SUPREME COURT OF ARIZONA

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

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER FILED WITH CONSENT OF ALL PARTIES

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INTEREST OF AMICUS CURIAE

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil rights organization devoted to defending constitutional freedoms from violations by the administrative state. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by elected lawmakers through constitutionally prescribed channels rather than by an executive agency acting outside those channels. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication, for they have been trampled upon for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Arizona and U.S. Constitutions were designed to prevent. This unconstitutional state within the state and federal governments is the focus of NCLA's concern.

This case is particularly important to NCLA. It believes this case is an opportunity for this Court to fulfill its fundamental duty "to say what the law is" and denounce deference to agency interpretations. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). In doing so, NCLA believes the Members of the Court would honor their duty as judges, protect the due process of law for all litigants, and bolster the confidence of the people in the courts.

No one other than the *amicus curiae* authored any part of this brief or financed the preparation of this brief. Counsel for all parties provided written consent via email to NCLA's submission of this *amicus* brief.

ARGUMENT

In granting the petition for review, this Court rephrased the questions presented. NCLA focuses on the second of the two questions: "Whether the Corporation Commission's constitutional status commands 'extreme deference' to its decisions." NCLA takes no position on the Arizona Corporation Commission's (ACC) statutory interpretations or any other issues raised on appeal. Its sole aim is to convince the Arizona Supreme Court to interpret the statutory or regulatory texts for itself and not to defer to the legal interpretations of any administrative agency, even the ACC. Deferring to a state agency's interpretations violates both the state and federal constitutions for at least two reasons. First, agency deference requires judges to abandon their duty of independent judgment. Second, agency deference violates the Due Process Clauses of the Arizona Constitution and the Fourteenth Amendment of the U.S. Constitution by commanding judicial bias toward one litigant—and hence against the other. *See* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1195 (2016) (asking and answering these two questions).[1]

[1] "What matters here, instead, are two constitutional questions about the judges' duty of independent judgment and about the people's due process right not to be subject to systematic judicial bias. These constitutional questions cannot be resolved by asking about the statutory authority of the executive and other agencies. Even if an agency has statutory authority to interpret for its purposes, judges enjoy their office of

The Arizona Constitution requires judges to exercise independent judgment and to refrain from bias in favor of one litigant and against the other when interpreting the law. These are foundational constitutional requirements for an independent judiciary. Additionally, the Due Process Clause of the Arizona Constitution forbids judges from showing bias for or against a litigant when resolving disputes. These statements of judicial duty are so axiomatic that they are seldom mentioned or relied upon in legal argument—because even to suggest that a court might depart from its duty of independent judgment or display bias toward a litigant would be disturbing.

Yet deference to agency interpretations flouts these bedrock constitutional principles. Unfortunately, repeated citations and incantations of any legal precedent run the danger of producing uncritical and unthinking acceptance. The constitutional problems with the court-created deference doctrine discussed in this brief remain as acute as ever.

I. DEFERENCE REQUIRES JUDGES TO ABANDON THEIR DUTY OF INDEPENDENT JUDGMENT

Agency deference compels judges to abandon their duty of independent judgment. Under the Arizona Constitution, the judiciary is a separate and independent branch of the state government, and no one else can exercise the "powers properly belonging" to the judiciary. Ariz. Const. art. 3; Ariz. Code of Judicial Conduct Canon 1 ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."),

judgment from [Article 6] and are limited by the [Due Process Clause]." Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. at 1196.

https://bit.ly/3rOmogF. Staying faithful to Arizona's separation-of-powers doctrine prevents state agencies from usurping the judicial role to say what the law is, and it protects judges from violating the doctrine by stopping them from acquiescing in the agency's statement of what the law is.

Despite these constitutional absolutes, "deference" actually commands Arizona judges to do exactly the opposite of what they are sworn to do. It tells them to abandon their independence by giving controlling weight to ACC's opinion of what a statute means—not because of the persuasiveness of ACC's argument, but rather based solely on the brute fact that this administrative entity has addressed the interpretive question before the Court. *See Michigan v. EPA*, 576 U.S. 743, 761 (2015) ("The judicial power … requires a court to exercise its independent judgment in interpreting and expounding upon the laws. … [Agency] deference precludes judges from exercising that judgment.") (quoting *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 119 (2015)) (cleaned up) (Thomas, J., concurring).

This abandonment of judicial responsibility is not tolerated in any other context—nor should it be accepted by a truly independent judiciary. The Code of Judicial Conduct and the Arizona Constitution both mandate judicial independence, a requirement that cannot and should not be easily displaced. Yet agency deference allows a non-judicial entity to usurp the judiciary's power of interpretation and commands judges to "defer" to the legal pronouncements of a supposedly "expert" body external to the judiciary.

In the end, agency deference is nothing more than a command that courts abandon their duty of independent judgment and assign controlling weight to a non-

judicial entity's interpretation of a statute. It is no different in principle from an instruction that courts assign weight and defer to statutory interpretations announced by a legislative committee, a group of expert legal scholars, or *The Arizona Republic* editorial board. In each of these absurd scenarios, the courts similarly would be following another entity's interpretation of a statute so long as it is not "clearly wrong"—even if the court's own judgment would lead it to conclude that the statute means something else.

To be clear, there is nothing at all wrong or constitutionally problematic about a court that considers an agency's interpretation and gives it weight according to its persuasiveness. *See, e.g., Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 914 N.W.2d 21, 53 (Wis. 2018) (noting "administrative agencies can sometimes bring unique insights to the matters for which they are responsible" but that "does not mean we should defer to them"). An agency is entitled to have its views heard and considered by the court, just as any other litigant or *amicus*, and a court may and should consider the "unique insights" an agency may bring on account of its expertise and experience. *Id.* "'[D]ue weight' means 'respectful, appropriate consideration to the agency's views' while the court exercises its independent judgment in deciding questions of law"—due weight "is a matter of persuasion, not deference." *Id.*

The court below gave "extreme deference" to ACC—which led Judge Brown to pen a dissent calling out the majority's error of "giving virtually absolute deference" to ACC's decision. *Sun City HOA v. ACC*, 248 Ariz. 291, 297 ¶ 13, 301 ¶ 35 (App. 2020). Recognizing an argument's persuasive weight does not compromise a judge's duty of independent judgment. But the deferential standard the court below applied to ACC

requires far more than respectful consideration of ACC's views; it commands that judges give weight to those views simply because ACC espouses them, and it instructs judges to subordinate their own judgments to the views preferred by ACC. That approach turns "judicial review" and "judicial independence" on their head. In contrast to such deference, the judicial duty of independent judgment allows (indeed, requires) judges to consider an agency's views and to adopt them *when persuasive*, but it forbids a regime in which courts "defer" or give automatic and controlling weight to a non-judicial entity's interpretation of statutory language—particularly when that interpretation does not accord with the court's sense of the best (*i.e.*, most correct) interpretation.

II. DEFERENCE VIOLATES THE DUE PROCESS CLAUSE BY REQUIRING JUDGES TO SHOW BIAS IN FAVOR OF AGENCIES

A related and more serious problem with deference is that it requires the judiciary to display systematic bias in favor of agencies whenever they appear as litigants. *See generally* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016). It is bad enough that a court would abandon its duty of independent judgment by deferring to a non-judicial entity's interpretation of a statute. But for a court to abandon its independent judgment in a manner that favors an actual *litigant* before the court violates due process.

The U.S. Supreme Court has held that even the appearance of potential bias toward a litigant violates the Due Process Clause. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886–87 (2009). Indeed, judges are required to provide "neutral and respectful consideration" of a litigant's views free from "hostility or bias." *Masterpiece*

Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719, 1734 (2018) (Kagan, J., concurring). The Arizona Code of Judicial Conduct Canon 2 recognizes this absolute and mandates "impartial[ity]" of an Article 6 judge. Nonetheless, under agency-deference doctrines, otherwise scrupulous judges who are sworn to administer justice impartially somehow feel compelled to remove the judicial blindfold and tip the scales in favor of the government litigant's position. This constitutionally abhorrent practice must stop.

Deference institutionalizes a regime of systematic judicial bias by requiring courts to "defer" to agency litigants whenever a disputed question of statutory interpretation arises. Rather than exercise their own judgment about what the law is, granting "deference" instructs judges to defer to the judgment of one particular litigant before them unless it is clearly wrong. A judge who openly admitted that he or she accepts a government litigant's interpretation of a statute by default—and that he or she automatically rejects any competing interpretations that might be offered by the non-governmental litigant unless the government is clearly wrong—might be impeached and removed from the bench for exhibiting such bias and abusing judicial power. Yet that description comes perilously close to what judges actually do whenever they apply "deference" in cases where ACC appears as a litigant. The government litigant wins simply by showing that its preferred interpretation of the statute is not "clearly wrong," or that the agency's interpretation is a product of "expertise" and "policy choice," while the opposing litigant gets no such latitude from the court and must show that the government's view is not merely wrong, but clearly so.

Deference has long remained the exception, not the rule, in Arizona. Even before A.R.S. § 12-910 was amended in 2018 to reject deference, "this Court ha[d] never expressly considered whether *Chevron* or its progeny establish standards for administrative deference under Arizona law." *Stambaugh v. Killian*, 242 Ariz. 508, 512 ¶ 25 (2017) (Bolick, J., concurring). There is no occasion to adopt a deferential standard of review now.

To the extent conflicting judicial precedent supports deference to ACC, such deference has strayed from its modest beginnings. Besides, "[a] wrong cannot be sanctioned by age and acquiescence, and transformed into a virtue. Indifference and lack of vigilance have lost some of the dearest rights to the people, but they can always be regained by energy and persistence." *Terrell v. Middleton*, 187 S.W. 367, 373 (Tex. Civ. App. 1916), *writ denied*, 191 S.W. 1138 (Tex. 1917); *see also Driscoll v. Burlington-Bristol Bridge Co.*, 86 A.2d 201, 231 (N.J. 1952) ("[W]e are not impressed by the plaintiffs' argument that the practice is to the contrary, for if that is the practice, it should be terminated, not perpetuated.").

Arizona's judiciary, like its federal counterpart, "has imposed upon it, by the Constitution, the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it." *United States v. Dickson*, 40 U.S. 141, 162 (1841) (Story, J., writing for the Court). Justice Clarence Thomas, dissenting from denial of certiorari in February 2020, had this to say: "In the past, I have left open the possibility that 'there is some unique historical justification for deferring to federal agencies.' … It now appears to me that there is no such special

justification and that [agency deference] is inconsistent with accepted principles of statutory interpretation from the first century of the Republic." *Baldwin v. United States*, 140 S. Ct. 690, 692–93 (2020) (quoting *Michigan v. EPA*, 576 U.S. at 763). This Court should apply the same longstanding principles and give no deference to ACC's interpretations.

The courts of last resort in other states have rejected deference to an administrative agency's interpretations in favor of maintaining judicial independence and separation of powers, thereby returning to the constitutional foundation of judicial review. Mississippi courts once reviewed agency interpretations of a rule or statute as "a matter of law that is reviewed *de novo*, but with great deference to the agency's interpretation." *Miss. Methodist Hosp. & Rehab. Ctr., Inc. v. Miss. Div. of Medicaid*, 21 So.3d 600, 606 ¶ 15 (Miss. 2009), *abrogated by King v. Mississippi Military Dep't*, 245 So.3d 404 (Miss. 2018). *Mississippi Methodist* had assumed, like the lower court here, that the "duty of deference derives from our realization that the everyday experience of the administrative agency gives it familiarity with the particularities and nuances of the problems committed to its care which no court can hope to replicate." 21 So.3d at 606 ¶ 15. In 2018, however, the Mississippi Supreme Court rejected this rationale and "abandon[ed] the old standard of giving deference to agency interpretations of statutes." *King*, 245 So.3d at 408 ("[I]n deciding no longer to give deference to agency interpretations, we step fully into the role the Constitution of 1890 provides for the courts and the courts alone, to interpret statutes.").

Wisconsin also once showed "great weight deference" to agency interpretations. But Wisconsin has now reversed course as well. *See Tetra Tech*, 914 N.W.2d at 33–34

(tracing the roots of its deference doctrine to "language of persuasion" and an "acknowledg[ment] that a change in an ancient practice could have unacceptable disruptive consequences."). Where Wisconsin courts "once treated an agency's interpretation of a statute as evidence of its meaning," the "reach of the deference principle" first expanded to "something the courts could do in interpreting and applying a statute, but were not required to do." *Id.* at 36–37. Later, a 1995 decision from the Wisconsin Supreme Court "made the deference doctrine a systematic requirement upon satisfaction of its preconditions" and "[i]t accomplished this fact by promoting deference from a canon of construction to a standard of review." *Id. Tetra Tech* explained this was a misguided step in the evolution of the deference doctrine:

> Enshrining this [deference] doctrine as a standard of review bakes deference into the structure of our analysis as a controlling principle. By the time we reach the questions of law we are supposed to review, that structure leaves us with no choice but to defer if the preconditions are met.

Id. at 38.

While Wisconsin courts recognized that this deference doctrine "allowed the [agency] to authoritatively decide questions of law in specific cases brought to our courts for resolution," the court never "determine[d] whether this was consistent with the allocation of governmental power amongst the three branches." *Id.* at 40. After concluding that its "deference doctrine cedes to administrative agencies some of our exclusive judicial power," it "necessarily follow[ed] that when [an] agency comes to [the court] as a party in a case, it—not the court—controls some part of the litigation." *Id.* at 49. "When a court defers to the governmental party, simply because it is the

government, the opposing party is unlikely to be mollified with assurances that the court bears him no personal animus as it does so." *Id.* *Tetra Tech* recognized Wisconsin's deference doctrine "deprive[s] the non-governmental party of an independent and impartial tribunal," while granting the "rule of decision" to any "administrative agency [that] has an obvious interest in the outcome of a case to which it is a party." *Id.* at 50. The court thus concluded that "deference threatens the most elemental aspect of a fair trial"—a fair and impartial decisionmaker. *Id.* By rejecting the deference doctrine, the court "merely … join[ed] with the ancients in recognizing that no one can be impartial in his own case." *Id.*

Justice Clarence Thomas recently underscored the rejection of the rationale for deference, concluding that agency deference "differs from historical practice in at least four ways." *Baldwin*, 140 S. Ct. at 694.

> First, it requires deference regardless of whether the interpretation began around the time of the statute's enactment (and thus might reflect the statute's original meaning). Second, it requires deference regardless of whether an agency has changed its position. Third, it requires deference regardless of whether the agency's interpretation has the sanction of long practice. And fourth, it applies in actions in which courts historically have interpreted statutes independently.

Id.

In short, no rationale can support a practice that weights the scales in favor of a *government* litigant—the most powerful of parties—and commands systematic bias in favor of the government's preferred interpretations of statutes. Whenever deference is applied in a case in which the government is a party, the courts deny due process to the

non-governmental litigant by showing favoritism to the government's interpretation of the law.

III. *STARE DECISIS* PROVIDES NO ROADBLOCK AND THE JUDICIAL CODE OF CONDUCT REQUIRES THE COURT TO RECOGNIZE CONSTITUTIONAL PROBLEMS WITH DEFERENCE

Arizona case law has not considered or addressed these constitutional objections to agency deference previously. *See, e.g.*, *Stambaugh*, 242 Ariz. at 512 ¶ 25 (Bolick, J., concurring). *Amicus curiae* is unaware of any Arizona cases addressing these precise constitutional objections. So, it is not true that this Court has rejected these constitutional arguments by deferring to agencies in the past. Judicial precedents do not resolve issues or arguments that they never raised or discussed. *See Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) ("Cases cannot be read as foreclosing an argument that they never dealt with."); *see also Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (holding that when "standing was neither challenged nor discussed" in an earlier case, that case "has no precedential effect" on the issue of standing); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point."); *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.").

Stare decisis therefore presents no obstacle to analyzing these constitutional objections and declaring agency deference unconstitutional. In all events, a court's ultimate duty is to enforce the Constitution—even if that comes at the expense of

judicial opinions that never considered the constitutional problems briefed here. *See Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."); *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (*Stare decisis* "is at its weakest when [the Court] interpret[s] the Constitution.").

Assuming for argument's sake that *stare decisis* applies, it is well-settled that "*stare decisis* is flexible and able to meet changing circumstances. … [It] is but a doctrine of persuasion and not an iron chain of necessary conclusion." *White v. Bateman*, 89 Ariz. 110, 113 (1961). *Amicus curiae* respectfully asks the Court to refuse to grant deference to ACC's interpretation. Hence, even if it ultimately reaches the same interpretive conclusion as ACC, the Court should repudiate agency deference on constitutional grounds in its opinion to make clear that the Court reached its decision independently.

The Court should give serious consideration to the above option—if only to avoid the potential hazard agency deference presents to lower courts in Arizona. Arizona Code of Judicial Conduct Canon 2.11(A)(1) requires a judge to "disqualify himself or herself in an proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party." Though agency deference involves an institutionally imposed bias rather than personal prejudice, the resulting partiality is inescapable, for the doctrine requires judges systematically to favor an agency's interpretations over those offered by opposing litigants. And judges cannot excuse this bias by invoking their duty to follow precedent, for there is no "superior-orders defense" available in the Code of Judicial Conduct. These fundamental constitutional

questions will continue to haunt judges—as they did the three-judge panel below—until this Court addresses them.

"Deference" to an administrative agency's interpretations of statutes puts lower court judges in an impossible situation; it is an assault on their duty of independence, their oath, the separation-of-powers doctrine, and the unbiased due process of law that courts owe to each and every litigant who appears before them. Deference thus compels them to betray core responsibilities of judicial office. It is long past time for conscientious judges to call out the ways in which this deference has misled the judiciary—and to advocate a return to the judicial independence, unbiased judgment, and due process of law that Arizona's Constitution requires. Ariz. Const. art. 2, § 4.

If the Court is not prepared to reject "deference" across the board, although *amicus curiae* believes that it should, the Court must at least recognize and repudiate the deep unfairness that would result from deferring to the interpretation that is proffered by the real party in interest in this litigation (the ACC). This Court should recognize the denial of due process inherent in deferring to one party at the expense of another and reject that indefensible approach regardless of whose interpretation the Court adopts.

IV. ARIZONA CORPORATION COMMISSION HAS NO SPECIAL CONSTITUTIONAL STATUS THAT SUPPORTS DEFERENCE TO ITS DECISIONS, AND RELEVANT STATE STATUTES DO NOT INSTRUCT OTHERWISE

The separation-of-powers, due-process, and judicial-conduct principles enunciated above are applicable with equal force and across the board whenever Article 6 judges are tasked with interpreting statutes or regulations, and whenever they are tasked with ensuring that adversarial factfinding strictly complies with the rule of law

and well-established rules of evidence and procedure.[2] Any agency that finds itself mentioned in the Arizona Constitution cannot thereby ask for and obtain any judicial acquiescence or bias.

Several state agencies are specifically mentioned, and their duties defined, in the Arizona Constitution:

- Department of Administration, Ariz. Const. art. 4, pt. 2, §§ 1(18), (19), (22);
- Independent Redistricting Commission, Ariz. Const. art. 4, pt. 2, §§ 1(18)–(23);
- Commission on Salaries for Elective State Officers, Ariz. Const. art. 5, § 12;
- Commission on Appellate Court Appointments, Ariz. Const. art. 6, § 36 & art. 4, pt. 2, §§ 1(4), (5), (7), (8), (11);
- Commission on Trial Court Appointments, Ariz. Const. art. 6, §§ 37, 41;
- Commission on Judicial Conduct, Ariz. Const. art. 6.1;
- Economic Estimates Commission, Ariz. Const. art. 9, §§ 17, 20, 21;
- Arizona Corporation Commission, Ariz. Const. art. 15;
- Department of Insurance, Ariz. Const. art. 15, § 5; and
- Arizona State Real Estate Department, Ariz. Const. art. 26, § 1.

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[2] "[D]eference to administrative interpretation is not the only problematic sort of judicial deference. Just as parties are owed the independent judgment of judges, they also are owed the independent verdict of a jury; thus, when judges defer to administrative records or other agency decisions about facts, they are denying Americans their right to a jury. Judges are denying Americans the right to a jury not merely at the agency level, but also in the courts themselves. Moreover, when judges adopt the record or factual claims of one of the parties, in place of a judicial record, they are engaging in systematic bias in favor of one party's version of the facts. This behavior is difficult to reconcile with the due process of law." Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. at 1203.

Deference cannot be owed to a state agency simply because the Constitution singles it out to better define and delimit its functions. The Corporation Commission enjoys no special constitutional status to interpret statutes or regulations. There is nothing in Article 15 that dilutes either the separation-of-powers doctrine of Article 3, the due-process clause of Article 2, Section 4, or the judicial oath of "impartial[ity]" taken by Arizona judges, including Members of this Court. Ariz. Const. art. 6, § 26.

A.R.S. § 12-910 also does not preclude this Court from rejecting deference to ACC. In 2018, after this Court decided *Stambaugh v. Killian* (2017), the fifty-third legislature amended Section 12-910 to reject deference by adding the following language to subsection (E):

> In a proceeding brought by or against the regulated party, 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. Notwithstanding any other law, this subsection applies in any action for judicial review of any agency action that is authorized by law.

A.R.S. § 12-910(E). The fifty-third legislature also added subsection (G), which reads as follows: "This section does not apply to any agency action by an agency that is created pursuant to article XV, Constitution of Arizona." A.R.S. § 12-910(G).

Subsection (G) cannot be construed as a legislative command to give "virtually absolute deference" to the Arizona Corporation Commission or the Department of Insurance—two agencies "created pursuant to article XV, Constitution of Arizona." By enacting subsection (G), the legislature simply did not provide a standard of review for

those two state agencies. Subsection (G) does not preclude Arizona courts from establishing a particular standard of review for these two state agencies. Nor does subsection (G) prevent this Court from evaluating the constitutionality of the "extreme deference" standard that the court below felt compelled to apply to ACC decisions. Because deference flunks as a constitutional matter, nothing in A.R.S. § 12-910 prevents this Court from saying so.

State statutes cannot override the state constitution; the legislature's "plenary power to deal with any topic" extends only insofar as it is not "otherwise restrained by the Constitution." *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 595 ¶ 27 (2017); Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. at 1197 ("[N]o amount of statutory authority for agencies can ever relieve judges of their constitutional duty or of the people's constitutional right. The statutory question about the authority of agencies cannot save judges from the constitutional questions about their role."). Even if one were to assume that A.R.S. §§ 12-910(E), (G), *by implication*, require the Court to defer to ACC decisions, this Court would still need to evaluate the constitutionality of affording such deference. This Court is constrained by the Constitution, as *amicus curiae* has explained throughout this brief, from deferring to state agencies—regardless of whether those agencies receive specific mention in the Arizona Constitution.

What's more, Article 15 itself preserves "the right of appeal to the courts of the state." Ariz. Const. art. 15, § 17. Article 15 does not in any manner modify Articles 2, 3, or 6 of the Constitution. And nothing in A.R.S. §§ 40-254, 40-254.01 (sections pertaining to judicial review of ACC decisions) precludes *de novo* or no-deference appellate review by state courts.

CONCLUSION

The Court should declare agency deference unconstitutional. The Court should decline to defer to ACC's interpretation and instead provide a *de novo* interpretation of the relevant statutory or regulatory text at issue in this case. Even if the Court's interpretation ultimately coincides with ACC's analysis, it should only reach that conclusion independently and should call out the constitutional defects of "deferring" to state-agency interpretations in its opinion.

Respectfully submitted, on April 6, 2021.

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SUPREME COURT OF ARIZONA

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

CERTIFICATE OF COMPLIANCE
FOR
BRIEF *AMICUS CURIAE* OF THE
NEW CIVIL LIBERTIES ALLIANCE
IN SUPPORT OF PETITIONER
FILED WITH CONSENT OF ALL PARTIES

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I hereby certify that the attached Brief complies with Arizona Rules of Civil Appellate Procedure 4(b) and 14(a)(4) because it is double spaced, uses a proportionally spaced 14-point Garamond typeface, and is less than 20 pages in length, which complies with the page limit as set by Court order.

Dated: April 6, 2021

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SUPREME COURT OF ARIZONA

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

CERTIFICATE OF SERVICE
FOR
BRIEF *AMICUS CURIAE* OF THE
NEW CIVIL LIBERTIES ALLIANCE
IN SUPPORT OF PETITIONER
FILED WITH CONSENT OF ALL PARTIES

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I hereby certify that on April 6, 2021, I electronically filed the attached Brief via the Court's electronic filing system. Counsel for all parties are registered users of TurboCourt and service will be accomplished by TurboCourt. I also emailed courtesy copies of the attached Brief to counsel for all parties, *viz.*,

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