IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
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CLEAN & CLEAR ADVANTAGE, LLC,

Petitioner,

V.)

Appeal from a final order of the Circuit Court of Kanawha County (CC-20-2025-C-457)

WEST VIRGINIA DEPARTMENT OF HEALTH OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION,

Respondent.

Petitioner's Brief

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STATEMENT OF THE CASE

Petitioner, Clean and Clear Advantage LLC, ("Petitioner", or sometimes herein and throughout the pleadings below "Plaintiff", "Clean and Clear" and/or "CCA") provides

drug and alcohol rehabilitation services at its facility in Parkersburg, West Virginia. (A.R. 1). [1]

A provider such as Petitioner must first obtain a license to operate, and then obtain an amended license from Respondent, West Virginia Department of Health Office of Health Facility Licensure and Certification ("Respondent" or sometimes herein and throughout the pleadings quoted below, "Defendant" or "Defendants") if it seeks to increase the bed capacity of a behavioral health center. *See* W. Va. C.S.R. § 64-11-4.2.3. (A.R. 4).

In August of 2020, Petitioner was provided a license to operate a facility with 59 substance abuse treatment beds ("SAT beds"). (A.R. 309).

Subsequently, in October 2022, the license was amended to allow Petitioner to operate an additional 55 SAT beds. (*Id.*).

Both before being granted its initial license to operate its facility in 2020 and before applying for a license to increase its SAT bed capacity in 2022, Petitioner was required to submit construction drawings and specifications to Respondent for preliminary approval before proceeding. *See* W. Va. C.S.R. § 64-11-4.5. (A.R. 4).

This specific preliminary approval is necessary and included in the initial licensure and licensure amendment application process, as only after such construction is substantially completed may behavioral health services providers (such as Petitioner) apply for and receive an initial license to operate and/or to receive an amended license to increase SAT bed capacity. *See* W. Va. C.S.R. § 64-11-4.1.5, -4.1.6. (A.R. 4).

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[1] References to the Appendix Record submitted concurrently with Petitioner's instant brief are identified as "A.R. ___."

Prior to establishing operations at its facility in 2020 and to applying for a licensure amendment to increase its bed capacity in 2022, Petitioner complied with the preliminary construction approval process.

Respondent approved both preliminary applications, and as stated above, approved Petitioner's initial license application and first amendment application to increase bed capacity. (A.R. 309).

In 2016, recognizing the considerable need for addiction treatment, the West Virginia Legislature exempted behavioral health centers — such as that operated by Petitioner — from the State's certificate of need process. *See* W. Va. Code § 16-2D-11(21) (eff. June 10, 2016). (A.R. 5).

Accordingly, Petitioner was granted an exemption to the certificate of need process by the Respondent in its initial application and first amendment application to expand the number of SAT beds at its facility. (*Id.*)

In or around February 2022, Petitioner complied with the preliminary construction approval requirement, and received Respondent s approval to engage in a significant construction project to expand the capacity of its facility to approximately three-hundred (300) total SAT beds. (*Id.*)

Petitioner then spent substantial sums of time, money, and resources to build out its facility to accommodate 300 beds, in compliance with applicable law and Respondent's preliminary construction approval. (*Id.*)

However, in the interim, the West Virginia Legislature passed a law to prohibit the issuance of certificates of need and to prospectively cap the number of "substance abuse treatment beds" per county at two-hundred and fifty (250). (A.R. 6).

This legislation originated as House Bill 3337, and the version advanced to the House floor included the following language and grandfather clause: "Behavioral health services require a certificate of need but the authority may not issue a certificate of need to: (5) Add licensed substance abuse treatment beds in any county which already has greater than 250 licensed substance abuse treatment beds: Provided, That this provision does not apply to the addition of licensed substance abuse treatment beds, when the facility, or other building to be converted to a facility, has been purchased for such purpose prior February 1, 2023." (A.R. 7).

This grandfather clause would have exempted Petitioner from the restrictions that Respondent alleged supported its denial of Petitioner's amended licensure application, as further discussed further below. (*Id.*)

However, HB 3337 was amended on the House floor approximately three days before the close of the 2023 legislative session, and the aforementioned grandfather clause was removed from the version that was ultimately enrolled, passed, and made effective as West Virgina Code § 16-2D-9 (sometimes "new law"). (*Id.*)

Almost immediately after the new law went into effect, Petitioner contacted Respondent for clarification of whether the cap would apply to it, based in part on Respondent's express previous approval to proceed with construction. (*Id.*)

As it did not receive a substantive answer from Respondent, on August 11, 2023, Petitioner applied for an amended license to operate additional SAT beds up the capacity of 300. (A.R. 7, 47).

On October 12, 2023, Petitioner received Respondent's denial of that application, via letter dated August 28, 2023. (*Id.*)

In this denial, Respondent cited only to the new law (W. Va. Code § 16-2D-9) restricting the issuance of certificates of need to entities seeking to operate substance abuse treatment beds. (A.R. 8, 47).

Petitioner then obtained as counsel the law firm of Hissam Forman Donovan Ritchie PLLC (sometimes "HFDR" or "previous counsel"), and appealed the denial of its licensure amendment application to Respondent's proper administrative Board of Review. (A.R. 44-46).

On November 9, 2023, an associate attorney of HFDR sent an email to the ALJ assigned to the BOR appeal and indicating that Petitioner had been informed by representatives of the Respondent that its application for expansion ***would not*** be decided on the merits based exclusively on the new law referenced above. (A.R. 54).

Accordingly, on behalf of Respondent's Board of Review, assigned Administrative Law Judge David A. Bishop upheld the denial of Petitioner's "behavioral health services licensure amendment," and in support, indicated as follows: "The Board of Review lacks the authority to grant relief based on, or to consider, the issues raised therein. The Board of Review is bound to apply the pertinent statute, West Virginia Code § 16-2D-9(5), and affirm respondent's denial based upon the same." (A.R. 56).

On January 16, 2024, through its previous counsel, Petitioner instituted an appeal of the Board of Review's decision to the West Virginia Intermediate Court of Appeals (ICA); however, its appeal was dismissed for failure to perfect. (A.R. 32-36, 61).

Petitioner subsequently retained undersigned counsel, Sean W. Cook, Esq. as counsel, who filed on its behalf the instant Complaint for equitable relief "pursuant to West Virginia Code § 53-5-8 governing injunctive relief, and the West Virginia Uniform

Declaratory Judgments Act, West Virginia Code § 55-13-1, *et seq*." (A.R. 1, 13) (sometimes "Complaint for equitable relief").

In support of its Complaint for Declaratory and Injunctive Relief (sometimes, "Complaint"), Petitioner cited (in part) the following five (5) arguments:

- The bed restrictions passed by the West Virginia Legislature in 2023 and codified as W. Va. Code § 16D-2D-9 do not apply to Petitioner, because by its clear language, the statute only applies to certificates of need rather than the amended licensure sought by Petitioner that is subject to the instant Complaint (*see*, Complaint, ¶ ¶ 55-59);

- The certificate of need restriction does not apply to Petitioner because it was provided a certificate of need exemption pursuant to West Virginia Code §16-2D-11 (*see*, *id*., ¶ ¶ 60-62);

- W. Va. Code §16-2D-9 cannot be retroactively applied to Petitioner (*see*, *id*., ¶ ¶ 63-67);

- W. Va. Code §16-2D-9 is vague and unenforceable against Petitioner because the critical term "substance abuse treatment" is not statutorily defined (*see*, *id*., ¶ ¶ 68-71); and,

- Petitioner has vested right to continue with its expansion to 300 to 300 SAT beds (*see*, *id*., ¶ ¶ 72-80).

(A.R. 8-14).

For purposes of the instant appeal, Respondent moved to dismiss based on Petitioner's alleged failure to exhaust administrative remedies, and in its Memorandum of Law in Support, argued that Petitioner's failure to perfect its appeal with the ICA deprived this Court of subject-matter jurisdiction. (A.R. 15-28).

In further support of its dismissal motion, Respondent indicated (in part) as follows: "Important to note is that the application was not denied pursuant to OHFLAC's licensure regulations. Rather, as found by the Board of Review (Bishop, ALJ) (Exhibit 4), the Board of Review – just like OHFLAC -- is bound to follow West Virginia law and deny

the license and any challenge to the denial pursuant to West Virginia Code 16-2D-9." (A.R. 25).

Respondent's dismissal motion was scheduled for hearing on April 21, 2025 (sometimes, "first hearing") and a briefing schedule was established by this Court.

Petitioner filed its written response in opposition to Respondent's dismissal motion, based principally on the following arguments:

- W. Va. Code § 29A-5-4 does not include language that requires an appeal to the ICA in order to exhaust administrative remedies, and Petitioner exhausted its administrative remedies by appealing to the Respondent's Board of Review.

- W. Va. Code § 29A-5-4 is an enabling rather than a restrictive statute.

- W. Va. Code § 29A-5-4 does not require exhaustion of remedies to the ICA based on its following language: "(a) Any party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof under this chapter, but nothing in this chapter shall be deemed to prevent other means of review, redress, or relief provided by law."

- There is no authority for the proposition that the decision to not "perfect" an appeal before the ICA represents a failure to exhaust administrative remedies.

- Respondent's exhaustion argument was contradictory to its previous representations that an appeal was unavailable because - based on Respondent's and the Board of Review's position – the certificate of need requirements and bed restrictions of the new law (W. Va. Code § 16D-2D-9) mandated denial of Petitioner's amended licensure application.

- A final decision was entered by the ICA, based on the following language of Rule 41(b) of the W. Va. Rules of Civil Procedure titled *Involuntary Dismissal*: "[U]nless the court in its order for dismissal provides otherwise, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication on the merits."

- There is no authority supporting a finding that a notice of the appeal to the ICA equates to an admission that an exhaustion requirement exists. [2]

[2] Neither Petitioner nor its current counsel know why Petitioner's previous counsel chose not to perfect by filing a brief after electing to notice an appeal before the ICA. However (as

- Respondent's arguments were unclear as to whether the exhaustion of remedies would be complete upon an appeal to and decision of the ICA, based on the following language of W. Va. Code § 29-A-5-4 (h).

(A.R. 68-72).

Respondent filed a Reply to Petitioner's response. (A.R. 84-94).

At the outset of the April 21, 2025 hearing, this Court clarified that it would only be addressing the issue of subject-matter jurisdiction, and would not at that time address the merits of Petitioner's Complaint for Declaratory and Injunctive Relief. (A.R. 174)

After reviewing the briefs of the parties and accepting oral argument at the first hearing, this Court denied Respondent's dismissal motion based on their exhaustion of remedies argument, and scheduled an evidentiary hearing for May 21, 2025, on the merits of Petitioner's Complaint. (A.R. 208-210).

In the interim, on May 1, 2025, the *State ex rel. Adkins v. Bailey*, No. 24-504, 2025 W. Va. LEXIS 148 (sometimes, hereinafter, "*Adkins*") decision was issued by the Supreme Court of Appeals of West Virginia, which addressed the issue of administrative exhaustion. [3]

The Circuit Court scheduled a virtual hearing for May 2, 2025, and advised the parties that it had considered the *Adkins* decision, and determined that the issue of

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explained further below), the previous notice of appeal to the ICA was a judicial appellate option, rather than a requirement for exhaustion of administrative remedies, and otherwise did not deprive the Circuit Court below of jurisdiction to decide Petitioner's Complaint for equitable relief.

[3] The *Adkins* decision as not yet been assigned a case citation for ___ S.E.___ or _____W. Va. ____. However, the decision was attached to Petitioner's *Supplemental Brief in Opposition to [Respondent]'s Motion for Dismissal Based on Exhaustion of Remedies*, and can be found at A.R. 234-279.

administrative exhaustion would be reconsidered by the Court as it was asserted by Respondent in support of dismissal. (A.R. 218-233).

Accordingly, the Circuit Court converted the hearing of May 21, 2025 from an evidentiary hearing on the merits of Petitioner's Complaint into a hearing on the administrative exhaustion issue, and provided that the parties could brief the issue on or before May 14, 2025, and could file reply briefs to the opposing party's brief on or before May 16, 2025. (*Id.*)

Both Petitioner and Respondent filed their respective briefs, replies, and exhibits (A.R. 107-169, 250-274).

On May 21, 2025, this Court accepted arguments from the parties, and based thereon and on the briefs, reversed its previous ruling, and granted (without prejudice) Respondent's dismissal motion based on exhaustion of administrative remedies, and support, relied principally on the *SER Adkins* decision. (A.R. 275-307).

The Circuit Court indicated that Petitioner's objections were noted; requested that Respondent prepare the Order reflecting its ruling; and further represented as follows: "[Respondent's counsel Ms. Green, just to make sure there is no misunderstanding, this is a dismissal without prejudice." (A.R. 305).

Accordingly, Respondent filed its proposed order with the Circuit Court reflecting dismissal of Petitioner's cause of action, and after consulting with Respondent, Petitioner asserted its objections to the order proposed by Respondent, and submitted its alternative proposed order reflecting dismissal.

On June 18, 2025, the Circuit Court entered its Order Granting Defendant's Motion to Dismiss, in essentially the same form as that submitted by Respondent. (A.R. 308-322).

SUMMARY OF ARGUMENT

The Circuit Court committed reversible error by dismissing Petitioner's complaint for equitable relief based on an alleged failure to exhaust administrative remedies.

First, the Circuit Court fundamentally misunderstood the nature of administrative versus judicial remedies. The ICA is unquestionably a judicial body exercising constitutional judicial power, not an administrative agency. Requiring appeal to the ICA to "exhaust administrative remedies" represents a categorical error that violates basic separation of powers principles. Petitioner properly exhausted its administrative remedies when Respondent's Board of Review affirmed the denial of its licensure amendment application.

Second, the Circuit Court erred in reversing its initial denial of Respondent's dismissal motion based on the subsequent *State ex rel. Adkins v. Bailey* decision. *Adkins* is factually and legally distinguishable because it involved ongoing administrative proceedings and was decided under West Virginia Code § 21A-7-19, which contains mandatory exhaustion language. Here, the administrative process concluded, and the applicable statute (W. Va. Code § 29A-5-4) contains no such mandatory requirement.

Third, the statutory framework itself contradicts the Circuit Court's ruling. West Virginia Code § 29A-5-4 expressly provides that "nothing in this chapter shall be deemed to prevent other means of review, redress, or relief provided by law." This enabling language creates a right to judicial review, not a requirement to exhaust judicial appeals as a prerequisite to seeking equitable relief in circuit court.

Fourth, even if administrative exhaustion were required, Petitioner satisfied any such requirement. Respondent's own general counsel informed Petitioner that no administrative appeal was available, and the Board of Review confirmed it lacked authority to grant the requested relief. Under established precedent, exhaustion is not required where it would be futile or where no administrative remedy exists.

Fifth, and the alternative, the ICA's dismissal of Petitioner's notice of appeal constituted a final adjudication on the merits under Rule 41(b) of the West Virginia Rules of Civil Procedure, further establishing that any exhaustion requirement was satisfied.

Finally, from a practical perspective, he Circuit Court's ruling would create an absurd result requiring parties to exhaust potentially years of judicial appeals before seeking equitable relief, contrary to fundamental principles of administrative law and separation of powers.

This Court should reverse and remand to the Circuit Court for consideration of the merits of Petitioner's Complaint for equitable relief.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner respectfully requests that this Court schedule oral argument in this matter, as this case presents significant legal and constitutional issues that would benefit from oral argument pursuant to the criteria established under the West Virginia Rules of Appellate Procedure.

This case involves constitutional questions regarding the validity of statutory interpretation and application, as well as fundamental separation of powers principles between the legislative, executive, and judicial branches of government. Specifically, the case addresses whether the Circuit Court erred in requiring exhaustion of judicial remedies through the Intermediate Court of Appeals as a prerequisite to seeking

administrative law relief, thereby implicating the constitutional separation between administrative and judicial functions.

Petitioners respectfully ask the Court for Rule 20 oral argument to permit the Court and the parties sufficient time to address all of the factual and legal issues raised in these six different cases. Because there is confusion among the lower courts as to the correct standard to apply when considering the timeliness of these claims, an opinion authored by a Judge would clearly articulate the proper standard.

STANDARD OF REVIEW

This Court reviews questions of subject matter jurisdiction *de novo*. *See, State ex rel. Miller v. Reed*, 203 W. Va. 673, 679, 510 S.E.2d 507, 513 (1998).

Questions of statutory interpretation and constitutional law, including separation of powers issues, are reviewed de novo. *See,* Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Questions of law are subject to de novo review.").

The interpretation of administrative exhaustion requirements under West Virginia Code § 29A-5-4 and related statutes presents pure questions of law subject to de novo review. *See, State ex rel. Hoover v. Berger*, 199 W. Va. 12, 18, 483 S.E.2d 12, 18 (1996).

Finally, orders granting motions to dismiss are also reviewed de novo. *See, Mandolidis v. Elkins Industries, Inc.*, 161 W. Va. 695, 698, 246 S.E.2d 907, 914 (1978).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT PETITIONER WAS REQUIRED TO APPEAL RESPONDENT'S ADMINISTRATIVE DENIAL OF THEIR LICENSURE AMENDMENT APPLICATION, AND RESPONDENT BOARD OF REVIEW UPHOLDING OF THE DENIAL, TO THE WEST VIRGINIA INTERMEDIATE COURT OF

APPEALS ("ICA") IN ORDER TO EXHAUST ITS ADMINISTRATIVE REMEDIES.

The Circuit Court found it lacked subject-matter jurisdiction to consider Petitioner's Complaint based on its specific finding that "an administrative remedy [was] available to Plaintiff under the West Virginia Code of State Rules, and Plaintiff failed to exhaust that administrative procedure." (A.R. 314).

The sole "administrative remedy" relied on by the Circuit Court in declining jurisdiction was based on Respondent's argument that appeal to the ICA was required regarding Respondent's Board of Review decision to affirm the denial of Petitioner's amended licensure application. (A.R. 308-322).

(a) The ICA is a judicial body, and appeal to the ICA is not an administrative remedy.

The Circuit Court recognized as follows: "On October 20, 2023, Plaintiff undertook an ***administrative appeal*** of the decision, and the decision was affirmed by the West Virginia Department of Health and Human Resources Board of Review by a December 8, 2023 Order." (A.R. 314) (emphasis added).

In its Order, the Circuit Court further cited the following authority in its *Conclusions of Law* in support of its finding that Petitioner failed to exhaust its administrative remedies: "In West Virginia, '[t]he general rule is that where an ***administrative remedy*** is provided by statute or by rules and regulations having the force and effect of law, relief must be sought ***from an administrative body***, and such remedy must be exhausted before the courts will act.'" (A.R. 311) (quoting Syl. Pt. 2, *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W. Va. 245, 183 S.E.2d 692 (1971) (additional citations omitted) (emphasis added).

"'The rule of exhausting ***administrative remedies*** before actions in courts are instituted is applicable, even though ***the administrative agency*** cannot award damages if the matter is within the jurisdiction of the agency.' Syl. Pt. 3, *id.*; see also *State ex rel. Smith v. Thornsbury*, 214 W. Va. 228, 588 S.E.2d 217 (2003)." (A.R. 311) (citations in original) (emphasis added).

"'The doctrine of exhaustion of administrative remedies provides that when the legislature provides for an ***administrative agency*** to regulate some particular field of endeavor, the courts are without jurisdiction to grant relief to any litigant complaining of any act done or omitted to have been done if such act or omitted act is within ***the rules and regulations of the administrative agency*** involved until such time as the complaining party has exhausted such remedies ***before the administrative body***. *Thornsbury*, 214 W. Va. at 233, 588 S.E.2d at 222 (quoting *Bank of Wheeling*, 155 W. Va. at 249, 183 S.E.2d at 693).'" (A.R. 311) (citations in original) (emphasis added).

In dismissing Petitioner's complaint based on failure to exhaust administrative remedies, the Circuit Court recognized as follows: "On August 11, 2023, Defendant WVOHFLAC received an application to again amend Plaintiff's license to add 160 SUD beds. In August 28, 2023, it was explained to Plaintiff that its August 11, 2023 application for amended license was denied because, if approved, Wood County would exceed the number of beds allowed per county as established by West Virginia Code § 16-2D-9." *Id.* (A.R. 313-314).

The Circuit Court acknowledged that Petitioner administratively appealed the denial of its amended licensure application to the Respondent's Board of Review, and that the denial was affirmed by the BOR. (A.R. 311).

Yet, the Circuit Court found: "In this matter, Plaintiff failed to exhaust its administrative remedies as required prior to seeking judicial review of this action." (A.R. 311).

This finding is fatally flawed, because the ICA is not an administrative body. Instead, just like the Circuit Court, the ICA is unquestionably a judicial body. Accordingly, the option to seek an appeal before the ICA represents judicial review rather than an administrative remedy.

In its response to Respondent's dismissal motion below, Petitioner brought this to the attention of the Circuit Court:

"'To the extent necessary, Clean & Clear exhausted is administrative remedies. In their Brief, Defendants definitively state as follows: 'Following this denial [of its amended licensure application] by OHFLAC and despite having received clear guidance on its right to an administrative appeal, Plaintiff failed to exhaust its administrative remedies.'" *Id.*, (A.R. 263-264). [4]

"'Yet, puzzlingly, in the very next sentence, Defendants confirm the following fact: "On October 20, 2023, Plaintiff requested an administrative appeal of the decision, and the decision was affirmed by the West Virginia Department of Health and Human Resources Board of Review by a December 8, 2023, Order." (A.R. 264).

"'These two conflicting and blatantly contradictory positions cannot be logically reconciled." (*Id.*)

[4] In the proceedings below, the current Respondent, West Virginia Department of Health, West Virginia Office of Health Facility, was mistakenly referred to by current Petitioner in plural form as "Defendants" rather than "Defendant". Thus, in the portions of Petitioner's submissions below that are quoted herein, Respondent/Defendant is referred to in the plural form. Petitioner otherwise has corrected this mistake in the current appellate brief.

"So essentially, Defendants argue, without explanation, that Clean & Clear 'failed to exhaust its administrative remedies.' Yet, in the very next sentence, they concede that Clean & Clear 'requested an administrative appeal' and that the Board of Review issued a final order denying its administrative appeal. This is facially inconsistent. Moreover, in their Brief, Defendants acknowledge that Clean & Clear 'further asserts that, prior to filing in Kanawha County Circuit Court, it exhausted its administrative remedies to receive an amended license from Defendants.'" (*Id.*)

Respondent was accurate in relaying this assertion, as Petitioner did in fact exhaust its administrative remedies before filing the Complaint seeking equitable relief from the Circuit Court.

Nonetheless, the Circuit Court adopted the arguments asserted by Respondent and entered the Order that it submitted based on this illogical concept that is contrary to the most basic interpretation of the term "administrative."

"In some instances, such appeals [of administrative decisions] come to this Court, and to the circuit courts, under statutory provisions, and on the theory that administrative agencies, when required to decide questions of law and fact, act in a ***quasi-judicial*** capacity, which furnishes a basis for an application for review by the courts." *State v. Huber*, 40 S.E. 2d 11, 129 W. Va. 198 (W. Va. 1946)**219]

The ICA, by contrast, exercises true ***judicial power*** under Article VIII of the West Virginia Constitution, not quasi-judicial administrative authority.

Accordingly, there is a fundamental distinction between administrative and judicial review.

Moreover, the ICA opened on July 1, 2022, overseeing administrative, family, and civil appellate jurisdiction, and representing a clear structural separation between administrative and judicial functions in West Virginia's governmental framework.

Section three, article VIII of the Constitution of West Virginia grants the Supreme Court of Appeals of West Virginia supervisory control over all intermediate appellate courts in the state, including the power to promulgate rules for the procedures of an intermediate appellate court created by statute. In accordance with those provisions, the ICA is therefore subject to the control, supervision, and oversight of the Supreme Court of Appeals. This constitutional structure demonstrates that the ICA functions as a ***judicial body*** exercising judicial power under the constitutional authority of the Supreme Court, not as an administrative agency.

To the contrary, Respondent's authority and existence have been established by the Legislature in specific statutes, and in the Code of State Rules. Then, Respondent operates under the executive branch of government within the specific scope of enforcing and carrying out the legislative objectives as it relates to licensure of facilities such as that operated by Petitioner.

Accordingly, there is no reasonable interpretation supporting a finding that the ICA is an extension of the Respondent for purposes of administrative remedy exhaustion.

With regard to administrative proceedings and exhaustion: "Adjudication refers to an agency's application of an established rule, law, or procedure to a set of particular facts and results in the issuance of an order affecting a particular party. Administrative adjudication is the process of resolving disputes or other specific matters, usually between an ***administrative agency*** and a private party. Most disputes of a substantive nature are resolved through formal proceedings which are normally heard by an

Administrative Law Judge (ALJ), an employee of the agency concerned, who is required to conduct the administrative proceedings in an independent and objective manner." U.S. Government Accountability Office, *The Administrative Process: An Overview* (emphasis added).

Moreover, it is well-established that appealing an administrative decision typically requires exhausting administrative remedies before seeking judicial review. This involves pursuing any internal appeals or reconsideration processes offered by the agency. *See*, *Carthy v. Madigan*, 503 U.S. 140, 112 S. Ct. 1081 (1992).

Accordingly, the Circuit Court below erred when it declined jurisdiction based on the doctrine of exhaustion of administrative remedies.

(b) The CCC's ruling represents an impermissible violation of the most basic constitutional principles of separation of powers.

In *State v. Huber*, 40 S.E. 2d 11, 129 W. Va. 198 (W. Va. 1946), the SCAWV was faced with the following fundamental legal question of whether the assumption of concurrent jurisdiction of an administrative role by the judiciary "ignore[d the separation and division of powers between the legislative, executive and judicial departments of the Government, and purports to delegate to the judiciary powers which are distinctively administrative and legislative[.]" *Id*. at 15, 201.

"The question presented involves a consideration of what constitutes legislative power, executive power, and judicial power. We are not particularly concerned here with a definition of legislative and executive power, except to distinguish them from judicial power." *Id*. at 17-18, 207.

Just as in the current case, where Respondent possesses the unquestionable power and authority to regulate drug-rehabilitation facilities such as that operated by Petitioner,

the *Huber* Court clarified: "Unquestionably, the power of regulation of public utilities, the licensing of businesses of all kinds, the regulation of such businesses, the general control thereof, including the power of revoking licenses or permits issued in connection therewith, is a legislative power." *Id*.

"This power is subject to control by the courts only where, in the exercise thereof, there has been a violation of some State or Federal constitutional provision, limiting the Legislature in its right to perform certain acts in connection with the power it assumes to exercise. The executive power is more limited: it merely extends to the detail of carrying into effect the laws enacted by the Legislature, as they may be interpreted by the courts." *Id*. at 18, 207-208.

"The separation of these powers; the independence of one from the other; the requirement that one department shall not exercise or encroach upon the powers of the other two, is fundamental in our system of government, State and Federal." *Id*. at 18, 209; *see also, id*. at 19, 209: ("A fundamental principle of American constitutional jurisprudence, accepted alike in the public law of the Federal Government and of the States, is that, so far as the requirements of efficient administration will permit, the exercise of the executive, legislative, and judicial powers are to be vested in separate and independent organs of government.")

"It will be noted that this Article of the Constitution provides against what may be termed two distinct dangers: First, the exercise by one department of any power vested by the Constitution in either of the other two, and, second, that one person might seek to exercise powers of more than one of them at the same time." *Id*. at 19, 210.

As it relates to the second danger identified in *Huber*, this occurred based on the facts present in the *Adkins* decision which the Circuit Court relied on in erroneously

reversing its initial decision and granting dismissal below. The plaintiffs in *Adkins* sought equitable relief from the Circuit Court while there was still an administrative review process pending at the administrative level. As further discussed below, this is a critical distinction between *Adkins* and the present case.

"We still think it is settled law in this State that the Legislature cannot impose upon any court a duty which requires the performance of an act not judicial in character." *Id.*, 21, 214.

In this case, the Circuit Court's interpretation of the statute and rules/regulations it cited in support of dismissal imposes a duty upon the ICA which requires performance of a purely "administrative" function, in that it would require Petitioner to appeal to the ICA to exhaust its administrative remedies.

Accordingly, the *Huber* Court held the power of administrative agencies to perform their functions, delegated to them by the Legislature, cannot be controlled by the courts; and, this being true, courts ***will not assume*** to exercise administrative power [.]" *Id.*, 24, 220-221 (emphasis added).

"In our opinion, this case requires a recurrence to fundamental principles, one of which, as we have endeavored to point out, is the importance of maintaining a separation of powers between the legislative, executive and judicial departments of our State Government." *Id.*, 24, 221.

Accordingly, the Circuit Court's dismissal cannot be reconciled with the fundamental legal principles artfully explain by the Court in Huber. Requiring additional review of the ICA – a judicial body – in order to exhaust administrative remedies represents an unconstitutional encroachment of power. Requiring exhaustion of

administrative remedies to the ICA would blur the constitutional separation of powers and transform the judiciary into an extension of the administrative state.

In this case, the administrative exhaustion requirement ended when Respondent's Board of Review upheld Petitioner's denial of Petitioner's amended licensure application.

Petitioner previously asserted as follows before the Circuit Court: "The law clearly distinguishes between administrative remedies – such as those sought and denied by the Defendants' BOR - and appeal to the ICA. The exhaustion requirement pertains solely to the former. Once Clean & Clear completed the Defendants' internal administrative process, it satisfied the exhaustion requirement, regardless of whether it decided to pursue further appeal to the ICA." (A.R. 208).

However, the Circuit Court ignored this fundamental principle, and instead, entered the Order submitted by Respondents dismissing the Petitioner's claims based on an alleged failure to exhaust administrative remedies.

(c) The statute cited by Respondent below in support of dismissal, does not mandate appeal to the ICA to exhaust administrative remedies, but instead, is an enabling statute creating a right rather than a requirement. FIX

In support of its dismissal argument that was adopted by the Circuit Court, Respondent relied on W. Va. Code § 29A-5-4, which states in part: "(a) Any party adversely affected by a final order or decision in a contested case ***is entitled*** to judicial review thereof under this chapter [.]" (A.R. 68). (emphasis added).

In *McCarthy v. Madigan*, the United States Supreme Court of Appeals explained as follows: "Of 'paramount importance' to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is ***required***. But where Congress has

not ***clearly required exhaustion***, sound judicial discretion governs." *Id.*, 503 U.S. at 144 (1992) (citations omitted) (emphasis added).

The omission of an exhaustion requirement in W. Va. Code § 29A-5-4 is corollary to the holding in *McCarthy* that exhaustion be explicitly mandated by the relevant statute.

Indeed, and to the contrary, W. Va. Code § 29A-5-4 is an enabling rather than a restrictive statute. The plain language indicates a party adversely affected by the administrative decision of a governmental agency is ***entitled*** to judicial review by the ICA, and not required to pursue such judicial review to satisfy exhaustion of its remedies.

(d) The section of the Code of State Rules cited by the Circuit Court in its dismissal order also creates a right to judicial review rather than a requirement to pursue an appeal before the ICA.

In support of it dismissal for lack of jurisdiction, the Circuit Court specifically cited as follows:

"11. West Virginia Code of State Rules § 64-11-13.8.1 provides, "[a]ny party who disagrees with the final administrative decision as a result of the hearing ***may***, within 30 days after receiving notice of the decision, appeal the decision to the West Virginia Intermediate Court of Appeals." WVCSR 64-11-13.8.1." (A.R. 312) (emphasis added).

Accordingly, just as W. Va. Code § 29A-5-4, WVCSR § 64-11-13.8.1 relied on by the Circuit Court provides a party such as the Petitioner with the option of directly pursuing an appeal to the ICA. It does not create a requirement for purposes of exhaustion of administrative remedies.

As cited by Petitioner below: "It is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes

something the Legislature purposely omitted. Courts are not free to read into the language what is not there, but rather should apply the statute as written." *War Mem'l Hosp., Inc. v. W.Va. Health Care Auth*. 887 S.E.2d 34, 39 (W. Va. 2023) (specifically addressing the exemption to certificate of need requirements found in W. Va. Code § 16-2D-11.")) (A.R. 69) (citations and quotations omitted).

(e) The Circuit Court's ruling could lead to the absurd result in which the exhaustion requirement would not be satisfied for years.

As to this point, Petitioner asserted as follows in its Response to Respondent's dismissal motion below:

> "Finally (as to this point), Clean & Clear once again respectfully requests that this Court apply common sense judgment. If this Court were to accept Defendant's argument, where and when would the exhaustion requirement end?
>
> For example, W. Va. Code § 29-A-5-4 (h) sets forth that "the judgment of the circuit court or the Intermediate Court of Appeals, whichever is applicable, shall be final unless reversed, vacated or modified on appeal to the Supreme Court of Appeals of this state in accordance with the provisions of W. Va. Code § 29A-6-1 of this Code.
>
> Pursuant to the Defendants' argument, would Clean & Clear be required to appeal and adverse decision of the ICA to the Supreme Court of Appeals of West Virginia in order to satisfy exhaustion requirements?
>
> Moreover, following a final decision of the Supreme Court of Appeals of West Virginia, a party has a right to appeal to the United States Supreme Court of Appeals pursuant to Rule 25(b) of the West Virginia Rules of Appellate Procedure.
>
> Pursuant to the Defendants' argument, would Clean & Clear be required to appeal and adverse decision of the Supreme Court of Appeals of West Virginia to the United States Supreme Court of Appeals in order to satisfy exhaustion requirements?"

(A.R. 71).

Pursuant to the most fundamental legal and practical principles, the Circuit Court erred in deciding that it lacked jurisdiction over Petitioner's complaint for equitable relief,

based on its finding that Petitioner was required to pursue and perfect an appeal before the ICA in order to exhaust its administrative remedies.

II. THE CIRCUIT COURT ERRED WHEN IT REVERSED ITS INITIAL DENIAL OF RESPONDENT'S DISMISSAL MOTION, AND THEN GRANTED THE MOTION BASED ON THE SUBSEQUENT *SER ADKINS* DECISION, WHICH IS FACTUALLY AND LEGALLY DISTINGUISHABLE FROM THE CURRENT MATTER.

In its *SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR DISMISSAL BASED ON EXHAUSTION OF ADMINISTRATIVE REMEDIES* ("Supplemental Brief"), Petitioner represented as follows to the Circuit Court:

> "In further support of their Motion to Dismiss, Defendants argued that subject matter jurisdiction was absent because of Plaintiff's alleged failure to exhaust administrative remedies before seeking injunctive relief before this Court. In support, Defendants cited exclusively to W. Va. Code § 29A-5-4.
>
> As to this issue regarding exhaustion of administrative remedies, this Court denied the Defendant's Motion to Dismiss at the 1st hearing, and in support, found that W. Va. Code § 29A-5-4 provides flexibility to the Plaintiff in choosing the administrative remedies route or seeking injunctive relief before this Court.
>
> After a series of correspondences were submitted to the Court and electronically filed by Plaintiff and Defendants, this Court scheduled an additional virtual hearing for May 2, 2025 ("2nd hearing").
>
> At the 2nd hearing, this Court (in part) indicated that it sought to clarify its ruling from the 1st hearing, and reaffirmed its denial of Defendants' dismissal motion based on the pre-suit notice requirements of W. Va. Code § 55-17-3. *See*, Transcript of May 2, 2025 Hearing (attached hereto as Exhibit B).
>
> However, at the 2nd hearing of May 2, 2025, ***the Court identified the decision of State of West Virginia ex rel. Scott A. Adkins, et al. v. The Honorable Jennifer Bailey, et al.*** (Supreme Court of Appeals of West Virginia, Docket No. 24-504) (hereinafter, "*Adkins*") that had been issued the day before on May 1, 2025. The *Adkins* decision addressed the issue of administrative exhaustion of remedies.
>
> Accordingly, this Court ordered that in light of the *Adkins* decision, Defendants' Motion to Dismiss based on their argument regarding exhaustion of administrative remedies would be reconsidered.

> This Court further ordered that the evidentiary hearing previously scheduled to occur on May 21, 2025 at 10 a.m. on the merits of Plaintiff's Complaint for Declaratory and/or Injunctive Relief be converted to a hearing on the reconsideration of Defendants Motion to Dismiss, based on their exhaustion of administrative remedies argument. *See*, Ex. B, at 6:16-19 (indicating that the Court is providing "plaintiff an opportunity to review the [*Adkins*] case that was handed down by the Supreme Court and make any and all arguments in support of his client regarding that basis.")
>
> Accordingly, Clean & Clear graciously accepts this opportunity provided by this Court, and asserts as follows [.]"

(A.R. 155-156).

In this aforementioned brief, Petitioner stated verbatim (in part) as follows: "For any and all of the reasons set forth below - as well as those reasons originally asserted in Clean & Clear's previous Response to Defendants' Motion to Dismiss and at the April 21, 2025 hearing – this Court should not reverse its previous decision denying Defendants' dismissal motion regarding their argument based on exhaustion of administrative remedies." (A.R. 156).

In its Supplemental Brief, Petitioner then asserted as follows:

"**THE *ADKINS* DECISION IS PROCEDURALLY, LEGALLY AND FACTUALLY DISTINGUISHABLE FROM THE CURRENT MATTER WITH REGARD TO PETITIONER'S REQUEST FOR INJUNCTIVE RELIEF.**

Having established that Clean & Clear's request for declaratory judgment may proceed before this Court, the focus shifts to whether the *Adkins* decision supports this Court's reversal of its ruling that the doctrine of exhaustion of administrative remedies does not preclude this Court from exercising subject matter jurisdiction over Clean & Clear's request for a preliminary injunction.

The recent decision of the SCAWV in *Adkins* does not support reversing this Court's previous denial of Defendants' dismissal motion based on the doctrine of exhaustion of administrative remedies.

"[T]he threshold issue is whether the circuit court had subject matter jurisdiction over this case." *Id*. at *18. This is the only factual and legal similarity between *Adkins* and the current matter. If a decision is factually and/or legally distinguishable, it is not controlling. *See, for example*, *Dailey v. Bechtel Corp.*, 207 S.E.2d 169 (W. Va. 1974)." (A.R. 160-161).

"The *Adkins* decision specifically addressed exhaustion of administrative remedies under the unemployment benefits statute, rather than W. Va. Code § 29A-5-4 on which Defendants exclusively rely.

In *Adkins*, the Petitioner challenged the Circuit Court's ruling that plaintiffs were not required to exhaust their administrative remedies before seeking extraordinary and equitable relief.

Plaintiffs' request for such relief was focused solely on the unlawful collection by the State of West Virginia through its state agency, Workforce WV (sometimes, "Petitioner" or "Workforce") of alleged overpayment of unemployment benefits. *See, id*. at *6. Accordingly, the *Adkins* Court focused on the specific statutes related thereto. *See, id*.: "West Virginia Code §§ 21A-10-8 [Recovery of benefits paid on misrepresentation] and 21A-10-21 [Recovery of benefits paid through error] are the two main statutes that the parties and the circuit court addressed. Because these are the two main statutes at issue, we include them in full [.]"

The *Adkins* Court decided in favor of the Petitioner, based on the following identified specific statutory language: "Claimants ***are required*** to exhaust their administrative remedies prior to seeking judicial review. West Virginia Code § 21A-7-19 provides this plain, unambiguous direction: 'A person claiming an interest under the provisions of this article ***shall*** exhaust his remedies before the board before seeking

judicial review.' Respondents did not exhaust their administrative remedies prior to filing this lawsuit." *Adkins* at *5 (emphasis added).

In the current matter, Defendants base their administrative exhaustion argument solely on the following statute: "(a) Any party adversely affected by a final order or decision in a contested case ***is entitled to judicial review*** thereof under this chapter, but nothing in this chapter shall be deemed to prevent other means of review, redress, or relief provided by law." W. Va. Code § 29A-5-4 (emphasis added).

Importantly, nowhere in the *Adkins* decision is W. Va. Code § 29A-5-4 referenced or addressed. *See, id., et al.* Rather, the *Adkins* decision was based on W. Va. Code § 21A-7-19, which ***explicitly*** requires exhaustion of remedies before seeking judicial review. In contrast, the current Defendants argue for dismissal pursuant to W. Va. Code § 29A-5-4, which does not contain a similar mandatory exhaustion requirement and explicitly allows for other means of judicial review or relief. This distinction is crucial.

This statutory difference demonstrates that the legislative intent and statutory language of the two codes are distinct. In contrast to West Virginia Code § 21A-7-19, W. Va. Code § 29A-5-4 on which Defendants solely rely is an enabling rather than a restrictive statute.

More specifically, W. Va. Code 29A-5-4 ***provides*** for judicial review ***but does not impose*** a mandatory exhaustion requirement, unlike W. Va. Code § 21A-7-19 related exclusively to collection of overpayment of unemployment benefits. Accordingly, the *Adkins* decision is distinguishable from the current case because it concerns a different statutory framework.

***

Accordingly, the SCAWV's recent decision in *Adkins* does not support reversal of this Court denial of Defendants' dismissal motion."

(A.R. 161-163).

"Unlike in the current matter, the *Adkins* decision was based on the fact that there was an ongoing administrative appeal before a state agency.

In *Adkins*, "the ICA . . . ***remanded*** the case to the BOR with instructions to more fully develop the factual record regarding whether the overpayments to Ms. Baldwin resulted from an error or whether she was responsible for material 'nondisclosure or misrepresentation[.]' [Plaintiff/Claimant/Respondent] ***Ms. Baldwin's administrative appeal remains active and ongoing***." *Adkins* at *10. (emphasis added).

Accordingly, "[i]n February of 2024, WorkForce filed a motion to dismiss Respondent's amended complaint. WorkForce's arguments included an assertion that the circuit court lacked jurisdiction because Respondents had not exhausted their administrative remedies:

> 'Plaintiffs challenge the lawfulness of [WorkForce's] ability to recoup the overpayments of benefits. For Ms. Baldwin, ***the administrative process is ongoing***, and Plaintiffs' Amended Complaint is an attempt to subvert those ***ongoing administrative proceedings*** by seeking relief that effectively amounts to Plaintiffs' impermissibly asking a Circuit Court to exercise concurrent jurisdiction over a lawful administrative appeals process. ***Because the administrative proceedings are ongoing***, Plaintiff Baldwin has failed to exhaust her administrative remedies, depriving this [Circuit] Court of subject matter jurisdiction.'

Id. at *2 (emphasis added).

The *Adkins* Court adopted these arguments asserted by Respondents, and accordingly, held as follows:

> "Because we find the circuit court's interpretation of these statutes was erroneous, we further conclude that the circuit court erred by finding that Respondents were not required to exhaust their administrative remedies prior to bringing this lawsuit. In so ruling, we reiterate that the Legislature has provided clear, unambiguous direction on this issue: 'A person claiming an interest under the provisions of this article shall exhaust his remedies before the board before seeking judicial review.' W.Va. Code § 21A-7-19. Respondents did not exhaust their administrative remedies prior to bringing this lawsuit. Therefore, the circuit court lacked subject matter jurisdiction over this case, and WorkForce is entitled to its requested writ of prohibition."

Id. at 30.

In the current matter, there is not an ongoing administrative proceeding. Defendants initially denied Clean & Clear's application for an amended license at the administrative level. Clean & Clear then appealed this denial to the Defendants' Board of Review, which upheld the denial.

Clean & Clear then filed its notice of appeal with the ICA. The ICA denied this appeal. Notably, unlike in *Adkins*, the ICA did not remand the matter to Defendants' BOR for further consideration.

To the contrary, a final decision was reached by the ICA, as reflected in its dismissal order regarding Clean & Clear's notice of appeal. *See*, Exhibit 5 attached to Defendant's Motion to Dismiss."

(A.R. 163-164).

Nonetheless, in its Order or dismissal, the Circuit Court indicated, in part, as follows:

> "A recent decision from the Supreme Court of Appeals of West Virginia provides guidance to this Court on the requirements of exhausting administrative remedies. In State ex rel. Adkins v. Bailey, the Supreme Court considered, under a writ of prohibition, whether a claimant is required to exhaust its administrative remedies before it is entitled to bring a claim before a West Virginia Circuit Court. See generally State ex rel. Adkins v. Bailey, No. 24-504, 2025 W. Va. LEXIS 148 (May 1, 2025).

> Specifically, the SER Adkins appeal dealt with whether a circuit court in West Virginia had subject matter jurisdiction where a group of plaintiff's brought claims for injunctive and declaratory relief against a state agency (Workforce West Virginia) after it determined that they had been overpaid unemployment benefits and WorkForce sought repayment. Id. at *6-11.
>
> The circuit court in that matter determined that it had subject matter jurisdiction over the plaintiffs' claims despite the fact that they had not exhausted their administrative remedies."

(A.R. 312-313).

For the same reasons and based on the same authority previously submitted to the Circuit Court, the *Adkins* decision is factually and legally distinguishable from the current case.

Accordingly, the Circuit Court erred in relying on the *Adkins* decision to reverse its initial decision to deny Respondent's dismissal motion, and subsequently reverse course and grant the same Motion.

III. THE CIRCUIT COURT ERRED IN DISMISSING PETITIONER'S COMPLAINT FOR EQUITABLE RELIEF, BECAUSE THE APPLICABLE STATUTE PROVIDES THAT ALTERNATIVE LEGAL REMEDIES MAY BE PURSUED.

In its Supplemental Brief, Petitioner further asserted as follows:

"W. Va. Code § 29A-5-4 does not preclude the equitable and injunctive relief sought by Clean & Clear.

W. Va. Code § 29A-5-4 clearly establishes that "nothing in this chapter shall be deemed to prevent other means of review, redress, or relief provided by law." As clarified above and in the instant Complaint, Clean & Clear seeks relief "pursuant to West Virginia Code § 53-5-8 governing injunctive relief, and the West Virginia Uniform Declaratory Judgments Act, West Virginia Code § 55-13-1, *et seq.*" Complaint at ¶ 87.

Notably, West Virginia Code § 21A-7-19 – the statute relied on exclusively by the *Adkins* Court in finding that exhaustion of administrative remedies did not occur – does not contain a provision clarifying that other legal remedies can be pursued, such as (for example) those for equitable relief.

Accordingly, W. Va. Code § 29A-5-4 does not prevent Clean & Clear's current action for redress and relief provided by law outside of the appellate option provided in this statute solely relied on by Defendants."

(A.R. 165-166).

In addition to the reasons set forth above, the provisions of W. Va. Code § 29A-5-4 establish that the Circuit Court erred in granting Respondent's dismissal motion.

IV. ALTHOUGH IT DID SO, PETITIONER WAS NOT REQUIRED TO APPEAL TO RESPONDENT'S BOARD OF REVIEW TO EXHAUST ADMINISTRATIVE REMEDIES, BECAUSE THE RESPONDENT ACKNOWLEGED THAT SUCH AN APPEAL WAS UNAVAILABLE AND/OR FUTILE.

As previously explained by Petitioner below: "On November 9, 2023, Clean & Clear's previous counsel, Carl W. Shaffer of Hissam Forman Donavan Ritchie PLLC, sent an email to ALJ Judge Bishop. (See, page 9 of 14 of internal Exhibit 1 to the administrative record, which is attached as Exhibit 4 to Defendant's Motion to Dismiss.)" (A.R. 261)(citation in original).

Petitioner further asserted as follows in his Supplemental Brief:

"In this email, Attorney Shaffer expressed as follows: "'I previously spoke and exchanged emails with Ms. Whitmore about this appeal. Among other things, ***Ms. Whitmore informed me that because OHFLAC denied my client's licensure amendment pursuant to a statute outside licensing regulations, my client does not have the right to appeal***.

"The record reflects that Jessica Whitmore (General Counsel to the W. Va. Office of Inspector General, which oversees OHFLAC, and who was copied on the email) did not dispute this representation, despite Attorney Shaffer offering as follows: 'Ms. Whitmore, please feel free to offer your input on anything I've got wrong here or any additional information you want to add.'

In his Order affirming Defendants' denial of Clean & Clear's "behavioral health services licensure amendment," ALJ Bishop confirmed Ms. Whitmore's previous representation, and held as follows: '***The Board of Review lacks the authority to grant relief based on, or to consider, the issues raised therein***. The Board of Review is bound to apply the pertinent statute, West Virginia Code § 16-2D-9(5), and affirm respondent's denial based upon the same.' See, Exhibit 2 to Defendants' Brief.

In its *Adkins* decision, the SCAWV recently explained as follows: 'We have recognized exceptions to our general rule requiring exhaustion of administrative remedies. In syllabus point one of State ex rel. Bd. of Educ. of Kanawha County v. Casey, 176 W.Va. 733, 349 S.E.2d 436 (1986), we held that "[t]he doctrine of exhaustion of administrative remedies is inapplicable where resort to available procedures would be an exercise in futility.' *Adkins* at *22.

Again, although Clean & Clear chose to seek administrative review from the Defendants' BOR, it proved to be a futile attempt. Defendants' General Counsel informed Clean & Clear that it did not have the right to appeal the denial of its application for a licensure amendment. ALJ Bishop then confirmed by finding that the Defendants' BOR did not have authority to grant the administrative appellate relief sought by Clean & Clear.

'Further, we have held that '[t]he rule which requires the exhaustion of administrative remedies is inapplicable where no administrative remedy is provided by

law.' *Adkins* at *22 (quoting, Syl. Pt. 2, *Daurelle v. Traders Fed. Sav. & Loan Ass'n of Parkersburg*, 104 S.E.2d 320 (W. Va. 1958).

In *Carter v. City of Bluefield*, 132 W.Va. 881, 54 S.E.2d 747, in which it appeared that the petitioner had no administrative remedy to challenge the validity of a municipal zoning ordinance before an administrative agency . . . this Court held that the issue of validity or invalidity of the ordinance was an issue to be judicially determined in a proceeding' for equitable relief by the Circuit Court. *Daurelle*, 104 S.E.2d at 326 (W. Va. 1958) (emphasis added). "In the absence of any showing that there is an available administrative remedy to enable the petitioner to obtain the [relief] which he seeks, the rule which requires the exhaustion of administrative remedies by a litigant before he may resort to the courts has no present application and does not preclude the petitioner from seeking judicial relief in this proceeding.' *Id*. at 327.

Both Defendants' General Counsel and Defendants' Board of Review confirmed that a remedy was not provided to Clean & Clear at the administrative level for the relief it sought. Accordingly, the doctrine of exhaustion of remedies is inapplicable in the present matter, and this Court possesses subject matter jurisdiction to decide the applicability of West Virginia Code § 16-2D-9(5), as applied to Clean & Clear under the current facts and circumstances."

(A.R. 261-263).

VI. ALTERNATIVELY, THE ICA'S DISMISSAL OF PETITIONER'S PREVIOUS NOTICE OF APPEAL FOR FAILURE TO PERFECT REPRESENTED A FINAL DECISION ON THE MERITS, AND THE CIRCUIT COURT ERRED IN FINDING THAT IT DID NOT HAVE JURISDICTION TO DECIDE PETITIONER'S COMPLAINT FOR EQUITABLE RELIEF.

In both its response to Motion to Dismiss and it Supplemental Brief, Petitioner asserted below as follows:

"Rule 41(b) [of the W. Va. Rules of Civil Procedure], entitled Involuntary Dismissal; effect thereof, provides, in pertinent part, '[u]nless the court in its order for dismissal provides otherwise, a dismissal under this subdivision and any dismissal not provided for in this rule, *other than a dismissal for lack of jurisdiction* or *for improper venue*, operates as an adjudication on the merits.' *Motto v. CSX Transp., Inc.*, 647 S.E.2d 848, 856 (W. Va. 2007) (emphasis in original)." (A.R. 70-165).

"By its Order in April of 2024, the ICA ***did not*** dismiss Clean & Clear's notice of appeal for lack of jurisdiction or improper venue. The ICA's dismissal represents an adjudication on the merits of Clean & Clear's appeal. Accordingly, Clean & Clear exhausted its remedies based on the ICA's final decision to dismiss." (*Id.*)

CONCLUSION

The Circuit Court below was presented with each of the arguments above in opposition Respondent's dismissal motion based on lack of jurisdiction for alleged failure to exhaust administrative remedies.

The Circuit Court initially denied dismissal, but then reversed course and granted dismissal based on the legally and factually distinguishable case of *SER Adkins v. Bailey*.

In doing so, the Circuit Court erred as a matter of law.

For the foregoing reasons, this Court should reverse the Circuit Court's Order Granting Defendant's Motion to Dismiss and remand this matter for consideration of the merits of Petitioner's Complaint for Declaratory and Injunctive Relief.

Respectfully submitted,

/s/ Sean W. Cook

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2025, true and accurate copies of the foregoing **Petitioner's Brief** were served upon counsel for Respondent via email and transmission and by filing electronically with the Intermediate Court of Appeal via FileServeXpress :

/s/ Sean W. Cook

Sean W. Cook, Esq. (WV Bar No. 10432)