IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 24-ICA-100

PUTNAM COUNTY AGING PROGRAM, INC.,
and FAYETTE COUNTY SENIOR PROGRAMS,

***Affected Parties Below, Petitioners*,**

v.

VILLAGE CAREGIVING, LLC,

***Applicant Below, Respondent*,**

and

WEST VIRGINIA HEALTH CARE AUTHORITY,

***Respondent*.**

BRIEF OF RESPONDENT
WEST VIRGINIA HEALTH CARE AUTHORITY

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INTRODUCTION

The Legislature tasked West Virginia's Health Care Authority with overseeing the standards for projecting the need for new health care services across the State—now and into the upcoming years. In fall 2022, the Authority took up that duty to amend standards for a category of in-home personal services that help West Virginia's elderly residents with daily life tasks. When the Authority finished that process last summer, the results showed that more providers could help meet the need for these vital services in 51 of West Virginia's 55 counties.

Village Caregiving, LLC wants to help fill that gap by expanding its existing Medicaid services into the realm of in-home personal services. So it applied for a certificate of need to begin offering those services in the counties where the Authority's methodology shows West Virginians need them. And—consistent with that methodology and a detailed evidentiary record further confirming that Village Caregiving could add real value to the healthcare market—the Authority said yes.

The Authority's decision "demonstrates consideration of each of the parties' positions [and] the evidence, and sufficiently sets forth the reasoning and analysis underpinning the Authority's conclusions." *Minnie Hamilton Health Care Ctr., Inc. v. Hosp. Dev. Co.*, 2023 WL 2424614, at *5 (W. Va. Ct. App. Mar. 9, 2023). Nothing more is needed to let it stand. The analysis's fact-bound nature means this Court's review is particularly deferential. So it's not enough that "Petitioners have actually proffered evidence" going the other way. Pet'r's Br. 17. They have to show the Authority's findings were clearly wrong and that it acted outside the considerable bounds of its discretion when measured against the record as a whole. Disagreeing with the Authority's methodology showing unmet need in the counties Village Caregiving will serve (and picking at evidence beyond the methodology itself) will not do. The same goes for

nonspecific fears that competition might cost Petitioners clients or revenues. And critiquing the demeanor of the hearing officer—who didn't make the decision on appeal—neither invalidates the Authority's order nor changes the standard of review. The Court should affirm and let Village Caregiving get to work.

ASSIGNMENTS OF ERROR

1. Was the Authority clearly wrong in finding that Village Caregiving's new services will meet unmet need in the counties the certificate of need covers? And did the Authority appropriately rely on its statutorily authorized and Governor-approved Health Care Need Methodology as part of this assessment—or should the Court strike down that Methodology instead? *See* Pet'r's Br. 1 (first, second, and fifth assignments of error).

2. Was the Authority clearly wrong in finding that Village Caregiving's new services will not negatively affect the communities the certificate of need covers? *See id.* (third assignment of error).

3. Does the hearing examiner's alleged bias change the standard of review for the Authority's separate decision to grant a certificate of need? *See id.* (fourth assignment of error).

STATEMENT OF THE CASE

1. West Virginia takes a watchful approach to new entrants in the healthcare markets. With concern to "contain or reduce increases in the cost of delivering health services" and "to avoid unnecessary duplication of services," the Legislature enacted a system of "review and evaluation." W. VA. CODE § 16-2D-1(1)-(2). This "certificate of need" system requires pre-approval before "certain health services … may be offered to the public in the first instance or expanded into a new area." *Amedisys W. Va., LLC v. Pers. Touch Home Care of W. Va., Inc.*, 245 W. Va. 398, 408-09, 859 S.E.2d 341, 351-52 (2021). And the Legislature tasked the West Virginia

Health Care Authority with administering that program. W. VA. CODE § 16-2D-3. The Authority may issue a certificate of need only if the proposed new service is "[f]ound to be needed" and "[c]onsistent with the state health plan, unless there are emergency circumstances that pose a threat to public health." *Id.* § 16-2D-12(a)(1)-(2). The Authority must also make several other findings before granting a certificate, but its review "may vary according to the purpose for which a particular review is being conducted." *Id.* § 16-2D-12(g).

Part of the Authority's role includes reviewing the state health plan applicants follow. W. VA. CODE § 16-2D-3(a)(2). That plan includes various standards that the Authority develops or revises, and then the Governor approves. *Amedisys*, 245 W. Va. at 408-09, 859 S.E.2d at 351-52. The standards, in turn, provide "different criteria" that "[d]ifferent types of health services" must meet to quality for a certificate of need. *Minnie Hamilton Health Care Ctr.*, 2023 WL 2424614, at *3. When the Authority changes the standards, it must form a "task force[] to assist it in satisfying its review and reporting obligations." W. VA. CODE § 16-2D-6(c). The Authority must also submit its proposed change to the State Register for "general public comment," and otherwise "coordinate the collection of information" to help inform its decisionmaking. *Id.* § 16-2D-6(a), (d). The Legislature made sure the Authority could rely on a variety of information when amending the standards, including standards of care and best practices, recommendations from patients and everyone in the healthcare sector, and the Authority's "own developed expertise in health planning." *Id.* § 16-2D-6(e).

The current standards for in-home personal care services—"services for Medicaid residents" that "are available to assist an eligible member to perform activities of daily living" like mobility and personal hygiene—went into effect on April 27, 2023. D.R.546. The Authority had held a task force meeting the prior September that was "open to representatives of consumers,

businesses, providers, payers, and state agencies, as well as those interested in developing and offering Medicaid personal care services." D.R.28. After incorporating the task force's input, D.R.383:19-384:5, the Authority published its proposed rule for public comment in November 2022. D.R.28-29. The Authority considered comments from "multiple entities" before finalizing its proposal for the Governor's approval. D.R.29.

The standards' core is its "Need Methodology." The Methodology requires applicants to "demonstrate with specificity" both "an unmet need for the proposed service" and that the service "will not have a negative effect on the community by significantly limiting the availability and viability of other services or providers." D.R.548. In assessing unmet need, the Methodology starts with the "average number of Medicaid residents per county for the most recent fiscal year," then multiplies that number by 3%—a multiplier "represent[ing] the projected number of Medicaid residents who are currently receiving or may be eligible to receive" in-home personal care services. *Id.* Next, the Methodology subtracts the "average number of residents" in the county who in fact receive those services. *Id.* The resulting number approximates how many residents could be in the market for in-home personal services but are not yet receiving them. In other words, that number reflects the county's unmet need. D.R.549; *see also id.* (explaining that the Authority subtracts another 25 if it approved a new provider "within the previous 12 months"). If the unmet need number is "25 or more then the County is considered open to additional providers." *Id.*

One of the key changes in the new standards was that 3% multiplier: before, it was 1.25%. The Authority knew that 1.25% was already too low when it started the revision process because it had decided not to increase the percentage to 2.5% several years prior in response to a reported Medicaid funding crisis. D.R.449:8-24. Beyond that, the West Virginia Bureau for Medical Services told the Authority it planned to remove subcontracting as an option in the in-home

personal services space—which meant meeting client needs going forward would very likely require approving more providers. *E.g.*, D.R. 359:17-22; D.R.368:10-17; D.R.369:4-8.

When the Authority applied the Need Methodology for fiscal year 2023, it showed unmet need at or above the 25 threshold for 51 counties. D.R.30. It does so directly for 50 counties. For the fifty-first, it lists Brooke County as -26, but only because of a clerical error. After correcting that error Brooke County's unmet need is 348. D.R.30.

2. Village Caregiving LLC is a Medicaid-certified provider with the Medicaid Aged and Disabled Waiver Program—it "help[s] the elderly population with activities of daily living such as bathing, eating, chores, toileting, grooming, hygiene, and other basic needs." D.R.9. On June 22, 2023, it filed a certificate of need application proposing to provide Medicaid in-home personal care services in the 51 counties where the Need Methodology shows unmet need. D.R.122-212.

Several existing providers—Petitioners Putnam County Aging Program, Inc., and Fayette County Senior Programs included—opposed Village Caregiving's application and filed for affected party status to participate in the Authority's proceedings. D.R.10-11. After discovery and other preliminary matters, the Authority set a hearing for Timothy Adkins, the Authority's Director of the Certificate of Need Division, to testify about the revised Methodology's rationale and the process behind it. D.R.13-14. A number of similar certificate-of-need proceedings were pending at the same time as Village Caregiving's, so Adkins testified once with the idea that his testimony could be used in each of those separate dockets. D.R.13 n.6. The Authority later held an evidentiary hearing specific to this matter on November 14, 2023. D.R.1387-1462. One of the Authority's lawyers served as the hearing examiner for both hearings. Consistent with that role, W. VA. CODE § 29A-5-1(d), she presided over the hearings but did not render a decision on Village Caregiving's application.

3. The Authority did: On February 7, 2024, its board of review voted to grant a certificate of need and issued the certificate and its forty-two-page written decision the same day. D.R.42. The Authority concluded Village Caregiving met the statutory requirements to show the services it seeks to offer are "needed" and "[c]onsistent with the state health plan" (and that it met the statute's other prerequisites). W. VA. CODE § 16-2D-12(a)(1)-(2).

Starting with unmet need, "[a]fter carefully considering the evidence and arguments of the parties," the Authority concluded that both the Need Methodology and "independent[]" evidence "based on the testimony of Mr. Adkins" supported Village Caregiving's application. D.R.22. It applied the Need Methodology to find unmet need in each county where Village Caregiving wants to operate—including Brooke County because, once corrected, its true unmet need was well above 25 residents. D.R.40. It also explained that many other applicants have relied successfully on the Methodology, and Village Caregiving was "permitted to demonstrate unmet need by using the need methodology" just like them. D.R.23.

The Authority also considered Petitioners' argument that the revised standards "artificially inflated the unmet need" and was built on a faulty process. D.R.23-24. On the procedural point, the Authority looked closely at Adkins's "detailed, first-hand account lasting several hours" describing the steps and input that had gone into the new standards. D.R.25. On the substance, it looked again to Adkins's testimony explaining how the change to a 3% multiplier "was at least partially intended to guard against Medicaid's expected move to eliminate the use of subcontractors for providing primary care services." D.R.26. All told, the record let the Authority find "no issue with the lawfulness and appropriateness of the Standards under which Village Caregiving's application is being reviewed." *Id.*

Finally, the Authority concluded that letting Village Caregiving enter the market would not negatively affect the relevant communities by significantly limiting other services. D.R.26. Looking again to the full record, "including extensive hearing testimony on the subject of proposed negative effects," the Authority concluded that Petitioners' fears they would face severe revenue cuts from a new competitor were "unprovable and speculative." D.R.27. It also explained that Petitioners' worries about its continued ability to provide non-personal care services—meals and transportation help—involved issues "not the subject of the Authority's oversight." *Id.* Nevertheless, it examined the record and explained how it did not substantiate Petitioners' fears on that score, especially given Petitioners' "substantial cash holdings" that could "fund any shortfalls that do occur." *Id.*

SUMMARY OF THE ARGUMENT

I.A. The Authority reasonably concluded, from its Need Methodology and independent record evidence alike, that granting Village Caregiving's application would meet legitimate need for in-home personal care services across West Virginia. The Authority relied on hours of testimony showing how most counties could use additional providers—and so had revised its Need Methodology accordingly. Petitioners would have the Court second-guess the Authority's finding by picking at isolated parts of the record, forgetting that the Court defers to the Authority's factual findings unless clearly wrong and test its overall conclusion against the record as a whole. And with the Methodology showing unmet need in every county Village Caregiving wants to serve (after fixing a clerical error for one county's numbers), this is not a close case. The Supreme Court of Appeals has already blessed similar Authority standards and held that applicants can rely on them to show unmet need.

I.B. Petitioners give no reason to strike down the standards themselves. Even assuming the Court concludes this is the right venue for that challenge, the Authority followed the statutorily set path when it amended the standards last year. It held a task force meeting with representatives from a wide set of interested parties. It revised its proposal in response to that input and submitted the draft standards for public comment, then revised again and sent to the Governor for approval—which he gave. The Authority's substantive decisions also make sense. The Authority knew the 1.25% multiplier was too low because it had reason to raise it on its last go-round revising the standards, but chose not to for other policy reasons. The Authority also fairly considered the upcoming loss of subcontractor services, which upped the urgency for additional in-home personal services providers.

II. The Authority reasonably concluded that Village Caregiving would not negatively affect Putnam and Fayette Counties by significantly limiting other providers' (read: Petitioners') viability. Despite extensive testimony on this part of the analysis, Petitioners point to little beyond generalized fears that increased competition will harm their bottom line to some degree. The Authority acted within its statutory discretion in finding those allegations of unspecified harm did not show significant detriment to the community.

III. Petitioners' disagreement with the hearing examiner does not get them the win, either. The hearing examiner was not the decisionmaker; the Authority was. So at most, any bias would be reason to conduct a new hearing, not (as Petitioners ask) to turn the standard of review on its head by erasing deference to the Authority's findings. Regardless, Petitioners cannot overcome the presumption of regularity and make out a case for bias. The law sees nothing untoward with someone associated with the Authority serving as its hearing examiner. And disliking some of the

examiner's calls and claiming hostility without showing where and how the hearing examiner overstepped does not establish bias. The Court should affirm.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary because the Authority applied settled law to the record's plain facts, and the briefs fully present the issues on appeal.

STANDARD OF REVIEW

This Court may set aside the Authority's decision only if it violates "constitutional or statutory provisions," exceeds the Authority's "statutory authority or jurisdiction," follows from "unlawful procedures," is "[a]ffected by other error of law," is "[c]learly wrong" when viewed against "the whole record," or is "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Syl. pt. 1, *Amedisys*, 245 W. Va. 398, 859 S.E.2d 341 (quoting W. VA. CODE § 29A-5-4(g)(1)-(6)). For fact-bound decisions like this one, that deferential standard also means the Court will not upset the Authority's "factfinding determinations" "unless clearly wrong." *Minnie Hamilton Health Care Ctr.*, 2023 WL 2424614, at *2.

ARGUMENT

I. The Authority Reasonably Found That Letting Village Caregiving Enter The Market Will Address Unmet Medical Needs.

Petitioners' main line of attack is that the record doesn't show unmet need in all the counties the certificate of need covers. They're right that showing need is a statutory prerequisite: The Authority may issue a certificate only "if the proposed health service is" "[f]ound to be needed." W. VA. CODE § 16-2D-12. And the Authority's in-home personal care services standards similarly require applicants to show "an unmet need for the proposed service." D.R.1557. But Petitioners are wrong that the Authority's decision fails on this score. Bringing to bear the right

standard of review—and setting aside unfounded attacks on the Authority's Need Methodology—the certificate of need stands.

A. Sufficient evidence grounds the Authority's decision.

The Authority found that "evidence in the record supports a determination that an unmet need exists, both under the Authority's own Need Methodology and independently." D.R.22. Let's start with "independently."

The Authority relied largely on Adkins's detailed testimony, D.R.22, to support its conclusion that "Village Caregiving has established that there is an unmet need for Medicaid personal care services" throughout most of West Virginia, D.R.40. Petitioners say a bit of Adkins's testimony renders that finding arbitrary and capricious. But in over a hundred pages of testimony, D.R.355-468, Petitioners object to just six lines, Pet'r's Br. 13-14. And in them, Adkins simply agreed he did not have data showing Medicaid-eligible "individuals out there who could not receive services," and that he did not know if "there's a waiting list" for personal care services." DR.378:23-379:6; *see also* D.R.1547:23-1548:6 (same passage from Petitioners' excerpts of Adkins' testimony). In other words, he said he lacked two specific types of data that could show unmet need. And for the second, he wasn't even saying that—not knowing if the State keeps a waiting list for in-home personal services as an administrative matter is not the definitive statement that no one is looking for those services Petitioners make it out to be. So Adkins did not testify "he was unaware of any" unmet need. Pet'r's Br. 13. Quite the contrary: right after the waiting list exchange, Adkins testified that the Authority "continually" got "questions, calls about in home personal care." D.R.379:6-13. He later gave more detail, explaining he had received a call "[a]sking about services" just the "[l]ast week." D.R.411:13-16. And the calls from individuals seeking these services were common enough he could explain the Authority's ordinary process to

"send a call like that to one of the analysts," who know "that we refer everything to the Bureau of Senior Services to say who are and who are not providers in their county." D.R.412:9-17.

Petitioners' other record nitpicks fare no better. Petitioners point to an email from a BMS program manager saying there "never has been or ever will be a 'wait list' for the Personal Care Services program." Pet'r's Br. 14 (quoting D.R.1571). But the email's "adamant[]" tone, *id.*, shows only (consistent with Adkins's testimony) that the writer was correcting a misapprehension that BMS kept a waiting list, not that no one in West Virginia was waiting for care. Otherwise, how could she have known there "never" "will be" a list even if need conditions change in the future? And Petitioners would have the Court ignore additional testimony in the record showing that Village Caregiving *also* got calls from potential personal care services clients—at least 300 in a year. D.R.13-14; D.R.610. They say Village Caregiving could not know for certain they all involved Medicaid-eligible clients, Pet'r's Br. 14, but the evidence was calls "seeking to transfer *Medicaid* [personal care] services," D.R.610 (emphasis added). They also say trying to transfer services does not prove existing providers couldn't handle those 300 clients. Pet'r's Br. 14. But calling around for a new provider is evidence you're in the market for one—the certificate-of-need statute is not a straitjacket requiring the Authority to ignore evidence of patient dissatisfaction simply because other providers operate, too. And though Petitioners may not have turned away any new clients, Pet'r's Br. 14-15, that evidence doesn't prove other providers haven't or that all eligible West Virginians have a good option for services.

More to the point, these quibbles risk losing the thread that reviewing courts do not pick apart individual pieces of the record to see "whether the court would have reached a different conclusion." Syl. pt. 2, *W. Va. Med. Imaging & Radiation Therapy Tech. Bd. of Examiners v.*

Harrison, 227 W. Va. 438, 711 S.E.2d 260 (2011). Here, the "evidence on the record as a whole support[s] the agency's decision." *Id.*

And all *that* evidence has yet to account for the strongest: after correcting a clerical error in one county's metrics, the Authority's Need Methodology conclusively shows unmet need in every county Village Caregiving seeks to serve.

Remember what the Methodology does—it estimates how many residents could benefit from Medicaid in-home services by applying a set multiplier to a county's Medicaid-eligible population, subtracts the residents already receiving services, and finds unmet need if the remainder is 25 or more people. Applied here, the Methodology directly shows "Need for [Personal Care] Services" over 25 in all 51 counties at issue except for Brooke County. D.R.1561-63. But the -26 recorded for Brooke County is a false negative. The Authority credited testimony explaining that "the numbers for Brooke and Hancock are so small [the Authority] add[s] them together." D.R.30. The chart showing the Methodology's results inadvertently "misstated" this combined-county math, though—reporting Brooke's unmet need at -26 but similarly sized Hancock's at 374. *Id.* Corrected, the Methodology shows "unmet need of 348.00 for Brooke and Hancock Count[ies]." *Id.*; *see also* D.R.40.

Petitioners brush this explanation aside as "nothing more than rumors and conjecture," insisting they see "literally no evidence" of unmet need in Brooke County. Pet'r's Br. 15-16. But whether a reporting error happened is a factual question—and Petitioners cannot show the Authority was clearly wrong in answering it. They say only that Adkins "testified that he does not know why the numbers are like that." Pet'r's Br. 16 (citing D.R.390, D.R.1549). But in context, Adkins explained he was "not the one" responsible for the data. D.R.390:23-24. Later, he explained a conversation where he learned how the Brooke and Hancock numbers had been

combined for "at least a year or more," an email he had sent about "the numbers being skewed," and his view that (apart from an explanation like the two counties being combined) the raw numbers for Hancock were too high. D.R.439:9-441:17. For their part, Petitioners do not try to explain why else Brooke County would have an average of 10 Medicaid recipients but next door Hancock County would have 13,155. D.R.439. Especially when faced with a puzzle like that, the Authority's choice to credit the clerical error explanation neither "ran counter to the evidence" nor "was so implausible" to be believed. Syl. pt. 2, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).

So if the Authority can rely on the Need Methodology, that's enough to show unmet need. And it can. Though you wouldn't know it from Petitioners' brief, the Supreme Court of Appeals greenlit the Authority to rely on very similar standards before: *Amedisys* upheld the Authority's "longstanding, consistent" interpretation of its home health care services need methodology that (as here) the Authority issued "pursuant to a legislative grant of authority" and that was "authorized by the Governor." 245 W. Va. at 415, 859 S.E.2d at 358. True, the Authority's 3% multiplier is not "longstanding." But if the Authority is entitled to rely on potentially ambiguous standards, *id.*, it can trust in *Amedisys*'s baseline principle that the standards constitute sound evidence even more when their meaning is plain. And the more the Authority uses the standards "consistently" in prior applications, the more reasonable it becomes to apply that same methodology to the next one. *Id.* at 413, 859 S.E.2d at 356 (explaining that "consisten[cy]" is a mark in favor of deferring to the Authority's interpretation of the standards); *cf. Minnie Hamilton Health Care Ctr.*, 2023 WL 2424614, at *4 ("the Authority cited three past [certificate of need] applications where it had approved [certain] data, highlighting it as an accepted practice" to rely on that data).

Amedisys also held that the Authority can grant applications built on the "most current methodology" even if more recent data suggests the standards might be outdated. 245 W. Va. at 415, 859 S.E.2d at 358. That holding dissolves Petitioners' last objection to how the Need Methodology applies here. Petitioners say Doddridge County has no unmet need because the Authority "will subtract 25 from each applicable county proposed" if it approved a new provider in the last year; because it approved one for Doddridge, the Authority should have recalculated that county's number from 35 to 10. Pet'r's Br. 16. But as in *Amedisys*, "Petitioners point to no statute, regulation, or case … requiring an applicant to use available raw data rather than the data contained in the Authority's most current [Methodology]." 245 W. Va. at 415, 859 S.E.2d at 358 (cleaned up).

Worse still, Village Caregiving submitted its application *before* the Authority approved the other Doddridge County application—so the new "raw data" didn't even exist. *See* D.R.212 (Village Caregiving application signed June 22, 2023); D.R.1612 (final decision for Doddridge County application issued August 2, 2023). And because the Methodology makes "the Authority," not applicants, responsible for updating numbers after granting applications, D.R.1558, the unmet need number Petitioners want "was *not* available for use" even after Village Caregiving's application "had been submitted" because the Authority had not yet made the change. *Amedisys*, 245 W. Va. at 415, 859 S.E.2d at 358 (emphasis in original). Nor was it a "clearly unwarranted exercise of discretion," syl. pt. 1, *id.*, for the Authority to reason that the July 2023 certificate and another one after helped "demonstrate[] that an unmet need still exists in Doddridge County," D.R.22; *contra* Pet'r's Br. 16-17—*Amedisys* shows the Methodology is sufficient to prove need, but doesn't hold it is the only possible evidence.

So at bottom, the Authority's reasoning cannot be "absolutely illogical," Pet'r's Br. 17, because "accepting the calculations contained in [an] application" from the then-current Methodology "cannot be said to have exceeded [the Authority's] constitutional or statutory authority or to be arbitrary or capricious." *Amedisys*, 245 W. Va. at 415, 859 S.E.2d at 358 (cleaned up).

B. The Need Methodology is valid.

With the Authority's unmet need calculations firmly against them, all Petitioners have left is a frontal attack on the Need Methodology itself. The Court should reject it.

To begin, Petitioners "do not believe it to be proper for this Court to strike down the validity of the [Authority] standards at issue in this proceeding"—they think their separate (now-dismissed, D.R.1730:1-4) challenge in circuit court was the better venue. Pet'r's Br. 34-35. The Authority agrees. It did below, too. *See* D.R.1729:22-24, D.R.1731:2-12 (explaining that when the Authority "pled in the alternative" in the circuit court action that Petitioners "had failed to exhaust [their] administrative remedies," it did not mean those "administrative remedies" allowed for taking up "issues that would overturn matters that the governor has put in place"). But Petitioners did not meet the pre-suit notice requirements for filing an action against government agencies and their officials, so the circuit court was compelled to dismiss their challenge there. *See* Final Order, *Aging & Family Servs. of Mineral Cnty. v. W. Va. Dep't of Health & Human Servs.*, No. 23-C-766 (W. Va. Cir. Ct. Sept. 19, 2023). Petitioners should not get a second shot merely because they failed to fulfill certain minimal requirements on the first go around. Rather, consistent with *Amedisys*, this Court should apply the standards as sound evidence and affirm.

Regardless, the standards sail through on the merits. The Legislature set the process for amending the Authority's certificate of need standards in West Virginia Code Section 16-2D-6:

The Authority must "identify" and "apply" the relevant statutory criteria, open the proposed change for public comment, and "form task forces" and "coordinate the collection of information" to assist in its review. W. VA. CODE § 16-2D-6(a)-(d). It may also "consult with or rely upon" a variety of expert sources—as well as its "own developed expertise in health planning." *Id.* § 16-2D-6(e). Then the Governor "shall either approve or disapprove all or part of" the changes before they become official. *Id.* § 16-2D-6(f).

The Authority found "no issue with the lawfulness and appropriateness of the Standards" under these requirements. D.R.26. It relied heavily on Adkins's "detailed, first-hand account lasting several hours of the process undertaken by the Authority to amend the Standards in 2023," including the substantive considerations the Authority took into account before making its final decision. D.R.25-26. And given that the Authority's process was "[t]he very same" it used for earlier standards revisions, D.R.428-29, that conclusion shouldn't be surprising.

Petitioners do not meet their burden to override the Authority's judgment. For one thing, their footnote-only argument that the Authority did not revise the standards often enough, Pet'r's Br. 18 n.5, can be set aside as quickly as they made it: though "the Authority has statutory *authority* to revise and upgrade the Standards," Petitioners give no precedent showing "it has a statutory *mandate* to do so, or that this Court either could or should force the Authority to act." *Amedisys*, 245 W. Va. at 409 n.13, 859 S.E.2d at 352 n.13 (emphases in original).

Petitioners' objections to the task force falter, too. They say meeting once wasn't good enough. Pet'r's Br. 24-25. But the statute says the Authority "shall form task forces to assist it in satisfying its review and reporting requirements. The task forces shall be comprised of representatives of consumers, business, providers, payers and state agencies." W. VA. CODE § 16-2D-6(c). That's it. The Legislature did not direct task forces to meet any number of times or to

discuss proposed revisions in any specified depth (nor say all Authority task forces need to operate the same, *contra* Pet'r's Br. 24). And though some task forces meet regularly, by nature task forces are "*temporary* grouping[s] under one leader for the purpose of accomplishing a definite objective." *See Task force*, MERRIAM-WEBSTER, bit.ly/3VVMDUD (last visited July 16, 2024) (emphasis added). Petitioners give no law suggesting otherwise.

Nor do Petitioners substantiate their claim that it was "clear" "the meeting that was held was nothing more than a formality." Pet'r's Br. 25. Petitioners don't challenge the Authority's finding that the September 29, 2022 task force meeting complied with the only thing the statute *does* require—representation across the spectrum of interested parties, including Petitioners. D.R.28 ("The task force meeting was open to representatives of consumers, businesses, providers, payers, and state agencies, as well as those interested in developing and offering Medicaid personal care services."); D.R.1634-35 (listing meeting participants). They cannot dispute that the Authority follows the same procedure for almost "all" of its other task forces. D.R.374:20-21. Indeed, the multiple-meeting hospice task force Petitioners point out "was the *only* one … [that] had to go to that extent." D.R.374:23-375:1 (emphasis added). And Petitioners overstate in saying Adkins believed "more than one meeting was going to be needed." Pet'r's Br. 25. Rather, he proposed revising the standards in response to the task force's discussion, then "send[ing] it out to you all. And then maybe we need to have another meeting." D.R.1584:14-24; *see also* D.R.1633-1701 (full task force meeting transcript). The Authority ultimately didn't convene a second meeting, but it did incorporate feedback into the new standards—the standards "presented for the 30 day comment period" had "changed" and become "better defined" from the draft "of standards at that meeting." D.R.383:10-20. And though Petitioners object that ditching the change to 3%

was not one of those post-meeting changes, they don't explain how not getting the outcome they wanted means the task force failed in its information-gathering role.

Finally, Petitioners say the Authority "failed to utilize the information" it gathered in other parts of the process because many public comments "criticiz[ed] the increase from 1.25% to 3%." Pet'r's Br. 26. But here again, Petitioners don't engage what the statute says. The Authority must make the "text of all proposed changes" available for "public comment" and otherwise "coordinate the collection of information" to help it develop "recommended modifications." W. VA. CODE § 16-2D-6(a), (d). Stakeholder input is supposed to solicit a variety of views—it is no surprise existing providers might balk at a proposed change that would open the market to additional competition while others might welcome it. The point is that all those views are recommendations, not dictates. General administrative-law principles teach that agencies "have discretion to rely on [their own] reasonable opinions" even "[w]hen specialists express conflicting views." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989). All the more here where the Legislature went out of its way to say the Authority "may consult with or rely" on a host of expert materials and recommendations beyond what comes in through the task force and public comment routes—including the Authority's "own developed expertise in health planning." W. VA. CODE § 16-2D-6(e). And Petitioners do not dispute that the Authority considered the input it received and revised its draft standards multiple times before finalizing for the Governor's approval. *E.g.*, D.R.423:19-425:5. Again, Petitioners may not agree with the result, but the statute does not call for "majority" rule. Pet'r's Br. 26. The Authority took in appropriate input, then used its expertise to make a judgment call on the best path forward.

Moving from procedure to substance, Petitioners also cannot show that changing the multiplier from 1.25% to 3% was arbitrary and capricious. Pet'r's Br. 19-23. They think the

Authority made that change for "the sole purpose of reacting to regulations that may or may not be implemented"—BMS's planned policy change to "eliminate subcontracting" in the personal services space. Pet'r's Br. 21. They are wrong this was the Authority's only motivation, and wrong it was a bad one.

The Authority acted on more than the expected BMS change. Adkins testified, for instance, that 1.25% was an artificially low starting point: The Authority had planned to up the percentage to 2.5% in 2016, but backed off around reports that "Medicaid was going to be $40 million in debt" because they did "not want to be a further burden to the system." D.R.449:8-24. Also supporting the Authority's conclusion that 1.25% was too low, Adkins explained that the Authority compared in-home personal care services both to the ".299 of the population" figure for the related category of home health services and to BMS numbers showing "[t]wo percent of the population that was receiving Medicaid were receiving in home personal care." D.R.365:13-367:11. This Court looks for "substantial evidence" from the "*whole* record," even if Petitioners will not. *Ruby v. Ins. Comm'n of W. Va.*, 197 W. Va. 27, 36, 475 S.E.2d 27, 36 (1996) (emphasis added).

Looking just at the anticipated subcontractor change would not make the Authority's decision unreasonable, either. Petitioners don't dispute that in a subcontractor-free world, either existing providers would need to absorb all "those additional patients, or there's going to be individuals that go without services." D.R.369:4-8. So everyone agrees this is a relevant factor in the Authority's analysis. Petitioners simply object that the Authority acted before BMS made the change. But adjusting the standards proactively was a permissible choice. The nature of the standards-setting task requires making "an educated projection of what we think is going to be needed currently *and for the next two to three years*." D.R.359:17-22 (emphasis added). And the Authority had good reason to factor in the likely subcontractor change. Adkins explained how the

Authority knew, through "multiple telephone calls," D.R.370:24, "that BMS was wanting to eliminate contractors"—and that "BMS actually had said, we need more providers for, to do this," D.R.368:10-17. Indeed, the week before he testified in October 2023, Adkins had another call with BMS, who explained that the plan to eliminate subcontractors was still in motion. D.R.371:17-24; D.R.413:19-414:1.

Petitioners think the Authority should have waited for BMS to finalize the change before amending the Methodology, or else chosen a different policy path, like "grandfather[ing] in the current subcontractors." Pet'r's Br. 22. What's missing from Petitioner's argument? Any law explaining how the policy the Authority settled on was an illegal choice. The Authority wasn't required to make the same call Petitioners (or more to the point, this Court, *see* syl. pt. 2, *Harrison*, 227 W. Va. 438, 711 S.E.2d 260) might have made looking at the same record, but only a non-arbitrary choice supported by the record as a whole. Courts review the Authority's decisions with deferential eyes because the standard of review requires it, and to avoid "becom[ing] a superagency" that ignores the actual agency's "own developed expertise." *Amedisys*, 245 W. Va. at 414, 859 S.E.2d at 357 (citation omitted). In any event, Petitioners provide no "empirical evidence in the appendix record" to support their claim that the move to 3% in fact "allows for the unnecessary duplication of home health services." *Id.* at 413, 859 S.E.2d at 356. So though Petitioners may *fear* unnecessary duplication by acting "early," the Authority reasonably concluded that the better path was not to walk knowingly into a provider shortage by acting too late.

II. The Authority Reasonably Found That Allowing Village Caregiving To Enter The Market Would Not Significantly Limit Other Community Services.

Petitioners next challenge the Authority's conclusion that the certificate of need will not negatively affect the communities Village Caregiving will serve. This claim is limited to Putnam

and Fayette Counties. Pet'r's Br. 28 (explaining "it will become more difficult to provide services in Putnam and Fayette County"); *id.* (saying Petitioners "use the income" from Medicaid in-home personal care services "to provide additional services" in the two counties). So at most Petitioners' arguments could call for "modify[ing]" the certificate of need, W. VA. CODE § 29A-5-4(g), to exclude authority to operate in those two counties. But once again, Petitioners' claim falls even on its own terms.

A reminder of the relevant text: the statute says "the proposed health service" must be "[c]onsistent with the state health plan." W. VA. CODE § 16-2D-12(a)(2). The "state health plan" is the same in-home personal services standards Petitioners challenge above. But here they agree that the second prong of its Need Methodology is valid—that "the proposed service will not have a negative effect on the community by significantly limiting the availability and viability of other services or providers." D.R.1029. The Authority reasonably found that prong satisfied.

In its decision, the Authority explained it had considered the full record before concluding a certificate of need was justified. D.R.27. Part of that record included Village Caregiving's explanation that in areas with "clear unmet need," increasing provider options would have only "limited impact on the utilization and operations of similar services offered by existing providers." D.R.192. Village Caregiving also explained that in the past several years many of its Medicaid clients had "requested Village Caregiving to be their [personal care services] agency," so "widespread community support" exists for granting the certificate of need because it will "honor[] member choice." D.R.211. The Authority also weighed the "extensive hearing testimony on the subject of proposed negative effects"—and found Petitioners' concerns about drastic revenue loss were "unprovable and speculative." D.R.27. And it addressed Petitioners' fears about indirect budgetary cuts to the *other* services Petitioners provide. It reasoned that transportation and meals

services "are not the subject of the Authority's oversight and not part of in-home personal care." *Id.* Regardless, it also explained that the record has no evidence showing how Petitioners "would have to cease offering other services," "would be prevented from offering those other services," or could not "shift[] financial resources from their substantial cash holdings to fund any shortfalls that do occur." *Id.* In short, the Authority considered "each of the parties' positions, the evidence, and sufficiently set forth the reasoning and analysis" for its decision. *Minnie Hamilton Health Care Ctr.*, 2023 WL 2424614, at *5.

Petitioners have a heavy task in convincing the Court to overturn that judgment. Again, it takes a lot under the "deferential" standard of review to show the agency's factual findings are clearly wrong or that it reached an arbitrary or capricious conclusion. *Lilly v. Stump*, 217 W. Va. 313, 317, 617 S.E.2d 860, 864 (2005). This general principle has added heft in "matters involving public health," where reviewing courts approach their task "with conscientious awareness of [their review's] limited nature"—asking "*solely*" whether the decision "was rational and based on consideration of the relevant factors." *Amedisys*, 245 W. Va. at 414, 859 S.E.2d at 357 (emphasis in original) (citation omitted). Questions like this one involving the Authority's standards (not the statutory text itself) can give even more reason to hesitate before "second-guess[ing]" how the agency interprets that policy. *Id.* And remember that parties challenging the Authority's findings need more than generalized critiques to prevail—they need "empirical data to support [their] contentions." *Id.* Against these standards, both of Petitioners' arguments fall short.

First, the Authority reasonably found that any clients or employees Petitioners might lose when Village Caregiving enters the market are not sufficient "negative effect[s] on the community." *Contra* Pet'r's Br. 27-28. Petitioners point to no evidence of their own that they think the Authority overlooked. They argue only that Village Caregiving says it will "increase its

clients' continuity of care"—as in, potentially persuade existing clients to switch to them for in-home personal care services—and "increase wage and benefit offerings to employees." *Id.* But they do nothing to make their fears concrete. They do not explain how many clients or employees they think they might lose or identify any other "empirical data" the Authority missed in evaluating this claim. Indeed, Petitioners are not new market entrants struggling to build a client base or earn employee loyalty—they have served their community well for "30 years, if not 40." D.R.1786. So it wasn't arbitrary and capricious for the Authority to reject Petitioners' arguments as "speculative." D.R.27.

Spotting Petitioners' conclusory assessment that "[c]learly" they "will lose clients," Pet'r's Br. 27, would not change the result, either. Petitioners ask the Court to follow the "inherent principle that additional competition in an area of business will result in the competitors fighting over employees in the workforce, clients, and resources." *Id.* But they point to nothing suggesting the certificate-of-need statute is meant to preserve monopoly power. And remember that the specific question here is not whether a certificate will lead to *some* "negative effect on the community"; it's whether Village Caregiving's proposed services will "*significantly* limit[] the availability and viability of other services or providers." D.R.1029 (emphasis added). Petitioners seem to recognize this wrinkle in arguing that they may lose clients "[p]otentially to the point [they] are ousted from providing services." Pet'r's Br. 28. But "potentially" is a hedge, and, anyway, "representations in an appellate brief do *not* constitute a part of the record." *Amedisys*, 245 W. Va. at 414, 859 S.E.2d at 357 (emphasis in original).

In reality, "significantly" does real work in this part of the certificate-of-need inquiry. The "ordinary meaning of 'significantly' is 'of a noticeably or measurably large amount." *Koito Mfg. Co., Ltd. v. Turn-Key-Tech, LLC*, 234 F. Supp. 2d 1139, 1154 (S.D. Cal. 2002) (citation omitted);

see also, *e.g.*, *Evans v. United States*, 978 F. Supp. 2d 148, 166 (E.D.N.Y. 2013) (citation omitted) ("significant" means "more than minor, mild or slight"); *DBW Partners, LLC v. U.S. Postal Serv.*, 2019 WL 5549623, at *4 (D.D.C. 2019) ("more than *de minimis*"). And not giving the term meaning would invite odd results. For a statute concerned with "contain[ing] or reduc[ing] increases in the cost of delivering health services," W. VA. CODE § 16-2D-1(1), at least some competition—with the price-lowering benefits it can bring—can be a boon. But Petitioners' approach that even some client loss is enough under this prong would mean the Authority might have to deny a certificate of need any time other providers are already in the market. This Court recently distanced itself from a similar argument when addressing the "superior alternative" requirement, disavowing a "preference of the needs of one [provider] over the needs of another" because the law doesn't let one provider exert an effective "veto" on increased competition. *Stonewall Jackson Mem'l Hosp. Co. v. St. Joseph's Hosp. of Buckhannon, Inc.*, 2023 WL 4197305, at *6 (W. Va. Ct. App. June 27, 2023). It should stay that course here.

Second, the Authority reasonably rejected Petitioners' concern that less Medicaid income from in-home personal care services might mean Petitioners can spend less on transportation and nutrition services. Pet'r's Br. 28-30. On the legal side, the Authority concluded that these other services "are not the subject of the Authority's oversight and not part of in-home personal care." D.R.27. Again, the Court gives some weight to an agency's assessment of what its own rules mean. *Amedisys*, 245 W. Va. at 414, 859 S.E.2d at 357. And this particular assessment makes good sense: agencies "can only exercise such powers as those granted by the legislature," *State ex rel. State Farm Mut. Auto. Ins. Co. v. Marks*, 230 W. Va. 517, 529, 741 S.E.2d 75, 87 (2012) (citation omitted), so it's reasonable to interpret the standards as reaching only the "health services" the statute contemplates, W. VA. CODE § 16-2D-1(1); *id.* § 16-2D-2(18) ("'Health

services' means clinically related preventative, diagnostic, treatment or rehabilitative services."). All Petitioners say in response is that an Authority employee might hold a different view. Pet'r's Br. 29-30. Their reading of the few transcript lines they cite is questionable—wanting to avoid "a situation where you're robbing Peter to pay Paul," for instance, D.R.407:2-4, likely means taking from a provider already offering the same services, not reducing a single provider's ability to offer multiple services. The testimony doesn't ultimately matter, though: Petitioners have zero authority for the idea that what one of the Authority's employees thinks can trump the Authority's own judgment.

On the factual side, Petitioners (again) do not substantiate their fears that additional competition will leave them with "less and less" to spend on non-personal care services. Pet'r's Br. 28. Indeed, they admit ten providers already compete with them "in Putnam County alone." *Id.* If any marginal loss in profits from those providers hasn't led to the dire consequences they predict, it is hard to see how one more would. Petitioners do not even try to explain how. And Petitioners also ignore the parts of the record undercutting their claim. They do not cite their own Executive Director's testimony in this appeal, even though it comprised most of the "extensive" testimony "on the subject of proposed negative effects." D.R.27. Adding back undisputed evidence like Petitioners' $4.1 million cash-on-hand at the end of 2022, for instance, D.R.1843:3-7, shows even more that the Authority's conclusion Petitioners could cover "any shortfalls" they might see after Village Caregiving's entry is not "clearly wrong." *Minnie Hamilton Health Care Ctr.*, 2023 WL 2424614, at *2.

In certificate-of-need cases, the interests of the "applicant, affected parties, and citizens of West Virginia" often "do not fully coincide." *Stonewall Jackson Mem'l Hosp.*, 2023 WL 4197305, at *5. Just as in other parts of the statutory inquiry, when assessing potential community effects

it's up to the Authority to "reasonably weigh the evidence as to each and balance their conflicting interests." *Id.* The Authority did just that—and Petitioners haven't met their burden to set that judgment aside.

III. The Evidentiary Hearing Is No Reason To Invalidate The Authority's Order.

Lastly, Petitioners say the Authority's "discretion should be stripped, or at least diminished," Pet'r's Br. 34, because they think the hearing examiner was biased against them. They cite no authority for this strong remedy, though. And none exists. So even if Petitioners were right on the substance of their charge against the *examiner* (and they aren't) the Court should not throw out the ordinary and long-standing standards of review for the *Authority's* decision.

Start first with the Authority's and hearing examiner's roles. The Authority, not the hearing examiner, "shall render a final decision on an application for a certificate of need." W. VA. CODE § 16-2D-15(a). That's what happened here: The Authority's board voted and then the chairman issued the decision on the full Authority's behalf. D.R.42-43. For their part, hearing examiners help get the record to a place the Authority can make its decision. They "regulate the course of [a] hearing," hold settlement conferences, and "dispose of procedural requests or similar matters." W. VA. CODE § 29A-5-1(d); *see also id.* § 16-2D-13(g)(3) (explaining that certificate of need hearings must follow Section 29A-5-1's requirements). Indeed, Section 29A-5-1 is Petitioners' *only* legal authority in the section of their brief supporting this assignment of error—so they know a "hearing examiner's powers are limited." Pet'r's Br. 33. Here, for instance, the hearing ended when the last witness left the stand—no findings of fact, conclusions of law, or hints about the Authority's ultimate outcome. D.R.1462. So in a real sense, it would be irrelevant if Petitioners' arguments *had* fallen "on deaf ears" at the hearing, Pet'r's Br. 34—the Authority's decision is what counts.

That statutory setup helps parse what remedy any bias could warrant. The only potential source of authority for the Court to take on a non-decisionmaker's bias (Petitioners offer none) is the requirement that "hearings shall be conducted in an impartial manner." W. VA. CODE § 29A-5-1(d). That is "*all* that the statute clearly mandates." *Varney v. Hechler*, 189 W. Va. 655, 660, 434 S.E.2d 15, 20 (1993) (emphasis added). So if Petitioners are right about the purported bias, the Court could direct "remand" for the Authority to try again because it made its decision "upon unlawful procedures." Syl. pt. 1, *Amedisys*, 245 W. Va. 398, 859 S.E.2d 341. But no precedent supports Petitioners' request that the Court should reach the merits anyway—and just give the Authority's findings no or little deference along the way. That approach would toss aside the limited, statute-set scope of review for agency decisions in contested cases. *See* W. VA. CODE § 29A-5-4(g). The statute's "clearly wrong" and "arbitrary and capricious" standards are highly "deferential," and "a court is not to substitute its judgment" in the agency's stead. *Lilly*, 217 W. Va. at 317, 617 S.E.2d at 864 (citations omitted). So Petitioners are wrong that this Court could look at the evidence on a blank slate and direct the Authority to reach a different substantive result. Remand is the most Petitioners could get.

And they haven't made out the case for even that. Even when a hearing officer *is* the decisionmaker, showing bias "is an exacting" standard. *Keith v. Barnhart*, 473 F.3d 782, 788 (7th Cir. 2007) (citation omitted). Courts extend administrative law judges "a presumption of honesty and integrity." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Overcoming it requires "some substantial countervailing reason," *Harline v. DEA*, 148 F.3d 1199, 1204 (10th Cir. 1998), along the lines of "deep-seated and unequivocal antagonism that would render fair judgment impossible," *Barnhart*, 473 F.3d at 788 (citing *Liteky v. United States*, 510 U.S. 540, 555 (1994)). Petitioners' examples of alleged bias come nowhere close.

First, the hearing examiner's role and association with the Authority are not enough. Petitioners are wrong that the examiner—who made no findings or legal judgments—operated as "judge, jury, and executioner." Pet'r's Br. 31. Regardless, combining the "investigative and adjudicative functions" does not "creat[e] an unconstitutional risk of bias." *Marfork Coal Co. v. Callaghan*, 215 W. Va. 735, 744, 601 S.E.2d 55, 64 (2004) (cleaned up). Nor does it matter that the hearing examiner represented the Authority in related matters. Pet'r's Br. 30-31. The agency itself—or "any member of the body which comprises the agency"—may serve as a hearing examiner. W. VA. CODE § 29A-5-1(d). Following that statutory path "does not on its own constitute, or even indicate, a proceeding that lacks the necessary impartiality." Syl. pt. 2, *Marfork*, 215 W. Va. 735, 601 S.E.2d 55; *see also Varney*, 189 W. Va. at 660, 434 S.E.2d at 20 ("No inherent conflict of interest is created simply because [an] agency member serves as a hearing examiner."). The same holds when the hearing examiner merely works for the agency—the Supreme Court of Appeals called an argument "untenable" that would mean hearings could never "be conducted by an administrative law judge employed by the same agency as the case is before." *McDonald v. Cline*, 193 W. Va. 189, 191, 455 S.E.2d 558, 560 (1995); *see also Harline*, 148 F.3d at 1204 (fact hearing officer worked for the agency, had an office in its building, and was "subject to threats of removal, reprimand, … and other reprisal" if the agency disliked its work did not show bias). Even having "preexisting knowledge" or participating in a case's earlier stages does not "tend to suggest that [the hearing officer] had necessarily prejudged the issues." *Marfork*, 215 W. Va. at 743, 601 S.E.2d at 63 (discussing *Morris v. City of Danville*, 744 F.2d 1041 (4th Cir. 1984)).

Second, nothing that happened at the hearing meets the heavy standard for showing bias. For one thing, some of Petitioners' critiques involve *different* cases. Petitioners, for instance, object to one relevancy decision during testimony in another matter that wasn't incorporated into

this one. *Compare* Pet'r's Br. 31 (citing D.R.1756-60 (Eric Hicks testimony from October 4, 2023 hearing in *In re: Elder Aid Services, LLC*)), *with* D.R.1407 (admitting into this record only Jenny Sutherland's testimony from that hearing). Whatever the hearing examiner might think about "another applicant," Pet'r's Br. 31, says nothing about purported partiality against these parties. Similarly, even Petitioners know that decisions about summary judgment motions in other matters are "not on record in this case." Pet'r's Br. 32. Petitioners are challenging those separate decisions in separate appeals; this Court should address them there. Regardless, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"—"[a]lmost invariably, they are proper grounds for appeal, not recusal." *Liteky*, 510 U.S. at 555. And here again, Petitioners conflate the hearing examiner's (alleged) views with the Authority's: the examiner's case-management decisions in other matters are not "clear evidence" that *the Authority* had prejudged this matter "far before any evidence was ever entered into the record." Pet'r's Br. 32.

The actual record here is little help, either. Asking a witness "clarifying questions" is part of a hearing examiner's ordinary role, *W. Va. State Police v. Walker*, 246 W. Va. 77, 86, 866 S.E.2d 142, 151 (2021), not evidence of bias, *contra* Pet'r's Br. 31-32. In fact, courts review even judges' questions to witnesses at criminal jury trials—which (unlike here) can risk prejudicing lay jurors' impartiality—under the deferential abuse of discretion standard. Syl. pts. 1, 3, 4-7, *State v. Thompson*, 220 W. Va. 398, 647 S.E.2d 834 (2007).

The rest of Petitioners' examples are how the examiner handled a few relevancy objections. Pet'r's Br. 31-33. But discretionary calls like those are "simply attempt[s] to focus the hearing on the precise issue at hand"; without more, they "cannot sustain a claim of bias." *Barnhart*, 473 F.3d at 790. In any event, Petitioners overreach in their "isolated," *id.* at 788, examples. The hearing examiner allowed four transcript pages' worth of testimony about the non-personal care services

Petitioners offer before "restrict[ing]" more, Pet'r's Br. 31—and at that point counsel was "done with the other services" point anyway. D.R.1810:11-1814:12; D.R.1814:15-16. Those pages of testimony then made it reasonable to allow cross-examination questions that went "directly to" Petitioners' argument that it "does not have enough money to sustain all of these other programs." D.R.1841:17-20; *contra* Pet'r's Br. 31-32. And the hearing examiner focused Tim Adkins's testimony away from "hypothetical questions about things that aren't there," D.R.396:3-9; *see also* Pet'r's Br. 33, only after allowing him to answer several related questions, D.R.393:23-394:21. So Petitioners do not make good on their claim that the hearing examiner "prevented [them] from developing the record" "many times," Pet'r's Br. 34—much less show how (if they had) disagreeing with the examiner's evidentiary calls would prove "deep-seated favoritism or antagonism." *Liteky*, 510 U.S. at 555.

Finally, general allegations of "hostility" do not satisfy Petitioners' burden. Petitioners concede "it is difficult" to prove their case from the record, so "implore this Court to read the transcripts" with an eye toward what may be between the lines. Pet'r's Br. 33-34. Even if outsourcing their burden of proof in this way was appropriate, at most Petitioners seem to suggest "remarks during the course of a [hearing] that are critical or disapproving of, or even hostile to, counsel [or] the parties." *Liteky*, 510 U.S. at 555. But comments in that vein "ordinarily do not support a bias or partiality challenge"—"expressions of impatience, dissatisfaction, annoyance, and even anger" are "within the bounds" of "ordinary efforts at courtroom administration." *Id.* at 555-56. All the more when what *is* on the page shows a hearing examiner trying to manage a complex docket of cases carefully. *E.g.*, D.R.1397 (pausing to "double check this record" to ensure it accurately reflected information about one party that may have been inadvertently attributed to the wrong case); D.R.1406 (giving Petitioners chance to object or offer "additional input" before

proceeding); DR.1407-08 (granting Petitioners' request to admit testimony from related matter into the record); D.R.1425 (after questioning witness, giving Petitioners chance to ask "any follow up from my questions"). Especially where "the record as a whole demonstrate[s] fundamental fairness," the bar to clear the presumption of impartiality remains high. *Barnhart*, 473 F.3d at 788. Petitioners haven't cleared it. So the Court should reject this assignment of error, too.

CONCLUSION

This Court should affirm the Authority's decision.

Respectfully submitted,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 24-ICA-100

PUTNAM COUNTY AGING PROGRAM, INC.,
and FAYETTE COUNTY SENIOR PROGRAMS,

***Affected Parties Below, Petitioners*,**

v.

VILLAGE CAREGIVING, LLC,

***Applicant Below, Respondent*,**

and

WEST VIRGINIA HEALTH CARE AUTHORITY,

***Respondent*.**

CERTIFICATE OF SERVICE

I, Michael R. Williams, certify that this Brief of Respondent West Virginia Health Care Authority is being served on counsel of record by File & Serve Xpress this the 22nd day of July, 2024.

/s/ Michael R. Williams
Michael R. Williams