IN THE SUPREME COURT

STATE OF ARIZONA

LEGACY FOUNDATION ACTION FUND, Plaintiff/Appellant, v. ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, Defendant/Appellee.	Supreme Court No. CV-22-0041-PR Court of Appeals Division One Case No. 1 CA-CV 19-0773 Maricopa County Superior Court No. CV2018-004532 CV2018-006031 (Consolidated)

SUPPLEMENTAL BRIEF OF AMICUS CURIAE THE GOLDWATER INSTITUTE IN SUPPORT OF PLAINTIFF/APPELLANT

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INTRODUCTION

This case started with the Clean Elections Commission issuing a probable cause determination—a unilateral order declaring its belief that it had jurisdiction over the matter. LFAF-APPV2-271. Legacy challenged that determination in a proceeding presided over by an Administrative Law Judge, who rejected the Commission's claim of jurisdiction. LFAF-APPV2-314. Yet the Commission has statutory authority to override the ALJ's decision, and it did so, thereby determining that it had jurisdiction. LFAF-APPV2-323.

In this subsequent proceeding, Legacy challenged the Commission's enforcement order as being unenforceable for lack of jurisdiction, taking the view that a Commission judgment issued without proper jurisdiction is void *ab initio*—a legal nullity—and that this argument "can never be forfeited or waived." *State v. Chacon*, 221 Ariz. 523, 526 ¶ 5 (App. 2009). True, such a jurisdictional argument, though nonwaivable, could be foreclosed by principles of *res judicata*, if it had been fully and fairly litigated below. *Jacuzzi v. Pimienta*, 762 F.3d 419, 420 (5th Cir. 2014). But "fully and fairly litigated," means that the previous adjudication was consistent with due process. This Court has therefore asked whether the Commission's determination that it had jurisdiction can be given this *res judicata* effect without violating due process. The answer is no.

I. Courts should be *less* deferential to agency determinations in favor of their own jurisdiction.

One of the "oldest and most salutory [*sic*]" principles of due process is that a party may not be a judge in its own case. *Emp.'s Ben. Ass'n of Calumet & Ariz. Min. Co. v. Johns*, 30 Ariz. 609, 620 (1926). This goes for government entities, as well. A process that empowers a government party to judge its own cases violates due process.

Perhaps the best analogy in Arizona law is the state's City Court system. In *Winter v. Coor*, 144 Ariz. 56 (1985), this Court said it was unconstitutional to have magistrates in these courts removable at the pleasure of city councils, because would inevitably cause such magistrates to feel "political pressures" to rule in favor of their employers, and because such an arrangement undermined "the public's perception of these courts as impartial and unbiased." *Id.* at 63, 61. *Jett v. City of Tucson*, 180 Ariz. 115 (1994), reiterated the point, warning that a scheme whereby the judge works, in effect, for the prosecution creates a "potential for political pressure" that "impermissibly threatens the judicial independence of magistrates." *Id.* at 123; *see also id.* at 125 (Martone, J., dissenting) ("To … allow the [city] to be the very body that can remove [a] judge fastens the lid on the coffin of judicial independence.").

The present case doesn't involve the removal of a magistrate—but something very like it. Section 41-1092.08(B) empowers agency directors to reject

ALJ decisions for whatever reasons they consider sufficient, which effectively enables agencies to veto any adverse factual or legal determinations, and to substitute their own mere accusations as findings of fact and law. This scheme erases whatever due process protections are provided by Sections 41-1092.07 and 41-1092.08(A), and literally makes the agency the judge in its own case, on matters of both fact and law. As Judge Ginsburg and Professor Menashi remarked of a similar federal scheme, "[such] an arrangement [is] at odds with the most basic notion of due process." *Our Illiberal Administrative Law*, 10 NYU J.L. & Liberty 475, 510 (2016). It certainly undermines any public perception of impartiality.

This is not merely a theoretical problem. Consider the facts here: In January 2015, ALJ Shedden received extensive stipulated facts and briefing from both sides, and heard oral arguments, before rendering his decision in March. LFAF-APPV2-302–314. Yet the Commission reversed that decision three weeks later, in an order that was not predicated on any new briefing or argument (and was not required to be), but was really just a list of the Commission's disagreements with the ALJ's findings. LFAF-APPV2-317–324. And, of course, by issuing a ruling in its own favor, the Commission was able to promote its institutional self-interest in maintaining or expanding its own authority. Whatever one might call this, one cannot call it a neutral decision-making process. *Cf. Town of Surfside v. Higgenbotham*, 733 So.2d 1040, 1045 (Fla. Dist. Ct. App. 1999) (to allow city

manager to override agency findings "is to make the appearance before the Hearing Examiner meaningless, and a violation of due process.")

II. Self-serving agency decisions are the poorest candidates for *res judicata*.

That's not to say due process is *per se* violated whenever a statutory scheme empowers an agency head to override an ALJ's decision. Agencies are executive branch entities, and as long as they are merely deciding *internally* whether or not to *accuse* someone of something, there's nothing unconstitutional about enabling their directors to reject ALJ opinions. Agency employees probably disagree a lot about policy, requiring the agency head to resolve *internal* disagreements and determine the agency's policy course or position. That's constitutional. What's unconstitutional is when the agency either imposes some kind of command or punishment on someone *outside* the agency at the end of this process—as happened in *Horne v. Polk*, 242 Ariz. 226, 228 ¶ 3 (2017), or *Phillip B. v. Ariz. Dep't of Child Safety*, 512 P.3d 1043, 1045–46 ¶ 5 (App. 2022)—or where, (as in this case) the judicial branch, by deferring to the agency's decision or estopping the regulated party from challenging it, deprives the regulated party of any chance to obtain a neutral arbiter's decision regarding the legal issues. In such a situation, the regulated party would be denied due process, and the agency would become the judge in its own case. *See Garrett v. Holmes Tuttle Broadway Ford*, 5 Ariz. App.

388, 390 (1967) (*res judicata* "must not be extended so far as to deprive persons of their day in court or so rigidly as to defeat the ends of justice").

One scenario in which this can happen, which state and federal courts have often addressed, is when an agency head overrides an ALJ's determinations respecting witness credibility. There are many reported cases involving ALJs hearing witnesses testify, and making credibility determinations, only to have an agency head—who did *not* hear the testimony—override that determination.[1] *See, e.g.*, *Ritland v. Ariz. State Bd. of Med. Exam'rs*, 213 Ariz. 187, 191–92 ¶ 15 (App. 2006). Courts have said that in such circumstances, a reviewing court should apply heightened scrutiny to the director's decision to override, precisely to avoid the risk that the agency is exploiting its power to become the judge in its own case. *See id.; In re Lakatos*, 939 A.2d 510, 517–20 ¶¶ 12–16 (Vt. 2007); *McEwen v. Tenn. Dep't of Safety*, 173 S.W.3d 815, 823 (Tenn. App. 2005); *Moore v. Ross*, 687 F.2d 604, 608–09 (2d Cir. 1982); *Aylett v. Sec'y of Hous. & Urb. Dev.*, 54 F.3d 1560, 1566 (10th Cir. 1995); *Penasquitos Vill., Inc. v. NLRB*, 565 F.2d 1074, 1078 (9th Cir. 1977).

Agency self-interest is a major consideration here. As the leading scholar on the subject has observed, "to withhold an independent judicial evaluation of an

[1] This happened in *Phillip B.*, 512 P.3d at 1045–46 ¶¶ 4–5, but the Court of Appeals found it unnecessary to address that issue.

agency's self-interested interpretation" of its own authority "effectively cedes to the agency the power to act as judge in its own cause, a result incompatible with a long line of authority demanding disinterested and impartial governmental decision-making." Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 Cornell J.L. & Pub. Pol'y 203, 206 (2004). Already, in many contexts, courts give government less deference when it makes self-interested decisions. *See, e.g.*, *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977) ("[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake."); *S. Utah Wilderness All. v. Dabney*, 222 F.3d 819, 828 (10th Cir. 2000) ("[A]n agency's litigating position is not entitled to *Chevron* deference because '[i]t would exceed the bounds of fair play to allow an institutionally self-interested advocacy position, which may properly carry a bias, to control the judicial outcome.'" (citation omitted)); *Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987) ("[I]f the agency itself were an interested party to the agreement, deference might lead a court to endorse self-serving views that an agency might offer … .").

Judicial skepticism is equally justified in cases where agencies make self-serving jurisdictional determinations. As one California court put it, "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." *Pitney-Bowes, Inc. v. State*, 108 Cal. App.3d 307, 321 n.12 (1980).

That "itch" does not indicate malfeasance—on the contrary, all diligent agencies will bend their full weight to their statutory duties, and will naturally seek to assert and defend their jurisdiction; as the U.S. Supreme Court observed, "[an] overbearing concern for efficiency and efficacy … characterize[s] praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). But this simply means that agencies are interested parties when it comes to determining the scope of their statutory authority—which is all the more reason courts should rigorously enforce the principles of due process against these well-meaning (but not impartial) agencies.

In fact, before federal courts invented *Chevron* deference, they followed "a rule against deference to agencies' jurisdictional interpretations, declaring that '[t]he determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested.'" Armstrong, *supra*, at 234 (quoting *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944)). Given that Arizona has explicitly repudiated anything like *Chevron* deference,[2] such skepticism is even more imperative here. And, of

[2] A.R.S. § 12-910(F).

course, agency jurisdictional determinations are legal questions, and courts have *never* traditionally deferred to agencies on questions of law. *Thomas & King, Inc. v. City of Phoenix*, 208 Ariz. 203, 206 ¶ 8 (App. 2004).

At bottom, *res judicata* is an equitable principle that depends on fundamental fairness. *Ferris v. Hawkins*, 135 Ariz. 329, 331 (App. 1983). Here, equity demands not leniency, but skepticism, toward the agency.

III. *Res judicata* is least applicable where there is a prior inconsistent ruling.

Res judicata[3] is an equitable device for preventing needless re-litigation or the waste of resources. But that means it shouldn't be applied where it will "defeat the ends of justice." *Garrett*, 5 Ariz. App. at 390. One strong indicator that applying *res judicata* would do that is the existence of prior inconsistent determinations of the same legal question. *See Sandoval v. Superior Ct.*, 190 Cal. Rptr. 29, 35 (App. 1983); *Crawford v. Ranger Ins. Co.*, 653 F.2d 1248, 1252 (9th Cir. 1981); *State Farm Fire & Cas. Co. v. Century Home Components, Inc.*, 550 P.2d 1185, 1191–92 (Or. 1976).

Where there has been a "previous determination" of a legal issue that is "inconsistent" with the position that the proponent of *res judicata* seeks to establish, it's typically improper for the court to apply that doctrine. *Wetzel v.*

[3] Some authorities cited herein discuss collateral estoppel instead of *res judicata*, but the distinction is irrelevant for our purposes.

Ariz. State Real Est. Dep't, 151 Ariz. 330, 334 (App. 1986). Or, as the *Century Home Components* court put it, it's "fundamentally offensive" to estop a party from relitigating a question if "there are extant determinations that are inconsistent on the matter in issue," because it would "would work an injustice" to block that party from making an argument "when he has shown beyond a doubt that on another day he prevailed" on that same argument. 550 P.2d at 1191.

Century Home Components went on to quote Section 29 of the *Restatement of Judgments*—the same *Restatement* on which the Commission relies so heavily here—which says that *res judicata* should only apply when there's confidence that the prior determination was clearly correct—but "[w]here a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted." *Id.* at 1192 (quoting *Restatement (Second) of Judgments* § 29, comment F);[4] *see also* Mary T. Henderson, *Note: Offensive Collateral Estoppel in Asbestos Litigation: Hardy v. Johns-Manville Sales Corp.*, 15 Conn. L. Rev. 247, 265–66 (1983) ("Collateral estoppel is, in part, a reflection of confidence in the determination of a prior action. Where another

[4] The principle that prior inconsistent determinations render *res judicata* improper is not limited to situations in which there are prior inconsistent *judgments*. Instead, the rule is that *res judicata* is less likely to be appropriate where decisionmakers disagree in their *reasoning*. *See Jack Faucett Assocs., Inc. v. Am. Tel. & Tel. Co.*, 744 F.2d 118, 130 (D.C. Cir. 1984).

court reaches an inconsistent decision, the confidence in the primary case is undermined.").

Here, there's obviously a prior inconsistent determination: the ALJ decision which the Commission director overrode. To estop Legacy from relitigating the jurisdictional question—on which Legacy prevailed before the ALJ—would contradict the "overriding consideration[s] of fairness to a litigant" necessary for the proper application of *res judicata*. *Ferris*, 135 Ariz. at 331.[5]

CONCLUSION

The answer to the Court's question is no: the Commission's self-serving determination that it has jurisdiction cannot be given *res judicata* effect consistently with due process.

Respectfully submitted this ___ day of January 2023 by:

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[5] It might seem paradoxical to point to the overridden ALJ decision as an instance of a prior inconsistent ruling—but it is less paradoxical than the consequence of the Court of Appeals' decision, which, as the dissent below pointed out, would mean that a party who fails to raise a jurisdictional objection before the ALJ remains free to dispute jurisdiction later, whereas one who *does* raise that objection before the ALJ would be *barred* from pursing it later. LFAF-APPV1-016, ¶ 38.