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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 23-ICA-127

BRIAN CUNNINGHAM,[1] 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' REPLY BRIEF

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[1] On July 5, 2023, Governor Justice appointed Brian Cunningham as Director of the Public Employees Insurance Agency. Under Rule 41(c) of the Rules of Appellate Procedure, he is automatically substituted as a Petitioner in this matter.

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INTRODUCTION

Air Evac's brief confirms that the circuit court got both the jurisdictional and the merits questions here wrong. On sovereign immunity, Air Evac can't find any precedent to bolster the lower court's invented paying-program exception. Instead, it relies on cases that are either distinguishable or don't address sovereign immunity at all. On the Administrative Procedure Act ("APA"), Air Evac mostly tilts at windmills, arguing that PEIA's Contested Case Rules ("CCR") are valid. But PEIA has never said otherwise, and Air Evac offers no law to counter the point PEIA actually made—that provider-payment disputes like this one don't trigger the CCR or APA appellate review. And on the merits, Air Evac relies too much on the federal injunction. It inappropriately misreads that injunction's commands, mistakenly ignores the statutes that the injunction left alone, and incorrectly thinks PEIA waived its qualified immunity. None of this is right. This Court should reverse.

ARGUMENT

I. Air Evac's Newly Minted Sovereign-Immunity Exception Has No Foundation In The Constitution Or Case Law.

Air Evac asks the Court to create a new sovereign-immunity exception—a "paying-program exception." As Air Evac has framed it, this exception would allow a private party to sue the State for damages whenever (1) the party is seeking relief under the APA from an agency; (2) the agency pays outside parties; and (3) the Legislature has appropriated the money sought. Resp. 19. Because Air Evac invented this exception, the Supreme Court of Appeals has "*never*" discussed it as a potential sovereign-immunity exception. *Id.* So lacking any legal authority, Air Evac instead relies on self-crafted notions of "common sense." *See, e.g., id.* at 10. But neither the law nor common sense support Air Evac's new exception.

A. Air Evac cites three cases that might be relevant, but none really are. Resp. 19-21.

First, each is irrelevant here because neither the opinions nor the briefing in any of the three discussed sovereign immunity. This silence is fatal. If a case doesn't address a jurisdictional point directly, its precedential value on that point is nil. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998), for example, the U.S. Supreme Court explained why one of its prior decisions was irrelevant even though the earlier case seemed to assume an answer to the jurisdictional question presented in *Steel Co.* In particular, the prior case did "not display the slightest awareness that" it was treading on jurisdictional ground. *Id.* at 1010. Rather, both the parties and the Court in the prior case had "assumed" *Steel Co.*'s jurisdictional question "without discussion." *Id.* at 1011. The same is true for Air Evac's authorities, where both the parties and Court appeared to assume that sovereign immunity was not an issue. Courts all over the country say "that drive-by jurisdictional rulings of this sort (if [they] can even be called a ruling on the point rather than a dictum) have no precedential effect." *Id.*; *accord Donnelly v. Controlled Application Rev. & Resol. Program Unit*, 37 F.4th 44, 55 (2d Cir. 2022); *Penkoski v. Bowser*, 486 F. Supp. 3d 219, 234 (D.D.C. 2020); *Thompson v. Frank*, 599 F.3d 1088, 1090 (9th Cir. 2010). Most importantly, the Supreme Court of Appeals says the same: Jurisdictional issues "neither asserted by the parties nor addressed" by the Court are "not binding." *Kanawha Cnty. Pub. Libr. Bd. v. Bd. of Educ. of Cnty. of Kanawha*, 231 W. Va. 386, 396, 745 S.E.2d 424, 434 (2013).

Second, these cases also do not apply on their facts. Take each one in turn.

In *Charleston Area Medical Center., Inc. v. State Tax Department of West Virginia*, the plaintiff did not sue the State for money damages, as Air Evac has; it sued to stop the State from over-collecting taxes. 224 W. Va. 591, 593, 687 S.E.2d 374, 376 (2009). *CAMC* wasn't about the *State's* liability but the *taxpayer's* liability; it was not about drawing money *out* of the state treasury but preventing money from going *in*. That difference is real. *CSX Transp., Inc. v. Bd. of Pub.*

Works of State of W. Va., 138 F.3d 537, 542 (4th Cir. 1998). And it matters because, as Air Evac notes, sovereign immunity prevents raids on the state coffers. Resp. 19.

Curry v. West Virginia Consolidated Public Retirement Board, 236 W. Va. 188, 778 S.E.2d 637 (2015), is inapplicable, too. There, the Department of Agriculture's former general counsel sued the Consolidated Public Retirement Board, arguing that he met the "the statutory eligibility requirement of 'full time' employment for participation in PERS." *Id.* at 189, 778 S.E.2d at 638. That question was in declaratory-judgment form: was attorney Curry a full-time employee? *Id.* And the form fits neatly into an existing exception to sovereign immunity: the declaratory-judgment exception. *Univ. of W. Va. Bd. of Trs. v. Graf*, 205 W. Va. 118, 122-23, 516 S.E.2d 741, 745-46 (1998). Because he wasn't full-time, the Board decided to refund the contributions Curry had paid to PERS. *Curry*, 236 W. Va. at 194, 778 S.E.2d at 643. But like in *CAMC*, this decision was not one on the *State's* liability for a past debt. The refund was to return money the *employee* had incorrectly paid. *Id.* So, *Curry* is no help. It's not an example of a secret paying-program exception; it's just a good example of two already recognized exceptions.

Maupin v. Sidiropolis, 215 W. Va. 492, 495, 600 S.E.2d 204, 207 (2004), is different as well: it involved only prospective remedies. The statute there set up a fund to pay monthly "awards" to registered in-state greyhound breeders. W. VA. CODE § 19-23-10(d) (1995). Months after Maupin registered, the Racing Commission tried to kick him out, deciding that he was ineligible because a state resident did not solely own the dogs. *Maupin*, 215 W. Va. at 494, 600 S.E.2d at 206. When the breeder objected, the commission held a hearing, an appeal followed, and the courts reversed the agency, finding that Maupin was "eligible to participate in the fund," *id.* at 495, 600 S.E.2d at 207, and should be "paid all monies due under" the Fund, *Maupin v. Sidiropolis*, No. 2-AA-103, 2007 WL 7314077 (Cir. Ct. Kanawha Cnty. Mar. 26, 2003). But, at

worse, that relief would've only required the commission to restart the monthly payments Maupin had missed during the administrative suit. Nothing indicates that the State Treasury was on the hook for payments before then. So *Maupin* looks like a classic "prospective declaration[s] of" citizen's future "rights," which Section 35 allows, syl. pt. 1, *Gribben v. Kirk*, 195 W. Va. 488, 466 S.E.2d 147 (1995), and nothing more. It doesn't aid Air Evac's suit for past debts.

B. Air Evac fares no better in trying to distinguish three of PEIA's cases; it notes immaterial differences, but it never explains why those differences empower it to avoid sovereign immunity. Resp. 22. It stresses that *Phillips v. West Virginia Department of Health & Human Resources*, No. 19-0610, 2020 WL 3408421 (W. Va. June 18, 2020) (mem. decision), and *Arnold Agency v. West Virginia Lottery Commission*, 206 W. Va. 583, 591, 526 S.E.2d 814, 822 (1999), involved direct lawsuits instead of an appeal from an administrative decision. Resp. 22. But that makes no difference. In Air Evac's telling, its paying-program exception is meant to keep state agencies honest and compliant with the law. *Id.* at 21. The plaintiffs in *Phillips* and *Arnold Agency* claimed that the agencies had violated the law in much the same way as Air Evac does here. So under Air Evac's new paying-program exception, that claim of malfeasance should be enough to ignore sovereign immunity—but it plainly was not. Air Evac also assumes that *Phillips* and *Arnold Agency* found sovereign immunity only because they were original actions. Yet again, though, Air Evac never says why the procedural vehicle through which a claim is brought makes a material difference. The same goes for Air Evac's discussion of "services rendered," *id.* at 22; it never explains why a party can erase sovereign immunity merely by providing "services." *CAMC* and *Maupin* did not concern "services rendered" to the State. *See also, e.g.*, *Davari v. W. Va. Univ. Bd. of Governors*, 245 W. Va. 95, 103, 857 S.E.2d 435, 443 (2021) (university professor's claims for supplemental pay excluded by insurance policy were barred by constitutional immunity even

though he had rendered services); *Van Gilder v. City of Morgantown*, 136 W. Va. 831, 836, 68 S.E.2d 746, 749 (1949), *overruled on other grounds by Long v. City of Weirton*, 158 W. Va. 741, 214 S.E.2d 832 (1975) (sovereign immunity barred suit even though the plaintiff rendered services by renting airplane hangar to city).

Air Evac also believes *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997), supports its position because it allowed employees to recover wages that are "prospective in nature"—meaning they were earned or incurred after the employees filed suit. Resp. 22-23. But Air Evac confuses the prospective/retroactive distinction. *Id.* This distinction matters because West Virginia law forbids retroactive actions for damages (and "prospective" damages actions are really allowed only for employees, *Graf*, 205 W. Va. at 123, 516, S.E.2d at 746). "The crucial date for drawing a line between prospective and retroactive relief should be the *initiation* of the relevant mandamus action," syl. pt. 3, *Gribben v. Kirk*, 195 W. Va. 488, 466 S.E.2d 147 (1995) (emphasis added), or the administrative suit seeking monetary relief, *Skaff*, 200 W. Va. at 706, 490 S.E.2d at 793. At the earliest, Air Evac initiated an action in October 2019. A.R. 68. So the most charitable reading of *Gribben* and *Skaff* bars Air Evac from seeking damages for any transports that occurred before then. But the 115 disputed transports here took place from June 2016 to May 2019, A.R. 603 (Order ¶ 48), so Air Evac's claims are retroactive. Although Air Evac tries to use its separate federal lawsuit as the demarcation date, Resp. 23, *Skaff* said the date when the suit for money was initiated is where the line is drawn—not just any potentially related lawsuit. After all, the "crucial date" for *Skaff* was when the employees filed their level-four grievance, *Skaff*, 200 W. Va. at 706, 490 S.E.2d at 791, 793, because that was when they first sought "retroactive application" of their overtime pay, *id.* at 704, 490 S.E.2d at 791.

Gribben's line-drawing doesn't help it, either. True, unlike *Skaff*, the crucial date for *Gribben* was the initiation of a separate, prior suit: the *Cordle v. Kirk*, No. 83-P-622 (Cir. Ct. Kanawha Cnty. Dec. 31, 1988) class action, *Gribben*, 195 W. Va. at 498-99, 466 S.E.2d at 157-58. But that was only because the prior suit decided the State's liability, the prospective nature of the award, and "estop[ped]" the State "from relitigating the Section 35 issue in [the later] case." *Id.* And the background on *Cordle* and *Gribben* shows just how unique that case was. In *Cordle*, the courts held that nearly 400 troopers had to be given back pay for undercompensated overtime. *Id.* at 492, 466 S.E.2d at 151. But *Cordle* stopped that recovery at "the date the lawsuit [for back pay] was filed" in circuit court, holding that earlier relief would have been retroactive and thus barred by sovereign immunity. *Id.* The State never appealed that ruling. A couple of years later, when another group of troopers (the *Gribben* class) filed a separate suit alleging that they were "coerced and mislead into 'opting out' of the *Cordle* litigation," *id.*, the Court set the line between retroactive and prospective relief at the same date, *id.* at 498, 466 S.E.2d at 157. The trooper's entitlement to back pay, the prospective nature of the relief, and the State's sovereign immunity were all decided in *Cordle*, and the State was "bound by" that "ruling." *Id.* at 498, 466 S.E.2d at 157. So finding that the Gribben troopers were "members of the *Cordle* class" entitled to the same back pay was no affront to sovereign immunity. *Id.* at 492, 466 S.E.2d at 151. But this case is nothing like those unique circumstances. *Cheatham* in no way estopped PEIA from asserting sovereign immunity. Nor did it decide how much PEIA had to pay Air Evac. Air Evac never sought monetary relief in *Cheatham* anyway: it only pursued injunctive and declaratory orders. A.R. 173-74. As the district court put it: such "relief would not impose any additional obligations on the State," and it isn't supposed to add anything "in terms of liability exposure to the State." *Air Evac EMS, Inc. v. Cheatham*, 260 F. Supp. 3d 628, 641-42 (S.D.W.Va. 2017). And true to

form, the federal courts did not award monetary relief, prospectively or otherwise.[2] *Air Evac EMS, Inc. v. Cheatham*, No. 2:16-cv-05224, 2017 WL 4765966 (S.D.W.Va. 2017), *aff'd Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 769 (4th Cir. 2018).

So neither *Skaff* nor *Gribben* offer support for Air Evac's notion that it can use *Cheatham* to set the retroactive/prospective line. Under both, the only date that matters is the date when Air Evac filed this state-court suit for money. And all Air Evac's claims predate it.

C. Law and fact aside, the three elements Air Evac sketched up for its paying-program exemption are groundless for two more reasons.

First, Air Evac fails to explain what makes APA appeals per se exempt from sovereign immunity. Many of the Court's sovereign immunity cases began as APA appeals. *E.g.*, *Skaff*, 200 W. Va. at 702, 490 S.E.2d at 789 (noting it was an appeal of "the final decision of the … State Employees Grievance Board"); *see also Graf*, 205 W. Va. at 120, 516 S.E.2d at 743 (same). Sovereign immunity cases come by indirect APA routes, too. *See W. Va. Lottery v. A-1 Amusement, Inc.*, 240 W. Va. 89, 100, 807 S.E.2d 760, 771 (2017) (finding sovereign immunity when the case flowed out of a permitting process governed by the APA). Thus, if Air Evac were right, then the exception could very well swallow the rule of sovereign immunity.

Second, Air Evac leans too much on *Mellon-Stuart*'s observation that sovereign immunity's underlying policy "is to prevent the diversion of State monies from legislatively appropriated purposes." Resp. 19 (quoting *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987)). In Air Evac's view, once the Legislature sets money aside for a program,

[2] Nor could they. Federal law "does not impose a duty on the State to pay air-ambulance claims." *EagleMed LLC, v. Cox*, 868 F.3d 893, 906 n.3 (10th Cir. 2017). If any such obligation exists, it exists in state law, *id.*, and federal courts may not "instruct[] state officials on how to conform their conduct to state law," *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

all sovereign immunity policy implications disappear. Resp. 19. But PEIA explained at length why this view is a bad reading of *Mellon-Stuart*. Petr's Br. 15-17. Among other things, *Mellon-Stuart*'s line about "legislatively appropriated purposes" wasn't a general statement about high-level appropriations for massive agency programs (like public insurance). It was instead a narrow statement addressing the scenario when a Legislative Claims Commission plaintiff wins, *Mellon-Stuart*, 178 W. Va. at 295, 359 S.E.2d at 128, and the Legislature passes a bill naming the plaintiff and identifying the specific amount it should receive as an appropriation, *e.g.*, H.B. 3344, 86th Leg., Reg. Sess. (W. Va. 2023) (example of such a bill in the 2023 Legislative Session), *available at* https://tinyurl.com/54hx9zrd. The *Mellon-Stuart* language can't be stretched out of that context. Yet Air Evac has no answer to this point or any of PEIA's others on *Mellon-Stuart*.

D. Lastly, Air Evac argues that Section 35's prohibition on the State being made a "defendant in any court of law or equity" doesn't apply because PEIA is a "respondent," not a defendant, and because this case started in an administrative proceeding, not a court of law or equity. Resp. 18. PEIA's party designation doesn't matter. *Gribben*, for example, recognized sovereign immunity for parties titled "respondents," 195 W. Va. at 488, 466 S.E.2d at 147. *Skaff* did, too. 200 W. Va. at 704, 490 S.E.2d at 791. So did *Mellon-Stuart*. 178 W. Va. at 298, 359 S.E.2d at 131. And our courts eschew this sort of formalism wherever they find it. *See Soriano v. Soriano*, 184 W. Va. 302, 305 n.6, 400 S.E.2d 546, 549 n.6 (1990) ("criticiz[ing]" a case for being "extremely formalistic" (cleaned up)); *accord State v. Wallace*, 205 W. Va. 155, 159, 517 S.E.2d 20, 24 (1999). Section 35 does not hinge on a case's posture or the forum in which the case begins, but on whether the State is defending the action. As noted above, plenty of sovereign-immunity cases began as agency challenges and then moved to the courts. Their genesis didn't matter—just

whether the defending party was the State. And once again, any contrary ruling could very well quash constitutional sovereign immunity in most cases—hardly a "common sense" result.

Ultimately, Air Evac refuses to grapple with the *constitutional* nature of PEIA's sovereign immunity. For example, Air Evac says sovereign immunity doesn't apply "whatsoever to APA review" given "PEIA's own Rules (and common sense)." Resp. 10. But the Constitution is stronger than administrative rules and self-interested "common sense." Its claim that PEIA's "arguments for sovereign or qualified immunity cannot displace" Air Evac's interpretation of regulations barks up the same wrong tree. *Id.* at 2. Constitutional sovereign immunity trumps legislative or agency actions. Elsewhere, Air Evac downgrades sovereign immunity to a "procedural roadblock," *id.* at 10, revealing a misunderstanding of the fundamental importance of *constitutional* protections like sovereign immunity.

Air Evac also insists that the Legislative Claims Commission is an improper forum for its complaints, Resp. 17-18, but it advances poor arguments. For example, it says that the Legislative Claims Commission exercises legislative not judicial power, making this case inappropriate for resolution by a legislative body. *Id.* at 17. If Air Evac is saying the Commission "is an administrative arm of the West Virginia Legislature, not a court created within the judicial branch of government," then PEIA agrees. *State ex rel. McLaughlin v. W. Va. Court of Claims*, 209 W. Va. 412, 415, 549 S.E.2d 286, 289 (2001) (per curiam). But if Air Evac is implying that the Commission doesn't read statutes and contracts and opine about whether the State has a moral obligation to pay someone (tasks that might be called "judicial"), then it is wrong. The Commission routinely does just that. *E.g.*, *Mellon-Stuart*, 178 W. Va. at 295, 359 S.E.2d at 128 (contract); *G.M. McCrossin, Inc. v. W. Va. Bd. of Regents*, 177 W. Va. 539, 540, 355 S.E.2d 32, 33 (1987) (regulations). The Commission is a sophisticated body that admits exhibits into

evidence, takes testimony (including of experts), hears argument, and applies law (including statutory duties) to facts. *State ex rel. Ladanye v. W. Va. Legis. Claims Comm'n*, 242 W. Va. 420, 423, 836 S.E.2d 71, 74 (2019). It can weigh moral obligations flowing from Air Evac's and PEIA's statutory duties and rights.

Finally, PEIA agrees with Air Evac that courts are a crucial check and balance on unlawful agency action. Resp. 21. But courts themselves cannot themselves violate the law in providing that check and balance. Before a court can do the good and necessary work of checking agencies, it must assure itself that is operating in its own constitutional lane—*i.e.*, that it has *jurisdiction*. Here, that jurisdiction is lacking. Sovereign immunity requires dismissal.

II. Air Evac Offers No Constitutional, Statutory, Or Administrative Source Requiring A Hearing And Thus Cannot Show That The APA Or CCR Apply.

Air Evac mostly misses PEIA's APA argument. It never shows that the APA applies.

A. Air Evac starts off by insisting the CCR are valid. Resp. 1 (saying the CCR are "valid contested case rules"); *id.* at 2 (saying the CCR "are alive and well"); *id.* at 7 (saying the CCR "remain active"); *accord id.* at 12-13. But PEIA never disputed that basic idea. Far from having "no answer to Air Evac's argument on this score," *id.* at 13, PEIA offers an unqualified, "We agree." But as PEIA explained in its opening brief, the correct question isn't whether the CCR are still active, but whether they *apply to these facts*—an issue Air Evac never touches. Put simply, Air Evac never got a contested-case hearing because this proceeding was not a contested case.

In describing the CCR, Air Evac avoids explaining what counts as a contested case, Resp. 6, but it at least admits that the CCR "expressly adopt" the APA's contested-case procedures, *id.* And as PEIA explained, the APA's procedures require that a constitutional provision, statute, or administrative rule give the affected party the right to a hearing. Petr's Br. 23. Air Evac says that it "*has* identified … an administrative rule" requiring PEIA to hold a hearing: the CCR themselves.

Resp. 17. But PEIA already spent pages explaining why that circular logic doesn't work. Petr's Br. 25-26. Air Evac responds to none of these arguments.

PEIA also has not argued that the circuit court was deprived of the power to review PEIA's administrative decision because PEIA "refused to hold a hearing" under the CCR. Resp. 10. PEIA agrees it can't strip a court of jurisdiction by refusing to apply its valid rules. PEIA argued something different: the circuit court had no power to review PEIA's administrative decision because, under the APA and CCR, the coverage dispute didn't fit the definition of "contested case," meaning neither authority applied. Petr's Br. 22-27. Again, the focus should be on what rules *apply*.

B. Also, Air Evac's fixation on the Plan's alleged deficiencies is a distraction. PEIA does not think that Air Evac had to call a 1-800 telephone number and chat with a third-party administrator to get this case resolved. Resp. 10, 17. PEIA agrees that this complex dispute would have quickly elevated to the Director's review—the third and final step in the dispute resolution process. Petr's Br. 29. Air Evac ignores this explanation, complaining repeatedly that the Plan was made to handle routine coverage questions—not the scope of PEIA's statutory responsibilities and authority. Resp. 14-15. Yet Air Evac started off in this process for two of its bills. A.R. 402, 404 (letters to PEIA's third-party administrator claiming the Medicare rate was too low following *Cheatham*). It cut itself short by refusing, in the same letters, to engage in further "administrative appeals," A.R. 402, 404, and insisting on direct court action instead, A.R. 402, 404; *see also* A.R. 107 (repeating its threat of "declaratory and injunctive relief" for "its outstanding bills").

Regardless, PEIA doesn't expect its third-party administrator to make tough statutory decisions. Air Evac is right that this isn't the run-of-the-mill provider dispute, and it wouldn't have gotten run-of-the-mill treatment had Air Evac handled things through the proper channels.

But ultimately, all this discussion about the Plan overlooks the first and more important issue: by its nature, the CCR could not resolve this dispute. The Plan was therefore the only option.

Air Evac also argues that PEIA's comments about having to proceed via the Plan are forfeited because agencies aren't allowed to post hoc rationalize. Resp. 13. But PEIA's APA arguments relate to subject-matter jurisdiction and so "can be raised at any time"—they can even be addressed "*sua sponte* by this Court." *State ex rel. Univ. Underwriters Co. v. Wilson*, 239 W. Va. 338, 345, 801 S.E.2d 216, 223 (2017). Plus, Air Evac (again) misunderstands PEIA's argument's regarding the plan: PEIA isn't saying that the CCR aren't a legitimate option *because* the Plan exists; the CCR aren't a legitimate option because Air Evac isn't entitled to a hearing—full stop. Separately, PEIA notes that the Plan *does* apply, providing Air Evac with some recourse. Petr's Br. 21-31. From the beginning, PEIA has insisted that it isn't giving Air Evac a contested case hearing because Air Evac wasn't entitled to one. A.R. 162 ("PEIA cannot grant Air Evac a contested case hearing under" the CCR). What's more, PEIA explained long ago why the Plan applied when it said that "Air Evac's October 24, 2019, *Demand* clearly relates to provider payments, expenses, and reimbursement." *Id*. PEIA may not have invoked formulaic language referencing "the Plan" or the specific administrative rules, but providers in West Virginia know that provider-payment issues are handled through the Plan. Air Evac is no exception. After all, right after *Cheatham*, it seemed to acknowledge that PEIA's third-party administrator handled initial payment disputes. A.R. 402, 404. So reminding Air Evac in October 2019 that it was raising a provider dispute and not a contested case should have been enough.

C. Air Evac similarly misunderstands the circuit-court case of *Demary v. PEIA*, CC-24-2018-P-57 (Cir. Ct. Marion Cnty. 2018). Resp. 16. *Demary* supports PEIA's position and is, on crucial points, identical to this case. Just like Air Evac, Demary tried to invoke the APA and CCR

by claiming that "contested case" applied broadly to "every person … affected by any rules, regulations or statutes enforced by' PEIA." A.R. 430-31. The court disagreed. Focusing on the definition of "contested case," *Demary* explained that contested cases exist only when the legal rights "of specific parties *are required* by law or constitutional right to be determined *after an agency hearing*." *Id.* at 441 (emphasis in original). And this obligation "must appear outside of the provisions of the APA [or CCR] because, in itself, the APA [or CCR] does not create substantive rights." *Id.* (cleaned up). But—again, just like Air Evac here—Demary pointed to no authority requiring PEIA "to provide [him] a hearing prior to denying him coverage for the requested treatment." *Id.* As in *Demary*, "[b]ecause a hearing is not required" by any substantive authority, this case is "outside this Court's jurisdiction." *Id.* at 432 (citing *W. Va. Bd. of Educ. v. Perry*, 189 W. Va. 662, 667-68, 434 S.E.2d 22, 27-28 (1993)). Rather than focus on these holdings, Air Evac again focuses on secondary, immaterial details. For example, it notes that Demary was a beneficiary, not a provider; that he never demanded a hearing; and that he challenged "determinations of medical necessity and appropriateness." Resp. 16-17. Yes, these factors are different from some facts here—but none were dispositive.

Finally, consider whether Air Evac's view or PEIA's view of the CCR accords better with this historical fact: no evidence suggests that, in the entire history of the PEIA, anyone has ever received a contested-case hearing—not one. Air Evac's view of the law means that for 40 years, thousands of PEIA providers and insurers and innumerable PEIA members—really, anyone remotely connected to the PEIA's work—could have at any time demanded a full contested-case hearing. Yet, no one ever did. On its face, that scenario seems unlikely. Alternatively, taking PEIA's view of the law, one exceedingly rare sort of PEIA action carries a right to a hearing—allegations of insurance fraud—so we should expect vanishingly few, if any, contested-case

hearings. Petr's Br. 24. And that's exactly what happened. In short, PEIA's view of the law incorporates the historical record, while Air Evac's ignores it.

III. Air Evac Misunderstands The PEI Act's Balance-Billing Provisions, PEIA's Obligations Under *Cheatham*, And Where The Equities Lie.

On the central merits question—whether the Director had the discretion he claims—Air Evac agrees that the PEIA Director has authority to "manage[] 'provider … payment.'" Resp. 5. And it doesn't seem to disagree with the general idea that the Legislature can give state officers the same power or discretion in multiple statutory provisions. These points of accord are important because of PEIA's central argument about what the *Cheatham* injunction really did. Although the decision stripped the PEIA Director's power under West Virginia Code Sections 5-16-8a (2016) and 5-16-5(c)(1) (2007), it did not touch or implicate his discretion under West Virginia Code Section 5-16-3(c). Rather than show why the Director lacks that latter form of discretion, Air Evac instead focuses on what it sees as violations of the spirit of the *Cheatham* injunction.[3] But these arguments show that Air Evac fundamentally misunderstands both the PEI Act's balance-billing provisions and the *Cheatham* injunction.

A. *Air Evac's Balance-Billing Confusion.* Remember that two balance-billing provisions could apply here: Section 5-16-8a (the air-ambulance specific prohibition) and Section 16-29D-4 (the general prohibition). As PEIA recognized in its opening brief, *Cheatham* invalidated the air-ambulance-specific balance-billing prohibition, and this Court must apply that holding retroactively. Petr's Br. 36-37. In other words, Section 5-16-8a was never good law, and neither the Court nor Air Evac can give it any effect here. *Id.* Appearing to recognize this truth, Air Evac focuses on the general balance-billing prohibition, incorrectly fighting the notion that PEIA can

[3] Throughout its brief, Air Evac also offers policy critiques of West Virginia government generally. *E.g.*, Resp. 27 n.7 (criticizing the Legislature for "thrust[ing] balance billing on PEIA insureds"). Those opinions have nothing to do with the legal questions here.

allow its Director to "override" Section 16-29D-4. Resp. 27. But PEIA never said that. PEIA merely explained that Section 16-29D-4(a)(2)'s general balance-billing ban includes an "uncovered" exception. Here, the Director found Air Evac's bills uncovered. Petr's Br. 36-37. So by its own plain language, Section 16-29D-4 does not apply to the disputed transports. Air Evac may not like Section 16-29D-4(a)(2)'s exception, but its application here cannot be called an "override" of the provision. And Air Evac can hardly complain when it brought the case that invalidated the balance-billing prohibition it is now trying to wish back into place.[4]

B. *Air Evac's* Cheatham *Confusion.*[5] Citing a federal contempt statute, Air Evac inveighs against what it calls PEIA's "formalistic ploy" to skirt *Cheatham*. Resp. 25. Yet, by Air Evac's own description, PEIA has complied with *Cheatham*. It says the "*Cheatham* injunction" merely forbids PEIA "from enforcing the statutory provisions and fee schedules that limit what Air Evac is paid for transporting patients insured by PEIA." Resp. 2; *see also id.* at 4 ("forcing Air Evac to accept PEIA's reduced payment rate as payment *in full*" was the problem (emphasis added)). But PEIA is not "limit[ing]" Air Evac from getting paid full price. With balance billing permitted, Air Evac is free to seek additional recovery from PEIA members or any other third party, just as it does for private-insured patients. A.R. 272-73 (Thomas: discussing Air Evac's general balance-billing practices). PEIA is now "acting" "like any other" commercial insurer, which is the whole point of *Cheatham*: after all, "[w]hat matters is that the state respect the line between regulatory and market power." *Cheatham*, 910 F.3d at 769.

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[4] PEIA agrees that the new statute explicitly allowing air ambulance providers to balance bill, W. VA. CODE § 5-16-8a (2019), doesn't control here. *See* Resp. 26. PEIA's argument doesn't hinge on the operation of that new air-ambulance-specific provision, but on the operation of the old general provision, W. VA. CODE § 16-29D-4.

[5] Air Evac appears to argue that *Cheatham* has some bearing on whether the CCR apply here. Resp. 9. This is wrong, too. The key question for CCR applicability is whether Air Evac is entitled to a hearing—*Cheatham* said nothing about that.

And PEIA has complied with *Cheatham*. Remember that federal courts painstakingly craft injunctions' language because these orders must meet "the exigencies of the particular case," *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 580 (2017) (cleaned up), and be "no more burdensome to the defendant than necessary," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (cleaned up). This special concern about scope, among other reasons, is why courts usually "construe injunctions narrowly"—especially when the injunction's effect might be unclear. *Abbott Lab'ys v. TorPharm, Inc.*, 503 F.3d 1372, 1382 (Fed. Cir. 2007). So when *Cheatham* said that its injunction prohibited PEIA from limiting what Air Evac could get paid, the parties and this Court must take it seriously. PEIA has complied with the letter and spirit of *Cheatham*, and that should be the end of it. No wonder, then, that Air Evac has not returned to federal court to seek further enforcement of the injunction—the natural next step if Air Evac genuinely believed that PEIA was in violation of its terms.

Air Evac steadily refuses to take seriously *Cheatham*'s reminder that the "ADA does not require a state to pay whatever an air carrier may demand." *Cheatham*, 910 F.3d at 769. Air Evac admits that federal law does not "force PEIA to pay certain amounts," Resp. 5, all while its central request is that PEIA pay exactly what it demands—full price. Yet *Cheatham*'s plain, straightforward language—that PEIA need not "pay whatever" Air Evac "may demand"—means exactly this: PEIA doesn't have to pay full price for the disputed transports. Air Evac strains to say that protection applies only "in the future under [a hypothetical] alternative statutory scheme." Resp. 4. It doesn't "absolve" PEIA or apply "during the time of the disputed transports," Air Evac insists. *Id.* at 5 (saying it applies "moving forward"). But that limit is not found in *Cheatham*. In fact, just the opposite. *Cheatham* said PEIA could limit "reimbursements for air ambulance services *after the fact*," 910 F.3d at 769 (emphasis added), therefore acknowledging that its

protections for PEIA looked backwards. And again, federal opinions, by default, say what the law always was. *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008). Air Evac bears the burden to show why *Cheatham*'s broad protection for PEIA doesn't apply this way, too. It does not carry that burden. Instead, Air Evac's argument seems driven by a base desire to punish West Virginia and impose $4 million worth of penance. *Cheatham* does not require that.

C. Air Evac's other merits arguments focus on what it views as several negative results of PEIA's actions; these "equities" arguments fit in two large buckets. Neither work.

First, Air Evac accuses PEIA of "shift[ing] millions of dollars of uncompensated emergency transports onto the shoulders of its own insureds." Resp. 1; *accord id.* at 11, 27-28. But it is *Air Evac* who is charging these high rates, not PEIA; it is Air Evac, not PEIA, who is deciding whether to balance bill PEIA's members. And Air Evac's concern for PEIA's members rings hollow. If Air Evac can, contrary to *Cheatham*, charge PEIA whatever it wants, then PEIA members will eventually be forced to cover most of that bill in the form of increased dues; West Virginia taxpayers will shoulder the rest. And Air Evac ignores its own role in creating this problem. The Legislature designed West Virginia's public insurance scheme as a finely tuned and integrated system. Air Evac went to federal court to strip out a piece of that system that protected the members. That inequities resulted is unsurprising.

Second, Air Evac casts itself as a noble company unfairly targeted by an unreasonable PEIA who refuses to pay its bills. *See* Resp. 19 (saying at one point that it is simply "asking to be paid for the life-saving service it has provides"). But PEIA *has* paid Air Evac. Rather than pay Air Evac's steep rates, PEIA pays Air Evac the Medicare rate—the rate that the federal government thinks is fair, that every other air ambulance provider in West Virginia gets, and that Air Evac has accepted going forward. *Id.* at 3 (admitting its full rates are "far" above what the federal

government has found reasonable in the Medicare rate). That rate approaches the amount it receives from some commercial insurers. A.R. 279 (Thomas: admitting that one of the largest commercial insurers in West Virginia paid it $8,700 per flight during a quarter, while PEIA paid it $7,100). So Air Evac is acting a bit disingenuously when it says it is "drastically undercompensated" or the like. Resp. 9; *id.* at 26 (claiming this rate is "notoriously inadequate"). Truth be told, Air Evac's attempt to take all that it can from the government is exactly the sort of action that should trigger "protection of the public against profligate encroachments on the public treasury"; immunity doctrines—and specifically sovereign immunity—provide that protection. *G.M. McCrossin*, 177 W. Va. at 541, 355 S.E.2d at 34 (cleaned up).

IV. PEIA Did Not Waive Or Forfeit Qualified Immunity, But Even If It Did, This Court Can, And Should, Consider This Important Issue.

Air Evac did not respond to the substance of PEIA's qualified-immunity argument. It mainly says that qualified immunity was "waived" because PEIA did not "raise qualified immunity" when it "reject[ed] Air Evac's Contested Case Demand." Resp. 24. But in its rejection letter, PEIA said it intended to "raise any and all defenses including sovereign and *qualified immunity*." A.R. 62 (Nov. 13, 2019) (emphasis added). That PEIA "did not use the words "qualified immunity'" at circuit court doesn't mean the defense is forfeited.[6] *McNeal v. Kott*, 590 F. App'x 566, 569 (6th Cir. 2014). It argued the key elements throughout. Qualified immunity requires a government actor acting reasonably within his statutory authority. The parties briefed both elements below in the sovereign immunity and merits sections. That briefing is enough to

[6] Calling this a "waiver" is not quite right; at worst, the Court could consider this a forfeiture. "Forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right." *Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 20 n.1 (2017) (cleaned up); *see also State v. Crabtree*, 198 W. Va. 620, 631, 482 S.E.2d 605, 616 (1996) (same). Here, PEIA has not intentionally relinquished qualified immunity, and courts treat forfeited arguments more leniently than waived arguments. *See, e.g., TD Bank N.A. v. Hill*, 928 F.3d 259, 276 n.9 (3d Cir. 2019).

preserve the argument: "One does not forfeit a qualified immunity defense by making arguments that, if accepted, establish the defense." *McNeal*, 590 F. App'x at 569. Qualified immunity is a "variation[] of the same basic argument" PEIA argued, *Schoonover v. Clay Cnty. Sheriff's Dep't*, No. 20-1680, 2023 WL 4026091, at *2 n.3 (4th Cir. June 15, 2023), and PEIA asks this Court to "evaluate the same fundamental question" regarding the Director's discretionary conduct and immunity from suit, *In re Under Seal*, 749 F.3d 276, 288 (4th Cir. 2014). It was not forfeited.

Even if PEIA had forfeited qualified immunity, the Court could still consider it. Although courts usually do not consider issues raised for the first time on appeal, that's a matter of prudence rather than a statutory or constitutional command. *United States v. Campbell*, 26 F.4th 860, 872-73 (11th Cir. 2022). And courts are slow to ignore immunity arguments on technical grounds. Remember that qualified immunity is the "state law corollary of" and "closely linked to the concept of sovereign immunity." Thomas Wilson Williams, *Isolation, Quarantine and Metaphorical Takings of the Body: Public Health Reactions to Disease Outbreaks*, 23 U. PA. J. CONST. L. 409, 435 (2021). Qualified immunity is "closely intertwined" with sovereign immunity because "the former grew out of the latter." Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701, 1779-80 (2022); *see also W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 661, 783 S.E.2d 75, 82 (2015) (noting that sovereign immunity and qualified immunity "spring from distinct, if related, concerns"). Thus, just as courts hesitate to ever find a State's sovereign immunity waived, *United States v. Testan*, 424 U.S. 392, 399 (1976), "[a]n official's qualified immunity is not easily forfeited," either, *Van Deusen v. Evatt*, No. 93-6314, 1994 WL 276758, at *2 (4th Cir. June 20, 1994).

Either way, the Court should consider the qualified-immunity argument. "Under certain circumstances, this court is free to consider issues that would otherwise be forfeited," *Brickwood*

Contractors, Inc. v. Datanet Eng'g, Inc., 369 F.3d 385, 396 (4th Cir. 2004), and sometimes prudence favors considering a technically forfeited argument, *Campbell*, 26 F.4th at 873. Courts have recognized a modest forfeiture exception for important issues—especially when the issue is "founded on concerns broader than those of the parties." *Wood v. Milyard*, 566 U.S. 463, 471 (2012). Qualified immunity is just such an issue. The doctrine is crucial to "shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). State officials must be allowed to do their work without concern that they can be dragged into court for an unpopular but lawful decision. In this sense, qualified immunity here transcends this case and these parties—it directly implicates the work of all West Virginia state officers.

A good example of courts' leniency in this space is *Marple*, where the plaintiff argued that State had waived its qualified immunity defense by not raising it in time. 236 W. Va. at 668, 783 S.E.2d at 89. The Court didn't think the State had waived the defense. But even if it had, the Court would still consider the qualified immunity argument because it could not say that the Board's late-breaking "assertion of qualified immunity waived the defense or subjected [the plaintiff] to unfair surprise or prejudice." *Id.* So too here. Because PEIA informed Air Evac of its qualified immunity defense at the outset, A.R. 62, and the parties have been litigating the two key elements for a long while, Air Evac can't be prejudiced by this Court's consideration of qualified immunity defense. And as Air Evac's silence on this defense confirms, qualified immunity applies to bar Air Evac's claim 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,

BRIAN CUNNINGHAM, 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

BRIAN CUNNINGHAM, 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 21st day of August 2023, the foregoing Petitioners' Reply 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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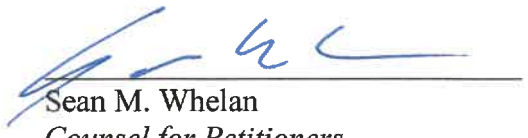

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