IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 23-760

STATOIL USA ONSHORE PROPERTIES, INC.

Petitioner Below, Petitioner,

v.

MATTHEW R. IRBY, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent Below, Respondent,

On Appeal from the Intermediate Court of Appeals of West Virginia, No. 22-ICA-225

RESPONDENT'S BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

Sean M. Whelan (WV Bar No. 12067)
Deputy Attorney General
Seth E. Harper (WV Bar No. 10244)
Assistant Attorney General
State Capitol Complex
1900 Kanawha Boulevard, East
Building 1, Room W-435
Charleston, West Virginia 25305
Telephone: 304-558-2522
Facsimile: 304-558-2525
Email: Sean.M.Whelan@wvago.gov
Seth.E.Harper@wvago.gov
Counsel for Matthew R. Irby,
State Tax Commissioner of West Virginia

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INTRODUCTION

The Intermediate Court of Appeals ("ICA") correctly dismissed Equinor USA Onshore Properties, Inc.'s[1] 2015 case in *Statoil USA Onshore Property, Inc. v. Irby*, 249 W. Va. 424, 895 S.E.2d 827 (2023) because the taxpayer's petition to the Office of Tax Appeals ("OTA") was filed over eleven months after the jurisdictional sixty-day deadline for that filing had run and none of the equitable estoppel principles Equinor relied on below excused Equinor's lateness. The ten overlapping assignments of error Equinor raises in its *Petitioner's Brief* (Apr. 18, 2024), don't show that the ICA's decision in this part of the opinion was wrong.

At the outset, OTA and both lower courts found that Equinor's 2015 petition was late under West Virginia Code Sections 11-10-14(d)(1) and 11-10A-9(b). In fact, the circuit court thought this issue "undisputed," D.R.90, and Equinor seemed to agree, D.R.541, until its brief to this Court, where it argues that the deadline didn't start until a year later when it got its last refund check. Yet, even setting Equinor's shift in positions aside, this argument has no merit and doesn't require reversal. The sixty-day deadline ran from the Tax Commissioner's formal February 27, 2019, refund denial letter because that letter notified Equinor of the substance of the Tax Commissioner's position, advised Equinor of its appeal rights, and was served on Equinor through United States mail as the Code and this Court's precedent requires. Plus, this Court's prior decisions have tracked this sixty-day deadline from the Tax Commissioner's formal notices and not, as Equinor now tries, from a refund check or an informal email from a Tax Division employee. Equinor's efforts to prove that its 2015 petition was timely fall short and should be rejected.

[1] Although Petitioner filed this appeal as Statoil USA Onshore Properties, *see* Notice of Appeal, No. 23-760 (Dec. 28, 2023), the ICA's opinion consistently refers to the Petitioner as "Equinor." *E.g.*, *Statoil*, 249 W. Va. --, 895 S.E.2d at 828. Equinor also refers to itself by that name throughout its *Petitioner's Brief* (Apr. 18, 2024). This *Respondent's Brief* does the same.

Equinor's attempts to invent a conflict between the statutes governing the deadline for OTA petitions and the statutes and rules governing the petition's content are similarly meritless. It hasn't shown a direct conflict—the relevant statutes relate to distinct and easily reconcilable requirements for filing at OTA. Plus, even if a conflict did arise, Equinor can't show that the jurisdictional deadline should recede under any of the typical canons of construction—especially since the crux of its manufactured conflict is a procedural rule, which a conflicting statute would always trump.

Lastly, nothing in Equinor's opening brief shows that the ICA was wrong about equitable estoppel. The filing deadline Equinor missed is statutory and sets limits on OTA's jurisdiction. So, the ICA was right to find that equity principles shouldn't expand OTA's power to hear cases beyond those legislatively established. The ICA rightly applied on-point precedent from this Court rejecting every attempt to excuse late OTA filings on equitable estoppel grounds. It also correctly distinguished this Court's decision in *Hudkins v. State Consol. Pub. Ret. Bd.*, 220 W. Va. 275, 647 S.E.2d 711 (2007) (per curiam) and explained why that case didn't apply here. And it found that Equinor couldn't rely on equitable estoppel anyway because, as a sophisticated taxpayer, it should've been aware of OTA's jurisdictional limits and more careful to preserve its claims.

To be sure, as set out in Commissioner Irby's *Petitioner's Brief* (Apr. 18, 2024) in Appeal No. 24-26, much of the ICA's *Statoil* opinion is wrong. But on OTA's jurisdiction and equitable estoppel, it applied the plain text of the relevant statutes and this Court's on-point precedent. Its decision to reverse OTA in Appeal No. 22-ICA-225 and direct the dismissal of Equinor's 2015 petition should be affirmed.

COUNTERSTATEMENT

I. West Virginia's Severance Tax Formula.

West Virginia imposes an annual tax on producers engaged "in the business of severing" natural resources "for sale, profit or commercial use." W. VA. CODE § 11-13A-3a(a) (2006).

Natural resources subject to the tax include "natural gas, oil and natural gas liquids," *id.* § 11-13A-2(c)(8), "physically remov[ed] . . . from the earth . . . of this state," *id.* § 11-13A-2(c)(11) (2004), *amended* (2021). The tax is generally calculated on the "market value of the natural resource" at the point "where [it is] severed" from the ground and is "commercially marketable or usable." *Id.* § 11-13A-2(c)(6). For natural gas and natural gas liquids ("NGLs"), that point is "at the wellhead," *id.* § 11-13A-2(c)(6)(G)—an industry term meaning: "where [gas] first emerges from the ground" in raw unprocessed form, which is historically where most, if not all, "oil and gas sales occurred." *Leggett v. EQT Prod. Co.*, 239 W. Va. 264, 271, 800 S.E.2d 850, 857 (2017) (regarding use of term in royalty contracts), *superseded by statute on other grounds, SWN Prod. Co. v. Kellum*, 247 W. Va. 78, 85, 875 S.E.2d 216, 223 (2022).

But these days, most gas isn't sold at the well. *Leggett*, 239 W. Va. at 271, 800 S.E.2d at 857. Instead, it is sold downline and often after the raw gas has been processed into its several marketable components. *Id.* The sales price for these downline sales is often higher than at the well to account for the enhanced value of the more refined products and to compensate producers for the added costs of processing the gas and transporting it to the commercial market. *Id.*

The tax formula accounts for the value added away from the well through cost deductions. Producers report "the gross proceeds derived from the sale" of their gas, W. VA. CODE § 11-13A-3a(b). Their reported "gross proceeds" must include "the value, whether in money or other property, actually proceeding from the sale" of their gas "or from the rendering of services" and must be reported prior to "any deduction[s]" for costs "or expenses of any kind." *Id.* § 11-13A-2(b)(5). But since they aren't selling the gas at the well, their gross proceeds are just the start of the formula. From there, producers get to subtract either actual costs of transportation, transmission, and processing as deductions, W. VA. CODE R. § 110-13A-4.8.1 (1992), or fifteen

percent of their gross proceeds (as a safe harbor) to account for the same costs, *id.* § 110-13A-4.8.4.[2] Either deduction is designed to work backwards to mathematically determine the value of gas before the producer incurs transportation and processing costs—*i.e.*, at the point when the gas is severed. They are then taxed at "five percent of" the wellhead value. *Id.* § 11-13A-3a(b).

II. Severance Tax Procedures And Administration.

Like most state taxes, the "assessment," "collection," and "administ[ration]" of severance tax is subject to "certain uniform procedures" in the Tax Procedures and Administration Act that are designed to "simplify . . . administration and collection," as well as "promote efficiency and uniformity" in the "application [and] administration of the tax laws." W. VA. CODE § 11-10-1; *see also id.* § 11-13A-19 ("Each and every provision of the 'West Virginia Tax Procedure and Administration Act' . . . shall apply to the taxes imposed by this article.").

Under the tax's specific procedures, a producer must file "an annual return" that "comput[es] the amount of taxes due" for each year. W. VA. CODE § 11-13A-8. Afterward, producers typically have three years to file a claim for a refund, *id.* § 11-10-14(l)(1), "with the Tax Commissioner," *id.* § 11-10-14(c). When the Tax Commissioner receives a refund claim, he must "determine the taxpayer's claim and notify the taxpayer in writing of his or her determination." *Id.*

"If the taxpayer is not satisfied with the Tax Commissioner's determination of [its] claim for refund," it "may file" "a petition for refund" with OTA. *Id.* § 11-10-14(d)(1). Petitioning OTA is "the sole method of" challenging a refund denial and is "in lieu of any other remedy." *Id.* § 11-10-14(i). A taxpayer "initiate[s]" a proceeding at OTA by "filing a written petition" stating "[t]he nature of the case," relevant facts, and "[e]ach question presented for review." *Id.* § 11-10A-9(a),

[2] Alternatively, producers can use Federal Energy Regulatory Commission ("FERC") data, W. VA. CODE R. § 110-13A-4.8.2, or "same pool" "average purchase price" numbers, *id.* § 110-13A-4.8.3, to establish their wellhead value. But these other methods are rarely, if ever, used.

(1)-(3). The petition also must be "verified under oath by the taxpayer," or its "authorized agent" and it must "set forth with particularity the items of the" Tax Commissioner's "determination objected to, together with the reasons for the objections." *Id.* § 11-10-14(d)(2).

But a taxpayer also must file its petition on time. The Code says so at least twice. One place says, "No petition for refund . . . may be filed more than 60 days after the taxpayer is served with notice of denial of taxpayer's claim." *Id.* § 11-10-14(d)(1). Another part of the Code reaffirms that a "timely" petition "initiates" an OTA proceeding and "is timely filed if postmarked or hand delivered to [OTA] within sixty days of the date a person received written notice of . . . denial of a refund . . . or other decision of the Tax Commissioner." *Id.* § 11-10A-9(b). And the assigned administrative law judge may not extend this deadline: "The period fixed by statute, within which to file a petition invoking the jurisdiction of the office of tax appeals, may not be extended by an administrative law judge." W. VA. CODE R. § 121-1-8.1 (2003), *recodified id.* § 121-1-7-1 (2023).

III. Equinor's Production, Processing, And Sale Of Natural Gas.

Equinor is a natural gas producer that drills wells in West Virginia. Its wells generate a mixture of water, sediment, and various liquid and gaseous natural resources. D.R.25. Once out of the ground, the gaseous elements are separated through Equinor's production and processing equipment before being transported downline to the facilities of its third-party processor, MarkWest Liberty Midstream & Resources LLC ("MarkWest"), D.R.25-26, who provides gas processing services to Equinor. From there, MarkWest breaks down and processes the raw gas into residue gas or methane, and "raw make." D.R.26. The raw make is then transferred to a fractionation plant where MarkWest separates it into various marketable NGL components (*i.e.*, ethane, butane, and propane), which it sells to its customers. D.R.26.

After that, MarkWest and Equinor settle up with each other. Each month, Equinor pays MarkWest certain contractually agreed-to marketing, fractionation, processing, and transportation

fees, D.R.27, by either letting MarkWest deduct these fees from the amount the processor receives from its customers, D.R.36, or occasionally, writing MarkWest a check. D.R.31. Then, MarkWest pays Equinor the remainder. D.R.27. MarkWest memorializes these payments in monthly settlement sheets. On these, the average price for all the NGLs MarkWest receives from its customers each month is called the "gross value" or "product value," and the amount of money Equinor receives after MarkWest deducts its fees is called the "net value." D.R.27. As an example, the January 2015 statement lists a product value of $386,174.91; fees of $44,791,68; and a net value of $341,383.23. D.R.27. On every one of these statements, the "net value is the product value minus the fees and adjustments." D.R.26.

IV. Equinor Files Its 2015 Return And Amends It; Then The Tax Division Issues A First And Second Denial Letter.

When Equinor filed its return for 2015, it used the gross product value amount listed on MarkWest's statements as the starting point of its tax calculations. This resulted in a total severance tax payment of nearly $7 million for this year alone. D.R.45 ($6,735,784.25). But in May 2016, the Tax Commissioner refunded $852,320.27 of that year's tax payment. D.R.296.

Later on, a tax service firm, Ryan LLC, reviewed Equinor's severance tax returns, and in 2018, filed amended returns in several tax years including 2014, 2015, and 2016. D.R.45, 251. It requested $4,837,548.01 in refunds just for 2015. D.R.45 The Tax Division reviewed each amended return, and while finding some parts appropriate, the Division determined that Ryan had subtracted all the fees Equinor paid to MarkWest (including administrative, marketing, and overhead fees) from the gross values reported on Equinor's original returns. D.R.47, 296.

The Division also found that Ryan claimed the fifteen percent safe-harbor cost deduction on top of these actual cost deductions, D.R.296, even though the rule only lets producers take one or the other. *See* W. VA. CODE R. § 110-13A-4.8. So, on January 23, 2019, the Tax Division issued

a refund decrease letter that granted Equinor $2,621,432.99 in refunds for 2015—in addition to the over $850,000 refund granted in May 2016—to account for the actual costs Equinor paid to MarkWest for transportation, transmission, and processing. D.R.296. But the letter stated that the rest of the refund requested—around $1.3 million—was denied because this part improperly deducted administrative and overhead costs as well as the safe-harbor. D.R.296. Similar refund decrease letters were issued in the other tax years. Like all refund denial letters, these advised Equinor that "if you have any objections to this decrease . . . you must file a petition for reassessment with" OTA "within sixty (60) days from receipt of this letter" or "the decreased [refund] shall become conclusive." D.R. 296. Equinor filed petitions challenging the 2014 and 2016 refund denial letters soon afterward. D.R.215 (2014: Jan. 9, 2019; 2016: Feb. 11, 2019).

But Equinor didn't appeal that 2015 denial. Instead, five days after it was issued, Tomas Gaytan, a representative of Ryan, emailed the Tax Division audit clerk responsible for the account with questions and asked for spreadsheets supporting the denied refund calculation. D.R.298-99. Twelve days after that, Mr. Gaytan emailed the audit clerk again suggesting that a mathematical error must've occurred because by his calculation, the refund should've been over $3.3 million instead of $2.6 million. D.R.301. Further discussions between Mr. Gaytan and the Tax Division followed, D.R.110, and on February 13, 2019, Stacy Acree, the Assistant Director of the Tax Commissioner's Business Tax Section, emailed Mr. Gaytan to explain that two of the schedules Equinor filed with its amended return weren't calculated the same way. D.R.301. So, she continued, the Tax Division was "pulling the refund back to further review" this issue. D.R.301.

Fourteen days after Ms. Acree's email, the Tax Division issued a second refund decrease letter. This February 27, 2019, letter corrected the amount of the refund for 2015 to $3,285,559.33. D.R.304. But it denied Equinor the remaining $699,668.41 refund because this part of the request

improperly deducted administrative and overhead costs as well as the safe-harbor. D.R.304. Like the first one, the second letter advised Equinor that it "must file a petition for reassessment with" OTA "within sixty (60) days from receipt of this letter" if it had "any objections to this decrease." D.R.304. It also stated that if Equinor "fail[s] to file the aforesaid petition within the time prescribed by law, the decreased [refund] shall become conclusive." D.R.304.

Equinor didn't take that advice, either. Instead, the next day, Mr. Gaytan called the Tax Division to report a mathematical error in this second letter, which he believed would've increased the refund by an additional $23,671.54. D.R.111. At the end of that call, Ms. Acree asked the audit clerk on the account to investigate this purported error. D.R.111. Three days later, the Tax Division mailed Equinor a refund check. The check did not include the additional $23,671.54. Rather, it was for the exact amount stated in the second refund decrease letter—$3,285,559.33. D.R.111.

Meanwhile, in the fall of 2019, the audit clerk on Equinor's account passed away, and several of her accounts had to be reassigned, which delayed the Tax Division's review of the additional $23,000 refund. D.R.111. Even then, Equinor didn't file its petition to OTA for 2015. Nor did it follow-up with the Tax Division in writing regarding the additional refund. Equinor filed another petition related to the 2016 tax year, D.R.256, but waited to file on the 2015 refund denial.

Ultimately, Ms. Acree undertook the reconciliation herself and completed the review of Mr. Gaytan's concerns a year later. D.R.111. The Tax Division issued Equinor a $23,671.54 check on February 27, 2020, D.R.306, bringing the total refund it received for this year to $4,161,551.14, and the total amount denied to $675,996.87. D.R.328.

V. Equinor Files Its Petition Eleven Months Late, The Tax Commissioner Moves to Dismiss, And OTA Hears Testimony From Both Sides.

Equinor filed its petition to OTA on its 2015 refund denial forty days after receiving the February 27, 2020, refund check—claiming that $708,438.95 was left "in controversy." D.R.342

(Apr. 7, 2020). The Tax Commissioner moved to dismiss the 2015 petition because Equinor missed its sixty-day petition deadline by eleven months—depriving OTA of jurisdiction. D.R.330. The Tax Commissioner also pointed out the disparity in the refund Equinor received and the amount it claimed in controversy. D.R.328. Equinor opposed this motion arguing that it couldn't file its petition until it got the final check. D.R.290, and that the Tax Commissioner should be equitably estopped from asserting this jurisdictional deadline because, according to Equinor, the Tax Commissioner's employees promised to issue a "third refund decrease letter" after the $23,000 check and didn't. D.R.290-91, 309 (Gaytan Aff'd: on the February 28, 2019, call "Ms. Acree instructed" the audit clerk "to perform a detailed reconciliation and issue a new refund letter").

OTA held a hearing on the Tax Commissioner's dismissal motion. There, Ms. Acree confirmed that Mr. Gaytan contacted the Tax Division about the additional $23,000 the day after the second refund letter was published. D.R.199. She testified that at the end of the call she "instructed the Audit Clerk to review his concerns," D.R.199, but she did "not recall" telling Mr. Gaytan that a third refund denial letter would issue after this review. D.R.209. In fact, a third letter wouldn't have made sense in this context anyway. As Ms. Acree explained, if the Tax Division "had disagreed on the $23,000 we wouldn't have issued a decree letter . . . because" that was already denied "in the second letter." D.R.212. And if the Tax Division agreed, it wouldn't issue a third denial letter either because the additional refund would be granted. D.R.200.

Rather, Ms. Acree's "assumption was . . . that the Audit Clerk [was] going to review this" "and that [Equinor] would file a petition with OTA on the remaining $600,000 or $700,000" in the interim. D.R.219. She said what normally happens with other taxpayers is "the refund decrease letter" and "refund" issue, D.R.234, then, "we continue to work with the taxpayer, if they want to,

to work out any discrepancies in numbers . . . . And if we can't agree, they have their petition at OTA and they can still contest it." D.R.234.

She acknowledged that the amount listed in the second letter wasn't "the final number" because an additional refund was paid a year later. D.R.212. But she testified that, in the past, even when additional refunds are "work[ed] . . . out with other companies" "there is not an additional letter sent." D.R.212. She said this hadn't been "confusing" or an "issue with any other company." D.R.213; D.R.236 (Acree: "Up until this point in time, this process has worked fine until this case with Ryan."). She testified, "We had always worked with companies after they had received their decrease letter," D.R.218, and she confirmed that some taxpayers bring "multiple" petitions "for even the same tax period." D.R.236. She also said that she presumed Ryan was "totally aware of th[is] process because they had filed OTA claims previously, at least six or seven." D.R.213.

Mr. Gaytan also testified at OTA. He confirmed that he called the Tax Division on February 28, 2019, to discuss why the number in the second refund denial letter was short around $23,000. D.R.245. He said Ms. Acree and the audit clerk were on the call. D.R.245. According to Mr. Gaytan, his "main purpose" for calling "was to get to the correct number to appeal," D.R.245, and that the audit clerk was "instructed to go back and perform a review and look at [the $23,000 discrepancy] again." D.R.245. But unlike Ms. Acree, he testified that "there was discussion" on the call "of a third letter being issued to replace the second letter." D.R.245-46.

He also believed that everyone on the call understood "that we were going to petition the full denial amount," D.R.245, and he was trying to avoid a situation where the Tax Commissioner and taxpayer "didn't have the same numbers at all times." D.R.245. But he conceded that there were "ongoing discrepancies" with the numbers in prior cases he'd been involved in, D.R.245, and that in subsequent cases he'd filed petitions on each refund denial letter (even where there were

multiple letters for a single tax year), D.R.246, 249, as a "belt and suspenders approach," D.R.256. He conceded that no one from the Tax Division "advise[d] [him] not to file a petition on the refund denial letters" in this case, D.R.255, and that he never "receive[d] anything in writing from anyone about the forthcoming third [refund denial] letter" he alleged Ms. Acree promised. D.R. 259.

VI. OTA Dismissed Equinor's Petition, The Circuit Court Reversed, And OTA Affirmed The Refund Denial On The Merits

OTA initially granted the Tax Commissioner's motion to dismiss. OTA recognized that the parties disputed whether Mr. Gaytan was told on the February 28, 2019, call that a third refund denial letter would be issued. D.R.112. But it "assume[d] the facts in a light most favorable to" Equinor on this point. D.R.112. Still, it found the factual dispute on this didn't change the outcome. D.R.113. OTA noted that it "regularly dismisses appeals that have missed the sixty-day" statutory "deadline," D.R.113, and "consistently refuse[s] to assert jurisdiction when" that deadline is missed. D.R.114. It noted that Equinor is "a sophisticated [t]axpayer, represented by a very sophisticated consulting firm, in constant contact with the Tax Department." D.R.114.

It also found that the Tax Commissioner couldn't be equitably estopped from challenging OTA's jurisdiction under these facts. Here, OTA relied on this Court's decision in *Hudkins* for the standards for finding estoppel against the State. D.R.115. OTA found that Equinor met the "traditional elements" for estoppel—"but it [was] a close call." D.R.117. It thought there was "a false representation" because "presumably" Ms. Acree told Mr. Gaytan that "a third letter would be issued," and that wasn't true. D.R.117. OTA also believed Ms. Acree had "constructive knowledge" that this statement may be incorrect, D.R.117, and Mr. Gaytan couldn't have known "the third letter was never coming," D.R.118. It further found that "the statement regarding the issuance of a third letter was made with intention that it would be acted upon," and Equinor "obviously acted upon this false representation to its determinant." D.R.118.

Yet, OTA concluded that wasn't enough. It believed taxpayers also had to show "affirmative misconduct" by a state employee—such as "deliberately giving" "wrong advice"—before estoppel could apply, D.R.119. Even viewing the facts "in a light most favorable to" Equinor and "assuming that the Ryan employee was told, on February 28, 2019[,] that a third letter would be forthcoming," D.R.121, OTA found no such misconduct. OTA did "not believe for a moment that [Ms. Acree] was setting [Equinor] up to miss its deadline." D.R.121. Rather, it thought this "was a simple misunderstanding," which was not enough to excuse the missed jurisdictional deadline or "change the tax laws of this state." D.R.121. In fact, OTA noted that it "has never ruled that the Tax Commissioner should be equitably estopped." D.R.115. So, it dismissed Equinor's petition for lack of jurisdiction. D.R.122.

Equinor appealed to the Circuit Court of Kanawha County arguing that equitable estoppel should've prevented the dismissal at OTA, D.R.105, and that court reversed. D.R.84. The circuit court found it "undisputed that Equinor's appeal of the February 27, 2019, Second Refund Decrease Letter to OTA was untimely." D.R.90. But the court held that OTA got the standards for estoppel in *Hudkins* wrong. D.R.92. Instead of requiring affirmative misconduct, the circuit court thought *Hudkins* allowed the State to be estopped in two situations: *either* (1) when affirmative misconduct occurred *or* (2) when "weigh[ing] the public policy implications" require it. D.R.94. The circuit court noted that *Hudkins* ultimately turned on "public policy" factors, D.R.94, such as whether "the injury and injustice" to the private party "outweighs the public interest" in enforcing the state's statutes, whether "the exercise of government functions will be impaired or interfered with," and whether "the public interest [will] be harmed." D.R.95. Because OTA didn't consider these factors, the court reversed and remanded with instructions to perform that task.

On remand, OTA denied the Tax Commissioner's motion to dismiss. It found that Equinor "clearly missed the sixty (60) day statutory deadline in which to file an appeal" to OTA, D.R.79-80, and that this deadline implicated OTA "jurisdiction to hear the matter," D.R.81. But OTA held that if "weigh[ing] public policy implications" was appropriate, each of the factors set out by the circuit court weighed in favor of estoppel. D.R.81. It found *first*, that hearing Equinor on the merits "will not harm the public interest"; *second*, that "[e]stopping the Tax Commissioner will prevent a manifest injustice"; *third*, that estoppel "will not interfere with the exercise of any government functions"; *fourth*, not estopping the Tax Commissioner would be "highly inequitable" "[d]ue to the amount of money involved"; and *fifth*, that the Tax Division's "conduct" "did work a serious injury to" Equinor. D.R.81. So, OTA held that estoppel applied and prevented the Tax Commissioner from raising the jurisdictional defect in Equinor's OTA petition. D.R.81.

Meanwhile, OTA also held a hearing on the 2014 and 2016 refund denial cases and afterward, in a separate order on August 18, 2022, ruled in the Tax Commissioner's favor on the merits. D.R.24. It then upheld the 2015 refund denial on the merits as well and confirmed that $708,438.95 was the denied amount in controversy in that year. D.R.41 n.1.

VII. The ICA Reversed OTA's Jurisdictional Order And Equinor Appealed.

Equinor then appealed to the ICA on the merits in all tax years,[3] and the Tax Commissioner cross-assigned error on OTA's jurisdictional ruling in the 2015 case.

On OTA's jurisdiction to hear the 2015 case, the ICA reversed. It disagreed with the circuit court's reading of *Hudkins* "at least as it applies to extending tax filing and appeal deadlines." *Statoil*, 249 W. Va. --, 895 S.E.2d at 835. Instead, it found that *Hudkins*' holding was "extremely

[3] The ICA reversed OTA on the merits of the refund denials in Appeal No. 22-ICA-111 and 22-ICA-226, which related to the 2014, 2016, 2018, and 2019 tax years. *Statoil*, 249 W. Va. 424, --, 895 S.E.2d at 828. That part of the ICA's decision is the subject of the Tax Commissioner's separate appeal to this Court in *Equinor USA Onshore, Inc. v. Irby*, Appeal No. 24-26.

limited" and didn't change "on-point tax administrative jurisprudence" from this Court "holding that clear statutory appeal deadlines are not subject to equitable modification." *Id.* The ICA noted that Equinor's petition to OTA in the 2015 case was "facially untimely," *Statoil*, 249 W. Va. --, 895 S.E.2d at 830, and that the sixty-day deadline was "mandatory," *id.* at 830. It also noted that "Equinor is a sophisticated party with extensive resources," and that it "is or should have been acutely aware of the importance of jurisdictional time limits in tax matters." *Id.* at 835. It further found that the "second notice" was "in writing and notified Equinor of the strict appeal deadline," and that the Tax Commissioner never "instructed" Equinor "to refrain from filing a timely" "petition with OTA that would preserve its right to appeal" that notice. *Id.* Rather, "Equinor mistakenly relied upon advice it received during a phone call," instead of the written instructions it received on the official second refund denial notice. *Id.* The ICA held that "a highly sophisticated party like Equinor cannot avail itself of equitable estoppel to expand OTA's jurisdiction." *Id.* So, it reversed the circuit court and OTA's findings to the contrary and remanded with directions to "OTA to dismiss Equinor's petition for tax year 2015." *Id.* at 836.

Equinor appealed the ICA's opinion asserting ten overlapping assignments of error. It says that the ICA erred (1) by reversing OTA and directing the dismissal of its 2015 petition; (2) by not applying *Hudkins*; (3) by concluding that Equinor had to prove affirmative misconduct or wrongful conduct; (4) by finding that this Court had refused to apply equitable estoppel on more compelling cases than Equinor's; (5) by considering Equinor's sophistication; (6) by finding that Equinor mistakenly relied on advice received on a phone call with the Tax Division; (7) by characterizing Ms. Acree as a "Tax Department employee"; (8) by creating a new (and allegedly impossible) standard for estoppel; (9) by creating a conflict between statutes and regulations governing

petitions to OTA; and (10) by not finding Equinor's petition to OTA timely when it was filed within sixty days of the last refund check. Petr's Br.4-5.

But in the rest of its brief, Equinor reorganized and consolidated these ten assignments into three main arguments. It argues that the ICA erred *first* by failing to address whether Equinor received adequate notice of its refund denial (which corresponds to Assignment of Error 10), *id.* at 5, 11-13; *second*, by creating a conflict between the timeliness and content requirements for OTA petitions (which corresponds to Assignment of Error 9), *id.* at 5, 13-18; and *third*, by ruling that the Tax Commissioner wasn't equitably estopped from challenging OTA's jurisdiction (which corresponds to Assignments of Error 1 through 8), *id.* at 4, 18-32.

SUMMARY OF ARGUMENT

The ICA's opinion in 22-ICA-225 should be affirmed and each of Equinor's ten related assignments of errors should be rejected.

I. Equinor's 2015 petition to OTA was late. Its petition was filed more than eleven months after the sixty-day deadline set out in West Virginia Code Section 11-10-14(d)(1) and 11-10A-9(b). That lateness deprived OTA of jurisdiction and mandated dismissal under the statute's plain text and this Court's established precedent. Although Equinor seemed to concede untimeliness below and all prior tribunals treated this issue as undisputed, it now argues that its deadline shouldn't run from the last formal refund denial it received—but from the date of its last refund check and the email confirming it. But the formal denial letter contained all the hallmarks of proper statutory notice: it notified Equinor of the substance of the Tax Commissioner's refund denial, it advised the taxpayer of its appeal rights, and it was delivered by official means through United States mail. That's why this Court's previous decisions treated the Tax Commissioner's formal notice letters as the trigger for OTA petitions. This Court should do the same here, too, and it should reject Equinor's attempt to start its deadline from the date of its last refund check. Neither

the last check nor the email confirming its delivery count as the written notice of a refund denial from which Equinor should've timely appealed. It should've appealed the refund denial on time and didn't. Its petition was late. Thus, this Court should reject Equinor's Assignment of Error 10.

II. Equinor's attempt in Assignment of Error 9 to sow conflict into statutory text this Court has described as "unambiguously" setting a sixty-day deadline, *Panhandle Used Equip., LLC v. Matkovich*, No. 15-230, 2016 WL 1417785, *3 (Apr. 8, 2016) (mem. decision), should also be rejected. Equinor says enforcing this deadline from the date of the formal refund denial letter creates a conflict with statutes and rules governing the contents of its petition. But it can't use statutes related to the content of OTA petitions to create ambiguity in an otherwise clear statute on their timeliness. Courts don't read statutes in conflict that deal with different issues. Plus, the deadline statute and the content statutes and rules are easily reconcilable—as common sense and the record below demonstrate. Furthermore, even if they weren't, none of the canons of construction would force the deadline statute to recede. It is later in time and more specific. Plus, statutes trump procedural rules, anyway. Equinor can't avoid the sixty-day deadline by inventing a statutory conflict.

III. Equitable estoppel principles don't excuse Equinor's late filing, either. The ICA correctly found that the sixty-day filing deadline is statutory and jurisdictional, and that equitable estoppel couldn't "expand OTA's jurisdiction" beyond its statutory limits. *Statoil*, 249 W. Va. --, 895 S.E.2d at 836. The ICA also recognized that this Court's decisions have rejected every attempt to extend this sixty-day deadline on estoppel grounds and that *Hudkins* was a fact-specific case inapplicable here. For similar reasons, the ICA was right to consider Equinor's sophistication in its equity evaluation—multiple decisions from this Court say this is a factor. It was also right to set a high bar for estoppel claims against the government: this Court and federal courts have

established a similarly difficult standard. And the ICA correctly found that Equinor failed to meet that bar. In fact, Equinor can't even meet the traditional elements for estopping private parties—much less the more difficult burden of proving estoppel against the government. Equinor can't blame the Tax Commissioner for its unreasonable and mistaken failure to preserve its 2015 appeal. Each of Equinor's first eight assignments of error should be rejected, and this Court should affirm the ICA's decision in Appeal No. 22-ICA-225.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary, and a memorandum decision affirming the ruling below is appropriate, *see* W. Va. R. App. P. 18(a) & 21, because this Court has used that type of decision to reject substantially similar arguments for extending the same statutory deadline.

STANDARD OF REVIEW

The "jurisdictional issues" raised in this appeal "are questions of law" subject to "de novo" review. *State ex rel. Univ. Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 343, 801 S.E.2d 216, 221 (2017). A lower court's application of "equitable principles" are reviewed for "abuse of discretion." *Helton v. Reed*, 219 W. Va. 557, 560, 638 S.E.2d 160, 163 (2006). Otherwise, this Court reviews a lower court's reversal of a decision from OTA under the standards set out in the Administrative Procedures Act, W. VA. CODE § 29A-5-4g (1988). *See* syl. pt. 1, *Griffith v. ConAgra Brands, Inc.*, 229 W. Va. 190, 191, 728 S.E.2d 74, 75 (2012). OTA's findings of fact should "not be set aside or vacated unless clearly wrong." *Id.* OTA's "interpretation of State tax provisions" are "afforded sound consideration," *id.*, and "given great weight unless clearly erroneous." Syl. pt. 2, *Keener v. Irby*, 245 W. Va. 777, 778, 865 S.E.2d 519, 520 (2021). The Tax Commissioner's interpretation and application of tax laws also receive deference unless his position "is arbitrary, capricious, or manifestly contrary to the statute." *Steager v. Consol Energy, Inc.*, 242 W. Va. 209, 223, 832 S.E.2d 135, 149 (2019) (cleaned up).

ARGUMENT

The ICA's decision to direct the dismissal of Equinor's 2015 case in Appeal No. 22-ICA-225 should be affirmed because Equinor filed its petition to OTA eleven months beyond the statutory sixty-day deadline in West Virginia Code Sections 11-10-14(d) and 11-10A-9(b). That deprived OTA of jurisdiction. Neither the statutory conflict Equinor tries to invent nor the equitable estoppel principles it advocates for justify extending that deadline.

I. Equinor Missed OTA's Statutory Sixty-Day Jurisdictional Petition Deadline.

Equinor was over eleven months late filing its 2015 OTA petition—as OTA and both lower courts agreed. It should've filed within sixty-days of receiving the second refund denial letter. None of the reasons it now gives for starting the sixty-day clock when it received the last refund check work. Equinor's Assignment of Error 10 and related arguments should be rejected.

A. The filing deadline Equinor missed is clear, statutory, and jurisdictional.

The ICA was right that "the Legislature intended to impose strict jurisdictional deadlines in connection with tax refund claims." *Statoil*, 249 W. Va. --, 895 S.E.2d at 835. Even Equinor admits as much. Petr's Br. 25 ("Equinor agrees . . . that the legislature "intended to impose [a] strict jurisdictional deadline."). That's no surprise either: the Code "unambiguously provides that petitions" to OTA "must be filed within sixty days of receipt of the assessment." *Panhandle*, 2016 WL 1417785, *3. The time allowed for petitioning a refund denial is the same. "[N]o petition for refund or credit may be filed more than 60 days after the taxpayer is served with notice of denial of taxpayer's claim." W. VA. CODE § 11-10-14(d) (2019). If that wasn't enough, the Legislature repeated that deadline in OTA's governing statutes. These say that "[a] proceeding before" OTA appealing "a denial of a tax refund . . . shall be initiated by a person timely filing a written petition." *Id.* § 11-10A-9(a) (2005). And it defines "a petition" as "timely filed if postmarked or hand

delivered to" OTA "within sixty days of the date [a] person received written notice of a[] . . . denial of a refund or credit, order or other decision of the Tax Commissioner." *Id.* § 11-10A-9(b).

What's more, this Court has treated similar "statutory-imposed deadlines" for "perfect[ing] an appeal" in tax cases "as jurisdictional." *Solution One Mortg., LLC v. Helton*, 216 W. Va. 740, 743, 613 S.E.2d 601, 604 (2005) (per curiam) (related to appeal bond deadline). That's why "[a] taxpayer's failure to abide by the express procedures established for challenging a decision of the West Virginia State Tax Commissioner" including those "enunciated in West Virginia Code § 11-10-14(c) and (d) (1995), precludes the taxpayer's claim for refund or credit." Syl. pt. 1, *Bradley v. Williams*, 195 W. Va. 180, 181, 465 S.E.2d 180, 181 (1995).

Equinor's April 7, 2020, petition was filed almost a year late. D.R.342. The Tax Commissioner issued his decision to disapprove "marketing, demand and administrative fees," the "15% safe harbor," and the related refund request on February 27, 2019. D.R.347. Equinor received a copy via certified mail on March 4, 2019, D.R.330. If it wanted to challenge that decision it should've filed its petition to OTA no later than May 3, 2019. It didn't. Instead, it waited nearly a year beyond the statutory deadline.

That's why the lower courts and OTA all agreed that Equinor missed its filing deadline. OTA treated that conclusion as a given—finding that the only issue left to decided was whether estoppel could save that late filing. D.R.113. Similarly, the circuit court found it "undisputed that Equinor's appeal of the February 27, 2019, Second Refund Decrease Letter to OTA was untimely." D.R.90. The ICA found the same thing—agreeing with the Tax Commissioner that "Equinor's 2015 tax year petition [was] filed nearly 11 months after the 60-day statutory deadline expired," *Statoil*, 249 W. Va. --, 895 S.E.2d at 834, and it characterized Equinor's petition as "facially untimely," *id.* at 831. Even Equinor seemed to admit as much at the ICA. It told that court it

"undisputedly missed" "the statutory deadline for appeal." D.R.540. And it characterized the Tax Commissioner's whole discussion of "the statutory deadline" as "frankly, irrelevant" and "not" worthy of even "address[ing]," D.R.541, because the filing deadline at OTA was so plainly missed.

B. The second refund denial letter gave Equinor adequate notice of the Tax Commissioner's position and its appeal deadline.

Yet, Equinor now says it didn't miss the filing deadline at all. And it blames the ICA for not addressing two arguments it thinks dispositively show that. Petr's Br. 11. *First*, it says the February 27, 2019, refund denial letter didn't give it sufficient notice to file its petition; and *second*, it thinks its sixty-day deadline didn't start until Ms. Acree's email confirmed delivery of the last refund check. Petr's Br. 11-12. But even setting aside whether Equinor properly raised these arguments in the half-sentence it cites from its ICA reply, D.R.541, neither argument has merit.

To be sure, "[a]dequate notice" is a basic prerequisite for "administrative" actions. *W. Va. Nonintoxicating Beer Comm'r v. A & H Tavern*, 181 W. Va. 364, 368, 382 S.E.2d 558, 562 (1989). This requirement is grounded in "basic rules of fairness" and constitutional mandates that the public be "informed of the possible consequences of government action." *Lee Trace, LLC v. Raynes*, 232 W. Va. 183, 190, 751 S.E.2d 703, 710 (2013). The Code requires that the Tax Commissioner "notify the taxpayer in writing of his . . . determination" on a refund claim. W. VA. CODE § 11-10-14(c). The notice must explain the "substance" of his action "with sufficient certainty" to allow the public to respond. *McJunkin Corp. v. W. Va. Human Rights Comm'n*, 179 W. Va. 417, 420-21, 369 S.E.2d 720, 723-24 (1988). Taxpayers also need to "be sufficiently alerted to [their] appeal rights" in the notice. *Penn Va. Operating Co., LLC v. Yokum*, 242 W. Va. 116, 122 829 S.E.2d 747, 753 (2019) (cleaned up).

The Tax Commissioner's second refund denial letter met all these standards. It was "in writing," and stated the substance of the Tax Commissioner's "determin[ation]" on Equinor's

refund claim. W. VA. CODE § 11-10-14(c). It said he was "denying marketing, demand fees and administrative fees" as a deduction as well as "the 15% safe harbor." D.R.304. The letter notified Equinor that the $4.8 million refund it requested was substantially decreased because of that decision. D.R.304. It also told Equinor to "file a petition for reassessment with" OTA "within sixty (60) days from receipt of this letter" or "the decreased overpayment shall become conclusive." D.R.304. And there's no question that Equinor received this February 27, 2019, notice: Mr. Gaytan called the Tax Division about it the next day, D.R.111, and Equinor received a copy via certified mail on March 4, 2019, D.R.330.

Yes, the refund amount in the second letter was short a little over $23,000. D.R.112. And that amount wasn't sent to Equinor until a year later. D.R.323. But an agency's notice doesn't have to be mistake-free. In fact, it doesn't even need to "meet the" notice pleading "standards applicable in a judicial proceeding." *Cf. McJunkin*, 179 W. Va. at 421, 369 S.E.2d at 724 (related to notice in Human Rights Act complaint). It just needs to be "adequate." *Id.* And the second letter plainly met that adequacy standard. The later correction of this $23,000 mathematical error didn't alter anything in the substance or rationale of the Tax Commissioner's refund determination. And it didn't bar Equinor from challenging that substance at OTA. If anything, Equinor could've listed this math error as another ground for its petition.

Likewise, the fact that the Tax Commissioner issued a first refund denial, D.R.338, and replaced it with a second one, D.R.335, doesn't change the effectiveness of the second notice. For one, no one disputes that Equinor could've filed a petition on the first refund denial, too. D.R.204. But that petition turned out unnecessary (and would've likely been found moot) because the second letter was issued thirty-five days after the first. *Cf. Cooper v. City of Charleston*, 218 W. Va. 279, 288, 624 S.E.2d 716, 725 (2005) (procedural challenge to enactment of city ordinance rendered

moot by "re-publication and re-enactment"). Well before the sixty-day deadline for the first letter had run, the second one had already replaced it.

But that doesn't excuse Equinor's failure to timely appeal the second letter. That second letter was "sufficiently detailed to" inform Equinor of the Tax Commissioner's substantive position, *Pritchard v. Catterson*, 184 W. Va. 542, 548, 401 S.E.2d 475, 481 (1990), it "sufficiently alerted [Equinor] to [its] appeal rights, *Penn Va.*, 242 W. Va. at 122, 829 S.E.2d at 753, and gave Equinor the "opportunity to prepare" its response, *A & H Tavern*, 181 W. Va. at 368, 382 S.E.2d at 562. The second refund denial letter gave Equinor adequate notice. And Equinor should've filed its petition to OTA within sixty-days of that notice if it wanted to preserve its 2015 refund claim.

C. Equinor can't track its appeal deadline from a Tax Division employee's email.

Equinor also can't treat Ms. Acree's February 27, 2020, email—that confirmed the delivery of the last refund check for 2015—as the "notice" from which to appeal. Petr's Br. 12-13. For one thing, the sixty-day appeal window runs from the written "notice of denial of taxpayer's claim," W. VA. CODE § 11-10-14(d)(1), and neither Ms. Acree's email nor the refund check *denied* Equinor anything. These communications alerted Equinor to a *grant* of an additional $23,000—that's all. D.R.323. So, there was no "denial" in the email or check for Equinor to appeal.

For another, Ms. Acree's email isn't the type of communication that counts as an official notice of the Tax Commissioner's refund determination—nor did it purport to be. Yes, an email may be a "writing" under Section 11-10-14(c), but other parts of the Code force agencies to communicate their official positions by different means. The Administrative Procedures Act, for example, directs that agencies "shall" give "notice" of their actions "by personal delivery . . . or by depositing such notice in the United States mail" "unless a different method of giving such notice is otherwise expressly permitted or prescribed." W. VA. CODE § 29A-7-2.

That explains why, before now, this Court and taxpayers alike have treated the Tax Commissioner's formal denial letters as the trigger for an appeal to OTA. In one case, this Court confirmed that a taxpayer "had sixty days from the receipt of the Tax Commissioner's letter" to petition OTA. *Helton*, 219 W. Va. at 559, 638 S.E.2d at 162. In another, it found a taxpayer was late because he didn't send his petition to OTA's correct address within sixty days of receiving formal "Audit Notices of Assessment." *Panhandle*, 2016 WL 1417785, *1. In yet another, the taxpayer admitted his petition was late because it "was beyond" sixty days from when the "audit notice of assessment" he was challenging issued. *Cate v. Steager*, No. 16-0599, 2017 WL 2608434, *1 (June 16, 2017) (mem. decision). In still one more, a taxpayer's petition was timely because it was filed "[w]ithin sixty days" of the Tax Division's formal denial letter. *Doran & Associates, Inc. v. Paige*, 195 W. Va. 115, 117, 464 S.E.2d 757, 759 (1995).

Even where timing isn't an issue, the Tax Commissioner's formal letters are still treated as the trigger for an OTA petition. *E.g.*, *Houyoux v. Paige*, 206 W. Va. 357, 358 & n.6, 524 S.E.2d 712, 713 & n.6 (1999) (noting that taxpayer appealed the refund denial the Tax Division issued "by letter"); *CNX Gas Co. v. Irby*, No. 23-ICA-36, 24 WL 1261813, *2 (App. Ct. 2024) (mem. decision) (noting that taxpayer "appealed" once it received "refund decrease letters"). That makes sense, too. Unlike Ms. Acree's email or a refund check—these letters communicate the substantive rationale of the Tax Commissioner's decisions, they advise taxpayers of their sixty-day window to appeal, and they're delivered by official means (*i.e.*, by certified mail). D.R.330. Emails aren't the sort of formal statement that courts (or other taxpayers) have looked to for the deadline to petition OTA. This Court shouldn't start that practice.

The second refund denial letter tracked every requirement of adequate notice of a refund denial. It stated the Tax Commissioner's substantive position on Equinor's claim and advised the

taxpayer of its appellate rights. The window to appeal to OTA ran from the date Equinor received that letter (and not from the date of Ms. Acree's later email). Equinor filed its 2015 petition to OTA over thirteen months after receiving that denial letter. So, its filing was eleven months late.

II. The Statute Governing The Deadline And Content Of OTA Petitions Aren't In Conflict; Nor Did The ICA's Decision Draw Them Into Conflict.

Calculating Equinor's deadline to file at OTA from the date of the second refund denial letter also doesn't create a conflict with the statutes or rules governing the content of OTA petitions. In Assignment of Error 9 and the related arguments, Equinor says that it does, Petr's Br. 14, because a petition filed at OTA must be "verified under oath by the taxpayer . . . and set forth with particularity the items of the [Tax Commissioner's] determination objected to." W. VA. CODE § 11-10-14(d)(2). It points to similar requirements in OTA's statutes, Petr's Br. 14, requiring the petition to "succinctly state[]" the "nature of the case," the "facts on which the appeal is based," and "[e]ach question presented" to OTA, W. VA. CODE § 11-10A-9(a). And it notes that, at the time, OTA's procedural rules required taxpayers to fill out a form identifying the "amount in controversy," W. VA. CODE R. § 121-1-21.3.3.g (2003) *amended* (2023), and verifying that "a willfully false representation" in the petition "is a misdemeanor." *Id.* § 121-1-21.3.3.n.

Equinor extrapolates a conflict with the statutory sixty-day deadline from all this because it thinks that it couldn't "have verified under oath that its petition contained the correct amount in controversy" until it received the $23,000 refund check. Petr's Br. 16. It also believes it'd be "unconscionable" to require Equinor to file the petition before that final check "particularly given the potential for perjury," and that the correct way to resolve this conflict is to treat the final refund check and Ms. Acree's email as the "correct notice" that triggers its petition deadline. *Id.* 17.

But Equinor's alleged conflict doesn't exist. And it doesn't undermine the ICA's application of the sixty-day jurisdictional filing deadline or its directive that OTA should dismiss Equinor's untimely petition.

This Court has already found that the sixty-day petition deadline statute is "unambiguous[]," *Panhandle*, 2016 WL 1417785, *3, and "a related statute cannot be utilized to create doubt in an otherwise clear statute." *Manchin v. Dunfee*, 174 W. Va. 532, 536, 327 S.E.2d 710, 714 (1984). Instead, this Court normally frames it as a "duty" "not to construe but to apply" such statutes' plain language. *Young v. State*, 241 W. Va. 489, 491, 826 S.E.2d 346, 348 (2019). It also doesn't find a conflict between "two statutes" unless they "address the same issue" or "relate to the same general subject" and it's not "reasonably possible to give effect to both statutes." *Id.* at 491-92, 826 S.E.2d at 348-49 (cleaned up). That's why this Court found an "apparent[] conflict" between "two distinct statutes that each require a county assessor to obtain the approval of a [different] body"—*i.e.*, the Valuation Commission or the County Commission—before hiring employees, *Harrison Cnty. Comm'n v. Harrison Cnty. Assessor*, 222 W. Va. 25, 30, 658 S.E.2d 555, 560 (2008), but not where one "statute relates to voting by paper ballots" and the other "deals with electronic voting." *Manchin*, 174 W. Va. at 536, 327 S.E.2d at 714. The second set of statutes weren't in conflict because they related to "two different types of voting procedures." *Id.*

Similarly, Equinor hasn't explained how one set of statutes related to the time to file an OTA petition and another set related to the content of OTA petitions "address the same issue" or "same general subject." *Young*, 241 W. Va. at 491-92, 826 S.E.2d at 348-49. Of course, both sets generally relate to OTA petitions, but they deal with different requirements for those petitions. And Equinor hasn't shown any irreconcilable conflict between these statutes, either. Equinor has offered no reason why it couldn't have filed its petition within sixty days of the refund denial letter,

stated the "amount in controversy" in its petition based on the current numbers in that letter, but also alerted OTA to the possibility that another $23,000 refund may be issued that could reduce that amount. Certainly, that would've "set forth" the facts and issue "with particularity." W. VA. CODE § 11-10-14(d)(2). An answer like that also couldn't be construed as "a willfully false representation" or perjury. W. VA. CODE R. § 121-1-21.3.3.n. And it would've met the mandatory jurisdictional deadline for filing.

The testimony below confirms that the parade of horribles Equinor conjures —including "potential for perjury," "clog[ging]" OTA's "docket," "undermin[ing] the coordination and communication" between taxpayers and the Division—are all illusory. As Ms. Acree testified, "this process has worked fine until this case with Ryan." D.R.236. In fact, as Mr. Gaytan admitted, there were "ongoing discrepancies" with the numbers in prior cases he'd been involved in. D.R.245. In subsequent cases, he also filed petitions on each refund denial letter (even where there were multiple letters for a single tax year), D.R.246, 249, as a "belt and suspenders approach." D.R.256. Discrepancy even existed in this case while at OTA: at times, OTA thought "$1.5 million" was at issue, and Mr. Gaytan seemed to agree. *E.g.*, D.R.257. At other times, the Tax Division said "$600,000 or $700,000" was contested, D.R.219; *see also* D.R.328 ("[I]t appears to [the Tax Commissioner] that $675,996.87 remains at issue."). And it wasn't until OTA's final order that everyone agreed on the $708,438.95 number. D.R41 n.1. But no one claimed that any of the discrepancies in these OTA petitions were willfully false or subject to perjury prosecutions. Rather, as Ms. Acree testified, "[m]ost companies . . . will file a petition with OTA [and] then we continue to negotiate or try to work things out prior to" appearing there. D.R.218-19. Actually, OTA's procedural rules expressly anticipate that possibility: a pending OTA proceeding "may not be viewed as precluding the parties from attempting to resolve the matters in controversy prior to

the hearing." W. VA. CODE R. § 121-1-18 (2003). The statutes and rules related to the content of OTA petitions wouldn't have prevented Equinor from doing the same thing here. They aren't in conflict with the sixty-day statutory filing deadline.

What's more, even if they were, Equinor offers no reason why the deadline statute would recede. The crux of Equinor's invented conflict lies with OTA's procedural rules, which require the taxpayer to identify the "amount in controversy," in its petition. W. VA. CODE R. § 121-1-21.3.3.g. But "[t]here is no question that" a statute would trump a conflicting rule, *Respass v. Workers Comp. Div.*, 212 W. Va. 86, 102, 569 S.E.2d 162, 178 (2002)—particularly a procedural rule. And even if the conflict lay principally between two statutes, the rules of construction would favor the jurisdictional filing deadline. It appears in the latest enactment, *see* W. VA. CODE § 11-10-14(d)(1) (2019), and so should control as "the most recent expression of" the Legislature's will. *W. Va. Health Care Cost Rev. Auth. v. Boone Mem. Hosp.*, 196 W. Va. 326, 336, 472 S.E.2d 411, 421 (1996). If the issue is timeliness, Section 11-10-14(d)(1) is also more specific since it directly addresses when OTA petitions need to be filed. It would certainly win out over a conflicting statute related to the contents of that petition. *Young*, 241 W. Va. at 492, 826 S.E.2d at 349.

Either way, the sixty-day deadline stands, and Equinor filed its petition eleven months after it had run. No imaginary conflict with other statutes or OTA's procedural rules justifies ignoring that deadline. Equinor's Assignment of Error 9 and its related arguments should be rejected.

III. Equitable Estoppel Doesn't Apply And Can't Extend OTA's Jurisdiction.

Equinor's first eight assignments of error all say the ICA was wrong not to rule in its favor on equitable estoppel grounds. Petr's Br. 4. But each of these alleged errors are wrong, and Equinor's related arguments are wrong, too. Petr's Br. 18-32. The ICA was right to find equitable estoppel inapplicable. It should be affirmed.

A. Estoppel can't change the sixty-day deadline because it's statutory and jurisdictional.

On estoppel, the ICA found that the Legislature "impose[d] strict jurisdictional deadlines" on the filing of OTA petitions, *Statoil*, 249 W. Va. --, 895 S.E.2d at 835, and that OTA and the circuit court were wrong to find that equitable estoppel could extend Equinor's late filing in this case, *id.* at 836. The ICA noted that this Court previously held that this filing deadline was "not readily susceptible to equitable modification or tempering," *id.* at 835 (quoting *Helton*, 219 W. Va. at 561, 638 S.E.2d at 164), that *Hudkins*' use of estoppel was "extremely limited" and inapplicable here, *id.*, that "Equinor is or should have been acutely aware of the importance of jurisdictional time limits in tax matters," *id.*, and that "Equinor cannot avail itself of equitable estoppel to expand OTA's jurisdiction," *id.* at 836. All this is correct.

At the outset, any use of equitable estoppel here is suspect because it would require OTA and the courts to disregard the plain text of multiple statutes. Again, the Code sets a sixty-day deadline for petitions in two places. W. VA. CODE §§ 11-10-14(d)(1), 11-10A-9(b). And in both, the language is mandatory, not discretionary. Together, Section 11-10A-9(a) and (b) say that "[a] proceeding before" OTA "shall be initiated by a person timely filing a written petition" and "is timely filed if postmarked or hand delivered . . . within sixty days of the date a person received written notice of . . . [a] denial of a refund." Similarly, Section 11-10-14(d)(1) says "no petition" to OTA "may be filed more than 60 days after the taxpayer is served with notice of denial." The use of "shall" in the Section 11-10A-9(a) and (b) "should be afforded a mandatory connotation," *State ex rel. Justice v. King*, 244 W. Va. 225, 233, 852 S.E.2d 292, 300 (2020), as should the prohibition in Section 11-10-14(d)(1) that "no petition . . . may be filed" outside the sixty-day deadline. *Cf. Denny's, Inc. v. Cake*, 364 F.3d 521, 528-59 (4th Cir. 2004) (reading the words "may not" in Federal Anti-Injunction Act as "absolute prohibition" against certain types of injunctions).

This Court has already held that these statutes "unambiguously provide[] that petitions" to OTA "must be filed within sixty days." *Panhandle*, 2016 WL 1417785, *3. Typically, where the "language of a statute is free from ambiguity, its plain meaning is to be accepted and applied." Syl. pt. 3, *Goldstein v. Peacemaker Props., LLC*, 241 W. Va. 720, 721, 828 S.E.2d 276, 277 (2019). This Court also eschews attempts to "modify, revise, amend, or rewrite" plainly worded statutes "under the guise of 'interpretation.'" Syl. pt. 5, *Consol Energy*, 242 W. Va. at 212, 832 S.E.2d at 138 (cleaned up). Concerns about policy, fairness, and equity play no role here. *State v. Beaver*, 248 W. Va. 177, 191, 887 S.E.2d 610, 624 (2022) ("[T]his Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes."). As OTA put it, equity concerns don't "change [the] law that set [the filing] deadline" Equinor missed. D.R.122. "[P]rinciples of equity" shouldn't factor into "a case easily decided by the application of statutory law." *Helton*, 219 W. Va. at 563, 638 S.E.2d at 166 (Benjamin, J., concurring).

The mandatory weight of these statutes is particularly heavy here because they govern the jurisdictional powers of OTA. The sixty-day statutes "impose strict jurisdictional deadlines" on taxpayers. *Statoil*, 249 W. Va. --, 895 S.E.2d at 835. Even Equinor seems to agree that the filing date it missed is jurisdictional. Petr's Br. 25 ("Equinor agrees with the ICA that the [L]egislature 'intended to impose strict jurisdictional deadlines in connection with tax refunds.'"). That's because OTA is "not a judicial tribunal" but "a creature of statute," which means it "has no greater authority than conferred" by the Legislature. *Expedited Transp. Sys., Inc. v. Vieweg*, 207 W. Va. 90, 100, 529 S.E.2d 110, 120 (2000) (cleaned up). OTA's "power" to hear refund cases "is dependent upon" its governing "statutes," *State ex rel. Farm Mut. Auto. Ins. Co. v. Marks*, 230 W. Va. 517, 529, 741 S.E.2d 75, 87 (2012), including the requirement that petitions be "timely fil[ed]" within "sixty days" of the "denial of a refund," W. VA. CODE § 11-10A-9(a), (b), and that "no

petition . . . be filed" beyond that deadline, *id.* § 11-10-14(d)(1). Like other agencies, OTA "must find within the statute warrant for the exercise of any authority which [it] claim[s]," and any action it takes "beyond" that "statutory authority" is "invalid" and "may be nullified by" the courts. *Id.* So, OTA can't hear Equinor's 2015 case because its governing statutes won't allow it. Equinor filed its petition late and that late filing "precludes [its] claim for refund or credit." Syl. pt. 1, *Bradley*, 195 W. Va. at 181, 465 S.E.2d at 181.

Yet, Equinor thinks the Tax Commissioner's actions require OTA to exercise jurisdiction anyway. Specifically, it says "Equinor was induced by" the Tax Commissioner's employees "to refrain from [timely] filing an appeal" to OTA, and so thinks that equitably barring the Tax Commissioner from challenging OTA's jurisdiction "is the correct remedy." Petr's Br. 18. But that reasoning defies basic rules of jurisdiction. "[I]t is fundamental" that "jurisdiction of the subject-matter can only be acquired by virtue of the Constitution or some statute." *State ex rel. Dale v. Stucky*, 232 W. Va. 299, 303-04, 752 S.E.2d 330, 334-35 (2013). It "cannot be conferred by" an opposing party. *State v. Tommy Y., Jr.*, 219 W. Va. 530, 536, 637 S.E.2d 628, 634 (2006). That's why party "agreement, consent, or waiver" doesn't matter when it comes to finding jurisdiction. *Id.* "[E]stoppel" is viewed the same way: it can't "confer[]" "[s]ubject matter jurisdiction," either. *In re Z.H.*, 245 W. Va. 456, 463, 859 S.E.2d 399, 406 (2021). Rather, OTA's jurisdiction "must exist as a matter of law" or not at all. *Stucky*, 232 W. Va. at 303, 752 S.E.2d at 334. It doesn't here; and no actions by the Tax Commissioner[4] can confer jurisdiction on OTA that the statutes preclude.

[4] That's why Equinor's critique of the ICA's designation of Ms. Acree as an "employee" goes nowhere. Petr's Br. 4, 29-30. It doesn't matter whether the actions are those of a high-ranking state official or a low-ranking employee. Even the Tax Commissioner can't grant OTA jurisdiction it doesn't have or change the law that sets OTA's filing deadline. *Cf. Antero Res. Corp. v. Irby*, No. 22-48 et al., 2023 WL 3964054, *3 (June 13, 2023) (mem. decision) (finding "guidance" signed by a former Tax Commissioner "inadequately persuasive to overcome" this Court's interpretation of a property tax deduction in a legislative rule). Plus, the ICA never said Ms. Acree was "a random, low-level tax employee." Petr's Br. 29. It said she was an "employee," *Statoil*, 249 W. Va. --, 895 S.E.2d at 830, 835—which is true and not an error in any sense.

Applying estoppel here would defy those statutory limitations, "expand OTA's jurisdiction" beyond the powers the Legislature had conferred, *Statoil*, 249 W. Va. --, 895 S.E.2d at 836, and let it hear a refund case that wasn't timely filed. The ICA was right to put a stop to that.

B. This isn't one of the rare hypothetical cases this Court has suggested could justify extending OTA's filing deadlines.

But even if OTA's statutory, jurisdictional limits could be set aside, Equinor's attempt to estop the Tax Commissioner runs into another hurdle: "estoppel" generally "may not be invoked against a governmental unit when functioning in its governmental capacity." *Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 59, 174 S.E.2d 318, 325 (1970). This Court has affirmed that "general rule" in several cases. In *Cunningham v. Cnty. Ct. of Wood Cnty.*, for example, it applied the rule so that a county wasn't "estopped by the legally unauthorized acts of its officers" from "assert[ing] the defense of governmental immunity." 148 W. Va. 303, 309-10, 134 S.E.2d 725, 729-30 (1964). This Court applied the same rule in *Freeman v. Polling* to determine that county employees weren't entitled to civil service protections even though they "reasonably and detrimentally relied" on their employer's promise that they would be. 175 W. Va. 814, 818, 338 S.E.2d 415, 420 (1985). True, this rule may soften "when [the State is] acting in a proprietary capacity." *Samsell*, 154 W. Va. at 59-60, 174 S.E.2d at 326. But in its governmental capacity, "[i]t is clear" that the State "is not subject to the law of equitable estoppel." *Martin v. Pugh*, 175 W. Va. 495, 503, 334 S.E.2d 633, 641 (1985). "[M]isguided government officials" cannot be allowed to "thwart[]" the Legislature's "will." *Freeman*, 175 W. Va. at 819, 338 S.E.2d at 420.

That rule applies with particular force in tax cases. "[T]axes are the lifeblood of government," *Bull v. United States*, 295 U.S. 247, 259 (1935), and their "collection is a governmental, as opposed to [a] proprietary, function." *W. Md. R.R. v. Goodwin*, 167 W. Va. 804, 820, 282 S.E.2d 240, 250 (1981). That's why it's not "surprising[]" at all that Equinor can't find

any cases where this Court has ignored OTA's jurisdictional deadline on estoppel grounds. *See* Petr's Br. 19. It concedes that this Court has addressed the application of "equitable estoppel" in "numerous" tax deadline cases, Petr's Br. 25, and it tries to distinguish each of these, Petr's Br. 25-29. But the fact remains: every time this Court has been asked to extend a missed statutory tax deadline on equitable estoppel grounds, it has refused.

Take *Bradley* for example. There a federal retiree tried to exclude his retirement income from taxation but was told, in writing, by the Tax Commissioner that the current state statute didn't allow that. 195 W. Va. at 182, 465 S.E.2d at 182. Several years later, the Supreme Court of the United States invalidated a similar Michigan statute. *Id.* But when Mr. Bradley later sought a refund based on the high Court's ruling, he was denied as his claim was beyond the same sixty-day filing deadline Equinor missed. *Id.* at 182-83, 465 S.E.2d at 182-83.

On appeal, this Court upheld that decision, *id.*, and it rejected the taxpayer's reliance on equitable estoppel principles, *id.* at 184, 465 S.E.2d at 184. Even the traditional elements for estopping a private party weren't met. *Id.* at 185, 465 S.E.2d at 185. In this Court's view, there was no "misrepresentation" or other "affirmative conduct" by the Tax Commissioner that induced the taxpayer not to challenge the refund denial. *Id.* So, "the doctrine of equitable estoppel [was] simply inapplicable." *Id.* The Court confirmed that "the doctrine of estoppel should" always "be applied cautiously" (even against private parties) and that it'd be particularly reluctant when a party seeks "to assert the doctrine of estoppel against the state." *Id.* (cleaned up). It repeated the rule that "Government may not be estopped on the same terms as any other litigant." *Id.* (quoting *Heckler v. Cmty. Health Servs of Crawford Cnty.*, 467 U.S. 41, 60 (1984)).

The result was repeated a decade later in *Helton*. Again, a taxpayer missed the same sixty-day deadline as Equinor—this time because it sent its petition to the Tax Commissioner instead of

OTA. 219 W. Va. at 559, 638 S.E.2d at 162. On appeal, the taxpayer said it was unfair for the Tax Commissioner to object to OTA's jurisdiction when he "did not object to the manner" of the filing on receipt "and never indicated that it would not be forwarded to" OTA even though he had done so with "other petitions." *Id.* at 561, 638 S.E.2d at 164. Still, this Court rejected the taxpayer's argument that "the Tax Commissioner must be estopped from claiming [its] petition was untimely." 219 W. Va. at 561, 638 S.E.2d at 164. And it found that the sixty-day deadline for filing at OTA was "not readily susceptible to equitable modification or tempering." *Id.*

Taxpayers missed the same sixty-day deadline again in *Panhandle* and *Cate*. And this Court never wavered from *Bradley*'s and *Helton*'s holdings. In both, it refused to extend OTA filing deadline on equitable grounds and affirmed the dismissal of the taxpayer's late petitions. *Cate v. Steager*, No. 16-0599, 2017 WL 2608434, *3 (June 16, 2017) (mem. decision) ("We have long held that filing requirements established by statute . . . are not readily susceptible to equitable modification or tempering." (cleaned up)). In *Panhandle*, that decision came even in the face of some compelling equitable grounds. The taxpayer only filed late because it mailed the petition to the wrong address based on advice from an "unlicensed tax preparer." 2016 WL 1417785, *1. But it also "called" OTA about it "and was told" the petition "would likely be forwarded to the proper office," *id.*, but that didn't happen until "after the sixty day deadline passed," *id.*, at *3. And it argued OTA's appeal "forms are misleading" because they contained "multiple addresses." *Id.* at *2. Still, this Court found that statutory deadline controlled and was not "readily susceptible to equitable modification or tempering." *Id.* *3. And it held that dismissal was appropriate. *Id.*

Even outside of the sixty-day petition deadline, this Court had been reluctant to "bend the rules" on tax filings "even for strong equitable reasons." *Helton*, 219 W. Va. at 561 n.6, 638 S.E.2d at 164 n.6. It refused to extend "mandatory" requirements for timely filing a certified

administrative record in property tax appeals, *Rawl Sales & Processing Co. v. Cnty. Comm'n of Mingo Cnty*., 191 W. Va. 127, 131, 443 S.E.2d 595, 599 (1994), even in the face of criticism that the procedures at play were "troublesome" and "probably the least competent . . . in the entire Code," *id.* at 132, 443 S.E.2d at 600 (Neeley, J., dissenting). It enforced the same filing deadline again in *Tax Assessment Against Purple Turtle, LLC v. Gooden* explaining (based on *Helton*) that jurisdictional tax deadlines like this one weren't "readily susceptible to equitable modification or tempering." 223 W. Va. 755, 761, 679 S.E.2d 587, 593 (2009). And even aside from filing deadlines, this Court has confirmed that the "general rule" against invoking estoppel "against a governmental unit" applies to the Tax Commissioner when he's "functioning in [his] governmental capacity." *W. Md*., 167 W. Va. at 820, 282 S.E.2d at 250.

Federal courts apply a similar rule. They typically refuse to "equitably estop[]" the government "from asserting its legal rights because of the actions of an agent." *Miller v. United States*, 949 F.2d 708, 712 (4th Cir. 1991). And they've found "equitable estoppel cannot be applied against the IRS because of misstatements of law made by its agents" or even "misrepresentations." *Id.* (cleaned up). "[T]he doctrine of estoppel has no place" in such cases because "the assessment and collection of revenues is a governmental function." *Id.* at 713 (cleaned up). Even outside the tax context, "equitable estoppel is rarely invoked against the government," never "absent a showing of affirmative misconduct," *United States v. Agubata*, 60 F.3d 1081, 1083 (4th Cir. 1995), and "cannot be premised on oral representations." *United States v. Vanhorn*, 20 F.3d 104, 112 n.19 (4th Cir. 1994).

True, the Supreme Court of the United States has declined to create a "flat" bar to estoppel claims, *Heckler*, 467 U.S. at 60, and has "left open" the possibility that "some type of 'affirmative misconduct' might give rise to estoppel against the Government," *Office of Pers. Mgmt. v.*

Richmond, 496 U.S. 414, 421 (1990). But the nation's highest court has "never upheld an assertion of estoppel against the Government by a claimant seeking public funds," *id.* at 434, and it has "reversed every finding of estoppel that [it's] reviewed." *Id.* at 422. As the Fourth Circuit put it, "[i]f equitable estoppel ever applies to prevent the government from enforcing its duly enacted laws, it would only [be] in extremely rare circumstances." *Volvo Trucks of N. Am., Inc., v. United States*, 367 F.3d 204, 211-12 (4th Cir. 2004).

That's why the ICA was right to find the same "affirmative conduct" test "in line" with this Court's consistent refusal to extend OTA's filing deadline. *Statoil*, 249 W. Va. --, 895 S.E.2d at 835. It's also no real critique that the standard the ICA used for equitable estoppel is extremely difficult to satisfy. Petr's Br. 24-25. It should be. Of course, this Court hasn't "entirely barred the consideration of equitable principles in the enforcement of tax refund filing deadlines." *Helton*, 219 W. Va. at 561 n.6, 638 S.E.2d at 164 n.6. Like the federal court, this Court has left open the possibility of finding estoppel in some "extremely rarely" hypothetical case. *Volvo Trucks*, 367 F.3d at 211-12. But this Court has suggested only one scenario that may fit that bill: where "an unsophisticated taxpayer" is given "erroneous information by a tax official." *Helton*, 219 W. Va. at 561 n.6, 638 S.E.2d at 164 n.6.[5] And it's rejected attempts by "sophisticated" taxpayers to rely on that hypothetical possibility. *Panhandle*, 2016 WL 1417785, *3. Taxpayers, like Equinor, that have "operations across the United States," Petr's Br. 5, and use professional "third-party . . . tax preparation services," like Ryan, show "a degree of sophistication" that "precludes" their reliance

[5] Although not based on equitable estoppel, this Court has let tax cases go forward on procedural due process grounds where the tax official's formal notice didn't "sufficiently alert[]" the taxpayer to "his or her appeal rights," *Lee Trace*, 232 W. Va. at 191, 751 S.E.2d at 711, or "misstat[ed] the correct procedure to challenge" the agency's decision, *Penn Va.*, 242 W. Va. at 122, 829 S.E.2d at 753. But the deadline in *Penn Va.* wasn't "absolute" like the one here. *Id.* at 123, 829 S.E.2d at 754. In fact, the rule "envision[ed] situations in which denials would be reconsidered" by the agency. *Id.* And Equinor never mentions these cases or due process in its opening brief. Plus, there is no question that the second refund denial letter correctly advised Equinor of its appeal rights and the sixty-day deadline to file at OTA. D.R.335.

on the rare hypothetical case for equitable estoppel left open in *Helton. Panhandle*, 2016 WL 1417785, *3. As the ICA put it: a "sophisticated party" like Equinor "is or should have been acutely aware of the importance of jurisdictional time limits in tax matters." *Statoil*, 249 W. Va. --, 895 S.E.2d at 835. It can't cry foul when it's late.

C. *Hudkins* is distinguishable and doesn't provide the right test for this case.

Despite all this, Equinor still thinks a test that weighs public policy factors is correct, Petr's Br. 22, and it criticizes the ICA for not relying on *Hudkins*. Yes, *Hudkins* is one of the extremely rare cases where this Court found estoppel against the government. But it doesn't apply here.

Ms. Hudkins retired early from state employment "based on assurances" given by the Consolidated Retirement Board that she "could freeze her sick leave" and use it "as additional service credit when she filed for retirement." *Id.* at 276, 647 S.E.2d at 712. Two years later, the Board flip-flopped and told her that she couldn't use her sick leave in this way, *id.* at 277, 647 S.E.2d at 713, resulting in a decrease in her monthly retirement income, *id.* at 281, 647 S.E.2d at 717. On appeal, this Court found that there were "exceptions" to the "general rule prohibiting" the use of estoppel against the State. *Id.* at 280, 647 S.E.2d at 716. Some courts, according to *Hudkins*, required proof of "affirmative misconduct or wrongful conduct" before estopping the government, while others balanced several public interest related factors. *Id.* Ultimately, this Court found "that the elements of equitable estoppel" were "met," *id.*, because Ms. Hudkins' injury "outweigh[ed] the public interest" and applying estoppel would not "defeat" "public policy" or "impair or interfere with" "the exercise of government functions," *id.* at 282, 647 S.E.2d at 718.

But *Hudkins* doesn't open the door to estopping the Tax Commissioner here. All signs indicate that the opinion should only apply in proprietary capacity (and not government capacity) cases because there "[t]he rule" against estopping the State in proprietary cases "is different" and provides "ample text and case authority" for the doctrine's application. *Samsell*, 154 W. Va. at 65-

66, 174 S.E.2d at 329 (Haymond, J., dissenting). Admittedly, *Hudkins* does not address the government versus proprietary capacity analysis directly, but it still fits neatly in the proprietary side of this Court's precedent. For one thing, *Hudkins* only estopped the Retirement Board after confirming that doing so would "not impair or interfere with" "the exercise of government functions." *Hudkins*, 220 W. Va. at 282, 647 S.E.2d at 718. *Hudkins* also looked to *Samsell* for "exceptions" to the "general rule prohibiting" estoppel, *Hudkins*, 220 W. Va. at 280, 647 S.E.2d at 716, and the only exception *Samsell* recognized was the proprietary capacity exception. *Samsell*, 154 W. Va. at 59-60, 174 S.E.2d at 326.

But even setting that aside, the ICA still rightly declined to extend *Hudkins*. To start, *Hudkins* is a per curiam opinion, and so didn't establish a "new point[] of law" on equitable estoppel. Syl. pt. 2, *Walker v. Doe*, 210 W. Va. at 490, 491, 558 S.E.2d 290, 291 (2001), *overruled in part*, syl. pt. 6, *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303 (2014). Plus, *Hudkins* "expressly limit[ed] [its own application] to the specific facts of [the] case." 220 W. Va. at 282, 647 S.E.2d at 718. That limitation has played out in practice, too. This Court has only cited to *Hudkins* in two employee benefit cases, and both involved the Retirement Board. *E.g.*, *Ringel-Williams v. W. Va. Consol. Pub. Ret. Bd.*, 237 W. Va. 702, 708, 790 S.E.2d 806, 812 (2016); *W. Va. Consol. Pub. Ret. Bd. v. Jones*, 233 W. Va. 681, 683, 760 S.E.2d 495, 497 (2014). In both, this Court found it "neither legally sound nor prudent to expand" *Hudkins* beyond its limited scope, *Ringel-Williams*, 237 W. Va. at 708, 790 S.E.2d at 812 (quoting *Jones*, 233 W. Va. at 687, 760 S.E.2d at 501). And it found estoppel inapplicable in both. *Id.* Equinor offers no reason to change course now. This case doesn't involve the Retirement Board, it isn't a claim for employee benefits, and Equinor isn't an unsophisticated person—like Ms. Hudkins—who had no choice but to act "upon the assurances given her" by the State. *Hudkins*, 220 W. Va. at 277, 647 S.E.2d at 713. Add

to all that, applying estoppel here would assuredly "impair or interfere with" the "government [tax collection] functions" and "public interests" the sixty-day deadline was designed to serve. *Hudkins*, 220 W. Va. at 282, 647 S.E.2d at 718; *cf. Webb v. United States*, 66 F.3d 691, 698 (4th Cir. 1995) ("The very purpose of statutes of limitations in the tax context is to bar the assertion of a refund claim after a certain period of time has passed.").

D. Equinor hasn't even met the test for estoppel in private party cases.

What's more, Equinor hasn't even met the traditional elements for applying equitable estoppel to private parties. To bring a basic claim for equitable estoppel, "there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts." Syl. pt. 3, *Folio v. City of Clarksburg*, 221 W. Va. 397, 398, 655 S.E.2d 143, 144 (2007). "[T]he party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been" intended to "be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice." *Id.* Additionally, the party who relies on the false representation must have done so "reasonably" and "through no fault of [its] own." *Hatfield v. Health Mgmt. Assocs. of W. Va.*, 223 W. Va. 259, 266, 672 S.E.2d 395, 402 (2008) (cleaned up).

Yes, OTA found that the traditional elements were met, but it thought "it is a close call" on each. D.R.117. And it only did so because it "presum[ed]" there was "a false representation of material fact," D.R.117, and viewed the evidence "in a light favorable to" Equinor. D.R.117, 121 (OTA: "viewing the facts in a light most favorable to [Equinor] . . . we are assuming that [Mr. Gaytan] was told, on February 28, 2019[,] that a third letter would be forthcoming."). But the Tax Commissioner has always disputed this alleged promise, D.R.112; D.R.209 (Papadopoulos: "Was there discussion" on the February 28th phone call "that the letter would be reissued?" Acree: "I don't recall that in the conversation."). So, presuming it as a fact wasn't correct. "[T]he taxpayer .

. . has the burden of proof" at OTA. W. VA. CODE § 11-10A-10(e). Also, "one who asserts estoppel has the burden of proving it." *Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 317, 504 S.E.2d 135, 144 (1998) (cleaned up). And when there's "a pretrial evidentiary hearing on" jurisdiction, "the party asserting jurisdiction" typically "must prove jurisdiction by a preponderance of the evidence." *State ex rel. Bell Atlantic-W. Va., Inc. v. Ranson*, 201 W. Va. 402, 415, 497 S.E.2d 755, 768 (1997) (regarding personal jurisdiction). "[T]he party asserting" subject matter jurisdiction similarly "bears the burden of proving the truth of" any necessary facts "by a preponderance of the evidence." *U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347 (2009) (cleaned up).

Aside from that, the ICA was right to find Equinor's reliance on the phone call with Ms. Acree a mistake. As the court pointed out, the "60-day appeal deadline was expressly set forth in the Tax Commissioner's notices of refund denials," *Statoil*, 249 W. Va. --, 895 S.E.2d at 834, and "Equinor was not instructed to refrain from filing a timely . . . petition," *id.* at 835. Mr. Gaytan conceded as much at the OTA hearing. D.R.255 (agreeing that no one from the Tax Division "advise[d] [him] not to file a petition on the refund denial letters" in this case).

Equinor's reliance didn't even line up with the parties' past practice (despite what Equinor thinks, Petr's Br. 31). For one, Mr. Gaytan regularly questions the Tax Commissioner's decision on refund calculations, *e.g.*, D.R.255 (Gaytan: admitted he'd filed "close" to "20" OTA petition by October 2020), and for many of these disagreements, there are multiple emails confirming his discussions with the Tax Division. *Cf.* D.R.253 (Gaytan: stating that he's "[a]lways communicating" with the Tax Division). Even on the first refund denial letter in this case, he sent two emails weeks apart attempting to reconcile the numbers. D.R.301-02. Two days later, Ms. Acree confirmed, by email, the Tax Division's decision to "pull the refund back" for "further

review," D.R.301, and the Tax Commissioner issued the second denial letter fourteen days after that, which was well within Equinor's time to appeal the first letter, D.R.304.

But none of that written (or timely) communication exists regarding the alleged third letter. As Mr. Gaytan confirmed at OTA, he never "receive[d] anything in writing from anyone about the forthcoming third [refund denial] letter" he alleged Ms. Acree promised. D.R. 259. So, it's no wonder the ICA found it a "mistake[]" for Equinor to delay its OTA filing on a disputed phone call. *Statoil*, 249 W. Va. --, 895 S.E.2d at 835. Even if Mr. Gaytan was promised a third refund letter, when the end of the appeal window drew close, he should have followed up with the Tax Division about the expected letter. He also should have confirmed his understanding in writing. And if he couldn't get a satisfactory answer before the appeal deadline passed, Equinor should have filed its petition to "preserve its right to appeal the second notice." *Statoil*, 249 W. Va. --, 895 S.E.2d at 835. Instead, Equinor delayed filing a petition on a nearly million-dollar refund claim while waiting for an extra $23,000. The ICA was right to find Equinor "mistaken[]" here. *Id.* It was unreasonable, too. And this unreasonable mistake precludes the application of even the traditional elements of equitable estoppel. *Hatfield*, 223 W. Va. at 266, 672 S.E.2d at 402.

The ICA was right to find that "equitable estoppel" couldn't "expand OTA's jurisdiction" in this case and to dismiss Equinor's 2015 petition as untimely. This Court should reject Equinor's first eight overlapping assignments of error and affirm the ICA's ruling on equitable estoppel.

CONCLUSION

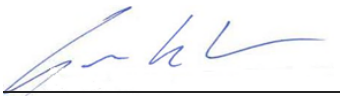
For the foregoing reasons, this Court should affirm the November 15, 2023, opinion of the Intermediate Court of Appeals in Appeal No. 22-ICA-225.

Respectfully submitted,

MATTHEW R. IRBY, STATE TAX COMMISSIONER OF WEST VIRGINIA,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



Sean M. Whelan (WV Bar No. 12067)
Deputy Attorney General
Seth E. Harper (WVSB # 10244)
Assistant Attorney General
1900 Kanawha Boulevard, East
Building 1, Room W-435
Charleston, West Virginia 25305
Telephone: 304-558-2522
Facsimile: 304-558-2525
Email: Sean.M.Whelan@wvago.gov
Seth.E.Harper@wvago.gov

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO. 23-760

STATOIL USA ONSHORE PROPERTIES, INC.

Petitioner Below, Petitioner,

v.

MATTHEW R. IRBY, STATE TAX COMMISSIONER OF WEST VIRGINIA,

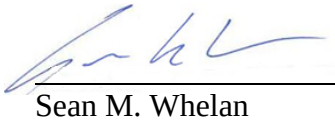
Respondent Below, Respondent,

On Appeal from the Intermediate Court of Appeals of West Virginia, No. 22-ICA-225

CERTIFICATE OF SERVICE

I, Sean M. Whelan, do hereby certify that on this 3rd day of June 2024, the foregoing *Respondent's Brief* of Matthew R. Irby, State Tax Commissioner of West Virginia was electronically filed with the Clerk of the Court using the File & Serve Xpress system, which constitutes service on the following:

Alexander Macia, Esq.
Paul G. Papadopoulos, Esq.
Chelsea E. Thompson, Esq.
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301
Counsel for Respondent



Sean M. Whelan
Deputy Attorney General