COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RONALD A. SIMMS, Plaintiff/Appellant/Cross-Appellee, v. JEREMY E. SIMMS, an individual; TP RACING, L.L.L.P., a limited liability limited partnership; BELL RACING, LLC, a limited liability company; ARIZONA RACING COMMISSION; and ARIZONA DEPARTMENT OF GAMING, Defendants/Appellees/Cross-Appellants.	No. 1 CA-CV 23-0139 Maricopa County Superior Court No. LC2016-000505-001

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANT RONALD A. SIMMS

ADITYA DYNAR (031583)
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
(202) 807-4472
ADynar@PacificLegal.org

Attorney for Amicus Curiae
Pacific Legal Foundation

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INTEREST OF AMICUS CURIAE

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt, California corporation established to litigate 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.

This case implicates grave concerns about administrative overreach and separation of powers. PLF discusses these principles in this brief. No party or its counsel authored this brief, in whole or in part. ARCAP 16(a), 16(b)(1)(A).

BACKGROUND

To continue to be the proprietor of a landmark racecourse in Phoenix, state law requires Ronald Simms to maintain an active license. But the state colluded with other business interests to deny Ronald Simms's racing license renewal application. APPV2-057. Ronald contested that denial by commencing the required administrative action at the Office of Administrative Hearings (OAH). An OAH Administrative Law Judge (ALJ) conducted a 21-day trial. APPV1-051. Ronald Simms

testified for three days, including a full cross-examination. *Id.* The ALJ found Ronald Simms's testimony to be credible. APPV1-055–56, -059. The ALJ ruled in favor of granting license renewal to Ronald Simms. APPV1-073. The ALJ decision was correct and should be upheld.

Ronald's sibling and business partner, Jerry Simms, appealed the ALJ's decision to the Arizona Racing Commission (Commission). The Commission heard no testimony and saw no witnesses testify. Ruling on a cold record, it reversed the ALJ Decision. The reversal was based solely on the Commission's disagreement with the ALJ's witness-credibility determination. APPV1-091–92. On appeal, the Superior Court deferred to the *Commission*'s witness-credibility determination, not the ALJ's, even though the latter was the only adjudicator who heard live witnesses. Decision at 5–6.

ARGUMENT

The Superior Court erred in deferring to the facts found by the Commission under the substantial-evidence standard. The substantial-evidence test of deferring to facts found by an Arizona agency is inapplicable for statutory reasons. Statutes require the first actual court vested with Arizona's judicial power to independently and impartially "decide all questions of fact." A.R.S. § 12-910(F). Ronald Simms's briefs explain why the Court can resolve the case in his favor as a statutory matter, so this amicus brief will not belabor that point.

More importantly, substantial evidence is inapplicable for constitutional reasons. This brief explores the foundational principles that preclude Arizona courts from giving weight to facts purportedly found by the Commission. A proper standard of review avoids casting substantial-evidence deference into constitutional doubt. Judicial deference to agency fact-finding violates the Arizona Constitution's separation of powers and checks and balances. *See* Ariz. Const. art. 2, §§ 4, 23; art. 3; art. 6, §§ 1, 17. If applied in the manner applied by the court below, it runs afoul of the Due Process and Jury Clauses of the Arizona Constitution. This Court should reverse.

I. Statutory Framework

Arizona's Administrative Procedure Act (APA), A.R.S. § 41-1001 *et seq.*, created the Office of Administrative Hearings, a state agency separate from the prosecuting agencies. A.R.S. § 41-1092.01. OAH decides cases in the first instance. But an appeal from the OAH decision goes to the head(s) of the agency that litigated a matter in the OAH. A.R.S. § 41-1092.08. The agency head(s) can "accept, reject, or modify" the OAH decision, even re-write facts the OAH found after conducting adversarial evidentiary hearings. A.R.S. §§ 41-1092.08(B), (D). An appeal from that decision comes to the superior court—the first actual court vested with the state's "judicial power"—for judicial review of the administrative decision. Ariz. Const. art. 6, § 1; A.R.S. §§ 12-901–914.

When such an appeal arrives at the superior court, the court, if a party requests, "shall hold an evidentiary hearing, including testimony and argument, to the extent necessary to make the determination required by subsection F of this section." A.R.S. § 12-910(A). Subsection F sets forth, as relevant here, two standards of review for particular kinds of cases. (1) If the superior court accepts "supplementing evidence presented at the [court's] evidentiary hearing," it "may affirm, reverse, modify or vacate and remand the agency action." A.R.S. § 12-910(F) (first sentence). (2) But if the superior court does not hold an evidentiary hearing, then the court "shall affirm the agency action unless the court concludes that the agency's action … is not supported by substantial evidence." *Id.* (second sentence).

In either case, (1) "the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency," *id.* (third sentence); and (2) "the court shall decide all questions of fact without deference to any previous determination that may have been made on the question by the agency," *id.* (fourth sentence).

The statute plainly requires Arizona superior courts to independently and impartially "decide all questions of fact." A.R.S. § 12-910(F). But the court below did not do so. Instead, using the substantial-evidence standard of deference, it went along with the Commission's

revision of the ALJ's credibility determination. That was plain error. It also makes the substantial-evidence standard, *see* A.R.S. § 12-910(F) (second sentence in relevant part), unconstitutional.

II. The Substantial-Evidence Standard Is Unconstitutional

"Who decides" questions of fact? *Nat'l Fed'n of Indep. Business v. OSHA*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring). For centuries, the answer was the jury—an arm of the judicial branch. Under Arizona's statutory scheme for agency adjudication, however, that power is given to executive officials. As a result, Arizona agencies like the Commission simultaneously act as the judge, jury, and prosecutor.

Even when the regulated party appeals the agency decision and finally reaches an independent Article 6 court of record, the Article 6 judge confines the inquiry, or so the court below concluded, to whether the agency's findings are supported by substantial evidence. Perhaps the substantial-evidence standard is appropriate when an appellate court considers *jury-found* facts. *See* U.S. Const. amend. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."). But deference to fact-finding based on a cold record by the agency head(s)—one of the litigating parties—effectively neutralizes all independent and meaningful judicial review, both in the OAH and in Arizona courts. Substantial evidence in such circumstances violates the due process of law.

And it nullifies the right to a jury. For centuries, juries heard the evidence and observed witnesses first-hand. Because juries decided facts, courts considered jury-found facts under a substantial-evidence standard. *See* U.S. Const. amend. VII. The advent of administrative adjudication has changed this practice. ALJs now hear evidence, and agencies, not courts, review ALJ decisions. And only then do courts review agency decisions. This altered structure of adjudication decouples the substantial-evidence standard from the jury in a manner that makes substantial evidence inapplicable and unconstitutional when courts that do not conduct their own evidentiary hearings use the substantial-evidence test to defer to facts found without a jury.

That is why the state legislature was wise when it amended A.R.S. §§ 12-910(C), (F) to freely permit de novo jury trials in appeals from agency decisions and added that Arizona courts must "decide all questions of fact without deference to any previous determination that may have been made on the question by the agency."

A. Combining the Commission's Power to Override the ALJ with Deferential Review on Appeal Violates Due Process

The state and federal Due Process Clauses (Ariz. Const. art. 2, § 4; U.S. Const. amends. V, XIV, § 1) should be approached with an eye to the realities of the case. *State v. Conn*, 137 Ariz. 148, 150 n.1 (1983). The due process of law requires fundamental fairness. *Taylor v. Kentucky*, 436

U.S. 478, 487 n.15 (1978); *DeWitt v. Ventetoulo*, 6 F.3d 32, 36 (1st Cir. 1993).

The procedure here failed to provide the required due process of law for three reasons. First, the Commission resolved the case and prescribed the remedy through a proceeding where normal rules of evidence and procedure did not apply. Second, the Commission did not conduct the evidentiary hearing but instead substituted its findings for the findings of the ALJ who did hear the evidence. Third, on appeal, the superior court applied substantial-evidence deference, thereby failing to exercise its independent judgment. The cumulative effect was that Ronald Simms was deprived of property (license renewal) without the due process of law.[1]

According to the Arizona Supreme Court, these "due process concerns" can be resolved by some form of independent appellate review. *Horne v. Polk*, 242 Ariz. 226, 230 ¶14 (2017). *Horne*—in which the ALJ's factual findings were overridden by the agency head—said that the due process problem with such a procedure is "magnified" if "the agency's final determination is subject only to deferential review" on appeal. *Id.* While *Horne* also said that due process does not necessarily prohibit an

[1] The "licensee has a property right in the reissuance of the license" "if the governing statute directs that a license shall be renewed upon compliance with certain criteria." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164–65 (9th Cir. 2005) (citing *Stauch v. City of Columbia Heights*, 212 F.3d 425, 430 (8th Cir. 2000); *Foss v. National Marine Fisheries Service*, 161 F.3d 584, 588 (9th Cir. 1998)).

agency from both investigating and adjudicating a case, a genuinely neutral and meaningful judicial scrutiny must take place at *some* point to ensure the due process of law. *Id.* at 232 ¶21.

As an example, *Horne* cited *Nightlife Partners v. City of Beverly Hills*, 133 Cal. Rptr. 2d 234 (Cal. App. 2003), which observed that where an agency determination is subject to "independen[t] review [of] the evidence and assess[ment of] its weight and relevance," this independent review could ensure adequate due process of law notwithstanding the fact that the agency operates without normal evidentiary or procedural safeguards. *Id.* at 248.

But no such independent review was provided here. Instead, the court below used the substantial-evidence test—a test so deferential that it results in affirmance if "there [is] any evidence at all to sustain the decision of the inferior tribunal," *Farish v. Young*, 18 Ariz. 298, 307 (1916), "even if substantial conflicting evidence exists," *Kocher v. Dep't of Revenue*, 206 Ariz. 480, 482 ¶9 (App. 2003), even if the record contains "contradictions," *State v. Hughes*, 104 Ariz. 535, 538 (1969), and even if "reasonable persons" would "draw different conclusions," *State v. Ballinger*, 110 Ariz. 422, 425 (1974).

This combination of agency power to override ALJ fact-finding followed by judicial deference deprived Ronald Simms of constitutionally protected rights.

B. The Commission's Decision to Disregard the ALJ's Ruling Must Be Followed by Skeptical Review on Appeal

The court below embraced the legal fiction that the Commission, not the ALJ, was the ultimate fact-finder. Decision at 4 n.4 (quoting *Ritland v. Board of Medical Examiners*, 213 Ariz. 187 (App. 2006)). Operating under the premise that the trier-of-fact's credibility determinations should not be disturbed, the court below refused to evaluate the Commission's credibility determinations even though the ALJ, not Commission, was the trier-of-fact.

While it is true that under *Ritland*, the agency, rather than the ALJ, is deemed the factfinder, this does not resolve the question of whether the proceedings here satisfied due process. On the contrary, *Ritland* expressly based its conclusion on the assumption that reviewing courts would apply a non-deferential review of agency conclusions in these circumstances.

Ritland involved a disciplinary proceeding against a doctor. It was referred to an ALJ, who found the complaining witness credible. 213 Ariz. at 188 ¶3. The accused then asked the Board of Medical Examiners to overturn that credibility finding, pointing out that the accusers had all been found guilty of unprofessional conduct. *Id.* at ¶4 n.3. But the Board felt itself bound to follow the ALJ's credibility determination. *Id.* at 188–89 ¶5.

The Court of Appeals reversed. It acknowledged that whether the Board was free to second-guess the ALJ's credibility findings was a close question, *id.* at 190 ¶9, and concluded that "certain deference is owed" to such findings, because the ALJ "had the opportunity to look the witnesses in the eye and reach a conclusion with respect to his veracity," *id.* at ¶10 (simplified). It "recognize[d] the importance of the ALJ's observation of the demeanor and attitude of the witnesses" and concluded that "those findings are entitled to greater weight than other findings of fact more objectively discernible from the record." *Id.* at 191 ¶13. So, although it allowed the Board to overrule an ALJ decision, it also said that "a reviewing court should be *particularly inclined to scrutinize* the Board's disagreements with an ALJ's credibility findings." *Id.* at 191–92 ¶15 (emphasis added).

In other words, *Ritland* expressed qualms about letting an agency disregard an ALJ's findings, doubtless because it recognized the risk that an agency might simply disregard institutionally disagreeable findings, without a legitimate basis for doing so. And the *Ritland* court was persuaded that heightened judicial scrutiny on appeal would counteract that danger. For instance, it cited *McEwen v. Tenn. Dep't of Safety*, 173 S.W.3d 815, 823 (Tenn. App. 2005), in which the Tennessee Court of Appeals said, "an agency should expect closer judicial scrutiny" by a reviewing court when it disregards an ALJ's findings of fact.

Similarly, in *Moore v. Ross*, 687 F.2d 604, 608–09 (2d Cir. 1982), the Second Circuit considered whether an agency could override an ALJ's factual findings and credibility determinations. It held that this was permissible *because* the parties would be entitled to meaningful judicial review on appeal. "[R]eviewing courts," it said, "give special weight to ALJ's credibility findings" on appeal, and accordingly "often [find] [agency] decisions unsupported by substantial evidence when they hinge on assessments of credibility contrary to those made by the ALJ who heard the witnesses." *Id.* at 609. Because it assumed that state courts would "adhere to these basic principles," and because it thought it unlikely that a reviewing court would affirm an agency decision to "rejec[t] the credibility findings of an ALJ without a further hearing," the court found that it was consistent with due process for the agency to override the ALJ. *Id.* Here, by contrast, the Commission did precisely what the Second Circuit said should not happen.

Commenting on *Moore*, the Indiana Court of Appeals explained that federal courts allow agencies to override ALJs because they "[a]ssum[e] that unsupported credibility findings will be rectified on appeal," so that "the danger of due process violations is considered minimal." *Stanley v. Review Board*, 528 N.E.2d 811, 814 (Ind. App. 1988). But, the court continued, "where demeanor credibility is the sole determinative factor and the review board reverses the [ALJ]'s findings, due process concerns cannot be brushed aside with the promise of rectifying any mistakes on

appeal." *Id.* Although it was "well settled that the [agency] is the ultimate factfinder," it said, an agency's reversal of a credibility determination "in favor of its own groundless opinion of demeanor credibility" was a due process violation. *Id.* at 814–15.

In other words, the more power the Commission has to override the ALJ, the more important it is for a reviewing court to apply meaningful judicial scrutiny on appeal. Yet here, the court below simply cited *Ritland* to justify applying the most deferential standard of review to the Commission's decision to override the ALJ and disregard *Ritland*'s recognition that an agency's power to override an ALJ must go hand-in-hand with skeptical review on appeal.

The decision below represents the kind of formalism that is improper under the Due Process Clause. *See Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975) (Due process of law "is concerned with substance rather than … formalism."); *Anderson v. Valley Union High Sch., Dist. No. 22*, 229 Ariz. 52, 55 ¶4 (App. 2012) ("[S]ubstance controls over form. Courts are not bound by labels."). The decision below is therefore legal error that should be reversed in order to avoid the constitutional due-process concerns that will otherwise surface if this Court upholds the lower court's application of the substantial-evidence standard of deference.

C. The State and Federal Jury Clauses Provide Constitutional Bases for Skeptical Judicial Review

The federal Constitution requires a civil jury "[i]n Suits at common law where the value in controversy shall exceed twenty dollars." U.S. Const. amend. VII. Courts have found that the federal jury right applies in cases where administrative agencies argue that the private party failed to comply with statutes. For example, the Fifth Circuit concluded that the Seventh Amendment applies to fraud cases brought by the SEC seeking civil penalties. *Jarkesy v. SEC*, 34 F.4th 446, 454 (5th Cir. 2022). *Jarkesy* follows up on *Granfinanciera* in which the Supreme Court held that "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 61 (1989).

The Seventh Amendment has not been incorporated against the states. But the Arizona Constitution itself contains Jury Clauses, which are broader than the Seventh Amendment.

Unlike the Seventh Amendment, Article 2, § 23, of the Arizona Constitution contains neither a twenty-dollar prerequisite nor a law-versus-equity distinction. It states: "The right of trial by jury shall remain inviolate." To ensure the message is heard loud and clear, Article 6, § 17 says: "The right of jury trial as provided by this constitution shall

remain inviolate." *See also* Ariz. Const. art. 2, § 24; art. 18, § 5 (additional jury-trial provisions).

"[J]udicial deference to fact-finding by administrative adjudicatory proceedings" deprives litigants like Ronald Simms of the civil jury and "its constitutionally apportioned fact-finding function." John Gibbons, *Why Judicial Deference to Administrative Fact-finding Is Unconstitutional*, 2016 B.Y.U. L. Rev. 1485, 1502.[2] Arizona's Jury Clauses say there is a right to trial by jury in not some but *all* cases. A.R.S. § 12-910(F), similarly, says courts should decide not some but *all* questions of fact without deference to facts found administratively.

If one looks at the vital historical and constitutional fact-finding role that civil juries perform, cases like *Palmer v. Superior Court*, 114 Ariz. 279 (1977), for example, start making sense. The Arizona Supreme Court concluded that the superior court is always "free to grant a trial de novo" in appeals taken from justice courts. *Id.* at 281. Superior courts have "complete power to insure that an appeal from a nonrecord court"—

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[2] *See also* Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 Geo J.L. & Pub. Pol'y 27 (2018); Suja Thomas, *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139 (2007); Jennifer W. Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 Tex. Tech. L. Rev. 303 (2012); Jennifer W. Elrod, *W(h)ither The Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 Wash. & Lee L. Rev. 3 (2011); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939 (2011). Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994).

i.e., an adjudicator other than the Arizona Supreme Court, court of appeals, or superior court, Ariz. Const. art. 6, §§ 30(A), 17—"is heard on a legally adequate record and that the record supports the conviction with evidence which has been received in conformity with the requirements of constitutional and statutory standards." *Palmer*, 114 Ariz. at 281. A.R.S. §§ 12-910(C)–(D) themselves freely permit trials de novo and jury trials in appeals from agency adjudications.

Therefore, short of de novo jury trials, which are the norm in Arizona, the Jury Clauses provide a constitutional textual basis for skeptical judicial scrutiny of agency-found facts. That is especially so in cases as this one where the litigating agency head(s) found facts on a cold record by overriding facts found by the independent OAH ALJ who actually presided over live witness testimony, observed witness demeanor, and made credibility determinations that were outcome determinative.

CONCLUSION

The Court should reverse and enter judgment in favor of Ronald Simms.

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Respectfully submitted,

/s/ Aditya Dynar
ADITYA DYNAR (031583)
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
(202) 807-4472
ADynar@PacificLegal.org

Attorney for Amicus Curiae
Pacific Legal Foundation

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CERTIFICATE OF COMPLIANCE

ADITYA DYNAR (031583)
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
(202) 807-4472
ADynar@PacificLegal.org

Attorney for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

This Brief Amicus Curiae complies with Rule 14(a)(4) of the Arizona Rules of Civil Appellate Procedure in that the brief is double-spaced, employs a proportionately spaced typeface and the author's word count software program reports that this motion consists of 3,404 words.

DATED: November 22, 2023.

/s/ Aditya Dynar
ADITYA DYNAR (031583)

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CERTIFICATE OF SERVICE

ADITYA DYNAR (031583)
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
(202) 807-4472
ADynar@PacificLegal.org

Attorney for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2023, I caused the original of this Brief Amicus Curiae to be electronically filed with the Court via AZTurboCourt.com, and to be served via AZTurboCourt E-Service upon:

Michael C. Manning
Michael C. Manning, PLLC
10645 N. Tatum Blvd.
Suite C200-159
Phoenix, AZ 85028
Mcm717@cox.net
Attorneys for TP Racing, L.L.L.P.,
Jeremy E. Simms, and Bell Racing, LLC

James M. Torre
Michael Vincent
Stinson, LLP
1850 N. Central Avenue, Suite 2100
Phoenix, AZ 85004-4584
James.torre@stinson.com
Michael.vincent@stinson.com
Attorneys for TP Racing, L.L.L.P.,
Jeremy E. Simms, and Bell Racing, LLC

John G. Kerkorian
Michael S. Myers
BALLARD SPAHR LLP
1 East Washington St., Suite 2300
Phoenix, AZ 85004-2555
kerkorianj@ballardspahr.com
myersm@ballardspahr.com
Attorneys for Arizona Department of Gaming

Christopher L. Hering
Jacqueline Marzocca
GAMMAGE & BURNHAM P.L.C.
40 North Central Avenue, 20th Floor
Phoenix, Arizona 85004
chering@gblaw.com
jmarzocca@gblaw.com
Attorneys for the Arizona Racing Commission

Nathan J. Novak
COLE PEDROZA LLP
2295 Huntington Dr.
San Marino, CA 91108
nnovak@colepedroza.com
Attorney for Ronald A. Simms

Thomas A. Zlaket
THOMAS A. ZLAKET PLLC
310 S. Williams Blvd., Suite 170
Tucson, AZ 85711-7700
tom@zlaketlaw.com
Attorney for Ronald A. Simms

Dominic E. Draye
Matthew P. Hoxsie
GREENBERG TRAURIG, LLP
2375 East Camelback Road
Phoenix, Arizona 85016
drayed@gtlaw.com
hoxsiem@gtlaw.com
Attorneys for Ronald A. Simms

/s/ Aditya Dynar
ADITYA DYNAR (031583)