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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-452

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.

RESPONDENTS' BRIEF

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

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INTRODUCTION

This is a textbook sovereign immunity case. Air Evac has brought a $4 million damages claim against the Public Employee Insurance Agency. As the Intermediate Court of Appeals held, that claim constitutes a straightforward attempt to make the State a defendant in a court of law. West Virginia Constitution article VI, Section 35, forbids that effort. And no exemptions to Section 35's sovereign immunity apply.

Air Evac argues that PEIA isn't the State—it's instead a corporation behaving in purely proprietary ways. And even if PEIA is the State, Air Evac insists the Court should create a new Section 35 exception for instances when the Legislature creates and funds an agency-administered program. The ICA was right to reject both these arguments, and this Court should, too.

PEIA is a defendant here, and it's "the State." Among other things, it's doing the State's work of insuring public employees in all the ways the Legislature commands, is totally reliant on Treasury funds for its revenue, and has a board that the Governor appoints and the Senate confirms. Despite what Air Evac says, an entity isn't purely proprietary just because it handles money.

Air Evac also errs in suggesting that the Court should craft a new paying-program exception. This Court can't amend West Virginia's *constitutional* sovereign immunity, and no case law supports an exception. Many opinions apply sovereign immunity with facts like this case. And the broad exception Air Evac wants to write would seriously endanger the public fisc.

Finally, the Court need not countenance Air Evac's complaints about fairness. PEIA has already paid Air Evac at exactly the rate Air Evac has accepted for post-2019 flights. Air Evac is now looking for a windfall beyond the normal reimbursement rate. As the Fourth Circuit said, PEIA had every right to pay Air Evac something less than full price; paying Air Evac at the Medicare Rural rate was well within PEIA's discretion. For these reasons, the Court should affirm.

STATEMENT OF THE CASE

I. Sovereign Immunity in West Virginia.

West Virginia's sovereign immunity has its roots in English common law. The Founders readily adopted England's "well established" rule that a sovereign "could not be sued without consent in its own courts." *Alden v. Maine*, 527 U.S. 706, 715 (1999). It was universally accepted at the founding that sovereign immunity was "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Id.* at 713. So in 1776, when Virginia adopted "[t]he common law of England," Syl. pt. 2, *Cunningham v. Dorsey*, 3 W. Va. 293, 298 (1869) (cleaned up), this adoption included sovereign immunity—chiefly to "protect[] the public purse" and "provid[e] for smooth operation of government," *Afzall ex rel. Afzall v. Commonwealth*, 273 Va. 226, 231, 639 S.E.2d 279, 282 (2007).

When West Virginia formed, it kept "the common law of Virginia." *Parkulo v. W. Va. Bd. of Prob. & Parole*, 199 W. Va. 161, 171, 483 S.E.2d 507, 517 (1996); W. VA. CONST. art. XI, § 8 (1863). West Virginia thus "adopt[ed] the same views" as Virginia on sovereign immunity. Syl. pt. 3, *Cunningham*, 3 W. Va. at 298. And by the mid-19th century, it was "an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission." *Beers v. State*, 61 U.S. 527, 529 (1857).

West Virginia's 1872 political power shifts led to a constitutional overhaul, including the sovereign immunity language we're familiar with: "The State of West Virginia shall never be made defendant in any court of law or equity." W. VA. CONST. art. VI, § 35 (1872). Unfortunately, sovereign immunity wasn't discussed at the ratifying convention. *See* HENRY S. WALKER, JOURNAL OF CONSTITUTIONAL CONVENTION (1872). Delegates referenced Section 35's "never be made defendant" only twice—and they debated it neither time. *Id.* at 12, 19. Besides an irrelevant addition in 1936 permitting the State to "be made defendant in any garnishment or attachment proceeding," W. VA. CONST. art. VI, § 35 (1936), that provision reads the same today.

This Court has offered several rationales for sovereign immunity. Early on, it said "the State, as the King, can do no wrong." *Downs v. Lazzelle*, 102 W. Va. 663, 136 S.E. 195, 197 (1926); *G.M. McCrossin, Inc. v. W. Va. Bd. of Regents*, 177 W. Va. 539, 541, 355 S.E.2d 32, 34 (1987) (saying this more likely meant the King couldn't be sued in his own courts). Later, it said that "as a sovereign power, it cannot be compelled by the process of courts of its own creation … to defend itself from prosecution." *Hayes v. Town of Cedar Grove*, 126 W. Va. 828, 30 S.E.2d 726, 728 (1944) (cleaned up). Concern for the "public treasury" and the "orderly administration of government" are more recent justifications. *G.M. McCrossin*, 177 W. Va. at 541, 355 S.E.2d at 34; *see also Mellon-Stuart Co. v. Hall*, 178 W.Va. 291, 296, 359 S.E.2d 124, 129 (1987).

And this Court has emphasized time and again that sovereign immunity is strict. It is "absolute" and "cannot be waived by the legislature or any other instrumentality of the State," *Mellon-Stuart*, 178 W.Va. at 296, 359 S.E.2d at 129 (cleaned up), including the judiciary, *Gribben v. Kirk*, 195 W. Va. 488, 493, 466 S.E.2d 147, 152 (1995) ("[T]he constitutional grounding of the State's immunity is not judicially revocable."); *accord Arnold Agency v. W. Va. Lottery Comm'n*, 206 W. Va. 583, 590, 526 S.E.2d 814, 821 (1999) (saying the State's sovereign immunity is "absolute" and "cannot be waived" (cleaned up)); *Skaff v. Pridemore*, 200 W. Va. 700, 705-06, 490 S.E.2d 787, 792-93 (1997) (same); *Clark v. Dunn*, 195 W. Va. 272, 276, 465 S.E.2d 374, 378 (1995) (same); *Kerns v. Bucklew*, 178 W. Va. 68, 357 S.E.2d 750 (1987) (same). It is "thoroughly established" that Section 35 means a person "has no right of action against the state" or "an agency of the state" performing its discretionary duties. *Mahone v. Road Comm'n*, 99 W. Va. 397, 398, 129 S.E. 320, 320 (1925). While this Court has recognized twelve exemptions to Section 35, they reflect instances that might appear to trigger Section 35 but on closer inspection fall outside its originally understood scope. (More on those below.)

II. The Public Employment Insurance Agency.

West Virginia created its Public Employment Insurance Agency in 1971 to provide medical and other "insurance coverage to eligible employees … and to establish and promulgate rules for the administration of these plans." *Agency*, *Public Employees Insurance Agency*, WV.GOV, https://tinyurl.com/z5pb55f7 (last visited Dec. 27, 2024); *see also* W. Va. Code §§ 5-16-1 *et seq.*

PEIA functions as a state agency. It "consists of the director, the finance board, the advisory board, and any employees who may be authorized by law." W. Va. Code § 5-16-3(a). The Governor appoints the director and the 10-member finance board "with the advice and consent of the Senate." *Id.* §§ 5-16-3(a), 5-16-4(a). PEIA's director can hire a deputy director and "any administrative, technical, and clerical employees" to administer PEIA's programs. *Id.* § 5-16-3(a). The director must "perform the duties that are required of him or her under the provisions of" the PEI Act. *Id.* These duties include complying with various quorum, notice, compensation, and public hearing requirements. *Id.* §§ 5-16-4(c), 5-16-5(d)(3). Nearly all agency "positions" are civil-service protected. *Id.* § 5-16-3(b). Each of the finance board members must meet detailed requirements and are drawn from various sectors and constituencies and "geographical areas within the state." *Id.* § 5-16-4(b)(1), (3). The board's chair is the "Secretary of the Department of Administration." *Id.* § 5-16-4(c). The finance board must develop its plan using the Governor's "estimate of total revenues" and adjust its plan in view of the Legislature's final spending bill. *Id.* § 5-16-5(d), (i).

PEIA's main goal is to bring "fiscal stability" to these members' healthcare costs. W. Va. Code § 5-16-5(a). To that end, the Legislature empowered PEIA to decide how much it will pay for health care services. *Id.* § 5-16-5(c)(1) (2007) (letting PEIA set the "[m]aximum level of reimbursement"—i.e., the specified rate—for categories of health care providers). Most rate limits are backed up by a statute prohibiting medical providers from directly billing PEIA members for any remaining balance—a practice known as "balance-billing." *Id.* § 16-29D-4(a)(2). The Legislature also listed extensive and specific plan requirements, including lists of various medical conditions that must be covered and specifications about how. *See generally id.* §§ 5-16-7, 5-16-7a, 5-16-7b, 5-16-7c, 5-16-7d, 5-16-7e, 5-16-7f, 5-16-7g, 5-16-9, 5-16-10. It clarified that PEIA's preferred provider system and incentives "may include multiyear renewal options" unless "prohibited by the Constitution." *Id.* § 5-16-16.

As for revenues, both "the employer and employee" pay PEIA premiums. W. Va. Code § 5-16-13. The Legislature fixed premium revenues "at a level of 80 percent for the employer and 20 percent for employees." *Id.* § 5-16-5; *accord id.* § 5-16-30 (same). West Virginia Code § 5-16-18(a) explains that every "employer[]" using "state general revenue or special revenue funds, or federal funds … shall budget the cost of insurance coverage provided by" PEIA "as a separate line item titled PEIA in its respective annual budget and [is] responsible for the transfer of funds to" PEIA amounting to its "proportionate share" of insurance costs. Employers "not operating from the state General Revenue Fund shall pay to the director their share of premium costs from their respective budgets." *Id.* § 5-16-18(c). An "employee's proportionate share of the premium or cost shall be withheld or deducted by the employer from the employee's salary or wages as and when paid and" forwarded to PEIA. *Id.* § 5-16-18(e).

An example helps understand PEIA's revenues. Suppose a Department of Transportation employee's family insurance plan premium costs are $2,000 a month. DOT would itself pay $1,600 and would withhold $400 from the employee's check. But because both DOT's and PEIA's accounts are managed and operated by Treasury, none of this money would ever leave Treasury's hands. Treasury would use the state payroll process or Internal Exchange Transactions (IET) in wvOASIS to transfer $2,000 from the DOT account or accounts to "a special fund or funds" for PEIA "in the State Treasury." W. Va. Code § 5-16-18(f). The Treasurer always remains the "custodian of the fund or funds," administering them on PEIA's behalf. *Id.* Only the Treasurer pays "warrants issued by the State Auditor against [PEIA's] fund or funds." *Id.* On top of the premiums, the Legislature appropriates whatever is "necessary to pay the proportionate share of the administrative costs for the state as an employer." *Id.* § 5-16-20. PEIA must submit annual financial reports to the Governor and Legislature. *Id.* §§ 5-16-25, 5-16-26.

III. West Virginia Tries To Control Exorbitant Air-Ambulance Costs.

In the 2000s and 2010s, air ambulance companies grew significantly. A "new Medicare payment formula," John Tozzi, *Air Ambulances Are Flying More Patients Than Ever, and Leaving Massive Bills Behind*, BLOOMBERG (June 11, 2018), https://tinyurl.com/4mk8fcx6, for example, caused air ambulances to double in the 2000s, JAMES G. HINSDALE, REP. OF THE COUNCIL ON MED. SERV., CMS REPORT 2-I-18, AMBULANCE REGULATIONS AND PAYMENTS 2 (2018).

This explosion was accompanied and facilitated by what many saw as troubling business practices and developments. Air ambulance companies doubled prices in just four years between 2010 and 2014. GAO, AIR AMBULANCE REPORT 11 (July 2017). But CMS "estimate[s] that nearly a third" of those transports were for "minimally injured" people. HINSDALE, *supra*, at 2. Further, these "high and growing prices" were concentrated "in a small number of private equity-owned carriers" like Air Evac. Loren Adler, et al., *High air ambulance charges concentrated in private equity-owned carriers*, BROOKINGS INST. (Oct. 13, 2020), https://tinyurl.com/37t5pute. These private-equity firms, responsible for "the largest bills and most aggressive collection practices," Elan Head, *Ban on surprise medical bills could reshape U.S. air ambulance industry*, VERTICAL (Jan. 19, 2021), https://tinyurl.com/2xkfyktv, were "lured by the industry's rapid growth," Tozzi, *supra*, and air ambulance companies' "lucrative business model," Head, *supra*. Their prices jumped by about 80% from 2012 to 2017, compared to 36% increases for everyone else. *Id.* ($48,000 per private-equity ride versus $28,000 for others). This was an "abnormally high ratio of charges to Medicare payments." Karan R. Chhabra, et al., *Most Patients Undergoing Ground And Air Ambulance Transportation Receive Sizable Out-Of-Network Bills*, 39 HEALTH AFFS. 5 (April 15, 2020). Owners blamed these increases on public payers' alleged "underpayments," but "empirical studies have consistently contradicted" those claims. Adler, *supra*. And when insurers wouldn't pay full charges, the companies would often "surprise bill[]" or "balance bill" patients for the remainder. Rachel Bluth, *Why Air Ambulance Bills Are Still Sky-High*, NPR (June 14, 2019), https://tinyurl.com/2u99swpr. From 2013 to 2017, 71% of rides included surprise bill with a "median surprise bill of nearly $22,000," and over the same timeframe out-of-network bills rose by $100 million. Chhabra, *supra*. This was the "linchpin" of the business. Tozzi, *supra*.

States took notice of these numbers and the media stories bringing them to life. *See, e.g.*, Tozzi, *supra*; Bluth, *supra*; Cynthia Gould, *Air ambulance bills soar for patients as Congress works to fix "surprise billing"*, ABC33/40 NEWS (Dec. 9, 2019), https://tinyurl.com/yck63rww. Deeply troubled by what they considered sharp business practices, many States tried to manage these trends through regulations. RYAN J. ROSSO, ET AL., CONG. RSHC. SERV., R46116, SURPRISE BILLING IN PRIVATE HEALTH INSURANCE: OVERVIEW AND FEDERAL POLICY CONSIDERATIONS 8 (Dec. 12, 2019). West Virginia was one of them. In 2016, it passed several laws to address these high costs. *See* W. Va. Code § 5-16-8a (2016). These provisions (1) limited air ambulance charges to the U.S. Center for Medicare and Medicaid Services rate and (2) prohibited balance billing for anything above that rate. *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 758, 769 (4th Cir. 2018).

IV. Federal Litigation Reaffirming PEIA's Discretion To Set Rates.

In June 2016, Air Evac sued PEIA in federal district court, arguing that the federal Airline Deregulation Act ("ADA") preempted the new provisions. In October 2017, the court agreed, holding that the ADA preempts Sections 5-16-5(c)(1) (the maximum-level-of-reimbursement provision) and 5-16-8a (the balance billing cap) because they went "beyond the methods available to … commercial insurer[s]." *Air Evac EMS, Inc. v. Cheatham*, No. 2:16-cv-5224, 2017 WL 4765966, at *8 (S.D.W. Va. Oct. 20, 2017). And it enjoined PEIA from enforcing those specific statutes and PEIA's accompanying fee schedules and regulations. *Id.* at *10.

While PEIA appealed, Air Evac suggested PEIA pay the charges as it demanded for transports since June 2016 because the fee schedule regarding air ambulances had been preempted and enjoined. App. 490. PEIA explained nothing required it to "unquestionably pay whatever amount Air Evac unilaterally establishes," but agreed to pay the Medicare Rural rate. App. 505.

In December 2018, the Fourth Circuit affirmed the district court's Order. *Cheatham*, 910 F.3d at 770. But in doing so, it explicitly agreed with PEIA that the ADA did not "require" PEIA "to pay whatever" an air ambulance provider "may demand." *Id.* at 769. Rather, PEIA may act like any private insurer and "limit reimbursements for air ambulance services after the fact" if it uses its "market power, and not its unique coercive authority." *Id.*

V. PEIA's Payments Premised On The Medicare Rural Rate.

In summer 2019, the West Virginia Legislature enacted a new air-ambulance fee statute that prospectively required PEIA to pay air ambulance providers at the Medicare Rural rate. 2019 W. Va. Acts 1213-14, *codified in* W. Va. Code § 5-16-8a (2019). And it removed any otherwise applicable administrative, civil, or criminal penalty. *Id.* Air Evac accepted this limit going forward, but it kept insisting that PEIA pay the demanded charges for the 115 transports it provided between June 11, 2016, and May 24, 2019. App. 480-81. PEIA tried to negotiate, but Air Evac refused to budge from its all-or-nothing position. App. 384-85. So in mid-2019, the PEIA Director used his West Virginia Code Section 5-16-3(c) discretion, combined with *Cheatham*'s statement that PEIA could limit payments for "services after the fact," and paid Air Evac for the 115 past transports at the Medicare Rural rate. App. 385 (Cheatham Aff. ¶ 25). In this way, PEIA treated Air Evac the same as other non-Plan providers: it designated its services as non-covered; voluntarily paid the same amount other air ambulance providers accept; and allowed Air Evac to charge PEIA members for the rest. App. 385-86 (Cheatham Aff. ¶¶ 27-32).

VI. Air Evac's New Suit.

Unhappy with the discretionary payments, Air Evac demanded more money. PEIA responded by explaining, among other things, that the proper forum for relief was the legislative claims commission and that the State's liability insurance didn't cover Air Evac's claim. App. 565. Air Evac wasn't impressed. So in December 2019 it filed a Petition for Appeal, asking the circuit court to hold a hearing and then (1) declare that PEIA must pay Air Evac's charges as demanded for the 115 transports; and (2) order PEIA to promptly issue such payment. App. 421.

In December 2022, the circuit court granted in part and denied in part Air Evac's Petition. The circuit court agreed any award against PEIA would "come from State monies held under the custody of the State Treasurer." App. 208 (Order ¶ 49). But the circuit court created a new "paying-program" sovereign immunity exception, under which sovereign immunity would not apply when the Legislature "creates a program, appoints an agency to administer it, and requires the agency to make payment[s] out of funds appropriated for that purpose." App. 209 (Order ¶ 54). Because PEIA purportedly met these conditions, it said PEIA was not sovereignly immune. App. 208-10 (Order ¶¶ 51, 53 57). On the merits, the circuit court rejected Air Evac's "pay us everything" demand, App. 214-17 (Order ¶¶ 81-95), but also found PEIA's decision suspect because of misunderstandings of the statute and PEIA's actions, App. 220-23 (Order ¶¶ 108-120) (saying PEIA was "potentially" violating the federal injunction). It thus (1) invalidated PEIA's payments regarding the 115 transports; (2) remanded the case for "further administrative proceedings and negotiations consistent with *Cheatham*"; and (3) denied Air Evac's request for "the entirety of its past charges for the transports." App. 225.

VII. The ICA Recognizes PEIA's Sovereign Immunity.

PEIA appealed, and the ICA ruled for it on sovereign immunity. The court first noted that sovereign "immunity is 'facially absolute,' unwaivable, and extends to agencies of the State," and that the point of sovereign immunity is "protect[ing] the public purse." App. 12. Crucially, "Air Evac d[id] not dispute that PEIA, as a state agency, constitutes 'the State' for the purposes of sovereign immunity." App. 16. The court was unimpressed with Air Evac's argument that Section 35 didn't apply because "PEIA is not a 'defendant' within the meaning of Section 35." *Id.* The "core consideration" isn't labels but "whether the true party in interest is the state." *Id.* Because this action is "one for recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity." App. 17 (quoting *W. Va. Lottery v. A-1 Amusement, Inc.*, 240 W. Va. 89, 103, 807 S.E.2d 760, 774 (2017)). Air Evac tried "to distinguish this matter from a typical claim for money damages," but "Air Evac cannot escape nor deny what it seeks—a directive requiring the State to pay" it the money it's allegedly owed. *Id.* Air Evac "concede[d] this point in its prayer for relief" and ICA briefing. App. 17-18. Because its "claim seeks money recovery from a State defendant," "Section 35 immunity is triggered." App. 18.

The ICA then considered whether exemptions applied. The court first asked whether this could be an action seeking prospective relief only, noting the "crucial date for drawing a line between prospective and retroactive relief" is the "initiation of the relevant action." App. 19 (cleaned up) (quoting syl. pt. 1, *Skaff*, 200 W. Va. 700, 490 S.E.2d 787). This Court in *Skaff* said the "initiation of the relevant action" is measured from the date of "the filing that produced the original decision appealed from." App. 20. Air Evac "initiated" this action when it officially requested "a contested hearing regarding its payment demand" in October 2019. *Id.* That demand letter was "the first time that [it] formally sought payment as relief." *Id.* Because the "transports predate the initiation of this matter"—occurring between June 2016 and June 2019—"the relief sought is retroactive, not prospective." App. 21.

The ICA also rejected Air Evac's invitation to create a brand-new exception to Section 35. The circuit court and Air Evac's new paying-program exception came from a "misappli[cation]" of *Mellon-Stuart*. App. 22. In *Mellon-Stuart*, the court explained, plaintiffs successfully sought a court of claims decision recommending plaintiffs be paid for their construction work performed for a state agency. *Id.* But the Legislature refused. *Id.* Plaintiffs argued the agency had "to pay [the] recommended claims from the agency's budget." *Id.* The Court "rejected" that argument, "declining to carve out a new exception in this context. Instead, the Court … reaffirm[ed] the general prohibition barring any monetary recovery that would directly draw from State funds." *Id.*

The ICA said *Mellon-Stuart*'s "factual context" showed Air Evac was misreading its "legislative appropriation" phrase. App. 23. As used in *Mellon-Stuart*, it refers to "a specific appropriation to authorize compensation to [a] vendor" after "a favorable recommendation from the court of claims." *Id.* It is "a legislative award of a specific sum to a specific entity, directly enacted by the Legislature." App. 24. It doesn't authorize Air Evac's "attempted … end-run around" sovereign immunity or allow it to "reach directly into the agency's budget." App. 23. That's because "the Legislature's general act of assigning basic budget appropriations to a state insurance agency that has been delegated with discretionary powers in administering those funds, does not amount to a 'legislative appropriation'" under *Mellon-Stuart*. App. 24. Any other holding would allow precisely what sovereign immunity bars—"the 'diversion of state money from legislatively appropriated purposes to the payment of court awards.'" App. 23 (quoting *Kerns*, 178 W. Va. at 72, 357 S.E.2d at 754). The ICA thus followed *Mellon-Stuart* in refusing to adopt this paying-program exception to sovereign immunity. App. 24. It reversed the circuit court's order and remanded the "matter to be dismissed with prejudice." App. 24. This appeal followed.

SUMMARY OF ARGUMENT

I. PEIA is protected by sovereign immunity, and Air Evac's $4 million retroactive damages claim is a clear violation of Section 35. First, PEIA is the State because it functions statewide, does the State's work of insuring public employees and keeping government running, was created by the Legislature, isn't subject to local control, and is utterly dependent on the State's coffers in the form of appropriations and (overwhelmingly employer) premiums. PEIA's governmental powers and duties and its legislatively prescribed governing board's composition confirm this. Air Evac tries to paint PEIA as a purely proprietary corporation, but it fails. For one thing, even if PEIA were a corporation, it would still be sovereignly immune. This Court often gives sovereign immunity to corporations like hospitals or insurance companies doing governmental work. For another, PEIA's work is governmental in nature—done for the common welfare with the power of the State. Engaging in commerce doesn't mean it is purely proprietary. Second, this case satisfies no current Section 35 exemption, and the Court shouldn't create a new paying-program exception to Section 35 that applies every time an agency is implementing a statutory scheme with funding. Air Evac's argument misunderstands this Court's relationship to *constitutional* sovereign immunity. And this paying-program exception appears nowhere in case law: Air Evac gets its main case (*Mellon-Stuart*) wrong, and it argues for a new jurisdictional holding from silence using inapposite cases. To the contrary, the Court has applied sovereign immunity in many cases just like this. And this paying-program exception would have devastating policy consequences, endangering the public fisc. Third, Air Evac misunderstands the prospective-retroactive line as a standalone Section 35 exemption. But it's just a tool this Court uses in forward-looking actions to decide when a remuneration clock starts. Here, because Air Evac initiated this lawsuit after the disputed transports, that line shows this action is retroactive.

II. Air Evac's fairness concerns about not getting paid are oversold and unjustified. The Court shouldn't allow Air Evac's backdoor attempt to litigate the merits. Besides, PEIA *has* paid Air Evac, and at the same Medicare Rural rate Air Evac accepted for post-2019 flights; Air Evac appears to be looking for a $4 million windfall. No matter which way one cuts it, West Virginia taxpayers will fund that windfall. Ultimately, PEIA is right on the merits: PEIA has the discretionary authority to pay Air Evac the Medicare Rural rate without violating the *Cheatham* injunction. And Air Evac has waived any due process argument in multiple ways. In the end, Air Evac may avail itself of the sole proper remedy constitutionally available here: the legislative claims commission.

STATEMENT REGARDING ORAL ARGUMENT

This case involves a straightforward application of familiar sovereign immunity principles. It does not require oral argument under West Virginia Rules of Appellate Procedure 19 or 20.

STANDARD OF REVIEW

The Court reviews sovereign immunity issues *de novo*. *Gribben*, 195 W. Va. at 493, 466 S.E.2d at 152.

ARGUMENT

I. Sovereign immunity bars Air Evac's total-payment claim because it's a straightforward, $4 million retroactive damages action against the State.

PEIA is protected by sovereign immunity. The Constitution says the "state of West Virginia shall never be made defendant in any court of law or equity." W. VA. CONST. art. VI,

§ 35. This grant of immunity sounds broad because it is. *Davari v. W. Va. Univ. Bd. of Governors*, 245 W. Va. 95, 99, 857 S.E.2d 435, 439 (2021) (describing "sovereign immunity" as "facially absolute"). It is "more than a defense to a suit in that [it] grant[s] governmental bodies and public officials the right not to be subject to the burden of trial at all" and spares defendants from undergoing "an inquiry into the merits of the case." *Hutchison v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996). This broad protection extends to government agencies like PEIA. *See* syl. pt. 7, *Shaffer v. Stanley*, 215 W. Va. 58, 593 S.E.2d 629 (2003). Because the "primary purpose" of this immunity today is "to prevent the diversion of state money" to pay court awards, *Kerns*, 178 W. Va. at 72, 357 S.E.2d at 754, it consistently bars suits against State agencies that "attempt to obtain a retroactive monetary recovery"—that is, a straight damages judgment—"payable from State funds," syl. pt. 1, *Gribben*, 195 W. Va. at 490, 466 S.E.2d at 149. Air Evac is suing a state agency for money damages. So this is a simple sovereign immunity case, and the Court's analysis should end there (as other courts have held). *See State ex rel. State Ins. Fund v. JOA, Inc.*, 2003 OK 82, ¶ 9, 78 P.3d 534, 537 (holding that the "State Insurance Fund" had "sovereign immunity"); *Comm'rs of State Ins. Fund v. M. Mathews & Sons Co.*, 131 A.D.2d 301, 301, 516 N.Y.S.2d 5, 6 (N.Y. App. Div. 1987) (holding that "[t]he State Insurance Fund is a state agency" and, thus, sovereignly immune)).

Air Evac disagrees, however, for two reasons—both of which fail. First, Air Evac argues that state agency PEIA isn't a state defendant. Second, Air Evac argues that the Court should invent a brand-new paying-program exception to Section 35.

A. PEIA is the State.

The crucial first step in immunity cases is to "properly categorize the party claiming immunity." *Kent v. Sullivan*, 249 W. Va. 747, 752, 901 S.E.2d 500, 505 (2024). Until Air Evac's opening brief here, everyone—PEIA, Air Evac, the circuit court, the ICA—agreed that PEIA was properly categorized as "the State." But now Air Evac argues that PEIA isn't the "State" but an insurance company or corporation. *See, e.g.*, Pet'r Br. 8, 15. Yet Air Evac ignores the five-factor test this Court uses to decide whether an entity is "the State" for Section 35 purposes. The five factors are: (1) "whether the body functions statewide"; (2) "whether it does the State's work"; (3) "whether it was created by an act of the Legislature"; (4) whether it is "subject to local control"; and (5) whether it is financially dependent "on State coffers." *Arnold Agency*, 206 W. Va. at 591, 526 S.E.2d at 822 (cleaned up). PEIA meets every factor of the test.

Factors one, three, and four are easy: no one disagrees that PEIA functions statewide, was directly created by the Legislature, and is not subject to local control.

Regarding the second factor, PEIA does the State's work. PEIA handles a significant piece of public employees' compensation packages: insurance. Administering and controlling the insurance of tens of thousands of public employees is quintessential state business. *Cf. Hamill v. Koontz*, 134 W. Va. 439, 445, 59 S.E.2d 879, 883 (1950) ("That test is: Is the matter involved the state's matter?" (cleaned up)); W. Va. Code § 5-16-1 (saying PEIA serves a "public purpose"). And in 21st century America, insurance for public employees is key to the administration of government. To do normal governmental activities like maintain roads, administer Medicaid, or implement our tax code, West Virginia needs employees—tens of thousands, in fact. In 2025, health insurance is part and parcel of the employer-employee relationship; that's especially true for the State's biggest employer with thousands of employees. To retain employees and keep the wheels of government turning, the State offers public employees health insurance. This means that not only is PEIA's insurance itself the State's work, but it facilitates all the State's other work, too. So PEIA hasn't "strayed from the traditional 'political' functions of government," Pet'r Br. 14—its work is the definition of governmental.

Regarding the fifth factor, PEIA is utterly dependent on the "State's coffers." The vast majority of PEIA's premium revenue comes directly from state or school employers—that is, state agencies' Treasury accounts, W. Va. Code §§ 5-16-5, 5-16-30, or appropriations for schools' premiums in the school aid formula, *id.* § 18-9A-24(b). State employees' premium are also withheld from their paychecks coming from Treasury accounts. *Id.* § 5-16-18(e). The Legislature supplements that premium revenue with various additional appropriations. *E.g.*, *id.* § 5-16-20. The Director puts PEIA's revenue in Treasury funds. *Id.* § 5-16-18(f). The Treasurer is the "custodian of the fund or funds" and pays "all warrants issued by the State Auditor against the fund or funds." *Id.* So like the WVU Board of Governors, *Davari*, 245 W. Va. at 102, 857 S.E.2d at 442, and West Virginia State University, *City of Morgantown v. Ducker*, 153 W. Va. 121, 126, 168 S.E.2d 298, 301 (1969)—both of which are sovereignly immune because of their funding structure—all "[m]oneys received and administered by" PEIA are "public moneys" and "can be withdrawn from the public fund in the State treasury only upon a warrant issued by the auditor on the treasurer and by the check of the treasurer." Even the circuit court admitted that "any money used to satisfy Air Evac's requested relief will come from State monies held under the custody of the State Treasurer." App. 208 (Order ¶ 49); *see, e.g.*, App. 1413 (2018 Treasury check to Air Evac). The only reason PEIA must develop its annual plan using the Governor's "estimate of total revenues" and adjust its plan in view of the Legislature's final spending bill is because it depends entirely on the State's coffers. W. Va. Code § 5-16-5(d)(4), (i). Because Air Evac's "action is in essence one for recovery of money from the state, the state is the real, substantial party in interest and is" sovereignly immune. *A-1 Amusement*, 240 W. Va. at 103, 807 S.E.2d at 774 (cleaned up)).

Still other factors cut against Air Evac's position. In deciding whether an agency is "in truth" the State, "all of [its] features or characteristics must be considered," including "the provisions of the entity's own creation" and operation. *Hope Nat. Gas Co. v. W. Va. Turnpike Comm'n*, 143 W. Va. 913, 928, 105 S.E.2d 630, 639 (1958). So in addition to the traditional five factors, this Court also refers to some from "analogous" contexts. *Arnold Agency*, 206 W. Va. at 591, 526 S.E.2d at 822. These factors focus on an agency's "legislative framework, giving particular attention to" "'its powers'" and duties and "'whether its governing board's composition'" is legislatively prescribed. *Id.* (quoting syl. pt. 1, *Blower v. W. Va. Educ. Broad. Auth.*, 182 W.Va. 528, 389 S.E.2d 739 (1990)).

PEIA's statutory framework reflects the Legislature's belief that it's a state agency like any other—wielding state power to do governmental work. The Legislature prescribes in detail who sits on PEIA's governing finance board, which is appointed by the Governor with the Senate's advice and consent and whose chair is statutorily designated a cabinet secretary. W. Va. Code § 5-16-4(a), (b)(1)-(3), (c). PEIA's director has extensive statutory duties and is also appointed and confirmed; and nearly all PEIA employees have civil-service protection. *Id.* § 5-16-3(a)-(b). PEIA must comply with the standard quorum, notice, and public hearing requirements. *Id.* §§ 5-16-4(c), 5-16-5(d)(3). The Legislature lists many extremely specific requirements of PEIA's plan. *Id.* §§ 5-16-7 to 5-16-10. And it requires PEIA to submit various annual financial reports to the Governor and Legislature. *Id.* §§ 5-16-25, 5-16-26. These provisions scream State agency.

This Court's analogous case law confirms that PEIA is the "State." Take *Blower*, where this Court held that the Educational Broadcasting Authority was "a public agency" and, thus, the State. 182 W. Va. at 531, 389 S.E.2d at 742. As in the PEI Act, the Legislature's findings supporting its creation of the Authority noted its public purpose and public good. *Id.* Its governing structure mirrored PEIA: its board was composed of state officials and those appointed and confirmed. And it operated the same way: it had many government-specific meeting requirements, acted statewide for and on behalf of the State, and deposited all the monies it received, including appropriations, in Treasury accounts. *Id.* "[T]hese circumstances" "comprehensive[ly]" showed that the Authority and PEIA alike are public agencies and, thus, the State. *Id.*

An even closer comparator is *State ex rel. W. Va. Real Estate Appraiser Licensing & Certification Bd. v. Chiles*, 234 W. Va. 125, 763 S.E.2d 663 (2014), where the Court held that the State's real estate licensing board was a State agency. Like PEIA, the Board was created by the Legislature to implement a complex state statutory scheme. *Id.* at 128-29, 763 S.E.2d at 666-67. The Board had several "powers that are characteristic of state agencies"—like rulemaking authority, the power to hold contested-case hearings, and annual reports to the Governor and Legislature. *Id.* at 129, 763 S.E.2d at 667. PEIA has those same powers. And like PEIA, its leadership were appointed and confirmed and had detailed qualification and residency requirements. *Id.* Finally, the Court noted that the Board could operate statewide and its money was deposited into Treasury accounts. *Id.* PEIA is on all fours with *Chiles*.

Chiles also helps dispense with Air Evac's "premium" arguments. Air Evac argues PEIA isn't "the State" because its revenues "are mostly raised from state employee premiums." Pet'r Br. 13. As explained above, that's wrong: 80% of state employer premiums statutorily comes straight from fellow agencies' Treasury accounts. *Contra* App. 33 (ICA dissent creating this mistake through a misreading of PEIA data). But even if Air Evac were right, it wouldn't help its case. In *Chiles*, the Court rejected Chiles's parallel argument that the Board wasn't "financially dependent on public funds" because it supported "itself using money that it collects." *Chiles*, 234 W. Va. at 128, 763 S.E.2d at 666. The Court explained that funds can be "public" without being "appropriated directly from the State Treasury or the State's General Revenue Fund." *Id.* at 130, 763 S.E.2d at 668. It was enough that the Board operated using funds it "collected pursuant to its statutory authority," that it "must account for all money it receives," and deposit it with Treasury. *Id.* PEIA does all that, too: it collects premiums under the statute, deposits them in Treasury accounts, and accesses that money through only the Treasurer. The premiums are "public funds."

Indeed, for those agencies who fund themselves, the Court's sovereign immunity analysis doesn't focus so much on where money comes *from* as where it *goes*. In *Ducker*, for instance, the Court said all the monies received "by the board of governors are public moneys … whether derived from admission fees to athletic contests, from tuition fees, from medical and hospital services, and from appropriations." 153 W. Va. at 126, 168 S.E.2d at 301; *see id.* (noting the monies had to be deposited in Treasury accounts and withdrawn only on the Auditor's warrant). PEIA is the same: no matter what sources its premiums come from, the important point is that *all* its premium revenue is turned over to Treasury, which holds ultimate dispensing power, too.

Air Evac disagrees with all this, arguing that PEIA can't be the State because it is a "state-run insurance company." Pet'r Br. 8, 13 (saying PEIA is "a corporation instrumentality of the State" and a "state governmental corporation"), 15 (same). As shown above, that's untrue. But even if it were a "corporation," that wouldn't matter. West Virginia has had "many boards and commissions brought into being by the Legislature, and many of them termed corporations" have generally "been treated as agencies of the State, and suits against them not permitted." *Schippa v. W. Va. Liquor Control Comm'n*, 132 W. Va. 51, 53, 53 S.E.2d 609, 610 (1948).

Consider a few examples of corporations as "the State." In *Miller Supply Co. v. State Bd. of Control*, 72 W. Va. 524, 78 S.E. 672, 673 (1913), the Court admitted the Legislature founded the "State Board of Control" as "a corporation" but said was still "a direct governmental agency of the state" because "[w]hen it acts, it acts for the state in the administration of state affairs" and contracts for the State. Because when PEIA acts as the State, and the State has a total interest in all PEIA's actions, PEIA would be a corporate agency of the State even if it were a corporation. The Court has said the same of State-created hospital "corporation[s]." *Barber v. Spencer State Hosp.*, 95 W. Va. 463, 121 S.E. 497, 497 (1924); *see also Shaffer v. Monongalia Gen. Hosp.*, 135 W. Va. 163, 168-70, 62 S.E.2d 795, 797-99 (1950) (citing many cases). Perhaps most analogous is *Zaleski v. W. Va. Physicians' Mut. Ins. Co.*, 220 W. Va. 311, 647 S.E.2d 747 (2007). There, the Court applied the *Blower* factors to hold that the West Virginia Physicians' Mutual Insurance Corporation was a "quasi-state entity rather than a private company for due process purposes" because the Legislature created it to serve a public purpose, implement a complex statutory scheme statewide, and run on funds from the Treasury. *Id.* at 314-15, 319, 647 S.E.2d at 750-51, 755. If a quasi-private insurance company doing public work and created as a placeholder in the private sector until a private company would replace it counts as the "State," then the fully public agency PEIA doing similar work is the "State," too.

Air Evac tries to dodge this conclusion by labeling PEIA's work "proprietary," not "governmental." It claims this Court has "routinely permitted" suits when "the State is acting in an enterprising fashion" because those entities aren't acting as the State. Pet'r Br. 13, n.7. But that's not true. The cases above involve hospitals, insurance companies, universities, lotteries and more—all engaging in commerce of some kind. Those State entities charge money to provide goods or services, and non-governmental actors—mostly private citizens—pay. No case says an exchange of money turns otherwise governmental work proprietary. Rather, the question is whether the purpose of the State action is simply to earn money or is, instead, to achieve some broader end "for the common welfare, freedom and security of" West Virginians," W. VA. CONST., preamble, or for their "common benefit, protection and security," W. VA. CONST. art. III, § 3. It is to serve these ends that West Virginia's "[g]overnment is instituted." *Id.* So long as the State action aims not just at financial profit but at some good done for the common welfare and backed by the State's power, monetary exchange alone won't turn that governmental action proprietary. Put another way, a public corporation wields strictly proprietary power when it acts "for the special benefit or profit of the corporation." *Shaffer*, 135 W. Va. at 169-70, 62 S.E.2d at 798-99.

Take just three of this Court's sovereign immunity cases involving real estate, alcohol, and hospitals. In *City of Charleston v. Se. Const. Co.*, 134 W. Va. 666, 674, 64 S.E.2d 676, 680 (1950), the Court held the State Office Building Commission was sovereignly immune, even though it was constructing buildings financed strictly by revenue bonds and "rented to private corporations or persons." That the Commission was perhaps "acting as a private property owner, the over-all purpose of the construction of buildings … is the housing of public agencies, and the fact that rental moneys may be obtained from private sources does not take the public or governmental character from the building commission." *Id.* at 674, 64 S.E.2d at 680. In *Schippa*, this Court held the Liquor Control Commission sovereignly immune even though its explicit mission was to buy and sell intoxicating liquor. 132 W. Va. at 61, 53 S.E.2d at 614. Engaging in this superficially proprietary business, though, was ultimately governmental because "a State has a particular duty to perform with respect to the regulation and sale of intoxicating liquor." *Id.* at 55, 53 S.E.2d at 611. And in *Shaffer*, 135 W. Va. at 167, 62 S.E.2d at 797, the Court said that the "public character of the" hospital was not "changed or affected by the payment of dues or charges" for medical care. The corporation plainly existed to serve the public, not itself, so its public character remained unchanged. *Id.* If building and leasing real estate, buying and selling liquor, and providing health care can be "governmental" despite the commercial component, so is providing insurance for tens of thousands of strictly public employees so the State doesn't grind to a halt.

Air Evac cites four cases it says justify its proprietary argument, but none shows what Air Evac needs it to. Pet'r Br. 12-13. Air Evac leans most heavily on *Tompkins v. Kanawha Board*, 19 W. Va. 257 (1881). In 1869, the West Virginia created a corporation—the "Kanawha Board"—to look after, maintain, and improve the Kanawha River. 1869 W. Va. Acts 75-76. The Legislature empowered the Board to "control and supervis[e]" the River, to "improve[]" it, to "issue bonds," execute liens on its revenue and its property, and charge tolls. *Id.* at 76. Once the River was improved and debts paid off, toll rates were limited to what was necessary "to pay expenses and keep the works in repair." *Id.* at 77. And crucially, "in no event [was] the state of West Virginia [to] be liable for any of the debts or contracts of said Kanawha Board." *Id.* at 76. In *Tompkins*, the plaintiff sued the Board, alleging that its negligence in maintaining the river channel led to the loss of 1,500 barrels of salt. 19 W. Va. at 258-59. The Court held the Board was not the State but a "creature of the State" and, thus, not immune. *Id.* at 264-65. The Board's primary argument for sovereignty rested on the State's stock ownership. But just because the State owns stock in a company—even all of it, the Court said—doesn't mean an otherwise private company is the State. *Id.* at 263. Of course, that reasoning is irrelevant here—PEIA has no stock and is not a "creature of the State" because it *is* the State. The Kanawha Board, on the other hand, wasn't the State because it was a corporation acting strictly "in a proprietary capacity, and in which the State exercise[d] no governmental powers." *Schippa*, 132 W. Va. at 54, 53 S.E.2d at 611.

Admittedly, some of the *Tompkins*'s language about the State not "enter[ing] into business" could be misconstrued (as Air Evac does) to mean if an entity is engaging in any economic behavior, it is not "the State." *Tompkins*, 19 W. Va. at 264. But that would ignore the second half of the Court's explanation for why the Kanawha Board wasn't the State: it was a corporation "*in which the State exercise[d] no governmental powers*." *Shippa*, 132 W. Va. at 54, 53 S.E.2d at 611 (emphasis added). So sometimes a legislatively created corporation will engage in commercial behavior with the power of the State, while other legislatively created corporations won't. The Legislature "is free to delegate either governmental or proprietary functions to either public or quasi public corporations." *Hope Nat. Gas*, 143 W. Va. at 926, 105 S.E.2d at 637-38. *Tompkins* cannot be read to say that playing in the marketplace forfeits sovereign immunity—the myriad cases above overwhelmingly rebut this extreme reading. Instead, the Kanawha Board is best understood as a kind of early public utility: the State granted it an exclusive regional monopoly for its particular kind of work; its work was closely tied to the common welfare but ultimately was *not* backed up with any governmental power; it could raise money through revenue bonds but its finances were completely separate from the State; it used State-owned public property (like easements in rights of way); and it wasn't for-profit, having to moderate prices to cover only costs. So no wonder that for 100 years this Court's sovereign immunity cases didn't consider *Tompkins* in detail. They usually briefly noted that the Kanawha Board wasn't the State, *Miller Supply Co.*, 72 W. Va. at 524, 78 S.E. at 673, or that it "was not an agency having to do directly with the administration of the state government," *Mahone*, 99 W. Va. at 397, 129 S.E. at 320. A public-utility-like, quasi-public, non-profit corporation exercising strictly proprietary authority like the Kanawha Board simply isn't comparable to a state agency welded completely to Treasury and wielding the full scope of governmental power bequeathed by a complex regulatory scheme.

Air Evac relegates its other three cases in support to a footnote—and with good reason: they aren't helpful at all. Pet'r Br. 13 n.7. First, *State ex rel. Davis Trust Co. v. Sims* said Section 35 didn't bar creation of the legislative claims commission to handle questions of the State's moral obligations; it explicitly disagreed with Air Evac's arguments here, stating that "there can be no cause of action against the State or any of its subdivisions for the negligent acts of its officers … in the exercise of a governmental function." 130 W. Va. 623, 638, 46 S.E.2d 90, 98 (1947). *Hope Natural Gas* hinged entirely on the Turnpike Commission's revenue stream. Of course, an entity exercising "only" a "proprietary function" isn't immune, it said; but the "real difficulty" is sussing out whether a quasi-public corporation doing some proprietary work is *also* "exercising sovereign powers." *Hope Nat. Gas*, 143 W. Va. at 925, 105 S.E.2d at 637. For the Court, "a most important factor" in deciding that was whether the entity "was dependent in a large degree, if not wholly, upon the revenues of the state." *Id.* The Commission derived its revenue "from tolls or other income as fixed and determined by the Commission, without any liability on the State or any pledge of its faith and credit" or state appropriations. *Id.* at 928, 105 S.E.2d at 638. So it was not a public entity and, thus, not sovereignly immune. *Id.* And *Ward v. County Court of Raleigh County*, 141 W. Va. 730, 93 S.E.2d 44 (1956), involved a public pool run by county government without a hint of governmental authority involved—it was just a nice, cosmetic community amenity. Most importantly, though, local governments like county governments aren't sovereignly immune. This case is fundamentally different from those three cases. PEIA agrees Air Evac could pursue a legislative claims commission action; PEIA's revenue overwhelmingly comes from and is kept exclusively in Treasury accounts; PEIA isn't a local government; and its work involve extensive uses of uniquely *governmental* power. So those cases don't apply.

In a last push, Air Evac argues Section 35's prohibition on the State being made a "defendant in any court" doesn't apply because PEIA is a "respondent," not a defendant, and because this case started in an administrative proceeding, not a court of law or equity. Pet'r Br. 18. PEIA's formal party designation doesn't matter. *Gribben*, 195 W. Va. at 488, 466 S.E.2d at 147, for example, recognized sovereign immunity for parties titled "respondents." And our courts are eschewing this sort of formalistic pedantry wherever they find it. *See Soriano v. Soriano*, 184

W. Va. 302, 305 n.6, 400 S.E.2d 546, 549 n.6 (1990) ("criticiz[ing]" a case for being "extremely formalistic" (cleaned up)). Moreover, Section 35 doesn't hinge on a case's posture or the forum in which begins, but on the whether *the State* is defending the action. Plenty of sovereign-immunity cases began as agency challenges and move to the courts. The Court should follow the ICA majority opinion's lead and declare Air Evac's distinction "immaterial." App. 18.

B. This case doesn't fit Section 35's recognized exemptions, and the Court shouldn't accept Air Evac's invitation to invent a new paying-program exception.

From its earliest days, this Court has faithfully repeated Section 35's rule that "the State … could be sued in no action." *Tompkins*, 19 W. Va. at 264. About 25 years ago, in *W. Va. Univ. v. Graf*, 205 W. Va. 118, 122-23, 516 S.E.2d 741, 745-46 (1998), however, this Court assembled a comprehensive list of the twelve Section 35 exemptions:

- Suits for injunctive relief "to restrain or require State officers to perform ministerial duties";
- "[S]uits for declaratory judgment";
- Suits for mandamus relief to compel state officers "to perform their lawful duties";
- "[S]uits against State officers acting or threatening to act, under allegedly unconstitutional statutes";
- Suits for mandamus relief after the Legislature recognizes a "moral obligation by the State" and appropriates funds to cover that specific obligation;
- Suits requiring the State Road Commission to conduct takings clause proceedings;
- Suits against a quasi-public entity that lacks "taxing power or dependency upon the State for financial support";
- Counterclaims against the State when the State sued first;
- Suits where Section 35 immunity is superseded by federal law that grants a cause of action—e.g., a state employee's federal sex discrimination claim;
- Suits asserting liability because of the "State's performance of [a] proprietary" or ownership role (e.g., owning a community swimming pool);
- "[S]uits by state employees seeking" a "prospective" "award of back wages"; and
- "[S]uits that seek recovery under and up to the limits of the State's liability insurance coverage" (the "*Pittsburgh Elevator*" exception).

Air Evac's petition fits none of these exemptions. The first six are out right away because Air Evac is seeking damages. App. 5. The other six don't work either. As set out above, PEIA is a purely public entity entirely dependent on the State for financial support and is not acting in a "proprietary" capacity. PEIA didn't sue Air Evac first, and Air Evac doesn't raise employee-back-pay claims. Air Evac's petition is based on West Virginia law, not federal law granting a cause of action. Nor does the petition mention or invoke PEIA's liability insurance coverage limits.

Because existing case law offers it no help, Air Evac urges the Court to invent a brand new paying-program exception, which would allow companies to "compel an agency to distribute legislatively appropriated funds in the manner required by the statutory scheme the agency administers." Pet'r Br. 18.[*] The Court should reject this unlawful invitation for three reasons.

i. Air Evac misunderstands Section 35's relationship to this Court, which has no power to abrogate or change Section 35.

The clearest black letter law regarding Section 35—repeated time and again in landmark sovereign immunity cases like *Miller*, *Mahone*, *Ducker*, *Mellon-Stuart*, *Gribben*, *Arnold Agency*, and *Skaff*, *supra*, p. 3—is that no arm of government can abrogate or reduce Section 35 immunity. *See also Bd. of Trs. of Univ. of Ark. v. Andrews*, 2018 Ark. 12, 10-11, 535 S.W.3d 616, 622 (interpreting identical "never" sovereign immunity language strictly). So *Graf*'s exemptions are best understood not as examples of the Court limiting Section 35 but, instead, factual and procedures postures that superficially appear to trigger Section 35 but actually fall outside its original scope. To be sure, at first blush this Court could sometimes be read to say it can manufacture "exceptions" to Section 35. *See, e.g.*, *Graf*, 205 W. Va. at 122, 516 S.E.2d at 745 ("[O]ver the years this Court has carved exceptions from the prohibition against suing the State.").

[*] Air Evac never reconciles the contradiction between its first argument, where it says PEIA *isn't* supported by legislative appropriations, and this argument, where it argues the Legislature *has* appropriated funds.

But that interpretation wouldn't be quite right. The better understanding of what the Court is doing is recognizing when a lawsuit isn't truly against the "State" as Section 35 understands it.

Take a few examples. The first six of *Graf*'s exemptions reflect the notion that a "suit against an officer of the State who acts or threatens to act" unlawfully "against him in his individual capacity … and not against the State." *Hamill*, 134 W. Va. at 444, 59 S.E.2d at 882; *see Chesapeake & Ohio Ry. Co. v. Miller*, 19 W.Va. 408 (1882) (allowing injunctions against state officers regarding ministerial duties); *Douglass v. Koontz*, 137 W.Va. 345, 71 S.E.2d 319 (1952) (same for declaratory judgment suits); syl. pt. 3, *Blue Jacket Consol. Copper. v. Scherr*, 50 W.Va. 533, 40 S.E. 514 (1901) (same for threatened unconstitutional behavior); *State ex rel. Ritchie v. Triplett*, 160 W.Va. 599, 236 S.E.2d 474 (1977) (same for mandamus relief). This was also the logic behind *Gribben*, 195 W. Va. at 496, 466 S.E.2d at 155, which allowed public employees to pursue a mandamus back-pay action against an official only because that was a ministerial, "nondiscretionary duty created by the statute." In *Hope Natural Gas*, the Turnpike Commission wasn't the "State" because it had no financial connection to the State. 143 W.Va. at 913, 105 S.E.2d at 630. In *State v. Ruthbell Coal Co.*, 133 W.Va. 319, 56 S.E.2d 549 (1949), the Court held that because the State's original claim and the mining company's procedurally, "purely defensive" counterclaim were so closely related, the counterclaim didn't make the State a "defendant" as the framers intended. *Id.* at 329-30. And in *Sims*, 130 W. Va. at 638, 46 S.E.2d at 98, the Court said allowing parties to bring claims of moral obligation in the court of claims (now legislative claims commission) involved issues "of an entirely different and independent character" than sovereign immunity. That is, it didn't make the State a "defendant" in "court" the way Section 35 envisioned.

The best evidence that *Graf*'s list aren't judicially created exceptions is that this Court will simultaneously articulate an exemption while saying Section 35 immunity isn't alterable. In *Ward*, just after the Court held that running a swimming pool absent governmental power was purely proprietary, it "kept in mind that the constitutional provisions relating to immunity of the State, and its agencies," are "absolute" and, thus, "cannot be waived." 141 W.Va. at 736, 93 S.E.2d at 47. And in *Kerns*, 178 W. Va. at 76, 357 S.E.2d at 758, the Court held that "[u]nder the supremacy clause" West Virginia isn't sovereignly immune to a lawsuit arising out "of a joint state/federal scheme to enforce the fourteenth amendment." This was a result of federal law, though, and Section 35 could not "be abrogated by the legislature or by this Court through its evolution of common law principles." *Id.* at 72. *Gribben* said the same. 195 W. Va. at 493, 466 S.E.2d at 152.

In short, the Court has traditionally seen this list of *Graf* cases as *recognizing exemptions* rather than *creating exceptions*. *Cf. Stewart v. State Rd. Comm'n of W. Va.*, 117 W. Va. 352, 185 S.E. 567, 567 (1936) (cleaned up) ("There is no specific exception to [Section 35's] inhibition. Such a provision is ordinarily construed to be absolute and unqualified."). Contrary to Air Evac's assertion, this Court does not "have a long history of tempering the harsh results of sovereign immunity." Pet'r Br. 12. It does not substitute its constitutional "policy preferences" for the text itself. *State ex rel. Miller v. Stone*, 216 W. Va. 379, 382 n.3, 607 S.E.2d 485, 488 n.3 (2004). Air Evac's request that the Court do so here is therefore ill-founded and should be disregarded.

ii. Air Evac's paying-program appears nowhere in existing case law.

Air Evac repeatedly justifies its paying-program exception by saying that it "does not implicate 'the policy which underlies sovereign immunity,' which 'is to prevent the diversion of State monies from legislatively appropriated purposes.'" Pet'r Br. 18-19 (quoting *Mellon-Stuart*, 178 W. Va. at 296, 359 S.E.2d at 129). But this is a misuse of *Mellon-Stuart* for several reasons.

First, *Mellon-Stuart* forecloses this paying-program exception. In *Mellon-Stuart*, the Court noted that Section 35's "grant of immunity is absolute"—meaning it "cannot be waived by the legislature or any other instrumentality of the State." 178 W. Va. at 296, 359 S.E.2d at 129. This truism should be uncontroversial—"[o]f course" the branches of government lack the power to waive *constitutional* sovereign immunity. *Ducker*, 153 W. Va. at 130, 168 S.E.2d at 303. Yet Air Evac's paying-program exception would do that by treating any agency paying money from a fund as an implicit legislative waiver. If *Mellon-Stuart* offers anything helpful here, it's that legislative waivers—implicit or otherwise—can't reduce or lessen Section 35 immunity.

Second, *Mellon-Stuart*'s facts belie any thought that its "legislatively appropriated purposes" language subtly created some additional, broad-based sovereign immunity exception. App. 22 (calling this a "misappli[cation]" of *Mellon-Stuart*). In *Mellon-Stuart*, two contractors working at Marshall University won $800,000 in claims against the Board of Regents in the Court of Claims. 178 W. Va. at 294, 359 S.E.2d at 127. But crucially, the Legislature refused to appropriate the $800,000. *Id.* at 295, 359 S.E.2d at 128. Nevertheless, the contractors filed a mandamus action, reasoning that the court of claims had found in their favor, and the only work left for the Board was the ministerial task of writing the check. *See id.* The Court held that sovereign immunity barred the suit. *Id.* at 297, 359 S.E.2d at 130. Given the unique fact that the Legislature refused to *appropriate* money, it makes sense the Court would make the point that sovereign immunity bars seeking "monetary relief … against the State treasury" without "a proper legislative *appropriation*." *Id.* at 296, 359 S.E.2d at 129 (emphasis added); *cf. Sims*, 130 W.Va. 623, 46 S.E.2d 90 (granting mandamus relief against auditor after he refused to issue warrant for funds specifically appropriated by Legislature). So contrary to Air Evac's assertions, the $4 million it's seeking has *not* already been "appropriated" as *Mellon-Stuart* uses it. *Contra* Pet'r Br. 9. Nothing suggests that this language tacitly crafted another exemption to Section 35.

And third, we know *Mellon-Stuart* wasn't creating an additional sovereign-immunity exception because it named the only two exceptions it considered: a *Pittsburgh Elevator* exception (relating to liability insurance coverage) and a proposed commercial-venture exception. 178 W. Va. at 295-96, 359 S.E.2d at 128-29. Nothing like the paying-program exception ever came up.

Air Evac's three other cases—*Curry*, *CAMC*, and *Maupin*—don't work either. *Contra* Pet'r Br. 20-22. First, each is irrelevant here because neither the opinion nor the briefing discuss sovereign immunity. *See* Pet'r Br. 21-22 (admitting the silence). This silence is fatal. *See* App. 19 (saying "none of [them] ever addressed" sovereign immunity). The "existence of unaddressed jurisdictional defects has no precedential effect." *Kanawha Cnty. Pub. Libr. Bd. v. Bd. of Educ. of Cnty. of Kanawha*, 231 W. Va. 386, 396, 745 S.E.2d 424, 434 (2013) (quoting *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1974)). Jurisdictional issues "neither asserted by the parties nor addressed" by this Court are simply "not binding." *Id.* When a past opinion does "not display the slightest awareness that" it was treading on jurisdictional ground, or "assumed" jurisdiction, its precedential value on that point is nil. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). In these three cases, the parties and Court were silent on sovereign immunity, appearing to think it was not an issue. *See Maupin v. Sidiropolis*, 215 W. Va. 492, 495, 600 S.E.2d 204, 207 (2004) (saying the "solitary" "issue presented" was plaintiff's "entitlement to receive monies").

Second, these cases are inapposite on their facts. In *CAMC v. State Tax Dep't of W. Va.*, for example, the plaintiff didn't sue the State for general money damages, as Air Evac is doing; it sued to stop the Treasury from over-collecting certain taxes. 224 W. Va. 591, 593, 687 S.E.2d 374, 376 (2009). *CAMC* wasn't about the *State's* liability—it was about the *taxpayer's* liability; it wasn't about money coming *out* of government coffers, but preventing money from going in. That difference is real. *CSX Transp., Inc. v. Bd. of Pub. Works of State of W. Va.*, 138 F.3d 537, 542 (4th Cir. 1998). And it matters because the purpose of sovereign immunity is to prevent raids on the state coffers. *Pittsburgh Elevator Co. v. W. Va. Bd. of Regents*, 172 W. Va. 743, 756, 310 S.E.2d 675, 688 (1983) (calling this concern "paramount").

Curry v. W. Va. Consol. Pub. Ret. Bd., 236 W. Va. 188, 778 S.E.2d 637 (2015) is inapplicable, too. There, a former Department of Agriculture employee sued the public retirement board, arguing he met the "the statutory eligibility requirement of 'full time' employment for participation in PERS." *Id.* at 189, 778 S.E.2d at 638. Nothing in the opinion or briefs mentions damages, back pay, or other remuneration. The only question handled by the Court was in declaratory-judgment form: was the claimant a full-time employee? *Id.* This question fits neatly into an existing exemption to sovereign immunity: the declaratory-judgment exemption. *Graf*, 205 W. Va. at 122-23, 516 S.E.2d at 745-46. Because he wasn't full-time, the Board decided to refund the contributions Curry previously paid to PERS. *Curry*, 236 W. Va. at 194, 778 S.E.2d at 643. But like in *CAMC*, this was not a decision on the *State's* liability for a past debt. The refund was to return money the *employee* had incorrectly paid. *Id.* at 194, 778 S.E.2d at 643. Either way, *Curry* is no example of Air Evac's paying-program exception.

Maupin is different as well: it involved only prospective remedies. 215 W. Va. at 495, 600 S.E.2d at 207. The statute there set up a fund to pay monthly "awards" to registered in-state greyhound breeders. W. Va. Code § 19-23-10(d) (1995). Months after Maupin registered, the Racing Commission tried to kick him out—deciding that he was ineligible because his dogs weren't solely owned by a state resident. *Maupin*, 215 W. Va. at 494, 600 S.E.2d at 206. When the breeder objected, the commission held a hearing, an appeal followed, and the courts reversed the agency finding that Maupin was "eligible to participate in the fund," *id.* at 495, 600 S.E.2d at 207, and should be "paid all monies due under" the Fund, *Maupin v. Sidiropolis*, No. 2-AA-103, 2007 WL 7314077 (W. Va. Cir. Ct. 2003). But that relief would've only required the commission to restart the monthly payments Maupin had missed during the administrative suit. Nothing indicates that the State Treasury was on the hook for payments prior to then. *Maupin* looks like a classic "prospective declaration of" a citizen's future "rights," which Section 35 allows, syl. pt. 1, *Gribben*, 195 W. Va. at 490, 466 S.E.2d at 149, and nothing more. It involves money, but only going forward. So it does not aid Air Evac's suit for past debts.

Altogether, this Court's cases instead show that sovereign immunity applies even where the Legislature set money aside for certain purposes and charges an agency with using those funds. *Contra* Pet'r Br. 18. For example, in *Phillips v. West Virginia DHHR*, this Court rejected a sign-language interpreter's claim for payment under a contract with DHHR. No. 19-0610, 2020 WL 3408421, at *1 (W. Va. 2020) (mem. decision). The court held that because the state's insurance policy did not cover such claims, they could not be brought in state court, *id.* at *3-4, even though DHHR is empowered by state law to engage such services for state-run psychiatric hospitals, W. Va. Code § 27-1A-4(d), and pays for them through legislative appropriations, *id.* § 27-1A-8. In *Skaff*, this Court held that sovereign immunity barred retroactive recovery of certain compensation for National Guard firefighters—even though the funds for their salaries were set apart from "general revenues" in a special revenue account. *Skaff*, 200 W. Va. at 703, 706, 490 S.E.2d at 790, 793. Similarly, in *Arnold Agency*, the Court held that an ad agency couldn't seek damages from the Lottery's mishandling of competitive bidding on a multi-million advertising contract unless it fit within the *Pittsburgh Elevator* exception to sovereign immunity. 206 W. Va. at 588, 526 S.E.2d at 819. It reached this conclusion even though State Code directed the Lottery to competitively bid out the contract, W. Va. Code §§ 5A-3-1 *et seq.*, and the successful bidder would be paid from special revenue set aside for that purpose, *State ex rel. Fahlgren Martin, Inc. v. McGraw*, 190 W. Va. 306, 311 n.4, 438 S.E.2d 338, 343 n.4 (1993) (discussing funding for this Lottery advertising contract). The Court did not create a new paying-program exception in any of these cases. The Legislature's choice to set aside money for specific purposes and place an agency over the use of these appropriated funds did not open the State Treasury to court-ordered awards from appropriations in those cases. It shouldn't here either.

Finally, adopting this paying-program exception would have devastating policy consequences. *Contra* Pet'r Br. 15. Allowing parties to pursue damages awards would undermine Section 35 chief objective: "protecting the public fisc." *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 661, 783 S.E.2d 75, 82 (2015). The framers adopted Section 35 explicitly "to protect the financial structure of the State." *Ruthbell Coal*, 133 W. Va. at 328, 56 S.E.2d at 554. The paying-program exception would "deplet[e]" the Treasury, App. 33, and "threaten[s]" the "integrity of the budget process," *G.M. McCrossin*, 177 W. Va. at 543, 355 S.E.2d at 36. Agencies that lose already-budgeted money to judgments will have to forgo other necessary work. *Id.* Air Evac reassures the Court that the $4 million is a small percentage of PEIA's total budget. Pet'r Br. 16. True, but it's *double* what PEIA budgets yearly for air ambulance charges. App. 539. That's why the Constitution's framers didn't leave it to Air Evac or the dissent to decide whether creating this new exception would sufficiently "deplet[e] the state's [c]offers." Pet'r Br. 24. They protected the public fisc at a *constitutional* level. Thus, anytime this Court makes a decision that could impose additional financial liabilities on the State, it "enter[s] such territory with great care, fully respectful of the fact that our Constitution places on the Legislature the primary responsibility for raising and allocating State funds." *Gribben*, 195 W. Va. at 494, 466 S.E.2d at 153. Air Evac does not appreciate that adopting its new exception would be a troubling and "profound holding." App. 19.

iii. Air Evac misunderstands the prospective-retroactive issue.

Air Evac appears to argue that damage suits are allowed whenever they are forward-looking—that is, that prospective relief is a standalone Section 35 exemption. Pet'r Br. 22. But that's wrong. The prospective-retroactive line is just a tool this Court uses in mandamus or declaratory judgment cases that include a ministerial duty to pay a plaintiff—that is, in only forward-looking actions—to decide precisely when that remuneration clock starts. *See* syl. pt. 3, *Gribben*, 195 W. Va. at 490, 466 S.E.2d at 149. And as the ICA explained, that "crucial date" is the "initiation of the relevant action." App. 19 (cleaned up) (quoting syl. pt. 1, *Skaff,* 200 W. Va. 700, 490 S.E.2d 787). So prospective relief is no standalone exemption. *Contra* Pet'r Br. 22.

Still, the prospective-retroactive distinction matters because it shows that even if Air Evac *had* styled its appeal as a mandamus action, Section 35 bars its requested relief. Remember the ICA generously marked the initiation of *this* action using Air Evac's October 2019 demand letter. App. 20. Air Evac's relief was retroactive because the "transports predate the initiation of this matter"—occurring between June 2016 and June 2019. App. 21. Air Evac argues that the proper line is *Cheatham*, not this case. No case law supports this novel approach. *Skaff* said the line is drawn on the date when the suit for money was initiated—not just any potentially related lawsuit. After all, the "crucial date" for *Skaff* was when the employees filed their level-four grievance; that was when they first sought "retroactive application" of their overtime pay, *Skaff*, 200 W. Va. at 704, 706, 490 S.E.2d at 791, 793. *Gribben*'s line-drawing does not help it, either. True, unlike *Skaff*, the crucial date for *Gribben* was the initiation of a prior suit: the *Cordle v. Kirk*, No. 83-P-622 (W. Va. Cir. Ct.) class action, *Gribben*, 195 W. Va. at 157-58, 466 S.E.2d at 498-99. But that was only because the prior suit decided the State's liability, the prospective nature of the award, and "estop[ped]" the State "from relitigating the Section 35 issue in [the later] case." *Id.*

Cheatham doesn't fit either *Skaff* or *Gribben* line-drawing criteria. This case is nothing like *Gribben*'s unique circumstances. *Cheatham* in no way estopped PEIA from asserting sovereign immunity. Nor did it decide how much PEIA had to pay Air Evac. Air Evac never sought monetary relief in *Cheatham* anyway: it pursued only injunctive and declaratory orders. As the district court put it: such "relief would not impose any additional obligations on the State" and is not supposed to add anything "in terms of liability exposure to the State." *Air Evac EMS, Inc. v. Cheatham*, 260 F. Supp. 3d 628, 641-42 (S.D.W.Va. 2017). And true to form, the federal courts didn't award monetary relief, prospectively or otherwise. *Cheatham*, 910 F.3d at 769. So, there's no support for Air Evac's notion that it can use *Cheatham* to set the retroactive-prospective line. Under both *Skaff* and *Gribben*, the initiation of this state court case for money sets that line.

Air Evac and Chief Judge Scarr respond that Air Evac had to wait for *Cheatham* to finish before filing this action. Pet'r Br. 23. But that's not true. Parties often file placeholder actions to meet certain deadlines and stay those actions while litigating a related cause of action. That's what happened when Air Evac's counterparts fought Wyoming's workers' compensation payments. *Air Methods/Rocky Mountain Holdings, LLC v. State ex rel. Dep't of Workforce Servs.*, 2018 WY 128, ¶ 6-10, 432 P.3d 476, 480 (Wyo. 2018) (contemporaneously filing state and federal suits). Or Air Evac could have litigated its federal preemption claim in state court. *See In re W. Va. Asbestos Litig.*, 215 W. Va. 39, 43, 592 S.E.2d 818, 822 (2003). Besides, the ICA used Air Evac's contested case demand letter as the "initiation," and everyone agrees it could have filed that anytime.

Beyond that, the prospective-retroactive line shows Air Evac's paying-program exception is philosophically inconsistent with established exemptions. The predominating characteristic of the *Graf*'s list is that they are *forward-looking* relief. From mandamus to employee back pay to injunctions, the Court recognizes prospective Section 35 exemptions. No exemption is possible when "the relief sought involves an attempt to obtain a retroactive monetary recovery." *Gribben*, 195 W. Va. at 497, 466 S.E.2d at 156. Air Evac's proposed paying-program would instead allow "retroactive monetary relief against the State." *Skaff*, 200 W. Va. at 706, 490 S.E.2d at 793.

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PEIA agrees that judicial review is crucial to ensuring agencies are running nondiscretionary pieces of their statutory schemes lawfully. Pet'r Br. 21. Our framers allowed mandamus and declaratory relief precisely to ensure agencies don't "flout" statutes they enforce. *Id.* But before a court can award those types of relief, it must assure itself that it is operating in its own constitutional lane—i.e., that it has *jurisdiction*. PEIA is sovereignly immune, so that jurisdiction is lacking here.

II. Air Evac's fairness concerns are oversold and unjustified.

Perhaps realizing its sovereign immunity argument's weakness, Air Evac generally complains that being paid the Medicare Rural rate is fundamentally unfair and, perhaps, even a due process violation. Pet'r Br. 14-15. It repeatedly says, for instance, that Air Evac is "asking to be paid for [its] life-saving service." Pet'r Br. 19; *e.g.*, *id.* at 18 (saying Air Evac is just seeking "reimbursement"). The Court can safely ignore these comments for several reasons.

First, this appeal to equity is Air Evac's backdoor attempt to litigate the merits question—i.e., whether the director can lawfully pay Air Evac the Medicare Rural Rate. *E.g.*, Pet'r Br. 8, 10, 16. Generally, the Court addresses only those issues raised in assignments of error. *See, e.g.*, *Hupp v. Sasser*, 200 W. Va. 791, 799-800, 490 S.E.2d 880, 888-89 (1997). And Air Evac's only assignment of error regards sovereign immunity. Ultimately, this Court does "not reach the merits of [an] appeal [if] those issues are not properly before" it. *Hustead ex rel. Adkins v. Ashland Oil, Inc.*, 197 W. Va. 55, 57 n.2, 475 S.E.2d 55, 57 n.2 (1996). Air Evac's attempts to inject questions of fairness or equity in payment isn't properly before the Court and should be disregarded.

Second, *PEIA has already paid Air Evac a fair rate for the transports*. Air Evac repeatedly says it deserves to be paid for its work. But PEIA paid Air Evac six years ago. *See* App. 480-485; Pet'r Br. 1 (admitting its real merits issue is not being paid in "full"). What's more, PEIA paid Air

Evac at the Medicare Rural Rate—the rate the federal government determined was fair at the time and, crucially, the rate Air Evac has accepted post-2019. So the merits aren't really about being "made whole" or getting what Air Evac is morally "entitled to." Pet'r Br. 19. Rather, they're about whether Air Evac can stretch *Cheatham* enough to snag a windfall above and beyond its normal compensation rate. Just consider the difference between Air Evac's charges demanded here and what it normally accepts as reimbursement. For the 115 disputed transports, Air Evac charged PEIA $4,773,034. Pet'r Br. 6. PEIA paid about $755,000 of that or just over $6,500 per ride. *See id.* Air Evac's claim for $4 million is nearly $35,000 per ride. *See id.* That means it wants almost *five times more* for each transport than it normally gets from the federal government and State. Not receiving this extreme windfall is hardly an injustice. *Contra* Pet'r Br. 9-10.

Third, Air Evac's protestations on behalf of PEIA's insureds ring hollow. Air Evac expresses concern that its bills will work to the "detriment" of "PEIA's own insureds" unless PEIA pays Air Evac's sky-high prices. Pet'r Br. 11. But of course, if Air Evac were truly concerned it could forgo balance billing PEIA's insured. Further, if Air Evac's theory about premiums is right, the $4 million judgment would come from PEIA's insureds. Regardless, Air Evac is ready to "burden" *some* "West Virginia citizens with over four million dollars of medical debt." Pet'r Br. 2. They pay the taxes that fund state agencies who in turn pay the employer share of PEIA's premium revenue and the employees who contribute their share from their paychecks. Either way, Air Evac's requested relief would come out of the pockets of West Virginia taxpayers.

Fourth, PEIA is right on the merits—it has the statutory authority to limit payments to Air Evac to the Medicare Rural rate without violating the federal injunction. The PEI Act has broad objectives, including fiscal stability and expansive Director discretion. W. Va. Code §§ 5-16-8(3)-(4); 5-16-3(a). PEIA's director has authority to manage provider negotiation, provider payment, contracting, and payment. *Id.* § 5-16-3(c). This authority includes the decision to pay Air Evac at the Medicare Rural rate for the 115 transports. This exercise of discretion does not offend the federal injunction. The federal injunction enjoined separate, specific provisions of the PEI Act—West Virginia Code §§ 5-16-8a (air-ambulance specific limit) and 5-16-5(c)(1) (the general fee-schedule provision). Ultimately, the Fourth Circuit said PEIA may act like any private insurer and "limit reimbursements for air ambulance services after the fact" so long as it doesn't use "its unique coercive authority." *Cheatham*, 910 F.3d at 769. So PEIA is not prohibiting balance billing and, thus, not limiting Air Evac's total reimbursement. Remember, the ADA does not "require" PEIA "to pay whatever" an air ambulance provider "may demand." *Id.* State insurance agencies are not at the disposal of air ambulance companies. *See, e.g.*, *EagleMed LLC v. Cox*, 868 F.3d 893, 906 n.3 (10th Cir. 2017) ("[T]he [ADA] does not impose a duty on the State to pay air-ambulance claims."); *accord Texas Mut. Ins. Co. v. PHI Air Med., LLC*, 610 S.W.3d 839, 850 (Tex. 2020). Paying Air Evac at the normal rate without balance-billing prohibitions complies with *Cheatham*. PEIA is thus treating "Air Evac in the same manner as other private insurers." Pet'r Br. 5.

Air Evac argues PEIA is violating the injunction because the separate statutes *Cheatham* enjoined also required Air Evac to be reimbursed at the Medicare Rural rate. *E.g.*, Pet'r Br. 9 (PEIA may not effectively implement "fee schedules determined to be illegal"). But this spirit-of-the-injunction read isn't correct. Federal courts "construe injunctions narrowly"—especially when the injunction's effect might be unclear. *Abbott Lab'ys v. TorPharm, Inc.*, 503 F.3d 1372, 1382 (Fed. Cir. 2007). And when it comes to governmental action, federal courts distinguish between means and its ends. *M'Culloch v. State*, 17 U.S. 316, 364 (1819). *Cheatham* never takes issue with PEIA's ends—i.e., paying Air Evac the Medicare Rural rate—but with West Virginia legally prohibiting Air Evac from balance billing insureds to secure *more* reimbursement. *Cheatham*, 910

F.3d at 769-70. That "lawful ends do not justify unlawful means" doesn't mean using unlawful means to achieve lawful ends permanently colors those ends unlawful, too. *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 368 n.* (2018). PEIA is not "flout[ing]" federal law—as evidenced by the lack of any further federal action on the injunction. *Contra* Pet'r Br. 17.

Fifth, although Air Evac mentions the phrase "due process" several times, *e.g.*, Pet'r Br. 11, it "has waived this argument by failing to explain or develop it," *United States v. Stewart*, 847 F. App'x 201, 202 n.* (4th Cir. 2021). Air Evac dedicates only a sentence or two to the idea that sovereign immunity gives way to claims regarding governmental takings, substantive due process (life, liberty, and property), and open-courts due process rights. Pet'r Br. 14. But gesturing at a concept by citing a few constitutional provisions isn't enough. *United States v. Fernandez Sanchez*, 46 F.4th 211, 219 (4th Cir. 2022) (saying a brief that only "takes a passing shot at" due process waives the argument (cleaned up)). Besides, the proper relief for a due process violation is mandamus or injunctive relief—not damages. *A-1 Amusement*, 240 W. Va. at 102, 807 S.E.2d at 773 (noting that with prospective due process claims "the reasons for sovereign immunity"—protecting the fisc—"completely disappear"). And Air Evac doesn't press a real due-process claim by applying tests from this Court's due-process cases like *A-1 Amusement, Inc.* or *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996). Nor does it incorporate standards in federal cases like *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

Regardless, West Virginia's sovereign immunity doesn't "eviscerate" Air Evac's rights. *Contra* Pet'r Br. 11. "Sovereign immunity itself clearly does not violate due process." *Skaff*, 200 W. Va. at 708, 490 S.E.2d at 795. And its application here wouldn't because Air Evac knew it had to avail itself of the legislative claims commission. Consider *G.M. McCrossin*, which Air Evac quotes, Pet'r Br. at 15, and which represents the highwater mark of this Court's purposivist, anti-sovereign immunity language, *Skaff*, 200 W. Va. at 708, 490 S.E.2d at 795 (noting *G.M. McCrossin* as *the* example of this Court's "past" "critical" comments about sovereign immunity). There, the Court held the Board sovereignly immune despite G.M. McCrossin's due-process argument. *G.M. McCrossin*, 177 W. Va. at 543-46, 355 S.E.2d at 36-39. A "large corporate entity with excellent legal counsel" "fully understand[s]" the sovereign immunity "ramifications of contracting with a state agency," it said. *Id.* The chief ramification is that its "exclusive" and "only recourse" if "it enter[s] into" business with a state agency is the legislative claims commission. *Id.* at 543, 355 S.E.2d at 36. Indeed, the commission is a sophisticated body that admits exhibits into evidence, takes testimony (including of experts), hears argument, and applies law (including statutory duties) to facts. *State ex rel. Ladanye v. W. Va. Legis. Claims Comm'n*, 242 W. Va. 420, 423, 836 S.E.2d 71, 74 (2019). It regularly decides questions of the State's "moral obligation." *Hutchinson v. Underwood,* No. 19-1079, 2020 WL 5588612, at *1 n.1 (W. Va. Sept. 18, 2020). Not pursuing this perfectly legitimate route to vindicate any rights continues to be Air Evac's choice.

CONCLUSION

This case is a $4 million "threat to the public purse," *contra* Pet'r Br. 15, and sovereign immunity prohibits efforts like these, App. 17-18. For all the foregoing reasons, the Court should affirm the decision of the Intermediate Court of Appeals.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-452

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.

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

CERTIFICATE OF SERVICE

I, Frankie A. Dame, do hereby certify that the foregoing Notice of Appearance is being served on all counsel of record by email and File & Serve Xpress on January 2, 2025.

/s/ Frankie A. Dame
Frankie A. Dame
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