**SUPREME COURT OF ARIZONA**

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| ROBERT BURNS,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>ARIZONA PUBLIC SERVICE COMPANY, et al.,<br><br>Defendants/Appellees. | Arizona Supreme Court<br>No. CV-21-0080-PR<br><br>Court of Appeals<br>Division One<br>No. 1 CA-CV 19-0183<br><br>Maricopa County<br>Superior Court<br>No. CV2017-001831 |

# SUPPLEMENTAL BRIEF OF DEFENDANTS/APPELLEES ARIZONA PUBLIC SERVICE COMPANY, PINNACLE WEST CAPITAL CORPORATION, AND DONALD BRANDT

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## INTRODUCTION

Article 15, Section 4 of the Arizona Constitution empowers the Arizona Corporation Commission and its members to enforce a subpoena "for the purpose of the commission, and of the several members thereof." The text of that provision contemplates a common purpose between the Commission and its members. It does not authorize an individual commissioner to enforce a subpoena at cross-purposes with the Commission. When the Commission orders that an individual commissioner's subpoena should not be enforced, that commissioner may not override the Commission's order and enforce the subpoena nevertheless.

The text of other constitutional provisions supports this conclusion. *First*, Article 15 establishes a unified enforcement scheme for orders of the Commission, not those of individual commissioners. Its penalty provisions (Sections 16 (forfeiture for violations) and 19 (fines)) speak of penalties for violating orders "of the corporation commission," not those of single commissioners. Its judicial review provision (Section 17) likewise refers to orders "by the corporation commission."

*Second*, Article 15, Section 6 vests the Commission with rulemaking power to govern its own proceedings. The Commission exercised that authority by adopting rules providing for Commission review of subpoenas. Mr. Burns's position, by contrast, would create a conflict between an individual commissioner's power under Section 4 and the Commission's power to control its proceedings under

Section 6.

*Third*, Article 15, Section 3 grants the Commission specific authority to set just and reasonable rates, and Mr. Burns issued his subpoenas in a rate case. The Commission's ratemaking power includes the power to control Commission ratemaking proceedings and to decide what evidence is relevant to them.

Other considerations further support this interpretation of Section 4. Statutes enacted in 1912—most notably, those governing acts of the Commission, judicial review of Commission decisions, and the contempt power—confirm that the Commission's orders overcome the will of a dissenting commissioner. The doctrines of primary jurisdiction and administrative exhaustion also counsel against judicial intervention in intra-agency affairs before the agency makes its final determination. So too do policy considerations, including those that motivated the Framers. The Framers did not want a Commission so weak as to be unable to control its own proceedings, nor did they want a single rogue commissioner empowered to pursue personal vendettas or politically motivated fishing expeditions against any publicly traded company doing business in Arizona.

Simply put, the Constitution, the Framers, the Legislature, and the Commission itself each place the Commission's will above that of a single commissioner. Throughout the years of litigating this case, Mr. Burns has never identified any case suggesting otherwise.

Finally, there is no doubt that Mr. Burns could use the Uniform Declaratory Judgment Act ("UDJA") to adjudicate whether he had a constitutional right to enforce his subpoenas without regard to the contrary order of the Commission. But, assuming the Commission's view takes priority, the UDJA does not then allow Mr. Burns to seek review of the *merits* of the Commission's order refusing to enforce his subpoenas. Substantive review of Commission orders is governed by §§ 40-254 and 40-254.01, and the UDJA cannot be used to circumvent these statutes.

## PERTINENT BACKGROUND

In 2016, Arizona Public Service Company ("APS"), a public service corporation regulated by the Commission, had a case pending before the Commission seeking an adjustment to its rates.

In August 2016, as part of that rate case, Mr. Burns—then a commissioner—issued subpoenas to APS, its parent company Pinnacle West Capital Corporation, and their then-Chief Executive Officer Donald Brandt (collectively, "the Companies"), demanding disclosure of the Companies' political and charitable contributions. As the source of authority for the subpoenas, Mr. Burns cited Article 15, Section 4 of the Arizona Constitution, and other provisions, including § 40-243, which states that "[a]ll hearings and investigations before the commission or a commissioner shall be governed … by rules of practice and procedure adopted by the commission," and Rule 45, Arizona Rules of Civil Procedure, which the

Commission had incorporated into its rules. *See* A.A.C. R14-3-101(A).

The Companies complied in part and moved to quash the subpoenas in part pursuant to A.A.C. R14-3-109(O), which permits the Commission to quash a subpoena that is "unreasonable or oppressive." Mr. Burns countered by suing in the superior court to compel compliance. The superior court stayed the case, holding that the Commission should have the opportunity to rule first on whether the subpoenas should be enforced. *See* IR-38 (5/26/2017 Order).[1]

On June 27, 2017, by a vote of 4 to 1, the Commission issued an interlocutory order in the rate case refusing to enforce Mr. Burns's subpoenas. The Commission found that "[t]he subpoenas seek information that is irrelevant to the rate case and is not reasonably calculated to lead to discovery of admissible evidence." Res. APP095-96 (Commission Interlocutory Order) (IR-78).

The superior court subsequently dismissed Mr. Burns's case in light of the Commission's decision. Among other things, the superior court held that Mr. Burns's position was inconsistent with the Commission's constitutional authority to govern its own proceedings. Res. APP049 (2/15/2018 Order at 10) (IR-104). Mr. Burns's position also contradicted basic principles of administrative agency review,

[1] Record items included in the Appendix to the Companies' Response to the Petition for Review are cited here by page number (e.g., Res. APP001). Other items are cited to the index of record (e.g., IR-3).

which recognize that the Commission is better situated than a court "to know what evidence is, and is not, relevant to its own decision-making in an area over which it has special expertise." Res. APP050.

The court of appeals affirmed. *Burns v. Ariz. Pub. Serv. Co.*, 250 Ariz. 607, ¶ 36 (App. 2021) ("Opinion"). The Opinion also cited the Commission's constitutional authority to govern its own proceedings and highlighted that "one such rule that the Commission has prescribed is that the Commission as a whole resolves objections to subpoenas." *Id.* ¶ 21 (citing A.A.C. R140-3-109(O)). It added that ruling for Mr. Burns "would essentially be overturning the Commission's vote and directly interfering in Commission operations." *Id.* ¶ 23.

The court of appeals next declined to address Mr. Burns's separate argument that the Commission's decision against enforcement was, on the merits, arbitrary and capricious. As the court explained, Mr. Burns's challenge was brought under the UDJA, not the statutes providing for judicial review of Commission decisions. Further, as a commissioner rather than a party to the proceeding, the court held that Mr. Burns lacked standing to challenge the merits of the Commission's decision. *See id.* ¶ 24 (citing A.R.S. §§ 40-254, 40-254.01).

This Court granted review on two questions: (1) Whether the Arizona Constitution allows a majority of corporation commissioners to prevent any single commissioner from exercising the investigatory powers that are expressly delegated

to them in Ariz. Const., art. 15, § 4; and (2) Whether the Arizona UDJA at A.R.S. § 12-1831, et seq. grants a corporation commissioner standing to seek a declaration of their rights and their fellow commissioners' rights.

## ARGUMENT

### I. The Commission, Not a Single Dissenting Commissioner, Has Authority to Decide if a Subpoena Will Be Enforced.

The court of appeals correctly concluded that a commissioner's authority to enforce a subpoena is "subject to review and oversight by the Commission as a whole" when "exercised as part of commission proceedings." Opinion ¶ 21.

#### A. The Text of Article 15 Places Commission Above Commissioner.

##### 1. Commissioner Enforcement of a Subpoena Presumes a Common Purpose with the Commission.

Mr. Burns relies on the text of Article 15, Section 4. But the text does not empower a single commissioner to override or disregard the Commission's decision not to enforce a subpoena. Section 4 provides in relevant part:

> The corporation commission, and the several members thereof, shall have power to . . . investigate . . . any corporation whose stock shall be offered for sale to the public and of any public service corporation[,] . . . *and for the purpose of the commission, and of the several members thereof*, shall have the power of a court of general jurisdiction to enforce the attendance of witnesses and the production of evidence by subpoena . . . .

Ariz. Const. art. 15, § 4 (emphasis added).

This text does not grant each commissioner an unconditional power to enforce subpoenas. Instead, Section 4 links a single commissioner's enforcement power to

"*the* purpose of the commission, *and* of the several members thereof." Notably, the provision uses the term "purpose" in the singular, and the conjunctive "and" when discussing this singular "purpose"—it does *not* read, "the *purposes* of the commission, *or* of the several members thereof." The text presupposes that when a single commissioner seeks to enforce a subpoena, the commissioner is doing so to further a common purpose shared with the Commission as a whole.

The Commission and Mr. Burns, by contrast, shared no common purpose. They were at cross-purposes: Mr. Burns sought to enforce subpoenas that the Commission ordered should not be enforced. In that situation, Section 4's text does not prioritize the single commissioner's dissenting vote. Rather, by authorizing individual commissioners to enforce a subpoena only "for the purpose of the commission, and of the several members thereof," Section 4 ensures that the will of the Commission prevails over that of a single commissioner.

**2. The Text of Article 15's Enforcement Scheme Gives Primacy to the Commission.**

The text of Article 15's enforcement scheme supports the primacy of the Commission's will over that of its members. Courts "examine constitutional language in its overall context to effectuate its purpose." *Morrissey v. Garner*, 248 Ariz. 408, 410 ¶ 8 (2020); *Fann v. State*, 251 Ariz. 425 ¶ 28 (2021) (considering text of surrounding provisions). Section 16 allows forfeitures for violating "orders . . . of the corporation commission"; Section 17 permits judicial review of "orders . . .

fixed by the corporation commission"; and Section 19 empowers "[t]he corporation commission" to impose fines to enforce "its . . . orders." Ariz. Const. art. 15, §§ 16–19. Each of these is premised on a Commission that acts as a body, not as individual parts. Moreover, Mr. Burns's interpretation of Section 4 would leave the target of an individual commissioner's subpoena without a constitutionally grounded path for judicial review, other than through a discretionary special action. That makes little sense, as a matter of constitutional structure or due process.

### 3. The Text of Other Constitutional Provisions Empowers the Commission to Control Its Proceedings.

The Commission's constitutional power to control its own proceedings likewise cannot be reconciled with Mr. Burns's interpretation of Section 4. Section 6 gives "the Commission," not individual members, the authority (absent legislation) to "make rules and regulations to govern" its "proceedings." Ariz. Const. art. 15, § 6. The Commission has enacted rules regarding the enforcement of subpoenas issued in commission proceedings. Most notably, the Commission resolves objections and will "[q]uash the subpoena if it is unreasonable or oppressive." A.A.C. R14-3-109(O). While Mr. Burns has argued that Section R14-3-109(O) does not apply to his subpoenas, he is mistaken. The rule is not limited to subpoenas issued by parties, and it applies to rate proceedings. Mr. Burns pursued his subpoenas in a rate case. *See* A.A.C. R14-3-101(A); IR-58 at 51-64 (subpoenas).

Additionally, the Commission's rules apply the Rules of Civil Procedure in

hearings, A.A.C. R14-3-101(A), including Rule 45, which allows a neutral tribunal to quash, limit, or compel compliance with a subpoena. Ariz. R. Civ. P. 45(e)(2). In fact, Mr. Burns cited Rule 45 as one of the authorities under which the subpoenas were issued. IR-58 at 51-64 (subpoenas). And under Rule 45, the target of a subpoena may lodge objections, and the proponent of the subpoena then must move to compel before the tribunal overseeing the case. Ariz. R. Civ. P. 45(c)(6)(B). As the relevant tribunal, the Commission thus had authority to review the subpoenas and decide whether they would be enforced.

Mr. Burns's position, meanwhile, puts Section 4 into direct conflict with Section 6. As the superior court recognized, "To hold that the Commission as a body has no authority to resolve objections to subpoenas issued by individual members would be to deny effect to a rule enacted by the Commission pursuant to authority expressly granted to it by the Constitution." Res. APP049 (2/15/2018 Order at 10). Such an outcome would violate the cardinal rule that courts strive to "avoid interpretations that result in contradictory provisions." *Premier Physicians Grp., PLLC v. Navarro*, 240 Ariz. 193, 195 ¶ 9 (2016).

The Commission's control over its own proceedings is especially important when carrying out its "exclusive" authority under Section 3 "to … prescribe … just and reasonable rates," Ariz. Const. art. 15, § 3; *Johnson Utils, L.L.C. v. Ariz. Corp. Comm'n*, 249 Ariz. 215 ¶¶ 21, 23 (2020). The Commission exercises that

ratemaking power based on an evidentiary record, which requires it to decide objections relating to that record and the scope of its proceedings. In particular, the Commission decides what is relevant and admits evidence based on what it determines "will aid in ascertaining the facts." A.A.C. R14-3-109(K). Thus, when the Commission determines (as it did here) that a subpoena in a rate case seeks irrelevant information, the Commission's decision overrides the contrary view of a dissenting commissioner.

Mr. Burns has never cited a single case from any Arizona court, nor any constitutional drafting history, to support the notion that a single commissioner may enforce a subpoena notwithstanding the Commission's contrary order, whether in a rate case like this one or in any other Commission proceeding. Instead, all the materials cited by Mr. Burns in this Court and below—including *Polaris Int'l Metals Corp. v. Ariz. Corp. Comm'n*, 133 Ariz. 500, 506 (1982) and *Carrington v. Ariz. Corp. Comm'n*, 199 Ariz. 303, 305 ¶ 8 (App. 2000), and the remarks of Delegate Parsons, *see* Burns Pet. 12; Burns Ct. App. Br. 11—discuss the power of *the Commission*, not an individual commissioner. Nor has Mr. Burns cited any historical example of a single commissioner enforcing a subpoena notwithstanding a contrary Commission order. "[S]ometimes the most telling indication of [a] severe constitutional problem ... is the lack of historical precedent." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) (quotation marks omitted).

There is no doubt that the Framers wanted "a strong Commission." *See* Leshy, 20 Ariz. St. L.J. at 90–91. But the Commission's power is undermined, not strengthened, when a single commissioner with an idiosyncratic viewpoint can hijack proceedings against the express wishes of the Commission as a whole. The Framers did not intend to place such a destabilizing power in the hands of one official elected to serve on a five-member commission that otherwise runs by majority rule.

### B. Secondary Interpretation Methods Counsel Against an Individual Commissioner's Unconstrained Subpoena Power.

This interpretation of Section 4 finds further support in "secondary interpretation methods, such as the statute's subject matter, historical background, effect and consequences, and spirit and purpose." *Rosas v. Ariz. Dep't of Econ. Sec.*, 249 Ariz. 26, 28 ¶ 13 (2020).

#### 1. Early Statutes Confirm that Individual Commissioners Are Subordinate to the Commission.

Statutes enacted close in time to the Constitution's framing confirm that the Commission has authority to oversee, and block, the enforcement of subpoenas by individual commissioners in Commission proceedings. Such statutes are "considered as a contemporary interpretation" of the Constitution and, thus, "entitled to much weight." *Laird v. Sims*, 16 Ariz. 521, 528 (1915); *accord Ingram v. Shumway*, 164 Ariz. 514, 519 (1990) (1912 legislation is "evidence as to the intent of some of the framers because" some were Constitutional Convention delegates).

*First*, Arizona's first legislature enacted an organizing statute allocating power between the Commission and the individual Commissioners, Laws 1912, Ch. 90, § 9, which survives in nearly identical form today as A.R.S. § 40-102. The statute provided:

> A majority of the Commissioners shall constitute a quorum for the transaction of any business, for the performance of any duty or for the exercise of any power of the Commission… The act of a majority of the Commissioners when in session as a board shall be deemed to be an act of the Commission; but any investigation, inquiry, or hearing which the Commission has the power to undertake or to hold may be undertaken or held by or before any Commissioner designated for the purpose by the Commission, and every finding, order, or decision made by a Commissioner so designated, pursuant to such investigation, inquiry or hearing, when approved or confirmed by the Commission and ordered filed in its office, shall be and be deemed to be the finding, order or decision of the Commission.

Laws 1912, Ch. 90 § 9. The text is significant in several respects:

- When an individual commissioner conducts a hearing or investigation that the Commission is empowered to undertake, the individual commissioner does so as the Commission's delegee: the individual commissioner is "designated for the purpose by the Commission." Laws 1912, Ch. 90 § 9. This language echoes Section 4. When it grants an individual commissioner the power to issue and enforce a subpoena "for the purpose of the commission, and of the several members thereof," Ariz. Const. art. 15, § 4, Section 4 is referring to an individual commissioner who is conducting an "investigation, inquiry, or hearing which the Commission has the power to undertake or to hold," for

which the commissioner was "designated for the purpose by the Commission." Laws 1912, Ch. 90 § 9. It follows that the Commission retains the final word on the enforcement of an individual commissioner's subpoena.

- The Commission, as a multi-member body, acts by majority rule. The 1912 statute accordingly required a "majority" to "perform[] … any duty" or "exercise … any power," and that the decision of the majority is the decision of the Commission. Laws 1912, Ch. 90, § 9. Operation by majority rule is incompatible with the unfettered subpoena power of a single commissioner.
- The Commission may ratify or disapprove the decisions of individual commissioners. The 1912 statute provided that "every finding, order, or decision made by a Commissioner so designated, pursuant to such investigation, inquiry or hearing, when approved or confirmed by the Commission …, shall be and be deemed to be the finding, order or decision of the Commission." Laws 1912, Ch. 90, § 9. The Commission thus retains the final word regarding whether an order by an individual commissioner should be enforced, and thereby become an order of the Commission.
- Finally, Laws 1912, Ch. 90, §§ 54-55, which have no analogue today, implement Article 15, Section 4 in a manner that is compatible with Laws 1912, Ch. 90, § 9. Those provisions likewise presuppose that a single commissioner enforcing a subpoena is doing so as a delegee of the

Commission, in connection with a proceeding before the Commission.

In sum, the 1912 legislation describes a Commission that delegates to individual commissioners responsibility for presiding over proceedings for the Commission's purposes, subject to the Commission's supervision. It does not contemplate an individual commissioner conducting his or her own investigation, against the Commission's will, and free of the Commission's oversight.

*Second*, the 1912 contempt statute made *the Commission* responsible for enforcing compliance with commissioners' orders. It provided: "In case any public service corporation, corporation or person shall fail to observe, obey or comply with any order, rule, regulation, direction, demand or requirement, or any part or portion thereof, of the Commission *or any commissioner*, such public service corporation, corporation or person shall be in contempt *of the Commission* and shall be fined *by the Commission*…" Laws 1912, Ch. 90 § 81 (emphasis added). The contempt statute—which survives in substantially similar form today, *see* A.R.S. § 40-424—necessarily presupposes that a commissioner's order serves the Commission's purposes, and that the Commission retains the final word on whether that order should be enforced through contempt sanctions. It would make little sense for the Framers to have vested a single commissioner with the power to enforce a subpoena against the will of the Commission, only to require that same commissioner to depend on the Commission to issue a contempt order to compel compliance.

*Third*, the judicial review statute provided for review only of a Commission order—not of an order by a single commissioner. Laws 1912, Ch. 90 § 67(a). Moreover, judicial review had to be preceded by a rehearing process directed to the Commission. *Id.* § 66. Versions of these provisions survive today. *See* A.R.S. §§ 40-253, -254, -254.01. This structure implies, again, that the Commission (through a majority vote) retains authority to resolve objections to a single commissioner's subpoena, only after which the Commission's decision (whether it agreed, disagreed, or simply ignored a party's objections) could be appealed. Mr. Burns's view of a single commissioner's authority upends this framework: a party would have a right to appeal a single commissioner's order only if the Commission agreed with the commissioner. The party would have no right to appeal a single commissioner's enforcement order with which the Commission disagreed; instead, it could only pursue, perhaps, an extraordinary writ via discretionary special action. This bizarre arrangement makes little sense. A single commissioner's order, with which the Commission disagrees, should be subject to greater judicial scrutiny than an order by the Commission, not less.

**2. Context and Purpose Support the Commission's Primacy.**

Requiring a common purpose between Commission and commissioner when the latter exercises subpoena power under Article 15, Section 4 not only respects the text and structure of the Constitution, but also makes practical sense. In Arizona in

1912, the subpoena enforcement authority of individual commissioners was logistically important. As hearing officers, each commissioner held the power to enforce subpoenas when presiding over proceedings on behalf the Commission. This ensured that the barriers to easy communication and travel that existed in 1912 would not impede the Commission's business.

Meanwhile, Mr. Burns's interpretation would have sweeping practical consequences that the Framers did not intend. The power in Article 15, Section 4 is not limited to subpoenas directed to public service corporations; it applies to "any corporation whose stock shall be offered for sale to the public." Ariz. Const. art. 15, § 4. Under Mr. Burns's view, the Commission is powerless to stop a single commissioner from launching politically motivated fishing expeditions against any publicly traded company doing business in Arizona.

It is hard to conceive of a rule more destabilizing to Arizona's business climate, or more at odds with the Framers' vision for the Commission. Although "[a] powerful corporation commission was at the heart of the progressives' plan for the regulation of corporations," Gordon Morris Bakken, *The Arizona Constitutional Convention of 1910*, 1978 Ariz. St. L.J. 1, 15 (1978), the Framers—the "great majority" of them "small businessmen and entrepreneurs," John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L.J. 1, 90 (1988)—roundly rejected any effort to vest the Commission with "such inquisitorial powers," Bakken, 1978

Ariz. St. L.J. at 15. Indeed, these "moderate delegates opposed the more extreme proposals of the progressives as ruinous to the industrial prosperity of Arizona," and wanted to encourage "outsiders to invest in Arizona business." *Johnson Utils.*, 249 Ariz. 215, 220 ¶ 16 (internal quotation marks omitted). Given these goals, surely the Framers did not envision the broad, disruptive powers Mr. Burns claims here.

### 3. Prudential Doctrines Disfavor Judicial Enforcement of a Commissioner's Subpoena Over Commission Objection.

Finally, doctrines like primary jurisdiction and administrative exhaustion—which limit judicial involvement with intra-agency processes and respect agencies' specialized expertise—further militate against Mr. Burns's interpretation of Article 15, Section 4. As the superior court noted, even Mr. Burns "does not contest" that "[a] party on whom an investigator subpoena has been served has … the right to object to its validity and/or scope," and that such an objection should be heard by a third party, not "solely by the individual commissioner who issued the subpoena in the first place." Res. APP048 (2/15/2018 Order at 9). Thus, the question is whether that objection should first be heard by a court or by the Commission. *Id.*

Putting aside that neither the Constitution nor the statutes provide a clear path for the target of a single commissioner's subpoena to obtain judicial review as of right—which, as discussed above, is a reason to doubt that the Framer's intended for a single commissioner to be able to enforce a subpoena without regard to the Commission—prudential reasons also urge that the Commission should resolve an

objection in the first instance.

First, the doctrine of primary jurisdiction counsels against judicial intervention "until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court." *Campbell v. Mountain States Tel. & Tel. Co.*, 120 Ariz. 426, 429 (App. 1978). This doctrine promotes the "orderly and sensible coordination of the work of agencies and of courts." *Id.* at 430. Thus, "a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer, for otherwise parties who are subject to the agency's continuous regulation may become the victims of uncoordinated and conflicting requirements." *Id.* Mr. Burns's interpretation poses precisely that danger. Specifically, the Companies would be caught between a commissioner order demanding compliance with a subpoena, and a Commission order declaring the subpoena irrelevant and therefore unreasonable and oppressive.

*Second*, administrative exhaustion deters "premature judicial intervention in inchoate administrative proceedings." *Moulton v. Napolitano*, 205 Ariz. 506, 511 ¶ 9 (App. 2003). The judicial role does not begin until "all . . . administrative remedies" have been used and final agency action occurs. *Id.* Thus, when, as here, the Commission "votes" during a rate case "not to pursue an investigation started by one of its elected members," the court should not "overturn[] the Commission's vote

and directly interfer[e] in Commission operations." Opinion ¶ 23.

A contrary rule would invite absurd consequences. *See Sell v. Gama*, 231 Ariz. 323, 327 ¶ 16 (2013) (text should be interpreted to avoid "absurdity"). Under Mr. Burns's approach, a court would be required to referee an internal dispute between one commissioner and the remaining four over issues such as whether certain evidence is relevant to the Commission's proceeding. That is an issue best left to the Commission's expertise and insight in the first instance. The Commission acts by majority rule precisely to avoid such entanglements. *See* A.R.S. § 40-102(C).

## II. The Declaratory Judgment Act May Not Be Used to Seek Review of the Merits of a Commission Decision.

The Court also granted review of the question whether the UDJA "grants an ACC commissioner standing to seek a declaration of their rights and their fellow commissioners' rights." Here, the Companies agree that the UDJA permits Mr. Burns to litigate whether a single commissioner has the constitutional power to enforce a subpoena in disregard of the Commission.

But Mr. Burns did not stop there: he also asked the court to review the merits of the Commission decision holding his subpoena unreasonable. *See* Opinion ¶ 27 ("Burns argues in the alternative that the Commission's decision not to enforce his subpoenas was arbitrary and capricious."). The Court of Appeals correctly held that the UDJA does not provide a cause of action to litigate *that* question.

As noted above, judicial review of Commission orders is addressed in A.R.S.

§ 40-254 and § 40-254.01. And that statutory framework for judicial review is exclusive: no court may "review any order" of the Commission "[e]xcept as provided" in §§ 40-254 and 40-254.01. *See* A.R.S. §§ 40-254(F), 40-254.01(F). Challenges to Commission orders issued in ratemaking proceedings must be brought to the court of appeals, not the superior court. *See* A.R.S. § 40-254.01(A). And only a "party to [the] proceeding" or the Attorney General may seek such review. *Id.* § 40-254.01(A); *see also id.* § 40-254 (review of other Commission orders limited to the Attorney General and "any party in interest"). Mr. Burns is neither.

A dissenting commissioner cannot seek review of the merits of a Commission order any more than a dissenting court of appeals judge can seek this Court's review of a decision the judge believed to have been wrongly decided. A dissenting decisionmaker may register disagreement in a dissent; the choice whether to seek judicial review is left to the parties. The Declaratory Judgment Act cannot be used to circumvent these limitations.

## CONCLUSION

For the foregoing reasons, this Court should affirm.

RESPECTFULLY SUBMITTED this 18th day of January, 2022.

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