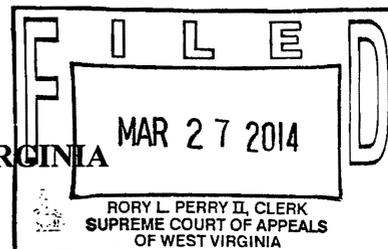


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**GREGORY GRIM, et al.,
Petitioners,**

v.

Docket No. 13-1133

**EASTERN ELECTRIC, LLC,
Respondent.**

COPY

RESPONDENT'S RESPONSE TO PETITIONERS' INITIAL BRIEF

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STATEMENT OF THE CASE

Respondent Eastern Electric, LLC is a locally owned, small business located in Mount Nebo, West Virginia. (A.R. 1369.) On or about February 13, 2007, the Purchasing Division of the Department of Administration of the State of West Virginia issued Request for Quotation No. GSD076425 (“RFQ”) for an open-end contract on behalf of the Department of Administration’s General Services Division. (A.R. 1081.) The RFQ was prepared by Krista Ferrell, a senior buyer with the Purchasing Division. (A.R. 1111.) The RFQ noted that questions concerning bids could be submitted to Ms. Ferrell. (A.R. 1081.)

When Respondent learned of the RFQ, it expressed interest in bidding on the project. Because the contract was for work to be performed at Department of Administration owned buildings, Michael Harlow, one of Respondent’s members, contacted Ms. Ferrell to determine whether prevailing wage rates would be applicable to the work performed pursuant to the RFQ. (A.R. 1370-1371.) Obviously, the applicability of the prevailing wage rates would significantly affect the amount bid by Respondent. Mr. Harlow and Respondent’s other members questioned whether prevailing wage rates were applicable because the RFQ was silent on the issue. (A.R. 1369-1373.) In their experience in bidding on prevailing wage projects, the request for proposal and contract documents always specified in clear terms if prevailing wage applied. This RFQ did not contain any such specifications.

Accordingly, pursuant to the instructions of the RFQ, Mr. Harlow contacted Ms. Ferrell about the issue. (A.R. 1370.) Ms. Ferrell explained that prevailing wage rates would not apply to the work performed under the RFQ because it was a maintenance contract, which is not subject to any prevailing wage requirements. (A.R. 1370-1371.) Therefore, relying on Ms. Ferrell’s statement and on the plain language of the RFQ, Respondent submitted a bid for work

to be performed at non-prevailing wage rates. Specifically, Respondent bid \$50.00 per hour for master-level electrician labor; it bid \$45.00 per hour for journeyman level electrician labor. (A.R. 1096.) If prevailing wage rates were applicable to the RFQ, then Respondent would have bid \$78.84 and \$73.84 for the labor, respectively. (A.R. 1370.)

Respondent was awarded the job. Therefore, on or about April 8, 2007, it entered into an open-end contract with the Department of Administration (hereinafter “GSD contract”). (A.R. 1116-1124.) Like the RFQ, the GSD contract did not specify that prevailing wages were applicable to the work being performed.

Respondent then began performing services on behalf of the West Virginia Department of Administration General Services Division at various Department of Administration facilities. Most of the work occurred in the greater Charleston area, including work at the State Capitol, the Governor’s Mansion, and a facility in South Charleston referred to as Building 74. (A.R. 1136.) In addition, some work was performed at Department of Administration facilities in Marion County and Raleigh County. (A.R. 1136.) In or about May 2008, Respondent and the Department of Administration renewed the GSD contract for another one-year term. (A.R. 1125.) The language of the contract remained the same. During 2007 and 2008, no official with the State of West Virginia ever suggested that Respondent’s employees should have been paid prevailing wage for the work performed under the GSD contract. (A.R. 1236.)

On or about February 9, 2009, Frank Jordan, an investigator with the West Virginia Division of Labor (“DOL”), commenced an investigation regarding whether Respondent’s employees should have been paid prevailing wage for the work performed under the GSD contract. (A.R. 1236.) After learning of the investigation, Respondent, with the

assistance of counsel, immediately contacted the Department of Administration regarding the issue. (A.R. 1236-1237.) Respondent wanted to ensure that its pay practices were in compliance with the GSD contract and the prevailing wage law. A meeting was held between Mr. Harlow, Chris Skaggs¹, Respondent's counsel, the Department of Administration's general counsel, and other officials from the Department of Administration. (A.R. 1236-1237.) During the course of that meeting, the Department of Administration again reassured Respondent that the work performed pursuant to the GSD contract was not subject to prevailing wage. (A.R. 1236-1237.)

However, the DOL continued with its investigation. (A.R. 1237.) Because of the ongoing DOL investigation, Respondent elected to cancel the GSD contract. (A.R. 1237.) Although it did not believe that prevailing wages were applicable, it could not risk committing any prevailing wage violation as such could bankrupt the company given the low price bid on the GSD contract. (A.R. 1237.)²

SUMMARY OF ARGUMENT

Petitioners, who are former employees of Respondent, seek to recover prevailing wages under the West Virginia Prevailing Wage Act ("PWA") for work they performed at West Virginia Department of Administration buildings pursuant to the GSD Contract. Pursuant to the plain language of the PWA, an employer cannot be held liable for prevailing wages or any other damages under the PWA if the employer's failure to pay prevailing wages was an "honest mistake or error." W. Va. Code § 21-5A-9(b). Given the undisputed facts in the record, the

¹ Mr. Skaggs is also a member of Respondent.

² The DOL investigation continued. Following the preliminary *ex parte* investigation, the DOL found that Respondent's employees should have been paid prevailing wages for the work performed on the GSD contract. (A.R. 215-216.) The DOL did not conduct an administrative hearing on the matter and did not pursue collecting any wages from Respondent. (A.R. 199.) As set forth in Petitioners' Statement of the Case, Petitioners then filed the instant action and the Circuit Court granted summary judgment in favor of Respondent on all claims.

Circuit Court properly held that any failure to pay prevailing wages was due to an “honest mistake or error.”

It is both factually and legally undisputed that if a contract is subject to prevailing wage requirements, the PWA requires the public authority to include mandatory language regarding the requirement that contractors pay prevailing wages to their employees. Neither the RFQ nor GSD contract issued by the Department of Administration contain the statutorily required language. Because of the absence of prevailing wage language in the pertinent documents, prior to bidding on the GSD project, Respondent asked the designated State official whether prevailing wages were applicable to the work to be performed. It is undisputed that the designated State official informed Respondent that prevailing wages did not apply. Relying on the representation of the State official and the plain language of both the RFQ and GSD contract, Respondent submitted a bid for the project that did not account for any prevailing wage premium and did not pay the employees working on the project any prevailing wage premium. The State’s representation that prevailing wages did not apply to the work being performed continued for the life of the GSD contract. Given these undisputed facts, the Circuit Court properly applied the “honest mistake or error” defense and granted summary judgment.

Further, the Circuit Court properly found that Petitioners’ claims under the PWA are time barred. Because the Legislature did not provide a specific statute of limitation in the PWA, this State’s general statute of limitation set forth in West Virginia Code § 55-2-12 is applicable. It is undisputed that each of Petitioners’ claims for prevailing wages accrued more than two years before they filed the instant action.

In addition, Plaintiffs are not entitled to any damages under the West Virginia Wage Payment and Collection Act (“WPCA”) because the PWA provides the exclusive means to

recover damages for violation of that statute. Allowing recovery under both the PWA and the WPCA for the alleged failure to pay prevailing wages would allow Petitioners a windfall and give them a double recovery that is not allowed under this Court's precedent. Further, Petitioners have failed to show as a matter of law that Respondent has violated the WPCA. Petitioners have failed to demonstrate any substantive entitlement to wage and have failed to show that Respondent violated any of the remedial provisions of the WPCA.

Accordingly, because there are no genuine issues of material fact and because the Circuit Court properly found that Petitioners' claims fail as a matter of law, this Court should affirm the Circuit Court's Order granting summary judgment on all of Petitioners' claims.

STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed *de novo*." *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994). "Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is required when the record shows that there is 'no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Jochum v. Waste Mgmt. of W. Va., Inc.*, 224 W. Va. 44, 48, 680 S.E.2d 59, 63 (2009). For example, summary judgment is required "when the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995). A party cannot successfully oppose a motion for summary judgment "by alleging the mere existence of a factual dispute, but must instead point to specific facts demonstrating a genuine issue of material fact worthy of being tried." *Reed v. Orme*, 221 W. Va. 337, 344, 655 S.E.2d 83, 90 (2007).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In accordance with West Virginia Rule of Appellate Procedure 18(a), oral argument is not necessary on this appeal. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. In addition, this appeal is appropriate for disposition by memorandum decision under the criteria of West Virginia Rule of Appellate Procedure 21(c) because there is no prejudicial error.

ARGUMENT³

I. The Circuit Court properly held that any alleged failure to pay prevailing wages was an “honest mistake or error.”

Section 9 of the PWA provides the exclusive remedy that an employee may use to recover prevailing wages:

Any skilled laborer, workman or mechanic who is engaged in construction on a public improvement let to contract, who is paid less than the posted fair minimum rate of wages applicable thereto, may recover from such contractor or subcontractor the difference between the same and the posted fair minimum rate of wages, and in addition thereto, a penalty equal in amount to such difference, and reasonable attorney fees. . . Provided, however, That an honest mistake or error shall not be construed as a basis for recovery under this subsection.

W. Va. Code § 21-5A-9(b) (emphasis added).⁴

³ Each of Petitioners assignments of error are addressed below but are not in the same order as in Petitioners’ brief, which was hand-delivered on February 10, 2014. This brief also responds to the *amicus brief* filed on behalf of the West Virginia State Building and Construction Trades Council, AFL-CIO, which is redundant of the arguments made by Petitioners.

⁴ West Virginia Code § 21-5A-9(a) provides that “[a]ny contractor or subcontractor who willfully and knowingly violates any provision of this article shall be fined not less than fifty nor more than two hundred and fifty dollars.” This provision is not at issue in this action. Respondent has never been found to have willfully or knowingly violated the PWA.

Petitioners contend that the Legislature did not intend for the “honest mistake or error” defense to be used by contractors as a defense to liability. Applying this Court’s precedent, the Circuit Court properly found that any other interpretation would be contrary to the clear intent of the Legislature. As this Court has recognized, “if the legislative intent is clearly expressed in the statute, this court is not at liberty to construe the statutory provision, but is obligated to apply its plain language.” See *Dan’s Carworld, LLC v. Serian*, 223 W. Va. 478, 484, 677 S.E.2d 914, 920 (2009); see also *DeVane v. Kennedy*, 205 W. Va. 519, 529, 519 S.E.2d 622, 632 (1999) (“Where the language of a statutory provision is plain, its terms should be applied as written and not construed.”); Syl. pt. 5, *State v. Gen. Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959) (“When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.”). The PWA is not ambiguous. The statutory language is clear: the “honest mistake or error” exception is a complete bar to civil liability.

In this action, the Circuit Court properly applied the “honest mistake or error” defense because it is undisputed that the GSD contract did not contain the mandatory prevailing wage language required by statute and it is undisputed that State officials made representations before and during the GSD contract that prevailing wages were not applicable. Thus, the Circuit Court correctly found as a matter of law that the “honest mistake or error” defense barred Petitioners’ claims.

A. The GSD contract did not specify that prevailing wages were applicable.

The PWA requires public authorities, including the State, to comply with numerous requirements before entering into contracts for work that may be subject to prevailing

wage. Chief among the requirements is that the public authority specify in the contract that prevailing wages are to be paid for the work performed:

In all cases where any public authority has ascertained a fair minimum rate or rates of wages as herein provided, and construction of a public improvement is let to contract, the contract executed between the public authority and the successful bidder shall contain a provision requiring the successful bidder and all his subcontractors to pay a rate or rates of wages which shall not be less than the fair minimum rate or rates of wages as provided by this article.

W. Va. Code § 21-5A-6 (emphasis added). It is undisputed that the GSD contract does not contain this mandatory language; it does not state that prevailing wages shall be paid for the work performed by Respondent. (A.R. 1116-1124.) Likewise, the RFQ also does not contain any such language.⁵ (A.R. 1081-1094.)

The DOL's regulations include the same requirement:

Every contract to which the State of West Virginia . . . is a party, . . . must include in its specifications a provision stating the Fair Minimum Wage Rates as determined by the Commissioner of Labor, which shall be paid for each craft or classification of all workmen needed to perform the contract in the locality in which the public work is performed.

W. Va. C.S.R. § 42-7-1.1 (emphasis added). Again, neither the GSD contract nor the RFQ contain this mandatory language. (A.R. 1094, 1116-1124.) Consistent with the statutory and regulatory requirements, in Respondent's experience, contracts to which prevailing wage applied would clearly state as much in the contract with the public authority. (A.R. 1370.)

In addition to providing that prevailing wage is applicable, the contract must also specify the particular prevailing wage rates that are to be paid for the work to be performed:

⁵ Significantly, the DOL's investigator, Mr. Jordan, noted the absence of the mandatory prevailing wage language when he conducted his investigation. (A.R. 1134.) He expressed that the language should have been included. (A.R. 1134.)

Any public authority authorized to let to contract the construction of a public improvement, shall, before advertising for bids for the construction thereof, ascertain from the state commissioner of labor, the fair minimum rate of wages, including fair minimum overtime and holiday pay, to be paid by the successful bidder to the laborers, workmen or mechanics in the various branches or classes of the construction to be performed; and such schedule of wages shall be made a part of the specifications for the construction and shall be published in an electronic or other medium and incorporated in the bidding blanks by reference when approved by the commissioner of labor where the construction is to be performed by contract.

W. Va. Code § 21-5A-3 (in part) (emphasis added). Again, it is undisputed that neither the GSD contract nor the RFQ include the schedule of wages.⁶ (A.R. 1081-1094, 1116-1124.)⁷

In addition, “[t]he contract shall contain the stipulation that such workmen shall be paid no less than such prevailing wage rates and such other provisions to assure payment thereof as heretofore set forth in this section.” *Id.* at § 42-7-3.1(b) (emphasis added). The GSD

⁶ Rather, the suggested hourly rates contained in the RFQ are so low as to suggest that the prevailing wage was not applicable. (A.R. 1081.)

⁷ The DOL’s regulations further provide:

The specifications for every contract for any public work as defined herein shall contain at least the following conditions, provisions and requirements:

(a) The fair minimum wage rates as shall have been determined by the Commissioner of Labor which must be paid to the workmen employed in the performance of the contract.

The contract shall specifically provide that the contractor and/or subcontractor or subcontractors shall pay no less than the wage rates as determined in the decision of the Commissioner and shall comply with the conditions of the West Virginia Act on wages for construction of public improvement, passed March 11, 1961, and made effective ninety (90) days from passage, and the regulations pursuant thereto, to assure the full and proper payment of said rates. Further, the wage rates as determined shall be printed on the bidding blanks and attention should be specifically noted to these facts within the body of the advertisement for bids.

W. Va. C.S.R. § 42-7-3.1 (emphasis added). Again, none of this information was contained in the GSD contract. (A.R. 1116-1124.) West Virginia C.S.R. § 42-7-3.1 provides that “[t]he provisions of the Act and these regulations may be incorporated by reference in the contract, except that the schedule of fair minimum wages shall be attached to and made a part of the specifications and contract.” The language was not incorporated by reference into the documents at issue in this action.

contract contains no such stipulation. (A.R. 1116-1124.) If it did, then Respondent would have bid differently on the job and would have paid its employees prevailing wage if it had been awarded the job. (A.R. 1369-1374.) Similarly, if prevailing wage is applicable, “[t]he contract shall provide that no workmen may be employed on the public work except in accordance with the classifications set forth in the decision of the Commissioner.” W. Va. C.S.R. § 42-7-3.1(e) (emphasis added). Again, the GSD contract contains no such language. (A.R. 1116-1124.)⁸

The undisputed evidence in the record is that the State uses the following mandatory language in contracts when prevailing wages apply:

WAGE RATES: THE CONTRACTOR OR SUBCONTRACTOR SHALL PAY THE HIGHER OF THE U.S. DEPARTMENT OF LABOR MINIMUM WAGE RATES AS ESTABLISHED FOR KANAWHA COUNTY, PURSUANT TO WEST VIRGINIA CODE 21-5A, ET, SEQ. (PREVAILING WAGE RATES APPLY TO THIS PROJECT)

(A.R. 1111-1113, 1136-1139.) (emphasis original).⁹ The language, however, was not included in the contract because the Department of Administration viewed the contract as a maintenance contract to which the prevailing wage does not apply. (A.R. 1112.)

If this mandatory language had been included in the RFQ or GSD contract applicable to this case, then Respondent would have been put on notice that prevailing wage rates applied to the work being performed under the contract. Respondent would have bid on the

⁸ In addition, the legislative rules provide that the contract must adhere to certain posting requirements at the jobsite:

- (g) The contract shall provide that the contractor and each subcontractor shall post for the entire period of construction the wage determination decisions of the Commissioner in a prominent and easily accessible place or places at the site of the work.

W. Va. C.S.R. § 42-7-3.1 (g) (in part) (emphasis added). Again, the GSD contract does not comply with this regulation. (A.R. 1116-1124.)

⁹ This language is taken from Request for Quotation No. GSD076404, which was issued on or about August 23, 2006. (A.R. 1136-1158.) Ms. Ferrell authenticated the document during her deposition. (A.R. 1112.)

contract at prevailing wages and would have paid its employees in accordance with the prevailing wage rate requirements. The absence of this mandatory language demonstrates that the Circuit Court properly applied the “honest mistake or error” defense to the undisputed facts in the record.

Petitioners rely on the “compliance” section of the “General Terms & Conditions Purchase Order/Contract” to argue that it meets the PWA’s mandatory contract terms. That form language states:

4. **Compliance:** Seller shall comply with all Federal, State and local laws, regulations and ordinances, including, but not limited to, the prevailing wage rates of the WV Division of Labor.

(A.R. 62.)

The Circuit Court properly held that, as a matter of law, this provision does not mandate that prevailing wages be paid for the work performed under the GSD contract. Rather, it simply requires compliance with any and all federal, state, and local laws. Respondent was in compliance with all West Virginia laws, including the PWA, when it received confirmation from multiple officials within the Department of Administration that prevailing wage did not apply to the GSD contract.

Courts that have considered similar “compliance” language in contracts have held that this language does not mandate the application of prevailing wages. *See Foundation for Fair Contracting, Ltd. v. N.J. State Dept. of Labor-Wage & Hour Compliance Div.*, 720 A.2d 619 (N.J. Super. 1998). Like the West Virginia statute, New Jersey’s prevailing wage statute requires all contracts subject to the prevailing-wage requirement to “stat[e] the prevailing wage rate which can be paid (as shall be designated by the commissioner) to the workers employed in the performance of the contract and the contract shall contain a stipulation that such workers shall be

paid not less than such prevailing wage rate.” *Id.* at 621 (citing N.J.S.A. § 34:11-56.27). The contract at issue in *Foundation for Fair Contracting* included the following language: “comply with all applicable State, Federal and local laws, rules and regulations, whether because the Developer received the Balanced Housing Funds or otherwise, including but not limited to, any affirmative action and/or prevailing wage laws.” *Id.* at 622 (emphasis added). The New Jersey Court found that this language was not sufficient to create a responsibility to pay prevailing wages:

We do not find that language determinative. First, it requires compliance with “applicable” laws; if the Act is not otherwise applicable, this provision does not make it so. Second, the express reference to “any ... prevailing wage laws,” without citing the Act and stating it to be applicable, suggests only that the drafters required Circle F to comply with any applicable federal or state prevailing wage law.

Id. at 622.

This Court should reach the same conclusion. The GSD contract requires compliance with federal, state, and local laws; if the PWA is not otherwise applicable, then the “compliance” provision of the GSD contract does not make it so. Moreover, the compliance provision also fails to cite the PWA by name or code provision as required by the plain language of the PWA. *See* W. Va. Code §§ 21-5A-3, 21-5A-6.

The difference between the “compliance” provision and the language that should have been contained in the contract is significant. The above language from Request for Quotation No. GSD076404 complies with the PWA and states clearly and emphatically that “PREVAILING WAGE RATES APPLY TO THIS PROJECT.” (emphasis original.) It cites the relevant section of the West Virginia Code and even states that the prevailing wage rates for

Kanawha County would be applicable to the contract. Neither the RFQ nor GSD contract in this action contain any such clear and mandatory language.

Even the DOL's investigator, Frank Jordan, noted the absence of the mandatory prevailing wage language when he conducted his investigation and expressed that the language should have been included. (A.R. 196.) Mr. Jordan testified that "[t]here was no language in the service contract that mentioned prevailing wage rates shall be paid." (A.R. 196.) The testimony of Mr. Jordan is consistent with the testimony of Ms. Ferrell that the GSD contract did not contain the mandatory prevailing wage language. The evidence is uncontroverted on this point, and Petitioners' reference to the "compliance" language on the pre-printed form is unavailing.¹⁰ Simply put, if prevailing wage rates were applicable to the GSD work, then both the RFQ and the GSD contract should have clearly provided that prevailing wages must be paid pursuant to the clear mandate of the PWA.

B. The Circuit Court properly found that Respondent's reliance on the language of the GSD contract constitutes an honest mistake or error.

The statutory requirement to include prevailing wage rates in the contract cannot be ignored. As the United States Supreme Court has recognized, such requirements in prevailing wage statutes exist "so that the contractor may know definitely in advance of submitting his bid what his approximate labor costs will be." *Univ. Research Assoc., Inc. v.outu*, 450 U.S. 754, 776 (1981) (interpreting similar statutory language in federal Bacon-Davis prevailing wage statute); *see also Affiliated Construction Trades Found. v. W. Va. Dep't of Transp.*, 227 W. Va. 653, 663, 713 S.E.2d 809, 819 (2011) (recognizing that the requirement that the prevailing wage

¹⁰ The language was not included in the contract because the Department of Administration viewed the contract as a maintenance contract to which the prevailing wage does not apply. (A.R. 1112.) More importantly, officials of the Department of Administration repeatedly relayed that view to Respondent, which, in reliance, bid on the GSD contract as a non-prevailing wage contract.

language be included in the contract serves the “dual purposes ... to give local laborers and contractors fair opportunity to participate in building programs[.]”).¹¹ Without this information in the RFQ, it would be impossible for contractors to submit an accurate bid and the entire bidding scheme would be undermined.

Courts from other jurisdictions have analyzed analogous prevailing wage statutes and held that a contractor is not liable for prevailing wages when the public authority failed to include the statutorily required notice provisions in the contract. In *Cullipher v. Weatherby-Godbe Corp.*, 570 S.W.2d 161 (Tex. Civ. App. 1978), electricians sought to recover from their private employer the difference between the prevailing wage rate and the compensation they were paid for work performed on behalf of a school district, which was a public authority for purposes of Texas’s prevailing wage statute. *Id.* at 162-63. Like the West Virginia PWA, the Texas prevailing wage law also included a requirement that the public authority awarding the contract ascertain and specify in the contract the prevailing wage rates applicable to the work to be performed:

“Sec. 2. The public body awarding any contract for public work on behalf of the State, or on behalf of any county, city and county, city, town, district or other political subdivision thereof, or otherwise undertaking any public work, shall ascertain the general prevailing rate of per diem wages in the locality in which the work is to be performed for each craft or type of workman or mechanic needed to execute the contract, and shall specify in the call for bids for said contract, and in the contract itself, what the general prevailing rate of per diem wages in the said locality is for each craft or type of workman needed to execute the contract, also the prevailing rate for legal holiday and overtime work, and it shall be mandatory upon the contractor to whom the contract is awarded, and upon any subcontractor under him, to pay not less than the said specified rates to all laborers, workmen and mechanics employed by them in the execution of the contract. . . .

¹¹ Petitioners contend that the *Coutu* decision does stand for this proposition. However, the language of the Supreme Court is clear and unambiguous.

Id. at 163 (quoting Art. 5159a, Tex. Rev. Civ. Stat. Ann. (1971)).

Like this action, the call for public bids and contract between the employer and public authority in *Cullipher* did not contain a schedule of prevailing wage rates. *Id.* The court concluded that because the contract did not include the prevailing wage specifications as required by the prevailing wage statute, the employees could not recover prevailing wages. The court explained that the purpose of the requirement “is two fold: (1) To inform the bidder/contractor of the wages he must pay his employees engaged in work on public contracts, and (2) to protect workman from working at rates below the prevailing wages in the locality.” *Id.* at 164. These provisions of the statute “are for the benefit of the bidder/contractor.” *Id.* The same is true for the West Virginia PWA. Thus, this Court should adopt the rationale of the *Cullipher* court and hold that the “honest mistake or error” defense is a bar to the Petitioners’ claims.

More recently, a Massachusetts court concluded that a contractor could not be held liable for failure to pay prevailing wages where the contract did not specifically provide for the same even though the contractor’s employees were performing work on behalf of public authorities. In *McGrath, III v. ACT, Inc.*, No. 08-ADMS-40018, 2008 WL 5115057 (Mass. App. Div. Nov. 25, 2008), an employee sued his private employer to recover prevailing wages for work performed at municipal buildings. *Id.* at *1. The contract between the employer and the municipality provided for “prevailing labor and material rates,” but the uncontroverted evidence as to the intended meaning of that phrase was that it did not refer to prevailing wages required by the pertinent Massachusetts statute but merely signified the employer’s then-existing rates. *Id.* Like the case here, “[d]uring the relevant time, ACT did not bid any such work as a prevailing wage job, and none of ACT’s municipal customers advised ACT that G.L. c. 149 [, the Massachusetts prevailing wage statute,] applied to ACT’s work. As far as ACT knew, none of its

municipal customers had requested that any state agency determine the statutorily required wage for any job on which ACT worked.” *Id.*

Like the West Virginia PWA, the Massachusetts statute places the onus on the public authority to determine the applicability of prevailing wages. *Id.* at *2. If prevailing wages are applicable, the public authority “must then determine those wages and furnish the public body with a schedule of them, which schedule must appear in advertising or bid solicitations, and is made part of any project contract.” *Id.* Like this case, the uncontroverted evidence in *McGrath* showed “that none of ACT’s municipal customers adhered to any aspect of these statutory mandates.” *Id.* Therefore, the appellate court upheld the trial court’s grant of summary judgment in favor of the employer, finding that no prevailing wages were owed. *Id.*¹² This Court should likewise affirm the Circuit Court’s grant of summary judgment.

C. Consistent with the terms of the GSD contract, State officials advised Respondent that prevailing wages did not apply. The Circuit Court properly found that Respondent’s reliance on the State officials’ statements constitutes an honest mistake and error.

Prior to submission of its bid, Respondent undertook the appropriate due diligence to determine whether prevailing wages were applicable. The RFQ provides that questions regarding the contract or bid submission could be directed to Krista Ferrell of the West Virginia Purchasing Division. (A.R. 1081.) The record is undisputed that Michael Harlow, a member of Respondent, spoke to Ms. Ferrell on the phone and inquired as to whether prevailing wage rates were applicable to the project. (A.R. 1370-1371.) It is undisputed in the record that Ms. Ferrell told Mr. Harlow that prevailing wage rates did not apply because the contract was a maintenance contract. (A.R. 1370-1371.) Relying on this statement from the designated official with the State

¹² The court made this finding and granted summary judgment in favor of the employer even though it recognized the fact that the plaintiff’s work fell within the ambit of the prevailing wage statute was not contested. *Id.* at *3.

responsible for answering questions about the nature of the RFQ, Respondent then submitted a bid on the project that did not include prevailing wage rate calculations. (A.R. 1369-1374.)

Ms. Ferrell's representations about the prevailing wage were consistent with the lack of prevailing wage language in the RFQ or GSD contract. The GSD contract did not include the prevailing wage language because it was treated as a maintenance contract, not a construction contract. According to Ms. Ferrell, if the contract was a construction contract, then it would have included the mandatory prevailing wage language. (A.R. 1112.) However, because the contract was a maintenance contract, it did not include this language. The fact that Ms. Ferrell represented to Mr. Harlow that prevailing wage was not applicable – a fact that is not in dispute – demonstrates that Respondent was acting in good faith when bidding on the GSD contract and supports the Circuit Court's holding that any failure to pay prevailing wage, if owed, was an "honest mistake or error."

Moreover, the State's representations that prevailing wage was not applicable continued for the life of the contract. Thus, Respondent had no reason to suspect that it should have paid its employees prevailing wages. For example, in December 2008, Respondent's business manager inquired of the General Services Division's David Parsons¹³ via email as to whether prevailing wage was applicable to the work being performed. (A.R. 1163-1166.)¹⁴ Mr. Parsons confirmed that the work was not subject to prevailing wage.

At no time, has any official with the Department of Administration, including the General Services Division or Purchasing Division, expressed to Respondent that it believed that prevailing wage rates were applicable to the GSD contract. To the contrary, the undisputed

¹³ Mr. Parsons was the General Services Division's Operations and Maintenance Manager. (A.R. 1160.)

¹⁴ Mr. Parsons authenticated the email chain during his deposition. (A.R. 1161.)

record evidence shows that State officials repeatedly told Respondent's members that prevailing wages did not apply. Indeed, when the DOL's investigation began, the Department of Administration officials reiterated to Respondent that prevailing wage rates were not applicable to the GSD contract.

It was reasonable for Respondent to rely on the representations made by the State as to the application of the prevailing wage. As discussed above, the PWA clearly intends for the public authority – in this case, the State – to determine whether prevailing wages must be paid. Thus, Respondent's reliance on the State's representations demonstrate that any failure to pay prevailing wages that may be owed was an "honest mistake or error." Accordingly, because these facts are not in dispute, the Circuit Court's Order should be affirmed.

D. The Ohio and California decisions relied upon by Petitioners do not support their position.

Petitioners rely on the Supreme Court of Ohio's decision in *Ohio Asphalt Paving, Inc. v. Ohio Dept. of Indus. Relations*, 63 Ohio St. 3d 512 (Ohio 1992), for the proposition that prevailing wages must be paid to workers regardless of whether the public contract contains any such requirement. Unlike the present situation, the *Ohio Asphalt Paving* decision includes no facts that suggest that the employer undertook any due diligence to determine whether prevailing wages applied prior to executing the contract. Significantly, unlike the West Virginia PWA, the Ohio prevailing wage statute does not contain an analogous "honest mistake or error" exception. *See generally* Ohio Rev. Code. § 4115, *et seq.* Thus, the *Ohio Asphalt Paving* decision is of no benefit to interpreting the West Virginia PWA.

Petitioners' brief also cites to *Bowland v. Espirit Constrs., Inc.*, No. 76424, 2000 WL 1036304 (Ohio Ct. App. July 27, 2000). The *Bowland* decision provides no support to Petitioners. In *Bowland*, the employer understood that it had a duty to pay prevailing wages but

did pay prevailing wages to its employees. *Id.* at *1. The employees filed an action because the employer paid the employees, who were carpenters, the lower prevailing wage rate for “Heavy and Highway laborers” rather than the higher prevailing wage rate for carpenters. *Id.* Unlike the present case, there was no dispute in *Bowland* that the public authority made clear that the employer had a duty to pay prevailing wages. Thus, the *Bowland* holding is in stark contrast to this case in which the State informed Respondent that prevailing wages did not apply to the work at issue.

Petitioners also rely on the Supreme Court of California’s decision in *Lusardi Constr. Co. v. Aubry*, 4 Cal. Rptr. 2d 837 (Cal. 1992), for the proposition that employees may be owed prevailing wages even when a public authority fails to notify a contractor that prevailing wages are applicable to the work to be performed. However, Petitioners ignore a central holding of the *Lusardi* court. Although the Supreme Court of California held that the employer was liable for the underpayment of prevailing wages, it further held that the employer was not liable for any additional penalties that are set forth in the statute:

We agree that in a proper case equitable considerations may preclude the imposition of statutory penalties against a public contractor for failing to pay the prevailing wage. This is such a case. Here, Lusardi acted in good faith in entering into the contract on the basis of the District’s representation, assertedly on the advice of its attorneys, that the project was not subject to prevailing wage law. Under the circumstances of this case it would be inequitable for Lusardi to be held liable for penalties for failure to pay the prevailing wage. Lusardi’s exposure to liability must be limited to the amount of underpayment.

Lusardi, 4 Cal. Rptr. 2d at 996. The Supreme Court of California further explained that “substantial justice would not be achieved by a resolution that left Lusardi liable for statutory penalties under section 1775 for failing to pay the prevailing wage when it acted in good faith and on the express representations of a governmental entity.” *Id.* at 997.

Unlike the California statute, the West Virginia PWA does not contain a provision that provides that an employer can be mandated to pay only the underpayment of prevailing wages while not having to pay any associated penalty. The West Virginia PWA speaks in clear terms that an “honest mistake or error” by employer negates any liability for the failure to pay prevailing wages, including both the underpayment and the associated penalties. Thus, applying the rationale of *Lusardi*’s holding to the facts of this case, Respondent’s good faith reliance on the State’s assertions that prevailing wage did not apply to the GSD Contract should bar Petitioners from any recovery under the PWA.¹⁵ Any other result would be inequitable and unjust.

E. The *Themeworks* decision provides Petitioners no support.

Petitioners rely on this Court’s memorandum decision in *Themeworks, Inc. v. West Virginia Division of Labor*, No. 11-0884, 2012 WL 3079100 (W. Va. June 8, 2012), for the proposition that the Court should disregard the language of the GSD contract. *Themeworks* has no application to this case. In *Themeworks*, the State awarded a contract to Design and Productions, Inc. (“D & P”) for certain work at the State Museum. *Id.* at *1. Unlike this case, “[t]he pre-bid documents and contract specifically stated that the work was subject to the payment of prevailing wage rates.” *Id.* D & P then subcontracted with Themeworks, Inc. and “[t]he subcontract between D & P and Themeworks contained a ‘flow down’ provision stating that all terms and conditions of the State’s contract with D & P shall also apply to Themeworks

¹⁵ In three separate concurring and dissenting opinions, three of the justices of the Supreme Court of California would have also held that the employer faced no liability, including the difference between the wages paid and the prevailing wage. *See id.* at 999-1008. One of those justices explained that “[t]o say that the contractor will only be liable for the extra wages and not for any penalties does not mitigate the fundamental unfairness of this outcome.” *Id.* at 1002 (J. Panelli, concurring and dissenting). In this case, the Court can prevent a “miscarriage of justice” and apply the plain language of the PWA to hold that the “honest mistake or error” doctrine bars Petitioners’ claims.

including ‘the prevailing wage rates of the WV Division of Labor[.]’” *Id.* After an investigation and hearing, the DOL ordered that the prevailing wage rates be paid to the D & P employees. *Id.*

Significantly, the employer in *Themeworks* was not a party to the contract with the State of West Virginia; rather, it was a subcontractor. The only contractual language at issue in *Themeworks* was the language of the third-party contract between Themeworks and D & P. Here, the focus is on the RFQ and GSD contract between the State entity and the primary contractor, Respondent. Unlike *Themeworks*, there is no second contract or middle-man between the public authority and the contractor. Rather, Respondent relied on assurances from the public authority – the State of West Virginia – that prevailing wages were not applicable. More importantly, the Supreme Court of Appeals recognized in *Themeworks* that “the pre-bid documents and contract specifically stated that the work was subject to the payment of prevailing wage rates.” *Id.* at *1. It is uncontroverted that the pre-bid documents and contract at issue here do not include this mandatory language. Thus, the *Themeworks* decision is distinguishable on its face and offers Petitioners no support.

II. The Circuit Court correctly applied this Court’s summary judgment standard.

A. The Circuit Court properly granted summary judgment because Petitioners’ claims are barred by the statute of limitation.

When claiming that the Circuit Court improperly applied this Court’s summary judgment standard, Petitioners ignore the Circuit Court’s holding that Petitioners claims are barred by the applicable statute of limitation. This Court has repeatedly affirmed summary judgment when the undisputed facts establish that a plaintiff’s claims are time-barred. *See, e.g., Jones v. Aburahma*, 215 W. Va. 521, 600 S.E.2d 233 (2004). Here, there are no facts in dispute with respect to when Petitioners’ claims accrued. Thus, as a matter of law, Petitioners’ claims are

time-barred. Accordingly, the Circuit Court’s holding that Petitioners’ claims are time-barred should be affirmed.¹⁶

B. The Circuit Court properly granted summary judgment because there are no genuine issues of material fact with respect to the “honest mistake or error” defense.

In arguing that the Circuit Court improperly granted summary judgment, Petitioners rely heavily on the work performed by Petitioners as part of the GSD contract. Those facts are not in dispute. Petitioners, however, ignore the Circuit Court’s application of the “honest mistake or error” defense to the undisputed facts of this case. The Circuit Court’s central holding and the plain language of the PWA is that the PWA does not allow for the recovery of any prevailing wages if there has been an “honest mistake or error” in the application of the statute.

The following undisputed facts in the record demonstrate that the “honest mistake or error” defense is a complete defense to Petitioners’ claims:

- (1) the PWA requires prevailing wage contracts to include mandatory language regarding the requirement for contractors to pay prevailing wages;
- (2) neither the RFQ nor the GSD contract contain the statutorily required language;
- (3) prior to bidding on the GSD project, Respondent asked the designated State official whether prevailing wages were applicable to the work to be performed;
- (4) the designated State official informed Respondent that prevailing wages did not apply;
- (5) relying on the representation of the State official and the plain language of the RFQ and GSD contract, Respondent submitted a bid for the project that did not account for any prevailing wage premium; and,

¹⁶ Petitioners’ contention that the Circuit Court applied the wrong limitation period is discussed in Section IV, *infra*.

- (6) the State’s representation that prevailing wages did not apply continued for the life of the GSD contract.

Because there are no genuine issues of material fact, the Circuit Court properly applied the law to the undisputed facts and held that the “honest mistake or error defense” barred Petitioners’ claims.¹⁷ The Circuit Court properly applied the law to the facts pursuant to Rule 56, and its grant of summary judgment should be upheld. *See Johnson v. Farmers & Merchants Bank*, 180 W. Va. 702, 713, 379 S.E.2d 752, 763 (1989).

C. The DOL’s investigation has no bearing on the Circuit Court’s decision to grant summary judgment in favor of Respondent.

Petitioners contend that the Circuit Court improperly granted summary judgment because the DOL performed an investigation and issued a settlement demand that Respondent pay prevailing wages to employees who performed work at Building 74 in South Charleston, West Virginia.¹⁸ Petitioners seem to suggest that the DOL’s *ex parte* investigation should be outcome determinative in this civil action. The DOL’s determination, however, should not be considered in this action because Respondent did not have a full and fair opportunity to litigate the issues during the DOL’s investigation.

This Court has held that for “issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, the prior decision must be rendered pursuant to the agency’s adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court.” Syl. pt. 2, in part, *Rowe v. Grapevine Corp.*, 206 W. Va. 703, 527 S.E.2d 814 (1999). It is

¹⁷ Further demonstrating the lack of genuine issues of material fact is the testimony of Petitioner Jeffery Ratliff. Petitioner Ratliff testified under oath that he did not believe that any failure to pay prevailing wages was intentional. (A.R. 1283-1284.)

¹⁸ It should be noted that the DOL did not make any finding that Respondent owed prevailing wages for work performed at the State Capitol as part of the same GSD contract. Rather, the investigation was limited to work performed at Building 74. (A.R. 192, 215-216.)

undisputed that the DOL did not employ procedures “substantially similar” to those used in a court. As Petitioners recognize, the DOL did not hold any hearing to determine whether prevailing wages were owed to Respondent’s employees for work performed under the GSD Contract. Rather, Mr. Jordan, the DOL’s investigator with no legal training, conducted an *ex parte* audit into the prevailing wage issue. (A.R. 185-188.) There is no indication in the record that Mr. Jordan or anyone at the DOL even considered the “honest mistake or error” exception in the PWA; in fact, the record evidence shows that Mr. Jordan did not even make an effort to speak to Respondent’s members before concluding his *ex parte* investigation. (A.R. 191.) At the conclusion of the audit, the DOL sent a letter to Respondent advising that it had concluded that employees were owed prevailing wages for work performed at Building 74. (A.R. 215-216.) This audit, however, did not constitute a finding that prevailing wages were owed, and the DOL’s investigator has testified that a determination has not yet been made by the DOL. (A.R. 197, 198.) Respondent contested the findings of the audit, and no further action was taken by the DOL.

There is no dispute that a hearing was not held and a final order was not entered as required by West Virginia law for any finding of the DOL to be enforceable.¹⁹ Thus, Respondent did not receive a “full and fair opportunity to litigate that matters in dispute.” Syl. Pt. 3, *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 359 S.E.2d 124 (1987). As such, the DOL’s *ex*

¹⁹ Indeed, the Code of State Rules provision titled “Rules of Procedure for Contested Case Hearings Dealing with Wage Collection Under Wage Payment and Collection Act, Wages for Public Improvements Act, Equal Pay Act, and Minimum Wages and Maximum Hours Act” clearly specifies certain procedural rules that the DOL must follow when conducting case hearings for alleged violations of the PWA. *See* W. Va. C.S.R. § 42-20-1.1; *see also id.* at § 42-20-3 (providing requirements for notice of hearing); *id.* at § 42-20-4 (providing rules for how hearings are to be conducted); *id.* at § 42-20-6 (requiring testimony, evidence, arguments, and rulings to be recorded). The procedural rules require “[e]very final order entered by the Commissioner, or hearing examiner, following a hearing conducted pursuant to these rules, shall be made pursuant to the provisions of W. Va. Code §29A-5-3 of 1931, as amended.” *Id.* at § 42-20-9.1. Further, West Virginia Code § 29A-5-3 requires findings of fact and conclusions of law.

parte, informal investigation is of no relevance to the Circuit Court’s own, independent analysis of the claims presented during the course of contested litigation.²⁰ Moreover, it is telling that the DOL did not take any action to enforce its finding that Respondent’s employees should have been paid prevailing wage for the work performed at Building 74.²¹

III. The Circuit Court properly held that the payment of prevailing wages to Petitioners would lead to an absurd and unfair result.

Petitioners contend that the “Circuit Court essentially argues that Respondent would lose money if the Respondent was required to comply with the law.” (Pet. Br. 29.) In making this claim, Petitioners again ignore the Circuit Court’s findings and the undisputed facts that the State – by representations of its officials and by the language used in the RFQ and GSD contract – repeatedly informed Respondent that prevailing wages were not applicable to the work being performed. The Circuit Court properly held that the “honest mistake or error” defense is supported by the amount that Respondent bid on the project. (A.R. 1425.)

The undisputed facts in the record show that because prevailing wage rates did not apply to the GSD contract, Respondent submitted a bid in the amount of \$50.00 per hour for a master-level electrician and \$45.00 per hour for a journeyman-level electrician. (A.R. 66.) At the time of the initial bid in 2007, the DOL had established a basic prevailing wage rate of \$29.38 per hour for electricians working in Kanawha County. The DOL’s established fringe benefits rate for electricians working in Kanawha County was \$12.79. (A.R. 218.) Thus, the total prevailing wage rate electricians working in Kanawha County would have been owed was \$42.17, which is only \$2.83 per hour less than what the State was reimbursing Respondent.

²⁰ The testimony of the DOL’s investigator actually supports the Circuit Court’s application of the “honest mistake or error” defense. As noted above, Mr. Jordan affirmed the absence of the mandatory prevailing wage language in the GSD contract.

²¹ Petitioners contend that the DOL’s investigation was not brought to a hearing “due to a backlog of similar matters,” but there is no evidence in the record to support that contention.

In addition to the \$42.17 prevailing wage rate, Respondent also would be responsible for numerous other costs associated with the labor, including but not limited to Social Security taxes, Medicare taxes, workers' compensation premiums, insurance premiums, federal unemployment taxes, and state unemployment taxes, which would total approximately \$6.10 per hour per employee. (A.R. 1369-1370, 1374.) That figure alone means that Respondent would have lost money for each hour a journeyman electrician who performed work on the GSD contract if they were owed prevailing wages. (A.R. 1369-1370.) In addition to these statutory costs, certain overhead is also factored into the hourly rate; the fixed overhead was \$14.00 per hour. (A.R. 1370, 1374.) Adding all of this together, the company would have to bill labor at a rate of at least \$62.01 per hour to break even on a prevailing wage contract.²²

Assume, for the sake of argument, that a journeyman-electrician worked one hour of overtime. Under the PWA and the federal Fair Labor Standards Act, that employee would be entitled to overtime compensation of 1.5 times the basic hourly rate, which would be \$44.07; he would also be entitled to the fringe benefit amount of \$12.79 per hour. Thus, a journeyman electrician working one hour of overtime would be entitled to \$56.86 if prevailing wage rates applied. That would result in Respondent losing more than \$11.86 for each hour of overtime a journeyman electrician would work. That figure does not include the incidental expenses that Respondent would also incur for such work.

Thus, if prevailing wage rates applied to this project, the undisputed facts are that Respondent would have lost a significant amount of money on this project. The fact that

²² When one considers the additional amount Respondent would need to bill to make a profit, the situation becomes even more stark. If it desired to make its standard 15% profit, then Respondent would have to bill \$68.34 per hour. (A.R. 1374.) When the costs associated with vehicle travel from Nicholas County to the Charleston area are factored into the equation, then Respondent would have billed \$73.34 per hour to make a 15% profit, which, of course, could be reduced by a number of variables. (A.R. 1370, 1374.)

Respondent bid the project at a rate of \$50.00 per hour and \$45.00 per hour for the respective positions demonstrates that it believed that prevailing wages were not applicable. This undisputed belief was premised on assurances by the Department of Administration and the plain language of the GSD contract.

As a matter of law, the Circuit Court properly held that the “honest mistake or error” exception in the PWA should be used to prevent an “absurd and unfair result” that is not contemplated by the laws of West Virginia. If Respondent were now ordered to pay prevailing wages, such order would have drastic consequences for this small business and would jeopardize its ability to continued viability. Obviously, the Legislature intended the “honest mistake or error” defense to prevent such an injustice from happening when the employer relied on assurances from the State that prevailing wage rates did not apply.

Applying the “honest mistake or error” exception of the PWA to prevent an absurd and unfair result is consistent with this Court’s holding that a court has a “duty to avoid whenever possible [an application] of a statute which leads to absurd, inconsistent, unjust or unreasonable results.” *Peters v. Rivers Edge Min., Inc.*, 224 W. Va. 160, 176, 680 S.E.2d 791, 807 (2009); *see also* Syl. pt. 6, *Barr v. NCB Mgmt. Servs., Inc.*, 227 W. Va. 507, 711 S.E.2d 577 (2011) (“It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.”). Thus, this Court should affirm the Circuit Court’s grant of summary judgment.

IV. The Circuit Court properly held that Petitioners' prevailing wage claims are barred by the statute of limitation.

A. The PWA does not contain a statute of limitation. Therefore, the statute of limitation provided for in West Virginia Code § 55-2-12 should apply.

It is undisputed that the PWA is silent as to the statute of limitation for recovery of prevailing wages. Because the PWA does not include a limitation period, the Circuit Court properly applied the general statute of limitations in West Virginia to the PWA:

Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.

W. Va. Code § 55-2-12.

In analogous situations, this Court has applied the statute of limitation set forth in West Virginia Code § 55-2-12 to other statutory employment-law claims when the pertinent statute, like the PWA, does not include a specific statute of limitation. *See McCourt v. Oneida Coal Co., Inc.*, 188 W. Va. 647, 651, 425 S.E.2d 602, 606 (1992) (holding that two-year statute of limitation set forth in W. Va. Code § 55-2-12 applies to claim brought in circuit court under the West Virginia Human Rights Act); *see also Turley v. Union Carbide Corp.*, 618 F. Supp. 1438 (S.D. W. Va. 1985). The Legislature chose not to include a limitation period when enacting the PWA. Therefore, this Court should apply the State's general statute of limitation, which was enacted prior to the PWA.

B. The legislative rule relied upon by Petitioners does not set forth a statute of limitation applicable to the PWA.

Petitioners contend that a three-year statute of limitations is applicable to PWA claims by virtue of a reference to a posted notice requirement set forth in the DOL's legislative rules relating to the PWA. This is the only reference in the legislative rules to a period that could be construed as affixing a statute of limitation:

- (g) The contract shall provide that the contractor and each subcontractor shall post for the entire period of construction the wage determination decisions of the Commissioner in a prominent and easily accessible place or places at the site of the work. The posted notice of wage rates must contain the following information:

...

- (5) A statement advising workmen that if they have been paid less than the fair minimum wage rate for their job classification or that the contractor and/or subcontractor or subcontractors are not complying with the Act or these regulations in any manner whatsoever may recover from such contractor and/or subcontractor(s) the difference between the same and the posted fair minimum wage rate of wages, and in addition thereto a penalty equal in amount to such difference and a reasonable attorney's fee. The limitation to such civil action by the workman is a period of three (3) years and venue of such action shall be in the county where the work is performed.

W. Va. C.S.R. § 42-7-3(g) (emphasis added).

This provision of the legislative rules describes a notice that is to be posted pursuant to the terms of the contract between the public authority and the purported employer. This provision cannot be used to provide a statute of limitation beyond the two years that is provided by West Virginia Code § 55-2-12.²³ Thus, the Circuit Court properly concluded that if

²³ Consistent with the lack of prevailing language in the GSD contract, this language from the legislative rules is also not included in the GSD contract.

the Legislature intended for a three-year statute of limitations to apply to the PWA, then it would have so provided in the PWA.

Moreover, even assuming that the DOL sought to affix a three-year statute of limitation by virtue of this single reference in the posting requirement, any such attempt is impermissible because it does not comport with the PWA. As this Court has recognized, “[i]t is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.” *Kokochak v. W. Va. State Lottery Comm’n*, 225 W. Va. 614, 695 S.E.2d 185 (2010) (quoting Syl. pt. 3, *Rowe v. W. Va. Dep’t of Corr.*, 170 W. Va. 230, 292 S.E.2d 650 (1982)). Significantly, unlike many provisions of Chapter 21 of the West Virginia Code, the Legislature did not delegate to the DOL the authority to promulgate rules and regulations to interpret the PWA. *See generally* W. Va. Code § 21-5A-1, *et seq.*²⁴ Rather, the authorization is limited to establishing prevailing wage rates for the localities of the State. *See* W. Va. Code §§ 21-5A-3, 21-5A-5.

²⁴ For example, in contrast to the PWA, in the WPCA, the Legislature specifically provided that “[t]he commissioner [of the Division of Labor] shall make rules and regulations to the extent necessary to effectuate the purposes of this article, in accordance with the provisions of chapter twenty-nine A of the Code of West Virginia, as amended.” W. Va. Code § 21-5-13. Similarly, the amendment to the WPCA relating to polygraph examinations specifically provides that the “commissioner of labor shall propose rules for legislative approval[.]” *Id.* at § 21-5-5c(f); *see also* Minimum Wage and Maximum Hours Standards, W. Va. Code § 21-5C-6(a) (“It shall be the duty of the commissioner to enforce and administer the provisions of this article, and to promulgate such rules and regulations . . . as shall be needful to give effect to the provisions of this article.”); Equal Pay for Equal Work for State Employees, W. Va. Code § 21-5e-6(c) (“the commission may propose legislative rules for promulgation in accordance with article three, chapter twenty-nine-a of this code to implement the provisions of this article.”); Child Labor, W. Va. Code § 21-6-11 (“The commissioner of the division of labor may propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code, to effectuate the provisions of this article.”). In stark contrast, the PWA contains no such grant of authority.

Moreover, the DOL's legislative rules seek to provide a longer statute of limitations than is provided for by the Legislature. As this Court has recognized, "procedures and rules properly promulgated by an administrative agency with authority to enforce a law will be upheld so long as they are reasonable and do not enlarge, amend or repeal substantive rights created by statute." *Simpson v. W. Va. Office of Ins. Comm'r*, 223 W. Va. 495, 509, 678 S.E.2d 1, 15 (2009) (quoting Syl. pt. 4, *State ex rel. Callaghan v. W. Va. Civil Serv. Comm'n*, 166 W. Va. 117, 273 S.E.2d 72 (1980)) (emphasis added). With this rule, the DOL seeks to enlarge substantive rights created by statute by giving claimants the ability to bring claims and recover damages greater than is specified by the statute itself. Accordingly, this Court should affirm the Circuit Court's holding that Petitioners' PWA claims are time-barred.

C. Petitioners' claims are barred by the statute of limitations.

Petitioners filed the instant action on July 26, 2011. (*See* A.R. 3.)²⁵ It is undisputed, however, that Petitioners stopped performing work under the GSD contract in May 2009.²⁶ Regardless as to whether the one-year or two-year statute of limitation applies, Petitioners' claims must be time-barred because their claims, if any, last accrued in May 2009.

"The statute of limitations ordinarily begins to run when the right to bring an action for personal injuries accrues which is when the injury is inflicted." Syl. pt. 1, *Jones v. Trustees of Bethany College*, 177 W. Va. 168, 351 S.E.2d 183 (1986). This Court has held that causes of action for wage-and-hour violations accrue each payday when the employee is not paid

²⁵ Petitioner Robert Bender moved to intervene in this action on July 27, 2012, and the motion to intervene was granted on October 18, 2012. (A.R. 1167.) Consequently, Petitioner Bender's claims for damages are time-barred inasmuch as he moved join this action more than three years after he last performed work under the GSD contract.

²⁶ The payroll records, including paystubs and timesheets, confirm that Petitioners' last worked on the GSD contract in May 2009, which is more than two years before this action was filed. (A.R. 282-1050.) The payroll records attached thereto also show that Petitioners were last paid for the work performed under the GSD contract more than two years before this lawsuit was filed.

all of the compensation he or she alleges is owed. See *Lipscomb v. Tucker County Com'n*, 197 W. Va. 84, 91, 475 S.E.2d 84, 91 (1996). In analyzing accrual of claims under the WPCA, which should accrue in the same manner as damages under the PWA, this Court explained the accrual rule as follows:

Under the [Fair Labor Standards Act (“FLSA”)] “a separate cause of action accrued each payday when the [employer] excluded the overtime compensation they claim ... Therefore, the statute bars their recovery of any overtime compensation due them prior to [two years before the time the petition is filed.]” *Beebe v. United States*, 226 Ct. Cl. 308, 640 F.2d 1283, 1293 (1981). *Accord Angulo v. The Levy Co.*, 568 F. Supp. 1209, 1215 (N.D. Ill. 1983), *aff’d sub. nom. Flores v. Levy Co.*, 757 F.2d 806 (7th Cir. 1985); *Wessling v. Carroll Gas Co.*, 266 F. Supp. 795, 801 (N.D. Iowa 1967); *Brown v. Bouchard*, 209 F. Supp. 130, 131 (D. Mass. 1962); *Doyle v. United States*, 20 Cl. Ct. 495, 502-03 (1990), *aff’d*, 931 F.2d 1546 (Fed.Cir. 1991), *cert. denied*, 502 U.S. 1029, 112 S.Ct. 866, 116 L.Ed.2d 772 (1992). The “continuing claim” doctrine treats each claim for money alleged to be improperly withheld from the employee's paycheck in the same manner that any other claim would be treated under the statute of limitations.

McIntyre v. Division of Youth Rehabilitation Services, 795 F. Supp. 668 (D. Del. 1992). We similarly hold that a claim for unpaid wages under the West Virginia Wage and Payment Collection Act is a continuing claim, and, therefore, a separate cause of action accrues each payday that the employer refuses to pay the wages claimed.

Id. (emphasis added).²⁷

²⁷ In *Lipscomb*, the Court refers to the “continuing claim” theory applicable to wage-and-hour claims. The phrase “continuing claim” is a bit of a misnomer. The *Lipscomb* court cites the “continuing claim” theory relied upon federal courts in determining the statute of limitations under the Fair Labor Standards Act. Even though it is referred to as a “continuing violation,” “a plaintiff may not recover compensation improperly withheld prior to the limitations period.” See *Meliton v. Wepfer Marine, Inc.*, No. 05-2184, 2006 WL 1745049, at *2 (W.D. Tenn. June 19, 2006) (citing *Gandy v. Sullivan County, Tenn.*, 24 F.3d 861, 865 (6th Cir. 1994)). “Even if an employer continuously fails to pay overtime wages during the course of employment, each paycheck constitutes a separate violation, and claims based on any paycheck that falls outside the statutory period are barred.” *Claeys v. Gandalf Ltd.*, 303 F. Supp. 2d 890, 894 (S.D. Ohio 2004); see also *Hasken v. City of Louisville*, 234 F. Supp. 2d 688, 691 (W.D. Ky. 2002) (rejecting the plaintiffs’ argument that city’s violations of FLSA were “continuing” and explaining that “each violation of the FLSA gives rise to a new cause of action [and] each failure to pay overtime begins

Thus, Petitioners' causes of action for prevailing wages accrued on the payday on which their paycheck for the workweek in question was issued. Petitioners filed this action on July 26, 2011. (*See* A.R. 3.) Thus, regardless if a one-year or two-year statute of limitations is applicable, then any claim for prevailing wages for paychecks issued prior to July 26, 2009 is time-barred. Because all of Petitioners' causes of action for prevailing wages, if any, accrued prior to July 26, 2009, the Circuit Court properly found that Petitioners' PWA claims are time-barred.²⁸

V. The Circuit Court properly held that the PWA is the exclusive remedy for Petitioners' claims.

This Court has long recognized that “[w]hen a statute creates a new offence and denounces the penalty, or give[s] a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribed.” Syl. pt. 2, *Lynch v. Merchants’ Nat’l Bank*, 22 W. Va. 554 (1883). The PWA provides for extensive remedies by allowing for recovery of “the difference between [the amount paid] and the posted fair minimum rate of wages, and in addition thereto, a penalty equal in amount to such difference, and reasonable attorney fees.” W. Va. Code § 21-5A-9(b).²⁹ Given the extensive remedies provided by the statute, allowing employees to recover damages under the PWA and another statute for the same injury would impermissibly allow a double recovery. *See* Syl. pt. 7, *Harless v. First Nat’l Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982) (“It is generally recognized that there can

a new statute of limitations period as to that particular event”). The same is true for damages under the PWA.

²⁸ As set forth in the briefing before the Circuit Court, if a three-year statute limitation did apply, Petitioners would not be entitled to recover the damages they seek because many of their claims for prevailing wages would be limited or barred by the accrual rule. It was proper for the Circuit Court not to address this issue given its ruling on the statute of limitation defense and its ruling on the “honest mistake or error” defense.

²⁹ In addition, a contractor or subcontractor may be subject to certain fines. *See id.* at § 21-5A-9(a).

be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury. A plaintiff may not recover damages twice for the same injury simply because he has two legal theories.”).

Petitioners desire to use the WPCA to collect damages allegedly owed under the PWA. In an analogous situation, West Virginia courts have concluded that an employee cannot use the WPCA to collect compensation that is allegedly due by virtue of another statute. For example, the United States District Court for the Northern District of West Virginia has held that an employee cannot use the WPCA to collect damages for the failure to pay the overtime premium that is required under the Fair Labor Standards Act (“FLSA”). *See Westfall v. Kendle Int’l, CPU, LLC*, No. 1:05-cv-00118, 2007 WL 486606, at *16 (N.D.W. Va. Feb. 15, 2007); *see also Graham v. Brooke County Parks & Recreation Comm’n*, No. 5:11-CV-87, 2012 WL 1995846, at *5-6 (N.D.W. Va. May 31, 2012) (holding that the WPCA has no application to claim for unpaid overtime compensation because the FLSA creates the right to entitlement). In holding that the WPCA is not applicable to a claim for compensation that arises from a separate statute, Judge Goodwin explained the interplay between the FLSA and WPCA:

The FLSA creates the right to overtime for the alleged employees in this case....Overtime is a premium rate of pay and accordingly, the FLSA makes the premium rate obligatory to those employers covered by FLSA. The FLSA entitles workers to receive rates above their normal working wage for working extra hours-not for performing an additional service or labor. The WPCA does not create a right to the overtime premium. ... thus the only obligation to pay overtime to the purported employees arises under the FLSA. The FLSA creates the right to overtime and provides the exclusive remedy for the recovery of such premium pay.

Westfall, 2007 WL 486606, at *16.³⁰

³⁰ Other courts have reached similar holdings when analyzing other states’ wage payment and collection laws. *See, e.g., Freeman v. Central States Health & Life Co. of Omaha*, 515 N.W.2d 131, 135 (Ne. Ct. App. 1994) (holding that employees cannot use the Nebraska Wage Act to collect overtime compensation owed under the FLSA).

The same analysis applies to the PWA. Petitioners cannot use the WPCA to collect the premium pay (i.e., prevailing wage) allegedly owed pursuant to the PWA. Rather, the PWA provides its own, exclusive remedies for violations of the statute including but not limited to recovery of prevailing wages, double damages (or liquidated damages), and attorney’s fees. There is no allegation that Respondent has violated the remedial provisions of the WPCA. Thus, Petitioners cannot use the WPCA to recover any damages.³¹ Because the Circuit Court made the proper legal determination that the PWA provides Petitioners the exclusive remedy in this action, this Court should affirm the Circuit Court’s order.

VI. The Circuit Court properly found that Petitioners cannot recover damages under the Wage Payment and Collection Act.

A. Petitioners have shown no entitlement to wages.

The WPCA is a remedial law, not a substantive law. The WPCA does not create a right to receive prevailing wages; rather, the PWA creates this right. *See* W. Va. Code § 21-5-1 *et seq.*; *see also* *Barton v. Creasey Co. of Clarksburg*, 900 F.2d 249, at *2 (4th Cir. 1990) (unpublished), *cert. denied*, 498 U.S. 849 (1990) (recognizing that although the WPCA provides various procedures and remedies to facilitate the collection of wages, “[t]he statute does not, however, grant any entitlements to pay or wage” and any substantive right to pay would be based on interpretation of a collective bargaining agreement). As a remedial statute, the WPCA “regulates the timing and payment of wages” but does not “establish how or when wages are

³¹ In a similar case, plaintiffs sought to recover prevailing wages allegedly owed under the federal Davis-Bacon Act. *See Johnson v. Prospect Waterproofing Co.*, 813 F. Supp. 2d 4 (D. D.C. 2011). However, because the Davis-Bacon Act does not provide for a private cause of action, the plaintiffs sought to recover the prevailing wages under the District of Columbia Wage Payment and Collection Law, D.C. Code § 32-1301, *et seq.*, and the District of Columbia Minimum Wage Act, D.C. Code § 32-1001, *et seq.* *Id.* at 5. The court held that the plaintiffs could not bypass the exclusive remedies provided by the Davis-Bacon Act by bringing claims under the District of Columbia statutes. *Id.* at 10. The same applies herein.

earned.” *Gregory v. Forest River, Inc.*, 369 F. App’x 464, 469 (4th Cir. 2010) (citing *Saunders v. Tri-State Block Corp.*, 535 S.E.2d 215, 219 (W. Va. 2000)). Indeed, the WPCA “does not establish a particular rate of pay,” *Robertson v. Opequon Motors, Inc.*, 205 W. Va. 560, 566, 519 S.E.2d 843, 849 (1999), nor any substantive “entitlement[] to pay or wages.” *Barton*, 1990 WL 36773, at *2. As discussed above, the Circuit Court correctly held that Petitioners are not entitled to the prevailing wage premium because Respondent did not violate the PWA. Because Petitioners cannot show any entitlement to compensation that has not been paid, the Circuit Court’s holding that the WPCA has not been violated should be upheld.

Moreover, consistent with this Court’s precedent, the Circuit Court properly found that the damages that Petitioners seek to recover under the PWA do not constitute wages within the meaning of the WPCA. In *Conrad v. Charles Town Races, Inc.*, 206 W. Va. 45, 521 S.E.2d 537 (1998), this Court examined whether damages paid to employees pursuant to the Worker Adjustment and Retraining Notification Act (“WARN”), 29 U.S.C. §§ 2101-2109, constituted wages for purposes of the WPCA. The plaintiffs argued that they could recover liquidated damages under the WPCA for damages owed under WARN because WARN refers to damages as “back pay.” *See id.* at 47, 521 S.E.2d at 539. This Court, however, concluded that back pay awarded under WARN does not constitute wages for purposes of the WPCA. *Id.* at 50, 521 S.E.2d at 542. In *Taylor v. Mutual Mining, Inc.*, 209 W. Va. 32, 543 S.E.2d 313 (2000), this Court reaffirmed that damages owed to employees for violations of other laws do not constitute wages for purposes of the WPCA. In *Taylor*, the Court held that a Mine Safety and Health Administration award of back pay and benefits and an arbitrator’s award of reinstatement plus back pay were awards of damages rather than awards of “wages.” *Id.* at 37, 543 S.E.2d at 318.

Significantly, the *Taylor* court also held that an award of graduated vacation pay also did not constitute wages for purposes of the WPCA. *Id.*

The clear import of *Conrad* and *Taylor* is that damages awarded as a result of legal proceedings do not constitute “wages” for purposes of the WPCA. The same is true for damages awarded under the PWA. Any award would constitute damages, not wages. Therefore, the WPCA has no application to the facts of this case, and the Circuit Court’s Order should be affirmed.³²

B. Respondent has not violated the remedial provisions of the Wage Payment and Collection Act.

Petitioners contend that Respondent violated the WPCA by not paying Petitioners every two weeks the prevailing wage rates which Petitioners allege they were owed. (Pet. Br. at 31.) Petitioners seek to recover liquidated damages in the amount of three times the difference between what they were paid and the prevailing wage rates which they allege should have been paid. As a matter of clearly established law, Petitioners cannot recover liquidated damages for this alleged violation of the statute. The WPCA requires an employer to “settle with its employees at least once in every two weeks, unless otherwise provided by special agreement, and pay them the wages due, less authorized deductions and authorized wage assignments, for their work or services.” W. Va. Code § 21-5-3(a). Even assuming that Respondent violated this provision of the WPCA, Petitioners cannot recover liquidated damages for any violation because liquidated damages are available only for violations of West Virginia Code § 21-5-4. *See* W. Va. Code § 21-5-4 (providing for an award of liquidated damages for a violation of the requirements

³² Of course, the *Conrad* and *Taylor* decisions are consistent with Judge Goodwin’s holding that the WPCA cannot be used to collect overtime compensation owed under the FLSA. *See Westfall*, 2007 WL 486606, at *16. Just as the PWA provides employees a remedy to recover prevailing wages and provides the exclusive remedy for recovery of that premium pay, “[t]he FLSA creates the right to overtime and provides the exclusive remedy for the recovery of such premium pay.” *Id.*

“under this section”). Rather, West Virginia Code § 21-5-6 provides the exclusive recovery for any violation of § 21-5-3 and does not allow for liquidated damages.³³

Recently, the United States District Court for the Southern District of West Virginia addressed this issue and held that plaintiffs cannot recover liquidated damages for any violation of § 21-5-3:

Plaintiff's pick-your-own-penalty theory is untenable because the WPCA provisions at issue in this case have clearly-defined remedies. Section 21-5-6 specifies that its remedy applies to violations of section three, while § 21-5-4(e) specifies that it is available for violations “of this section,” section four. Rather than read this language out of the statute, the Court will apply it. In *Kessel v. Monongalia Cnty. Gen. Hosp. Co.*, 220 W. Va. 602, 648 S.E.2d 366, 382 (2007), the Supreme Court of Appeals of West Virginia held that where the state legislature had set forth a category of activities that it intended to constitute per se restraints of trade, the principle of *expressio unius est exclusio alterius* applied to prohibit the addition of additional activities to that category through regulation. *Id.* at 384.

...
Further, Plaintiff's interpretation of the regulations renders meaningless the statutory language in § 21-5-4(e) and § 21-5-6, which clearly states the violations to which the penalties in those sections apply. Whenever possible, the Court will interpret statutes so as to give meaning to the words therein. *See Cmty. Antenna Serv. Inc. v. Charter Commc'ns VI*, 227 W. Va. 595, 712 S.E.2d 504, 513 (W. Va. 2011) (“Our rules of statutory construction require us to give meaning to all provisions in a statutory scheme, if at all possible.”) (citing Syl Pt. 2, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975)). Applying these principles of statutory construction, it is plain that the remedy for a violation of § 21-5-3(a) is found in § 21-5-6, not § 21-5-4(e).

³³ West Virginia Code § 21-5-6 provides:

If any person, firm or corporation shall refuse for the period of five days to settle with and pay any of its employees at the intervals of time as provided in section three of this article . . . within the time specified, if presented, and suit be brought for the amount overdue and unpaid, judgment for the amount of such claim proven to be due and unpaid, with legal interest thereon until paid, shall be rendered in favor of the plaintiff in such action[.]

Atchison v. Novartis Pharmaceuticals Corp., No. 3:11-0039, 2012 WL 851114, at *2-3 (S.D. W. Va. Mar. 13, 2012) (Chambers, J.).

Similar to the holding in *Atchison*, the DOL has also recognized that plaintiffs cannot recover liquidated damages in this scenario:

The reference in Section 4(e) to “this section” does, as a matter of strict statutory construction, limit the applicability of liquidated damages to violations of that section. Furthermore, such a distinction appears consistent with the apparent policy distinction underlying Section 3 and 4 of the WPCA. The Supreme Court of Appeals of this State appeared to recognize the limitation of liquidated damages to violations of Section 4 when it noted at Syl. Pt. 2 in *Ash v. Ravens Metal Products, Inc.*, 190 W. Va. 90, 437 S.E.2d 254 (1993)[,] that the liquidated damages prescribed in W. Va. Code § 21-5-4(e) “are to be paid whenever an employer fails to pay an employee as required under W. Va. Code [§] 21-5-4.”

W. Va. Div. of Labor v. Coyne Textile Servs., DOL Case No. 01-0707/51229, at *7-8 (Dec. 26, 2002).³⁴

West Virginia Code § 21-5-4(e) establishes that liquidated damages are an available remedy for violations of that section of the WPCA. Importantly, § 21-5-3 contains no reference to liquidated damages, demonstrating that such damages are not available for violations of those sections. Had the legislature intended for liquidated damages to be an available remedy under § 21-5-3, the legislature could have expressly provided for liquidated damages in those sections. Instead, the legislature chose to limit awards of liquidated damages to violations of § 21-5-4, making clear in § 21-5-4(e) that liquidated damages apply to violations “under [that] section[.]” Accordingly, Petitioners are not entitled to any liquidated damages under the WPCA. Thus, the Circuit Court’s Order should be affirmed.

³⁴ A copy is attached to the record at A.R. 1241-1249.

CONCLUSION

Although this Court has never addressed the PWA’s “honest mistake or error” defense, the plain language of the statute makes clear that is a complete bar to Petitioners’ claims. If the plain language of the statute is to have any meaning, it should be applied in this action as it is undisputed that Respondent relied on assertions from officials of the State of West Virginia and the language of the RFQ and GSD contract to conclude that prevailing wages were not applicable. Any conclusion to the contrary would jeopardize the viability of Respondent, a small business in West Virginia, which is precisely the result the Legislature intended to avoid when adopting the “honest mistake or error” defense.

For all of the foregoing reasons, this Court should affirm the judgment of the Circuit Court in all respects.

Respectfully submitted this 27th day of March, 2014.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**GREGORY GRIM, et al.,
Petitioners,**

v.

Docket No. 13-1133

**EASTERN ELECTRIC, LLC,
Respondent.**

CERTIFICATE OF SERVICE

I do hereby certify that on March 27, 2014, I served the foregoing **RESPONDENT'S RESPONSE TO PETITIONERS' INITIAL BRIEF** upon counsel of record via hand-delivery, addressed as follows:

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