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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	Supreme Court No. R-20-0008
PETITION TO AMEND RULE 3, RULES OF PROCEDURE FOR JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS	**GOLDWATER INSTITUTE'S COMMENT IN SUPPORT OF THE PETITION**

Pursuant to Rule 28, Ariz. R. Sup. Ct., the Goldwater Institute hereby submits this comment to the New Civil Liberties Alliance's ("NCLA") Petition to Amend Arizona Rule of Procedure for Judicial Review of Administrative Decisions 3 ("JRAD Rule 3").

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual liberty through litigation, research papers, editorials, policy briefings, and forums. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates and files *amicus* briefs when its

or its clients' objectives are implicated. The Goldwater Institute seeks to enforce the features of our state and federal constitutions, including the separation of powers among government branches, and the protection of individual rights, including the right to due process. The Institute has worked extensively on administrative law matters through scholarship, public policy, and direct litigation.

The Goldwater Institute supports the Petition to Amend JRAD Rule 3. It joins the NCLA's legal analysis as to why amendment is necessary and appropriate.

In addition to the reasons articulated in the Petition, the proposed amendment would ensure that JRAD Rule 3 complies with the Arizona Constitution's separate and carefully balanced distribution of powers.

Pursuant to Article 3 of the Arizona Constitution, "The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." The separation of powers doctrine of Article 3 "protect[s] one branch against the overreaching of any other branch" and is "part of an overall constitutional scheme to protect individual rights." *State v. Prentiss*, 163 Ariz. 81, 84–85 (1989).

This principle is reinforced by Article 4, Part 1, Section 1 of the Arizona Constitution, which vests the legislature with the "legislative authority" of the State, and Article 6, Section 5(5) of the Arizona Constitution, which expressly vests this Court with the "[p]ower to make rules relative to all procedural matters in any court."

Thus, under our state's separation of powers doctrine, the legislature has primacy over substantive law and the judiciary over procedural rules. *Id.* If a statute is substantive and conflicts with a court-promulgated procedural rule, the statute prevails. *See Valerie M. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 331, 336 ¶ 22 (2009); *State v. Hansen*, 215 Ariz. 287, 289 ¶ 10 (2007) (If a conflicting statute "is substantive, it indisputably governs.").

The legislature has elected under A.R.S. § 12-911(A) to allow for stays of administrative agency decisions while the case is pending in superior court if the moving party can show "good cause." "Good cause" means "[a] legally sufficient reason." CAUSE, Black's Law Dictionary (11th ed. 2019). This is obviously a less exacting standard than that required to issue a preliminary injunction, as, *inter alia*, it does not include a necessary showing of "strong likelihood" of success on the merits and "irreparable harm." *See Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990).

In the administrative context, a stay is intended to preserve the rights of regulated parties and others with an interest in administrative action until the agency decision can be heard in a neutral court. A stay of administrative action, unlike judicial actions, is particularly important because decisions from administrative agencies "combin[e] prosecutorial and adjudicative functions in the same agency official," which "gives rise to due process concerns." *Horne v. Polk*, 242 Ariz. 226, 230 ¶ 14 (2017).

What's more, administrative agencies exercise tremendous power, including the power to fine people, deny them licenses, recommend criminal prosecution, and affect the livelihood of thousands of businesses and their employees in scores of industries. Thus, a stay of such decisions affects the substantive rights of those subject to administrative power. Because the standard for obtaining a stay of administrative decisions is higher under JRAD Rule 3 than it is under A.R.S. § 12-911, a party's substantive rights to maintain the status quo on such significant matters is plainly affected, and A.R.S. § 12-911(A) should thus prevail over JRAD Rule 3.

Additionally, in recent years, the legislature has shown an intent to *increase* judicial review of administrative actions, and thus protect the rights of regulated parties, not *lessen* the scope of that review. This was demonstrated most clearly with the 2018 amendments to A.R.S. § 19-910(E), which eliminated deference to

administrative decisions on questions of law. *See*. 2018 Ariz. Legis. Serv. Ch. 180 (H.B. 2238) (amending A.R.S. § 12-910(E) to require 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."). This shows a legislative intent to protect the rights of those subject to administrative action and to allow for a more probing review of such action. Contrary to that legislative intent, JRAD Rule 3 places a greater burden on regulated parties to maintain the status quo following administrative adjudication and thus is contrary to that legislative intent.

For these reasons and those stated in NCLA's Petition, the Petition should be granted.

Respectfully submitted this 29th day of April 2020,

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