IN THE SUPREME COURT OF STATE OF ARIZONA

TOM HORNE, individually; Tom Horne for Attorney General Committee (SOS Filer ID 2010 00003); KATHLEEN WINN, individually; Business leaders for Arizona (SOS Filer ID 2010 00375), Petitioners/Appellants, vs. SHEILA SULLIVAN POLK, Yavapai County Attorney, Respondents/Appellees.	Supreme Court No. CV-16-0052-PR Court of Appeals No.1 CA-CV 14-0837 Maricopa County Superior Court No. LC2014-000255-001

SUPPLEMENTAL MERITS BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS

This amicus curiae brief is submitted on behalf of the Institute for Justice (IJ) pursuant to Rule 16 of the Arizona Rules of Civil Appellate Procedure. IJ litigates to secure individual rights, including free speech, free association, and to earn an honest living, all of which are often subject to administrative proceedings. This case arises from one such proceeding that implicates (1) the due process right to an unbiased adjudicator; and (2) the necessity of independent judicial review of findings of fact when free speech is at stake.

INTRODUCTION

This case turns on a disputed question of fact: Did Petitioners Kathleen Winn and Business Leaders for Arizona (BLA) coordinate political expenditures with Petitioner Tom Horne, then a candidate for electoral office (Attorney General)? If Horne and Winn/BLA coordinated, BLA's expenditures may be treated as contributions to Horne and subject to some limitations; if they did not coordinate, the First Amendment prohibits the government from limiting BLA's independent expenditures. *Buckley v. Valeo*, 424 U.S. 1, 44-51 (1976).

The statutory procedure used to determine the disputed fact violates Petitioners' due process rights and constitutes structural error because the prosecutor also served as the adjudicator of that fact. The due process violation was then compounded when the courts deferred to the finding of fact, as required

by statute, instead of independently reviewing it, as required by the First Amendment. Arizona's administrative procedures fall below the "floor" of federal constitutional protections. These procedures also violate the heightened protections of the Arizona Constitution because Arizona courts must exercise greater oversight of administrative agencies to ensure they are respecting constitutional rights.

STATEMENT OF THE CASE

In 2013, pursuant to then-A.R.S. § 16-924(A),[1] the Secretary of State determined "reasonable cause" existed to believe that Petitioners had unlawfully coordinated expenditures during the 2010 general election. Yavapai County Attorney Sheila Polk was assigned to investigate the alleged violation and serve a compliance order—"stating with reasonable particularity the nature of the violation and . . . requir[ing] compliance within twenty days"—if a violation was found. *Id.*; *accord* A.R.S. § 16-938(A)–(E) (2016).

Polk served as an advocate in this case. She "assist[ed] with the preparation and strategy" of it, Pet. Review at 2, and "supervise[d]" the prosecutors and investigators working on it. Resp. Pet. Review at 3. Thereafter, based on the investigation, Polk concluded there was unlawful coordination and served an enforcement order.

[1] Arizona's campaign finance laws were reorganized in 2016. Current A.R.S. § 16-938 sets forth enforcement procedures effectively identical to those followed here.

Petitioners requested a hearing before an Administrative Law Judge (ALJ). A.R.S. § 16-924(B) (2013); *accord* A.R.S. § 16-938(H) (2016). The ALJ, reviewing live testimony and the totality of the record, determined there was insufficient evidence of coordination and recommended Polk vacate her enforcement order. But Polk rejected the ALJ's findings and reinstated her enforcement order, as permitted by statute. A.R.S. § 41-1092.08(A).

Petitioners then sought judicial review of Polk's enforcement order. This process treats the enforcement order as final "agency action" for purposes of administrative review. *See* A.R.S. § 16-924(C) (2013); *accord* A.R.S. § 16-938(I) (2016). While courts "may affirm, reverse, modify or vacate and remand the agency action," they are *required* to affirm ("*shall* affirm") "the agency action unless . . . [it] is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion." A.R.S. § 12-910(E).

This statutory standard of review means courts "must defer to the agency's factual findings." *Gaveck v. Ariz. State Bd. of Podiatry Exam'rs*, 222 Ariz. 433, 436 ¶ 11, 215 P.3d 1114, 1117 (App. 2009). Courts must affirm agency action if it is "supported by the record . . . even if the record also supports a different conclusion." *Id.* at 436 ¶ 11, 215 P.3d at 1117. Courts "may not reweigh the evidence," and "if two inconsistent factual conclusions can be supported by the record, then there is substantial evidence to support an administrative decision that

elects either conclusion." *Williams v. Pima Cty.*, 164 Ariz. 170, 172, 791 P.2d 1053, 1055 (1989).

The Superior Court affirmed Polk's decision. *See* App. 1 ("Slip Op.") at 3 ¶ 7. On further appeal, the Court of Appeals also affirmed. Addressing Polk's fact findings, and notwithstanding the ALJ's decision, the Court of Appeals, following A.R.S. § 12-910(E), declined to independently review the factual record. Rather, the court determined only that there was sufficient evidence to support Polk's decision and "[a]lthough the record may also support a different conclusion, we must defer to Polk's decision." *Id*. at 8 ¶ 11. Moreover, the court held that Petitioners' due process rights were not violated, notwithstanding the fact that "Polk was both an advocate and judge in this case," because "an agency employee can investigate, prosecute, and adjudicate a case." *Id*. at 11 ¶ 13.

ARGUMENT

The issues in this appeal involve two of the most fundamental rights protected by the United States and Arizona constitutions: due process of law and freedom of speech. As shown in Part I, Petitioner's due process rights were violated by the procedure followed here because the administrative adjudicator was also the prosecutor in the case. This violation requires the immediate vacatur of the enforcement order. Part I.A. demonstrates that the procedure fell below the "floor" of federal due process standards set forth in *Williams v. Pennsylvania* and similar

cases. Part I.B. explains that the Arizona Constitution provides greater due process protections to persons subjected to administrative proceedings than are provided by the U.S. Constitution. Although this Court must vacate the enforcement order because of the due process violation explained in Part I, Part II further demonstrates that the deferential standard of review applied to the administrative fact-finding here also violated the right to independent judicial review of facts in free speech cases. Part II.A. demonstrates the deferential review violated the First Amendment standards set forth in *Bose Corp. v. Consumers Union of U.S., Inc.* and its progeny. Part II.B. explains that the requirement of independent judicial review applies even more forcefully in Arizona because our Constitution is more protective of speech rights than is the First Amendment.

I. The administrative process prescribed by Arizona's statutes violates Petitioners' due process rights and constitutes structural error.

A. Arizona's administrative procedures fall below the "floor" of federal constitutional protections.

"[U]nder the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). An adjudicator's involvement as an advocate in a case is not just a due process violation, but also structural error that undermines faith in the entire proceeding and demands immediate vacatur. *Id.* at 1909-10. Polk served

as both prosecutor and adjudicator in this case. Although Polk followed the statutory administrative procedures, *Williams* and similar cases establish that those procedures are unconstitutional.

In *Williams*, then-Chief Justice of the Pennsylvania Supreme Court Ronald Castille was on a panel of seven justices who unanimously overturned the grant of post-conviction relief to convicted death row prisoner Terrance Williams. *Id.* at 1904. But three decades earlier, Castille had been the district attorney whose office prosecuted Williams, and Castille had signed off on pursuing the death penalty against Williams based on his review of a one-and-a-half page memorandum from a deputy prosecutor. *Id.* The Court held that Castille's prior involvement in the criminal case necessarily created an impermissible risk of actual bias in Williams's post-conviction relief proceeding. *Id.*at 1908-09. Even though there had been "involvement of other actors and the passage of time" between the two events to potentially lessen the threat of bias, the Court insisted that "[t]his context only heightens the need for objective rules preventing the operations of bias that otherwise might be obscured." *Id.* at 1907. This error was "structural," such that the judgment had to be vacated—even without further evidence of harm to Williams—so that Williams could present his claims to an adjudicator "unburdened" by any bias. *Id.* at 1909-10.

Arizona's statutes expressly make the prosecutor the judge in all administrative proceedings to enforce campaign finance laws. A.R.S. § 16-924 (2013), *accord* A.R.S. § 16-938(A) (2016). Arizona's statutes expressly give the prosecutor the authority to overrule any contrary ALJ decisions. A.R.S. § 41-1092.08(A). And Arizona statutes thereafter demand judges defer to the prosecutor's adjudication. A.R.S. § 12-910(E). Accordingly, Polk's argument that the "separation" of adjudication and advocacy was sufficient here because she "did not personally appear before the ALJ and was not present at the hearing," Polk Supp. Br. at 2, is a red herring. The ALJ—who can only make a recommendation, who can be (and was) overruled by Polk, and whose recommendation the courts therefore ignored—was not the judge here; Polk was.[2] And Polk was admittedly "not excluded or 'walled off' from the administrative process in this case." *Id*.

The intermixing of prosecutorial and adjudicatory roles in this case is thus even clearer than in *Williams*. Where Castille's prosecutorial involvement was merely reviewing a short memo on aggravating and mitigating factors, Polk's prosecutorial involvement was "assisting with the preparation and strategy" of the case. Where Castille ruled on a post-conviction application collateral to and involving different issues than the proceeding in which he was a prosecutor, *id.* at

[2] Moreover, that Polk was absent from the ALJ hearing—the only time testimony was taken in this proceeding—suggests a further due process violation: an insufficient opportunity to be meaningfully heard by the actual adjudicator. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

1913-14 (Roberts, C.J., dissenting), Polk entered the administrative enforcement order and rejected the ALJ's contrary findings in the very same proceeding that she had a hand in investigating and prosecuting. And where three decades passed between Castille's involvements in Williams's case, Polk's involvement was contemporaneous and continuous.

Moreover, because Polk acted as advocate and adjudicator in the same proceeding involving the same issue ("Was there coordination?"), this case closely resembles the due process violation found to have occurred in *In re Murchison*, 349 U.S. 133 (1955). In *Murchison*, a judge overseeing a "one-man grand jury" suspected that a witness in the proceeding committed perjury, and he charged another with contempt after he refused to answer the judge's questions without counsel present. The judge then tried, convicted, and sentenced both men in open court based, in part, on his interrogation of them in the secret proceedings. *See id.* at 134-35. The Court held this was a violation of due process because the judge had acted in the perjury/contempt proceeding—*a single proceeding*—as both prosecutor and judge. *Id.* at 137 ("Having been a part of that process a judge cannot be . . . wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal."). *Murchison* remains good law, *Williams*, 136 S. Ct. at 1905, *id.* at 1913 (Roberts, C.J., dissenting), because it

"constitutionalizes the early American statutes requiring disqualification when a single person acts as both counsel and judge in a single civil or criminal proceeding," *id.* at 1920 (Thomas, J., dissenting).

Because Polk acted as both advocate and adjudicator in this single proceeding, the proceeding violated the due process guarantee against the threat of biased judges described in both *Williams* and *Murchison.* Nevertheless, Polk suggests that *Withrow v. Larkin*, 421 U.S. 35 (1975), blesses the procedures she followed because this is an administrative proceeding. Polk Supp. Br. at 5. She is wrong. *Withrow* has been limited by *Williams.* And *Withrow* does not render administrative law a due-process-free zone.

In *Withrow*, a state medical board conducted an investigation of a doctor, ultimately suspended his license, and filed a complaint with the district attorney to permanently revoke his license. 421 U.S. at 41-42. The district court had ruled that the board's procedure—initiating, investigating, and adjudicating—denied the doctor his due process rights because it did not provide "'an independent, neutral and detached decision maker.'" *Id.* at 42 (quoting district court). The Supreme Court, however, analyzed the procedure based on the likelihood that the decision makers would be biased. *Id.* at 54. In so doing, the Court found it important that the board had initially sought only to investigate, and while it must have contemplated a chance that it would adjudicate against the doctor, the doctor

presented no "evidence of bias or the risk of bias or prejudgment." *Id.* The Court refused to hold that the procedure violated due process without such evidence.

But *Withrow* did not hold that any mixing of investigative and adjudicative functions was constitutional. Instead, the Court said that the combination of functions in that case was, without more, not a due process violation because there was "a presumption of honesty and integrity in those serving as adjudicators." *Id.* at 47. Thus, a challenger had to show "that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden." *Id.*.

Critically though, the Court recognized "various situations . . . in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* In these situations honesty and integrity cannot be presumed. At the time, these situations only included a pecuniary interest, as in *Tumey v. Ohio*, 273 U.S. 510 (1927), or direct "contemptuous conduct," as in *Taylor v. Hayes*, 418 U.S. 488, 501 (1974). But *Williams* now adds another constitutionally intolerable situation based on experience: "when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." 136 S. Ct. at 1905.

Thus, *Withrow*'s "presumption of honesty and integrity in those serving as adjudicators," has been further limited by the *Williams* decision.

That this case arises from an administrative proceeding does not change the constitutional analysis. "[M]ost of the law concerning disqualification because of interest applies with equal force to administrative adjudicators." *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). The leading case in this area is *Gibson*, in which the Court applied *Tumey*'s disqualification for pecuniary interest bias holding to the administrative context. But even before *Gibson*, the courts of appeal had been applying due process protections against potentially biased adjudicators in administrative proceedings. *E.g., Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 589-92 (D.C. Cir. 1970); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962).

The procedure followed in this case violated the federal due process protection against the threat of a biased adjudicator because the same person served as prosecutor and adjudicator. Because the threat of bias undermines faith in the reliability of the proceeding—there cannot be a presumption of honesty and integrity—it is structural error demanding vacatur of the enforcement order.

B. Arizona courts must exercise still *greater* oversight to ensure administrative agencies are respecting constitutional rights.

The threat of biased adjudicators in administrative proceedings is particularly inappropriate in Arizona. Our Constitution demands greater judicial

checks against the concentrated power of administrative agencies. Moreover, experience since *Withrow* teaches that administrative agencies are a greater threat to individual rights and are more biased than the *Withrow* court realized.

The Arizona Constitution requires the courts to be skeptical of administrative action because agencies concentrate government power. The hallmark of modern administrative agencies is their deviation from the concept of separation of powers. Agencies concentrate legislative, executive, and judicial powers in a single governmental entity by issuing, enforcing, and adjudicating disputes involving regulations that have the force of law. This deviation is usually attempted to be justified by the claim it is a pragmatic post-constitutional development not anticipated by the founders and made necessary by new and complex problems in post-industrial revolution America. The validity of this claim is weak generally. *See* Philip Hamburger, Is Administrative Law Unlawful? (2014). But it is absolutely false when it comes to Arizona. The framers of our constitution—drafted in 1910—were well aware of such administrative agencies; they were progressives, John D. Leshy, The Arizona State Constitution 13 (2d ed. 2011), and the administrative state was already a progressive creation. Nevertheless, our framers "manifested . . . more distrust than confidence in the uses of authority" and were "skeptic[al] of concentrating power" in the government. *Id.* at 18. Thus, even with their knowledge of the administrative state,

the framers of our Constitution still expressly divided the legislative, executive, and judicial powers, *and* expressly prohibited combining those powers in a single branch "except as provided in this constitution." Ariz. Const. art. III. Accordingly, to protect individual rights and "so that intent of the framers" expressed in the text of Article III "may be . . . carried out," *Davis v. Osborne*, 14 Ariz. 185, 204, 125 P. 884, 892 (1912), Arizona courts must be skeptical of administrative adjudication.

Experience has borne out our framers' manifested distrust in concentrated government power, especially when it comes to administrative agencies.

First, public choice analysis has shown that government action is frequently not motivated by the public good, but rather by raw political power and naked preferences. There is general recognition that governmental policies often reflect the goals of powerful interests who are able to organize and exert greater political influence relative to the general public. James C. Cooper, et al., *Theory and Practice of Competition Advocacy at the FTC*, 71 ANTITRUST L.J. 1091 (2005), Richard A. Posner, Economic Analysis of Law § 19.3, at 534–36 (6th ed. 2003); John O. McGinnis, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 735 n.137 (2002) (the "intense common concerns" of special interest groups "help them overcome organizational difficulties and give them more influence than their numbers warrant"). This danger is particularly acute when it comes to administrative agencies because they are frequently under the de jure or de facto

control of self-interested individuals who can use the concentrated power of government for personal benefit. *E.g.*, *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1108 (2015) (regulatory board consisting, by law, of a majority of dentists used government power to protect dentists from competition from non-dentist teeth whiteners); *see also Gibson*, 411 U.S. at 579 (state board consisting of self-employed optometrists had an unconstitutional pecuniary interest in judging corporate employed competitors to be in violation of state optometry law).

Second, there is no reason to defer to administrative agencies. When unleashed on America during the Progressive and New Deal Eras, proponents of the administrative state insisted that "scientific" government by "experts" would lead to better outcomes than republican democracy and therefore judicial deference to administrative agencies was required.[3] Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 Cardozo L. Rev. 2189, 2195 (2011). Today, however, we know that such faith is not warranted:

> Political appointees, often not experts, are normally responsible for managing agencies and determining policy. And policy often reflects political, not simply 'scientific,' considerations. Agency decisions will also occasionally reflect 'tunnel vision,' an agency's supreme confidence in the importance of its own mission to the point where it leaves common sense aside.

[3] Indeed, this faith was so great that proponents of the administrative state actively and openly denigrated the idea of individual rights. *E.g.*, Thomas C. Leonard, Illiberal Reformers, Race, Eugenics & American Economics in the Progressive Era 24–25 (2016) (collecting examples from, among others, President Woodrow Wilson and Prof. Roscoe Pound).

Id.

Third, as judges and academics across the country are rediscovering, judicial deference to administrative agencies means Americans are not getting the neutral adjudicator promised by the Constitution. That administrative adjudication has an inherent bias for the government is increasingly clear. *E.g.*, Kent Barnett, *Against Administrative Judges*, 49 U.C. Davis L. Rev. 1643, 1645 (2016) ("The New York Times and the Wall Street Journal have reported that the . . . [SEC] prevails much more frequently—sometimes 100% of the time in a given year—in its in-house enforcement proceedings than in court."). This means people's "liberties may now be impaired not by an independent decisionmaker seeking to declare the law's meaning as fairly as possible—the decisionmaker promised to them by law—but by an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring).

Accordingly, even if the U.S. Constitution did not prohibit the procedure followed in this case, the Arizona Constitution would. The concentration of government power in a single agency—much less a single individual as in this case—runs afoul of the heightened protections against such power in Arizona.

II. The administrative review prescribed by Arizona statute violates Petitioners' free speech right to independent appellate review.

For the reasons set forth above, there has not been a constitutionally permissible fact-finding in this case (aside from maybe the ALJ decision, which was overruled and ignored). But even if there had been, the statutorily-mandated deferential review of that fact-finding separately violated constitutional rights.

A. The administrative review prescribed by Arizona statute violates the "floor" of the First Amendment.

"In cases raising First Amendment issues . . . an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (internal quotation omitted). Because the "requirement of independent appellate review . . . is a rule of federal constitutional law," it preempts contrary standards of review provided by rule or statute. *Id*. at 510, 514. *See also Yetman v. English*, 168 Ariz. 71, 76, 811 P.2d 323, 328 (1991) (*Bose* requires "enhanced appellate review" of the factual record to protect free speech rights). The courts in this case have not applied enhanced/independent appellate review, they have instead applied the contrary standard of review set forth in A.R.S. § 12-910(E). As applied, this violated Petitioners' First Amendment rights.

In *Bose*, a federal district court judge found, as a matter of fact, that certain product-disparaging statements were made with actual malice, rendering the disparaging statements actionable under the First Amendment. 466 U.S. at 488-91. Although an appellate court usually defers to findings of fact, the Supreme Court refused to defer in this case. Instead, the Court recognized a constitutional duty to determine whether particular communications "actually fall[] within" an unprotected category of speech by conducting an independent review of the record. *Id*. at 505. After all,

> the question whether the evidence in the record . . . is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that

infringes on protected speech. *Id.* at 511. And this is true no matter who performs the "factfinding function." *Id*. at 501.

That this case arises from an administrative proceeding does not change the constitutional analysis. Independent review is required in appeals from administrative orders affecting speech. In both *Peel v. Attorney Registration & Disciplinary Commission*, and *Ibanez v. Florida Department of Business & Professional Regulation*, the Court applied independent review, not deference, to state administrative agencies' fact findings that commercial speech was misleading; findings that would have placed such speech outside the protections of

the First Amendment. *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation,* 512 U.S. 136, 141-49 (1994); *Peel v. Attorney Registration & Disciplinary Comm'n,* 496 U.S. 91, 98, 108 (1990) (plurality), *id* at 111-17 (Marshall, J., concurring). Independent review was appropriate in these cases because administrative agencies are "necessarily constrained by the First Amendment" no less than any other part of government, including the courts. *Peel*, 496 U.S. at 108 (plurality).

Contrary to the constitutional requirement of independent appellate review, A.R.S. § 12-910(E) requires judges to defer to administrative fact finding, even when First Amendment rights are at stake. It was only Polk's factual finding that Petitioners coordinated that allowed the imposition of her enforcement order. Slip Op. at 3 ¶ 4. The courts below applied A.R.S. § 12-910(E)'s deferential standard to Polk's factual findings instead of independent review. *Id.* at 4-11 ¶¶ 8-12. But independent appellate review "is a rule of federal constitutional law." *Bose*, 466 U.S. at 510. It therefore preempted a federal rule of civil procedure—Rule 52(a)—that required deferential fact review in *Bose*. *Id.* at 514. It also preempts Arizona's statutory rule of administrative review, A.R.S. § 16-910(E), that purports to require deferential fact review here. U.S. Const. art VI, cl. 2 (federal constitution is "the supreme Law of the Land" and preempts contrary state laws).

The Arizona courts' deference to Polk's fact determination here, driven by A.R.S. § 12-910(E), is unconstitutional because this case involves a claimed

exercise of free speech. Thus, if this Court does not vacate the enforcement order because the administrative procedure violates due process, it has to engage in its own independent—non-deferential—review of the record or vacate and remand to the superior court for the same.

B. Arizona courts must exercise still *greater* oversight to ensure administrative agencies are respecting the freedom of speech.

The need for independent appellate review of administrative findings that affect free speech rights is even greater in Arizona. First, as explained in Part I.B. above, the Arizona Constitution requires greater judicial suspicion of administrative proceedings generally. Second, as explained below, Article II, § 6, of the Arizona Constitution affords a greater degree of protection of speech than does the First Amendment.

The Arizona Constitution is even more protective of speech than is the First Amendment. *E.g.*, *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354-55, 773 P.2d 455, 459-60 (1989).This is especially true when it comes to content- or viewpoint-based regulation of speech, because our Constitution protects the "right to speak freely on all topics." *State v. Stummer*, 219 Ariz. 137, 144 ¶ 23, 194 P.3d 1043, 1050 (2008).

Independent appellate review is necessary because of the threat that a decision-maker's "factual" determination placing speech in an unprotected category may not be value or viewpoint neutral. *Bose*, 466 U.S. at 505. This threat

is grave enough that independent appellate review is necessary even when facts are found by a judge with an ethical obligation of neutrality and insulated by office from political influence. *E.g.*, *id*. (reviewing judge-found facts). Logically, the threat of non-neutrality is even greater when an administrative agency—which also prosecutes the case and is avowedly free to pursue its own policy preferences—"finds facts." *E.g.*, *Dental Exam'rs*, 135 S. Ct. at 1108 (board used its power to engage in anti-competitive conduct), *Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013) (board accused blogger of illegally practicing dietetics based on the content of his blog); *Rosemond v. Markham*, 135 F. Supp. 3d 574 (E.D. Ky. 2015) (board accused newspaper columnist of unlicensed psychiatry based on content of his advice column). The Arizona Constitution does not countenance a greater threat to free speech, especially from the concentrated power of administrative agencies.

CONCLUSION

To describe the proceeding in this case is to know it violates multiple provisions of the U.S. and Arizona Constitutions: The "fact" of coordination—which allowed the government to penalize communications between Petitioners—was determined (on a disputed record) by a "judge" that also served as the prosecutor. Thereafter, the courts refused to independently review the decision and instead deferred to it. This Kafkaesque process is unbecoming of a free society and cannot be permitted in Arizona.

Respectfully submitted this 20th day of January, 2017, by:

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IN THE SUPREME COURT OF ARIZONA

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CERTIFICATE OF COMPLIANCE

1. This certificate of compliance concerns an amicus curiae brief, and is submitted under Rule 16(b)(1)(C)(iii) of the Arizona Rules of Civil Appellate Procedure.
2. The undersigned certifies that the brief of amicus curiae, to which this certificate is attached, uses type of at least 14 points, is double-spaced, and contains 4,651 words.

3. The document to which this Certificate is attached does not exceed the word limit that is set by Rule 16(d)(2) because, excluding those sections specified by Rule 4(b)(9), it does not exceed the 20 pages allowed for supplemental briefing by the parties.

Dated this 20th day of January, 2017.

By: _/s/ Paul V. Avelar_____

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