No. 24-452

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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

AIR EVAC EMS, INC.

Petitioner,

v.

JASON HAUGHT, 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,

REPLY OF PETITIONER AIR EVAC EMS, INC.

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION AND SUMMARY OF REPLY

The key question in this appeal is whether PEIA is immune from having to compensate an emergency health care provider that it has illegally underpaid for years, in violation of the federal Airline Deregulation Act of 1978 (the "ADA") and the binding federal court decisions in *Cheatham*. The answer is no. PEIA has, for over a decade, trampled on the constitutional rights of Air Evac and continues to rely on the very illegal fee schedules struck down by the federal courts in *Cheatham.* And yet, the Intermediate Court of Appeals (the "ICA") would bar this proceeding based on a strained application of sovereign immunity. This Court should reverse.

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 amounts set forth in the preempted fee schedules. Yet, PEIA insists it has no legal obligation to change its patently illegal behavior.

Despite having suffered absolute defeat before the federal courts, PEIA insists that sovereign immunity insulates it from having to answer to the very rules and processes that it established for resolving disputes just like this. Right out of the gates, PEIA erroneously asserts that this case is a "straightforward attempt to make the State a defendant in a court of law" for "damages." Resp. Br. at 1. A cursory review of the record shows otherwise— this proceeding is an administrative action pursuant to the Administrative Procedures Act, W. Va. Code § 29-1-1, *et seq.* (the "APA"), and PEIA's own contested case rules. PEIA knows this, of course, which is why it deliberately and repeatedly mischaracterizes this action as a "suit" seeking "damages" in "court" against the State as a "defendant," as if the repetition of these words functions as a magical incantation that renders this administrative proceeding subject to Article VI, section 35's prohibition. It simply is not.

Air Evac has never said that PEIA is not part of the State, nor has Air Evac argued that sovereign immunity could never apply to PEIA. Rather, as then-Chief Judge Scarr deftly observed in his dissenting opinion, the relief sought by Air Evac, the nature of PEIA's operations, and the funding specifically appropriated to pay health care providers, all underscore the unique nature of this dispute and demonstrate why this case does not implicate sovereign immunity's bar to suit, especially considering the competing constitutional and federalism concerns that flow from *Cheatham*. 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) (cleaned up). Yet, that would be the result sanctioned by the ICA's majority opinion.

Over the piercing dissent from Chief Judge Scarr, the ICA majority erroneously shielded PEIA with a rigid application of sovereign immunity, nullifying the consequences of years-long federal litigation between Air Evac and PEIA—litigation which enjoined the very reimbursement schedules on which PEIA still mystifyingly relies to restrict payment to Air Evac for the 115 disputed transports. This Court should reverse and reject PEIA's efforts to illegally limit reimbursement to Air Evac.

II. DISCUSSION

A. The Consequences of *Cheatham.*

1. The *Cheatham* Litigation.

To recap, in 2011, PEIA abruptly implemented "new laws and regulations aimed at air ambulance expenses," including fee schedules that capped the reimbursement rate for air ambulance providers at the federal Medicare Rural Rate. *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 758 (4th Cir. 2018). This rate was "substantially below" Air Evac's billed charges. App. 783. 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. App. 783; *see* W. Va. Code §§ 5-16-8a(a), 5-16-8a(b) (2016); *Cheatham*, 910 F.3d at 758.

These provisions 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. 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 (emphasis added). The *Cheatham* courts concluded that this scheme was preempted by the ADA, enjoining PEIA from enforcing its statutory reimbursement caps, while leaving the balance billing prohibition intact.

During the pendency of *Cheatham*—and after—Air Evac was legally required to continue to do business with PEIA and accept PEIA's partial payments. W. Va. Code St. R. § 64-48-4.15

2. **Post-Cheatham.**

Then, in 2019, the West Virginia Legislature accepted the Fourth Circuit's invitation to change course *moving forward*, passing a new law exempting air ambulance providers from the balance billing prohibition, thereby allowing providers to seek payment of the balance of their bills from state employees and their families. However, this new law, effective June 4, 2019, is of no application to the 115 disputed transports at issue in this case. *See* S.B. 587, W. Va. Legis. Reg. Sess. (2019), *codified at* W. Va. Code § 5-16-8a(d).

Predictably, PEIA glosses over *Cheatham* and its temporal relation to the disputed transports by retreating to its familiar refrain that "the Fourth Circuit said, PEIA had every right to pay Air Evac something less than full price . . .." Resp. Br. at 1. That statement, of course, ignores the most fundamental holding in *Cheatham*—that PEIA imposed its coercive power rather than negotiating as a market participant.

Deliberately missing the point, PEIA insists: "[t]he ADA does not require a state to pay whatever an air carrier may demand." *See, e.g.* Resp. at 4 (quoting *Cheatham*, 910 F.3d at 769). Of course, the ADA does not give Air Evac *carte blanche* to decree reimbursement levels. However, *Cheatham* held that states may use only their "market power, and not [their] unique coercive authority" to determine reimbursement levels. *Cheatham*, 910 F.3d at 769. Because PEIA used its "coercive power" "to achieve its goals" in capping recoupment by Air Evac, it lost in *Cheatham*. *Id*. at 768. As the Fourth Circuit found, "[t]here was nothing subtle or indirect about this approach; it was directly targeted at payments for air ambulance services." *Id*. at 767.

PEIA nonetheless attempts to avoid *Cheatham's* application to these 115 transports by arguing that it retained discretionary means of restricting reimbursement in the very manner prohibited by the federal courts.[1] *See* Resp. at 31 – 32 (PEIA suggesting that generalized discretion afforded by W. Va. Code § 5-16-3(c) absolves it of any consequences stemming from *Cheatham*). To be clear, what PEIA is saying is that it may retroactively strip the balance billing statute from the books with respect to the transports at issue, imposing a massive retroactive liability on its most sensitive beneficiaries: those that received emergency transports.

Fortunately, an agency cannot "enlarge, amend or repeal substantive rights created by statute." *Penn Va. Operating Co., LLC v. Yokum*, 242 W. Va. 116, 829 S.E. 2d 747, 752 (2019) (citation omitted). And though it is not afforded such legislative authority, it is worth noting that the practical impact of this action would impose a massive retroactive liability of nearly $4 Million on the 115 PEIA insureds who were—and remain—protected by statute from balance billing for the relevant transports. PEIA is wrong on the law, and the ICA's erroneous decision would bless this result.[2]

In short, *Cheatham* is not advisory. Its impact is real and accentuates the improvidence of shielding PEIA with absolute immunity in this unique proceeding, as the ICA has done.

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[1] As an aside, PEIA remarks that the federal courts in *Cheatham* "didn't award monetary relief" because they didn't feel that Air Evac was entitled to such. Resp. Br. at 35. That is mistaken and PEIA knows better. To be clear, as has been stated by Air Eavc on numerous occasions, the federal courts in *Cheatham* did not arrive at any such conclusion because severability analysis is reserved exclusively for the state courts, even where the federal courts have invalidated state statutes. *Env't Tech. Council v. Sierra Club*, 98 F.3d 774, 788 n.21 (4th Cir. 1996) ("State law governs the severability of a state statute.").

[2] PEIA also ignores the interplay of federal preemption and its roots in the Supremacy Clause of The Constitution of the United States, Article 2, Clause 2, as it relates to a state's application of sovereign immunity. That is, "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.*, 243 F.3d at 170, *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.

B. Sovereign Immunity Cannot Bar this Proceeding.

1. This is an Administrative Action.

From the outset, PEIA seeks to misrepresent the nature of this dispute, repetitively maintaining that Air Evac has brought a "suit" against it in a "court of law" for "damages." *See* Resp. Br. at 1 (Air Evac's dispute "constitutes a straightforward attempt to make the State a defendant in a court of law."); *see also id*. at 9-10 (entire section of PEIA's argument titled "Air Evac's New *Suit*") (emphasis added). What PEIA omits is most illuminating: this action was initiated pursuant to PEIA's long-standing "Rules of Procedure for Contest Case Hearings and Declaratory Rulings" under W. Va. Code St. R. §§ 151-1-1 *et seq.* (the "Rules"). PEIA's Rules provide a "just, speedy, and inexpensive" process for "every" person or entity affected by any rules, regulations or statutes enforceable by PEIA to have their "legal rights" and PEIA's "legal duties" determined in a contested-case hearing. *Id*. §§ 151-3-1, 151-3-3, 151-3-4. Once PEIA holds a hearing and issues a "final order," a party can seek judicial review under the APA. *Id.* § 151-3-13.

This distinction matters. *Rice v. Underwood*, 205 W. Va. 274, 280, 517 S.E.2d 751, 757 (1998) ("the deciding of contested cases by a board or regulatory body is a recognized administrative function and does not transform the administrative agency into a court.") (citing *State v. Huber*, 129 W.Va. 198, 217, 40 S.E.2d 11, 22 (1946)); *Thornton v. Comm'r of the Dep't of Lab.*, 190 Mont. 442, 445, 621 P.2d 1062, 1064 (1980) ("An administrative hearing is not a suit at law").

The ICA ignored this, failing to acknowledge that this Court has *never* held that a suit 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. To 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 very purpose. Seeking payment under such a scheme, as Air Evac has done here, simply does not implicate sovereign immunity.

As Judge Scarr succinctly noted in his dissent, sovereign immunity is meant to "protect state monies from being *diverted* from their legislatively appropriated purposes, not to prevent the spending of any state monies whatsoever." App. 54. Accordingly, this Court routinely adjudicates administrative disputes where a petitioner seeks monetary relief from a state agency when an agency fails to pay or bestow benefits in accordance with statute. *See Charleston Area Med. Ctr., Inc. v. State Tax Dep't of W. Virginia,* 224 W. Va. 591, 687 S.E.2d 374 (2009) (health care provider action against the State Tax Dept. of West Virginia seeking refund of an incorrect tax assessment under the West Virginia Health Care Provider Tax Act); *Curry v. W. Virginia Consol. Pub. Ret. Bd.*, 236 W. Va. 188, 778 S.E.2d 637 (2015) (appeal against the West Virginia Consolidated Public Retirement Board following its denial of attorney's request to participate in the Public Employees Retirement System pursuant to the West Virginia Public Employees Retirement Act); *Maupin v. Sidiropolis*, 215 W. Va. 492, 493, 600 S.E.2d 204, 205 (2004) (action against the West Virginia Racing Commission for collection of monies consistent with W. Va. Code § 19-23-10).

In none of these appeals did this Court refuse to entertain an action based on sovereign immunity—and for good reason. Each petitioner, like here, initiated proceedings against agencies which are charged with administering statutory schemes.

The same reasoning applies here. The Legislature created PEIA 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).[3] As PEIA all but ignores, it 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).

Like *Charleston*, *Curry*, and *Maupin*, this case stems from a claim that a state agency failed to administer and distribute payments or benefits in accordance with law. Air Evac's seeks to compel PEIA to comply with the statutory scheme that it administers and to issue reimbursement "for which a proper legislative appropriation" has already been made for a specific purpose. *See Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 296, 359 S.E.2d 124 (1987). Under these cases, sovereign immunity did not apply, as it does not here.[4]

2. Air Evac Has Never Maintained that PEIA is not an Arm of the State.

Undeterred, PEIA spends considerable time detailing why it *is* a State agency, belaboring the point for eleven pages of its Response. Resp. Br. at 14-26. Yet, Air Evac has never argued that

[3] PEIA declares by fiat that "PEIA's main goal is to bring 'fiscal stability' to these members' healthcare costs." Resp. Br. at 4 (citing w. Va. Code § 5-16-5(a)). Putting aside whether this is the "main goal" of an agency established to provide health insurance coverage to state employees, the record in this case demonstrates that air ambulance reimbursements have little impact on the PEIA's fiscal stability, constituting less than 0.003% of PEIA's overall budget for medical expenditures. App. 539 (Depo. of T. Cheatham at 102:13 – 103:1-10). Moreover, the 115 disputed transport charges make up even a much smaller percentage of such expenditures, as detailed in Air Evac's opening briefing at 15-16.

[4] In this respect, PEIA misrepresents the impact of *Mellon-Stuart*. PEIA reflects on *Mellon-Stuart's* dealing with generalized, "basic budget appropriations" (Resp. Br. at 11), far from what is at issue here. *First*, unlike here, there was no specific appropriation made for the activities in dispute in *Mellon-Stuart*, the construction of a facility at Marshall University. *Id*. at 295. *Second*, West Virginia law did not explicitly compel funds to be expended on the services at issue in *Mellon-Stuart*. By contrast, PEIA is required by law to distribute its collected premiums and appropriations to pay medical providers like Air Evac. *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). *Third*, as powerfully and repeatedly captured in Judge Scarr's dissent and in *Cheatham*, "Air Evac was legally required to do business with PEIA," (App. 45) "accepting patients without regard to insurance or ability to pay." *Air Evac EMS, Inc. v. Cheatham*, 260 F. Supp. 3d 628, 633 (S.D. W.Va. 2017). So, unlike the contractor in *Mellon-Stuart*, which was in contractual privity with the State, "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." App. 55. *Compare with G.M. McCrossin, Inc. v. W. Virginia Bd. of Regents*, 177 W. Va. 539, 543, 355 S.E.2d 32, 36 (1987) (acknowledging much different scenario where a party "knowingly and willingly" "contracts" with the state, such as the scenario in *Mellon-Stuart*.).

PEIA is not a state agency or that sovereign immunity does not apply to certain actions filed against it. Air Evac has simply pointed out that the circumstances of this case—like the circumstances explored by this Court in *Thomkins* and its progeny (including *Pittsburgh Elevator*)—militate against the application of sovereign immunity. *See* Op. Br. at 12-18.

As discussed extensively in Air Evac's opening brief, West Virginia law has long tempered the application of sovereign immunity in the face of such concerns. "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). "Whenever 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).

Here, the years-long dispute between Air Evac and PEIA has centered on two competing factors: Air Evac's desire to vindicate its constitutional and statutory rights to be made whole on the 115 disputed transports versus PEIA's efforts to avoid any consequences from the *Cheatham* litigation. In attempting to shift balance in its favor, PEIA continues to bang the "we are a State agency" drum, now citing two cases from other jurisdictions for the general proposition that state insurance programs enjoy sovereign immunity. *See* Resp. Br. at 14 (citing *State ex rel. State Ins. Fund v. JOA, Inc.*, 2003 OK 82, ¶ 9, 78 P.3d 534, 537 (2003), *as corrected* (Oct. 8, 2003) and *Comm'r of State Ins. Fund v. M. Mathews & Sons Co.*, 516 N.Y.S.2d 5, 131 A.D.2d 301, 302(1987).[5] But again, Air Evac has never argued that PEIA can never enjoy *traditional* protections of sovereign immunity.[6]

But not in this case. Indeed, even the cases cited by PEIA recognize that the application of sovereign immunity is neither absolute nor exclusively dependent upon the fact that one party is a stage agency. In *JOA, Inc.*, the Supreme Court of Oklahoma concluded that the State Insurance Fund *was not subject to absolute sovereign immunity*, contrary to PEIA's representation: "sovereign immunity does not bar an action against the State Insurance Fund when the action is based upon the Fund's contractual obligations." *JOA Inc.*, 2003 OK 82, ¶ 9, 78 P.3d at 537.

Similarly, this action is based upon PEIA's comparable—but heightened—obligations to reimburse a health care provider for providing legally compelled services to PEIA beneficiaries. Air Evac seeks to be justly compensated for its non-discretionary transports following the invalidation of the very fee schedules PEIA continues to rely on with respect to the disputed transports. State and federal law compelled Air Evac to provide these 115 transports without regard to the insurance status of the patients or the pending dispute with their insurer. App. 54 (again, "Air Evac's inability to choose is the crux of this issue here" and the "mandatory compulsion to do business with PEIA while fixing reimbursement and prohibiting balance-billing eliminated any hope of free-market negotiation and competition.").[7] Under such circumstances, when a private

[5] Both *JOA, Inc.* and *M. Matthews & Sons Co.* involved suits originated in courts of law, not as administrative proceedings, as is the case here.

[6] *JOA, Inc.* discusses the application of sovereign immunity in the context of immunity of the insurance fund from tort liability, but permits action on contractual liability. *JOA, Inc.*, 2003 OK 82, ¶ 9, 78 P.3d at 537 (discussing "sovereign immunity from certain tort actions" under Oklahoma's "Governmental Tort Claims Act," but permitting action on contractual liability). As discussed, this is illuminating to this context, where Air Evac, by the mandate of state and federal law, was compelled to provide services to PEIA's insureds and their beneficiaries.

[7] As Judge Scarr recognized, PEIA's failures post-*Cheatham* are likely themselves violative of the ADA—a deregulation statute that is purposed to reap the benefits of free market air transportation.

actor is not compensated for services compelled to be provided pursuant to applicable law, there must be a means for redress.

Yet, the majority opinion would immunize PEIA from answering for its illegal behavior, with ludicrous results. Take this for example: if under the statutory scheme applicable to the disputed transports, what if PEIA simply decided—in direct conflict with its statutory mandate—to pay such providers a fraction of the Medicare Rural Rate? Does that mean that those entities providing non-discretionary services, such as Air Evac, would have no recourse against PEIA to ensure that they are paid what is required by statute? The answer to that question must be no. Yet, that is the scenario here: *Cheatham* conclusively invalidated PEIA's former reimbursement regime as illegal and preempted by the ADA, altering the statutory landscape for reimbursement. PEIA ignores that reality, as did the ICA.

3. An Exception, Exemption, or Other?—Sovereign Immunity's Inapplicability by Any Other Name.

To continue muddying the waters, PEIA expends considerable energy trying to distinguish between "exceptions," "exemptions," and other instances where sovereign immunity's bar to suit does not apply. PEIA insists that this Court has never really "created exceptions" to sovereign immunity, but simply has issued opinions "recognizing exemptions." Resp. Br. at 27-28. This is obviously wrong. This Court has expressly noted that "over the years this Court has carved exceptions from the prohibition against suing the State." *Univ. of W. Virginia Bd. of Trustees ex rel. W. Virginia Univ. v. Graf*, 205 W. Va. 118, 122, 516 S.E.2d 741, 745 (1998).

Indeed, exceptions to sovereign immunity have been definitively established by the courts. *See Chesapeake & Ohio Ry. Co. v. Miller, Auditor*, 19 W.Va. 408 (1882), *aff'd*, 114 U.S. 176, 5 S.Ct. 813, 29 L.Ed. 121 (1885) (blessing injunctive action against State officers to compel performance of ministerial duties); *Blue Jacket Consol. Copper. v. Scherr*, 50 W.Va. 533, 40 S.E.

514 (1901) (permitting suits against State officers acting, or threatening to act, under unconstitutional statutes); *State ex rel. Davis Trust Co. v. Sims*, 130 W.Va. 623, 46 S.E.2d 90 (1947) (permitting suits in recognition of moral obligation by the State); *State v. Ruthbell Coal Co.*, 133 W.Va. 319, 56 S.E.2d 549 (1949) (permitting counterclaims against the State). Indeed, *Graf* itself catalogs this history, and more.[8]

Ultimately, a debate about whether this dispute fits within an “exception,” a “recognized exemption,” or some other category, matters little. What matters is the substance. Sovereign immunity operates to prevent the *diversion* of public monies from their designated purpose—not to preclude the spending of any state monies whatsoever. Put simply, reimbursing a health care provider consistent with federal and state law does *not* jeopardize the public fisc or otherwise implicate the principles that sovereign immunity is designed to protect. The labels matter less than the substance.

West Virginia courts have, since near the State’s inception, moderated the harsh results of sovereign immunity where it displaces the fundamental rights of the people. App. 47. As Judge Scarr aptly captured:

> Our courts have a long history of wisely tempering the harsh language of Article VI, § 35 so that the State of West Virginia’s right to be free from suit does not displace the fundamental rights of its citizens. *See Tompkins v. Kanawha Bd.*, 19 W. Va. 257, 264 (1881) (“There is no creature of the State above the law and irresponsible. If this were so, the corporation might deny to certain individuals all

[8] *Graf* lists a history of court-adopted exceptions to sovereign immunity, including: suits for declaratory judgment, *Douglass v. Koontz*, 137 W.Va. 345, 71 S.E.2d 319 (1952); mandamus relief to require the State Road Commission to institute proper condemnation proceedings upon the taking or damaging of land for public purposes, *Stewart v. State Rd. Comm’n of W. Virginia*, 117 W.Va. 352, 185 S.E. 567 (1936); suits alleging liability arising from the State's performance of proprietary functions, *Ward v. Cnty. Court of Raleigh Cnty.*, 141 W.Va. 730, 93 S.E.2d 44 (1956); suits against quasi-public corporations which have no taxing power or dependency upon the State for financial support, *Hope Nat. Gas v. W. Virginia Turn. Com'n*, 143 W.Va. 913, 105 S.E.2d 630 (1958); mandamus relief to compel State officers, who have acted arbitrarily, capriciously or outside the law, to perform their lawful duties, *State ex rel. Ritchie v. Triplett*, 160 W.Va. 599, 236 S.E.2d 474 (1977); suits in which constitutional immunity is superseded by federal law, *Kerns v. Bucklew*, 178 W.Va. 68, 357 S.E.2d 750 (1987); suits that seek recovery under and up to the limits of the State's liability insurance coverage, *Pittsburgh Elevator v. W.Va. Bd. of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983); and suits by state employees seeking an award of back wages which is prospective in nature, *Gribben v. Kirk*, 195 W.Va. 488, 466 S.E.2d 147 (1995).

> benefits to be conferred by the corporation, and yet it being sovereign or representing sovereignty it could not be sued.”). Less than two decades after West Virginia’s formation, the *Tompkins* Court noted the inherent problems that an overly rigid application of sovereign immunity would create when it held that the doctrine was inapplicable to a state-owned corporation, stating that to hold otherwise would create “a legalized despot trespassing upon the rights of the citizens, who would be powerless to protect themselves.”
>
> “The concept that ‘[t]here 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.’” *Pittsburgh Elevator Co. v. W. Virginia Bd. of Regents*, 172 W. Va. 743, 750, 310 S.E.2d 675, 682 (1983). 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, “the 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. 47-48 (cleaned up).

At bottom, it is the substance that matters. PEIA’s actions are uniquely troubling and damaging, demanding restraint from this Court in the rigid application of sovereign immunity, if it were otherwise implicated. “Whenever 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 nature of Air Evac’s dispute with PEIA “accentuate[s] the danger of obviating Air Evac’s due process rights by applying immunity’s bar to its claims.” App. 51.[9] Air Evac

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[9] PEIA is insincere in its suggestion that Air Evac has waived a due process or balancing of harms argument. *See* Resp. Br. at 36, 39. The balance of Air Evac’s briefing is dedicated to (1) identifying the due processes harms it has suffered (Op. Br. at 1-9), and (2) squaring those against PEIA’s call for sovereign immunity. *Id.* at 12-18 (Section titled “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.”) (emphasis added). All the while, PEIA has utterly ignored that Judge Scarr’s dissent centered on these issues. This is just another of PEIA’s many efforts to evade the merits of the injustice it has caused. It should be swiftly tabled.

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.[10] 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.

4. Air Evac Appropriately Seeks Prospective Relief.

PEIA is not serious in its discussion of retroactive versus prospective relief. In short, PEIA maintains that Air Evac could have set the demarcation for prospective relief at an earlier date, as "[p]arties often file placeholder actions to meet certain deadlines and stay those actions while litigation a related cause of action." Resp. Br. at 35. Judge Scarr grasped the absurdity of this suggestion:

> 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). 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. 40-41.

[10] PEIA suggests that it has already fairly compensated Air Eavc for its transports. Resp. Br. at 36-37. That is not correct. Despite PEIA's misguided declarations about what is fair compensation, a comparison of in-network rates secured by Air Evac in neighboring states demonstrate that West Virginia's rates are remarkably low. For example, Kentucky and Tennessee remit to Air Evac at levels in-line with its billed charges. *See* App. 481-484 (letter demonstrating "payment metrics which have been deemed reasonable by other public benefits administrators, including in Kentucky and Tennessee" and outlining those "Avg. in Network Comparative" figures against the disputed transport charges)

Simply put, the *Cheatham* litigation established 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. As recognized in *Black v. State Consolidated Public Retirement Board*, the very basis to distinguish relief as prospective versus retroactive "flow[s] 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) (cleaned up).

PEIA ultimately concedes this very point, acknowledging in its discussion of *Gribben*, that the "crucial date [for prospective relief delineation] in *Gribben* was the initiation of a prior suit . . . because the prior suit decided the State's liability." Resp. Br. at 24 (quoting *Gribben*, 195 W. Va. at 157-58, 466 S.E.2d at 498-99). That sounds familiar because the *Cheatham* litigation was the obligatory prior suit that decided PEIA's liability in operating its illegal reimbursement regime. 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, as it was compelled to do by federal and state law—without regard to who it was transporting or their ability to pay.

III. CONCLUSION

For the foregoing reasons, this Court should reverse the ICA majority's decision that sovereign immunity shields PEIA and remand this action with instruction that PEIA remit full payment Air Evac on the disputed transports in recognition of the severed portions of PEIA's illegal reimbursement scheme.

Respectfully submitted,

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No. 24-452

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

AIR EVAC EMS, INC.

Petitioner,

v.

JASON HAUGHT, 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 22nd day of January, 2025, that I electronically filed the foregoing ***Reply 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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