COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LEGACY EDUCATION GROUP dba EAST VALLEY HIGH SCHOOL, an Arizona non-profit corporation; and TUCSON PREPARATORY SCHOOL, an Arizona non-profit corporation, Plaintiffs/Appellants, v. ARIZONA STATE BOARD FOR CHARTER SCHOOLS, Defendant/Appellee.	No. 1 CA-CV 17-0023 Maricopa County Superior Court No. CV2016-051845

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS WITH CONSENT OF ALL PARTIES

Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Timothy Sandefur (033670)
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Litigation@goldwaterinstitute.org
Attorneys for Amicus Curiae

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INTRODUCTION AND SUMMARY OF ARGUMENT

The "frameworks" at issue in this case are rules subject to the Administrative Procedure Act. Appellants are correct that these frameworks differ significantly from the valuation tables that were found not to be rules in *Duke Energy Arlington Valley, LLC v. Arizona Dep't of Revenue*, 219 Ariz. 76 (2008). But *Duke Energy* is inapplicable here, not only for the reasons offered by Appellants, but also because the subjects involved are different. The tables at issue in *Duke Energy* were tools for economic valuation—something that is not susceptible of reduction to a *rule*. By contrast, the "frameworks" in this case deal with the interpretation of the state's educational standards and the governing of the charter school laws in Arizona. They *are* rules.

It is critical that the rulemaking procedures of the APA be followed, because state agencies regularly seek to expand their authority by adopting *de facto* regulations in the form of "guidances" or other "interpretive" documents that, in substance, function as rules, but which avoid the open deliberation and evaluation that goes into more formal types of rulemaking. Given that the APA is the "bill of rights for the … regulatory state," George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1678 (1996), this cannot be allowed. Given the relatively small staff of many charter schools, compared to traditional public schools, the burden of regulatory

compliance can be crippling, especially if the regulatory power is left unchecked. Federal agencies are already abusing their authority to draft *de facto* regulations without meaningful checks and balances. This Court should not allow state agencies to follow suit.

Other state courts that have considered similar questions have concluded that administrative pronouncements of general applicability that interpret and implement statutory requirements are "rules" subject to those states' APAs. This Court should do likewise. The Board's "frameworks" are subject to the APA and should be promulgated under the proper rulemaking procedures.

ARGUMENT

I. THE APA APPLIES TO THE "FRAMEWORKS" BECAUSE THEY ARE RULES, REGARDLESS OF THEIR FORM

The question of whether the Administrative Procedure Act (APA) applies to the "frameworks" imposed by the Board should be resolved not by reference or deference to formalistic labels—"framework" versus "rule." Instead, the question should turn on what these "frameworks" are and do. The APA applies unless an "*express[ ]*" exemption is provided by law. A.R.S. § 41-1002(A) (emphasis added). Given that the statute uses the word "express[ ]," it is plain that courts are not to *infer* exceptions to the APA that are not explicit.

Thus in *Carondelet Health Servs. v. Arizona Health Care Cost Containment Sys. Admin.*, 182 Ariz. 221, 228 (1994), this Court rejected the argument by the Arizona Health Care Cost Containment System (AHCCCS) that it was exempt from the APA because the legislature did not expressly require it to comply: "it is more reasonable to conclude that, had the legislature intended that AHCCCS be exempt from the APA when administering the session law, it would have so stated." *Id.*

Defendant-Appellee here argues precisely what AHCCCS argued in that case. It contends that the legislature "[knows] how to require the Department" to comply with the APA "when it want[s] it to do so," and since it did not do so, therefore the legislature did not mean for the APA to apply. Answering Br. at 18. But the Supreme Court rejected this argument because it shifts the burden to the wrong party: unless the legislature grants an "express" exception, the APA applies. *Carondelet Health Servs.*, 182 Ariz. at 228.

The Board contends that it is not arguing for an implied exception, but instead is arguing that the Legislature did not require it to adopt "rules," and therefore it is not subject to the APA in the first instance. Answering Br. at 18 It relies on *Duke Energy*, 219 Ariz. at 77–79 ¶¶ 6–12. But *Duke Energy* presented a different situation because it dealt with price-setting, a matter that is far less susceptible to determination by rule than are the matters dealt with by the "frameworks" in this case. As the Court noted, the tables at issue in *Duke Energy* "function[ed] more like

a guideline than a rule" because they did not "prescribe a law or policy," but were a tool for determining values for tax purposes. *Id.* at 79 ¶ 13.

As Lon Fuller observed, however, economic valuation is inherently insusceptible of resolution by general rule. Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 334 (1971). Because valuation depends on market prices, which are determined solely by the marginal utility of the parties, and not by reference to an abstract principle, it is impossible "to lay down in advance impersonal, act-prescribing rules that will determine" prices or the allocation of resources to particular users. *Id.* *See also* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 367 (1978) (there is no "test of rationality" by which the market value of a product can be compared, so such matters are not susceptible to judicial determination except by consulting markets). Thus when agencies are tasked with determining questions of economic value, it is more common for them to consult a list of factors and decide on a fact-specific basis, instead of following a *rule*, which prescribes a general policy or practice.

Duke Energy was therefore right that the tables at issue in that case were not rules because it is not possible to set values for tax purposes *by rule* in a market where prices fluctuate and are affected by countless factors. The tables at issue there were tools "to aid in the determination," instead of rules. *Id.* at 79 ¶ 14.

But this case involves the exact opposite situation. As the Board itself acknowledges, the "frameworks" set out "performance expectations," "operational expectations," "financial expectations," and "intervention and improvement *policies*." Answering Br. at 12 (emphasis added). These are "General Orders"—which are the very definition of rules. *Sulger v. Arizona Corp. Comm'n*, 5 Ariz. App. 69, 73 (1967). They provide that in such-and-such circumstances, thus-and-so consequences will follow. That is the definition of a rule.

To take one example, at random, from the current version of the "frameworks": "The most recent Overall Rating of each school operated by a Charter Holder will be used to determine whether the Charter Holder is meeting or making sufficient progress toward meeting the Board's academic performance expectations. Charter Holders will be required to undergo an Academic Systems Review, as defined in Appendix B, at five-year intervals."[1] This is simply "an agency statement of general applicability" that "prescribes" a "policy" and "describes the procedure" and "requirements" of that agency. A.R.S. § 41-1001(19). It is a rule. This case therefore involves the opposite of the scenario at issue in *Duke Energy*, and should have the opposite result.

[1] ARIZONA STATE BD. FOR CHARTER SCH., ACADEMIC PERFORMANCE FRAMEWORK AND GUIDANCE (June 13, 2016) at 9, https://goo.gl/weXCG5.

II. IT IS CRITICAL THAT THE ADMINISTRATIVE PROCEDURE ACT BE STRICTLY ENFORCED

A. The Administrative Procedure Act is One of the Few Effective Shields Against Agency Overreach

Since the advent of the independent administrative agency over a century ago, these entities have grown to massive proportions, both at the state and federal levels. For example, between 2015 and 2017, the 114th Congress passed 329 laws. Federal agencies, by contrast, adopted 3,378 new regulations—a total of more than 81,000 *pages* of new rules—in just 2015 alone. Lydia Wheeler, *Study: 2015 Was Record Year for Federal Regulation*, THE HILL, Dec. 30, 2015. Before Governor Brewer pronounced a moratorium on new regulations in 2009, Arizona regulatory agencies adopted about 100 new regulations per year.[2]

The agencies adopting these regulations are staffed, not by elected officials answerable to voters, but by employees who are for all intents and purposes immune from the electoral process. Indeed, administrative agencies were *designed* that way, on the theory that by being non-political bodies staffed by experts, they would stand outside political controversy. *See, e.g.*, Shepherd, *supra*, at 1559 ("Many supporters of the New Deal favored a form of government in which expert bureaucrats would influence even the details of the economy, with little recourse for the people and

[2] Policy Report: Why Arizona's Regulatory Moratorium is Unnecessary (Grand Canyon Institute Policy Report, Apr. 4, 2014), at 29–30.

businesses that felt the impacts of the bureaucrats' commands."). However, agencies are not immune to politics. They, too, are subject to political influence, *see, e.g.*, *Tummino v. Torti*, 603 F. Supp. 2d 519, 545-46 (E.D.N.Y. 2009), as well as to ordinary human fallibility and to the phenomenon of "capture," whereby regulated entities gain control of their own regulators and use them to their advantage. *See Michigan v. U.S. Army Corps of Eng'rs*, 911 F. Supp. 2d 739, 754 & n.13 (N.D. Ill. 2012), *aff'd* 758 F.3d 892 (7th Cir. 2014) (citing sources).

But whatever advantages might result from it, this independence also poses a risk because administrative agencies exercise power without a democratic check, and because such agencies frequently combine the rulemaking, enforcement, and adjudicative powers, in violation of basic principles of constitutional government. *See* PHILIP A. HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 325 (2016) ("Defenders of administrative law candidly acknowledge that its consolidation of powers conflicts with the separation of powers."). That is why the Arizona Supreme Court has emphasized the importance of checks and balances in administrative law. *See Polaris Int'l Metals Corp. v. Arizona Corp. Comm'n*, 133 Ariz. 500, 506 (1982) ("We have vested our officials with extensive powers to enable them to govern us, but we have also designed the system so that no branch of government has unlimited powers."). In fact, as Judge (now Justice) Gorsuch observed recently, the independent nature of these agencies should warrant greater vigilance, not more

deference, by courts. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring).

The Administrative Procedure Act (both its federal original and the state versions created soon after) represented an effort to impose some restraint on the power of agencies otherwise largely immune from voter control. Its rulemaking procedures were devised to ensure, at a minimum, that citizens have an opportunity to participate in the process when an agency formulates general policies. Thus it has often been likened to the Bill of Rights in its importance as a shield against overreach by administrative agencies that are largely unaccountable. *See, e.g.*, Shepherd, *supra*, at 1678; Michael Boudin, *The Real Roles of Judges*, 86 B.U. L. REV. 1097, 1098 (2006).

As the Ninth Circuit noted, the APA's rulemaking procedures help protect "the right of the people to present their views to the government agencies which increasingly permeate their lives. The interchange of ideas between the government and its citizenry provides a broader base for intelligent decision-making and promotes greater responsiveness to the needs of the people." *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982) (citation and quotations omitted). For that reason, "procedural safeguards that assure the public access to the decision-maker should be vigorously enforced." *Id.*

Notice-and-comment rulemaking enables citizens not only to better inform the agency about the consequences of a proposed rule, but even to change the agency's mind. *United Steelworkers of Am., AFL-CIO-CLC v. Schuylkill Metals Corp.*, 828 F.2d 314, 324-25 (1987) (Jones, J., dissenting). It also helps ensure that citizens will themselves cooperate with the final rule rather than see it as an imposition against their will. As the D.C. Circuit noted in *Chamber of Commerce of U.S. v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980), failure to comply with the notice-and-comment requirements "is more than just offensive to our basic notions of democratic government," because it tends to encourage "suspicions of agency predisposition, unfairness, arrogance, improper influence, and ulterior motivation."

Thus, while the APA remains an inadequate substitute for genuine separation of powers, *see, e.g.*, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1213-25 (2015) (Thomas, J., concurring); *Lynch*, 834 F.3d at 1155 (Gorsuch, J., concurring); *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. N.L.R.B.*, 802 F.2d 969, 974 (7th Cir. 1986), it is nevertheless crucial.

B. Agencies Routinely Seek *Sub Rosa* Exceptions from APA Procedures

Unfortunately, administrative agencies frequently find ways to circumvent the APA and promulgate what are in substance and effect "rules," in a manner that avoids the notice-and-comment requirements—as occurred in this case. Agencies now routinely issue "guidances" or "interpretive letters," or find other ways to

express their general policies and legal interpretations in a manner that evades the notice-and-comment requirements. HAMBURGER, *supra*, at 114.

This is not necessarily because agencies have bad motives, but simply because they are charged with the obligation of implementing laws—often vaguely written—and are held responsible by the legislature if they fail to do so. It is often their very diligence that causes them to expand their powers. *Cf.* *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("praiseworthy government officials" may have an "overbearing concern for efficiency" and be led to harm "the fragile values of a vulnerable citizenry."). But that is all the more reason why meaningful checks and balances are important—both judicial checks such as this case and the quasi-legislative check of formal rulemaking requirements. *See also* *Pitney-Bowes, Inc. v. California*, 108 Cal. App. 3d 307, 321 n.12 (1980) ("absent a clear legislative mandate, in the interest of the wise public policy of avoiding uncalled for and unnecessary regulation in the free market place, courts should exercise judicial restraint and refrain from scratching administrative agencies' itch to expand their regulatory powers.").

If those checks are lacking, the result can be what the D.C. Circuit warned of in *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015 (D.C. Cir. 2000):

> [The legislature] passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like . Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting,

> defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. "It can issue or amend its real rules, *i.e.*, its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures." The agency may also think there is another advantage—immunizing its lawmaking from judicial review.

Id. at 1020 (quoting Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 85 (1995)).

Agency guidances—or, in this case, "frameworks"—have the effect of law because they indicate the general policy that the agency will follow in its enforcement responsibilities. Because, in a hypertechnical sense, guidances are often deemed "non-binding," and they therefore often allowed to escape the formal requirements that apply to the adoption of ordinary rules. This subverts the APA and allows agencies "to 'create *de facto* … new regulation[s]' through the use of … mere letter and guidance document[s]," which sets a dangerous precedent "and could open the door to allow further attempts to circumvent the rule of law—further degrading our well-designed system of checks and balances." *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 132 F. Supp. 3d 736, 746-47 (E.D. Va. 2015) (citation

omitted). *Cf.* *National Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 45 (D.D.C. 2011) ("Guidance Memorandum" was "final agency action" because "despite the representation that it is an interim document, it is nonetheless being applied in a binding manner.").

And because these *de facto* rules are not produced though a formal process, affected parties are often denied legal standing to challenge them in court on the grounds that they are just guidelines. *See, e.g.*, *National Council for Adoption v. Jewell*, No. 1:15-CV-675-GBL-MSN, 2015 WL 12765872, at *4–5 (E.D. Va. Dec. 9, 2015) (plaintiffs could not challenge "guidelines" because they were technically non-binding, despite operating as rules). Thus an important aspect of checks-and-balances is removed.

Unsurprisingly, agencies have at times exploited this ability to adopt *de facto* regulation via "guidances" or "frameworks," and have even drafted regulations themselves with an eye to later using this technique to expand their authority beyond the regulation. Research shows that "rule drafters" are more familiar with the process of judicial interpretation than elected legislators are, and "often think about subsequent judicial review when interpreting statutes." Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1066 (2015). Agency officials sometimes decide that "they do not have to worry about being clear and precise" when preparing a regulation, "as they can always clarify and clean up in

subsequent guidance." *Id*. Justice Scalia echoed this concern when he warned that informal rulemaking methods such as "guidances" and "frameworks" are dangerous because they expand the "notice-and-comment-free domain." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in judgment). The agency "need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Id.*

In other words, scrupulous enforcement of regulatory rulemaking procedures also helps ensure the orderly operation of our democratic system, by preventing unelected officials from exploiting the gaps in procedural statutes that might enable them to escape oversight by elected officials.

Remarkably, these guidances are sometimes accorded *more* deference—at least under federal law—than are regulations themselves, because while regulations must be consistent with a statute, an agency interpretation is given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citation and quotations omitted). *See also* Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 5 (1996) (noting "the bizarre anomaly that a nonlegislative or ad hoc document interpreting a regulation garners greater judicial deference (and thus potentially greater legal force) than does a legislative rule … in which an agency interprets a statute."). Such expansive

deference makes it "less likely that an agency will give clear notice of its policies either to those who participate in the rulemaking process … or to the regulated public," and "also contradicts a major premise of our constitutional scheme … that a fusion of lawmaking and law-exposition is especially dangerous to our liberties." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617 (1996).

Even more significantly, administrative interpretations or other forms of *de facto* regulation are subject to rapid and politics-driven changes in ways that laws and notice-and-comment rules are not. Indeed, one of law's principal purposes is to establish a system of rules that is *not* subject to sudden changes based solely on momentary political considerations. *See* LON L. FULLER, THE MORALITY OF LAW 79 (2d ed. 1969) (citing "constancy of the law through time" as essential quality of law as opposed to arbitrary rule). Yet allowing agencies to, in substance, write law through "guidances" or "frameworks" or some other process that avoids notice-and-comment rulemaking, also enables them to impose "frequent or sudden changes in the law," *id.* at 80, or to change the substantive effect of the law for political considerations.

C. It is Essential to Preserve and Expand Transparency in Regulation

The result, as Professor Epstein has observed, is that "one administration [can] disregard the interpretation of its predecessor for no reason at all, creating the risk

of serious flip-flops between administrations on matters of immense importance, which makes for great difficulty in long-term planning in the private sector." Richard A. Epstein, *Lawless Rules*, CLAREMONT REV. OF BOOKS, Summer 2017 at 58. And in fact that has happened, particularly in the education context, in recent years. For example, the U.S. Department of Education's "Dear Colleague Letters" have been the subject of much dispute regarding whether they constitute new rules subject to the APA. *See, e.g., G.G., supra; United Student Aid Funds, Inc. v. King*, 200 F. Supp. 3d 163 (D.D.C. 2016); *Oklahoma Wesleyan University v. Lhamon*, 1:16-cv-01158-RC (D.D.C., filed June 16, 2016).

The federal Education Department issues a guidance document of some sort at the rate of about one per business day. In 2012, it issued 270 regulatory updates, modifications, or other such "guidance." TASK FORCE ON FED. REGULATION OF HIGHER ED., RECALIBRATING REGULATION OF COLLEGES AND UNIVERSITIES 64 (2015). Charter schools are particularly at risk from such regulatory burdens, because they often lack the personnel and resources to devote to regulatory compliance duties.

The Board emphasizes that it made the "frameworks" publicly available, as required by law—but this public availability is *no substitute* for the transparency required by the Administrative Procedure Act. The latter applies to rulemaking *before* adoption of the rule, whereas in this case the Board made the "frameworks"

public *after* adoption. A.R.S. § 41-1021 and other provisions of the APA require that the agency publish information about the rule prior to its adoption and invite public participation and deliberation over the proposed rule.

That difference is critical, because regulatory agencies often evade the public notice and participation that the APA requires when they engage in *de facto* rule-making through "guidances" and the like. One recent survey, seeking to count the amount of *de facto* rule documents at the federal level, labeled such documents "regulatory dark matter," because they are adopted essentially in a "secret … 'black box.'" Clyde Wayne Crews, Jr., *Mapping Washington's Lawlessness: A Preliminary Inventory of Regulatory Dark Matter*, (2017 Ed.) 42 (Competitive Enter. Inst. Issue Analysis No. 4). That report concluded that it was impossible to count the number of such rules adopted without APA procedures, but that "[t]here are hundreds of 'significant' agency guidance documents now in effect, plus many thousands of other such documents that are subject to little scrutiny or democratic accountability." *Id.* at 1.

III. ARIZONA CHARTER SCHOOLS SUFFER FROM THE LACK OF TRANSPARENCY IN THE ADOPTION OF RULES

The nature of the "frameworks" becomes quite clear when one considers the sanctions that are imposed on a charter school that fails to comply. The Board has adopted what it calls an "accountability policy matrix" that specifies how schools

that break the rules will be penalized. *See* Arizona State Board of Charter Schools Policy Statement, June 14, 2004. Although carefully couched in language that implies discretion by the Board, the "matrix" makes clear the mandatory nature of the underlying "frameworks." It lists the "factors" that the board "may consider" as including the school's "compliance record," its "compliance with staff investigation," the "[l]ength of time violation(s) ha[ve] been occurring," "[n]ot meeting the academic needs of the children," etc.—and provides that if the Board determines that a school "is in noncompliance," it may take such penalizing actions as directing the government to withhold funding, issuing a notice of intent to revoke the school's charter, and "entering into a consent agreement with the school for the resolution of the non-compliance." However permissive such language might seem, its ultimate point is clear: these provisions set general policy, and schools are punished for failure to comply.

Another recent example of *de facto* rulemaking by the Arizona Department of Education illustrates some of the problems that occur when the government adopts rules without going through the required APA procedures. In 2016, the Arizona Department of Education adopted a "Handbook" for the state's Education Savings Account program. This "Handbook" purported to explain certain technical aspects of that program to participating parents. In fact, it imposed restrictions and formulae on parents, without any legal warrant for doing so. For example, it declared that

parents were required to spend a quarter of their annual ESA award by the end of the contract year, imposed an $800 limit on spending for uniforms, required that 60 percent of spending be on core academic subjects, required parents to obtain multiple quotes on academic materials before buying them, and prohibited expenditures that (in the Department's judgment) "far exceeds" those of the academic curriculum.

None of these, or the many other rules imposed in the "Handbook" were the product of any formal, or even informal, rulemaking proceeding. How they were created remains a mystery. Indeed, after *amicus* Goldwater Institute wrote to the Department threatening litigation over the matter, the Attorney General's office announced it would withdraw most of the offending material.[3] But in the interim, parents and their children were unaware that these limits and requirements had no legal validity.

In *Loup City Pub. Sch. v. Nebraska Dep't of Revenue*, 252 Neb. 387 (1997), the Nebraska Supreme Court emphasized the importance of compliance with APA rulemaking. It found that the state taxing authority had failed to comply with the APA in devising valuation rules for taxation, so that the rules it did use were legally invalid. That, in turn, "substantially impaired" the ability of concerned interests "to

[3] *See* Letter of Assistant Atty. Gen. Jordan T. Ellel to Carrie Ann Donnell, Esq., Apr. 11, 2017.

meaningfully participate" in the process of appealing a tax assessment at a later hearing. *Id.* at 395.

> Because the department had not adopted and promulgated rules and regulations that would govern the process by which property would be valued …, the district could not know with finality what rules the department had followed, nor could the district know with what rules it was required to conform. It naturally follows that a reviewing court is not able to make a determination whether an agency decision "conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable" when there are no valid rules or regulations governing the administrative proceeding. Administrative proceedings under such circumstances are, by definition, arbitrary and capricious, and do not comport with the law.

Id. at 395–96.

Uncertainty in the law—let alone a direct misrepresentation of what the law actually requires—causes significant social costs. This effect is especially severe when it comes to charter schools, many of which are small, "boutique-style operations" that have fewer employees and fewer resources to devote to regulatory compliance. Monica Higgins & Frederick M. Hess, *The Challenges for Charter Schools*, EDUCATION OUTLOOK, Apr. 2009. And severe regulatory burdens have a deleterious effect on schools. *See* Vicki Murray, *State's Rules Stifle Charter Schools, Threaten Success*, ARIZONA REPUBLIC, Nov. 6, 2005. Indeed, some schools have been forced to turn to professional management companies simply to oversee compliance with regulations. J.D. Tuccile, *Regulating the Innovation Out of Charter Schools*, REASON, May 17, 2012. This is problematic because the whole point of

charter schools is to reduce bureaucracy to enable school staff to focus instead on student outcomes. While it is crucial to ensure that students meet basic state standards, it is also important to prevent unwarranted bureaucratic burdens from being imposed on charter schools.

IV. OTHER STATE COURTS HAVE RECOGNIZED THAT WHILE SPECIFIC ADJUDICATIVE DECISIONS ARE NOT SUBJECT TO APA REQUIREMENTS, GENERAL RULES ARE

Other state courts reviewing similar cases have concluded that rules similar to the "frameworks" at issue here are subject to the rulemaking requirements of their state APAs.

For example, in *American Fed'n of State, Cnty. & Mun. Emps. (AFSCME), AFL-CIO v. Department of Mental Health*, 500 N.W.2d 190 (Mich. 1996), the Michigan Supreme Court held that provisions in a standard contract for the provision of residential mental health services were rules subject to that state's APA. There the government argued, as the Board does here, that the contract provisions were just "guidelines," and were subject to modification in specific instances, *id.* at 192, but the court found that they "prescribe[d] policies and standards affecting the care [that the state] is statutorily required to provide." *Id.* It emphasized that the standard contract provisions governed a contract "not for the provision of light bulbs, laundry services, or the proverbial widget," *id.*, but for the provision of government services. "[M]any of the contract's provisions set forth *departmental policy and standards*

that have a direct effect on the care provided in group homes, care that the department is statutorily mandated to provide." *Id.* at 193 (emphasis added). Precisely the same is true of the educational services here. The contract provisions established "standards and policy concerning the care administered" in the homes, and therefore "implement[ed] and appl[ied] the Mental Health Code's requirement that the department provide mental health services appropriate to the public's needs and prescribe the department's procedure relevant to these services." *Id.*. Similarly, the "frameworks" here implement and prescribe the state's policies regarding the appropriate educational services that charter schools must provide.

In *Engelmann v. State Bd. of Educ.*, 2 Cal. App. 4th 47 (1991), the California Court of Appeal found that the criteria and standards by which the state Board of Education evaluated and adopted school textbooks were regulations under that state's APA. The Board argued that since those standards were not interpretations of a statute, they did not qualify as regulations. But the court rejected that argument, holding that the criteria were "the result of quasi-legislative determinations," and therefore fell within the APA. *Id.* at 56. Because the guidelines were "rule[s]" that "govern[ed] its procedure," and did not relate solely to the agency's internal management, they were "rules." *Id.*

Likewise, the Washington Court of Appeals held in *Hunter v. University of Wash.*, 2 P.3d 1022 (Wash. App. 2000), that the University's frameworks for

determining when to issue education benefits to veterans were rules under that state's APA. The University claimed that the frameworks were only "fiscal processes," rather than rules, *id.* at 1027, and that they were simply an internal process for determining who receives the benefit, rather than mandating any kind of requirement. *Id.* The court rejected this, holding that while the University had authority to decide who receives the benefits, it was required to do so by complying with the APA's rule-making process. *Id.* at 1028.

And in *Board of Educ. v. Cooperman*, 507 A.2d 253 (N.J. Super. 1986), *aff'd* 523 A.2d 655 (N.J. 1987), the New Jersey courts found that rules established by the state's Commissioner of Education to restrict admission of students with AIDS qualified as rules under the New Jersey APA. The Commissioner argued that the guidelines were only written to ensure that schools "comply with existing regulations and statutes," *id*. at 271, and did not announce new policy, but the court disagreed. It found that they "constitute[d] an agency statement of general applicability which implements policy designed to assist all local school districts in dealing with the admission of children with AIDS," *id.*, and that they were "action[s] which 'implement[] or interpret[] law or policy." *Id.* at 269. Thus they were rules subject to the APA.

By contrast, in *Oregon Envtl. Council v. Oregon State Bd. of Educ.*, 761 P.2d 1322 (Or. 1988), the Oregon Supreme Court found that the state Board of

Education's decision to adopt a particular textbook was *not* subject to the Oregon APA, because it was not a rule. A rule is "an 'agency directive, standard, regulation or statement of general applicability,'" the court explained, whereas the action at issue in the case "concerns but one book," and was therefore "functionally similar to individual licensing decisions made by professional licensing agencies," which are "orders, not rules." *Id.* at 1325 (citation omitted).

The "frameworks" at issue in this case fall plainly in the "rule" category. They are generally applicable. They are intended to interpret and to guide the implementation of state law. They are not confined to internal processes, but are enforced against charter schools that fail to comply. They are the result of quasi-legislative determinations, that govern the Board's procedure, and they dictate the standards and policy that govern the state's provision of educational services via third parties—charter schools. The "frameworks" are not specific determinations relating to a single instance, like the Oregon textbook case. Instead, they are "directive[s] of general applicability that implement[] the policy" in state law. *Id.* (citation omitted). Thus the "frameworks" fall plainly within the definition of "rules" consistent not only with Arizona law, but with the law of other states.

CONCLUSION

The decision below should be *reversed*.

Respectfully submitted September 12, 2017 by:

/s/ Timothy Sandefur
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE

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CERTIFICATE OF COMPLIANCE

Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Timothy Sandefur (033670)
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Litigation@goldwaterinstitute.org
Attorneys for Amicus Curiae

Pursuant to ARCAP 23(g)(2), I certify that the attached brief uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains approximately 5444 words.

Respectfully submitted September 12, 2017 by:

/s/ Timothy Sandefur
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE

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CERTIFICATE OF SERVICE

Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Timothy Sandefur (033670)
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Litigation@goldwaterinstitute.org
Attorneys for Amicus Curiae

Pursuant to Rule 15, Arizona Rules of Civil Appellate Procedure, the undersigned hereby certifies that on the 12th day of September, 2017, she electronically filed this Brief of Amici Curiae Goldwater Institute in Support of Petitioner with the Arizona Court of Appeals, Division One, and on the same date electronically served copies to:

Kim S. Anderson
Leslie Kyman-Cooper
Arizona Attorney General's Office
1275 W. Washington
Phoenix, AZ 85007-2997
EducationHealth@azag.gov
Attorneys for Defendant/Appellee

Roger W. Hall
BUCHALTER
16435 N. Scottsdale Rd., Ste. 440
Scottsdale, AZ 85254
rhall@buchalter.com
Attorneys for Plaintiffs/Appellants

Lynne C. Adams
Eric M. Fraser
OSBORN MALEDON
2929 N. Central Ave., Ste. 2100
Phoenix, AZ 85012
ladams@omlaw.com
efraser@omlaw.com
Attorneys for Plaintiffs/Appellants

Respectfully submitted September 12, 2017 by:

/s/ Kris Schlott
Kris Schlott, Paralegal