IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 24-504

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STATE OF WEST VIRGINIA EX REL.
SCOTT A. ADKINS, in his official capacity as
Acting Commissioner of WORKFORCE WEST
VIRGINIA and WORKFORCE WEST
VIRGINIA,

Petitioners,

v.

HONORABLE JENNIFER BAILEY, Judge of the
Circuit Court of Kanawha County, West Virginia,
and DEBORAH BEHELER BALDWIN, DENNIS R. CHAMBERS,
LINDA WARNER, ASHLEAH MURPHY, KELLY HARDY,
and BRITTANY GANDEE,
on their behalf and on behalf of all others similarly situated,

Respondents.

Response to Petition for Writ of Prohibition

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RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Come now the Respondents, Deborah Beheler Baldwin, Dennis R. Chambers, Linda Warner, Ashleah Murphy, Kelly Hardy, and Brittany Gandee ("Respondents"), by counsel, and respond to the *Verified Petition for Writ of Prohibition* filed by Petitioners, Scott A. Adkins, in his capacity as acting Commissioner of WorkForce West Virginia, and WorkForce West Virginia ("Petitioner" or "WorkForce"). Petitioner has failed to meet the stringent standard for a writ of prohibition, has not shown lack of subject matter jurisdiction, has not shown that the circuit court exceeded its legitimate powers, or shown clear error as a matter of law in the decisions of the court below. Therefore, the petition for a writ of prohibition should be denied. In further opposition, Respondents state as follows:

STATEMENT OF THE CASE

Deborah Baldwin

In March of 2020, Respondent Deborah Beheler Baldwin ("Mrs. Baldwin") was employed at Alliance Oncology in Charleton, West Virginia, when she was placed on part-time employment due to the Covid-19 pandemic, after which she was told to file claims with Petitioner for unemployment compensation benefits. Appx.000002 ¶ 1, Appx.000326. When Mrs. Baldwin tried contacting WorkForce for assistance with her claim, she was unable to reach anyone. Appx.00326 ¶ 2.

Mrs. Baldwin filed a claim with WorkForce for unemployment compensation benefits on or about April 5, 2020, and Petitioner made the determination to provide Mrs. Baldwin unemployment benefits the same month. Appx.000002 ¶ 3. After receiving benefits for approximately three months, Mrs. Baldwin regained full-time employment and her unemployment

benefits ended. Thereafter, she did not hear from Petitioner for three (3) years. Appx.000002 ¶ 4.

However, in the Summer of 2023, Mrs. Baldwin received an envelope from the State of West Virginia. The envelope contained a letter from Petitioner dated July 26, 2023, indicating there may be an 'overpayment' regarding payments to her in 2020, and asked for a telephone call. Mrs. Baldwin then received an identical letter dated August 2, 2023, and she assumed the letters were mistakes. Appx.000002 ¶ 5, Appx. 000325, Appx.0000398-000399.

One week later, WorkForce mailed a third document dated August 9, 2023 – an "**Overpayment Determination**" – setting forth its decision that the agency had overpaid Mrs. Baldwin by $2,054.00 for the weeks of "04/11/20 to 04/18/20" and "05/09/20". Appx.000003 ¶ 6, Appx.000400. The letter included statements that:

> "You are required to repay to the Commissioner the amount of this overpayment;"
>
> The determination "will become final" unless appealed within eight days of the letter's date; and
>
> Provided instructions for sending payment by check or money order.

Appx.000003 ¶ 6, Appx.000400. The letter also set forth that:

> "This determination was made in accordance with West Virginia Unemployment Compensation Law".

Appx.000003 ¶ 6, Appx.000400. Mrs. Baldwin submitted a letter to appeal the determination, (Appx.000230), and a hearing was set for the appeal to occur (Appx.000003 ¶ 9, Appx.000330-000331), and on August 29, 2023, WorkForce mailed Mrs. Baldwin a copy of its response to her appeal, which included the following language, which it represented to be West Virginia law:

§ 21A-10-21 West Virginia Unemployment Compensation Law:

> A person who, by reason of error, irrespective of the nature of said error, has received a sum as a benefit under this chapter, shall either have such sum deducted from a future benefit payable to him or shall repay to the commissioner the amount which he has received.

Appx.000003 ¶ 10, Appx.000332-000343, at 000343. However, Petitioner had misquoted *West Virginia Code* § 21A-10-21 in their letter. The actual heading, and actual text of the statute, are as follows:

§ 21A-10-21. Recovery of benefits paid through error; limitation.

> A person who, by reason of error, irrespective of the nature of said error, has received a sum as a benefit under this chapter, shall either have such sum deducted from a future benefit payable to him or shall repay to the commissioner the amount which he has received. Collection shall be made in the same manner as collection of past due payment: Provided, That such collection or deduction of benefits shall be barred after the expiration of two years.

W. Va. Code § 21A-10-21 (bold emphasis original; emphasis added by underline).

Although the full text of *West Virginia Code* § 21A-10-21 is only one paragraph, the only portion omitted from Petitioner's quotation was the one sentence containing a two-year time limit within which Petitioner may engage in collections or deductions. Appx.000004 ¶ 12; Appx.000343. Moreover, the language Petitioner substituted for the true heading bears no resemblance to the actual heading of *West Virginia Code* § 21A-10-21, and provides no indication of a "**limitation**" on the time or manner of Petitioner's collections. Appx.000004 ¶ 13, Appx.000343. *See also*, *W. Va. Code* § 21A-10-21 (bold original).

Petitioner's omission of the final sentence in *West Virginia Code* § 21A-10-21, and fabricating language to substitute for the statute's heading, are a repeated course of conduct. The same misquotation of the statute appears elsewhere in the record of appeal responses mailed to

another claimant whose overpayment determinations by Petitioner occurred more than two (2) years following payment. Appx.000004 ¶ 14, Appx.000375-378, at 376. The omission, and the fabrication of language to substitute for the statute's heading, were intentional. Appx.000004 ¶ 15.

Petitioner's August 9, 2023, Overpayment Determination regarding Mrs. Baldwin occurred more than two (2) years after the payments at issue, applicable to the weeks of "04/11/20 to 04/18/20" and "05/09/20". Appx. 000005 ¶ 16, Appx.000328. Neither Petitioner's Overpayment Determination, nor any document pertaining to Petitioner's determination, alleged any act of non-disclosure, misrepresentation, or fraud by Mrs. Baldwin. Appx. 000005 ¶ 18, Appx. 000326-000343, Appx.0000398-000400.

Dennis Chambers

In 2020, Respondent Dennis R. Chambers ("Mr. Chambers") was working at the Charleston Coliseum and Convention Center, when the Covid-19 pandemic caused the widespread cancellation of public events, resulting in his filing a claim with Petitioner for unemployment benefits in or about April of 2020, by answering questions over the phone. Appx.000005 ¶ 19, Appx.000344, Appx.000196.

Petitioner made the determination to grant unemployment benefits, and Mr. Chambers received benefits for approximately five (5) months -- May, June, July, August, and September of 2020. Appx.000005 ¶ 20, Appx.000196. After receiving unemployment benefits in 2020, Mr. Chambers did not hear from Petitioner for nearly two-and-a-half (2 ½) years, during which time his mailing address did not change. Appx. 000005 ¶ 21, Appx.000196.

Mr. Chambers received an envelope from the State of West Virginia with a letter dated January 19, 2023. Appx.000006 ¶ 22, Appx.000240. The letter alleged there was a "balance due"

on an "overpayment" by Petitioner of $4,106.00. Appx.000006 ¶ 22, Appx.000240. The letter warned that "If no agreement of restitution is established, your account may be subject to:

- wage garnishment - federal tax refund interception."

Appx.000006 ¶ 23, Appx.000240.

The letter did not provide appeal rights to Mr. Chambers. Appx.000006 ¶ 24, Appx.000240. Mr. Chambers assumed the request for payment was valid and lawful, and feared that state government would pursue him if he did not pay the amount requested. Appx.000006 ¶ 25, Appx.000197. He also feared that the state government would institute a wage garnishment, intercept tax refunds, and withhold future benefits if he failed to pay. Appx.000006 ¶ 25, Appx.000197.

Acting on the letter's instruction to contact "our collection department" to make repayment arrangements, Mr. Chambers found a WorkForce office and paid the full amount WorkForce requested, or $4,106.00. Appx.000006 ¶ 26, Appx.000133-000134. Mr. Chambers asserts that neither the January 19, 2023, letter nor any other document received in the mail from WorkForce had indicated a possible nondisclosure, misrepresentation, or any other problem regarding Mr. Chambers' payments[1]. Appx.000006 ¶ 27, Appx000132.

Linda Warner

In 2020, Linda Warner was working at a restaurant in South Charleston, West Virginia, when the Covid-19 shutdown caused her to lose work, and she applied for unemployment benefits in or about March of 2020. Appx.000007 ¶ 29, Appx.000135-000136. Ms. Warner received

[1] WorkForce asserts in its Petition that Mr. Chambers failed to disclose a proper form of identification and that WorkForce had requested this from him several times. Appx.000006 Fn 2, Appx.000632). To the extent this would constitute a payment by reason of error, a non-disclosure or a misrepresentation under the unemployment statutes at issue, Respondents assert that these notices were sent only by email (Appx.000006 Fn 2, Appx.000469-000471, 000477, 000482-000483) several months after benefits ended (Appx.000506-000512) and Mr. Chambers verified under oath that no such notices were received. Appx.000006 Fn 2, Appx.000197.

benefits until approximately May of 2021, and made sure that all her weekly reports were submitted to WorkForce regarding work activity and pay. Appx.000135-000136. In late April and May of 2023, WorkForce began sending letters to Ms. Warner, claiming she owed WorkForce thousands of dollars in "overpayments." Appx.000007 ¶ 31, Appx.000137-000141.

This was the first Ms. Warner had heard of any possible problem with the benefits paid by WorkForce over two (2) years earlier, although all her contact information had remained the same. Appx.000007 ¶ 32, Appx.000135-000136. The letters were a few days apart, but claimed she owed five (5) different amounts to WorkForce -- $8,240.00 in two letters, $3,012.00 in another letter, $2,336.00 in yet another letter, $1,200.00 in still another letter, and $404.00 in a sixth letter. Appx.000007 ¶ 33, Appx.000135-000136. Ms. Warner immediately appealed WorkForce's 'Overpayment Determinations',and sent letters of appeal each time she received one. Appx.000007 ¶ 34, Appx.000143-000147. At first, WorkForce scheduled a hearing, but then canceled it shortly prior to the time it was to take place. Appx.000007 ¶ 34.

After WorkForce canceled her hearing, it continued to send Ms. Warner letters claiming that she owed overpayments. Appx.000007 ¶ 35, Appx.000135-000136. WorkForce never granted Ms. Warner a hearing or sent any communication that a hearing would be scheduled, but continued its collections against Ms. Warner, ultimately resulting in WorkForce taking all of her federal tax refund of $341.00. Appx.000008 ¶ 36, Appx.000148-000149. Ms. Warner assumes that WorkForce continues to assert debts against her relating to the thousands of dollars remaining in balances asserted in her Overpayment Determinations. Appx.000008 ¶ 36, Appx.000135-000136.

Ashleah Murphy

Ashleah Murphy applied for unemployment benefits in or about March of 2020 when the Covid-19 shutdown caused her to lose work, and she received benefits until approximately August of 2020. Appx.000008 ¶ 37, Appx.000150-000151. Ms. Murphy did not hear from WorkForce again until September of 2023, when she received an "Overpayment Determination" dated August 30, 2023, more than three (3) years after she received benefits, stating that she was required to pay WorkForce $3,346.00. Appx.000008 ¶ 38, Appx.000150-000152. Although Ms. Murphy's mailing address, telephone number, and email address had been the same since 2020 when she applied for benefits, this 2023 letter was the first suggestion from Petitioner of any possible issue relating to the benefits she received in 2020. Appx.000008 ¶ 39, Appx.000150-000152.

The letter surprised her since she had made weekly reports to WorkForce West Virginia concerning any work activity and earnings. Appx.000008 ¶ 39, Appx.000150-000152. The same day she received her letter, Ms. Murphy called WorkForce for information about appealing the decision, but WorkForce told her it was too late to appeal it. Appx.000008 ¶ 40, Appx.000150-000152.

Ms. Murphy received other letters from WorkForce around the same time. These letters were only a day apart but claimed she owed different amounts. Appx.000008 ¶ 41, Appx.000152-000154. Whereas one letter claimed she owed $3,346.00, another letter claimed she owed WorkForce only $70.00, while a third letter said she owed $ 3,274. Appx.000009 ¶ 41, Appx.000152-000154. WorkForce has informed Ms. Murphy that it would submit the matter to the federal Treasury Offset Program in order to take it from her tax refund. Appx.000009 ¶ 42, Appx.000155.

Kelly Hardy

In 2020, Kelly Hardy was working in Kanawha County when the Covid-19 shutdown caused her to lose work, and she applied for unemployment benefits in or about March of 2020. Appx.000009 ¶ 43, Appx.000156-000158. WorkForce granted her benefits and she continued receiving them until approximately December of 2020. Appx.000009 ¶ 43, Appx.000156-000158. In or about late August and early September of 2023, Ms. Hardy began receiving letters from WorkForce claiming that she owed thousands of dollars in "overpayments". Appx.000009 ¶ 44, Appx.000159-000161. Although the letters were only days apart, they claimed Mrs. Hardy owed two (2) different amounts to WorkForce -- $1,528.00 in one letter and $1,348.00 in another letter mailed the next day. Appx.000009 ¶ 45, Appx.000159-000161.

These letters – mailed more than two-and-a-half (2 ½) years after Mrs. Hardy last received payments -- were the first she had heard of a problem relating to her benefits, although her contact information had remained the same since 2020. Appx.000009 ¶ 46, Appx.000159-000161. These letters surprised Mrs. Hardy, since she had made her weekly reports to WorkForce concerning any work hours and earnings, and stayed current with those reports. Appx.000009 ¶ 46, Appx.000159-000161.

Mrs. Hardy appealed the Overpayment Determination she received, and on September 28, 2023, WorkForce mailed documents to her regarding the appeal. Appx.000010 ¶ 47, Appx.000162-000173. In those documents, WorkForce claimed that the law is as follows:

> **§ 21A-10-21 West Virginia Unemployment Compensation Law:** A person who, by reason of error, irrespective of the nature of said error, has received a sum as a benefit under this chapter, shall either have such sum deducted from a future benefit payable to him or shall repay to the commissioner the amount which he has received.

Appx.000010 ¶ 47, Appx.000375-378, at 376. Reading this, Mrs. Hardy and her husband did some research and learned that WorkForce had misrepresented the wording of the law under which it was pursuing her. Just as with Mrs. Baldwin, WorkForce had left out the sentence in *W. Va. Code* § 21A-10-21 relating to time limits on collections:

> Collection shall be made in the same manner as collection of past due payment: **Provided, That such collection or deduction of benefits shall be barred after the expiration of two years.**

W. Va. Code § 21A-10-21 (emphasis added).

WorkForce had also misquoted the heading of the statute, in bold-face type, as **§ 21A-10-21 West Virginia Unemployment Compensation Law**, instead of the actual title -- **§ 21A-10-21 Recovery of benefits paid through error; *limitation***. Appx.000010 ¶ 49, Appx.000376. The errors in quoting the statute are identical to those in the Deborah Baldwin claim, despite the documents being assembled by two different WorkForce employees. Appx.000010 ¶ 50, Appx.000376; Appx.000010 ¶ 50, Appx.000116.

Eventually, Mrs. Hardy received documents about the hearing WorkForce was supposed to schedule, but they did not arrive until after the hearing, therefore she had no opportunity to appear for it. Appx.000011 ¶ 51, Appx.000156-000158. Mrs. Hardy received a WorkForce decision dated October 6, 2023 saying that she failed to appear and denying her appeal Appx.000011 ¶ 52, Appx.000115-000116. Therefore, Mrs. Hardy assumed WorkForce considered her indebted to it for at least $1,348.00, or $1,528.00, or both, while she does not know why WorkForce believes she was overpaid. Appx.000011 ¶ 52, Appx.000158.

Brittany Gandee

Brittany Gandee was working in Kanawha County, West Virginia in 2020, when the Covid-19 shutdown caused her to lose work, and she applied for unemployment benefits in or about

March of 2020. Appx.000011 ¶ 53, Appx.000176-000177. Ms. Gandee's benefits were granted and she received them until approximately November of 2020, and she submitted weekly reports regarding work activity and earnings. Appx.000011 ¶ 54, Appx.000176-000177. Ms. Gandee moved residences in 2022, but her email address and telephone number stayed the same. Appx.000011 ¶ 54, Appx.000176-000177. During the three (3) years between the time her benefits ended in 2020 and February 2024, she did not hear from WorkForce. Appx.000011 ¶ 55, Appx.000176-000177.

In early February of 2024, Ms. Gandee received a voicemail claiming to be from WorkForce, and once the call was returned, Petitioner communicated that it had been trying to reach her beginning in May 2023 about an overpayment. Appx.000011 ¶ 56, Appx.000176-000177. During the call, WorkForce discussed taking the overpayment from Ms. Gandee's income tax refund, but the amount discussed was only around $20.00, and WorkForce said it would mail documents to her regarding the overpayment at the mailing address given during the call. Appx.000011 ¶ 57, Appx.000176-000177.

Unfortunately, Ms. Gandee never received the documents from WorkForce. Instead, she received a letter several weeks later from the U.S. Treasury, notifying her that it was paying WorkForce West Virginia $2,945.00 out of her tax refund. Appx.000012 ¶ 58, Appx.000178-000179. The February 2024 telephone call and the letter from the U.S. Treasury were the first notice Ms. Gandee had ever received that WorkForce had claimed she was overpaid. Appx.000012 ¶ 59, Appx.000176-000177. When the U.S. Treasury office was called to ask about the letter, the funds had already been taken from Ms. Gandee's tax refund. Appx.000012 ¶ 60, Appx.000176-000177. In a subsequent telephone call to WorkForce, Petitioner did not provide information about appealing or challenging what had occurred. Appx.000012 ¶ 60, Appx.000176-000177.

STATEMENT REGARDING ORAL ARGUMENT

Respondents believe oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure is warranted in this appeal to provide any necessary context, and believe these issues to be of fundamental public importance.

SUMMARY OF ARGUMENT

This case concerns the practice of Petitioner WorkForce West Virginia of unlawfully seeking collection of time-barred debts from everyday citizens who received unemployment benefits during the Covid-19 pandemic. Although W. Va. Code § 21A-10-21 permits WorkForce to pursue overpayments based on application errors for up to two (2) years following payment, § 21 imposes a stringent time bar prohibiting WorkForce from collecting on these alleged error-based claims once this two-year period has passed. The time bar is clear under the statute, and West Virginia case law further provides that such claims cannot be pursued unless a collection is initiated by WorkForce deputy's Overpayment Determination issued within two years following the payment at issue.

Despite this, WorkForce blatantly violates this prohibition, knowing that its statute contains a provision for the exhaustion of remedies which, if enforced, forces claimants to plod through layers of appeals individually with little hope of a positive outcome in the absence of either a lawyer or the kind of tenacity to make their way to the State's appeals courts. In this way, WorkForce's administrative proceedings are a weaponized system of avoiding most any accountability, allowing Petitioner to continue violating this important right provided to citizens by the West Virginia Legislature. After all, even if individual appeals eventually result in isolated

individual citizen victories, WorkForce continues initiating unlawful time-barred collections against others.[2]

Unfortunately, even for those who do prevail before an ALJ based on the two-year limit, Petitioner then stacks the deck further and unlawfully asserts more serious overpayment violations based on misrepresentation, non-disclosure, or worse – since the time bar is significantly longer at five to ten years. See, W Va. Code § 21A-10-8. This also violates the unemployment statute since § 8 – the very law authorizing these more serious collections -- requires WorkForce to pursue such claims only in Circuit Court.

Petitioner has filed a petition for writ of prohibition with this Court, challenging three orders issued by the Circuit Court of Kanawha County, which were all in favor of the Respondents. Whereas these include an order denying WorkForce's motion to dismiss and an order granting Respondents' motion for leave to amend their Complaint, Petitioner primarily challenges the lower Court's *Order Granting Writ of Mandamus* (Appx. 000024) which ordered WorkForce to comply with these important citizen protections. Importantly, part of Petitioner's position in this challenge is that WorkForce is not subject to <u>any</u> time bar for initiating collections against citizens, therefore WorkForce believes the law allows it to initiate collections indefinitely, regardless of when they originated. For many citizens, these claim decisions result in the loss of their federal tax income refunds as WorkForce submits its decisions to the US Treasury, often without citizens' knowledge.

Petitioner challenges the lower court's mandamus order asserting that claimants must instead exhaust their remedies in administrative process, which naturally would result in only piecemeal claim review instead of a single court of general jurisdiction weighing facts and law to

[2] In addition to the arguments made herein and below as to why WorkForce's actions are unlawful, Governor Jim Justice's Executive Order 11-21 further prohibited Petitioners from pursuing Pandemic Unemployment Assistance benefit overpayments that were obtained without fault on the part of the recipient.

determine the lawfulness of Petitioner's conduct. However, the circumstances of this case clearly meet the criteria for circuit court jurisdiction since engaging in the individual claim process would be futile and duplicative, and leave litigants without an adequate remedy. Petitioner further claims that other requirements and conclusions by the circuit court's mandamus order exceed the lower court's legitimate powers or are clearly erroneous. However, virtually all of Petitioner's arguments depend on Petitioner's legal theories based on cherry-picked language from an article elsewhere in the unemployment statute bearing no relation to the specific collection matters addressed in the statutes being enforced by the circuit court. Petitioner's arguments also depend on an equally unsupported "presupposition" legal theory requiring the reader to "presuppose" language or interpretations which simply are not present in the statutes at issue. Because Petitioner has blatantly violated the unemployment statute's time-bar protections for citizens and has failed to meet any standard to support a writ of prohibition, clear error, exceeding the circuit court's lawful powers, or other articulable challenge, WorkForce's Petition must be denied.

ARGUMENT

I. Standard of Review

This Court has required a stringent standard for litigants seeking a writ of prohibition, providing that:

> This Court has explained the standard of review applicable to a writ of prohibition, stating that "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court**.** It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W.Va. Code 53–1–1." Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver,* 160 W.Va. 314, 233 S.E.2d 425 (1977) . . . .
>
> We have held that an extraordinary writ . . . is not to be used as a substitute for an appeal. "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syl. Pt. 1, *Crawford v. Taylor,* 138 W.Va. 207, 75 S.E.2d 370 (1953). In addition, "[t]his Court is 'restrictive in its use of prohibition

> as a remedy.' *State ex rel. West Virginia Fire Cas. Co. v. Karl,* 199 W.Va. 678, 683, 487 S.E.2d 336, 341 (1997)." *State ex rel. Allstate Ins. Co. v. Gaughan,* 220 W.Va. 113, 118, 640 S.E.2d 176, 182 (2006). In syllabus point 4 of *State ex rel. Hoover v. Berger,* [199 W.Va. 12, 483 S.E.2d 12 (1996)], this Court said:
>
> "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight."

State ex rel. Owners Ins. Co. v. McGraw, 233 W.Va. 776, 779-80, 760 S.E.2d 590, 593-94 (2014) (per curiam) (emphases added).

The Petitioner cannot demonstrate entitlement to relief by way of prohibition. As this Court has repeatedly cautioned, "[t]o justify this extraordinary remedy, the petitioner[s] ha[ve] the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy." *State ex rel. Stewart v. Alsop*, 533 S.E.2d 362, 364 (W.Va. 2000) (citing *State ex rel. Paul B. v. Hill*, 201 W.Va. 248, 254, 496 S.E.2d 198, 204 (1997) (*quoting State ex rel. Allen v. Bedell*, 193 W.Va. 32, 37, 454 S.E.2d 77, 82 (1994) (Cleckley, J., concurring)).

"A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers." Syl. Pt. 4, *State ex rel. Jeanette H. v. Pancake*, 529 S.E.2d 865 (W.Va. 2000); *State ex rel. Lambert v. King,* (2000 WL 973741 W.Va. July 14, 2000). A heavy burden of proof

is required to demonstrate that a circuit court's finding is clearly erroneous. As explained by this Court in *State ex rel. Owners Ins. Co. v. McGraw*, 233 W.Va. at 780, 760 S.E.2d at 594:

> "A finding is `clearly erroneous' when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirely."

(emphasis added)(quoting Syl. Pt. 1, in part, *In the interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)). Petitioner essentially is disagreeing with the Circuit Court, but that does not meet the standard for extraordinary relief it seeks.

II. Discussion

A. Petitioner's insistence on pursuing W. Va. Code § 21A-10-21 'error' collections against citizens outside that section's two-year time bar is indefensible, and its practice of asserting more serious W. Va. Code § 21A-10-8 collections in the administrative proceedings is equally unlawful, therefore Circuit Court's requirement that Petitioner comply with its mandatory duties to adhere to these statute's requirements does not exceed its legitimate powers or raise clear error.

Petitioner cannot meet its burden for an extraordinary remedy before this Court because the lower court's orders did not exceed its legitimate powers or cause clear error in requiring Petitioner to comply with its mandatory duties to refrain from violating W. Va. Code § 21A-10-21 and W. Va. Code § 21A-10-8.

The West Virginia Legislature established a mandatory, non-discretionary duty for the commissioner of WorkForce West Virginia to refrain from collecting benefits paid in error once two (2) years have passed:

> A person who, by reason of error, irrespective of the nature of said error, has received a sum as a benefit under this chapter, shall either have such sum deducted from a future benefit payable to him or shall repay to the commissioner the amount which he has received. Collection shall be made in the same manner as collection of past due payment**:** Provided, That such collection or deduction of benefits **shall be barred** after the expiration of **two years**.

West Virginia Code § 21A-10-21 (emphasis added).

At a minimum, the two-year period is the time between the payment itself and WorkForce's deputy decision informing a claimant that it was an overpayment. As held by the West Virginia Supreme Court in 2015, "Workforce is barred from collecting benefits paid to [the claimant] prior to two years before the dates of the deputy's decision[.] *Myers v. Outdoor Express, Inc*., 235 W. Va. 457, 465, 774 S.E.2d 538, 546 (2015). As reiterated recently by the West Virginia Intermediate Court of Appeals, "[T]he Supreme Court has held that West Virginia Code § 21A-10-21 bars Workforce from collecting benefits paid to a claimant prior to two years before the date of the deputy's decision. *Workforce W. Va. v. Kirker*, 2023 W. Va. App. LEXIS 207, *8, 2023 WL 5696097; *Workforce W. Va. v. Jonese*, 2023 W. Va. App. LEXIS 228, *8, 2023 WL 5695915 (citing *Myers*).

In spite of the two-year prohibition as a built-in protection for citizens, WorkForce has engaged in an extensive and draconian campaign of collections against ordinary citizens under *West Virginia Code* § 21A-10-21. The facts are plain from the initial letters WorkForce sends to claimants dated well more than two (2) years following payment and Overpayment Determinations which follow shortly after. In every case, WorkForce has engaged in repeated collections against claimants despite the fact that its deputies' Overpayment Determinations and similar letters were issued well more than two (2) years after the payments themselves. Appx.000325-Appx.00392.

- Baldwin: Overpayment Determination August 9, 2023 seeking $2,054.00 referring to various payments in April and May of 2020. (Appx.000328);
- Warner: Overpayment Determination April 28, 2023 seeking $3,012.00 referencing payment dates from August 2020 through March 2021 (Appx.000352);
- Warner: Overpayment Determination April 28, 2023 seeking $2,336.00 referencing payment dates between March 2020 through August 2020 (Appx.000353);

- Warner: Overpayment Determination May 1, 2023 seeking $ 1,200.00 referring to payments in August 2020 (Appx.000354);

- Warner: Overpayment Determination May 2, 2023 seeking $404.00 referencing payments in September 2020 and October 2020 (Appx.000355);

- Murphy: Overpayment Determination August 30, 2023 seeking $3,346.00 referencing payments in March through July of 2020 (Appx.000365);

- Murphy: Overpayment Determination August 31, 2023 seeking $70.00 referencing a payment in May 2020 (Appx.000366);

- Hardy: Overpayment Determination August 30, 2023 seeking $$1,348 referring to various dates from June 2020 through August 2020 (Appx.000375);

- For Brittany Gandee, WorkForce had never sent Overpayment Determinations to a reachable address but obviously had not begun its process until May of 2023. (Appx.000389 ¶ 7);

- For Mr. Chambers, despite that his address had never changed, the first notice provided to him by Workforce was a January 2023 demand for payment, after he had not received any payment since September 2020. (Appx.000344-Appx.000346).

There is no question that this collection process is being undertaken by WorkForce pursuant to *W. Va. Code* § 21A-10-21: It has only two statutory avenues for collections -- *W. Va. Code* § 21A-10-21 and *W. Va. Code* § 21A-10-8 -- and both delineate the conduct to be proven as well as the time within which WorkForce may try proving it. Whereas § 8 controls overpayment collections for more serious allegations such as Non-Disclosure or Misrepresentation that must be addressed in trial courts[3], § 21 controls collections for less serious overpayments resulting from error, and may be pursued in administrative proceedings. These § 21 'error' collections are initiated by a deputy's Overpayment Determination with an offer for claimants to file an administrative appeal. *See*, Appx.000328; Appx.000352, Appx.000353, Appx.000354 and Appx. 355; Appx.000365, Appx.000366; and Appx.000374. By opening the collection with an offer of

[3] See argument I.A.2, below.

administrative appeal, all such collections are by definition § 21 'error' proceedings with a two-year time bar, since § 8 cases cannot be brought in administrative proceedings.[4]

Further, WorkForce specifies § 21A-10-21 as the law under it pursues claimants, once claimants do appeal. In these cases, WorkForce employees preparing hearing submissions cite to § 21A-10-21, in identical fashion, as the law under which the claimant is being pursued – calling it the "Unemployment Compensation Law". This is obvious from the collections against both Kelly Hardy as well as Deborah Baldwin. (Appx.000375-378, at 376; Appx.000000332-343, at 343). Respondents' collection process as to all parties discussed in this Petition involves blatantly violating the non-discretionary mandate to refrain from collections in *W. Va*. Code § 21A-10-21.

1. Petitioner's argument against the two-year time bar in § 21A-10-21 is unsupported, is obviously contrary to case law, and defies logic since Petitioner's reading imposes no time bar at all.

In its Petition WorkForce claims the Circuit Court should have read § 21 in a form other than what its words say. Under Petitioner's legal theory, it claims the 2-year time bar in § 21 does not begin to run until the "final decision". (Pet. at 29). In other words, Petitioner argues that the two-year period begins only after an overpayment is fully adjudicated, but it fails to support this notion with any applicable legal authority. Instead, Petitioner cherry-picks inapplicable language from a completely different Article with no cross-cites or other connection with § 21, and claims this other provision bears some connection to its § 21 time limit for overpayment collections. However, one reading shows this Article 7 provision bears no connection at all to § 21 time limits in Article 10. It reads as follows:

> **§ 21A-7-11. Benefits pending appeal.**
>
> (a) Benefits found payable by decision of a deputy, appeal tribunal, the board or court shall be immediately paid up to the week in which a subsequent appellate

[4] See argument I.A.2, below.

body renders a decision, by order, finding that benefits were not or are not payable.

(b) If, at any appeal stage, benefits are found to be payable which were found before the appeal stage to be not payable, the commissioner shall immediately reinstate the payment benefits.

(c) If the final decision in any case determines that a claimant was not lawfully entitled to benefits paid to him or her pursuant to a prior decision, the amount of benefits paid are considered overpaid.

. . . .

Finding some language it likes in a far-flung section and article, WorkForce cherry-picked the words "final decision" from subsection (c), claiming that this is the moment the clock starts in § 21. Again however, there is no support for this theory. *W. Va. Code* § 21A-7-11, by its text as well as its heading – "Benefits pending appeal" – clearly relates to how WorkForce should handle benefits while and appeal is pending, especially to ensure that needy claimants receive the benefit of the beneficent purposes of the unemployment statute. *See, W. Va. Code* § 21A-1-1. By contrast, *W. Va. Code* § 21A-10-21 relates specifically to overpayment collections by WorkForce and delineates the conduct to be proven as well as the time within which WorkForce may try proving it.

Petitioner claims § 21 "presuppose[s] that an administrative decision has already been made and fully adjudicated" (Pet. at 29), and argues that this "presupposition" is "made clear" by § 21A-7-11(c). To the contrary, neither section refers to the other, and there is absolutely no legislative suggestion that either looks to the other for guidance. Clearly, had the legislature intended to base the two-year time bar in § 21 on the agency's "final decision", it would have said so § 21, or at a minimum, made reference to the other statute as a guiding principle.[5]

[5] By contrast, in enacting *W. Va. Code* § 21A-10-8 the Legislature specifically referred to § 21A-5-16 in *W. Va. Code* § 21A-10-8 to buttress its requirement that more serious overpayment allegations be addressed only in trial courts.

Moreover, if any doubt even remained, the very specific language in *W. Va. Code* § 21A-10-21 particular to collection of error claims prevails over the generalized reference in § 21A-7-11(c) referring to a final decision. "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." *Miller v. WesBanco Bank, Inc*., 245 W. Va. 363, 379, 859 S.E.2d 306, 322 (2021).

More importantly, Petitioner's self-serving interpretation of § 21 is directly contrary to West Virginia case law holding that the period begins on the date of the payment itself. The two-year period is the time between the payment itself and the WorkForce deputy's decision (Overpayment Determination) informing a claimant that it was an overpayment. As held by the West Virginia Supreme Court in 2015, "Workforce is barred from collecting benefits paid to [the claimant] prior to two years before the dates of the deputy's decision[.] *Myers v. Outdoor Express, Inc*., 235 W. Va. 457, 465, 774 S.E.2d 538, 546 (2015). As reiterated recently by the West Virginia Intermediate Court of Appeals, "[T]he Supreme Court has held that West Virginia Code § 21A-10-21 bars Workforce from collecting benefits paid to a claimant prior to two years before the date of the deputy's decision. *Workforce W. Va. v. Kirker*, 2023 W. Va. App. LEXIS 207, *8, 2023 WL 5696097; *Workforce W. Va. v. Jonese*, 2023 W. Va. App. LEXIS 228, *8, 2023 WL 5695915 (citing *Myers*).

Part of Petitioner's legal theory even tries to draw a nonexistent distinction between its administrative process and its collection process, as if its pursuit of overpayments are not collections simply because they are in an administrative law setting. (Pet. at 29-30). Again however, WorkForce fails to support this position beyond its "presupposition" argument discussed above. (Pet. at 29-30). However, *Myers* clearly sees Petitioner's deputy overpayment

determinations as what they are: Among other things, these deputies' overpayment determinations in the administrative process are the initiation of a collection action.

Just as importantly, Petitioner's legal theory defies logic because under its interpretation, § 21 would impose virtually no time bar at all. If the two-year period began to run only after a "final determination" were made, WorkForce would be free to wait 10, 20, or 30 years (indefinitely) before issuing a deputy decision to initiate collections on minor overpayment claims based on error. This is contrary to any concept of statutory interpretation. As declared by the West Virginia Supreme Court of Appeals, [i]t is always presumed that the legislature will not enact a meaningless or useless statute." *State ex rel. Tucker Cty. Solid Waste Auth. v. W. Va. Div. of Labor*, 222 W. Va. 588, 599, 668 S.E.2d 217, 228 (2008) (quoting Syl. pt. 4, *State ex rel. Hardesty v. Aracoma-Chief Logan No. 4523, VFW of the United States, Inc.,* 147 W. Va. 645, 129 S.E.2d 921 (1963)).

Clearly, WorkForce's collection actions against each of the Respondents began with a deputy's Overpayment Determination issued more than two years following the payment at issue, beyond the time bar clearly articulated in *W. Va. Code* § 21A-10-21. Appx.000328, Appx.000352, Appx.000353, Appx.000354, Appx.000355, Appx.000365, Appx.000366, Appx.000375, Appx.000389, Appx.00034-346

2. Respondents' attempts to argue W.Va. Code § 21A-10-8 are equally unavailing, and unlawful.

When WorkForce's practice of exceeding the two-year time bar in *W. Va. Code* § 21A-10-21 is challenged, the agency tries to invoke a longer time bar by asserting *W. Va. Code* § 21A-10-8 Non-disclosure or Misrepresentation allegations in an existing § 21 proceeding. *See, eg.* Appx.000118. This is because *W. Va. Code* § 21A-10-8 has a longer time-bar of five (5) years.[6]

[6] 10 years for fraud.

This practice by WorkForce blatantly violates the unemployment statute. First, these late-in-the-game § 8 allegations are being attempted by WorkForce in § 21 proceedings, which is prohibited. Due to the more serious nature of Non-disclosure or Misrepresentation, WorkForce is not permitted to pursue such collections in its administrative adjudication process. Instead, it must pursue them only in civil actions before West Virginia trial courts. *W. Va. Code* § 21A-10-8 is clear:

> A person who, by reason of nondisclosure or misrepresentation, either by himself or another (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent), has received a sum as a benefit under this chapter, shall either have such sum deducted from a future benefit payable to him or shall repay to the commissioner the amount which he has received. **Collection shall be made in the same manner as collection of past-due payments against employers as set forth in section sixteen [§ 21A-5-16] of article five of this chapter, which specifically includes the institution of civil action and collection procedures thereon enumerated in said section**: Provided, That such collection or deduction of benefits shall be barred after the expiration of five years, except for known or fraudulent nondisclosure or misrepresentation which shall be barred after the expiration of ten years, from the date of the filing of the claim in connection with which such nondisclosure or misrepresentation occurred.

W. Va. Code § 21A-10-8 (emphasis added). Instead of referring generally to the unemployment statute for options, § 21A-10-8 specifically mandates that the forum and manner in a precise statute be used.

That statute – *W. Va. Code* § 21A-5-16 – provides various procedural guidelines and requirements for WorkForce to use in pursuing employers in trial courts, and trial courts alone. Reviewing § 21A-5-16 in its entirety, the only forum in these procedures is a West Virginia trial court. It does not provide for action in an administrative proceeding and there is no room to argue that it does. Instead, all of its subsections -- (a) through (g) -- refer only to civil actions, summarized as follows:

(a) Providing for civil actions by WorkForce after due notice of nonpayment, with required docket preferences "on the calendar of the court over all other civil actions";

(b) Establishing the results as enforceable debts and judgment liens by the circuit court except certain purchasers for value;

(c) Authorizing WorkForce to distrain on property "in addition to all other civil remedies prescribed herein" including intangibles and seizure, and collect attorney fees and costs;

(d) Requiring "any state court in this state" with a receivership or insolvency proceedings to provide for regular debtor payments to WorkForce;

(e) Requiring the Secretary of State to withhold certificates from debtors until notified of payment to WorkForce;

(f) Authorizing injunctions in Kanawha County Circuit Court to prevent debtors from doing business until debts are paid, or to set up bonds to ensure full payment; and

(g) Requiring all payments collected under the civil actions authorized by the statute be deposited to particular accounts.

See, id. (emphasis added.) Importantly, administrative proceedings are not among the options provided in *W. Va. Code* § 21A-5-16 – they are not contemplated or discussed at all.[7]

[7]Due to the importance of this statute, and what it does **not** say, Petitioners provide the entire text of the *W. Va. Code* § 21A-5-16 here:

> *W. Va. Code* § 21A-5-16 Collection of payments.
>
> (a) The commissioner in the name of the State may commence a civil action against an employer who, after due notice, defaults in any payment, interest or penalty thereon required by this chapter. Civil actions under this section shall be given preference on the calendar of the court over all other civil actions except petitions for judicial review under article seven [§§ 21A-7-1 *et seq*.] of this chapter and cases arising under the workers' compensation law. Upon prevailing in any such civil action, the commissioner is entitled to recover attorneys' fees and costs of action from the employer.
>
> (b) Any payment, interest and penalty thereon due and unpaid under this chapter is a debt due the state in favor of the commissioner. It is a personal obligation of the employer immediately due and owing and is, in addition thereto, a lien that may be enforced as other judgment liens are enforced through the provisions of chapter thirty-eight [§§ 38-1-1 et seq.] of this code and the same shall be deemed by the circuit court to be a

Petitioner asserts that it is not required to pursue these more serious § 8 overpayments in trial courts and argues that it is free to pursue them in the administrative process[8], but again its

judgment lien for this purpose against all the property of the employer: Provided, That no such lien is enforceable as against a purchaser (including lien creditor) of real estate or personal property for a valuable consideration, without notice, unless docketed as provided in article ten-c [§§ 38-10C-1 et seq.], chapter thirty-eight of this code.

(c) In addition to all other civil remedies prescribed herein the commissioner may in the name of the State, after giving appropriate notice as required by due process, distrain upon any personal property, including intangibles, of any employer delinquent for any payment, interest and penalty thereon. If the commissioner has good reason to believe that such property or a substantial portion thereof is about to be removed from the county in which it is situated, upon giving appropriate notice, either before or after the seizure, as is proper in the circumstances, he or she may likewise distrain in the name of the State before such delinquency occurs. For purposes of effecting a distraint under this subsection, the commissioner may require the services of a sheriff of any county in the state in levying distress in the county in which the sheriff is an officer and in which the employer's personal property is situated. A sheriff so collecting any payments, interest and penalties thereon is entitled to compensation as provided by law for his or her services in the levy and enforcement of executions. Upon prevailing in any distraint action, the commissioner is entitled to recover his or her attorney fees and costs of action from the employer.

(d) In case a business subject to the payments, interest and penalties thereon imposed under this chapter is operated in connection with a receivership or insolvency proceeding in any state court in this state, the court under whose direction such business is operated shall, by the entry of a proper order or decree in the cause, make provision, so far as the assets in administration will permit, for the regular payment of such payments as the same become due.

(e) The Secretary of State of this State shall withhold the issuance of any certificate of dissolution or withdrawal in the case of any corporation organized under the laws of this State, or organized under the laws of another state and admitted to do business in this State, until notified by the commissioner that all payments, interest and penalties thereon against any such corporation which is an employer under this chapter have been paid or that provision satisfactory to the commissioner has been made for payment.

(f) In any case where an employer defaults in payments, interest or penalties thereon, for as many as two calendar quarters, which quarters need not be consecutive, and remains delinquent after due notice, the commissioner may bring action in the Circuit Court of Kanawha County to enjoin that employer from commissioner may bring action in the Circuit Court of Kanawha County to enjoin that employer from continuing to carry on the business in which such liability was incurred: Provided, That the commissioner may as an alternative to this action require such delinquent employer to file a bond in the form prescribed by the commissioner with satisfactory surety in an amount not less than fifty percent more than the payments, interest and penalties due.

(g) Amounts of payments and penalties collected under this section shall be deposited to the credit of the Unemployment Compensation Trust Fund. Amounts of interest, attorneys' fees and costs collected under this section shall be paid into the Employment Security Special Administration Fund. Any such amounts are not to be treated by the Auditor or Treasurer as part of the general revenue of the State.

[8] Petitioner seeks a writ of prohibition preventing the circuit court from enforcing its order finding that WorkForce is prohibited by West Virginia Code § 21A-10-8 from administratively (determining alleged overpayments based on nondisclosure or misrepresentation; that West Virginia Code § 21A-10-8 requires a civil action to adjudicate alleged nondisclosure or misrepresentation, or fraud overpayments; and that initiation of an administrative proceeding on an overpayment determination is a *de facto* concession that the two-year time bar in West Virginia Code § 21A-10-21 applies. (Pet. at 33).

arguments are fully reliant on its "presupposition" legal theory that W. Va. Code § 21A-10-8 "presuppose[s] that an administrative determination has already been made and fully adjudicated". (Pet. at 29). Based on this wholly unsupported notion, Petitioner argues that the five-year time bar in § 8 does not even begin to run until a "final decision" is adjudicated, based on cherry-picked language from a section in a different Article (§ 21A-7-11(c)) with no connection to § 8 or its specific mandates regarding time and items to be proven (Pet. at 29). Relying wholly on this, Petitioner argued "Therefore, the circuit court committed clear legal error when it determined that West Virginia Code § 21A-10-8 requires WorkForce to institute a civil action in a trial court both to pursue collections and for "'adjudications for overpayments based on nondisclosure, misrepresentation, or fraud[,]'" (Pet. at 30). Again, this is wholly unsupported and draws on WorkForce's phantom distinction between collections and adjudications, for which it provides no authority.

Directly contrary to the Petitioner's argument wherein neither § 21A-10-8 nor § 21A-7-11 make any reference to each other, § 8 does in fact specifically refer to another statute for its operative mandate that WorkForce pursue these more serious collections in circuit court (*See*, p. 21-24, *supra*). Moreover, clearly any statute or regulation cited by Petitioner claiming to support permitting § 8 adjudications administratively is very generalized and gives way to the very specific mandate in § 8 to pursue these more serious overpayments in civil actions.

Petitioner also tries to suggest that the lower court's Mandamus order against invoking § 8 allegations in administrative proceedings prohibits workforce from informing claimants of their administrative hearing rights (Pet. at 31), but nothing in the statutes cited by WorkForce suggests more serious § 8 overpayments should be brought before an ALJ. *See, W. Va. Code* 21A-7-3, 8, 10, and 17.

The unsupported distinction between collections and adjudications is illusory. Just like standard everyday debts, § 8 non-disclosure or misrepresentation cases must be filed within a particular time frame, and circuit courts both "determine" the legitimacy of a debt and an amount, and even impose a means of recovering funds. To the extent any collection time bar on earth begins only at "writ of execution" stage -- after a judicial body determines a debt simply exists -- certainly no law exists in the West Virginia Code to support that notion for WorkForce. Workforce has never cited to a single provision to support that notion, because it simply does not exist. Whereas Petitioner cites to cases holding the "mandamus will not lie to compel performance of an illegal or unlawful act", (Pet. at 32), certainly in the unemployment statute requires WorkForce to convey administrative appeal rights to "all" overpayment claimants since some actions will necessarily occur in Circuit Court.

Petitioner argues it was clear legal error and beyond the court's legitimate powers to conclude that initiating administrative proceedings for overpayment determinations is a de facto concession to the § 21 two-year time bar. (Pet. at 31). Naturally however, the § 8 mandate to pursue more serious overpayment allegations only in trial courts is clear, and § 8 along with § 21 are the only existing statutes to provide time frames for overpayment collections. Therefore the § 21 administrative process with its two-year time bar is the only remaining provision by default.

This conclusion addresses the Circuit Court's concern over workforce's practice of asserting more serious § 8 allegations in administrative proceedings unlawfully when the going got tough trying to prove § 21 error overpayments. This was done in Respondent Baldwin's case, where the ALJ agreed with the claimant that workforces pursuit was time barred. Appx.000490-492, but WorkForce appealed to its internal Board of Review. Only two days before the 'hearing', and more than three (3) months into the administrative process, WorkForce mailed a brief asserting

that Ms. Baldwin was culpable of non-disclosure pursuant to § 21A-10-8. SuppAppx.000004. Therefore, this conclusion disliked by Petitioner is simply in support of the lower court's mandate requiring Petitioner to comply with *West Virginia Code* § 21A-10-21 and § 21A-10-8. (Mandamus Order ¶ C at 22).

Lastly, Petitioner suggests that the circuit court's requirements that it adhere to § 21A-10-21 and § 8 interfere with WorkForce's ability to adhere to federal law, but only generally states that "Federal law also requires WorkForce to engage in this process and to recoup overpayments. 42 U.S.C. §§ 503(g) and (m); 26 U.S.C. § 3304; 15 U.S.C. § 9023(f)." (Pet. at 32). Petitioner cites to nothing requiring it to recoup payments only through the administrative process and cites to no federal provision which would interfere with the prohibition in *West Virginia Code* § 21A-10-8.

In attempted furtherance of its presupposition argument involving a nonexistent distinction between '"determination" proceedings and collections, petitioner claims "WorkForce has no statutory authority to file civil suits to determine if overpayments occurred and/or the reasons for overpayments" (Pet. at 32). However, there is no such distinction and obviously nothing stops WorkForce from doing what any other creditor does — to investigate whether claims are owed and file a lawsuit. In § 21A-10- 8 proceedings, obviously a trial judge will make findings regarding whether amounts are owed and how much, just like any other collection case in trial courts and just like an ALJ does in § 21 proceedings.

B. The Circuit Court clearly had subject matter jurisdiction, as exhaustion of remedies was not required.

Not unpredictably, WorkForce postulates that its primary legal accountability should rest mainly within its own in-house adjudication process. In fact, the bulk of WorkForce's Petition is dedicated to the proposition that Respondents should have been required to individually exhaust

their administrative remedies. (Pet. at 18-27). However, the facts of this case and the circuit court's orders met and exceeded criteria for not requiring claimants to exhaust administrative remedies; Petitioner's argument regarding subject matter jurisdiction is without merit.

Instead of addressing its position under the facts of Petitioner's own misdeeds alleged in the pleadings, WorkForce's Petition attempts to deflect the inquiry as if it is matter of "claimant eligibility". (Pet at 20). Petitioner argues the complained-of harm to Respondents is "governed by" statutes regarding various eligibility criteria for claimants to be able to receive benefits (§ 21A-6-1 *et seq*.) and the appointment of deputies to hear those eligibility questions (§ 21A-7-1 *et seq*.) (Pet at 20). However, obviously the issues in this case – WorkForce's wholesale and widespread violations of the unemployment statute – are not an eligibility question.

Petitioner misses the point. This case is to address Petitioner's conduct in erecting a collection program that fails, legally, out of the gate. All of the collections at issue in this case are time-barred by § 21A-10-21 as a matter of law, well before they reach any individualized issues before an ALJ. In cases such as this, exhaustion of remedies is not required. As stated by the West Virginia Supreme Court,

> The factors courts have cited to excuse failure to exhaust are: (1) that the claim is collateral to a demand for benefits; (2) that exhaustion would be futile; and (3) that plaintiffs would suffer irreparable harm if required to exhaust administrative remedies.

Hicks v. Mani, 230 W. Va. 9, 13-14, 736 S.E.2d 9, 13-14 (2012) (quoting *Pavano v. Shalala*, 95 F.3d 147, 150 (2d Cir. 1996). *See also* Syl. pt. 6, *Wiggins v. Eastern Assoc. Coal Corp*., 178 W. Va. 63, 357 S.E.2d 745 (1987).

The Court specifically quoted *Wiggins*, recognizing "This Court will not require the exhaustion of administrative remedies where such remedies are duplicative or the effort to obtain them futile." (emphasis added). *Id*.

The Court went on to say,

> We also have recognized that "[t]he rule which requires the exhaustion of administrative remedies is inapplicable where no administrative remedy is provided by law."

Id at 13-14 (quoting Syl. pt. 2, *Daurelle v. Traders Fed. Sav. & Loan Ass'n*, 143 W. Va. 674, 104 S.E.2d 320).

In this case, requiring exhaustion of remedies for people affected by Petitioner's violation of the § 21A-10-21 time bar would be unendingly duplicative, when a court of general jurisdiction may stop the conduct with a single court order. Each Respondent's alleged overpayment matter was beyond Petitioner's two-year limit, therefore each initiation of collections by WorkForce was unlawful.[9] Further, WorkForce has demonstrated the futility of challenging its time-barred overpayment determinations by requiring claimants such as Respondent Baldwin to incessantly engage the appeals process on collections clearly prohibited by statute. Exhaustion of remedies is inapplicable where no administrative remedy is provided by law, and extraordinary remedies such as mandamus are not options in Petitioner's administrative adjudication process. Nor would such administrative proceedings have authority to issue wholesale orders that all such proceedings cease to be used as an implement of the agency's unlawful collection practices. Both Plaintiffs and the public would be irreparably harmed if ordered to exhaust all remedies. In contrast, Petitioner's conduct constitutes one violation which can be addressed in all cases.

In this case, the futility of exhausting administrative remedies is obvious simply from the existence of the instant Petition by WorkForce. Petitioner is clinging steadfastly to its unlawful collections process, insisting it should be allowed to pursue § 21 collections well past § 21's two-year time bar, all while its position is dependent on an unsupported "presupposition" argument.

[9] See deputies' Overpayment Determinations at Appx.000328, Appx.000352, Appx.000353, Appx.000354, Appx.000355, Appx.000365, Appx.000366, Appx.000375, Appx.000389, Appx.00034-346.

While Petitioner cites to the public policy reasons behind exhaustion of remedies generally, Respondents note that in this case, those same public policy reasons are better served by not forcing claimants to exhaust remedies. As stated in *Sturm v. Bd. of Educ*., the functions served by exhausting remedies include:

> (1) permitting the exercise of agency discretion and expertise on issues requiring these 0characteristics; (2) allowing the full development of technical issues and a factual record prior to court review; (3) preventing deliberate disregard and circumvention of agency procedures established by Congress [or the Legislature]; and (4) avoiding unnecessary judicial decision by giving the agency the first opportunity to correct any error.

223 W. Va. 277, 282, 672 S.E.2d 606, 611 (2008). In this case, the agency discretion in factor number (1) caused widespread violations of claimants' rights, as evidenced simply from the agency having initiated so many time-barred overpayment claims. In addition to the six plaintiffs in this case, it is clear from Petitioner's continued insistence on its interpretation through this appeal and the clearly vast numbers of Covid-era claimants, that the number of claimants affected by these time-barred collections very high. Beyond these numbers, it is clear that Petitioner's deliberate misrepresentation of Section 21's language is systemic, since the omission was identical in letters to two different claimants – Mrs. Baldwin and Mrs. Hardy. Appx.000332-000343, at 000343; Appx.000375-378, at 376.

For the same reasons, preventing deliberate disregard and circumvention of agency procedures under factor (3) clearly required circuit court action to stop these practices and prevent further harm. Lastly, the circuit court's orders will do far more to avoid unnecessary judicial decision under factor (4), since the only alternative would be for likely thousands of claimants to individually engage in the administrative hearing process, up to and including every level of appeal.

Petitioner notes that Respondent Baldwin should have waited out the administrative process before filing suit (Pet. at 21), but her circumstances are a classic example of Petitioner's abuses of the process and the extent to which it forces claimants to exhaust their remedies individually just to enforce their basic rights not to be unlawfully harassed. After an ALJ agreed with the Baldlwin that WorkForce's pursuit was time-barred Appx.000490-492, WorkForce appealed to its internal Board of Review, and more than three (3) months into the administrative process WorkForce submitted a brief only two days before the 'hearing'[10] to assert that Ms. Baldwin was culpable of "non-disclosure" pursuant to § 21A-10-8. SuppAppx.000004.

C. Respondents met and exceeded all requirements for mandamus by establishing clear right to the relief sought, clear nondiscretionary duties on the part of Petitioner, and lack of other adequate remedies, therefore there was no clear legal error and circuit court did not exceed its legitimate powers.

Respondents' circumstances clearly meet all three factors required for a writ of mandamus: (1) the existence of a clear right in the petitioner to the relief sought: (2) the existence of a legal duty on the part of the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law. Syl. Pt. 1, *State ex rel. Sams v. Comm 'r. W. Virginia Div. of Corr*., 218 W. Va. 572. 625 S.E.2d 334 (2005) (quoting Syl. Pt. 3, *Cooper v. Gwinn*, 171 W. Va. 245, 298 S.E.2d 781 (1981)).

"Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies." *State ex rel. W. Virginia Parkways Auth. v. Barr*, 228 W. Va. 27, 716 S.E.2d 689, 693 (2011) (quoting Sy]. Pt. 1, *State ex rel. Allstate Ins. Co. v. Union Pub. Serv. Dist*., 151 W. Va. 207, 151 S.E.2d 102 (1966).

[10] Although dated two days before the BOR's review, WorkForce's brief wasn't postmarked until December 6, 2023, one day prior to the BOR's consideration (contrary to even the BOR's new process which eliminated hearings, with submissions due on paper only two days prior to the BOR's review). Respondent Baldwin didn't receive WorkForce's submission until after the BOR's review had occurred.

As Respondents have established above, Petitioner has a mandatory, non-discretionary duty pursuant to *W. Va. Code* § 21A-10-21 to undertake any desired collections on alleged error overpayments no later than two (2) years after the payments at issue, under deputy decisions issued and mailed no later than two (2) years following the payments.[11] Respondents have also established that Petitioner has a mandatory, non-discretionary duty under *W. Va. Code* § 21A-10-8 to pursue non-disclosure, misrepresentation, or fraud overpayment allegations only in West Virginia trial courts and refrain from pursuing such claims in its administrative adjudication process.

Respondents have also established a clear right to the relief sought, having submitted undisputed evidence that WorkForce is engaging in repeated § 21A-10-21 collections against claimants despite that its deputies' Overpayment Determinations and similar letters were issued and mailed well more than two (2) years after the payments being made. Appx.000328, Appx.000352, Appx.000353, Appx.000354, Appx.000355, Appx.000365, Appx.000366, Appx.000375, Appx.000389, Appx.00034-346.

Finally, there is no other adequate remedy. Petitioner's position regarding exhaustion of remedies relies heavily on the concept that unemployment claims turn on very individualized factual circumstances. Importantly however, the conduct subject to mandamus in this case involves an entire population of persons whose rights were violated in precisely the same way: All their alleged overpayments are either patently time-barred as a matter of law or resulted from WorkForce's unlawful pursuit of them through its administrative adjudication process. Petitioners seek only to require Petitioner to comply with its mandatory duty to refrain from pursuing time-

[11] *W. Va. Code § 21A-10-21; Myers v. Outdoor Express, Inc., 235 W. Va. 457, 465, 774 S.E.2d 538, 546 (2015).*

barred overpayment claims and related mandates contained in the lower court's mandamus order, but no adequate remedy is available in Petitioner's administrative process to accomplish that.

D. Petitioner's attempts to invoke longer time bars in W. Va. Code § 21A-10-8 in existing W.Va. Code § 21A-10-21 administrative proceedings are in contravention of Article 3, Section 10, of the West Virginia Constitution.

Attempts by WorkForce to invoke longer time bars in W. Va. Code § 21A-10-8 in existing W. Va. Code § 21A-10-21 administrative proceedings violate Article 3, Section 10, of the West Virginia Constitution, therefore contrary to Petitioner's claims, the circuit court certainly did not exceed its legitimate powers and could not have committed clear error in concluding as such.

While the very generalized section of the unemployment statute cited by WorkForce permit it pursue employers either in civil actions or in any manner provided in the unemployment statute for employer collections,[12] all collections of claimant overpayments are tightly controlled by *W. Va. Code* § 21A-10-21 and *W. Va. Code* § 21A-10-8, which are specific and provide the parameters within which WorkForce may and may not engage in collections against citizens. Respectively, they very clearly prohibit error-based overpayment collections after two (2) years, and very clearly force WorkForce to collect more serious 'Non-disclosure' overpayments only in trial courts. Therefore, not only does WorkForce have a mandatory, non-discretionary duty to refrain from collecting benefits paid in error once two (2) years have passed, but it also has a mandatory, non-discretionary duty to refrain from pursuing claims with higher time-bars (Non-disclosure, Misrepresentation, or Fraud) in any forum except West Virginia trial courts.

West Virginia's unemployment compensation program is governed by Chapter 21A of the West Virginia Code. The West Virginia Legislature created the unemployment system in order to:

[12] *See*, *eg. W. Va. Code* § 21A-7-11(c)(1) and § 21A-7-11(f).

(1) Provide a measure of security to the families of unemployed persons.

(2) Guard against the menace to health, morals and welfare arising from unemployment.

(3) Maintain as great purchasing power as possible, with a view to sustaining the economic system during periods of economic depression.

(4) Stimulate stability of employment as a requisite of social and economic security.

(5) Allay and prevent the debilitating consequences of poor relief assistance.

W. Va. Code § 21A-l-l.

In view of *W. Va. Code* § 21A-l-l, the means employed by Respondents in seeking collection of alleged error overpayments well beyond the two-year time bar in *W. Va. Code* § 21A-10-21 and its attempts to assert *W. Va. Code* § 21A-10-8 claims in administrative proceedings are oppressive and in bad faith, and are not rationally related to the purpose of Chapter 21A of the West Virginia Code. They are clearly inconsistent with such purpose, and violate Article 3, Section 10, of the West Virginia Constitution.

Petitioner's attempt to invoke longer § 8 time bars in existing § 21 administrative proceedings clearly is in contravention of Article 3, Section 10, of the West Virginia Constitution. The due process of law guaranteed by the West Virginia and federal constitutions, when applied to procedure in the courts of the land, requires both notice and the right to be heard. *State ex rel. Chris Richard S. v. McCarty*, 200 W. Va. 346, 489 S.E.2d 503, 1997 W. Va. LEXIS 148 (W. Va. 1997). As stated by the West Virgnia Supreme Court, a fundamental element of due process of law is an opportunity to be heard, and an opportunity to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to contest. *Segal v. Segal Beard*, 181 W. Va. 92, 380 S.E.2d 444, 1989 W. Va. LEXIS 60 (W. Va. 1989).

Undoubtedly, WorkForce has undertaken collection in this way because it is simpler and offers the least resistance, but the law forbids it. For claims WorkForce wishes to pursue past two (2) years, it must conduct a review as to whether there are facts sufficient for probable cause that

a claimant has actually committed a non-dislosure, misrepresentation, or fraud sufficient for a filing in a trial court. Respondents then have the option of pursuing such matters in trial courts, with all the legal accountability imbedded in that process, such as provable service of process on claimants, the Rules of Evidence, the prospect of countersuits for improper pursuits by Workforce, unbiased attention to statutory time-bars, and many other protections.

The Petitioner, beyond failing to establish the lawfulness of its practices, similarly fails to show that its conduct in invoking longer § 8 time bars in administrative proceedings is constitutionally appropriate. Petitioner instead argues only a general precept that "due process of law may be afforded administratively as well as judicially and that lawful administrative process is due process equally with lawful judicial process." *State ex rel. Gooden v. Bonar*, 155 W. Va. 202, 208-209, 183 S.E.2d 697, 701 (1971). This case certainly does not suggest that all administrative proceedings provide due process in all cases, and certainly does not say anything contrary to the prohibition against invoking administrative proceedings in section 8 cases. *See, id*.

By requiring civil actions to pursue § 8 cases through its reference to W. Va. Code § 21A-5–16, the legislature clearly required the additional due process rights imbedded in trial court proceedings for these more serious cases. Therefore, Petitioner's discussion of the notice and opportunities to be heard by claimants in § 21 administrative proceedings are simply unavailing. Petitioner certainly cannot argue that Respondent Baldwin was given adequate notice of § 8 allegations and opportunity to be heard when WorkForce made such allegations for the first time in a letter mailed two days prior to the BOR's 'hearing. SuppAppx.000006. These are precisely the types of due process issues sought to be avoided in more serious cases by requiring they be addressed in trial courts.

WorkForce's assertion that the circuit court's orders will result in "less due process" (Pet. at 37) is again unconvincing, since its alleged lack of authority to "prejudge" a § 8 claim before filing suit is based on the same unsupported distinctions discussed above. Petitioner is free to investigate these more serious overpayments in the same ways any creditor assesses debts before filing suit.

In fact, Petitioner's assignment of error completely misstates the circuit court's order, claiming that the lower court restrains it from "determine[ing] if an overpayment was caused by nondisclosure, misrepresentation, or fraud in an administrative proceeding. (Pet. at 35). The court's order contains no bar to "determining" overpayments (Appx.000001-Appx.000023), but nothing stops WorkForce from doing what any other creditor does, investigating whether a debt is owed before pursuing a debtor in circuit court.

E. The mandamus order's requirement that WorkForce suspend any in-progress violations of W. Va. Code § 21A-10-21 is clearly not a legal error or beyond its legitimate powers.

Workforce attempts to argue it should not be required to suspend violations of *W. Va. Code* § 21A-10-21 already in progress – administrative collections or proceedings initiated beyond the two-ear time bar -- because, as it claims, "There is no statute of limitations on the initiation of the administrative process, only on collection". (Pet. at 38). Again, this is directly contrary to this Court's holding in *Myers*, establishing that WorkForce has only two years from the date of payment to initiate administrative proceedings: "Workforce is barred from collecting benefits paid to [the claimant] prior to two years before the dates of the deputy's decision[.] *Myers* at 465, 546 (2015).

Regardless of Petitioner's reference to this requirement as an 'Injunction', the circuit court's order that Petitioner suspend in-progress pursuits of time-barred overpayment claims is

clearly a command in furtherance of the circuit court's order that WorkForce comply with its mandatory duty to adhere to *W. Va. Code* § 21A-10-21 and refrain from pursuing these claims beyond two years.

Ultimately Petitioner faults the court for preventing it from pursuing § 21 collections that are well beyond the statute's two-year time frame, and for preventing from pursuing § 8 claims in administrative proceedings. (Pet. at 38.) However, neither the Court, nor the Respondents, nor any West Virginia claimant or citizen, is responsible for Petitioner's practice of pursuing collection actions late or its decisions to wrongfully pursue more serious violations unlawfully in the wrong forum.

F. The Mandamus Order did not command discovery, therefore it did not exceed legitimate powers or commit error.

Petitioner further asserts that the circuit court committed error by ordering it to engage in "discovery". (Pet. at 39.) Contrary to Petitioners' position, the lower court has not ordered WorkForce to produce discovery. Instead, it merely ordered Petitioners to gather data regarding the claims at issue "for review under the Court's direction at a later date". (App. at 023, ¶ F). Moreover, the data ordered to be assembled is precisely that – ordered by a judge. Therefore, it is not discovery and the cases cited by Petitioner are inapplicable in any event. For these reasons, clearly the lower court has not exceeded its legitimate powers and there is no clear error.

CONCLUSION

For all the above reasons, Respondents request that his Honorable Court Deny Petitioner's Petition for Writ of Prohibition.

RESPECTFULLY SUBMITTED,

By the RESPONDENTS,

DEBORAH BEHELER BALDWIN,
DENNIS R. CHAMBERS,
LINDA WARNER,
ASHLEAH MURPHY,
KELLY HARDY, and
BRITTANY GANDEE,

Respondents/Plaintiffs,
On behalf of themselves and all others
Similarly situated,

By Counsel

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VERIFICATION

STATE OF WEST VIRGINIA,

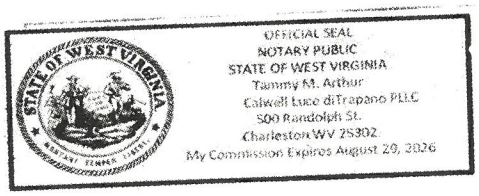
COUNTY OF KANAWHA, TO-WIT:

I, D. Christopher Hedges, counsel for Deborah Beheler Baldwin, Dennis R. Chambers, Linda Warner, Ashleah Murphy, Kelly Hardy, and Brittany Gandee, on their behalf and on behalf of all others similarly situated, hereby certify that, to the best of my knowledge and belief, the contents of the *Response to Petition for Writ of Prohibition* are true and accurate.

D. Christopher Hedges
W. Va. State Bar No. 7894

Taken, subscribed and sworn before m this 27th day of November, 2024.

My commission expires August 29, 2026.



Tammy M. Arthur
Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 24-504

STATE OF WEST VIRGINIA EX REL. SCOTT A. ADKINS, in his official capacity as Acting Commissioner of WORKFORCE WEST VIRGINIA and WORKFORCE WEST VIRGINIA,

Defendants/Respondents Below, Petitioners,

v.

HONORABLE JENNIFER BAILEY, Judge of the Circuit Court of Kanawha County, West Virginia, and DEBORAH BEHELER BALDWIN, DENNIS R. CHAMBERS, LINDA WARNER, ASHLEAH MURPHY, KELLY HARDY, and BRITTANY GANDEE, on their behalf and on behalf of all others similarly situated,

Plaintiffs/Petitioners, Below, Respondents.

CERTIFICATE OF SERVICE

I, Chris Hedges, attorney for Respondents Deborah Beheler Baldwin, Dennis R. Chambers, Linda Warner, Ashleah Murphy, Kelly Hardy, and Brittany Gandee, on their behalf and on behalf of all others similarly situated, hereby certify that a true and correct copy of the foregoing *Response to Petition for Writ of Prohibition* has on the 27th day of November, 2024, been served upon the parties hereto by e-file through File and Serve Express as well as by United States First Class Mail:

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