ARIZONA COURT OF APPEALS

DIVISION ONE

LEGACY FOUNDATION ACTION FUND, Plaintiff/Appellant, v. CITIZENS CLEAN ELECTIONS COMMISSION, Defendant/Appellee.	Court of Appeals Division One No. 1 CA-CV 19-0773 Maricopa County Superior Court No. CV2018-004532 CV2018-006031 (Consolidated)

DEFENDANT/APPELLEE'S SUPPLEMENTAL BRIEF

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INTRODUCTION

The Commission provides the following answers to the Court's request for supplemental briefing regarding the Restatement (Second) of Judgments § 12 ("Restatement § 12").

First, although Arizona law should foreclose LFAF's claims regardless of § 12, the Restatement provides persuasive authority supporting affirmance of the superior court's judgment. The Restatement, like Arizona law and the authorities discussed in the Answering Brief, confirms that a party may not collaterally attack subject matter jurisdiction when it already litigated that issue (as LFAF did) or had an opportunity to do so (as LFAF had).

Second, none of the three exceptions to the presumption of finality in § 12 applies here. Quite the opposite: the "subject matter of the action" is "plainly" *within* the Commission's jurisdiction (§ 12(1)); the Commission's enforcement does not "infringe the authority of another tribunal or agency," (§ 12(2)); and the Commission is capable of determining its own jurisdiction to enforce the Act (§ 12(3)).

Third, though directly on-point case law is limited it supports the Commission.

I. The Restatement confirms that claim preclusion rules should apply to subject matter jurisdiction, especially when a party had an opportunity to litigate the issue.

Arizona courts often "look to the Restatement for guidance in the absence of controlling authority." *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 201, ¶ 24 (App. 2007). The Court does not *need* to consult the Restatement for guidance because existing Arizona law resolves this appeal in the Commission's favor. As explained in the Answering Brief (at 23-28), LFAF had a full and fair opportunity to contest subject matter jurisdiction, did in fact contest subject matter jurisdiction, and its failure to further appeal the Commission's "final administrative decision makes the decision final and res judicata." *Gilbert v. Bd. of Med. Exam'rs of Ariz.*, 155 Ariz. 169, 174 (App. 1987). *See* AB at 15 (showing table citing record where LFAF challenged subject matter jurisdiction); *see also Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 416, 417, ¶¶ 47, 48 (2006) (explaining that "a party may not use a complaint for declaratory relief as a substitute for a timely complaint for judicial review of an administrative order").

The Restatement is relevant as persuasive authority confirming that Arizona law should apply claim preclusion rules to subject matter jurisdiction. *See Pettit v. Pettit*, 218 Ariz. 529, 531, ¶ 6 n.3 (App. 2008)

(assuming "for purposes of [that] opinion . . . that the doctrine of claim preclusion does not prevent a party from collaterally attacking" subject matter jurisdiction).

Section 12 underscores that LFAF's central argument—a decision is *never* final because a party can *always* collaterally challenge subject matter jurisdiction—is incorrect and out of step with the modern presumption of finality. Contrary to LFAF's claim, Section 12 provides that "[w]hen a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation." Restatement § 12. Collateral attacks are the rare exception. *Id.* "When the question of the tribunal's jurisdiction is raised in the original action, in a modern procedural regime there is no reason why the determination of the issue should not thereafter be conclusive under the usual rules of issue preclusion." *Id.* cmt. c.

Arizona's claim-preclusion case law similarly prefers finality when a party has had a fair chance to litigate an issue, whether the litigation occurred in superior courts of general jurisdiction or in administrative tribunals. Claim preclusion "binds the same party standing in the same capacity in subsequent litigation on the same cause of action, not only upon

facts actually litigated but also upon those points which might have been litigated." *Gilbert*, 155 Ariz. at 174. This extends to constitutional challenges to an agency's authority. *See Smith*, 212 Ariz. at 416, ¶¶ 47-49; *Olson v. Morris*, 188 F.3d 1083, 1086 (9th Cir. 1999) (stating, under Arizona law, that preclusion "applies even to alleged constitutional errors that might have been corrected" in an appeal from an administrative decision).

The Restatement is consistent with the law elsewhere. As the United States Supreme Court explained, "[i]t has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982). As with the Restatement § 12, a "party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment." *Id.*; *see also Harris Cty. Hosp. Dist. v. Pub. Utility Comm'n of Tex.*, 577 S.W.3d 370, 377-78 (Ct. App. Tex. 2019) (rejecting collateral challenge to subject matter jurisdiction of final matter); *Conservation Comm'n of Falmouth v. Pacheco*, 733 N.E.2d 127, 128-31 (Ct. App. Mass 2000) (challenge to agency jurisdiction after failure to seek review "precluded" (citing Restatement)).

Section 12 does not impact whether this Court affirms. If the Court were to consider the merits of LFAF's subject-matter jurisdiction arguments, it should conclude easily that the Commission has subject matter jurisdiction over LFAF's violation of the Clean Elections Act. *See below*, § II.A; *see also* AB at 36-42 (addressing merits of LFAF's jurisdictional claims). *See KCI Rest. Mgmt. LLC v. Holm Wright Hyde & Hays PLC*, 236 Ariz. 485, 488 n.2 (App. 2014) (court may "affirm the judgment if the court was correct in its ruling for any reason" (quotation marks omitted)).

II. None of the three Restatement exceptions to finality is present here.

A. The subject matter was not plainly beyond the Commission's jurisdiction.

The first exception applies if "[t]he subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority." Restatement § 12(1). The inquiry is whether the exercise of jurisdiction was facially out of bounds, not a disagreement about the merits. *See In Interest of A.E.H.*, 468 N.W. 2d 190, 206 (Wis. 1991) ("We construe the term 'manifest abuse of authority' narrowly, and reserve their application to egregious cases where a court lacks the power to hear a particular class of case."). For instance, a bankruptcy court would be

"plainly beyond" its jurisdiction if it "decided to conduct a criminal trial, or to resolve a custody dispute." *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 153 n.6 (2009) (positing examples of the "plainly beyond" exception). It is not enough that the argument may have prevailed on appeal in this particular case, but whether the tribunal lacks jurisdiction over the "entire category of cases." *See In re C.L.S.*, 225 A.3d 644, 651 (Vt. 2020); *Sousa v. Sousa*, 143 A.3d 578, 589-91 (Conn. 2016) (collateral challenge only if lack of jurisdiction is "entirely obvious," which is "extraordinarily rare"); *Hodge v. Hodge*, 621 F.2d 590, 592 (3d Cir. 1980).

Here the question is not close. The Clean Elections "Act obligates the Commission to '[e]nforce this article.'" *Ariz. Advocacy Network Found. v. State*, __ Ariz. __, __, ¶ 53 2020 WL 5793080, at *10 (App. Sept. 29, 2020) (quoting A.R.S. § 16-957(A)(7)). The Act "imposes reporting obligations on '*any person* who makes independent expenditures.'" *Id.*, ¶ 55 (quoting A.R.S. § 16-941). The Act empowers the Commission to investigate and enforce such violations or, as occurred here, upon "receiving . . . third-party complaints about violations within its purview." *Id.* ¶ 57 (citing A.R.S. § 16-956(A)(7)); *see* CAPP059 (complaint alleging violation by LFAF). Thus, the subject matter—whether or not LFAF was a "person" required to file an

"independent expenditure" report under § 16-941—was "plainly within" not "plainly beyond" the Commission's jurisdiction.

B. Affirming the judgment will not "substantially infringe the authority of another tribunal or agency".

The second exception applies if "[a]llowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government." Restatement § 12(2). To apply, the intrusion must be so substantial that it raises governmental and societal concerns that outweigh the strong interest in finality. *See In re Bulldog Trucking, Inc.*, 147 F.3d 347, 353, 354 (4th Cir. 1998) ("Any improper exercise of jurisdiction necessarily intrudes on the power of another tribunal, but not every such intrusion implicates public concerns that outweigh the countervailing interest in finality."). For example, the exception could apply if a state court entered a judgment in violation of federal bankruptcy law's exclusive jurisdiction or a judgment violating Indian Nation sovereign immunity. *Blinder, Robison & Co., Inc. v. SEC*, 837 F.2d 1099, 1103-04 & n.5 (D.C. Cir. 1988) (citing examples of substantial infringement). Overlapping jurisdiction is not enough.

Other governmental entities (e.g., Attorney General) may enforce other reporting requirements for independent expenditures, but "the

Commission alone is empowered to enforce" "a violation of the Act." *Ariz. Advocacy*, 2020 WL 5793080, at *10, ¶ 56.

Governmental and societal interests in finality should carry the day. If LFAF's argument on the merits is correct, then "other litigants on other occasions . . . will have the opportunity and incentive to object to the excess of authority if it is repeated." Restatement § 12, cmt. d.

C. The Commission is able to make an adequately informed determination of its own jurisdiction.

The third exception applies if the "judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment" should be able to "belatedly attack" jurisdiction. Restatement § 12(3).

This exception does not apply to the Commission. The Commission's governing statutes and procedural rules, like "[v]irtually all systems of procedure . . . permit the question of subject matter jurisdiction . . . to be raised" and "also afford opportunity for appellate review." Restatement § 12, cmt. e (describing typical modern scenario where exception does not apply); *see* A.R.S. § 16-957 (providing enforcement procedure, including

judicial review); Ariz. Admin. Code § R2-20-201 to -228 (providing multi-step procedural process for resolving complaints of Clean Elections Act).

This case is "unexceptional." *See Blinder*, 837 F.2d at 1104. LFAF vigorously contested subject matter jurisdiction before the Commission and failed to exercise its right of appeal. *See* AB at Case and Fact § IV.B. This third exception, like the other two, does not afford LFAF yet another bite at the apple. *See State Human Rights Comm'n v. Accurate Mach. & Tool Co., Inc.*, 245 P.3d 63, 68 (Ct. App. N.M. 2010) (finding third exception inapplicable because "after actually litigating the [commission's] subject matter jurisdiction then taking no further action, [the challenger's] subsequent claims in another proceeding . . . [were] outweighed by the principle of finality"). LFAF fully litigated and lost the issue of the Commission's subject matter jurisdiction. Under these circumstances, LFAF can present "no persuasive claim to a second try." *Blinder*, 837 F.2d at 1104.

III. Cases applying these principles support affirmance of the superior court.

Although the Commission has not identified any cases applying the Restatement in exactly this procedural scenario (a motion to dismiss an

agency's enforcement action), analogous case law supports the view that the Restatement would support affirmance.

In *Conservation Commission of Falmouth v. Pacheco*, a party contested a commission's subject matter jurisdiction but never sought judicial review of the commission's assertions of jurisdiction after the commission entered an order finding violations and requiring remedial action. 733 N.E. 2d at 129-32. The commission eventually filed a complaint for enforcement of its order and obtained judgment. On appeal in that new proceeding, the party again disputed subject matter jurisdiction, but the court held that the "jurisdictional argument was no longer viable after his failure to exhaust his administrative and judicial remedies with respect to the commission's first order," and held that the party was precluded from relitigating jurisdiction. *Id.* at 130-32. *See also Colville Envtl. Servs., Inc. v. N. Slope Borough*, 831 P.2d 341, 345-50 (Alaska 1992) (applying Restatement § 12 to hold that res judicata prohibits jurisdictional challenges to administrative commission's orders when the challenging party "had the opportunity to litigate this issue").

CONCLUSION

The Restatement § 12 provides additional reason to affirm.

RESPECTFULLY SUBMITTED this 5th day of November, 2020.

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