IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 24-ICA-98

PUTNAM COUNTY AGING PROGRAM, INC.,

***Affected Party Below, Petitioner*,**

v.

PANHANDLE SUPPORT SERVICES, INC.,

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 at least 50 of West Virginia's 55 counties.

Panhandle Support Services, Inc. wants to help fill that gap by obtaining a certificate of need for its current operations in Putnam County. This certificate would allow the company to continue its work in the county and eliminate the need for it to subcontract to do so. And—consistent with that methodology and findings during briefing and argument—the Authority approved Panhandle's application.

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 evidence could "have been proffered by Petitioner" going the other way. Pet'r's Br. 10. They must 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. It's not enough for Panhandle to just disagree with the Authority's methodology showing unmet need in the counties Panhandle will serve—nor is it enough to pick at the edges of the evidence beyond the

methodology itself. The same goes for nonspecific fears that competition might cost Petitioner clients or revenues. The Court should affirm and let Panhandle work.

ASSIGNMENTS OF ERROR

1. Can the Authority err in granting summary judgment in an administrative proceeding when there are no genuine disputes of material fact, and the hearing examiner determined no evidence could be introduced showing otherwise? *See* Pet'r's Br. 1 (first and second assignment of error).

2. Was the Authority clearly wrong in finding that Panhandle'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 id.* at 1-2 (third (parts a and b) and fourth assignments of error).

3. Was the Authority clearly wrong in finding that Panhandle's new services will not negatively affect the communities the certificate of need covers? *See id.* at 2 (third (part c) 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 health 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.787. The Authority had held a task force meeting the prior September that was aimed at "mak[ing] the Standards more

workable." D.R.652. After the task force meeting, the Authority published its proposed rule for public comment. *See*, *e.g.*, D.R.879-81 (Petitioner's comment). Then, the Authority considered the public's input—including Petitioner's—and "submitt[ed] the 2023 [Personal Care] Standards to the Governor for his approval." D.R.1007.

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.789. 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. D.R.789. Next, the Methodology subtracts the "average number of residents" in the county who in fact receive those services. D.R.789. 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.790 (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." D.R.790.

When the Authority applied the Need Methodology for fiscal year 2023, it showed unmet need at or above the 25-remainder threshold for at least 50 counties. *See* D.R.907-09. The counties with unmet need included all the counties covered by the certificate of need granted in this case.

2. The Authority decides certificate of need applications using detailed procedures that largely track the rules of civil procedure used in West Virginia and federal courts. In broad strokes, after the initial filings, the parties engage in discovery and motions practice, which culminates in

a pretrial-like conference and a hearing with all the trappings of a trial. *See generally* W. VA. CODE R. § 65-32-8. The process starts when an applicant notifies the Authority of its intention to file an application, and that intention is circulated in relevant newspapers, an applicant must file its application and fee within 10 days. *Id.* §§ 65-32-8.1 to 8.4. The Authority then promptly determines "whether the application is complete" or if it needs more information to decide the application. *Id.* §§ 65-32-8.6 to 8.7. Once the Authority determines an application is complete and publishes notice of its intention to decide the application, "affected persons may request a public hearing." *Id.* § 65-32-8.10. If an affected party requests a hearing, the Authority has 15 days to issue a hearing order, which contains dates for the hearing and prehearing conference and deadlines for discovery, discovery motions, subpoenas, and all other motions. *Id.* §§ 65-32-8.12 to 8.13.

All "parties may engage in discovery as provided by the West Virginia Rules of Civil Procedure." W. VA. CODE R. § 65-32-8.25. And the Authority has full subpoena power and uses Kanawha County Circuit Court to compel obedience to subpoenas. *Id.* § 65-32-8.20. The prehearing conference is an important date in the discovery process: the hearing examiner can use the prehearing conference to dispose of any pending motions. *Id.* § 65-32-8.17. That's also the date by which parties must file the evidence they intend to introduce and a list of witnesses they intend to call at the hearing. *Id.* § 65-32-8.18. And the Authority must hold a hearing within three months of issuing the hearing order. *Id.* § 65-32-8.14. At that hearing, parties have a right to cross-examine and be represented by counsel; all witnesses testify under oath; a reporter transcribes the proceedings; and normal ethics rules apply. *Id.* §§ 65-32-8.26 to 8.29. These proceedings are also governed by the Administrative Procedure Act's contested case provisions. *Id.* §§ 65-32-8.11, 8.14.

3. Panhandle Support Services, Inc. is a Medicaid-certified provider with the Medicaid Aged and Disabled Waiver Program—it provides services that "enable patients to meet their needs in their own home." D.R.34. These services include "meal preparation, bathing, dressing, medication reminders, grooming and mobility assistance." D.R.34. In June 2023, Panhandle filed a certificate of need application proposing to continue providing Medicaid in-home personal care services in five counties where the Need Methodology shows unmet need—and where Panhandle is already providing those services via a subcontracting agreement. D.R.16-144.

Several existing providers—Petitioner Putnam County Aging Program, Inc., included—opposed Panhandle's application and filed for affected party status to participate in the Authority's proceedings. D.R.165. In response, the Authority set hearings for October 6, 2023, and October 16, 2023. D.R.178. The first hearing was set "to designate the issues for the [following] hearing, resolve any procedural matters, receive any motions," and handle evidentiary issues. D.R.176. Along with scheduling these hearings, the Authority told the parties to file "[d]ispositive and preliminary motions" by October 2, 2023. D.R.179.

Leading up to the October 2 hearing, the parties engaged in extensive discovery. *See* D.R.417-506 (Panhandle's responses to interrogatories, requests for production, and requests for admission) and 507-765 (Petitioner's responses to the same). Discovery closed on September 21, 2023, before the first hearing. D.R.178.

4. On October 2, 2023, Panhandle filed a motion for summary judgment. D.R.262. In its motion, Panhandle noted that, under the Authority's need methodology, "unmet need for [Personal Care] Services exists in 53 of West Virginia's 55 counties," totaling about "12,100 West Virginian residents" who "are currently eligible for [Personal Care] Services" but "are not receiving them." D.R.265. And applying this methodology here reveals the "undisputed fact[]" that there are 678

Cabell County residents, 114 Lincoln County residents, 161 Mason County residents, 286 Putnam County residents, and 142 Wayne County residents "who have an unmet need for" Panhandle's personal care services. D.R.265. Panhandle said Petitioner wouldn't dispute the math—it'd likely just nakedly assert that "there is no actual need for [Personal Care] Services within the counties they serve." D.R.267. Further, Panhandle noted that when the Authority was setting standards, it counted the services Panhandle already provided through subcontracting agreements. D.R.267. So Petitioner's fears about a new provider and its arguments that the counties' needs were already being met was doubly wrong. D.R.268. Given these "uncontestable" facts, Panhandle asked for summary judgment. D.R.268.

Soon after, Petitioner filed its response in opposition to Panhandle's motion for summary judgment. D.R.276. That response argued two things. First, Petitioner alleged that the "2023 [Need] Methodology is inaccurate." D.R.279-80. Importantly, Petitioner did not contend that Panhandle had failed to show unmet need under the methodology, only that the methodology itself was wrong. In other words, Petitioner tacitly conceded that if the methodology was proper, Panhandle was correct that there was unmet need in the areas covered by its application. And second, Petitioner argued that Panhandle failed to show its "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.280.

Following briefing, the parties argued their positions before a representative of the Authority at the initial October 6, 2023 hearing. *See* D.R.972-97 (transcript of proceedings). One of the Authority's lawyers served as the hearing examiner for the hearing. Following the parties' arguments, which echoed their briefing, the examiner found that there was "no genuine issue of

material fact … and that Panhandle [was] entitled to judgment as a matter of law" and granted Panhandle's certificate of need application. D.R.1007.

The Authority based its decision in part on the fact that Panhandle had shown unmet need based on the certificate of need methodology. D.R.1007. The hearing examiner determined that there were no facts that Petitioner could argue that would change this fact. D.R.1007. And because the Authority "does not have the authority to overrule" the standards, summary judgment was appropriate. D.R.1005.

As to negative effect, the examiner first noted that "other services" to be considered "must be related to the services at issue in the Application." D.R.1007. Based on this, the examiner held that Petitioner's arguments regarding "other services" were legally irrelevant because those services were "wholly unrelated to the [Personal Care] Services at issue." D.R.1007. Further, the examiner found that Panhandle "ha[d] already been providing [Personal Care] Services in the target area for years." D.R.1007. As a result, Panhandle's certificate of need did not entail an expansion of services and so "w[ould] not create any new negative impact on any services offered by [Petitioner]." D.R.1007.

With both certificate need prongs established as a matter of law, the examiner granted summary judgment, and the Authority approved Panhandle's application. It is from this order that Petitioner appeals.

SUMMARY OF THE ARGUMENT

I. Summary judgment is appropriate in administrative proceedings where there is no genuine dispute of material fact. West Virginia's Administrative Procedure Act allows agencies to adopt and enforce rules, including procedures to resolve contested cases (like summary-judgment motions). The plain text of the State's APA says as much. And though the question has

not been addressed by the Supreme Court of Appeals, federal caselaw and scholarship on the issue confirms that this reading is proper.

II.A. The Authority reasonably concluded that granting Panhandle's application would meet legitimate need for in-home personal care services across West Virginia. The Authority relied on the governor-approved Need Methodology as well as the arguments and evidence from the parties. Petitioner would have the Court second-guess the Authority's finding by picking at isolated parts of the record and claiming irrelevant evidence would have changed the outcome below. But Petitioner forgets that the Court defers to the Authority's factual findings unless clearly wrong and tests its overall conclusion against the record as a whole. And with the Methodology showing unmet need in every county Panhandle wants to serve, this case is not a close one. The Supreme Court of Appeals has already blessed similar Authority standards and held that applicants can rely on them to show unmet need.

II.B. Petitioner gives no reason to strike down the standards themselves. Even assuming the Court concludes this venue is the right one for that challenge, the Authority followed the statutorily set path when it amended the standards last year. It held a task force meeting for the purpose of improving the standards. 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. And the Authority fairly considered the potential loss of subcontractor services, which upped the urgency for additional in-home personal services providers, and its change to the 1.25% multiplier was in its discretion. Petitioner has not shown otherwise.

III. The Authority reasonably concluded that Panhandle would not negatively affect Putnam County by significantly limiting other providers' (read: Petitioner's) viability. Petitioner

points to little beyond generalized fears that increased competition will harm their bottom line to some degree. And nothing it claims it would have introduced shows anything more. The Authority acted within its statutory discretion in finding those allegations of unspecified harm did not show significant detriment to the community. 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. West Virginia Agencies May Award Summary Judgment Before Holding Trial-Like Hearings.

West Virginia's APA governs the Authority's hearing processes, *see, e.g.*, *War Mem'l Hosp., Inc. v. W. Va. Health Care Auth.*, 248 W. Va. 49, 52, 887 S.E.2d 34, 37 (2023), and the APA gives agencies and their hearing examiners many powers to resolve contested cases. Those powers relevant to this case are listed in West Virginia Code Sections 29A-5-1(d)(3), (5)-(6),

which say an agency and its hearing examiners may "(3) regulate the course of the hearing, … (5) dispose of procedural requests or similar matters, and (6) take other action authorized by a rule adopted by the agency." The Authority's summary judgment procedures satisfy each of those three subdivisions.

First, the Authority uses its summary judgment procedures to regulate the course of its certificate of need hearings—exactly what happened here. Second, "administrative summary judgment" is a "procedural device." *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 606 (1st Cir. 1994); *accord* Paul M. Coltoff, et al., *Summary judgment in lieu of hearing*, 2 FED. PROC., L. ED. § 2:154 (July 2024 update) (same); Lee Modjeska, *Right to hearing*, ADMIN. L. PRAC. & PROC. § 4:14 (Aug. 2022 update) (same). So the Authority has the power to dispose of a summary judgment motion under subdivision (5). Third, summary judgment is allowed under subdivision (6) because, as part of the larger certificate of need application process, the Authority has authorized by legislative rule its hearing examiners to grant or deny "motions" at the prehearing conference. W. VA. CODE R. § 65-32-8.17.

While the unambiguous text of West Virginia APA's supports the decision below, West Virginia authorities have not explicitly examined whether agencies have summary judgment power under the State's APA. But federal authorities say a great deal about agency authority to grant summary judgment under the federal APA. That's relevant here because West Virginia courts generally interpret the State's APA "consistent with" the federal APA. *State ex rel. W. Va. Bd. of Educ. v. Perry*, 189 W. Va. 662, 666, 434 S.E.2d 22, 26 (1993); *see also W. Va. Chiropractic Soc., Inc. v. Merritt*, 178 W. Va. 173, 178, 358 S.E.2d 432, 437 (1987) (using federal APA to determine West Virginia's APA's meaning). After all, "[f]ederal and State administrative procedures acts" have the same history. *Citizens Bank of Weirton v. W. Va. Bd. of Banking & Fin. Institutions*, 160

W. Va. 220, 226, 233 S.E.2d 719, 724 (1977). In fact, not only is West Virginia's APA based on the same original text as the federal APA, *id.* at 226 n.3, 233 S.E.2d at 724 n.3, the federal APA's contested-case procedures have the same three subdivisions supporting administrative summary judgment here, *see* 5 U.S.C. § 556(c)(5) ("regulate the course of the hearing"), (9) ("dispose of procedural requests"), (11) ("take any other action authorized by agency rule").

Authorities discussing the federal APA overwhelmingly agree that agencies have the power to award summary judgment before a trial-like hearing. This power flows from both agencies' APA powers and inherent powers. Indeed, "[s]ummary judgment in administrative adjudications is well accepted." *Judgment prior to resolution of the hearing—Summary judgment*, 7 WEST'S FED. ADMIN. PRAC. § 7793 (July 2023 update); *see also* Charles H. Koch Jr. & Richard Murphy, *Judgement prior to resolution of the hearing*, 2 ADMIN. L. & PRAC. § 5:42 (3d ed. 2024 update) (saying agencies have power to grant summary judgment that tracks Federal Rule of Civil Procedure 56); Richard Murphy, *Rights to Present Evidence and Cross-Examine*, 32 FED. PRAC. & PROC. JUDICIAL REV. § 8238 (2d ed. June 2024 update) ("[A]s a prerequisite to holding a statutory hearing, an agency may require demonstration of the existence of a 'genuine' issue of 'material' fact."). Today, "hundreds of [agency] hearing programs" are using "summary judgment" procedures to resolve cases. Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U.L. REV. 377, 433 (2021). Indeed, "most major agencies in the federal system have opted to make available procedures for the summary disposition of adjudicatory matters." *Puerto Rico Aqueduct*, 35 F.3d at 606. Nationwide consensus is that a party is entitled to a hearing only once they show "that there is a dispute worth hearing," so when "there is no issue" of material fact, "a hearing is not required"—"even when a statute prescribes a hearing." 73A C.J.S. *Public Administrative Law and Procedure* § 308 (May 2024) (collecting federal and

state cases). So under modern administrative law, an agency needn't waste its time with "a meaningless evidentiary hearing" if there are no disputed facts—e.g., when "the only questions involved in an administrative proceeding are of law or administrative policy." *Id.*; *see also* Coltoff, et al., *supra*, § 2:154.

Federal case law backs up this scholarship. The Supreme Court long ago "justif[ied] administrative summary judgment … in the context of procedural due process." Alexander I. Platt, *Unstacking the Deck: Administrative Summary Judgment and Political Control*, 34 YALE J. ON REG. 439, 444 (2017). In cases like *United States v. Storer Broad. Co.*, 351 U.S. 192, 205 (1956), and *FPC v. Texaco*, 377 U.S. 33, 39 (1964), the Court affirmed administrative summary judgment awards given without formal hearings, saying that agencies could "bar[]" applicants "at the threshold" when necessary. And in *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 617 (1973), the Court said that the because the FDA reduced its summary-judgment "standard to detailed regulations," its "so-called administrative summary judgment procedure [was] appropriate." The Court found no statutory or constitutional reason to "demand[] a hearing when it appears conclusively from the applicant's 'pleadings' that the application cannot succeed." *Id.* at 621. Since then, the Court has consistently upheld federal agency use of administrative summary judgment procedures. *See*, *e.g.*, *Heckler v. Campbell*, 461 U.S. 458, 467 (1983); *Costle v. Pacific Legal Found.*, 445 U.S. 198, 213-14 (1980); *Nat'l Indep. Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 398-99 (1976).

And naturally, the federal circuit courts agree. For instance, the D.C. Circuit has "reaffirm[ed]" time and again "the propriety of administrative summary judgment" when a "hearing can serve no useful purpose." *Hess & Clark, Div. of Rhodia, Inc. v. FDA*, 495 F.2d 975, 985 (D.C. Cir. 1974); *see also Am. Cyanamid Co. v. FDA*, 606 F.2d 1307, 1323 (D.C. Cir. 1979)

(observing that "FDA may properly enter administrative summary judgment"); *accord Consol. Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 279 (D.C. Cir. 1986); *SmithKline Corp. v. FDA*, 587 F.2d 1107, 1119 (D.C. Cir. 1978); *Cooper Lab., Inc. v. FDA*, 501 F.2d 772, 780 (D.C. Cir. 1974). As it said in *John D. Copanos & Sons, Inc. v. FDA*, the Supreme Court's summary judgment principles as articulated in *Anderson v. Liberty Lobby* "apply with equal force in the context of administrative judgment." 854 F.2d 510, 523 (D.C. Cir. 1988) (citing *Veg–Mix, Inc. v. Dep't of Ag.*, 832 F.2d 601, 607-08 (D.C. Cir. 1987)); *see also id.* at 520 (noting that an agency can, in some contexts, even award summary judgment without "precise regulations specifying the type of evidence necessary to justify a hearing").

Other federal circuit courts have joined the D.C. Circuit in embracing administrative summary judgment—the First Circuit's powerful defense of the procedure in *Puerto Rico* being the best example. 35 F.3d at 600. There, the court held that "[t]o force an agency fully to adjudicate a dispute that … can have no bearing on the disposition of the case, would be mindless, and would suffocate the root purpose for making available a summary procedure." *Id.* at 605. Indeed, any argument that agencies lack a Rule 56-like summary judgment power "is sheer persiflage," it said. *Id.* "Administrative summary judgment is not only widely accepted, but also intrinsically valid. An agency's choice of such a procedural device is deserving of deference under 'the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.'" *Id.* at 606 (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 544 (1978)). Due process doesn't "require an agency to convene an evidentiary hearing when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way." *Id.* Thus, "administrative summary judgment, properly configured, is an acceptable procedural device." *Id.* A decade later, in *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743,

750 (6th Cir. 2004), the Sixth Circuit said the same thing: "it would seem strange if disputes could not be decided without an oral hearing when there are no genuine issues of material fact." And "it would be bizarre if administrative agencies, which are in many respects modeled after the federal courts and which indeed often have more informal proceedings than federal courts, could not follow" Rule 56-like procedures. *Id.* So the court held that the HHS rule in *Crestview* "allowing ALJs to grant summary judgment without an in-person hearing [wa]s valid." *Id.*

And really, this isn't a close question: circuit opinion after circuit opinion has held that agencies can grant summary judgment *before* a hearing. *See*, *e.g.*, *Shah v. Azar*, 920 F.3d 987, 996 (5th Cir. 2019) ("[I]t is well-established that an ALJ is empowered to decide a case on a motion for summary judgment without an evidentiary hearing."); *Pennsylvania v. Riley*, 84 F.3d 125, 130 (3d Cir. 1996) ("An administrative agency need not provide an evidentiary hearing when there are no disputed material issues of fact."); *Travers v. Shalala*, 20 F.3d 993, 998 (9th Cir. 1994) ("Since there were no disputed issues of material fact, a plenary, adversary administrative proceeding involving evidence, cross-examination of witnesses, etc., was not obligatory." (cleaned up)); *Walled Lake Door Co. v. NLRB*, 472 F.2d 1010, 1014 (5th Cir. 1973) ("If there is nothing to hear, then a hearing is a senseless and useless formality."); *accord Fal–Meridian, Inc. v. DHHS*, 604 F.3d 445, 449-450 (7th Cir. 2010); *Cedar Lake Nursing Home v. DHHS*, 619 F.3d 453, 457 (5th Cir. 2010); *Gattegno v. Admin. Rev. Bd.*, 353 F. App'x 498, 499 (2d Cir. 2009); *Big Bend Hosp. Corp. v. Thompson*, 88 F. App'x 4, 7 n.4 (5th Cir. 2004); *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 68-69 (2d Cir. 2000); *Adams v. EPA*, 38 F.3d 43, 53 (1st Cir. 1994); *United States v. Cheramie Bo–Truc No. 5, Inc.*, 538 F.2d 696, 698 (5th Cir. 1976); *Nat'l Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 704 (2d Cir. 1975); *E. R. Squibb & Sons, Inc. v. Weinberger*, 483 F.2d 1382, 1384 (3d Cir. 1973).

In short, across all districts and States and in every possible regulatory context, "[i]t is common practice for an agency to issue administrative summary judgement, whereby the agency dispenses with an evidentiary hearing." *New England Tel. & Tel. Co. v. Conversent Comms. of R.I., L.L.C.*, 178 F. Supp. 2d 81, 93 (D.R.I. 2001); *see also Fuentes v. Becerra*, No. 4:20-cv-26, 2021 WL 4341115, at *12 (W.D. Va. Sept. 23, 2021) (saying "it is well-established that an ALJ is empowered to decide a case on a motion for summary judgment without an evidentiary hearing"); *accord Pringle v. Wheeler*, 478 F. Supp. 3d 899, 905 (N.D. Cal. 2020); *Nesby v. Yellen*, No. 2:18-cv-1655, 2022 WL 1091916, at *4 (W.D. Pa. Apr. 12, 2022); *Nawaz v. Price*, No. 4:16-cv-386, 2017 WL 2798230, at *3 (E.D. Tex. June 28, 2017); *Cmty. Home Health v. DHHS*, No. 7:08-cv-168, 2010 WL 11561593, at *6 (N.D. Ala. Feb. 24, 2010), R&R adopted, No. 7:08-cv-168, 2010 WL 11561592 (N.D. Ala. Mar. 23, 2010).

Relying on this wealth of federal case law, States have followed suit with their own APAs. In *Henderson v. Popolizio*, 565 N.E.2d 482, 484 (N.Y. 1990), for example, the New York Court of Appeals held that "administrative summary judgment … is not inconsistent with the requirements of due process or prohibited by the Federal regulation." Massachusetts's high court has repeatedly held that administrative summary judgment "does not contravene the requirements of either the [APA] or due process." *Pepin v. Div. of Fisheries & Wildlife*, 4 N.E.3d 875, 888 (Mass. 2014); *see Kobrin v. Bd. of Registration in Med.*, 832 N.E.2d 628 (Mass. 2005). This includes when an agency uses administrative summary judgment "to dispense with a hearing" because "the papers or pleadings filed conclusively show on their face that the hearing can serve no useful purpose, because a hearing could not affect the decision." *Mass. Outdoor Advert. Council v. Outdoor Advert. Bd.*, 405 N.E.2d 151, 156-57 (Mass. 1980). As a Connecticut Superior Court put it: "Due process does not require a hearing when it appears that the complainant cannot

succeed. Threshold requirements before a hearing is held do not violate due process." *Torres v. Conn. Comm'n on Hum. Rts. & Opportunities*, No. CV 950323545S, 1999 WL 171521, at *5 (Conn. Super. Ct. Mar. 11, 1999) (cleaned up).

So it appears that the state courts' consensus lines up with the federal courts' views. *See Giles v. Lab. Comm'n*, 2005 UT App 4, 2005 WL 27539 (noting that Utah's agencies can grant motions for summary judgment under its APA); *Verizon Nw., Inc. v. Wash. Emp. Sec. Dep't*, 194 P.3d 255, 260 (Wash. 2008) (permitting agencies to decide cases on summary judgment); *Owsley v. Idaho Indus. Comm'n*, 106 P.3d 455, 458 (Idaho 2005) (using a summary-judgment like procedure); *Contini v. Bd. of Educ. of Newark*, 668 A.2d 434, 442 (N.J. Super. Ct. App. Div. 1995) (relying on federal APA and interpreting case law in affirming the validity of an agency's "summary decision procedures"); *cf. Time Warner Cable Info. Servs. (N.C.), LLC v. Duncan*, 656 F. Supp. 2d 565, 575 (E.D.N.C. 2009) (noting that a state law used administrative summary judgment).

And this outcome makes sense. After all, state and federal courts see significant, "obvious" policy advantages to administrative summary judgment. *Puerto Rico*, 35 F.3d at 605-06. Efficiency, for one. "[G]iven the volume of matters coursing through an agency's hallways, efficiency is perhaps more central to an agency than to a court." *Id.* at 605. So it might "make as good, if not more, policy sense to have a standard for summary judgment in … administrative proceedings as it does to have one in federal court proceedings." *Crestview*, 373 F.3d at 750. The American legal system has embraced administrative summary judgment, in part, "as a way to avoid costly hearings wherever the benefits (reduced procedural costs) outweigh the costs (inaccuracy)." Platt, *supra*, at 444. For example, because undisputed "legislative facts … dominate most rulemaking," administrative summary judgment allows agencies "to eliminate almost all

testimonial proceedings." Richard Murphy, *Formal Rulemaking*, 32 FED. PRAC. & PROC. JUDICIAL REV. § 8186 (2d ed. June 2024). Another advantage is that because there are no juries in administrative proceedings, and because the adjudicators are policy experts, "[t]he question of whether any disputed facts may be 'material' is easier" to settle. Koch Jr. & Murphy, *supra,* § 5:42. And resolving actions on summary judgment is actually "less jarring in the administrative context" than the civil-courts context because administrative litigants don't usually expect "full-dress jury trials." *Puerto Rico*, 35 F.3d at 606. And because "the prototype for administrative summary judgment procedures" is Rule 56—which itself has a familiar, stable "jurisprudence"—for most litigators the nuts and bolts of administrative summary judgment are old hat. *Id.*

Against all this, Petitioner can only insist that Section 29A-5-1(d) does not expressly mention summary judgment "in the list of explicit statutory powers." Pet'r's Br. 15. But even if that were true (and, as should be clear to this point, it's not), that's not the relevant question. "It is well established that there are certain circumstances in which an agency may perform a function that is implied, but not specifically permitted, by statute." *Benjamin v. Walker*, 237 W. Va. 181, 188, 786 S.E.2d 200, 207 (2016) (cleaned up). That authority includes such "powers as are necessarily or reasonably incident to the powers granted." *Id.* (cleaned up). Petitioner never even tries to explain why the power to grant summary judgment is not an *implied* part of an agency's right to conduct its own hearings, especially considering the background principles described above. And in the end, Petitioner seems to conceive of the hearing examiner as little more than an administrative secretary. Nothing in West Virginia law supports that narrow conception of the role. *See, e.g.*, *Varney v. Hechler*, 189 W. Va. 655, 661, 434 S.E.2d 15, 21 (1993) (describing how a hearing examiner "considered and dealt with" proposed findings of fact).

As for Petitioner's argument that summary judgment was "premature," Petitioner can speak only in generalities. Petitioner had an opportunity to respond to the motion for summary judgment and identify whatever evidence it might like that could support its case. Though Petitioner now suggests that something might have happened at the hearing that could have helped it further develop its case, Petitioner has never identified what the evidence might be or explained why it was unable to at least describe it in response to the motion for summary judgment. It certainly did not provide an affidavit explaining why it need more information or time, which his the ordinary requirement for a party opposing summary judgment. *See Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 62, 459 S.E.2d 329, 339 (1995). "[A] party may not simpl[y] assert in its brief that discovery was necessary and thereby overturn summary judgment," as Petitioner tries to do here. *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 702, 474 S.E.2d 872, 882 (1996).

Thus, like every other federal or state agency, the Authority was within its power to rule on a summary judgment motion in this case. And it properly did so here.

II. The Authority Reasonably Found That Letting Panhandle Enter The Market Will Address Unmet Medical Needs.

On the merits, Petitioner's main argument is that the record doesn't show unmet need in the counties the certificate of need covers. And Petitioner is correct 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. The Authority's in-home personal care services standards similarly require applicants to show "an unmet need for the proposed service." D.R.789. But Petitioner is wrong that the Authority's decision fails on this score. Under the proper standard of review—and setting aside unfounded attacks on the Authority's Need Methodology—the Authority's finding of unmet need is proper, and no evidence Petitioner introduced or could have

introduced changes that. Thus, "there [was] no genuine issue as to any material fact" related to the presence of unmet need. *Goodwin v. Shaffer*, 246 W. Va. 354, 358, 873 S.E.2d 885, 889 (2022). So, the Authority's ruling to that effect was correct.

A. The Authority properly relied on the 2023 Need Methodology to support its finding of unmet need.

Petitioner errs in insisting that "Panhandle would have been unable to show an actual unmet need." Pet'r's Br. 19. To the contrary, the Authority found that each of the counties covered by the certificate of need "have existing need for [Personal Care] services based on the need methodology outlined by the approved 2023 [Personal Care] Standards." D.R.1004. And satisfying the Methodology shows unmet need, so summary judgment on that question was proper.

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 five counties at issue. D.R.781. And it's no close call either: each of the counties covered by the significant of need have a remainder over 100—more than *quadruple* the amount denoting unmet need. *See* D.R.781 (showing remainders of 678 in Cabell County, 114 in Lincoln County, 161 in Mason County, 286 in Putnam County, and 142 in Wayne County).

And Petitioner makes no effort to show that the Authority's unmet need findings under the Need Methodology are incorrect. Instead, Petitioner merely asserts that Panhandle failed to "present[] any actual evidence of unmet need." Pet'r's Br. 22. But Petitioner then directly admits that Panhandle indeed showed unmet need by "rel[ying] … on the 2023 Need Methodology." *Id.*

So Petitioner seems to agree that if the Authority can rely on the Need Methodology, that's enough to show unmet need. It can.

Though you wouldn't know it from Petitioner's brief, the Supreme Court of Appeals greenlit the Authority to rely on 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 ("[T]he 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.).

The Need Methodology showed a certificate of need was warranted in this case. Thus, the Authority "cannot be said to have exceeded its constitutional or statutory authority or to be arbitrary or capricious" in relying on that methodology and finding unmet need. *Amedisys*, 245 W. Va. at 415, 859 S.E.2d at 358 (cleaned up).

And none of the evidence Petitioner says it wanted to introduce would have changed the Authority's finding of unmet need. As Petitioner points out, the Authority "relied on its 2023 Need Methodology calculations to find an unmet need existed." Pet'r's Br. 9. Yet Petitioner did

not—and could not—plan to bring in any evidence that those calculations were wrong, based on incorrect data, or otherwise improper. Rather, Petitioner sought to introduce testimonial evidence that it claims would have shown there was no "actual evidence of unmet need." Pet'r's Br. 22. For one thing, Petitioner fails to explain what "actual" evidence means and instead just suggests that it is somehow separate from the Need Methodology, despite the latter's use of real-world data. But in any case, there is no legal requirement that the Authority rely only on testimonial evidence, let alone that it must do so to the exclusion of the Need Methodology's calculations.

But even on its own terms, Petitioner's proposed testimonial evidence does not undermine the Authority's finding of unmet need. Petitioner makes much of the fact that in his deposition, Adkins 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." Pet'r's Br. at 21-22. (citing Adkins' deposition from a separate certificate of need proceeding). So in one statement, Adkins simply said he lacked two specific types of data that *could* show unmet need. And in his second statement, he was just confessing to a lack of knowledge about whether a waiting list exists, but 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 Petitioner makes it out to be. In other words, Adkins did not testify "he was unaware of any" unmet need, only that he does not know if a waiting list is kept at all under any circumstances. Pet'r's Br. 21.

Petitioner's remaining proposed evidence fares no better. Petitioner points 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. 22 (quoting D.R.883). But the email's "adamant[]" tone, Pet'r's Br. 22, shows only—consistent with the quote Petitioner offers from Adkins—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 though Petitioner may have introduced testimony that they haven't "turn[ed] away any new" clients, Pet'r's Br. 22, that evidence would not 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 Exam'rs 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.*

B. The Need Methodology is valid.

With the Authority's unmet need calculations firmly against them, all Petitioner has left is a last-ditch attack on the Need Methodology itself. The Court should resist it.

To begin, Petitioner "does 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 previous challenge in circuit court was the better venue. Pet'r's Br. 33. The Authority agrees. 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 Need Methodology sails 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).

In this case, the Authority specifically noted that the methodology is "established" and must be applied. D.R.995:22. Further, the Authority found that did "not have the authority to overrule the Governor's approval of the 2023 [Personal Care] Standards." D.R.1005. Given the authority's involvement in the process, that finding shouldn't be a surprise.

Petitioner does 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. 22 n.1, can be set aside as quickly as they made it: though "the Authority has statutory *authority* to revise and upgrade the Standards," Petitioner 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).

Petitioner's objections to the task force falter, too. It says meeting once wasn't good enough. Pet'r's Br. 26-28. 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. 27). 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 17, 2024) (emphasis added). Petitioner gives no law suggesting otherwise.

Nor does Petitioner substantiate its claim that it was "clear … the meeting that was held was nothing more than a formality." Pet'r's Br. 28. And Petitioner leans too heavily on claiming that Adkins believed "more than one meeting was going to be needed." Pet'r's Br. 27. One member of the task force's subjective beliefs about how best to proceed do not change the statutory requirements and legally bind the task force's operations going forward. And though Petitioner objects that ditching the "increase from 1.25% to 3%" was not a change implemented following the task force meeting, they don't explain how not getting the outcome they wanted means the task force failed in its information-gathering role.

Finally, Petitioner says 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. 28. But here again, Petitioner doesn't engage with 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). Again, Petitioner may not agree with the result, but the statute does not call for "majority" rule. Pet'r's Br. 28. 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, Petitioner also cannot show that changing the multiplier from 1.25% to 3% was arbitrary and capricious. Pet'r's Br. 24-26. They think the Authority made that change for "the sole purpose of reacting to regulations that may or may not be implemented"—those regulations being BMS's planned policy change to "eliminate subcontracting" in the personal services space. Pet'r's Br. 24. Petitioner points to nothing supporting this claim. But even if they had, it would be wrong to imply it is a bad reason for the change.

In a subcontractor-free world, existing providers would be forced to either absorb the new patients or there would be individuals who go without services. Petitioner does not dispute this reality and thus seems to agree it is a relevant consideration. Rather, Petitioner simply objects 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 educated guesses for projected need years down the line. Waiting until problems have reached their boiling point—as Petitioner's argument would require—is a dangerous alternative.

Petitioner thinks 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. 25. 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 Petitioner (or more to the point, this Court, *see Harrison*, 227 W. Va. at 440, 711 S.E.2d at 262) 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. In any event, Petitioner provides 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 Petitioner 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.

III. The Authority Reasonably Found That Allowing Panhandle To Enter The Market Would Not Significantly Limit Other Community Services.

Petitioner next challenges the Authority's conclusion that the certificate of need will not negatively affect the communities Panhandle will serve. This claim is limited to Putnam County. Pet'r's Br. 30 (explaining "it will become more difficult to provide services in Putnam County"); *id.* (saying Petitioner "uses the income" from Medicaid in-home personal care services "to provide additional services" in the county). So at most Petitioner's 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, Petitioner's claim falls even on its own terms.

Recall 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 Petitioner challenges above. But here, Petitioner agrees 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.789. The Authority reasonably found that prong satisfied.

In its decision, the Authority explained it had considered the full record and concluded that it "show[ed] no genuine issue of material fact." D.R.1007. Part of that record included Panhandle's explanation that in areas with unmet need, granting them a certificate of need would have "limited impact on the utilization and operations of similar services offered by existing providers." D.R.128. Given that the methodology showed a high level of unmet need in those areas, this makes sense.

Further, Panhandle pointed out that in Putnam County, it "already provide[d] … services through subcontracting," thus its application would "not result in any changes of services in the area." D.R.128. Panhandle explained that its members appreciated "having the choice of agency" its services enabled in Putnam County. D.R.142. For that reason, Panhandle's "members currently being served show[ed] support and endorsement" for the grant of a certificate of need. D.R.142. In other words, Panhandle had no intention to *expand* its services, and therefore, the certificate of need "w[ould] not have an effect on health services in the area." D.R.128. The only impact that the Authority's decision had was to allow Panhandle to forego subcontracting and instead operate under its own certificate of need. Given the lack of possible negative impact, "there [was] no genuine issue of fact to be tried," making summary judgment appropriate. Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 148 W. Va. 160, 133 S.E.2d 770 (1963).

The Authority also considered Petitioner's argument that their "other services" would be impacted by granting Panhandle a certificate of need. D.R.1007. As a threshold matter, the Authority held that the "other services" referenced in the certificate of need process "must be

related to the services at issue in the Application." D.R.1007. So it was unnecessary to consider the impact on Petitioner's other services, "such as food delivery services, which are wholly unrelated to the [Personal Care] Services at issue here." D.R.1007. But even considering unrelated services like those raised by Petitioner, the Authority noted that Panhandle "ha[d] already been providing [Personal Care] Services in the target service area for years." D.R.1007. And without evidence of intention to modify services from Panhandle, the Authority found that "granting a [certificate of need] to Panhandle w[ould] not create any new negative impact on any services offered" by Petitioner. D.R.1007. 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. And given that the evidence Petitioner wanted to bring in was unnecessary "to clarify the application of the law," the Authority was right to grant summary judgment. Syl. pt. 2, *Bradley v. Dye*, 247 W. Va. 100, 875 S.E.2d 238 (2022).

Petitioner has a heavy task in convincing the Court to overturn that judgment. Again, under the "deferential" standard of review, it takes a lot 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). 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 Petitioner's arguments fall short.

First, the Authority reasonably found that Panhandle operating under a certificate of need rather than by subcontracting "w[ould] not create any new negative impact on any services offered by [Petitioner]." D.R.1007; *Contra* Pet'r's Br. 29. Petitioner doesn't indicate any evidence in the record or that they could have produced showing otherwise. They argue merely that Panhandle having a certificate of need will "result in lost resources, clients, and employes" but only with regard to Petitioner's "nutritional and transportation services." Pet'r's Br. 29. But Petitioner does nothing to make its fears concrete. It does not explain how many clients or employees it thinks it might lose or identify any other "empirical data" the Authority missed in evaluating this claim. Indeed, Petitioner is a not new market entrants struggling to build a client base or earn employee loyalty—they have served their community well "for years." Pet'r's Br. 29. And neither is Panhandle, who has also been "providing [Personal Care] Services within the target service area for many years." D.R.1005. So when the certificate of need would not change the organization's operational "status quo," D.R.985:12—meaning services covered under the certificate of need would not be functionally changed in the area—it was wasn't arbitrary and capricious for the Authority to grant summary judgment on Petitioner's futile arguments. D.R.1007.

Indeed, Petitioner could not have introduced evidence that the certificate of need "w[ould] have a negative effect on existing services." Pet'r's Br. 29. No part of Panhandle's application indicated an intention to increase or otherwise modify services. Indeed, Panhandle expressed that it sought the certificate only to get its be "capable of determining its own future as opposed to being under the thumb of a contracting entity." D.R.985:14-16. Yet without support, Petitioner asks 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." Pet'r's Br. 29. Again, though, Panhandle already operates in the area, so granting it a certificate of need will not increase competition. But even if it would increase competition, Petitioner points 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 Panhandle's proposed services will "*significantly* limit[] the availability and viability of other services or providers." D.R.789 (emphasis added). Petitioner seems to recognize this wrinkle in arguing that they may lose clients "[p]otentially to the point [it] is ousted from providing services." Pet'r's Br. 30. But "potentially" is a hedge, and, anyway, Petitioner itself conceded below that it "d[idn't] have any facts in the record" demonstrating this would happen to any degree—let alone a significant one. D.R.995:9-10.

And though Petitioner skirts around it, "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); *see also*, *e.g.*, *Evans v. United States*, 978 F. Supp. 2d 148, 166 (E.D.N.Y. 2013) ("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 Petitioner's 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 Petitioner's concern that less Medicaid income from in-home personal care services might mean Petitioner can spend less on transportation and nutrition services. Pet'r's Br. 29-32. On the legal side, the Authority concluded that "'other services' must be related to the services at issue in the Application." D.R.1007. And it also found that the services Petitioner calls attention to "are wholly unrelated to the [Personal Care] Services at issue here." D.R.1007. 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), 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 Petitioner says in response is that an Authority employee might hold a different view. Pet'r's Br. 31-32. Its reading of the few transcript lines it cites is both beyond the record and questionable on its own terms—wanting to avoid "a situation where you're robbing Peter to pay Paul," for instance, Pet'r's Br. 31-32, 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: Petitioner has zero authority for the idea that what one of the Authority's employees thinks can trump the Authority's own judgment.

And the evidence the Authority precluded Petitioner from introducing does not change this. Petitioner again cannot substantiate its fears that competition will leave them with "less and less" to spend on non-personal care services. Pet'r's Br. 31. Indeed, it admits ten providers already compete with them "in Putnam County alone." Pet'r's Br. 30. 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. Petitioner does not even try to explain how. Thus, the Authority was not "clearly wrong" to find that granting a certificate of need to Panhandle—who already operates in the area—would not create a significant negative impact. *Minnie Hamilton Health Care Ctr.*, 2023 WL 2424614, at *2. Without any "issues to be tried," summary judgment was the proper route. *Gentry v. Mangum*, 195 W. Va. 512, 519, 466 S.E.2d 171, 178 (1995).

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 determined "there [was] no genuine issue of fact … and inquiry concerning the facts [was] not desirable to clarify the application of the law." D.R.1006 (quoting *Payne v. Weston*, 195 W. Va. 502, 506, 466 S.E.2d 161, 165 (1995)). Petitioner hasn't met its burden to set that judgment aside.

CONCLUSION

This Court should affirm the Authority's decision.

Respectfully submitted,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 24-ICA-98

PUTNAM COUNTY AGING PROGRAM, INC.,

***Affected Party Below, Petitioner*,**

v.

PANHANDLE SUPPORT SERVICES, INC.,

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 25th day of July, 2024.

/s/ Michael R. Williams
Michael R. Williams