

In the Supreme Court of Appeals of West Virginia

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No. 33682

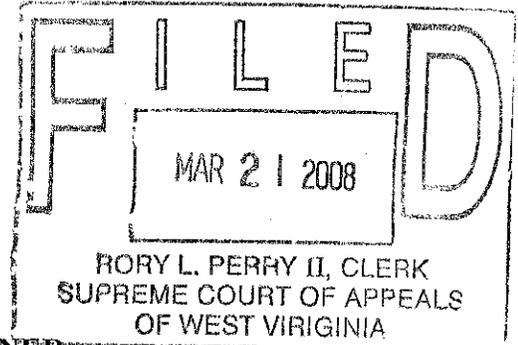
DAVIS MEMORIAL HOSPITAL,

Appellant,

v.

WEST VIRGINIA STATE TAX COMMISSIONER,

Appellee.



Honorable John L. Henning
Circuit Court of Randolph County
Civil Action No. 07-C-9

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I. INTRODUCTION

Appellant Davis Memorial Hospital (the “Hospital”) is a not-for-profit hospital. Its I.R.C. (26 U.S.C.) § 501(c)(3) tax-exempt purpose is to provide healthcare services (from which it derives most of its income). As an I.R.C. § 501(c)(3) not-for-profit healthcare provider, the Hospital is exempt from West Virginia state sales and use tax if it passes the state “support test,” *i.e.*, if it “annually receives more than one half of its support from any combination of gifts, grants, direct or indirect charitable contributions or membership fees” W. VA. CODE § 11-15-9(a)(6)(C). It is the meaning of the term “support” that forms the heart of this appeal. Specifically, the question is whether exempt-purpose income falls within this definition: If “support” includes exempt-purpose income, as the Appellee West Virginia State Tax Commissioner (“Commissioner”) urges, then the Hospital would fail the test. If “support” excludes exempt-purpose income, however, as the Hospital urges, it passes the test. Based on both the statute’s legislative history and plain text, the Hospital submits that its definition of the term “support” is correct.

With respect to legislative history, under similar *federal* tax law—unchanged since 1981, the Hospital would not pass the “support” test because category two¹ in the *federal* statute defines “support” very broadly, to include both exempt-purpose income *and* fundraising income:

gross receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities in any activity which is not an unrelated trade or business (within the meaning of [I.R.C. § 513])

I.R.C. (26 U.S.C.) § 509(d)(2). Category two of the federal test defines “support” to include receipts that are excluded from I.R.C. § 513. Section 513, in turn, (also unchanged since 1981)

¹Both state and federal support tests define “support” as income from six categories. It is undisputed that the Hospital’s exempt-purpose income, at issue here, does not fall within any of the other five categories of support.

expressly excludes both exempt-purpose income, *see* I.R.C. § 513 (defining “unrelated trade or business” as “any trade or business the conduct of which is *not* substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501”) (emphasis added), and fundraising income, *see* I.R.C. § 513(a)(1) to (3) (commonly referred to as “the fundraising exceptions”). It is, therefore, beyond any dispute that for decades the *federal* definition of “support” at I.R.C. § 509(d)(2) has *included* both the Hospital’s exempt-purpose and fundraising incomes and that if *federal* law applied, the Hospital would fail the support test.

The West Virginia Legislature is, of course, presumed to have been aware that the federal support test (at I.R.C. § 509(d)(2)) included both exempt-purpose and fundraising income. If the Legislature had wanted to include both exempt-purpose and fundraising income in the state definition of “support,” therefore, it simply would have enacted the federal statute *verbatim*.

Looking at the statutory language, however, when the Legislature enacted the State’s definition of “support” at W. VA. CODE § 11-15-9(a)(6)(F)(i), it made a significant change to category two, expressly *rejecting* the all-inclusive federal definition and instead adopting a *different, narrower* definition of “support” which *includes only fundraising income* and thereby *excludes exempt-purpose income*:

[g]ross receipts from fundraisers which include receipts from admissions, sales of merchandise, performance of services or furnishing of facilities in any activity which is not an unrelated trade or business within the meaning of Section 513 of the Internal Revenue Code of 1986, as amended²

²W. VA. CODE § 11-15-9(a)(6)(F)(i)(II)(emphasis added); *accord* W. VA. CODE ST. R. § 110-15-2.90.2 (same definition).

W. VA. CODE § 11-15-9(a)(6)(F)(i). Including only fundraising income and excluding exempt-purpose income is the *only* significant difference between the state and federal definitions. Under this narrower, state-law definition, the Hospital *does* pass the support test and the Circuit Court of Randolph County erred in failing to acknowledge the distinction between state and federal law. Consequently, this Court should reverse the judgment of the Circuit Court of Randolph County and remand this case to the Tax Commissioner for a refund.

When the Hospital discovered that, on examination of the legislative history and statutory language, it had been overpaying its sales and use tax, it (and several similarly situated hospitals) applied for a refund. Notwithstanding the Legislature's clear command that the state-law definition of support be narrower than its federal counterpart and include in category two only gross receipts from certain fundraisers, the Commissioner nevertheless insisted on ignoring the phrase added by the Legislature and applying the federal, not state, support test, stripped of the Legislature's changes, and denied the Hospital's petition. Thereafter, instead of interpreting the state support test that the Legislature actually enacted, the Office of Tax Appeals ("OTA") affirmed the Commissioner's refusal to apply controlling state law by entirely rewriting the statute—misquoting not one, but *all*, of the guideposts included by the Legislature that should have led to a rejection of the Commissioner's argument, and the Circuit Court affirmed this error on appeal. Despite these critical textual differences, the OTA and Circuit Court held that the state and federal support tests are the same.

Of course, the mere fact that the Legislature decided to reject the federal support test can only serve to tell us what the state support test does *not* mean. We must look to the language of the state support test to know what that law—the only relevant law—*does* mean. Turning to that language, there are several independently compelling textual bases for finding that the state support test *excludes* exempt-purpose income. As explained herein, it is clear, not only by

comparing the face of the state support test to its federal counterpart, but also from a careful analysis of the state statute's plain language, that § 11-15-9(a)(6)(F)(i)(II) includes only the fundraising components of its federal counterpart, and thereby *excludes* the Hospital's exempt-purpose income. The Hospital respectfully requests the Court to reverse the Agency's statutory sleight-of-hand and hold that the Hospital is entitled to the sought-after refund.

II. STATEMENT OF FACTS

The relevant facts are undisputed (and for the purposes of this appeal, largely immaterial), consisting of the various amounts that the Hospital listed in the various categories of income on its relevant income tax returns. Petitioner thus accepts, *arguendo*, the factual and procedural background, as presented, for example, in the OTA Order.³ This case is not about any evidentiary disputes; it is about the proper application of state law.

III. ASSIGNMENT OF ERROR

The Circuit Court Erred by Affirming the Tax Commissioner's Decision Which Improperly Disregarded Critical Textual Differences Between Federal and State Law and Has Resulted in a Frustration of Legislative Intent.

IV. DISCUSSION OF LAW

A. Standard of Review.

The single issue in this case—the meaning of a statute—is a legal question.⁴ The circuit court's decisions, therefore, is entitled to no deference, and this Court's review thereof will be *de novo*.⁵ Likewise, because the agency's misquotation and misinterpretation of the statute was so

³See OTA Order at 1-4.

⁴As noted, the parties have agreed on the dollar amounts in question.

⁵See *Schmeil v. Helton*, No. 33379 at 2 (W. Va. Feb. 27, 2008) (“The issues in the instant case largely involve the application of the law to undisputed facts, in which circumstances we review the lower tribunals’ rulings under a *de novo* standard. *In Re Petrey*, 206 W.Va. 489, 490, 525 S.E.2d 680, 681 (1999).”).

clearly ripped loose from any statutory mooring, it, too, is entitled to no weight.⁶ Consequently, the Hospital submits that this Court should overturn the Commissioner's tortured reading of the applicable statute.

B. The Circuit Court Erred by Affirming the Tax Commissioner's Decision, Which Improperly Disregarded Critical Textual Differences Between Federal and State Law and Has Resulted in a Frustration of Legislative Intent.

As noted, the Hospital is exempt from West Virginia's state sales and use tax if the Hospital "annually receives more than one half of its *support* from any combination of gifts, grants, direct or indirect charitable contributions or membership fees" W. VA. CODE § 11-15-9(a)(6)(C) (emphasis added).

1. What the state support test does *not* mean.

If this case were governed by *federal* law, then it would have ended before it began, because the Hospital does not meet the federal support test. This is because *federal* law defines "support" very broadly to include, in pertinent part, any:

gross receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities in any activity which is not an unrelated trade or business (within the meaning of [I.R.C. § 513])

I.R.C. (26 U.S.C.) § 509(d)(2). Because the Hospital has substantial income from its performance of services alone (*i.e.*, its exempt-purpose income), the ratio of its income from

⁶See Syl. pt. 4, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003) ("While the interpretation of a statute by the agency charged with its administration should ordinarily be afforded deference, when that interpretation is unduly restrictive and in conflict with the legislative intent, the agency's interpretation is inapplicable.") (citation omitted) (quoting syl. pt. 5, *Hodge v. Ginsberg*, 172 W. Va. 17, 303 S.E.2d 245 (1983); Syl. pt. 1, *Consumer Advocate Div. v. PSC*, 182 W. Va. 152, 386 S.E.2d 650 (1989) (holding that "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten"); *Childress v. Muzzle*, No. 33440 at 15 (W. Va. Mar. 19, 2008)("[W]e believe that the interpretation of Local Office Letter 2200 by the appellees is contrary to the intention of the Legislature and the purposes of the Act.").

gifts, grants, *etc.* (the small numerator) to the very broad *federal* definition of support (the large denominator) is small, and in any event less than one half.

It is, however, beyond cavil that federal law does *not* apply here, where the issue is the proper analysis of the Hospital's petition for a *state* tax refund. Instead, what "support" means in W. VA. CODE § 11-15-9(a)(6)(C) is unquestionably a matter of *state* law, so the support test in § 509(d)(2) is simply inapposite.

Indeed, the Legislature expressly *rejected* the broad federal definition, instead adopting a *very different, far narrower* definition that includes:

[g]ross receipts *from fundraisers which include receipts* from admissions, sales of merchandise, performance of services or furnishing of facilities in any activity which is not an unrelated trade or business within the meaning of Section 513 of the Internal Revenue Code of 1986, as amended

W. VA. CODE § 11-15-9(a)(6)(F)(i)(II) (emphasis added). And under this different, narrower, *state-law* definition, the hospital *does* pass the support test.

2. The "modified adopted construction" doctrine requires rejecting the federal support test.

As a starting point, the "adopted construction" doctrine, with which courts are universally familiar, provides that when one jurisdiction adopts a statute from another jurisdiction *unchanged*, the courts of the former jurisdiction will give the same construction to the adopted statute as the courts of the latter jurisdiction already had at the time of the adoption. *See, e.g., State ex rel. Knight v. Pub. Serv. Comm'n*, 161 W. Va. 447, 459, 245 S.E.2d 144, 151 (1978) (applying adopted construction rule); *Larzo v. Swift & Co.*, 129 W. Va. 436, 444, 40 S.E.2d 811, 816 (1946) (same); Syl. pt. 2, *Kirk v. Firemen's Ins. Co. of Newark, N.J.*, 107 W. Va. 666, 150 S.E. 2 (1929) ("The Legislature, in prescribing the New York standard as an exclusive form of fire insurance policy, is presumed to have adopted the previous interpretations of its provisions

by this court.”); *Rose v. Pub. Serv. Comm’n*, 75 W. Va. 1, 83 S.E. 85, 87 (1914) (“All courts recognize the rule that, when a state copies a statute from another state or country, it adopts also the construction put upon that statute by the courts of that country.”).⁷

As even the name of this rule makes clear, however, its converse is also equally true: Where a legislature borrows a statute from another jurisdiction *but changes it*, it must be presumed that the legislature intended to *change the definition* of the borrowed statute:

We have traditionally held that where a statute is amended to use different language, it is presumed that the legislature intended to change the law. We spoke to this concept in Syllabus Point 2 of *Butler v. Rutledge*, 174 W. Va. 752, 329 S.E.2d 118 (1985): “‘The Legislature must be presumed to know the language employed in former acts, and, *if in a subsequent statute on the same subject it uses different language in the same connection, the court must presume that a change in the law was intended.*’ Syl. pt. 2, *Hall v. Baylous*, 109 W. Va. 1, 153 S.E. 293 (1930).”

Arnold v. Turek, 185 W. Va. 400, 404, 407 S.E.2d 706, 710 (1991) (emphasis added) (footnote omitted).⁸ *Accord State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 144, 107 S.E.2d 353, 358 (1959).⁹

⁷See also *In re Estate of Sumler*, 62 P.3d 776, 781 (N.M. Ct. App. 2002) (“It is a general rule based upon a presumed intent, that the adoption of a statute from another state includes its prior construction by the courts of that state, and the presumption is strong that the legislature did so intend. While the rule is not absolute, it should be followed unless the strong presumption is overthrown by stronger reasons or evidence that it was not adopted.”) (citation omitted); *United States Cent. Underwriters Agency, Inc. v. Manchester Life & Cas. Mgt. Corp.*, 952 S.W.2d 719, 722 (Mo. Ct. App. 1997) (“It is a well-settled rule of statutory construction that the legislature, in reenacting a statute in substantially the same terms, is presumed to adopt the construction given to the statute by courts of last resort, unless a contrary intent clearly appears or a different construction is expressly provided for.”); *State v. Stockfleth/Lassen*, 804 P.2d 471 (Ore. 1991) (“[W]hen Oregon adopts the statute of another jurisdiction, the legislature is presumed also to adopt prior constructions of the statute by the highest court of that jurisdiction.”); *State v. Dilger*, 322 N.W.2d 461, 464 (N.D. 1982) (“Where a statute is taken from another state *and adopted without change* it is presumed that the legislature adopted the construction previously placed upon it by the courts of the state from which the statute was taken.”) (emphasis added); *General Acc. Fire & Life Assur. Corp. v. Cohen*, 127 S.E.2d 399, 401 (Va. 1962) (“The legislature is presumed to have adopted the construction of the statute placed upon the verbatim language of Rule 36 by the federal courts.”).

⁸This rule should come as no surprise to the Commissioner, having relied on it in the past. See, e.g., *Shawnee Bank, Inc. v. Paige*, 200 W. Va. 20, 26-27, 488 S.E.2d 20, 26-27 (1997) (“[T]he Tax

Examples of the application of this converse rule are numerous. In *State, Dept. of Bus. & Indus., Office of Labor Comm'r v. Granite Const. Co.*, 40 P.3d 423 (Nev. 2002), for example, the Nevada Supreme Court, applying statutory construction law identical to West Virginia's, reconfirmed its earlier holding:

“When a federal statute is adopted in a statute of this state, a presumption arises that the legislature knew and intended to adopt the construction placed on the federal statute by federal courts. ***This rule of [statutory] construction is applicable, however, only if the state and federal acts are substantially similar and the state statute does not reflect a contrary legislative intent.***”

Id. at 426 (footnote omitted) (quoting *Sharifi v. Young Bros., Inc.*, 835 S.W.2d 221, 223 (Tex. Ct. App. 1992)). And, in *L.B. Foster Co. v. R. Serv., Inc.*, 734 F. Supp. 818 (N.D. Ill. 1990), the district court, applying Illinois law, held:

When a state adopts the statute of another state, it is presumed that the judicial construction of the borrowed statute is adopted along with the statute and treated as incorporated therein ***unless the adopting legislature indicates a different intent.***

Id. at 821-22 (citing *Bd. of Governors v. Ill. Educ. Labor Rel'ns Bd.*, 524 N.E.2d 758, 767-68 (Ill. Ct. App.) (“[W]hen a statute is adopted from another State, the interpretation of that statute accompanies it. It may be presumed the legislature adopted the language with the knowledge of the previous construction placed upon it. ***Dissimilarities indicate the legislature wished to achieve a different result.***”) (emphasis added)), *appeal denied*, 530 N.E.2d 239 (1988).

What these cases strongly suggest—*i.e.*, that a change in language signals an intent to change the meaning—others make perfectly clear. In *Laborer's Int'l Union of N. Am., Local*

Commissioner submits that “[t]he Legislature must be presumed to know the language employed in former acts, and, if in a subsequent statute on the same subject it uses different language in the same connection, the court must presume that a change in the law was intended.” (internal quotations and citations omitted) (second alteration in *Shawnee Bank*).

1280 v. State Labor Rel'ns Bd., 507 N.E.2d 1200 (Ill. Ct. App.), *appeal denied*, 116 Ill.2d 559

(1987), for example, the Illinois Court of Appeals held:

[W]hen the state legislature passes a state statute based upon a federal statute, the statute can presumably be interpreted in conformity with the decisions of the federal courts rendered prior to the adoption of the statute. Further, it may be presumed that the legislature adopted the language it did with knowledge of the construction previously enunciated in the federal courts. However, the converse of these principles of statutory construction is also true. Since it may be presumed that the legislature had knowledge of the federal court's construction of the federal statute, the intent of the state legislature can be derived not only from the language actually adopted, but also from the language which was changed or not adopted. *The fact that the state legislature specifically declined to adopt a certain section of the model federal statute, evidences an intent to achieve a result different from that announced by the decisions of the federal courts.*

Id. at 1204 (emphasis added).¹⁰

⁹*Cf. In re Hillcrest Mem'l Gardens, Inc.*, 146 W. Va. 337, 346, 119 S.E.2d 753, 758 (1961) ("The fact of this change in the statute, we believe, must be given due weight in the interpretation and application of the statute in its present form.").

¹⁰*See also Airwork Serv. Div'n v. Director, Div'n of Taxation*, 2 N.J. Tax 329, 346-47 (N.J. Tax Ct. 1981) ("Where the Legislature adopts a new law, using as a source a statute theretofore enacted in another jurisdiction, but omits a provision of the source statute, the omission is construed as being deliberate. Indeed, all changes in words and phrasing in a statute adopted from another state are deemed deliberately made with the purpose of limiting, qualifying or enlarging the adopted rule. . . . It is a well established rule of statutory construction that a change of language in a statute implies a purposeful alteration in substance of the law."); *Racine Unified Sch. Dist. v. Labor & Ind. Review Comm'n*, 476 N.W.2d 707, 715 (Wis. Ct. App. 1991) ("Moreover, we have previously held that we will refuse to interpret provisions of the [the state act] in accordance with analogous federal laws where the statutory language differs from that of the federal legislation.") (footnote and citations omitted); *Sharifi v. Young Bros., Inc.*, 835 S.W.2d 221, 223 (Tex. Ct. App. 1992) ("When a federal statute is adopted in a statute of this state, a presumption arises that the legislature knew and intended to adopt the construction placed on the federal statute by federal courts. This rule of construction is applicable, however, only if the state and federal acts are substantially similar and the state statute does not reflect a contrary legislative intent. After comparing the two statutes, we conclude that their coverage provisions are not substantially similar and that the legislature clearly intended to broaden the coverage of [the state law] when it selected the phrase [different than the one] found in the federal Act. The federal Act is by its plain language more restrictive in its coverage than the Texas Act. Under the circumstances, we must determine and follow the intent of the legislature when it adopted a statute with obviously broader coverage.") (citations omitted); *Aultman v. Entergy Corp.*, 747 So.2d 1151, 1155 (La. Ct. App. 1999) ("As defendants point out, it is a tenant of statutory construction that when the Legislature adopts a new law using a source statute that has already been adopted in another state or by the federal government and omits provisions of the source statute, it must be construed that the intention of the Legislature was not to adopt the omitted

As noted, I.R.C. § 509(d)(2) *does* include exempt-purpose income. In purposefully *changing* the statute the way that it did, the Legislature plainly intended to *narrow* the state “support” test to include only those “gross receipts from fund raisers” in one of the four enumerated categories, and the OTA’s conclusion that “there is little to no functional difference between the two [federal and state statutes]” (OTA Order at 14) is wrong.

3. What the state support test *does* mean.

Of course, the mere fact that the Legislature rejected the federal support test standing alone can only tell us what the state support test does *not* mean. By making a material change to the federal statute before adopting it as state law, the Legislature made clear that the state support test does *not* include *both* exempt-purpose and fundraising income, as the federal test does.

The goal of statutory interpretation is to ascertain the intent of the Legislature, and where, as here, the statutory language is clear, the sole authority on legislative intent is the language of the statute itself: “Where the language of a statute is clear and without ambiguity the plain

portion.”); *Beason v. United Tech. Corp.*, 337 F.3d 271, 276 (2d Cir. 2003) (“Connecticut’s highest Court has also declared that, when comparing comparable state and federal statutes, it employs ‘the usual rule in statutory interpretation that the difference between the state and federal acts was purposeful and is meaningful.’”) (citation omitted); *Codata Corp. v. Comm’r of Taxation & Fin.*, 558 N.Y.S.2d 723, 724 (N.Y. App. Div. 1990) (“where the State tax laws specifically and expressly diverge from the Federal tax laws, there is no requirement that the court strain to read them as identical”); *Coalition for ICANN Transparency Inc. v. VeriSign, Inc.*, 452 F. Supp. 2d 924, 939 (N.D. Cal. 2006) (“[M]aterial changes in the phraseology of statutes normally demonstrate an intent by the lawmakers to change the meaning.”) (citation omitted) (alteration in *Verisign*); *Kmart Corp. v. Taxation & Rev. Dept.*, 131 P.3d 22, 26 (N.M. 2005) (“We presume that the Legislature knows the state of the law when it enacts legislation, and when enacting a[n amended] statute, we conclude that the Legislature intended to change the law as it previously existed.”) (citation omitted); *State v. Bryant*, 614 S.E.2d 479, 484 (N.C. 2005) (“In construing a statute with reference to an amendment, the presumption is that the legislature intended to change the law. This is especially so, in our view, when the statutory language is so drastically altered by the amendment.”) (citation omitted); *Sabine Parish Police Jury v. Comm’r of Alcohol & Tobacco Control*, 898 So.2d 1244, 1256 (La. 2005) (“Where a new statute is worded differently from the preceding statute, the legislature is presumed to have intended to change the law.”) (alteration and citation omitted); *Metz v. Metz*, 101 P.3d 779, 783-84 (Nev. 2004) (“[W]hen the Legislature makes a substantial change in a statute’s language, it indicates a change in the legislative intent.”); *Bd. of Sedgwick County Comm’rs v. Action Rent To Own, Inc.*, 969 P.2d 844, 852 (Kan. 1998) (“When the legislature revises an existing law, it is presumed that the legislature intended to change the law as it existed prior to the amendment.”).

meaning is to be accepted without resorting to the rules of interpretation.” Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968); Syl. pt. 2, *In re Greg H.*, 208 W. Va. 756, 542 S.E.2d 919 (2000).¹¹ When “interpret[ing] a statutory provision, this Court is bound to apply, and not construe, the enactment’s plain language. We have held that ‘[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.’ ” *Rose ex rel. Rose v. St. Paul Fire & Marine Ins. Co.*, 215 W. Va. 250, 599 S.E.2d 673, 678 (2004) (quoting syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951)).

We must, then, look to the language of the state support test to know what that state law *does* mean. When we do so, we find that there are no fewer than three clear, unmistakable statutory language that should have served to direct the Commissioner to find that when the Legislature said that support means “[g]ross receipts from fundraisers which include receipts from” certain enumerated categories, the Legislature meant precisely that: *i.e.*, that support includes gross receipts from only fundraisers, and not from all fundraisers, but only from certain enumerated kinds of fundraisers. In short, the Commissioner, like courts, “must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 312, 465 S.E.2d 399, 414 (1995) (emphasis added) (internal quotations and citation omitted) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

¹¹See also *State v. Elder*, 152 W. Va. 571, 575, 165 S.E.2d 108, 111 (1968) (“This and other courts will always endeavor to give effect to what they consider the Legislative intent; but, we do not change plain and simple language employed in framing a statute unless there is an impelling reason for so doing.”) (quoting *Baird-Gatzmer Corp. v. Henry Clay Coal Mining*, 131 W. Va. 793, 805, 50 S.E.2d 673, 680 (1948)); *Leary v. McDowell County Nat’l Bank*, 210 W. Va. 44, 48, 552 S.E.2d 420, 424 (2001) (“This Court has often noted that the paramount goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature.”) (citations omitted).

The Commissioner, however, believes that (1) a “fundraiser” as the Legislature used that term in the state support test means *any* activity that raises funds, and (2) that the remainder of the inserted language (“which include receipts from [the enumerated categories]”) is mere statutory fluff, added to expand, rather than restrict, the meaning of fundraiser. Thus, would go the Commissioner’s argument, income from “gross receipts” obtained through *any* activity that “raises funds” by engaging in the “performance of services” constitutes support. Plainly, this is contrary to what is commonly understood as “fundraising.” A private school, for example, operates largely on tuition charged its students, and this is not “fundraising.” But a carwash by the school’s marching band in order to earn money to attend a competition is “fundraising.” Yet, under the Commissioner’s analysis, the charging of tuition is “fundraising.”

Neither agencies nor courts are free to so cavalierly disregard the Legislature’s careful amendments. Instead, common sense and basic grammar dictate that (1) “fundraisers” means what everyone knows it means, and (2) the phrase that follows “fundraisers” in the statute was meant to narrow, not expand, the term. Thus, the income at issue must first constitute “gross receipts from *fundraisers*.” Then—*i.e.*, if and only if the income at issue constitutes “gross receipts from *fundraisers*”—do we second move on to ask whether that income also constitutes not just gross receipts from any fundraiser, but specifically “[g]ross receipts from *fundraisers which include receipts from [the enumerated categories]*.”

In what can only be called a brash acknowledgment of the impossibility of the Commissioner’s position, however, the OTA—which affirmed the Commissioner’s denial of the Hospital’s petition for refund, and which decision the circuit court in turn affirmed—could not possibly have correctly ascertained what the statute *means*, because it is beyond dispute that the OTA did not so much as look at what the statute actually *says*. **Instead, as to each of the three**

clear and unmistakable guideposts, the OTA openly changed the statutory language to say precisely the *opposite* of what the Legislature actually wrote.¹²

Rather than re-invent the statute to suit its needs, the Hospital turns to language that the Legislature actually enacted.

a. **Obviously, “fundraiser” does not mean just any activity that raises funds.**

The Commissioner has maintained throughout this litigation that *any* activity that “raises funds” constitutes a “fundraiser” within the meaning of the state support test. Little more need be said about that argument beyond that it is untenable. Nowhere in the Code has the Legislature so much as suggested that the Commissioner’s definition—which flies in the face of the definition of “fundraiser”¹³—comports with legislative intent.¹⁴ Indeed, even the OTA recognized that “fundraisers” has a commonly understood meaning.¹⁵

¹²Crucially, the OTA Order changed the statutory text by inserting a non-existent comma, changing a verb’s number from plural to singular, and substituting “and” for “or.” In short, the OTA Order interprets not a statute in the West Virginia Code, but one of its own creation, designed specifically so that it could reach the result it intended, rather than what the Legislature intended.

¹³*See, e.g.,* WEBSTER’S NEW WORLD COLL. DICT. 574 (4th ed.) (defining “fundraiser” as “an event organized for the purpose of fundraising” and “fundraising” as “the act . . . of soliciting money for charitable organizations, political parties, etc.”).

West Virginia is not alone in this use of the term. In the State of Tennessee’s 2004 *Annual Report on Charitable Fund Raising*, defining the term “fund raising revenue,” the Tennessee Secretary of State noted that the term included “*gross receipts from fund raising activities, such as special event dinners, shows or professional solicitation campaigns.*” *Id.* at 7 (emphasis added) (available at <<http://www.tennessee.gov/sos/charity/annualreport/annualrpt-04.pdf>>, last visited 10/08/2007). The Secretary defined “other revenue” as “[r]evenue that is *not related to fund raising efforts*, such as government grants, *fees received by charity for services rendered*, the profit or loss on sales of assets, interest, rents, bona fide membership and affiliate dues.” *Id.* (emphasis added). *See also* WASH. REV. CODE § 63.60.020(2) (defining “Fund raising” as “an organized activity *to solicit donations of money or other goods or services from persons or entities by an organization, company, or public entity*”).

¹⁴*See, e.g.,* W. VA. CODE § 3-8-5a (addressing “fund-raising” in the context of inaugural event, *see* W. VA. CODE § 3-8-2a, and other “events” at which contributions are solicited, and defining, in subsection (I)(3): “Fund-raising event’ means an event such as a dinner, reception, testimonial, cocktail party, auction or similar affair through which contributions are solicited or received by such means as the purchase of a ticket, payment of an attendance fee or by the purchase of goods or services.”); W. VA. CODE § 6B-2-5(c)(6)(v) (“The official letterhead of the Legislature may not be used by the legislative member in conjunction with the *fund raising or solicitation effort.*” (emphasis added)); W. VA. CODE

In W. VA. CODE § 11-15-9(a)(14), for example, casual, occasional sales—just like those included in subparagraph (6)(F)(i)(II)—are themselves exempt from sales and use tax.¹⁶ Indeed, an *entire act* of the Code, the Solicitation of Charitable Funds Act, addresses certain restrictions on and procedures to be followed during “fund-raising.” See W. VA. CODE § 29-19-1 to -15b. Simple, common sense precludes resort to a definition that would make every mercantile transaction a “fundraising” activity and that would thereby bring every business in the state within the scope of the Solicitation of Charitable Funds Act.

It is clear, therefore, that when our Legislature narrowed the federal definition in the state-law support test to “fundraisers,” it intended only the kind of fundraising that everyone thinks of when they see this word—*i.e.*, soliciting contributions, gifts, *etc.*—and *not* the performance of services associated with the hospital’s exempt purpose.

Finally, it is important to note the fallacy in the circuit court’s observation that the Hospital’s argument rests primarily on the *next* section of this brief (demonstrating why “which include” is restrictive and narrows, rather than expands, the term “fundraisers”). (See Cir. Ct. Order at 6.) With all due respect, this observation is incorrect: **The most important relevant legal fact about the state-law support test is that the Hospital’s exempt-purpose income is not a fundraiser to start with, and therefore it cannot possibly ever be included in the state-law support test, even if the restrictive clause that follows had never been added.** The

§ 11-15-9(a)(6)(D) (exemption for certain organizations whose exempt purpose is fund raising); W. VA. CODE § 15-2-13(d)(3) (“While out of uniform and off duty, no member of the West Virginia state police may participate in any political activity except . . . [c]ontribute money to political organizations and attend political fund-raising functions.”); W. VA. CODE § 49-2B-15 (clearly distinguishing, in context of pilot day care programs, fees charged in exchange for rendering program services from funds collected “by donations or fund-raising activities”).

¹⁵(See OTA Order at 11 n.9 (observing that term means “a social event (as a cocktail party) held for the purpose of raising funds”) (citation and quotations omitted).)

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Commissioner argued that the restrictive clause somehow expands the meaning of fundraisers, and the Hospital's discussion in the following section simply serves to disprove that argument.

- b. W. VA. CODE § 11-15-9(a)(6)(F)(i)(II) contains—plainly—a restrictive clause, and the OTA's opinion to the contrary is clearly erroneous.**

The Commissioner's argument that the remainder of the state-law support test (“[g]ross receipts from fundraisers *which include receipts from*” four enumerated categories) was meant to expand, rather than narrow, the definition of “fundraisers” directly contradicts not one but three grammatical cues in the statute that the clause is restrictive.

As the Court is aware, there are two types of subordinate relative clauses—restrictive and non-restrictive, and an understanding of the difference between them is critical to the correct interpretation of the W. VA. CODE § 11-15-9(a)(6)(F)(i)(II). As its name implies, a *restrictive* clause restricts, *i.e.*, limits or narrows, the object that it modifies. Such a clause cannot be omitted from the sentence without changing that sentence's meaning entirely, because the object as modified means something narrower, something more specific, than it would unmodified by the restrictive clause. On the other hand, a *non-restrictive* clause does not do so. It merely adds information that could just as accurately have been restated separately.¹⁷

As noted in, for example, *Rhodes*, non-restrictive clauses are always set off with punctuation (nearly always commas), and they are always properly introduced with “which.” Restrictive clauses, on the other hand, are never set off with commas. And while modern usage

¹⁶*Cf.* 26 C.F.R. § 1.513-1(c)(2)(iii) (“Accordingly, income derived from the conduct of an *annual dance or similar fund raising event* for charity would not be income from trade or business regularly carried on.” (emphasis added)).

¹⁷*See, e.g., Rhodes v. County of Darlington, S.C.*, 833 F. Supp. 1163, 1191 n.18 (D.S.C. 1992) (“A restrictive clause modifies a sentence differently from an identically-phrased nonrestrictive clause. A restrictive clause identifies a subset of the object described and directs the meaning of the sentence to that subset. A nonrestrictive clause, however, modifies the entire set as already described. *Nonrestrictive*

tends to introduce them with “that,” it is well-settled that “that” and “which” still are quite commonly interchanged in restrictive clauses, especially in statutes.¹⁸

The difference between the two is as important as the difference between the two sentences, “I like sports which include racquets or nets,” and “I like sports, which includes baseball and football.” In the former sentence, “which include racquets or nets” is plainly *restrictive*: The speaker likes sports, but not all sports. Only some sports. Which sports? The speaker likes only those sports which include racquets or nets. In the latter sentence, though, the clause “which includes baseball and football” is *non-restrictive*. It adds supplemental information about sports generally that could just as easily have been restated separately: “I like sports. The term ‘sports’ includes baseball and football.”

In *State v. Webb*, 927 P.2d 79 (Ore. 1996), the Oregon Supreme Court explained:

“An adjectival clause or phrase that follows a noun and restricts or limits the reference of the noun in a way that is essential to the

clauses must be set off by commas, while restrictive clauses must not be set off by commas.”) (emphasis added).

¹⁸See, e.g., THE NEW FOWLER’S MODERN ENGLISH USAGE 774 (Burchfield ed. 3d ed. 1996) (“Take two sentences or parts of sentences from Anita Brookner’s *A Family Romance* (1993): *with the ball-point pen which my father had bought for me in a curiously shaped department store; This sharpness of gaze gave her an air of vanity, which I dare say was justified.* The first contains a restrictive clause led by *which*. In it *which* could have been replaced by *that* without change of meaning and without giving offence to any rule of syntax. The second contains a non-restrictive use of *which* preceded by a comma. In the first sentence the *which*-clause defines and particularizes; and *that* would have done the same work just as well. In the second example, the *which*-clause provides additional information as a kind of parenthetical aside. In other words it is a non-restrictive clause. . . . ‘The two kinds of relative clauses, to one of which *that* and to the other of which *which* is appropriate, are the defining and the non-defining; and if writers would agree to regard *that* as the defining relative pronoun, and *which* as the non-defining, there would be much gain both in lucidity and in ease. Some there are who follow this principle now; but it would be idle to pretend that it is the practice either of most or of the best writers.’ ”); *id.* at 672 (“[‘]Non-restrictive relative clauses are usually separated from the noun phrases they modify by parenthetical punctuation (usually commas, but sometimes dashes or brackets). In speech, there may be a pause that serves the same function as the parenthesis.’ When these are taken together it emerges that a non-restrictive relative clause can normally be recognized because of its parenthetical punctuation or its spoken equivalent—pauses in the flow of speech.”) (quoting S. GREENBAUM, THE OXFORD COMPANION TO THE ENGLISH LANG. (Tom McArthur ed. 1992)); see also WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 3 (3d ed. 1979); WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 59 (4th ed. 2000).

meaning of the sentence should not be set off by commas; but an adjectival clause or phrase that is nonrestrictive or is purely descriptive, which could be dropped without changing the reference of the noun or the meaning of the sentence, is set off by commas[.]” See also WILLIAM A. SABIN, THE GREGG REFERENCE MANUAL ¶ 131, at 20 (7th ed[.] 1992) (“An essential clause is necessary to the meaning of the sentence. Because it cannot be omitted, it should not be set off by commas. * * * A nonessential clause provides additional descriptive or explanatory detail. Because it can be omitted without changing the meaning of the sentence, it should be set off by commas.” (Emphasis in original.)); WILLIAM STRUNK JR., THE ELEMENTS OF STYLE 3-4 (3d ed[.] 1979) (“Nonrestrictive relative clauses are parenthetical * * *. Commas are therefore needed. A nonrestrictive clause is one that does not serve to identify or define the antecedent noun.”).

In [the statute at issue], the absence of a comma before the modifying clause indicates that it is a restrictive clause.

Id. at 83 (first alteration in *Webb*) (emphasis added) (citation omitted).¹⁹

At this point, it is worth again repeating the *actual* language of W. VA. CODE § 11-15-9(a)(6)(F)(i)(II), because as explained later the OTA Order materially misquoted that section not once, and not twice, but *three* times to “fix” all three of the relevant grammatical cues. In the Code, as relevant to this appeal, the Legislature provided that “support” means:

[g]ross receipts from fundraisers which include receipts from admissions, sales of merchandise, performance of services or furnishing of facilities in any activity which is not an unrelated trade or business within the meaning of Section 513 of the Internal Revenue Code of 1986, as amended

W. VA. CODE § 11-15-9(a)(6)(F)(i)(II).

As noted, there are no fewer than three express indications in this subparagraph that the Legislature plainly and unambiguously intended the four enumerated categories of income following “[g]ross receipts from fundraisers” to be restrictive, *i.e.*, to limit that phrase. In other

¹⁹See also *Nat'l Family Care Life Ins. Co. v. Kuykandall*, 705 S.W.2d 267, 270 (Tex. Ct. App. 1986) (“The absence of a comma following the word *facilities* indicates that the clause following it,

words, there are three bases, explained next, that each mandate concluding that in § 11-15-9(a)(6)(F)(i)(II), “support” means not just any “gross receipts from fundraisers,” but only certain “gross receipts from fundraisers.” Which “gross receipts from fundraisers”? *Only* those gross receipts from fundraisers “which include receipts from [1] admissions, [2] sales of merchandise, [3] performance of services or [4] furnishing of facilities” in any activity which is not an unrelated trade or business (*i.e.*, the four enumerated categories).

The OTA Order is predicated on a fundamental misinterpretation (and misquotation) of § 11-15-9(a)(6)(F)(i)(II). In addition to ignoring the plain meaning of “fundraisers,” the Commissioner and the OTA believe that the term “gross receipts from fundraisers” is all there is to § 11-15-9(a)(6)(F)(i)(II) and that the Legislature added “which include receipts from [the enumerated categories]” for absolutely no reason whatsoever.²⁰ This error creeps in on the very first page of the OTA’s analysis, and serves as the basis for the OTA’s eventual rejection of the Hospital’s petition for refund.

- i. **Contrary to the language misquoted in the OTA’s Order, the Legislature did *not* use a comma to set off the subordinate clause; thus, that clause is necessarily a restrictive clause.**

First, the Legislature did *not* use commas to set off the phrase “which include receipts from [four enumerated categories].” That fact alone is sufficient to conclude authoritatively that the Legislature intended that clause to restrict, *i.e.*, to narrow, “gross receipts from fundraisers.”²¹

‘which do not meet the standards of ICU as described above,’ is a restrictive clause modifying facilities and limiting its meaning to only those facilities which do not meet the standards of ICU . . .”).

²⁰*Cf. Ex parte Watson*, 95 S.E. 648, 649 (W. Va. 1918) (“An interpretation of a statute or a clause thereof which gives it no function to perform, and makes it a mere repetition of another clause, must be rejected as unsound; for it is presumed that the Legislature had a purpose in the use of every word and clause found in a statute, and intended the terms used to be effective.”).

²¹As noted, the use of “which” (instead of “that”) in restrictive clauses is quite common, and examples of the Legislature doing so where it *unambiguously* intended the clause to be restrictive (by omitting the comma) are too numerous to catalog. *See, e.g.*, W. VA. CODE § 11-1A-21(j)(2) (defining

But while the OTA Order initially quotes W. VA. CODE § 11-15-9(a)(6)(F)(i)(II) correctly, by the end of the Order, the statute has been magically transformed from one without a comma to one with a comma.²² **This non-restrictive comma in the OTA Order does not appear in W. VA. CODE § 11-15-9(a)(6)(F)(i)(II).**

Had the Legislature intended Respondent's and OTA's version, it would have simply written that support means "gross receipts from fundraisers," which includes . . ." **But the Legislature did not write this.** It wrote "[g]ross receipts from fundraisers which include . . ." without a comma—plainly a **restrictive** clause. The enumerated activities *restrict*, i.e., narrow, "gross receipts from fundraisers." The OTA misinterpreted the statute based on its misunderstanding (and misquotation) of § 11-15-9(a)(6)(F)(i)(II) as containing a *non-restrictive* clause that *expands* on "gross receipts from fundraisers." This conclusion was clearly erroneous.

- ii. **Contrary to the language used in the OTA Order, the Legislature did not use the singular verb "includes" to modify the entire category specified in W. VA. CODE § 11-15-9(a)(6)(F)(i)(II), but instead used the plural verb "include" to modify "fundraisers" only.**

Second, the OTA misquoted W. VA. CODE § 11-15-9(a)(6)(F)(i)(II) as containing the singular "includes" when the statute actually employs the plural "include" instead. This misquotation-misinterpretation is, again, devastating to the proper analysis of the Code.

"electronic data processing" as "the use of the computer for *operations which include* the storing, retrieving, sorting, merging, calculating and reporting data") (emphasis added); W. VA. CODE § 11A-3-2(b)(4) (requiring publication of certain notice "in the case of *property which includes* a mineral interest but does not include an interest in the surface other than an interest for the purpose of developing the minerals") (emphasis added); W. VA. CODE § 14-2A-19a (applying to "any case wherein *an award is made which includes* an amount for funeral, cremation or burial expenses, [etc.]") (emphasis added). Obviously, not all operations include storing, retrieving, etc.; not all property includes a mineral interest; not all awards include amounts for funerals, and so on. Notwithstanding the Legislature's use of "which," these clauses are obviously restrictive.

²²See OTA Order at 14 (claiming that § 11-15-9(a)(6)(F)(i)(II) "consists of 'gross receipts from fundraisers,' [sic] which includes [sic] 'receipts from [the enumerated activities].'").

Throughout the opinion, the OTA Order claims that the statute says “includes.” (*See, e.g.,* OTA Order at 13 (“Use of the term ‘includes’ [*sic*] means that this list is not exhaustive.”) & 14 (claiming that § 11-15-9(a)(6)(F)(i)(II) “consists of ‘gross receipts from fundraisers,’ [*sic*] which includes [*sic*] ‘receipts from [four enumerated activities].’ ”).²³ By using the plural “include,” however, the Legislature plainly meant to associate that word with “fundraisers” (or with “receipts”; the outcome is the same). The Legislature did *not* mean to associate the word with the entire category “gross receipts from fundraisers” as a category (and thus a singular concept), or it would have used the singular “includes” (and quotation marks around the term “gross receipts from fundraisers,” as the OTA Order also misquotes (which also does *not* exist in the statute)). There are many examples of the Legislature using a singular verb to refer to a category that, while grammatically plural, is used semantically as a singular noun in its definition.²⁴ The OTA’s phantom statute is simply *not* what the Legislature wrote.

Had the Legislature intended the Commissioner’s version, it would have (and easily could have) written that support means “‘gross receipts from fundraisers,’ which *includes* receipts from” **But the Legislature did *not* write this.** It wrote that support means “[g]ross receipts from *fundraisers which include*” “Include” modifies “fundraisers” and, therefore, serves to narrow that word, not expand on an entire category, as OTA’s misquoted

²³Petitioner appreciates that the OTA escaped technically misquoting the statute as using “includes” on page 14 by carefully omitting it (alone) from the quoted portion. Throughout the remainder of the OTA Order, however, “includes” appears in quotations, suggesting that the Legislature actually used that phrase, when, as a simple glance at the statute makes clear, it did not.

²⁴*See, e.g.,* W. VA. CODE § 2-2-10(t) (“‘laws of the state’ includes”); W. VA. CODE § 5-10C-3 (“‘Accumulated contributions’ means . . . and includes”); W. VA. CODE § 5-19-1 (“‘Public works’ includes”); W. VA. CODE § 3-4A-2(c) (“‘Ballot labels’ means”); W. VA. CODE § 4-7-1(2) (“‘Bonds’ means”); W. VA. CODE § 4-11-2(1) (“‘Federal funds’ means”); W. VA. CODE § 9-9-3(m) (“‘Support services’ includes”); *cf.* W. VA. CODE § 2-2-10(ff) (Rules for construction of statutes) (“The words ‘board of regents’ . . . means”). As noted, these examples further illustrate that if the Legislature meant “‘gross receipts from fundraisers,’ which includes” it would likely have used—but did *not* use—quotation marks.

statute suggests.²⁵ “Support” means some gross receipts from fundraisers, but not all gross receipts from fundraisers. Which gross receipts from fundraisers? The plain language of the statute indicates—only those gross receipts from “fundraisers which *include*” one of the four enumerated categories.

- iii. **Contrary to the language misquoted in the OTA Order, the Legislature did *not* use “and” to join the four items in the subordinate clause (which might have indicated a non-restrictive meaning), but instead used “or” (which can only indicate a restrictive meaning).**

The OTA Order states that the Legislature used “and” to separate the four enumerated activities that follow—and limit—“gross receipts from fundraisers.” (See OTA Order at 10 (“These *include* [categories 1-3] and [*sic*] [category 4].”); *id.* (“It clearly evinces a legislative intent to include receipts from all activities, including those from [categories 1-3] and [*sic*] [category 4]”)) As the statute plainly says, however, the four categories of income that limit “gross receipts from fundraisers” are separated by “or,” *not* “and.” This is the final nail in the coffin of OTA’s misquotation (and, again, misinterpretation) of § 11-15-9(a)(6)(F)(i)(II).

Restrictive lists are, by their very nature, also disjunctive: Items not on the list are by their absence necessarily excluded. Non-restrictive lists are, also by nature, conjunctive: Items not on the list are not by their absence necessarily excluded from the list.

This difference is the difference between, “I like sports, which includes baseball *and* football,” and “I like sports which include racquets *or* nets.” In the first sentence, the speaker

²⁵Looking at the Code that the Legislature *actually* wrote, we can see that, as the Legislature used “include” in § 11-15-9(a)(6)(F)(i)(II), it plainly meant the word to take the same meaning as it does in the “racquets or nets” example. In that context, “include” means “only those which use” or “only those which consist of” (e.g., “I like sports which include racquets or nets,” is the same as saying, “I like only those sports which use racquets or nets.”). The Legislature plainly did *not* mean to use “include” in the sense of presenting a non-exhaustive list of examples, as Commissioner asserts, and as in our “baseball and football” example. In that context, “includes” means to illuminate by example (e.g., “I like sports, which includes baseball and football,” is the same as saying “I like sports, and baseball and football are just two examples of sports.”).

made two statements: (1) that he or she likes sports, and (2) that the category “sports” includes, among other things, baseball *and* football. It would have made absolutely no sense whatsoever for the speaker to have said, “I like sports, which includes baseball *or* football.” This is abrasive to our natural understanding of non-restrictive lists. In the second sentence, the speaker equally plainly meant to limit the class of sports that he likes to only those including either racquets or nets. Either of two will suffice, but the sport *must include* at least one *or* the other.²⁶ The clause *narrows* the object that it modifies.

Had the Legislature intended Respondent’s and OTA’s version, *i.e.*, that the enumerated categories were mere examples to be expanded at will, it would have (and easily could have) written that support means “‘gross receipts from fundraisers,’ which includes receipts from admissions, sales of merchandise, performance of services *and* furnishing of facilities” **But, once again, the Legislature did *not* write this.** It wrote that support means “[g]ross receipts from fundraisers which include receipts from admissions, sales of merchandise, performance of services *or* furnishing of facilities in any [enumerated activity].” W. VA. CODE § 11-15-9(a)(6)(F)(i)(II) (emphasis added).

This *exact issue* was considered by a Wisconsin appellate court in *Plevin v. Dept. of Transp.*, 671 N.W.2d 355 (Wis. Ct. App. 2003), and that court came to *exactly* this same conclusion:

According to our supreme court, the word “includes” may be construed in two ways: either as an illustration of a few acceptable examples; or, as a statement of limitation setting forth an exclusive list. . . . Here, the language of the code provision provides some guidance by its use of the disjunctive “or” between the three acceptable methods, rather than the conjunctive “and.” The use of the former suggests that the rule was meant to set out a restrictive

²⁶While it does make sense to say, “I like sports which include racquets *and* nets,” the meaning is thereby altered to refer to only those sports including both—a meaning inapposite to the statute here.

list of alternatives, rather than to provide examples as illustrations of an unenumerated form of acceptable methods of proof.

671 N.W.2d at 360. OTA's misquotation notwithstanding, in § 11-15-9(a)(6)(F)(i)(II), the fact that our Legislature also used "or" demonstrates that our Legislature also intended a restrictive list, not a mere "illustration of a few acceptable examples."

c. The Commissioner's and OTA's misquotations and misinterpretations are clearly erroneous.

The OTA must have understood that *as the Legislature actually wrote it*, W. VA. CODE § 11-15-9(a)(6)(F)(i)(II) cannot possibly bear the weight of the Commissioner's tortured interpretation. Thus, the OTA helpfully—and *thrice*—rewrote the statute. The entire OTA Order and the subsequent circuit court's affirmation thereof are predicated on this impermissible statutory sleight-of-hand.

It is, of course, beyond cavil that the state and federal due process clauses require that courts must read the Code as our Legislature *actually wrote* it, not as the Commissioner or the OTA only *wish* the Legislature had written it:

It is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.

Dunlap v. Friedman's, Inc., 213 W. Va. 394, 398, 582 S.E.2d 841, 845 (2003) (one alteration, internal quotations, and citations omitted) (alteration in *Dunlap*).²⁷

²⁷"The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Compensation Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). Where, as here, that legislative intent is expressed in the plain, unambiguous language of a statute, courts must *apply* that language as written. See also syl. pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970) ("Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."); *Rose ex rel. Rose v. St. Paul Fire & Marine Ins. Co.*, 215 W. Va. 250, 255, 599 S.E.2d 673, 678 (2004) ("Moreover, when we interpret a statutory provision, this Court is bound to apply, and not construe, the enactment's plain language. We have held that '[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent

Even if everything the OTA said about the language that *it* was interpreting was correct, that is of no matter, because the language that the OTA interpreted appears *nowhere* in West Virginia law. The OTA's misinterpretation is clearly erroneous because it fails to recognize not one but three plain and unambiguous bases for the correct interpretation of the Code. As demonstrated, *infra*, the Hospital's request for refund, on the other hand, is based on the only possible interpretation of what the Legislature *actually* wrote.

In W. VA. CODE § 11-15-9(a)(6)(F)(i)(II), the Legislature not only meant to say, but *actually did say*, that support means "[g]ross receipts from fundraisers which include receipts from [the four enumerated categories]." The only possible interpretation of this section is that, for the purposes of that section, support means only those gross receipts from fundraisers which consist of receipts from one of the four enumerated categories.

d. The Commissioner's reliance on "includes, but is not limited to" is misplaced because that clause cannot put back in a category of income that a specifically applicable clause expressly took out.

As a fallback from the suggestion that we ignore the differences between the state and federal support tests and the plain language of the definition of "support," the Commissioner also attempted below to make a great deal of the Legislature's use of the phrase "includes, but is not limited to" in the test, an issue not addressed in detail by later review. The Commissioner argued generally that the phrase serves to sweep unlimited revenue into the meaning of "support," and claimed specifically that the Legislature *implicitly* intended to create a phantom seventh category that includes the *sole* class of income (*i.e.*, exempt-purpose income) that, as explained *supra*, the Legislature *expressly deleted* from the federal statute.

will not be interpreted by the courts but will be given full force and effect.' ") (citation omitted) (quoting syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951)).

First, the illogic of this argument is hard to ignore. The Commissioner apparently believes that if the Legislature wrote, “the term ‘widget’ includes, but is not limited to, (1) bananas, (2) pears, and (3) apples that are *not* red,” we should believe that the “includes, but is not limited to” proviso can sweep apples that *are* red back into the definition of “widget.” This is simply wrong. As demonstrated, *supra*, the Legislature took the federal definition of “support,” which, if it is accepted, *included* exempt purpose income from gross receipts of non-fundraising activities, and *excluded* such income by only including “[g]ross receipts from fundraisers which include receipts from” four enumerated categories.

And second, while the Hospital maintains that W. VA. CODE § 11-15-9 is plain and unambiguous, even if the Court were to find that the “includes, but is not limited to” proviso introduces some degree of ambiguity, well-settled canons of construction necessarily preclude the Commissioner’s position.

The related canons of *ejusdem generis* and *noscitur a sociis*, the legal equivalents of “birds of a feather,” require that “includes, but is not limited to” be limited to only non-exempt-purpose income:

Under the doctrine of *ejusdem generis*, “[w]here general words are used . . . after specific terms, the general words will be limited in their meaning or restricted to things of like kind and nature with those specified.” [Syl. pt.] 4, *Jones v. Island Creek Coal Co.*, 79 W. Va. 532, 91 S.E. 391 (1917). The phrase *noscitur a sociis* literally means “it is known from its associates,” and the doctrine implies that the meaning of a general word is or may be known from the meaning of accompanying specific words. See [Syl. pt.] 4, *Wolfe v. Forbes*, 159 W. Va. 34, 217 S.E.2d 899 (1975). The doctrines are similar in nature, and their application holds that in an ambiguous phrase mixing general words with specific words, the general words are not construed broadly but are restricted to a sense analogous to the specific words.²⁸

²⁸*Tankovits v. Glessner*, 211 W. Va. 145, 150-51, 563 S.E.2d 810, 815-16 (2002) (emphasis added) (citation and internal indentation omitted) (quoting *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 485, 509 S.E.2d 1, 9 (1998)); see also *Houyoux v. Paige*, 206 W. Va. 357, 524 S.E.2d 712

In *Kings Daughters Housing, Inc. v. Paige*, 203 W. Va. 74, 506 S.E.2d 329 (1998), for example, the Commissioner ruled that a government subsidy for the operation of a certain program was not a “grant” within the meaning of the § 11-15-9 support test. The Supreme Court affirmed the circuit court’s reversal of the Commissioner’s ruling, first applying *noscitur a sociis* to the meaning of “grant”:

It is a fundamental rule of construction that, in accordance with the maxim *noscitur a sociis*, the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated. *Language, although apparently general, may be limited in its operation or effect where it may be gathered from the intent and purpose of the statute that it was designed to apply only to certain persons or things, or was to operate only under certain conditions.*²⁹

The Court concluded that:

[b]oth “gifts” and “charitable contributions” involve the concept of donation, or the giving of something to accomplish charitable purpose. From the use of these associated words, the application of maxim *noscitur a sociis* indicates that the Legislature intended the term “grant” in W. VA. CODE § 11-15-9, also to mean the giving of something to accomplish a charitable purpose. Rather clearly the “subsidies” involved in the present case were given by the federal government to accomplish a charitable purpose, that is, to provide decent and affordable housing to low income elderly persons. This fact, along with the commonly accepted definition of a “subsidy,” leads the Court to conclude that the subsidies in question were, in fact, “grants” within the meaning of W. VA. CODE § 11-15-9.³⁰

(1999) (rejecting Commissioner’s interpretation of sales tax refund statute based in part on *noscitur a sociis*).

²⁹203 W. Va. at 76-77, 506 S.E.2d at 331-32 (emphasis added) (quoting syl. pt. 1, *Darlington v. Mangum*, 192 W. Va. 112, 450 S.E.2d 809 (1994)) (internal quotations and citations omitted).

³⁰203 W. Va. at 77, 506 S.E.2d at 32; see also *Wolfe v. Forbes*, 159 W. Va. 34, 45, 217 S.E.2d 899, 906 (1975) (“From the application of the maxim *Noscitur a sociis*, it seems fair to conclude that the ‘among other variances’ language does not enhance the Board’s authority, but rather merely permits the Board to grant variances in situations *similar to the twelve specified.*”) (emphasis added); 2A SUTHERLAND STAT. CONST. § 47.18, at 200 (5th ed. 1992) (“The doctrine of *ejusdem generis* applies when the following conditions exist: (1) the statute contains an enumeration by specific words; (2) the members of the enumeration suggest a class; (3) the class is not exhausted by the enumeration; (4) a

In *Wester v. State*, 422 S.E.2d 433 (Ga. Ct. App. 1992), the court held that “includes, but is not limited to” is subject to *ejusdem generis* limitations:

[Section] 17-7-211 [of the Georgia Code] applies to “written scientific reports,” which “includes, but is not limited to [certain delineated reports].” . . . “It is a well-recognized rule of construction that when a statute or document enumerates by name several particular things, and concludes with a general term of enlargement, this latter term is to be construed as being *ejusdem generis* with the things specifically named, unless, of course, there is something to show that a wider sense was intended.”

422 S.E.2d at 434-35 (citations omitted).³¹ The Third Circuit reached the same result in *Donovan v. United States*, 580 F.2d 1203 (3d Cir. 1978):

The regulations state that a “personnel action . . . includes, but is not limited to, separations for any reason . . . , suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave” 5 C.F.R. § 550.803(e) (1977). Under the doctrine of *Ejusdem generis* it would appear that the language “includes, but is not limited to” indicates that any other action falling within the scope of the regulation must be of the same nature as those listed. The common thread of the activities outlined by the regulation is that they involve an actual reduction in job status. Thus, to qualify as a “personnel action” the agency’s action which is under attack must result in a reduction of job grade or level. This interpretation is reinforced by the Supreme Court’s understanding of the Act.³²

And the Florida Supreme Court has applied the doctrine to the same phrase:

Appellant points to the language of the statute which states that “the term ‘law enforcement officer’ includes, but shall not be

general reference supplementing the enumeration, usually following it; and (5) there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires. It is generally held that the rule of *ejusdem generis* is merely a rule of construction and is only applicable where legislative intent or language expressing that intent is unclear.” (footnotes omitted).

³¹See also *Boyd v. Essin*, 12 P.3d 1003, 1007 (Ore. Ct. App. 2000) (“Here, the statute provides that ‘contact’ includes but is not limited to eleven specific acts. Those enumerated acts provide a guide for determining the type of other acts the term includes.”), *review denied*, 21 P.3d 96 (Ore. Mar. 07, 2001).

³²580 F.2d at 1207 (citations omitted).

limited to, any sheriff, deputy sheriff, municipal police officer, highway patrol officer, beverage enforcement agent, county probation officer, officer of the Parole and Probation Commission, and law enforcement personnel of the Game and Fresh Water Fish Commission and the Departments of Natural Resources and Criminal Law Enforcement.” . . . We reject appellant’s assertion. Under the well-established doctrine of *ejusdem generis*, where general words follow the enumeration of particular classes of persons, the general words will be construed as applicable only to persons of the same general nature or class as those enumerated, unless an intention to the contrary is clearly shown. This rule of statutory construction is based on the principle that if the legislature had intended the general words to be used in their unrestricted sense, they would not have made mention of the particular classes.”³³

The West Virginia support test provides:

The term “support” includes, but is not limited to:

(I) Gifts, grants, contributions or membership fees;

(II) Gross receipts from fundraisers which include receipts from admissions, sales of merchandise, performance of services or furnishing of facilities in any activity which is not an unrelated trade or business within the meaning of Section 513 of the Internal Revenue Code of 1986, as amended;

(III) Net income from unrelated business activities, whether or not the activities are carried on regularly as a trade or business;

(IV) Gross investment income as defined in Section 509(e) of the Internal Revenue Code of 1986, as amended;

(V) Tax revenues levied for the benefit of a corporation or organization either paid to or expended on behalf of the organization; and

³³*Soverino v. State*, 356 So.2d 269, 273 (Fla. 1978); see also *Chen v. Quark Biotech, Inc.*, 2004 WL 1368797, *5-6 (N.D. Ill. June 17, 2004) (“Plaintiff contends the termination for cause clause should be construed as being limited to the specific grounds set forth in § 6 of the parties’ contract. The contract, however, specifically states that cause “includes but is not limited to” the listed grounds. This is a clear statement that other possible grounds for cause may exist. However, absent some indication to the contrary, the *ejusdem generis* rule of contract construction should be applied, which calls for limiting other grounds included in this clause to ones that are *similar to those that are expressly included in the list*, that is, they must fall within the same general class of conduct.”)(emphasis added).

(VI) The value of services or facilities (exclusive of services or facilities generally furnished to the public without charge) furnished by a governmental unit referred to in Section 170(c)(1) of the Internal Revenue Code of 1986, as amended, to an organization without charge. This term does not include any gain from the sale or other disposition of property which would be considered as gain from the sale or exchange of a capital asset or the value of an exemption from any federal, state or local tax or any similar benefit. . . .

W. VA. CODE § 11-15-9(a)(6)(F)(i).³⁴

It is plain from this statutory definition that *every other element* of the “support” test consists of *non-exempt-purpose* income. Non-exempt-purpose income is, as the Third Circuit put it, the “common thread.” To the extent that “includes, but is not limited to” need be construed to sweep other income into the term’s meaning, such other income must be likewise limited to the common thread of *non-exempt-purpose* income.³⁵

The Commissioner’s argument that exempt-purpose income (which is so patently categorically different in kind from the other classes specified in West Virginia’s “support” test) is included in “support” contradicts the law, and the Court should reject it.³⁶

³⁴Although the Legislature has on occasion used the spellings “fundraiser” and “fund raiser,” the outcome is the same because both phrases mean the same thing.

³⁵Of the innumerable categories of organizations to which the “support” test is applied, there is *one* category of organization that *will* include its exempt purpose income in “support”: *i.e.*, foundations formed for the purpose of fund raising and then passing on the net revenue thereby received to another charitable organization to use in carrying out that other organization’s exempt purpose. This single category of organizations, *whose exempt purpose is fund raising*, is *sui generis*. For such organizations, whose numbers are small and who are not implicated in this dispute, “support” will, thus, include exempt-purpose income, all such organizations will fail the support test, and they would presumably all be subject to sales and use tax.

³⁶The argument that the Legislature purposefully designed the “includes, but is not limited to” language to ensure that gross receipts from *non-fundraising* activities (*i.e.*, lines 2, 10a, and 11 of IRS Form 990) *were* included in the meaning of “support” is equivalent to arguing that it was the intent of the West Virginia Legislature to do *indirectly, implicitly, and obscurely* that which it could have far more easily done *directly and expressly*, which is, of course, absurd. As noted, the Commissioner argues that the Legislature, in order to make certain that gross receipts from *non-fundraising* activities were *included* in the meaning of “support,” thought it would somehow be better to take the federal definition of support, *see* I.R.C. § 509(d)(2)—a definition that *already included* gross receipts from *non-fundraising* activities—then expressly *exclude* non-fundraising activities from the *specifically relevant provision* (*i.e.*,

C. The Legislature intended to ease the tax burden on struggling non-profit hospitals and place greater control for the future of such hospitals in the hands of the communities, all while maintaining a degree of parity with for-profit businesses.

When a legislature has so clearly manifested its intentions in the plain language of statute, that language alone must be dispositive as to the proper interpretation of the law:

It is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten[.] [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.

Taylor-Hurley v. Mingo County Bd. of Educ., 209 W. Va. 780, 788, 551 S.E.2d 702, 710 (2001) (alteration, internal quotations, and citations omitted) (alterations in original).³⁷ The discussion so far easily demonstrates *that* the statute means the Hospital is entitled to the sought-after petition for refund of overpaid taxes.

But here, there is also, to paraphrase Justice Holmes, at least a page of history to support this volume of logic.³⁸ Thus, to the extent that we find ourselves seeking a broader legislative purpose in the plain and unambiguous language of the state “support” test, at least two laudable legislative goals leap out from the text of that test. It is, therefore, just as important (and just as

by adding the “gross receipts from fund raisers” language), and finally rely instead on the generic “includes, but is not limited to” language to catch non-fundraising receipts. In other words, the Commissioner in effect argues that the Legislature wanted to make sure that item B was *included* in the definition of a term, so it first took a federal statute that expressly said “includes but is not limited to A, B, C, D, E, and F,” then *specifically deleted B from the list*, and codified “includes but is not limited to A, C, D, E, and F,” all along hoping courts would fall back on the “includes but is not limited to” clause to re-sweep B back into the definition. The absurdity of this argument could not be more apparent.

³⁷See also *State ex rel. Orlofske v. City of Wheeling*, 212 W. Va. 538, 546-47, 575 S.E.2d 148, 156-57 (2002) (“While we appreciate the City’s position, we have emphasized that we are not plenipotentiaries in the realm of statutory interpretation. ‘[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.’ Even in the face of sound policy arguments, ‘[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten[.]’”) (citations and internal quotations omitted) (alterations in *Orlofske*).

³⁸*Cf. N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

easy) to conclude by noting *why* the Hospital's position is correct and the Commissioner's position is incorrect.

1. First, the Legislature meant to lighten the financial burden on non-profit organizations who charge a partial-cost-defraying fee for their exempt purpose.

The importance that non-profit hospitals and clinics have to the State, and that they serve as anchors of their respective communities, are obvious. They provide a full spectrum of both day-to-day and life-and-death medical care, from routine preventative and responsive treatment, through more complex attention like dialysis and surgery, all the way to advanced emergency medicine and trauma care.³⁹ And in most communities, it is an unfortunate economic reality that emergency rooms have become the first-line defense for families and the elderly, who so often lack access to primary care.⁴⁰

Less obviously, hospitals are also one of their respective community's largest employers.⁴¹ And as not-for-profit facilities, they collectively provide many millions of dollars

³⁹One need look no further than any hospital's web site to appreciate the spectrum of services provided. See, e.g., <http://www.davishealthcare.com/davismem.cfm> (explaining Petitioner's services); see also http://www.prestonmemorial.org/pm.nsf/View/About_Us (same for similar facility).

⁴⁰See, e.g., Abstract, *The Potential Effects of Welfare Reform on West Virginia's Primary Care Center System*, C.K. Braun & M.A. Thompson, Management and Marketing Division, Marshall University (1998), available at <<http://gateway.nlm.nih.gov/MeetingAbstracts/102234256.html>> ("While the logic behind welfare reform is intuitively appealing, there is a strong possibility that there will be substantial cost shifting in areas where job opportunities are limited by low skill levels and/or the presence of too few employers willing or able to offer medical benefits to their employees. When current Medicaid recipients lose their benefits, more pressure will likely be placed on the primary care centers to provide services on a highly discounted or gratis basis. The lack of substantial financial reserves within these facilities will likely cause a reduction in service levels or even closure in some cases. Either situation will result in more poor people foregoing primary care until it is necessary to present themselves at a local emergency room.").

⁴¹For example, according to its web site, one large system of not-for-profit health facilities "is the largest provider of care and single largest employer in southeastern Kentucky and the third largest private employer in southern West Virginia." <<http://www.arh.org/default.php>>.

in free health care to West Virginians.⁴² The closing of, or even the curtailing of services at, any West Virginia hospital would, therefore, be a double-disaster for the affected communities.⁴³

Sadly, however, for a number of reasons (including substantial cuts in federal medical care spending), hospitals and clinics are struggling, or even worse, failing. The Court is undoubtedly already aware of several highly publicized failures or near-failures of hospitals in West Virginia in the past few years; there are several examples in southern West Virginia alone, including Logan General Hospital and Man Hospital—one of the original “miners’ memorial” hospitals established in the Appalachians in the 1950s:

In West Virginia, where rural life is the norm for residents struggling with poor health habits and jobs that don’t provide insurance, the cuts have hit especially hard.

The state ranks second only to Florida in the percentage of its population covered by Medicare—18 percent compared with 14 percent nationally.

“When you’re that dependent on federal funds, that’s what makes the Balanced Budget Act so critical,” said Lew Newberry, administrator at Roane General Hospital.

In the 2½ years since the Medicare cuts were enacted, West Virginia’s health care industry has taken a nose-dive. Twenty home health agencies have closed, Man Appalachian Regional Hospital is on the brink of closing and a chain of nursing homes has filed for bankruptcy. Hospitals have also closed rural clinics and skilled nursing facilities, reduced services, eliminated patient beds and cut staff—just to break even.

“All the easy cost shifts and management tricks you can make—they’re all gone,” said Robert Hammer, chief executive of [Petitioner] Davis Memorial Hospital in Elkins. “We’re to the

⁴²In 2005, for example, United Hospital Center, a not-for-profit hospital in north central West Virginia, “provided nearly \$17 million in uncompensated care, which represented 6.14% of total gross patient service revenue. Included in this amount was \$5.6 million of charity care for individuals that qualified for financial assistance.” <http://www.uhcwv.org/pages/communitybenefit.html>. Also, UHC’s system is the State’s second largest employer. <http://www.uhcwv.org/pages/groundbreaking.html>.

⁴³Thus, it is well known that the presence of a large, thriving hospital is an important consideration to both individuals and businesses seeking to move into a community.

point now where we don't have anywhere left to cut. So the next thing is, we start cutting services."

The West Virginia Hospital Association estimates the state's 69 hospitals will lose \$525 million over five years. The West Virginia Council of Home Health Care Agencies says the state's remaining 71 home health companies are each losing about \$180,000 a year. The state's 55 county health departments have already lost \$4.9 million.

Beyond the closings, losses and layoffs are the faces of West Virginia's elderly. Health care professionals say many patients are discharged from hospitals too early, then end up in the emergency room because they can't get the home health services they need to recover.⁴⁴

By refusing to be as stingy with the state support test as its federal counterpart, West Virginia's Legislature expressly decided to lighten the financial burden on hospitals—and all other non-profit organizations—by not penalizing them for the fortuitous fact that many must charge a fee, not to turn a profit, but solely to help recoup some of their exempt-purpose operating expenses.⁴⁵ Indeed, calling such exempt-purpose fees "support" hardly even makes sense. Under the State's support test, these fees—charged for exempt-purpose services—do not deprive a non-profit organization of its sales and use tax exemption.

2. **The Legislature intended to place some measure of the long-term viability of non-profit organizations in the hands of their communities, and at the same time bring a measure of equity in the relationship between not-for-profit organizations and for-profit businesses.**

There is a second, equally important legislative purpose apparent from the plain language of W. VA. CODE § 11-15-9: *i.e.*, a greater ability of communities to determine whether a non-

⁴⁴*Medicare Cuts Hurting Elderly, Disabled*, Malia Rulon, Assoc. Press (Feb. 21, 2000).

⁴⁵Although the statute undoubtedly governs *all* non-profit organizations, and not just hospitals, the same arguments can just as easily be made for all non-profit foundations, search and rescue organizations, food banks, and the other wealth of community organizations that fall under § 11-15-9.

profit organization, like the Hospital, will be viable in the long term by keeping non-profit organizations on more equal footing with for-profit businesses.

Subparagraph (II) of W. VA. CODE § 11-15-9—the subsection at issue here—sets out four categories of fundraisers that, like certain *non*-exempt purpose income, *do* count toward “support”: fundraising admissions, fundraising sales of merchandise, fundraising performance of services, and fundraising furnishing of facilities, all to the extent that they accrue “in any activity which is not an unrelated trade or business.”

Fundraising admissions, for example, would include charging friends of the organization a ticket price to attend a fundraising dinner, cocktail party, *etc.* Fundraising sales of merchandise commonly includes the sale of donated items at an auction, bazaar, *etc.* Fundraising performance of services easily includes, for example, the performance of certain professional or other services by an organization’s members in exchange for a contribution to the organization. And fundraising furnishing of facilities encompasses such revenue as that generated by the renting of extra meeting and hall space.

In contrast to “pure” fundraising solicitations, gifts, grants, and so forth, these subsection (II) fundraising activities have the potential to compete with for-profit businesses—businesses that typically *do* pay sales and use tax.⁴⁶ In subsection (II), the Legislature decided that increased revenue from such fundraising activities should commensurately increase the likelihood that a non-profit organization must pay sales and use tax, placing it on more equal footing with for-profit entities.

⁴⁶For example, dinners and cocktail parties compete with restaurants and taverns, the sale of merchandise competes with retailers, the performance of services competes with the corresponding for-profit service industry, and the furnishing of facilities competes with hall and meeting space providers.

So, if an I.R.C. § 501(c)(3) non-profit organization limits its activities to its exempt purpose, then the Legislature has provided in W. VA. CODE § 11-15-9 that any cost-defraying income it receives from that exempt purpose will not jeopardize its sales and use tax immunity.

But, if a non-profit organization involves itself in significant *non*-exempt purpose activities—*i.e.*, either state "support" category (III) unrelated trade or business activities that compete with the private sector, state "support" category (II) fundraising activities that compete with the private sector (*see* examples above), or state "support" category (IV) hoarding its assets and failing to spend them on its exempt purpose (*e.g.*, by investing in marketable securities that provide dividend income and interest income)—then that organization will fail the state support test—*unless* the community “rescues” it by matching this activity with significant gifts, grants, charitable contributions, or membership fees (thereby bringing the ratio back above ½).

Thus, for example, an I.R.C. § 501(c)(3) hospital with \$65,000,000 in exempt-purpose income, some grants, and no other significant income passes the support test (because the grants constitute 100% of its § 11-15-9 “support”). Such an entity should not be—and under W. VA. CODE § 11-15-9 is not—burdened with sales and use tax.

But, if that same hospital expands its activities to generate significant non-exempt purpose income (*e.g.*, runs a book store or parking lot that makes \$100,000 in net unrelated trade or business income, and has another \$50,000 income from its investment portfolio), then the community will determine whether that hospital passes or fails the support test. If the community donates only \$20,000 to such a hospital, it fails the test (because \$20,000 divided by \$170,000 (\$20,000 + \$100,000 + \$50,000) is only 11.7%—far less than the 50% required). If, on the other hand, the community matches this activity with \$250,000 in contributions, the hospital will retain its sales and use tax immunity (because \$250,000 divided by \$400,000 (\$250,000 + \$100,000 + \$50,000) is 62.5%).

V. CONCLUSION

The Hospital maintains that no statutory “construction” is needed to easily conclude that it is entitled to its petition for refund. Nonetheless, there is certainly ample evidence for concluding *why* the West Virginia Legislature rejected the federal “support” test in favor of one far more supportive of the praiseworthy mission served by the State’s many non-profit organizations, and “[t]his court has always attempted to liberally construe socioeconomic legislation to effectuate recited legislative intent.” *Andy Bros. Tire Co., Inc. v. W. Va. State Tax Comm’r*, 160 W. Va. 144, 147, 233 S.E.2d 134, 136 (1977); *accord Brockway Glass Co., Inc., Glassware Div. v. Caryl*, 183 W. Va. 122, 394 S.E.2d 524 (1990).⁴⁷

Because the Hospital’s exempt purpose income does not fall within any of the six categories of support in W. VA. CODE § 11-15-9(a)(6)(F)(i), including subparagraph (II), the Hospital is entitled to a refund.

Accordingly, the Hospital respectfully requests the Court to reverse the judgment of the Circuit Court of Randolph County and remand this case to the Tax Commissioner for an award of its refund.

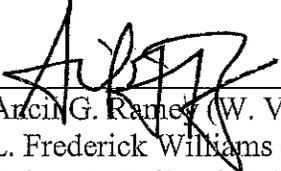
DAVIS MEMORIAL HOSPITAL

By Counsel

⁴⁷Finally, the Hospital points out, as it did below, that the budgetary sky will hardly fall because of any decision in this case. Most organizations—even many in the Hospital’s own industry—will still fail to meet the state statutory “support” test. (The Hospital proffers that a thorough survey has identified only a small number of such entities in Petitioner’s industry that—haphazardly—do meet the test.) Finally, any exposure is limited by the short (two or three year) statute of limitations for claims for refund. *See* W. VA. CODE § 11-10-14(I).

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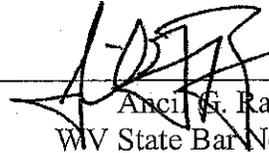
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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2008, I served the foregoing *Brief of the Appellant* on all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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