IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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NO. 23-ICA-135

AIR EVAC EMS, INC.,

Petitioner,

v.

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

Respondents,

On Appeal from the Circuit Court of Kanawha County, Civil Action No. 19-AA-169

RESPONDENTS' BRIEF

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INTRODUCTION

Air Evac's state-court case should have been dismissed years ago. As explained in Director Cunningham and the Members of the Finance Board's (collectively, "PEIA's") *Petitioners' Brief* in Appeal No. 23-ICA-127 (June 16, 2023), the circuit court lacked jurisdiction because Air Evac is seeking money from PEIA for past services. PEIA is the "State," and the money it uses to pay providers like Air Evac comes from the State Treasury. The West Virginia Constitution makes PEIA immune from such suits. No recognized exception applies. And the one the circuit court invented violates the Constitution, case law, and good sense. This Court should reaffirm PEIA's immunity and dismiss.

What's more, the circuit court also lacked appellate jurisdiction under the Administrative Procedures Act ("APA"), W. VA. CODE §§ 29A-1-1 *et seq*. Air Evac sued PEIA under the APA and the agency's Contested Case Rules ("CCR"), W. VA. CODE R. §§ 151-3-1 *et seq*. But both the statute and rule require that the underlying proceeding be a "contested case"—that is, a decision made after a hearing. PEIA's payment decision wasn't. Nor does any constitutional provision, statute, or rule say it had to be. And without an administrative-level hearing, no appellate APA jurisdiction arises. This Court should dismiss for this reason, too.

If that's not enough, Air Evac is wrong on the merits, too. The air ambulance provider won a federal injunction to bar PEIA from capping its total reimbursement for transports of PEIA members at the Medicare rate. But that does not mean West Virginia is at the mercy of whatever it demands. As the federal circuits have said repeatedly, federal law gives state insurers the option to pay less than air ambulance providers' full charges as long as they also allow the providers to bill the rest to their insured. After the injunction, PEIA did just that. Under statutes Air Evac admits were not enjoined, its Director declared the transports at issue noncovered. He then paid

the same amount other air ambulance providers accept. And he let Air Evac bill PEIA members for the remainder. Even though the amount PEIA paid did not change, the State is no longer capping Air Evac's total recovery. So, it is complying with federal law and the injunction.

No part of Air Evac's assignment of error or its analysis of the severability of the Public Employees Insurance Act ("PEI Act") changes that. First off, severability analysis is unnecessary because no one believes the injunction invalidated that entire article of Code. With that option gone, none of Air Evac's suggested statutory edits matter. This analysis cannot write the Director of PEIA's discretionary powers out of the PEI Act. And it was that authority that let him make the payments Air Evac dislikes. Plus, even if this Court engages with Air Evac's severability analysis, it gets the provider nowhere. Cutting the words it objects to out of the PEI Act doesn't result in full payment. It achieves exactly what PEIA already paid Air Evac: the same amount that other air ambulance providers receive and accept.

Air Evac's appeal is jurisdictionally defective and without merit anyway. This Court should remand with instructions to dismiss, or in the alternative affirm the circuit court's holding that Air Evac is not entitled to full payment.

COUNTERSTATEMENT

I. The Legislature Endowed PEIA With Broad Discretionary Powers.

West Virginia provides health insurance to its employees and their spouses and dependents through PEIA. W. VA. CODE §§ 5-16-1 *et seq.* PEIA's main goal is to bring "fiscal stability" to the State's healthcare costs. *Id.* § 5-16-5(a) (2007).

The Legislature empowered PEIA to decide how much it will pay for health care services. PEIA's main rate-setting tool is its annual financial plan and fee schedules, which set the "[m]aximum level of reimbursement" for "categories of health care providers." *Id.* § 5-16-5(c)(1). These fee schedules fix PEIA's responsibility to pay for certain services at a specified rate, and

they limit how much a provider is paid at the Plan's "maximum" amount. *Id.* PEIA sets rates and saves costs through many other means as well, such as utilization review, contract negotiation, and managing "provider contracting and payment," *e.g.*, *id.* §§ 5-16-3(c), 5-16-7(a)(6)(B). Rate limits are backed up by a statute that generally prohibits medical providers from directly billing a PEIA member for any remaining balance—a practice known as "balance-billing." *Id.* § 16-29D-4(a)(2).

Finally, PEIA has established a multi-level review process in its rules, W. VA. CODE R. §§ 151-1-1 *et seq.* (2019),[1] under which providers may dispute payments, App. 594 (Plan § V.9).

II. The Legislature Sought To Regulate And Control Air Ambulance Costs.

"Air ambulance services unfortunately do not come cheap. A single flight can cost tens of thousands of dollars." *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 757 (4th Cir. 2018). In 2016, the West Virginia Legislature took notice of this price problem and passed several laws to address the exorbitant costs. *Id.* at 758; *see also* 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. *Cheatham*, 910 F.3d at 758 & 769.

III. The Federal Courts Enjoined the Statutory Air Ambulance Rate Caps And Related Schedule, But Reaffirmed PEIA's Authority To Set And Negotiate Rates.

District court. In June 2016, Air Evac sued PEIA in federal district court arguing that the federal Airline Deregulation Act ("ADA") preempted the Legislature's new protective provisions. During the federal suit, Air Evac admitted that other private insurers did not pay its full charge App. 428, 436 (Thomas Dep.). But it argued that, unlike other insurers, PEIA had capped Air Evac's recovery from any other source and enforced this cap through threats of civil enforcement

[1] This case spans multiple legislative rules, but the controlling part of each does not materially differ. So, the briefing below used the 2019 version, in line with common practice of referring to current law where difference with earlier enactments are immaterial. *Foster Found. v. Gainer*, 228 W. Va. 99, 102 n.1, 717 S.E.2d 883, 886 n.1 (2011). The relevant parts of the 2019 rule appear at App. 584-95, (the "Plan"), and the 2023 version is available through the Code of State Rules Online at https://tinyurl.com/2ux9yrea.

actions. *Air Evac EMS, Inc. v. Cheatham*, No. 2:16-CV-05224, 2017 WL 4765966, at *8-9 (S.D.W. Va. Oct. 20, 2017). In October 2017, the district court ruled in Air Evac's favor. *Id.* at *10. It held that the ADA preempts West Virginia Code Section 5-16-5(c)(1) (the maximum-level-of-reimbursement provision) and West Virginia Code Section 5-16-8a (the provision capping air-ambulance reimbursement at the Medicare rate) because these enforcement mechanisms went "beyond the methods available to [] commercial insurer[s]." *Cheatham*, 2017 WL 4765966, at *8-9. And it enjoined PEIA from enforcing those specific statutes and their accompanying fee schedules and regulations. *Id.* at *10. But it left West Virginia Code Section 16-29D-4 (the general prohibition on balance-billing) alone, *Cheatham*, 2017 WL 4765966, at *10, because Air Evac only challenged this section "in the alternative." App. 235-36. The federal courts also did not mention, much less enjoin, West Virginia Code Section § 5-16-3(c), the provision affording PEIA's director discretion in managing the agency.

Demand letters interlude. While PEIA was appealing that decision, Air Evac began pressing a novel interpretation of the PEI Act in letters to PEIA. Because the fee schedule as applied to air ambulances was enjoined, Air Evac argued that PEIA was legally required to pay Air Evac in full for every transport since Air Evac began the litigation (in June 2016). App. 89. It also disclaimed any reliance on administrative remedies to resolve its claims. App. 95 n.5 (threatening declaratory and injunctive action), Suppl. App. 904 (saying "administrative appeals are not required"), Suppl. App. 906 (same). PEIA responded that neither the injunction nor federal law mandated that it "unquestionably pay whatever amount Air Evac unilaterally establishes as its charge." App. 104. Under the PEI Act, the agency routinely pays providers less than their full charge, PEIA explained, and Air Evac was no different. *Id.* Even so, PEIA agreed to pay Air Evac for each post-June 2016 transport at the Medicare rate. App. 105.

Fourth Circuit. In December 2018, the Fourth Circuit affirmed the district court's Order. *Cheatham*, 910 F.3d at 770. But in doing so, it explicitly noted 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.*

IV. The Legislature Passed A New Statute Accepted By All Sides, And PEIA Limited Payment On 115 Past Air Evac Transports To The Medicare Rate.

In the summer of 2019, the Legislature enacted a new air-ambulance fee statute that prospectively required PEIA to pay air ambulance providers at the Medicare rate. W. Va. Acts 2019, c. 146 (June 4, 2019), *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 demanding that PEIA pay roughly $4 million more for the 115 transports it provided between June 11, 2016, and May 24, 2019. App. 79-82.

PEIA tried to negotiate with Air Evac over these past-transport bills, but Air Evac refused to budge from its all-or-nothing position. Suppl. App. 899 (Cheatham Aff. ¶ 19), App. 90 (Air Evac: offering to accept 90% of total bill charged on all future claims). So in mid-2019, PEIA's Director used his 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 rate. Suppl. App. 900 (Cheatham Aff. ¶ 25). The Director also explained that the statutory balance-billing provision did not apply because Air Evac's services were no longer covered under the Plan. Suppl. App. 902 (Cheatham Aff. ¶ 33). In this way, PEIA treated Air Evac the same as other providers who do not participate in the Plan: it designated the services as noncovered, voluntarily paid the same amount other air ambulance providers accept, and allowed Air Evac to charge PEIA members for the remainder. Suppl. App. 901 (Cheatham Aff. ¶¶ 28-31).

V. Air Evac, Ignoring All The Correct Procedure, Sued PEIA In State Court.

Air Evac was not pleased. In October 2019, it sent PEIA a letter titled "Demand for Contested Case Hearings," which insisted on both a hearing and full payment on the 115 transports. App. 51. PEIA explained to Air Evac that it had the process all wrong: provider payment disputes go through the Plan's review procedures, so the CCR are inapplicable. App. 163. PEIA also reminded Air Evac of other, more appropriate forms of relief, such as a claim before the Legislative Claims Commission. App. 164. It also told Air Evac that there was no coverage for its claims under the State's liability insurance policy. *Id.* But in December 2019, Air Evac filed a Petition for Appeal, asking the circuit court to (1) "affirm the validity of" the CCR; (2) hold a hearing on the merits of Air Evac's demand; (3) declare that PEIA must pay Air Evac's full charges for the 115 transports; and (4) order PEIA to promptly issue such payment. App. 19-20.

VI. The Circuit Court Erred As To Jurisdiction, The Remedy, And The Merits, But It Rightly Rejected Air Evac's Pay-In-Full Theory.

After briefing and oral argument, in December 2022, the circuit court granted in part and denied in part Air Evac's Petition. But in doing so, it misunderstood sovereign immunity, jurisdiction under the APA and CCR, and PEIA's discretion under the PEI Act.

Sovereign immunity. The circuit court agreed that any award against PEIA would "come from State monies held under the custody of the State Treasurer." App. 792 (Order ¶ 49). Normally, this funding source would render PEIA immune. But the court created a new sovereign immunity exception. Sovereign immunity does not apply, it held, 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. 793 (Order ¶ 54). Because the Legislature has designed PEIA to distribute funds, App. 792-93 (Order ¶ 51)—and specifically "to pay medical providers," App. 793 (Order ¶ 53)—it said PEIA was not sovereignly immune, App. 794 (Order ¶ 57).

APA and CCR applicability. The circuit court held—and PEIA agrees—that the CCR are valid and enforceable. App. 795 (Order ¶ 64). But the court rejected PEIA's argument that Air Evac's claims should still be heard under the Plan. The Plan's review process, it said, was "not applicable to the nature of claims Air Evac has brought," App. 796 (Order ¶ 67), because the Plan focuses on mistakes, "routine decisions about whether a given service or treatment is covered or medically necessary," and "medical judgment," App. 796 (Order ¶¶ 68-70). So, it thought Air Evac's claims must "be resolved under the APA" and CCR. App. 796-97 (Order ¶¶ 71-72).

The merits. On the merits, the circuit court thought both sides were wrong. It rejected Air Evac's results-oriented severability analysis and its claims that PEIA had to pay whatever Air Evac wants. App. 798-802 (Order ¶¶ 81-95). It recognized that Air Evac did not apply its severability analysis consistently, App. 800-01 (Order ⁋ 92), and that regardless, federal and state law did not entitle Air Evac to full payment, App. 801-02 (Order ⁋ 95-96). Turning to PEIA's argument, the circuit court agreed that, under Section 5-16-3(c), the Director had used his discretion to pay Air Evac the Medicare rate for the 115 transports and designated the rest of those bills "noncovered." App. 803 (Order ¶ 103). But it found both decisions suspect, App. 804 (Order ¶ 108) (PEIA was "potentially" violating the federal injunction), because it read *Cheatham* to prohibit the Director from using the Medicare rate at all. App. 804-05 (Order ¶ 109). The circuit court also mistakenly thought PEIA was "retroactively" and unilaterally "lift[ing] the ban on balance-billing" for air ambulances. App. 805-06 (Order ¶ 114). Because the 115 transports occurred (from 2016 to 2019), when Section 5-16-8a(a) (2016) forbade air-ambulance balance billing, the court thought the Director couldn't use Section 5-16-3(c) to erase that statute. App. 806-07 (Order ¶¶ 118-20).

Given that the circuit court thought both sides were wrong on the merits, it (1) invalidated PEIA's payments regarding the 115 transports; (2) remanded the case for "further administrative

proceedings and negotiations consistent with *Cheatham*, the APA," and the CCR; and (3) denied Air Evac's request for "the entirety of its past charges for the [115] transports." App. 809.

Both sides appealed to this Court. PEIA asserted error because the circuit court failed to dismiss on sovereign immunity and APA jurisdictional grounds; federal and state law let it limit the amount the State paid Air Evac to the Medicare rate; and its decision to do so was protected on qualified immunity grounds. *Petitioners' Brief*, No. 23-ICA-127, at 1 (June 16, 2023). In turn, Air Evac raised one assignment of error saying that the circuit court was wrong when it declined to sever the PEI Act in a way that entitled it to full payment on its past transports. *Brief of Petitioner-Appellant*, No. 23-ICA-135, at v (June 16, 2023). This *Respondents' Brief* followed.

SUMMARY OF ARGUMENT

This Court shouldn't address Air Evac's assignment of error at all: its whole case is jurisdictionally defective, and so, its appeal should be dismissed.

I. Air Evac chose to sue PEIA in state court for money despite the immunity the State and its agency are guaranteed by the Constitution. W. Va. Const. art. VI, § 35. PEIA is entitled to that immunity because it is the "State," and the money Air Evac seeks would be paid from the State Treasury. Neither Air Evac nor the circuit court identified any recognized exception that would allow this suit in spite of that immunity. So, they invented a new paying-program exception for when the Legislature appropriates money to an agency and directs the agency to spend it. But that won't fly because sovereign immunity cannot be waived by the Legislature or revoked by the judiciary. Setting aside money for a specific purpose also hasn't opened the Treasury to lawsuits before. And this new paying-program exception violates the internal logic of the recognized immunity exceptions because it permits suits for money to pay past debts—precisely the type of claims sovereign immunity is designed to bar. The circuit court should have dismissed based on sovereign immunity but didn't. This Court should correct that mistake.

II. Air Evac also selected the wrong way to bring its suit. At circuit court, it invoked the APA and PEIA's CCR. But to trigger a case under either the statute or rule, Air Evac must identify a right to a "contested case"—*i.e.*, a hearing. It can't find such a right. The PEI Act allows for contested-case hearings in only insurance-fraud cases, not provider-payment disputes. And the CCR are procedural rules; they include no substantive rights. Regardless, the Plan's review process controls. As a legislative-exempt rule, the Plan has controlling weight, and it outlines a three-step process that providers should use to settle payment disputes like this one. And it doesn't give providers a right to a hearing. The circuit court shouldn't have disregarded this rule or taken jurisdiction under the APA. This Court should fix those mistakes as well and dismiss.

III. Despite all that, the circuit court got one thing right: PEIA does not have to pay Air Evac's full charges. As far as federal law is concerned, the Fourth Circuit made this abundantly clear: "The ADA does not require a state to pay whatever an air carrier may demand." *Cheatham*, 910 F.3d at 769. Instead, it lets states "negotiate better rates up front or limit reimbursements for air ambulance services after the fact" as long as they don't "prevent" providers "from seeking additional recovery from any third party." *Id.* After the injunction, that's exactly what PEIA did. Using discretionary powers under Section 5-16-3(c) that even Air Evac says weren't preempted, Petr's Br. 21, the Director designated its services as noncovered (just like other non-participating providers), paid what other air ambulance companies accept, and let Air Evac balance-bill for the rest. This choice complies with state law and the options the ADA and *Cheatham* left the State.

Air Evac's severability analysis doesn't change that, either. Severability is typically at issue where the invalidity of one provision of Code may cause an entire legislative act to fall. The question then, according to the Supreme Court of the United States, is "Would the legislature have preferred what is left of its statute to no statute at all?" *Ayotte v. Planned Parenthood of N. New*

Eng., 546 U.S. 320, 330 (2006). But that is not something this Court needs to answer because the parties agree that *Cheatham* did not invalidate the entire PEI Act. With that off the table, even the section-specific revisions Air Evac employs go nowhere. Nothing Air Evac suggests cutting out of the PEI Act affects how much PEIA has to pay it because the Director retains discretion—independent from any statute the federal courts enjoined—to manage provider payments and designate services as noncovered. When he makes this choice, the general bar to balance billing falls away and Air Evac's total recovery is no longer capped. What's more, even if Air Evac's edits to the PEI Act are accepted, Petr's Br. 16, it would be entitled to no more than what it already received: the same reimbursement as other providers in the same category. The circuit court was right to not accept Air Evac's severability theory and this Court shouldn't either.

On this point, the lower court was right. So, if this appeal isn't dismissed on jurisdictional grounds, the circuit court's finding that Air Evac can't get full payment should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

PEIA requests oral argument under Rule 20 of the Rules of Appellate Procedure because this case involves issues of high public importance.

STANDARD OF REVIEW

The assignments of error involve only questions of law, so the Court reviews them all *de novo*. *In re H.W.*, 247 W. Va. 109, ___, 875 S.E.2d 247, 253 (2022).

ARGUMENT

I. PEIA Is Sovereignly Immune; So The Constitution Requires Dismissal.

This Court need not address Air Evac's lone assignment of error because PEIA is sovereignly immune. PEIA is the State under the Court's ordinary five-part test. Faced with that reality, the Constitution couldn't be clearer: "The state of West Virginia shall never be made defendant in any court of law or equity." W. VA. CONST. art VI, § 35. This suit also fits none of

the exceptions to this immunity identified by the State's high court. It seeks precisely the type of relief Section 35's immunity guards against—money from the State Treasury to pay for past debts. The circuit court and its invented paying-program exception got this immunity analysis wrong, but this Court shouldn't. Sovereign immunity requires dismissal and the end of Air Evac's case.

a. PEIA is immune under the ordinary five-part test.

West Virginia's immunity under Article VI, Section 35 of the Constitution ends this case. This immunity is "a jurisdictional bar," *Skaff v. Pridemore*, 200 W. Va. 700, 705, 490 S.E.2d 787, 792 (1997) (per curiam), which acts not only as a "defense to liability" but also protects the State from being sued in the first place, *W. Va. Lottery v. A-1 Amusement*, 240 W. Va. 89, 94, 807 S.E.2d 760, 765 (2017). When sovereign immunity applies, it serves as "a sufficient basis" for "dismissal" without regard for any other issue presented in the appeal. *Ellis v. W. Va. Human Rights Comm'n*, No. 19-908, 2020 WL 6482748, at *1 n.4 (W. Va. 2020) (mem. decision); *Davari v. W. Va. Univ. Bd. of Governors*, 245 W. Va. 95, 103 n.22, 857 S.E.2d 435, 443 n.22 (2021) (same).

That should be the result here, too. PEIA is entitled to sovereign immunity. The immunity the Constitution affords to the State extends to its agencies as well. Syl. pt. 7, *Shaffer v. Stanley*, 215 W. Va. 58, 61, 593 S.E.2d 629, 632 (2003). To test whether an agency counts as the "State" for purposes of immunity, courts ask (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 v. W. Va. Lottery Comm'n*, 206 W. Va. 583, 591, 526 S.E.2d 814, 822 (1999) (cleaned up). The last factor is key, *cf. Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 543 (4th Cir. 2014) (finding state-treasury factor "most important" in similar arm-of-the-state analysis for 11th Amendment), because the "primary purpose" of this immunity is "to prevent the diversion of state money" to pay court awards. *Kerns v. Bucklew*, 178 W. Va. 68, 72, 357 S.E.2d 750, 754 (1987).

PEIA meets each factor. It functions statewide and does the State's work: it manages the insurance programs available to "any" "full-time" employee "of the State of West Virginia," W. VA. CODE § 5-16-2, which is quintessential state business. It is also created by the Legislature, and the Governor appoints its director and finance board with the advice and consent of the Senate. *Id.* §§ 5-16-3(a), 5-16-4(a). It is not subject to local control either but performs the work outlined in its governing statutes. And like other state agencies, all "[m]oneys received and administered by" PEIA go into the State Treasury and "can be withdrawn" "only upon a warrant issued by the auditor on the treasurer and by the check of the treasurer," *City of Morgantown v. Ducker*, 153 W. Va. 121, 126, 168 S.E.2d 298, 301 (1969); *see* W. VA. CODE § 5-16-18(a), (b), (f). As even the circuit court admitted, "any money used to satisfy Air Evac's requested relief will come from State monies held under the custody of the State Treasurer." App. 792 (Order ¶ 49); *see*, *e.g.*, App. 98 (2018 State Treasury check to Air Evac for transport). All this means PEIA is the state and is entitled to the immunity the Constitution affords: "[W]hen the action is in essence 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." *A-1 Amusement*, 240 W. Va. at 103, 807 S.E.2d at 774 (cleaned up).

b. No exception to sovereign immunity applies.

Though state funds are clearly at issue, the circuit court and Air Evac thought an exception to sovereign immunity let this case go forward anyway. They are wrong. No recognized exception fits; and the new one the circuit court made up for this case is flawed.

Our Supreme Court of Appeals laid out a comprehensive list of the twelve exceptions to Section 35 sovereign immunity in *Univ. of W. Va. Bd. of Trs. v. Graf*, 205 W. Va. 118, 122-23, 516 S.E.2d 741, 745-46 (1998). These are:

- Suits for injunctions "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";
- Suits for mandamus relief after the Legislature recognizes a "moral obligation by the State" and appropriates funds to cover that obligation;
- "[S]uits against State officers acting or threatening to act, under allegedly unconstitutional statutes";
- Suits requiring the State to conduct takings clause proceedings or;
- 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 an award of back wages which is prospective in nature"; and
- "[S]uits that seek recovery under and up to the limits of the State's liability insurance coverage" (the "*Pittsburgh Elevator*" exception).

None of these work for Air Evac. The first six don't apply because it is seeking damages. It does not seek "a prospective declaration" of its rights, syl. pt. 1, *Gribben v. Kirk*, 195 W. Va. 488, 490, 466 S.E.2d 147, 149 (1995), or a "prospective[]" adjustment of PEIA's future "conduct," syl. pt. 2, *id.* It asks for more money for transports that pre-dated its state court suit. App. 10 (asking PEIA to pay more money for 115 transports all occurring more than five months before it filed suit); App. 81-82, 500; Pet'r Br. 6 n.5 (referring to all transports at issue as "past transports"); *see also Skaff*, 200 W. Va. at 706, 490 S.E.2d at 793 (finding award for liability prior to administrative suit "barred by sovereign immunity"). The other six don't work either. PEIA is a purely public entity entirely dependent on the State for financial support and didn't sue Air Evac first. Air Evac's petition is based on West Virginia law, not federal law granting a cause of action. Air Evac disputes only PEIA's payment decision—it doesn't raise proprietary or ownership or employee-back-pay claims. Nor does the petition mention or invoke PEIA's liability insurance

coverage limits. And PEIA already checked and told Air Evac that it has no such coverage, App. 170, so the *Pittsburgh Elevator* exception is off the table. *Nat'l Union Fire Ins. Co. of Pittsburgh v. Miller*, 228 W. Va. 739, 746, 724 S.E.2d 343, 350 (2012) (per curiam) ("[When] a claim falls outside the bounds of the state's liability insurance, it may not be maintained against the state.").

Since none of *Graf*'s recognized exceptions apply, this case should be over. Yet, the circuit court found sovereign immunity inapplicable "where the Legislature itself creates a program, appoints an agency to administer it, and requires the agency to make payment out of funds appropriated for that purpose." App. 793 (Order ¶ 54).

This Court should not sanction this brand-new "paying-program" exception. It appears nowhere in Supreme Court of Appeals cases. Neither the circuit court nor Air Evac cited any. And the circuit court has no power to create a work-around to Section 35's immunity: sovereign immunity is "not judicially revocable." *Gribben*, 195 W. Va. at 493, 466 S.E.2d at 152.

A "paying-program" exception also bucks basic principles of this immunity. It assumes that the Legislature opens the door to suits for money by "requir[ing] the agency to make payment out of funds appropriated for that purpose." App. 793 (Order ¶ 54). But Section 35's "grant of immunity is absolute"—meaning it "cannot be waived" even "by the legislature." *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987). This truism should be uncontroversial—"[o]f course" the Legislature can't waive immunity the constitution provides. *Ducker*, 153 W. Va. at 130, 168 S.E.2d at 303. Even explicit statutory language letting an agency "sue and be sued" doesn't count as a waiver. *Id.* at 129-30, 168 S.E.2d at 302-03. The circuit court's implied "paying-program" exception has far less ground to stand on.

Plus, an exception for paying-programs opens an extraordinarily wide door into the State Treasury. It could subject any number of the legislative programs that use State funds for

educational, *e.g.*, W. VA. CODE §§ 18-31-1 et seq. (2021) (creating Hope Scholarship), or economic purposes, *e.g.*, *id.* § 31-15-8a (2021) (creating broadband loan insurance program); *id.* § 12-6-9e (2003) (authorizing loans for industrial development), to lawsuits.

And setting money aside for certain purposes and directing an agency to use that money hasn't worked as an exception to immunity before. Rather, a sign-language interpreter's claim for payment under a contract with DHHR was barred by sovereign immunity, *Phillips v. W. Va. Dep't of Health & Human Res.*, No. 19-0610, 2020 WL 3408421, at *1, 3-4 (W. Va. 2020) (mem. decision), 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. Sovereign immunity also barred retroactive recovery of overtime and holiday compensation for certain National Guard firefighters. *Skaff*, 200 W. Va. at 703, 490 S.E.2d at 790. These employees were entitled to an award for leave going forward—*i.e.*, prospectively, *id.*, and the funds for their salaries came "from the federal government" and were set apart from "general revenues" in a special revenue account. *Id.* at 706, 490 S.E.2d at 793. But that didn't matter for sovereign immunity purposes. The Constitution still protected the State Treasury from a damages award drawn from that appropriation. *Id.* Sovereign immunity should work the same way here, too.

True, the circuit court did not directly order PEIA to pay Air Evac more money. Instead, it ordered the parties to "meaningfully conduct a mediation" and engage in "good faith negotiations regarding Air Evac's past due charges and disputed payments." App. 809.[2] But directing PEIA

[2] Air Evac also objects to this relief but for the wrong reasons. Petr's Br. 21 (saying the "APA does not provide negotiation as a viable remedy"). The APA never defines private rights or an agency's substantive obligations. *State ex rel. W. Va. Bd. of Ed. v. Perry*, 434 W. Va. 662, 665, 434 S.E.2d 22, 25 (1993). For that, courts must look to external sources such as "statutory language creating an agency" or "the agency's rules." *Id.* Some of these external sources do provide for agency level mediation. *E.g.,* W. VA. CODE R. § 77-2-4.15 (mediation before Human Rights Commission); W. VA. CODE § 6C-2-3 (mediation before

to negotiate with Air Evac for a higher rate is just an indirect invasion of the State Treasury: it still leaves the state coffers open to Air Evac's claims for past damages. After all, the circuit court's order does not contemplate refusing to pay anything at the end of the negotiation. And it is all the more a violation of Section 35 since this immunity is not only a "defense to liability" but also relieves the State of the burdens of participating in the litigation. *A-1 Amusement*, 240 W. Va. at 94, 807 S.E.2d at 765; *cf. Seminole Tribe of Fl. v. Florida*, 517 U.S. 44, 72 (1996) (finding suit to force state to comply with mediation under Indian Gaming Regulatory Act barred by similar 11th Amendment immunity). Part of the benefit of Section 35 immunity would be lost if PEIA were forced by court order to negotiate a higher payment for Air Evac's past bills.

At a basic level, this "paying-program" theory defies the internal logic of the exceptions *Graf* and other cases identify. The predominant feature of each is that they are *forward-looking* relief. From writs of mandamus to injunctions to employee back pay, the Court crafts exceptions based on their prospective nature. Exceptions to Section 35 can sometimes be found when "the relief sought involves a prospective declaration of the parties' rights," but not where the suit "involves an attempt to obtain a retroactive monetary recovery . . . payable from State funds." *Gribben*, 195 W. Va. at 497, 466 S.E.2d at 156. Even when one of these exceptions applies, the courts "enter[] 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." *Id.* at 494, 466 S.E.2d at 153. The circuit court's "paying-program" exception pays little heed to that rule: it allows for "monetary relief against the State" to pay past debts. *Skaff*, 200 W. Va. at 706, 490 S.E.2d at 793. That is precisely the type of relief sovereign immunity is designed to stop.

Public Employee Grievance Board). In theory, a court under appellate APA review could remand with instructions to conduct mediation in certain cases. It wasn't right here because of sovereign immunity.

PEIA is entitled to sovereign immunity; and the circuit court's reasons for rejecting that immunity violate case law and basic Section 35 immunity principles. Because sovereign immunity bars this type of case, this Court should reverse and order the circuit court to dismiss.

II. Neither The APA Nor The CCR Provided The Lower Court Jurisdiction.

If sovereign immunity isn't enough, this Court should also dismiss because the circuit court lacked appellate APA jurisdiction. The lower court thought that the case should be "resolved under the APA and PEIA's Contested Case Rules." App. 798 (Order ¶ 79). But an APA appeal is only available when a claim arises out of a "contested case"—that is, a proceeding in which the law requires the State to give the party a hearing. PEIA's CCR are limited in the same way. Yet, Air Evac points to nothing giving it such a right. What's more, the Plan's review process expressly applies to situations like this, where a medical provider is disputing how much PEIA paid them. The Plan is a legislative-exempt rule, and it gets the same weight as statutes—*i.e.*, "controlling" preference. So even if the CCR applied, the Plan would supersede it. The circuit court was wrong not to dismiss for lack of APA jurisdiction, too. This Court should correct that error on appeal.

A. This payment dispute does not present a "contested case."

The APA and PEIA's CCR aren't the right fit because PEIA's decision to pay the Medicare rate didn't come out of a "contested case." Agency decisions aren't automatically reviewable under the APA. *Perry*, 189 W. Va. at 665, 434 S.E.2d at 25. Rather, a party "is entitled to judicial review" of an agency decision under the APA only when they are "adversely affected by a final order or decision *in a contested case*." W. VA. CODE § 29A-5-4(a) (emphasis added). The APA defines a "contested case" as any "proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." *Id.* § 29A-1-2(b).

The CCR are largely limited to the same "contested cases" category. *See* W. VA. CODE R. § 151-3-1 (noting that the "Scope" of the CCR extends to "general procedures for conducting *contested case hearings*," except for proceedings for declaratory judgments, which Air Evac does not request (emphasis added)). The CCR describes "contested case" proceedings by copying verbatim the APA's hearing and "required by law" language. *Id.* § 151-3-4.

So to invoke appellate APA jurisdiction *or* the CCR, "an agency must either be required by some statutory provision or administrative rule to have hearings or the specific right affected by the agency must be constitutionally protected such that a hearing is required." Syl. pt. 1, *Perry*, 189 W. Va. at 663, 434 S.E.2d at 23. "[W]here there is no right to an administrative hearing, there is no 'contested case' from which to file an appeal." *Williams v. W. Va. Div. of Motor Vehicles*, 226 W. Va. 562, 567, 703 S.E.2d 533, 538 (2010).

Air Evac's petition is not a "contested case" under *Perry*'s test because no constitutional right, statute, or agency rule requires PEIA to determine the amount it owes Air Evac after a hearing. Constitutional rights do not ground Air Evac's petition: it has never claimed that either the state or federal constitutions entitle it to more money. The search for a statutory right to a hearing is equally fruitless. The PEI Act lets the agency use "utilization review" procedures and "third-party administrators", *id.* § 5-16-7(a)(6)(C), to manage provider payments and disputes. It never says providers have to be given a hearing before they are paid anything less than they demand. Rather, the statute allows for contested case hearings in only one scenario: insurance fraud. W. VA. CODE § 5-16-12a(c) (authorizing PEIA to recover fraudulent overpayments "after notice and an administrative proceeding"); *see also id.* § 5-16-12(b) (authorizing recovery of overpayments from certain fraudulent activities like "[w]illfully misrepresent[ing] a diagnosis or the nature of service provided"). Healthcare provider claims of underpayment don't fit that bill.

And this singular statutory basis for a hearing should not be judicially expanded to cover other types of disputes. *See* syl. pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984) ("[T]he express mention of one thing implies the exclusion of another.").

Looking to PEIA's rules doesn't help Air Evac, either. PEIA's legislative-exempt Plan expressly governs provider payment disputes and doesn't give providers a hearing. App. 594 (Plan § V.9). Still, Air Evac thinks the CCR themselves includes such a right. *See* App. 4, 7-8, 12-15, 20. That's a mistake. The CCR are "procedural rules," W. VA. CODE R. § 151-3-1.1, which, by definition, can never "grant[] or den[y] a specific benefit"—like a right to a hearing—or be "determinative on any issue affecting . . . statutory . . . rights, privileges or interests," W. VA. CODE § 29A-1-2(e). The CCR details the procedures for "contested cases," a term imported straight from the APA. *See* W. VA. CODE R. § 151-3-1.1 (explicitly invoking and incorporating the APA).

And by itself, the APA never creates a "contested case" or a right to a hearing, syl. pt. 2, *Perry*, 189 W. Va. at 663, 434 S.E.2d at 23; the APA merely defines what a contested case is and explains how an agency should treat it. Created to mirror the APA, the CCR by themselves don't make any dispute a "contested case" either. They simply explain how a case involving a "hearing . . . required by law" proceeds through PEIA's administrative system. To show that a dispute is a "contested case," a petitioner must always point to some external, non-APA *and* non-CCR legal source that then works in tandem with the APA's definitions and structure. For example, *Currey v. State of W. Va. Human Rights Comm'n*, fell "squarely within the statutory definition of contested cases," 166 W. Va. 163, 169, 273 S.E.2d 77, 80–81 (1980), because a non-APA statute, W. VA. CODE § 5-11-10, explicitly required the defendant commission "to hold a hearing on [the plaintiff's] sex discrimination charge." *Id.* Air Evac found nothing similar to point to in this case. Since Air Evac hasn't done so, it can't use the APA to bring suit in circuit court.

B. The Plan's provider-dispute procedures govern Air Evac's claims.

PEIA has never disputed that the CCR are valid and binding rules. PEIA does contend that CCR are not the appropriate dispute-resolution mechanism *for this case*. Instead, provider disputes like this one are governed by the Plan's process. The circuit court shouldn't have tossed that established process out in favor of the CCR.

Under the Plan, if a provider believes PEIA has made a mistake in processing a "claim or reviewing a service," it may raise the issue with a "Third-Party Administrator." App. 594-95 (Plan § V.9). If this doesn't fix the provider's concerns, it may then appeal in writing to the Third-Party Administrator. *Id.* If the provider dislikes the decision on appeal, it may appeal that decision "in writing to the director of the PEIA" who is then charged with "reconsider[ing] the entire case," considering all relevant materials, and issuing a "decision, in writing." *Id.* Air Evac raises a classic provider payment dispute: PEIA paid it a given sum (the Medicare rate) for its air transport services, but Air Evac thought PEIA should have paid more. The Plan is meant to handle that type of dispute.

Of course, Air Evac's legal arguments wouldn't be a run-of-the-mill "mistake" that third-party administrators are used to handling. App. 796-97 (Order ¶¶ 69-72). But an out-of-the-ordinary dispute doesn't give the circuit court the right to substitute the CCR for the Plan's appeals process. It just means Air Evac's claim would have moved quickly to the third and final step: review by the Director, who would have then decided the legal questions—exactly the sort of statutory interpretation problems he and PEIA confront daily. After that, Air Evac could have pursued any remaining claim or arguments before the Legislative Claims Commission. Or, it could have pursued non-damages remedies, like a writ of mandamus, W. VA. CODE §§ 53-1-1 *et seq*., or an original action for declaratory judgment, *id.* §§ 55-13-1 *et seq.*, assuming it could satisfy the jurisdictional and other requirements that apply to those actions.

And the CCR does not provide conflicting directives for handling provider claims. It refers to providers zero times. Instead, it lists employees, employers, and "any other party" as potential parties. W. VA. CODE R. § 151-3-4.3, 4.4. It also makes no mention of payment issues. Instead, its scope could hardly be more general: its procedures are for any "hearing" to "determine[] any constitutional rights, legal rights, duties[,] interests or privileges" of "any party." W. VA. CODE R. § 151-3-4.1. So, the CCR and Plan can easily be "reconciled" "and applied together" as long as the Plan is allowed to operate in its specific lane—*i.e.*, governing provider payment disputes—and the CCR acts as the catchall. *Young v. State*, 241 W. Va. 489, 492, 826 S.E.2d 346, 349 (2019).

But even if the CCR and Plan did conflict, the Plan would still control.

First, the Plan is a uniquely powerful sort of regulatory authority. It is a "legislative exempt" rule and thus "entitled to controlling weight" in any legal analysis. Syl. pt. 9, *Charleston Gazette v. Smithers*, 232 W. Va. 449, 752 S.E.2d 603 (2013) (cleaned up). Legislative exempt rules are those "the Legislature expressly exempts . . . from such legislative rule-making review and approval." Syl. pt. 13, *Simpson v. W. Va. Off. of Ins. Comm'r*, 223 W. Va. 495, 678 S.E.2d 1 (2009). Under West Virginia Code Section 5-16-8(1), PEIA "insurance plans" are explicitly "not subject to chapter § 29A-1-1 *et seq.* of this code," making the Plan a "legislative (exempt) rule[]," *see* W. VA. CODE R. § 151-1-1.1 (2019). Because legislative exempt rules like the Plan are "authorized by legislation," *Griffith v. Frontier W. Va., Inc.*, 228 W. Va. 277, 290, 719 S.E.2d 747, 760 (2011) (cleaned up), they "can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious." *Simpson*, 223 W. Va. at 510, 498, 678 S.E.2d at 16. Otherwise, they are "given controlling weight." *Murray Energy Corp. v. Steager*, 241 W. Va. 629, 640, 827 S.E.2d 417, 428 (2019) (cleaned up).

On the other hand, the CCR are procedural. W. VA. CODE R. § 151-3-1.1. This type of rule can define the way "proceedings before an agency" are held but lacks the "force of law" assigned to the Plan, W. VA. CODE § 29A-1-2(e), (h), and do not come with controlling weight.

Second, the Plan is more specific than the CCR—unlike the CCR, it expressly addresses provider payment disputes like this one. App. 594-95 (Plan § V.9). And it details how those disputes get resolved. *Id.* So, the Plan would "be given precedence over a general" rule like the CCR if "the two cannot be reconciled." Syl. pt. 3, *Newark Ins. Co. v. Brown*, 218 W. Va. 346, 348, 624 S.E.2d 783, 785 (2005).

Third, if they can't be read together, the annually-promulgated Plan would win out over the 1987 CCR as "the most recent expression of" regulatory authority. *W. Va. Health Care Cost Rev. Auth. v. Boone Mem. Hosp.*, 196 W. Va. 326, 336, 472 S.E.2d 411, 421 (1996).

This all means that the circuit court mistakenly took jurisdiction under the APA. The Plan process is designed to handle provider disputes and does not include a right to a hearing. Without a hearing, the circuit court had no power to exercise appellate APA jurisdiction. It also should not have brushed aside the Plan process in favor of the less authoritative, less specific, and older CCR. This Court should correct that error and order the circuit court to dismiss for lack of jurisdiction.

III. Air Evac Is Not Entitled To Full Payment.

Despite all its mistakes, the circuit court was right about one thing: Air Evac is not entitled to full payment. App. 801 (Order ¶ 96). Federal law does not "require [West Virginia] to pay whatever an air carrier may demand." *Cheatham*, 910 F.3d at 769. State law doesn't either; and Air Evac cannot use severability analysis to rewrite the PEI Act to make it do so. The circuit court was right to reject Air Evac's mistaken severability analysis. This Court should do the same and reject Air Evac's assignment of error and pay-in-full theory, too.

A. *Cheatham* made clear that federal law lets PEIA limit its payments to Air Evac as long as it doesn't bar recovery from other sources.

At the heart of Air Evac's assignment of error (and its whole state-court case) is a misunderstanding of what the federal injunction commanded. It says that *Cheatham* and the ADA prohibit PEIA from limiting "air ambulance reimbursement at *any* amount," Petr's Br. 15-16, that continuing to pay the Medicare rate violates the injunction, *id.* at 22, and that "[t]he best—and only—way to bring the" PEI Act "into compliance with federal law" is to "order PEIA to pay Air Evac's claims in full," *id.* at 19. It also says it can't be allowed to balance bill under *Cheatham*, *id.* at 22, thus, eliminating any option for PEIA to permit this practice under West Virginia Code Section 16-29D-4(a)(2)'s plain terms.

Air Evac is wrong on each point. Paying Air Evac less than it demands does not violate federal law or the injunction. As the Fourth Circuit made clear: "[t]he ADA does not require a state to pay whatever an air carrier may demand." *Cheatham*, 910 F.3d at 769. Nor is paying at the Medicare rate a problem. True, the federal courts held that the statutes which capped Air Evac's recovery at that rate were preempted by the ADA, 49 U.S.C. § 41713(b), *see Cheatham*, 2017 WL 4765966, *10. But that was because these went "beyond the methods available to [] commercial insurer[s]." *Id.* at *8. They not only "limit[ed] reimbursement rates paid by the state," but also "prevent[ed] air ambulance companies from seeking additional recovery from any third party." *Cheatham*, 910 F.3d at 769. Put differently, it wasn't the amount of PEIA's set rate that was said to have violated the ADA; it was the set rate working *in combination with* the balance-billing prohibition that led to preemption.

But if balance billing was permitted, then the amount the State pays would not be a federal-law concern. After all, the ADA "does not impose a duty on the State to pay air-ambulance claims" at all. *Id.* at 769. PEIA could pay Air Evac nothing and not violate the ADA as long as it did "not

preclude air ambulance companies from seeking payment—at any rate—from the individual who received their service." *EagleMed LLC v. Cox*, 868 F.3d 893, 906 & n.3 (10th Cir. 2017) (noting that even a "rate of zero dollars" "does not violate the [ADA]" as long as it "only affects the payment . . . from state funds"). If paying nothing passes federal muster, surely paying thousands of dollars more under the Medicare rate does, too—provided the State did not bar balance billing. *Id.* at 906 n.3.

After *Cheatham,* West Virginia chose that route. For the future, it passed a statute keeping the rate the State pays the same but removed any cap on the amount air ambulance providers could recover elsewhere. W. VA. CODE § 5-16-8a (2019). But PEIA's Director also exercised the discretion he always had under West Virginia Code Section 5-16-3(c) to achieve the same end for the transports since the litigation had started. He declared Air Evac's services as "noncovered," App. 787 (Order ¶ 27), as Section 5-16-3(c) allows. That declaration lifted the ban on balance-billing since "there shall be no prohibition against billing the beneficiary directly" "for those health care services which are not covered by the plans." W. VA. CODE § 16-29D-4(a)(2). Then, he paid Air Evac at the Medicare rate since he paid the same amount to other air ambulance providers. Suppl. App. 900 (Cheatham Aff. ¶ 25).

Nothing in *Cheatham* blocks this statutory path. True, *Cheatham* did not strike down the general balance-billing prohibition directly. After all, Air Evac only challenged Section 16-29D-4(a)(2) in the alternative. *Cheatham*, 2017 WL 4765966, *10; *see also* App. 235-36. But that just means the ban was left to operate under its plain terms and could be lifted (in conjunction with Section 5-16-3(c)) if PEIA's Director designated Air Evac's service "not covered by the plan[]." W. VA. CODE § 16-29D-4(a)(2). And *Cheatham* clearly left this option open as a way to comply with federal law. As the Fourth Circuit put it: the ADA lets West Virginia "negotiate better rates

up front or limit reimbursements for air ambulance services after the fact" as long as it does not cap the providers' total recovery from other sources. *Cheatham*, 910 F.3d at 769.

Air Evac tries to counter in two ways. Both miss the mark. *First*, it says *Cheatham* only let West Virginia keep the Medicare rate and lift the balance-billing bar "going forward" and so, this option is unavailable for the past transports at issue. Petr's Br. 20 (quoting *Cheatham*, 910 F.3d at 769). But the Fourth Circuit plainly contemplated "after the fact" reimbursement limitations. *Cheatham*, 910 F.3d at 769. It also clarified that "[n]othing in our analysis forecloses the possibility" of using a "fee schedule" "in the absence of both the caps and the balance-billing prohibition." *Cheatham*, 910 F.3d at 769 n.3. That makes sense because federal courts don't "create new rules of law"; they say what the law always was. *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008). So, West Virginia's right to limit air ambulance payments "necessarily pre-exist[ed]" the Fourth Circuit's opinion. *Id.* Given that background, the court's "going forward" language was likely a reflection of the forward-looking declaratory and injunctive relief Air Evac sought, *Air Evac EMS, Inc. v. Cheatham*, 260 F.Supp.3d 628, 641-42 (S.D.W.Va. 2017) (recognizing that Air Evac "asks the Court to enjoin future violations" of the ADA), *Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018) (noting that these remedies address "ongoing or future" harms), and not meant to restrict the State's options to cure its run-in with the ADA.

Second, Air Evac says the Fourth Circuit's analysis on this point was dicta anyway. Petr's Br. 20. That's not true, either. Dicta is part of an opinion "unnecessary to the decision in the case." *State ex rel. Med. Assurance of W. Va., Inc. v. Recht*, 213 W. Va. 457, 471, 583 S.E.2d 80, 94 (2003). That definition is not met here. One of PEIA's arguments on appeal was that the district court's order (and Air Evac's overbroad reading of it) could put the State in a worse position than private insurers who were not forced to pay air ambulances full charges. Opening

Br. of Defendants-Appellants, *Air Evac EMS v. Cheatham*, No. 17-2349, 2018 WL 539516, *37-38 (Jan. 16, 2018). This made whether the ADA left West Virginia the ability to limit its payment to air ambulance providers a key issue in the case. So, the court needed to rule on those limits. Plus, even if this part of *Cheatham* was dicta, it "does not impugn [the] integrity" of its statement that the ADA lets PEIA limit reimbursement after the fact "as a valid proposition of law." *W. Va. Dep't of Transp., Div. of Highways v. Parkersburg Inn, Inc*., 222 W. Va. 688, 695, 671 S.E.2d 693, 700 (2008). After all, other federal and state courts have been clear on this point as well: federal law "does not impose a duty on the State to pay air-ambulance claims" at all, much less at the rates Air Evac unilaterally demands. *EagleMed*, 868 F.3d at 906; *Texas Mut. Ins. Co. v. PHI Air Med.*, LLC, 610 S.W.3d 839, 850 (Tex. 2020) (same).

B. The targeted nature of the injunction and PEIA's reserve of discretion make severability analysis unnecessary.

In addition to reading *Cheatham* wrong, Air Evac's arguments on severability falter as well. It says that the circuit court was wrong not to "perform [] severability analysis" because that is the "only way to determine" what parts of the PEI Act survived the injunction. Petr's Br. 12-13. That's incorrect. Analyzing the severability of the PEI Act is unnecessary in this case because *Cheatham* affected only specific sections of Code. And what it left alone gives PEIA ample discretion to pay Air Evac the Medicare rate. Severability principles don't change that.

1. When courts "confront[] a . . . flaw in a statute" they sometimes "try to limit the solution" by "severing any problematic portions" of the statute "while leaving the remainder intact." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2209 (2020). This relief is based on the recognition that "[a] statute may contain [valid] and [invalid] provisions which may be perfectly distinct." *Louk v. Cormier*, 218 W. Va. 81, 96, 622 S.E.2d 788, 803 (2005) (cleaned up). So, the whole thing does not have to fall because one part of it is invalid. *Id.*

But the "only question" courts have "authority to decide" using severability principles, *Seila Law*, 140 S. Ct. at 2210, is "whether [an] entire statute, or merely" a specific "provision of" it "must be declared [invalid]." *State ex rel. Loughry v. Tennant*, 229 W. Va. 630, 642-43, 732 S.E.2d 507, 518-19 (2012). This wholesale choice avoids "inherently complex" "line-drawing" best left to the Legislature. *Ayotte*, 546 U.S. at 330. "The Court's only instrument [here] is a blunt one" with no "editorial freedom" to "re-write [the Legislature's] work." *Seila Law*, 140 S. Ct. at 2211 (cleaned up). Courts just ask: "Would the legislature have preferred what is left of its statute to no statute at all?" *Id.* If the answer is yes, "such remaining portion will be upheld and sustained." *Louk*, 218 W. Va. at 97, 622 S.E.2d at 804. If no, then the entire act (or section of the act) will be invalidated. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1484 (2018).

This is not a question the circuit court (or this Court) needed to engage with. Severing a statute is typically the job of the court that initially rules on its invalidity. *E.g., Tennant*, 229 W. Va. at 642-43, 732 S.E.2d at 518-19. And no one disputes that the PEI Act survived the *Cheatham* injunction: Air Evac cites several parts of the act it thinks are enforceable, *e.g.,* Petr's Br. 18 (citing W. VA. CODE §§ 5-16-3, 5-16-7, 5-16-8, 5-16-11 as authority), and even admits that Section 5-16-3(c) is "non-preempted," *id.* at 21. The federal courts were also clear about what provisions of the PEI Act *Cheatham* affected. Injunctions are supposed to be "narrowly tailored," *Cromer v. Kraft Foods N. Am.,* 390 F.3d 812, 818 (4th Cir. 2004), and "no more burdensome" "than necessary to provide" the requested relief, *Califano v. Yamasaki,* 442 U.S. 682, 702 (1979). Federal rules also mandate that injunctions be "specific[]" in "its terms" and "describe in reasonable detail . . . the act or acts sought to be restrained." Fed. R. Civ. Pro. 65(d)(1)(B), (C). This specificity is "designed to prevent uncertainty and confusion on the part of those faced with injunctive orders." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). It also lets "those who seek to obey" the order

"know precisely what the court intends to forbid." *Abbott Labs. v. Unlimited Beverages, Inc*., 218 F.3d 1238, 1240 (11th Cir. 2000). Two related principles follow from this specificity: *first*, when "determining whether a particular act falls within" an injunction's "scope," "particular emphasis" is "given to the express terms of the order," *Ala. Nursing Home Ass'n v. Harris*, 617 F.2d 385, 388 (5th Cir. 1980); *second*, courts "may not expand the decree or impose obligations that are not unambiguously mandated by the decree itself." *Abbott Labs*, 218 F.3d at 1240.

The *Cheatham* injunction lived up to those rules. It targeted the specific provisions Air Evac objected to and barred the enforcement of no other parts of the PEI Act. The district court's opinion found that the "ADA preempts West Virginia Code § 5-1[6]-8a(a)'s reimbursement cap," *Cheatham*, 2017 WL 4765966, *10, as well as "West Virginia Code § 5-16-5(c)(1) . . . , the accompanying fee schedule[], and all accompanying regulations, with respect to air ambulance services providers." *Id.* So, the court's order "enjoined" PEIA "from enforcing § 5-1[6]-8a(a)[,] § 5-16-8a(b)" and "§ 5-16-5(c)(1) . . . , the fee schedules and regulations attendant thereto, against air ambulance service providers." App. 488. But it set no bar to enforcement of other sections of the PEI Act. It even expressly left another section of the Code PEIA operates under (Section 16-29D-4) alone because Air Evac objected to it in the alternative. *Cheatham*, 2017 WL 4765966, *10. The order clearly targeted only the provisions Air Evac challenged. Nothing justifies expanding it beyond that: "An injunction does not prohibit those acts that are not within its terms as reasonably construed." *Ala. Nursing*, 617 F.2d at 388. The question of "whether [the] entire" PEI Act "must be declared invalid," *Tennant*, 229 W. Va. at 641, 732 S.E.2d at 518, is simply not at issue. And with that off the table, there is no other work for severability analysis to do.

2. Instead, the issue is: must the Director pay Air Evac more under the parts of the PEI Act *Cheatham* didn't enjoin? Normally, the Court's "role" in addressing that question would

"simply [be] to give" "force and effect" to the PEI Act's non-preempted provisions. *Beasley v. Sorsaia*, 247 W. Va. 409, --, 880 S.E.2d 875, 878 (2022) (cleaned up). Or it would defer to PEIA "if the statute is silent or ambiguous" on "the specific issue" and leaves a "gap" for the agency to fill. *Steager v. Consol Energy, Inc.,* 242 W. Va. 209, 223, 832 S.E.2d 135, 149 (2019). But Air Evac thinks severability analysis is needed here, too. It says the words "maximum levels of" must be severed from Section 5-16-5(c)(1) and that afterward, this section will "establish" not only reimbursement but "full reimbursement" for its past transports at whatever rate it selects. Petr's Br. 16. It also argues that another air ambulance used the same approach to get full payment from Wyoming's workers' compensation system after its fee schedule was enjoined. *Id.* at 16-17.

But Air Evac is wrong. Such revision efforts "go[] beyond the permissible boundaries of severance and tread[] into the legislative role." *United States v. Under Seal*, 819 F.3d 715, 723 (4th Cir. 2016). "[C]ourts" are not supposed to "take a blue pencil to statutes" under the guise of severability. *Murphy*, 138 S. Ct. at 1486 (J.Thomas, concurring). Nor is the analysis a "license to rewrite" statutes "to say whatever" parties "need[] [them] to say in a given situation." *Seila Law*, 140 S. Ct. at 2207.

3. What's more, no amount of editing of Section 5-16-5(c)(1) can change the outcome of this case. That's because other parts of the Code let PEIA's Director pay air ambulance carriers as it sees fit and allow the provider to bill the member for the remainder. These sections operate independent of anything in Section 5-16-5(c)(1) or any of the other statutes *Cheatham* enjoined.

Relevant to this case, the Director's power to set rates flows from three statutory provisions: *first*, Section 5-16-8a (2016) (the air-ambulance specific fees provision); *second*, Section 5-16-5(c)(1) (the general fee-schedule provision); and *third*, Section 5-16-3(c) (the general managerial discretion provision). Before the injunction, PEIA capped Air Evac's recovery under

Section 5-16-8a, Section 5-16-5(c)(1), and the related fee schedules by setting the maximum amount it could recover from the State at the Medicare rate and barring recovery of anything more from its members. *Cheatham*, 910 F.3d at 758. But after the injunction stopped it from using the first two sections, its Director relied on the third, Section 5-16-3(c), to negotiate with Air Evac. And when negotiations fell through, he used the same authority to limit Air Evac's reimbursement to the Medicare rate. App. 803 (Order ¶ 103). That subsection reads:

> The director is responsible for the administration and management of the [PEIA] . . . . Nothing in [the fee schedule provision] limits the director's ability to manage on a day-to-day basis the group insurance plans required or authorized by this article, including, but not limited to, . . . provider negotiations, provider contracting and payment, designation of covered and noncovered services, . . . or any other actions which would serve to implement the plan . . . .

W. VA. CODE § 5-16-3(c). The plain language of this section gives the Director more than enough discretion to negotiate with providers—like Air Evac—and determine the amount of any bill PEIA will cover and pay. It gives the Director total control over "provider negotiations," provider "payment," and anything else that would serve the purposes of the Plan and Act. These words encompass paying Air Evac at the Medicare rate and "include" powers beyond even those broadly specified. *Davis Mem'l Hosp. v. W. Va. State Tax Comm'r*, 222 W. Va. 677, 684, 671 S.E.2d 682, 689 (2008) (treating the words "includes, but is not limited to" "as [] word[s] of enlargement").

Section 5-16-3(c) also gives PEIA's Director broad discretion to "designat[e] . . . covered and noncovered services." W. VA. CODE § 5-16-3(c). This authority lets him engage with Section 16-29D-4(a)(2)—which generally bans balance billing—since it only applies to services the Plan covers. It says that "there shall be no prohibition against billing the beneficiary directly" "for those health care services which are not covered by the plans." W. VA. CODE § 16-29D-4(a)(2). It also makes paying for such services "the responsibility of the beneficiary." *Id.*

The exception to the balance-billing prohibition fits well with the Director's discretion. Operating together, Section 5-16-3(c) and Section 16-29D-4(a)(2) allow him to declare Air Evac's services "noncovered." Suppl. App. 901 (Cheatham Aff. ¶ 29). When he does, the ban on balance billing in Section 16-29D-4(a)(2) falls away—just like when a member is treated by other non-participating providers who don't accept PEIA's rate. Suppl. App. 901 (Cheatham Aff. ¶¶ 27-28). Since these providers' services are considered noncovered, PEIA pays what it is willing to and lets the provider bill any balance directly to the member. Suppl. App. 901 (Cheatham Aff. ¶¶ 28-31). The Director is treating Air Evac the same way: he declared Air Evac's bills "noncovered," paid it what other air ambulance providers accept, and let it bill the members for the rest.

Importantly, Section 5-16-3(c) operates independent of the enjoined fee schedule. It says that "nothing in . . . § 5-16-5 of this code limits the director's" authority under Section 5-16-3(c). It provides standalone power for the Director to set rates and pay bills. And the federal injunction on the fee provision does not disturb it. Air Evac concedes as much when it admits that Section 5-16-3(c) is "non-preempted." Petr's Br. 21. But that also means that none of Air Evac's edits to Section 5-16-5(c)(1) matter. Regardless of any words it tries to cut from (or add to) Section 5-16-5(c)(1), the indisputably *non*-preempted Section 5-16-3(c) preserves the Director's discretion to designate covered and noncovered services and to manage PEIA's payments to providers.

That is also why the circuit court was right not to rely on *Air Methods/Rocky Mountain Holdings, LLC v. State ex rel. Dep't of Workforce Servs.*, 432 P.3d 476 (Wyo. 2018). Nothing like Section 5-16-3(c) was available for the Wyoming officials who were compelled to pay air ambulance providers in full after the State's workers' compensation fee schedule was enjoined. *Id.* at 487. The preempted rate schedule was the only authority for paying air ambulances. *Id.* at 487. With no discretionary powers available, when the fee schedule fell away, the state officials

argued that the rate-capping provision could not be validly and constitutionally severed from the rest of the statute. *Id.* at 485-87. That made severability analysis a key issue in that case. *Id.* But Section 5-16-3(c) makes this suit different. Air Evac's most aggressive severability analysis is unnecessary and would not change the result regardless.

4. True, courts occasionally need to sever "more than just the offending provision" if "a particular surrounding or connected provision is not operative in the absence of the" invalid "provision." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2352 n.9 (2020). But Air Evac can't even manage to employ this approach consistently. *Cheatham* barred PEIA from "enforcing § 5-1[6]-8a" and "§ 5-16-5(c)(1) . . . against air ambulance service providers," App. 488, but Air Evac claims that it affected each section differently. It says that the injunction made Section 5-16-8a (the air ambulance reimbursement cap) entirely unenforceable. Petr's Br. 16 (saying this section should "be completely severed"). But it says Section 5-16-5(c)(1) (the general fee schedule) can be partially severed and selectively enforced. Petr's Br. 16. It tries to explain why the words "maximum levels of" could be deleted from Section 5-16-5(c)(1), but it never explains why (using the same severability approach) Section 5-16-8a (2016)'s prohibition on collecting more than the Medicare rate from "the covered employee or dependent of the employee" couldn't be deleted instead—thus, allowing recovery from the member instead of PEIA. Nor does it explain why the injunction would entirely bar one section and only partly bar the other.

Air Evac does not even strike through the same words in Section 5-16-5(c)(1) consistently. Initially, Air Evac thought striking the words "maximum" and "to categories of health care providers" was the right call. App. 62 (Demand ¶ 26); App. 18 (Pet. p.15). Later on, it decided the words "levels of" also had to be excised from Section 5-16-5(c)(1) but that "categories of health care providers" could stay in. App. 509; Petr's Br. 16. It never tries to explain this inconsistency.

Undoubtedly, it must have thought the second approach necessary to get the full payment it wants. But this result-driven analysis only signals "the kind of free-wheeling" "judicial policymaking or *de facto* judicial legislation" courts must avoid when conducting severability analysis. *Barr*, 140 S. Ct. at 2351 & n.7. The circuit court was right not to trust Air Evac's unnecessary, inconsistent, and result-driven approach to severability. This Court should reject it as well.

C. Air Evac applies severability principles incorrectly; and its flawed analysis doesn't get it full reimbursement anyway.

Even if analyzing the severability of the PEI Act is needed, Air Evac does it wrong. It says that striking through the words "maximum levels of" in Section 5-16-5(c)(1) "is the only fair reading of what is left of the [PEI] Act" after the injunction. Petr's Br. 16. And it says that this revision complies with the severability test laid out in syllabus point 6 of *State v. Heston*, 137 W. Va. 375, 71 S.E.2d 481 (1952). "[W]hen" a court finds "a portion of [a] statute" invalid, that test lets it salvage "the remain[der]" if it "reflects the legislative will, is complete in itself, is capable of being executed independently" and "is valid" "in all other respects." Syl. pt. 6, *id.*

None of this test is satisfied by rewriting the PEI Act to require full payment for Air Evac's past transports.

1. This result pays little regard to legislative intent. Here, Air Evac points to subdivisions of Code stressing that "the health and well-being of" PEIA members is "of primary concern to the state," Petr's Br. 18 (quoting W. VA. CODE § 16-29D-1(a)(6)), and it extrapolates from this that the Legislature would have preferred to pay all of its bills, Petr's Br. 18, and "guarantee[] that" it "will be able to afford" to operate in West Virginia. *Id.* It also notes that PEIA is supposed to provide "coverage for emergency services;" so, it reasons, the Legislature would want PEIA to cover its bills, too. *Id.* (quoting W. VA. CODE § 5-16-8(12)(a)-(b) (2000)).

But Air Evac forgets that "a primary objective" of the PEI Act was to "bring fiscal stability to [PEIA]." *Am. Fed'n of State, Cnty. & Mun. Emps. of W. Va. v. Richardson*, 184 W. Va. 285, 288, 400 S.E.2d 293, 295 (1990). It also ignores multiple subdivisions in the same section of Code it cites stating that "it is in the best interest of the state and [its] citizens" for PEIA to "effect[] cost savings," W. VA. CODE § 16-29D-1(a)(5), that "the state must effect cost savings in the provision of [] health care" to "alleviate" the "significant and ever-increasing" use of "the state's financial resources," *id.* § 16-29D-1(a)(1), (4), (5), and that absent these cost-saving tools, PEIA "face[d] serious financial difficulties" "paying debts presently owed," *id.* § 16-29D-1(a)(3).

It also ignores that the Director of PEIA has considerable discretion to implement these cost-saving goals as he sees fit. He can take "any other actions which would serve to implement" PEIA's insurance plans, W. VA. CODE § 5-16-3(c), and is allowed to "use recognized health care . . . cost management tools including, but not limited to, . . . setting coverage levels, . . . and using patient cost sharing" methods to limit its costs, *id.* § 5-16-7(a)(6)(B) (2023). Cutting costs and the Director's discretion must factor into any analysis of legislative intent: "the statute should be read as a whole." *Ohio Cnty. Comm'n v. Manchin*, 171 W. Va. 552, 554, 301 S.E.2d 183, 185 (1983); *Murphy*, 138 S. Ct. at 1482 (refusing to "rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole").

Nor does the PEI Act's treatment of "emergency services" help Air Evac. Even here, PEIA's payments are limited to services "necessary to screen and stabilize" patients, and members are responsible for "any applicable copayments, deductibles, or coinsurance." *Id.* § 5-16-8(12)(b). And like any medical services, these are subject to "coverage levels" set by PEIA. *Id.* § 5-16-7(a)(C)(6). And Air Evac cannot compare itself to emergency service providers anyway. It spent the entire federal litigation arguing that it did not provide the type of "preventive, diagnostic,

treatment, or rehabilitative" services that qualified as "emergency health care services." *Id.* § 16-29D-2(b). Instead, it asserted that it provided "transportation" services, App. 265-66, 450-51, 475-76, so that it would have a basis to challenge the Code's general balance-billing bar (which doesn't apply to emergency service providers). *Id*. And despite PEIA's objections, the district court agreed. *Cheatham*, 2017 WL 4765966, *8. Principles of judicial estoppel prevent Air Evac from claiming any benefit from "emergency service" coverage now that it's convenient. *Banbury Holdings, LLC v. May*, 242 W. Va. 634, 639, 837 S.E.2d 695, 700 (2019).

These cost-saving goals are yet another reason why *Air Methods* is inapposite: workers' compensation systems like the one in Wyoming are designed "to provide quick and efficient delivery of benefits to injured workers." *Air Methods*, 432 P.3d at 486. In such systems, it makes little sense to shift some of the burden of air ambulance flights to the injured worker: the system is supposed to "indemnify" them for their work injuries. *Id.*

But the PEI Act has a different focus. The whole statute makes clear that the Legislature intended PEIA to balance both the health and wellness of its members and its fiscal stability. It also trusted PEIA to determine how to allocate costs between the State and its members. That balance cannot work if providers like Air Evac can dictate prices to the State. True—as Air Evac points out—air ambulance costs are not the lion's share of PEIA's fiscal burden. Petr's Br. 19. But the strain that rising medical costs place on PEIA's limited budget is common knowledge. *See* Randy Yohe, WV Public Broadcasting, *House Passes PEIA Reform Legislation to Prevent Program Collapse* (Mar, 4, 2023), https://tinyurl.com/3e6ftkns (last visited July 20, 2023). And with scarce resources available, using millions of dollars more for air ambulance services means less money for hospital care, pharmacy benefits, and other key medical services. Allocating these scarce funds is undoubtedly a difficult task; but multiple sections of the PEI Act make clear that it

is one assigned to PEIA and its Director. Nothing indicates that the Legislature wanted providers to unilaterally dictate how much PEIA had to pay them.

What the Legislature has actually said regarding air ambulance reimbursement doesn't reflect this intention, either. On two occasions, the Legislature has spoken to payments for air ambulance transports, and both times it set the amount PEIA should pay at the Medicare rate. Before the injunction, it set this rate as the most air ambulance providers could recover from PEIA or its members, W. VA. CODE § 5-16-8a (2016), and after *Cheatham* invalidated this option, it stuck to the same number but eliminated any option for PEIA to prohibit balance-billing on this type of service. W. VA. CODE § 5-16-8a (2019). If the question is "What would the Legislature want PEIA to pay Air Evac?" the only answer is the Medicare rate.

Admittedly, this new statute did not take effect until June 4, 2019, and applies prospectively. W. Va. Acts 2019, c. 146 (eff. June 4, 2019). But if legislative intent matters at all to severability analysis, then the way this Court construes State law in light of *Cheatham* should track what the Legislature has said better than Air Evac's full-payment theory. *Ayotte*, 546 U.S. at 330 (cautioning that severability "cannot" be used "to circumvent the intent of the legislature"). The Legislature has never condoned using State funds to pay air ambulance providers whatever they charge. This Court shouldn't either.

2. Air Evac's revision is not complete in itself; nor can they be executed independently. Air Evac says that rewriting Section 5-16-8a and Section 5-16-5(c)(1) to require full payment would not hinder the operation of the PEI Act at all. Petr's Br. 19-20. But it can only claim that because it forgets to look at other sections of Code. For example, requiring full payment for Air Evac would conflict with Section 5-16-3(c), which always reserves the Director's discretion regarding provider payment and "designating covered" services. It would also write out of the

Code PEIA's authority to use "recognized health care quality and cost management tools" like "setting coverage levels, and using patient cost sharing in the form of copayments, deductibles, and coinsurance," W. VA. CODE § 5-16-7(a)(6)(B), or its members' obligation to pay "for those health care services which are not covered by the plans," *id* § 16-29D-4(a)(2). And it would countermand the Director's obligation to "make every effort to . . . manage health care delivery costs," *id.* § 5-16-3(e), and PEIA's duty to "establish . . . [a]ny cost-containment measures" the Director needs to "implement[]" the Plan, *id.* § 5-16-5(c)(2). None of these cost-saving or cost-sharing provisions factor into Air Evac's analysis at all. But each would be hindered by its suggested revisions to the PEI Act.

3. Reading the PEI Act to require full payment would not be valid anyway. Air Evac thinks that deleting Section 5-16-8a entirely and striking through the words "maximum levels of" in Section 5-16-5(c)(1) would be enough to compel "full reimbursement." Petr's Br. 16. But even if these edits are adopted, that's not what the plain language of what's left says.

At that point, Section 5-16-5(c)(1) would provide that "[a]ll financial plans" PEIA develops "shall establish . . . reimbursement which [PEIA] makes to categories of health care providers." Petr's Br. 16. The word "full" appears nowhere even in this revised text. Nor can it be read into the statute as Air Evac suggests: courts should never "arbitrarily [] read into a statute that which it does not say." *State v. Louk*, 237 W. Va. 200, 206, 786 S.E.2d 219, 225 (2016). Such judicial restraint is all the more important here since misusing severability principles—especially in "murky" or "inherently complex" areas—risks a "serious invasion of the legislative domain." *Ayotte*, 546 U.S. at 330.

Nor is the word "full" implied by context. PEIA rarely—if ever—pays for health care costs in full. *Cf.* App. 383-84 (Cheatham Dep). Even where it does not have an enforceable contract or

fee schedule in place—such as when a member seeks care with a non-participating out-of-state provider—the agency does not pay in full. Like, Air Evac, these providers do not have to accept PEIA's rate. Suppl. App. 900 (Cheatham Aff. ¶ 27). But the result is not what Air Evac suggests here. Instead, these providers' services are considered noncovered, PEIA pays what it is willing to, and the provider can bill any remaining charges directly to the member. Suppl. App. 901 (Cheatham Aff. ¶¶ 28-31); *see also* App. 383-84 (Cheatham Dep).

Reading "reimbursement" to mean "full reimbursement" would also be out of line with the current healthcare market. Insurance providers across the county rarely reimburse medical providers at their full charges, *Higgs v. Costa Crociere S.P.A. Co*., 969 F.3d 1295, 1315 (11th Cir. 2020) (describing the full charges for medical services as "an amount that never was and never will be paid" in "the contemporary healthcare market"); *West v. Shelby Cnty. Healthcare Corp.*, 459 S.W.3d 33, 45 (Tenn. 2014) ("[V]irtually no public or private insurer actually pays full charges" (cleaned up)); *Kenny v. Liston*, 233 W. Va. 620, 636, 760 S.E.2d 434, 450 (2014) (J.Loughry, dissenting) (describing full charges as amounts "the medical provider never actually expects to be paid and never will be paid" due to "'write-offs' or discounts" standard in healthcare).

Air ambulance reimbursement is no exception: Air Evac admits that some private insurers do not pay its full charge. App. 428, 436 (Thomas Dep.). The Fourth Circuit acknowledged this, too. *Cheatham*, 910 F.3d at 757 (noting that "some insurance companies have" responded to air ambulance rising costs by "refus[ing] to pay the full reimbursement" for them); *see also Med. Mut. of Ohio v. Air Evac EMS, Inc*., 341 F.Supp.3d 771, 780 (N.D. Ohio 2018) (noting that insurer had refused to pay Air Evac "its full billed charges" "in 90 percent of the instances at issue"). Courts and juries alike have also grown skeptical of Air Evac's theory that "the only 'reasonable' price" for its services is "the full amount [it] billed." *Med. Mut.*, No. 1:16-cv-80, 2019 WL 13197046,

*2 (N.D. Ohio Sept. 20, 2019); *Med. Mut*., No. 1:16-cv-80, 2020 WL 13454002, *1 (N.D. Ohio Sept. 1, 2020) (noting that jury found that insurer had "paid the reasonable value of Air Evac's services" even though the amount was less than the provider's full charges). Courts have even found Air Evac's "claim[s] for payment in full" from private insurers "not plausible on [their] face." *Air Evac EMS, Inc. v. USAble Mut. Ins. Co*., 931 F.3d 647, 655 (8th Cir. 2019). Similar reasoning applies here. It just does not make sense textually or in the health care context to read the word "reimbursement" in Section 5-16-5(c)(1) to mean "full reimbursement."

If all that wasn't enough, two additional textual points foreclose Air Evac's full payment theory. *First*, deleting the words "maximum levels of" from Section 5-16-5(c)(1) doesn't change *who* sets the amount of reimbursement under the PEI Act. Prior to the injunction, it was clearly PEIA that "establish[ed]" the amount it was willing to pay Air Evac, and it set this amount as the "maximum allowable recovery" from the State and its members. *Cheatham*, 910 F.3d at 758. The injunction bars West Virginia from capping Air Evac's recovery from the State and "from anyone else." *Id*. at 767. But it does not let Air Evac dictate the amount PEIA establishes as its reimbursement. After all, federal law lets PEIA "limit reimbursements for air ambulance services after the fact." *Id.* at 769. And it does not have to pay Air Evac "whatever" the provider "may demand." *Id.* Even taking Air Evac's preferred revisions into account, it is still PEIA—not Air Evac—that "establish[es]" the amount of reimbursement.

Second, the amount of reimbursement still has to be the same for all air ambulance providers. As a practice, PEIA typically tries to pay providers who provide the same type of service the same amount, Suppl. App. 900 (Cheatham Aff. ¶ 24), even if the providers bill at different rates for those services. This ensures that PEIA treats providers equally and doesn't give any one of them a windfall just because they charge more. Section 5-16-5(c)(1) reflects this

approach, too. Even with Air Evac's revisions, the "reimbursement" PEIA "establish[es]" under this section still has to be equal across the board. It is for "categories of health care providers" and not an amount specific to any one provider. W. VA. CODE § 5-16-5(c)(1) (2007). But that is what PEIA has done anyway. For years, PEIA had a contract with another air ambulance provider, HealthNet Aeromedical Services. Suppl. App. 900 (Cheatham Aff. ⁋ 21). And it has always paid this provider at the Medicare rate. *Id.* (Cheatham Aff. ⁋ 25). So, when PEIA's Director chose the amount it should pay Air Evac after the injunction, he selected the same rate that other air ambulance providers receive and accept. Even if the words Air Evac dislikes were written out of Section 5-16-5(c)(1), it would be entitled to no more than it already received.

* * * * *

In the end, Air Evac's severability analysis is both unneeded and ineffective. *Cheatham* was specific about the sections of Code it enjoined and the parties agree it did not render the entire PEI Act void. What's more, using severability analysis to revise Section 5-16-5(c)(1) as Air Evac suggests gets them nothing. It cannot write out of the Code the Director's discretion under Section 5-16-3(c) and Section 16-29D-4(a)(2) to designate its services as noncovered, pay it the amount PEIA sees fit, and let it balance bill the members. And even if its revisions to Section 5-16-5(c)(1) are controlling, it still does not get full payment. The most Air Evac is entitle to is exactly what it already received: the same amount that every other air ambulance providers receives for this services and the right to bill the member for the remainder. The circuit court was right to disregard Air Evac's severability analysis and its full payment theory. This Court should, too.

CONCLUSION

This Court should vacate the circuit court's opinion and remand with instructions to dismiss the case, or in the alternative, affirm that Air Evac is not entitled to full payment.

Respectfully submitted,

BRIAN CUNNINGHAM, in his capacity as Director of the Public Employees Insurance Agency, and MARK D. SCOTT, GEOFF S. CHRISTIAN, AMANDA D. MEADOWS, JARED ROBERTSON, DAMITA JOHNSON, JASON MYERS, MICHAEL COOK, WILLIAM MILAM, AND MICHAEL T. SMITH, in their capacities as Members of the Public Employees Insurance Agency Finance Board,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 23-ICA-135

AIR EVAC EMS, INC.,

Petitioner,

v.

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

Respondents,

On Appeal from the Circuit Court of Kanawha County, Civil Action No. 19-AA-169

CERTIFICATE OF SERVICE

I, Sean M. Whelan, do hereby certify that on this 31st day of July 2023, the foregoing Respondents' Brief was electronically filed with the Clerk of the Court using the File & Serve Xpress system, which constitutes service on the following:

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