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 RESPONSE TO SUPPLEMENTAL BRIEF

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INTRODUCTION

LFAF's supplemental brief largely sidesteps the Court's questions and is unconvincing for at least two reasons:

First, LFAF's primary argument is that the Restatement is not relevant because Arizona law allows collateral challenges to an agency's jurisdiction. But this argument does not answer whether the rules of *claim preclusion* should apply to subject matter jurisdiction when a party has had an opportunity to litigate the issue in a prior proceeding. As discussed in the Supplemental Brief, Arizona law, the law nationwide, and the Restatement all confirm that claim preclusion applies, except in rare and extraordinary circumstances. Nothing cited in LFAF's supplemental brief changes that conclusion.

Second, LFAF's argument about the Restatement's exceptions—that the Commission's adjudication was a "manifest abuse of authority"—largely ignores the Restatement, its commentary, and the cases applying it. Those authorities confirm that this case is simply not one of the exceptional and rare cases where claim preclusion would not apply under the Restatement.

I. LFAF's argument against the Restatement fails to address whether claim preclusion rules should apply.

LFAF's supplemental brief (at 2) contends that the Restatement § 12 is not relevant to this action because various Arizona cases have "addressed" whether an agency's jurisdiction "can be challenged in a collateral proceeding." According to LFAF, the cases allow such collateral challenges because Arizona prefers the "validity of a judgment over any secondary interest in finality."

LFAF's argument and the cases it cites, however, do not address the question at the heart of the matter: whether ***claim preclusion*** principles (such as those spelled out in Restatement § 12) should apply to subject matter jurisdiction. As explained in the Commission's supplemental brief (at 7-8), Arizona law, the Restatement, and the law nationwide all embrace the view that claim preclusion should apply to all issues that a party had an opportunity to or actually did litigate. *See, e.g.*, *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 153 (2009) (so long as parties "were given a fair chance to challenge [the tribunal's] subject-matter jurisdiction, they cannot challenge it now by resisting enforcement of the" earlier orders); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982) ("It has

long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal."). Indeed, "[t]he principle of finality has its strongest justification where the parties have had full opportunity to litigate a controversy, especially if they have actually contested both the tribunal's jurisdiction and issues concerning the merits." Restatement (Second) of Judgments § 12, cmt. a.

None of LFAF's authorities put this conclusion in doubt or otherwise indicate that Arizona law would depart from the Restatement's guidance. For example, LFAF (at 3) quotes *Arizona Board of Regents ex rel. University of Arizona v. State*, 160 Ariz. 150 (App. 1989), for the principle that a party may collaterally challenge jurisdiction. But that case does not involve a claim by a party who had an opportunity to litigate the issues in a prior proceeding. *Id.* at 154, 156. There, the Regents challenged a decision (made via letter, not adversarial hearing) of an administrator via lawsuit in superior court in the first instance. There was simply no occasion for the court to consider whether claim preclusion rules should apply to any of the issues raised in that lawsuit, including subject matter jurisdiction. This case does not help answer this Court's questions.

The same is true for the other cases LFAF cites. *See Tucson Warehouse & Transfer Co. v. Al's Transfer*, 77 Ariz. 323, 324-28 (1954) (no discussion of claim preclusion in case allowing a plaintiff to collaterally attack an order of the Corporation Commission in a prior proceeding to which the plaintiff was not a party); *Lamb v. Super. Ct.*, 127 Ariz. 400, 403 & n.4 (1980) (no discussion of claim preclusion in special action from an interlocutory family court order regarding authority of lower court to order certain child support payments). And although *Gilbert v. Board of Medical Examiners of Arizona*, 155 Ariz. 169, 174 (App. 1987)—discussed extensively in the parties' briefing—in dictum recites the general principle that collateral challenges are permitted for jurisdiction, the holding of that case is that claim preclusion applies to final administrative decisions, including as to constitutional claims.

Finally, other cases LFAF cites confirm rather than refute that Arizona law is consistent with the Restatement. Indeed, in *State v. Espinoza*, 229 Ariz. 421 (App. 2012), the Court expressly endorsed the Restatement's approach to subject matter jurisdiction, and found that the challenge there—involving severe, long-lasting criminal penalties from a years-old sentencing order—was an exceptional case where "true limitations on a court's authority" were "breached." *Id.* at 429, ¶ 34 (noting that, at least for criminal judgments, "our

state has adopted a modern approach, in conformity with the Restatement, which resists the temptation to characterize even serious procedural irregularities as violations of jurisdictional court authority"). Similarly, in *Silver v. Rose*, 135 Ariz. 339, 340-43 (App. 1982), the Court allowed a party challenging child custody decisions in juvenile court to proceed via special action, explaining that "extraordinary relief" was necessary because of "the urgent and agonizing nature of the numerous proceedings affecting custody . . . [and] the resulting detriment to the children." These cases simply do not back up LFAF's claim that Arizona has rejected the approach embodied in Restatement § 12.

II. LFAF fails to show that any of the Restatement's exceptions apply to this case.

Tellingly, in arguing that the Restatement's exceptions apply, LFAF largely ignores the Restatement and the cases applying it. The reason is plain: this case is not one of the rare and exceptional cases justifying this Court's intervention.

As to the first factor (whether the Commission acted "plainly beyond" its jurisdiction), LFAF argues (at 5) that the Commission's "judicial overreach is patent" because, it contends, the Clean Elections Act authorizes

penalties only against "candidates" or someone acting in coordination with a candidate.

LFAF's argument is merely an assertion that the Commission incorrectly applied its authority to LFAF in this particular case. That is plainly not the kind of extreme overreach the first exception targets. As explained in the Commission's brief, the first exception is for cases that are facially out of bounds, like a bankruptcy court conducting a criminal proceeding. Commission Supp. Br. at 9-11; *see Travelers Indem.*, 557 U.S. at 153 n.6. Letting this judgment stand final—even if the outcome would have changed on direct appeal—does not implicate any governmental or societal interests that outweigh the strong interest in final judgments. Commission Supp. Br. at 9-11; *see, e.g.*, *In re C.L.S.*, 225 A.3d 644, 651 (Vt. 2020).

As to the second exception, LFAF argues (at 6) that letting the judgment stand would "seriously disturb[] the distribution of governmental powers by creating intolerable, competing, and ambiguous enforcement standards." But, the Court of Appeals just confirmed what the Clean Elections Act says: the Commission is obligated to enforce the Act, including the requirement that "any person" who makes an independent expenditure over a certain amount must file an independent expenditure report under

§ 16-941(D). *See* A.R.S. §§ 16-941, 16-957(A)(7); *Ariz. Advocacy Network Found. v. State*,__ Ariz. __, __, ¶¶ 53, 55 2020 WL 5793080, at *10 (App. Sept. 29, 2020). The subject matter of this case originally was just that—the Commission's adjudication of a complaint that LFAF had failed to file independent expenditure reports under § 16-941(D). Moreover, there is nothing unusual about overlapping jurisdiction among different parts of the government. Commission Supp. Br. 11-12. The fact that the Secretary of State and Attorney General may play a role in the regulation of independent expenditure reports is not a basis to revive LFAF's arguments about the Commission's exercise of its jurisdiction in this case.

Finally, LFAF argues (at 7-8) that the Court should not apply claim preclusion because, it says, the Commission has infringed LFAF's speech rights. But LFAF's disagreement with the Commission's conclusion that LFAF's advertisement triggered a reporting requirement has nothing to do with whether LFAF may relitigate the Commission's *subject matter jurisdiction* to consider the question. LFAF fully litigated the Commission's subject matter jurisdiction and failed to timely seek judicial review. LFAF cites no authority and no facts authorizing courts to re-open and reconsider the Commission's decision under the unremarkable circumstances here.

RESPECTFULLY SUBMITTED this 13th day of November, 2020.

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