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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 23-ICA-127

JASON HAUGHT, IN HIS CAPACITY AS DIRECTOR OF THE PUBLIC EMPLOYEES INSURANCE AGENCY, AND MARK D. SCOTT, GEOFF S. CHRISTIAN, AMANDA D. MEADOWS, JARED ROBERTSON, DAMITA JOHNSON, JASON MYERS, MICHAEL COOK, WILLIAM MILAM, AND MICHAEL T. SMITH, IN THEIR CAPACITIES AS MEMBERS OF THE PUBLIC EMPLOYEES INSURANCE AGENCY FINANCE BOARD,

Petitioners,

v.

AIR EVAC EMS, INC.,

Respondent,

On Appeal from the Circuit Court of Kanawha County, Civil Action No. 19-AA-169

PETITIONERS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Rules

Regulations

Other Authorities

ASSIGNMENTS OF ERROR

The Circuit Court of Kanawha County granted in part and denied in part Respondent Air Evac EMS Inc.'s Petition for Appeal. That court held that it had jurisdiction and remanded the case to the administrative level for a hearing. This Court should vacate the circuit court's order and remand with instructions to dismiss the case based on the following:

I. The circuit court should have dismissed this case on sovereign immunity grounds because Petitioners (collectively, "PEIA") are "the state" under W. Va. Const. art VI, § 35, no sovereign-immunity exceptions apply, and the circuit court's newly minted work-around violates the constitution, case law, and public policy.

II. The circuit court should have dismissed this case because the procedural vehicles Air Evac is using—the Administrative Procedures Act ("APA") and PEIA's Contested Case Rules ("CCR")—are inapplicable here; a party can invoke them only after proving that it had a right to an administrative hearing, something Air Evac never showed.

III. The circuit court should have dismissed this case on the merits because PEIA had authority under state law and the law of the case, *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751 (4th Cir. 2018), to limit payment to the Medicare Rural Rate.

IV. The circuit court should have dismissed this case on qualified immunity grounds because PEIA's decision to pay Air Evac the Medicare Rural rate for ambulance trips was discretionary, and Air Evac cannot show that it has a clearly established right to be paid whatever it demands.

INTRODUCTION

Air Evac doesn't have the power over PEIA that it imagines. It thinks it can sue PEIA for money; compel PEIA to give it an administrative hearing without qualifying for one under the statute and rules; force PEIA to pay whatever Air Evac demands for its services; and strip PEIA of its discretion in implementing the PEI Act. But Air Evac is wrong on all counts.

The West Virginia Constitution makes PEIA sovereignly immune. PEIA is "the state," and Air Evac is seeking money for past services. No recognized exception applies, and the Court should not endorse the one the circuit court invented; it violates the Constitution, case law, and

good sense. Air Evac can't sue PEIA in state court. Thus, jurisdiction is lacking, and the case should be over.

Were all that not enough, Air Evac also used the wrong legal mechanism to bring its claims. It sued under the APA and CCR—both of which require the underlying agency proceeding to be a "contested case." To qualify as a contested case, some legal authority must require the agency to hold a hearing. But no constitutional provision, statute, or rule gives Air Evac that right. So for this other reason, the circuit court lacked jurisdiction and (again) should have dismissed.

Jurisdictional issues aside, Air Evac fares no better on the merits. As the Fourth Circuit put it, the law does not require PEIA to "pay whatever" Air Evac "may demand" but may limit payments to Air Evac "after the fact." In line with that view, PEIA used its director's broad statutory authority to manage provider payments—authority federal courts did not consider or enjoin in Air Evac's related litigation. The agency then chose to pay Air Evac the Medicare Rural rate. And because Air Evac can charge members for the balance of those bills, PEIA's rate doesn't violate the federal injunction.

Lastly, PEIA should also win on qualified immunity grounds. Common law says that because PEIA's decision at issue—paying Air Evac the Medicare Rural rate for its air ambulance services—didn't clearly violate the law. The circuit court therefore cannot second-guess PEIA's discretionary choice. Air Evac's suit should have been dismissed for this reason, too.

The Court lacks jurisdiction for two independent reasons, and Air Evac is wrong on the merits for two other independent reasons. So no matter how one views this case, the Court should vacate the circuit court's order and remand with instructions to dismiss.

STATEMENT OF THE CASE

I. The Legislature endowed PEIA with broad power to provide and manage state employees' insurance.

West Virginia provides health insurance to its employees and their spouses and dependents through PEIA. W. VA. CODE §§ 5-16-1 *et seq.* PEIA's main goal is to bring "fiscal stability" to these members' healthcare costs. *Id.* § 5-16-5(a).

The Legislature empowered PEIA to decide how much it will pay for health care services. PEIA's main rate-setting tool is its annual financial plan and accompanying fee schedule, which set the "[m]aximum level of reimbursement" for "categories of health care providers." W. VA. CODE § 5-16-5(c)(1). These fee schedules fix PEIA's responsibility to pay for certain services at a specified rate, and they limit how much a provider is paid at the Plan's "maximum" rate. *Id.* PEIA sets rates and saves costs through many other means as well, such as utilization review, contract negotiation, and managing "provider contracting and payment," *e.g.*, *id.* §§ 5-16-3(c), 5-16-7(a)(6)(B), 5-16-9. Rate limits are backed up by a statute that generally prohibits medical providers from directly billing a PEIA member for any remaining balance—a practice known as "balance-billing." *Id.* § 16-29D-4(a)(2).

Finally, PEIA has established a multi-level review process in its legislative-exempt rules, W. VA. CODE R. §§ 151-1-1 *et seq.* (2019),[1] under which providers may dispute adverse payments, A.R. 416 (Plan § V.9).

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[1] This case spans multiple legislative rules. But because the controlling provisions of each rule do not materially differ, the briefing below used their 2019 versions, in line with the Supreme Court of Appeals's common practice of referencing current law where difference with earlier enactments are immaterial. *E.g.*, *Foster Found. v. Gainer*, 228 W. Va. 99, 102 n.1, 717 S.E.2d 883, 886 n.1 (2011). The substantive and controlling components of the 2019 rule appear at A.R. 406-17, (hereinafter, the "Plan"), and the current version is publicly available, through the Code of State Rules Online, at https://tinyurl.com/4awpp6zy.

II. The Legislature sought to regulate and control exorbitant air-ambulance costs.

"Air ambulance services unfortunately do not come cheap. A single flight can cost tens of thousands of dollars." *Cheatham*, 910 F.3d at 757. In 2016, the West Virginia Legislature took notice of this price problem and passed several laws to address the exorbitant costs. *Id.* at 758; *see also* W. VA. CODE § 5-16-8a (2016). These provisions (1) limited air ambulance charges to the U.S. Center for Medicare and Medicaid Services rate and (2) prohibited balance billing for anything above that rate. *Cheatham*, 910 F.3d at 758 & 769.

III. The federal courts declared preempted West Virginia's statutory air ambulance rate limitations and related schedule, but reaffirmed PEIA's broad authority to set and negotiate rates.

District court. In June 2016, Air Evac sued PEIA in federal district court, arguing that the federal Airline Deregulation Act ("ADA") preempted the Legislature's new protective provisions. During the federal suit, Air Evac admitted that other private insurers did not pay its full charge A.R. 264, 272 (Thomas Dep.). But it argued that, unlike other insurers, PEIA had capped Air Evac's recovery from any other source and enforced this cap through threats of civil enforcement actions. *Air Evac EMS, Inc. v. Cheatham*, No. 2:16-CV-05224, 2017 WL 4765966, at *8-9 (S.D.W. Va. Oct. 20, 2017). In October 2017, the district court ruled in Air Evac's favor. *Id.* at *10. It held that the ADA preempts West Virginia Code Section 5-16-5(c)(1) (the maximum-level-of-reimbursement provision) and West Virginia Code Section 5-16-8a (the provision capping air-ambulance reimbursement at the Medicare rate), because these enforcement mechanisms went "beyond the methods available to [] commercial insurer[s]." *Cheatham*, 2017 WL 4765966, at *8-9. And it enjoined PEIA from enforcing those specific statutes and their accompanying fee schedules and regulations. *Id.* at *10. But it left West Virginia Code Section 16-29D-4 (the prohibition on billing PEIA members for the portion of the insurance bill PEIA doesn't cover) alone, *Cheatham*, 2017 WL 4765966, at *10, because Air Evac only challenged this section "in

the alternative." A.R. 172-73. The federal courts also did not mention—much less enjoin—W. VA. CODE § 5-16-3(c), the provision affording PEIA's director discretion in managing the agency.

Demand letters interlude. While PEIA was appealing that decision, Air Evac began pressing a novel interpretation of the West Virginia Public Employees Insurance Act ("PEI Act") in letters to PEIA. Because the fee schedule as applied to air ambulances had been preempted and enjoined, Air Evac argued that PEIA was legally required to pay Air Evac in full for every transport since Air Evac began the litigation (in June 2016). A.R. 101. It also disclaimed any reliance on administrative remedies to resolve its claims. A.R. 107 n.5 (threatening declaratory and injunctive action), A.R. 402 (saying "administrative appeals are not required"), A.R. 404 (same). PEIA responded that neither the injunction nor federal law mandated that it "unquestionably pay whatever amount Air Evac unilaterally establishes as its charge." A.R. 116. Under the PEI Act, the agency routinely pays providers less than their full charge, PEIA explained, and Air Evac was no different. A.R. 116. Even so, PEIA agreed to pay Air Evac for each post-June of 2016 transport at the Medicare Rural rate. A.R. 117.

Fourth Circuit. In December 2018, the Fourth Circuit affirmed the district court's Order. *Cheatham*, 910 F.3d at 770. But in doing so, it explicitly noted that the ADA did not "require" PEIA "to pay whatever" an air ambulance provider "may demand." *Id.* at 769. Rather, PEIA may act like any private insurer and "limit reimbursement for air ambulance services after the fact" if it uses its "market power, and not its unique coercive authority." *Id.*

IV. The Legislature passed a new statute accepted by all sides, and PEIA limited payment on 115 past Air Evac transports to the Medicare Rural rate.

In summer of 2019, the West Virginia Legislature enacted a new air-ambulance fee statute that prospectively required PEIA to pay air ambulance providers at the Medicare Rural rate. W. Va. Acts 2019, c. 146 (June 4, 2019), *codified in* W. VA. CODE § 5-16-8a (2019). And it

removed any otherwise applicable administrative, civil, or criminal penalty. *Id.* Air Evac accepted this limit going forward, but it kept demanding that PEIA pay the full charges for the 115 transports it provided between June 11, 2016, and May 24, 2019. A.R. 91-92.

PEIA tried to negotiate with Air Evac over these past-transport bills, but Air Evac refused to budge from its all-or-nothing position. A.R. 397 (Cheatham Aff. ¶ 19), A.R. 102 (Air Evac: offering to accept 90% of total bill change on all future claims). So in mid-2019, the PEIA Director used his West Virginia Code Section 5-16-3(c) discretion, combined with *Cheatham*'s statement that PEIA could limit payments for "services after the fact," and paid Air Evac for the 115 past transports at the Medicare Rural rate. A.R. 397 (Cheatham Aff. ¶ 25). The Director also explained that the statutory balance-billing provision did not apply because Air Evac's services were no longer covered under the Plan. A.R. 399 (Cheatham Aff. ¶ 33); *see also* W. VA. CODE § 16-29D-4(a)(2) (West Virginia's general balance-billing statute). In this way, PEIA treated Air Evac the same as other providers who do not participate in the Plan: it designated its services as non-covered, voluntarily paid the same amount other air ambulance providers accept, and allowed it to charge PEIA members for the remainder. A.R. 399 (Cheatham Aff. ¶¶ 28-31).

V. Air Evac, ignoring all the correct procedure, sued PEIA in state court.

Air Evac was not pleased. In October 2019, it sent PEIA a letter titled "Demand for Contested Case Hearings," which insisted on both a contested case hearing and full payment on the 115 transports. A.R. 68. PEIA explained to Air Evac that it had the process all wrong: provider payment disputes go through the Plan's review procedures, so the Contested Case Rules ("CCR"), W. VA. CODE R. §§ 151-3-1 *et seq.*, are inapplicable. A.R. 62. PEIA also reminded Air Evac of other, more appropriate forms of relief, such as a claim before the Legislative Claims Commission. A.R. 63. It also told Air Evac that there was no coverage for its claims under the State's liability insurance policy. A.R. 63.

But in December 2019, Air Evac filed a Petition for Appeal, asking the circuit court to (1) "affirm the validity of" the CCR; (2) hold a hearing on the merits of Air Evac's demand; (3) declare that PEIA must pay Air Evac's full charges for the 115 transports; and (4) order PEIA to promptly issue such payment. A.R. 19-20.

VI. The circuit court erred as to jurisdiction, the remedy, and the merits, but it rightly rejected Air Evac's pay-in-full theory.

After briefing and oral argument, in December 2022, the circuit court granted in part and denied in part Air Evac's Petition. But in doing so, it misunderstood sovereign immunity, jurisdiction under the APA and CCR, and PEIA's discretion under the PEI Act.

Sovereign immunity. The circuit court agreed that any award against PEIA would "come from State monies held under the custody of the State Treasurer." A.R. 561 (Order ¶ 49). Normally, this funding source would render PEIA immune. But the circuit court created a new sovereign immunity exception. Sovereign immunity does not apply, it held, when the Legislature "creates a program, appoints an agency to administer it, and requires the agency to make payment[s] out of funds appropriated for that purpose." A.R. 562 (Order ¶ 54). Because the Legislature has designed PEIA to distribute funds, A.R. 561-62 (Order ¶ 51)—and specifically "to pay medical providers," A.R. 562 (Order ¶ 53)—it said PEIA was not sovereignly immune, A.R. 563 (Order ¶ 57).

APA and CCR applicability. The circuit court held—and PEIA agrees—that the CCR are valid and enforceable. A.R. 564 (Order ¶ 64). But the court rejected PEIA's argument that Air Evac's claims should still be heard under the Plan. The Plan's review process, it said, was "not applicable to the nature of claims Air Evac has brought." A.R. 565 (Order ¶ 67). The Plan focuses on mistakes, "routine decisions about whether a given service or treatment is covered or medically necessary," and "medical judgment." A.R. 565 (Order ¶¶ 68-70). Because the Plan's review

process is purportedly not built to address questions about statutory and constitutional interpretation, Air Evac's claims must "be resolved under the APA" and CCR. A.R. 565-66 (Order ¶¶ 71-72). The circuit court never reviewed or discussed the CCR in making this decision; it said only that because the Plan wouldn't do, the CCR had to.

The merits. On the merits, the circuit court thought both sides were wrong. It rejected Air Evac's destructive PEI Act severability analysis and the resulting argument that PEIA had to pay Air Evac whatever Air Evac wants. A.R. 567-70 (Order ¶¶ 81-95). Turning to PEIA's argument, the circuit court agreed that, under West Virginia Code Section 5-16-3(c), the Director had used his discretion to pay Air Evac the Medicare Rural rate for the 115 transports and designated the rest of those bills "noncovered." A.R. 572 (Order ¶ 103). But it found both decisions suspect. A.R. 573 (Order ¶ 108) (PEIA was "potentially" violating the federal injunction). *First*, the circuit court read *Cheatham* to prohibit the Director from declaring a "maximum level of reimbursement" for Air Evac—"including through a fee schedule." A.R. 573-74 (Order ¶ 109). Using Section 5-16-3(c)'s discretion to pay the Medicare Rural rate amounted to the same thing. A.R. 575 (Order ¶¶ 110-11). *Second*, the circuit court mistakenly thought PEIA was "retroactively" and unilaterally "lift[ing] the ban on balance-billing" for air ambulances under its Section 5-16-3(c) discretion. A.R. 574-75 (Order ¶ 114). The circuit court noted that when the 115 transports were happening (from 2016 to 2019), Section 5-16-8a(a) (2016) forbade air-ambulance balance billing. A.R. 576 (Order ¶ 120). The Director couldn't use Section 5-16-3(c) to erase that statute, the circuit court said. A.R. 575-76 (Order ¶¶ 118-19). That the Legislature deleted that prohibition in 2019 was said to be more proof the Director lacked this power. A.R. 575 (Order ¶¶ 116-17).

Given that the circuit court thought both sides were wrong on the merits, it (1) invalidated PEIA's payments regarding the 115 transports; (2) remanded the case for "further administrative

proceedings and negotiations consistent with *Cheatham*, the APA," and the CCR; and (3) denied Air Evac's request for "the entirety of its past charges for the [115] transports." A.R. 578.

SUMMARY OF ARGUMENT

The circuit court's order suffers from two jurisdictional defects, either of which should have ended Air Evac's case.

I. *First*, PEIA is sovereignly immune. Under Article VI, Section 35 of the West Virginia Constitution, the "state of West Virginia" cannot be a "defendant in any court of law or equity." PEIA counts as the State because the Legislature created it, it does state work across all of West Virginia, and it is funded from the State Treasury. Air Evac's suit conflicts with this immunity because it seeks state funds to pay for past transports. Section 35 has several exceptions, but this case fits none of them. The circuit court invented one that applies whenever an agency is administering a legislatively created program that requires making payments. This exception has no basis in law; violates the nature of *constitutional* immunity; contradicts the sole case the circuit court quoted in support; and contradicts other Supreme Court of Appeals case law, too. The Legislative Claims Commission, which has handled claims against PEIA for decades, was the proper forum for this sort of claim. This jurisdictional failing requires reversal.

II. *Second*, the circuit court further lacked jurisdiction because the petition was not proper under either the APA or CCR. An agency appeal under the APA or CCR must be a "contested case," meaning Air Evac must identify a right to an administrative hearing. But Air Evac and the circuit court can't find one. The PEI Act allows for contested-case hearings in only insurance-fraud cases, not provider-payment disputes. Air Evac thinks the CCR gives it a right to a hearing, but this view is wrong. The CCR are procedural rules; they include no substantive rights. And they import the term "contested case" from the APA, which never uses the term to

create a hearing right. The APA and CCR must work in tandem with an external statute or rule that creates the right. Further, even if the CCR's mechanism applied here, the Plan's review process trumps it. As a legislative-exempt rule, the Plan has controlling weight, and it outlines a three-step process that providers should use to settle payment disputes like this one. The circuit court thought the Plan couldn't tackle this subject matter, but that's not the circuit court's choice. And using the CCR here ends up at the same place as the Plan: both processes let PEIA's Director make the final agency decision on Air Evac's bills. This Court should reverse on this ground too.

Besides these jurisdictional flaws, the circuit court was wrong on the merits.

III. PEIA has the statutory authority to limit payments to Air Evac to the Medicare Rural rate without violating the federal injunction. Under West Virginia Code Section 5-16-3(c), the Director has full authority to manage provider negotiation, contracting, and payment. This authority easily includes the Director's decision to pay Air Evac at the Medicare Rural rate for the 115 transports. This reading supports the PEI Act's broad objectives, including fiscal stability and expansive Director discretion. And it does not offend the federal injunction. The injunction said West Virginia can't use unique government power to cap Air Evac's recovery—it must act like a market player. That's what PEIA did here—it limited what *it* would pay Air Evac, but it did not use its government power to stop Air Evac from balance billing PEIA members. Air Evac can now bill PEIA's members directly if it chooses because the air-ambulance-specific balance-billing prohibition is preempted, and the Director exercised his lawful authority to exempt bills for the 115 transports from the general balance-billing prohibition.

IV. Either way, PEIA is qualifiedly immune. Under West Virginia's common law, an agency doing government work has qualified immunity for discretionary acts unless it violates clearly established rights. PEIA has broad statutory discretion to decide how much to pay Air

Evac; because it didn't exceed that discretion, it is immune. Further, even if Air Evac were right that it deserves payment, that answer is (at best) a close statutory call—not nearly clear enough to strip PEIA of qualified immunity. PEIA should win on that basis, too.

STATEMENT REGARDING ORAL ARGUMENT

PEIA requests oral argument under Rule 20 because this case involves issues of high public importance.

STANDARD OF REVIEW

The assignments of error involve only questions of law, so the Court reviews them all *de novo*. *In re H.W.*, 247 W. Va. 109, ___, 875 S.E.2d 247, 253 (2022).

ARGUMENT

I. The Court Lacks Jurisdiction Because PEIA Is Sovereignly Immune.

PEIA enjoys sovereign immunity, so the circuit court had no jurisdiction. All agree that PEIA is the State, and all agree that the recognized sovereign-immunity exceptions don't apply. After all, Air Evac seeks the type of relief sovereign immunity bars—State money to pay for a past debt. These undisputed facts should end the analysis—and the case—under Article VI, Section 35 of the West Virginia Constitution. But the circuit court invented a new paying-program exception, saying that if the Legislature intends for an agency to pay third parties, then the agency is amenable to suit. That exception violates Section 35, related case law, and the policy arguments the circuit cited in support.

A. Under the ordinary five-factor test, PEIA is sovereignly immune.

PEIA is sovereignly immune. The Constitution says that the "state of West Virginia shall never be made defendant in any court of law or equity." W. VA. CONST. art VI, § 35. This grant of immunity sounds broad because it is. *Davari v. W. Va. Univ. Bd. of Governors*, 245 W. Va. 95, 99, 857 S.E.2d 435, 439 (2021) (describing "sovereign immunity" as "facially absolute"). It is

"more than a defense to a suit in that [it] grant[s] governmental bodies and public officials the right not to be subject to the burden of trial at all [and] . . . spares the defendant from having to go forward with an inquiry into the merits of the case." *Hutchison v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996). This broad protection also extends to government agencies like PEIA. Syl. pt. 7, *Shaffer v. Stanley*, 215 W. Va. 58, 593 S.E.2d 629 (2003). Because the "primary purpose" of this immunity is "to prevent the diversion of state money" to pay court awards, *Kerns v. Bucklew*, 178 W. Va. 68, 754, 357 S.E.2d 750, 72 (1987), it consistently bars suits against State agencies that "attempt to obtain retroactive monetary recovery"—that is, a straight monetary damages judgment—"payable from State funds," syl. pt. 1, *Gribben v. Kirk*, 195 W. Va. 488, 466 S.E.2d 147 (1995).

The Court considers five factors to decide whether an agency counts as the "state" for sovereign immunity purposes: (1) "whether the body functions statewide"; (2) "whether it does the State's work"; (3) "whether it was created by an act of the Legislature"; (4) whether it is subject to local control"; and (5) whether it is financially dependent "on State coffers." *Arnold Agency v. W. Va. Lottery Comm'n*, 206 W. Va. 583, 591, 526 S.E.2d 814, 822 (1999) (cleaned up).

PEIA meets every factor of the test. It functions statewide. It does the state's work, too: Administering and controlling the insurance of tens of thousands of state employees is quintessential state business. *Cf. Hamill v. Koontz*, 134 W. Va. 439, 445, 59 S.E.2d 879, 883 (1950) ("That test is: Is the matter involved the state's matter?" (cleaned up)). PEIA is also a legislative creation: By statute, the Governor appoints its director and finance board to perform statutory duties. W. VA. CODE §§ 5-16-3(a), 5-16-4. It is not subject to local control either. And all PEIA's money goes into and comes out of the state treasury. Like the Board of Governors of West Virginia University, *Davari*, 245 W. Va. at 102, 857 S.E.2d at 442, and West Virginia State

University, *City of Morgantown v. Ducker*, 153 W. Va. 121, 126, 168 S.E.2d 298, 301 (1969), all "[m]oneys received and administered by" PEIA are "public moneys" and "can be withdrawn from the public fund in the State treasury only upon a warrant issued by the auditor on the treasurer and by the check of the treasurer," *id.*; *see* W. VA. CODE § 5-16-18(a), (b), (f). Even the circuit court admitted that "any money used to satisfy Air Evac's requested relief will come from State monies held under the custody of the State Treasurer"—i.e., the state coffers. A.R. 561 (Order ¶ 49); *see, e.g.*, A.R. 110 (2018 State Treasury check to Air Evac for payment of transport). Given PEIA's "features [and] characteristics" and "the provisions of [its] creation," it is the "state." *Hope Nat. Gas Co. v. W. Va. Tpk. Comm'n*, 143 W.Va. 913, 928, 105 S.E.2d 630, 639 (1958). And at bottom, "when the action is in essence one for recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity." *W. Va. Lottery v. A-1 Amusement, Inc.*, 240 W. Va. 89, 103, 807 S.E.2d 760, 774 (2017) (cleaned up)).

B. No recognized exception to sovereign immunity applies here.

Neither the circuit court nor Air Evac disagreed that State funds are at issue. Instead, they thought sovereign immunity doesn't apply because Air Evac's petition fits into one of Section 35's several exceptions. But it doesn't. No recognized exception applies here; and the brand-new exception Air Evac and the circuit court invented out of whole cloth is flawed.

About 25 years ago, in *Univ. of W. Va. Bd. of Trs. v. Graf*, 205 W. Va. 118, 122-23, 516 S.E.2d 741, 745-46 (1998), our Supreme Court of Appeals assembled a comprehensive list of the twelve exceptions to Section 35 sovereign immunity:

- Suits for injunctive relief "to restrain or require State officers to perform ministerial duties";
- "[S]uits for declaratory judgment";
- Suits for mandamus relief to compel state officers "to perform their lawful duties";

- Suits for mandamus relief after the Legislature recognizes a "moral obligation by the State" and appropriates funds to cover that obligation;
- "[S]uits against State officers acting or threatening to act, under allegedly unconstitutional statutes";
- Suits requiring the State Road Commission to conduct takings clause proceedings or;
- Suits against a quasi-public entity that lacks "taxing power or dependency upon the State for financial support";
- Counterclaims against the State when the State sued first;
- Suits where Section 35 immunity is superseded by federal law that grants a cause of action—e.g., a state employee's federal sex discrimination claim;
- Suits asserting liability because of the "State's performance of [a] proprietary" or ownership role (e.g., owning a community swimming pool);
- "[S]uits by state employees seeking an award of back wages which is prospective in nature"; and
- "[S]uits that seek recovery under and up to the limits of the State's liability insurance coverage" (the "*Pittsburgh Elevator*" exception).

Air Evac's petition fits none of these exceptions. The first six are out right away because Air Evac is seeking damages. It does not seek "a prospective declaration" of its rights, syl. pt. 1, *Gribben*, 195 W. Va. at 490, 466 S.E.2d at 149, or a "prospective[]" adjustment of PEIA's future "conduct," syl. pt. 2, *id.* It asks for more money for transports that pre-dated its state court suit. A.R. 10 (asking PEIA to pay more money for 115 transports all occurring more than five months before it filed suit); A.R. 93-94, 334; *see also Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) (per curiam). The other six don't work either. PEIA is a purely public entity entirely dependent on the State for financial support and didn't sue Air Evac first. Air Evac's petition is based on West Virginia law, not federal law granting a cause of action. Air Evac disputes only PEIA's payment decision—it doesn't raise proprietary or ownership or employee-back-pay claims. Nor does the petition mention or invoke PEIA's liability insurance coverage limits (likely because PEIA already checked and told Air Evac that it has no such coverage, A.R. 63).

C. The circuit court's new exception to sovereign immunity is unsustainable as a matter of law and policy.

PEIA is the "state" under Section 35, Air Evac's suit is for money damages, and its petition doesn't fit any of Section 35's exceptions. That should be the end of the sovereign immunity analysis. But it wasn't below. Air Evac and the circuit court invented a brand-new exception that doesn't appear in any Supreme Court of Appeals case; violates longtime precedent; and badly mangles the cases the circuit court gestured to in support.

The circuit court's new exception would allow suits against the State "where the Legislature itself creates a program, appoints an agency to administer it, and requires the agency to make payment out of funds appropriated for that purpose." A.R. 562 (Order ¶ 54). It justified this new paying-program exception by explaining that it satisfies a "policy" behind sovereign immunity: "to prevent the diversion of State monies from legislatively appropriated purposes." *Id.* (quoting *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987)).

The Court should reject this newly minted exception for six reasons.

First, this exception has no basis in the law. No Supreme Court of Appeals case law mentions or creates this rule; neither the circuit court nor Air Evac cited any. Sovereign immunity is "not judicially revocable." *Gribben*, 195 W. Va. at 493, 466 S.E.2d at 152. Even if it were, creating new policy-based exceptions to Section 35 is, at best, a job for the high court—not the circuit court. *See* Stephen J. Ware, *Originalism, Balanced Legal Realism and Judicial Selection: A Case Study*, 22 KAN. J.L. & PUB. POL'Y 165, 190 (2013) (noting the general American rule that "State supreme courts," not trial courts, steward the evolution of the law).

Second, although the circuit court cited *Mellon-Stuart* as its policy justification, the case elsewhere forecloses this paying-program exception. In *Mellon-Stuart*, the Court noted that Section 35's "grant of immunity is absolute"—meaning it "cannot be waived by the legislature or

any other instrumentality of the State." 178 W. Va. at 296, 359 S.E.2d at 129. This truism should be uncontroversial—"[o]f course" the Legislature lacks the power to waive *constitutional* sovereign immunity. *Ducker*, 153 W. Va. at 130, 168 S.E.2d at 303 (1969); *see also Hope Nat.*, 143 W. Va. at 925, 105 S.E.2d at 637 (saying "the constitutional provision cannot be disregarded," even if the Legislature can waive other immunities in other contexts). Yet the circuit court's paying-program exception would do exactly that by treating any agency paying money from a fund as an implicit legislative waiver of sovereign immunity. If *Mellon-Stuart* offers anything helpful here, it's that legislative waivers—implicit or otherwise—don't change Section 35 immunity.

Third, *Mellon-Stuart*'s own facts belie any thought that its "legislatively appropriated purposes" language subtly created some additional, broad-based sovereign immunity exception. In *Mellon-Stuart*, two contractors working on Marshall University won $800,000 in claims against the Board of Regents in the Court of Claims. 178 W. Va. at 294, 359 S.E.2d at 127. The contractors then filed a mandamus action against the Board, reasoning that because the Court of Claims had found in the contractors' favor, the only work left for the Board was the ministerial task of writing the check. *Id.* at 295, 359 S.E.2d at 128. But crucially, the Legislature had refused to appropriate the $800,000. *Id.* The Court held that sovereign immunity barred the suit. *Id.* at 297, 359 S.E.2d at 130. Given the unique facts about the Legislature's refusal to appropriate money, it makes sense the Court would make the point that sovereign immunity bars seeking "monetary relief . . . against the State treasury" without "a proper legislative *appropriation*." *Id.* at 296, 359 S.E.2d at 129; *cf. State v. Sims*, 130 W.Va. 623, 46 S.E.2d 90 (1947) (granting mandamus relief against auditor after he refused to issue warrant for funds specifically appropriated by Legislature). Nothing suggests that this language tacitly crafted another exception to Section 35.

Fourth, we know *Mellon-Stuart* wasn't creating an additional sovereign-immunity exception because it explicitly named the only two exceptions it was considering: a *Pittsburgh Elevator* exception and a proposed commercial-venture exception. 178 W. Va. at 295-96, 359 S.E.2d at 128-29. The parties never mentioned, nor did the Court consider, anything like the expansive exception Air Evac and the circuit court created.

Fifth, other cases show that sovereign immunity applies even where the Legislature set money aside for certain purposes and charges an agency with using those funds. For example, in *Phillips v. W. Va. Dep't of Health & Human Res.*, the Court rejected a sign-language interpreter's claim for payment under a contract with DHHR. No. 19-0610, 2020 WL 3408421, at *1 (W. Va. 2020) (mem. decision). The court held that because the state's insurance policy did not cover such claims, they could not be brought in state court, *id.* at *3-4, even though DHHR is empowered by state law to engage such services for state-run psychiatric hospitals, W. VA. CODE § 27-1A-4(d), and pays for them through legislative appropriations, *id.* § 27-1A-8. In another case, the Supreme Court of Appeals held that sovereign immunity barred retroactive recovery of overtime and holiday compensation for certain National Guard firefighters. *Skaff*, 200 W. Va. at 703, 490 S.E.2d at 790. It didn't matter that these employees were entitled to an award for leave going forward—i.e., prospectively, *id.*, or that the funds for their salaries came "from the federal government" and were set apart from "general revenues" in a special revenue account. *Id.* at 706, 490 S.E.2d at 793. Sovereign immunity still protected the State Treasury from a damages award drawn from that appropriation. *Id.* Similarly, in *Arnold Agency*, the Court held that an ad agency couldn't seek damages from the Lottery's mishandling of competitive bidding on a multi-million advertising contract unless it fit within the *Pittsburgh Elevator* exception to sovereign immunity. 206 W. Va. at 588, 526 S.E.2d at 819. It reached this conclusion even though State Code directed the Lottery

to competitively bid out the contract, W. VA. CODE §§ 5A-3-1 *et seq.*, and the successful bidder would be paid from special revenue set aside for that purpose. *State ex rel. Fahlgren Martin, Inc. v. McGraw*, 190 W. Va. 306, 311 n.4, 438 S.E.2d 338, 343 n.4 (1993) (discussing funding for this Lottery advertising contract). The Court did not create a new paying-program exception in any of these cases. The Legislature's choice to set aside money for specific purposes and place an agency over the use of these appropriated funds did not open the State Treasury to court-ordered awards from those appropriations. It shouldn't in this case either.

Sixth, the paying-program exception wouldn't make a good addition to *Graf*'s list of Section 35 exceptions because allowing retroactive damages relief rather than prospective relief violates the list's internal logic. The predominating character of the *Graf* exceptions is that they are *forward-looking* relief. From writs of mandamus to injunctions to employee back pay, the Court crafts exceptions based on their prospective nature. Exceptions to Section 35 can sometimes be found when "the relief sought involves a prospective declaration of the parties' rights," but no exception is possible when "the relief sought involves an attempt to obtain a retroactive monetary recovery." *Gribben*, 195 W. Va. at 497, 466 S.E.2d at 156; *cf. Papasan v. Allain*, 478 U.S. 265, 278 (1986) (explaining that relief against the State "to compensate a party injured in the past" is "barred" by similar 11th Amendment principles). Air Evac's proposed paying-program exception is unlike *Graff*'s other exceptions because it would allow "retroactive monetary relief against the State," thus, "implicat[ing]" sovereign immunity. *Skaff*, 200 W. Va. at 706, 490 S.E.2d at 793.

Trying to cast this paying-program doctrine as a longtime and familiar Section 35 exception, the circuit court cited three Supreme Court of Appeals cases in which someone sued a state agency for money. A.R. 562-63 (Order ¶ 55). But those cases are not precedent here. They're all silent on sovereign immunity; so they can't be used to show exceptions to it. The "existence

of unaddressed jurisdictional defects has no precedential effect." *Kanawha County Pub. Library Bd. v. Bd. of Educ. of County of Kanawha*, 231 W. Va. 386, 396, 745 S.E.2d 424, 434 (2013) (quoting *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1974)). Jurisdictional issues "neither asserted by the parties nor addressed" by the Supreme Court of Appeal are simply "not binding." *Id.*

None of the circuit court's preferred cases apply, either: none of them involve recovery of State funds for past State debts. *Maupin* only involves prospective remedies. The question there was whether a dog breeder "would . . . be eligible to receive payments" of certain State funds in the future. *Maupin v. Sidiropolis*, 215 W. Va. 492, 494, 600 S.E.2d 204, 206 (2004). *CAMC v. State Tax Dep't of W. Va.* is a suit to determine a hospital's tax liability, 224 W. Va. 591, 594, 687 S.E.2d 374, 377 (2009), and not—like Air Evac's—a suit to determine the *State's* liability. When the hospital initiated its suit, the money was in the taxpayer's (not the State's) possession. *Id.* Sovereign immunity doesn't apply to a private person's challenge of its obligation to pay State taxes. *Cf. CSX Transp., Inc. v. Bd. of Pub. Works of State of W. Va.*, 138 F.3d 537, 542 (4th Cir. 1998) (finding that similar 11th Amendment immunity barred suits for "money the state owed the plaintiff" but suits for money taxpayer owed the state are not). It does, however, stop suits—like Air Evac's—that allege that the State is liable for a past debt. Syl. pt. 2, *Ables v. Mooney*, 164 W. Va. 19, 264 S.E.2d 425 (1979). *Curry* is distinguishable for similar reasons. It involved an agency's prospective determination that a part-time State employee was not entitled to participate in the Public Employees Retirement Fund ("PERS"), and therefore, was ineligible for future retirement benefits. *Curry v. W. Va. Consol. Pub. Ret. Bd.*, 236 W. Va. 188, 190, 778 S.E.2d 637, 640 (2015). This forward-looking decision triggered a refund of the contributions PERS previously collected from the employee. *Id.* at 194, 778 S.E.2d at 643. But like *CAMC*, *Curry* was not a decision on the *State's* liability for a past debt. Instead, the court ordered the refund of money

the *employee* had incorrectly paid. *Id.* at 194, 778 S.E.2d at 643. Air Evac's suit is nothing like *Maupin*, *CAMC* or *Curry*. Air Evac seeks money *from the State* to pay *past debts*—not a refund or any prospective remedy. Its suit is just the type sovereign immunity bars. Nothing in *Maupin*, *CAMC* or *Curry* says otherwise.

Air Evac still has a remedy: it may bring its claim before the Legislative Claims Commission, just as parties otherwise barred by sovereign immunity do every day. W. VA. CODE § 14-2-12. The Legislature created the commission—formerly called the "Court of Claims—because Section 35 "provides sovereign immunity protections and does not allow for suits to be brought against the State." *Hutchinson v. Underwood*, No. 19-1079, 2020 WL 5588612, at *1 n.1 (W. Va. Sept. 18, 2020) (mem. decision). "The function of this legislative body is to make 'a recommendation to the Legislature based upon a finding of moral obligation, and the enactment process of passage of legislation authorizing payments of claims recommended by the court is at legislative discretion.'" *Id.* (quoting W. VA. CODE § 14-2-28 (2014)). Given our Constitution's strict sovereign immunity protections, any "knowledgeable party" doing business with a state agency has effectively "agreed to submit any disputes with the contracting state agency for resolution to the court of claims." *Mellon-Stuart*, 178 W. Va. at 296-97, 359 S.E.2d at 129-30. Like the *Mellon-Stuart* contractors, Air Evac is a "seasoned and sophisticated business entit[y]," so it knew from the start that the Claims Commission was available. *Id.* at 297, 359 S.E.2d at 130. Air Evac cannot now "attempt to recover damages against the State by means of [this] civil action"; its "sole and exclusive remedy is an adjudication of [its] claims before the" Legislature. *Id.*

Since the Legislature created PEIA in the early 1970s, many parties have recovered PEIA-related funds through that process. *See, e.g.*, *E. Panhandle Transit Auth. v. PEIA*, CC-89-88 (W. Va. Ct. Claims Dec. 20, 1989) (awarding claimant a refund of overpaid premiums); *Lewis v. PEIA*,

CC-90-6 (W. Va. Ct. Claims March 26, 1990) (awarding member claim amount sought); *White v. PEIA*, CC-89-497 (W. Va. Ct. Claims March 26, 1990) (same); *Ramsey v. PEIA*, CC-83-289 (W. Va. Ct. Claims Jan. 17, 1984) (same); *Morgan v. PEIA*, CC-83-13 (W. Va. Ct. Claims May 25, 1983) (denying claim for overpayment of premiums). Air Evac simply chose not to pursue this legal route for relief. But it's not like it didn't know. PEIA told it years ago that it could bring its claims in the Legislative Claims Commission—not the courts. A.R. 63.

And affording PEIA sovereign immunity tracks the chief objective underpinning Section 35: "protecting the public fisc." *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 661, 783 S.E.2d 75, 82 (2015); *see also A-1 Amusement*, 240 W. Va. at 102, 807 S.E.2d at 773 (saying sovereign immunity is "designed to protect the public purse" (cleaned up)). The framers adopted Section 35 explicitly "to protect the financial structure of the State." *State v. Ruthbell Coal Co.*, 133 W. Va. 319, 328, 56 S.E.2d 549, 554 (1949). Thus, even in that exceptionally rare cases where the courts order the State to comply with some financial mandate—i.e., in one of the exceptional cases identified in *Graf*—they "enter[] such territory with great care, fully respectful of the fact that our Constitution places on the Legislature the primary responsibility for raising and allocating State funds." *Gribben*, 195 W. Va. at 494, 466 S.E.2d at 153. The circuit court was too ready to disregard PEIA's sovereign immunity. This Court should correct that error and dismiss Air Evac's suit.

II. Neither The APA Nor The CCR Provided The Lower Court Jurisdiction.

The circuit court lacked appellate APA jurisdiction, too. The circuit court and Air Evac thought that Air Evac's petition should be "resolved under the APA and PEIA's Contested Case Rules." A.R. 567 (Order ¶ 79); *see also* A.R. 7 (Air Evac saying PEIA's decision "is appealable to [the circuit court] in accordance with W. Va. Code § 29A-5-4 and W. Va. Code R. § 151-3-13."). But a party can invoke the APA's appellate jurisdiction or PEIA's CCR only when its claim

arises out of a "contested case"—that is, a proceeding in which the law requires the government to give the party a hearing. Air Evac doesn't have such a right. It can't show any legal authority requiring PEIA to give Air Evac a hearing. So the APA and CCR do not apply. What's more, the Plan's review process expressly applies to situations like this, where a medical provider is disputing how much PEIA paid them. The Plan is a legislative-exempt rule, so it gets the same preference as statutes—i.e., "controlling" preference. So even if the CCR applied, the Plan would supersede it. The circuit court was wrong to hold otherwise.

A. This payment dispute does not present a "contested case."

To start, the APA and PEIA's CCR aren't the right fit for Air Evac's petition because the administrative action the petition challenges, PEIA's decision to pay the Medicare Rural Rate, wasn't a "contested case."

Agency decisions aren't automatically reviewable under the APA. *W. Va. Bd. of Educ. v. Perry*, 189 W. Va. 662, 665, 434 S.E.2d 22, 25 (1993). Rather, a party "is entitled to judicial review" of an administrative decision under the APA only when they are "adversely affected by a final order or decision *in a contested case*." W. VA. CODE § 29A-5-4(a) (emphasis added). The APA defines a "contested case" as any "proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." *Id.* § 29A-1-2(b).

Nor do the CCR apply to every dispute; they, too, are largely limited to the same "contested cases" category. *See* W. VA. CODE R. § 151-3-1 (noting that the "Scope" of the CCR extends to "general procedures for conducting *contested case hearings,*" except for proceedings for declaratory judgments, which Air Evac does not request (emphasis added)). The CCR describes "contested case" proceedings by copying verbatim the APA's hearing and required-by-law

language from W. Va. Code § 29A-1-2(b). *Id.* § 151-3-4 (requiring certain things of "[a]ny party who demands a hearing . . . required by law").

So to invoke appellate APA jurisdiction *or* the CCR, "an agency must either be required by some statutory provision or administrative rule to have hearings or the specific right affected by the agency must be constitutionally protected such that a hearing is required." Syl. pt. 1, *Perry*, 189 W. Va. at 663, 434 S.E.2d at 23. Our Supreme Court of Appeals has boiled "contested cases" down to this: "where there is no right to an administrative hearing, there is no 'contested case' from which to file an appeal." *Williams v. W. Va. Div. of Motor Vehicles*, 226 W. Va. 562, 567, 703 S.E.2d 533, 538 (2010). A circuit court invoking APA jurisdiction or the CCR must, of course, adhere strictly to these limitations. *Cruikshank v. Duffield*, 138 W. Va. 726, 735, 77 S.E.2d 600, 605 (1953) ("[W]hen acting only by virtue of a statute, as in the instant case, such courts are limited in power to that granted by the statute.").

Air Evac's petition is not a "contested case" because no constitutional right, statute, or agency rule requires PEIA to determine the amount it owes Air Evac after a hearing. Taking these sources of law in turn:

Constitutional rights. Air Evac's petition mentions state or federal constitutional rights zero times. It also never claims that either constitution entitles it to more money. Air Evac's reply brief below did say that denying it a hearing "would raise serious due process and equal protection concerns." A.R. 452. But this circular logic cannot support its right to APA review. If not holding a hearing (when the base-claim is not constitutional) was itself a constitutional violation, *Perry*'s "contested case" test would be meaningless. All agency decisions would always require hearings even when "the specific right affected by the agency" decision wasn't "constitutionally protected."

Syl. pt. 1, *Perry*, 189 W. Va. at 663, 434 S.E.2d at 23. That's not how APA review works. No constitutionally protected rights require a hearing or implicate the APA here.

Statutory rights. *Perry* also says courts should search for "statutory language creating an agency hearing." Syl. pt. 2, *Perry*, 189 W. Va. at 663, 434 S.E.2d at 23. Here, that search is fruitless. Nothing in the PEI Act—or any other statute—gives Air Evac a right to an administrative hearing. The PEI Act allows for contested case hearings in only one scenario: insurance fraud. Under West Virginia Code Section 5-16-12(b), a fraudster can be held in violation of the article and liable for any overpayment "after notice and an administrative proceeding." *See also id.* § 5-16-12a(b) (authorizing PEIA "through administrative proceeding to recover any benefits or claims paid to or for any employee, or their dependents, who obtained or received benefits through fraud"). Healthcare provider claims of underpayment don't fit that bill.

And contrary to the circuit court's assumption, the Court should not find an implicit right to a hearing based on the PEI Act's structure or the nature of Air Evac's claims. *See* A.R. 566 (Order ¶ 72). The Supreme Court of Appeals doesn't appear to have done so before; its cases consistently contemplate some kind of express statutory provision. *See Williams*, 226 W. Va. at 567, 703 S.E.2d at 538. And the Legislature knows perfectly well how to set up a "contested case" structure when it wants to. Take these many contexts just in Chapter 16: W. VA. CODE § 16-2D-19 (certificates of need); W. VA. CODE § 16-35-11 (suspending or revoking a "lead abatement discipline license"); W. VA. CODE § 16-5N-12 (a residential care community "licensee or applicant" challenging a civil penalty); W. VA. CODE § 16-29D-8 (penalties flowing from a health care provider's knowing violation of Article 16 and related regulations); W. VA. CODE § 16-5L-10 (long-term care ombudsmen bringing actions on behalf of long-term care facility resident); and W. VA. CODE § 16-29B-13 (various orders of the Health Care Authority Board). The examples of

contested-case language—both generally and in other healthcare related statutes in particular—are strong evidence that the Legislature's choice to omit a provider right to an administrative hearing in the PEI Act was no accident. *See* syl. pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984) ("[T]he express mention of one thing implies the exclusion of another."). The Court shouldn't second guess that choice.

Regulatory rights. No rule or regulation gives Air Evac a right to an administrative hearing either. Air Evac seems to think the CCR itself includes such a right. *See* A.R. 4, 7-8, 12-15, 20 (referring to PEIA's contested case proceedings). But that's a mistake. As noted above, "contested case" is a well-known term of art in the administrative law context, so a court must give its more sophisticated and context-specific reading. *See United States v. Miltier*, 882 F.3d 81, 91 (4th Cir. 2018) (recognizing "term of art" in textual reading of statutes). Both that context and the CCR's citations to the APA explain that they are importing the term "contested case" straight from the APA. *See* W. VA. CODE R. § 151-3-1(1.1) (explicitly invoking and incorporating the APA).

By itself, the APA never creates a "contested case" because it never creates a right to a hearing, syl. pt. 2, *Perry*, 189 W. Va. at 663, 434 S.E.2d at 23; the APA merely defines what a contested case is and explains how an agency should treat it. To show that a dispute is a "contested case," a petitioner must always point to some external, non-APA legal source that then works in tandem with the APA's definitions and structure. In *Currey v. State of W. Va. Human Rights Comm'n*, 166 W. Va. 163, 169, 273 S.E.2d 77, 80–81 (1980), the plaintiff's claim fell "squarely within the statutory definition of contested cases" because the non-APA statute, W. VA. CODE § 5-11-10, explicitly required the defendant commission "to hold a hearing on [the plaintiff's] sex discrimination charge." Created to mirror the APA, the CCR by themselves don't make any dispute a "contested case" because they don't include a right to a hearing; they simply explain how

a case involving a "hearing . . . required by law" proceeds through PEIA's administrative system. All of this means the APA and CCR apply only once Air Evac produces some other statute or other rule creating a right to a hearing. Air Evac hasn't done so.

Two arguments from the CCR's passage buttress this analysis. *First*, when the Public Employees Insurance Board originally promulgated the CCR in 1987, it called them "Rules of Procedure." Pub. Emps. Ins. Bd., Notice of Agency Adoption on Rules of Procedure for contested case hearings and Declaratory Ruling, Chapter 5-15 Series III (1987) (Mar. 18, 1987), bit.ly/3LSIGd4; *see also* W. VA. CODE R. § 151-3-1.2 (referring to them as "procedural rules"). And the Secretary of State's online system (the official reporter for State rules) still categorizes them as "Procedural Rules." A.R. 350; *see also* Rule Detail and Documents: Rules of Procedure for Contested Case Hearing and Declaratory Rulings, W. VA. SEC'Y OF STATE, bit.ly/3HV5V5a (last visited June 14, 2023). This procedural designation matters because only legislative rules can "grant or deny a specific benefit" or be "determinative on any issue affecting . . . statutory . . . rights, privileges or interests," W. VA. CODE § 29A-1-2(e). *Second*, and relatedly, the APA requires every agency to "adopt appropriate rules of procedure for hearing[s] in contested cases"—irrespective of whether that agency even handles contested cases. *Id.* § 29A-5-1(a). The CCR state at the start that they implement that provision. W. VA. CODE R. § 151-3-1.2 (1987). Given this mandatory promulgation, we shouldn't be surprised that the CCR don't apply widely. In short, citing the CCR alone won't cut it.

Further, Air Evac's explicit, long-time, and repeated refusal to invoke the CCR support their inapplicability here. For over two years, Air Evac disclaimed reliance on any administrative remedies. A.R. 402 (saying "[i]t is our position that . . . administrative appeals are not required, and we can now file suit"); A.R. 404 (same). Instead, it threatened direct circuit court action. A.R.

107 (stating intent to sue for declaratory and injunctive relief in circuit court). It was only in late 2019 that, reversing positions, Air Evac asked the circuit court to use the CCR and APA to order PEIA to promptly pay whatever it unilaterally demands for the 115 transports. A.R. 19-20, 68-83. The circuit court acts as though the CCR's applicability is straightforward and obvious. But for at least two years, Air Evac didn't think so.

Finally, the circuit court's role in reviewing agency actions under the APA shows Air Evac's "petition for review" is inappropriate. Under the APA, the circuit "determine[s] whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *State ex rel. Frazier v. Thompson*, 243 W. Va. 46, 54, 842 S.E.2d 250, 258 (2020) (quoting *W. Va. Health Care Cost Rev. Auth. v. Boone Mem'l Hosp.*, 196 W. Va. 326, 335, 472 S.E.2d 411, 420 (1996)) (cleaned up). When there's no contested case hearing, there's no decision or judgment to review. *Cowie v. Roberts*, 173 W. Va. 64, 312 S.E.2d 35 (1984); *State ex rel. Miller v. McGraw*, No. 12-0380, 2012 WL 3155761, at *3 (W. Va. May 30, 2012) (mem. decision). Here, there was no contested hearing, so Air Evac was wrong to file a petition for review under the APA.

At bottom, Air Evac tried to turn a provider payment dispute into a "contested case" by styling a document with legal formatting a "Demand for a Contested Case" and then suing over it. But that move won't work. Air Evac hasn't done the hard work of offering any legal authority that gives it a right to a hearing; nor can it, since none exists. This isn't a contested case and is inappropriate under both the APA and CCR.

B. If this administrative action were a "contested case," the Provider Plan's provider-dispute procedures would govern.

PEIA agrees with the circuit court and Air Evac that the CCR are valid and binding rules. *See* A.R. 564 (Order ¶ 61). PEIA has never disputed that. But what PEIA *does* dispute is that

those valid CCR are the appropriate dispute-resolution mechanism *for this case*. Even if the Air Evac could somehow justify invoking the CCR, the Plan is the better fit.

The Plan has a uniquely powerful sort of regulatory authority. It is a "legislative exempt" rule and thus "entitled to controlling weight" in any legal analysis. Syl. pt. 9, *Charleston Gazette v. Smithers*, 232 W. Va. 449, 752 S.E.2d 603 (2013) (cleaned up). Legislative exempt rules are those "the Legislature expressly exempts . . . from such legislative rule-making review and approval." Syl. pt. 13, *Simpson v. W. Va. Off. of Ins. Comm'r*, 223 W. Va. 495, 678 S.E.2d 1 (2009) (citing W. VA. CODE § 29A-1-3(d)). Under West Virginia Code Section 5-16-8(1), PEIA "insurance plans" are explicitly "not subject to chapter § 29A-1-1 *et seq.* of this code," making the Plan a "legislative (exempt) rule[]," *see* W. VA. CODE R. § 151-1-1.1 (2019). Because legislative exempt rules like the Plan are "authorized by legislation," *Griffith v. Frontier W. Va., Inc.*, 228 W. Va. 277, 290, 719 S.E.2d 747, 760 (2011) (cleaned up), they "can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious." *Simpson*, 223 W. Va. at 510, 498, 678 S.E.2d at 16. "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Murray Energy Corp. v. Steager*, 241 W. Va. 629, 640, 827 S.E.2d 417, 428 (2019) (cleaned up).

The Plan has a three-step process to resolve provider payment disputes. If a provider believes PEIA has made a mistake in processing a "claim or reviewing a service," it may raise the issue with a "Third-Party Administrator." A.R. 416-17 (Plan § V.9). Then, if the provider dislikes the Third-Party Administrator's decision, it may appeal that decision in writing to the Third-Party Administrator. *Id.* If the provider dislikes the decision on appeal, it may appeal that decision "in writing to the director of the PEIA." *Id.* PEIA will then "reconsider the entire case," considering all relevant materials, and issue a "decision, in writing, explaining the reason for modifying or

upholding the original disposition." *Id.* (In cases involving medically specific decisions, there may also be an external review. *Id.*) Air Evac raises a classic provider payment dispute: PEIA paid it a given sum (the Medicare Rural Rate) for its air transport services, but Air Evac thought PEIA should have paid more. The Plan is meant handle that dispute.

A similar case in the Circuit Court of Marion County rejecting a member's attempt to use the APA and CCR to appeal one of PEIA's coverage decisions to circuit court shows how all this is supposed to work. *Demary v. PEIA*, CC-24-2018-P-57, *11 (Cir. Ct. Marion Cnty. 2018). The member there sought payment for an experimental treatment and insisted that APA gave it an avenue to do so because the CCR applied to "every person . . . affected by" PEIA. A.R. 430-31. But the Marion County court found that the Plan was more specific and controlled PEIA's coverage decision, A.R. 431, and that its procedures did not implicate the APA. A.R. 429. So it dismissed for lack of jurisdiction. A.R. 432. Air Evac's suit should have ended the same way.

In contrast, the circuit court here tossed out the Plan's process and substituted the CCR instead. The circuit court is right that Air Evac's legal arguments wouldn't be the sort of run-of-the-mill "mistake" that third-party administrators are used to handling. A.R. 565-66 (Order ¶¶ 69-72). But an out-of-the-ordinary dispute doesn't give Air Evac or the circuit court the right to ignore the Plan's "controlling" appeals process. It just means Air Evac's claim would have moved quickly to the third and final step: review by the Director, who would have then decided the legal questions—exactly the sort of statutory interpretation problems he and PEIA confront daily. Maybe the circuit court would have designed some of PEIA's regulations differently. But the circuit court's opinion about the Plan's appeals process's nuance is irrelevant. Its sole prerogative is to give the Plan the "controlling weight" it is entitled to. Brushing away the Plan's appeals process was error.

Further, even if the CCR and the Plan overlap here, all the canons of textual construction point to using the Plan. The CCR say nothing about payment disputes; they include only generic language about parties rectifying rights. The highly specific and targeted Plan appeals process gets priority over the more general and procedural CCR process. Syl. pt. 3, *Newark Ins. Co. v. Brown*, 218 W. Va. 346, 624 S.E.2d 783 (2005) (the specific trumps the general). We get the same result using the *in pari materia* canon, which requires legal authorities touching the same topics or having the same purpose to be reconciled. Syl. pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975). It's easy to read these provisions harmoniously so long as the CCR play the catchall role and the Plan operates in its specific lane. Finally, as the newer regulation, the Plan should prevail. *Russell v. Town of Granville*, 237 W. Va. 9, 12, 784 S.E.2d 336, 339 (2016).

Even worse, for purposes of this case, the CCR process is no improvement over the Plan's appeals process. The circuit court felt the Plan wasn't appropriate to handle those "[q]uestions and arguments regarding the scope of PEIA's statutory authority, and the legal rights of medical providers," A.R. 566 (Order ¶ 72), because (1) the Plan focuses mainly on medical factfinding and (2) the Director shouldn't be the final "arbiter" of whether he has complied with a federal court order, A.R. 565-66 (Order ¶¶ 67-73). Yet the same two problems exist with using the CCR process here. The CCR's fact-finding mechanisms aren't helpful. *See generally* W. VA. CODE R. §§ 151-3-1 *et seq*. Remember that no contested questions of fact exist here: the merits involve strictly legal questions about PEIA's duty to pay Air Evac the full amount. A.R. 560 (Order ¶ 45) ("[T]he facts of this matter are not in dispute."). And just like the Plan, which gives final say on all questions (including legal questions) to the Director, the CCR give PEIA final say on all questions of law—including whether PEIA is complying with a federal court order. *See* W. VA. CODE R.

§ 151-3-11. If the concern is who makes the final call on the amount PEIA pays, the CCR are no better than the Plan.

And at the heart of the circuit court's reasoning here lies a false dichotomy: that Air Evac's claim and arguments could be resolved under only either the CCR or the Plan. The circuit court ignored a third (and the proper) option: follow the Plan's appeals process, get the Director's written decision, and then pursue any remaining claim or arguments before the Legislative Claims Commission. Or, if Air Evac insisted on going straight to court, it could have pursued non-damages remedies, like a writ of mandamus, W. VA. CODE §§ 53-1-1 *et seq.*, or an original action for declaratory judgment, *id.* §§ 55-13-1 *et seq.*, assuming it could satisfy the jurisdictional and other requirements that apply to those actions. But instead of dismissing this dysfunctional suit so Air Evac could pursue one of those options, the circuit court issued a results-oriented decision that crammed Air Evac's petition into the shape of a contested case and ignored the controlling weight of the Plan's appeals process. This Court should rectify those mistakes.

III. PEIA Legally Limited Payments To Air Evac To The Medicare Rural Rate.

Even if the APA were to apply, PEIA's actions do not violate it. Relevant here, the APA allows a court to reverse an agency decision if that decision violates a statutory provision, exceeds the agency's statutory authority, employs an unlawful procedure, or is affected by some other error of law. W. VA. CODE § 29A-5-4(1)-(4). But PEIA's statutory authority and discretion easily encompass its decision to limit payment to the Medicare Rural rate.

A. The Director enjoys significant discretion to implement the PEI Act and maintain fiscal stability.

Any review of the decision here must start with the PEI Act itself. And that Act reflects two central legislative purposes: *first*, the Legislature created the PEI Act to serve the public and,

to that end, intends PEIA to be fiscally stable; *second*, the Legislature granted the Director incredibly broad discretion to implement the Act consistent with those objectives.

PEIA exists for a "public purpose." W. VA. CODE § 5-16-1. Any PEIA plans or other work must therefore be geared toward ensuring long-term fiscal stability. *Id.* § 5-16-8(3)-(4). The PEIA Finance Board has a "fiduciary responsibility to protect plan assets for the benefit of plan participants." *Id.* § 5-16-4(b)(4); *see also id.* § 5-16-5 (noting that the finance board's purpose "is to bring fiscal stability to" PEIA); *id.* § 16-29D-1 (explaining how the Legislature sought to "effect cost savings in the provision of . . . health care" provided through PEIA and other state-funded programs). For example, PEIA must use extra funds to offset premiums. *Id.* § 5-16-5(j).

The Director's discretion is extremely broad. Among other things, he is PEIA's Chief Administrative Officer, W. VA. CODE § 5-16-3(a); has total control over hiring PEIA staff to implement the act, *id.*; controls member expenses, contributions, and costs, *id.* §§ 5-16-4(d), 8(1); has "exclusive authorization" to contract for PEIA, free from normal statutory processes controlling government contracts, *id.* § 5-16-9(a)-(b); decides who to pay on claims, *id.* § 5-16-11; investigates claims of fraud and abuse with broad subpoena power, *id.* § 5-16-12a(a)-(b); and controls all ancillary plans, *id.* §§ 5-16-15, 5-16-16 (naming dental, optical, preferred provider plans, among others). And of course, he "may make all rules necessary to effectuate the" PEI Act. *Id.* § 5-16-3(c); *see also id.* § 5-16-24 ("The director shall promulgate any necessary rules for the effective administration of the provisions of this article.").

These two themes—fiscal stability and director discretion—often merge, giving the Director wide latitude to save money, cut costs, and maintain the PEIA's financial health. For example, the Director must "make every effort" to manage long-term costs. W. VA. CODE § 5-16-3(e). This includes the power to "[m]anag[e] specialty pharmacy costs"; coordinate with

stakeholders to "encourage" "cost-effective [] care"; explore and develop "payment methodologies . . . such as case rates, capitation," etc.; adopt federal measures "to reduce cost"; "[e]valuat[e] the expenditures" in various areas to combat "the agency's medical rate of inflation"; and recommend certain benefit designs to control plan cost. *Id.* § 5-16-3(e)(2), (4)-(6), (8), (12). Every plan includes "necessary cost-containment measures" the Director implements. *Id.* § 5-16-5(c)(2); *see also id.* § 5-16-3(d) (allowing for differences in Medicare plan offering if it is "financially advantageous").

B. In deciding to pay Air Evac at the Medicare Rural Rate, the Director acted within his statutory discretion.

One way in which the Director exercises this direction is in setting rates. Relevant to this case, the Director's power to set rates flows from three specific statutory provisions:

- W. Va. Code § 5-16-8a (2016)—the air-ambulance specific fees provision.
- W. Va. Code § 5-16-5(c)(1)—the general fee-schedule provision.
- W. Va. Code § 5-16-3(c)—the general managerial discretion provision.

The Director used Section 5-16-3(c) to limit Air Evac's reimbursement to the Medicare Rural rate. A.R. 572 (Order ¶ 103). That provision reads:

> The director is responsible for the administration and management of the [PEIA] . . . and in connection with his or her responsibility may make all rules necessary to effectuate the provisions of this article. Nothing in [the fee schedule provision] limits the director's ability to manage on a day-to-day basis the group insurance plans required or authorized by this article, including, but not limited to, . . . provider negotiations, provider contracting and payment, designation of covered and noncovered services, . . . or any other actions which would serve to implement the plan . . . .

W. VA. CODE § 5-16-3(c); *see also id.* § 5-16-9 (confirming the Director may "negotiate and contract directly with health care providers . . . to secure competitive premiums, prices, and other financial advantages"). The plain language of this section gives the Director more than enough

discretion to negotiate with providers—like Air Evac—and determine the amount of any bill PEIA will cover and pay. It gives the Director total control over "provider negotiations," provider "payment," and anything else that would serve the purposes of the Plan and Act. These words encompass paying Air Evac at the Medicare Rural rate. The word "included" is important here, too. As used in Section 5-16-3(c), "included" acts "as a word of enlargement"—especially because here it "is followed by 'but not limited to.'" *Davis Mem'l Hosp. v. W. Va. State Tax Comm'r*, 222 W. Va. 677, 684, 671 S.E.2d 682, 689 (2008). This language confirms that the Director's authority is broader than the provision's plain language suggests. Finally, Section 5-16-3(c) says that it is not limited by the fee schedule provision. It provides standalone power for the Director to set rates and pay bills. And the federal injunction on the fee provision does not disturb it.

Applying Section 5-16-3(c) in this way was consistent with the PEI Act's purpose and the Director's default discretion, as discussed in Section III.A., *supra*. Reading Section 5-16-3(c) in light of the PEI Act's broader themes is important because "the basic and cardinal principle, governing the interpretation and application of a statute" is the Legislature's intent in passing the it. *Michael v. Consolidation Coal Co.*, 241 W. Va. 749, 756, 828 S.E.2d 811, 818 (2019). And to discern legislative intent, the Court must take a "view of the purpose of the whole act." *Thompson v. Curry*, 79 W. Va. 771, ___, 91 S.E. 801, 802 (1917). As noted in Section III.A., *supra*, the Legislature intended the PEI Act to support the public interest; accomplishing this depends, in major part, on preserving PEIA's fiscal stability and its ability to control billing negotiations with providers. But that doesn't happen here if Air Evac may strong arm PEIA into paying whatever Air Evac wants. With limited funds available, any extra money paid for air ambulance services means less money for hospitals, pharmacy benefits, and other medical claims. PEIA's interpretation protects against that. Further, through several permissive, open-ended grants of

power, the Act gives the Director the broadest possible authority. It's no stretch to say that the Act's default assumption is that if an otherwise lawful action will help implement the act, the Director can do it. This is doubly true for actions that can save PEIA money. PEIA's reading reflects that broad authority. Nor is there any question that one of those actions is deciding about provider rates and bills, given that the Act mentions that power twice. *See* W. VA. CODE §§ 5-16-3(c); 5-16-9. PEIA's reading jives better with the Act's purposes—i.e., the Legislature's intent—especially compared to Air Evac's straight-jacket reading.

C. The federal injunction only precludes PEIA from capping rates *and* denying recovery of the excess—and the Director properly permitted recovery of the excess.

The circuit court held that the Director's exercise of discretion violated the federal injunction even though Air Evac didn't raise, and the federal court didn't mention, the Director's discretion under West Virginia Code Section 5-16-3(c).

Instead, the circuit court's analysis concluded that "PEIA's payment of only the Medicare Rural rate" might "establish[] a maximum amount" in "violat[ion] of the *Cheatham* injunctions"; but this determination explicitly hinged on the supposed "absen[ce] [of] balance-billing." A.R. 577 (Order, ¶ 127). Put differently, it wasn't just PEIA's set rate that was said to have violated the ADA; it was the set rate working *in combination with* the balance-billing prohibition that led to preemption. *Cheatham*, 910 F.3d at 769 (noting preemption happened because West Virginia's statutes "limit[ed] reimbursement rates paid by the state *and* prevent[ed] air ambulance companies from seeking additional recovery from any third party" (emphasis added)); *Cheatham*, 2017 WL 4765966, at *8-9 (finding that PEIA's rate capping mechanisms went "beyond the methods available to [] commercial insurer[s]"). So if balance billing were on the table, then the circuit court's single theory for how PEIA violated the law evaporates on its own terms. The Medicare Rural rate no longer standards as the maximum sum that PEIA can collect.

The circuit court misunderstood West Virginia Code Section 5-16-8a (2016) to preclude balance billing throughout 2016-2019, when Air Evac provided the 115 transports. But that's not true. *Cheatham*, of course, declared that provision was preempted. And "a rule of federal law, once announced . . . must be given full retroactive effect by all courts adjudicating federal law." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 96 (1993); *see also Cipollon v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) ("[S]tate law that conflicts with federal law is 'without effect.'"). Federal courts do not "create new rules of law," they just say what the law is. *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008). So the rules they announce "necessarily pre-exist [the] articulation of the new rule." *Id.* Our high court also "give[s] retroactive effect to judicial decisions" "[a]bsent special circumstances." *Caperton v. A.T. Massey Coal Co.*, 225 W. Va. 128, 156, 690 S.E.2d 322, 350 (2009); *cf. City of Fairmont v. Pitrolo Pontiac-Cadillac Co.*, 172 W. Va. 505, 512, 308 S.E.2d 527, 534 (1983). So West Virginia Code Section 5-16-8(a) (2016) was retroactively void the moment the federal courts declared it preempted and enjoined PEIA from enforcing it. A.R. 323-24. It was never operative from 2016 to 2019. The circuit court was "deeply trouble[ed]" because it erroneously thought the Director was claiming he could just ignore Section 5-16-8a (2016) through his Section 5-16-3(c) power, but that's just not true. The federal courts' declaration that federal law preempts Section 5-16-8a is what voided that law, not the Director.

The Director did invoke his broad authority to address a different balance-billing ban: West Virginia Code Section 16-29D-4(a)(2). That provision is a generalized balance-billing ban that would apply irrespective of West Virginia Code Section 5-16-8a (2016). In its federal suit, Air Evac did at first seek to preempt this statute too. A.R. 172-73. But it did so "in the alternative." *Id.*; A.R. 554 (Order ¶ 11 n.1) (acknowledging the same). So the district court ultimately dismissed this part of Air Evac's federal suit, A.R. 323-24, leaving West Virginia Code Section 16-29D-

4(a)(2) to operate as it always had. But the generalized ban left in place doesn't apply to, and also legally obligates beneficiaries to pay for, services the Plan doesn't cover. It says that "any health care service which is not subject to payment by the plan or plans shall be the responsibility of the beneficiary." W. VA. CODE § 16-29D-4(a)(2). It also makes plain that "there shall be no prohibition against billing the beneficiary directly" "for those health care services which are not covered by the plans," *id.*—which fits neatly with the Director's Section 5-16-3(c) discretion. Under this section, the Director can declare services "noncovered." *Id.* § 5-16-3(c). When he does, the ban on balance billing in Section 16-29D-4(a)(2) falls away—just as it does when a member is treated by other non-participating providers. A.R. 399 (Cheatham Aff. ¶ 28). Like Air Evac, these providers do not have to accept PEIA rate. A.R. 398 (Cheatham Aff. ¶ 27). So, their services are considered non-covered, PEIA pays what it is willing to, and the provider can bill any remaining charges directly to the member. A.R. 399 (Cheatham Aff. ¶¶ 28-31). The Director is treating Air Evac the same way: he declared Air Evac's bills "noncovered," paid it what other air ambulance providers accept, and let it bill the members for the rest.

What all of this means is that no balance-billing prohibition applies to the 115 transports at issue here. Air Evac is free under the law to pursue its claims against individual members, and the "maximum amount" concerns voiced in *Cheatham* are beside the point.

D. The Director's decision was an appropriate exercise of market power.

Perhaps most fundamentally, West Virginia is still free use its "market power" "as the insurer of state employees to negotiate better rates up front *or* limit reimbursements for air ambulance services after the fact." *Cheatham*, 910 F.3d at 769 (emphasis added). Simply "limit[ing] reimbursements for air ambulance services after the fact" is what PEIA has done here. The circuit court and Air Evac don't see limiting PEIA's payments to Air Evac as satisfying that option, but it's difficult to imagine what else the Fourth Circuit could have had in mind. Now that

Air Evac can, if it chooses, bill PEIA's members above the Medicare Rural rate, PEIA's payment decision is no different than any other private insurer's payment decision. PEIA is using no coercive or special government power; it's just setting the rate it will pay. Indeed, PEIA's after-the-fact limitation is standard insurance-industry fare. Many other private insurers don't pay Air Evac its full charge. A.R. 264, 272 (Thomas Dep.: admitting as much). And as the circuit court found, PEIA pays the same rate to "other providers in the same category"—and those other providers accept it. A.R. 572 (Order ¶ 103).

In the end, the "ADA does not require a state to pay whatever an air carrier may demand." *Cheatham*, 910 F.3d at 769. State insurance agencies are not at the disposal of air ambulance companies. *See, e.g., EagleMed LLC v. Cox*, 868 F.3d 893, 906 n.3 (10th Cir. 2017) ("[T]he [ADA] does not impose a duty on the State to pay air-ambulance claims."); *accord Texas Mut. Ins. Co. v. PHI Air Med.*, LLC, 610 S.W.3d 839, 850 (Tex. 2020). ADA aside, States still play a crucial role in insurance regulation. And *Cheatham*'s acknowledgement of continuing state discretion "reflects . . . a faith in federalism and the legislative process." Timothy M. Ravich, *Airline Deregulation in the Fourth Circuit*, 71 S.C. L. REV. 717, 737 (2020). PEIA has justified the Fourth Circuit's faith here: it has functioned as a good-faith market participant and merely limited services after the fact—like the Fourth Circuit said it could. The circuit court was wrong to hold otherwise.

IV. PEIA Is Qualifiedly Immune Because Air Evac Had No Right To Full Payment, Let Alone A "Clearly Established" One.

PEIA should win on qualified immunity, too. Government agencies and officials are qualifiedly immune when they exercise their discretion lawfully—meaning they don't violate a clearly established right. PEIA is correct that Air Evac has no right to full payment. But even if it were wrong, that's not so clear based on the statute that PEIA loses its qualified immunity. The Court should vacate the circuit court's order and remand with instructions to dismiss.

On top of Section 35's sovereign immunity, state agencies like PEIA are also "entitled to assert" common-law "qualified immunity." *A-1 Amusement*, 240 W. Va. at 104, 807 S.E.2d at 775. They may be qualifiedly immune even if a suit falls within a sovereign immunity exception. *Marple*, 236 W. Va. at 661, 783 S.E.2d at 82. Put simply, qualified immunity also makes an agency doing agency work immune from suit. *Hope Nat.*, 143 W. Va. at 925, 105 S.E.2d at 637 ("Even without the constitutional inhibition against making the state a defendant in any suit, there is no right to sue a state upon a claim arising from the exercise of its governmental functions unless by consent of the state."). This doctrine is crucial to the smooth workings of government because it gives agencies the necessary room to "deliberate" on and "carry out" their various tasks. *Marple*, 236 W. Va. at 660-61, 783 S.E.2d at 81-82 ("[Q]ualified immunity . . . allow[s] officials to do their jobs and to exercise judgment, wisdom, and sense without worry of being sued.").

So PEIA is "absolute[ly]" "immune from liability" for all administrative "policy-making acts" unless Air Evac can show that PEIA's discretionary acts violate Air Evac's "clearly established statutory . . . rights or laws of which a reasonable person would have known." Syl. pts. 9-11, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014). "In absence of such a showing, both [PEIA] and its officials or employees . . . are immune from liability." Syl. pt. 11, *id.*

Air Evac can't make that showing here. PEIA had broad discretion in deciding how much to pay Air Evac. *See*, *supra*, Section III. Because PEIA exercised this discretion within its statutory bounds, it is qualifiedly immune. *See Marple*, 236 W. Va. at 660-61, 783 S.E.2d at 81-82 (holding that the Board was qualifiedly immune because "the actions complained of by Dr. Marple were discretionary judgments within" the State's authority). Indeed, PEIA is qualifiedly immune even if the Court agrees with Air Evac on the merits, just so long as Air Evac's win isn't

wholly unreasonable. That the circuit court remanded the case for more agency proceedings despite no fact issues is good prima facie evidence that isn't true. The circuit court explicitly refused to wade into the merits issues because, in its view, they warranted further development. Indeed, even Air Evac seems at points to admit its demand of full payment isn't the only reading of the statute. *See, e.g.*, A.R. 18 (admitting full payment is the easiest or "best" reading—not necessarily the clearly correct one). That Air Evac's putative rights are at least not clearly established is enough for qualified immunity. *Cf. Ashland Specialty Co. v. Steager*, 241 W. Va. 1, 9, 818 S.E.2d 827, 835 (2018) (refusing to second-guess State official's exercise of "discretion" with "a range" of options permitted by the statute).

Allowing this suit to proceed could work precisely those dangers qualified immunity seeks to prevent. PEIA interacts with hundreds of medical providers. Like Air Evac, most want to be paid more, and all interface with PEIA through various provisions of the PEI Act. Allowing any of these medical providers to sue PEIA anytime it makes a judgment call on a statutory question would create chaos. PEIA could not deliberate about or conduct its tasks "without worry of being sued" when it could be dragged into court for every exercise of judgment or common sense. *Marple*, 236 W. Va. at 660-61, 783 S.E.2d at 81-82. Given the number of such calls PEIA makes every day and the number of medical providers it interacts with, that result would be devastating. Qualified immunity protects PEIA's discretionary decision-making here.

CONCLUSION

This Court should vacate the circuit court's opinion and order and remand to the circuit court with instructions to dismiss the case.

Respectfully submitted,

JASON HAUGHT, in his capacity as Director of the Public Employees Insurance Agency, and

MARK D. SCOTT, GEOFF S. CHRISTIAN, AMANDA D. MEADOWS, JARED ROBERTSON, DAMITA JOHNSON, JASON MYERS, MICHAEL COOK, WILLIAM MILAM, AND MICHAEL T. SMITH, in their capacities as Members of the Public Employees Insurance Agency Finance Board,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 23-ICA-127

JASON HAUGHT, IN HIS CAPACITY AS DIRECTOR OF THE PUBLIC EMPLOYEES INSURANCE AGENCY, AND MARK D. SCOTT, GEOFF S. CHRISTIAN, AMANDA D. MEADOWS, JARED ROBERTSON, DAMITA JOHNSON, JASON MYERS, MICHAEL COOK, WILLIAM MILAM, AND MICHAEL T. SMITH, IN THEIR CAPACITIES AS MEMBERS OF THE PUBLIC EMPLOYEES INSURANCE AGENCY FINANCE BOARD,

Petitioners,

v.

AIR EVAC EMS, INC.,

Respondent,

On Appeal from the Circuit Court of Kanawha County, Civil Action No. 19-AA-169

CERTIFICATE OF SERVICE

I, Sean M. Whelan, do hereby certify that on this 16th day of June 2023, the foregoing Petitioners' Brief was electronically filed with the Clerk of the Court using the File & Serve Xpress system, which constitutes service on the following:

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