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**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

AIR EVAC EMS, INC.

Petitioner,

v.

BRIAN CUNNINGHAM, IN HIS CAPACITY AS DIRECTOR OF THE PUBLIC EMPLOYEES INSURANCE AGENCY, AND JOHN MCHUGH, GEOFF S. CHRISTIAN, AMANDA D. MEADOWS, JARED ROBERTSON, DAMITA JOHNSON, JASON MYERS, MICHAEL COOK, WILLIAM MILAM, DOUGLAS COFFMAN, HUGH MURRAY, AND MICHAEL T. SMITH, IN THEIR CAPACITIES AS MEMBERS OF THE PUBLIC EMPLOYEES INSURANCE AGENCY FINANCE BOARD,

Respondents,

BRIEF OF PETITIONER
AIR EVAC EMS, INC.

On Appeal from the Intermediate Court of Appeals, No. 23-ICA-135

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ASSIGNMENT OF ERROR

Sovereign immunity does not offer the West Virginia Public Employees Insurance Agency ("PEIA") refuge to refuse payments to Air Evac EMS, Inc. ("Air Evac") for non-discretionary emergency air transports where PEIA's bases for restricting payments were determined to be preempted and illegal by the federal courts.

STATEMENT OF THE CASE

Air Evac appeals the majority opinion of the Intermediate Court of Appeals of West Virginia (the "ICA"), which erroneously concluded that sovereign immunity shields PEIA from remitting payment to Air Evac for non-discretionary air ambulance transports provided to PEIA's insureds. Over a piercing dissent from Chief Judge Scarr, the ICA majority reversed the Circuit Court and wrongly shielded PEIA with a rigid application of sovereign immunity, nullifying the consequences of years-long federal litigation between Air Evac and PEIA—litigation which resulted in the enjoining of the very reimbursement schedules on which PEIA still relies to restrict payment to Air Evac.

Introduction

For years, Respondents—the Director of PEIA and members of the PEIA Finance Board (collectively, "PEIA")—have denied Air Evac and other air ambulance providers full payment on emergency air medical transportation provided to PEIA beneficiaries. Through a combination of statutory provisions and fee schedules, PEIA limited Air Evac to a small fraction of its billed charges on each air medical transport while simultaneously forbidding Air Evac from recovering the balance from PEIA's insureds.

In 2016, Air Evac filed a declaratory judgment action in the United States District Court for the Southern District of West Virginia, challenging this rate-capping scheme as preempted by the Airline Deregulation Act of 1978 ("ADA"), which prohibits state regulation of the prices of federally registered "air carriers" such as Air Evac. On October 20, 2017, the district court agreed and entered judgment in Air Evac's favor. *See Air Evac EMS, Inc. v. Cheatham*, No. 2:16-cv-05224, 2017 WL 4765966 (S.D. W. Va. Oct. 20, 2017). The district court ruled that the PEIA fee schedules and related statutes are preempted and granted Air Evac's request for an injunction barring their enforcement. *Id*. The district court's judgment was unanimously affirmed by the United States Court of Appeals for the Fourth Circuit. *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751 (4th Cir. 2018). Accordingly, under the terms of the *Cheatham* injunction, PEIA is forbidden from enforcing the PEIA statutory provisions and fee schedules that limit what Air Evac is paid for transporting patients insured by PEIA.

PEIA has persistently refused to accept the consequences of the federal injunction. Both during and after the *Cheatham* litigation, Air Evac continued to provide emergency transports to PEIA insureds—*as it is required to do under federal and state law*. Over Air Evac's protests, PEIA drastically undercompensated Air Evac on each of the transports made during this time. And to date, PEIA has paid not a single cent on these outstanding bills beyond the amount called for under the preempted fee schedules. Yet, PEIA insists it has no legal obligation to change its patently illegal behavior.

PEIA learned nothing from their stinging rebuke at the hands of the federal courts. PEIA lost the *Cheatham* litigation. And this case flows directly from PEIA's mystifying insistence that it can reimburse Air Evac in accordance with the very rate schedules that were struck down in *Cheatham*. Doubling down on their efforts to avoid the consequences of that litigation, PEIA is apparently content with defying a federal court order and all responsibility for PEIA's illegal reimbursement scheme by now *attempting to retroactively and illegally burden West Virginia citizens with over four million dollars of medical debt*. Beyond being unlawful, PEIA's position promises to harm not just Air Evac, but the very beneficiaries PEIA is tasked with safeguarding. The ICA majority immunizes this conduct.

Background

Air Evac is a federally regulated air carrier that provides life-saving emergency transportation services to critically ill and injured patients in West Virginia. For more than a decade, PEIA has engaged in concerted efforts to cap payments to Air Evac for transporting state employees during a medical emergency, which it is required by state and federal law to do. W. Va. Code St. R. § 64-48-4.15; App. 8.

Before 2011, PEIA reimbursed Air Evac's billed charges for air ambulance transports. But in 2011 PEIA implemented fee schedules that capped the reimbursement rate for air ambulance providers at the federal Medicare Rural Rate. *Cheatham*, 910 F.3d at 758. This rate was "substantially below" Air Evac's billed charges. App. 341. Then, the West Virginia Legislature enacted a statute in 2016 that further capped what air ambulance providers could receive at one of two amounts: (1) the federal Medicare reimbursement rate, or (2) the fee or cost of the air ambulance's subscription service agreement, which was typically around $100. *Id*; *see also* W. Va. Code §§ 5-16-8a(a), 5-16-8a(b) (2016); *Cheatham*, 910 F.3d at 758 (4th Cir. 2018).[1] These

[1] The full text of these provisions is as follows:

> (a) Notwithstanding any provision of this code to the contrary, any air-ambulance provider which does not have a contract with the plan, that provides air transportation or related emergency or treatment services to an employee or dependent of an employee covered by the plan, may not collect from the plan and the covered employee or dependent of the employee, a combined amount for those services which exceeds the reimbursement amount then in effect for the federal Medicare program, including any applicable Geographic Practice Cost Index.
>
> (b) If an air-ambulance provider has entered into a subscription service agreement with an employee or dependent of an employee covered by the plan, and the employee or dependent is in good standing with the agreement, the air-ambulance provider shall accept the fee or cost of the subscription service agreement as payment in full for any air-ambulance transport and related emergency treatment or services which the air-ambulance provider may provide to that employee or dependent of an employee.

provisions of the Public Employees Insurance Act (the "Act")[2] and schedules were "backed up" by a ban on balance-billing, *see* W. Va. Code § 16-29D-4, which prohibited Air Evac from recovering from PEIA insureds any more than the reimbursement rate cap set by PEIA. App. 342-343 (quoting *Cheatham*, 910 F.3d at 758). PEIA enforced this rate-capping scheme through threats of enforcement actions and criminal and civil penalties. *See* W. Va. Code § 5-16-12(a) (2016) (civil liability); § 5-16-12(b) (2016) (criminal liability). As the Fourth Circuit recognized, "West Virginia has simply dictated a relatively low reimbursement rate and prohibited any additional recovery," and as a result, "the state faces no pressure to bargain up front, and no threat of patients being directly billed on the back end, thereby lowering total reimbursement costs." *Cheatham*, 910 F.3d at 758.

Procedural History

On June 9, 2016, Air Evac filed a Complaint for Declaratory and Injunctive Relief in the United States District Court for the Southern District of West Virginia. *See Air Evac EMS, Inc. v. Cheatham*, No. 2:16-cv-05224 (S.D.W. Va. June 6, 2019) (ECF No. 1). Air Evac contended that PEIA's rate-capping scheme was preempted by the ADA, which invalidates any state law, rule, or fee schedule that "relate[s] to" the "price[s]" or "service[s]" of federally-regulated "air carrier[s]." 49 U.S.C. § 41713(b)(1). App. 342. Air Evac challenged the balance-billing ban in the alternative.

On October 20, 2017, the federal district court concluded that the ADA preempted the reimbursement cap set forth in W. Va. Code § 5-16-8a(a) (2016), and the regulation of Air Evac's subscription agreements set forth in W. Va. Code § 5-16-8a(b) (2016). *Cheatham*, 2017 WL 4765966, at *10. The court likewise concluded that the ADA preempted W. Va. Code § 5-16-

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W. Va. Code Ann. § 5-16-8a(a), (b) (2016).

[2] The Act is found in Article 16, Chapter 5 of the West Virginia Code.

5(c)(1), the accompanying fee schedules, and all accompanying regulations "with respect to air ambulance service providers." *Id*. The court held that PEIA was enjoined from enforcing all of those provisions and schemes. *See id*. But the district court left intact the ban on balance-billing PEIA insureds for air ambulance services, which was challenged in the alternative.

PEIA appealed to the United States Court of Appeals for the Fourth Circuit and filed a motion to stay the injunction pending appeal, which was denied. Thus, "the District Court's order has remained in effect from the date it was entered [October 20, 2017] through the present day." App. 343. The Fourth Circuit ultimately affirmed the district court's decision on December 7, 2018. *See Cheatham*, 910 F.3d at 758.

Following the district court's decision, and during the pendency of the Fourth Circuit appeal, Air Evac demanded that PEIA pay the full cost of each air ambulance transport beginning on June 9, 2016, the date it filed its Complaint in federal court. *E.g.* App. 488-489, 1705, 1707. PEIA outright rejected Air Evac's demands, explaining that it retained the authority to pay Air Evac in the same manner as other private insurers.[3] *E.g.* App. 488-489. PEIA also contended that other provisions of West Virginia law were unaffected by the injunction, and PEIA retained discretion to choose which of Air Evac's services it would cover. App. 564. Remarkably, perpetuating its bald-faced efforts to underpay crucial air ambulance services, PEIA has remained steadfast that Air Evac will only be reimbursed for each transport at the Medicare Rural Rate, which was precisely the rate PEIA set by its preempted fee schedules.

In the wake of the *Cheatham* litigation, the West Virginia Legislature passed a new law providing that, going forward, air ambulance providers were no longer subject to penalties for seeking payment of the balance of their bills from insureds, if PEIA did not pay providers in full.

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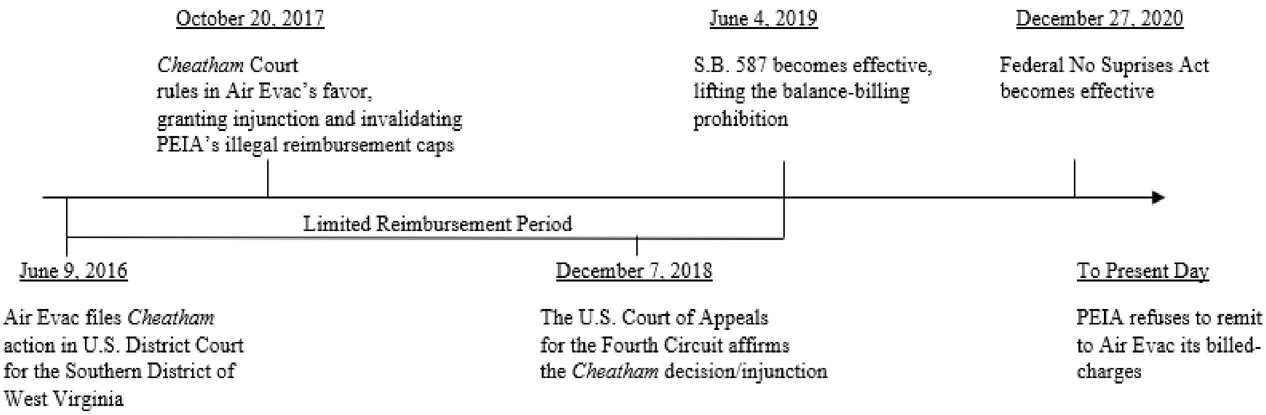
[3] Notably, the district court noted that PEIA "fail[ed] to recognize that Air Evac recovers full billed charges from some private healthcare insurers." *Cheatham*, 2017 WL 4765966, at *7 n.1.

See S.B. 587, W. Va. Legis. Reg. Sess. (2019), *codified at* W. Va. Code § 5-16-8a(d). The new law took effect on June 4, 2019, rendering the following timeline:



During and after the *Cheatham* litigation, Air Evac continued to provide emergency air ambulance transportation to PEIA insureds, as required under state and federal law. App. 345. During the time frame at issue in this appeal, Air Evac conducted 115 air ambulance transports to PEIA members, at a total cost of $4,773,034. App. 480-485. After PEIA's payments at the Medicare Rural Rate for each, Air Evac was left with $4,018,046 in unpaid transports. *Id.* After multiple requests for PEIA to reimburse Air Evac in accordance with the *Cheatham* injunction, and PEIA's consistent refusal to do so, on October 24, 2019, Air Evac demanded a Contested Case Hearing (the "Demand") pursuant to PEIA's Contested Case Rules (the "Rules"). App. 570-585.[4]

[4] Also relevant to this timeline is the December 27, 2020, enactment of the federal No Surprises Act, which quells any concern of "'surprise billing' for patients and removes them from the middle of payment disputes between the issuer and provider. *Ass'n of Air Med. Servs. v. U.S. Dep't of Health & Hum. Servs.*, No. CV 21-3031 (RJL), 2023 WL 5094881, at *1 (D.D.C. Aug. 9, 2023) (citing Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. BB, tit. 1, 134 Stat. 1182, 2758-2890 (2020)). Mechanically, instead of placing patients in the middle of such payment disputes (like PEIA tries to do with S.B. 587), the No Surprise Act directs the out-of-network emergency provider engage in direct negotiations with the insurer. 42 U.S.C. § 300gg-111(c)(1)(A)-(B). If the negotiations are not fruitful, the provider may engage an "independent dispute resolution process," which mirrors a "baseball-style" arbitration process, by which a neutral chooses the appropriate level of compensation based on several factors. *Texas Med. Ass'n v. U.S. Dep't of Health & Hum. Servs.*, 110 F.4th 762, 768 (5th Cir. 2024). The No Suprises Act, given its enactment at the end of 2020, has no impact on the transports that are the subject of this dispute *except* that it illustrates the confined universe of the transports that are the subject of this dispute.

In the Demand, Air Evac requested that the agency determine its legal rights, and the legal duties of the parties "with regard to payments on certain air ambulance transports provided by Air Evac to West Virginians insured" by PEIA. *Id*. It also demanded that PEIA pay full charges for air ambulance transports that occurred between June 9, 2016 (the initiation of the *Cheatham* litigation) and June 4, 2019 (the effective date of the statute allowing balance billing, W. Va. Code § 5-16-8a). App. 576-577. PEIA summarily denied Air Evac's request twenty days later. App. 564-569.

Air Evac filed a timely Petition for Appeal with the Circuit Court of Kanawha County. App. 896-920. In PEIA's response, it argued there was no APA jurisdiction for the Petition; the Petition was barred by sovereign immunity; and in any event, Air Evac was not entitled to full payment for Air Evac's past charges and transports. App. 931–947.

The Circuit Court held oral argument on April 26, 2022, and issued a final order on December 16, 2022. App. 340-368. In the Order, the Circuit Court rejected most of PEIA's arguments, holding that Air Evac's request was not barred by sovereign immunity, and the issues raised in the Demand were to be resolved under the APA and PEIA's Rules. *Id*.

The Circuit Court also rejected PEIA's argument that it retains the discretion to determine the amount that must be reimbursed for the transports of PEIA members, or that it could legally continue to offer reimbursement for the transports at the Medicare Rural Rate and force Air Evac to balance-bill PEIA members for those transports. The court found PEIA's arguments regarding balance-billing "*deeply troubling*" because PEIA "ha[s] no statutory authority to override [the balance-billing provision], to delete it from the statute books, or to treat it as if it did not exist during the period when these transports took place." App. 364-365 (emphasis added). The court went so far as to "question[] whether the actions taken by the Director exceed his authority . . . and whether such actions are contrary to public policy." *Id.*; *see also* App. 365 (n.3) (PEIA "has a duty to its insureds and the actions by the Director are in stark contrast to the duties and purpose of PEIA"). The court also took issue with PEIA's view that it need only pay the Medicare Rural Rate, reasoning that this action "establishes a maximum amount that Air Evac will be paid," thereby "violat[ing] . . . the *Cheatham* injunctions." App. 366.

And yet on the issue of payment for past transports, the Circuit Court erroneously refused to engage in a severability analysis, reasoning that such an analysis "is not required to reach a decision in this matter" because Air Evac is "not entitled to full payment of its past charges under either *Cheatham* or West Virginia law."[5] App. 359-0360. This was backwards. When part of a statute is invalidated, the court must perform a severability analysis to determine whether the remaining parts of the statutory scheme can continue operating without the invalid provisions. *State v. Heston*, 137 W. Va. 375, 403, 71 S.E.2d 481, 496 (1952). Thus, the court had to engage in severability *to determine whether* Air Evac is entitled to full payment of its past charges.

Air Evac and PEIA separately filed notices of appeal with the Supreme Court of Appeals on January 13, 2023. The Supreme Court of Appeals dismissed the appeals and directed the parties to file renewed Notices of Appeal to the ICA. Air Evac and PEIA's cross appeals to the ICA proceeded. *See* Nos. 23-ICA-127 and 23-ICA-135.

Following briefing and oral argument, the ICA erroneously accepted PEIA's call for sovereign immunity to shield it from any further payment on the disputed transport charges. App. 3-20. The ICA majority's rote application of sovereign immunity effectively abrogated the federal injunction and failed to recognize the unique scenario at hand—that a state-run insurance company

[5] To be clear, the federal courts in *Cheatham* did not conduct severability analysis because that exercise is reserved exclusively for the state courts, even where the federal courts have invalidated state statutes. *Environmental Technology Council v. Sierra Club*, 98 F.3d 774, 788 n.21 (4th Cir. 1996) ("State law governs the severability of a state statute.").

refused to remit charges with already appropriated money for non-discretionary emergency air ambulance charges by relying on fee schedules determined to be illegal by the federal courts.[6] *Id*.

Recognizing the troubles with the ICA majority's view, Chief Judge Scarr issued a pointed dissent from the majority's decision on July 3, 2024, concluding that the majority "improperly places the state's sovereign right to immunity from suit above our people's fundamental due process rights." App. 27. As addressed below, Judge Scarr's reasoning is most sensible and legally correct: "by allowing this overly broad construction of our sovereign immunity doctrine, the majority has enabled PEIA to essentially nullify the result of the *Cheatham* cases. In doing so, the majority improperly places the state's sovereign right to immunity from suit above our people's due process rights." *Id*. "PEIA's continued obstinance has trammeled upon Air Evac's due process rights." App. 35.

On August 14, 2024, Air Evac noticed its appeal to this Court.

[6] Indeed, as noted by Judge Scarr, PEIA's continued obstinance itself is likely *again* and *continuously* violative of the ADA. App. 37.

SUMMARY OF ARGUMENT

Air Evac has provided critical life-saving air ambulance services to the people of West Virginia for decades. But, for over thirteen years, PEIA has engaged in concerted efforts to limit reimbursement payments to Air Evac and other air ambulance carriers to an amount substantially below Air Evac's actual costs. In 2017, a federal district enjoined PEIA from capping or otherwise limiting air ambulance costs because the federal ADA preempts such actions, and it invalidated three different parts of the Public Employees Insurance Act allowing it to do so.

Despite this injunction—which was affirmed by the United States Court of Appeals for the Fourth Circuit, and which is still in place to this day—PEIA has nonetheless refused to reimburse Air Evac for 115 air transports to PEIA members occurring over a three-year period, resulting in losses to Air Evac of over $4 million. Air Evac demanded a contested case hearing from PEIA to determine its right to payment under the injunction and seek full payment of its costs. PEIA summarily denied this request.

On initial appeal, the Circuit Court agreed that PEIA had acted improperly, but then refused to recognize that when part of a state statute is invalidated (as it was here), courts must sever the invalidated portion and assess the meaning and effect of the remaining language. Had the court done so, it would have been compelled to conclude that Air Evac is entitled to full reimbursement for the past air ambulance transports. Instead, the Circuit Court remanded this matter and directed Air Evac to initiate administrative proceedings with PEIA and engage in negotiations regarding the disputed payments.

The appeal to the ICA presented the opportunity to complete the final step—severability analysis—on which the Circuit Court stopped short. However, instead of making that final determination and awarding Air Evac its outstanding transport charges, the ICA majority departed from the Circuit Court, applying sovereign immunity to thwart the lawful and appropriate cultivation of Air Evac's years-long litigation with PEIA. That decision was incorrect, as distinctly captured in Chief Judge Scarr's dissent. The ICA majority's opinion would eviscerate Air Evac's due process rights, disregard the balancing of conflicting constitutional provisions, and nullify the outcome in *Cheatham*. If not reversed, the ICA majority's decision will permit PEIA to emerge unscathed from the stinging rebukes by the federal courts in *Cheatham* and the very real consequences of that litigation—all to the detriment to Air Evac and PEIA's own insureds. This Court should find sovereign immunity entirely inapplicable. Reversal is warranted.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument is necessary. Air Evac has not waived oral argument, the appeal is not frivolous, the dispositive issues have not been authoritatively decided, and the decisional process will be significantly aided by oral argument. W. Va. R. App. P. 18(a). This matter is appropriate for oral argument because it involves assignments of error involving an unsustainable exercise of discretion where the law governing that discretion is settled, W. Va. R. App. P. 19(a)(2), and issues of public importance and constitutional questions—specifically, the effect of federal preemption and the interplay of due process guarantees. W. Va. R. App. P. 20(a)(2), (a)(3).

STANDARD OF REVIEW

This Court reviews questions involving principles of sovereign immunity *de novo*. *Gribben v. Kirk*, 195 W. Va. 488, 493, 466 S.E.2d 147, 152 (1995); *Blessing v. Nat'l Eng'g & Contracting Co.*, 222 W. Va. 267, 269, 664 S.E.2d 152, 154 (2008) (A plenary, *de novo* standard of review applies to questions involving principles of sovereign immunity).

ARGUMENT

I. The Application of Sovereign Immunity Should be Tempered in Favor of Air Evac Given Competing Constitutional Concerns and the Unique and Contained Nature of this Dispute.

The basis for PEIA's call for sovereign immunity is rooted in Article VI, § 35 of the West Virginia Constitution:

> The state of West Virginia shall never be made defendant in any court of law or equity, except the state of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.

However, West Virginia law has long tempered the application of sovereign immunity in the face of competing constitutional concerns, like those raised here. The years-long saga between Air Evac and PEIA has centered on two such competing factors: Air Evac's desire to vindicate its constitutional and statutory rights to be made whole on its finite number of disputed transports versus PEIA's efforts to avoid any real consequences from the *Cheatham* litigation.

As recognized by Chief Judge Scarr, West Virginia courts have a long history of tempering the harsh results of sovereign immunity where it displaces the fundamental rights of the people. App. 47. "There is no creature of the State above the law and irresponsible. If this were so, the corporation might deny to certain individuals all benefits to be conferred by the corporation, and yet it being sovereign or representing sovereignty it could not be sued." *Tompkins v. Kanawha Bd.*, 19 W. Va. 257, 264 (1881).

In *Tompkins*, this Court—in its earliest years—was presented with a claim of immunity from the Kanawha Board from negligence liability concerning an obstruction in the channel of the Kanawha River that resulted in the loss of a salt shipment. *Id*. at 258-259. As a corporation instrumentality of the State, the Kanawha Board was determined to *not* be protected from suit by the application of sovereign immunity. *Id*. at 264-265. The Court held that the defense of constitutional immunity from suit was not available to the state governmental corporation. *Id*. at 264. In making this determination, the *Tompkins* Court observed the imperfect fit for sovereign immunity where the State has stepped beyond its traditional "political" prerogative into the realm of traditionally private enterprise:

> The State as such does not enter into business of any such character. Her business is political, and when she wants improvements carried on, she creates corporations with the ordinary incidents thereto, to do that business. It would be against all our ideas of State government, if a corporation created by the State to carry on a work of improvement should not be liable like any other corporation for the damage it inflicted, notwithstanding the State might own the property of the corporation.

Id. at 264.[7]

The corollary to PEIA is evident: PEIA operates as an insurance company, and its revenues available for the payment of medical care (including air ambulance transports) are mostly raised from state employee premiums.[8] App. 33. In turn, those premiums and other appropriations, are required by law to be distributed by PEIA to pay medical providers, like Air Evac, who are, in

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[7] This Court has routinely permitted suits for damages where the State is acting in an enterprising fashion, *Ward v. Cnty. Ct. of Raleigh Cnty*., 141 W. Va. 730, 739-40, 93 S.E.2d 44, 49 (1956); when an agency is acting as a quasi-public corporation, *Hope Nat. Gas Co. v. W. Va. Tpk. Comm'n*, 143 W. Va. 913, 930, 105 S.E.2d 630, 639-40 (1958); and when the state has a "moral obligation" to pay damages. Syl., *State ex rel. Davis Tr. Co. v. Sims*, 130 W. Va. 623, 46 S.E.2d 90 (1947). Such is the same with federal courts. *See Indian Motorcycle Co. v. United States*, 283 U.S. 570, 576, 51 S. Ct. 601, 603, 75 L. Ed. 1277 (1931) ("it also has been held where a state departs from her usual governmental functions and engages in a business which is of a private nature no immunity arises in respect of her own or her agents' operations in that business.").

[8] "PEIA receives premiums from its insured, and these premiums make up the great majority of its revenue; state appropriations have been well under ten percent of PEIA's yearly revenue since 2014." App. 33.

turn, instructed to "bill" the State for payment. *See, e.g.*, W. Va. Code §§ 5-16-3, 5-16-5(c)(1), 5-16-18(f), 5-16-11, 16-29D-3(f), 16-29D-4(a)(2). Clearly, PEIA has strayed from the traditional "political" functions of government identified in *Tompkins* to something beyond. *Cf. United States v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, No. 20-13448, 2022 WL 1180142 at *16 (11th Cir. Apr. 21, 2022) ("Providing insurance is traditionally a private enterprise, so the government's decision to wade into that field suggests that NICA does not act as an arm of the state.").

The construct from *Tompkins*, which should be applied here, was recognized more recently in *Pittsburgh Elevator Co. v. W. Va. Bd. of Regents.*: "The concept that there is no creature of the State above the law and irresponsible expressed in *Tompkins* finds its foundation in article III of the West Virginia Constitution, commonly known as our Bill of Rights." 172 W. Va. 743, 750, 310 S.E.2d 675, 682 (1983) (cleaned up). In turn, as acknowledged by Judge Scarr in his departure from the ICA majority:

> There are several due process rights enumerated in the West Virginia Constitution's Bill of Rights that are at odds with a broad construction of our sovereign immunity doctrine. See id. Indeed, "[t]he philosophical basis of our pluralistic society is crippled when the government's power is found to be so absolute that it cannot be made to answer for the wrongs committed in its name." *G.M. McCrossin, Inc. v. W. Virginia Bd. of Regents*, 177 W. Va. 539, 541, 355 S.E.2d 32, 34 (1987).

App. 48.

This Bill of Rights guarantees include various constitutional protections in favor of Air Evac, including those against governmental takings (Article III, § 9), deprivation of life liberty, or property without due process of law (Article III, § 10), and guarantees to the courts to protect such rights (Article III, § 17). As recognized in *Pittsburgh Elevator Co.* "[t]he fact that the wrongdoer is an instrumentality of state government should not eviscerate these constitutional rights, inasmuch as the Bill of Rights contained in article III is designed to protect people from government." 172 W. Va. at 754, 310 S.E.2d at 686.

As seized upon by Judge Scarr, these conflicting principles, when analyzed in this unique scenario, balance in favor of Air Evac. App. 49-62. Indeed, "[w]henever possible, apparently conflicting portions of a constitution will be read so as to reconcile and harmonize them. We have, however, recognized that, if it is necessary to maintain the rights of a citizen under article III, those rights will be treated as an exception to the inhibition on suing the state government." *G.M. McCrossin, Inc.*, 177 7 W. Va. at 542, 355 S.E.2d at 35 (citations omitted).

The history of Air Evac's dispute with PEIA and the substance of that dispute, as discussed above at considerable length, "accentuate the danger of obviating Air Evac's due process rights by applying immunity's bar to its claims." App. 51. Air Evac conclusively prevailed in the *Cheatham* litigation, while during its pendency having no choice but to (1) continue to provide non-discretionary services to PEIA beneficiaries, and (2) accept PEIA's partial payments. W. Va. Code St. R. § 64-48-4.15. And in the wake of the *Cheatham* litigation, PEIA has remained remarkably obstinate, refusing to acknowledge any of the very real consequences of *Cheatham* and refusing to so much as abide by its own administrative rules when they were engaged by Air Evac.

Further, the relief Air Evac seeks poses no threat to the public purse. The reimbursement Air Evac seeks is for services for which appropriations and premiums were initially made and paid. App. 52 ("the nature of the funds at issue and for what they would be awarded must be considered. PEIA is an insurance company created by the State of West Virginia to serve as an insurance provider for its employees. *See* W. Va. Code § 5-16-1 (2024)."). And, as PEIA's former director testified, air ambulance reimbursements constitute less than 0.003% of PEIA's overall budget for medical expenditures. App. 539 (Depo. of T. Cheatham at 102:13 – 103:1-10). In turn, the disputed transport charges sought by PEIA make up even a much smaller percentage of such expenditures. The reimbursement requested is also for a definite and discernable period, from the initiation of the Cheatham litigation on June 9, 2016, to the effective date of S.B. 587 on June 4, 2019. *See infra* at 6 - 7. Finally, as addressed, the already appropriated funds—composed primarily of individual insurance premiums—were purposed for the very services provided by Air Evac.

Coloring this all, Air Evac's provision of services to PEIA insureds were not the result of a voluntary business decision to do business with the state, and to accept the associated risks. As recognized by Judge Scarr, "*Air Evac's inability to choose is the crux of the issue here, as it goes directly against the eponymous purpose of the ADA, deregulation*." Dissent at 12 (emphasis added). As Judge Scarr recognized:

> When Congress passed the ADA, it included the preemption clause specifically to ensure that the states did not merely replace federal aviation regulations with their own. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992). Congress clearly desired to replace the previously highly regulated American aviation sector with one maximally reliant on competitive market forces that would foster efficiency, innovation, and low prices. *Id*. at 378. Here, the mandatory compulsion to do business with PEIA while fixing reimbursement and prohibiting balance-billing eliminated any hope of free-market negotiation and competition. In direct contradiction of the ADA, Air Evac was essentially made "an offer they couldn't refuse." The Fourth Circuit's command that PEIA negotiate and act as a market participant sought to realize the goals of the ADA, as anything less contravenes the ADA's broad sweep. *See Cheatham III*, 910 F.3d at 762

Id. at 36-37.

And to be sure, PEIA's continued flouting of *Cheatham* and the ADA is not isolated to its agency. "Air Evac has troublingly become something of a white whale to the State of West Virginia's Ahab, as the state has made repeated efforts to regulate Air Evac despite the ADA's broad preemption." *Id*. 41.

Indeed, mere months after the Cheatham litigation ended, the West Virginia Offices of the Insurance Commissioner ("OIC") sought to bring Air Evac under its regulatory control by considering its membership program an unauthorized insurance plan. *Air Evac EMS, Inc. v. Dodrill*, 523 F. Supp. 3d 859, 863-64, 870 (S.D.W. Va. 2021), *aff'd sub nom*. *Air Evac EMS, Inc. v. McVey*, 37 F.4th 89 (4th Cir. 2022) ("*Dodrill I*"). After the OIC's regulatory effort was enjoined, the Legislature statutorily designated Air Evac as an insurance provider. *Air Evac EMS., Inc. v. Dodrill*, 548 F. Supp. 3d 580, 585-87 (S.D.W. Va. 2021) ("*Dodrill II*"). Unsurprisingly, the district court found the *Dodrill II* legislation to be preempted by the ADA. *Id*. at 595. Apparently undeterred by the result of *Dodrill II*, the Legislature enacted another law attempting to regulate Air Evac as an insurance company. *Air Evac EMS, Inc. v. McVey*, No. 2:21-cv-00105, 2024 WL 1287634, at *2 (S.D.W. Va. Mar. 26, 2024). The state's efforts are concerningly targeted at Air Evac, as *Dodrill I* reveals that the OIC told one of Air Evac's competitors that he was looking for ways he could "shut down" Air Evac's membership program, and the legislation in McVey would have solely affected Air Evac. *See Id*.; *Dodrill I*, 523 F. Supp. 3d at 869. The state's attempts to regulate Air Evac show a disregard for the ADA and free market principles, as it seems that the state has committed its coercive power and resources to pushing Air Evac out of the air ambulance market.

This all flavors the disingenuous efforts of PEIA to flout the *Cheatham* decision and the ADA and hide behind a thin veil of immunity. After all, "the defense of sovereign immunity does not confer upon the State a concomitant right to disregard the Constitution or valid federal law." *S.C. State Ports Auth. v. Fed. Mar. Comm'n*, 243 F.3d 165, 170 (4th Cir. 2001), *aff'd*, 535 U.S. 743, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002) (quoting *Alden v. Maine*, 527 U.S. 706, 754, 119 S. Ct. 2240, 2266, 144 L. Ed. 2d 636 (1999)). Instead, the "States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design." *Alden*, 527 U.S. at 755, 119 S. Ct. at 2240.

Is sum, PEIA decisively lost the game it decided to play in meddling with the free market directives of the ADA and, in turn, Air Evac's protected operations under the ADA, as decisively determined in *Cheatham*. Though PEIA has acknowledged its mistake by changing course in revising its applicable statutory framework, it cannot find refuge for the very real consequences of *Cheatham*: reimbursement to Air Evac for the limited reimbursement period with no shield of immunity.

II. Sovereign Immunity is Otherwise Categorically Inapplicable.

Again, the basis for the State's sovereign immunity is established in Article VI, § 35 of the West Virginia Constitution. The plain reading of Article VI, § 35 revels three realities concerning Air Evac's dispute with PEIA.

First, while it is true that the Constitution provides that the "state of West Virginia shall never be made defendant in any court of law or equity," this appeal represents the natural extension of the *administrative procedures* authorized by PEIA's own administrative rules. For this reason, sovereign immunity concerns are not implicated. PEIA has not been made a "defendant in any court of law or equity," a reality that the ICA majority opinion does not reconcile against the plain language of Article VI, § 35.

Second, the Supreme Court of Appeals has *never* held an application for relief under the APA, seeking to compel an agency to distribute legislatively appropriated funds in the manner required by the statutory scheme the agency administers, is barred by sovereign immunity. On the contrary, sovereign immunity is inapplicable where the Legislature itself creates a program, appoints an agency to administer it, and requires the agency to make payment out of funds appropriated for that purpose. Seeking payment under such a scheme, as Air Evac has done, does not implicate "the policy which underlies sovereign immunity," which "is to prevent the diversion of State monies from legislatively appropriated purposes." *Mellon-Stuart Co. v. Hall*, 359 S.E.2d 124, 129, 178 W. Va. 291, 296 (1987).

Quite the opposite is true: Air Evac requests to be made whole for its transports are in furtherance of already made legislative appropriations. Indeed, the Legislature created PEIA with the duty to establish health insurance plans to pay for medical care for public employees, including "coverage for emergency services" by "an ambulance." *See* W. Va. Code §§ 5-16-7, 5-16-8(12)(a)–(b). As a general matter, PEIA is funded by legislative appropriations, and it is required to deposit its monies in a fund as well as maintain a reserve fund for "unanticipated claim[s]." *See generally* W. Va. Code §§ 5-16-18, 5-16-25. PEIA is required to distribute these funds as required by law, including to pay medical providers who are, in turn, instructed to "bill" the State for payment. *See, e.g.*, W. Va. Code §§ 5-16-3, 5-16-5(c)(1), 5-16-18(f), 5-16-11, 16-29D-3(f), 16-29D-4(a)(2).

Moreover, PEIA operates as an insurance company, and its revenues available for the payment of medical care (including air ambulance transports) are "mostly raised from state employee premiums," paralleling existing West Virginia law that already explicitly recognizes the unique implications of state monies spent on insurance. *See* Syl. Pt. 2, *Pittsburgh Elevator Co.*, , 172 W. Va. at 744, 310 S.E.2d at 676.

Simply put, Air Evac's demand is not a prohibited raid on the State Treasury. Air Evac is asking to be paid for the life-saving service it has provided from funds that the Legislature appropriated for that purpose, using the administrative procedure that PEIA itself promulgated. Indeed, as the Supreme Court of Appeals held in *Mellon-Stuart*, sovereign immunity is applicable only "where monetary relief is sought against the State treasury for which a proper legislative appropriation *has not been made*." *Mellon-Stuart Co.*, 178 W. Va. at 296 (emphasis added). The

ICA majority misses that fundamental point: Air Evac is seeking what it is entitled to from money already appropriated by the Legislature for the particular purpose of paying a health care provider for non-discretionary emergency air-ambulance.

This Court's jurisprudence confirms that sovereign immunity is inapplicable here. For example, this Court readily ruled on an appeal of a contested administrative decision against the state in *Curry v. West Virginia Consol. Public Retirement Bd.*. 236 W.Va. 188, 189 (2015). The Court acknowledged that when it reviews contested administrative decisions, the "West Virginia Administrative Procedures Act, specifically West Virginia Code § 29A-5-4(g) (2012), governs . . ." *Id*. And, as here, the Court did not use the term "defendant" to describe the state agency before it; instead, the Court described the West Virginia Public Retirement Board as a "Respondent," since it was responding to a petition for review of its administrative decision. *Id*. *See also Curry v. W. Va. Consol. Pub.Ret. Bd.*, No. 14-AA-28, 2014 WL 9954119 (W. Va. Cir. Ct. July 30, 2014) (designating state entity as "respondent").

Similarly, this Court also required the refund of monies owed a petitioner when the State Tax Department of West Virginia came before it on an appeal of an administrative decision by the State Tax Department of West Virginia's Office of Hearings and Appeals. *Charleston Area Med. Ctr., Inc. v. State Tax Dep't of W. Va.*, 687 S.E.2d 374, 376, 381-382 (2009). The health care provider taxpayer brought a contested case before the Tax Department's Office of Hearings and Appeals seeking remuneration under the same statute that the PEIA has adopted—§ 29A-5-4. *Id*., at 594. The Circuit Court ruled in favor of the state entity arguing in support of its administrative decision. *Id*. The taxpayer appealed, bringing the state entity before the Supreme Court of Appeals to further justify the reasons underpinning its administrative ruling. And the Supreme Court of

Appeals held that the state's tax department would need to pay money to the taxpayer-petitioner. *Id*.

Finally, in *Maupin v. Sidiropolis*, this Court again reviewed an administrative decision by an arm of the state under W. Va. Code § 29A-5-4—this time the West Virginia State Racing Commission. 215 W. Va. 492, 493, 600 S.E.2d 204, 205 (2004). In that case, the petitioner sought payment from the West Virginia Greyhound Breeding Development Fund, for which the legislature had appropriated funds to promote better breeding and racing of greyhounds in the state. *Id.*, at 496. As in *Curry, Charleston Area Medical Center*, and here, the state entity appeared in response to a petition to argue in favor of its administrative decision under Section 29A-5-4. *Id*. That is, the State Racing Commission was *not* a "defendant;" instead, it was responding to a petition concerning the legal reasoning underpinning its administrative decision-making. The Supreme Court ultimately held that the state entity was required to disburse funds that the legislature had earmarked for disbursement. *Id.*, at 496 (discussing purpose of legislature's appropriated funds); *Id.*, at 498-99 (holding that the Racing Commission's administrative order erred, and that the petitioner was entitled to the funds).

In none of these cases did this Court refuse to entertain an action seeking payment from an agency based on concerns of sovereign immunity—and for good reason. Each petitioner challenged agencies—the West Virginia Tax Department, the West Virginia Consolidated Public Retirement Board, and the West Virginia Racing Commission—which are charged with administering a statutory scheme. Should they run afoul of the law and fail to administer those monies or benefits in manner consistent with the law, there must be—and indeed is—judicial review. In the absence of such review, agencies would be able to flout the very legislative directive they are beholden to, usurping by decree the fundamental and balancing power bestowed on reviewing courts. *See* Syl. Pt. 1, *State ex rel. Frazier v. Meadows,* 193 W. Va. 20, 21–22, 454 S.E.2d 65, 66–67 (1994) ("The system of 'checks and balances' . . . practically compels courts, when called upon, to thwart any unlawful actions of one branch of government which impair the constitutional responsibilities and functions of a coequal branch.").

The ICA majority's failed to recognize the import of *Curry, CAMC,* and *Maupin*, wrongly concluding that, because a sovereign immunity defense was not advanced by the State in those cases, the cases should not be honored as examples of appropriate relief for Air Evac. ICA Majority Op. at n. 26. Put simply, this is incorrect—the very absence of the application of sovereign immunity in those cases is the point.

Third, because Air Evac has long sought *prospective* relief, as opposed to *retroactive* relief, sovereign immunity is not implicated. This Court has long recognized this distinction as it relates to sovereign immunity. *Skaff v. Pridemore*, 200 W. Va. 700, 705, 490 S.E.2d 787, 792 (1997); Syl. Pt. 2, *Gribben*, 195 W. Va. 488. To be sure, Air Evac is seeking *prospective* relief. The line between prospective and retroactive recovery in this case must be drawn to include all disputed transports that are open and unresolved between the date federal suit was initiated and the effective date of S.B. 587 (the end of the balance billing prohibition). Until that new law became effective in June, 2019, all disputed transports taking place prior to that date remained open and PEIA is required—under West Virginia severability law—to pay those transports prospectively in full. Indeed, *Skaff* explicitly recognized, as other cases have, that the initiation of suit (here *Cheatham*) to challenge State action (here PEIA's) marks the date from which payment sought becomes "prospective." 200 W. Va. at 705.

Air Evac seeks payment for transports made after the filing of the *Cheatham* complaint on June 9, 2016, through the new law's effective date in June, 2019. In *Skaff*, the Supreme Court of

Appeals authorized similar payments, holding that "the appellees are entitled to [remuneration] . . . from the filing of their complaint on August 16, 1991 until August 3, 1993 when the new rules became effective." *Id*., at 798. All along the way—and even before the initiation of the *Cheatham* litigation—Air Evac has advised PEIA of its intentions and demands for full and appropriate compensation on its transports. This is the very type of prospective recovery that would otherwise render the sovereign immunity rule inapplicable.

The ICA majority misguidedly set the dividing line between prospective and retroactive relief as the date of the initiation of the administrative proceedings before PEIA. In turn, the ICA majority concluded that, because the disputed transports were conducted before the initiation of the administrative proceedings (the extension of which is this appeal), reimbursement for such transports necessarily constituted retroactive relief for money forbidden by sovereign immunity.

Chief Judge Scarr recognizes the fundamental problem with the majority's position: it fails to recognize the practical reality that if Air Evac would have initiated a PEIA administrative action concurrent with the initiation of the federal *Cheatham* litigation:

> Air Evac could not have possibly initiated any type of relevant action to demarcate its relief as prospective until the federal courts had already held the rate capping statutory scheme to be preempted by the ADA. Before the federal preemption in the *Cheatham* litigation, what would Air Evac's cause of action be? Such an action would most likely have been soundly trounced at the pleading stage. *See* W. Va. R. Civ. P. 12(b)(6).[9] In such a case, filing the federal action to have the rates caps enjoined should be considered the "relevant mandamus action." This result would better accord with the equitable purpose underpinning *Black's* reasoning, that a remedy should be available when an administrative agency blatantly contravenes a federal injunction.

App. 41.

[9] This correctness of forecasting by Judge Scarr is underscored by the simple fact that when presented with the administrative action which was flowed into this appeal, PEIA summarily denied Air Evac any such relief. It is beyond debate that PEIA would have done the same in 2017 should an agency action have been filed concurrently with the *Cheatham* case.

Simply put, the *Cheatham* litigation establishes the initiation of Air Evac's efforts for *prospective* relief, capturing *all* disputed transports. This squares with the practical, equity-based exercise that should be employed in making such a demarcation. Indeed, as recognized in *Black v. State Consolidated Public Retirement Board*, the very basis to distinguish relief as prospective vs. retroactive in "*Gribben* and *Skaff* flowed from this Court's implicit recognition that 'relief should not be limited to the vagaries of how long litigation requires to run its course.'" *Black v. State Consol. Pub. Ret. Bd.*, 202 W. Va. 511, 522, 505 S.E.2d 430, 441 (1998). Here, the *Cheatham* litigation was the first necessary step in Air Evac initiating its call for relief from PEIA. And it is only transports from the initiation of the *Cheatham* suit to the passage of SB 587 for which Air Evac seeks its relief—"a period of limited duration, so there is no risk of an indeterminant amount of future payments depleting the state's offers." App. 33.

The initiation of the *Cheatham* litigation was not purposed as an academic exercise. It was Air Evac's first proactive and prospective effort to obtain relief from PEIA. And all-the-while, during the pendency of *Cheatham*, Air Evac continued to provide its non-discretionary, life-saving services to PEIA insureds and beneficiaries.

CONCLUSION

For the foregoing reasons, this Court should reverse the ICA majority's decision that sovereign immunity shields PEIA for remitting fully payment Air Evac on the disputed transports and should remand this action for further proceedings consistent with its ruling.

Respectfully submitted,

<u>/s/ Carte P. Goodwin</u>

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No. 24-452

**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

AIR EVAC EMS, INC.

Petitioner,

v.

BRIAN CUNNINGHAM, IN HIS CAPACITY AS DIRECTOR OF THE PUBLIC EMPLOYEES INSURANCE AGENCY, AND JOHN MCHUGH, GEOFF S. CHRISTIAN, AMANDA D. MEADOWS, JARED ROBERTSON, DAMITA JOHNSON, JASON MYERS, MICHAEL COOK, WILLIAM MILAM, DOUGLAS COFFMAN, HUGH MURRAY, AND MICHAEL T. SMITH, IN THEIR CAPACITIES AS MEMBERS OF THE PUBLIC EMPLOYEES INSURANCE AGENCY FINANCE BOARD,

Respondents,

CERTIFICATE OF SERVICE

I, Carte P. Goodwin, hereby certify that on this 18th day of November, 2024, that I electronically filed the foregoing ***Brief of Petitioner Air Evac EMS, Inc.*** using the File & *ServeXpress* system which sent a Notice of Electronic Filing to, and constitutes service on, counsel of record.

/s/ Carte P. Goodwin
Carte P. Goodwin

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