IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
No. 25-298

CLEAN & CLEAR ADVANTAGE, LLC,
Petitioner,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH and WEST VIRGINIA OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION,
Respondents.

RESPONDENTS' BRIEF

Appeal from Dismissal
From the Circuit Court of Kanawha County
Civil Action No. 25-C-457

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RESPONSE TO STATEMENT OF THE CASE

The cause of action raised below by Petitioner Clean & Clear Advantage, LLC (CAC) seeks licensure for substance abuse rehabilitation beds beyond the state statutory limit. CAC operates a facility in Wood County, West Virginia. Per the Circuit Court's Order Granting Motion to Dismiss, "[i]n August of 2020, Clean & Clear was provided a license to operate a facility with 59 substance use treatment beds (SUD beds); then in October 2022, the license was amended to allow Plaintiff an additional 55 SUD beds." [JA 309] The Circuit Court of Kanawha County further found and the parties agree that "[o]n August 11, 2023, Defendant WVOHFLAC received an application to again amend Plaintiff's license to add 160 SUD beds. In [sic] 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." [JA 309]

West Virginia Code Section 16-2D-9 (5) provides that "Notwithstanding § 16-2D-8 and § 16-2D-11 of this code, these 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." At the time of CAC's August 11, 2023, application, Wood County could not license additional substance abuse treatment beds.

Facilities are licensed through a two-step process: Health Care Authority's (HCA) Certificate of Need and then licensure by the Office of Health Facility Licensure and Certification (OHFLAC). *See, e.g.,* W. Va. Code Section 16-2D-13; W. Va. CSR 64-12-3.1. CAC was statutorily exempt from the Certificate of Need process, needing only to submit information to HCA. W. Va. Code Section 16-2D-11(b)(23). Thereafter, CAC asserts it undertook additional construction, incurred expense relative to its planned expansion, yet its August 11, 2023, application for licensure was denied. In denying the application, OHFLAC responded in part as follows:

> This letter serves as formal notice that Clean & Clear Advantage's (CCA) Amended Application for License to Provide Behavioral Health Services has been denied. CCA's amended application has been denied because licensing the additional beds proposed would be a violation of W. Va. Code§16-2D-9, which states in pertinent part:
>
> > *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.*
>
> CCA was initially licensed in August 2020, by the Office of Health Facility Licensure and Certification (OHFLAC), for 59 substance abuse treatment beds (SUD beds) and 16 rehabilitation/detox beds. CCA's license was amended in October 2022 to allow CCA to open an additional *55* SUD beds. On August 11, 2023, OHFLAC received CCA's Application for Amended License requesting an additional 160 SUD beds.
>
> We understand that it has been part of CCA's plan to continue expanding and open more beds. However, once House Bill 3337 became effective on March 8, 2023, W. Va. Code §16-2D-9 prohibited OHFLAC from licensing any additional SUD beds in

> a county that already has greater than 250 SUD beds. With Wood County already well over the 250-bed limit, OHFLAC is statutorily prohibited from licensing CCA, or any other provider in Wood County, to have any additional SUD beds. [JA 47]

It is undisputed that, as the Circuit Court found, "[o]n October 20, 2023, Plaintiff undertook an administrative appeal of the [OHFLAC licensure] 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." [JA 56, JA 310]

Where an agency may have regulatory discretion or may be able to consider a waiver request from an applicant relative to its own policies, an agency such as OHFLAC has no authority to negotiate away West Virginia law. *Repass v. Workers' Comp. Div.,* 212 W. Va. 86, 102, 569 S.E.2d 162, 178 (2002). Indeed, ALJ Bishop found exactly that:

> The Board of Review is in receipt of Appellant's October 20, 2023, request for administrative appeal of Respondent's denial of a behavioral health services licensure amendment. Having considered Appellant's request, the Board of Review lacks the authority to grant relief based upon, 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. [JA 56]

Thereafter, pursuant to West Virginia's Administrative Procedures Act (APA), West Virginia Code Section 29A-5-4(b), CAC initiated the appeal process of the Board of Review's decision to the West Virginia Intermediate Court of Appeals (ICA). [JA 32] Specifically, CAC by and through then-counsel Isaac Foreman argued in the Notice of Appeal as follows:

> Clean & Clear seeks an order reversing the ALJ's decision or otherwise having the effect of causing OHFLAC to consider Clean & Clear's licensure amendment application notwithstanding W. Va. Code§ 16-2D-9(5). Because Clean & Clear spent substantial resources on construction in reliance of OHFLAC's permission to proceed, Clean & Clear has a vested right in its pre-existing exemption from certificate of need procedures. [JA 36]

Despite the timely filing of the Notice of Appeal, however, CAC failed to perfect its appeal on April 8, 2024 [JA 38]. Therefore, on or about April 12, 2024, this Court issued an administrative

dismissal order: "Pursuant to Rule 5(g) of the Rules of Appellate Procedure, this case is dismissed from the Court's docket." [JA 61, JA 310] The dismissal for failure to perfect was entered pursuant to West Virginia Rules of Appellate Procedure Rule 5, which states in pertinent part that "Failure by the petitioner to perfect an appeal will result in the case being dismissed from the docket." Rule 5 further provides that "If a party fails to comply with a scheduling order, the Intermediate Court or the Supreme Court may impose sanctions, or dismiss the appeal, or both." RAP Rule 5(e).

Pursuant to West Virginia's APA, a reviewing court "may affirm the order or decision of the agency or remand the case for further proceedings."

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

Finally, "[t]he judgment of the . . . the Intermediate Court of Appeals, . . . 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 §29A-6-1 of this code."

CAC did not move and, to date, has not moved this Court for leave to reopen its administrative appeal and pursue its arguments directly upon administrative appeal. Conversely, CAC initiated new process. On March 6, 2025, nearly a year after failing to perfect its administrative appeal, CAC sent notice of impending suit to West Virginia's Attorney General, Department of Health and OHFLAC. [JA 29] Thereafter, CAC filed suit on April 4, 2025, and the State Defendants filed a Motion to Dismiss in Lieu of Answer and memorandum in support, [JA 15ff] The parties below engaged in *inter alia* two full rounds of briefing, two substantive

hearings. The Circuit Court first denied and then granted the State's motion to dismiss based upon failure to exhaust. [JA 322]

It is axiomatic under West Virginia law that exhaustion is jurisdictional and that "[w]henever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket." Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.*, 158 W. Va. 492, 211 S.E.2d 705 (1975). Where Petitioner asserted below that it would refile after exhaustion (which it elected not to attempt), that process is not a threat. If CAC completes administrative process, it has the right to refile – but not until it accomplishes both. Syl. pt. 1 of *State ex rel. Adkins v. Bailey*, ___ W. Va. ___, 915 S.E.2d 364 (2025), is the standard precept as relates to all exhaustion: "The 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 the administrative body, and such remedy must be exhausted before the courts will act." Syl. Pt. 1, *Daurelle v. Traders Fed. Sav. & Loan Ass'n of Parkersburg*, 143 W. Va. 674, 104 S.E.2d 320 (1958)."

In *State ex rel Adkins,* the Supreme "Court has observed that the doctrine of exhaustion of administrative remedies serves a number of useful purposes including

> (1) permitting the exercise of agency discretion and expertise on issues requiring these characteristics; (2) allowing the full development of technical issues and a factual record prior to court review; (3) preventing deliberate disregard and circumvention of agency procedures established by Congress [or the Legislature]; and (4) avoiding unnecessary judicial decision by giving the agency the first opportunity to correct any error.
>
> *Sturm v. Bd. of Educ. of Kanawha Cnty.*, 223 W. Va. 277, 282, 672 S.E.2d 606, 611 (2008) (internal citation omitted)."

Each of those useful purposes would have aided the parties and the Circuit Court here. Even now, CAC has not provided arguments that would circumvent these benefits.

CAC does not deny that it failed to exhaust the administrative remedies as set out in the related statutes, regulations and even in the materials provided to Clean & Clear after its Board of Review appeal. (Petitioner's Brief at 5) Yet now, even on appeal, the issue before the Court is clear. Does CAC's failure to exhaust its administrative remedies deprive the Circuit Court of subject matter jurisdiction? As a matter of black letter law in West Virginia, failure to exhaust administratively deprives a party of access to circuit court for any civil process. Failure to exhaust deprived the Circuit Court of subject matter jurisdiction.

Where a finding of exigency can obviate the need for exhaustion, any review of the jurisprudence finds that exigency is something other than an unwise investment, a setback occasioned by a change in the law, passage of time. West Virginia's Supreme Court has found exigent active, ongoing misuse of water rights, where a delay wastes resources, or where an ongoing practice where a partner is liquidating partnership assets to pay itself exorbitant fees, where a delay becomes more injurious each day. Both of these were recognized as ongoing and exigent by West Virgina's Supreme Court. *Northeast Nat. Energy LLC v. Pachira Energy LLC*, 243 W. Va. 362, 844 S.E.2d 133 (2020). Conversely, a licensure denial from two years ago, an administrative process left pending for more than a year, a financial investment made with no evidence adduced of mitigation does not fit the mold.

Respondent's Statement of the Case.

CAC received serial licenses over time, allowing for an increased bed count at its facility in Wood County, West Virginia. [JA 137] After CAC had invested in building out its facilities to 300 SUD beds, CAC applied for additional licensure on August 11, 2023, and learned only then that West Virginia law had changed effective March 8, 2023. W. Va. Code Section 16-2D-9(5). In denying CAC's application, OHFLAC stated in part as follows:

> We understand that it has been part of CCA's plan to continue expanding and open more beds. However, once House Bill 3337 became effective on March 8, 2023, W. Va. Code §16-2D-9 prohibited OHFLAC from licensing any additional SUD beds in a county that already has greater than 250 SUD beds. With Wood County already well over the 250-bed limit, OHFLAC is statutorily prohibited from licensing CCA, or any other provider in Wood County, to have any additional SUD beds. [JA 47]

CAC asserts that it had relied upon an earlier draft of the legislation that would have allowed the expansion [Petitioner's Brief at 4], yet that version of the bill did not become law. CAC pursued an administrative appeal before the Board of Review, where ALJ Bishop upheld the denial as a matter of law. [JA 56] Then CAC filed a notice of appeal to the Intermediate Court of Appeals, this Court, and asserted that it "spent substantial resources on construction in reliance of OHFLAC's permission to proceed [such that] Clean & Clear has a vested right in its pre-existing exemption from certificate of need procedures." [JA 36] CAC failed to perfect its appeal and received an administrative dismissal. [JA 151] Over one year later, CAC filed suit.

The issues before the Circuit Court included whether CAC had failed to exhaust its administrative remedies and whether injunctive relief was available to it regardless. The Circuit Court held two hearings. On April 21, 2025, the Circuit Court denied the State's motion to dismiss and scheduled the evidentiary hearing for May 21, 2025, relative to the preliminary injunction. (Petitioner's Brief at 8). [JA 218] The second hearing was held after the Supreme Court of Appeals handed down *State ex rel. Adkins v. Bailey*, ___ W. Va. ___, 915 S.E.2d 364 (2025) and resulted in the Circuit Court's granting the State's motion to dismiss for failure of exhaustion. [JA 275, JA 305-06] At Syl. pt. 1, *Adkins* provides that "The 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 the administrative body, and such remedy must be exhausted before the courts will act." Syl. Pt. 1, *Daurelle v. Traders Fed. Sav. & Loan Ass'n of Parkersburg*, 143 W. Va. 674, 104 S.E.2d 320 (1958)." [JA 320]

West Virginia law cites the administrative process as concluded, absent further appeal, only after the issuance of the ICA's final decision, which was never reached here. West Virginia Code § 29A-5-4 (h). West Virginia Code Chapter 29A sets out the appellate process to challenge any administrative determination such as the licensure decision issued by OHFLAC. *Cleaver v. Big Arm Bar & Grill, Inc.,* 202 W. Va. 122, 128, 502 S.E.2d 438, 444 (1998). That is, CAC filed an administrative appeal to the Board of Review, filed a notice of appeal to this Court and thereby demonstrated knowledge of and appreciation for the mandated review, participated initially in same, and then failed to obtain a final decision. As such, CAC failed to exhaust the administrative process – the administrative remedies available to it. Below the State filed a motion to dismiss for failure to exhaust, further asserting that that failure deprived the Circuit Court of subject matter jurisdiction, of standing to proceed. *See Ragione v. Bd. of Educ.,* No. 17-0037, 2018 W. Va. LEXIS 16 *9, 2018 WL 300576 (W. Va. Jan. 5, 2018); *see also State ex rel. Devono v. Wilmoth,* 248 W. Va. 654, 889 S.E.2d 736 (2023). The Circuit Court reported the *Adkins* decision to the parties and sought briefs and argument relative to same.

"'[S]tanding is an element of jurisdiction over the subject matter.'" *State ex rel. Paul B. v. Hill,* 201 W. Va. 248, 256, 496 S.E.2d 198, 206 (1997) (quoting 21A Michie's Jurisprudence Words & Phrases 380 (1987)) (additional citation omitted). It has been the State's position that, as a matter of law, failure of exhaustion is a jurisdictional bar to CAC's process below, such that dismissal was necessary and proper until *inter alia* such time as exhaustion is accomplished, if ever. The Circuit Court's dismissal of CAC's cause of action must be upheld upon review.

SUMMARY OF RESPONDENT'S ARGUMENT.

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." Syl. Pt. 1, *Daurelle v. Traders Fed. Sav. & Loan Ass'n of Parkersburg*, 143 W. Va. 674, 104 S.E.2d 320 (1958)." Syl. pt. 1, *State ex rel. Adkins v. Bailey*, ___ W. Va. ___, 915 S.E.2d 364 (2025). *See also* Syl. Pt. 2, *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W. Va. 245, 183 S.E.2d 692 (1971); *State ex rel. Devono v. Wilmoth*, 889 S.E.2d 736, 743 (W. Va. 2023); Syl. Pt. 10, in part, *State ex rel. Miller v. Reed*, 203 W. Va. 673, 510 S.E.2d 507 (1998); Syl. Pt. 1, *Cowie v. Roberts*, 173 W.Va. 64, 312 S.E.2d 35 (1984). "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). 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).[1] Here, the APA provides an administrative remedy to entities such as CAC.

Respondent agrees with CAC that it is not *required* to appeal its administrative denial to this Court, just as it is true that no one is *required* to act to enforce his/her rights. CAC could have stopped at DHHR Board of Review ALJ Bishop's recognition of the statutory bar to the relief CAC seeks. However, as a matter of West Virginia law, when CAC elected to skip administrative review by this Court, the capstone process set out in West Virginia's Administrative Procedures

[1] The exhaustion requirement also applies to mandamus actions. "Mandamus is available only when all administrative remedies have been exhausted and when there is no other available adequate remedy." *State ex rel. Gooden v. Bonar*, 155 W. Va. 202, 210, 183 S.E.2d 697, 702 (1971) (citations omitted).

Act, W. Va. Code Section 29A-5-4 (g)(h), it precluded further process on the precise issue left open on its failed administrative challenges. As a matter of statute, "proceedings for judicial review of any final order or decision issued after June 30, 2022, ***must*** be instituted by filing an appeal to the Intermediate Court of Appeals as provided in §51-11-1 *et seq*. of this code." W. Va. Code §29A-5-4 (emphasis added). Judicial review of contested cases (emphasis added). It is beyond dispute that administrative process is not ***final*** until after the ICA issues its opinion. W. Va. Code Section 29A-5-4 (g), (h). That is, West Virginia law cites the administrative process as concluded, absent further appeal, only after the issuance of this Court's final decision, which by statute is limited to affirm, reverse, vacate, modify. That final order was never reached here. As a matter of law, then, CAC did not exhaust its administrative remedies.

CAC's failure to exhaust deprives the Circuit Court of subject matter jurisdiction. "Whenever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket." Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.*, 158 W. Va. 492, 211 S.E.2d 705 (1975).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Appellate Procedure, this matter would be suitable for Rule 19(a) oral argument in that the assignments of error arise from settled West Virginia law. However, given the similarities between this matter and the recent decision *State ex rel. Adkins v. Bailey*, ___ W. Va. ___, 915 S.E.2d 364 (2025), it is unclear that oral argument is necessary on these issues.

STANDARD OF REVIEW

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syllabus Point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc*., 194 W.Va. 770, 461 S.E.2d 516 (1995). Additionally, in the instances in which the facts are not in dispute, appellate review of legal questions of subject matter jurisdiction are reviewed de novo. *State ex rel. Hope Clinic, PLLC v. McGraw,* 245 W. Va. 171, 858 S.E.2d 221 (2021).

RESPONDENT'S ARGUMENT

I. THE CIRCUIT COURT CORRECTLY APPLIED WEST VIRGINIA LAW IN REQUIRING ADMINISTRATIVE EXHAUSTION AS A NECESSARY PREDICATE TO ANY CIVIL CAUSE OF ACTION.

As a matter of law, Plaintiff has not exhausted its administrative remedies.[2] West Virginia Code Chapter 29A sets out the appellate process to challenge any administrative determinations. *Cleaver v. Big Arm Bar & Grill, Inc.,* 202 W. Va. 122, 128, 502 S.E.2d 438, 444 (1998). That is, Clear and Clean Advantage filed a notice of appeal at the ICA, challenging Defendant OHFLAC's denial of its application on the basis of West Virginia Code § 16-2D-9 Health Services That Cannot Be Developed. [JA 122] In response to its notice of appeal, Clear and Clean received a Scheduling

[2] In its Brief, Petitioner makes several arguments for the first time including arguments that any requirement that it exhaust its administrative remedies before the ICA is unconstitutional. None of these arguments were made before the lower court. As such, this Court is required to disregard arguments made for first time on appeal. The Supreme Court of Appeals of West Virginia has held, "Our general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered." *Whitlow v. Bd. of Educ. of Kanawha County*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993); *Shrewsbury v. Humphrey*, 183 W. Va. 291, 395 S.E.2d 535 (1990); *Cline v. Roark*, 179 W. Va. 482, 370 S.E.2d 138 (1988). The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we have the benefit of its wisdom. *Whitlow*, 190 W. Va. at 226, 438 S.E.2d at 18. Therefore, this Court should not consider the constitutional arguments made in support of Petitioner's constitutional arguments as those arguments were not raised below. To the extent the Court determines that Petitioner's constitutional arguments, whether to consider these arguments is left to the Court's discretion. *Argus Energy, LLC v. Marenko,* 248 W. Va. 98, 103, 887 S.E.2d 223, 228 (2023).

Order, received the full administrative record – and yet failed to proceed further. That is, CAC demonstrated knowledge of and appreciation for that additional level of review, participated initially in same, and then failed to reach a final decision. [JA 127] As such, CAC failed to exhaust the administrative process – the remedies available to it. Thereafter, CAC filed civil suit in the Circuit Corut of Kanawha County, and the State defendants moved to dismiss CAC's failure to exhaust administrative remedies pursuant to Rule 12(b)(1) standard. *See Ragione v. Bd. of Educ.*, No. 17-0037, 2018 W. Va. LEXIS 16 *9, 2018 WL 300576 (W. Va. Jan. 5, 2018) (finding that dismissal of plaintiff's claims for failure to exhaust administrative remedies was proper under Rule 12(b)(1)); *see also State ex rel. Devono v. Wilmoth*, 889 S.E.2d 736 (2023) (reviewing Circuit Court's decision on failure to exhaust administrative remedies under a Rule 12(b)(1) standard). Additionally, "'standing is an element of jurisdiction over the subject matter.'" *State ex rel. Paul B. v. Hill*, 201 W. Va. 248, 256, 496 S.E.2d 198, 206 (1997) (quoting 21A Michie's Jurisprudence Words & Phrases 380 (1987)) (additional citation omitted). [JA 015] Argued State, as a matter of law, failure of exhaustion is a jurisdictional bar to Plaintiff's process here, such that dismissal is necessary and proper until *inter alia* such time as exhaustion is accomplished, if ever.[3] [JA 19-23]

CAC argues that the whole concept of an *administrative* appeal to the Intermediate Court of Appeals (an Article III *court*) is oxymoronic, nonsensical on its face, as an administrative appeal must be brought before an administrative tribunal. (Petitioner's Brief at 16) Therefore, by CAC's reasoning, CAC exhausted administratively when it appealed to the DHHR Board of Review and received ALJ Bishop's decision. CAC argues what it sees as the "fundamental distinction between administrative and judicial review." (Petitioner's Brief at 16) CAC argues that "there is no

[3] *See, e.g.,* West Virginia Rules of Appellate Procedure Rule 5(b).

reasonable interpretation supporting a finding that the ICA is an extension of the Respondent for purposes of administrative remedy exhaustion." (Petitioner's Brief at 17)

The Supreme Court in *State ex rel. Atkins v. Bailey* considered the role of the Legislature in crafting the APA. While the issue was not precisely the same, so the *Atkins* Court does not expressly address separation of powers, nonetheless, the *Adkins* Court considered the potential anomaly of Article III courts serving as capstone tribunal in an administrative appeal and then as the situs for civil litigation:

> Additionally, Respondents have created the "duplicative" process by filing a lawsuit in circuit court prior to exhausting their administrative remedies. Because the Legislature has enacted a mandatory administrative process, a claimant cannot avoid this process by creating a parallel judicial proceeding by filing a lawsuit before exhausting their administrative remedies in clear violation of West Virginia Code § 21A-7-19. Therefore, we find no support for the circuit court's ruling that Respondents met the duplicative exception to the exhaustion requirement.

Adkins, 915 S.E.2d 364, 377. The *Adkins* Court relies upon "that the Legislature['s] . . . clear, unambiguous direction on this issue." *Id.* at 378.[4] Therefore, where CAC argues that it is inappropriate, unseemly, a violation of the separation of powers for an Article III court to sit review over an administrative decision, West Virginia's Legislature has provided clear, unambiguous direction on this issue.

Petitioner works to distinguish the administrative process before the Supreme Court in *Adkins* and that at issue here, citing that in *Adkins* as a dedicated, particularized, more pointed statute. (Petitioner's Brief at 7, 25-28) Petitioner alleges that the APA does not mandate appeal to

[4] Where Petitioner raises these constitutional, separation of powers issues on appeal, those issues were not raised before the Circuit Court. West Virginia law allows this Court the discretion to address issues raised for the first time on appeal, although more usually those would be beyond the scope of proceedings here. *See Greaser v. Hinkle,* 245 W. Va. 122 n.7, 857 S.E.2d 614 n. 7 (2021); *Mayhew v. Mayhew,* 205 W. Va. 490, 519 S.E.2d 188 (1999)*, citing Koffler v. City of Huntington, 196 W. Va. 202, 207 n.6, 469 S.E.2d 645, 649-650 n.6 (1996). But see Argus Energy, LLC v. Marenko,* 248 W. Va. 98, 103, 887 S.E.2d 223, 228 (2023).

the ICA in order to achieve exhaustion of administrative remedies, but instead, is an enabling statute that creates a right rather than a requirement. *Id.* However, of note, the *Adkins* decision relies not upon WorkForce's dedicated statute in upholding exhaustion, but rather upon West Virginia's general exhaustion precepts, such as at Syl. pt. 1:

> "The 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 the administrative body, and such remedy must be exhausted before the courts will act."Syl. Pt. 1, *Daurelle v. Traders Fed. Sav. & Loan Ass'n of Parkersburg*, 143 W. Va. 674, 104 S.E.2d 320 (1958)."

Therefore, despite any difference in the particularities of the underlying statutes, the Supreme Court in *Adkins* tracks the law in West Virginia, indeed, the law in West Virginia at least since 1958.

Prior to creation of the ICA, West Virginia's Supreme Court of Appeals commented on its bases and role in administrative review. *Ashland Specialty Co. v. Steager*, 241 W. Va. 1, 9, 818 S.E.2d 827, 835 (2018). The Court differentiated its legal toolbox in reviewing administrative decisions and its toolbox relative to appeals from circuit courts. The Supreme Court found that different authorities guide its review under West Virginia Code § 29A-5-4(g) and the APA's interpretive case law than in the appeals from circuit courts, for instance. The authorities related to administrative review sufficiently provide for the ICA's review of the Board of Review's decision. *See, e.g.,* Syl. pt. 2, *Duff v. Kanawha Cnty. Comm'n*, 250 W. Va. 510, 905 S.E.2d 528 (2024). Indeed, as recently as September 30, 2025, the Supreme Court of West Virginia confirmed yet again in Rules of Appellate Procedure Rule 1 that

> The Intermediate Court has appellate jurisdiction of the following: (1) Final judgments or orders of a circuit court in <u>all</u> civil cases, <u>including but not limited to civil cases where</u> <u>there is a request for legal or equitable relief</u> [emphasis in original], entered after June 30, 2022. The Supreme Court may, on its own motion or by motion of a party, obtain jurisdiction over any civil case filed in the Intermediate Court; (2) Final judgments or orders of a family court, entered after June 30, 2022, except appeals from

> final judgments or orders issued by a family court in any domestic violence proceeding shall first be made to a circuit court; (3) Final judgments or orders of a circuit court concerning guardianship or conservatorship matters, entered after June 30, 2022; (4) **Final judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022;** [emphasis added] (5) Final orders or decisions of the Health Care Authority issued prior to June 30, 2022, in a certificate of need review, but transferred to the jurisdiction of the Intermediate Court upon termination of the Office of Judges; (6) Final orders or decisions issued by the Office of Judges after June 30, 2022, and prior to its termination; and (7) Final orders or decisions of the Workers' Compensation Board of Review, entered after June 30, 2022.

Approval of Amendments to Rule 1 of the Rules Of Appellate Procedure, No. 24-319 (9.30.25). Further, where Petitioner relies upon *State v. Huber*, 129 W. Va. 198, 40 S.E.2d 11 (1946), relative to any failure of separation of powers, the Supreme Court has found salient that

> [t]he principle is also firmly established that any doubt as to the constitutionality of an act of the Legislature will always be resolved in favor of the validity of the statute. *State v. Harrison, 130 W. Va. 246, 43 S.E.2d 214*; *State ex rel. Cosner* v. *See*, *129 W. Va. 722, 42 S.E.2d 31*; *State v. Furr, 101 W. Va. 178, 132 S.E. 504*; *Ex parte McNeeley, 36 W. Va. 84, 14 S.E. 436, 15 L.R.A. 226*; *Bridges v. Shallcross, 6 W. Va. 562*. In passing upon the validity of a statute which is challenged as violative of the Constitution of this State, every reasonable construction will be resorted to by the court to sustain its constitutionality. *State ex rel. Cosner* v. *See*, *129 W. Va. 722, 42 S.E.2d 31*; *West Central Producers Co-Operative Association v. Commissioner of Agriculture, 124 W. Va. 81, 20 S.E.2d 797*; *State v. Massie, 95 W. Va. 233, 120 S.E. 514*; *State v. England, 86 W. Va. 508, 103 S.E. 400*; *Coal and Coke Railway Company v. Conley and Avis, 67 W. Va. 129, 67 S.E. 613*; *Hooper v. California, 155 U.S. 648, 15 S. Ct. 207, 39 L. Ed. 297*.

Walter Butler Bldg. Co. v. Soto, 142 W. Va. 616, 625, 97 S.E.2d 275, 282 (1957). *See also Id.* at Syl pt. 3, "Any doubt as to the constitutionality of an act of the Legislature will always be resolved in favor of the validity of the statute." The Administrative Procedures Act was passed in 1964 and has been amended twice (in 1998 and 2021), neither instance changing the judicial review component. In 2024, the Supreme Court heard 124 administrative appeals,[5] while, in 2023, the ICA heard 230.[6] Indeed, the Supreme Court in *Adkins* expressly upheld the APA as a clear and

[5] 2023-2024 SCA QuickView Stats - Final
[6] 2022-2023 ICA QuickView Stats.pdf

unambiguous statement of legislative intent. 915 S.E.2d 364, 378. Where Petitioner alleges that an absurd result awaits, should it be sent to achieve exhaustion (Petitioner's Brief at 23) [*see also* 915 S.E.2d at 377], it bears noting that, even now, Petitioner seeks appellate relief from the same tribunal that would review the claims on administrative appeal. It is unclear what relief Petitioner seeks now through this appeal to the ICA that could not be available from this same tribunal on administrative appeal, if CAC had moved or would move for leave to complete that process. The dismissal by the Circuit Court was the necessary and proper outcome here and must be upheld on appeal.

II. THE CIRCUIT COURT CORRECTLY RELIED UPON THE EXHUASTION PRINCIPLE AS SET OUT IN *STATE EX REL. ADKINS V. BAILEY.*

During the pendency of the matter below, the Supreme Court of Appeals released the *Adkins* decision that provides guidance relative to administrative exhaustion. In response to State's initial motion to dismiss for failure of exhaustion, the Circuit Court found that exhaustion was not an issue and that the appropriate questions before the Court were tied to injunctive relief. [JA 95-106, JA 209] Specifically, at the April 21,2025, hearing, the Court held that "a plaintiff has a right of venue as long as the defendant is in that place, then I think the plaintiff is -- should be given some flexibility with regard to administrative remedies route or court action right. So on that basis, I deny the defendant's motion to dismiss for -- for plaintiff's alleged failure to exhaust administrative remedies." [JA 209] Both parties thereafter contacted the Circuit Court, seeking clarification. [JA 95-106] It is correct as Petitioner asserts that the Court responded with an additional hearing on May 2, 2025. (Petitioner's Brief at 24) Respondent agrees that "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." (Petitioner's Brief at 24) The parties briefed the exhaustion issue in light of the *Adkins* decision.

The State Defendants below argued that *State ex rel. Adkins v. Bailey* provides guidance to the Circuit Court, as the question before the Court in *Adkins* was whether a claimant is required to exhaust its administrative remedies before it is entitled to bring a claim before a West Virginia circuit court, even if that claim is seeking extraordinary relief. *See generally State ex rel. Adkins v. Bailey*, ___ W. Va. ____, 915 S.E.2d 364 (2025). Specifically, the *SER Adkins* appeal dealt with whether a circuit court in West Virginia has subject matter jurisdiction where a group of plaintiffs brought claims for injunctive and declaratory relief against a state agency (Workforce West Virginia) after the agency determined that the claimants had been overpaid unemployment benefits and sought repayment. *Id*. at 368-370. The circuit court in that matter determined that it had subject matter jurisdiction over the plaintiffs' extraordinary claims despite the fact that they had not exhausted their administrative remedies. *Id*. at 370. In assessing the circuit court's decision, the Supreme Court stated, "Our 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 the administrative body, and such remedy must be exhausted before the courts will act.'" *Id*. at 374. The Supreme Court reasoned that there was nothing to support an argument that the plaintiffs did not have to exhaust their administrative remedies prior to the lower court gaining subject matter jurisdiction. *Id*. at 377. Therefore, the Supreme Court remanded the case to circuit court with the direction to grant the motion to dismiss. *Id*. at 378.

It also bears noting that the concept of administrative exhaustion is not new to *Adkins.* Where Petitioner argues that WorkForce's dedicated, expressly mandatory exhaustion statute showcased in

Adkins is different, expects more (Petitioner's Brief at 26), the truth of the matter is that the Court in *Adkins* relies upon the general concept of exhaustion as reflected in West Virginia jurisprudence. Indeed, the exhaustion syllabus point in *Adkins* is unrelated to WorkForce. Syl. pt. 1, *Adkins,* citing syl. pt. 1, *Daurelle v. Traders Fed. Sav. & Loan Ass'n of Parkersburg*, 143 W. Va. 674, 104 S.E.2d 320 (1958), raising exhaustion by and through the Federal Home Loan Bank Board. Further, the Court in *Adkins* relies upon *Redd v. McDowell County Bd. of Educ.*, 2016 W. Va. LEXIS 352, 2016 WL 2970303, a memorandum decision), which addresses exhaustion under the West Virginia Public Employees Grievance Board.

Petitioner argues that *Adkins* is not controlling here, as it is factually and/or legally distinguishable. Petitioner's Brief at 26, citing *Daily v. Bechtel Corp.* 157 W. VA. 1023, 207 S.E.2d 169 (1974). However, the lesson from *Adkins* is that the concept of exhaustion is fundamental, universal, whether the underlying subject matter is unemployment benefits, savings and loan associations, assistant principals or substance abuse beds. Exhaustion is the rule not the exception, and Petitioner has not demonstrated why the rule does not apply to it here. Where Petitioner argues that *Adkins* was different because the claimants had pending administrative appeals when they filed suit – as opposed to CAC that filed suit after administrative dismissal (Petitioner's Brief at 28), the claimant in *Redd* had eschewed continued administrative appeals as well on the basis that she was "not wasting money on appeals, that's number one. I don't think that was winnable." 2016 W. Va. LEXIS 352, *6. In *Durelle,* the Supreme Court upheld the lower court's finding that "The petitioner has failed to invoke and exhaust an available administrative remedy to obtain the relief which he seeks and, for that reason, is not entitled to judicial relief and can not [sic] maintain this proceeding in mandamus[.]" 143 W. Va. 674, 677; 104 S.E.2d 320, 324. The status of the underlying administrative remedy has not been determinative to the Supreme Court upon review.

In the instant case, as was the case in *Adkins*, an administrative remedy is available to Petitioner

under the West Virginia Code of State Rules and under the Administrative Procedures Act nothing Petitioner has asserted upon appellate review changes the fact that Petitioner failed to exhaust the administrative remedy available to it. By the express terms of the APA and the Rules of Appellate Procedure, a procedural dismissal for failure to perfect does not constitute the appellate review that leads to upholding, reversing, vacating, or modifying the order or decision of the agency that constitutes appellate review by the ICA. Because Petitioner failed to exhaust its administrative remedies, this Court should find, as our Supreme Court found in *Adkins*, that the Circuit Court correctly found that it lacks subject matter jurisdiction to proceed.

III. THE CIRCUIT COURT CORRECTLY FOUND THAT PETITIONER'S CASE FOR EXTRAORDINARY RELIEF COULD NOT TRUMP ADMINISTRATIVE EXHAUSTION, AN ISSUE ADDRESSED EXPRESSLY IN *ADKINS.*

Petitioner argues that West Virginia's APA expressly does not preclude it from pursuing equitable relief. (Petitioner's Brief at 30). Petitioner argues pointedly that West Virginia Code Section 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.'" *Id,* quoting W. Va. Code § 29A-5-4. Petitioner argues once more that the APA is different from the statute at issue in *Adkins,* as West Virginia Code Section 21A-7-19 does not provide the APA's alleged safe harbor, the 'other means of review, redress, or relief provided by law.' (Petitioner's Brief at 31) However, in so arguing, Petitioner fails to focus on the *Adkins* Court's discussion of mandamus and the discussions by the Court in the authorities that are the foundational to *Adkins,* as follows.

The plaintiffs in *Adkins* argued to the circuit court there similarly to Petitioner here, and the circuit court there adopted same:

> exhaustion of remedies is unnecessary because Mandamus and other extraordinary remedies are not options in [WorkForce's] administrative adjudication process, and Plaintiff[s] [have] pled sufficient irreparable harm if ordered to expend individual resources exhausting all remedies; [WorkForce's] § 21A-10-21 collections in

> excess of the two-year time bar, by contrast, may be addressed in single orders by a court of general jurisdiction.

Id. t 370. In review, the *Adkins* Court relied expressly upon *Redd* where petitioner sought mandamus because of the monetary damages available there. The *Adkins* Court quoted *Redd's* reasoning: "the grievance board's inability to award certain types of damages [does] not prevent the doctrine of exhaustion of administrative remedies from applying to this case." 915 S.E.2d at 377, quoting *Redd,* 2016 W. Va. LEXIS 352, [WL] at *5, fn.13. The *Adkins* Court expressly stated that "We agree [with the Court in *Redd]* and find that [the claimant's in *Adkins]* request for mandamus relief in the instant case does not relieve them from exhausting their administrative remedies."

Further, in *Redd,* the Supreme Court expressly considered *Ewing v. Board of Educ*., 202 W. Va. 228, 503 S.E.2d 541 (1998), relative to a claimant's "obtain[ing] relief from the adverse decision in one of two ways."

> First, he/she may request relief by mandamus as permitted by W. Va. Code § 18A-4-7a. In the alternative, he/she may seek redress through the educational employees' grievance procedure described in [currently, W. Va. Code §§ 6C-2-1 to 6C-2-8].

Redd, *9-10. However, after identifying two choices – mandamus or grievance – the *Ewing* Court held that in West Virginia Code Section 6C-2-1, "the Legislature made clear its intention to resolve grievances through the statutorily provided procedure so that redress may be had in a 'fair, efficient, cost-effective and consistent manner.'" Further reasoned the *Ewing* Court as adopted within *Redd,*

> In Syllabus Point 2 of *State ex rel. Smith v. Thornsbury,* 214 W.Va. 228, 588 S.E.2d 217 (2003), we reiterated that '[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 the administrative body, and such remedy must be exhausted before the court will act.' (Internal quotations and citations omitted.)

The Supreme Court in *Adkins, Redd* and *Ewing* finds great value and economy in enforcing administrative exhaustion even in instances where mandamus is offered as a clear choice as well. Likewise here, Petitioner would rely upon the 'other means of redress' language but provides no compelling West Virginia law that would obviate the Supreme Court's express and repeated preference for and belief in the exhaustion available and necessary through administrative appeals. For this reason, Petitioner's claim must fail.

IV. PETITIONER WAS REQUIRED TO APPEAL THE ADMINISTRATIVE DETERMINATION BY ALJ BISHOP BUT ONLY TO THE EXTENT THAT IT SOUGHT TO PURSUE CIVIL REMEDIES THEREAFTER.

Petitioner argues that it achieved all of the exhaustion that should matter, as it pursued its remedies within the agency, up to the WVDHHR Board of Review. (Petitioner's Brief at 31) Also, Petitioner alleges that it pursued the first level of administrative review even given that Respondent acknowledged administrative appeal would be futile or unavailable. (Petitioner's Brief at 31) [JA 144] Respondent denies the assertion of futility as an unadjudicated "fact" that Petitioner drags across this path, a quintessential red herring. However, even assuming futility were an adjudicated or admitted fact from below, it does not affect outcome here as the Supreme Court has considered instances of petitioners who prognosticate an adverse outcome and has found it unavailing. That is, where CAC predicts it would or must fail on administrative appeal before this Court, the Supreme Court has addressed that argument, finding it unpersuasive.

In *Adkins,* the Supreme Court identified futility as an exception to exhaustion (*Id.* at 377 n.21) but clarified that an expectations of adverse outcome does not constitute futility. Specifically, in *Adkins,* the Court addressed the subject petitioners' assertion that having to pursue administrative remedies would be "duplicative and futile." *Id.* at n.21. The *Adkins* Supreme Court reasoned that

> there is no evidence that an ALJ or BOR would not rule in a claimant's favor in a particular overpayment determination case. In fact, one of the Respondents herein, Ms. Baldwin, pursued such administrative process and the ALJ ruled in her favor. The BOR

> subsequently ruled, in part, in her favor. Therefore, we find no support for the circuit court's finding that a claimant participating in the mandatory administrative process would be an exercise in futility.

Perhaps the absurdity of Petitioner's pursuing this appeal to the ICA relative to this argument has escaped it. Here CAC is dedicating energies and resources to this tribunal's review even while arguing that any administrative appeal to ICA would be pointless. [JA 032] To the extent that Petitioner seeks a positive resolution before the ICA on direct appeal, it is nonsensical to believe that the same resolution could not be available to it on administrative appeal. Where the administrative appeal raised an issue not expressly identified in the civil suit (detrimental reliance), nonetheless, Petitioner has options relative to the scope of its arguments in any motion for leave to go back and exhaust.

West Virginia has an additional administrative appeal tribunal available and mandated for Clean and Clear. West Virginia law does not support Clean and Clear's *sua sponte* allowing itself a hard pass to that relief. The Circuit Court's dismissal must be upheld as a clear statement of West Virginia law.

V. A DISMISSAL FOR FAILURE TO PROSECUTE DOES NOT ACCOMPLISH ADMINISTRATIVE EXHAUSTION, WHICH IS LIMITED BY STATUTE TO THE REVIEWING COURT'S AFFIRMING, REVERSING, VACATING OR MODIFYING.

Where an agency may have regulatory discretion or may be able to consider a waiver request from an applicant relative to its own policies, an agency such as OHFLAC has no authority to negotiate away West Virginia law. *Repass v. Workers' Comp. Div.,* 212 W. Va. 86, 102, 569 S.E.2d 162, 178 (2002). Indeed, ALJ Bishop found exactly that:

> The Board of Review is in receipt of Appellant's October 20, 2023, request for administrative appeal of Respondent's denial of a behavioral health services licensure amendment. Having considered Appellant's request, the Board of Review lacks the authority to grant relief based upon, 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. [JA 56]

Thereafter, pursuant to West Virginia's Administrative Procedures Act (APA), West Virginia Code Section 29A-5-4(b), CAC initiated the appeal process of the Board of Review's decision to this Court, the West Virginia Intermediate Court of Appeals (ICA). [JA 32] Specifically, CAC by and through then-counsel Isaac Foreman argued in the Notice of Appeal as follows:

> Clean & Clear seeks an order reversing the ALJ's decision or otherwise having the effect of causing OHFLAC to consider Clean & Clear's licensure amendment application notwithstanding W. Va. Code§ 16-2D-9(5). Because Clean & Clear spent substantial resources on construction in reliance of OHFLAC's permission to proceed, Clean & Clear has a vested right in its pre-existing exemption from certificate of need procedures. [JA 36]

Despite the timely filing of the Notice of Appeal, however, CAC failed to perfect its appeal on April 8, 2024 [JA 38]. Therefore, on or about April 12, 2024, this Court issued an administrative dismissal order: "Pursuant to Rule 5(g) of the Rules of Appellate Procedure, this case is dismissed from the Court's docket." [JA 61, JA 310] The dismissal for failure to perfect was entered pursuant to West Virginia Rules of Appellate Procedure Rule 5, which states in pertinent part that "Failure by the petitioner to perfect an appeal will result in the case being dismissed from the docket." Rule 5 further provides that "If a party fails to comply with a scheduling order, the Intermediate Court or the Supreme Court may impose sanctions, or dismiss the appeal, or both." RAP Rule 5(e).

Pursuant to West Virginia's APA, a reviewing court "may affirm the order or decision of the agency or remand the case for further proceedings."

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

Further, "[t]he judgment of the . . . 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 §29A-6-1 of this code." The administrative order for failure to prosecute falls outside the express terms of what the ICA may do as the final layer of review: reverse, vacate, modify, uphold.

CAC did not move and, to date, has not moved this Court for leave to reopen its administrative appeal and pursue its arguments directly upon administrative appeal. Conversely, CAC initiated new process. On March 6, 2025, nearly a year after failing to perfect its administrative appeal, CAC sent notice of impending suit to West Virginia's Attorney General, Department of Health and OHFLAC. [JA 29] Thereafter, CAC filed suit on April 4, 2025, and the State Defendants filed a Motion to Dismiss in Lieu of Answer and memorandum in support, [JA 15ff] The parties below engaged in *inter alia* two full rounds of briefing, two substantive hearings. The Circuit Court first denied and then granted the State's motion to dismiss based upon failure to exhaust.

Conclusion.

Respondents request that this Honorable Court uphold the dismissal of Circuit Court of Kanawha County Civil Action Number 25-C-457 as in compliance with West Virginia law, including *State ex rel Adkins v. Bailey,* ___ W. Va. ___, 915 S.E.2d 364 (2025).

WEST VIRGINIA DEPARTMENT OF HEALTH and WEST VIRGINIA OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION,
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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
No. 25-298

CLEAN & CLEAR ADVANTAGE, LLC,
Petitioner,

v.

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

CERTIFICATE OF SERVICE

I, Roberta F. Green, certify that I have this 19th day of November, 2025, served a true copy of the foregoing **RESPONDENTS' BRIEF** to the following individual(s) through electronic service:

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