IN THE SUPREME COURT

STATE OF ARIZONA

SUN CITY HOME OWNERS ASSOCIATION, Petitioner, v. THE ARIZONA CORPORATION COMMISSION, Respondent, EPCOR WATER ARIZONA, INC. and VERRADO COMMUNITY ASSOCIATION, INC., Intervenors.	Supreme Court No. CV-20-0047-PR Court of Appeals Case No. 1 CA-CC 17-0002 Arizona Corporation Commission Docket No. WS-01303A-16-0145 Decision No. 76162

BRIEF *AMICUS CURIAE* OF THE GOLDWATER INSTITUTE IN SUPPORT OF PETITION FOR REVIEW FILED WITH CONSENT OF ALL PARTIES

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Goldwater Institute ("GI") is a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, individual freedom, and promoting the faithful enforcement of *state* constitutional protections. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files *amicus* briefs when its rights or is clients' objectives are directly implicated.

Among GI's priorities is the protection of individual rights against the administrative state—here specifically the Corporation Commission. Levels of deference that grant the Commission near immunity from judicial review contradict the principle of separation of powers, deprives individuals of the due process to which they are constitutionally entitled, and strips the court of its right to say what the law is. GI has litigated or participates as *amicus curiae* in courts around the nation in defense of individuals and in support of the curtailing of such deferential doctrines. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), *Cal. Sea Urchin Comm'n v. Combs*, 139 S. Ct. 411 (2018). GI scholars have published important research on the problems caused by the deference doctrines. *See. e.g.*,

[1] No counsel for any party authored the brief in whole or part, and no person or entity other than the Institute, its members, or counsel, made any monetary contribution for the preparation or submission of this brief.

Timothy Sandefur, *The First Line of Defense: Litigation for Liberty at the State Level* (Goldwater Institute, 2019).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Arizona courts have long followed a rule of deference toward the Corporation Commission's actions. But the deference applied by the court below exceeds anything established by existing precedent. The principle behind deference, to the Commission or any other state agency, is that such bodies exercise "informed and expert judgment" regarding a complex area of industry, the environment, or the economy, and that courts should accept their expertise. *S. Pac. Co. v. Ariz. Corp. Comm'n*, 98 Ariz. 339, 347 (1965). But this case is different. First, it concerns not a factual question calling for expertise, but a legal question calling for judicial determination: whether the Commission's action was "unjust" or "discriminatory." Second, the Commission made *no* determination on that question—yet the Court of Appeals deferred to it anyway by simply *assuming* it had.

Such a sweeping degree of legal fiction-plus-deference pushes the court to uncharted waters. If courts can first assume an agency has made a determination when it has not, and then defer to that imaginary determination, then judicial deference really will become what it is not supposed to be: judicial abdication.

Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 538 (2012) ("[D]eference in matters of policy cannot, however, become abdication in matters of law.").

In its previous cases, this Court has extended deference to the Commission only after the Commission made a showing that it was fulfilling its constitutional and statutory mandates. Here, by contrast, the Commission *did not address* the question of arbitrariness or discrimination. Instead, the court below supplied its own determination on that matter—by "presum[ing] the Commission's actions [were] constitutional," *Sun City Home Owners Assoc. v. Ariz. Corp. Comm'n*, 2020 WL 372884 at *3 ¶ 13 (Ariz. App. 2020) (citation omitted), and then deferring to its own presumption. That is excessive because courts cannot defer to discretion that was never exercised. *In re Morgan*, 506 F.3d 705, 710 (9th Cir. 2007) (deference improper where "no discretion has been exercised."). To permit this degree of deference would essentially erase all judicial review of the Commission's actions. *Amicus* urges the Court to review this case to put Commission jurisprudence back on the right track.

ARGUMENT

I. The Corporation Commission is not one of the three branches of Government established in the Constitution, and is not entitled to deference equivalent to those branches actually enumerated in the Constitution.

A. The Constitution does not make the Commission a coequal branch.

It is often argued that the Corporation Commission is a fourth branch of government because it has its own section in the Arizona Constitution. *See, e.g.,* *Polaris Int'l Metals Corp. v. Ariz. Corp. Comm'n*, 133 Ariz. 500, 506 (1982). This is a misconception. The Constitution subordinates the Commission to the other powers, including the judicial power.

First, the Constitution establishes an explicitly three-part government—not four: "[t]he powers of the government…shall be divided into three separate departments, the legislative, the executive, and the judicial…and no one of such departments shall exercise the powers properly belonging to either of the others." Ariz. Const. art. 3.

Moreover, the Constitution subordinates the Commission to the three actual branches, by authorizing the legislature to "prescribe rules and regulations to govern proceedings instituted by and before" the Commission, Article 15, section 6, and by expressly establishing the right to judicial review of Commission rate

proceedings. *Id*. section 17.These protections for the checks-and-balances system reiterate the point in Article 15 that there are only three, not four, branches.

The judicial power granted to the Commission in Article 15, section 4 is limited. It gives the Commission power to inspect books, papers, business methods and properties, which is similar to the authority of a court of general jurisdiction in terms of compelling attendance of witnesses and production of evidence. These are specific and explicit grants of power—not a general judicial power, but a limited one, which , again implies that the Commission is not on a constitutional par with the three branches of government.

In addition, the "legislature's right to control…the Commission's rate proceedings are expressly set forth" in Article 15, section 6. *State ex rel. Corbin v. Ariz. Corp. Comm'n*, 143 Ariz. 219, 224–25 (App. 1984). The legislature has exercised this power by, among other things, adopting A.R.S. § 40-254, which entitles any party in interest, or the Attorney General, to appeal a Commission decision. It also exercised its power over the Commission by requiring adherence to the Arizona Administrative Procedure Act.

The rationale underlying deference is that the Commission deals with complex questions of fact that may be beyond the expertise of the Court. *Campbell v. Mountain States Tel. & Tel. Co.*, 120 Ariz. 426, 430 (App. 1978). For the same reason, deference to an agency on *legal* questions is improper, because

courts are the experts on legal questions. Likewise, courts should not invade the Commission's sphere of power by providing it with expertise that it failed to exercise, or by creating findings of fact and conclusions of law relating to discrimination where the Commission made no such findings or conclusions. For a court to *aid* an agency by imposing its own views regarding proper legal conclusions violates the basic principles of deference just as much as if a court were to disregard the agency's properly-exercised expert judgment.

Separation-of-powers protects not only each branch of government from incursion by the other branches, but also the individual rights of citizens. *Bond v. United States*, 564 U.S. 211, 222 (2011). The judiciary cannot fulfill its obligations when it allows the Commission to usurp its power, and thus prevent courts from objectively analyzing the legal issues before it. As this Court warned in *J.W. Hancock Enterprises v. Arizona State Registrar of Contractors*, 142 Ariz. 400, 404 (App. 1984), where "powers are united in the same…body of magistracy, there can be no liberty;…[because]…the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator." (internal citations omitted).

B. Existing precedent is unclear on the question of the Commission's constitutional status, and that should be definitively determined.

The theory that the Commission is on a constitutional par with the legislature traces back to *State v. Tucson Gas, Electric Light & Power Co.*, 15

Ariz. 294 (1914), which, through an overly-generous application of the *exclusio alterius* canon, concluded that the Commission's power preempts the legislature with regard to regulation of corporations. Because the Constitution lets the Commission set rates, with only one specific exception to that power (relating to incorporated cities and towns), *Tucson Gas* concluded that the legislature was preempted from regulating corporations. *Id.* at 298-300.

The conclusion *Tucson Gas* drew was far broader than the premises warranted. If "[t]he framers of the Constitution were fully informed as to the chaotic conditions existing…and sought to correct it in the fundamental law," and because of this made the Corporation Commission a fourth branch of government, it is implausible that they would have left such a radical proposition to implication instead of saying so directly—let alone use the word "three" in article 3. *Id.* at 306.

Moreover, as the dissent in *Tucson Gas* observed, there is no necessary conflict between the Commission's authority to prescribe rates and otherwise regulate the operations of public service corporations, and the legislature's authority to enact laws regulating corporations. *Id.* at 310 (Cunningham, J., dissenting). Using the same *exclusio alterius* reasoning, the dissent observed that the legislature has a general power to regulate matters not expressly denied it (and the regulation of corporations is not expressly withheld). The logical conclusion to

draw is that the Commission's regulations take precedence over *conflicting* regulations adopted by the legislature, but in the absence of conflict, the legislature has authority.

Four years after *Tucson Gas*, this Court essentially agreed with the dissent's theory in *Arizona Eastern Railroad Co. v. State*, 19 Ariz. 409 (1918), which, concluded that the legislature and the Commission had concurrent authority to regulate railroads, and that the Constitution did not give the Commission exclusive authority. *Id.* at 410-11. It said the same in *Corporation Commission v. Pacific Greyhound Lines*, 54 Ariz. 159 (1939).

But in *Arizona Corporation Commission v. Woods*, 171 Ariz. 286 (1992), it again reversed course, on the grounds that the Constitution's authors "shared a strong distrust" both of "corporate powers" and of the legislature's regulation of corporations. *Id.* at 291. That is true, of course, but those authors were also distrustful of government agencies controlling individual freedom—particularly economic freedom—without adequate checks and balances. The Arizona Constitution, after all, was a product of the so-called "*Lochner* era," during which it was assumed that the right to engage in economic exchange and productivity was protected by the Constitution, and that government interference with that liberty was subject to judicially-enforceable limits. *See* Paul Avelar & Keith Diggs, *Economic Liberty and the Arizona Constitution: A Survey of Forgotten History*, 49

Ariz. St. L.J. 355, 388–95 (2017) (Arizona's founders were skeptical of regulatory agencies). In fact, Arizona's framers shared a "heightened concern" about the risk of what today's economists call "regulatory capture," as discussed below. *Id.* at 395. But while the *Woods* court correctly noted the founders' concerns about the potential of *corporate* abuses, it entirely ignored countervailing concerns about the danger of *regulatory* authority in the absence of checks and balances.

II. Judicial Review Requires the Commission to Develop and Base Decisions on the Record

Like much of the administrative state, the Commission is a legacy of the Progressive Era that began at the end of the nineteenth century. Gary Lawson, *Federal Administrative Law* 8 (7th ed. 2016). The scope of judicial deference to agency decision-making has waxed and waned throughout the past century, as our understanding of the role, benefits, and shortcomings of agencies and commissions advanced.

At their inception, advocates viewed administrative agencies as apolitical entities that dispassionately used their expertise in support of the common good. *Id.* at 73. Believing that agencies acted objectively in the best interest of the public, courts began deferring to their actions in ways that largely removed themselves from the picture. *Id.*

Beginning in the 1960s, however, economists began to emphasize that regulatory agencies were subject to economic incentives and political pressures

just as all public entities and private firms are. "Capture theory" emphasized that agencies often came to serve the interests of the industries they were supposed to regulate, and the "knowledge problem" underscored that no central authority could obtain the information necessary to competently and fully regulate an industry. *See* James Buchanan & Gordon Tullock, *The Calculus of Consent* (1960); Friedrich Hayek, *The Use of Knowledge in Society*, 35 Amer. Econ. Rev. 519 (1945).

Though popularized by Nobel Prize winning economists such as Hayek, Buchanan, Milton Friedman, and George Stigler, these theories actually originated with empirical investigations into the functioning of regulatory agencies that controlled electricity prices and securities markets. *See* Larry Gerston, et al., *The Deregulated Society* (1988). By the late 1960s, agency capture, rent-seeking, and other phenomena were recognized as universal conditions of the administrative state. Thomas Merrill, *Capture Theory and the Courts: 1967-1983*, 72 Chi.-Kent L. Rev. 1039, 1061 (1997). These developments led courts to reconsider their previous deference to agency autonomy because over time, agency action could be co-opted so that its policies benefit those it regulates. Gerston, *supra*, at 193-95.

The late 1980s witnessed a shift back toward a greater judicial deference to agency decision making, which was initiated by the decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), but

Chevron's broad deference rule was hard to square with traditional understandings of the judicial role or understandings of agency capture, and was met with hostility. Lawson, *supra*, at 568. In fact, scholars agree that *Chevron* was not originally intended to suggest that courts should provide greater deference to agencies. *Id.* at 572. What the Court intended was either an unchanged level of deference or possibly *less* deference to agency interpretation. *Id.* at 572. The misreading originated in the lower courts, particularly in the D.C. Circuit, which used *Chevron* as a means to consolidate a confusing, ten-factor inquiry into a simpler two-step test—but this led them to give *Chevron* a stronger and unwarranted reading. *Id.* at 568-69. *See* Colin Diver, *Statutory Interpretation in the Administrative State*, 133 U. Pa. L. Rev. 549, 562 (1985). In fact, the Supreme Court clarified in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), that it did not intend *Chevron* to be read as broadly as the lower courts read it. Instead an issue which is "a pure question of statutory interpretation [is] for the *courts* to decide." *Id.* at 446 (emphasis added).

By 1987, Justice Scalia was the only Justice on the Supreme Court who would routinely grant deference to agency interpretations of matters of pure law. Although three of his colleagues later joined him, Lawson, *supra* at 576, the Court never moved past a 4-4 split on that level of deference, and by 2011, even Scalia began to question broad agency deference. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring).

Today, courts have stepped up their effort to ensure that regulators act in conformity with the requirements of statutes and constitutions. Recent federal decisions highlight this focus on limiting the discretion of regulatory bodies. *See* *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2055 (2018) (agencies are required to comply with the Appointments Clause of the Constitution); *Kisor*, 139 U.S. at 2408 (*Auer* deference should be "cabined in its scope."); *Guedes v. ATF*, 140 S. Ct. 789 (2020) (mem.) (judicial deference to an agency's shifting interpretation of existing law may be unconstitutional).

Here, however, the Court of Appeals did the opposite, and in an extraordinary way. First, it assumed that the Commission reached a legal conclusion that it never actually reached, and then it deferred to that conclusion. The words "discrimination" and "discriminatory" were not in the Commission's findings of fact and conclusions of law, and the Commission referenced neither the relevant statute nor any appropriate constitutional provision in its argument. Yet the court below simply assumed the opposite, and then deferred to the legal fiction it had created regarding the Commission's findings.

This stretches deference far beyond the boundaries of existing precedent. It is axiomatic that a court cannot defer to discretion that was never exercised. *Williams v. BellSouth Telecomms., Inc.*, 373 F.3d 1132, 1137 (11th Cir. 2004); *Gritzer v. CBS, Inc.*, 275 F.3d 291, 295 (3d Cir. 2002). By creating the legal

fiction that the Commission exercised discretion, and then deferring to that fictitious discretion, the court below effectively acted as both litigant and adjudicator. This does not comport with traditional notions of fairness or justice. It is also difficult to square with the separation of powers. The framers of the Constitution made the Commission, not the judiciary, responsible for engaging in complex and technical calculations. John Goff ed., *The Records of the Arizona Constitutional Convention of 1910* at 979 (1991). But they made the judiciary, not the Commission, responsible for legal matters such as whether the Commission's actions violate the non-discrimination requirement. While the Commission's views on that matter may inform judicial judgment, they cannot be taken as dispositive, and *certainly* not where the Commission never made any such findings.

Such excessive deference diverges not only from existing Arizona precedent, but also from the trend of state courts today, which have begun to reject as outdated standards of review that defer excessively to agency interpretations of statutes, on the grounds that it is "for the courts and the courts alone, to interpret statutes." *King v. Miss. Military Dept.*, 245 So. 3d 404, 408 ¶ 12 (Miss. 2018).

Arizona's history of judicial review of Commission actions aligns with and tends to foreshadow the national trend, from its original grant of extreme deference in *Tucson Gas* in 1914, to more robust review, in which the Court re-established

judicial authority over the Commission. This can be seen in cases through the 1940s, as typified by *Trico Electric Cooperative v. Ralston*, 67 Ariz. 358 (1948), in which the Court, in deciding a contract dispute, held that "[n]o judicial power is vested in or can be exercised by the [C]orporation [C]omission unless that power is *expressly* granted" by a "*strict* construction of the Constitution and implementing statutes." *Id.* at 363, 365 (emphasis added). This move toward lesser deference is also seen in cases like *Menderson v. City of Phoenix*, 51 Ariz. 280 (1938), in which the Court was asked to decide if a municipal corporation could be required to obtain a certificate of necessity and convenience from the Commission. *Id.* at 282. It held that the Commission could not regulate any government or municipal corporations. *Id.* at 283.

In the 1970s, the judiciary continued to cabin the Commission's power. In *General Cable Corp. v. Citizens Utilities Co.*, 27 Ariz. App. 381 (1976), the court dealt with a contract dispute in which a utility company sought payment for a cancelled electricity contract. The court held that it was for judges, not the Commission, to determine the construction and interpretation to be given to legal rights under a contract. *Id.* at 385-86. In the 1980s, Arizona continued in this direction, bucking the national trend that saw federal courts reviving deference to agencies. For instance, in *Corbin*, *supra*, a case challenging fraudulent rate-making proceedings by the Commission, this Court held that rate-making agencies

were subject to judicial scrutiny. 143 Ariz. at 223. The Court characterized agency rate-making as legislative, but explicitly refused to afford the Commission the level of deference it would grant the legislature. *Id.* at 223-24. The Court stated that the process by which rate decisions are made cannot legitimately be analogized to a legislative process. *Id.* *Corbin* mandated that for the rate-making process there must be a proceeding that meets fundamental procedural fairness requirements, including a full hearing, and the taking and weighing of adequate evidence to support pertinent and necessary findings of fact. *Id.*

This Court should not retreat from this healthy skepticism of regulatory agency actions. Nor should it further erode its own authority by becoming a mere rubber stamp. *See* *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 426 ¶ 58 (App. 2001) (courts must not "merely rubber-stamp" decisions by the legislature). *See also* *Ariz. Ctr. for Law in Pub. Interest v. Hassell*, 172 Ariz. 356, 367 (App. 1991) (granting deference but being cognizant that the court may not rubber-stamp the legislature's decisions). Certainly, the judiciary should not provide a level of deference it does not even grant the legislature. It should instead require the Commission to exercise its expertise and provide clearly articulated standards for its determinations. *Id.* At a minimum, it should require a "reasoned explanation…for disregarding facts and circumstances that underlay or were

engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

CONCLUSION

The Court should grant the petition to declare that there are only three branches of government in this state, the Executive, the Judicial, and the Legislative and cabin the scope of the Corporation Commission's power by limiting judicial deference to its decisions. At a minimum the Commission should be required to actually employ its discretion before a court defers to that discretion. The Court should remand this case for further consideration and require the Commission to show, if it can, that it considered the question of rate discrimination. Thereafter, that conclusion should be subjected to a reasoned and thorough substantive review by the courts.

Respectfully submitted this 13th day of April, 2020 by:

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