No. 23-ICA-265

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

St. Joseph's Hospital of Buckhannon, Inc.
d/b/a St. Joseph's Hospital,
Respondent Below, Petitioner

vs.) No. 23-ICA-265

Stonewall Jackson Memorial Hospital Company,
Petitioner Below, Respondent

and

West Virginia Health Care Authority,
Respondent Below, Respondent

BRIEF OF PETITIONER ST. JOSEPH'S HOSPITAL OF BUCKHANNON, INC.

From The West Virginia Health Care Authority
CON File #23-7-12659-X

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III. ASSIGNMENTS OF ERROR

St. Joseph's Hospital of Buckhannon, Inc. d/b/a St. Joseph's Hospital ("St. Joseph's") appeals from a decision of the West Virginia Health Care Authority (the "Authority") issued on June 15, 2023 (the "Decision"), in the matter of *In re: Stonewall Jackson Memorial Hospital Co.*, CON File #23-7-12659-X, which determined that Stonewall Jackson Memorial Hospital Company ("Stonewall") could relocate its entire hospital without a Certificate of Need ("CON"). St. Joseph's also appeals and objects to the "Amended Decision" issued by the Authority on July 12, 2023. St. Joseph's raises the following assignments of error:

1) The Authority erred in its determination that Stonewall's project did not require a CON under W. Va. Code § 16-2D-8(a)(5) because the project contemplates the relocation of beds and thereby a substantial change in bed capacity.
2) The Authority erred in its determination that Stonewall's project did not require a CON under W. Va. Code § 16-2D-8(a)(1) because the project contemplates the construction of a health care facility.
3) The Authority's Amended Decision, which was issued while St. Joseph's appeal was pending, is void and ultra vires.
4) The Authority erred in its determination that Stonewall's project did not require a CON under W. Va. Code § 16-2D-8(a)(5) because the project encompasses a reduction in Stonewall's hospital beds.

IV. STATEMENT OF THE CASE

Over the past few years, Stonewall has sought to obtain the Authority's approval to relocate its hospital campus to Staunton Drive near the I-79 Route 33 interchange, 4.2 miles from its current location. While Stonewall is fully aware that the location that it has chosen for the construction of

its new hospital will adversely impact the viability of St. Joseph's, Stonewall has made it abundantly clear that it does not care about such externalities and has obstinately refused to consider alternative locations for its project.

Originally founded in 1921, St. Joseph's is a 25-bed critical access hospital ("CAH") and the sole hospital located within and servicing the community of Buckhannon, Upshur County. (*See* D.R. 0253-0255). St. Joseph's became a CAH on April 2, 2014. (D.R. 0253-0254). CAH status is a designation made by the Centers for Medicare & Medicaid Services ("CMS"), a federal agency within the United States Department of Health and Human Services, which enables qualified rural hospitals to be reimbursed on a cost-basis for providing services to Medicare patients, as opposed to being reimbursed under prospective payment systems. The CAH program was implemented to address a rash of closings of rural hospitals across the country. (D.R. 0256). Generally, to qualify for CAH status a hospital must, *inter alia*, be located more than 15 (mountainous terrain) miles from another hospital. *See* 42 C.F.R. § 485.610(c). Importantly, Stonewall's move of its hospital campus to Staunton Drive will destroy St. Joseph's ability to retain its CAH status because the proposed site is located approximately 12 miles away from St. Joseph's, which is closer than the 15-mile threshold necessary for St. Joseph's to qualify as a CAH. *Id.* (D.R. 0258).

In the summer of 2022, the Authority denied Stonewall's application for a CON to build a replacement acute care health facility and move its hospital campus to Staunton Drive. *See In re: Stonewall Jackson Mem'l Hosp. Co.,* CON File 21-7-12157-H (Decision dated June 13, 2022) (D.R. 0046-0090). In doing so, the Authority found that the project was not a superior alternative as required by the CON law and would "cause [St. Joseph's] to lose its CAH status which would have a significant detrimental financial effect on [St. Joseph's.]" (D.R. 0083). That decision was recently affirmed by this Court. *Stonewall Jackson Mem'l Hosp. Co. v. St. Joseph's Hosp. of*

Buckhannon, Inc., No. 22-ICA-147, 2023 WL 4197305 (W. Va. App. June 27, 2023) (memorandum decision). Because "Stonewall failed to provide any independent evidence that it explored various alternatives . . . . or otherwise that alternative locations do not exist that would not affect St. Joseph's CAH status", this Court held that "the Authority did not err in finding that Stonewall did not meet its burden of proving that superior alternatives to the services in terms of cost, efficiency, and appropriateness do not exist and that the development of alternatives is not practicable under W. Va. Code § 16-2D-12(b)(1) (2016)." *Id.* at *4.

Having failed to establish that its project is the superior alternative, Stonewall attempted to make an end run around these prior decisions by filing a request for a determination of reviewability ("RDOR") under W. Va. Code § 16-2D-7. (D.R. 0004-0005). Section 16-2D-7 provides that "[a] person may make a written request to the authority for it to determine whether a proposed health service is subject to the certificate of need or exemption process." Relying on the Legislature's recent increase of the CON law's Expenditure Minimum, Stonewall argued that the proposed construction of its new hospital no longer requires a CON because the Capital Expenditure associated with the project ($56,000,000) is less than the Expenditure Minimum (raised to $100,000,000).[2] (D.R. 0004-0005).

St. Joseph's intervened to oppose Stonewall's RDOR on April 5, 2023, because the proposed construction of Stonewall's new hospital is clearly subject to CON review. Before the Authority, St. Joseph's argued that Stonewall's application is subject to CON review because, *inter alia*, (a) the project contemplates a substantial change in bed capacity, *see* W. Va. Code § 16-2D-

[2] *Compare* 2023 West Virginia Laws Ch. 255 (S.B. 613) ("'Expenditure minimum' means the cost . . . above $100 million") *with* 2017 West Virginia Laws Ch. 185 (H.B. 2459) ("'Expenditure minimum' means the cost . . . above $5 million").

8(a)(5) (D.R. 0443-0445; D.R. 0450-0454); and (b) the project involves the construction and/or development of a health care facility, *see* W. Va. Code § 16-2D-8(a)(1) (D.R. 0455-0447).

Ultimately, the Authority held that Stonewall's project was not subject to review, concluding that "the West Virginia legislature raised the minimum capital expenditure for CON review . . . and [thereby] made it possible for Stonewall to relocate [its] entire hospital to a new location[.]" (D.R. 0476; D.R. 0607). The Authority determined that "the complete relocation of the hospital to a new location in its service area is NOT subject to Certificate of Need review because [Stonewall's] project is a replacement and relocation of the same services, in the same service area, and does not exceed the minimum capital expenditure." (D.R. 0476; D.R. 0607). As explained further below, that holding contradicts the plain language of the CON law because it ignores the various provisions brought to the Authority's attention by St. Joseph's requiring a CON irrespective of whether the Expenditure Minimum has been exceeded.

St. Joseph's filed its Notice of Appeal to this Court on June 21, 2023. On June 28, 2023, the Court entered a scheduling order providing a deadline of July 18, 2023, for the submission of the administrative record and October 16, 2023, for perfecting the appeal. Also on June 28, 2023, Stonewall filed a Motion to Dismiss the Appeal. St. Joseph's filed its Response in Opposition to Stonewall's Motion to Dismiss and a Motion to File a First Amended Notice of Appeal on July 10, 2023. Stonewall subsequently sought leave to submit a Reply in support of its Motion to Dismiss on July 18, 2023, and St. Joseph requested leave to file a Sur-Reply on July 21, 2023. On July 12, 2023, the Authority, acting *sua sponte*, issued its Amended Decision (D.R. 0600-0610), and on July 25, 2023, St. Joseph filed a Motion to Strike the Authority's Amended Decision or, in the alternative, to file a Second Amended Notice of Appeal incorporating St. Joseph's objections to the Amended Decision.

Meanwhile, on June 22, 2023, St. Joseph's filed a motion for stay before the Authority (D.R. 0480-0499), which the Authority denied on July 26, 2023. Accordingly, on August 4, 2023, St. Joseph's filed a Motion for Stay before this Court, seeking to stay the effectiveness of the Authority's Decision and/or Amended Decision until its appeal is decided.

On September 6, 2023, the Court entered an omnibus Order in which it denied Stonewall's Motion to Dismiss, granted St. Joseph's Motion for Stay, and denied St. Joseph's Motion to Strike the Authority's Amended Decision.[3] St. Joseph's now files this Brief of Petitioner St. Joseph's Hospital of Buckhannon, Inc. in accordance with the Scheduling Order.

V. SUMMARY OF THE ARGUMENT

Unless you live in Wonderland,[4] relocating "beds from one physical facility or site to another" means relocating "beds from one physical facility or site to another." *See* W. Va. Code § 16-2D-2(45). And "the construction...of a health care facility" means "the construction...of a health care facility." Both of these activities require an applicant to obtain a CON and Stonewall's proposal clearly contemplates both activities, neither of which are contingent on exceeding the Expenditure Minimum.

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[3] While the Court did not strike the Authority's Amended Decision, it granted St. Joseph's leave to file its Second Amended Notice of Appeal incorporating its objections to the Amended Decision. St. Joseph's objections to the issuance of the Amended Decision after its appeal had been filed are discussed in Section c, *infra*. The arguments in Sections a and b apply with equal weight to both the Authority's Decision and Amended Decision. While Section d also applies to both the Decision and Amended Decision, its application varies between the Decision and Amended Decision because of changes made to the Authority's findings of fact.

[4] *See Butler v. Comm'r of Soc. Sec.*, No. 5:19-CV-00182, 2019 WL 5653254, at *1 (N.D. Ohio Oct. 31, 2019) ("I am initially aware that the present matter could be quickly adjudicated by Humpty Dumpty, who was quoted in *Alice in Wonderland* as saying, 'in rather a scornful tone,' that 'When I use a word, it means just what I chose it to mean – neither more nor less.'") (quoting Carroll, Lewis, 1832-1898. *Alice's Adventures in Wonderland and Through the Looking-Glass*. Chapter 6, pg. 63. Peterborough, Ontario, Broadview Press, 2000).

The Authority's Decision and Amended Decision, which myopically focus on the Expenditure Minimum and ignore these other triggers requiring a CON, cannot stand. The CON law is unmistakably clear: the relocation of beds to another physical site involving a Capital Expenditure—however small—is subject to CON review. W. Va. Code § 16-2D-8(a)(5); *see also* W. Va. Code § 16-2D-2(45). So is the "construction . . . of a health care facility." W. Va. Code § 16-2D-8(a)(1). Since the Authority found that Stonewall's project encompasses both of these actions (each of which is sufficient to trigger CON review), its ultimate determination of non-reviewability is erroneous and contrary to the plain language of the CON law. Stonewall's project also requires a CON under W. Va. Code § 16-2D-8(a)(5) because it requires a reduction in the number of Stonewall's beds. Each of these arguments was presented to the Authority and are therefore properly before this Court. (D.R. 0443-0445; D.R. 0450-0454 (corresponding to assignments of error 1 & 4)); (D.R. 0455-0447 (corresponding to assignment of error 2)).

Additionally, the Authority's Amended Decision, which was issued while St. Joseph's appeal was pending, is void and ultra vires. The Authority does not have the power to reconsider its Decisions on a Determination of Reviewability, and even if it did, it does not have jurisdiction to do so once that decision has been appealed.

Consequently, the Court should reverse and vacate the Authority's Decision and Amended Decision and remand to the Authority with directions to enter an order requiring Stonewall to obtain a CON.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is not suitable for a memorandum decision and oral argument is appropriate pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure because the case involves an issue of fundamental public importance; the Authority's singular focus on the Expenditure

Minimum and disregard of other triggers requiring a CON has dramatically and unwarrantedly restricted the scope of the CON law.

VII. STANDARD OF REVIEW

At least three applicable West Virginia statutes (W. Va. Code §§ 29A-4-1, 16-2D-16a(a)(2), & 16-29B-13) establish that the Authority's Decision and Amended Decision are subject to judicial review under the standard of review for contested cases set forth in W.Va. Code § 29A-5-4, which provides as follows:

> (g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It 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).

Under W. Va. Code § 29A-5-4, the Court "reviews questions of law presented *de novo*" and "findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. Pt. 1, in part, *W. Virginia State Police v. Walker*, 246 W. Va. 77, 866 S.E.2d 142, 144 (2021) (quoting Syl. Pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996)).

"Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review." Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dep't of W.*

Virginia, 195 W. Va. 573, 578, 466 S.E.2d 424, 429 (1995). As the Supreme Court of Appeals recently noted, "[t]he judiciary is the final authority on issues of statutory construction, and [is] obliged to reject administrative constructions that are contrary to the clear language of a statute." Syl. Pt. 3, *War Mem'l Hosp., Inc. v. W. Virginia Health Care Auth.*, 248 W. Va. 49, --, 887 S.E.2d 34, 35 (2023) (Syl. Pt. 5, *CNG Transmission Corp. v. Craig*, 211 W.Va. 170, 564 S.E.2d 167 (2002)).

The analytical framework provided by *Chevron* and its progeny governs the judicial review of an agency's construction of a statute that it administers. *Appalachian Power Co*, 195 W. Va. 573, 582, 466 S.E.2d 424, 433 (1995) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). This analysis involves two separate but interrelated questions:

> We first ask whether the Legislature has 'directly spoken to the precise [legal] question at issue.' *Chevron,* 467 U.S. at 842, 104 S.Ct. at 2781, 81 L.Ed.2d at 702–03. 'If the intention of the Legislature is clear, that is the end of the matter.' *Id.* If it is not, we may not simply impose our own construction of the statute. 'Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the [agency's] answer is based on a permissible construction of the statute.'

Id., *Id*. (quoting *Sniffin v. Cline*, 193 W. Va. 370, 374, 456 S.E.2d 451, 455 (1995)).

VIII. ARGUMENT

This is a straightforward case that can be resolved by this Court applying the first prong of the *Chevron* analysis. "If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Id*. at 587, *Id*. at 438. There is no deference due to the Authority's interpretation at this point. *See War Mem'l Hosp., Inc.*, 248 W. Va. at --, 887 S.E.2d at 41.

Here, the CON law is clearly at odds with the Authority's Decision and/or Amended Decision and, thus, the Decision and/or Amended Decision must be overturned under the first prong of the *Chevron* analysis. In analyzing the first prong of *Chevron*, two facts as found by both the Authority's Decision and Amended Decision are dispositive: (1) Stonewall proposes to replace and relocate its existing hospital—including its beds—4.2 miles from its original hospital; and (2) there is a Capital Expenditure associated with this relocation.[5] Additionally, the Authority's original Decision also found that Stonewall's project encompasses a decrease in Stonewall's bed capacity, providing an alternative basis requiring Stonewall to obtain a CON. Applying the statutory scheme described below to these findings leads to only one logical conclusion—Stonewall's project requires a CON.

The Court should reverse and vacate the Authority's Decision and Amended Decision because, as explained further in the subsections that follow, the Authority misconstrued and misapplied the CON statute, which unambiguously requires Stonewall to obtain a CON prior to relocating its hospital.

A. STONEWALL'S PROJECT REQUIRES A CON PURSUANT TO W. VA. CODE § 16-2D-8(A)(5) BECAUSE THE PROJECT ENCOMPASSES A SUBSTANTIAL CHANGE TO STONEWALL'S BED CAPACITY VIA THE RELOCATION OF STONEWALL'S HOSPITAL BEDS.

i. The Authority's interpretation conflicts with the plain language of W. Va. Code §§ 16-2D-8(a)(5) and 16-2D-2(45).

A CON is required for any project contemplating "[a] substantial change to the bed capacity of a health care facility with which a capital expenditure is associated[.]" W. Va. Code § 16-2D-8(a)(5). In turn, the CON law defines a "substantial change to the bed capacity" as a change that "increases or decreases the bed capacity ***or*** **relocates beds from one physical facility or site**

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[5] (D.R. 0506 (Decision, Finding of Fact Nos. 5-6)); (D.R. 0606 (Amended Decision, Finding of Fact Nos. 5-6). In its RDOR, Stonewall itself acknowledges that "[t]he capital expenditure involved in the construction of the replacement facility will be approximately $56,000,000[.]" (D.R. 0004).

to another[.]" *See* W. Va. Code § 16-2D-2(45) (emphasis added). "Where the legislature . . . declare[s] what a particular term 'means,' such definition is ordinarily binding upon the courts and excludes any meaning that is not stated." *In re Greg H.*, 208 W. Va. 756, 760, 542 S.E.2d 919, 923 (2000) (per curiam); *see also Tanzin v. Tanvir*, 208 L. Ed. 2d 295, 141 S. Ct. 486, 490 (2020) ("'When a statute includes an explicit definition, we must follow that definition,' even if it varies from a term's ordinary meaning."). Stonewall's project indisputably encompasses the relocation of beds from one physical facility or site to another.

Any Capital Expenditure, however small, is sufficient to trigger CON review when, as here, it is associated with a substantial change to bed capacity. Capital Expenditure and Expenditure Minimum are separately defined terms in the CON law that mean different things. *Compare* W. Va. Code § 16-2D-2(10) *with* W. Va. Code § 16-2D-2(15). An expenditure becomes a Capital Expenditure if it is "not properly chargeable as an expense of operation and maintenance," and if it meets any one of the following three categories: (1) the expenditure is over the Expenditure Minimum; (2) **the expenditure is associated with a substantial change in bed capacity**; ***or*** (3) the expenditure results in a substantial change to the services of the health care facility. W. Va. Code § 16-2D-2(10) (emphasis added).

Essential here is W. Va. Code § 16-2D-2(10)'s use of the word "or." "[R]ecognizing the obvious, the normal use of the disjunctive 'or' in a statute connotes an alternative or option to select." *Brickstreet Mut. Ins. Co. v. Zurich Am. Ins. Co*., 240 W. Va. 414, 423, 813 S.E.2d 67, 76 (2018) (quoting *Carper v. Kanawha Banking & Tr. Co*., 157 W. Va. 477, 517, 207 S.E.2d 897, 921 (1974)); *see also Pajak v. Under Armour, Inc.*, 246 W. Va. 387, 395, 873 S.E.2d 918, 926 (2022) (holding that the "use of 'or' in West Virginia Code § 5-11-9(7) to refer to 'any person' *or* 'employer' indicates they are separate choices, and, therefore, an 'employer' is not the same as

'any person.'"). Hence, any expenditure not properly chargeable as an expense of operation and maintenance, regardless of the amount, becomes a Capital Expenditure when it is associated with a substantial change in bed capacity. *See* W. Va. Code § 16-2D-2(10). While the Authority's Decision and Amended Decision make multiple references to a "minimum capital expenditure" (*See* D.R.0469-0476; D.R. 0601-0606), there is no statutorily defined "minimum capital expenditure" in the CON law, and the Authority's use of that term cannot be reconciled with the statutory definition of Capital Expenditure. *See* W. Va. Code § 16-2D-2(10).

In its RDOR, Stonewall itself acknowledges that "[t]he capital expenditure involved in the construction of the replacement facility will be approximately $56,000,000[.]" (D.R. 0004). And, as the Authority found in both its Decision and Amended Decision, this $56,000,000 Capital Expenditure is associated with the complete relocation of Stonewall's hospital facility (and thus, its hospital beds) to a new physical facility constructed 4.2 miles away. (D.R. 0506 (Decision, Finding of Fact Nos. 5-6)); (D.R. 0606 (Amended Decision, Finding of Fact Nos. 5-6)). Stonewall's project therefore clearly contemplates a "substantial change to the bed capacity" of a health care facility because it requires the relocation of beds from one physical facility or site, Stonewall's existing hospital, to another site at which Stonewall has no existing facilities. *See* W. Va. Code § 16-2D-2(45). Ultimately, because the capital expenditure involved in the construction of the replacement facility will be approximately $56,000,000 and because the project contemplates a substantial change in bed capacity due to the relocation of Stonewall's hospital beds, the project requires a CON pursuant to W. Va. Code § 16-2D-8(a)(5), which requires a CON for "[a] substantial change to the bed capacity of a health care facility with which a capital expenditure is associated."

Because the plain language of the statute is clear, "the language must prevail and further inquiry is foreclosed." *Appalachian Power*, 195 W.Va. at 587, 466 S.E.2d at 438; *Monongahela Power Co. v. Buzminsky*, 243 W. Va. 686, 691, 850 S.E.2d 685, 690 (2020) ("Only when a statute is ambiguous may the Court inquire as to a statute's purpose and otherwise employ the canons of statutory construction.").

ii. The Authority's interpretation conflicts with several rules of statutory construction.

Even if the plain language was not dispositive (which it is), the Authority's interpretation of W.Va. Code § 16-2D-8(a)(5) and 16-2D-2(10) is also inconsistent with several rules of statutory construction. The Supreme Court of Appeals of West Virginia has noted that "[r]espectable authority indicates it is appropriate to employ all the 'traditional tools of statutory construction' in the first part of the *Chevron* analysis when the statutory language is not dispositive." *Appalachian Power*, 195 W.Va. at 586, 466 S.E.2d at 437.

In this regard, "the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning[.]" *Osborne v. United States*, 211 W.Va. 667, 673, 567 S.E.2d 677, 683 (2002) (quoting *Keatley v. Mercer Cnty. Bd. Of Educ.,* 200 W.Va. 487, 493, 490 S.E.2d 306, 312 (1997)). If exceeding the Expenditure Minimum was a prerequisite of applying the "substantial change in bed capacity" provision (W.Va. Code § 16-2D-8(a)(5)), there would be no reason for this section because such an expenditure would already need a CON under the provision requiring a CON for an expenditure in excess of the Expenditure Minimum (W.Va. Code § 16-2D-8(a)(3)(A)). The Authority has essentially limited its analysis to W.Va. Code § 16-2D-8(a)(3)(A), concluding that Stonewall's project does not require a CON because the Capital Expenditure does not exceed the Expenditure Minimum, and ignoring all of the other provisions

of W.Va. Code § 16-2D-8 which require a CON irrespective of whether the Expenditure Minimum has been exceeded.

Since the "bed relocation" section is rendered meaningless under this construction, it violates a "cardinal rule of statutory construction [which] is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999). Similarly, the HCA's interpretation violates the rule of statutory interpretation that no provision should be considered entirely redundant. *Kungys v. United States*, 485 U.S. 759, 778, 108 S.Ct. 1537, 1550, 99 L.Ed.2d 839 (1988) (Scalia J., plurality opinion) ("[T]he cardinal rule of statutory interpretation that no provision should be considered to be entirely redundant"); *see also In re Petition of McKinney*, 218 W.Va. 557, 561, 625 S.E.2d 319, 323 (2005) ("In other words, to read W.Va. Code § 17B-3-6(a)(1) as urged by McKinney would be to find that the Legislature enacted a completely redundant statutory provision. This we decline to do.").

Moreover, neither courts nor administrative agencies are permitted to eliminate through interpretation words that were purposely included within the statute. Syl Pt. 3, *Pajak*, 246 W.Va. at 387, 873 S.E.2d at 919. In *Birchfield-MODAD v. West Virginia Consol. Pub. Ret. Bd.*, No. 20-0747, 2022 WL 16646485 (W.Va. 2022) (memorandum decision), the Supreme Court of Appeals held that "[h]ere under the guise of interpretation, the circuit court effectively rewrote the definition of 'administrative staff of the public school' to exclude persons from that definition who the Legislature explicitly included: secretaries. That was outside of the realm of interpretation and constituted clear legal error." *Id.* at *5; *Thompson v. Western Construction, Inc.*, 248 W.Va. 578, 889 S.E.2d 300, 304 (Ct. App. 2023) ("In *Birchfield-MODAD* . . . the court warned about rewriting statutes to limit the class of persons entitled to benefits when the legislature had not

incorporated such limitations in the statute."). Here, the Authority, through the guise of interpretation, has rewritten the statute to remove the "substantial change in bed capacity" provision (W.Va. Code § 16-2D-8(a)(5)). This reading is outside the realm of statutory interpretation and cannot stand.

iii. The Authority's interpretation frustrates the overarching purpose of the CON law.

"'It is a cardinal rule governing the interpretation of statutes that the purpose for which a statute has been enacted may be resorted to by the courts in ascertaining the legislative intent.'" *State ex rel. W. Virginia Div. of Corr. & Rehab. v. Ferguson*, 248 W. Va. 471, 889 S.E.2d 44, 53 (2023) (quoting *State ex rel. Bibb v. Chambers*, 138 W. Va. 701, 717, 77 S.E.2d 297, 306 (1953)). As our Supreme Court of Appeals has explained, statutory provisions should be construed so as to harmonize their subject matter with the general purposes of the statute:

> A statute is enacted as a whole with a general purpose and intent, and each part should be considered in connection with every other part to produce a harmonious whole. Words and clauses should be given a meaning which harmonizes with the subject matter and the general purpose of the statute. The general intention is the key to the whole and the interpretation of the whole controls the interpretation of its parts.

State ex rel. Appleby v. Recht, 213 W. Va. 503, 510, 583 S.E.2d 800, 807 (2002) (quoting Syl. Pt. 1, *State ex rel. Holbert v. Robinson*, 134 W.Va. 524, 531, 59 S.E.2d 884, 889 (1950)).

West Virginia's CON law, W. Va. Code § 16-2D-1 *et seq*., provides that any proposed new health service, as defined therein, shall be subject to review by the Authority prior to the offering or development of the service. The Legislative purposes of the CON law are to "avoid the unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services" and to ensure that health services are developed in a manner that is "orderly, economical and consistent with the effective development of necessary and adequate

means of providing for the health services of the people of this state." W. Va. Code § 16-2D-1(1). The Legislature has further found that "the general welfare and protection of the lives, health and property of the people of this state require . . . criteria as provided for in [the CON law] . . . be subject to review and evaluation before any health services are offered or developed[.]" W. Va. Code § 16-2D-1(2). For example, the CON law requires applicants to, among other things, demonstrate that a proposed project is the "superior alternative . . . in terms of cost, efficiency and appropriateness . . . and the development of alternatives is not practicable" prior to receiving a CON. W. Va. Code § 16-2D-12(b)(1).

Left unchecked, the Authority's newfound, myopic focus on the Expenditure Minimum will render it a toothless façade in dereliction of its statutory charge. While it is true that the construction of a hospital would historically have exceeded the Expenditure Minimum, and therefore been subject to review under W.Va. Code § 16-2D-8(a)(3)(A), the Authority should not ignore the other triggers under the CON law requiring a CON just because the Expenditure Minimum has been significantly increased. If anything, the increase in the Expenditure Minimum makes these other triggers, such as changes in bed capacity, even more critical. The Authority's abject failure to consider these triggers contravenes the Legislative purpose of the CON law and threatens "the general welfare and protection of the lives, health and property of the people of this state." *See* W. Va. Code §§ 16-2D-1(2) and 16-2D-8(a)(5).

Indeed, both the Authority and this Court have already found that Stonewall's project is not the superior alternative as required by the CON law because Stonewall has failed to consider alternative locations for its hospital that would not compromise St. Joseph's CAH status. *Stonewall Jackson Mem'l Hosp. Co. v. St. Joseph's Hosp. of Buckhannon, Inc.*, No. 22-ICA-147, 2023 WL 4197305 (W. Va. App. June 27, 2023) (memorandum decision); (D.R. 0046-0090). Stonewall

could not obtain a CON for its project, but now, without any review of the CON criteria whatsoever, the Authority has given Stonewall permission to construct a new hospital on Staunton Drive—such a result is clearly not "orderly, economical and consistent with the effective development of necessary and adequate means of providing for the health services of the people of this state" and jeopardizes "the general welfare and protection of the lives, health and property of the people of this state." *See* W. Va. Code § 16-2D-1(1)-(2).

The Authority's determination has effectively eviscerated the CON statute, allowing Stonewall, and in principle other parties, to relocate an entire hospital without any consideration of the project's need, superior alternatives to the project, the project's impact on existing facilities, the project's consistency with the State Health Plan, or any of the other criteria applicable to CON reviews. *See* W. Va. Code § 16-2D-12. The Authority's decisions also all but render obsolete various portions of the State Health Plan, which contains standards specifically applicable to the "Renovation-Replacement of Acute Care Facilities and Services",[6] "Operating Rooms",[7] and other services encompassed by Stonewall's project. To obtain a CON, Stonewall would have to demonstrate compliance with each of these standards in addition to the criteria for CON reviews set out in W. Va. Code § 16-2D-12. But because the Authority found that Stonewall's project is not reviewable, none of these standards and/or criteria will be evaluated. This is an absurd result which defeats the CON program's goal of maintaining an orderly and structured health system in West Virginia.

iv. The Court should reject Stonewall's attempts to sow confusion.

In its prior briefing, Stonewall repeatedly attempted to dodge W.Va. Code 16-2D-8(a)(5)

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[6] Available at https://hca.wv.gov/certificateofneed/Documents/CON_Standards/RenovAcute.pdf.

[7] Available at https://hca.wv.gov/certificateofneed/Documents/CON_Standards/Operating_Rooms.pdf.

by equivocating it with W.Va. Code § 16-2D-8(a)(8)(A)-(C). (D.R. 0462; D.R. 0594). These provisions are not the same. St. Joseph's bed capacity arguments rest upon W.Va. Code 16-2D-8(a)(5), not W.Va. Code 16-2D-8(a)(8)(A)-(C).[8] Notwithstanding Stonewall's repeated suggestions to the contrary, St. Joseph's does not and has never argued that W.Va. Code § 16-2D-8(a)(8)(A)-(C) applies to Stonewall's project. "At the very best, th[is] technique is known as the fallacy of irrelevance, often referred to as irrelevant conclusion or *ignoratio elenchi*: the material fallacy of attacking something that has not been asserted." *See Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1100 (3d Cir. 1984) (Aldisert, J., Concurring). It is a strawman argument and should be disregarded by this Court.

Stonewall's dubious analysis of W. Va. Code § 16-2D-8(a)(5) is scantily made by the following few sentences from its response before the Authority:

> W.Va. Code § 16-2D-8(a)(5) provides that "[a] substantial change to the bed capacity of a health care facility with which a capital expenditure is associated" is subject to certificate of need review. The term "capital expenditure" is defined in W.Va. Code § 16-2D-2(10) as, **inter alia,** an expenditure that exceeds the expenditure minimum. W.Va. Code § 16-2D-2(10)(A)(ii). The expenditure in this matter does not exceed the expenditure minimum . . . Thus, [this code section] referencing changes to bed capacity [is] not relevant to this matter.

[8] W. Va. Code § 16-2D-8(a)(8)(A)-(C) requires a CON for:

> A) A substantial change to the bed capacity or health services offered by or on behalf of a health care facility, whether or not the change is associated with a proposed capital expenditure;
>
> (B) If the change is associated with a previous capital expenditure for which a certificate of need was issued; and
>
> (C) If the change will occur within two years after the date the activity which was associated with the previously approved capital expenditure was undertaken.

(D.R. 0462 (emphasis added)). This analysis completely falls off the rails upon its purported examination of the definition of Capital Expenditure. As highlighted and bolded in the language quoted above, Stonewall's usage of the term "inter alia" (or "among other things") betrays an implicit understanding that a Capital Expenditure can be triggered in different ways. Despite this Freudian slip, Stonewall conveniently only addresses one (1) of the **three (3) separate ways** in which a Capital Expenditure could be triggered under the CON law. *See* W. Va. Code § 16-2D-2(10). Specifically, a Capital Expenditure occurs when an expenditure is made by or on behalf of a health care facility that: (1) exceeds the Expenditure Minimum; **(2) encompasses "a substantial change to the bed capacity of the facility with respect to which the expenditure is made"**; ***or*** (3) encompasses a substantial change to the services of such facility. *Id*. (emphasis added).

Stonewall has further attempted to muddy the waters by citing various determinations of non-reviewability issued by the Authority pertaining to the relocation of outpatient services. These cases are inapposite because they do not involve "the relocat[ion] of beds from one physical facility or site to another." W. Va. Code § 16-2D-2(45); W.Va. Code § 16-2D-8(a)(5).[9] They are not comparable to Stonewall's project, which contemplates the construction of a new hospital and the relocation of Stonewall's hospital beds. Again, no beds were moved in these cases.

While Stonewall also previously asserted that "the Authority has twice found the relocation of a hospital was not subject to [CON] review," this argument folds under its own weight upon a simple analysis of the facts of those cases. (D.R. 0464-0465 (*citing Select Specialty Hospital-Charleston, Inc*., CON File No. 22-3-12456-X; *Select Specialty Hospital-Charleston, Inc*., CON File No. 06-3-8441-X) (collectively, the "Select Specialty Cases")). The Authority references the

[9] St. Joseph's submitted detailed arguments (and related citations) distinguishing these cases from Stonewall's project in its previous filings to the Authority in this matter, CON File No. 23-7-12659-X. (D.R. 0444-0445; D.R. 0452-0453).

Select Specialty Cases on page four of its Amended Decision. (D.R. 0603). Contrary to the Authority and Stonewall's suggestions, neither of these cases encompassed the relocation of any beds. The Select Specialty Cases involved long-term acute care hospitals ("LTACHs"). *Id.* While LTACHs are located within host hospitals, they are distinct entities which only provide services within such hospitals. The beds at which LTACHs provide services do not belong to the LTACH—they instead belong to the host hospital.[10] The Select Specialty Cases are distinguishable because when a LTACH moves from one host hospital to another it does not bring beds with it. Rather, the new host hospital must allocate some of its existing beds to the LTACH.

While the Authority has heretofore generally been able to rely on the Expenditure Minimum to hold projects such as Stonewall's subject to CON review, it has recognized that any Capital Expenditure associated with the relocation of hospital beds triggers the need for a CON regardless of whether the expenditure exceeds the Expenditure Minimum, which is consistent with the clear and plain language of the statute. *See, e.g., In re: Columbia Raleigh General Hospital*, CON File #97-1-6128-X (Decision dated July 29, 1997).[11] In that case, Columbia Raleigh General

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[10] *See* W. Va. Code R. 64-12-2.17 ("LTACHs are referred to as a hospital within a hospital."); W. Va. Code R. 64-12-17.1.2-17.1.3 ("The [host] hospital shall surrender the license of any acute care beds used in the development of the Long Term Acute Care Hospital", but "[i]f the Long Term Acute Care Hospital ceases to exist, terminates its services, or fails to offer its services for a period of 12 months, any beds whose license was surrendered by the hospital to establish the Long Term Acute Care Hospital shall revert back to the hospital's licensed bed capacity."); *see also* State Health Plan Standards for Addition of Acute Care Beds, pp. 9-11 (available at https://hca.wv.gov/certificateofneed/Documents/CON_Standards/AcuteBedsapp.pdf).

[11] http://www.hcawv.org/vs5FileNet/DocContent.dll?LibraryName=EDMS^Oracle&SystemType=2&LogonId=zY1/x4Bz0UVVteRrsz6lNe41j5gygrqDZ8V5r6qHBingjipMmVJYr7jlXMv$jhd225HcPG0/3t391P9/Gh4lbhESkd4xxlf5cpXtxs8p1CO9hBRrHHLgc$fGC2Z$xV3H7jWPmDKCuoNnxXmvqocGKe41j5gygrqDZ8V5r6qHBinuNY$YMoK6g2fFea$qhwYp7jWPmDKCuoNnxXmvqocGKe41j5gygrqDZ8V5r6qHBinuNY$YMoK6g2fFea$qhwYp7jWPmDKCuoNnxXmvqocGKYWZPqER29ZllX7i2IfbaTHuNY$YMoK6g2fFea$qhwYpgHCvm/lr/UpOUT8XD2ECihb6aLDTwg6$a3RGHJL5qv8pxT7pxWiC2bAslJth7/3E&DocId=003707787&Page=

Hospital ("RGH") requested a determination of reviewability for the relocation of "its 17-bed inpatient psychiatric unit from the fourth floor of the Raleigh campus to the second floor of the Beckley campus." Even though the Capital Expenditure associated with the proposal was "estimated to be less than $15,000", well below the Expenditure Minimum at that time,[12] the Authority found the project was reviewable because "the Authority determine[d] that RGH's proposal to relocate psychiatric services from the Raleigh campus to the Beckley campus" involved "[a] substantial change to the bed capacity of a health care facility[.]" *Id.*

Ultimately, even if Stonewall's representations of the Authority's prior decisions are to be believed (they are not), the Authority's precedent cannot supplant the plain language of W.Va. Code § 16-2D-8(a)(5). "[A] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." *War Mem'l Hosp., Inc.*, 248 W. Va. at --, 887 S.E.2d at 39 (quoting Syl. Pt. 1, *Consumer Advoc. Div. v. Pub. Serv. Comm'n of W. Virginia*, 182 W. Va. 152, 154, 386 S.E.2d 650, 652 (1989)). The Authority's "power is dependent upon statutes, so that [it] must find within the statute warrant for the exercise of any authority which [it] claim[s]." Syl. Pt. 4, in part, *McDaniel v. W. Virginia Div. of Lab.*, 214 W. Va. 719, 721, 591 S.E.2d 277, 279 (2003). The CON law is unmistakably clear: the relocation of beds to another physical site involving a Capital Expenditure is subject to CON review. W. Va. Code § 16-2D-8(a)(5); *see also* W. Va. Code § 16-2D-2(45). Since Stonewall's project indisputably involves the

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[12] The Legislature amended W. Va. Code § 16-2D-2 in 1991, setting the Expenditure Minimum at seven hundred fifty thousand dollars per fiscal year. HEALTH CARE FACILITIES—CERTIFICATE OF NEED—COST REVIEW AUTHORITY, 1991 West Virginia Laws Ch. 78 (H.B. 2194). The statute was subsequently amended in 1997, raising the Expenditure Minimum to one million dollars, and again in 1999, raising the Expenditure Minimum to two million dollars. HEALTH—HOSPITAL, STATE HOSPITAL, MENTAL HEALTH FACILITIES—DEFINITIONS, 1997 West Virginia Laws Ch. 100 (S.B. 553); HEALTH CARE—CERTIFICATE OF NEED—MINIMUM CRITERIA, 1999 West Virginia Laws Ch. 135 (S.B. 492).

relocation of beds in association with a Capital Expenditure, Stonewall's project is subject to review pursuant to the plain language of the CON law. W. Va. Code § 16-2D-8(a)(5).

B. STONEWALL'S PROJECT REQUIRES A CON UNDER W. VA. CODE § 16-2D-8(A)(1) BECAUSE THE PROJECT CONTEMPLATES THE CONSTRUCTION OF A HEALTH CARE FACILITY.

The construction of a new hospital is subject to CON review pursuant to the plain language of W. Va. Code § 16-2D-8(a)(1), which provides that: "[t]he construction . . . of a health care facility" requires a CON. The meaning of two words are important here: "construction" and "health care facility." The Legislature defined a "health care facility" broadly to be "a publicly or privately owned facility, agency or entity that offers or provides health services, whether a for-profit or nonprofit entity and whether or not licensed, or required to be licensed, in whole or in part." W.Va. Code § 16-2D-2(16). Thus, a "health care facility" can be an entity, but it can also be a brick-and-mortar building (i.e., facility) when it is constructed for the purpose of providing health services.[13]

The Legislature did not define the term "construction." As an undefined term, it is given its "common, ordinary, and accepted meaning." Syl. Pt. 6, in part, *State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171 (1984). The Supreme Court of Appeals has previously considered the meaning of "construction" in *Eggleston v. W. Virginia Dep't of Highways*, 189 W. Va. 230, 234, 429 S.E.2d 636, 640 (1993). In that case the Court noted:

> When we turn to a dictionary definition of the word "construction," it appears to include the completion of the entire project. In Webster's Third New International Dictionary at 489, "construction" is defined as "the act of putting parts together to form a complete integrated object." In II(C) *The Oxford English Dictionary* at 880 (1970), "construction" is stated as "[t]he action of

[13] Indeed, Merriam Webster's Online Dictionary defines "facility" as, *inter alia*, "something (such as a hospital) that is built, installed, or established to serve a particular purpose." *Facility*, merriam-webster.com (2023) (Available at https://www.merriam-webster.com/dictionary/facility).

> framing, devising, or forming, by putting together of parts; erection, building."

Id., Id. In addition, the *Eggleston* Court cited to an Arkansas case which considered what constituted the construction of a hospital and concluded that it was "more than a mere building of four walls and a roof" and that it included the "equipping" of the hospital. *Id.* at 235, *Id*. at 641 (quoting from *Hollis v. Ervin*, 237 Ark. 605, 613, 374 S.W.2d 828, 833 (1964)).

Here, Stonewall is clearly proposing to erect and equip a health care facility on Staunton Drive which has four walls and a roof. In its original Decision and Amended Decision, the Authority states that "the complete relocation of [Stonewall's] hospital to a new location in [Stonewall's] service area is NOT subject to Certificate of Need review because [Stonewall's] project is a replacement and relocation of the same services, in the same service area, and does not exceed the minimum capital expenditure." (D.R. 0476; D.R. 0607). However, there is nothing in the plain language of W. Va. Code §16-2D-8(a)(1) that supports the Authority's interpretation. "If the language of an enactment is clear and within the constitutional authority of the law-making body which passed it, courts must read the relevant law according to its unvarnished meaning[.]" Syl. Pt. 3, in part, *W. Virginia Health Care Cost Rev. Auth. v. Boone Mem'l Hosp.*, 196 W. Va. 326, 329, 472 S.E.2d 411, 414 (1996). The construction of a health care facility is still the construction of a health care facility, even though the entity currently operates an existing health care facility.

In addition, '"[i]t is not for this Court arbitrarily to read into [a statute] that which it does not say . . . . we are obliged not to add to statutes something the Legislature purposely omitted."' *War Mem'l Hosp., Inc.*, 248 W. Va. at --, 887 S.E.2d at 39 (quoting *Appalachian Power Co.,* 195 W. Va. at 587, 466 S.E.2d at 438); *see also Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 491, 647 S.E.2d 920, 927 (2007). In *War Memorial*, petitioner disputed the Authority's

interpretation of a statutory exemption for "[t]he acquisition and utilization of one computed tomography scanner and/or one magnetic resonance imaging scanner with a purchase price of up to $750,000 by a hospital." *Id*. at --, *Id.* at 38. The Authority held that the exemption did not apply to the petitioner's proposal because the proposed MRI unit would not be located at the "hospital's primary location." *Id., Id.* Our Supreme Court of Appeals rejected the Authority's interpretation because a "review of the relevant statutory provisions pertaining not only to the CON process but also to the statutory exemption set forth in West Virginia Code section 16-2D-11(c)(27) demonstrates the complete absence of any mention of a 'hospital's primary location'" and "the Legislature has expressly established location-specific requirements for certain other health services that are exempt from the CON process." Accordingly, the Court held that "the clear language of West Virginia Code section 16-2D-11(c)(27), which contains no location-specific requirement applicable to the exemption therein, reflects the intention of the Legislature to omit any such requirement." *Id* at --, *Id* at 40-41.

Here, as in *War Memorial*, the statutory provision at issue is unambiguous and does not contain any language corresponding to the limitations urged by the Authority. There is nothing in W. Va. Code § 16-2D-8(a)(1) that excludes from its purview "the complete relocation of [a] hospital" because it is a "replacement and relocation of the same services, in the same service area, [that] does not exceed the [Expenditure Minimum]." (D.R. 0476; D.R. 0607). W. Va. Code § 16-2D-8(a)(1) does not require a Capital Expenditure and does not reference the Expenditure Minimum. Nor does it mention the "replacement" or "relocation" of services within the same "service area." The Court must decline Respondents' invitations to read into W. Va. Code § 16-2D-8(a)(1) that which it does not say.

Moreover, there is no exemption for "a replacement and relocation of the same services, in the same service area, [that] does not exceed the [Expenditure Minimum]." (D.R. 0507; D.R. 0607). Here, as noted in *War Memorial*, the Legislature has demonstrated that it knows how to create exemptions. *See, e.g.,* W. Va. Code § 16-2D-11(18) (exempting the "construction . . . of community mental health and intellectual disability facility"); W. Va. Code § 16-2D-11(20) (exempting the "construction . . . of kidney disease treatment centers"); W. Va. Code § 16-2D-11(23) (exempting the "construction . . . of an alcohol or drug treatment facility and drug and alcohol treatment services"). Similarly, W. Va. Code § 16-2D-11(9) provides an exemption for "[r]enovations ***within*** a hospital" in excess of the Expenditure Minimum but "[t]he renovations may not expand the health care facility's current square footage, incur a substantial change to the health services, or a substantial change to the bed capacity[.]" (emphasis added). If the Legislature wanted to exempt the construction of replacement hospitals from review, it would have said so.

Respondents' insistence on reading the Expenditure Minimum into W. Va. Code § 16-2D-8(a)(1) not only conflicts with the plain language of the statute, it also violates accepted canons of statutory construction by rendering the subsection redundant with W.Va. Code § 16-2D-8(a)(3)(A). Again, "[a]n obligation for a capital expenditure incurred by or on behalf of a health care facility in excess of the expenditure minimum" is already subject to review under W.Va. Code § 16-2D-8(a)(3)(A). Requiring a Capital Expenditure to be in excess of the Expenditure Minimum under W. Va. Code § 16-2D-8(a)(1) would render it superfluous. *See Kungys*, 485 U.S. at 778, 108 S.Ct. at 1550, 99 L.Ed.2d at 839; *see also In re Petition of McKinney*, 218 W.Va. at 561, 625 S.E.2d at 323.

In sum, Stonewall's project requires a CON pursuant to W. Va. Code § 16-2D-8(a)(1) because it contemplates "[t]he construction . . . of a health care facility." The Authority cannot

read elements into W. Va. Code § 16-2D-8(a)(1) that are not there. *See War Mem'l Hosp., Inc.*, 248 W. Va. at --, 887 S.E.2d at 39.

C. THE AUTHORITY'S AMENDED DECISION IS VOID AND ULTRA VIRES.[14]

Twenty-one days after St. Joseph's filed its Notice of Appeal, the Authority attempted, *sua sponte*, to amend its Decision. The Authority included this "Amended Decision" with the administrative record it filed with the Intermediate Court of Appeals on August 10, 2023. (D.R. 0600-0610). While the Court denied St. Joseph's Motion to Strike the Amended Decision, it granted St. Joseph's leave to file a Second Amended Notice of Appeal allowing St. Joseph's to address the Authority's Amended Decision in its opening brief. As explained further below, the Authority's Amended Decision is an invalid and "ultra vires" action for three reasons: (1) the Authority has no power, either in the statute or by regulation, to amend its final decision prior to judicial review; (2) even if the Authority had such power prior to judicial review, the Authority clearly has no power to amend a final decision once that decision has been appealed to this Court; and (3) the *Chenery* doctrine requires this Court to judge the Authority's actions solely based on the contemporaneous explanations it provided in the original decision. Accordingly, the Amended Decision is void, and should be vacated.

i. The Authority's Decision is final and cannot be amended by the Authority before judicial review.

"Administrative agencies and their executive officers are creatures of statute" and "they must find within the statute warrant for the exercise of any authority for which they claim." Syl. Pt. 2, *Mountaineer Disposal Serv., Inc. v. Dyer*, 156 W. Va. 766, 766, 197 S.E.2d 111, 112 (1973). Relying upon this proposition, the Supreme Court of Appeals of West Virginia has held that "[a]n

[14] The Court need not consider the arguments in Sections c and d should it find for St. Joseph's on either one of the preceding arguments.

administrative agency's reconsideration of its own final order before judicial review is not valid unless the agency was given the authority under a statute or administrative rule to do so." *Reed v. Thompson*, 235 W. Va. 211, 214–15, 772 S.E.2d 617, 620–21 (2015).

In *Reed*, the Department of Motor Vehicles ("DMV") revoked a motorist's driver's license following his arrest for driving under the influence. *Id.* at *213, Id*. at 619. The motorist requested a hearing with the Office of Administrative Hearings ("OAH"). *Id*., *Id*. The OAH issued a final order finding that the motorist had not been driving under the influence and reinstated his driver's license. *Id., Id*. However, the DMV moved for reconsideration, and the OAH subsequently issued a "revised final order" concluding that the motorist had driven under the influence and explaining that its initial order was "legally deficient and erroneous." *Id., Id*. The Circuit Court of Wayne County reversed because OAH had no statutory or regulatory authority to revoke its original order. *Id*., *Id*.

On appeal, the Supreme Court of Appeals adopted a two-part test for determining whether an administrative agency, such as the OAH, has authority to amend its final order:

> Whether an administrative agency has authority under a statute or administrative rule to reconsider, revoke, or amend its final order entails a two-part inquiry. *See Atl. Greyhound Corp. v. Pub. Serv. Comm'n*, 132 W.Va. 650, 659–61, 54 S.E.2d 169, 174–75 (1949). The first question is whether an agency's power to reconsider its own final order is expressly or impliedly granted by statute. *Id*. at 659–660, 54 S.E.2d at 175. If not, the second inquiry is whether the following two conditions are met: (a) the Legislature granted the agency authority to adopt administrative rules of procedure; and (b) the agency adopted an administrative rule allowing it to reconsider its own final orders. *Id*. at 661, 54 S.E.2d at 175. If an agency has authority to reconsider its own final order under an administrative rule (as opposed to a statute), the scope of the agency's authority is strictly limited to what is contained in the rule.

Id. at 215, *Id*. at 621. The Court noted that "no provision in the *West Virginia Code* authorizes the OAH to reconsider, revoke, or amend its own orders" and "[t]here were no administrative rules which applied to the OAH when it reconsidered its original final order in June 2013." *Id*. at 215-216, *Id*. at 621-22. The Court explained that an implied power to revoke or reconsider only exists in narrow circumstances (*i.e.*, fraud or newly discovered evidence), which were not present. *Id*., *Id*. Accordingly, the Court concluded that "the DMV should have appealed to the circuit court rather than requesting the OAH to exceed its statutory authority by revoking its original final order." *Id*. at 216, *Id*. at 622.

Here, "[t]he Health Care Authority board of review voted during a scheduled board meeting on April 26, 2023 and the **final decision** in this certificate of need review was issued by the Health Care Authority on June 15, 2023." (D.R. 0508 (emphasis added)). The Authority has not been given the power either under statute or administrative rule to reconsider, revoke, or amend its final order on a RDOR. Rather, "[a] decision of the board [of the Authority] is final unless reversed, vacated or modified upon judicial review thereof[.]" W. Va. Code § 16-29B-12(g); *see also* W. Va. Code St. R. 65-32-18.4 ("Upon receipt of a request for declaratory ruling or a ruling regarding reviewability, the Authority shall issue its ruling within 45 days of its receipt of the request if all of the necessary information has been provided to the Authority in a timely manner.").

Accordingly, the Amended Decision constitutes ultra vires agency action, and it should be vacated. *See City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 291, 133 S. Ct. 1863, 1864–65, 185 L. Ed. 2d 941 (2013) ("for agencies charged with administering congressional statutes, both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires.").

ii. Even if the Authority had the power to amend its decisions before judicial review (it does not), the Authority does not have jurisdiction to amend decisions once they have been appealed.

As explained above, the Authority generally lacks the power to amend its final orders on a RDOR prior to judicial review. However, even if it had that power, the Authority lacked jurisdiction to reconsider the RDOR at issue because St. Joseph's had already appealed the Authority's Decision.

Once an appeal has been properly filed, the lower tribunal is divested of jurisdiction and jurisdiction is transferred to the reviewing body. *See e.g.,* Syl. Pt. 3, *Fenton v. Miller*, 182 W. Va. 731, 732, 391 S.E.2d 744, 745 (1990) ("Once this Court takes jurisdiction of a matter pending before a circuit court, the circuit court is without jurisdiction to enter further orders in the matter except by specific leave of this Court."); *Bartles v. Hinkle*, 196 W. Va. 381, 388, 472 S.E.2d 827, 834 (1996) ("A trial court is deprived of jurisdiction [] when it has entered a 'final' order within the contemplation of W. Va. Code, 58–5–1 (1925), and the final order has been appealed properly to this Court."); *Antero Res. Corp. v. Irby*, No. 21-0119, 2022 WL 1682290, at *2 (W. Va. May 26, 2022) (memorandum decision) ("Thus, we remind the bench and bar that, in general, circuit courts lack jurisdiction to issue rulings while a proper appeal is pending before this Court.").

In this respect, the position of our Supreme Court of Appeals is consistent with that of the federal courts. *See, e.g., Griggs v. Provident Consumer Disc. Co*., 459 U.S. 56, 58, 103 S. Ct. 400, 402, 74 L. Ed. 2d 225 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."); *Gilda Indus., Inc. v. United States*, 511 F.3d 1348, 1350 (Fed. Cir. 2008); *Fed. Trade Comm'n v. Lin*, 66 F.4th 164, 167 (4th Cir. 2023). As noted by the United States Supreme Court, "[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously," as doing so creates

"a danger [that] a district court and a court of appeals w[ill] be simultaneously analyzing the same judgment." *Griggs*, 459 U.S. at 58-9, 103 S. Ct. at 402, 74 L. Ed. 2d at 225.

Federal practice makes clear that a proper appeal deprives an administrative agency of jurisdiction to alter or amend the decision under review. *See, e.g., Alvarado v. Jaddou*, No. 1:20CV538, 2021 WL 7162570, at *1 (M.D.N.C. Dec. 17, 2021) ("A proper petition 'vests the district court with exclusive jurisdiction, unless and until the court "remand[s] the matter" to the [US]CIS.'"); *Olympia Expl., Co. v. Dep't of Energy*, No. CIV-80-054-E, 1981 WL 1285, at *6 (W.D. Okla. Dec. 10, 1981) (noting that "Defendants' Motion for Partial Remand implicitly concedes that the filing of a complaint seeking judicial review of an administrative decision divests the agency of jurisdiction to take any further action in the matter except through remand to it of the proceeding by the reviewing court.").

Numerous state courts have likewise held that filing an appeal divests an administrative agency of jurisdiction over the case. *See, e.g., Magma Copper Co. v. Arizona State Tax Comm'n*, 67 Ariz. 77, 86, 191 P.2d 169, 175 (1948); *Fiebig v. Wheat Ridge Reg'l Ctr.*, 782 P.2d 814, 816 (Colo. App. 1989); *Christiansen v. Iowa Bd. of Educ. Examiners*, 831 N.W.2d 179, 190 (Iowa 2013); *Baltimore Ravens, Inc. v. Self-Insuring Emp. Evaluation Bd.*, 2002-Ohio-1362, 94 Ohio St. 3d 449, 459, 764 N.E.2d 418, 427.

In sum, the Authority had no jurisdiction to amend its Decision, and therefore the Authority's Amended Decision is void and must be vacated.

iii. Under the Chenery doctrine, the Court must limit its consideration to the contemporaneous explanations for the Authority's determination provided by the Authority's original Decision.

"[W]hen a case is appealed, there is the need for a clean jurisdictional handoff from the district court to the Court of Appeals." *Lujan v. City of Santa Fe*, 122 F. Supp. 3d 1215, 1237

(D.N.M. 2015). Given the manner in which the Court reviews administrative orders, there is even a greater need for a clean jurisdictional handoff between an administrative agency and this Court.

As this Court is well aware, the Supreme Court of Appeals of West Virginia requires agencies in contested cases to issue reasoned, articulate decisions:

> When W.Va. Code, 29A-5-3 (1964) says: "Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. . . . " the law contemplates a reasoned, articulate decision which sets forth the underlying evidentiary facts which lead the agency to its conclusion, along with an explanation of the methodology by which any complex, scientific, statistical, or economic evidence was evaluated. In this regard if the conclusion is predicated upon a change of agency policy from former practice, there should be an explanation of the reasons for such change.

Syl. Pt. 2, *Citizens Bank of Weirton v. W. Virginia Bd. of Banking & Fin. Institutions*, 160 W. Va. 220, 220, 233 S.E.2d 719, 721 (1977); *Hasan v. W. Virginia Bd. of Med.*, 242 W.Va. 283, 292 n. 28, 835 S.E.2d 147, 156 n. 28 (2019).

"While there is a requirement that agencies give reasons, there is an implicit corollary that the decision must stand or fall on the basis of the reasons stated." Schwartz, Administrative Law, 591 (1984). Thus, the grounds upon which an administrative order must be judged are those upon which its action was based. *See Webb v. W. Virginia Bd. of Med.*, 212 W. Va. 149, 158, 569 S.E.2d 225, 234 (2002) (quoting *SEC v. Chenery Corp*., 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947)). "It has long been admonished that 'court's may not accept appellate counsel's *post hoc* rationalizations for agency action'" because '"an agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself[.]" *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69, 83 S. Ct. 239, 246, 9 L. Ed. 2d 207 (1962)).

In *Webb*, the West Virginia Board of Medicine ("BOM") entered an order taking disciplinary action against a physician. *Id*. at 151, *Id*. at 227. The physician appealed to the circuit court, which reversed the BOM's order because the BOM's findings were not supported by sufficient evidence. *Id*., *Id*. Before the Supreme Court of Appeals, the BOM argued that, even if its findings were erroneous, the physician still violated the ethics code on other grounds. *Id*. at 158, *Id*. at 234. The Supreme Court of Appeals, however, rejected this argument because it was not a basis for the BOM's decision. *Id*., *Id*. Quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947), the Court explained that:

> [A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

Id., *Id*. Because the BOM's decision was based on findings which were unsupported by the record, the Court upheld the Circuit Court's reversal of the BOM's order. *Id*., *Id*.

The *Chenery* doctrine applied by our Supreme Court of Appeals in *Webb* is widespread and well established. *Lawson v. Colvin*, No. 1:14-CV-01851-JMS, 2015 WL 5334374, at *5 (S.D. Ind. Sept. 14, 2015) ("The Commissioner's attempts to rehabilitate the ALJ's decision for reasons not identified by the ALJ are *post hoc* rationalizations that violate the well-established *Chenery* doctrine."); *Sheffield v. Colvin*, No. 1:14-CV-652-JMS-MJD, 2015 WL 3449476, at *4 (S.D. Ind. May 28, 2015 ("Moreover, any *post hoc* analysis of evidence not mentioned by the ALJ violates the well-established *Chenery* doctrine."). Under the *Chenery* doctrine, courts judge agency decisions based on their contemporaneous justifications. *See Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1909, 207 L. Ed. 2d 353 (2020) ("Considering only

contemporaneous explanations for agency action also instills confidence that the reasons given are not simply "convenient litigating position[s].' . . . . Permitting agencies to invoke belated justifications, on the other hand, can upset 'the orderly functioning of the process of review,' . . . forcing both litigants and courts to chase a moving target.").

Indeed, the United States Supreme Court has consistently rejected belated justifications, whether provided by the agency itself or its counsel, raised once judicial review has begun. *See Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539, 101 S. Ct. 2478, 2505, 69 L. Ed. 2d 185 (1981) ("the *post hoc* rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action."); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419, 91 S. Ct. 814, 825, 28 L. Ed. 2d 136 (1971) (rejecting "litigation affidavits" from agency officials as "merely 'post hoc' rationalizations."), *abrogated by Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977); *see also Dep't of Homeland Sec.*, 140 S. Ct. at 1909, 207 L. Ed. 2d at 353 ("The functional reasons for requiring contemporaneous explanations apply with equal force regardless whether post hoc justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves.").

St. Joseph's and the Court should not be forced to pursue a moving target. Allowing an administrative agency, such as the Authority, to amend its Decisions on appeal disrupts the orderly functioning of the review process. This Court should refuse to entertain the Authority's attempts to revise its Decision to support its litigation position.

d. STONEWALL'S PROJECT REQUIRES A CON PURSUANT TO W. VA. CODE § 16-2D-8(A)(5) BECAUSE THE PROJECT ENCOMPASSES A SUBSTANTIAL CHANGE TO STONEWALL'S BED CAPACITY DUE TO THE REDUCTION OF STONEWALL'S HOSPITAL BEDS.

i. The Authority's Decision found that Stonewall's project encompassed a reduction in its hospital beds.

In addition to the relocation of beds (*See* Section a, *supra*), Stonewall's proposal also encompasses a substantial change in bed capacity because, as noted by the Authority's original Decision, it contemplates a reduction of Stonewall's bed capacity. (D.R. 0475 (see footnote 6, finding of fact number 7, finding that "Stonewall proposes a reduction from 70 to 29 beds to align with the service area's unmet need calculations.")). As explained above, a "substantial change to the bed capacity" includes any change that "increases or **decreases** the bed capacity or relocates beds from one physical facility or site to another[.]" *See* W. Va. Code § 16-2D-2(45) (emphasis added).

The Decision's finding that Stonewall's project contemplated a reduction of Stonewall's beds is not clearly wrong. To this end, this Court must be aware of two critical facts. First, Stonewall's project proposed by its RDOR has **the exact same projected capital expenditure** as the project proposed in its prior CON filing: $56,000,000. (*Compare* D.R. 0004 *with* D.R. 0048). Second, Stonewall's previous CON filing for its $56,000,000 project identified that it would reduce the number of its licensed hospital beds from 70 to 29, a 58.6% reduction. (D.R. 0048; D.R. 0201).

Hence, both the RDOR and the project in Stonewall's previous CON application proposed the construction of a new hospital to be located on Staunton Drive and provided the same estimated Capital Expenditure of $56,000,000. (*Compare* D.R. 0004 *with* D.R. 0048). The precise match of capital expenditures between the RDOR project and the project in Stonewall's CON application objectively evidences that both proposals are substantially similar, if not the same. Therefore, the

Authority reasonably concluded that the project proposed by Stonewall's RDOR is substantially the same as that proposed by its previous CON application and that both projects encompassed a reduction in Stonewall's bed capacity.

As the applicant, Stonewall had the burden of proving that its project is not subject to CON review. *See PNGI Charles Town Gaming, LLC v. W. Virginia Racing Comm'n*, 234 W. Va. 352, 361, 765 S.E.2d 241, 250 (2014) ("the general practice in administrative proceedings is that 'an applicant for relief . . . has the burden of proof.'") (quoting 73A C.J.S. *Public Administrative Law & Procedure* § 296 (2014)). Yet, prior to the entry of the Authority's Decision, Stonewall presented no evidence it was building a 70-bed hospital. Instead, Stonewall made evasive statements, claiming that St. Joseph's argument "is based on assumptions that [St. Joseph's] has no idea to be factually accurate." (D.R. 0462). These statements do not carry Stonewall's burden of proof. If anything, Stonewall's reluctance to aver that it will not be reducing its beds in connection with the project further betrays the obvious conclusion that Stonewall cannot build a 70-bed hospital for $56,000,000. Stated differently, the notion that Stonewall could coincidently match the exact same price tag of its former proposal with a new proposal that encompasses extra space for **41 more beds** is simply not credible. This notion would not be credible in the context of the construction of any other type of building—whether a house, office, hotel, or otherwise—and it is not credible here. To the contrary, the exact match of capital expenditures leads to only one logical conclusion: Stonewall is proposing to construct a hospital which—like its formal proposal—contemplates a reduction in beds from Stonewall's current 70-bed acute care facility.

In its opposition to St. Joseph's Motion to Stay the Authority's Decision, Stonewall again evaded the issue, arguing that it "has no intention of constructing a 29 bed hospital." (D.R. 0593). Indeed, given the state of inflation over the past two years, it is very unlikely that Stonewall could

still build a 29-bed hospital for $56,000,000.[15] The point is that whether Stonewall still intends to build a 29-bed hospital, it certainly cannot build a 70-bed hospital for $56,000,000. And, ***any*** decrease in Stonewall's bed capacity is sufficient to trigger CON review. *See* W. Va. Code § 16-2D-2(45), *see also* Section a, *supra*. Stonewall's claim that it will not be building a 29-bed hospital misses the mark.

Again, a CON is required for any project contemplating "[a] substantial change to the bed capacity of a health care facility with which a capital expenditure is associated[.]" W. Va. Code § 16-2D-8(a)(5). Any reduction in bed capacity, however small, constitutes a substantial change in bed capacity. W. Va. Code § 16-2D-2(45). Because common sense prevails, Stonewall's project entails a reduction in Stonewall's bed capacity and requires a CON.

ii. To the extent that the Authority's Amended Decision has found that Stonewall's project will not be reducing Stonewall's bed capacity, the Amended Decision is, in addition to being ultra vires and void, clearly wrong.

In its Amended Decision, the Authority attempts to reverse its position, finding that Stonewall's RDOR does not encompass a reduction in beds:

> In the previous CON matter, Stonewall proposed to reduce the number of licensed beds it was replacing in the new facility from 70 beds to 29 beds. The reason for the reduction was to comply with the requirements in the Certificate of Need Standards, Renovation-

[15] According to the U.S. Bureau of Labor Statistics "CPI Inflation Calculator" $1.00 in September 2021 had the same buying power as $1.12 in September 2023. (available at https://www.bls.gov/data/inflation_calculator.htm). The Court can take judicial notice of inflation. *See People v. Toms*, 191 Misc. 2d 585, 589, 743 N.Y.S.2d 690, 693 (Co. Ct. 2002) ("The court may properly take judicial notice of the consumer price index and of government inflation statistics"); *see also Sweeney v. Sweeney*, 135 N.E.3d 1189, 1196 (Ohio Ct. App. 2019) ("A court may take judicial notice of past [consumer price index] rates because they are generally known and not subject to dispute")."'It is discretionary with appellate courts to permit judicial notice where the matter was not first brought before the trial judge."' *Jackson v. Putnam Cnty. Bd. of Educ.*, 221 W. Va. 170, 181, 653 S.E.2d 632, 643 (2007) (quoting Franklin D. Cleckley, Vol. 1, Handbook on Evidence for West Virginia Lawyers, § 2–1(E)(2) (4th ed. 2000)).

> Replacement of Acute Care Facilities and Services, § III (B). Stonewall proposes no such reduction in the RDOR.[16]

(D.R. 0606). The Court should reject this finding because the Amended Decision is void and ultra vires. *See* Section c, *supra*. And, even if the Amended Decision were not void (it is), the Authority's conclusion that Stonewall will not be reducing its bed capacity is clearly wrong.

Again, it is not plausible that Stonewall will be able to construct a 70-bed hospital for $56,000,000. *See Kanawha County Bd. Of Ed. v. Hayes*, 201 W.Va. 731, 734, 500 S.E.2d 547, 551 (1997) (a finding is clearly wrong if it is not "plausible when viewing the evidence in its entirety"); *see also see also Massaro v. Bd. of Educ. of City Sch. Dist. of City of New York*, 774 F. App'x 18, 21 (2d Cir. 2019) ("In deciding whether an allegation is plausible, 'judges [are] to rely on their "experience and common sense," and to consider the context in which a claim is made.'"). As explained above, Stonewall's previous filings before the Authority (as well as common sense) elucidates that Stonewall will in fact reduce the number of its acute care beds. (*See* D.R. 0048). The project proposed by Stonewall's CON application only contemplated the construction of 29 patient rooms. (D.R. 0055). Housing 70 beds would require a much larger hospital, and therefore a much larger Capital Expenditure, than that proposed by Stonewall's CON application. Stonewall clearly cannot build a 70-bed hospital today at the same cost proposed for the construction of a 29-bed hospital in its September 2021 CON application. (*See* D.R. 0048). That is not plausible, and therefore clearly wrong.

The Amended Decision's finding that Stonewall's project does not encompass a reduction in bed capacity is likewise clearly wrong because Stonewall failed to present any evidence that its

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[16] Section III (B) of the Certificate of Need Standards, Renovation-Replacement of Acute Care Facilities and Services provides that "[t]he Authority will not approve any renovation or replacement to a patient care area of a hospital where the number of licensed acute care beds, after completion of the renovation or replacement project, will equal or exceed 160% of the average daily census of the hospital for the past twelve (12) months."

RDOR contemplates the construction of a 70-bed hospital. Again, Stonewall had the burden of proof in this matter. *See PNGI Charles Town Gaming,* LLC, 234 W. Va. at 361, 765 S.E.2d at 250. Nonetheless, Stonewall has submitted zero evidence that it intends to build a 70-bed hospital, and Stonewall's evasive statements merely underscore its unwillingness to say that its new $56,000,000 hospital will house 70-beds. Thus, in addition to being implausible, the Authority's finding that Stonewall's RDOR does not contemplate a reduction in Stonewall's bed capacity is clearly wrong because it is completely unsupported by the record.

In sum, the idea that Stonewall could build a 70-bed hospital for the same cost as its previously proposed 29-bed hospital is nonsense, and to the extent that the Authority's Amended Decision goes along with that idea, the Amended Decision is clearly wrong. Because Stonewall's project contemplates a reduction in bed capacity, Stonewall must obtain a CON.

IX. CONCLUSION

For the reasons set forth above, St. Joseph's respectfully requests that the Court reverse and vacate the Authority's Decision and Amended Decision and remand the case to the Authority with directions to enter a decision ordering Stonewall's construction of a hospital at Staunton Drive, Weston, West Virginia subject to CON review.

ST. JOSEPH'S HOSPITAL OF BUCKHANNON, INC.
D/B/A ST. JOSEPH'S HOSPITAL
By Counsel

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

St. Joseph's Hospital of Buckhannon, Inc.
d/b/a St. Joseph's Hospital,
Respondent Below, Petitioner

vs.) No. 23-ICA-265

Stonewall Jackson Memorial Hospital Company,
Petitioner Below, Respondent

and

West Virginia Health Care Authority,
Respondent Below, Respondent

CERTIFICATE OF SERVICE

I, Alaina N. Crislip, do hereby certify that I have served the foregoing ***Brief of Petitioner St. Joseph's Hospital of Buckhannon, Inc.*** on this 16th day of October, 2023, via the Court's electronic filing system, which caused a true and exact copy of the same to be served upon counsel of record:

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