No. 81224

IN THE SUPREME COURT OF THE STATE OF NEVADA

DIAMOND NAT. RES. PROT. AND CONSERVATION ASS'N, et al.,

Appellants,

v.

DIAMOND VALLEY RANCH, LLC, et al.,

Respondents.

ON APPEAL FROM THE SEVENTH JUDICIAL DISTRICT, EUREKA COUNTY
Case No. CV1902-348, CV1902-349, CV1902-350

MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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**Pro Hac Vice pending*

Pacific Legal Foundation ("PLF) respectfully submits this motion pursuant to Rule 29 of the Nevada Rules of Appellate Procedure seeking leave to file the proposed brief *amicus curiae* in support of Respondents which is attached as Exhibit A.

Pacific Legal Foundation requests leave to file this brief to urge the Court to use this case as an opportunity to address and resolve its contradictory and irreconcilable precedent regarding whether executive agencies like the State Engineer receive deference for their statutory interpretations. As evidenced by the briefing in this case, this Court's precedent on the topic is inconsistent, with some cases suggesting that the State Engineer is entitled to great deference and other cases stating that it is entitled to no deference and that its interpretations are merely persuasive. These incompatible decisions are causing serious confusion for courts, state agencies, and the general public. This case provides the Court with an opportunity to bring clarity to the important question of whether state agencies are entitled to administrative deference.

The proposed brief urges this Court to conclude that agency deference is incompatible with the role of the judiciary, and to clarify its jurisprudence on the point. The Nevada Constitution imposes a rigorous

separation of powers whereby only the judiciary is responsible for judicial interpretation. Giving administrative agencies in the executive branch a trump card over legislative enactment and judicial interpretation cannot be reconciled with this allocation of responsibility. Allowing executive agencies to conclusively determine what the law means also subverts individual liberty and leads to the continued encroachment of individual rights—as this case vividly illustrates. Pacific Legal Foundation is interested in this case as it relates to the proper role of inter-branch relations of government and as it impacts personal liberties and property rights. NRAP 29(c)(1).

The proposed brief will be of assistance to this Court by illustrating the divergent statements of this Court on these issues, and in providing this Court with information concerning legal trends concerning these issues. NRAP 29(c)(2). For example, the brief explains that in the past few years, at least six other state judiciaries (Michigan, Kansas, Utah, Wisconsin, Mississippi, and Arkansas) have recognized the many problems with administrative deference and have abolished deference to executive agencies' interpretations of state statutes. And two other states

(Florida and Arizona) have abolished deference through legislation or ballot measure. PLF urges the Court to follow suit.

Pacific Legal Foundation was founded in 1973 and is widely regarded as the most experienced and successful nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel or counsel for amici in cases considering the contemporary practices of judicial deference to agency interpretations of statutes and regulations. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018) (interpretation of Clean Water Act venue statute); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (*Auer* deference to agency guidance letter); *Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 620 (2017) (*Auer* deference to agency staff testimony); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013) (*Auer* deference to Clean Water Act regulations); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "navigable waters"). Moreover, PLF attorneys have contributed to the body of scholarly literature on the topic of deference. *See* Daniel

Ortner, *The End of Deference: How States are Leading a (Sometimes Quiet) Revolution against Administrative Deference Doctrines* (March 2020) (conducting a fifty-state survey of state deference doctrines), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552321.

PLF's arguments based on this experience will assist the Court in understanding and deciding the important issues on review in this case.

/ / /

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the court grant it leave to file the amicus curiae brief attached as Exhibit A to this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS was filed electronically with the Nevada Supreme Court on the 13th day of November, 2020. Electronic Service of the Brief shall be made in accordance with the Master Service List, as follows:

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I further certify that on the 13th day of November, 2020, I served, via USPS first-class mail, complete copies of the Brief on the following attorneys of record who are not registered for electronic service:

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DATED: November 13, 2020.

Respectfully submitted,
/s/ *Barbara Spagna*
Employee of
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EXHIBIT A

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that Pacific Legal Foundation has no parent corporations, and that no publicly held company owns 10% or more of its stock. Steven M. Silva, a partner at Blanchard, Krasner, and French, and Daniel M. Ortner, an attorney at the Pacific Legal Foundation, are the only attorneys who have appeared or are expected to appear on behalf of the Pacific Legal Foundation in this case.

/s/ Steven M. Silva

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pacific Legal Foundation was founded in 1973 and is widely regarded as the most experienced and successful nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel or counsel for amici in cases considering the contemporary practices of judicial deference to agency interpretations of statutes and regulations. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018) (interpretation of Clean Water Act venue statute); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (*Auer* deference to agency guidance letter); *Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 620 (2017) (*Auer* deference to agency staff testimony); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013) (*Auer* deference to Clean Water Act regulations); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "navigable waters"). Moreover, PLF attorneys have contributed to the body of scholarly literature on the topic of deference. *See* Daniel Ortner, *The End of Deference: How States are Leading a (Sometimes*

*Quiet) Revolution against Administrative Deference Doctrines (*March 2020) (conducting a fifty-state survey of state deference doctrines), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=355232 1.

PLF's arguments based on this experience will assist the Court in understanding and deciding the important issues on review in this case. If oral argument is ordered, PLF requests the opportunity to participate in oral argument to address the topic of deference.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about an executive agency changing an interpretation of its own authority in a way that mirrored a rejected legislative change to that authority. The court below ably showed why the agency's interpretation is an inferior reading of law. That should end the matter, as it is the duty of the judiciary to say what the law is.

But the State Engineer now argues that even if its new interpretation is inferior, it is still a plausible reading of the statute and therefore entitled to deference. In other words, the State Engineer wants this Court to tilt the field in its favor and against the individuals that it is alleged to have harmed through its radical reinvention of state water law.

In support of its argument, the State Engineer points to cases in which this Court has declared that "great deference" is due to an agency's interpretation of a statute, such as *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988). *See* State Engineer Br. at 22; *see also* DNRPCA Br. at 28. But the Respondent water rights holders just as credibly point to cases where this Court has unequivocally declared that although an agency's interpretation of a statute may be "persuasive," it is "not entitled to deference." *Sierra Pacific Indus. v. Wilson,* 135 Nev. 105, 108, 440 P.3d 37, 40 (2019).

This Court should address and resolve its contradictory and irreconcilable deference precedent. Its past decisions are causing serious confusion for courts, state agencies, and the general public. This case provides the Court with an opportunity to bring clarity to the important question of whether state agencies are entitled to administrative deference.

The Court should conclude that agency deference is incompatible with the role of the judiciary. The Nevada Constitution imposes a rigorous separation of powers whereby only the judiciary is responsible for judicial interpretation. Giving administrative agencies in the

executive branch a trump card over legislative enactment and judicial interpretation cannot be reconciled with this allocation of responsibility. Allowing executive agencies to conclusively determine what the law means also subverts individual liberty and leads to the continued encroachment of individual rights—as this case vividly illustrates.

In the past few years, at least six other state judiciaries (Michigan, Kansas, Utah, Wisconsin, Mississippi, and Arkansas) have recognized the many problems with administrative deference and have abolished deference to executive agencies' interpretations of state statutes. And two other states (Florida and Arizona) have abolished deference through legislation or ballot measure. Nevada should follow suit.

ARGUMENT

I. This Court's Precedents Regarding Deference Are Contradictory and Need Resolution

For decades, decisions from this Court have been inconsistent in their approach towards agency deference. On the one hand, agencies seeking deference for their statutory or regulatory interpretations can point to a variety of cases declaring that they are to receive "great deference," *e.g.*, *Clark Cty. Sch. Dist. v. Local Gov't Emp. Mgmt. Relations Bd.*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974); *State v. Morros*, 104 Nev.

709, 713, 766 P.2d 263, 266 (1988), including at least one decision deferring to the State Engineer. *United States v. State Eng'r*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001). Such language can be found in decisions as recent as earlier this year. *Smith v. Bd. of Wildlife Commissioners*, Order of Affirmance, Docket No. 77485, 461 P.3d 164, 2020 WL 1972791 (Nev. April 23, 2020) (unpublished disposition). Even those decisions, however, are not unreservedly deferential, as they frequently caveat the "great deference" standard by declaring that an agency's interpretation is "not controlling" and merely "persuasive." *Morros*, 104 Nev. at 713; *see also Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 625, 310 P.3d 560, 565 (2013).

On the other hand, several decisions of this Court flatly reject deference. Many of these cases specifically involve the refusal to defer to the State Engineer. For example, just last year in *Sierra Pacific Industries v. Wilson*, the State Engineer argued for deference to its view of whether the anti-speculation doctrine applies to extensions of the time for putting water to beneficial use. 135 Nev. 105, 108, 440 P.3d 37, 40. This Court emphasized that because that is a question of law, the State

Engineer's ruling on the issue "is persuasive, but not entitled to deference." *Id.*[1]

This Court was even more emphatic in *Town of Eureka v. Office of State Engineer*, holding that courts are "free to decide purely legal questions . . . without deference to the agency's decision," including by "undertak[ing] independent review of the construction of a statute." *Town of Eureka v. Office of State Eng'r of State of Nev., Div. of Water Res.*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992). Other cases have come to similar conclusions. *See, e.g., Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010). And at least one federal district court applying Nevada law has relied on this line of authority to conclude that the State Engineer's statutory interpretation is not entitled to controlling deference. *United States v. Alpine Land & Reservoir Co.*, No. 3:73-CV-183-LDG, 2012 WL 4442804, at *2 (D. Nev. Sept. 24, 2012). This line of precedent suggests that while an agency's construction and interpretation of a statute carries some persuasive weight, as would the brief of any experienced practitioner in a field, it is

[1] The District Court in this matter relied on *Sierra Pacific Industries* to conclude that the State Engineer's interpretation was "persuasive, but not entitled to deference." JA 2392.

not authoritative and thus not entitled to any deference, let alone "great deference."

For at least twenty-eight years, these conflicting lines of authority have uncomfortably coexisted in Nevada, as evidenced by the briefing in this very case.[2] This court should address the precedential split head-on. As this case illustrates, inconsistent application of deference has real consequences. Valuable vested property rights can be protected or extinguished based solely on which line of authority a judge chooses to follow. Such outcomes should not be left to chance, particularly when water rights are at stake. As this Court recently reemphasized, "finality [regarding water rights] is vital in arid states like Nevada." *Mineral County v. Lyon County*, 136 Nev. Adv. Op. 58, 473 P.3d 148 (2020). Property owners, and indeed all residents of Nevada, deserve clarity on this critical issue of statutory interpretation. *See id.* (listing the various

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[2] *Compare* Sadler Ranch Br. at 14 ("While courts generally defer to the State Engineer's factual findings, questions of law are reviewed without deference to the State Engineer's ruling.") (internal quotation marks omitted), *with* DNRPCA Br. at 28-29 ("The State Engineer's factual findings and *interpretation of the statutes* he is tasked with implementing are entitled to deference. However, questions of *statutory interpretation* receive de novo review.") (emphases added and internal quotation marks omitted).

institutions and industries that rely on the finality of water rights). Moreover, as discussed in greater detail below, the application of deference is in significant tension with the Nevada Constitution and its guarantee of separation of powers. This Court should remove the uncertainty by resolving once and for all whether deference is due to an agency's statutory interpretation.

II. Judicial Deference is Incompatible with the Nevada Constitution, the Separation of Powers, and Individual Liberty

A. The Nevada Constitution Establishes a Rigorous Separation of Powers Regime

The division of governmental power into three distinct branches, Legislative, Executive, and Judicial, is one of the most important features of the American Constitutional system. The Founders believed that this division was an elemental part of the design for just government. *See Myers v. United States*, 272 U.S. 52, 116 (1926) ("If there is a principle in our Constitution, indeed in any free Constitution more sacred than another, it is that which separates the legislative, executive and judicial powers.") (quoting James Madison, 1 *Annals of Congress* 581). Born of the Founders' distrust of government power, *Boumediene v. Bush*, 553 U.S. 723, 742 (2008), the separation of powers is one of the Constitution's

key structural protections against tyranny. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (calling the separation of powers a "vital check against tyranny"); *United States v. Brown*, 381 U.S. 437, 443 (1965) (explaining that the separation of powers was not designed to "promote governmental efficiency" but "as a bulwark against tyranny"). The separation of powers therefore serves to protect individual liberty. *See Bond v. United States*, 564 U.S. 211, 223 (2011); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

This same commitment to the separation of powers is found in the Nevada Constitution. Indeed, the Nevada Constitution "goes one step further" than the federal Constitution. *State v. Second Jud. Dist. Court (Hearn)*, 134 Nev. 783, 786, 432 P.3d 154, 158 (2018). It contains an extremely thorough separation of powers clause which not only emphasizes that the powers of government "shall be divided into three separate departments" but also declares that "no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except

in the cases expressly directed or permitted in this constitution." Nev. Const. art III, § 1. This constitutional separation of powers "is the most important foundation for preserving and protecting liberty by preventing the accumulation of power in any one branch of government." *Berkson v. LePome*, 126 Nev. 492, 498, 245 P.3d 560, 564 (2010). Indeed, it is "probably the most important single principle of government." *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 299, 212 P.3d 1098, 1108 (2009).

B. Deference Infringes the Separation of Powers

Judicial deference to agency interpretations is incompatible with the Nevada Constitution's separation of powers in two fundamental respects. First, it is contrary to the power of the legislative branch to make law. Second, it is contrary to the power of the judicial branch to interpret the law.

i. Deference infringes on legislative power

"One of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated to any other body or authority." *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 227, 19 P.3d 245, 248 (2001). While the legislature "may authorize administrative agencies to make rules and regulations supplementing

legislation," that power must be "prescribed in terms sufficiently definite to serve as a guide in exercising that power." *Id.*

Deference to executive agencies is contrary to these principles. When a court defers to an agency's rule or regulation that is contrary to the best reading of the law, then the agency is no longer constrained by the policy that the legislature has actually adopted. *See Williams v. United Parcel Servs.*, 129 Nev. 386, 391–92, 302 P.3d 1144, 1147 (2013) ("Our duty is to interpret the statute's language; this duty does not include expanding upon or modifying the statutory language because such acts are the Legislature's function."). And because getting a law enacted or modified by the legislature can be difficult, deference incentivizes agencies to instead adopt expansive interpretations of their own authority and try to enact their policy preferences through the backdoor.

This case illustrates how deference can result in the ceding of legislative authority to the executive branch. Prior appropriation and the robust protection of vested water rights have been touchstones of water law in Nevada since the state's founding. *Mineral Cty.*, 136 Nev. Adv. Op. at 58. If changing circumstances require the diminishment of those

rights, the people's representatives in the legislative branch should be the ones to make such a decision.[3] The State Engineer initially recognized this and sought a bill authorizing it to adopt a plan that diminished vested water rights. Respondents Br. at 25-29. But when the legislature did not give it the additional authority that it sought, the State Engineer put forward a strained interpretation of its already existing authority and asks for deference to accomplish the same ends. *Id.* In other words, when its legislative lobbying efforts failed, the State Engineer claimed the power it sought by merely expanding its view of its existing authority. So empowered, it approved a plan that diminished the share of water that would go to vested holders, to the detriment of Respondents.[4]

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[3] Moreover, because any divestment of water rights is likely a taking, *Carson City v. Lompa's Estate*, 88 Nev. 541, 542, 501 P.2d 662, 662 (1972) ("When a right to use water has become fixed either by actual diversion and application to beneficial use or by appropriation as authorized by the state water law, it is a right which is regarded and protected as real property."), the legislature should decide whether to incur the financial obligation of compensating affected property owners.

[4] The problem is not necessarily that the State Engineer took a particular action. Rather, the problem is that the State Engineer claims that its own analysis of why it has such powers is entitled to deference, notwithstanding its prior failure to legislatively obtain those same powers. Alarmingly, deference would allow the State Engineer, in its sole discretion, to reverse course, or alternatively decide to take even more aggressive action to diminish vested water rights in response to changing

Deference also weakens legislative oversight of executive policy in another significant respect. The availability of deference may incentivize the legislature to pass vague or open-ended laws. This allows the legislature to avoid accountability by leaving it to the agency to make the difficult policy decisions. *See Egan v. Del. River Port Auth.*, 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring) (arguing that deference "leads to perverse incentives, as [the legislature] is encouraged to pass vague laws and leave it to agencies to fill in the gaps, rather than undertaking the difficult work of reaching consensus on divisive issues"). Lawmaking can be difficult and so the legislative branch may at times prefer this arrangement. But the separation of powers is a structural protection on arbitrary governmental power that cannot be waived, especially in Nevada. Hence, in *Commission on Ethics v. Hardy*, 125 Nev. 285, 297, 212 P.3d 1098, 1107 (2009), this Court invalidated an executive commission created to discipline members of the legislature even though the legislature had arguably assented to the creation of the commission.

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circumstances. Indeed, even those who benefit from the State Engineer's proposed management plan here could find themselves on the unfortunate side of a later "interpretation" of the State Engineer. All of this is wholly incompatible with the principals of finality expressed by this Court in *Mineral County*, 136 Nev. Adv. Op. at 58.

"[R]egardless of the degree of assent or acquiescence by the Legislative or Executive Department, legislation which infringes on the structural protections of separation of powers is unconstitutional." *Id.*, 125 Nev. 285, 299, 212 P.3d 1098, 1108 (2009). For the same reason, deference violates the separation of powers even if the legislature may sometimes prefer that an agency be given deference.

ii. Deference infringes on judicial power

Deference to executive agencies also leads to executive usurpation of judicial power. It is "emphatically the province and duty of the judicial department to say what the law is." *MDC Restaurants, LLC v. The Eighth Judicial Dist. Court of the State of Nevada in & for Cty. of Clark*, 134 Nev. 315, 320, 419 P.3d 148, 153 (2018) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *see also Nevadans for Nevada v. Beers*, 122 Nev. 930, 943 n.20, 142 P.3d 339, 347 n.20 (2006). This "is a responsibility that [the Court] cannot abdicate to an agency." *MDC Restaurants*, 134 Nev. at 320. To abdicate that responsibility by deferring to an agency's interpretation of the law "represents a transfer of judicial power to the Executive Branch" and "amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches." *Perez v.*

Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring). Accordingly, this Court has "been especially prudent to keep the powers of the judiciary separate from those of either the legislative or the executive branches." *LePome*, 126 Nev. at 498.

Judicial deference to agency interpretations flouts these principles because statutory interpretation is the province of the judiciary, not the executive. Deference interferes with this core judicial function by impermissibly giving the executive the final say over what the law is. If the agency adopts an interpretation of a statute before the judiciary has ever had a chance to interpret the law, judicial deference prevents the judiciary from ever thoroughly engaging in statutory interpretation. In this way, deference stymies the development and deployment of "neutral and impartial . . . interpretive rules" of construction. Brett M. Kavanaugh, *Fixing Statutory Interpretation Judging Statutes*, 129 Harv. L. Rev. 2118, 2139 (2016) (reviewing Robert A. Katzmann, *Judging Statutes* (2014)). Indeed, in *LePome*, this Court recognized that of all violations of separation of powers, combining the executive with the judicial power was by far the most dangerous—arming anyone so

empowered to act with all the "violence of an oppressor." *LePome*, 126 Nev. at 499 (quoting French enlightenment philosopher Montesquieu).

Even more egregiously, deference may allow an agency to adopt a contrary interpretation after the judiciary has already spoken. As then-Judge Gorsuch explained, this form of deference "risks trampling the constitutional design by affording executive agencies license to overrule a judicial declaration of the law's meaning prospectively, just as legislation might—and all without the inconvenience of having to engage the legislative processes the Constitution prescribes." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring). In other words, it allows an agency to maintain an executive veto over the courts' interpretation of the best meaning of a statute—so long as it can be said that the agency's interpretation is permissible. *See id.* at 1150 (Gorsuch, J., concurring) ("[T]his means a judicial declaration of the law's meaning in a case or controversy before it is not 'authoritative,' . . . but is instead subject to revision by a politically accountable branch of government.").

Regardless of whether it precedes or follows a judicial interpretation, deference to an agency's interpretation of a statute is an

improper derogation of judicial authority. While agencies may have expertise in promulgating and enforcing regulatory policy, they are not experts at statutory interpretation, the province of the judiciary. *See Ellis-Hall Consultants v. Pub. Serv. Comm'n*, 379 P.3d 1270, 1275 (Utah 2016) (rejecting deference to state agencies' interpretation of their own regulations and emphasizing that "[w]e are in as good a position as the agency to interpret the text of a regulation that carries the force of law. In fact, we may be in a better position"); *see also Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part) ("Making regulatory programs effective is the purpose of rulemaking, in which the agency uses its 'special expertise' to formulate the best rule. But the purpose of interpretation is to determine the fair meaning of the rule—to 'say what the law is[.]'"). In this case, the State Engineer is undoubtedly a subject matter expert on topics such as water availability, but it is not an expert on determining whether the Nevada Legislature authorized it to pass a plan which harms vested water rights.

C. Deference to Agencies Harms Individual Liberty

In addition to the separation of powers concerns that it raises, deference is fundamentally unfair. It represents a tilting of the scales of

justice in favor of one party—the government—at the expense of those who are subject to agency regulation. As Columbia Law School Professor Phillip Hamburger put it, "when judges defer to the executive's view of the law, they display systematic bias toward one of the parties." Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1212 (2016). Deference thereby deprives citizens of their due process right to be heard before a fair and impartial arbiter. Instead, the executive branch official making critical judgments of law is often an interested party that desires a particular outcome.

Deference to executive agencies also thwarts the structural limits on government power, such as the requirements for bicameralism and presentment, that ordinarily protect individual liberty. *See I.N.S. v. Chadha*, 462 U.S. 919, 957 (1983) ("The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps."). The legislative process is designed to be difficult so as to protect individuals from oppressive government action. *Id.* But when an agency can expand its power through creative

statutory interpretation, the agency erases one of the primary checks on its power, and the difficulty of reversing that interpretation through legislation instead becomes a shield for the agency.

This case illustrates the liberty-curtailing and government-expanding tendencies of deference. The State Engineer sought a legislative change to provide it the power to enact plans that curtail vested water rights. Respondents Br. at 25-29. When the legislative branch did not act on its request, the State Engineer attempted to use deference as a workaround to add to its authority. *Id.* If deference is granted, then the State Engineer will have expanded its power over the citizens of Nevada, and affirmative legislative action will be required to take away that newly accrued power. And while expansion of the State Engineer's authority lacked legislative support, it is also possible that *repealing* that authority would similarly not have sufficient legislative support. If so, then the grant of deference would shift the equilibrium decisively in favor of the State Engineer and away from individual rights, without any legislative action and indeed when the legislature affirmatively chose not to act. Such deference is incompatible with individual liberty.

III. Other States Have Recently Rejected Deference

In the past dozen years, six state supreme courts have issued decision that reject deference.[5] These states recognized that, as described above, deference is incompatible with the proper role of the judiciary and corrosive to liberty.

The Michigan Supreme Court started the recent trend away from deference in 2008, concluding that deference "conflicts with this state's administrative law jurisprudence and with the separation of powers . . . by compelling delegation of the judiciary's constitutional authority to construe statutes to another branch of government." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich. 90, 111, 754 N.W.2d 259, 272 (2008).

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[5] *In re Complaint of Rovas Against SBC Michigan*, 482 Mich. 90, 111, 754 N.W.2d 259, 272 (2008); *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 559, 293 P.3d 723, 728 (2013); *Ellis-Hall Consultants*, 379 P.3d 1270, 1275 (2016); *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 382 Wis. 2d 496, 535, 914 N.W.2d 21, 40 (2018); *King v. Miss. Military Dep't*, 245 So. 3d 404, 407 (Miss. 2018); *Myers v. Yamato Kogyo Co. Ltd.*, 2020 Ark. 135, 597 S.W. 3d 613 (2020).

In addition, Delaware rejected deference over twenty years ago. *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 383 (Del. 1999). And two other states—Arizona and Florida—have ended deference via legislation, Ariz. Rev. Stat. Ann. § 12-910 (2018) and ballot measure, Fla. Const. art. V, § 21 (2018), respectively.

The Kansas Supreme Court was the next state highest court to reject deference, in 2013. In doing so, it declared that the doctrine of deference "has been abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books where it will never again affect the outcome of an appeal." *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 559, 293 P.3d 723, 728 (2013). Subsequently the Kansas Supreme Court has described its review of statutes as "unlimited review on the determinative question of statutory interpretation without deference." *Landrum v. Goering*, 306 Kan. 867, 875, 397 P.3d 1181, 1187 (2017).

The Utah Supreme Court followed suit with a series of three decisions rejecting deference with increasing force.[6] In the last of these, the court explained that its caselaw had long been "riddled with tension on the question of the standard of review that applies to judicial review of agency action." *Ellis-Hall Consultants*, 379 P.3d at 1273. The court resolved that tension by rejecting all forms of deference because, it concluded, the courts are "in as good a position as the agency to interpret

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[6] *Murray v. Utah Labor Comm'n*, 308 P.3d 461, 472 (2013); *Hughes Gen. Contractors, Inc. v. Utah Labor Comm'n*, 322 P.3d 712, 717 (2014); *Ellis-Hall Consultants*, 379 P.3d 1270, 1273 (2016).

the text of a regulation that carries the force of law" and it was their duty to do so. *Id.* at 1275. The court also explained that "judicial review without deference by the courts" is necessary for "preserv[ing] the proper separation of powers." *Id.* at 1275 n.4.

Likewise, the Wisconsin Supreme Court recognized in 2018 that it had for decades applied a highly deferential standard of review for agency interpretations modeled after federal law without ever stopping to carefully consider whether this was justified. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 382 Wis. 2d 496, 535, 914 N.W.2d 21, 40 (2018). Indeed, it had never determined whether deference "was consistent with the allocation of governmental power amongst the three branches." *Id.* Confronting that question, the court concluded that deference results in the abdication of core judicial powers and is therefore incompatible with the separation of powers. Indeed, "[n]o aspect of the judicial power is more fundamental than the judiciary's exclusive responsibility to exercise judgment in cases and controversies arising under the law." *Id.* ¶ 54. Furthermore, deference unjustly and unequally "deprives the non-governmental party of an independent and impartial tribunal." *Id.* ¶ 67. So, even though the court's decision "represents a significant break" from

past precedent, that break is necessary because deference "is unsound in principle." *Id.* ¶ 83. "It does not respect the separation of powers, gives insufficient consideration to the parties' due process interest in a neutral and independent judiciary, and risks perpetuating erroneous declarations of the law." *Id.* ¶ 83 (quotation omitted).[7]

Also in 2018, the Mississippi Supreme Court reversed its past precedent and rejected the use of deference, emphasizing that "the ultimate authority and responsibility to interpret the law, including statutes, rests with this Court." *King v. Miss. Military Dep't*, 245 So. 3d 404, 407 (Miss. 2018). The court explained that its past effort to apply "*de novo* but deferential review" was deeply contradictory and confusing and didn't allow the judiciary to "step fully into the role the [state] Constitution . . . provides for the courts and the courts alone, to interpret statutes." *Id.* at 408. In a decision from earlier this year, the Mississippi Supreme Court went a step further, concluding that not only had it rejected *agency* deference, but that any effort by the state *legislature* to demand deference was itself unconstitutional because "interpreting

[7] The Wisconsin state legislature later codified the court's decision. Wis. Stat. Ann. § 227.10 (2018).

statutes is reserved exclusively for courts." *HWCC-Tunica, Inc. v. Miss. Dep't of Revenue*, 296 So. 3d 668 ¶¶ 33-34 (Miss. 2020).

Most recently, earlier this year the Arkansas Supreme Court rejected deference. *Myers v. Yamato Kogyo Co. Ltd.*, 2020 Ark. 135, 597 S.W. 3d 613 (2020). The court "acknowledge[d] confusion in prior cases regarding the standard of review for agency interpretations of a statute" and set out to clarify its doctrine. *Id.* at 616. It explained that it was "concern[ed]" with "the risk of giving core judicial powers to executive agencies in violation of the constitutional separation of powers." *Id.* at 617. Granting agency deference "effectively transfers the job of interpreting the law from the judiciary to the executive." *Id.* This combination of executive and judicial function is precisely the concern that this Court expressed in *LePome*, 126 Nev. at 499. Accordingly, Arkansas Supreme Court emphasized that agency interpretations of statutes would thereafter be conducted *de novo* and that "the agency's interpretation will be one of our many tools used to provide guidance."[8]

[8] This language is consistent with this Court's pronouncement in *Sierra Pacific Industries* that agency interpretations are considered for their persuasive value but not entitled to any special deference. 135 Nev. at 108, 440 P.3d at 40.

Id. And recently, the Arkansas Supreme Court reiterated that its decision in *Myers* applied as a "general matter" to foreclose deference including in the context of Arkansas Tax Procedure Act. *American Honda Motor Co., Inc. v. Walther*, 2020 Ark. 349 at *2 (2020).

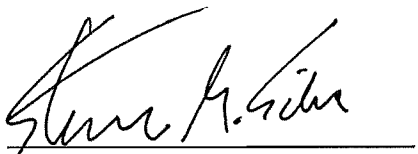
In each of these examples, a state's highest court has awoken to the dangers that judicial deference poses to judicial independence and to individual liberty. Some of the states, like Kansas, were required to abandon or discard decades of precedent in order to do so. But they took that step because they recognized that deference cannot be justified and had resulted in severe and pervasive consequences. *Douglas*, 296 Kan. at 559. Because this Court has long straddled the line between embracing and rejecting deference, it will have a much easier time decisively embracing the already well-established line of precedent that rejects deference. Doing so will allow this Court to live up to its constitutional duty and to protect the separation of powers and the rights of Nevadans.

CONCLUSION

The Court should address head-on the issue of whether agencies in Nevada receive deference for their statutory interpretations. It should hold that they do not.

Dated: November 13, 2020.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28.2 of the Nevada Rules of Appellate Procedures, I, Steven M. Silva, certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century Schoolbook font. I further certify that this brief complies with the page- or type-volume limitations and NRAP 29(e) because it contains 5,200 words which is less than one-half of the maximum length authorized for an answering brief under of NRAP 32(a)(7).

Further, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that

the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that the AMICUS BRIEF OF PACIFIC LEGAL FOUNDATION was filed electronically with the Nevada Supreme Court on the 13th day of November, 2020. Electronic Service of the Brief shall be made in accordance with the Master Service List, as follows:

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I further certify that on the 13th day of November, 2020, I served, via USPS first-class mail, complete copies of the Brief on the following attorneys of record who are not registered for electronic service:

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