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.

Reply Brief of Petitioner, Clean & Clear Advantage, LLC

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SUMMARY OF ARGUMENT

In its response brief, Respondent fails to provide any compelling basis or authority in opposition to the Petitioner's brief that would persuade this Court to uphold the Circuit Court's decision below.

As an initial and determinative matter, Respondent's positions are fundamentally flawed because they are exclusively based on the legal fiction that Petitioner's option to seek judicial review from the Intermediate Court of Appeals ("ICA") created an obligation to do so in order to exhaust administrative remedies.

Accordingly. the Circuit Court erred in dismissing Petitioner's complaint for lack of subject matter jurisdiction.

The plain language of West Virginia Code § 29A-5-4(a) expressly preserves "other means of review, redress, or relief provided by law" beyond the APA's own appeal mechanism. This savings clause, consistently recognized by West Virginia courts including in *Brown v. Civil Service Commission* and most recently in *Downs-Jamal v. Department of Health & Human Resources*, permits Petitioner to seek declaratory and injunctive relief in circuit court as an alternative to an APA appeal to the ICA.

Respondent's characterization of this case as involving a failure to exhaust administrative remedies reflects a fundamental misunderstanding of the judicial system. The ICA is a court, not an administrative agency. Once Respondent's Board of Review issued its final order, all administrative remedies were exhausted. Petitioner's choice to invoke circuit court jurisdiction rather than ICA jurisdiction does not constitute a failure to exhaust administrative remedies—it represents a choice between two judicial forums, a choice expressly preserved by statute.

Moreover, the *SER* *Adkins* ("*Adkins*") decision upon which the Circuit Court relied is inapplicable for two critical reasons Respondent fails to address:

First, *Adkins* interpreted a specific unemployment statute requiring exhaustion before seeking judicial review, whereas § 29A-5-4 contains no such mandatory language and instead preserves alternative remedies. Second, *Adkins* involved an ongoing administrative proceeding that had been remanded to the agency; here, the administrative process concluded with the Board of Review's final order.

To the extent any ambiguity exists in how §§ 29A-5-4(a) and (b) operate together, West Virginia law requires that ambiguity be resolved to preserve—not eliminate—access to judicial remedies. Remedial statutes must be liberally construed, constitutional rights of access to courts must be protected, and traditionally available equitable remedies must be maintained.

Moreover, Respondent mischaracterizes the judicial record, and demonstrates a fundamental misunderstanding of the determinative legal issues currently before this Court.

ARGUMENT

I. Respondent fails to adequately address the plain language of the APA expressly preserving additional and alternative judicial remedies.

West Virginia's Administrative Procedure Act (APA) expressly safeguards the availability of judicial relief outside the APA's own appeal mechanism. The statute provides that any party aggrieved by a final agency decision "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(a)(emphasis added). This "savings clause" reflects a deliberate legislative choice to preserve alternative judicial remedies even when an APA appeal is available.

In *Brown v. Civil Service Commission*, the Supreme Court of Appeals gave full effect to this clause, and refused to treat the APA as an exclusive path. *See, id.* 155 W.Va. 657, 186 S.E.2d 840 (W. Va. 1972),

The *Brown* Court found "no repugnancy or irreconcilable conflict" between the APA and a different statute providing a special route of appeal, precisely because §29A-5-4(a) declares that the APA does not displace other remedies. *Id.* at 660, 843. In other words, the Legislature's retention of the savings clause means that an aggrieved party may pursue "other means of review, redress or relief provided by law" outside the APA process.

In *Halstead in State ex rel. Stewart v. Alsop*, 207 W.Va. 430, 533 S.E.2d 362 (2000), the Court granted a writ of mandamus to prevent a circuit court from joining the state superintendent of schools in an action against a county board of education on an employment issue. In support, the *Alsop* Court observed,

> "that although W. Va. Code § 29A-5-4 governs only appeals from administrative decisions, the statute does not preclude a party from seeking relief from an administrative decision through an extraordinary writ. It is specifically provided under W. Va. Code § 29A-5-4(a) that 'nothing in this chapter shall be deemed to prevent other means of review, redress or relief provided by law.' When a party seeks to challenge an administrative decision through an extraordinary writ, he/she does so under the authority of the statutes permitting such writs."

Id. at 207 W.Va. at 433, 533 S.E.2d at 365, n. 4 (citations omitted).

Similarly, Petitioner's decision to pursue an alternate form of judicial action (a declaratory judgment and injunction in circuit court) falls squarely within the "other means of ... relief provided by law" that the APA expressly preserves. The APA's text forbids interpreting the statute in a way that would abolish such alternate remedies.

Just last month, the Supreme Court of Appeals of West Virginia reaffirmed the application of the alternative remedies portion the APA: "See generally W. Va. Code § 29A-5-4(a) (nothing in the State Administrative Procedures Act 'shall be deemed to prevent other means of review, redress, or relief provided by law.')." *Downs-Jamal v. Dep't of Health & Human Res.*, No. 23-432, mem. dec. (W. Va. Nov. 13, 2025), pg. 4, f.n. 6.

Accordingly, the Circuit Court below erred in dismissing Petitioner's Complaint because the law establishes that the APA route is *not* exclusive. Holding otherwise would read the alternative remedies clause out of the statute, and violate the fundamental rule that every provision of a statute must be given meaning and effect. By its plain terms, §29A-5-4(a) protects Petitioner's right to seek court review through a different lawful avenue, and that legislative directive should be respected.

II. Respondent fails to provide an explanation for its continued mischaracterization of the ICA as an administrative rather a judicial body.

In its Response, Respondent continues to incorrectly characterize Petitioner's failure to perfect an APA appeal to the ICA as a failure to "exhaust administrative remedies." This is a categorical error.

An appeal to the Intermediate Court of Appeals is ***a judicial proceeding***, not a step in the administrative process. By the time an aggrieved party is entitled to invoke §29A-5-4, the agency has already rendered a final order in a contested case – meaning the administrative process is complete. The doctrine of ***exhaustion of administrative remedies*** requires a party to pursue all available relief within the agency *before* turning

to the courts. Once the agency's decision is final, the administrative remedies are exhausted.

The ICA, as a constitutionally authorized appellate court, is part of the judicial branch, not an administrative tribunal. Thus, not filing an appeal in the ICA is not a failure to obtain some further administrative decision.

Petitioner pursued relief through the courts via an injunction and/or declaratory judgment action, rather than through a direct APA appeal to the ICA. But by doing so it did not leave any administrative remedy unexhausted – it simply chose one judicial avenue over another. Indeed, Petitioner had already obtained a final agency position – more specifically, a final order issued by Respondent's Board of Review refusing to act on its application for an amended license.

Therefore, it is doctrinally incorrect to treat the absence of an ICA appeal as a failure to exhaust administrative remedies. The exhaustion doctrine simply does not apply to a choice among judicial forums once the administrative process has ended. Petitioner satisfied the exhaustion requirement by obtaining a final administrative decision, and nothing in law required it to *additionally* "exhaust" a judicial appeal route before invoking the jurisdiction of another court.

The Respondent does not nor could it explain away the fact that ICA review is judicial in nature. The Constitution and statutes establishing the Intermediate Court of Appeals (W. Va. Code §51-11-1 *et seq.*) make clear that the ICA is part of the judiciary, exercising appellate jurisdiction. It is not an "administrative" body or a prerequisite to judicial involvement – it *is* judicial involvement. Therefore, Petitioner's decision to invoke the circuit court's jurisdiction rather than the ICA does not offend the exhaustion doctrine.

III. W. Va. Code § 29A-5-4(b) governs APA appeal venue and timing, and does not abrogate subsection (a)'s alternative legal remedies provision.

The 2021 amendments to the APA introduced §29A-5-4(b), directing that agency orders issued after June 30, 2022 are to be reviewed in the new Intermediate Court of Appeals (ICA) instead of the circuit courts. Subsection (b) thus changed the *forum* for APA appeals – creating an appeal of right to the ICA – but it did not purport to eliminate the *alternative* routes preserved in subsection (a). In fact, the Legislature pointedly left subsection (a)'s savings clause intact when enacting the ICA venue requirement.

The phrase in subsection (b) stating that proceedings for review "must be instituted by filing an appeal to the Intermediate Court of Appeals is an instruction about where an APA appeal shall be taken. This ensures that if a party proceeds "under this chapter" (i.e. pursues the APA's method of judicial review), the exclusive venue is the ICA, overriding older statutes that had sent such appeals to circuit court.

But nothing in subsection (b) repeals or limits subsection (a)'s authorization of other forms of judicial relief. To the contrary, these provisions address different subjects and can be read in harmony. Subsection (a) guarantees an aggrieved party's right to judicial review (while preserving other remedies), and subsection (b) merely channels the *APA-mode* of judicial review to a particular court and timeframe.

Accordingly, reading subsection (b) as an implied repeal of all non-APA remedies would violate settled rules of construction.

The new subsection (b) can be given full effect by funneling standard APA appeals to the ICA *without* nullifying subsection (a). The more sensible reconciliation is that subsection (b) governs the procedure and venue *when a party elects to invoke APA*

judicial review, while subsection (a) preserves the party's option to seek other judicial relief as provided by law.

IV. Respondent fails to address the two crucial distinctions identified by Petitioner in its brief establishing that the *Adkins* decision is inapplicable to the current matter.

First, the *Adkins* decision specifically addressed exhaustion of administrative remedies under the unemployment benefits statute, rather than W. Va. Code § 29A-5-4 on which Respondent exclusively relies. *See*, Petitioner's brief at pp. 26-28.

In finding a failure to exhaust administrative remedies, the *Adkins* Court based its decision 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).

To the contrary, 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.

Second, unlike in the current matter, the *Adkins* decision was based on the fact that there was an ongoing administrative appeal before a state agency. *See*, Petitioner's Brief, pp. 28-30.

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[.]" *Adkins* at *10 (emphasis added).

"[Plaintiff/Claimant/Respondent] ***Ms. Baldwin's administrative appeal remains active and ongoing***." *Id.* (emphasis added).

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

Respondent's refusal to acknowledge and address these two critical distinguishing factual and legal differences does not extinguish their existence.

Accordingly, the Circuit Court erred in reversing its initial denial of Respondent's dismissal motion, and in subsequently granting dismissal based exclusively on the *Adkins* decision.

V. To the extent ambiguity exists in the APA, statutory interpretation must be undertaken in favor of the Petitioner.

As exhaustively asserted by Petitioner throughout the current appellate proceedings and those below, the plain language of §29A-5-4(a) provides authority to pursue its action for equitable relief before the Circuit Court, and perfection of an appeal with the ICA was not required to exhaust administrative remedies.

However, to the extent that any ambiguity exists in how §§ 29A-5-4(a) and (b) operate together, that ambiguity must be resolved in a manner that preserves, not restricts, a party's access to the courts and to traditional equitable remedies.

When West Virginia statutes are ambiguous, the resolution is clear: courts must construe them to:

(a) Give effect to their remedial purpose (liberal construction).

The West Virginia Supreme Court of Appeals has consistently held that remedial statutes—statutes designed to provide access to relief—must be construed liberally in favor of preserving, not eliminating, avenues for redress. In *State ex rel. City of Wheeling Retirees Ass'n, Inc. v. City of Wheeling*, 185 W. Va. 380, 383, 407 S.E.2d 384, 387 (1991), the Court stated unequivocally: "The policy that a remedial statute should be liberally construed in order to effectuate the remedial purpose for which it was enacted is firmly established."

This principle was reaffirmed by the Intermediate Court of Appeals in *In Re: Petition of D.K. for Expungement of Record*, No. 22-ICA-122 (W. Va. Intermediate Ct. App. 2023), where the court emphasized that "the circuit court and the majority should have construed [the statute] in a way that effectuates its remedial purpose."

The Administrative Procedures Act is quintessentially remedial—its express purpose is to provide judicial review of administrative action. W.Va. Code § 29A-5-4(a) itself confirms this remedial nature: "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." (emphasis added).

This savings clause of the APA is not mere surplusage. When a remedial statute explicitly preserves "other means of review, redress, or relief," any interpretation that would eliminate such alternatives contradicts the statute's remedial purpose and violates the rule of liberal construction. The Respondent's argument that the APA mandates exclusive appeal to the ICA would effectively read the savings clause out of existence.

(b) Preserve constitutional rights of access to courts (constitutional avoidance).

The West Virginia Constitution, Article III, Section 17, guarantees that "the courts of this state shall be open." The Supreme Court of Appeals has held this creates a "fundamental constitutional right of access" to judicial proceedings. *State ex rel. Garden State Newspapers, Inc. v. Hoke*, 205 W. Va. 611, 3, 520 S.E.2d 186, 188 (1999).

This recognition of the constitutional mandate demonstrates the Legislature's commitment to preserving—not restricting—access to courts.

When a statute is susceptible to multiple interpretations, one of which would restrict or eliminate access to courts while another would preserve it, the constitutional avoidance doctrine requires courts to adopt the interpretation that preserves constitutional rights, including situations that involve the separation of powers. *See*, *State ex rel. Brotherton v. Moore*, 159 W. Va. 934, 230 S.E.2d 638 (1976),

Even when separation of powers concerns are implicated, courts must carefully preserve access to judicial remedies. Here, where the statute contains an explicit savings clause and the constitutional right of access is directly implicated, the case for preserving judicial remedies is even stronger.

(c) Maintain historically available extraordinary remedies (preservation of equity jurisdiction).

West Virginia law has long recognized that extraordinary and equitable remedies provide essential checks on governmental overreach and protect fundamental rights. These remedies operate independently of statutory appeal procedures and are grounded in the Circuit Court's inherent equitable jurisdiction. *See, for example, State ex rel.*

Rhodes v. West Virginia Dept. of Hwys., 187 S.E.2d 218 (W. Va. 1972); and *In State ex rel. Wilmoth v. Gustke*, 373 S.E.2d 484 (W. Va. 1988).

Such equitable remedies include those invoked by the Petitioner in its complaint below 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*.

***

Here, the interplay of subsection (a) and subsection (b) – one suggesting alternative remedies are preserved, the other suggesting a mandatory route for appeals – appears to have engendered confusion at the Circuit Court level.

There is perhaps no better example than the fact that the Circuit Court initially denied Respondent's dismissal motion, and the reversed its decision after the *Adkins* decision was issued (although Petitioner maintains that this decision is inapplicable to the current case).

As a further example, the Circuit Court made the following comments at the final hearing below recognizing the uncertainty of the law on this issue: "Now, as I stated earlier, I think the ICA is fairly new, okay? And I think some of the problems that we're having here is it's a new institution and maybe not all of the case law or even all of the statutes that maybe apply to [Respondent] OHFLAC have been reconfigured to recognize the place that the ICA has in our judiciary." 05.24.2025 Hearing Transcript, at 23:10-17.

Petitioner reasonably relied on the plain language of §29A-5-4(a) - and decades of case law construing it - in pursuing a judicial remedy outside the APA's specific appeal procedure. If that understanding was mistaken, it was a mistake invited by the statute's own dual provisions.

Accordingly, to the extent the Administrative Procedures Act contains an inherent ambiguity between its procedural provisions directing appeals to the ICA and its savings clause preserving "other means of review, redress, or relief provided by law", West Virginia law requires this ambiguity be resolved in favor of preserving—not eliminating—Petitioner's access to judicial remedies.

VI. The content of the Respondent's response brief is misleading and inaccurate, and represents a fundamental misunderstanding of the issues before this Court.

To the extent Respondent chooses to address the reasons supporting Petitioner's current appeal, it largely mischaracterizes the appellate record and seeks to distract this Court from the core arguments essential to this Court's analysis and ultimate decision.

(a) Respondent blatantly misrepresents the appellate record regarding Petitioner's pursuit of ICA review as to its appeal on the merits of the Respondent's denial of its amended licensure application.

"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." Response Brief, pg. 4. [1]

As an initial matter, and as explained in Petitioner's original brief and herein, Respondent incorrectly characterizes an appeal to the ICA as administrative action rather than an option for judicial review.

Nonetheless, Respondent is boldly claiming that by way of its current appeal, Petitioner has not attempted to seek review of the merits of Respondent's denial of its amended licensure application.

[1] In its response brief, Respondent refers to Petitioner as "CAC".

However, a cursory review of the appellate record in this case reveals that this representation of Respondent is inaccurate and simply false.

In the current matter, Petitioner filed its Notice of Appeal ("NOA") on July 18, 2025. Petitioner submitted as an attachment to its NOA its Response to Section 11 of Appendix A of the Rules of Appellate Procedure, in which it specifically expressed and requested (in part) as follows:

"Petitioner respectfully requests that this Court accept and consider the entirety of the current appeal: Petitioner respectfully requests that this Court review, as a matter of law, the Respondent's refusal to consider Petitioner's application for an amended licensure to complete construction of its facility to expand and accommodate up to 300 substance abuse treatment beds." *Id*. at pg. 4.

"Petitioner asserts that Respondent committed legal error in refusing to consider its amended licensure application based on W. Va. Code § 16-2D-9, because this statute is inapplicable to Petitioner, and further asserts that Petitioner is authorized to continue with its expansion pursuant to the vested rights doctrine" *Id*. at pg. 5.

"Petitioner properly requested declaratory judgment and injunctive relief from the Circuit Court, and the Circuit Court refused Petitioner's request. Accordingly, the merits of Petitioner's legal arguments regarding application of W. Va. Code § 16-2D-9 and vested rights are now properly before ICA." *Id*. at pg. 7.

Moreover, Petitioner submitted as an attachment to its NOA its Response to Section 16 of Appendix A of the Rules of Appellate Procedure, in which it specifically expressed and requested (in part) as follows:

"**RESPONSE TO SECTION 16: NATURE OF THE CASE, RELIEF SOUGHT AND OUTCOME BELOW:** In its Complaint below for declaratory judgment

and injunctive relief, Petitioner sought an equitable ruling as a matter of law regarding Respondent's refusal to consider its amendment licensure application. Petitioner now requests (in part) that the ICA perform a similar review of this question of law regarding Respondent's misapplication of W. Va. Code § 16-2D-9 to Petitioner, and the applicability of the vested rights doctrine to the current matter." *Id.*

Petitioner also submitted as an attachment to its NOA its Response to Section 17 of Appendix A of the Rules of Appellate Procedure, in which is specifically detailed the *Assignments of Error* related to the merits of Rspondent's denial of its amended licensure application. *See*, *id.*

However, this Court indicated as follows in its Scheduling Order: "The scope of the appeal is limited to the Circuit Court of Kanawha County's June 18, 2025, Order Granting Defendant's Motion to Dismiss."

The Circuit Court's Order was based solely on a jurisdictional finding that Petitioner failed to exhaust its administrative remedies by not perfecting a previous notice of appeal to the ICA. The Circuit Court's Order did not address the merits of Petitioner's arguments regarding Respondent's refusal to consider its amended licensure application at the administrative level.

Accordingly, Petitioner abided by this Court's Scheduling Order and did not address the merits (or lack thereof) Respondent's licensure denial in its original brief perfecting the current appeal.

In its response, Respondent blatantly misrepresents that Petitioner has not sought a review from this Court based on the merits of the licensure denial contained in its Complaint filed with the Circuit Court below. As demonstrated above and by the current appellate record, Petitioner repeatedly requested such a review from this Court. However,

this Court exercised its discretion and limited the current appeal to the issue of subject matter jurisdiction and exhaustion of administrative remedies.

Such a misrepresentation demonstrates the lack of credibility of Respondent's response brief as a whole, and is one of many futile attempts to distract this Court from the core issues of this case rather than substantively addressing them.

Respondent also argues as follows: "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." Response, pg. 5 (parenthesis in original).

This argument is contradictory and thoroughly confusing. How could Petitioner elect or not elect to refile after exhaustion, when the sole issue before this Court in the current appeal is whether Petitioner was required to perfect its previous appeal with the ICA in order to achieve exhaustion?

Moreover, Petitioner frankly has no idea of the meaning of Respondent's representation that refiling after exhaustion is "not a threat."

Although certainly unclear, perhaps Respondent is once again inaccurately arguing that a decision on the merits of Respondent's denial of Petitioner's amended licensure application has not been pursued before this Court.

Nonetheless, under any interpretation, this is yet another example of Respondent's attempt to distract this Court from the fundamental issues to be resolved in the current appeal.

(b) Respondent fundamentally fails to understand the main issue before this Court on appeal.

"CAC does not deny that it failed to exhaust the administrative remedies as set out in the related statutes [and] regulations [.]" Petitioner's Brief at pg. 6.

This particular assertion by the Respondent is quite puzzling.

This is not only misleading, but whether intentional or unintentional, represents a fundamental misunderstanding on behalf of Respondent regarding the nature of the current proceedings before this Court.

Indeed, ***the entire basis of the current appeal is that the Circuit Court erred in finding that it lacked subject matter jurisdiction in determining that Petitioner failed to exhaust the administrative remedies as set out in the related statutes and regulations.***

CONCLUSION

For the foregoing reasons, and those set forth in Petitioner's opening brief, this Court should reverse the Circuit Court's June 18, 2025 Order dismissing Petitioner's complaint, and remand with instructions to reinstate the case and proceed to the merits.

The Administrative Procedure Act's express savings clause guarantees Petitioner's right to pursue judicial relief through declaratory judgment and injunctive proceedings.

The Legislature preserved these alternative remedies when it enacted § 29A-5-4(a), and nothing in the 2021 amendments creating the ICA eliminated that statutory right. Respondent issued a final order denying Petitioner's license application; administrative proceedings concluded; and Petitioner properly invoked circuit court jurisdiction through lawful alternative means of judicial review.

The Circuit Court possessed subject matter jurisdiction over Petitioner's complaint, and its dismissal on exhaustion grounds was erroneous as a matter of law.

This Court should reverse and remand for proceedings on the merits of Petitioner's claims that Respondent unlawfully denied its amended licensure application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 2025, true and accurate copies of the foregoing **Reply Brief of Petitioner's Clean & Clear Advantage, LLC** 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)