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Court of Appeal, Second Appellate District
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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 7

Case No. B292091

WARREN M. LENT, et al.,
Plaintiffs–Appellants, Cross-Appellees;

vs.

CALIFORNIA COASTAL COMMISSION, et al.,
Defendant–Appellee, Cross-Appellant

On Appeal from the Superior Court of Los Angeles
(Case No. BS167531, Honorable James C. Chalfant, Judge)

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF IN SUPPORT OF CROSS-APPELLEES

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under California Rules of Court, Rule 8.208.

DATED: July 20, 2020

Respectfully Submitted,

/s/ Fredrick A. Hagen

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND STATEMENTS OF INTERESTS OF *AMICI CURIAE*

TO THE HONORABLE PRESIDING JUSTICE:

Amici Curiae the New Civil Liberties Alliance, the National Federation of Independent Business Small Business Legal Center, and the California Farm Bureau Federation respectfully make this application to file the accompanying brief pursuant to California Rules of Court, Rule 8.200(c). This brief is offered in support of Plaintiffs-Appellants and Cross-Appellees Warren and Henny Lent.

Amici 's brief will assist the Court by highlighting important due process and agency adjudication considerations implicated in this case. This brief draws on *amici* 's experience and expertise in administrative adjudications both in California and nationally.

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 United States Constitution itself, such as the right to due process of law and the right to be tried in front of an impartial and independent judge (not a partial and dependent adjudicator). Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because legislatures, administrative agencies like the

California Coastal Commission ("Commission"), and even sometimes the courts have neglected them for so long.

NCLA considers administrative adjudication an especially serious threat to civil liberties. Although Americans still enjoy the shell of their Republic, a very different sort of government has developed within it—a type, in fact, that state and federal constitutions were designed to prevent. This unconstitutional administrative state within the Constitution's United States—and within the State of California—is NCLA's chief concern here.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

The California Farm Bureau Federation ("Farm Bureau") is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home, and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing approximately 38,000 agricultural, associate and collegiate members in 56 counties, including members in California's coastal counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Amici are particularly disturbed by the Commission's unconstitutional regulatory enforcement and adjudication practice under the California Coastal Act's recently enacted Pub. Res. Code § 30821.

Because this case involves one of the first contested applications of section 30821, the decision of this Court will strongly impact not only the due process rights of the Lents, but the rights of future enforcement targets as well. This Court's decision will also establish and define the scope of the Commission's power under section 38021. The proposed brief will assist the Court in making those determinations through *amici*'s

unique expertise in, and experience with administrative adjudications. Accordingly, *amici* respectfully request leave to file the *amici curiae* brief that is combined with this application.

Pursuant to California Rules of Court, Rule 8.200(c)(3), *amici* declare that no party or counsel for a party in the pending appeal authored the accompanying brief in whole or in part. Furthermore, no party, counsel for party, or other person or entity made a monetary contribution intended to fund the preparation or submission of the accompanying brief.

DATED: July 20, 2020

Respectfully Submitted,

/s/ Fredrick A. Hagen

Fredrick A. Hagen

BRIEF OF *AMICI CURIAE*

I. THE COMMISSION'S HEARING PROCESS AND DECISION TO LEVY A $4.185 MILLION ADMINISTRATIVE CIVIL PENALTY VIOLATED THE LENTS' DUE PROCESS RIGHTS AND WARRANTS REMAND

A. At a Minimum, Due Process Requires Notice and a Meaningful Opportunity to Respond, but the Commission's Hearing Provided the Lents with Neither

The Due Process Clauses of the California and United States Constitutions state clearly that no person may be deprived of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV; Cal. Const. art. I, § 7. As Justice Cardozo observed, the essential element of due process is "the protection of the individual against arbitrary action." *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n*, 301 U.S. 292, 302 (1937); *cf. Today's Fresh Start, Inc. v. Los Angeles County Office of Education*, 57 Cal. 4th 197, 212 (2013). At a minimum, due process requires notice and a meaningful opportunity to respond. *See Today's Fresh Start*, 57 Cal. 4th at 212. Due process is flexible, but a meaningful opportunity to respond also requires an impartial adjudicator. *Id.*; *see also infra* Section II. This flexibility protects individuals from arbitrary actions by permitting due process to "be tailored to the requirements of each particular situation." *In re Marriage of Flaherty*, 31 Cal. 3d 637, 654 (1982).

Here, the administrative civil penalty calculation looks more like the result of a bidding war instigated by an auctioneer, rather than a reasoned consideration, analysis, and weighing of

section 30820's penalty factors in a manner comporting with due process.

The Lents were told that the staff recommended a "penalty in the range of $800,000 to $1,500,000" but specifically recommended a $950,000 penalty. AR 470-471. The same report also indicated that the Commission could impose a maximum fine of $8,370,000. AR 500. Facing a roughly $7,570,000 range in penalties as indicated in the report, it was not clear to the Lents until the hearing that the Commission intended to deviate upwards from the staff's recommendation. AR 4231. As the Lents noted, the first request to deviate upward came not from the Commission but from the public during the comment period, which occurred after the Lents had completed their presentation. AR 4188-4217, 4231, 4240, 4244, 4246-47.

During the public comment period, the proposed administrative civil penalty escalated rapidly with successive witnesses in a frenzy to demand that it be higher, with at least one request for the full penalty indicated in the report of over $8.3 million. *Id.* After the public made its demands, the Commission joined in and began considering upward departures from the suggested range. AR 4259-4310. At no time, however, did the Commission provide the Lents with the opportunity to respond to these newly proposed amounts. *Id.*

This haggling over the amount of the administrative civil penalty to impose violated the Lents' due process rights. As the trial court recognized, and the Commission now appeals, "due process requires that the Commission comply with this practice

and give Petitioners an additional opportunity to present evidence and argue against the $4.1 million fine." Appellants' App. Vol. II, at 321. The trial court's opinion inherently acknowledged the flexible nature of due process and applied it to the facts and circumstances leading to the Commission's exorbitant penalty. In sum, the Lents did not have sufficient notice of the penalty against them because it was increased in real time at the hearing. The Commission then refused to allow the Lents the opportunity to meaningfully respond to the increase in the penalty. The trial court recognized that, under these circumstances, due process demands more than what was provided to the Lents and that remand is warranted. This Court should recognize that as well.

B. Binding Involuntary Adjudications that Occur Outside of the Courts Violate Due Process

There is another, more universal due process consideration that also mitigates against the Commission's arguments that the Lents received due process and that remand is not warranted. Namely, all binding involuntary adjudications occurring outside the courts that impose legal obligations violate due process.

As a policy matter, benefits accrue from the Coastal Act's legislative goal of maximizing public access. *See* Pub. Res. Code § 30001.5(c). By focusing on the perceived policy value of levying administrative civil penalties under section 30821 to alleviate alleged violations of the Act's public access provisions, the Commission misses the important fact that section 30821 necessarily violates regulated persons' and landowners' civil

rights and civil liberties. The arrogation of judicial power through binding adjudication by the Commission denies regulated entities their right to an independent judge, and to the full due process of law. This denial is because the constitutional principle of due process "is not simply due process … but the due process of law—meaning judicial decisions following the law, in the courts of law, in accord with their essential traditional procedures." Philip Hamburger, *Is Administrative Law Unlawful?* 254 (U. Chicago Press 2014).

When the government chooses to exercise its power through administrative shortcuts, *i.e.*, section 30821 administrative civil penalties, rather than constitutionally permissible pathways, *i.e.*, imposition of civil liability by the superior court under section 30820, the government's actions breathe new life into the basic elements of absolute power. *See id.* at 6-7. The Commission's levying of fines under section 30821 infringes on the Lents' due process rights. Even though the Commission's decision remains reviewable in the courts, *see McHugh v. Santa Monica Rent Control Board*, 49 Cal. 3d 348, 372 (1989), the constitutional harms still accrue, and justice delayed is justice denied.

Indeed, the Commission's enthusiasm for section 30821 illustrates this point. *See* Cross-Appellant's Opening Brief 23-24. The Commission has argued that seeking civil penalties under section 30820 through litigation was "arduous" and required "tremendous expenditure of resources." *Id.* at 23. But that section 30821's enactment has, in contrast, led "to much quicker resolution of violations." *Id.* at 24. The speed and efficiency of the

administrative shortcut, achieved in part by evading litigation before an independent court, makes it a preferable pathway for the Commission and thus more likely to be used in the future.[1]

That the legislature created the pathway, and even incentivized its use through administrative convenience, is no defense to the unconstitutional nature of binding extralegal administrative adjudications.[2] This point is especially true here where under section 30821, the Commission is empowered to levy an administrative civil penalty just upwards of $20.5 million for a single violation. Such unchecked power would even make the King himself blush.

At a minimum, the trial court was correct to remand because the procedures the Commission employed in determining

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[1] Moreover, administrative investigation, enforcement, and adjudication processes are inherently coercive, forcing regulated parties into settlement when there has been no independent finding of proof or admission of legal wrongdoing. The Commission's statement that the Lents could have settled for much less than the levied administrative penalty highlights the coercive nature of settlement that section 30821 enables. *See, e.g.,* Combined Respondent's Brief and Cross-Appellant's Opening Brief 94. Since section 30821's enactment, the Commission has secured a higher rate of settlements in a faster time. *See* Cross-Appellant's Reply Brief 36.

[2] *Cf. Ohio Bell Telephone Co.*, 301 U.S. at 304-305 (internal citations omitted) ("The right to such a [fair and open] hearing is one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement [of due process] has been neglected or ignored."); *see also Endler v. Schutzbank*, 68 Cal. 2d 162, 180 (1968) (quoting *id.*).

and levying its massive penalty against the Lents were constitutionally insufficient. Moreover, because any binding involuntary adjudications that occur outside the courts necessarily violate due process, any future attempts by the Commission to levy an administrative civil penalty against the Lents under section 30821 will also violate the Lents' due process rights.

II. DEFERENCE TO THE COMMISSION'S INTERPRETATION THAT §§ 30820 AND 30821 PERMIT CONSIDERING DETERRENCE IN SETTING AN ADMINISTRATIVE CIVIL PENALTY VIOLATES THE CALIFORNIA AND FEDERAL CONSTITUTIONS

Granting "deference"[3] to agency statutory interpretations violates both the California and federal constitutions for two

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[3] *Ross v. Cal. Coastal Comm'n*, 199 Cal. App. 4th 900, 938 (2011) (requiring deference to "an administrative agency's interpretation of a statute or regulation involving its area of expertise unless the challenged construction contradicts the clear language and purpose of the interpreted provision"); *but see Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 12 (1998) (in contrast to "quasi-legislative" rules, whether and how much deference courts accord an agency's interpretation of statutes is "fundamentally *situational*" (emphasis in original)). The difference under a *Ross* analysis versus a *Yamaha* analysis is only the degree of deference due to the agency, if any. *Cf. Lindstrom v. Cal. Coastal Comm'n*, 40 Cal. App. 5th 73, 96 (2019) ("[B]ecause the meaning of the relevant provisions of the City's [Local Coastal Program] is plain, we need not resolve the issue of whether it is more appropriate to defer to the Commission [under the cases relied on in *Ross*] or the City [under *Yamaha*] when interpreting the City's [Local Coastal Program], or what degree of deference, if any, would be appropriate."). However, for the reasons discussed below, the Lents are harmed by deferring to

reasons. First, agency deference requires judges to abandon their duty of independent judgment in violation of Article III, § 3 of the California Constitution. Second, agency deference violates the Due Process Clauses of the California Constitution, Cal. Const. art. I, § 7, and the Fourteenth Amendment of the U.S. Constitution, by commanding judicial bias toward a litigant. Here the Commission seeks deference to its interpretation that deterrence is an appropriate penalty consideration for a first-time alleged offender under the factors enumerated in section 30820 for levying an administrative civil penalty under section 30821. *See* Cross-Appellant's Reply Brief 29–31.

A. Judicial Deference Violates Article III by Requiring Judges to Abandon Their Duty of Independent Judgment

Judicial deference compels judges to abandon their duty of independent judgment. Under the California Constitution, the judiciary is a separate and independent branch of the state government, and no member of the political branches shall exercise its powers except as permitted by the Constitution. Cal. Const. art. III, § 3. The judicial powers clause vests power in the state's courts: "The power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." Cal. Const. art. VI, § 1.[4] The California

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the Commission's interpretation regardless of the amount of deference the Court ultimately provides.

[4] California agencies may "constitutionally hold hearings, determine facts, apply the law to those facts, and order relief" if the agency activity is "authorized by statute or legislation and

Supreme Court has observed that while Article III, section 3 of the California Constitution "'may suggest a sharp demarcation between the operations of the three branches of government'" the courts have recognized that such demarcation does not preclude interrelatedness and even impact on functions between the branches of government. *Marine Forests Soc'y v. Cal. Coastal Comm'n*, 36 Cal. 4th 1, 25 (2005) (quoting *Superior Court v. Cty. of Mendocino*, 13 Cal. 4th 45, 51 (1996)). However, California's separation of powers "'doctrine unquestionably places limits upon the actions of each branch with respect to the other branches.'" *Id.* (quoting *County of Mendocino*, 13 Cal. 4th at 53). And "[a] judge shall perform the duties of judicial office *impartially*, competently, and diligently." Cal. Code Jud. Conduct Canon 3 (emphasis added).

Despite these stated principles, judicial deference would command California judges to abandon their impartiality and independence by giving controlling weight to an agency's opinion of what a statute means—not because of the persuasiveness of the agency's argument, but rather based solely on the basic fact that the interpretive question the Commission has addressed is within its area of "expertise." *See Ross*, 199 Cal. App. 4th at 938; *but see Pereira v. Sessions*, 138 S. Ct. 2105, 2712 (2018)

[the agency action is] reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes" and "'essential' judicial power (*i.e.*, the power to make enforceable, binding judgments) remains ultimately in the courts, through review of agency determinations." *McHugh,* 49 Cal. 3d at 372 (italics omitted); *see also Walnut Creek Manor v. Fair Employment & Housing Comm'n*, 54 Cal. 3d 245, 256 (1991).

(Kennedy, J., concurring) ("[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.").

This abandonment of judicial responsibility is not tolerated in any other context—nor should it be accepted by any truly independent judiciary. The California Code of Judicial Conduct's and the California Constitution's mandate of judicial independence cannot be easily displaced. Yet agency deference would allow a non-judicial entity[5] to usurp the judiciary's constitutionally assigned power of interpretation and would command judges to "defer" to the legal pronouncements of a supposed "expert" body external to the judiciary. *See Ross*, 199 Cal. App. 4th at 938; *but see Yamaha*, 19 Cal. 4th at 11 (interpretations of statute are "an agency's *legal opinion*, however 'expert,' … [and] command[] a commensurably lesser degree of judicial deference." (emphasis in original)).

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

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[5] The Commission sometimes acts in a quasi-judicial function. *See Marine Forests Soc'y*, 36 Cal. 4th at 25 ("the Coastal Commission is authorized (by the Coastal Act) to perform a variety of governmental functions, some generally characterized as 'executive,' some 'quasi-legislative,' and some 'quasi-judicial.'").

interpretation of a statute. It is no different in principle from an instruction that courts must assign weight and defer to statutory interpretations announced by a congressional committee, a group of expert legal scholars, or the *Los Angeles Times* editorial page. 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 erroneous"—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 solely according to its persuasiveness. *See, e.g.*, *Tetra Tech EC, Inc. v. Wis. 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.* But here, the trial court noted it *must* defer to "[t]he Commission's interpretation of the statutes and regulations under which [the Commission] operates" and the Commission now asks this Court to enforce that mandatory

deference. Appellants' App. Vol. II, at 295 (citing, *Ross*, 199 Cal. App. 4th at 921); Cross-Appellant's Reply Brief 30–31.

Recognizing an argument's persuasive weight does not compromise a court's duty of independent judgment. In contrast, mandatory deference requires far more than respectful consideration of an agency's views; it commands that courts give "great weight" to those views simply because the agency espouses them, and it instructs courts to subordinate their own judgments to the views preferred by the agency. *See Ross*, 199 Cal. App. 4th 939 ("Courts *must defer* to an administrative agency's interpretation of a statute or regulation involving its area of expertise unless the challenged construction contradicts the clear language and purpose of the interpreted provision." (emphasis added)); *Id.* at 922 ("an agency's interpretation of its governing statutes is entitled to great weight").

The judicial duty of independent judgment allows (indeed, requires) courts 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 interpretation.

B. Judicial Deference Violates the Due Process Clause by Requiring Judges to Show Bias in Favor of the Commission

A related, more serious problem with judicial 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).[6] 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 favor of the legal judgment of 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); *see also Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (holding that agency and judicial proceedings are required to provide "neutral and respectful consideration" of a litigant's views free from hostility or bias); *id.* at 1734 (Kagan, J., concurring) (agreeing that the Constitution forbids agency or judicial proceedings that are "infected by . . . bias"). And the California Code of Judicial Conduct mandates that "[a] judge shall perform the duties of judicial office *impartially* [.]" Cal. Code Jud. Conduct Canon 3; *see also Today's Fresh Start*, 57 Cal. 4th 197. Nonetheless, under judicial deference doctrines, otherwise scrupulous judges who are sworn to administer justice impartially somehow feel compelled

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[6] Hamburger explains that "the Constitution prohibits judges from denying the due process of law, and judges therefore cannot engage in systematic bias in favor of the government. Nonetheless, judges defer to administrative interpretation, thus often engaging in systematic bias for the government and against other parties." *Id.* at 1250.

to remove the judicial blindfold and tip the scales in favor of the government agency's position. This practice must stop.

Judicial deference to agencies institutionalizes a regime of systematic judicial bias, by requiring courts to "defer" to agency litigants whenever a disputed question of statutory interpretation arises. *See* Philip Hamburger, *The Administrative Threat* 43 (Encounter Books 2017) ("When the government is a party to a case, the doctrines that require judicial deference to agency interpretation are precommitments in favor of the government's legal position[.]"). Rather than exercise their own judgment about what the law is, deference doctrines instruct judges to defer to the judgment of one of the litigants before them unless it is clearly wrong.

Imagine a judge who took a step further and openly admitted that he or she would accept a government-litigant's interpretation of a statute by default. And, in doing so, this judge would reject any competing arguments offered by the non-government litigant unless the government were clearly wrong. This is perilously close to what judges do whenever they apply deference doctrines in cases where an agency appears as a litigant. The government litigant wins simply by showing that its preferred interpretation of the statute is not "clearly erroneous" 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.

C. Other States Are Abandoning Judicial Deference Doctrines over Independence and Bias Concerns

There is a growing trend among states rejecting deference to an administrative agency's interpretation of statutes and rules in favor of maintaining an independent and impartial judiciary. California, like New York, has never been fully on board the deference train, and now is no time to change when the prevailing trend is running very much against judicial deference.

In 2018, Florida voters approved a constitutional amendment eliminating deference to agency interpretations. *See* Fla. Const. art. V, § 21. The amendment precludes courts and administrative hearing officers from deferring to an agency's interpretation of a statute or rule and requires any interpretations to be made *de novo*. *Id.* That same year, Arizona enacted a statute that requires courts to 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." Ariz. Rev. Stat. § 12-910(E). Other state supreme courts have taken up the constitutional critiques of the court-created doctrine and rejected judicial deference.

Wisconsin courts once showed "great weight deference" to agency statutory interpretations. But Wisconsin has also reversed course. *See Tetra Tech*, 914 N.W.2d at 33–34. The *Tetra Tech* court recognized Wisconsin's deference doctrine "deprive[d] the non-governmental party of an independent and impartial tribunal," while granting the "rule of decision" to an

"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.*[7] The Wisconsin Supreme Court is not alone in rejecting deference recently. The Supreme Courts of Mississippi and Arkansas have also expressly rejected deference to agency interpretations. *See, e.g., King v. Miss. Military Dep't*, 245 So.3d 404, 408 (Miss. 2018) ("[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."); *Myers v. Yamato Kogyo Co., Ltd.*, 597 S.W.3d 613, 617 (Ark. 2020) ("By giving deference to agencies' interpretations of statutes, the court effectively transfers the job of interpreting the law from the judiciary to the executive. This we cannot do. … [W]e clarify today that agency interpretations of statutes will be reviewed *de novo*. After all, it is the province and duty of this Court to determine what a statute means."); *see also In re Complaint of Rovas Against SBC Mich.*, 754 N.W.2d 259, 272 (Mich. 2008) (rejecting *Chevron* deference because it

[7] Of note, after the Wisconsin Supreme Court expressly rejected deference in *Tetra Tech*, the state's legislature likewise rejected deference by precluding state agencies from seeking it in proceedings. *See* Wis. Stat. 227.10(2g) ("No agency may seek deference in any proceeding based on the agency's interpretation of any law.").

"compel[s] delegation of the judiciary's constitutional authority to construe statutes to another branch of government.").

In short, no rationale can support a practice that weights the scales in favor of a government litigant—the most powerful of parties—and that 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.

CONCLUSION

For the reasons stated above, *amici curiae* respectfully submit that this Court should deny the Commission's requested relief.

DATED: July 20, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing *Amici Curiae* Brief is proportionately spaced, has a typeface of 13 points or more, and contains 3,928 words, not including tables of contents and authorities, cover information, required certificates, and the signature block, as counted by Microsoft Word, the computer program used to prepare this brief.

DATED: July 20, 2020

/s/ Fredrick A. Hagen

Fredrick A. Hagen

DECLARATION OF SERVICE

I, Fredrick A. Hagen, declare as follows:

I am a resident of the State of California, am over 18 years of age, and am not a party to this action. My business address is 2175 N. California Blvd., Suite 500, Walnut Creek, CA 94596.

On July 20, 2020, a true copy of the **Application for Leave to File *Amici Curiae* Brief and *Amici Curiae* Brief** of New Civil Liberties Alliance, National Federation of Independent Business Small Business Legal Center, and the California Farm Bureau Federation in Support of Cross-Appellees Warren M. Lent, *et al.*, was electronically filed with the Court through Truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Washington, District of Columbia.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 20, 2020 at Walnut Creek, California.

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