

NO. 101503 ✓

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

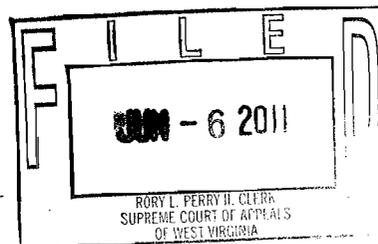
v.

PLEADING FILED  
WITH MOTION

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

and

WEST VIRGINIA RACING COMMISSION  
Respondent Below, Respondents



and

THE NATIONAL HBPB, INC. (NHBPA), CHARLES TOWN HORSEMEN'S BENEVOLENT  
& PROTECTIVE ASSOCIATION (CTHBPA), AND MOUNTAINEER PARK HORSEMEN'S  
BENEVOLENT & PROTECTIVE ASSOCIATION (MPHBPA)  
Amici

**JOINT *AMICUS CURIAE* BRIEF  
ON BEHALF OF NHBPA, CTHBPA, AND MPHBPA  
IN SUPPORT OF AFFIRMANCE FOR RESPONDENTS**

9/20/11  
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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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## STATEMENT CONCERNING AMICUS CURIAE

Amici include: The National H.B.P.A., Inc., (*i.e.*, the National Horsemen's Benevolent & Protective Association, hereafter "NHBPA"), a national affiliation of local H.B.P.A. affiliates; the Charles Town Horsemen's Benevolent & Protective Association, Inc. ("CTHBPA"); and the Mountaineer Park Horsemen's Benevolent & Protective Association, Inc. ("MPHBPA").<sup>1</sup> The HBPA's are non-profit trade associations of owners and trainers of thoroughbred racehorses. Among other things, the HBPA's provide benevolence and charitable services for personnel involved in the owning, raising, and training of racehorses and for racetrack-backside personnel, including grooms and exercise riders, all of whom work in the West Virginia horseracing industry. The local HBPA amici – *i.e.*, the CTHBPA and MPHBPA – also function as the "horsemen's groups" and "authorized representatives" of owners and trainers for purposes of collective negotiations with racetracks concerning the sale and receipt of interstate simulcasts of horseracing accompanied by off-track wagering rights under the Interstate Horseracing Act of 1978 (15 U.S.C. § 3001 *et seq.*) and the West Virginia Horse and Dog Racing Act (W. Va. Code § 19-23-12a). *See, e.g.*, 15 U.S.C. § 3002(12) (defining "horsemen's group"); W. Va. Code § 19-23-12a(1) (referring to the "authorized representative of a majority of owners and trainers who hold ... [occupational] permit[s]").

Amici's motion for leave to file an amicus curiae brief sets forth amici's interest in the case. At issue in this appeal is the scope of Respondent West Virginia Racing Commission's jurisdiction over horseracing. State law confers upon the Racing Commission "plenary power

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<sup>1</sup> Pursuant to Rule 30(e)(5) of the Revised Rules of Appellate Procedure, amici NHBPA, CTHBPA and MPHBPA hereby jointly certify that no party and no counsel for any party funded or authored, in whole or in part, this brief. Amici have nothing to disclose in the way of funding, connection to, etc. with any of the parties to this appeal. Amici are wholly independent organizations, whose legal representation is self-funded. Co-counsel for amici, Douglas L. McSwain, is the General Counsel for the NHBPA, and on occasion, acts as special counsel to the CTHBPA and the MPHBPA.

and authority.” W. Va. Code §19-23-6. Petitioner PNGI Charles Town Racing & Slots (“CTRS”) is a “racing association” licensed and regulated by the Racing Commission under West Virginia Code §19-23-1(a), but CTRS claims to have an independent power to eject jockeys that is not subject to review by the Racing Commission, or as postured in this case, even by the courts, based upon common law property rights. The dispute before this Court, of significance to these amici, is whether an unchecked ejection power by racing associations is incompatible with the Racing Commission’s “plenary power and authority” over horseracing, especially when racing associations use their purported power against other racing participants.

Horse owners and trainers, both nationally and in West Virginia, are interested in this appeal because they are similarly situated to the jockeys. Like jockeys, owners and trainers are integral participants in horseracing. Indeed, excluding owners and trainers has more severe industry consequences because their racehorses are excluded as well. 178 W. Va. C.S.R. 1, § 39.1.<sup>2</sup> Owners and trainers must, like jockeys, obtain occupational permits from the Racing Commission to ply their trade. W. Va. Code § 19-23-2(a). As such, the Racing Commission has clear jurisdiction over them and their ability to participate (or not) in horseracing competitions. In these respects, jockeys, owners, and trainers are distinct from racetrack patrons who are not involved in racing competitions and who do not need permits. Furthermore, jockeys, owners, and trainers are independent contractors within the racing industry, and as such, they make decisions regarding racing and the industry for themselves apart from, and not accountable to, racing associations. In this last respect, jockeys, owners, and trainers are also distinct from racetrack employees, most of whom have occupational permits.

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<sup>2</sup> The Racing Commission’s rules and regulations, 178 W. Va. C.S.R. 1 *et seq.* (hereinafter “Thoroughbred Racing Rule” or “Rule”) have been amended and new, renumbered rules will take effect July 10, 2011. New Rule 6.3 corresponds to current Rule 39.1. Citations to the current rules include a parenthetical with the corresponding new rule number when applicable.

An unchecked power by racing associations to eject or exclude jockeys, owners, or trainers crosses into the Racing Commission's clear "plenary" jurisdiction over horseracing and transfers dual control over all racing participants to racetracks. This control acquired by racetracks through ejection powers diminishes, indeed negates, the ability of jockeys, owners, or trainers to make independent decisions about horseracing. And dual control by racetracks poses significant barriers and risks because CTRS urges an *absolute* ejection or exclusionary power, unreviewable by (and thus, unanswerable to) the West Virginia Racing Commission. If CTRS' purported power is recognized, jockeys, owners, and trainers would have no procedural safeguards, standards, or oversight against arbitrary or capricious decision-making by racetracks regarding their livelihood and trade. Furthermore, the "plenary power and authority" over horseracing (and the pari-mutuel wagering thereon) intended, by statute, to reside in the Racing Commission is circumvented. These interests and concerns prompt this brief by these amici.

A motion for leave to file an amicus curiae brief has been submitted herewith. Amici accordingly file this brief pursuant to the authority under Rule 30 of the Revised Rules of Appellate Procedure.

### **BACKGROUND AND HISTORY OF EXCLUSION ISSUE**

The Racing Commission's prior brief already sets out, in detail, the factual background and procedural history underlying the instant appeal and it is incorporated herein by reference. To frame the dispute, amici summarize only the key background facts. In addition, the instant appeal follows an earlier case touching upon the same ejection and exclusion power. And there are ongoing incidents involving CTRS's disputed ejection power. Amici's background summary also notes the prior case and the more recent incidents (with supporting documentation included in the Appendix pursuant to Rule 30 of the Revised Rules of Appellate Procedure).

In March 2009, seven jockeys and the Clerk of Scales at CTRS were suspected of violating weigh-out and weigh-in procedures.<sup>3</sup> The jockeys subsequently received notices to appear before the stewards assigned to CTRS. At the proceeding, the jockeys received notice of the charges, were confronted with evidence, and had an opportunity to respond. When the hearing ended, the stewards fined the jockeys \$1,000 each and suspended their occupational permits for 30 days. Immediately following the stewards' rulings, CTRS issued separate 30-day ejection notices to the jockeys.

Under state law, the rulings by the stewards were subject to appeal and *de novo* review by the Racing Commission. 178 W. Va. C.S.R. 1, § 68.2. In this case, the jockeys properly exercised their appeal rights. The jockeys also filed a separate civil action in Kanawha Circuit Court alleging due process violations and requesting the Court to stay the rulings by the stewards pending appeal. Hon. L.D. Egnor, Jr. granted the stay and issued a temporary restraining order ("TRO") suspending the penalties by the stewards pending appeal and *de novo* review by the Racing Commission.

CTRS, however, refused to honor the TRO respecting its separate 30-day ejection notices. Based on common law property rights, CRTS asserted an independent power to eject any person (including permit holders, such as jockeys, who are within the Racing Commission's clear jurisdiction) from its racetrack.<sup>4</sup> The issue went back before Judge Egnor for resolution. Judge Egnor ordered CTRS to comply with the TRO because independent ejections by CTRS

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<sup>3</sup> The Thoroughbred Racing Rules assign weights to be carried by racehorses during races. To monitor the weight requirements, jockeys must "weigh-out" before the race and "weigh-in" after the race. 178 W. Va. C.S.R. 1, §§ 63 & 64 (new Rule 45.5). The Clerk of Scales is a racing official employed by the racetrack to conduct weigh-outs. 178 W. Va. C.S.R. 1, §17 (new Rule 13).

<sup>4</sup> The power to eject is synonymous with the power to exclude.

would nullify and frustrate the Court's TRO protecting the jockeys' right to have the charges and penalties heard by the Racing Commission.

During five days in August and September 2009, the jockeys received an in-depth hearing regarding the charges. An appointed hearing officer issued a recommended decision in April 2010 upholding the fines and 30-day suspensions originally imposed by the stewards. The Racing Commission issued a final order in May 2010 adopting, in relevant part, the recommended decision. In accordance with state law, the jockeys exercised their right to further appeal the agency's final order to circuit court. The jockeys requested another stay pending such further appeal. Conversely, CTRS reasserted its purported common law property right to eject the jockeys independent of the Racing Commission's broad jurisdiction and powers over horseracing and horseracing participants, including racing associations and jockeys. Incorporating by reference Judge Egnor's prior ruling, Hon. Paul Zakaib, Jr. granted the stay and the ordered CTRS to comply. CTRS subsequently petitioned this Court to hear the dispute, which was granted.

The same exclusion issue was also presented in *PNGI Charles Town Races & Slots, LLC v. West Virginia Racing Commission, et al.* No. 100098, but the Court did not accept this earlier case for review. These amici do not intend to relitigate *PNGI*, but amici note that case's posture and outcome because the case touches upon the current appeal.<sup>5</sup> The petition for appeal in *PNGI* is referenced in the instant appeal in CTRS' "Petition for Appeal" at p. 5, in its "Supplemental Brief" at p. 12, and in the Racing Commission's "Response" at p. 3.

In *PNGI*, CTRS excluded three owners and trainers (Richard and Janene Watson, and Patty Burns). The West Virginia Racing Commission granted their requests for review (*i.e.*,

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<sup>5</sup> In *PNGI*, counsel for amici herein represented the three owners and trainers litigating against CTRS and these amici financially supported that litigation.

appeal) under Rule 4.7 of the rules of racing (178 W. Va. C.S.R. 1, § 4.7 (new Rule 6.1)), because they alleged that CTRS was “arbitrarily” and “indefinitely” excluding them and their racehorses, effectively precluding them from participating in racing despite possessing occupational permits duly and properly issued by the Racing Commission. After hearing arguments by CTRS and these three excluded owners and trainers, the Racing Commission determined it had jurisdiction to hear their appeals and to review their ongoing exclusions. CTRS, however, filed a civil action in Kanawha Circuit Court to block the Racing Commission’s hearing and review process. Hon. Charles E. King subsequently issued a writ prohibiting the Racing Commission from holding a hearing or reviewing their exclusions. That writ was founded upon rationale embodied in an Order drafted by attorneys for CTRS. *See PNGI Charles Town Races & Slots, LLC v. West Virginia Racing Commission, et al.* No. 09-MISC-106 (Kanawha Circuit Court Sept. 24, 2009)(order granting writ of prohibition)(copy attached in Amici Apdx. at Tab 1, pp. 1-18). Judge King’s writ was left intact because this Court declined accepting the Racing Commission’s and the owners’ and trainers’ petitions for appeal. *See PNGI Charles Town Races & Slots, LLC v. West Virginia Racing Commission, et al.* No. 100098, *cert denied* (W. Va. April 5, 2010).

Unlike Judges Egnor and Zakaib, Judge King overlooked how CTRS’ continuing exclusion of these three owners and trainers frustrates and nullifies the Racing Commission’s broad power to provide licensed (*i.e.*, occupationally “permitted”) horseracing participants a meaningful right of review and appeal from their dispute with another licensee of the Commission, the racing association. Perhaps the issue was less perceptible in *PNGI*. In this case, however, the dueling suspensions (by the Racing Commission) and ejections (by CTRS) clearly reveal the tension and incompatibility. The Legislature granted, by *statute*, “plenary power and

authority’ over horseracing participants to the Racing Commission (which is mandated by law to act in the “best interests” of horseracing), but if racing associations have independent and unreviewable ejection and exclusion powers, *de facto* control over all racing participants is transferred to racetracks (who are free to act in their “self-interest”).

*De facto* control by unaccountable racing associations compromises the fair and orderly operation of horseracing. And the danger of abuse is real. For example, just this past March, 2011, CTRS “indefinitely” ejected Carlos Castro for concealing “hand weights” in his pants at weigh-out. *See* Castro “Notice of Indefinite Ejection” (copy attached in Amici Apx. at Tab 2, p. 19); Castro “Notice of Hearing” (copy attached in Amici Apx. at Tab 3, pp. 20-21). The ejection purportedly was to protect the image and integrity of CTRS. Yet, Christian Santiago Reyes committed the same infraction (concealing weights in his pants) in California in September 2010, but Reyes rode in the first graded stakes race at CTRS in its 77-year operation. *See* BloodHorse.com Article “Jock Reyes Suspended 30 Days” (copy attached in Amici Apx. at Tab 4, p. 22.); Program for Grade III stakes race at CTRS (showing Reyes on horse number 4)(copy attached in Amici Apx. at Tab 5, p. 23).

The disparate treatment between Castro and Reyes is inexplicable because the racetrack’s first ever graded stakes race should have received more scrutiny – not less – if image and integrity were indeed the racetrack’s motivation for ejection. This example underscores the potential for abuse by a racing association that exercises arbitrary or capricious power to eject. Likewise, in the prior *PNGI* case, two of the excluded owners and trainers (the Watsons) were never disciplined for any wrongdoing by the Racing Commission, never harmed CTRS financially, and were long forgiven by, and made amends with the CTHBPA, their employer; yet, CTRS has continuously excluded them for well over 5 years (and apparently permanently).

Requiring a racetrack to justify apparent arbitrary action against duly permitted racing participants who may appeal to the Racing Commission for review would not seem too much.

For the reasons stated below, amici urge the Court to follow the law of West Virginia and commit final decision-making and control over horseracing to the Racing Commission consistent with Legislature's intent in West Virginia Code § 19-23.

### ARGUMENT

**A. Ejections of permit holders by racing associations are subject to review by the Racing Commission.**

Horseracing, in connection with purses and pari-mutuel wagering, is unlawful unless a racing association “possesses a license therefor from the West Virginia racing commission and complies with the provisions of this article and all reasonable rules and regulations of such racing commission.” W. Va. Code § 19-23-1(a). Pursuant to West Virginia Code § 19-23-6, the Legislature granted the Racing Commission “full jurisdiction” over “all horse race meetings” and “all persons involved in the holding or conducting of horse or dog race meetings.” *Id.* The Racing Commission accordingly has “plenary power and authority” to “promulgate reasonable rules and regulations implementing and making effective the provisions of this article and the powers and authority conferred and the duties imposed upon the racing commission under the provisions of this article.” W. Va. Code § 19-23-6(3). Indeed, the Legislature has even endowed the Commission with “plenary power” to do or take such actions as it may deem “necessary and proper” to regulate and control horseracing and effectuate its rules and regulations: “***To take any other action*** that may be reasonable or appropriate to effectuate the provisions of this article and its reasonable rules and regulations.” W. Va. Code § 19-23-6(16) (emphasis added).

The broad jurisdiction and powers over horseracing conferred upon the Racing Commission is complemented by more specific statutory provisions regarding particular subject

matters, including exclusions and ejections from racetracks. In relevant part, West Virginia Code § 19-23-6(9) vests the Racing Commission with “plenary power and authority” to implement “reasonable rules and regulations ... *to authorize the stewards to rule off the grounds* of any horse or dog racetrack any tout, bookmaker or other undesirable individual determined inimical to the best interests of horse and dog racing or the pari-mutuel system of wagering in connection therewith[.]” *Id.* (emphasis added). Thus, West Virginia Code § 19-23-6(9) sets forth the core procedure (a ruling by the stewards) and the outer boundary (the “best interests” of horseracing) governing either ejections or exclusions at racetracks. The statute charges the Racing Commission with implementing more detailed rules and regulations and empowers the Commission to take any other reasonable and appropriate actions to effectuate its power “to rule off the grounds.” W. Va. Code § 19-23-6(9) & (16).

The Racing Commission’s Thoroughbred Racing Rules define the circumstances and procedures governing ejections. In addition to stewards, the Racing Commission has delegated, by rule, a portion of its ejection power to racing associations when persons act “improperly” or “objectionable.” 178 W. Va. C.S.R. 1, § 10.19 (“The stewards or the association have the power to suspend or exclude from the stands and grounds persons acting improperly or whose behavior is otherwise objectionable.”)(new Rule 6.2); *see also* 178 W. Va. C.S.R. 1, § 4.7 (“Any person ejected by the stewards or the association from the grounds ...”)(new Rule 6.1); 178 W. Va. C.S.R. 1, § 39.1 (“When a person is excluded from a racetrack or suspended, by the stewards or the association ...”)(new Rule 6.3). However, the racing associations have no enforcement power. 178 W. Va. C.S.R. 1, § 10.19 (“The stewards shall enforce the suspension or exclusion.”)(new Rule 6.2); *see also* 178 W. Va. C.S.R. 1, § 60.1 (“It is the duty of the stewards and those authorized by them to exclude from all places under their jurisdiction persons who

commit the offenses.”); 178 W. Va. C.S.R. 1, § 60.16 (“The stewards shall fine, suspend or eject the person from the racetrack.”). Instead, the stewards have “general supervision and authority ... over the association grounds.” 178 W. Va. C.S.R. 1, § 10.3 (new Rule 8.3.b.). Thus, all ejections are enforced through the stewards in accordance with West Virginia Code § 19-23-6(9).

When permit holders are ejected, the Racing Commission *always has authority to review* the exclusion. 178 W. Va. C.S.R. 1, § 4.7 (new Rule 6.1). Thoroughbred Racing Rule 4.7 states *in toto*:

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. ***However, all occupational permit holders who are ejected have the right of appeal to the Racing Commission.***

*Id.* (emphasis added) Rule 4.7 (new Rule 6.1), in the last sentence, expressly grants to occupational permit holders, such as jockeys, owners, or trainers, the right to an appeal and review before the Racing Commission from an ejection.<sup>6</sup> The right of appeal and review is essential; it underpins delegating ejection rights to racing associations because the Racing Commission could not constitutionally delegate to private entities its authority under West Virginia Code § 19-23-6(9) to “rule off” persons from the racetrack “grounds,” especially when ejecting owners and trainers is accompanied by state-enforced sanctions excluding their

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<sup>6</sup> Many racetrack employees are also permit holders (such as the clerk of scales or a pari-mutuel clerk, etc.). CTRS asserts that the Racing Commission will gain control over the racetrack’s “employment” decisions through Rule 4.7 if ejections by racing associations are subject to review. CTRS’ concerns are unfounded because Rule 4.7 only applies to ejections from racetrack grounds. To the extent an employment relationship with a permit holder, such as clerk of scales or pari-mutuel clerk, is terminated by the racetrack, the person formerly employed as such would thereafter have the same status as a patron if s/he returned to the racetrack, and as such, would not have permit holding status entitled to appeal and ask for review of an ejection by the Racing Commission under Rule 4.7.

racehorses, without providing a procedural avenue of review by the Commission so that it exercises final control over racing.<sup>7</sup> 178 W. Va. C.S.R. 1, § 39.1 (new Rule 6.3).

**B. Racing associations do not have an unchecked, unreviewable power to eject permit holders based on common law property rights or “internal business” or “internal affairs.”**

*1. Common law property rights are inapplicable.*

Based on common law property rights, CTRS claims to have power to eject or exclude any person, including permit holders, without enforcement by the stewards and without permit holders having any right of review by the Racing Commission. However, an unchecked power by racing associations to exclude permit holders, such as jockeys, owners or trainers, is inconsistent with the “plenary power and authority” conferred upon the Racing Commission by the Legislature over all persons involved in racing. The Racing Commission has control over integral horseracing participants through licensing and disciplinary powers. W. Va. Code § 19-23-2(a)(prohibiting involvement in horseracing “unless such person possesses a permit therefor from the West Virginia racing commission and complies with the provisions of this article and all reasonable rules and regulations of such racing commission”); W. Va. Code § 19-23-6(8); (“The racing commission has ... plenary power and authority ... [t]o investigate alleged

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<sup>7</sup> Based on the definition of “Appeal” in 178 W. Va. C.S.R. 1, § 2.7 (unchanged and not renumbered), which refers to “any decisions or rulings of the stewards,” Judge King in *PNGI* determined that Rule 4.7 only grants an appeal from ejections by stewards. Judge King misconceived the regulatory scheme. Pursuant to West Virginia Code § 19-23-6(9), only stewards have authority “to rule off the grounds.” In promulgating rules and regulations to implement West Virginia Code § 19-23-6(9), the Racing Commission delegated some ejection rights to racing associations in addition to stewards, but the Thoroughbred Racing Rules channeled enforcement through the stewards, consistent with West Virginia Code § 19-23-6(9). Therefore, whether racing associations or the stewards initiate an ejection, the stewards (and ultimately the Racing Commission) have final enforcement authority to “rule off the grounds,” pursuant to West Virginia Code § 19-23-6(9) and Rule 10.19, and such an ejection “ruling” regarding permit holders is always subject to “appeal,” pursuant to Rule 4.7 and Rule 2.7. Furthermore, the definition of “appeal” in Rule 2.7 is prefaced by the following language: “As used in this rule and *unless the context clearly requires a different meaning . . .*” 178 W. Va. C.S.R. 1, § 2 (emphasis added.). In Rule 4.7, the “context” requires the term “appeal” to reflect the delegation, in part, of reviewable ejection rights to racing associations.

violations of the provisions of this article, its reasonable rules and regulations, orders and final decisions and to take appropriate disciplinary action against any licensee [racing association] or permit holder ... for the violation thereof or institute appropriate legal action for the enforcement thereof or take such disciplinary action and institute such legal action[.]”). And the Racing Commission has control over racetrack grounds, via its stewards, through supervisory and enforcement powers. 178 W. Va. C.S.R. 1, § 10.3 (“The stewards have general supervision and authority over all occupational permit holders or licensees and other persons attendant on horses and also over the association grounds during a meet.”)(new Rule 8.3.b). If racing associations retain unreviewable power to eject or exclude permit holders, they will acquire *de facto* control over horseracing and all of racing’s participants.

Dual control by the Racing Commission and racing associations over racing’s participants cannot coexist. The Racing Commission is mandated by law to act in the “best interests” of horseracing, but private racing associations are economically driven to act in their self-interest. When the “best interests” of horseracing and the association’s self-interests clash, the Racing Commission has been granted “plenary power and authority” to act. W. Va. Code § 19-23-6(16) (“The racing commission has ... plenary power and authority ... [t]o take any other action that may be reasonable or appropriate to effectuate the provisions of this article and its reasonable rules and regulations.”). Thus, racing associations must be subject to the Racing Commission’s control; racing associations do not share control with the Racing Commission.

Otherwise, dual control by racing associations will disrupt the local horseracing industry because their decision-making is not transparent or subject to any procedures, standards, or oversight, unlike the detailed regulatory scheme crafted by the Racing Commission. And dual control by racing associations may lead to manipulation or corruption. For example, a racing

association could use an unreviewable exclusion power to manipulate whose horses are entered into races inasmuch as owners or trainers excluded by a racetrack are barred from starting a horse. *See, e.g.*, 178 W. Va. C.S.R. 1, § 39.1 (new Rule 6.3). A racing association's decision to exclude an owner, trainer, or jockey will also alter the odds for pari-mutuel wagering since bettors consider who owns the horse, who trains it, and who rides it.

Corruption could easily develop if racing associations have power to make decisions – unreviewable by the Racing Commission – regarding who can start horses or ride in races. Racing associations may disclaim any intention to undermine the integrity of horseracing, but such assurances are beside the point: the Legislature vested “plenary power and authority” over horseracing *exclusively* in the Racing Commission to avoid abuses by other self-interested actors. Considering these circumstances, *only* a neutral, regulatory body – the Racing Commission and its stewards, the on-site representatives at racetracks – can be trusted with final decision-making over who participates or not in racing, especially when gambling is involved.

CTRS asserts that racing associations have retained their common law property rights unless abrogated “clearly and without equivocation” by the Legislature. Ejection by racing associations based on common law property rights, however, is a private act, and unreviewable ejections of permit holders are inconsistent with the Racing Commission’s “full jurisdiction” and plenary power and authority” over horseracing. The Legislature expressly repealed all private acts inconsistent with the Horse and Dog Racing Act: “*All acts, whether general or local, public or private, inconsistent with the provisions of this article are hereby repealed* to the extent of their inconsistency.” W. Va. Code § 19-23-27 (emphasis added). Therefore, the common law property right power to eject, a private right and act, has not been retained but was repealed.

Furthermore, in obtaining a license to hold or conduct racing in connection with purses and pari-mutuel wagering, CTRS chose to submit itself and its property to the full range of state regulation. W. Va. Code § 19-23-1(a). CTRS focuses on whether the common law property right to eject, in particular, has been abrogated, but the Legislature intended the licensing controls of West Virginia Code § 19-23-1(a), complemented by the Racing Commission's "full jurisdiction" and "plenary power and authority" over licensees and their property in West Virginia Code § 19-23-6, to effect wholesale abrogation. CTRS parses the Act too narrowly.

The full range of property rights swept within the Racing Commission's "plenary" regulatory scope through the licensing controls of West Virginia Code § 19-23-1(a) is further revealed by subsection (b). In relevant part, subsection (b) states: "Notwithstanding the provisions of subsection (a) ..., the provisions of this article shall not be construed to prevent in any way the use without a license of any *grounds, enclosure or racetrack* owned and controlled by any association for any local, county or state fair, horse show or agriculture or livestock exposition ..., if the pari-mutuel system of wagering upon the results of such horse ... racing is neither permitted nor conducted ...." W. Va. Code § 19-23-1(b) (emphasis added). To give effect to this carve-out in subsection (b), subsection (a) means that licensing *is* required for the association's "use" of "any grounds" for horseracing when wagering is permitted on such racing. Statutory subsections are to be construed together to give meaning and effect to all subparts. Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999) ("A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute."); *Parkins v. Londeree*, 146 W. Va. 1051, 1060, 124 S.E.2d 471, 476 (1962) ("All parts, provisions, or sections of a statute or section, must be read, considered, or construed together[.]").

In order to have unregulated ejection or exclusion powers, CTRS claims, in effect, an “exemption” from the scope of the licensing controls in West Virginia Code § 19-23-1 over the “use” of its “grounds.” Any such exemption fails. “Where a person claims an exemption from a law imposing a license ..., such law is strictly construed *against* the person claiming the exemption.” Syl. pt. 5, *Davis Mem. Hospital v. W. Va. State Tax Commissioner*, 222 W. Va. 677, 679, 671 S.E.2d 682, 684 (2008); Syl. pt. 2, *Tony P. Sellitti Const. Co. v. Caryl*, 185 W. Va. 584, 586, 408 S.E.2d 336, 338 (1991)(emphasis added)(citing Syl. pt. 2, *State ex rel. Lambert v. Carman, State Tax Commissioner*, 145 W.Va. 635, 116 S.E.2d 265 (1960) and Syl. pt. 5, *Pennsylvania & West Virginia Supply Corp. v. Rose*, 179 W.Va. 317, 368 S.E.2d 101 (1988)).

CTRS also cites cases from other jurisdictions recognizing that racetracks have common law property rights to eject persons, including the sport’s primary participants. Those cases are distinguishable because the issue is controlled by each jurisdiction’s statutory and regulatory scheme. In West Virginia, the Legislature has repealed – in West Virginia Code § 19-23-27 – private rights and acts inconsistent with the Horse and Dog Racing Act, and unregulated ejection and exclusion powers by racing associations are inconsistent with the Racing Commission’s “full jurisdiction” and “plenary power and authority” over horseracing through the licensing controls in West Virginia Code § 19-23-1(a) and the powers set out in West Virginia Code § 19-23-6, which abrogated the full range of property rights by racing associations. In numerous other jurisdictions conferring similar “plenary” authority upon their regulatory bodies that oversee horseracing, courts have determined that racetracks cannot eject or exclude licensed racing participants “arbitrarily” and “without justification,” with “impunity,” or “absolutely,” without some avenue of review or relief for the participant either before the state’s racing commission or the courts, or both.

A sampling of cases and legal authority from other jurisdictions in North America is cited hereafter (organized alphabetically by jurisdiction). *See, e.g., Arkansas—Evans v. Arkansas Racing Commission*, 606 S.W.2d 578, 583-584 (Ark. 1980)(licensed horsemen’s exclusion by a racetrack is subject to review by the racing commission); **California**—*Greenberg v. Hollywood Turf Club*, 86 Cal. Rptr. 885, 890-891 (Cal. Ct. App. 1970)(racetrack does not have an “absolute privilege” to exclude licensed racing participant); **Illinois**—*Cox v. National Jockey Club*, 323 N.E.2d 104, 108-109 (Ill. App. 1974) (racetrack cannot “arbitrarily and without justification” exclude licensed racing participant from racing); **Louisiana**—*Fox v. Louisiana State Racing Comm’n*, 433 So.2d 1123, 1126 (La.App. 4th Cir. 1983), *cert. denied*, 441 So.2d 217 (La. 1983)(racetrack does not have proprietary right to “unilaterally” exclude licensed racing participants); **Maryland**—Md. A.G. Opin. No. 96-037, 81 Md. Op. Atty. Gen. 169, 1996 WL 719902, at \*7 (1996) (racetracks may have a common law right to exclude licensed racing participants, but racing commission could review the exclusion); **New York**—*Jacobson v. NYRA*, 305 N.E.2d 765, 768 (N.Y. 1973)(racetrack may not with “impunity” exclude a state-licensed racing participant as such power “may infringe on the State’s power to license horsemen”); *Saumell v. NYRA*, 447 N.E.2d 706, 710-711 (N.Y. 1983)(racetrack’s exclusion of licensed racing participant is “state action” and subject to due process review procedures); **Massachusetts**—*Foxboro Harness, Inc. v. State Racing Comm’n*, 674 N.E.2d 1322, 1325 (Mass. App. Ct. 1997) (racetrack’s exclusion of licensed racing participant was subject to review by the racing commission); *see also Catrone v. State Racing Comm’n*, 459 N.E.2d 474 (Mass. App. Ct. 1984)(same); **Pennsylvania**—*Boyce v. State Horse Racing Comm’n*, 651 A.2d 656, 658 (Pa. 1994)(licensed racing participant has right to appeal racetrack’s exclusion to the racing commission); *see also Kulick v. Comm., Penn. State Harness Racing Comm’n*, 540 A.2d 620

(Pa. Comm. Ct. 1988)(same); *see also Iwinski v. Comm., Penn. State Horse Racing Comm'n*, 481 A.2d 370 (Pa. Comm. Ct. 1984)(same); **Rhode Island**—*Narragansett Racing Ass'n v. Mazzaro*, 357 A.2d 442 (R.I. 1976)(racetrack's common law right to eject a person for any reason is abrogated by statute that empowers it to eject someone as undesirable); *see also Burrillville Racing Ass'n v. Garabedian*, 318 A.2d 469 (R.I. 1974) (same); **Canada**—*Ontario Harness Horse Ass'n v. Ontario Racing Comm'n*, 2002 CanLII 41981, ¶¶ 41-57 (Ontario C.A.)(finding racing commission may hold hearing regarding exclusion of licensee based on the commission's broad powers to regulate horseracing in public interest despite racetrack's claim of property rights)(copy attached in Amici Apx. at Tab 6, pp. 24-49).

Furthermore, the Racing Commission has interpreted its powers to extend broadly over the racing association's property. 178 W. Va. C.S.R. 1, § 10.3 ("The stewards have general supervision and authority over all occupational permit holders or licensees and other persons attendant on horses *and also over the association grounds* during a meet.") (emphasis added) (new Rule 8.3.b.). Consistent with its general authority over the "association grounds" illustrated by Rule 10.3, the Racing Commission defines when persons are subject to ejection from the grounds by the stewards *or* by the racing associations (through limited, delegated ejection rights). After "any" ejection by the stewards or the racing association, the Racing Commission mandates the right of appeal and review for "all" permit holders. 178 W. Va. C.S.R. 1, § 4.7 ("However, all occupational permit holders who are ejected have the right of appeal to the Racing Commission.")(new Rule 6.1). Thus, the Thoroughbred Racing Rules regulate ejections by racing associations, but the rules are unnecessary and meaningless if racing associations have separate unlimited, unreviewable ejection powers based on common law property rights. The regulations should be construed to have meaning. Syl. pt. 2, *Comm. on Legal Ethics of the W.*

*Virginia State Bar v. Battistelli*, 185 W. Va. 109, 116, 405 S.E.2d 242, 249 (1991)(“ In interpreting administrative regulations, we follow our general rule of statutory construction which requires us to give effect to the entire statute.”). In addition, the Racing Commission’s rules regarding its control over CTRS’ property, including ejections from the racetrack grounds, are valid and entitled to deference. Syl. pt. 4, *Kokochak v. W. Virginia State Lottery Comm’n*, 225 W. Va. 614, 615, 695 S.E.2d 185, 186 (2010).<sup>8</sup> The Thoroughbred Racing Rules accordingly set forth the only framework regulating ejections, either by the stewards or by the racing association. Since the Thoroughbred Racing Rules are legislative rules approved by the Legislature having the full “force of law,” Rule 4.7 alternatively abrogates any unreviewable common law property right to eject. *Appalachian Power Co. v. State Tax Dept. of W. Virginia*, 195 W. Va. 573, 583, 466 S.E.2d 424, 434 (1995).

For the reasons stated, common law property rights are inapplicable and were not retained by CTRS when CTRS submitted itself and the full range of its property rights to state regulation through the licensing controls of § 19-23-1.

2. *The racetrack’s “internal business” or “internal affairs” does not include exclusion and ejection powers over occupational permit holders who are participants in horseracing.*

In addition to common law property rights, CTRS alternatively asserts power to eject based on the unnumbered, “flush” language at the end of W. Va. Code § 19-23-6: “The racing commission shall not interfere in the internal business or internal affairs of any licensee.” The terms “internal business” and “internal affairs” are undefined, but the terms cannot contemplate

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<sup>8</sup> To the extent that the Thoroughbred Racing Rules can be construed to give racing associations unreviewable ejection rights regarding permit holders, the rules are invalid and inconsistent with West Virginia Code § 19-23-6(9), which directs the Racing Commission to implement rules and regulations authorizing the stewards – not racing associations – to “rule off the grounds” persons “inimical” to the “best interests” of horseracing.

control over independent contractors, such as jockeys, owners, and trainers, and their accessibility to, or participation in, racing.

The “sport of racing” would not exist without the combined efforts of racing associations, racehorse owners and trainers, and jockeys. Racing associations provide racetrack grounds; owners and trainers provide racehorses; and jockeys ride. Unlike other professional sports (such as football), in the sport of horseracing, the owners and trainers and jockeys – who are the sport’s participants – have never been employees of racing associations. There are no “players’ leagues” who negotiate for salaries and benefits with professional “clubs.” This distinction from other professional sports stems from the gambling involved; the “house” (*i.e.*, the racing associations) should have no “interest” in the outcome of racing competitions, or else corruption could arise. The racing associations, therefore, offer purses, establish the race “conditions,” and the racing participants independently choose to enter the races. In this sport, a decision by a racing association to exclude a participant, in spite of a duly issued occupational permit to participate in racing from the Racing Commission, cannot be deemed “internal.” CTRS reads entirely too much into the “flush” language, and its attempt to do so exceeds its “plain meaning.”

To the extent the “flush” language creates any ambiguity in meaning, the provision must be interpreted *in pari materia* with other provisions of the statute. “A statute should be so read and applied to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part.” Syl. pt. 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (W.Va 1908); Syl. pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (W.Va. 1975) (holding that “[s]tatutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded *in pari materia* to assure recognition and implementation of the

legislative intent.”). Furthermore, the “Court must, if reasonably possible, construe ... statutes so as to give effect to each [provision].” Syl. pt. 4, in part, *State ex rel Graney v. Sims*, 144 W.Va. 72, 105 S.E.2d 886 (W.Va. 1958). “In ascertaining the intent of the Legislature, we must not base our decision on a single term or a few select words. Rather we must give effect to the entire statute.” *Jan-Care Ambulance Serv. Inc. v. Public Serv. Comm’n*, 206 W.Va. 183, 522 S.E.2d 912, 919-920 (W.Va. 1999). Finally, if a statute is “of doubtful meaning or ambiguous, rules of construction may be resorted to and the construction of such statute by the person charged with the duty of executing same is accorded great weight.” Syl. pt. 4, *Pennsylvania & West Virginia Supply Corp. v. Rose*, 179 W.Va. 317, 318, 368 S.E.2d 101, 101-102 (1988).

When construing the entire racing statute, the racetrack’s “internal business” or “internal affairs” is limited compared to the Racing Commission’s broad powers and authority to act. For example, the statute grants the Racing Commission power and authority to remove the racetrack’s employees. W. Va. Code § 19-23-6(10). To properly reflect the racetrack’s subordinate status to the Racing Commission, the “flush” language must only apply when a racing association’s decision to eject has no effect on the broader horseracing industry and is purely “internal.” The unchecked exclusion or ejection power urged by CTRS oversteps the “flush” language. To read it as CTRS urges, and not permit the Racing Commission or the courts a power to review a racing association’s ejection of a racing participant, could lead to associations having a corruptive influence or control over racing – a result that is contrary to the Legislature’s intent to make all aspects of racing subject to the Racing Commission in light of the gambling offered thereon. This is precisely how the Racing Commission perceives and construes its own power and authority over racing participants.<sup>9</sup> It is the body charged by the

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<sup>9</sup> Indeed, the Racing Commission construed West Virginia Code § 19-23-1 *et seq.*, and in particular § 19-23-6, as well as the rules of racing adopted thereunder, as granting it “full jurisdiction” and authority to

Legislature to execute the racing laws of West Virginia, and to the extent the “flush” language is of doubtful meaning, the Commission’s construction of those laws is entitled to “great weight.” Syl. pt. 4, *Pennsylvania & West Virginia Supply Corp.*, 179 W.Va. at 318, 368 S.E.2d at 101-102

### CONCLUSION

For the reasons stated, Rule 4.7 (new Rule 6.1) gives permit holders the mandatory right of appeal and review by the Racing Commission when ejected or excluded. The Horse and Dog Racing Act and the Thoroughbred Racing Rules exclusively govern the ejection issue; racing associations have no separate or independent common law property right to eject. Any such private act or right was repealed by West Virginia Code § 19-23-27 and/or was abrogated when CTRS submitted itself and the full range of its property rights to state regulation through the licensing controls of West Virginia Code § 19-23-1 and the Racing Commission’s “full jurisdiction” and “plenary power and authority” in West Virginia Code § 19-23-6.

In this appeal, the ejection issue is the core substantive dispute, but there are several other procedural issues that have been raised. To the extent the Court resolves this appeal based on procedural arguments and the ejection issue is avoided, these amici request the Court to speak with clarity that its disposition is purely procedural leaving the ejection issue unresolved to await decision another day. The ejection issue merits full consideration and analysis, but if a decision on its merits must wait, amici request the Court to clarify its disposition does not place imprimatur on CTRS’ view that racing associations may eject or exclude duly permitted racing participants and not be subject to administrative or judicial review.

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hold hearings on the appeals of three owners and trainers in the case of *PNGI Charles Town Races & Slots, LLC v. West Virginia Racing Commission, et al.* No. 100098. The Racing Commission would have held those hearings but for the writ of prohibition granted by Judge King of the Kanawha Circuit Court. *Id.* The Racing Commission construes its own “jurisdiction” to hear appeals of disputes between licensed racing associations and occupational permit holders in racing not to be impaired by the “flush” language.

**CERTIFICATE OF SERVICE**

This is to certify that a true and accurate copy of the foregoing has been served upon the following via U.S. Mail, on this the 6<sup>th</sup> day of June, 2011:

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