wrong.

In fact, CTR&S *did* preserve the errors by lodging an objection to the entry of the June 3, 2010 TRO. Prior to the Judge's signing of that order, counsel for CTR&S, Stuart A. McMillan, hand wrote and signed his objection on the face of the order itself on page 2, which is the page signed by the Judge. The notation clearly states that the order was "objected to and approved as to form only." (See 6/3/10 Order at p.2). The objections to the substantive deficiencies of order were therefore preserved.

Regardless, the deficiencies constitute plain error that would be reviewable by this Court in any event. See Syl. pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995) ("To trigger application of the 'plain error' doctrine there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings."). All of the elements of the plain error doctrine are satisfied here because the Circuit Court made two "errors" that are "plain." The Jockeys do not (and cannot) dispute that an evidentiary hearing was never held, no bond was ever set, nor was the bond requirement expressly waived in any of the orders entered by the Circuit Court. Nor can the Jockeys dispute that these omissions were a direct violation of existing law. The West Virginia Code requires that a bond be set before an injunction may take effect.<sup>4</sup> W.Va. Code § 53-5-9

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<sup>4</sup> "The purpose of an injunction bond is ... to protect persons whose rights are prejudicially affected from loss occasioned by damages or injury." *Pioneer Co. v. Hutchinson*, 220 SE 2d 894 (W.Va. 1975).

(“An injunction ... shall not take effect until bond be given in such penalty as the court or judge awarding it may direct....”); *see also* syl. pt. 2, *State ex rel. Lloyd's Inc. v. Facemire*, 224 W. Va. 558, 687 S.E.2d 341, 344 (2009) (citation omitted) (“An order of injunction is of no legal effect under [W.Va. Code §53-5-9], unless the court requires a bond, or recites in the order that no bond is required for good cause, or unless the movant is a personal representative.”). Likewise, Rule 65(c) of the West Virginia Rules of Civil Procedure states that “[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court in its discretion deems proper....” W.Va. R. Civ. P., Rule 65(c). Rule 52(a) states that “in granting or refusing preliminary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.” W.Va. R. Civ. P., Rule 52(a). All of these statutes, decisions and rules were in effect at the time the TROs were entered, yet the Circuit Court ignored them all. The Circuit Court’s repeated failure to receive evidence, and set or waive the bond in this case is a clear violation of the West Virginia Code, the West Virginia Rules of Civil Procedure, and multiple case authorities. It constitutes “error” that is “plain.”

The remaining two elements of the plain error doctrine are also met because the failure to take evidence and set the bond affects the substantial property rights of CTR&S and seriously affects the fairness, integrity, or public reputation of the judicial proceedings. Therefore, even assuming for purposes of argument that CTR&S’s explicit objection somehow was insufficient to preserve these errors for appellate review, the Court nevertheless must address and correct these clear errors to preserve the integrity of the judicial process.

**D. West Virginia Code § 19-23-17 is Constitutional.**

The Jockeys also argue that West Virginia Code § 19-23-17, which prohibits the Circuit Court from staying the suspension of the Jockeys' permits pending appeal, is unconstitutional. The Circuit Court did not rule that W.Va. Code § 19-23-17 is unconstitutional – it simply ignored it. However, other courts have found that laws of similar effect, including the companion statute, W.Va. Code § 19-23-16 (prohibiting stays pending appeal of Racing Stewards' decisions by the Racing Commission),<sup>5</sup> are consistent with due process.

In *Hubel v. West Virginia Racing Commission*, 376 F. Supp. 1 (S.D.W.Va. 1974), *aff'd by published opinion*, 513 F.2d 240 (4th Cir. 1975), Judge K.K. Hall upheld the constitutionality of a nearly identical statute and corresponding racing commission rule prohibiting stays pending appeal. In *Hubel*, a racehorse trainer challenged the constitutionality of former Racing Commission Rule 804 (now found at 178 C.S.R. § 68.3), which provided that “An appeal from a decision of a racing official to the Racing Commission shall not affect the decision until the Racing Commission has acted upon the appeal.” Noting the Legislature’s plenary power to regulate horse racing, Judge Hall held that this rule did not deny trainers due process of law, but instead represented and constituted a legitimate exercise of the state's police powers. *Hubel*, 376 F. Supp. 1, 4 (S.D.W.Va. 1974). Like the Jockeys in this case, the plaintiffs in *Hubel* argued that the blanket prohibition against stays pending appeal “denie[d] them the opportunity to be heard on the suspensions, render[ed] their statutory right of appeal meaningless, and, therefore, deprive[d] them of their right to pursue their chosen profession in violation of the fourteenth amendment.” *Id.* at 4-5. The court concluded, however, that while

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<sup>5</sup> In the most recent legislative session, the West Virginia Legislature amended W.Va. Code § 19-23-16 to provide a process for seeking a stay pending appeal to the Racing Commission of a decision by the stewards to revoke or suspend a racing permit. See 2011 West Virginia Laws H.B. 2989 (effective June 16, 2011). Importantly, the Legislature *chose not* to amend W.Va. Code § 19-23-17, which contained a similar provision prohibiting stays pending appeal of the Racing Commission decisions.

broad on its face, the rule did not violate due process when read in conjunction with Rule 805, which required a hearing to take place within thirty (30) days of the demand for hearing, writing succinctly: “A thirty-day delay pending a hearing under the West Virginia regulatory scheme does not work a sufficient hardship on plaintiffs to justify invalidating the procedure.” *Hubel*, 376 F. Supp. at 5-6 (footnotes omitted). This decision was appealed to the U.S. Court of Appeals for the Fourth Circuit, and affirmed. In light of Judge Hall’s cogent analysis, the arguments raised by the Jockeys fall flat. *Hubel* dispels the notion that a 30-day suspension served out by a permit holder before his first hearing does not violate due process. Certainly, then, W.Va. Code § 19-23-17’s blanket prohibition against stays *following a full hearing* before the racing commission can pose *no* due process problem.

Brazenly content to inundate this Court with additional fanciful constitutional arguments, the Jockeys also submit that the W.Va. Code § 19-23-17 violates their rights to Equal Protection because it *requires* stays for racing license holders (*i.e.* racing associations) while *prohibiting* stays for racing permit holders (*e.g.* owners, trainers, and jockeys, *etc.*). This argument has no legal support at all.

The Equal Protection Clause of the Fourteenth Amendment and its West Virginia corollary, W.Va. Const. Article III § 10, forbid the state to “deny to any person within its jurisdiction the equal protection of the law.” U.S. Const. amend. XIV; Syl. Pt. 3, *Robertson v. Goldman*, 179 W.Va. 453, 369 S.E.2d 888 (1988) (“The concept of equal protection of the laws is inherent in article three, section ten of the West Virginia Constitution, and the scope and application of this protection is coextensive or broader than that of the fourteenth amendment to the United States Constitution.”) Accordingly, the Equal Protection Clause requires that similarly situated persons should be treated in a like manner. *Spence v. Zimmerman*, 873 F.2d 256, 258

(11th Cir. 1989); *Board of Educ. of County of Kanawha v. West Virginia Bd. of Educ.*, 219 W.Va. 801, 806, 639 S.E.2d 893, 898 (W.Va., 2006) (“equal protection means the State cannot treat similarly situated people differently unless circumstances justify the disparate treatment.”)

In the present case, the statute in question treats differently situated people differently, thus posing no risk of an Equal Protection violation. The state issues racing licenses only to racing associations, which are businesses, while it issues racing permits only to individuals. While the suspension of a racing *permit* affects only one individual (or at most, a handful), a suspension of a racing license affects many thousands of persons because the racing association cannot operate a racetrack without its license. In terms of the revenues at stake, a racing license is substantially more valuable than any individual racing permit. The State of West Virginia has substantial interest in continuing a racing business while an appeal is pending while it has almost no interest in allowing suspended permit holders to continue racing. In fact, the state’s interest is in *preventing* a suspended racing permit holder from racing pending appeal.

As the Fourth Circuit observed in *Hubel*:

The state has at least two substantial interests to be served [in preventing an owner accused of drugging a horse from racing pending appeal of his suspension]. It has a humanitarian interest in protecting the health of the horse, and it has a broader and more weighty interest in protecting the purity of the sport, both from the standpoint of protecting its own substantial revenues derived from taxes on legalized pari-mutuel betting and protecting patrons of the sport from being defrauded. Collectively, these interests, we think, justify the severe penalty of disqualifying a horse that has been drugged, its trainer and perhaps its owner, from further participation in legalized racing until the matter can be heard and determined and an appropriate final sanction formulated.

*Hubel*, 513 F. 2d at 243. For these reasons, the West Virginia Legislature is permitted to distinguish between licensees and permittees and treat them differently without running afoul of Equal Protection.

**E. CTR&S Has Standing to Appeal.**

Finally, the Jockeys argue that CTR&S lacks standing to seek relief for errors committed by the Circuit Court in improperly enjoining its lawful business decisions. Specifically, they claim CTR&S lacks standing to challenge the manner in which the Circuit Court's order ignored the express mandates of W.Va. Code § 19-23-17. This argument is especially disingenuous when one considers that CTR&S did not intervene in this suit, it was dragged in by the Jockeys. They cannot now be heard to argue CTR&S has no standing to challenge the errors committed by the Circuit Court which they invited.

Although it is true that W.Va. Code § 19-23-17 does not address the racing association's right to eject a jockey, it figures prominently into the present case because, had it been followed, no TRO would have been issued.

CTR&S clearly has standing to challenge the Circuit Court's error under the three-factor test set forth in *Guido v. Guido*, 202 W.Va. 192, 202, 503 S.E.2d 511, 515 (1998).

In *Guido*, this Court explained that

Standing ... is comprised of three elements: First, the party must have suffered an "injury-in-fact"--an invasion of a legally protected interest. Second, there must be a causal connection between the injury and the conduct forming the basis of action. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

*Guido v. Guido*, 202 W.Va. 198, 203, 503 S.E.2d 511, 516 (1998) (citations omitted). All three of these elements are met in this case.

First, the Circuit Court inappropriately invaded CTR&S's common law right to exclude undesirable persons from its property by extending its illegal stay of the Racing Commission's order to CTR&S. This "injury-in-fact" continues to interfere with CTR&S's property rights to this day.

Second, because CTR&S is a non-party, the Circuit Court had to establish a causal connection between the conduct of the Racing Commission in enforcing its suspensions and CTR&S's conduct in exercising its right to exclude. It accomplished this by finding, with no supporting evidence, that CTR&S's exclusions were "in active concert or participation" with the Racing Commission. This finding creates a direct causal connection (albeit a false one) between the stay order against the Racing Commission and the TRO against CTR&S. The Circuit Court's violation of W.Va. Code § 19-23-17 paved the way for its invasion of CTR&S's property rights.

The third and final element is satisfied because if this Court finds that § 19-23-17 was violated, the stay will be lifted, the Racing Commission will be permitted to suspend the Jockeys pending their appeal, and CTR&S will be permitted to eject them. CTR&S's rights have been violated by an improper extension of an improper stay order. It therefore has standing to challenge the stay.

For these reasons, the Court should reject the arguments raised by the Jockeys and vacate the TRO against CTR&S.

## **II. RESPONSE TO ARGUMENTS RAISED BY THE WEST VIRGINIA RACING COMMISSION**

In its Response to CTR&S's petition, the Racing Commission suggests the instant case turns on the single question of "[w]ho regulates thoroughbred racing in the State of West Virginia[,]" as if CTR&S's lawful exercise of a common law right – one preserved by West Virginia law – somehow encroaches upon the exclusive regulatory authority of this state agency. Although the Racing Commission's dramatic characterization may grab the reader's attention, it cannot overcome one simple truth: CTR&S has a well-established common law right to exclude undesirable persons (including permit holders) from its premises.

Essentially, the Racing Commission attempts to relitigate *PNGI Charles Town Gaming, LLC v. West Virginia Racing Commission, et al.*, Civil Action No. 09-MISC-106 (King, J.), in which it argued that it should be given the ultimate authority to decide whether a permit holder can race at any particular racetrack over the racing association's objection, an argument that was considered and rejected by this Court by a 5-0 vote on April 5, 2010. *See PNGI Charles Town Gaming, LLC v. West Virginia Racing Commission, et al.*, W.Va. Supreme Court Appeal No. 10098, *cert denied* April 5, 2010.<sup>6</sup> Because no published opinion was issued, the Racing Commission has reasserted its arguments in this case.

As a starting point, the Court will note that the Racing Commission does not maintain that CTR&S has no common law right to exclude these Jockeys or any other undesirable persons from its grounds. Instead, they ask the Court to "render a decision that the racetrack's right of ejection is not unfettered and that it must yield to the orders of the Racing Commission in cases involving persons who hold valid Commission-issued occupational permits." (Racing Commission Resp. Br. at 13). The Racing Commission's nuanced position presented for the first time on appeal – that it should maintain *some* undefined "authority" to review or override CTR&S's ejections – was never developed before the Circuit Court in this case. It does not explain what it means by this, but it implies that it wants the Court to create

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<sup>6</sup> See <[http://www.state.wv.us/wvsca/calendar/april1\\_10r.htm](http://www.state.wv.us/wvsca/calendar/april1_10r.htm)> at paragraph 14:

**14. PGNI [sic] Charles Town Gaming, LLC v. West Virginia Racing Commission, Chairman Fred C. Peddicord, Chairman of the West Virginia Racing Commission, and Richard C. Watson, Janene Watson and Patty A. Burns, Intervenor** - No. 100098. The West Virginia Racing Association appeals the Circuit Court's order granting a petition for prohibition filed by PGNI Charles Town Gaming, LLC d/b/a Charles Town Races & Slots. The Court prohibited the Commission from conducting hearings on the ejection decisions of racing associations, including the Charles Town Races & Slots, concluding that the Commission lacks the authority to unilaterally reinstate an ejected permit holder over the objection of a racing association. **Refuse 5-0**

some form of hearing process allowing it to review and override the decisions of CTR&S's management to eject a permit holder from its grounds.

The Racing Commission's request must be rejected because it asks this Court to grant to the Commission a power the Legislature has never given it – the power to force a private business to admit undesirable persons on its property to conduct their business simply because they hold a valid racing permit.

**A. Overview**

As briefed extensively in the Petition for Appeal, *see* Petition, pp. 19-24, the common-law right of a private property owner to exclude others is fundamental and must be protected by the courts. CTR&S possesses this right – an undisputed right founded in the common law of this State and specifically codified in the statutes which created the West Virginia Racing Commission. Certainly, limitations on this common law right exist: an exclusion or ejection cannot be for illegal discriminatory reasons; in such a case, an aggrieved individual may seek redress in a court of competent jurisdiction. That scenario, however, is not, and has never been, applicable here.

The Racing Commission now asks this Court to anoint it final arbiter of who CTR&S, or any other private racing association, may or may not eject from its business premises. The West Virginia Legislature explicitly prohibits the Racing Commission from interfering in the internal business operations of racing associations. *See* W.Va. Code § 19-23-6 (“The Racing Commission shall not interfere in the internal business or internal affairs of any licensee.”). Deciding who should be excluded from its property is one of those internal business decisions. This Court should once again reject the expansion of the Racing Commission's powers at the expense of fundamental private property rights.

**B. Racing Associations Have a Common Law Right to Exclude or Eject That Has Not Been Abrogated by Statute.**

“The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.” *Lorreto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *Kaiser Aetna v. U.S.*, 444 U.S. 164, 176 (1979). Proprietors of private enterprises, such as CTR&S, possess this right. In the context of racing specifically, the common law right of racetracks to exclude patrons has been recognized for over one hundred fifty years. *See, Wood v. Leadbitter* (Ex. 1845), 153 Eng. Rep. 351. American courts have followed *Wood* since the beginning of the last century. *See, Marrone v. Washington Jockey Club*, 227 U.S. 633 (1913) (Holmes, J.). In *Marrone*, the United States Supreme Court, citing *Wood*, held that track management had the right to exclude a patron suspected of “doping” a horse he entered in a previous race. *Id.* at 636.

Since *Marrone*, courts have recognized the right of a racetrack to exclude unwanted patrons. *James v. Churchill Downs, Inc.*, 620 S.W.2d 323 (Ky. Ct. App. 1981); *Greenfield v. Maryland Jockey Club of Baltimore*, 57 A.2d 335 (Md. 1948); *Garfine v. Monmouth Park Jockey Club*, 148 A.2d 1 (N.J. 1959); *Madden v. Queens County Jockey Club*, 72 N.E.2d 697 (N.Y. 1947), *cert. denied*, 332 U.S. 761 (1947). Thus, proprietors of private places of amusement, such as racing associations, have the right to exclude unwanted patrons from their property, so long as the exclusion is not based upon race, creed, national origin or other protected classification.

The common law principle established in *Wood* and *Marrone* is not limited to the exclusion of patrons; rather, it applies equally to the exclusion of licensees or permit-holders by racetracks. *Hedges v. Yonkers Racing Corp.*, 918 F.2d 1079, 1083-84 (2<sup>nd</sup> Cir. 1990); *Martin v. Monmouth Park Jockey Club*, 145 F. Supp. 439, 441 (D. N.J. 1956); *Calder Race Course, Inc. v.*

*Gaitan*, 393 So.2d 15, 16 (Fla. Dist. Ct. App. 1980) (holding that “[u]ntil the Florida Legislature acts or private racing establishments disparage constitutionally guaranteed rights, they continue to have the right to choose those persons with whom they wish to do business”); *Hughes v. Kentucky Horse Racing Auth.*, 179 S.W.3d 865, 868, fn. 8 (Ky. Ct. App. 2004) (holding that the Kentucky Revised Code, in 810 K.A.R. 1:025, Section 7, recognizes “the independent ‘common law right of associations to eject or exclude persons, licensed or unlicensed, from association grounds”); *Marzocca v. Ferone*, 461 A.2d 1133, 1137 (N.J. 1983) (holding that “the racetrack’s common law right to exclude exists in the context of this case, i.e., where ‘the relationship [is] between the track management and persons who wish to perform their vocational activities on the track premises”); *Arone v. Sullivan Cty. Harness Racing Ass’n, Inc.*, 457 N.Y.S.2d 958, 959 (N.Y. App. Div. 1982) (holding that “defendant had available to it the long-recognized prerogative of racetrack operators to exclude anyone from its track, without cause, provided the exclusion is not based on race, creed, color or national origin”); *Bresnik v. Beulah Park Limited Partnership, Inc.*, 617 N.E.2d 1096, 1098 (Ohio 1993) (recognizing common law right of proprietor of racetrack to exclude licensed jockey agent from its racetrack).

If the Legislature had intended to abrogate this common law right of ejectment it would have been required to do so in language that explicitly expresses such an intention – a standard not met by the statutes and rules at issue. Under West Virginia law, “[t]he common law, if not repugnant of the Constitution of this State, continues as the law of this State unless it is altered or changed by the Legislature.” *Seagraves v. Legg*, 127 S.E.2d 605, Syl. Pt. 3 (W. Va. 1962). Moreover, “it has been repeatedly held in this state that under the provisions of Article VIII, Section 21, of the Constitution of the State of West Virginia, and [West Virginia Code Section] 2-1-1, the common law prevails unless changed by statute.” *Id.* at 608. In determining

whether the common law has been changed by statute, this Court has held that “[i]f the Legislature intends to alter or supersede the common law, it must do so clearly and without equivocation.” *State ex rel. Van Nguyen v. Berger*, 483 S.E.2d 71, 75 (W. Va. 1997); *see, Burch v. Nedpower Mount Storm, LLC*, 647 S.E.2d 879, 887 (W. Va. 2007) (holding that “[i]n determining the meaning of a statute, it will be presumed, in the absence of words therein, specifically indicating the contrary, that the legislature did not intend to innovate upon, unsettle, disregard, alter or violate . . . the common law”); *Seagraves v. Legg*, 127 S.E.2d 605, 608-09 (W. Va. 1962); *Shifflette v. Lilly*, 43 S.E.2d 289, 293 (W. Va. 1947).

Thus, if the Legislature intended to change the historic common law rule so as to deprive a racing association of the ultimate decision regarding who is permitted to enter its business premises, it must have drafted the legislation with language that explicitly expresses that intent. *See, State ex rel. Van Nguyen v. Berger*, 483 S.E.2d 71, 75 (W. Va. 1997). The Legislature has not done so here.

Indeed, the Racing Commission cannot point to a single statutory or regulatory provision that expressly abrogates this common law right. To the contrary, the language of W. Va. Code § 19-23-6 and W. Va. C.S.R. § 178-1-4.7 (2007) evinces the Legislature’s intent to *preserve* the common law right of ejectment. W. Va. Code § 19-23-6 bestows upon the Racing Commission broad authority to regulate thoroughbred racing by granting “plenary power and authority” to undertake the eighteen (18) specifically enumerated responsibilities. Critically, not a single one of these 18 duties includes the authority to oversee, regulate, or review ejectment decisions made by a racing association. Moreover, even this plenary grant of authority is qualified by the flush language appearing at the end of section 19-23-6 that reserves internal business decisions to the racing associations: “The racing commission shall not interfere in the

internal business or internal affairs of any licensee.” *Id.* Surely, the statutory freedom to govern one’s own business affairs and control one’s own property includes the ability to eject those whose very presence undermines the legitimacy of the association’s business operations. But again, we need not speculate, for if the Legislature had intended to abrogate this common law right, it would have done so explicitly.

Similarly, the provisions of Rule 4.7 of the Thoroughbred Racing Rules reinforce the continuing existence of the common law right to eject, as well as the Commission’s own lack of authority to reinstate an ejected permit-holder over the objection of an association:

*Any person ejected by the stewards or the association from the grounds of an association shall be denied admission to the grounds until permission for his or her reentry has been obtained from the association and the Racing Commission.*

W. Va. C.S.R. § 178-1-4.7 (2007) (emphasis added).<sup>7</sup> As the foregoing language provides, an ejected permit-holder shall be denied admission until reinstated by both the racing association and the Racing Commission – an outcome consistent with the common law right retained by CTR&S.

Despite similar provisions and court decisions in dozens of jurisdictions, the Racing Commission instead relies on the untenable minority position stated in *Wolf v. Louisiana State Racing Commission*, 545 So.2d 976 (La. 1989) to support its argument that the common law right of ejectment has been abrogated. (See Racing Commission Resp. Br. at 9-10). However, *Wolf* only underscores the legislative specificity necessary to abrogate the common

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<sup>7</sup> The Court should note the practical differences between an ejection by the stewards and an ejection by a racing association. When the stewards rule someone off the premises, that ruling is honored by most every other jurisdiction. So, if a jockey is ejected from CTR&S by the CTR&S Stewards, he will not be allowed to ride in Maryland. But, if the same jockey is ejected only by the management of the racetrack and not the stewards, he is not automatically precluded from racing at another track (in West Virginia or elsewhere). Plaintiff Alexis Rios-Conde is a good example. Mr. Rios-Conde was arrested and charged with armed robbery, and was ejected by CTR&S management from its property. However, since his ejection from CTR&S, Mr. Rios-Conde has ridden as a jockey in Maryland.

law right to eject. Recognizing the common law right to eject rested with private racetracks and not the Racing Commission, the Louisiana Legislature enacted Louisiana Revised Statute 4:193(C). *Wolf*, 545 So.2d at 979. Section 4:193(C) provides that “[n]o permittee in good standing shall be denied access to or racing privileges at any racing facility except in accordance with the rules of the Louisiana State Racing Commission.” *L.S.A. R.S. 4:193(C)* (West 2010). Based upon this specific and deliberate change, which was made one year after the original Louisiana Racing Commission statutory scheme was enacted, the Supreme Court of Louisiana held that ejection of permit-holders in Louisiana may only be accomplished in accordance with the hearing provisions set forth in Section 192.8 *Wolf*, 545 So.2d at 979-80. In other words, the *Wolf* Court held that the enactment of Section 4:193(C) one year after the original enactment, which reserved racing associations’ proprietary rights, indicated that the Louisiana Legislature intended to abrogate private racing associations’ common law, or proprietary, right to eject permit-holders by subjecting ejection decisions to the review procedures set forth in Section 4:192.

Statutes and regulations from other jurisdictions provide similar examples of the level of specificity required to abrogate private racing associations’ common law right to eject. *See e.g.*, 230 Ill. Comp. Stat. 5/9(e) (“The power to eject or exclude an occupation licensee or other individual may be exercised for just cause by the licensee or the Board, subject to subsequent hearing by the Board as to the propriety of said exclusion.”); Mass. Gen. Laws ch.

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<sup>8</sup> Section 192(A) provides that “[t]he person excluded or ejected may demand a public administrative hearing by giving to the commission written notice of his exclusion or ejection within ten calendar days after its occurrence . . .” *L.S.A. R.S. 4:192(A)* (West 2010). Section 192(b) then declares that “[t]he commission, upon the evidence received at the hearing and the merits of the testimony, shall determine whether the person was lawfully excluded or ejected in accordance with its rules and regulations provided for in R.S. 4:193, and shall enter its decision in its record of official proceedings.” *L.S.A. R.S. 4:193(B)*. Finally, Section 4:192(B) also provides that “[i]t shall be the responsibility of the owner or officer to show that the person was excluded or ejected in accordance with such rules and regulations.” *Id.*

128A, § 10A (recognizing right of tracks to refuse admission or eject, but expressly providing that such decision is subject to appeal to regulatory commission). By contrast, the West Virginia Legislature has not abrogated the common law right to eject because the language of the statutes and rules does not clearly and without equivocation express the Legislature's intent to do so.

To demonstrate the folly of the Racing Commission's argument, consider the fact that its urging for a judicially-created administrative review process would grant a right of appeal not only to horse owners, trainers and jockeys, but also to every employee of a racing association. Under Thoroughbred Racing Rule 43.1, virtually every individual working for or performing services at a West Virginia racetrack must obtain an occupational permit from the Racing Commission.<sup>9</sup> These permit-holders include owners,<sup>10</sup> trainers,<sup>11</sup> jockeys,<sup>12</sup> employees of the racing association,<sup>13</sup> concessionaires,<sup>14</sup> tip sheet vendors,<sup>15</sup> blacksmiths,<sup>16</sup> jockey agents<sup>17</sup> and photographers.<sup>18</sup> Therefore, a finding that the Racing Commission is empowered to take such actions applies not only to owners, trainers and jockeys, but to all permit-holders, including all employees of racing associations.

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<sup>9</sup> Rule 43.1 provides that "[a]ny person who is involved in or employed by those involved in racing or operating a licensed racetrack or those operating concessions for or under authority from any association, shall have a valid occupational permit issued by the Racing Commission, unless otherwise specifically exempt from this requirement." *W. Va. C.S.R. § 178-1-43.1* (2007).

<sup>10</sup> *See, W. Va. C.S.R. § 178-1-49* (2007).

<sup>11</sup> *Id.*

<sup>12</sup> *See, W. Va. C.S.R. § 178-1-45* (2007).

<sup>13</sup> *See, W. Va. C.S.R. § 178-1-43.1* (2007).

<sup>14</sup> *Id.*

<sup>15</sup> *See, W. Va. C.S.R. § 178-1-44* (2007).

<sup>16</sup> *See, W. Va. C.S.R. § 178-1-48* (2007).

<sup>17</sup> *See, W. Va. C.S.R. § 178-1-46* (2007).

<sup>18</sup> *See, W. Va. C.S.R. § 178-1-32* (2007).

The underlying case presents a perfect example of the absurdity of the Racing Commission's request. In the present case, Michael Garrison, the Clerk of Scales who conducted the largely uncontroverted sham weighouts of these Jockeys, was *terminated* for his role and immediately excluded from the grounds. Because he was also an occupational permit holder, the Racing Commission contends that it and not CTR&S should have the ultimate authority over whether Garrison should be permitted to re-enter the grounds, gain reinstatement as an employee, and carry out his occupation as Clerk of Scales. This would be an absolutely absurd result, but one that would be possible under the paradigm advanced by the Racing Commission. This example only lends support to the proposition that ejection decisions involve a racing association's internal business or internal affairs. Accordingly, the Racing Commission should be prohibited from interfering in CTRS's internal business or internal affairs by conducting hearings on the propriety of CTRS's decision to eject permit-holders from its business premises.

**C. The Ejection of Permit-holders Does Not Implicate Due Process.**

Additionally, the Racing Commission asserts (practically in passing, with little legal authority) that the Jockeys possess a property interest in their occupational permits sufficient to confer due process protections; as such, the Commission insists that the ejection of a valid permit-holder effectively usurps the State's regulatory power. Response, p. 9. However, a permit-holder does not have a legitimate claim of entitlement to enter horses at a private racing association's racetrack – the permit-holder has, at best, a unilateral expectation. Arguably, as a result of the Commission's granting of an occupational permit, the permit-holder has an interest in racing horses in the State of West Virginia, but not at any particular racetrack.<sup>19</sup> The property

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<sup>19</sup> The Racing Commission argues in its Response Brief that CTR&S is a "quasi-monopoly" because it is one of only two tracks in the State of West Virginia. (Racing Commission Resp. Br. at 11-12). CTR&S denies that

interest claimed by an ejected permit-holder, properly characterized, is an interest in racing his horses at a particular racing association's racetrack – not an interest in racing horses in the state generally.

As such, an ejected permit-holder can demonstrate no more than an abstract need or desire for this property interest. The permit-holder can point to no legitimate claim of entitlement to race horses at an individual racetrack. The Horse and Dog Racing Act and Thoroughbred Racing Rules are extensive and give the Racing Commission substantial powers. Under those laws, the Racing Commission has the power to deny, revoke or suspend a permit issued to an individual or to eject a permit-holder from the racetrack premises. However, as previously indicated, none of these statutes or rules provides, or even implies, that the right of the Racing Commission to revoke permits or eject permit-holders in any way limits or otherwise affects the common law right of the racing association to eject permit-holders from its premises.

Similarly, nowhere do the Thoroughbred Racing Rules or the West Virginia Code provide that racing associations must accept all horse entries from permit-holders. The fact that an individual is licensed by the Racing Commission conveys no automatic right of admission to an individual racing association's facilities. *Hedges v. Yonkers Racing Corp.*, 918 F.2d 1079 (2<sup>nd</sup> Cir. 1990); *Martin v. Monmouth Park Jockey Club*, 145 F. Supp. 439, 440 (D. N.J. 1956), *aff'd per curiam*, 242 F.2d 344 (3<sup>rd</sup> Cir. 1957). In other words, a permit issued by the Racing Commission does not convert a mere privilege of access to a private racetrack into a legally enforceable right to compel a racetrack to grant that privilege.

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it is a "quasi-monopoly," and further submits that the record below is insufficient to examine this issue on appeal because the Racing Commission failed to raise the argument below. Had the evidence been developed, it would have shown that in addition to Mountaineer Race Track, numerous tracks in Pennsylvania, Delaware and Maryland are within a few hours' drive of CTR&S. In fact, many of the Jockeys in this case testified before the Racing Commission that they race at these out of state racetracks. Their racing permits entitle them to reciprocity in other states. Therefore, CTR&S is not a monopoly or quasi-monopoly.

Nor is there any understanding that the granting of an occupational permit by the Commission creates the absolute right to enter one's horses into races held by a racing association. To the contrary, the Thoroughbred Racing Rules, in Rule 4.7 and 39.1, grant racing associations the right to eject permit-holders from their premises and prevent such permit-holders from entering horses in races at their racetracks. Therefore, an ejected permit-holder has no reasonable claim of entitlement to the absolute right to race horses at whatever racetrack she chooses. As a result, there can be no substantive due process violation when a permit-holder is ejected.

### **III. CONCLUSION AND RELIEF REQUESTED**

The importance of fairness, transparency and honesty in horse racing is of critical importance to CTR&S and to the State of West Virginia. If CTR&S is viewed as condoning cheating or corrupt practices, it will lose the trust of the wagering public and its reputation will be damaged. If the wagering public cannot trust that the races are conducted in a fair and transparent fashion, they will place their bets elsewhere, and all racing constituents will be adversely impacted. CTR&S's standards are established in the exercise of its independent business judgment that is not dependent upon nor subject to the approval of the Racing Commission. In fact, the Racing Commission is prohibited from interfering with CTR&S's internal business operations, including its decisions regarding exclusions. W. Va. Code § 19-23-6 (West 2009) ("The racing commission shall not interfere in the internal business or internal affairs of any licensee.")

CTR&S regards the Jockeys' corrupt practices as detrimental to the best interests of racing, and the Jockeys' continued presence and engagement in racing activities at its race track impugns the integrity of racing. Forcing CTR&S to allow these Jockeys to race while the

Jockeys spend years exhausting their appeals harms CTR&S's business and violates the standards CTR&S has established for the integrity of the sport at its property.

ACCORDINGLY, PNGI Charles Town Gaming, LLC requests that this Court vacate the injunction entered by the Circuit Court of Kanawha County.

**Respectfully Submitted,**

**PNGI Charles Town Gaming, LLC**  
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**PNGI CHARLES TOWN GAMING, LLC,  
D/B/A CHARLES TOWN RACES AND SLOTS,  
Petitioner,**

v.

**LAWRENCE REYNOLDS,  
ANTHONY MAWING,  
ALEXIS RIOS-CONDE, JESUS SANCHEZ,  
DALE WHITTAKER, LUIS PEREZ. and  
TONY A. MARAGH,  
Petitioners Below, Respondents,**

and

No.: 101503

**THE WEST VIRGINIA RACING  
COMMISSION,  
Respondent Below, Respondent,**

**CERTIFICATE OF SERVICE**

I, Stuart A. McMillan, do hereby certify that a true and exact copy of the foregoing **Supplemental Brief of Appellant PNGI Charles Town Gaming, LLC** was hand delivered to the West Virginia Supreme Court Clerk and served to counsel by depositing the same postage prepaid in the United States Mail, this 4th day of May, 2011, addressed as follows:

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