IN THE SUPREME COURT
OF THE STATE OF ARIZONA

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF LEGACY FOUNDATION ACTION FUND WITH CONSENT OF ALL PARTIES

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INTEREST OF AMICUS CURIAE

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt, California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited constitutional government, private property rights, and individual freedom. PLF has vast experience defending the constitutional principle of separation of powers in the arena of administrative law in courts throughout the nation. PLF has obtained important administrative-law victories from the U.S. Supreme Court. And PLF has filed briefs on the topic in this Court. *Mills v. Ariz. Bd. of Tech. Registration*, 253 Ariz. 415 (2022); *Roberts v. State*, 253 Ariz. 259, 512 P.3d 1007 (2022). This case implicates grave concerns about the due process of law, separation of powers, and freedom of speech. PLF discusses these principles in this brief. All parties provided written consent for the filing of this amicus brief. No party or its counsel authored this brief, in whole or in part. ARCAP 16(a), 16(b)(1)(A).

ARGUMENT

In Round One of this case, the Court "express[ed] no view on whether Legacy may pursue alternative procedural means to challenge the Commission's penalty order as void." *Legacy Found. Action Fund v. Citizens Clean Elections Comm'n*, 243 Ariz. 404, 408 ¶19 (2018) (*Legacy I*). This Round Two is that "alternative procedural means."

Relevant here: after Legacy's direct appeal under the Judicial Review of Administrative Decisions Act (JRADA), A.R.S. §§ 12-901–914, failed, the *Commission* filed a brand-new civil suit (Maricopa County Superior Court Case No. CV2018-006031) to collect the $95,460 civil penalty the Commission had unilaterally levied

against Legacy. Pet. App. LFAF-APPV1-018. Legacy, now a *defendant* in that case, filed a motion to dismiss challenging the Commission's subject-matter jurisdiction. Pet. App. LFAF-APPV1-019. That question is squarely within the Courts' purview to answer in the first instance.

The opinions below flout terminological hygiene in at least three ways: (1) To reject Legacy's valid defense raised in a motion to dismiss, the superior court called it a "collateral attack" on the agency's jurisdiction. Pet. App. LFAF-APPV2-016. But Legacy's defense, properly understood, is neither collateral nor an attack. (2) The Court of Appeals erroneously assumed that executive-branch agencies can issue "judgments." Pet. App. LFAF-APPV1-007 ¶9. Agencies cannot. Only courts can. (3) No special consequences flow from labeling something as an agency's subject-matter jurisdiction. Agencies only have powers delegated to them by the legislature; they can exercise those powers so long as they do not step outside the bounds of the statute or the Arizona and federal constitutions. And it is an Article 6 court's task to carefully police the boundary of the agency's delegated authority. To answer the Court-framed question: Article 6 courts have unflagging judicial power to determine whether a defendant owes the plaintiff money. It would violate the Due Process, Speech, and Separation of Powers Clauses of the Arizona Constitution if the Court were to conclude otherwise. Ariz. Const. art. 2, §§ 4, 6; art. 3.

I. Legacy's Defense Is Neither Collateral Nor an Attack

The Law of Judicial Precedent contains a very important clue to deciding this case. Edited by Bryan Garner, many jurists, including Neil Gorsuch, Brett Kavanaugh, Jeffrey Sutton, and Rebecca White Berch, are its contributing authors. It contains exhaustive

research and analysis of doctrines of precedent such as stare decisis, res judicata, issue preclusion, claim preclusion. The clue is this: it does not mention even once that issue preclusion applies to preclude judicial review of administrative-agency decisions. To the contrary, the rule is as flat as this: "Decisions or opinions of … administrative tribunals are not precedents in court." *The Law of Judicial Precedent* 277 (Bryan A. Garner ed. 2016); *see also id.* at 373–74 (discussing res judicata, stare decisis), 379 (evidence of "invalidity" used to set aside prior decisions or opinions). So, none of the doctrines of precedent can apply to decisions or opinions of administrative tribunals.

The United States Supreme Court does not decline judicial review of agency action "if a finding of preclusion could foreclose all meaningful judicial review," even where the suit is "wholly collateral to a statute's review provisions," and if the underlying claim is "outside the agency's expertise." *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 489 (2010). There are no preclusion-of-review statutes in Arizona. *See, e.g.*, *Axon Enterprise, Inc. v. FTC*, 986 F.3d 1173 (9th Cir. 2021), *cert granted* 142 S. Ct. 895 (2022); *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021); *cert granted sub nom. SEC v. Cochran*, 142 S. Ct. 2707 (2022). The Court should not legislate such a statute into being.

The *Free Enterprise* test arises within a uniquely federal statutory scheme, and the federal Supreme Court may be poised (in the consolidated cases of *Axon* and *Cochran*) to amend the test[1] if not eliminate it altogether.[2] But it provides useful lessons to

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[1] PLF has argued in a merits-stage amicus brief in *Cochran* that the federal test should be "refined or clarified." Brief Amicus Curiae of Pacific Legal Foundation in Support of Michelle Cochran, *SEC v. Cochran*, No. 21-1239, 2022 WL 2674090 (July 6, 2022).

[2] The Institute for Justice has argued in a merits-stage amicus brief in *Cochran* that jurisdiction stripping is unconstitutional, and the federal test "was wron[g] and has

Arizona. Issue preclusion here forecloses all "meaningful judicial review"—a factor this Court has already considered salient. *Aguirre v. Industrial Commission*, 247 Ariz. 75, 77 ¶12 (2019). And the underlying claim (the Commission's lack of authority) is "outside the agency's expertise"—another factor that is familiar to this Court. *See, e.g.*, *Univar Corp. v. City of Phoenix*, 122 Ariz. 220, 224 (1979) (exhaustion doctrine inapplicable where the "jurisdiction of the agency is being contested; in which the agency's expertise is unnecessary").

Too, Legacy's civil-procedure-rule 12(b) *defense* is neither "collateral" nor an "attack"; it is a valid defense—an "alternative procedural means to challenge the Commission's penalty order as void," *Legacy I*, 243 Ariz. at 408 ¶19—that was properly raised in a motion to dismiss. Nothing about Legacy's defense is "[s]upplementary," "secondary" or "subordinate" to the Commission's attempt to lawfully collect the fine from Legacy; it is central to deciding whether the Court can sign off on the Commission's collection. *Black's Law Dictionary* 328 (Deluxe 11th Ed.) (defining "collateral"); *see also id.* at 329 (defining "collateral attack" as an "attack on a judgment" like "habeas corpus").

Pointing to the infirmities in the Commission's decision and decision-making is mere evidence of the plaintiff's wrongdoing that supports a valid Civil Procedure Rule 12(b) argument. It is not a collateral attack that can be insulated from judicial review.

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proved unworkable." Brief for the Institute for Justice as Amicus Curiae in Support of Respondent, *SEC v. Cochran*, No. 21-1239, 2022 WL 2704142 (July 7, 2022).

II. The Commission Issued No Judgment

The Court of Appeals mistakenly assumed that executive-branch agencies can issue "judgments." Pet. App. LFAF-APPV1-007 ¶9. Agencies cannot. Only courts can.

A "judgment … is an act of a *court* which fixes clearly the rights and liabilities of the respective parties to litigation and determines the controversy at hand." *In re Marriage of Zale*, 193 Ariz. 246, 249 ¶10 (1999) (simplified; emphasis added). The dictionary also defines "judgment" as a "*court's* final determination of the rights and obligations of the parties in a case." *Black's Law Dictionary* at 1007 (emphasis added). The Commission's decision falls comfortably outside the definition. There is no such thing as an administrative-agency judgment. *See id.* at 1007–10 (defining all possible types of judgments).

The Commission's decision is merely one of the litigants' written views about the controversy. It is no different from the views any litigant expresses in the argument section of a court filing. It is not even an expert opinion because it has neither undergone nor survived *Frye/Daubert* testing. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

So, whether a *judgment* is to be given precedential effect under the Restatement (Second) of Judgments is the wrong question. The Commission is not a foreign court. It is an Arizona state agency fully subject—and subordinate—to Arizona's legislative, executive, and judicial power wielded separately by the three major branches of the state government. Legacy has invoked the state's judicial power to check the Commission's actions. There is no impediment to this Court "say[ing] what the law is" by independently reviewing the propriety of the Commission's actions. *Marbury v. Madison*,

5 U.S. 137, 177 (1803). There is no "counter-*Marbury*" in Arizona. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 969 (1992).

III. Nothing Impedes an Article 6 Court's Duty to Police Agency Power

Agencies only have powers delegated to them by the legislature; they can exercise them so long as they do not step outside the bounds of the statute or the Arizona and federal constitutions. So, it is an Article 6 court's "critical" "task … to fix the boundaries of [such] delegated authority; that is not a task we can delegate to the agency." *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting). For example, *Chevron* deference is dead in Arizona in part because this Court has never adopted the notion that statutes impliedly delegate "interpretive power from the courts to agencies" to thereby foreclose de novo interpretation in Article 6 courts. David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 Yale J. on Reg. 327, 327 (2000).

Labeling something jurisdictional in one stroke both over-includes and under-includes concepts that do not belong to the category. Indeed, the U.S. Supreme Court has admonished that calling something "jurisdictional" in "[p]assing" "display[s] the terminology employed when the Court's use of 'jurisdictional' was 'less than meticulous'." *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1848 n.4 (2019).

There is nothing conceptually special about an agency's "subject matter jurisdiction" to do something. Agencies (except perhaps the Corporation Commission), being creatures of statute, have only those powers that are given to them by the legislature. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Roberts,* 512 P.3d at 1018 ¶44. There is no meaningful difference between concepts such as an agency's

scope of authority, limit or lack of power, adjudicatory jurisdiction, subject-matter jurisdiction, or *ultra vires* agency action. *See Black's Law Dictionary* at 1017 (defining "agency jurisdiction" as "regulatory or adjudicative power of a government administrative agency over a subject matter or matters"). In other words, saying an agency does not have subject-matter jurisdiction is just another way of saying the agency lacks authority to do something—due to either statutory or constitutional strictures. "Subject-matter jurisdiction" relates to whether "*a court* can rule on the conduct of persons or the status of things." *Black's Law Dictionary* at 1020 (emphasis added). No Arizona agency has expertise in deciding its own scope of authority—only Article 6 courts do. *See, e.g.*, *Carr v. Saul*, 141 S. Ct. 1352, 1361 (2021) (agencies "have no special expertise" in deciding questions of their jurisdiction; courts do) (collecting cases); *see also Califano v. Sanders*, 430 U.S. 99, 109 (1977) (same).

Statutes presume—even require—Arizona's judiciary to act as a check on agency power. The Commission, like other Arizona agencies, must file a civil suit to collect fines the Commission imposes on the regulated party through in-house hearings (if the regulated party does not acquiesce in the agency's decision by voluntarily paying the fine). *See* A.R.S. § 12-1551. When an agency like the Commission that is given executive and lawmaking functions adjudicates and imposes a civil penalty, Article 3 of the Arizona Constitution, its Due Process Clause, and A.R.S. § 12-1551, require an Article 6 judge to independently review the propriety of the fine, issue the money judgment if the agency's decision is lawful, and direct a separate executive-branch officer (the sheriff) to collect the fine.

Arizona agencies do not have the self-help power to send collection agents to enforce their unilateral decrees. Put another way, the Anglo-American system of checks and balances and separation of powers require that all three branches of government take distinct actions consistent with their respective functions "before any person can be deprived of life, liberty, or property." Randy E. Barnett & Evan D. Bernick, *The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit* 31 (2021). The legislature must enact laws in advance; the executive must enforce the law (*i.e.*, investigate and prosecute alleged violations); the judiciary must independently determine if a party's action is lawful; and if so found, enjoin the offending action or direct the executive to collect a monetary fine if punishing the act is necessary. Insulating from judicial review the Commission's levy of the fine against Legacy would consolidate the functions of three major branches of government within the Commission. It will chill a large swath of speech and subject it to administrative investigation, accusation, and administratively-imposed monetary penalties, all in violation of the Speech Clause, Ariz. Const. art. 2, § 6. And the question of whether the resulting commingling of functions is permissible under the Separation of Powers Clause would also be thereby insulated from meaningful judicial review. This Court should forthwith reject such an extraconstitutional transfer of power to an administrative agency.

IV. The Commission's Action Violates Legacy's Due Process Rights

The Court-framed question[3] implies the Court is potentially looking at crafting a multi-factor balancing test—neutral as compared to biased decision-making; agency's

[3] Did the Commission serve as a neutral decisionmaker in deciding that it possessed subject matter jurisdiction in light of its concomitant advocacy role so that

subject-matter jurisdiction as opposed to some other challenge to agency authority; the agency's advocacy role as a factor; what if any preclusive effect agency adjudicative decisions have; collateral or direct posture of superior court proceedings; et cetera. The better approach would be a bright-line rule. Even though the procedural posture of this case is somewhat unique, it does not necessarily warrant a case-specific rule.

Because the Commission has investigatory, accusatory, adjudicatory, and advocacy functions, in-house agency adjudication creates *inherent* and *irremediable* bias against the regulated party and its speech. *See Horne v. Polk*, 242 Ariz. 226, 230–31 ¶¶16–18 (2017) (declining to limit due-process violations to actual-bias cases). The presence of such inherent bias is impermissible under the Due Process, Speech, and Separation of Powers Clauses. Ariz. Const. art. 2, §§ 4, 6; art. 3. *See also* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672 (2012) (discussing due process as a particular instantiation of separation of powers). The Court should so hold.

The Commission is like any other plaintiff who thinks a defendant owes them money. The bright-line rule should be as follows: In cases where an Arizona governmental entity is a litigating party, Article 6 courts have the constitutional obligation to determine in the first instance whether the plaintiff is entitled to monetary or other relief.

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issue preclusion in the collateral superior court proceeding applied without violating Legacy's due process rights?

CONCLUSION

The Court should (1) vacate the decision below, (2) conclude that the validity of the Commission's levy of a close-to-six-figure fine is subject to plenary judicial review, and (3) remand to the superior court so that it can independently review the Commission's actions de novo without deference to any prior determination that may have been made on any legal or factual question by the Commission.

Respectfully submitted, on January 27, 2023.

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