IN THE SUPREME COURT

STATE OF ARIZONA

RICHARD RODGERS, et al. Plaintiffs-Appellees, v. CHARLES H. HUCKELBERRY, et al., Defendants-Appellants,	Supreme Court No. _____ Court of Appeals, Division Two Case No. 2 CA-CV 2017-0091 Pima County Superior Court Case No. C20161761

PETITION FOR REVIEW OF OPINION OF COURT OF APPEALS

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Issue Presented for Review

When the Legislature expanded Counties' economic development authority by passing A.R.S. § 11-254.04, did it *sub silentio* repeal A.R.S. § 11-256—a longstanding competitive bidding law that is intended to protect taxpayers from "favoritism, fraud and public waste"—because § 11-256 might hamper the unbridled exercise of § 11-254.04?

Facts and Procedural History

In 2016, Pima County built a $14.5 million headquarters and then leased it to World View Enterprises at a substantial discount, to subsidize the private firm's space balloon business. ROA.15 ep.2. After the World View deal was made public, taxpayers sued to remedy the County's failure to follow the appraisal, auction, and minimum price safeguards of A.R.S. § 11-256, as well as violations of the Gift Clause, ROA.2 ¶¶ 49–65, and state and local competitive bidding requirements, ROA.2 ¶¶ 82–90. On cross-motions for partial summary judgment, the Superior Court held that the County's admitted failure to follow the appraisal, auction, and minimum price safeguards of § 11-256 rendered the lease unlawful. ROA.47 ep.7. The County appealed and the Court of Appeals reversed. *Rodgers v. Huckelberry*, 2017 WL 6379531 (App. 2017) ("Op.").

The only issue in this appeal is the legality of the County's failure to follow § 11-256 when it leased the headquarters to World View. The Superior Court

stayed taxpayers' Gift Clause claim, because declaring the lease unlawful under § 11-256 would remedy the unlawful gifts and subsidies contained in the lease, avoiding the constitutional issue. ROA.56. The Superior Court also stayed its ruling on the § 11-256 claim pending appeal. ROA.70. Other claims regarding the County's failure to follow competitive bidding requirements for the design and construction of the facility are ongoing in the Superior Court. This Petition is timely.[1]

Reasons the Petition Should Be Granted

This is a case of first impression regarding the interplay between two laws governing county authority—one that authorizes economic development, A.R.S. § 11-254.04, and another that requires public bidding when a county leases land to private parties, A.R.S. § 11-256.

These two statutes can easily be read in harmony: The appraisal, auction, and minimum price safeguards of § 11-256 place common-sense limits on counties, including when they act pursuant to their economic development authority under § 11-254.04. There is not even an implicit conflict between the two, let alone the "manifest" conflict, or "repugnancy [and] inconsistency," required for a *sub silentio* repeal. *Hudson v. Brooks*, 62 Ariz. 505, 513 (1945); *UNUM Life Ins. Co. v. Craig*, 200 Ariz. 327, 333 ¶ 29 (2001).

[1] Petitioners request fees and costs, pursuant to the private attorney general doctrine. ARCAP 21.

Instead, the decision below *creates* a conflict where none exists by reading the economic development statute as impliedly repealing the public bidding statute—in direct disobedience of this Court's admonition in *Achen-Gardner, Inc. v. Superior Court*, 173 Ariz. 48 (1992), that "[i]f the legislature meant for agents to dispense with public bidding on work performed under an [economic] development agreement, it could and should have made this explicit, given the importance of public bidding." *Id.* at 54.

The result of the Court of Appeals' mistake is to render at least five statutes surplusage and eliminate any requirement that counties follow appraisal, auction, and minimum price safeguards when leasing property. This is an error of significant statewide consequence because it expands county authority far beyond the bounds the Legislature intended when it enacted § 11-254.04. And it leaves taxpayers without the protections against "favoritism, fraud and public waste" that public bidding provides. *Johnson v. Mohave Cnty.*, 206 Ariz. 330, 333 ¶ 12 (App. 2003).

This Court should grant the Petition and hold that § 11-254.04 did not impliedly repeal § 11-256.

I. The Decision Below Creates a Conflict Between Public Bidding and Economic Development Where None Exists.

It is a basic principle of statutory construction that "[r]epeals by implication are disfavored—'very much disfavored.'" ANTONIN SCALIA & BRYAN A. GARNER,

READING LAW: THE INTERPRETATION OF LEGAL TEXTS 327 (2012) (citation omitted); *see also* *Pijanowski v. Yuma Cnty.*, 202 Ariz. 260, 263 ¶ 14 (App. 2002) ("modification-by-implication is disfavored by courts when construing statutes, and we will not find such an intent unless the interplay between the statutes under consideration compels us to find the legislature must have intended the later statute to impliedly repeal the earlier one"); *Craig*, 200 Ariz. at 333 ¶ 28 ("[W]hen two statutes appear to conflict, whenever possible, we adopt a construction that reconciles one with the other, giving force and meaning to all statutes involved.").

In *Achen-Gardner*, 173 Ariz. at 54, this Court refused to read the economic development powers granted by A.R.S. § 9-500.05 as creating an implied exception to another competitive bidding statute. Competitive bidding, this Court said, was too important to be swept under the rug on a hunch. In part, that is because "[t]he potential for a subsidy is heightened when … a public entity enters into the contract without the benefit of competitive proposals." *Turken v. Gordon*, 223 Ariz. 342, 350 ¶ 32 (2010).

Achen-Gardner involved a similar dispute to the one here, where a local government eschewed competitive bidding in an economic development deal intended to benefit a particular business. Similar to the authority granted to counties by § 11-254.04, § 9-500.05 authorizes municipalities to enter into development agreements "to enhance their economies by attracting private development."

Achen-Gardner, 173 Ariz. at 54. Like the decision below, the parties in *Achen-Gardner* argued that competitive bidding would make economic development more difficult. *Id.* But this Court rejected that argument in words that apply here: "If the legislature meant for agents to dispense with public bidding on work performed under an A.R.S. § 9-500.05 development agreement, it could and should have made this explicit, given the importance of public bidding. It did not." *Id.* Likewise, if the Legislature meant for counties to dispense with public bidding on economic development leases "it could and should have made this explicit …. It did not." *Id.*

The decision below eschews rules of statutory construction, this Court's precedent, and 100 years of legislative convention in favor of a policy approach to legal decision-making. The panel was concerned that the appraisal, auction, and minimum price requirements of § 11-256 would not meaningfully constitute the form of spending for economic development that § 11-254.04 authorizes. That is no basis for a court to rewrite a statute, and it is not even accurate.

Passed in 1994, § 11-254.04 expanded county economic development authority—including for the first time spending on "leasing or conveyance" to spur economic growth. Op. ¶ 5. Before that, in 1989, counties were given limited economic development authority: they could only appropriate $1.5 million per year for economic development, only to governmental agencies or nonprofits, and only

within the county. A.R.S. § 11-254. That was the limit of a county's economic development authority, since all county power must be explicitly granted by the Legislature. *See* *Hartford Accident & Indem. Co. v. Wainscott*, 41 Ariz. 439, 448 (1933) ("If it were the intention of the Legislature to give counties the unlimited right to engage in every nature of private business for which their property might be used, we think that intention would have been made manifest in language very different from that in question.").

The Legislature lifted those restrictions when it passed § 11-254.04. It removed the $1.5 million cap and the limitation on grants only to "governmental agencies or nonprofits," eliminated the location requirement, and explicitly let counties "appropriate and spend public monies" on "economic development," which the statute defined as a long list of activities, including leases. These changes "vastly increased counties' authority to engage in economic development activities." ROA.47 ep.6. But the Legislature left § 11-256 untouched.

It is entirely possible to follow both § 11-256 and § 11-254.04. Section 11-256 requires an appraisal, public auction, and minimum rent, but it allows counties to set other lease terms, so they can accomplish their economic development goals. *See* A.R.S. § 11-256(C) ("Such land or building shall be leased … subject to such other terms and conditions as the board may prescribe."). If the County has some rational reason for leasing a property to only one particular industry, or to a lessee

that promises to create a certain number of jobs, § 11-256 allows it to do so. *Id.*; ROA.47 ep.5–6. The County did just that when it *complied* with § 11-256 in an earlier economic development lease. Bidders' Information Package at 14. It is therefore empirically false that applying § 11-256 "substantially frustrate[s]" § 11-254.04. Op. ¶ 7. Also, § 11-256 allows the County to lease property for 10% less than market value if necessary to attract a bidder who will comply with "such other terms and conditions as the board may prescribe." A.R.S. § 11-256(C). Of course, if there are multiple bidders willing to comply with those terms but pay market rates, then the § 11-256 safeguards allow the County to achieve its economic development goals without unnecessary spending.

Because the two statutes do not conflict, the decision below was erroneous. "To the extent possible, the courts must enforce all statutes that have been duly enacted. In so doing, it is the court's 'obligation to harmonize related statutes,' and this obligation '"applies even where the statutes were enacted at different times, and contain no reference one to the other."' *Hounshell v. White*, 219 Ariz. 381, 385 ¶ 12 (App. 2008) (citations omitted). That alone is grounds for reversal.[2]

Applying the common-sense safeguards of § 11-256 does not "significantly diminish[] the legislative incentives to private development embodied in" § 11-

[2] Because the two statutes are harmonious, the general/specific canon, *see* Op. ¶ 18, does not apply here. *See* SCALIA & GARNER, *supra* at 183 (that canon "deals with what to do when conflicting provisions simply cannot be reconciled—when the attribution of no permissible meaning can eliminate the conflict").

254.04. *Achen-Gardner*, 173 Ariz. at 54. Consider the deal at issue here. Assuming the County's building is worth the approximately $14.5 million it cost to build (but we can only assume, since no appraisal took place), if the County discounted the value of the lease by 10%, as § 11-256(C) allows, World View would have captured a $1.45 million subsidy. That is nearly as much spending on a *single deal* as the County could spend in an *entire year* prior to § 11-254.04. And the deal itself would have been illegal since the predecessor to § 11-254.04 only allows the County to spend on projects run by governments and non-profits, not private firms like World View. *See* A.R.S. § 11-254.

At oral argument in the Court of Appeals, the County could only suggest that complying with competitive bidding requirements might be "awkward" because a better bid might come along after the County had negotiated a deal with a particular business. But competitive bidding is designed to protect taxpayers from "favoritism, fraud and public waste." *Johnson*, 206 Ariz. at 333 ¶ 12. If the County negotiates a bad deal and competitive bidding exposes its shortcomings, then the law is working.

What § 11-256 prohibits is what happened here: giving one company special dispensation to lease a County-owned building without assessing how much the lease is worth, without determining if other companies would pay more, and without regard to minimum lease rates designed to protect taxpayers' investment. Sec-

tion 11-256 provides important safeguards against favoritism, cronyism, and abuse—safeguards this Court should not short-circuit.

II. Had the Legislature Intended to Exclude Economic Development Leases from the Public Bidding Safeguards of § 11-256, it Knew How to Do So.

A. Consistent with *Achen-Gardner*, the Legislature Has Always Been Explicit When Exempting Counties from § 11-256.

Achen-Gardner cited A.R.S. § 9-500.05(E) as an example of an explicit repeal "evincing an intent to supersede the competitive bidding law" and "to dispense with public bidding." 173 Ariz. at 54. No such intent appears in § 11-254.04, but it *does* appear elsewhere in the statutes governing county authority.

On multiple occasions, both before and after enactment of § 11-254.04, the Legislature has expressed this intent by *explicitly* repealing existing restrictions on county leasing authority. For instance, leases to achieve public policy goals by renting property to other governments, non-profits, school districts, and county fair associations were exempted in 1981. A.R.S. § 11-256.01(A). Two years later, the Legislature authorized the lease of hospital facilities in rural areas, "[n]otwithstanding any other statute." A.R.S. § 11-256.02. The year after enactment of § 11-254.04, the Legislature explicitly excused counties from complying with § 11-256 when contracting with Community Health Systems, A.R.S. § 11-1435(B), and then exempted affordable housing projects in 2000, A.R.S. § 11-251.10(A). Similarly, the Legislature explicitly made Industrial Development Au-

thorities "exempt from any restrictions imposed on municipalities, counties or political subdivisions relating to the leasing, sale or other disposition of property or funds." A.R.S. § 35-751(B). The Legislature has also added several explicit exceptions to § 11-256 itself over the years. 2012 Ariz. Legis. Serv. Ch. 254 (HB2389) (no appraisal for land worth less than $5,000); 2005 Ariz. Legis. Serv. Ch. 43 (SB1019) (no auction for certain leaseback deals). All of this shows that if the Legislature had intended to exclude county economic development leases from the safeguards of § 11-256, it would have done so explicitly. But it did not.

Like § 11-254.04, none of the statutes cited above involves situations where a county is trying to get the best price for its property. *Cf.* Op. ¶ 19. They all involve leasing property at below market rates to achieve some other public policy goal. Yet the Legislature still realized it needed to *explicitly* excuse counties from § 11-256 if exemption was intended. Unlike those other statutes, § 11-254.04 leaves § 11-256 undisturbed, intentionally protecting taxpayers from the sort of backroom deal the County devised here.[3]

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[3] The fact that § 11-254.04 makes no mention of § 11-256 does not "cut both ways." Op. ¶ 20. The Legislature had already made county leases subject to competitive bidding when it enacted § 11-256, which "governed all leases of land not involving parks until" the legislature added an explicit exemption. *Johnson*, 206 Ariz. at 333–34 ¶ 13. There was no need for the Legislature to double down on that requirement when it passed § 11-254.04, especially in light of *Achen-Gardner*. The decision below cites statutes that involve a different situation: the Legislature creating an entity and thereby making it subject to certain good-government requirements. *Cf.* A.R.S. § 11-812(D) (creating aggregate mining operation recommenda-

B. The Decision Below Ignores this Court's Precedents and Legislative Practice by Fundamentally Misinterpreting Two Statutes.

i. The Statutes at Issue in *Achen-Gardner* are Not Distinguishable from the Statutes at Issue here.

Achen-Gardner was clear that courts should look for explicit language repealing competitive bidding requirements; the record of statutory amendments shows the Legislature understood that rule. The panel below sidestepped *Achen-Gardner* by fundamentally misunderstanding the statute at issue in that case and the import of this Court's decision. The panel was flatly wrong when it concluded the development agreement statute at issue in *Achen-Gardner*, is "not premised on incentivizing an employer to locate or remain within a county." Op. ¶ 15. The opposite is true. Section 9-500.05 is designed to "allow municipalities to enhance their economies by attracting private development," *Achen-Gardner*, 173 Ariz. at 54—the exact same interest served by § 11-254.04, which is intended to "improve or enhance the economic welfare of the inhabitants of the county." A.R.S. § 11-254.04(C). Yet *Achen-Gardner* held that enforcing competitive bidding requirements did not "significantly diminish[] the legislative incentives to private development embodied in A.R.S. § 9-500.05." *Id.* As discussed above, that is also true here.

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tion committee, subject to open meeting laws); A.R.S. § 11-952.01(B) (creating county workers' compensation pool, subject to existing statutes governing workers' compensation).

ii. Section 11-256 Does Not Contain an "Omnibus Exception."

The decision below also tried to distinguish *Achen-Gardner* on the basis of § 11-256(F), but—like the panel's reading of § 9-500.05—it got subsection (F) exactly backward. Section 11-256(F) directs that it is "supplementary to and not in conflict with other statutes governing or regulating powers of boards of supervisors." This admonition echoes the rule of statutory construction applied in *Achen-Gardner*: courts should avoid implied repeals and endeavor to read statutes together, i.e., statutes should be read as "supplementary to and not in conflict with" other statutes. The decision below instead reads subsection (F) as an "omnibus exception." Op. ¶¶ 9–10, 16. The central problem with that interpretation is that the Legislature has used the phrase "supplementary to and not in conflict with" four times since statehood. No instance of the phrase comports with the panel's backward reading.

In 1922, an appropriations bill was passed to pay staff and members during a special session. 1922 Ariz. Sess. Laws (HB1). That special session wore on, and two more appropriations bills were passed, each making "an Additional appropriation" that was "supplementary to and not in conflict with" HB1. 1922 Ariz. Sess. Laws (HB70; HB80). The use of that phrase did not repeal HB1—quite the opposite—it directed that all three bills must be read in harmony.

The phrase next appeared in 1939 in House Bill 128, creating rules for "Inspection of Imported Sheep and Goats." 1939 Ariz. Sess. Laws (HB128). These rules were "*supplementary to and not in conflict with* other laws governing or regulating the livestock industry." *Id.* §6. As in 1922, the Legislature was not directing that the new sheep and goat rules wiped away other laws governing and regulating the livestock industry. Rather, the opposite: the new and old statutes were meant to be read *together*.

Finally, the Legislature employed "supplementary to and not in conflict with" when it enacted § 11-256 in 1939. As in the previous instances, the appraisal, auction, and minimum price requirements of § 11-256 were intended to be read in *harmony* with existing and future laws governing counties, *not* in conflict with them.

If subsection (F) were an "omnibus exception" and § 11-256 did not apply any time counties exercised other authority, the Court of Appeals would have been wrong in *Johnson*, 206 Ariz. at 333–34 ¶ 13, when it held that § 11-256 "governed all leases of land not involving parks until" the legislature added the first of four explicit exemptions (each made superfluous by the decision below). *Id. See* A.R.S. §§ 11-256.01(A); 11-256.02; 11-1435(B); 11-251.10(A).

Following its past and subsequent practice, the Legislature easily could have written § 11-254.04 in the way the decision below rewrites it: "In addition to the

authority granted under § 11-254, *[and notwithstanding § 11-256 or any other statute]* a board of supervisors may appropriate and spend public monies for and in connection with economic development activities." But the bracketed text does not appear in the statute. The Court of Appeals should not have added it.

III. The Opinion Below Scrambles the Statutory Scheme and Rewrites Limited Economic Development Authority into a Blank Check.

Although the decision below was driven by perceived practical concerns, it actually creates significant practical problems. First, it wrongly renders four explicit statutory exemptions to § 11-256 are meaningless surplusage, *see State v. Eddington*, 228 Ariz. 361, 363 ¶ 9 (2011) ("we generally construe statutes so that no part is rendered redundant or meaningless"). Second, the decision below, reads § 11-254.04 so broadly that it wipes § 11-256 entirely off the books.

Section 11-254.04 allows counties to "appropriate and spend public monies" and lease real property whenever the board of supervisors determines this will "assist in the creation or retention of jobs" or "otherwise improve or enhance the economic welfare of the inhabitants of the county." One hopes every action a county takes would do those things. And therein lies the problem: if the decision below is correct—that good-government requirements like § 11-256 no longer apply if they interfere with unbridled exercise of economic development authority—then *any action* a county takes that "enhances the economy" is not subject to competitive bidding. Under the rule established in this case, avoiding competitive bidding

would not be "acting in bad faith," Op. ¶ 21; it would be a straightforward application of the plain language of § 11-254.04.

But the safeguards of § 11-256 prevent this from happening. Abuse of § 11-254.04 is prevented by the appraisal, auction, and minimum price requirements of § 11-256 (to say nothing of other good-government requirements like open meetings, open records, and conflict of interest laws). The logic of the opinion below undoes that protection on the grounds that "there may be an economic burden by complying with [the] mandate" of § 11-256. *Pijanowski*, 202 Ariz. at 265 ¶ 22. But if that were enough, other restrictions on county authority should also be wiped away. That is the absurd result of leaving the decision below in place—and another reason it should be reversed.

Conclusion

The petition should be *granted.*

Respectfully submitted this 16th day of January 2018 by:

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