No. 24-347

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

St. Joseph's Hospital of Buckhannon, Inc.,
Petitioner

v.) No. 24-347

Stonewall Jackson Memorial Hospital Co. and
West Virginia Health Care Authority,
Respondents

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

From The West Virginia Intermediate Court of Appeals, No. 23-ICA-265
On Appeal From The West Virginia Health Care Authority, CON File #23-7-12659-X

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St. Joseph's Hospital of Buckhannon, Inc. d/b/a St. Joseph's Hospital ("St. Joseph's") appeals from the May 23, 2024, Opinion of the Intermediate Court of Appeals of West Virginia ("ICA") affirming the July 12, 2023, Amended Decision[2] of the West Virginia Health Care Authority (the "Authority") issued in the matter of *In re: Stonewall Jackson Memorial Hospital Co.*, CON File #23-7-12659-X. The Authority's Amended Decision determined that Stonewall Jackson Memorial Hospital Company ("Stonewall") could relocate its entire hospital without a Certificate of Need ("CON"). St. Joseph's raises the following assignments of error:

1) Based on the recent United States Supreme Court decision in *Loper Bright Enterprises v. Raimondo*, this Court should overrule syllabus points two through four of *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 579, 466 S.E.2d 424, 430 (1995) and its progeny and hold that a reviewing court must exercise independent judgment in deciding whether an agency has acted within its statutory authority.
2) The ICA and the Authority have misconstrued the plain language of W. Va. Code § 16-2D-8(a)(1), which provides that a CON is required for "[t]he construction, development, acquisition, or other establishment of a health care facility[.]"
3) The ICA and the Authority have failed to properly apply W. Va. Code § 16-2D-2(45) and W. Va. Code § 16-2D-8(a)(5), which require a CON for the relocation of beds from one physical facility or site to another when there is a capital expenditure.

IV. STATEMENT OF THE CASE

Over the past few years, Stonewall has sought to obtain the Authority's approval to relocate

[2] The Authority's original decision (Appx._0178-0188), which was issued on June 15, 2023, was amended when the Authority issued the Amended Decision (Appx._0025-0035) on July 12, 2023. St. Joseph's moved to strike the Amended Decision as ultra vires, but the ICA denied St. Joesph's motion and granted the Authority leave to amend. (*See* Appx._0023-0024).

its hospital campus to Staunton Drive near the I-79 Route 33 interchange, 4.2 miles from its current location. While Stonewall is fully aware that the location it has chosen for the construction of its new hospital will adversely impact the viability of St. Joseph's, Stonewall has made it abundantly clear that it does not care about such externalities and has obstinately refused to consider alternative locations for its project.

Originally founded in 1921, St. Joseph's is a 25-bed critical access hospital ("CAH") and the sole hospital located within and servicing the community of Buckhannon, Upshur County. St. Joseph's became a CAH on April 2, 2014.[3] CAH status is a designation made by the Centers for Medicare & Medicaid Services ("CMS"), a federal agency within the United States Department of Health and Human Services, which enables qualified rural hospitals to be reimbursed on a cost-basis for providing services to Medicare patients, as opposed to being reimbursed under prospective payment systems.[4] The CAH program was implemented to address a rash of closings of rural hospitals across the country.[5] Generally, to qualify for CAH status a hospital must, *inter alia*, be located more than 15 (mountainous terrain) miles from another hospital.[6] Importantly, Stonewall's move of its hospital campus to Staunton Drive will destroy St. Joseph's CAH status because the proposed site is located approximately 12 miles from St. Joseph's, closer than the 15-mile threshold necessary for St. Joseph's to qualify as a CAH.[7]

In the summer of 2022, the Authority denied Stonewall's application for a CON to build a replacement acute care health care facility and move its hospital campus to Staunton Drive, finding that the project was not a superior alternative as required by the CON law and would "cause [St.

[3] (Appx._0424-0425; Appx._0254).
[4] (Appx._0392-0395).
[5] (Appx._0426-0427).
[6] *See* 42 C.F.R. § 485.610(c).
[7] (*See* Appx._0428-0429; Appx._0253-0254).

Joseph's] to lose its CAH status which would have a significant detrimental financial effect on [St. Joseph's.]"[8] The ICA affirmed that decision.[9] Because "Stonewall failed to provide any independent evidence that it explored various alternatives . . . . or otherwise that alternative locations do not exist that would not affect St. Joseph's CAH status", the ICA held that "the Authority did not err in finding that Stonewall did not meet its burden of proving that superior alternatives to the services in terms of cost, efficiency, and appropriateness do not exist and that the development of alternatives is not practicable under W. Va. Code § 16-2D-12(b)(1) (2016)."[10]

Having failed to establish that its project is the superior alternative, Stonewall has now made an end run around the CON law by filing a request for a determination of reviewability ("RDOR") under W. Va. Code § 16-2D-7.[11] Section 16-2D-7 provides that "[a] person may make a written request to the authority for it to determine whether a proposed health service is subject to the certificate of need or exemption process." Relying on the Legislature's recent increase of the CON law's Expenditure Minimum, Stonewall argued[12] that the proposed construction of its new hospital no longer requires a CON because the Capital Expenditure associated with the project ($56,000,000) is less than the Expenditure Minimum (raised to $100,000,000).[13]

St. Joseph's intervened to oppose Stonewall's RDOR,[14] arguing that Stonewall's project requires a CON because, *inter alia*, (a) it involves the construction of a health care facility, W. Va.

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[8] *See In re: Stonewall Jackson Mem'l Hosp. Co.*, CON File 21-7-12157-H (Decision dated June 13, 2022) (Appx._0254).
[9] *Stonewall Jackson Mem'l Hosp. Co. v. St. Joseph's Hosp. of Buckhannon, Inc.*, No. 22-ICA-147, 2023 WL 4197305 (W. Va. App. June 27, 2023) (memorandum decision).
[10] *Id*. at *4.
[11] (Appx._0595-0597).
[12] (Appx._0595-0597).
[13] *Compare* 2023 West Virginia Laws Ch. 255 (S.B. 613) ('"Expenditure minimum' means the cost . . . above $100 million") *with* 2017 West Virginia Laws Ch. 185 (H.B. 2459) ('"Expenditure minimum' means the cost . . . above $5 million"). The Expenditure Minimum is adjusted annually to account for inflation; the Expenditure Minimum for calendar year 2024 is $104,300,000.00. (available at https://hca.wv.gov/Pages/default.aspx).
[14] (*See* Appx._0593; Appx._0208-0216; Appx._0189-0195).

Code § 16-2D-8(a)(1) (providing that a CON is required for "[t]he construction, development, acquisition, or other establishment of a health care facility"); and (b) the project contemplates a substantial change in bed capacity, *see* W. Va. Code § 16-2D-8(a)(5); W. Va. Code § 16-2D-2 (45) ('"Substantial change to the bed capacity' of a health care facility means any change, associated with a capital expenditure, that increases or decreases the bed capacity or relocates beds from one physical facility or site to another, but does not include a change by which a health care facility reassigns existing beds.").

Failing entirely to engage with the statutory text, the Authority held that Stonewall's project does not require a CON because "the West Virginia legislature raised the minimum capital expenditure for CON review . . . and [thereby] made it possible for Stonewall to relocate [its] entire hospital to a new location[.]"[15] On appeal, the ICA affirmed, holding that the statute was ambiguous and that the Authority's determination was reasonable under step two of the *Chevron* analysis. As explained below, the ICA and the Authority have failed to properly apply W. Va. Code §§ 16-2D-8(a)(1), 16-2D-8(a)(5), and 16-2D-2(45).

V. SUMMARY OF THE ARGUMENT

As an initial matter, St. Joseph's submits that *Chevron*[16] has fallen out of favor and was overruled by the United States Supreme Court on June 28, 2024.[17] This Court should likewise abandon *Chevron* deference and "exercise [its] independent judgment in deciding whether an agency has acted within its statutory authority."[18]

[15] (Appx._0032; Appx._0185).
[16] *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984).
[17] *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 219 L Ed.2d 832 (2024).
[18] *Id*. at 2273, 219 L Ed.2d at 867.

Regardless of whether or not the Court elects to apply the *Chevron* framework, the Authority's Amended Decision, which myopically focuses on the Expenditure Minimum and ignores other triggers requiring a CON, cannot stand.[19] The CON law is unmistakably clear: the "construction . . . of a health care facility" is subject to CON review.[20] So is the relocation of beds to another physical site involving a Capital Expenditure—however small.[21] Because the Authority found that Stonewall's project encompasses both of these actions (each of which is sufficient to trigger CON review), its ultimate determination of non-reviewability is erroneous and contrary to the plain language of the CON law. Each of these arguments was presented to the Authority and to the ICA below and are therefore properly before this Court.[22]

Nonetheless, the ICA affirmed the Authority's Decision, holding that the Authority's determination was reasonable under step two of the *Chevron* analysis.[23] The ICA determined that "the Authority's construction of § 16-2D-8(a)(1) is that the words 'or other establishment' excludes a relocation because no new facility is being established, a pre-existing one is just moving into a new building" and that "the Authority has merely concluded that in a relocation, one reassigns the existing beds to the new facility, excluding a relocation from being a 'substantial change to bed capacity.'"[24] To be clear, these ideas are the product of the ICA and were not briefed by the parties.[25] The Authority never explained how W. Va. Code §§ 16-2D-8(a)(1), 16-2D-8(a)(5), and/or 16-2D-2(45) are unclear or ambiguous, and never attempted to offer its own construction of these provisions.[26]

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[19] (*See* Appx._0025-0035; Appx._0178-0188).
[20] W. Va. Code § 16-2D-8(a)(1).
[21] W. Va. Code § 16-2D-8(a)(5); *see also* W. Va. Code § 16-2D-2(45).
[22] (*See, e.g.*, Appx._0208-216; Appx._0130-175).
[23] (Appx._0001-0024).
[24] (Appx._0018-0019).
[25] (*See* Appx._0037-0175; Appx._0189-0269).
[26] (*See* Appx._0025-0035; Appx._0178-0188).

The ICA has misconstrued W. Va. Code § 16-2D-8(a)(1), and has wholly ignored its plain language. Applying the plain and ordinary meaning of the term "construction", it is clear that Stonewall's project encompasses "[t]he construction . . . of a health care facility[.]"[27] Indeed, the ICA itself concluded that **"**Stonewall clearly plans to construct and develop a health care facility[.]"[28] That should have been decisive. Construction, development, acquisition, and even relocation are all forms of establishment, and pursuant to the doctrine of *ejusdem generis*, a generic term at the end of the series is construed by reference to the specific terms preceding it, and not vice versa.[29] The ICA's interpretation of establishment is unduly narrow and misapplies the surplusage cannon by reading the preceding terms (*e.g.*, construction) out of the statute.

The ICA further erred when it found that "the Authority has merely concluded that in a relocation, one reassigns the existing beds to the new facility[.]"[30] The Authority offered no such construction of W. Va. Code § 16-2D-2(45), and Stonewall never argued that it was merely reassigning its beds.[31] The ICA should not have raised this issue.[32] A reassignment is a conversion of beds of one type (*e.g.*, medical-surgical beds) to another type (*e.g.*, psychiatric beds), and does not encompass a relocation from one physical facility or site to another. The ICA's construction of W. Va. Code § 16-2D-2(45) improperly conflates the terms "relocates" and "reassigns", failing to appreciate the distinction drawn by the Legislature's juxtaposition of these terms.

Accordingly, St. Joseph's asks that the Court reverse the decisions of both the ICA and the Authority and remand the case to the Authority with instructions to enter an order requiring Stonewall to obtain a CON before commencing its project.

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[27] W. Va. Code § 16-2D-8(a)(1).
[28] (Appx._0014).
[29] *See W. Va. Consol. Pub. Ret. Bd. v. Clark*, 245 W. Va. 510, 520, 859 S.E.2d 453, 463 (2021).
[30] (Appx._0019).
[31] (*See* Appx._0025-0035; Appx._0178-0188; Appx._0073-0129).
[32] *See Noble v. W. Va. Dep't of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009).

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is not suitable for a memorandum decision and oral argument is appropriate pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure because the case involves an issue of fundamental public importance; the Authority's singular focus on the Expenditure Minimum and the ICA's constructions of W. Va. Code §§ 16-2D-8(a)(1) and 16-2D-8(a)(5) have dramatically and unwarrantedly restricted the scope of the CON law.

VII. STANDARD OF REVIEW

This Court's '"ruling on a matter subject to the Administrative Procedures Act is governed by the same statutory standards of review employed by the [ICA]."'[33] The Authority's Decision is subject to judicial review under the standard of review for contested cases set forth in W. Va. Code § 29A-5-4(g), which provides as follows:

> (g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority or jurisdiction of the agency;
> (3) Made upon unlawful procedures;
> (4) Affected by other error of law;
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Under W. Va. Code § 29A-5-4, the Court "reviews questions of law presented *de novo*" and "findings of fact by the administrative officer are accorded deference unless the reviewing court

[33] *See Duff v. Kanawha Cnty. Comm'n*, No. 23-43, 2024 WL 1715166, at *5-6 (W. Va. Apr. 22, 2024) (quoting *Nesselroad v. State Consol. Pub. Ret. Bd.*, 225 W. Va. 397, 399, 693 S.E.2d 471, 473 (2010) (per curiam)).

believes the findings to be clearly wrong."[34] "Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review."[35] As this Court recently noted, "[t]he judiciary is the final authority on issues of statutory construction, and [is] obliged to reject administrative constructions that are contrary to the clear language of a statute."[36]

Previously, this Court has employed the analytical framework set forth by *Chevron* and its progeny when reviewing an agency's construction of a statute that it administers.[37] This analysis involves two separate but interrelated questions:

> We first ask whether the Legislature has 'directly spoken to the precise [legal] question at issue.' *Chevron,* 467 U.S. at 842, 104 S. Ct. at 2781, 81 L.Ed.2d at 702–03. 'If the intention of the Legislature is clear, that is the end of the matter.' *Id.* If it is not, we may not simply impose our own construction of the statute. 'Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the [agency's] answer is based on a permissible construction of the statute.'[38]

As this Court has noted, "[n]o deference is due to the agency's interpretation at [step one of the *Chevron* framework]"[39] and "'[r]espectable authority indicates it is appropriate to employ all the 'traditional tools of statutory construction' in the first part of the *Chevron* analysis when the statutory language is not dispositive."[40]

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[34] Syl. Pt. 1, in part, *W. Va. State Police v. Walker,* 246 W. Va. 77, 866 S.E.2d 142, 144 (2021) (quoting Syl. Pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996)).
[35] Syl. Pt. 1, *Appalachian Power*, 195 W. Va. at 578, 466 S.E.2d at 429.
[36] Syl. Pt. 3, *War Mem'l Hosp., Inc. v. W. Va. Health Care Auth.*, 248 W. Va. 49, 50, 887 S.E.2d 34, 35 (2023) (quoting Syl. Pt. 5, *CNG Transmission Corp. v. Craig*, 211 W.Va. 170, 564 S.E.2d 167 (2002)).
[37] *Appalachian Power*, 195 W. Va. at 582, 466 S.E.2d at 433 (citing *Chevron*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984)).
[38] *Id.*, 466 S.E.2d at 433 (quoting *Sniffin v. Cline*, 193 W. Va. 370, 374, 456 S.E.2d 451, 455 (1995)).
[39] *Id*. at Syl. Pt. 3, in part; *see also Kentuckians for Commonwealth Inc. v. Rivenbaugh*, 317 F.3d 425, 443 (4th Cir. 2003) ("Agency interpretations of statutory provisions only come into play if Congress has not spoken clearly.").
[40] *Id*. at 586, 466 S.E.2d at 437 (citing *INS v. Cardoza–Fonseca*, 480 U.S. 421, 107 S. Ct. 1207, 94 L. Ed.2d 434 (1987)).

Additionally, the United States Supreme Court's recent decision in *Loper* overruled *Chevron*,[41] and St. Joseph's submits that this Court should therefore abandon the *Chevron* framework.[42] The *Loper* Court held that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority" and "may not defer to an agency interpretation of the law simply because a statute is ambiguous."[43]

VIII. ARGUMENT

A. THIS COURT SHOULD OVERRULE ITS CASES APPLYING *CHEVRON* DEFERENCE AND HOLD THAT A REVIEWING COURT MUST EXERCISE INDEPENDENT JUDGMENT IN DECIDING WHETHER AN AGENCY HAS ACTED WITHIN ITS STATUTORY AUTHORITY.

For nearly 40 years, federal courts have looked to the two-step framework established in *Chevron*[44] to determine whether an agency has properly construed a statute that it administers. However, on June 28, 2024,[45] the United States Supreme Court overruled *Chevron* and held that "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the [federal] APA requires" and "need not and under the [federal] APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."[46] In doing so, the Supreme Court relied on Section 706 of the federal Administrative Procedure Act ("Federal APA") which "specifies that courts, not agencies, will decide '*all* relevant questions of law' arising on review of agency action[.]"[47] The Supreme Court noted that "agencies have no special competence in resolving statutory ambiguities" but that "[c]ourts do."[48] According to the

[41] *See Loper*, 144 S. Ct. at 2273, 219 L Ed.2d at 867.
[42] *See* Section VIII.a, *infra*.
[43] *Loper*, 144 S. Ct. at 2273, 219 L Ed.2d at 867.
[44] 467 U.S. at 837, 104 S. Ct. at 2778, 81 L. Ed.2d at 694.
[45] This Argument could not have been raised below because the ICA issued its opinion before *Loper* was decided.
[46] *Loper*, 144 S. Ct. at 2273, 219 L Ed.2d at 867.
[47] *Id*. at 2261, 219 L Ed.2d at 854.
[48] *Id*. at 2266, 219 L Ed.2d at 859.

United States Supreme Court, there is a "best reading" of a statute—'"the reading the court would have reached' if no agency were involved"—and that is the only permissible reading.[49]

While this Court was not bound to apply the *Chevron* framework when reviewing state agency decisions, the Court has often referred to federal law where state law is patterned after it.[50] In February of 1995, this Court first applied the *Chevron* framework in reviewing the propriety of an administrative decision.[51] In September of 1995, the Court incorporated the *Chevron* analysis into three new syllabus points.[52] The only clue that the Court gave for adopting the *Chevron* two-step analysis was by noting that "*Chevron*, of course, was a watershed decision in the area of judicial deference to regulatory decisions."[53]

The West Virginia APA is patterned after the 1961 version of the Model State Administrative Procedure Act ("MSAPA"). While our state APA is not exactly patterned after the Federal APA, there are significant similarities between the two acts. In the case of judicial review of administrative decisions, this Court has noted that the "Model State Administrative Procedure Act, upon which W. VA. Code chapter 29A is based, does not differ significantly from the federal Administrative Procedures Act in its impact on judicial review."[54] In *Loper*, the United States

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[49] *Id*., 219 L Ed.2d at 859.

[50] *See, e.g., Painter v. Peavy*, 192 W.Va. 189, 192 n. 6, 451 S.E.2d 755, 758 n. 6 (1994) ("Because the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules, we give substantial weight to federal cases, especially those of the United States Supreme Court, in determining the meaning and scope of our rules"); *State v. Sutphin*, 195 W.Va. 551, 563, 466 S.E.2d 402, 414 (1995) ("we have repeatedly recognized that when codified procedural rules or rules of evidence of West Virginia are patterned after the corresponding federal rules, federal decisions interpreting those rules are persuasive guides in the interpretation of our rules."); *Barefoot v. Sundale Nursing Home*, 193 W.Va. 475, 482, 457 S.E.2d 152, 159 (1995) ("We have consistently held that cases brought under the West Virginia Human Rights Act, W. Va. Code, 5–11–1, *et seq*., are governed by the same analytical framework and structures developed under Title VII").

[51] *See Sniffin*, 193 W.Va. at 370, 456 S.E.2d at 455.

[52] Syl. Pts. 2-4, *Appalachian Power*, 195 W.Va. at 573, 466 S.E.2d at 424.

[53] *Id*. at 582, 466 S.E.2d at 433 n. 6.

[54] *Citizens Bank of Weirton v. W. Va. Bd. of Banking and Fin. Inst.*, 160 W. Va. 220, 227 n. 3, 233 S.E.2d 719, 724 n. 3 (1977).

Supreme Court held that the Federal APA "codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions applying their own judgment."[55] Similarly, this Court stated that "[t]he judiciary is the final authority on issues of statutory construction, and we are obliged to reject administrative constructions that are contrary to the clear language of a statute."[56]

Although the West Virginia APA does not expressly contain the first sentence of 5 U.S.C. § 706—courts will decide "all relevant questions of law"—the judicial review provisions of the West Virginia APA make clear that determinations of questions of law are solely a judicial function. In this regard, the first four reasons given for overturning agency action under W. Va. Code § 29A-5-4(g) are based on errors of law. Specifically, pursuant to W. Va. Code § 29A-5-4(g), agency action may be overturned if it is: "(1) [i]n violation of constitutional or statutory provisions; (2) [i]n excess of the statutory authority or jurisdiction of the agency; (3) [m]ade upon unlawful procedures;" or "(4) [a]ffected by other error of law."

Frank Cooper, who had been intimately involved with the 1961 revision of the MSAPA,[57] noted in his 1965 treatise on State Administrative Law that "state courts hold that agency action which is judicially reviewable at all is subject to reversal if it is found that the agency has committed an error of law which affects the rights of the parties."[58] He further noted in this pre-*Chevron* period that "[m]any state courts treat as questions of law issues which would not be so classified by many of the federal courts. On the whole, state courts have been less willing than the federal courts to adopt the philosophy of judicial self-restraint (which some critics describe as

[55] *Loper*, 144 S. Ct. at 2261, 219 L Ed.2d at 854 (citing *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60 (1803)).
[56] Syl. Pt. 5, *CNG Transmission Corp.*, 211 W.Va. at 170, 564 S.E.2d at 167.
[57] *Tex. Dep't of Prot. & Regul. Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 180 (Tex. 2004) ("Cooper had been intimately involved with the 1961 revision of the 1946 model act.").
[58] 2 F. Cooper, *State Administrative Law*, 706 (1965).

'judicial abnegation')[.]"[59] Thus, courts were expected to decide issues of law under the 1961 MSAPA.

Chevron has, in recent years, fallen out of fashion. In *Loper*, the United States Supreme Court noted that it had not relied on the *Chevron* framework since 2016.[60] Similarly, this Court last cited to *Chevron* in 2021.[61] In a recent appeal involving judicial review of the Authority's interpretation of the CON law, neither the majority nor the dissent cited to *Chevron*'s two-step framework in resolving the statutory construction issue.[62] Instead, the Court stated that "[t]he judiciary is the final authority on issues of statutory construction[.]"[63] Interestingly, both parties cited to the *Chevron* framework in the standard of review section of their briefs.[64] More recently, this Court overruled an opinion of the Intermediate Court of Appeals affirming the Workers' Compensation Board of Review because it was based on an erroneous construction of the controlling statute, and the Court did not apply the *Chevron* framework.[65]

In the instant case, the Intermediate Court of Appeals applied the *Chevron* framework to the Authority's Amended Decision.[66] After finding that the applicable statutes were ambiguous under the first step of *Chevron*, the Intermediate Court of Appeals then concluded that the Authority's interpretations of W. Va. Code §§ 16-2D-8(a)(1) and 8(a)(5) were reasonable.[67] While St. Joseph's contends that the Intermediate Court of Appeals erred in finding that the statute was

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[59] *Id*. at 709
[60] 144 S. Ct. at 2269, 219 L Ed.2d at 863. ("This Court, for its part, has not deferred to an agency interpretation under *Chevron* since 2016.").
[61] *See* Syl. Pts. 2 & 3, *Amedisys W. Va., LLC v. Pers. Touch Home Care of W.Va., Inc*., 245 W. Va. 398, 859 S.E.2d 341, 344 (2021).
[62] *See War Mem'l Hosp. Inc.*, 248 W. Va. at 49, 887 S.E.2d at 34.
[63] *Id*. at Syl. Pt. 3, in part.
[64] *War Mem'l Hosp., Inc. v. W. Va. Health Care Auth.*, Petitioner's Brief, 2022 WL 17601994, at *7 (Feb. 7, 2022); *Id*., Respondent's Brief, 2022 WL 17601834, at *6 (Mar. 24, 2022).
[65] *See Duff*, 2024 WL 1715166, at *1.
[66] (*See* Appx._0011, n. 5).
[67] (Appx._0018-0019).

not clear and unambiguous, the question arises as to whether this Court should continue to apply the *Chevron* framework.

This case itself highlights the shortcomings of the *Chevron* framework. Applying *Chevron*, the ICA, *sua sponte*, searched for any ambiguity in the statutory text that could, by its reckoning, support a construction of the statute that is consistent with the Authority's Amended Decision. All the while, the Authority never even engaged with the statutory text, explaining that "[n]one of the Board members are lawyers."[68] In fact, the Authority admitted that Stonewall's RDOR left the Authority in a "quandary," and that "[t]his case is one of first impression for the Authority . . . that will ultimately depend on the wisdom of [the ICA] to decide."[69] The Authority never articulated a coherent interpretation and/or construction of W. Va. Code §§ 16-2D-8(a)(1), 16-2D-8(a)(5), or 16-2D-2(45). This underscores the fact that courts, not agencies, have special expertise in statutory construction and that a court should not defer to an agency's so-called interpretation of a statute.[70]

In sum, it is for the Court, not the Authority, to determine what the law is.[71] This Court should continue to follow the guidance of the United States Supreme Court and abandon *Chevron* deference by overruling syllabus points two through four of *Appalachian Power* and its progeny.

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

W. Va. Code § 16-2D-8(a)(1) provides that a CON is necessary for the "construction, development, acquisition, or other establishment of a health care facility." This statutory provision

[68] (Appx._0077).
[69] (*See* Appx._0082-0083).
[70] Indeed, this Court has already held that administrative personnel's "lack of legal training coupled with the broad range of subjects presented to them [] preclude the [Legislature's] delegation of a general contempt power [to an agency]." *Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 170 W. Va. 757, 761, 296 S.E.2d 887, 890 (1982).
[71] *See War Mem'l Hosp., Inc.*, 248 W. Va. at 51, 887 S.E.2d at 36.

details a series of different actions with the disjunctive "or" placed before the last term in the series. In determining the meaning of this series, essential here is W. Va. Code § 16-2D-8(a)(1)'s use of the word "or." "[R]ecognizing the obvious, the normal use of the disjunctive 'or' in a statute connotes an alternative or option to select."[72] Thus, a CON is necessary if any of the four following actions is proposed: (1) construction of a health care facility; (2) development of a health care facility; (3) acquisition of a health care facility; or (4) establishment of a health care facility.

Examining the first alternative, the meaning of two words is important here: "construction" and "health care facility." At W. Va. Code § 16-2D-2(16), the Legislature broadly defined a "health care facility" as "a publicly or privately owned facility, agency or entity that offers or provides health services, whether a for-profit or nonprofit entity and whether or not licensed, or required to be licensed, in a whole or in part."[73] Thus, a "health care facility" can be an entity, but it can also be a brick-and-mortar building (*i.e.*, a facility) when it is constructed for the purpose of offering or providing health services.[74]

The Legislature did not define the term "construction." As an undefined term, it is given its "common, ordinary, and accepted meaning."[75] This Court has recently noted that "[w]e frequently look at dictionary definitions for the common, ordinary, and accepted meaning of

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

[73] "Where the legislature . . . declare[s] what a particularly term 'means,' such definition is ordinarily binding upon the courts and excludes any meaning that is not stated." *In re Greg H.*, 208 W.Va. 756, 760, 542 S.E.2d 919, 923 (2000) (per curiam); *see also Tanzin v. Tanvir*, 592 U.S. 43, 47, 141 S. Ct. 486, 490, 208 L. E.2d 295, 301 (2020) ('"When a statute includes an explicit definition, we must follow that definition,' even if it varies from a term's ordinary meaning.").

[74] Indeed, merriam-webster.com defines "facility" as, *inter alia*, "something (such as a hospital) that is built, installed, or established to serve a particular purpose." *Facility*, merriam-webster.com (2024) (Available a https://www.merriam-webster.com/dictionary/facility).

[75] Syl. Pt. 6, in part, *State ex rel Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171 (1984); Syl. Pt. 3, *W. Va. Land Res., Inc. v. Am. Bituminous Powers Partners, LP*, 248 W.Va. 411, 888 S.E.2d 911 (2023).

undefined terms."[76] In fact, this Court specifically considered the dictionary definition of "construction" in *Eggleston v. W. Va. Dep't of Highways.*[77] In that case the Court noted:

> When we turn to a dictionary definition of the word "construction," it appears to include the completion of the entire project. In Webster's Third New International Dictionary at 489, "construction" is defined as "the act of putting parts together to form a complete integrated object." In II(c) *The Oxford English Dictionary* at 880 (1970), "construction" is stated as "[t]he action of framing, devising, or forming, by putting together of parts; erection, building."[78]

In addition, the *Eggleston* Court cited to an Arkansas case which considered what constituted the construction of a hospital and concluded that it was "more than a mere building of four walls and a roof" and that it included the "equipping" of the hospital.[79]

Here, Stonewall is clearly proposing to "construct" a "health care facility" as part of its project. This proposed project does not end with Stonewall's hospital being magically plopped down on a site 4.5 miles from where it currently exists. Rather, it ends with a large construction site on a lot on Staunton Drive in Weston where Stonewall intends to construct a health care facility with at least "four walls and a roof" and which is to be equipped to function as a hospital. In fact, the ICA has itself recognized that ***"Stonewall clearly plans to construct and develop a health care facility[.]"***[80] As this Court "has repeatedly held[,] the plain language of a statute should be afforded its plain meaning, and [] the rules of interpretation are resorted to for the purpose of

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[76] *Christopher P. v. Amanda C.*, 250 W. Va. --, n. 20, 902 S.E.2d 185, 192 n. 20 (2024); *Eldercare of Jackson Cnty., LLC v. Lambert*, 902 S.E.2d 840, 853 n. 18 (W. Va. 2024) ("This Court has routinely looked to dictionary definitions to afford undefined terms their common, ordinary, and accepted meaning.").
[77] 189 W.Va. 230, 234, 429 S.E.2d 636, 640 (1993).
[78] *Id.*, 429 S.E.2d at 640
[79] *Id.* at 235, 429 S.E.2d at 641 (quoting from *Hollis v. Ervin*, 237 Ark. 605, 613, 374 S.W.2d 828, 833 (1964)).
[80](Appx._0014 (emphasis added); *see also* Appx._0015 (Stonewall's "relocation plan necessarily entails the physical construction and development of a health care facility[.]")).

resolving an ambiguity and not for the purpose of creating one."[81] Because the plain language of the statute is clear, "the language must prevail and further inquiry is foreclosed."[82]

1. The Authority erred in finding that the construction of Stonewall's health care facility does not require a CON.

In its Amended Decision, the Authority states that "the complete relocation of [Stonewall's] hospital to a new location in [Stonewall's] service area is NOT subject to Certificate of Need review because [Stonewall's] project is a replacement and relocation of the same services, in the same service area, and does not exceed the minimum capital expenditure."[83] However, there is nothing in the plain language of W. Va. Code § 16-2D-8(a)(1) that supports the Authority's interpretation. The construction of a health care facility is still the construction of a health care facility, even though the entity currently operates an existing health care facility. Moreover, exceeding the Expenditure Minimum plays no role in determining whether a project is subject to the CON requirements under W. Va. Code § 16-2D-8(a)(1). "If the language of an enactment is clear and within the constitutional authority of the law-making body which passed it, courts must read the relevant law according to its unvarnished meaning[.]"[84]

In addition, '"[i]t is not for this Court arbitrarily to read into [a statute] that which it does not say . . . we are obligated not to add to statutes something the Legislature purposely omitted.'"[85] In *War Mem'l Hosp., Inc. v. W. Va. Health Care Auth.*,[86] for example, the Authority improperly

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[81] *Slater v. Ballard*, No. 12-0330, 2013 WL 5418574, at *11 (W. Va. Sept. 27, 2013)) (memorandum decision); *see also Crockett v. Andrews*, 153 W. Va. 714, 719, 172 S.E.2d 384, 387 (1970); *Deller v. Naymick*, 176 W. Va. 108, 112, 342 S.E.2d 73, 77 (1985).
[82] *Appalachian Power*, 195 W.Va. at 587, 466 S.E.2d at 438; *Monongahela Power Co. v. Buzminsky*, 243 W. Va. 686, 691, 850 S.E.2d 685, 690 (2020) ("Only when a statute is ambiguous may the Court inquire as to a statute's purpose and other employ the canons of statutory construction.").
[83] (Appx._0032; Appx._0185).
[84] Syl. Pt. 3, in part, *W. Va. Health Care Cost Rev. Auth. v. Boone Mem'l Hosp.*, 196 W.Va. 326, 329, 472 S.E.2d 411, 414 (1996).
[85] *War Mem'l Hosp., Inc.*, 248 W.Va. at 54, 887 SE.2d at 39 (quoting *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 491 647 S.E.2d 920, 927 (2007)).
[86] 248 W. Va. 49, 887 S.E.2d 34 (2023).

held that a statutory exemption for "[t]he acquisition and utilization of one computer tomography scanner and/or one magnetic resonance imaging scanner with a purchase price of up to $750,000 by a hospital" only applied to a scanner purchased for the "hospital's primary location."[87] This Court rejected the Authority's interpretation because a "review of the relevant statutory provisions pertaining not only to the CON process but also to the statutory exemption set forth in West Virginia Code section 16-2D-11(c)(27) demonstrates the complete absence of any mention of a 'hospital's primary location.'"[88] The Court explained that "the clear language of West Virginia Code section 16-2D-11(c)(27), which contains no location-specific requirement applicable to the exemption therein, reflects the intention of the Legislature to omit any such requirement."[89]

Here, as in *War Memorial*, the statutory provision at issue is unambiguous and does not contain any language corresponding to the limitations urged by the Authority. There is nothing in W. Va. Code § 16-2D-8(a)(1) that excludes from its purview "the complete relocation of [a] hospital" into a newly constructed health care facility because it is a "replacement and relocation of the same services, in the same service area, [that] does not exceed the [Expenditure Minimum]."[90] W. Va. Code § 16-2D-8(a)(1) does not require a Capital Expenditure and does not reference the Expenditure Minimum. Nor does it mention the "replacement" or "relocation" of services within the same "service area." The Court must decline Respondents' invitation to read into W. Va. Code § 16-2D-8(a)(1) that which it does not say.

Moreover, there is no exemption for "a replacement and relocation of the same services, in the same service area, [that] does not exceed the [Expenditure Minimum]."[91] Here, as noted in

[87]*Id*. at 49, 887 S.E.2d at 38.
[88]*Id.*, 887 S.E.2d at 38.
[89]*Id* at 49, 887 S.E.2d at 40-41.
[90](Appx._0032; Appx._0185).
[91](*See* Appx._0032; Appx._0185).

War Memorial, the Legislature has demonstrated that it knows how to create exemptions for projects that are otherwise subject to CON review. *See, e.g.*, W. Va. Code § 16-2D-11(18) (exempting the "construction . . . of community mental health and intellectual disability facility"); W. Va. Code § 16-2D-11(20) (exempting the "construction . . . of kidney disease treatment centers"); W. Va. Code § 16-2D-11(23) (exempting the "construction . . . of an alcohol or drug treatment facility and drug and alcohol treatment services"). Similarly, W. Va. Code § 16-2D-11(9) provides an exemption for "[r]enovations ***within*** a hospital" in excess of the Expenditure Minimum but "[t]he renovations may not expand the health care facility's current square footage, incur a substantial change to the health services, or a substantial change to the bed capacity[.]" (emphasis added). "Atextual judicial supplementation is particularly inappropriate when, as here, [the Legislature] has shown that it knows how to adopt the omitted language or provision."[92]

If the Legislature wanted to exempt the construction of replacement hospitals from review, it would have said so. Indeed, in 2010, State Health Plan Standards were specifically developed to govern CON review in cases involving the "Renovation-Replacement of Acute Care Facilities and Services" (*i.e.*, hospitals).[93] This is exactly what is proposed by Stonewall's project, and in fact, these are the standards that were applied to Stonewall's 2021 CON application.[94] The Legislature was aware of these standards, declaring that "[t]he certificate of need standards in effect on July 1, 2016, and all prior versions promulgated and adopted in accordance with the provisions of this section are and have been in full force and effect from each of their respective dates of approval

[92] *Rotkiske v. Klemm*, 589 U.S. 8, 14, 140 S. Ct. 355, 357, 204 L. Ed.2d 291, 294 (2019).
[93](Avialable at https://hca.wv.gov/certificateofneed/Documents/CON_Standards/RenovAcute.pdf). "Acute Care" means "inpatient hospital care provided to patients requiring immediate and continuous attention of short duration" and includes "medical, surgical, obstetric, pediatric, psychiatric, ICU and CCU care in a hospital." *Id.*
[94] (*See* Appx._0222).

by the Governor."[95] Nonetheless, the Legislature never saw fit to exempt the construction of replacement hospital health care facilities from CON review.

Respondents' insistence on reading the Expenditure Minimum into W. Va. Code § 16-2D-8(a)(1) not only conflicts with the plain language of the statute, it also violates accepted canons of statutory construction by rendering this subsection redundant with W. Va. Code § 16-2D-8(a)(3)(A).[96] "An obligation for a capital expenditure incurred by or on behalf of a health care facility in excess of the expenditure minimum" is already separately subject to CON review under W. Va. Code § 16-2D-8(a)(3)(A). As a result, the imposition of an Expenditure Minimum requirement to W. Va. Code § 16-2D-8(a)(1) would render it completely meaningless and superfluous. Thus, this interpretation violates a "cardinal rule of statutory construction [which] is that significance and effect must, if possible, be given to every section, clause, word or part of the statute."[97]

In sum, Stonewall's project requires a CON pursuant to W. Va. Code § 16-2D-8(a)(1) because it contemplates "[t]he construction . . . of a health care facility." The Authority cannot read elements into W. Va. Code § 16-2D-8(a)(1) that are not there.[98] Here, like in *War Memorial*, the agency's interpretation is directly contrary to the statute. Such an interpretation cannot stand.[99]

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[95] W. Va. Code § 16-2D-6.

[96] *Kungys v. U.S.*, 485 U.S. 759, 778, 108 S. Ct. 1537, 1550, 99 L. Ed.2d 839, 858 (1988) (Scalia J., plurality opinion) ("[T]he cardinal rule of statutory interpretation that no provision should be considered to be entirely redundant"); *see also In re Petition of McKinney*, 218 W.Va. 557, 561, 625 S.E.2d 319, 323 (2005) ("In other words, to read W. Va. Code § 17B-3-6(a)(1) as urged by McKinney would be to find that the Legislature enacted a completely redundant statutory provision. This we decline to do.").

[97] Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999).

[98] *See War Mem'l Hosp., Inc.*, 248 W. Va. at 54, 887 S.E.2d at 39; s*ee also Rotkiske*, 589 U.S. at 15, 140 S. Ct. at 357, 204 L. Ed.2d at 298 ("It is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'") (quoting from A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts*, 94 (2012)).

[99] 2 F. Cooper, *State Administrative Law*, 693 (1965) ("The suggestion by Dean Pound that agencies have a tendency to set up and give effect to policies beyond or even at variance with those of the statutes they are created to administer is supported by a number of cases in which state courts have had occasion to strike

2. The ICA has misconstrued the plain language of W. Va. Code § 16-2D-8(a)(1), which provides that a CON is required for "[t]he construction, development, acquisition, or other establishment of a health care facility[.]"

In its Opinion, the ICA itself recognized that "*Stonewall clearly plans to construct and develop a health care facility*[.]"[100] Nonetheless, as shown previously, the ICA has refused to give the word "construction" its common, ordinary, and accepted meaning. Instead, the ICA concluded that Stonewall's project was not reviewable under W. Va. Code § 16-2D-8(a)(1) because, '[a]lthough a relocation plan necessarily entails the physical construction and development of a health care facility, it cannot be so plainly said that such a relocation 'establishes' a health care facility."[101] The ICA explains that "the Authority's construction of § 16-2D-8(a)(1) is that the words 'or other establishment' excludes a relocation because no new facility is being established, a pre-existing one is just moving into a new building."[102]

The ICA's construction of the words "or other establishment" is incorrect. According to merriam-webster.com, "other" means "being the one (as of two or more) remaining or not included," "distinct from that or those first mentioned or implied," "not the same;" "different;" or "additional."[103] Similarly, dictionary.combridge.org explains that "other" means "as well as the thing or person already mentioned" and may be "used at the end of a list to show that there are more things, without being exact about what they are[.]"[104] The Legislature used "other" to modify the term "establishment," not the terms "construction, development, [or] acquisition."[105] As noted

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down administrative orders on these grounds.") (citing to Roscoe Pound, Administrative Law, 70-73 (1942)).

[100] (Appx._0014 (emphasis added); *see also* Appx._0015 (Stonewall's 'relocation plan necessarily entails the physical construction and development of a health care facility[.]")).

[101] (Appx._0015).

[102] (Appx._0018). Neither the Authority nor the Respondent offered such a construction of W. Va. Code § 16-2D-8(a)(1). The issue was not briefed. (*See* Appx._0037-0175; Appx._0189-0269).

[103] *Other*, merriam-webster.com (2024) (https://www.merriam-webster.com/dictionary/other).

[104] *Other*, dictionary.cambridge.org (2024) (https://dictionary.cambridge.org/us/dictionary/english/other).

[105] *See* W. Va. Code § 16-2D-8(a)(1).

previously, the use of the disjunctive "or" in a statute constitutes an alternative or option to select. The phrase "or other establishment" is meant to expand the scope of W. Va. Code § 16-2D-8(a)(1), to capture more than the terms construction, development, and acquisition would themselves. The use of the disjunctive "or" and term "other" calls for the application of a broader definition of establishment, not a narrower definition of construction.

The ICA has *sua sponte* applied the surplusage cannon exactly backwards, concluding that three terms (construction, development, and acquisition) all mean the same thing (establishment). It has improperly rewritten the statute to say that a CON is only required for "[t]he establishment of a health care facility." "[A] statute or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten."[106] Because the ICA has effectively written the words construction, development, and acquisition out of the statute, it has violated the "cardinal rule of statutory construction" that "significance and effect must, if possible, be given to every section, clause, word or part of the statute."[107]

The ICA has also misapplied the *ejusdem generis* cannon of statutory construction. *Ejusdem generis* "is a rule of legal construction that general words following an enumeration of particulars are to have their generality limited by reference to the preceding enumeration."[108] In this regard, the United States Supreme Court decision in *Cir. City Stores, Inc. v. Adams,*[109] is instructive. There, the Court considered the scope of Section 1 of the Federal Arbitration Act ("FAA"), which provided that the FAA shall not apply "to contracts or employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[110]

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[106] *War Mem'l Hosp., Inc.*, 248 W.Va. at 54, 887 S.E.2d at 39; *see also Birchfield-MODAD v. W. Va. Consol. Pub. Ret. Bd.*, No. 20-0747, 2022 WL 16646485 (W.Va. 2022) (memorandum decision).
[107] Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999).
[108] Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, 202 (2012).
[109] 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed.2d 234 (2001).
[110] *Id.* at 112, 121 S. Ct. at 1306, 149 L. Ed.2d at 243.

In construing this series, the United States Supreme Court, unlike the ICA, did not give precedence to the last term in the series.[111] Instead, the Court did exactly the opposite and found that the meaning of the last term was limited by the meanings of the first two terms, which were more specific.[112] In this regard, the Court found:

> [T]he words "any other class of workers engaged in . . . commerce" constitute a residual phrase, following, in the same sentence, explicit reference to "seamen" and "railroad employees." Construing the residual phrase to exclude all employment contracts fails to give independent effect to the statute's enumeration of the specific categories or workers which precedes it; there would be no need for Congress to use the phrases "seamen" and "railroad employees" if those same classes of workers were subsumed within the meaning of the "engaged in . . . commerce" residual clause. The wording of § 1 calls for the application of the maxim *ejusdem generis*, the statutory canon that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Under this rule of construction the residual clause should be read to give effect to the terms "seamen" and "railroad employees," and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it; the interpretation of the clause pressed by respondent fails to produce these results.[113]

However, the canon of *ejusdem generis* can only be used where "general words following an enumeration of particulars are to have their generality limited by reference to the preceding enumeration."[114] "[T]he specific-general sequence is required, and [ ] the rule does not apply to a general-specific sequence."[115] This point is demonstrated by this Court's decision in *W. Va. Consol. Pub. Ret. Bd. v. Clark:*

> *[E]jusdem generis* applies only to general words that follow a list of classes or things. When presented in that order, "general words do

[111] *Id.*, at 114, 121 S. Ct. at 1308, 149 L. Ed.2d at 245.
[112] *Id.*, 121 S. Ct. at 1308, 149 L. Ed.2d at 245.
[113] *Id.*, at 114-15, 121 S. Ct. at 1308-09, 149 L. Ed.2d at 246-47. (internal citations omitted).
[114] Antonia Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, 202 (2012) (emphasis added).
[115] *Id.*, at 203.

> not amplify particular terms preceding them but are themselves restricted and explained by the particular terms." Here, the general words, "other payment," *precede* the list of lump sum payments, and so are neither restricted nor explained by the list that follows.[116]

Thus, even if one were to somehow conclude that "construction" is the general term and "establishment" the specific term (not so), W. Va. Code § 16-2D-8(a)(1) cannot be read such that "establishment" narrows the scope of "construction" because "construction" precedes "establishment" in the statute.

Because Stonewall's project clearly encompasses the construction of a health care facility, this Court need not decide what "establishment" means. However, even if one were to accept the ICA's erroneous conclusion that "establishment" somehow subsumes the terms "construction," "development," and "acquisition", Stonewall's project certainly requires the establishment of a health care facility.[117] A brick-and-mortar hospital is a health care facility. As the ICA acknowledges, Stonewall's plan "necessarily entails the physical construction and development of a health care facility"—a new hospital. There is hardly a more concrete way to establish or bring a health care facility into existence than building a hospital on an empty lot. The ICA's conclusions that "Stonewall clearly plans to construct and develop a health care facility" but that "no new facility is being established" cannot be reconciled with each other.[118]

The ICA's inference that an "establishment" cannot encompass a "relocation" is also at odds with the very definition of "relocation," which Black's Law Dictionary defines as the "[r]emoval and ***establishment of*** someone or ***something in a new place***."[119] Similarly, merriam-webster.com—the same dictionary from which the ICA draws its definition of "establish"—

[116] 245 W.Va. 510, 520, 859 S.E.2d 453, 463 (2021).
[117] (*See* Appx._0015).
[118] (*See* Appx._0014; Appx._0018).
[119] *Relocation,* Black's Law Dictionary (12th ed. 2024) (emphasis added).

defines "relocate" as "to establish or lay out in a new place."[120] Thus, contrary to the ICA's finding, Stonewall is proposing to establish a health care facility.[121]

Moreover, contrary to the finding of the ICA,[122] there is no "newness" requirement in W. Va. Code § 16-2D-8(a)(1). In fact, in 2016, the Legislature recodified W. Va. Code § 16-2D-3(b)(1) as W. Va. Code § 16-2D-8(a)(1), removing the word "new" from the statute.[123] "It will be presumed that the legislature, in adopting an amendment, intended to make some change in the existing law[.]"[124] The Court is "obliged not to add to statutes something the Legislature purposely omitted.'"[125] The ICA erred in reading a "newness" requirement into W. Va. Code § 16-2D-8(a)(1) because the Legislature purposefully removed "new" from the statutory language in 2016.

The ICA's interpretation of the statute creates further inconsistencies. Pursuant to the plain language of W. Va. Code § 16-2D-8(a)(1) even the "acquisition" of an existing health care facility is sufficient to trigger the need for a CON. That is, were Stonewall to do nothing more than sell its existing hospital to a third-party purchaser, a CON would be required. The facility could be

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[120] *Relocate*, merriam-webster.com (2024) (https://www.merriam-webster.com/dictionary/relocation); *see also United States v. Boley*, No 219CR00032JAW001, 2019 WL 5699596, at *5 (D. Me. Nov. 4, 2019) ("The Guidelines do not define the term 'relocate,' so courts have given the word its ordinary meaning of 'to establish or lay out in a new place'").

[121] Again, per the maxim of *ejusdem generis*, general words (like "establish") are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words (such as "construction," "acquisition," or "development"). Since Stonewall's proposed hospital replacement patently encompasses "construction," Stonewall's project likewise encompasses the "establishment" of a health care facility. The clear facts of this case do not necessitate a further inquiry of the potential theoretical bounds of the word "establishment."

[122] (Appx._0015).

[123] *Compare* 1999 West Virginia Laws Ch. 135 (S.B. 492) ("The construction, development, acquisition or other establishment of a new health care facility or health maintenance organization") (emphasis added) *with* 2016 West Virginia Laws Ch. 195 (H.B. 4365) ("The construction, development, acquisition or other establishment of a health care facility.").

[124] *Shale Energy A1., Inc. v. Warner,* No. 20-0270, 2021 WL 2411324, at *6 (W.Va. June 14, 2021) (memorandum decision) (quoting *W. Va. Bd. of Dental Exam'rs v. Storch*, 146 W.Va. 662, 670, 122 S.E.2d 295, 300 (1961)).

[125] *War Mem'l Hosp., Inc.*, 248 W.Va. at 54, 887 S.E.2d at 39 (quoting *Phillips*, 220 W. Va. at 491, 647 S.E.2d at 927).

completely the same, and offer the same services through the same staff, and yet the acquisition requires a CON. The ICA's interpretation renders the Legislature's inclusion of the term acquisition completely meaningless because, by the ICA's reckoning, "one does not 'establish' something that is already in existence."[126]

In sum, a CON is required for "[t]he construction, development, acquisition, or other establishment of a health care facility," and "Stonewall clearly plans to construct and develop a health care facility[.]"[127]

3. The interpretations of the ICA and the Authority frustrate the overarching purpose of the CON law.

'"It is a cardinal rule governing the interpretation of statutes that the purpose for which a statute has been enacted may be resorted to by the courts in ascertaining the legislative intent."'[128] As this Court has explained, statutory provisions should be construed so as to harmonize their subject matter with the general purposes of the statute:

> A statute is enacted as a whole with a general purpose and intent, and each part should be considered in connection with every other part to produce a harmonious whole. Words and clauses should be given a meaning which harmonizes with the subject matter and the general purpose of the statute. The general intention is the key to the whole and the interpretation of the whole controls the interpretation of its parts.[129]

West Virginia's CON law, W. Va. Code § 16-2D-1 *et seq*., provides that any proposed new health service, as defined therein, shall be subject to review by the Authority prior to the offering or development of the service. The Legislative purposes of the CON law are to "avoid the

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[126] (Appx._0015).
[127] (Appx._0014).
[128] *State ex rel. W. Va. Div. of Corr. & Rehab. v. Ferguson*, 248 W. Va. 471, 889 S.E.2d 44, 53 (2023) (quoting *State ex rel. Bibb v. Chambers*, 138 W. Va. 701, 717, 77 S.E.2d 297, 306 (1953)).
[129] *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 510, 583 S.E.2d 800, 807 (2002) (quoting Syl. Pt. 1, *State ex rel. Holbert v. Robinson*, 134 W.Va. 524, 531, 59 S.E.2d 884, 889 (1950)).

unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services" and to ensure that health services are developed in a manner that is "orderly, economical and consistent with the effective development of necessary and adequate means of providing for the health services of the people of this state."[130] The Legislature has further found that "the general welfare and protection of the lives, health and property of the people of this state require . . . criteria as provided for in [the CON law] . . . be subject to review and evaluation before any health services are offered or developed[.]"[131] For example, the CON law requires applicants to, among other things, demonstrate that a proposed project is the "superior alternative . . . in terms of cost, efficiency and appropriateness . . . and the development of alternatives is not practicable" prior to receiving a CON.[132]

Left unchecked, the Authority's newfound, myopic focus on the Expenditure Minimum will render it a toothless façade in dereliction of its statutory charge. While it is true that the construction of a hospital would historically have exceeded the Expenditure Minimum, and therefore been subject to review under W. Va. Code § 16-2D-8(a)(3)(A), the Authority should not ignore the other triggers under the CON law requiring a CON just because the Expenditure Minimum has been significantly increased. If anything, the increase in the Expenditure Minimum makes these other triggers even more critical. The Authority's abject failure to consider these triggers contravenes the Legislative purpose of the CON law.[133]

The CON law imposes multiple legal standards which require thorough planning and convincing proof. The need for such planning and proof is readily apparent when, as here, a proposed project threatens the viability of a rural community's sole hospital. Indeed, the Authority

[130] W. Va. Code § 16-2D-1(1).
[131] W. Va. Code § 16-2D-1(2).
[132] W. Va. Code § 16-2D-12(b)(1).
[133] *See* W. Va. Code §§ 16-2D-1(2) and 16-2D-8(a)(5).

already found that Stonewall's project is not the superior alternative as required by the CON law because Stonewall failed to consider alternative locations for its hospital that would not compromise St. Joseph's CAH status, and the ICA has affirmed that finding.[134] Stonewall could not obtain a CON for its project, but now, without any review of the CON criteria whatsoever, the Authority has given Stonewall permission to construct a new hospital on Staunton Drive—such a result is clearly not "orderly, economical and consistent with the effective development of necessary and adequate means of providing for the health services of the people of this state[.]"[135]

The determinations by the Authority and the ICA have eviscerated the CON statute, allowing Stonewall, and in principle other parties, to relocate a hospital to an entirely new location[136] without any consideration of need, superior alternatives, impact on existing facilities, consistency with the State Health Plan, or any of the other criteria applicable to CON reviews.[137] These decisions also all but render obsolete various portions of the State Health Plan, which contains standards specifically applicable to the "Renovation-Replacement of Acute Care Facilities and Services",[138] "Operating Rooms",[139] and other services encompassed by Stonewall's project. To obtain a CON, Stonewall would have to demonstrate compliance with each of these standards in addition to the criteria for CON reviews set out in W. Va. Code § 16-2D-12. But because the Authority found that Stonewall's project is not reviewable, none of these standards

[134] *Stonewall Jackson Mem'l Hosp. Co. v. St. Joseph's Hosp. of Buckhannon, Inc.*, No. 22-ICA-147, 2023 WL 4197305 (W. Va. App. June 27, 2023) (memorandum decision).
[135] *See* W. Va. Code § 16-2D-1(1)-(2).
[136] Because the term "service area" is not defined and there is no requirement in the CON statute that a relocation take place within the same "service area", the ICA's holding would in principle allow a hospital to be relocated to anywhere in the state without obtaining a CON.
[137] *See* W. Va. Code § 16-2D-12.
[138] (available at https://hca.wv.gov/certificateofneed/Documents/CON_Standards/RenovAcute.pdf).
[139] (available at https://hca.wv.gov/certificateofneed/Documents/CON_Standards/Operating_Rooms.pdf).

and/or criteria will be evaluated. This is an absurd result which defeats the CON program's goal of maintaining an orderly and structured health system.

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

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

A CON is required for any project contemplating "[a] substantial change to the bed capacity of a health care facility with which a capital expenditure is associated[.]"[140] In turn, the CON law defines a "substantial change to the bed capacity" as a change that "increases or decreases the bed capacity ***or*** **relocates beds from one physical facility or site to another[.]**"[141] "Where the legislature . . . declare[s] what a particular term 'means,' such definition is ordinarily binding upon the courts and excludes any meaning that is not stated."[142] Stonewall's project indisputably encompasses the relocation of beds from one physical facility or site to another site 4.2 miles away.

Moreover, any Capital Expenditure, however small, is sufficient to trigger CON review when, as here, it is associated with a substantial change to bed capacity. Capital Expenditure and Expenditure Minimum are separately defined terms in the CON law that mean different things.[143] An expenditure becomes a Capital Expenditure if it is "not properly chargeable as an expense of operation and maintenance," and if it meets any one of the following three categories: (1) the expenditure is over the Expenditure Minimum; (2) **the expenditure is associated with a**

[140] W. Va. Code § 16-2D-8(a)(5).
[141] *See* W. Va. Code § 16-2D-2(45) (emphasis added).
[142] *In re Greg H.*, 208 W. Va. at 760, 542 S.E.2d at 923; *see also Tanzin*, 592 U.S. at 47, 141 S. Ct. at 490, 208 L. Ed. 2d at 301.
[143] *Compare* W. Va. Code § 16-2D-2(10) *with* W. Va. Code § 16-2D-2(15).

substantial change in bed capacity; ***or*** (3) the expenditure results in a substantial change to the services of the health care facility.[144]

Essential here is W. Va. Code § 16-2D-2(10)'s use of the word "or." Again, "the normal use of the disjunctive 'or' in a statute connotes an alternative or option to select."[145] Hence, any expenditure not properly chargeable as an expense of operation and maintenance, regardless of the amount, becomes a Capital Expenditure when it is associated with a substantial change in bed capacity.[146] While the Authority makes multiple references to a "minimum capital expenditure",[147] there is no statutorily defined "minimum capital expenditure" in the CON law. Rather, the Authority is amalgamating two separately defined terms, Capital Expenditure and Expenditure Minimum, suggesting that a Capital Expenditure must be over the Expenditure Minimum. Not so. The term "minimum capital expenditure" cannot be reconciled with the statutory definition of Capital Expenditure because an expenditure does not have to be over the Expenditure Minimum to be a Capital Expenditure.[148]

If exceeding the Expenditure Minimum was a prerequisite of applying the "substantial change in bed capacity" provision (W. Va. Code § 16-2D-8(a)(5)), there would be no reason for this section because such an expenditure would already need a CON under the provision requiring a CON for an expenditure in excess of the Expenditure Minimum (W. Va. Code § 16-2D-8(a)(3)(A)). The Authority has essentially limited its analysis to W. Va. Code § 16-2D-8(a)(3)(A), concluding that Stonewall's project does not require a CON because the Capital Expenditure does not exceed the Expenditure Minimum, and ignored all of the other provisions of W. Va. Code §

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[144] W. Va. Code § 16-2D-2(10) (emphasis added).
[145] *Brickstreet Mut. Ins. Co*., 240 W. Va. at 423, 813 S.E.2d at 76 (quoting *Carper*, 157 W. Va. at 517, 207 S.E.2d at 921); *see also Pajak*, 246 W. Va. at 395, 873 S.E.2d at 926.
[146] *See* W. Va. Code § 16-2D-2(10).
[147] (*See* Appx._0025-0035; Appx._0178-0188).
[148] *See* W. Va. Code § 16-2D-2(10).

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

In its RDOR, Stonewall itself acknowledges that "[t]he capital expenditure involved in the construction of the replacement facility will be approximately $56,000,000[.]"[149] And, as the Authority found, this $56,000,000 Capital Expenditure is associated with the complete relocation of Stonewall's hospital facility (and thus, its hospital beds) to a new physical facility constructed 4.2 miles away.[150] Stonewall's project therefore clearly contemplates a "substantial change to the bed capacity" of a health care facility because it requires the relocation of beds from one physical facility or site, Stonewall's existing hospital, to another site at which Stonewall proposes to construct a health care facility.[151]

Ultimately, because there is a capital expenditure involved in the construction of the replacement facility and because the project contemplates a substantial change in bed capacity due to the relocation of Stonewall's hospital beds, the project requires a CON pursuant to W. Va. Code § 16-2D-8(a)(5). Because the plain language of the statute is clear, "the language must prevail and further inquiry is foreclosed."[152]

2. The ICA has misconstrued the plain language of W. Va. Code § 16-2D-2(45) and W. Va. Code § 16-2D-8(a)(5), which require a CON for the relocation of beds from one physical facility or site to another when there is a capital expenditure.

Again, a substantial change in bed capacity includes any change relocating beds from one physical facility or site to another associated with a capital expenditure. W. Va. Code § 16-2D-2(45) ('"Substantial change to the bed capacity' of a health care facility means any change,

[149] (Appx._0595).
[150] (*See* Appx._0031; Appx._0184).
[151] *See* W. Va. Code § 16-2D-2(45).
[152] *Appalachian Power*, 195 W.Va. at 587, 466 S.E.2d at 438; *Monongahela Power Co.*, 243 W. Va. at 691, 850 S.E.2d at 690.

associated with a capital expenditure, that increases or decreases the bed capacity or relocates beds from one physical facility or site to another, but does not include a change by which a health care facility reassigns existing beds."). Here, there is a capital expenditure of $56,000,000.00,[153] and, as the ICA has itself acknowledged, "***a relocation of a [hospital] does necessarily entail physically relocating beds 'from one physical facility or site to another' as they are moved into the new facility***."[154] Therefore, Stonewall's project requires a CON.

W. Va. Code § 16-2D-2(45)'s reference to relocating beds from "one physical facility or site to another" does not, as the ICA suggests, imply "the simultaneous existence of multiple [health care] facilities."[155] Rather, it implies only the simultaneous existence of two "physical facilit[ies] or site[s]."[156] Merriam-webster.com defines "site" as "a space of ground occupied or to be occupied by a building" or "the spatial location of an actual or planned structure or set of structures."[157] Similarly, Black's Law Dictionary defines "site" as "[a] place or location; esp[ecially], a piece of property set aside for a specific use."[158] Clearly, Stonewall's project entails the relocation of beds from one site, Stonewall's existing hospital, to another site, the land/property upon which Stonewall proposes to construct a hospital on Staunton Drive.

Stonewall's project also clearly encompasses the relocation of beds from one "physical facility" to another. "[P]hysical" means, *inter alia*, "[o]f, relating to, or involving material things; pertaining to real, tangible objects."[159] And, "facility" means "something (such as a hospital) that

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[153] (*See* Appx._0595).
[154] (Appx._0016 (emphasis added); *see also id.* ("[A] relocation such as Stonewall's does require physically moving beds[.]")).
[155] (*See* Appx._0016).
[156] *See* W. Va. Code § 16-2D-2(45).
[157] *Site*, merriam-webster.com (2024) (https://www.merriam-webster.com/dictionary/site).
[158] *Site*, Black's Law Dictionary (12th ed. 2024).
[159] *Physical*, Black's Law Dictionary (12th ed. 2024); *see also Physical*, merriam-webster.com (2024) ("**a :** having material existence : perceptible especially through the senses and subject to the laws of nature . . . **b :** of or relating to material things") (https://www.merriam-webster.com/dictionary/physical).

is built, installed, or established to serve a particular purpose."[160] Thus, a brick-and-mortar hospital is a physical facility, and the relocation of beds from one brick-and-mortar hospital (*i.e*. Stonewall's existing health care facility) to another brick-and-mortar hospital (*i.e*., the new hospital Stonewall intends to construct on Staunton Drive) constitutes the relocation of beds from one physical facility to another. The ICA seems to conflate "physical facility" with "health care facility", arguing that, because Stonewall will be closing the existing hospital before it relocates its beds to Staunton Drive, there will not be two health care facilities simultaneously in existence.[161] This interpretation is an impermissible rewriting of the statute.[162] A brick-and-mortar health care facility does not have to remain in operation to constitute a physical facility.

Moreover, the ICA's speculation that Stonewall will close its existing hospital prior to relocating any beds to the new hospital is baseless. Nothing in the record supports that position. Stonewall has never claimed that it is going to completely shut down and discharge all of its patients before opening the new hospital. Rather, a transition period will be required after the construction of Stonewall's replacement hospital.[163] For example, when United Hospital Center, Inc. replaced its hospital facility, the discontinuation of services at its existing hospital (and initiation of services at the replacement hospital) occurred in a phased approach once the replacement hospital was completely constructed.[164] Similarly, Stonewall's hospital will transfer

[160] *Facility*, merriam-webster.com (2023) (Available a https://www.merriam-webster.com/dictionary/facility).
[161] (*See* Appx._0016).
[162] *See* Section VIII.b, *supra*.
[163] The transition to the constructed replacement hospital involves the assessment of various complexities, including but not limited to: (1) the number of patients expected to make the move; (2) the type of move (via ambulance or other transport); (3) the patient populations, including the acuity of care required by patients; and (4) any other unique factors or constraints.
[164] *See In re: United Hospital Center/West Virginia United Health Systems, Inc.*, CON File No. 02-6-7476-H (Decision Dated October 24, 2023 at p. 44) (available at https://wv-dhhr.arkcase.com/arkcase/external-portal/rest/request/readingroom/document?downloadFileName=United%20Hospital%20Center%2FWest%20Virginia%20United%20Health%20Systems%2C%20Inc.pdf&id=38586).

patients (likely through a written protocol) to the new hospital where they will be moved into the appropriate patient bed (via an informal "admission" process), and Stonewall's existing hospital will not shut down until all patients, equipment, and materials are transferred to the replacement hospital facility on Staunton Drive. Due to changes in physical environment, work processes, and technology, there will be a point when both hospital facilities are operational until a safe transfer of all patients can be effectuated. Since a new hospital license is required upon "[a]ny change in location of the hospital," it follows that Stonewall will simultaneously operate two (2) separately licensed hospital facilities during such transition period.[165] This contradicts the ICA's baseless inference that the "simultaneous existence of multiple facilities" will not (at least temporarily) occur.[166]

Refusing to apply the Legislature's definition, the ICA concludes that in "a relocation, the number of available beds, the 'bed capacity,' will not change so a relocation should not be considered a 'substantial change to the bed capacity."'[167] Again, "[w]here the legislature . . . declare[s] what a particular term 'means,' such definition is ordinarily binding upon the courts and excludes any meaning that is not stated."[168] By finding that a "substantial change in the bed capacity" can only occur if there is a change in the total number of beds, the ICA has rendered the entire phrase "relocates beds from one physical facility or site to another" surplusage.[169]

3. The ICA erroneously concluded that the complete relocation of Stonewall's hospital beds from one physical facility or site to another was merely a reassignment.

[165] W. Va. Code R. § 64-12-3.1.4.
[166] (Appx._0016).
[167] (Appx._0019).
[168] *In re Greg H.*, 208 W. Va. at 760, 542 S.E.2d at 923.
[169] *See* Syl. Pt. 3, *Meadows*, 207 W.Va. at 203, 530 S.E.2d at 676.

According to the ICA, "the Authority has merely concluded that in a relocation, one reassigns the existing beds to the new facility, excluding a relocation from being a 'substantial change to the bed capacity.'"[170] The ICA has misstated the record. The Authority did not find that a reassignment of beds was at issue.[171] Rather, it determined that "the West Virginia legislature raised the minimum capital expenditure for CON review . . . and [thereby] made it possible for Stonewall to relocate [its] entire hospital to a new location[.]"[172] Indeed, in its original decision, the Authority explained that "[u]nless the minimum capital expenditure has been met, the Authority will not look to a change in bed capacity when determining reviewability."[173] The Authority never suggested or asserted that Stonewall was reassigning beds, and Stonewall never argued that it was reassigning beds.[174] This issue was raised *sua sponte* by the ICA, and it was reversible error for the ICA to do so.[175] For example, in *Noble*, this Court held that it was reversible error for a court hearing an administrative appeal "to consider a non-jurisdictional question . . . that was made for the first time on appeal."[176] Certainly then, it was error for the ICA to base its holding on arguments of its own design which were not raised below.

The ICA's error was further compounded when it awarded *Chevron* deference to its own construction of W. Va. Code § 16-2D-2(45) as if it were the product of the Authority. "[D]eference cannot be provided unless there is a tangible agency construction to which a court may defer."[177]

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[170] (Appx._0019).
[171] (*See* Appx._0025-0035; Appx._0178-0188).
[172] (Appx._0032; Appx._0185).
[173] (Appx._0184).
[174] (*See* Appx._0037-0175; Appx._0189-0269).
[175] *See Noble*, 223 W. Va. at 821, 679 S.E.2d at 653.
[176] *Id*. at 822, 679 S.E.2d at 654.
[177] *W. Va. Consol. Pub. Ret. Bd. v. Wood*, 233 W. Va. 222, 228 n. 9, 757 S.E.2d 752, 758 n. 9 (2014).

As the United States Supreme Court has explained, construing statutory ambiguities "is not a task we ought to undertake on the agency's behalf in reviewing its orders."[178]

Moreover, '"an agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself[.]"[179] This fundamental rule of administrative law is known as the *Chenery* doctrine.[180] Under the *Chenery* doctrine, an administrative order is distinguishable from an order issued by a trial court, which may be upheld on any grounds so long as its result is correct.[181]

In *Chenery*, the United States Supreme Court held that "[i]f an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment."[182] As "the appellate court cannot take the place of the jury", it likewise "cannot intrude upon the domain which [the Legislature] has exclusively entrusted to an administrative agency." [183] This, the *Chenery* Court explained, is distinct from "the settled rule that, in reviewing the decision of a

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[178] *Dep't of Treasury, I.R.S. v. Fed. Lab. Rels. Auth.*, 494 U.S. 922, 933, 110 S. Ct. 1623, 1630, 108 L. Ed.2d 914, 927 (1990).

[179] *See Webb v. W. Va. Bd. of Med.*, 212 W. Va. 149, 158, 569 S.E.2d 225, 234 (2002) (quoting *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168–69, 83 S. Ct. 239, 246, 9 L. Ed.2d 207, 216 (1962)); *see also Env't Def. Fund, Inc. v. Adm'r, U.S. E.P.A.*, 898 F.2d 183, 189 (D.C. Cir. 1990) ("We cannot sustain an action merely on the basis of interpretive theories that the agency might have adopted and findings that (perhaps) it might have made."); *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 23, 140 S. Ct. 1891, 1909, 207 L. Ed.2d 353, 271 (2020) ("Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply "convenient litigating position[s].' . . . . Permitting agencies to invoke belated justifications, on the other hand, can upset 'the orderly functioning of the process of review,' . . . forcing both litigants and courts to chase a moving target.").

[180] *See, e.g., Iglesia Pentecostal Casa De Dios Para Las Naciones, Inc. v. Duke*, 718 F. App'x 646, 652 (10th Cir. 2017) ("The *Chenery* doctrine provides that courts 'may not properly affirm an administrative action on grounds different from those considered by the agency."'); *Parker v. Astrue*, 597 F.3d 920, 922 (7th Cir. 2010) ("[T]he *Chenery* doctrine . . . forbids an agency's lawyers to defend the agency's decision on grounds that the agency itself had not embraced.").

[181] *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 88, 63 S. Ct. 454, 459, 87 L. Ed. 626, 633 (1943).

[182] *Id.*, 63 S. Ct. at 459, 87 L. Ed. at 633.

[183] *Id.*, 63 S. Ct. at 459, 87 L. Ed. at 633.

lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason."'[184]

This Court has adopted the *Chenery* doctrine. In *Webb*, for example, the West Virginia Board of Medicine ("BOM") entered an order taking disciplinary action against a physician.[185] The physician appealed to the circuit court, which reversed the BOM's order because the BOM's findings were not supported by sufficient evidence.[186] Before the Supreme Court of Appeals, the BOM argued that, even if its findings were erroneous, the physician still violated the ethics code on other grounds.[187] This Court, however, rejected the BOM's argument because it was not a basis for the BOM's decision.[188] The Court explained that:

> [A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.[189]

Because the BOM's decision was based on findings which were unsupported by the record, the Court upheld the Circuit Court's reversal of the BOM's order.[190]

Here, neither Stonewall nor the Authority ever suggested that a reassignment of beds was at issue and that alone is sufficient to warrant reversal. Additionally, a "reassignment" of beds refers to changing from one bed usage type to another within the same facility (*e.g.*, between medical-surgical beds and psychiatric beds) and cannot, as the ICA suggests, encompass a

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[184] *Id.*, 63 S. Ct. at 459, 87 L. Ed. at 633.
[185] *Webb*, 212 W. Va. at 151, 569 S.E.2d at 227.
[186] *Id.*, *Id.*
[187] *Id.* at 158, *Id.* at 234.
[188] *Id.*, *Id.*
[189] *Id.*, *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 1577, 91 L. Ed. 1995 (1947)).
[190] *Id.*, *Id.*

relocation of beds from one site to another site. This becomes immediately apparent when one examines the prior definition of "substantial change to the bed capacity", which read:

> (41) "Substantial change to the bed capacity" of a health care facility means any change, associated with a capital expenditure, that increases or decreases the bed capacity or relocates beds from one physical facility or site to another, but does not include **a change by which a health care facility reassigns existing beds as swing beds between acute care and long-term care categories**[.][191]

The language "but does not include a change by which a health care facility reassigns existing beds as swing beds between acute care and long-term care categories" dates all the way back to 1990.[192] In 2017, the Legislature revised the definition of "substantial change to the bed capacity" to its current form: "any change, associated with a capital expenditure, that increases or decreases the bed capacity or relocates beds from one physical facility or site to another, but does not include a change by which a health care facility reassigns existing beds."[193] The Legislature did not remove the "relocates beds" language and offered no indication that a reassignment encompasses anything other than the conversion of beds of one type to another type. The ICA has conflated the terms "relocates" and "reassigns", rendering the term "relocates" meaningless.[194] These are two distinct terms and each must be given its own distinct meaning.[195]

4. The Authority has never previously allowed a brick-and-mortar hospital to be relocated without a CON.

The precise issues implicated by the instant matter have not been directly addressed by the Authority's past practices or interpretations. In fact, the Authority admitted that Stonewall's RDOR left the Authority in a "quandary," and that "[t]his case is one of first impression for the

[191] *See* 2016 West Virginia Laws Ch. 195 (H.B. 4365) (emphasis added).
[192] *See* 1990 West Virginia Laws Ch. 93 (H.B. 4230).
[193] 2017 West Virginia Laws Ch. 185 (H.B. 2459).
[194] (*See* Appx._0019).
[195] *See Lynch v. Jackson*, 845 F.3d 147, 152 (4th Cir. 2017) ("Because Congress chose to use two different words in the same sentence, the words must mean something different.").

Authority . . . that will ultimately depend on the wisdom of [the ICA] to decide."[196] '"In a case of first impression, there is by definition a total lack of precedent.'" *Case, Case of First Impression*, Black's Law Dictionary (12th ed. 2024) (quoting Eugene Wambaugh, *The Study of Cases* § 60, at 56 (2d ed. 1894)). As Stonewall and the Authority have acknowledged, the Authority has never allowed the relocation of a brick-and-mortar hospital without a CON because "it is impossible to have relocated a hospital for less than the previous $5.4 million dollar threshold."[197]

While the Authority stated that Stonewall "supplied two cases involving the relocation of hospitals where the capital expenditure was less than the then expenditure minimum that were found not to be subject to CON review", this assertion folds under its own weight upon a simple analysis of the facts of those cases.[198] Contrary to the Authority and Stonewall's suggestions, neither of these cases encompassed the relocation of any beds. The *Select Specialty* Cases involved long-term acute care hospitals ("LTACHs"). While LTACHs are located within host hospitals, they are distinct entities which only provide services within such hospitals. The beds at which LTACHs provide services do not belong to the LTACH—they instead belong to the host hospital.[199] The *Select Specialty* Cases are distinguishable because when an LTACH moves from one host hospital to another it does not bring beds with it.

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[196] (*See* Appx._0082-0083).

[197] (Appx._0029; *see also* Appx._0203 ("Prior to the 2023 legislative amendments to the statute that increased the expenditure minimum from approximately $5.6 million to $100 million, the relocation of a full hospital was not practical. A hospital simply cannot be constructed for 5.6 million.")).

[198] (*See* Appx._0028, *see also* Appx._0203-0204, (*citing Select Specialty Hospital-Charleston, Inc.*, CON File No. 22-3-12456-X (available at https://wv-dhhr.arkcase.com/arkcase/external-portal/rest/request/readingroom/document?downloadFileName=Select%20Speciality%20Hospital-%20Charleston%2C%20Inc.pdf&id=158200); *Select Specialty Hospital-Charleston, Inc*., CON File No. 06-3-8441-X) (available at https://wv-dhhr.arkcase.com/arkcase/external-portal/rest/request/readingroom/document?downloadFileName=Select%20Specialty%20Hospital%20-%20Charleston.pdf&id=64609) (collectively, the "*Select Specialty* Cases")).

[199] *See* W. Va. Code R. 64-12-2.17 ("LTACHs are referred to as a hospital within a hospital."); W. Va. Code R. 64-12-17.1.2-17.1.3 ("The [host] hospital shall surrender the license of any acute care beds used in the development of the Long Term Acute Care Hospital", but "[i]f the Long Term Acute Care Hospital

Similarly, the ICA's assertion that "the Authority has consistently held the position that a complete relocation is not subject to CON" review regardless of any substantial change in bed capacity is mistaken.[200] In *In re: Columbia Raleigh General Hospital*, CON File No. 97-1-6128-X,[201] for example, the Authority found that the relocation of the applicant's 17-bed inpatient psychiatric unit from the fourth floor of its Raleigh campus to the second floor of its Beckly campus was reviewable because it encompassed (1) a capital expenditure of less than $15,000 (well below the expenditure minimum at that time) and (2) the relocation of beds from one physical facility or site to another. Nowhere in that decision did the Authority discuss the notion of a partial or incomplete transfer of beds. Moreover, the *In re: Raleigh General Hospital*, CON File No. 98-1-6531-X case cited by the ICA is likewise inapposite. In that case, the Authority found Raleigh General Hospital could transfer all 102 licensed beds of the Beckley Hospital to the Raleigh General Hospital campus "***because there [was] no capital expenditure***" associated with the proposal, not because it was a total or complete transfer. [202] The point is that bed relocation triggers CON review when it is associated with a capital expenditure, however small, but does not trigger CON review when there is no capital expenditure.

Taken together, *Columbia Raleigh* and *Raleigh General* are completely consistent with the statutory language. *See* W. Va. Code § 16-2D-2(45) ('"Substantial change to the bed capacity' of

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ceases to exist, terminates its services, or fails to offer its services for a period of 12 months, any beds whose license was surrendered by the hospital to establish the Long Term Acute Care Hospital shall revert back to the hospital's licensed bed capacity."); *see also* State Health Plan Standards for Addition of Acute Care Beds, pp. 9-11 (available at https://hca.wv.gov/certificateofneed/Documents/CON_Standards/AcuteBedsapp.pdf).

[200] (Appx._0020, n. 8).

[201] (available at https://wv-dhhr.arkcase.com/arkcase/external-portal/rest/request/readingroom/document?downloadFileName=Raleigh%20General%20Hospital%20Columbia.pdf&id=13880).

[202] (available at https://wv-dhhr.arkcase.com/arkcase/external-portal/rest/request/readingroom/document?downloadFileName=Raleigh%20General%20Hospital.pdf&id=13840) (emphasis added).

a health care facility means any change, ***associated with a capital expenditure***, that increases or decreases the bed capacity or relocates beds from one physical facility or site to another[.]") (emphasis added). The relocation of beds proposed by Stonewall is indisputably associated with a capital expenditure. Thus, Stonewall's project requires a CON.

Ultimately, the Authority's precedent cannot supplant the plain language of W. Va. Code § 16-2D-8(a)(5). Administrative agencies (like the Authority) "have no general or common-law powers" and "[t]heir power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim[.]"[203] The ICA was "obliged to reject [the Authority's] constructions [because they] are contrary to the clear language of [the] statute."[204]

IX. CONCLUSION

For the reasons set forth above, St. Joseph's respectfully requests that the Court reverse the decisions of both the ICA and the Authority and remand the case to the Authority with instructions to enter an order requiring Stonewall to obtain a CON before commencing its project.

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D/B/A ST. JOSEPH'S HOSPITAL
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[203] Syl. Pt. 4, in part, *McDaniel v. W. Va. Div. of Lab.*, 214 W. Va. 719, 720, 591 S.E.2d 277, 279 (2003); *see also* Syl. Pt. 3, in part, *Mountaineer Disposal Serv., Inc. v. Dyer*, 156 W. Va. 766, 766, 197 S.E.2d 111, 112 (1973).
[204] *War Mem'l Hosp., Inc.*, 248 W. Va. at 50, 887 S.E.2d at 35.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

St. Joseph's Hospital of Buckhannon, Inc.,
Petitioner

v.) No. 24-347

Stonewall Jackson Memorial Hospital Co. and
West Virginia Health Care Authority,
Respondents

CERTIFICATE OF SERVICE

I, Alaina N. Crislip, do hereby certify that I have served the foregoing ***Brief of Petitioner St. Joseph's Hospital of Buckhannon, Inc.*** and the accompanying ***Joint Appendix*** on this 23rd day of October, 2024, via the Court's electronic filing system, which caused a true and exact copy of the same to be served upon counsel of record:

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