No. 23–ICA-135



**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**

**AIR EVAC EMS, INC.**
*Petitioner-Appellant,*

**v.**

**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,**
*Respondents-Appellees,*

# BRIEF OF PETITIONER-APPELLANT AIR EVAC EMS, INC.

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

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## ASSIGNMENT OF ERROR

Whether Air Evac EMS, Inc., is entitled to full payment for air ambulance transports provided to members of the West Virginia Public Employees Insurance Agency ("PEIA"), when a federal district court and the United States Court of Appeals for the Fourth Circuit held that federal law preempts state statutory provisions allowing PEIA to limit what Air Evac is paid for such transports.

## STATEMENT OF THE CASE

Air Evac EMS, Inc. ("Air Evac" or "Appellant") asks this Court to reverse in part a final order of the Circuit Court of Kanawha County, which was issued upon review of a final agency action of PEIA, denying Air Evac full payment for air ambulance transports to PEIA members.

***Introduction***

For years, Appellees – the Director of PEIA and members of the PEIA Finance Board (collectively, "PEIA") – have denied Air Evac and other air ambulance providers full 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 insured.

In 2016, Air Evac filed a declaratory judgment action in the United States 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. *See 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 United States 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 PEIA statutory provisions and fee schedules that limit what Air Evac is paid for transporting patients insured by PEIA.

PEIA has persistently refused to accept the consequences of the federal injunction. Both during and after the *Cheatham* litigation, Air Evac continued to provide emergency transports to PEIA insureds – as it is required to do under federal and state law. Over Air Evac's protests, PEIA has 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 schedules PEIA is enjoyed from enforcing. Yet, PEIA insists it has no legal obligation to change its ways.

PEIA appears to have learned nothing from their stinging rebuke at the hands of the federal courts. PEIA lost the *Cheatham* litigation, in which the federal district court and the Fourth Circuit concluded that PEIA's rate-capping scheme for air ambulance transports was preempted by the ADA. This case flows directly from PEIA's mystifying insistence that it can continue to reimburse Air Evac in accordance with the very rate schedules struck down in *Cheatham*. Doubling down on their efforts to avoid the consequences of that litigation, PEIA is apparently content with defying a federal court order, and seek to shirk all responsibility for PEIA's illegal reimbursement scheme by attempting to burden West Virginia citizens with over four million dollars of medical debt. Beyond being patently unlawful, PEIA's position, if accepted by this Court, would harm the very insureds PEIA is tasked with safeguarding.

***Background***

Air Evac is a federally regulated air carrier that provides life-saving emergency transportation services to critically ill and injured patients in West Virginia. For more than a decade, PEIA has engaged in concerted efforts to cap payments to Air Evac for transporting state employees during a medical emergency, which it is required by state and federal law to do. *See* App. 783.

First, beginning in 2011, PEIA abruptly implemented "new laws and regulations aimed at air ambulance expenses," including fee schedules that capped the reimbursement rate for air ambulance providers at the federal Medicare Rural Rate. *Cheatham*, 910 F.3d at 758. This rate was "substantially below" Air Evac's billed charges. App. 783. Then, the West Virginia Legislature enacted a statute in 2016 that further capped what air ambulance providers could receive at one of two amounts: (1) the federal Medicare reimbursement rate, or (2) the fee or cost of the air ambulance's subscription service agreement, which was typically around $100. App. 783; *see* W. Va. Code §§ 5-16-8a(a), 5-16-8a(b) (2016); *Cheatham*, 910 F.3d at 758.[1] These provisions of the Public Employees Insurance Act (the "Act")[2] and schedules were "backed up" by a ban on balance-billing, *see* W. Va. Code § 16-29D-4, which prohibited Air Evac from recovering from PEIA insureds any more than the reimbursement rate cap set by PEIA. App. 783–84 (quoting *Cheatham*, 910 F.3d at 758). PEIA enforced this rate-capping scheme through threats of enforcement actions and criminal and civil penalties. *See* W. Va. Code § 5-16-12(a) (2016) (civil liability); § 5-16-12(b) (2016) (criminal liability). As the Fourth Circuit recognized, "West

[1] The full text of these provisions is as follows:

> (a) Notwithstanding any provision of this code to the contrary, any air-ambulance provider which does not have a contract with the plan, that provides air transportation or related emergency or treatment services to an employee or dependent of an employee covered by the plan, may not collect from the plan and the covered employee or dependent of the employee, a combined amount for those services which exceeds the reimbursement amount then in effect for the federal Medicare program, including any applicable Geographic Practice Cost Index.
>
> (b) If an air-ambulance provider has entered into a subscription service agreement with an employee or dependent of an employee covered by the plan, and the employee or dependent is in good standing with the agreement, the air-ambulance provider shall accept the fee or cost of the subscription service agreement as payment in full for any air-ambulance transport and related emergency treatment or services which the air-ambulance provider may provide to that employee or dependent of an employee.

W. Va. Code Ann. § 5-16-8a(a), (b) (2016).

[2] The Act is found in Article 16, Chapter 5 of the West Virginia Code.

Virginia has simply dictated a relatively low reimbursement rate and prohibited any additional recovery," and as a result, "the state faces no pressure to bargain up front, and no threat of patients being directly billed on the back end, thereby lowering total reimbursement costs." *Cheatham*, 910 F.3d at 758.

***Procedural History***

On June 9, 2016, Air Evac filed a Complaint for Declaratory and Injunctive Relief in the United States District Court for the Southern District of West Virginia. *See Air Evac EMS, Inc. v. Cheatham*, No. 2:16-cv-05224 (S.D.W. Va. June 6, 2019) at ECF No. 1. Air Evac contended that PEIA's rate-capping scheme was preempted by the ADA, which invalidates any state law, rule, or fee schedule that "relate[s] to" the "price[s]" or "service[s]" of federally-regulated "air carrier[s]." 49 U.S.C. § 41713(b)(1). App. 784. Air Evac challenged the balance-billing ban in the alternative. App. 784.

On October 20, 2017, the federal district court concluded that the ADA preempted the reimbursement cap set forth in W. Va. Code § 5-16-8a(a) (2016), and the regulation of Air Evac's subscription agreements set forth in W. Va. Code § 5-16-8a(b) (2016). *Cheatham*, 2017 WL 4765966, at *10. It likewise concluded that the ADA preempted W. Va. Code § 5-16-5(c)(1),[3] the accompanying fee schedules, and all accompanying regulations "with respect to air ambulance providers." *Id*. The court held that PEIA was enjoined from enforcing all of those provisions and schemes. *See id*. But the district court left intact the ban on balance-billing PEIA insureds for air ambulance services, which was challenged in the alternative.

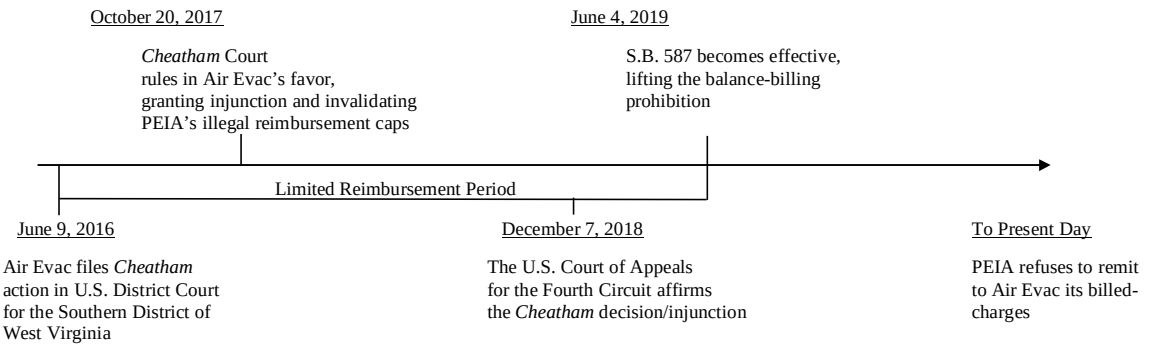
[3] The version of § 5-16-5(c)(1) in effect at the time provided, "All [annual and long-range] financial plans required by this section shall establish . . . [m]aximum levels of reimbursement which the [PEIA] makes to categories of health care providers." W. Va. Code § 5-16-5(c)(1) (2007).

PEIA appealed to the United States Court of Appeals for the Fourth Circuit and filed a motion to stay the injunction pending appeal, which was denied. Thus, "the District Court's order has remained in effect from the date it was entered [October 20, 2017] through the present day." App. 785. The Fourth Circuit ultimately affirmed the district court's decision on December 7, 2018. *See Cheatham*, 910 F.3d at 758.

Following the district court's decision, and during the pendency of the Fourth Circuit appeal, Air Evac demanded that PEIA pay the full cost of each air ambulance transport beginning on June 9, 2016, the date it filed its Complaint in federal court. App. 089, 096, 785. PEIA outright rejected Air Evac's demands, explaining that it retained the authority to pay Air Evac in the same manner as other private insurers.[4] App. 163–64. PEIA also contended that other provisions of West Virginia law were unaffected by the injunction, and PEIA retained discretion to choose which of Air Evac's services it would cover. App. 163. Remarkably, perpetuating its bald-faced efforts to underpay crucial air ambulance servicers, PEIA then notified Air Evac that it only intended to pay for each legitimate transport at the Medicare Rural Rate, which was precisely the rate PEIA set by its preempted fee schedules. App. 163–64. Indeed, the Circuit Court found that up to this point, PEIA still "ha[d] only paid Air Evac's outstanding bills at the amount established by the preempted fee schedules – the Medicare Rural Rate." App. 787.

In the wake of the *Cheatham* litigation, the West Virginia Legislature passed a new law providing that, going forward, air ambulance providers were no longer subject to penalties for seeking payment of the balance of their bills from insureds, if PEIA did not pay providers in full. *See* S.B. 587, W. Va. Legis. Reg. Sess. (2019), *codified at* W. Va. Code § 5-16-8a(d). The new law took effect on June 4, 2019.

[4] Notably, the district court noted that PEIA "fail[ed] to recognize that Air Evac recovers full billed charges from some private healthcare insurers." *Cheatham*, 2017 WL 4765966, at *7 n.1.




During and after the *Cheatham* litigation, Air Evac continued to provide emergency air ambulance transportation to PEIA insureds, as required under state and federal law. App. 787. During the time frame at issue in this appeal, Air Evac conducted 115 air ambulance transports to PEIA members, at a total cost of four million, seven-hundred seventy-three thousand, thirty-four dollars ($4,773,034). App. 84. After PEIA's payments at the Medicare Rural Rate for each, Air Evac was left with four million, eighteen thousand, forty-six dollars ($4,018,046) in unpaid transports, and no way to recoup those costs. [*Id.*] After multiple requests for PEIA to reimburse Air Evac in accordance with the *Cheatham* injunction, and PEIA's consistent refusal to do so, Air Evac demanded a Contested Case Hearing (the "Demand") pursuant to PEIA's Contested Case Rules (the "Rules") on October 24, 2019. App. 53.

In the Demand, Air Evac requested that the agency determine its legal rights, and the legal duties of the parties "with regard to payments on certain air ambulance transports provided by Air Evac to West Virginians insured" by PEIA. App. 53. It also demanded that PEIA pay full charges for air ambulance transports that occurred between June 9, 2016 (the initiation of the *Cheatham* litigation) and June 4, 2019 (the effective date of the statute allowing balance billing, W. Va. Code § 5-16-8a).[5] App. 57–58. PEIA summarily denied Air Evac's request twenty days later, claiming that it had been exempted from certain Administrative Procedure Act ("APA") oversight and was

[5] Throughout this brief, Air Evac will refer to air ambulance transports made from June 9, 2016, to June 5, 2019, as "past transports" for ease of reference.

not required to follow its Rules providing for contested case hearings using APA procedures. App. 163–64.

Air Evac filed a timely Petition for Appeal (the "Petition") with the Circuit Court of Kanawha County, Hon. Carrie L. Webster. App. 4–27 (petition); 490–515 (brief in support). In PEIA's Response, it argued there was no APA jurisdiction for the Petition; the Petition 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. 526–41. 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. 535 (quoting W. Va. Code § 5-16-3(c)). PEIA also argued that Air Evac is "free to bill PEIA members directly for the balance of any bill PEIA does not cover," App. 541, despite the fact that Air Evac was not and is not seeking recoupment on transports occurring after the enactment of S.B. 587 on June 4, 2019.

The Circuit Court held oral argument on April 26, 2022, and issued a final order (the "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 were to be resolved under the APA and PEIA's Rules. App. 782–810.

The Circuit Court also rejected PEIA's argument that it retains the discretion to determine the amount that must be reimbursed for past transports of PEIA members, or that it could legally continue to offer reimbursement for past transports at the Medicare Rural Rate and force Air Evac to balance-bill PEIA members for those transports. The 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. 806–07. 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." App. 806–07; *see also* App. 807 & n.4 (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. 808.

And yet on the issue of payment for past transports, the Circuit Court erroneously refused to engage in a severability analysis, reasoning that such an analysis "is not required to reach a decision in this matter" because Air Evac is "not entitled to full payment of its past charges under either *Cheatham* or West Virginia law." App. 801–02. This is backwards. When part of a statute is invalidated, the court must perform a severability analysis to determine whether the remaining parts of the statutory scheme can continue operating without the invalid provisions. *State v. Heston*, 137 W. Va. 375, 403, 71 S.E.2d 481, 496 (1952). Thus, the court had to engage in severability *to determine whether* Air Evac is entitled to full payment of its past charges. Severability is the crux of this matter and the court's refusal to follow West Virginia law and sever the enjoined provisions is reversible error.

In other words, the Circuit Court accurately resolved every legal question along the way up to the ultimate question: the required severability analysis. At that point, the court simply refused to complete the inquiry, instead deciding to remand the mater to PEIA and requiring the parties to engage in "good faith negotiations." App. 809.

Air Evac and PEIA separately filed notices of appeal with the West Virginia Supreme Court of Appeals on January 13, 2023. The Supreme Court dismissed the appeals and directed the

parties to file renewed Notices of Appeal in this Court. On March 31, 2023, PEIA filed a Notice of Appeal seeking to challenge the Circuit Court's conclusions on the legal issues it decided. Appeal No. 23-ICA-127. App. 851–93.

Air Evac's appeal is different – it challenges the Circuit Court's erroneous refusal to finish the job of deciding the severability question. Also on March 31, 2023, Air Evac filed a Notice of Appeal regarding the Circuit Court's decision not to engage in a severability analysis and its denial of full payment of past transports. Appeal No. 23-ICA-135; App. 811–50. On May 22, 2023, this Court consolidated the appeals for purposes of decision and, if warranted, oral argument.

## SUMMARY OF ARGUMENT

Air Evac has provided critical life-saving air ambulance services to the people of West Virginia for decades. But over the last 12 years, PEIA has engaged in concerted efforts to limit reimbursement payments to Air Evac and other air ambulance carriers to an amount substantially below Air Evac's actual costs. In 2017, a federal district court held that PEIA is enjoined from capping or otherwise limiting air ambulance costs because the federal Airline Deregulation Act preempts such actions, and it invalidated three different parts of the Public Employees Insurance Act allowing it to do so.

Despite this injunction, which was affirmed by the United States Court of Appeals for the Fourth Circuit, and which is still in place to this day, PEIA has nonetheless refused to reimburse Air Evac for 115 air transports to PEIA members occurring over a three-year period, resulting in losses to Air Evac of over $4 million. Air Evac demanded a contested case hearing from PEIA to determine its right to payment under the injunction and seek full payment of its costs. PEIA summarily denied this request.

On appeal, the Circuit Court agreed that PEIA had acted improperly, but then refused to recognize that when part of a state statute is invalidated (as it was here in the case of preemption), courts must sever the invalidated portion and assess the meaning and effect of the remaining language. Had the court done so, it would have been compelled to conclude that Air Evac is entitled to full reimbursement for the past air ambulance transports. Instead, the Circuit Court remanded this matter and directed Air Evac to initiate administrative proceedings with PEIA and engage in negotiations regarding the disputed payments. Respectfully, this path has already proved to be futile, as PEIA has made clear that it believes it retains discretion to cap Air Evac's reimbursement, in direct contravention of the federal injunction. This Court should reverse the

Circuit Court's decision and remand with instructions that PEIA provide full reimbursement of Air Evac's outstanding costs.

## 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 – regarding the validity of a statute, W. Va. R. App. Proc. 20(a)(2), (a)(3).

## STANDARD OF REVIEW

On appeal of an administrative order from a circuit court, this Court applies the same standard of review that the circuit court applied. *Lightner v. Riley*, 233 W. Va. 573, 578, 760 S.E.2d 142, 147 (2014). That standard provides that the court "shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision, or order are:

> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority or jurisdiction of the agency;
> (3) Made upon unlawful procedures;
> (4) Affected by other error of law;
> (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

W. Va. Code § 29A-5-4(g).

In cases where a circuit court has amended 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)). Here, Air Evac challenges only the legal issue of whether the Circuit Court was required to engage in a severability analysis, and whether – pursuant to that analysis – Air Evac is entitled to full reimbursement for past transports, which is reviewed de novo.

## ARGUMENT

### I. Pursuant to the *Cheatham* Injunction, Air Evac is Entitled to Full Payment for Air Ambulance Transports Provided to PEIA Members from June 9, 2016, to June 4, 2019.

The Circuit Court's failure to perform a severability analysis and resulting rejection of Air Evac's request for full reimbursement for past transports legally erroneous. Moreover, had the court engaged in a severability analysis, it would have been compelled to rule that the residual text of that statute mandates that Air Evac be paid full cost for its past transports from June 9, 2016, to June 4, 2019. Any alternative resolution would read the language invalidated by the federal courts directly back into the statute and allow PEIA to create an end-run around the *Cheatham* injunction. PEIA's and the Circuit Court's decisions on this point cannot stand.

#### A. The Circuit Court Erred as a Matter of Law in Concluding that a Severability Analysis is Not Required to Reach a Decision on Whether Air Evac is Entitled to Full Reimbursement for Past Transports.

The Circuit Court cursorily reasoned that it need not engage in a severability analysis because Air Evac is "not entitled to full payment of its past charges under either *Cheatham* or West

Virginia law." App. 838. But this reasoning is backwards – the court cannot know whether Air Evac is entitled to full payment *unless and until* it engages in a severability analysis. The only way to determine the applicable law governing Air Evac's request for full payment of past transports is to "sever" the preempted parts of the Act from the parts that were not preempted.

**1. By its preemption ruling in *Cheatham*, the federal courts invalidated parts of the Act enabling PEIA to limit payment for air ambulance costs.**

The federal courts held that "the ADA preempts" – and therefore invalidates – each of the sources of Air Evac's rate-capping: specifically, the courts (1) invalidated and enjoined PEIA from enforcing its fee reimbursement caps under W. Va. Code § 5-16-8a(a) and W. Va. Code § 5-16-8a(b) with regard to air ambulance providers; and (2) invalidated and enjoined PEIA from enforcing the reimbursement fee schedules implemented under W. Va. Code § 5-16-5(c)(1) and attendant regulations with regard to air ambulance providers. *Cheatham*, 2017 WL 4765966, at *10, *aff'd*, *Cheatham*, 910 F.3d at 767. The ADA's preemption clause provides, "[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price . . . of an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1). The Fourth Circuit explained that the rate-capping statutes and fee schedules in the Act "clearly" had a "connection to air ambulance prices" because they "establish the maximum amounts that the state will pay directly to air ambulance providers . . . and limit the ability of those providers to seek recovery from anyone else." *Cheatham*, 910 F.3d at 767 (citations omitted). Further, the provisions at issue reveal a "scheme" of "government dictates backed by civil and criminal sanctions," which "counts as an action 'having the force and effect of law' if anything does." *Id.* at 769 (quoting *Am. Trucking Ass'n v. City of Los Angeles*, 569 U.S. 641, 651 (2013)).

After the outcome in the *Cheatham* decisions, it is now crystal clear that PEIA does not have authority to set the fee schedules for – or otherwise set maximum reimbursement limits on – payment to Air Evac for air ambulance transports. But after *Cheatham*, the question remained – what is Air Evac owed for its past transports that occurred during the litigation? In its Demand, Air Evac sought to have this question answered via PEIA's administrative procedures, but PEIA summarily denied that request. In its Petition for Appeal, Air Evac asked the Circuit Court to apply settled principles of statutory construction to determine the consequences of the federal court's preemption holding, but the Circuit Court – despite making all the right legal decisions along the way – declined to take the final step of performing a severability analysis.

Now – as there are no facts in dispute – Air Evac asks this Court to perform a basic statutory severability analysis as part of its *de novo* review of the Circuit Court's decision, reverse the Circuit Court's decision remanding for further proceedings, and remand with instructions to award full reimbursement for past transports. *See Air Methods/Rocky Mountain Holdings v. Dep't of Workforce Servs., Workers' Comp. Div.*, 432 P.3d 476, 485–86 (Wyo. 2018) (performing severability analysis on *de novo* review of agency decision and holding that statute required full payment for air ambulance services).

**2. A severability analysis is necessary to understanding PEIA's residual authority and obligations in the wake of the *Cheatham* preemption decision.**

When part of a state statute is preempted by federal law, that statute "need not be treated as a package which stands or falls in its entirety." *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 509 n.8 (1993). A statute "may contain constitutional and unconstitutional provisions which may be perfectly distinct and separable so that some may stand and the others will fail." *State v. Heston*, 137 W. Va. 375, 403, 71 S.E.2d 481, 496 (1952). To determine what parts of a statute remain in light of a federal injunction, courts employ a "severability" analysis. *Env't Tech. Council v. Sierra*

*Club*, 98 F.3d 774, 788 n.21 (4th Cir. 1996). Further, "[s]tate law governs the severability of a state statute." *Id.*

Here, a presumption in favor of severability applies because the Act contains a severability clause. *See* W. Va. Code § 5-27-1 ("[I]f any provision of this chapter or the application thereof to any person or circumstance is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other provisions or applications of the chapter, and to this end the provisions of this chapter are declared to be severable."). This indicates that the West Virginia Legislature did not believe that PEIA's ability to cap air ambulance payments to the amount in a fee schedule is indispensable to the operation of the Act.

Under West Virginia law, once the invalid parts of the statute are stricken, if "the remaining portion reflects the legislative will, is complete in itself, is capable of being executed independently of the rejected portion, and in all other respects is valid, such remaining portion will be upheld and sustained." Syl. pt. 6, *Heston*, 137 W. Va. 375, 71 S.E.2d 481; *see also Louk v. Cormier*, 218 W. Va. 81, 97, 622 S.E.2d 788, 804 (2005) (severability is possible unless "the valid and the invalid provisions of a statute are so connected and interdependent . . . as to preclude the belief, presumption or conclusion that the Legislature would have passed the one without the other").

Therefore, based on this basic operation of well-settled federal and West Virginia law, a severability analysis is required to determine PEIA's obligations in light of *Cheatham*'s invalidation of reimbursement caps. The Circuit Court erred in failing to do so.

### B. Under a Proper Severability Analysis, After the Preempted Parts of the Act are Stricken, the Residual Text Mandates that Air Evac is Entitled to Payment from PEIA for All Past Transport Costs.

Pursuant to the guidance above, this Court must engage in a proper severability analysis. *Cheatham* invalidated an application of the Act that allowed PEIA to limit (or cap) air ambulance

reimbursement at *any* amount. The remaining language of the Act dictates that reimbursement to air ambulance servicers is required.

**1. The remaining language of the Act demonstrates that PEIA must reimburse air ambulance providers for medical services to PEIA members.**

First, sections 5-16-8a(a) and 8a(b) can be completely severed without undermining the purpose of the Act, because those provisions were not even part of the Act until 2016, when PEIA undertook to unilaterally cap air ambulance rates. If these preempted provisions are severed, the *status quo ante* would be restored, and the Act would function as it did for many years.

As for Section 5-16-5(c)(1), to be consistent with both federal preemption and the West Virginia Legislature's intent, the language that caps air-ambulance fees should be stricken. Therefore, rather than providing,

> "All [annual and long-range] financial plans required by this section shall establish . . . [m]aximum levels of reimbursement which the [PEIA] makes to categories of health care providers,"

after severance – as applied to air-ambulance providers – it would provide

> "All [annual and long-range] financial plans required by this section shall establish . . . [~~m]aximum levels of~~ reimbursement which the [PEIA] makes to categories of health care providers."

Accordingly, "establish[ing]" full reimbursement is the only fair reading of what is left of the Act.

This was the precise result in a 2018 decision from Wyoming. There, the federal courts struck down a provision of Wyoming's Workers' Compensation Act that capped air ambulance payments as preempted by the ADA. *EagleMed LLC v. Cox*, 868 F.3d 893, 898, 907 (10th Cir. 2017) (holding that the ADA preempts a provision of the Wyoming Workers' Compensation Act that limited air ambulance providers to "a reasonable charge . . . at a rate not in excess of the rate schedule established by the director"). Thereafter, state officials still refused to pay the balance due to the air-ambulance providers. *See* Order on Mot. for Restitution, Mot. for Contempt, and

Mot. to Strike at 4-5, *EagleMed v. Wyoming Dep't of Workforce Servs., Workers' Comp. Div.*, No. 2:15-cv-00026-ABJ (D. Wyo. Apr. 12, 2018) (ECF No. 112). The air-ambulance providers sued the State of Wyoming to obtain recovery.

The Wyoming Supreme Court applied state severability law and held that once the invalid language was severed from the Wyoming workers' compensation statute, the remaining statutory language required "payment in full" of the air-ambulance providers' charges by the Division of Workers' Compensation. *Air Methods/Rocky Mountain Holdings v. Dep't of Workforce Servs., Workers' Comp. Div.*, 432 P.3d 476, 485 (Wyo. 2018). Specifically, the Court struck the rate-capping language, so that the statute read as follows:

> "If transportation by ambulance is necessary, the division shall allow a ~~reasonable~~ charge for the air ambulance service~~ at a rate not in excess of the rate schedule established by the director~~ . . . ."

*See id.* at 485–86; Wyo. Stat. Ann. § 27-14-401(e). Under the Wyoming statute as severed, "air ambulance charges incurred by an injured worker are covered expenses," and the State "has authority to pay those charges." *Id.* at 487. The Wyoming court also found that this result furthered the purpose of the Wyoming Workers' Compensation Act to ensure that injured workers who require air ambulance transportation "will have that cost covered," and this purpose "takes precedence over cost control." *Id.* at 486.

This case dictates the same result. PEIA was required to establish reimbursement to health care providers, including air ambulance providers; the reimbursement it "established" violated federal law because a state cannot cap reimbursements to air ambulance providers; therefore, the only permissible reimbursement the plan could have legally established at that time was full reimbursement. This interpretation of the Act "reflects the legislative will," is "complete in itself,"

is "capable of being executed independently of the rejected portion," and "in all other respects is valid." Syl. pt. 6, *Heston*, 137 W. Va. 375, 71 S.E.2d 481.

**2. The remaining language of the Act reflects the legislative will of offering coverage for emergency services and protecting the health and welfare of state citizens.**

Simply put, the Legislature intended for medical services like air ambulance transports to PEIA members to be paid for. The Legislature's intent in establishing the Act was to create a health insurance program that pays for medical care provided to West Virginia public employees and their dependents. Indeed, the Legislature has expressly declared that "the health and well-being of all state citizens, and particularly those whose health care is provided or paid for by the [PEIA] . . . are of primary concern to the state." W. Va. Code § 16-29D-1(a)(6) (emphasis added).

The Act creates an insurance program funded by both employers and public employees—a program that serves a "public purpose." W. Va. Code § 5-16-1. The Act provides for the creation of health insurance plans for eligible employees, and requires those plans to offer "coverage for emergency services." *Id.* §§ 5-16-7, 5-16-8(12)(a)-(b). And the Act vests PEIA's director with the authority to make payments to medical providers on behalf of insureds. *Id.* §§ 5-16-3(c), 5-16-11.

The Act's purpose of providing PEIA insureds with health care coverage, in particular in case of a medical emergency, is readily furthered by severing the preempted provisions, so that the remaining provisions allow for payment by PEIA of Air Evac's bills for transporting PEIA insureds. Ordering full payment protects the "health and well-being" of public employees by ensuring that their emergency air ambulance transportation will be covered by their insurer. And it protects the "health and well-being" of "all state citizens" – including PEIA's members – by guaranteeing that Air Evac will be able to afford to keep offering its life-saving services in West Virginia.

Under this as-severed provision, as well as other provisions of the Act that the federal injunction left intact, PEIA would retain both the power and the duty to reimburse air ambulance providers in full on transports provided to its insureds during the *Cheatham* litigation. *See* W. Va. Code § 5-16-11 ("[a]ny benefits payable" under a PEIA plan "may be paid either directly to the . . . corporation furnishing the service upon which the claim is based, or to the insured upon presentation of valid bills for such service").

Moreover, interpreting the Act to require full payment by PEIA of Air Evac's billed charges does not interfere with PEIA's duty to operate and administer a fiscally stable insurance program. During the federal proceedings, Ted Cheatham, former Director of PEIA, testified that air ambulance reimbursements constitute less than 0.003% of PEIA's overall budget for medical expenditures. App. 138, 399. The best – and only – way to bring the Act into compliance with federal law and further the Legislature's intent is therefore for this Court to reverse the Circuit Court's decision and order PEIA to pay Air Evac's claims in full.

**3. The remaining language of the Act is complete in itself and capable of being executed independently.**

The language requiring reimbursement for past transports is complete and capable of being executed separate and apart from the severed language. As noted above, sections 5-16-8a(a) and 8a(b) can be completely severed without affecting the remaining provisions of the Act. Those sections were not part of the Act until 2016, and if these preempted provisions are severed, the Act would function as it did for many years.

Section 5-16-5(c)(1)'s provisions are only invalidated with regard to air ambulance carriers due to the language of the ADA. For other types of health care providers, PEIA may set maximum levels of reimbursement. For air ambulance providers, PEIA may not cap the reimbursement

levels. The operation of the statute is not hindered by the severance of the preempted language, and it can be executed either way depending on the health care provider involved.

**4. The remaining language of the Act is in all other respects valid.**

The residual language of the Act – dictating that Air Evac should receive full reimbursement for past transports – is also valid. The Circuit Court and PEIA rely on misguided arguments in concluding it is not.

First, the Circuit Court relies on a quote from the Fourth Circuit's decision in *Cheatham* – "The ADA does not require a state to pay whatever an air carrier may demand." App. 801 (quoting *Cheatham*, 910 F.3d at 769). But the court takes this quote completely out of context. The portion of the Fourth Circuit's opinion from which this quote was so eagerly plucked was actually discussing prospects for PEIA "moving forward." *Cheatham*, 910 F.3d and 769. The court had just finished explaining that the fee schedules *at issue here* had the force and effect of law because PEIA imposed them, not as a market participant, but pursuant to their unique coercive, regulatory powers. *See id*. Then, the court – in dicta – turned to potential avenues for future negotiation:

> This is not to say that West Virginia cannot, moving forward, bargain for lower payments to air ambulance companies. It would be permissible for the state to use its considerable purchasing power as the insurer of state employees to negotiate better rates up front or limit reimbursements for air ambulance services after the fact. As the program for state employees, the PEIA is a large part of the healthcare market in West Virginia and nothing in the preemption provision prevents that market power from playing a role at the negotiating table. ***The ADA does not require a state to pay whatever an air carrier may demand***. *See EagleMed LLC*, 868 F.3d at 906 n.3 ("[W]e reiterate that the Airline Deregulation Act does not impose a duty on the State to pay air-ambulance claims."). In obtaining favorable terms, however, it must be the state's market power, and not its unique coercive authority, that is driving the negotiation.

*Id.* (emphasis added) (footnote omitted). Clearly, the court was not commenting on the reimbursement of the past transports at hand, but on the potential for future discussions on air ambulance costs. This quote cannot bear the weight the Circuit Court gives it.

Additionally, in the Circuit Court proceedings, PEIA relied heavily on a non-preempted provision stating that the PEIA Director has 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. 535 (quoting W. Va. Code § 5-16-3(c)). The Circuit Court roundly rejected this attempt at creating an end-run around the federal injunction, and this Court should as well. PEIA uses the authority set forth in this provision to argue that PEIA can continue to not only limit air ambulance reimbursement, but continue to cap it at the Medicare Rural Rate, which was explicitly foreclosed by *Cheatham.*

### C. The Circuit Court's Remedy on the Reimbursement of Past Transports of is Futile and Contravenes *Cheatham*.

After rejecting PEIA's argument that it can choose to set a cap on reimbursement due to other non-preempted provisions, and stopping just short of completing its analysis of Air Evac's claim for past transports by failing to engage in a severability analysis, the Circuit Court decided that remand for "further administrative proceedings consistent with the APA and PEIA's Contested Case Hearing Rules" is appropriate. App. 845–46. It also directed Air Evac to "initiate administrative proceedings," which "shall include good faith negotiations regarding Air Evac's past due charges and disputed payments." App. 846.

The Circuit Court's remedy has no basis in law. The APA does not provide negotiation as a viable remedy. A circuit court may "affirm," "remand," "reverse," "vacate," or "modify," but the APA does not provide that a circuit court may direct the parties to engage in negotiation. W.

Va. Code § 29A-5-4(g). There is no further factual development to be done, only a pure legal issue based on application of the well-settled severability doctrine.

The Circuit Court's remedy is also futile. Air Evac has already tried initiating agency proceedings. It properly exhausted its administrative remedies by raising the issue of full reimbursement with the PEIA via its Contested Case Rules, and the PEIA summarily rejected this request. Over and over PEIA has made its intention known: It will not reimburse Air Evac for any past transport amounts above the Medicare Rural Rate. Instead, PEIA is attempting to shift the burden of repayment to its own insureds, causing the Circuit Court to seriously question whether the Director is exceeding his authority and rightfully fulfilling his duty to the people of West Virginia. *See* App. 844 & n.4.

Additionally, the Fourth Circuit explained that negotiation between a state insurance providers and air carrier is effective if "the state's market power, and not its unique coercive authority, . . . driv[es] the negotiation." *Cheatham*, 910 F.3d at 769. But the State has shown no desire to use *anything but* its coercive authority to cap reimbursement payments to Air Evac and other air ambulance carriers.

Finally, awarding full reimbursement will force PEIA to comply with the *Cheatham* injunction once and for all. To this day, PEIA has for all intents and purposes ignored the injunction. The federal injunction forbids PEIA from limiting air ambulance reimbursement, which necessarily includes applying the preempted laws and fee schedule in ongoing disputes involving outstanding claims, such as the transports at issue here. But PEIA insists that they still can limit Air Evac's reimbursement on these transports to the fee-schedule amount – even while, pursuant to the federal order, the prohibition on recovering the balance from PEIA's insureds still applies. The takeaway is that PEIA has effectively never stopped enforcing the preempted rate-

capping provisions and fee schedules, and this has left Air Evac with a deficit of over $4 million in fees for four years and counting. Enough is enough.

## CONCLUSION

For the foregoing reasons, this Court should reverse the Circuit Court's decision that Air Evac is not entitled to full payment for air ambulance transports from June 9, 2016, to June 4, 2019, and remand with instructions to order PEIA to fully reimburse Air Evac for these charges.

Respectfully submitted,

*/s/ Carte P. Goodwin*

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**No. 23–ICA-135**

**IN THE INTERMEDIATE COURT OF APPEALS**
**OF WEST VIRGINIA**

**AIR EVAC EMS, INC.**
*Petitioner-Appellant,*

**v.**

**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,**
*Respondents-Appellees,*

## CERTIFICATE OF SERVICE

I, Carte P. Goodwin, hereby certify that on this 16th day of June, 2023, that I electronically fled the foregoing ***Brief of Petitioner-Appellant Air Evac EMS, Inc.*** using the File & ServeXpress system which sent a Notice of Electronic Filing to, and constitutes service on, counsel of record.

*/s/ Carte P. Goodwin*
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