No. 23–ICA-127

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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-Appellants,

v.

AIR EVAC EMS, INC.

Respondent-Appellee.

On Appeal from the Circuit Court of Kanawha County, No. 19-AA-169
Hon. Carrie L. Webster

BRIEF OF RESPONDENT-APPELLEE AIR EVAC EMS, INC.

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STATEMENT OF THE CASE

Air Evac, EMS, Inc. ("Air Evac") asks this Court to uphold, in large part[1], the December 16, 2022, final order of the Circuit Court of Kanawha County of April (the "Order"), which was issued upon review of a final agency action by PEIA. The portion of the Order at issue in this appeal should be upheld because the Circuit Court properly required PEIA to honor administrative procedures under its own valid contested case rules, and soundly rejected PEIA's misplaced application of sovereign immunity. Further, the Circuit Court appropriately rejected PEIA's *post hoc* justifications for operating in direct contravention of a federal injunction.

I. Introduction

PEIA has learned nothing from its stinging rebukes from federal courts and the Circuit Court. And once again, PEIA advances its tired refrain in this appeal: it ought to be permitted to contravene an active federal injunction in *Cheatham* and limit payments for emergency transports in precisely the manner forbidden by the federal courts. Equally troublesome, as recognized by the Circuit Court, PEIA's conjured, after-the-fact justification for flouting the federal injunction promises to shift millions of dollars of uncompensated emergency transports onto the shoulders of its own insureds.

For years, PEIA and its officials have denied Air Evac and other air ambulance providers adequate payment on emergency air medical transportation provided to PEIA beneficiaries. Through a combination of statutory provisions and fee schedules, PEIA limited Air Evac to a fraction of its billed charges on each transport while simultaneously forbidding Air Evac from recovering the balance from PEIA's insureds.

[1] *See* consolidated appeal of Air Evac, No. 23-ICA-135 (Air Evac asking this Court to engage in statutory severability analysis following preemption finding in *Cheatham*).

In 2016, Air Evac filed a declaratory judgment action in the U.S. District Court for the Southern District of West Virginia, challenging this rate-capping scheme as preempted by the Airline Deregulation Act of 1978 ("ADA"), which prohibits state regulation of the prices of federally registered "air carriers" such as Air Evac. On October 20, 2017, the district court agreed and entered judgment in Air Evac's favor. *Air Evac EMS, Inc. v. Cheatham*, No. 2:16-cv-05224, 2017 WL 4765966 (S.D. W. Va. Oct. 20, 2017). Specifically, the district court ruled that the PEIA fee schedules and related statutes are preempted and granted Air Evac's request for an injunction barring their enforcement. *Id.* The district court's judgment was unanimously affirmed by the U.S. Court of Appeals for the Fourth Circuit. *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751 (4th Cir. 2018). Under the terms of the *Cheatham* injunction, PEIA is forbidden from enforcing the statutory provisions and fee schedules that limit what Air Evac is paid for transporting patients insured by PEIA.

PEIA is required by law to answer for its mistakes, not evade them. Its contested case rules are alive and well and are to be employed in a manner that makes Air Evac whole for its mandated emergency transports of PEIA insureds. Creative arguments for sovereign or qualified immunity cannot displace this administrative remedy and pose no bar to review under the West Virginia Administrative Procedures Act, W. Va. Code § 29A-1-1, *et seq.* (the "APA") in these circumstances. As PEIA's own rules dictate, when it fails to pay for services rendered in accordance with a statutory obligation to do so, a service provider has administrative and judicial recourse to see that it is made whole.

II. Background

A. The Fourth Circuit Rules that PEIA's Caps on Air Ambulance Reimbursement Are Preempted by the Airline Deregulation Act.

This case arises out of PEIA officials' concentrated campaign, beginning in 2011, to unilaterally cap payments to air ambulance providers for transporting the PEIA beneficiaries. *See Cheatham*, 910 F.3d at 758. "There was nothing subtle or indirect about this approach; it was directly targeted at payments for air ambulance services." *Id*. at 767.

First, PEIA used its statutory power over fee schedules to set the reimbursement rate in its schedule "at the Medicare rate exactly." *Id*.; *see* W. Va. Code § 5-16-5(c). That rate is far below Air Evac's billed charges. *See generally Cheatham*, 2017 WL 4765966, at *7 (addressing PEIA's attempts to justify refusing "to pay Air Evac's full charges"). *Second*, PEIA orchestrated the enactment of a new law in 2016—Section 5-16-8a—which further capped what Air Evac could receive for transporting PEIA insureds at one of two amounts: either the "federal Medicare rate" or the annual cost of Air Evac's membership program. W. Va. Code § 5-16-8a(a)-(b). *Third*, PEIA "backed up" all these provisions and its fee schedule with "a ban on balance billing," which prohibited Air Evac from recovering any more from PEIA's insureds. *Cheatham*, 910 F.3d at 758; *see* W. Va. Code § 16-29D-4 (balance-billing ban).

In June 2016, Air Evac filed suit against PEIA in federal court, challenging these laws as preempted by the ADA, which invalidates any state law, rule, or fee schedule that "relates to" the "prices" or "services" of federally-regulated "air carriers." 49 U.S.C. § 41713(b)(1). U.S. District Court Judge Johnston agreed, ruling that "the ADA preempts"—and therefore invalidates—all of PEIA's rate-capping devices: Section 5-16-5(c), the accompanying fee schedule, and newly-enacted Section 5-16-8a. *Cheatham*, 2017 WL 4765966, at *10. The district court enjoined PEIA from enforcing the fee schedule and the related rate-setting provisions against air ambulance

providers. *Id*. It dismissed as moot Air Evac's alternative claim challenging the ban on balance-billing PEIA insureds. *Id.* PEIA's motion to stay the injunction pending appeal was denied, and the district court's order has remained in effect from the date it was entered through the present day.

On December 7, 2018, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's order in full. *Cheatham*, 910 F.3d 751. The court ruled that Air Evac—which plays "a vital and life-saving role in responding to medical emergencies," "particularly in rural areas"—is an "air carrier," and is protected by the ADA from state laws having "the force and effect of law" that "relate to" its "prices" and "services." *Id*. at 757, 763-770. The Fourth Circuit found it obvious that PEIA's rate-capping scheme violated the ADA: "[t]he challenged West Virginia laws clearly have a connection to air ambulance prices," and forcing Air Evac to accept PEIA's reduced payment rate as payment in full "counts as action having the force and effect of law if anything does." *See id*. at 767, 769. Accordingly, the U.S. Court of Appeals for the Fourth Circuit affirmed the District Court's judgment enjoining PEIA's "fee schedule[] and reimbursement caps." *Id*. at 769 n.3[2].

In doing so, the Fourth Circuit did note that the "ADA does not require a state to pay whatever an air carrier may demand," yet "it must be the state's market power, and not its unique coercive authority, that is driving the negotiation." *Id*. at 736. PEIA repeatedly misuses this quote in an effort to ignore that *Cheatham* invalidated the illegal statutory regime employed by PEIA

[2] In the wake of *Cheatham*, the Legislature passed Senate Bill No. 587. S.B. 587, 84th W. Va. Leg., Reg. Sess. (2019) (enacted), codified at W. Va. Code § 5-16-8a. S.B. 587 provides that, going forward, air ambulance providers are no longer subject to penalties under the Act for seeking payment of their bills from insureds if PEIA does not pay them in full. *See* W. Va. Code § 5-16-8a (where the ADA "applies to the reimbursement of air ambulance providers under . . . this code, the provisions of this code, including any administrative, civil, or criminal penalties, are inapplicable"). S.B. 587 does not apply retroactively and is not relevant to the claims at issue here. *See Pub. Citizen, Inc. v. First Nat'l Bank in Fairmont*, 198 W. Va. 329, 334 (1996) ("A statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute . . . unless the statute provides explicitly for retroactive application.").

during the time of the disputed transports. What PEIA misses (or ignores), is that this passage from the Fourth Circuit's opinion was speaking to what PEIA could do in the future under an alternative statutory scheme. That is, the Fourth Circuit acknowledged the obvious: that the ADA does not set reimbursement rates or force PEIA to pay certain amounts. Rather, the ADA merely prohibits PEIA from illegally curtailing a federal air carrier's rate. But what PEIA may do moving forward, with action by the Legislature, to achieve a legal solution cannot absolve its actions under the illegal reimbursement program it operated for years—a program which remains invalidated by the active *Cheatham* injunction. This is what this case is about.

B. PEIA Operates a Comprehensive Program to Fund Public Employees' Health Insurance and Reimburse Medical Providers Who Offer Service to PEIA Insureds.

Generally speaking, PEIA is funded by premiums paid by the state agencies or quasi-public entities whose employers are covered under PEIA plans. *See generally* W. Va. Code § 5-16-18. PEIA's revenue is deposited in a fund to be distributed in accordance with the Act and its accompanying regulations. *See* W. Va. Code § 5-16-18(f). In turn, PEIA is to use its revenue to make payments for claims "against the Fund" as directed by the State Auditor or the Director "in accordance with the provision of" the Act. *See id*. Separately, PEIA must "establish and maintain a reserve fund" to pay "unanticipated claim[s]" during a given fiscal year—an account that must contain "no less than 10 percent of the projected total plan costs for that fiscal year." W. Va. Code § 5-16-25.

PEIA uses these funds to pay medical providers who provide care to PEIA insureds. W. Va. Code §§ 5-16-3, 5-16-5(c)(1) (Director manages "provider contracting and payment," and Finance Board's plans must establish "reimbursement levels" for "health care providers"); *id.* § 5-16-18(f) (Treasurer must issue payment out of PEIA's revenue fund for claims "against the fund"

consistent with the Act); *see also id.* § 5-16-11 ("Any benefits payable under" a PEIA plan "may be paid either" to the insured or "directly to" the party "furnishing the service upon which the claim is based"); *id.* § 16-29D-3(f) ("a state check shall be issued" by PEIA "[f]or the purchase of health care or health care services by a health care provider participating in a plan").

As in any public health-insurance program, from time to time legal disputes may arise between providers and the Agency over whether PEIA has paid the amounts required by law. Under the Act, PEIA has the authority to establish procedures for resolving such disputes. *See* W. Va. Code § 5-16-24 ("The director shall promulgate any necessary rules for the effective administration of the provisions of this article").

The Agency—the Public Employees Insurance Board—did so in 1987, promulgating "Rules of Procedure for Contested Case Hearings and Declaratory Rulings." W. Va. Code St. R. §§ 151-3-1, *et seq*. The Rules expressly adopt the contested-case procedures provided for under the APA. *See* W. Va. Code § 29A-5-1 et. seq. (establishing procedures for agency contested case hearings and judicial review of final agency orders). PEIA's Rules provide a "just, speedy, and inexpensive" process for "every" person or entity "affected by any rules, regulations or statutes enforceable by [PEIA]" to have their "legal rights" and PEIA's "legal duties" determined in a contested-case hearing. *Id*. §§ 151-3-1, 151-3-3, 151-3-4. Once PEIA holds a hearing and issues a "final order," a party can seek judicial review under the West Virginia APA. W. Va. Code St. R. § 151-3-13.

At the time PEIA adopted its Rules, the Act required that all of PEIA's "rules and regulations," as well as its hearings, be "promulgated and held in accordance with the provisions" of the APA. 1972 West Va. Laws, Ex. Session, ch. 2, § 5-16-18. Although the Legislature later

exempted certain PEIA rules, hearings, and regulatory activities from being subject to the APA,[3] the Legislature also specified that "[a]ny rules and regulations *now in existence* promulgated by the public employees insurance board *shall remain in full force and effect until they are amended or replaced by the [board] pursuant to law*." 1998 W. Va. Laws, Reg. Sess., ch. 102, § 5-16-18 (emphasis added). Although re-codified and slightly re-worded, that same provision exists today as part of the Act. W. Va. Code § 5-16-24 (PEIA's existing rules "shall remain in full force and effect until they are amended or replaced by the director").

PEIA has never "amended or replaced" its Rules providing for contested-case hearings and the Rules remain active.[4]

C. PEIA Refuses to Pay Air Evac's Outstanding Charges for Transports Taking Place Under PEIA's Preempted Regime.

Since the filing of the *Cheatham* lawsuit, Air Evac consistently has disputed PEIA's unlawful underpayments and expressly reserved its rights to pursue and obtain full payment on all disputed transports once the federal litigation ended. Almost immediately after entry of the district court's judgment, Air Evac approached PEIA for remittance on disputed claims.[5] Once negotiation efforts with PEIA failed, Air Evac demanded a contested case hearing under PEIA's own Rules on October 24, 2019. App. 068 – 090 (the "Demand"). In the Demand, Air Evac requested that

[3] *See, e.g.*, 1998 W. Va. Laws, Reg. Sess., ch. 102, §§ 5-16-8, 5-16-18.

[4] Indeed, consistent with the continued validity of the Rules and lack of amendment, replacement, or repealing of the same, the West Virginia Secretary of State's website, to this day, reflects that the Rules are "Active". *See* https://apps.sos.wv.gov/adlaw/csr/ruleview.aspx?document=6855&KeyWord=. (last visited 7/31/2023).

[5] *See* Ltr. of December 21, 2017 from Sean M. Whalen, Assistant Attorney General to Carte P. Goodwin (App. 097 - 098); Ltr. of April 12, 2018 from Katherine A. Shultz to Carte P. Goodwin (App. 099 - 100); Ltr. of May 4, 2018 from Carte P. Goodwin to Katherine A. Shultz (App. 101 - 107); Ltr. of August 27, 2018 from Carte P. Goodwin to Katherine A. Shultz (App. 108 - 114); Ltr. of October 26, 2018 from Katherine A. Shultz to Carte. P. Goodwin (App. 115 - 117); Ltr. of November 13, 2018 from Carte P. Goodwin to Katherine A. Shultz (App. 118 – 119); Ltr. of August 7, 2019 from Katherine A. Shultz to Alex J. Zurbuch (App. 120 - 121). Ultimately, Air Evac was directed to address any future inquiries regarding payment to William B. Hicks, the general counsel of PEIA. (App. 121) (8/7/19 Letter).

PEIA "determine its legal rights, and the legal duties of" PEIA with regard to payments on certain air ambulance transports provided by Air Evac to West Virginians insured by" PEIA. App. 070. Twenty days later, PEIA summarily denied that request, contending that it was not required to follow its own Rules. App. 062 - 063.

D. The Circuit Court Rejects PEIA's Claim of Sovereign Immunity and Affirms the Validity and Application of it Contested Case Rules to this Dispute.

Air Evac timely initiated an appeal of PEIA's summary denial to the Circuit Court of Kanawha County. *See* Pet. for Appeal (App. 004 – 032); Brief in Support of Appeal (App. 325 – 365). In response, PEIA argued there was no APA jurisdiction; the appeal was barred by sovereign immunity; and in any event, Air Evac was not entitled to full payment for Air Evac's past charges and transports. App. 366 - 390. As to this latter point, PEIA contended that the federal injunction "left PEIA's Director the discretion to 'manage . . . provider negotiations, provider contracting and payment,' without reliance on any fee schedule or the portions of the West Virginia law Air Evac successfully challenged." App. 383. PEIA also argued that Air Evac is "free to bill PEIA members directly for the balance of any bill PEIA does not cover," (App. 389), despite the fact that Air Evac was not and is not seeking recoupment on transports occurring after the enactment of S.B. 587 (the bill lifting the balance-billing prohibition) on June 4, 2019.

The Circuit Court held argument on April 26, 2022, and issued its final Order on December 16, 2022. In the Order, the Circuit Court rejected most of PEIA's arguments, holding that Air Evac's request was not barred by sovereign immunity, and the issues raised in the Demand could be resolved under the APA and PEIA's Rules. App. 551 – 579.

The Circuit Court also dismissed out of hand PEIA's strained argument that it retains the discretion to unilaterally determine the amount that must be reimbursed for the disputed transports, or that it could legally continue to limit reimbursement for the disputed transports at the Medicare

Rural Rate and force Air Evac to retroactively balance-bill PEIA members for those transports. The Circuit Court found PEIA's arguments regarding retroactive balance-billing "deeply troubling" because PEIA "ha[s] no statutory authority to override [the balance-billing provision], to delete it from the statute books, or to treat it as if it did not exist during the period when these transports took place." App. 617 – 618. The court went so far as to "question[] whether the actions taken by the Director exceed his authority . . . and whether such actions are contrary to public policy." *Id*.; *see also* App. 618 (noting that PEIA "has a duty to its insureds and the actions by the Director are in stark contrast to the duties and purpose of PEIA"). The court also took issue with PEIA's view that it need only pay the Medicare Rural Rate, reasoning that this action "establishes a maximum amount that Air Evac will be paid," thereby "violat[ing] . . . the *Cheatham* injunctions." App. 619.

And yet on the final issue of what now requires PEIA to pay for the disputed transports, the Circuit Court erroneously refused to engage in a severability analysis (App. 609 – 613), which remains the sole issue to be resolved in Air Evac's consolidated appeal before this Court. *See* No. 23-ICA-135. In tandem with Air Evac's own appeal, PEIA initiated this appeal, to which Air Evac now responds.

SUMMARY OF ARGUMENT

PEIA simply will not acknowledge the consequences of the federal injunction in *Cheatham*. PEIA's refusal to apply its own Legislative Rules for Contested Case hearings is only the most recent example of PEIA's disregard of the consequence of the *Cheatham* litigation. Both during and after the *Cheatham* litigation, Air Evac continued to provide non-discretionary emergency air ambulance transportation to PEIA insureds—as it is required to do under federal and state law. Over Air Evac's protest, PEIA drastically undercompensated Air Evac on each of the transports made during this time. And to date, PEIA has paid not a single cent on these

outstanding bills beyond the amount called for under the preempted fee schedules—the same fee schedules PEIA is enjoined from enforcing. Yet, PEIA insists it has no legal obligation to change its ways.

It is wrong. The federal preemption issue has been conclusively decided in Air Evac's favor. In turn, the Circuit Court soundly rejected each of PEIA's contrived procedural roadblocks, confirming that PEIA's Rules remain valid and properly available to Air Evac. This Court should do the same.

First, the Circuit Court had jurisdiction over Air Evac's Demand under both the APA and PEIA's own Rules incorporating it. PEIA's newly-concocted theory—that the proper review for this dispute is a 1-800 telephone call with a private benefits administrator, followed by a panel of medical professionals—is waived and meritless. Just the same, the APA and PEIA's Rules similarly sideline PEIA's suggestion that such claims should be made before the West Virginia Legislative Claims Commission (the "Claims Commission"). And now, seemingly appreciating that its prior attempts to move the target have not worked, PEIA remarkably suggests that because *it* refused to hold a hearing pursuant to its Rules, the Circuit Court had no power to review its summary denial. Nonsense.

Second, Air Evac's Demand is not barred by sovereign immunity or qualified immunity. Air Evac seeks proper and lawful payment of funds the Legislature has appropriated to pay healthcare providers. Sovereign immunity poses no bar whatsoever to APA review in these circumstances. As PEIA's own Rules (and common sense) dictate, when an agency fails to pay for services rendered in accordance with a statutory obligation to do so, a service provider has administrative and judicial recourse to see that it is made whole. Likewise, although waived by its failure to raise earlier, PEIA's qualified immunity theory similarly fails. Simply put, PEIA cannot

be excused under the guise of "discretionary governmental action" for continuing to unconstitutionally administer a statute invalidated by the federal courts.

Third, in the face of the rebuke in *Cheatham*, the Circuit Court appropriately rejected PEIA's *post hoc* rationalization for its preempted actions, particularly noting and appreciating that such a shift would burden PEIA's own insureds with over $4 million in transport charges that PEIA refuses to pay after its string of losses. Put simply, the Circuit Court got it right: PEIA can neither change the law by command nor ignore the federal injunction.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument is necessary. Air Evac has not waived oral argument, the appeal is not frivolous, the dispositive issues have not been authoritatively decided, and the decisional process will be significantly aided by oral argument. W. Va. R. App. Proc. 18(a). This matter is appropriate for oral argument because it involves assignments of error in the application of settled law, W. Va. R. App. Proc. 19(a)(1), and it involves issues of public importance and constitutional questions – specifically, the effect of federal preemption and circumstances under which immunities may be properly raised. W. Va. R. App. Proc. 20(a)(2), (a)(3).

STANDARD OF REVIEW

In cases where a circuit court has altered the result before the administrative agency, "this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law de novo." *Muscatell v. Cline*, 196 W. Va. 588, 595, 474 S.E.2d 518, 525 (1996) (citing *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d 264 (1995)).

ARGUMENT

Because the threshold issue of the validity and administration of PEIA's contested case rules under the APA informs and overcomes PEIA's misdirected call for immunity, Air Evac will proceed by first addressing that issue before turning to PEIA's strained reliance on notions of immunity. It concludes with a straightforward rejection of PEIA's argument—that after the *Cheatham* litigation—it retained the residual "discretion" to do precisely what the *Cheatham* courts said it could not.

I. The Circuit Court Correctly Held that PEIA is Obligated to Abide by its Valid Contested Case Rules.

PEIA's obligation to hold a contested-case hearing is clear, and the Circuit Court's decision was right. For thirty-six years, PEIA has had in place "Rules of Procedure for Contested Case Hearings and Declaratory Rulings," which offer an APA-style hearing to "every" party affected by the agency's activities and provide judicial review from the agency's final decision. W. Va. Code St. R. §§ 151-3-1, *et seq*. Although PEIA was exempted in part from the APA by later legislative enactments, that exemption has an important caveat. Specifically, the Legislature mandated that "[a]ny rules promulgated by the public employees insurance board or director shall remain in full force and effect until they are amended or replaced by the director." W. Va. Code §§ 5-16-8(1).

It is undisputed that PEIA's contested-case hearing Rules have not been "amended or replaced." Accordingly, PEIA is obligated to enforce its own rules. *Vosberg v. Civil Serv. Comm'n of West Virginia*, 166 W. Va. 488, 493 (1981) ("an administrative agency must follow its own rules and regulations"); *Powell v. Brown*, 160 W. Va. 723, 723 syl. 1 (1977) ("An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs"). And since PEIA issued a final order refusing to hold a hearing, the Circuit Court had jurisdiction

both to correct the agency's error and to resolve the merits of this purely legal dispute. *See* W. Va. Code St. R. § 151-3-13, ¶¶ 4.2(A)-(B), 13.1 (providing for judicial review under the APA of a "final order" issued by PEIA, including one "refusing to grant the hearing as requested"); W. Va. Code § 29A-5-4 (a), (g) (providing for judicial review of "a final order or decision in a contested case," including claims that the agency's actions are legally or procedurally erroneous).

PEIA does not dispute the two facts that matter here: (a) the Legislature expressly left PEIA's contested-case hearing rules in effect and in force until PEIA repeals them, and (b) PEIA has never repealed them. PEIA has no answer to Air Evac's argument on this score, which alone demands that the Circuit Court's decision be upheld in Air Evac's favor.

Instead of meeting Air Evac's arguments head on, PEIA suggests that Air Evac is supposed to pursue relief through a *different* route: the multi-step benefits review process provided under PEIA's plan document, W. Va. Code St. R. §§ 151-1-1, *et seq*. ("Plan Document") (App. 408 – 417), "to appeal the denial of a claim or request for service." *see id.* § V.9, p. 121 (App. 416). According to PEIA, Air Evac must present its arguments regarding statutory interpretation, severability, and the scope of federal preemption in the following manner: by (1) calling a private, Third-Party Administrator at a 1-800 number (presumably in Utah)[6] "to verify that a mistake has been made"; (2) if that doesn't work, sending a follow-up letter to this same private administrator (also in Utah); (3) "appeal[ing] in writing to the director of PEIA; and (4) seeking additional review from "independent health care professionals," who are not lawyers and who represent "the final level of appeal." *Id*. at 121-22 (App. 416 – 417). And according to PEIA, since there is no "right" to a contested-case hearing under these Plan procedures, PEIA's provider-reimbursement decisions are judicially unreviewable under the APA. In other words, "PEIA's decision at the

[6] *See* https://peia.wv.gov/understand_my_benefits/preferred-provider-benefit-plans-a-b-d/claims-and-appeals/Pages/How-to-Appeal-a-Medical-Claim.aspx (last visited 7/31/2023).

conclusion of these procedures is final." App. 377. PEIA's position is waived, misleading, and incorrect.

As an initial matter, PEIA waived this "1-800" argument by not articulating it in its summary denial. *See* App. 062 – 063. "It has long been admonished that courts may not accept . . . counsel's *post hoc* rationalizations for agency action." *Webb v. West Virginia Bd. of Medicine*, 212 W. Va. 149, 158 (2002) (citation omitted). "Rather, an agency's discretionary order must be upheld, if at all, on the same basis articulated in the order by the agency itself." *Id*. (citation and alterations omitted). In its summary denial, PEIA never once cited the Plan Document, or suggested that the Plan "appeals" process serves as a statutorily-exclusive substitute for its contested-case procedures. *See* App. 062 – 063. PEIA may wish it had done so, but this Court "is powerless to affirm the administrative action" now "by substituting . . . a more adequate or proper basis." *Webb*, 212 W. Va. at 159 (quoting *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947)).

At any rate, PEIA's argument is meritless. As a matter of law and common sense, the appeals process in the Plan is not applicable to the kind of claims Air Evac has brought. The Plan makes clear that the purpose of this internal benefits-review procedure is to resolve disputes where the insurer or provider believes a mistake has been made regarding coverage *in applying the standards set out in the Plan*. *See* Plan Document § V.9 (App. 416 - 417) (the process applies if an insured or provider "think[s] that an error has been made in processing your claim or reviewing a service"). That includes challenging routine decisions about whether a given service or treatment is covered or medically necessary—which are the kind of decisions that healthcare administrators and healthcare professionals are well equipped to make. *Cf. id.* at p. 122 (App. 417) (external review of decisions involving "the medical necessity, appropriateness, health care setting, level of care or effectiveness of the health care service or treatment you requested"). Resolving those kinds

of "errors" involves applying the terms of the Plan and bringing medical judgment to bear on the problem.

The Plan appeals process is not a mechanism for resolving this dispute. Air Evac is not claiming that PEIA made a payment "error" under the Plan in "processing" its claims for payment or evaluating the medical necessity of a transport. Rather, Air Evac contests the scope of PEIA's statutory authority in light of the ADA, the Supremacy Clause, and West Virginia severability principles. Air Evac further seeks judicial intervention because PEIA insists on flouting the federal courts' mandates in *Cheatham* by continuing to limit its reimbursements to the invalidated fee-schedule amounts. This is a far cry from the appeal process of § V.9, which is aimed at coverage disputes about "payment for a health care service or course of treatment" under PEIA's plan. Plan at § V.9 (App. 416 – 417). The idea that questions regarding the scope of federal preemption and West Virginia severability law should be resolved over a 1-800 hotline or submitted to a round table of physicians for a final decision, with no possibility for judicial review, is ludicrous.

And the notion that PEIA's Director should be the arbiter in a proceeding contesting whether he has complied with, or unlawfully defied, a federal court order—again with no possibility for APA or judicial review—is contrary to common sense and would raise serious due process and equal protection concerns. *See* Syl. pt. 2, *State ex rel. Ellis v. Kelly*, 145 W.Va. 70, 112 S.E.2d 641 (1960). ("Due process of law, within the meaning of the State and Federal constitutional provisions, *extends to actions of administrative officers* and tribunals, as well as to the judicial branches of the governments.") (emphasis added). Fortunately, that is not how things work. Instead, as the Circuit Court soundly concluded, questions regarding the scope of PEIA's statutory authority, and the legal rights of medical providers, are to be resolved under the APA and PEIA's contested-case hearing Rules. App. 563 – 567.

But PEIA does not stop there. It further suggests that a 2018 circuit court decision from the Circuit Court of Marion County supports its view. App. 375 (citing *Demary v. PEIA*, CC-24-2018-P-57 (Cir. Ct. Marion Cty. 2018)). But the *Demary* decision (and PEIA's own briefing in that case) unambiguously supports Air Evac.

In *Demary*, a PEIA *beneficiary* sought pre-approval for radiological treatment from PEIA under the Plan's appeal procedures. App. 419 – 420. The PEIA beneficiary, Demary, never requested a contested-case hearing, nor did PEIA conduct one. *Id*. Instead, Demary followed the appeal process set forth in the Plan; when coverage was denied, Demary sought relief in the circuit court, including attempting to initiate appellate review under PEIA's contested-case rules. *Id*. The court sensibly decided that Demary could not rely on the Rules, concluding that the contested-case rules do not apply to decisions regarding "the 'medical necessity and appropriateness' of a requested treatment," which are more appropriately addressed under the Plan's review process. App. 430 (quoting W. Va. Code § 5-16-7(a)(6)(C)). Additionally, the court noted that Demary could not utilize the contested-case procedures because he never invoked them (and thus PEIA never relied on them). App. 430 - 431. However, the court was careful to note that it would have jurisdiction under the APA if "*some statutory provision or administrative rule require[d] that an agency hold a hearing prior to issuing its decision.*" App. 429 (citation omitted, emphasis added).

Demary—and PEIA's own briefing in that case—devastate PEIA's arguments. The distinction the *Demary* court drew between the contested-case rules and the Plan's review process profoundly supports Air Evac's position. Indeed, PEIA itself argued in *Demary* that the Plan's "appeal procedure" "reflect[s] standard insurance practice of utilizing healthcare professions to determine the medical necessity and appropriateness of specific treatments," and PEIA need not "conduct an administrative hearing in order to determine[e] whether it will cover a specific

procedure." App. 472 – 473. Air Evac's statutory claims do not involve a challenge to PEIA's "determinations of medical necessity and appropriateness," and it would not make sense for the pure questions of law raised here to be settled by third-party administrators via the Plan review process. But nowhere in *Demary* did PEIA take the sweeping position they urge now: that this internal "appeal procedure" also requires questions of statutory interpretation to be resolved by private "healthcare professionals," rather than the agency and the courts. PEIA also never suggested in *Demary* that its contested-case hearing rules are obsolete or invalid.

Here, Air Evac expressly invoked the contested-case hearing procedures before PEIA. App. 068 – 090. And unlike *Demary*, Air Evac *has* identified a statute, an administrative rule, and caselaw that require PEIA to hold a contested-case hearing. *See* W. Va. Code § 5-16-8(1) (all PEIA rules "remain in full force and effect until they are amended or replaced by the Director"); W. Va. Code St. R. § 151-3-1 et seq. (PEIA's contested-case hearing rules, which have never been amended or replaced).

In addition to shirking its own Rules, PEIA also suggests that this dispute should be resolved before the Claims Commission. This argument is unavailing.

The ultimate relief owed to Air Evac involves the judicial interpretation of the statutory framework following the federal *Cheatham* injection—severability analysis. This demands a judicial function, not legislative action.

> The action of the Legislature and of the court of claims in approving or rejecting claims presented to either involves the exercise of a legislative, not a judicial, function. In finding and declaring, by the enactment of a statute, that a moral obligation of the State, based upon facts which give rise to a juristic condition, exists, the Legislature performs a legislative function, but the determination of the validity of such obligation, which involves the constitutionality of the statute, is a judicial, not a legislative, function.

Price v. Sims, 134 W. Va. 173, 185, 58 S.E.2d 657, 665 (1950). (citing *State ex rel. Cashman v. Sims*, 130 W.Va. 430, 43 S.E.2d 805, 172 A.L.R. 1389.).

The relief Air Evac seeks requires the application of severability principles by this Court. *State v. Tennant*, 732 S.E.2d 507, 518, 229 W. Va. 630, 641 (2012) (mandating application of severability analysis in the face of an unconstitutional statute); *see also Department of Treasury v. Fabe*, 508 U.S. 491, 509–10 (1993) (state law governs severability of a state statute). Under this framework, as further addressed in Air Evac's briefing in the companion appeal (No. 23-ICA-135), it is the courts of West Virginia , not the Legislature (or even the federal courts) that address issues of severability.

And, as a practical matter, presentation of this dispute to the Claims Commission otherwise makes very little sense given that the funds payable to Air Evac have already been appropriated by the Legislature for the services for which Air Evac seeks reimbursement. There is no need for the Legislature to make any new appropriation to satisfy the relief sought by Air Evac. It already did that—a fundamental point that undermines the premise of nearly all of PEIA's arguments.

II. Sovereign Immunity Does Not Bar Suits To Enforce an Agency's Duty To Pay Funds Already Appropriated By the Legislature For That Purpose And PEIA's Late Arriving Call for Qualified Immunity Fails for Similar Reasons.

Sovereign immunity is of no application. The Circuit Court was correct in rejecting PEIA's argument for sovereign immunity for two primary reasons. First, while it is true that the Constitution states that the "state of West Virginia shall never be made defendant in any court of law or equity," PEIA is not a "defendant" here. And the proceeding was neither initiated in a "court of law or equity." Rather, this appeal represents the natural extension of the administrative procedures authorized by PEIA's own administrative rules, and for this reason, does not raise sovereign immunity concerns.

Second, and relatedly, the Supreme Court of Appeals has *never* held that an application for relief under the APA, seeking to compel an agency to distribute Legislatively-appropriated funds in the manner required by the statutory scheme the agency administers, is barred by sovereign immunity. To the contrary, sovereign immunity is inapplicable 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. Seeking payment under such a scheme, as Air Evac has done, simply does not implicate "the policy which underlies sovereign immunity," which "is to prevent the diversion of State monies from legislatively appropriated purposes." *Mellon-Stuart Co. v. Hall*, 359 S.E.2d 124, 129, 178 W. Va. 291, 296 (1987).

Simply put, Air Evac's Demand is not a prohibited raid on the State Treasury. Rather, Air Evac is asking to be paid for the life-saving service it has provides from funds that the Legislature appropriated for that purpose, using the administrative procedure that PEIA itself promulgated. Indeed, as the Supreme Court of Appeals held in *Mellon-Stuart*, sovereign immunity is applicable only "where monetary relief is sought against the State treasury for which a proper legislative appropriation *has not been made*." *Mellon-Stuart Co.*, 178 W. Va. at 296 (emphasis added). PEIA misses that point: Air Evac is seeking what it is entitled to from money already appropriated by the Legislature for the particular purpose of paying a health care provider for non-discretionary emergency air-ambulance.

The Supreme Court of Appeals' jurisprudence in circumstances such as this confirms that sovereign immunity is simply inapplicable. For example, the Supreme Court of Appeals readily ruled on an appeal of a contested administrative decision against the state in *Curry v. West Virginia Consol. Public Retirement Bd.*. 236 W.Va. 188, 189 (2015). The Court acknowledged that when it reviews contested administrative decisions, the "West Virginia Administrative Procedures Act,

specifically West Virginia Code § 29A-5-4(g) (2012), governs . . .” *Id*. And, as here, the Court did not use the term “defendant” to describe the state agency before it; instead, the Court described the West Virginia Public Retirement Board as a “Respondent,” since it was responding to a petition for review of its administrative decision. *Id*. *See also Curry v. West Virginia Consol. Public Retirement Bd.*, No. 14-AA-28, 2014 WL 9954119 (W. Va. Circuit Ct. July 30, 2014) (designating state entity as “respondent”).

Similarly, the Supreme Court of Appeals required the refund of monies owed a petitioner when the State Tax Department of West Virginia came before it on an appeal of an administrative decision by the State Tax Department of West Virginia’s Office of Hearings and Appeals. *Charleston Area Medical Center, Inc. v. State Tax Dept. of W. Va.*, 224 W. Va. 591, 593, 598-99 (2009). In other words, the health care provider taxpayer brought a contested case before the Tax Department’s Office of Hearings and Appeals seeking remuneration under the same statute that the PEIA has adopted—§ 29A-5-4. *Id*., at 594. The Circuit Court ruled in favor of the state entity arguing in support of its administrative decision. *Id*. The taxpayer appealed, bringing the state entity before the Supreme Court of Appeals to further justify the reasons underpinning its administrative ruling. And the Supreme Court of Appeals held that the state’s tax department would need to pay money to the taxpayer-petitioner. *Id*.

Finally, in *Maupin v. Sidiropolis*, the Supreme Court of Appeals again reviewed an administrative decision by an arm of the state under W. Va. Code § 29A-5-4—this time, the West Virginia State Racing Commission. *Maupin v. Sidiropolis*, 215 W. Va. 492, 493 (2004). In that case, the petitioner sought payment from the West Virginia Greyhound Breeding Development Fund, for which the legislature had appropriated funds to promote better breeding and racing of greyhounds in the state. *Id*., at 496. As in *Curry, Charleston Area Medical Center*, and here, the

state entity appeared in response to a petition to argue in favor of its administrative decision under Section 29A-5-4. *Id*. That is, the State Racing Commission was not a "defendant;" instead, it was responding to a petition concerning the legal reasoning underpinning its administrative decision-making. The Supreme Court ultimately held that the state entity was required to disburse funds that the legislature had earmarked for disbursement. *Id*., at 496 (discussing purpose of legislature's appropriated funds); 498-99 (holding that the Racing Commission's administrative order erred, and that the petitioner was entitled to the funds).

In none of these cases did the Court refuse to entertain an action seeking payment from an agency based on concerns of sovereign immunity—and for good reason. Each petitioner sued agencies—the West Virginia Tax Department, the West Virginia Consolidated Public Retirement Board, and the West Virginia Racing Commission—which are charged with administering a statutory scheme. Should they run afoul of the law and fail to administer those monies or benefits in manner consistent with the law, there must be—and indeed is—judicial review. In the absence of such review, agencies would be able to flout the very legislative directive they are beholden to, usurping by decree the fundamental and balancing power bestowed on reviewing courts. *See* Syl. Pt. 1, *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 21–22, 454 S.E.2d 65, 66–67 (1994) ("The system of 'checks and balances' . . . practically compels courts, when called upon, to thwart any unlawful actions of one branch of government which impair the constitutional responsibilities and functions of a coequal branch.").

The same reasoning applies here. The Legislature created PEIA with the duty to establish health insurance plans to pay for medical care for public employees, including "coverage for emergency services" by "an ambulance." *See* W. Va. Code §§ 5-16-7, 5-16-8(12)(a)–(b). As a general matter, PEIA is largely funded by Legislative appropriations, and it is required to deposit

its monies in a fund as well as maintain a reserve fund for "unanticipated claim[s]." *See generally* W. Va. Code §§ 5-16-18, 5-16-25. PEIA is required to distribute these funds as required by law, including to pay medical providers (who are, in turn, instructed to "bill" the State for payment). *See*, *e.g.*, W. Va. Code §§ 5-16-3, 5-16-5(c)(1), 5-16-18(f), 5-16-11, 16-29D-3(f), 16-29D-4(a)(2).

PEIA's attempts to interject confusion on this point are unavailing. The cases it cites, *Phillips*, *Skaff*, and *Arnold Agency*, do nothing to further its position. Pet. Br. 17 – 18. None of these cases involve the unique scenario at hand: a federal injunction invalidating a statutory regime under which a state agency is withholding already appropriated funds to be paid for non-discretionary emergency services.

Additionally, two of these cases, *Phillips* and *Arnold Agency*, were direct lawsuits naming the States instead of a judicial review of the propriety of an administrative decision. This fact alone makes them distinct from this action, but the relief sought in both *Phillips* and *Arnold Agency* was also for services that had not even been rendered. In *Phillips*, the plaintiff, sued in circuit court, complaining of a lack of allotted work under a contract with the Department of Health and Human Resources ("DHHR"), under which DHHR had exclusive discretion for the allotment of work. 2020 WL 3408421, at *1. In *Arnold Agency*, the plaintiff filed direct suit in circuit court, challenging the propriety of a lost bid with the West Virginia Lottery Commission. 206 W. Va. at 588. Neither claims in *Phillips* or *Arnold Agency* were seeking reimbursement for any services rendered.

Finally, while *Phillips* and *Arnold Agency* are merely inapposite, the *Skaff* case *fundamentally supports* Air Evac's position in this case. As provided in *Skaff*, "[t]he sovereign immunity doctrine is implicated when retroactive monetary relief against the State is sought, but does not operate as to bar an award which is prospective in nature." 200 W. Va. at 706. PEIA's

reliance on *Skaff* and, in turn, its suggestion that Air Evac seeks "retroactive recovery" of State funds misses the point entirely.

To be sure, Air Evac is seeking *prospective* payment. The line between prospective and retroactive recovery in this case must be drawn to include all disputed transports that are open and unresolved between the date federal suit was initiated and the effective date of S.B. 587 (the end of the balance billing prohibition). Until that new law became effective in June, 2019, all disputed transports taking place prior to that date remained open and PEIA is required—under West Virginia severability law—to pay those transports prospectively in full. Indeed, *Skaff* explicitly recognized, as other cases have, that the initiation of suit (here *Cheatham*) to challenge State action (here PEIA's) marks the date from which payment sought becomes "prospective." 200 W. Va. at 705.

Here, Air Evac seeks payment for transports made after the filing of the *Cheatham* complaint on June 9, 2016, through the new law's effective date in June, 2019. In *Skaff*, the Supreme Court of Appeals authorized similar payments, holding that "the appellees are entitled to [remuneration] . . . from the filing of their complaint on August 16, 1991 until August 3, 1993 when the new rules became effective." *Id.* All along the way—and even before the *Cheatham* Complaint—Air Evac has advised PEIA of its intentions and demands for full and appropriate compensation on its transports. This is the very type of prospective recovery that would otherwise render the sovereign immunity rule inapplicable.

Even so, the Court need only distinguish between prospective and retroactive recovery if sovereign immunity would otherwise be applicable, and—as explained above—it is not. As such, the Court should uphold the Circuit Court's ruling and find that sovereign immunity simply is not implicated by the case before it, where it is reviewing administrative decisions made under the

West Virginia APA. And, even if the Court considers sovereign immunity, it should have no role when the monies Air Evac seeks have already been appropriated by the Legislature, and where such payments are prospective in nature. *Mellon-Stuart Co. v. Hall*, 178 W. Va. at 296; *Skaff*, 200 W. Va. at 705.

Qualified immunity is waived and otherwise of no application. PEIA's argument for qualified immunity is made for the first time in its briefing before this Court. PEIA did not raise qualified immunity in summarily rejecting Air Evac's Contested Case Demand. App. 062 – 063. And it did not raise the issue before the Circuit Court in the first stage of this appeal. App. 366 – 446. As such, PEIA's late-arriving argument is waived. Syl. Pt. 2, *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 210-211, 470 S.E.2d 162,164-165 (1996) ("To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect."). *Cf. Jackson v. Belcher*, 753 S.E.2d 11, 24 n.4 (W. Va. 2013) (recognizing that "qualified immunity is in the nature of an affirmative defense.") (quoting *Vent v. Johnson*, 2009 Ark. 92, 303 S.W.3d 46 (2009); *Hutchinson v. Lemmon*, 436 F. App'x 210, 218 (4th Cir. 2011) (the Fourth Circuit observing when presented with a "state-law qualified immunity" claim by a West Virginia State Police officer that such a claim "may be waived" before rejecting the qualified immunity claim for failure to have it "squarely presented" to the lower court.).

PEIA's call for qualified immunity also fails substantively. PEIA cannot reinvent its basis for reimbursement to Air Evac after its original basis was deemed illegal. This strikes at the heart of qualified immunity. Here, PEIA has not exercised lawful discretion—it has doubled down on administration of an illegal statutory regime in the face of federal court orders telling it that it cannot do so.

The Circuit Court concluded the same: "[t]his Court rejects [PEIA's] argument that the Director has the authority to determine the amount PEIA will pay Air Evac for the past charges and transport and, further, to shift the remaining payment burden for the past charges and transports at issue onto PEIA's insureds." App. 572. That, as the Circuit Court observed, is not discretion or a permissible judgment call. App. 572 – 574.

III. PEIA Attempts to Rewrite *Cheatham* and the Sequence of History in its Claim that it has Discretion to Deny Reimbursements.

Mirroring its qualified immunity argument, PEIA maintains that it is entitled to ignore the *Cheatham* injunction and continue limiting air ambulance payments to the amount in the fee schedule the Fourth Circuit held preempted—leaving injured public employees with the bill. According to PEIA, the federal courts overlooked a supposed "second payment authority" possessed by Director Cheatham: W. Va. Code § 5-16-3(c), which authorizes the Director to "manage . . . provider negotiations . . . and . . . payment." App. 384; Pet. 33 – 38. Under this back-up provision, it claims, the Director retains the discretion to do precisely what the Fourth Circuit said he could not. PEIA's position makes a mockery of the federal-court injunction, is wrong on the law, and if credited, would impose a staggering retrospective liability on West Virginia public employees.

First, under the federal injunction, PEIA is forbidden from relying on its statutory authority to "establish [m]aximum levels of reimbursement" that it "makes to" air ambulances and is enjoined from enforcing any "fee schedules" doing so. W. Va. Code § 5-16-5(c)(1); *Cheatham*, 2017 WL 4765966, at *10. Section 5-16-3(c) preserves the Director's general, "day-to-day" power to administer the plan "as a benefits management professional." PEIA's position is that the Director can use this general administrative power to cap payments *at the same level as the preempted fee schedules*. This formalistic ploy displays an aggressive disregard for the authority

of the federal courts, which have forbidden enforcement of the fee schedules. *See* 18 U.S.C. § 401 (punishing contempt of a federal court's "authority," including "resistance to its lawful writ, process, order, rule, decree, or command").

Second, PEIA tries to justify its stance by suggesting that all the Director is doing when he refuses to pay the disputed claims is limiting *PEIA*'s reimbursement, while Air Evac is supposedly free to bill ***PEIA members*** for the balance. App. 386 – 389; Pet. 33 – 38. This is contrary to the law.

To recap:

- In 2016, when this litigation commenced, West Virginia law capped air-ambulance reimbursements via a fee schedule that adopted the notoriously inadequate federal Medicare rate. *See Cheatham*, 910 F.3d at 758, 767; *see also* W. Va. Code 5-16-8a (capping the amount Air Evac could receive at either the "federal medicare rate" or the annual cost of Air Evac's membership program). Air Evac was also prohibited by law from "balance-billing PEIA members." W. Va. Code § 16-29D-4.

- Air Evac filed its federal suit on *June 9, 2016*, challenging the fee schedule and—in the alternative—the balance-billing prohibition.

- The federal district court enjoined the rate-capping provisions and fee schedules on *October 20, 2017*. However, *the federal district court left the prohibition on balance-billing in place*. The Fourth Circuit unanimously affirmed this injunction on *December 7, 2018*. This injunction remains in effect today.

- On *June 4, 2019*, the West Virginia Legislature adopted a new law (at PEIA's behest) that authorizes PEIA to limit reimbursement at the Medicare Rural rate and exempts air ambulances from penalties for balance billing. W. Va. Code § 5-16-8a (2019). As PEIA admit, the 2019 Legislation was "prospective" only and did not purport to allow balance-billing for transports provided prior to the statute's effective date.

- All of the claims at issue in this dispute concern transports provided *between June 9, 2016 and June 4, 2019*—in other words, *while Air Evac was subject to the balance-billing ban.*

Accordingly, Section 16-29D-4, which prohibits balance billing of PEIA insureds, is applicable to all of the claims at issue in this dispute. The Director has no authority, whether from Section 5-16-3(c) or any other provision, to override this provision. An agency's rules cannot "enlarge, amend or repeal substantive rights created by statute." *Penn Virginia Operating Co., LLC v. Yokum*, 829 S.E. 2d 747, 752 (W. Va. 2019) (citation omitted); *Zelenka v. City of Weirton*, 208 W. Va. 243, 245 n.2 (2000) ("the Legislature enacted the statutory provision[] at issue, and only the Legislature has the authority to amend" it).[7]

Third, if PEIA is correct, then it has imposed a breathtaking retroactive liability on West Virginia public employees. As just reviewed, up until June 4, 2019, those employees and PEIA beneficiaries had statutory protection from balance billing for air-ambulance transports. That includes the $4 million in unpaid balances at issue here. If the Director is allowed, with the stroke of a pen, to rescind that statutory protection and subject the affected PEIA insureds to balance billing for these claims, that result would be contrary to West Virginia law, *see Yokum*, 829 S.E. 2d at 752; *Zelenka*, 208 W. Va. at 245 n.2, and raise significant constitutional questions, *see*, *e.g.*, W. Va. Const. art. III, § 3-4 (prohibits laws "impairing the obligation of a contract"); *id*. art. III, § 10 ("[n]o person shall be deprived of life, liberty or property without due process of law . . . ."); *Kisner v. Public Serv. Comm'n*, 163 W. Va. 565, 570 (1979) (for due process purposes, "a

[7] PEIA suggest that the Fourth Circuit invited it to retroactively shift the costs of compliance with the injunction on to injured employees by noting that PEIA could "limit reimbursements for air ambulance services after the fact." *Cheatham*, 910 F.3d at 769. That is misleading. What the Fourth Circuit wrote is that West Virginia could comply with the ADA "moving forward" through several mechanisms, including "negotiat[ing] better rates up front or limit[ing] reimbursements for air ambulance services after the fact"—so long as PEIA did not cap Air Evac's total reimbursement. *Id*. at 769 & n.3 (emphasis added). As it happens, "[m]oving forward" from the *Cheatham* decision, PEIA has scorned Air Evac's repeated efforts to engage the Director and reach a permanent reimbursement agreement. Instead, PEIA has unfortunately convinced the Legislature to thrust balance billing on PEIA insureds; that is the 2019 Legislation, which compromises PEIA's very mission to safeguard the interests of its insureds. *See* W. Va. Code § 16-29D-1(a)(6). Regardless, nothing in the Fourth Circuit's opinion suggested that PEIA was free enforce its fee schedule on past transports and exposing insureds to balance-billing.

'property interest' . . . extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings").

CONCLUSION

For the foregoing reasons, this Court should not disturb the Circuit Court's findings that PEIA's prohibited actions are not insulated by sovereign immunity and that Air Evac properly engaged PEIA's own contested case rules for resolution of the disputed emergency transport reimbursements under the APA. Further, this Court should reject PEIA's *post hoc* rationalizations that it may, somehow, operate in direct contravention of the federal courts' orders in *Cheatham*. Finally, for many related reasons and also because it is waived, this Court should reject PEIA's late-arriving qualified immunity argument.

Respectfully submitted,

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No. 23–ICA-127

IN THE INTERMEDIATE COURT OF APPEALS

OF WEST VIRGINIA

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-Appellants,

v.

AIR EVAC EMS, INC.

Respondent-Appellee.

On Appeal from the Circuit Court of Kanawha County, No. 19-AA-169
Hon. Carrie L. Webster

CERTIFICATE OF SERVICE

I, Carte P. Goodwin, hereby certify that a copy of the foregoing was filed via File & ServeXpress on July 31, 2023, providing service to all counsel of record.

/s/ Carte P. Goodwin
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