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

REPLY 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

Alaina N. Crislip (WVSB #9525)[1]
Neil C. Brown (WVSB #13170)
Colton Koontz (WVSB #13845)
JACKSON KELLY PLLC
1600 Laidley Tower
Post Office Box 553
Charleston, WV 25322
Phone: (304) 340-1372
alaina.crislip@jacksonkelly.com
neil.brown@jacksonkelly.com
Counsel for St. Joseph's Hospital of Buckhannon, Inc. d/b/a St. Joseph's Hospital

[1] Counsel of Record.

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I. This Court Should Follow *Loper* and Abandon *Chevron* Deference.

A. St. Joseph's Has Not Waived Its Argument That the Court Should Follow Loper.

St. Joseph's could not have raised *Loper* below because, while the ICA issued its opinion affirming the Authority's Amended Decision in this matter on May 23, 2024, the *Loper* decision was not issued until June 28, 2024.[2] It would not have been appropriate for St. Joseph's to raise this argument based upon a mere anticipation that *Chevron* could be overruled by the United States Supreme Court in *Loper*. Moreover, even if *Loper* had been decided in time to bring the matter to the ICA's attention, the ICA could not have acted on it. The ICA, "as a midlevel court of appeal, does not have the authority to review or overturn decisions of [this Court]", which "are binding precedent[.]"[3]

While this Court need not follow the United States Supreme Court, it chose to do so when it adopted *Chevron.* Syllabus points 2 through 4 of *Appalachian Power*[4] are based solely on the *Chevron* decision, and now that the United States Supreme Court has overruled *Chevron*, the Court needs to decide if there is any legal justification to continue to adhere to the *Chevron* doctrine. Whether to apply *Chevron* deference or not relates to the appropriate standard for judicial review of administrative decisions. It is for this Court and not the parties to determine what the proper standard of review is on appeal. This Court recently acknowledged this in *Duff v. Kanawha Cnty.*

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[2] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2254, 219 L. Ed. 2d 832, 846 (2024).

[3] *Barr v. Jackson*, 903 S.E.2d 268, 274 (W. Va. Ct. App. 2024); *see also State ex rel. West Virginia Mut. Ins. Co. v. Salango*, 246 W. Va. 9, 16, 866 S.E.2d 74, 81 (2021) ("We need not belabor the point that a majority opinion is binding precedent with or without a syllabus point."); *Hutto v. Davis*, 454 U.S. 370, 375, 102 S. Ct. 703, 706, 70 L. Ed. 2d 556, 561 (1982) (per curium) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of [SCOTUS] must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

[4] *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 466 S.E.2d 424 (1995) (adopting *Chevron* deference).

Comm'n,[5] when it stated "[b]ecause this Court and 'not the parties, must determine the standard of review . . . '[the Court is] not bound by the parties' position on the standard of review[.]"'[6] Thus, the standard of review cannot be waived.

However, to the extent that this Court finds that the continued applicability of *Chevron* in the wake of *Loper* is a nonjurisdictional issue that is subject to waiver (it is not), this Court has recognized an exception to that rule.[7] In *Whitlow*, the Court considered an equal protection challenge to the validity of W. Va. Code § 29-12A-6 that was not raised below, explaining that the Court was "confronted with very limited and essentially undisputed facts", that the "issue raised for the first time on appeal is the controlling issue in the resolution of the case", and that "the issue is one of substantial public interest that may recur in the future."[8] Here, this appeal likewise involves essentially undisputed facts. And, while it is questionable whether the resolution of this issue will control the disposition of this case, there can be no question that the issue is one of substantial public interest because it routinely arises in administrative appeals.

In 2022, one of the most preeminent scholars on the *Chevron* doctrine wrote that the United States Supreme Court "cannot indefinitely continue to dodge the fate of the *Chevron* doctrine. The confusion spawned by the Court's silence must be frustrating to the lower courts, not to mention the lawyers who appear before them and the agencies whose interpretations are challenged in court."[9] While this Court did nothing to create the issue now before it, it is critical for the Court to

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[5] *Duff v. Kanawha Cnty. Comm'n*, 905 S.E.2d 528 (W. Va. 2024).
[6] *Id*. at 534 n.3 (quoting *State v. Brewer*, 438 S.C. 37, 882 S.E.2d 156, 160 n.1 (S.C. 2022)); *see also United States v. Venable*, 943 F.3d 187, 192 (4th Cir. 2019) ("[o]ur case law is clear that 'parties cannot waive the proper standard of review by failing to argue it.'") (quoting *Sierra Club v. U.S. Department of the Interior*, 899 F.3d 260, 286 (4th Cir. 2018)); *Worth v. Tyer*, 276 F.3d 249, 262 n. 4 (7th Cir. 2001) ("[T]he court, not the parties, must determine the standard of review, and therefore, it cannot be waived.").
[7] *Whitlow v. Bd. of Educ*., 190 W. Va. 223, 225, 438 S.E.2d 15, 17 (1993).
[8] *Id*.
[9] T. Merrill, *The Chevron Doctrine: Its Rise and Fall, and the Future of the Administrative State*, 7 (2022).

resolve the confusion spawned by *Loper* and decide whether West Virginia is going to retain or jettison the *Chevron* doctrine.

B. The Chevron Doctrine Was Overruled by The United States Supreme Court and The Authority's Amended Decision Is Not Entitled to Deference.

Stonewall incorrectly claims that *Loper* did not overrule the *Chevron* doctrine.[10] Chief Justice Roberts could not have been clearer when he wrote "*Chevron* is overruled."[11] Stonewall is confused. While the United States Supreme Court explained that "[t]he holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis*", the Court was clear that the standard of review applied in those cases, the *Chevron* two-step framework, is no longer applicable.[12] Instead, federal "[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."[13] St. Joseph's is not asking the Court to overrule the holdings of *Appalachian Power Co*. and its progeny vis-à-vis the specific agency actions at issue in those cases, but their prescribed adherence to the *Chevron* two-step framework.

Contrary to Stonewall's suggestions, the *Loper* Court did not intend to freeze administrative law as of June 28, 2024, by giving a new-found status of *stare decisis* to all unreviewed administrative decisions, past and present. Stonewall's claim that *Loper* stands for the proposition that prior unreviewed administrative decisions are entitled to *stare decisis* and that this Court cannot take up issues decided in those cases is simply absurd.

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[10] Stonewall's Br., pp. 12-13 ("This is a complete misreading of the Supreme Court's *Loper*, which decision specifically declined to overturn *Chevron*[.]").
[11] *Loper*, 144 S. Ct. at 2273, 219 L. Ed. 2d at 867.
[12] *Id*.
[13] *Id*. at 2273.

Stare decisis has no application here.[14] The doctrine of *stare decisis* "is not a rule of law but is a matter of judicial policy."[15] It requires this Court to follow **its own decisions** absent some compelling reason not to do so.[16] Because this Court has never previously addressed the specific issues presented in this appeal (*i.e.* whether the replacement and complete relocation of a hospital requires a CON under W. Va. Code § 16-2D-8), *stare decisis* does not apply.[17] This Court is not bound by *stare decisis* to follow the decisions of lower courts and/or administrative agencies.[18] As West Virginia's court of last resort, this Court would not be able to function if it were bound by the decisions below and/or other decisions that have not been reviewed by the Court.

Stonewall also argues that, if this Court were to follow *Loper* and abandon *Chevron* deference, it should defer to the Authority's Amended Decision under *Skidmore*.[19] Not so. Like

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[14] *Stare decisis* does not even bind administrative agencies to follow their own decisions. *Cent. W. Va. Refuse v. Pub. Serv. Comm'n*, 190 W. Va. 416, 420, 438 S.E.2d 596, 600 (1993) ("[T]he doctrine of *stare decisis* does not generally apply to regulatory decisions by administrative agencies."); *see also* Jacob A. Stein & Glenn A. Mitchell, 5 *Administrative Law* § 40.02 ("The judicial doctrine of *stare decisis* requires courts to be consistent and not to deviate from the established precedent of prior decisions. Administrative agencies are, in general, not bound by this doctrine.").

[15] *Dailey v. Bachtel Corp.*, 157 W. Va. 1023, 1029, 207 S.E.2d 169, 173 (1974).

[16] *State Farm Mut. Auto. Ins. Co. v. Rutherford*, 229 W. Va. 73, 83, 726 S.E.2d 41, 51 (2011) ("Absent some compelling justification for deviation, such as a change in the law or a distinguishable fact pattern, the doctrine of *stare decisis* requires this Court to follow its prior opinions."); *see also Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1373 (Fed. Cir. 2001) ("stare decisis is a doctrine that binds courts to follow their own earlier decisions or the decisions of a superior tribunal.").

[17] The only way *stare decisis* would apply is if this court previously decided the issue on appeal. For example, in *W. Va. Health Care Cost Review Auth. v. Boone Mem'l Hosp.*, the Court applied *Chevron* deference and upheld the West Virginia Health Care Cost Review Authority's interpretation of W. Va. Code § 16-2D-3(e). 196 W. Va. 326, 337, 472 S.E.2d 411, 422 (1996). Were the Court to reexamine this issue under *Loper*, statutory *stare decisis* would require it to follow its holding in *Boone* absent a special justification to do otherwise. Because the Court has not decided the issues presented in this appeal, statutory *stare decisis* does not apply.

[18] *See* B. Garner, *The Law of Judicial Precedent*, 376 (2016) ("Under *stare decisis*, only cases decided by a higher court or by the same court have precedential effect on later courts; lower-court precedents cannot bind higher courts."); *see also, e.g., Catalina Mktg. Sales Corp. v. Dep't of Treasury*, 470 Mich. 13, 23, 678 N.W.2d 619, 625 (2004) (holding that the Michigan Supreme Court "is not bound by Court of Appeals decisions"); *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 44 (Alaska 2007) (distinguishing vertical and horizontal *stare decisis* and explaining "that lower courts generally cannot overrule decisions of higher courts, whereas a court may, given adequate reasons to do so, overrule itself.").

[19] Stonewall's Br., p. 14 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944)).

Chevron deference, *Skidmore* deference only applies if the statutory text is ambiguous.[20] As explained further below, the total relocation of a hospital is unambiguously subject to CON review regardless of whether it results in an expenditure above the expenditure minimum because (1) it encompasses the "construction . . . of a health care facility" and (2) requires a substantial change in the bed capacity.[21] Each of these activities, in and of itself, requires a CON, and Stonewall's project encompasses both activities. Because the statute is clear and unambiguous, no deference or respect can be given to the Authority.

Moreover, even if the Court were to find that the statute is ambiguous, it should not defer to the Authority's interpretation under *Skidmore*. The *Skidmore* doctrine is more a doctrine of respect than one of deference.[22] The amount of respect afforded to an administrative decision under *Skidmore* "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[23] No respect is warranted under *Skidmore* where

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[20] *See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 109, 114 S. Ct. 517, 531, 126 L. Ed. 2d 524, 545 (1993) (refusing to apply deference under *Skidmore* or *Chevron* because "no deference is due to agency interpretations at odds with the plain language of the statute itself"); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326, 128 S. Ct. 999, 169 L. Ed. 2d 892 (2008) (explaining that it is "unnecessary" to engage in *Skidmore* analysis if "the statute itself speaks clearly to the point at issue");*Catskill Mts. Chptr. of Trout Unlimited, Inc. v. United States EPA*, 846 F.3d 492, 509 (2d Cir. 2017) ("As with *Chevron* deference, we will defer to the agency's interpretation under the *Skidmore* standard only when the statutory language at issue is ambiguous."); *Kientz v. Comm'r, SSA*, 954 F.3d 1277, 1281 (10th Cir. 2020) ("not even *Skidmore* deference 'is due to agency interpretations at odds with the plain language of the statute itself'").

[21] *See* Sections II & III, *infra.*

[22] *United States v. Mead Corp.*, 533 U.S. 218, 221, 121 S. Ct. 2164, 2168, 150 L. Ed. 2d 292, 300 (2001) ("we hold that under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 89 L. Ed. 124, 65 S. Ct. 161 (1944), the ruling is eligible to claim respect according to its persuasiveness"); *Ard v. O'Malley*, 110 F.4th 613, 619 (4th Cir. 2024) ("agency interpretations 'contained in . . . agency manuals . . . which lack the force of law' are 'entitled to respect' under *Skidmore* 'only to the extent that those interpretations have the power to persuade.'"); *Regents of the Univ. of Cal. v. The Chefs' Warehouse, Inc.*, No. 2:23-cv-00676-KJM-CKD, 2024 U.S. Dist. LEXIS 152803, at *14 (E.D. Cal. Aug. 23, 2024) ("Under *Skidmore* deference, the agencies' FAQs are entitled to a 'measure of respect' and the court may refer to them for guidance.").

[23] *Skidmore*, 323 U.S. at 140, 65 S. Ct. at 164, 89 L. Ed. at 129.

"the agency's interpretation [is] 'completely devoid of any statutory analysis' and made 'no effort to explain or justify' the agency's position."[24]

Here, "the Authority justified its decision by relying on a longtime and unwritten interpretive rule saying a complete relocation within the same service area doesn't trigger certificate-of need review."[25] The Authority admits, "[t]his unwritten rule's exact origins and statutory justifications are unclear" and the decisions applying it, including the decision that is the subject of St. Joseph's appeal, "do not expressly explain or justify it."[26] The Authority speculates that "[t]he unwritten rule was perhaps originally grounded in the [statute's prior] double use of the modifier 'new' and the word 'institutional'", but acknowledges that the 2016 amendments to the CON law "removed the modifier 'new' from both subsection (a) and subdivision (a)(1) and the modifier 'institutional' from subsection (a)."[27] Accordingly, the Authority concedes that its "unwritten relocation rule . . . is ultimately unlawful because [the rule] does not have an appropriate statutory basis."[28] Because the Authority has never provided any statutory basis or analysis to support its unwritten rule, and in fact now acknowledges that the rule is unlawful, the Authority's determination is not entitled to respect under *Skidmore*.

On the other hand, the Authority's brief, unlike its Amended Decision, is based upon a thorough analysis of the statutory text.[29] If anything is entitled to respect under *Skidmore*, it is the

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[24] *Carlton & Harris Chiropractic Inc. v. PDR Network*, LLC, 982 F.3d 258, 265 (4th Cir. 2020) (quoting *Sierra Club v. United States Army Corps of Eng'rs*, 909 F.3d 635, 645 (4th Cir. 2018)); *see also Fogo de Chao (Holdings) Inc. v. United States Dep't of Homeland Sec.*, 413 U.S. App. D.C. 39, 53, 769 F.3d 1127, 1141 (2014) ("we conclude that the Appeals Office failed to ground its newly adopted, categorical exclusion of cultural knowledge in statutory text, statutory purpose, regulatory guidance, or reasoned analysis. This aspect of its decision accordingly lacks the power to persuade under *Skidmore*.").

[25] Authority's Br., p. 2.

[26] Authority's Br., p. 5.

[27] Authority's Br., pp. 5-6.

[28] Authority's Br., p. 3.

[29] *Compare* Authority's Br., pp. 23-31 *with* (Appx_0025-0035). A high-water mark of Anglo-American law came in 1891 when then Solicitor General William Howard Taft inaugurated the practice of the government confessing error in appropriate cases. *See* J. Rosen, *William Howard Taft*, 27 (2018) ("The tradition of

Authority's brief and its conclusion that St. Joseph's is "the only reasonable interpretation of West Virginia Code § 16-2D-8(a)(1)."[30] Even if the Court were to retain *Chevron* deference, it would be unreasonable to defer to the Authority's determination because, in addition to agreeing that the statute is unambiguous, the Authority has confessed error and is now disclaiming any reliance on *Chevron.*[31] In sum, the Authority's determination is not entitled to any deference or respect, be it under *Chevron* or *Loper*/*Skidmore*, and it is certainly not subject to *stare decisis* and/or entitled to "absolute deference."[32]

II. Stonewall's Project Requires A CON Under W. Va. Code § 16-2D-8(a)(1) Because It Involves the Construction of a Health Care Facility.

"Stonewall has never disputed that the total hospital relocation project involves 'construction'"[33] Instead, Stonewall attempts to argue that, while it is undeniably constructing a hospital, it is not establishing a health care facility because Stonewall already exists. This argument completely overlooks the fact that, while Stonewall may exist, the hospital it intends to construct does not, and "[i]f the CON statute covers anything, it would be expected to cover a brand new hospital building costing well north of $50 million."[34] A hospital is a health care facility.[35] There is no statutory basis for distinguishing the construction of a new hospital to replace an existing

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solicitors general 'confessing error' continues to this day, and it is a tribute to Taft's honesty and his fervent belief that all conduct by the executive branch should conform to the Constitution and the laws of the United States."). The Authority's brief continues this grand tradition.

[30] Authority's Br., p. 23.

[31] *See HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 594 U.S. 382, 394, 141 S. Ct. 2172, 2180, 210 L. Ed. 2d 547, 556 (2021) ("EPA asked the court of appeals to defer to its understanding under *Chevron*. . . . Although the refineries repeat that ask here, the government does not. With the recent change in administrations, 'the government is not invoking *Chevron*.' Brief for Federal Respondent 46-47. We therefore decline to consider whether any deference might be due its regulation.").

[32] *See* Stonewall's Br., p.17.

[33] *See* Stonewall's Br., p. 5.

[34] Authority's Br., p. 29.

[35] W. Va. Code § 16-2D-2(16) (defining "[h]ealth care facility" to include a "facility" that "offers or provides health services"); *see also* Facility, merriam-webster.com (2023) (Available a https://www.merriam-webster.com/dictionary/facility) (defining "facility" as "something (such as a hospital) that is built, installed, or established to serve a particular purpose.").

hospital from the construction of a new hospital more generally. '"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."'[36] "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect."[37]

Contrary to Stonewall's assertions, St. Joseph's interpretation of W. Va. Code § 16-2D-8(a)(1) is supported by far more than just the common and ordinary meaning of the term "construction." In its opening brief, St. Joseph's carefully analyzed the syntax of W. Va. Code § 16-2D-8(a)(1) and applied various statutory canons to support its interpretation of the statute.[38] Stonewall fails to engage with St. Joseph's arguments. For example, Stonewall never addresses St. Joseph's discussion of statutory exemptions, the surplusage canon, the use of the disjunctive "or", *ejusdem generis*, the common and ordinary meaning of "establishment", the fact that "relocation" is defined as a type of "establishment", the fact that the word "new" was removed from the statutory text in 2016, or how the statute's inclusion of the word "acquisition" is inconsistent with the ICA's holding.[39]

Instead of grappling with the statutory text, Stonewall's argument chiefly relies upon various administrative decisions applying the Authority's unwritten relocation rule, which the Authority now concedes to be unlawful,[40] and a dubious and unduly selective application of the policy statement appearing in W. Va. Code § 16-2D-1. Neither of these approaches could ever

[36] *Duff*, 905 S.E.2d at 534 (quoting *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 312, 465 S.E.2d 399, 414 (1995)).
[37] Syl. Pt. 4, *War Mem'l Hosp., Inc. v. W. Va. Health Care Auth.*, 248 W. Va. 49, 50, 887 S.E.2d 34, 36 (2023) (quoting Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951)).
[38] *See* St. Joseph's Br., pp. 16-27.
[39] *See* St. Joseph's Br., pp. 16-27.
[40] Authority's Br., p. 3.

trump the clear and unambiguous language of the statute,[41] and even if they could, they are not persuasive.

First, Stonewall's reliance on *In re: Ohio Valley Medical Center*, CON File No. 99-10-6721-X (Decision Dated July 8, 1999) and *In re: Reynolds Memorial Hospital*, CON File No. 99-10-6776-X (Decision Dated August 12, 1999) and their progeny is misplaced. None of the four types of relocations identified in *Ohio Valley* or *Reynolds* specifically address the complete relocation of a hospital to a new location, and the only type of relocation discussed in those cases which arguably could apply to Stonewall's project, "a relocation from the facility's campus . . . to an off-campus site . . . would be subject to certificate of need review[.]"[42] If anything, *Ohio Valley* and *Reynolds* serve to underscore the fact that the cases relied upon by Stonewall are distinguishable and that "[t]his case is [as the Authority has explained,] one of first impression for the Authority[.]"[43] Certainly, none of the cases cited by Stonewall involve the construction of a hospital because, as Stonewall has acknowledged, "it is impossible to have relocated a hospital for less than the previous $5.4 million dollar threshold."[44]

While Stonewall may speculate that certain hospital relocations or other construction projects would not have been subject to CON review if they had not exceeded the expenditure minimum,[45] what is not considered is not resolved.[46] A finding that a particular project was subject

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[41] *War Mem'l Hosp.*, 248 W. Va. at 54, 887 S.E.2d at 39 ("[A] statute or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten."); *Monongahela Power Co. v. Buzminsky*, 243 W. Va. 686, 691, 850 S.E.2d 685, 690 (2020) ("Only when a statute is ambiguous may the Court inquire as to a statute's purpose and otherwise employ the canons of statutory construction.").
[42] *In re: Ohio Valley Medical Center*, CON File No. 99-10-6721-X, p. 2 (unnumbered); *In re: Reynolds Memorial Hospital*, CON File No. 99-10-6776-X, p. 2 (unnumbered).
[43] (*See* Appx._0082-0083).
[44] (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.")).
[45] *See* Stonewall's Br., p. 20 n.12.
[46] B. Garner, *The Law of Judicial Precedent*, 47 (2016) ("One of the age-old maxims of organic law is that '[w]hat is not judicially presented cannot be judicially considered, decided, or adjudged.'").

to review because the capital expenditure associated with the project exceeded the expenditure minimum is not, as Stonewall suggests, tantamount to a finding that the project would not be subject to review had it not exceeded the expenditure minimum. Having found a project subject to review on one ground, the Authority had no need to consider alternative grounds under which the project would be subject to review.

The administrative cases cited on page 19 of Stonewall's brief are likewise inapposite. For example, the Chestnut Ridge case, *In re: West Virginia University Hospitals, Inc.*,[47] involved the relocation of an ambulatory health care facility, not a hospital. The Healthy Minds Day Program, formerly the Chestnut Ridge Center Day Hospital,[48] is a behavioral health center that provides services on an outpatient basis and has zero beds. The Chestnut Ridge Center "Day Hospital" is an ambulatory health care facility, not a licensed hospital, and therefore is not comparable to Stonewall's project. Similarly, in *In re: Thomas Health Systems Inc.*,[49] the Authority found that Thomas' project was not subject to review because the project contemplated "a complete relocation of existing services from one of its hospitals to another *with no change in the number of licensed beds at either hospital* ***and*** the capital expenditure is less than the capital expenditure minimum."[50] Thomas' project is distinguishable because it did not involve the construction of a health care facility or the relocation of beds. Finally, the remaining case cited by Stonewall, *In re: United Hospital Center, Inc.*,[51] involved the relocation of an ambulatory health care facility from

[47] CON File No. 190-6-11556-X (Decision Dated January 29, 2019).
[48] The Healthy Minds Day Program is a d/b/a of West Virginia University Hospitals, Inc. providing outpatient behavioral health services. *See* https://ohflac.wvdhhr.org/Apps/Lookup/FacilityDetails/1280 (OHFLAC Registration).
[49] CON File No. 18-3-11281-X (Decision Dated February 15, 2018).
[50] *Id.*, p. 1 (emphasis added).
[51] CON File No. 17-7-11161-X (Decision Dated September 29, 2017).

one authorized off-campus location to another off-campus location. It is not comparable to Stonewall's project.[52]

This case is not about whether the complete relocation of an ambulatory health care facility without construction requires a CON, and the Court does not need to decide that issue. The question presented is whether the construction of a hospital and/or the complete relocation of hospital beds requires a CON. The administrative cases cited by Stonewall are distinguishable because they involve the relocation of ambulatory health care facilities. More importantly, the Authority's prior decisions cannot trump the plain language of the statute.[53] Certainly, they are not subject to statutory *stare decisis* and St. Joseph's does not need a "special justification" to prevail before this Court.[54]

In a further attempt to avoid the plain meaning of W. Va. Code § 16-2D-8(a)(1), Stonewall argues that, pursuant to W. Va. Code § 16-2D-1, the purpose of the CON law is to avoid the unnecessary duplication of health services and that because the total relocation of health services within the same service area would not create unnecessary duplication, such relocations should not be subject to CON review. This argument fails for a number of reasons. First, relocating an existing health care facility can create unnecessary duplication. For example, moving one hospital nearer to another hospital can create unnecessary duplication in some areas and shortages in other areas. Second, avoiding unnecessary duplication is only one of the goals of the CON program. W.

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[52] Stonewall also argues that the Authority recently determined that United Hospital Center ("UHC") could construct a medical office building in Elkins without a CON and that the Court should affirm that approval. Stonewall's Br., pp. 32-33. UHC and St. Joseph's are separate corporations. UHC's project is not in the record and has nothing to do with the dispute between St. Joseph's and Stonewall. The Court cannot, as Stonewall requests, "affirm that approval" because it is not on appeal before this Court. *See* Stonewall Br., p. 34.

[53] *War Mem'l Hosp.*, 248 W. Va. at 54, 887 S.E.2d at 39; *see also Buzminsky*, 243 W. Va. at 691, 850 S.E.2d at 690.

[54] *See* Section I.B. *supra*.

Va. Code § 16-2D-1 also provides that "the development of all health services shall be accomplished in a manner which 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[.]" Stonewall, while hypocritically admonishing St. Joseph's for failing to consider the entirety of the CON law, fails even to consider the entirety of the policy statement on which it bases its argument.[55] Allowing Stonewall to relocate its entire hospital without a CON is not consistent with the orderly, economical, and effective development of health services, and the Authority's denial of Stonewall's 2021 CON application proves that.[56]

Relocating Stonewall's hospital to Staunton Drive will deprive St. Joseph's of its CAH status[57] likely leading to the closure of St. Joseph's and depriving the citizens of Buckhannon of their sole community hospital.[58] That is not consistent with the orderly, economical and effective development of health services and is exactly the sort of externality that the CON law is intended to avoid. Accordingly, W. Va. Code § 16-2D-1 does not support Stonewall's interpretation of W. Va. Code § 16-2D-8(a)(1), and in fact cuts against it.

More importantly, W. Va. Code § 16-2D-1's generic policy statement cannot serve as a basis for ignoring the plain meaning of W. Va. Code § 16-2D-8(a)(1). "Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by

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[55] *See* Stonewall's Br., pp. 20-31.

[56] *See In re: Stonewall Jackson Mem'l Hosp. Co.*, CON File 21-7-12157-H (Decision Dated June 13, 2022) (Appx._0254); *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).

[57] Contrary to Stonewall's assertions (*See* Stonewall's Br., p. 1), St. Joseph's cannot be equated to West Virginia United Hospital Systems, Inc. ("WVUHS"). *See* Syl. Pt. 3, S. *Elec. Supply Co. v. Raleigh Cnty. Nat'l Bank*, 173 W. Va. 780, 781, 320 S.E.2d 515, 516 (1984) ("The law presumes that two separately incorporated businesses are separate entities and that corporations are separate from their shareholders."). St. Joseph's is a small rural hospital and it must stand on its own. (Appx_0429-0432; *see also* Appx._0544-0545). Stonewall's assertions that WVUHS will subsidize St. Joseph's losses are baseless and unsupported. The Authority rejected these assertions when it denied Stonewall's 2021 CON application. (*See* Appx._0254).

[58] *See id.*; (Appx._0544-0545; Appx._0429-0430).

language in the preamble",[59] and "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."[60] "Only when a statute is ambiguous may the Court inquire as to a statute's purpose and otherwise employ the canons of statutory construction."[61] W. Va. Code § 16-2D-8(a)(1) is not ambiguous, and it must be applied as it is written.

St. Joseph's "literal application" of W. Va. Code § 16-2D-8(a)(1) is not, as Stonewall contends, "absurd."[62] As the Authority explains, "[i]f the CON statute covers anything, it would be expected to cover a brand new hospital building costing well north of $50 million."[63] A hospital has never been built without triggering CON review. Moreover, the acquisition of a single provider physician practice without regard to capital expenditure requires a CON. It is not absurd to suggest that the replacement and relocation of a hospital requires a CON. These projects have always required a CON and there is a specific standard governing CON review for the renovation and/or

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[59] *Jurgensen v. Fairfax Cnty., Va.*, 745 F.2d 868, 885 (4th Cir. 1984); *see also Antanovich v. Allstate Ins. Co.*, 488 A.2d 571, 573 (Pa. 1985) (findings codified by the statute were merely "prefatory to the 'purposes' of the Act" and could not "overcome a plain unambiguous contract provision on the ground of policy."); W. Va. Leg., Bill Drafting Manual., General Rules of Statutory Construction, p. 61 (Rev. ed. 2022) (available at https://www.wvlegislature.gov/legisdocs/misc/pub/Drafting_Manual.pdf) ("[p]reamble and purpose clauses neither enlarge nor contract powers in the main body [of the Act]."); *Freeland v. Marshall*, 249 W. Va. 151, 159 n.6, 895 S.E.2d 6, 14 n.6 (2023) (citing to the West Virginia Legislature's Bill Drafting Manual).

[60] *Rodriguez v. United States*, 480 U.S. 522, 526, 107 S. Ct. 1391, 1393, 94 L. Ed. 2d 533, 538 (1987); *see also Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 171, 127 S. Ct. 799, 808, 166 L. Ed. 2d 638, 650 (2007); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 647, 110 S. Ct. 2668, 2676, 110 L. Ed. 2d 579, 595 (1990); *see also* A. Scalia & B. Garner, *Reading Law*: *The Interpretation of Legal Texts*, 168 (2012) ("It is not a proper use of the [whole-text] canon to say that since the overall purpose of the statute is to achieve x, any interpretation of the text that limits the achieving of x must be disfavored.").

[61] *Buzminsky*, 243 W. Va. at 691, 850 S.E.2d at 690; *see also United States v. Husted*, 545 F.3d 1240, 1245 (10th Cir. 2008) ("When a statute is unambiguous, however, we must apply its plain meaning except in the rarest of cases; after all, there can be no greater statement of legislative intent than an unambiguous statute itself."); *United States v. Leveille*, No. 1:18-cr-02945-WJ, 2023 U.S. Dist. LEXIS 6500, at *8-9 (D.N.M. Jan. 13, 2023) ("[c]ourt will not look outside the text—to legislative intent or to the other sections of the statute—to create an ambiguity if the text itself plainly states its requirements.").

[62] *See* Stonewall's Br., pp. 31-32.

[63] Authority's Br., p.29.

replacement of hospitals.[64] "This Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation"[65] and it is the duty of this Court "to reject administrative constructions that are contrary to the clear language of a statute."[66]

Stonewall further argues that "[i]f the Legislature wanted to require a CON for any project involving construction of a health care facility, including construction to relocate an existing health care facility, the Legislature can plainly say that."[67] But W. Va. Code § 16-2D-8(a)(1) does plainly say that projects involving the construction of a health care facility require a CON, and that plainly includes any construction of a health care facility whether or not it is intended to replace an existing facility. Dealing with a similar argument, the Fourth Circuit Court of Appeals noted '"'"[t]hou shall not kill" is a mandate neither silent nor ambiguous about whether murder is permissible if committed after 5:00 p.m.,' even though it is 'silent' about what time the deed is done."[68] Just as murder is still murder regardless of the time at which it occurs, "constructing a health care facility" is still "constructing a health care facility" regardless of whether or not one operates another health care facility.

In sum, a CON is required for "[t]he construction, development, acquisition, or other establishment of a health care facility,"[69] and "Stonewall clearly plans to construct and develop a health care facility[.]"[70]

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[64] Available at https://hca.wv.gov/certificateofneed/Documents/CON_Standards/RenovAcute.pdf.
[65] Syl. Pt. 2, *Huffman v. Goals Coal Co.*, 223 W. Va. 724, 725, 679 S.E.2d 323, 324 (2009).
[66] Syl. Pt. 3, *War Mem'l Hosp., Inc.*, 248 W. Va. at 50, 887 S.E.2d at 35 (quoting Syl. Pt. 5, *CNG Transmission Corp. v. Craig*, 211 W. Va. 170, 564 S.E.2d 167 (2002)).
[67] Stonewall's Br., p. 32.
[68] *Julmice v. Garland*, 29 F.4th 206, 208 (4th Cir. 2024).
[69] W. Va. Code § 16-2D-8(a)(1).
[70] (Appx._0014).

III. Stonewall's Project Requires A CON Under W. Va. Code § 16-2D-8(A)(5) Because It Encompasses a Substantial Change in Bed Capacity.

Contrary to Stonewall's assertions, Stonewall's project encompasses a substantial change in bed capacity whether or not Stonewall intends to reduce its bed count because, by definition, a substantial change in bed capacity includes "any change, associated with a capital expenditure, that . . . relocates beds from one physical facility or site to another[.]"[71] Ignoring W. Va. Code § 16-2D-2(45)'s definition of substantial change in bed capacity, Stonewall has chosen to stick its head in the sand, averring that St. Joseph's bed relocation argument is "totally fabricated" and "unsupported by any interpretation of the law."[72] Not so. "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."[73] Stonewall's assertion that a substantial change in bed capacity requires an increase or decrease in the total number of licensed beds is inconsistent with the statutory definition. Stonewall essentially reads "or relocates beds from one physical facility or site to another" out of the statute, violating 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."[74]

Rather than attempt to grapple with the statutory text, Stonewall relies on various administrative decisions applying the Authority's unwritten relocation rule to argue that the total relocation of its hospital does not encompass a substantial change in bed capacity. Again, this approach can never overcome the plain meaning of the statute. "[A] statute or an administrative

[71] *See* W. Va. Code § 16-2D-2(45).
[72] Stonewall's Br., p. 6; *see also* Stonewall's Br. p. 45.
[73] *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] Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999).

rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten."[75]" That said, Stonewall has mischaracterized the Authority's precedent and its arguments are not persuasive.

The Authority has not, as Stonewall contends, historically "interpreted [W. Va. Code § 16-2D-2(45)] to mean that only a change in the number, nature or license of the beds requires a CON review."[76] What the Authority has found is that a relocation of beds requires a CON when it is associated with a capital expenditure regardless of whether that expenditure is over the expenditure minimum, but that a relocation of beds that is not associated with a capital expenditure does not require a CON.[77] This is consistent with the text of W. Va. Code § 16-2D-8(a)(5), which requires a CON for any project contemplating "[a] substantial change to the bed capacity of a health care facility with which a capital expenditure is associated[.]" Stonewall has completely ignored the Authority's reasoning in these cases, substituting an alternative reasoning that is clearly at odds with the statutory text. Because Stonewall's project is indisputably associated with a capital expenditure,[78] it requires a CON under this line of cases.

As explained in St. Joseph's opening brief, the *Select Specialty* Cases[79] are distinguishable because they did not involve the relocation of beds from one physical facility or site to another.[80]

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[75] *War Mem'l Hosp.*, 248 W. Va. at 54, 887 S.E.2d at 39 (quoting Syllabus Point 1, *Consumer Advocate Division v. Public Service Commission*, 182 W. Va. 152, 386 S.E.2d 650 (1989)).
[76] *See* Stonewall's Br., p. 35.
[77] *Compare In re: Columbia Raleigh General Hospital*, CON File No. 97-1-6128-X (available at https://wv-dhhr.arkcase.com/arkcase/external-portal/rest/request/readingroom/document?downloadFileName=Raleigh%20General%20Hospital%20Columbia.pdf&id=13880) *with In re: Raleigh General Hospital*, CON File No. 98-1-6531-X (available at https://wv-dhhr.arkcase.com/arkcase/external-portal/rest/request/readingroom/document?downloadFileName=Raleigh%20General%20Hospital.pdf&id=13840).
[78] (Appx._0595).
[79] *See Select Specialty Hospital-Charleston, Inc.*, CON File No. 22-3-12456-X; *Select Specialty Hospital-Charleston, Inc.*, CON File No. 06-3-8441-X (collectively, the "*Select Specialty* Cases").
[80] *See* St. Joseph's Br., pp. 38-49.

The *Select Specialty* Cases involved long-term acute care hospitals ("LTACHs"). LTACHs are located within host hospitals,[81] and when a LTACH moves from one host hospital to another the new host must "surrender the license of any acute care beds used in the development of the [LTACH]" and "any beds whose license was surrendered by the [original] host to establish the [LTACH] shall revert back to the hospital's licensed bed capacity."[82]

St. Joseph's bed relocation argument is not, as Stonewall argues, about the relocation of physical beds between licensed facilities, but the relocation of licensed beds between physical facilities or sites. Stonewall's project clearly contemplates the relocation of licensed beds from one physical facility or site to another, and therefore it requires a CON. Changing the physical location of licensed beds from one site to another site is, contrary to Stonewall's contentions, a change that can cause unnecessary duplication and adversely impact the integrity of the health care system; the Authority's denial of Stonewall's 2021 CON application proves that.[83] Moreover, contrary to Stonewall's claim that "the license will remain the same" if it relocates its hospital,[84] "[a]ny change in [the] location of [a] hospital . . . requires the issuance of a new license."[85]

Notwithstanding Stonewall's suggestions to the contrary, the Authority clearly has no long-standing practice of allowing the "total relocation of existing hospital beds" without CON approval when there is a capital expenditure associated with the relocation.[86] The Authority's application of its unwritten relocation rule has been limited to relocations involving ambulatory health care

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[81] *See* W. Va. Code R. § 64-12-2.17 ("LTACHs are referred to as a hospital within a hospital."); *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).
[82] W. Va. Code R. § 64-12-17.1.2-17.1.3.
[83] *See In re: Stonewall Jackson Mem'l Hosp. Co.,* CON File 21-7-12157-H (Decision Dated June 13, 2022) (Appx._0254); *Stonewall Jackson Mem'l Hosp. Co.*, 2023 WL 4197305.
[84] Stonewall Br., p. 37.
[85] W. Va. Code R. § 64-12-3.1.4.
[86] *See* Stonewall's Br., p. 39.

facilities and health services; the rule has not been applied to hospital beds or hospitals. The relocation cases cited by Stonewall are inapposite because no beds were relocated in any of those cases. They have no relevance to St. Joseph's bed relocation argument. And, even if they did, the Authority's relocation decisions contain little to no analysis and certainly cannot trump the plain meaning of the statute.[87]

Moreover, Stonewall's claim that, "since at least 2017, the Legislature has enacted legislation to losen [sic] CON regulations" is irrelevant.[88] The 2017 changes did not remove "or relocates beds from one physical facility or site to another" from the definition of "substantial change to the bed capacity",[89] and this language remains in the statute.[90] Whether or not the Legislature has loosened the CON law in other respects is not relevant. A CON is still required for a "substantial change to the bed capacity" and a "substantial change to the bed capacity" still includes any change that "relocates beds from one physical facility or site to another." If the Legislature wanted to eliminate this requirement, it would have done so when it amended the definition of "substantial change to the bed capacity" in 2017.

Finally, while Stonewall argues that the ICA properly affirmed the Authority's decision, it does not defend the ICA's conclusion that "in a relocation, one reassigns the existing beds to the new facility."[91] Neither Stonewall nor the Authority ever claimed that Stonewall's project merely

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[87] *War Mem'l Hosp.*, 248 W. Va. at 54, 887 S.E.2d at 39; *see also Buzminsky*, 243 W. Va. at 691, 850 S.E.2d at 690.

[88] Stonewall also argues that Dr. Michael J. Maroney and Dr. Tom Takubo, two state senators it alleges to have ties to WVUHS, supported the 2023 amendments raising the expenditure minimum. Stonewall's Br., pp. 2 n.3, 27. Acts undertaken by Dr. Takubo and Dr. Maroney as state senators cannot be attributed to WVUHS. "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S. Ct. 1362, 1381-82, 12 L. Ed. 2d 506, 527 (1964). Moreover, there were, in addition to Dr. Takubo and Dr. Maroney, thirty-two senators and 100 delegates in the state legislature during the 2023 legislative session. Dr. Takubo and Dr. Maroney's alleged ties to WVUHS are not relevant to St. Joseph's appeal.

[89] 2017 West Virginia Laws Ch. 185 (H.B. 2459).

[90] W. Va. Code § 16-2D-2(45).

[91] (Appx._0019).

entailed a reassignment of Stonewall's existing beds, and Stonewall's continued failure to support the ICA's conclusion speaks volumes. Reassignment was never an issue, and it was reversable error for the ICA to raise it.[92] As St. Joseph's explained in its opening brief, a "reassignment" of beds refers to changing from one bed usage type to another (*e.g.*, between medical-surgical beds and psychiatric beds) and cannot, as the ICA suggests, encompass a relocation of beds from one site to another site.[93] Appellees failure to respond to St. Joseph's argument or support the ICA's conclusion constitutes a "tacit agreement" that Stonewall is relocating, not reassigning, its beds.[94]

CONCLUSION

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

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

/s/Alaina N. Crislip
ALAINA N. CRISLIP (WVSB #9525)
NEIL C. BROWN (WVSB #13170)
COLTON KOONTZ (WVSB #13845)
JACKSON KELLY PLLC
500 Lee St., E., Suite 1600
Post Office Box 553
Charleston, WV 25322
(304) 340-1372

[92] *See Noble v. W. Va. Dep't of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009).
[93] St. Joseph's Br., pp. 37-38.
[94] *Freeland*, 249 W. Va. at 160, 895 S.E.2d at 15 (holding that appellee's failure to respond constituted a "tacit agreement" and that "'[i]f an appellee fails to respond to an issue in its brief, the court may treat the failure to respond as a confession that the appellant's position is correct[.]"') (quoting 5 Am. Jur. 2d Appellate Review § 477 (2018)).

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 ***Reply Brief of Petitioner St. Joseph's Hospital of Buckhannon, Inc.*** on this 30th day of December, 2024, via the Court's electronic filing system, unless otherwise specified below, and have caused a true and exact copy of the same to be served upon counsel of record:

Thomas G. Casto, Esq.
Webster J. Arceneaux, Esq.
Hannah Wright, Esq.
Lewis Gianola PLLC
300 Summers Street, Suite 700
Charleston, WV 25301
tcasto@lewisgianola.com
wjarceneaux@lewisgianola.com

Gordon Lane, General Counsel
West Virginia Health Care Authority
100 Dee Drive
Charleston, WV, 25311-1692
Phone: 304-558-7000
(via hand delivery)

Michael R. Williams, Esq.
Frankie Dame, Esq.
Office of the West Virginia Attorney General
1900 Kanawha Blvd. East
Building 1, Room E-26
Charleston, WV 25305
Phone: 304-558-2021
Michael.R.Williams@wvago.gov
Frank.A.Dame@wvago.gov

/s/Alaina N. Crislip
ALAINA N. CRISLIP