No. 22-0974

IN THE SUPREME COURT OF TEXAS

J-W POWER COMPANY,

Petitioner,

v.

STERLING COUNTY APPRAISAL DISTRICT,

Respondent.

On Petition for Review from the Third Court of Appeals at Austin

BRIEF OF AMICI CURIAE TEXAS TAXPAYERS AND RESEARCH ASSOCIATION AND ARCHROCK, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Texas Taxpayers and Research Association, TTARA, is a non-profit, non-partisan, membership-supported organization of businesses, trade associations, tax practitioners and individuals that endorses and advocates for sound state and local fiscal policy. Its more than 200 member companies come from a broad range of economic sectors and are some of the largest taxpayers in Texas. For more than seventy years, TTARA (including its predecessor organizations the Texas Association of Taxpayers and the Texas Research League) has been recognized as the state's preeminent organization specializing in tax and fiscal policy and, as such, has long worked closely with legislators and executive officials and agencies in pursuit of a rational, balanced, and efficient system of taxation.

Archrock, Inc. is an energy infrastructure company with a primary focus on midstream natural gas compression. It is the leading provider of natural gas compression services to customers in the oil and natural gas industry throughout the U.S. and a leading supplier of aftermarket services to customers that own natural gas compression equipment in the United

[1] No party's counsel authored this brief in whole or in part, and no party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person, other than amici curiae, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Tex. R. App. P. 11.

States. Headquartered in Texas, Archrock is a major provider of local jobs. Archrock's business is also a capital intensive one. It and its subsidiaries own, maintain, and operate extensive fleets of heavy equipment, all of which are subject to a host of state and local taxes in Texas, including *ad valorem* tax. Archrock's property has been the subject of hundreds of appraisal review board hearings in counties all over the State, which have given it a keen insight into the operation of those proceedings.

INTRODUCTION

This is one of several related cases on similar facts in which Texas courts denied J-W Power Company the ability to invoke Section 25.25 of the Texas Tax Code to correct certified county appraisal rolls.[2] In each case, the court of appeals affirmed the district court's dismissal of J-W Power's claims, holding that orders by county appraisal review boards (ARBs) denying property-tax protests, brought years earlier under Texas Tax Code Section 41.41, carried preclusive *res judicata* effect that barred courts from hearing J-W Power's motions—brought under an entirely different section of the Tax Code—to correct the county appraisal rolls.

Counsel for the counties proclaimed to the press that these cases "are important in that they extend the principle of res judicata to this particular area of law for the first time" and that they establish "that res judicata can apply not just to court rulings, but also to appraisal review boards." Sanjay Talwani, *Texas Appeals Court Says Equipment Co.'s Tax Claims Barred*, LAW360 (Apr. 26, 2023), https://law360.com/articles/1601330.

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[2] *See J-W Power Co. v. Irion Cnty. Appraisal Dist.*, No. 22-0975; *J-W Power Co. v. Jack Cnty. Appraisal Dist.*, No. 02-22-00082-CV, 2023 WL 415517 (Tex. App.—Fort Worth Jan. 26, 2023, pet. filed) (mem.op.); *J-W Power Co. v. Henderson Cnty. Appraisal Dist.*, No. 12-22-00325-CV, 2023 WL 4002733 (Tex. App.—Tyler June 14, 2023, pet. filed) (mem. op.); *J-W Power Co. v. Frio Cnty. Appraisal Dist.*, --- S.W.3d ---, No. 04-21-00564-CV, 2023 WL 3081772 (Tex. App.—San Antonio Apr. 26, 2023, pet. filed); *J-W Power Co. v. Wise Cnty. Appraisal Dist.*, No. 02-22-00227-CV, 2023 WL 2325507 (Tex. App.—Fort Worth Mar. 2, 2023, pet. filed) (mem. op.).

None of the courts below, however, made the three-pronged inquiry that this Court adopted in 2008 for determining whether the decisions of a given agency are of the sort that *can* have preclusive effect in a later, separate court proceeding. In short, to have the capacity for preclusive effect, agency decisions must be: (1) of a judicial nature, (2) on disputed fact issues, (3) that the parties had an adequate opportunity to litigate. This Court should grant review, apply that test to the facts here, and resolve this issue to give clarity to both taxing authorities and Texas taxpayers.

SUMMARY OF THE ARGUMENT

In applying *res judicata* to bar judicial determination of J-W Power's motions to correct county appraisal rolls for prior years, the court of appeals took for granted that past orders issued by three-member county ARB panels were the type of "prior final judgment on the merits by a court of competent jurisdiction" that could have preclusive effect. Op. 5. Although the realities of modern agency administration at both the federal and state level have dispelled the notion that only courts can issue judgments with preclusive effect, the extension of the *res judicata* doctrine to agency decisions has never been unbounded or automatic. Quite the contrary.

Because *res judicata* remains at its core a judicial concept, extension of its preclusive effect to agency decisions has been consistently restricted to

those in which proceedings are sufficiently formal and protective of all parties' rights to be a competent substitute for a judicial tribunal. A half-century ago, the United States Supreme Court articulated three elements present in agency decisions that can have preclusive effect: (1) the agency is acting in a judicial capacity; (2) it resolves disputed issues of fact; and (3) the parties had an adequate opportunity to litigate the issues. This Court later adopted that three-pronged approach for deciding when to extend preclusive effect to agency decisions at the state level.

Rather than inquire first whether county ARB orders satisfy those three prongs, the court of appeals skipped straight to—and focused all its analysis on—whether J-W Power's claims in this case were the same as those decided years ago by the ARB. But the court never should have gotten to that question because ARB panel decisions fail on at least two of the three points above. First, ARBs often decide much more than disputed issues of fact. As this case shows, they also decide legal and policy issues. And they do so with nowhere near the qualifications, expertise, or training to warrant deference on legal or policy questions. Second, ARB hearings do not give taxpayers an adequate opportunity to litigate their claims. Typically limited to 15 minutes from start to finish, including deliberation and decision, they are perfunctory at best. Moreover, despite the formal legal separation between ARBs and the

appraisal districts whose decisions they are established to review, there are more than enough indicia to reasonably suggest that taxpayers are not being heard by an entirely independent tribunal.

The *res judicata* doctrine unquestionably grants preclusive effect to the decisions of many administrative agencies. But the doctrine should not be automatically extended to every decision-making body at every level of government. This Court should grant review if only to reiterate that granting preclusive effect to the orders of an administrative body is not automatic and must not be done without deliberation.

ARGUMENT

I. The Court of Appeals wrongly presupposed that county ARB decisions have preclusive *res judicata* effect.

"Res judicata requires proof of three elements: '(1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action.'" *Rosetta Res. Operating, LP v. Martin*, 645 S.W.3d 212, 225 (Tex. 2022) (quoting *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996)). J-W Power's briefing focuses on its contention that the court of appeals erred in applying *res judicata* to bar its Section 25.25 motion because that claim does not satisfy the third *Amstadt* element—it could not have been raised at the

time of its ARB protest case. *See* Petitioner's Br. 19-30.

Amici offer this brief because the court of appeals committed a more fundamental error in failing to make the required antecedent inquiry of whether *res judicata* could ever apply to county ARB orders. In other words, whether, under step one of *Amstadt*, a county ARB order can properly be "a prior final judgment on the merits by a court of competent jurisdiction." 919 S.W.3d at 652. Had the court of appeals applied the test this Court adopted for determining whether decisions by a given agency can have preclusive effect in the first place, it would have concluded, Amici submit, that giving any preclusive effect to county ARB orders is improper. It would not have reached the second and third *Amstadt* steps at all. *See* Op. 5-7.

A. Granting preclusive effect to agency decisions is neither unlimited nor automatic.

To determine whether granting preclusive effect to a particular *agency* decision is appropriate, this Court has adopted the three-factor test announced by the United States Supreme Court in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966). Under *Utah Construction*, preclusive effect is appropriately extended to those administrative decisions in which an agency:

(1) "is acting in a judicial capacity," as opposed to a rulemaking or other administrative capacity;

(2) "resolves disputed issues of fact properly before it," as opposed to questions of law; and

(3) provides the parties "an adequate opportunity to litigate."

Id. at 422 (line breaks added).

This Court adopted the "Supreme Court's three-pronged approach" to extending preclusive effect to administrative agency rulings some four decades later in *Igal v. Brightstar Information Technology Group, Inc.*, 250 S.W.3d 78, 86-87 (Tex. 2008), superseded by statute on other grounds, Act of Apr. 28, 2009, 81st Leg., R.S., ch. 21, §§ 1-2, 2009 Tex. Gen. Laws 40, 40 (codified at Tex. Lab. Code §§ 61.051(c), .052(b-1)). That test remains the law in Texas. *See, e.g.*, *City of Dallas v. Stewart*, 361 S.W.3d 562, 566 (Tex. 2012).

Although the court of appeals cited *Igal* for its conclusion "that administrative bodies' final decisions, like courts' final decisions, *can* have preclusive effect under *res judicata*," Op. 5 (first emphasis added), it never actually applied the three-prong inquiry to decide whether the decisions of county ARB panels *should* be given preclusive effect. It simply presupposed that such orders are among those to which *res judicata* can apply. *See id.*

Utah Construction's three-prong inquiry is essential, however, because the doctrine—from its Roman Law precursor, *res judicata pro veritate*

accipitur,[3] through its early English common-law formulation,[4] to its incorporation into American and Texas jurisprudence[5]—was developed in the *judicial* system, was fundamentally designed for adjudication in *court* proceedings, and was premised on the preclusive judgment having come from a "*court* of competent jurisdiction in a prior suit." *Igal*, 250 S.W.3d at 87 (emphasis added). And although it was recognized early in the rise of the administrative state that an "increasing number of governmental administrative boards to which various duties of a quasi-judicial nature are frequently assigned" were issuing orders and awards, it was, well into the twentieth century, an open question whether "such orders and awards [ought] to have the same force of res judicata as is accorded to judgments of actual courts." Robert von Moschzisker, *Res Judicata*, 38 YALE L. J. 299, 329 (1929). The answer was unclear because "however broadly '[c]ourt of competent jurisdiction' was defined, it would require quite a leap to say that

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[3] "A matter adjudged is taken for the truth." *Legal Maxims*, BLACK'S LAW DICTIONARY 1956 (11th ed. 2019), Westlaw; Herbert Broom, *A Selection of Legal Maxims* 326-27 (7th Am. ed. 1874), https://archive.org/details/cu31924022835551/page/326/mode/2up.

[4] *See Rex v. Duchess of Kingston*, 20 How. St. Tr. 355, 537 (HL 1776), *reprinted in* 20 William Cobbett, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors* (Thomas Bayly Howell ed., London, T.C. Hansard 1814), https://babel.hathitrust.org/cgi/pt?id=njp.32101047811490&view=1up&seq=281 ("[T]he judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court.")

[5] *See Graves v. Bos. Marine Ins. Co.*, 6 U.S. (2 Cranch) 419, 432 (1805); *Sutherland v. De Leon*, 1 Tex. 250, 260 (1846).

the concept encompasses administrative agencies, which were recognized as categorically different from courts." *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 164 (2015) (Thomas, J., dissenting) (alteration in original).

Utah Construction's three-prong inquiry, in short, allows for the repose that is "the most important product of *res judicata*," 18 Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 4403 (3d ed.), Westlaw (database updated Apr. 2023), while also protecting parties and the judicial power by extending preclusive effect to only those decisions in which an agency's proceedings are sufficiently formal and protective of all parties' rights for it to be a competent substitute for a judicial tribunal. *Igal,* 250 S.W.3d at 86-87. Even before endorsing the *Utah Construction* test to hold that wage claim decisions by the Texas Workforce Commission can have preclusive effect, this Court took pains to point out its "tradition of the *restricted* use of *res judicata* in administrative proceedings," repudiating any notion that it would, as a matter of course, impart "collateral estoppel and res judicata effect on *all* actions and inactions by administrative agencies." *Coal. of Cities for Affordable Util. Rates v. Pub. Util. Comm'n of Tex.*, 798 S.W.2d 560, 563 n.5 (Tex. 1990) (emphases added and omitted).

Igal exemplified that tradition of extending preclusive effect to agency decisions on only a "restricted" basis by adopting and thoughtfully applying

the *Utah Construction* test. Thereafter, when citing *Igal* in the *res judicata* context, this Court has typically done so as it *restricted*—not expanded—the extension of preclusive effect to other agency decisions. In *City of Dallas v. Stewart*, for example, the Court noted *Igal*'s limited holding that, as a "general matter, … *some* agency determinations are entitled to preclusive effect in subsequent litigation," 361 S.W.3d at 566 (emphasis added), before refusing to give preclusive effect to a nuisance finding by the Dallas Urban Rehabilitation Standards Board that resulted in a home's demolition because doing so would "not sufficiently protect a person's rights" under the Texas Constitution. *Id.* The concurrence in *In re Blair* was even more explicit, noting that the Texas "Comptroller's determination of eligibility [for compensation under the Texas Wrongful Imprisonment Act], even when final, does not have res judicata effect" because it fails *Utah Construction*'s first prong, as adopted in *Igal*. 408 S.W.3d 843, 866 (Tex. 2013) (orig. proceeding) (Boyd, J. concurring).

B. County ARB decisions fail two of *Utah Construction*'s three prongs for *res judicata* to apply.

When the *Utah Construction* test is applied here, it is apparent that county ARB decisions fail the second and third prongs. As detailed in Part B.1 below and as this case amply illustrates, ARB decisions often are not limited to "resolv[ing] disputed issues of fact." *See Igal*, 250 S.W.3d at 86-

87. Instead, they often involve consequential legal and policy conclusions made by panelists who, almost without exception, have zero legal training and very little training of any sort. And as discussed in Part B.2, ARB hearings do not provide an "adequate opportunity to litigate" taxpayers' claims such that giving preclusive effect to ARB orders could be proper. *See Igal*, 250 S.W.3d at 87.

1. County ARB decisions fail *Utah Construction*'s second prong because they often go well beyond "resolv[ing] disputed issues of fact."

The United States Supreme Court has reaffirmed the *Utah Construction* test on several occasions, including its decisions in *University of Tennessee v. Elliott*, 478 U.S. 788, 797 (1986), and *Astoria Federal Savings & Loan Association v. Solimino*, 501 U.S. 104, 108 (1991). In so doing, the Court reiterated that the "principles of issue preclusion" apply only "to the *factfinding* of administrative bodies acting in a judicial capacity," Elliott, 478 U.S. at 797 (emphasis added), and stated unambiguously that "[c]ourts do not, of course, have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand," *Solimino*, 501 U.S. at 108.

Likewise, when this Court adopted the *Utah Construction* test in *Igal*, it applied *all three* prongs, not just two, in concluding that wage claim orders by the Texas Workforce Commission could have preclusive effect:

> In deciding wage claims under Section 61, TWC acts in a judicial capacity. The parties had an adequate opportunity to litigate their claims through an adversarial process in which TWC finally **decided disputed issues of fact**. Res judicata, therefore, will generally apply to final TWC orders.

Igal, 250 S.W.3d at 87 (emphasis added). Other Texas cases since *Igal* have generally limited their extension of preclusive effect to agency decisions resolving issues of fact. *See, e.g.*, *Estate of Howard*, 543 S.W.3d 397, 401-02 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (recounting prior Texas cases in which administrative factfinding was given preclusive effect and applying *res judicata* to bar a wrongful death suit "[b]ecause the factual dispute regarding informal marriage was previously litigated" in a death-benefits claim before the Division of Workers' Compensation); *Nairn v. Killeen Indep. Sch. Dist.*, 366 S.W.3d 229, 243 (Tex. App.—El Paso 2012, no pet.) ("Under the principle of collateral estoppel, the Commissioner's fact-findings on the nonrenewal of Nairn's contract bind the trial court.").

This is not to say that extending preclusive effect to agency decisions on legal questions never happens. The Ninth Circuit, for example, has expressly "extend[ed preclusive effect] to state administrative adjudications of legal as well as factual issues, even if unreviewed, so long as the state proceeding satisfies the requirements of fairness outlined in *Utah Construction*." *Guild Wineries & Distilleries v. Whitehall Co.*, 853 F.2d 755,

758-59 (9th Cir. 1988). In other instances, courts have granted preclusive effect to agency decisions that resolve both disputed fact issues and disputed legal issues without expressly commenting on the latter, *see, e.g.*, *Sierra Club v. Two Elk Generation Partners, Ltd. P'ship*, 646 F.3d 1258, 1270 (10th Cir. 2011), or by suggesting that the findings of fact disposed of the legal issues without the need for legal interpretation, *see, e.g.*, *Brockman v. Wyo. Dep't of Family Servs.*, 342 F.3d 1159, 1167 (10th Cir. 2003).

Although county ARB decisions are often limited to deciding disputed issues of fact (the most frequent being the taxable value of a specific piece of real or business personal property), they are often not so limited. In this case, for example, the ARB decision to which the court of appeals gave preclusive effect concerned clear questions of law—specifically, whether J-W Power's inventory of natural gas compression equipment "qualif[ied] to be valued under Section[s] 23.1241 and 23.1242 of the Texas Property Tax Code," as J-W Power contended, or whether the individual units of compression equipment were properly assessed "separately as business personal property" under Section 23.01 of the Texas Tax Code, as the appraisal district contended. Op. 7 (first alteration added). The county ARB panel made the legal determination that J-W Power's property did not qualify as heavy equipment inventory under Sections 23.1241 and 23.1242

and that it must instead be assessed separately as business personal property under Section 23.01. That determination far exceeds the scope of *Utah Construction*'s second prong.

Even if this Court were to decide that purely legal questions could sometimes be committed to agency determination, this is not the proper case in which to do it. Simply put, a county ARB panel has nowhere near the expertise, training, or qualifications to warrant deference on legal questions.[6]

Indeed, the Appraisal Review Board Manual, published by the Texas Comptroller as "the text for the official training course" for ARB members, states that, "[f]or the most part, ARB members do not need any special qualifications." Tex. Comptroller of Pub. Accounts, Pub. No. 96-308, *Appraisal Review Board Manual* 1, 4 (Jan. 2023), https://comptroller.texas.gov/taxes/property-tax/docs/96-308.pdf. ARB members instead have a few minimal eligibility requirements, including that they: (1) must have lived in the appraisal district for two years, *see* Tex. Tax Code § 6.41(c);

[6] Wright and Miller suggest that at least part of the willingness by some modern courts to extend preclusive effect to some legal determinations by agencies acting in a judicial capacity arises from "the special expertness of a particular agency in administering a particular statute." 18 Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 4475. It may be unsurprising that *Chevron* is not cited in any of these cases, dealing as it does with agency rulemaking and not agency adjudication. But it should also be unsurprising that a sense of deference to agency expertise is what gives some courts comfort in extending preclusive effect to legal determinations by administrative agencies.

(2) must be up-to-date on payment of property taxes, *see id.* § 6.035(a)(2); (3) must not work for the taxing unit, the appraisal district, or the Comptroller's office, *see id.* § 6.412(c), or be closely related to someone who does, *see id.* § 6.412(a)(1), (b)[7].

There is a required eight-hour, state-administered training course. *Id.* § 5.041(b), (c). But an ARB member appointed after the course offering for the most recent period may nevertheless continue to participate in hearings and issue decisions, then simply take the course when it is next offered. *Id.* § 5.041(e). The massive gap in required expertise, training, or qualifications between those adjudicative bodies whose judgments have been held to have preclusive effect and county ARB panel members is illustrated in the table below, which compares relative qualification requirements of various administrative and judicial tribunals.

[7] The Tax Code does provide for ARB "special panels" whose members must have one of a list of qualifications including a CPA or real estate license, an appraiser or assessor professional designation, a JD or MBA degree, or have ten years of experience in property tax appraisal. Tex. Tax Code § 6.425(d). But special panels are only available in counties with more than 1.2 million residents and only for certain classifications of property exceeding $50 million in value. *Id* § 6.425(b), (g); *see id.* § 6.41(b-2). And the qualification requirement of special panel members may even be disregarded if there are not enough ARB members with those qualifications. *See id.* § 6.425(e).

Relative qualification requirements of different tribunals[8]

Qualification	ARB Member (TX County)	Dist. Judge (TX State)	ALJ (Fed. Agency)	ALJ (General TX)	TWC Hearing Officer (TX)	ALJ (Tax TX)
High School or Equivalency	✗	✓	✓	✓	✓	✓
Bachelor's Degree	✗	✓	✓	✓	✓	✓
Law Degree or Law License	✗	✓	✓	✓	✓	✓
Required Continuing Education / Training	✗	✓	✓	✓	✓	✓
Mandatory Prior Experience	✗	✓	✓	✗	✗	✓

ARB orders, in short, are made by either one[9] or three[10] laypeople with no legal training in their "free time." *See* Amy Davis, *Got some free time? Get paid to serve on the Appraisal Review Board*, CLICK2HOUSTON NEWS (July 29, 2020) https://www.click2houston.com/news/local/2020/07/29/got-some-free-time-get-paid-to-serve-on-the-appraisal-review-board/. Giving preclusive effect to their legal conclusions is simply too great a concession of the judicial power to be made without this Court's deliberate attention.

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[8] *See* Tex. Tax Code § 6.41(c) (two-year residency requirement for ARB membership); Tex. Const. art. V § 7 (qualifications for Texas district judge); Tex. Gov't Code § 56.005 (continuing education of Texas judges); Tex. Ct. Crim. App., Rules of Judicial Education (Jan. 12, 2023), https://txcourts.gov/media/1447901/rules-of-judicial-education.pdf; *Qualification Standard for Administrative Law Judge Positions*, U.S. Office of Personnel Mgt., https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/ (last visited Oct. 15, 2023); Tex. Govt. Code § 2003.041(b) (qualifications for Texas ALJ); https://aa270.taleo.net/careersection/ex/jobdetail.ftl?job=823828 (last visited Oct. 10, 2023) (qualifications for TWC Hearing Officer); Tex. Govt. Code § 2003.101(d) (qualifications for Texas Tax ALJ).

[9] Tex. Tax Code § 41.45(b-4).

[10] *Id.* § 6.41(b).

2. County ARB orders fail *Utah Construction*'s third prong because hearings do not give taxpayers an "adequate opportunity to litigate" their claims.

Only when the "parties had an adequate opportunity to litigate their claims through an adversarial process in" an adjudicative proceeding can an agency decision have preclusive *res judicata* effect. *See Igal*, 250 S.W.3d at 87. Although *Igal* did not specify everything required to meet that threshold, some considerations that suggest a party had an adequate opportunity to litigate include: (1) representation by counsel; (2) pre-hearing discovery; (3) ability to issue subpoenas; (4) opportunity to present witness testimony; (5) opportunity to thoroughly cross-examine adverse witnesses; (6) application of the rules of evidence; and (7) proceedings that are open to the public and recorded. *See Turnage v. JPI Multifamily, Inc.*, 64 S.W.3d 614, 620-21 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

ARB hearings do not, as a practical matter, provide enough protections to meet this test. The Tax Code admittedly states that taxpayers are "entitled to offer evidence, examine or cross-examine witnesses or other parties, and present argument on the matters subject to the hearing." Tex. Tax Code § 41.66(b). But in some material respects, what the Tax Code giveth the ARB taketh away—most notably by applying short time limits to hearings that simply do not allow parties to adequately offer evidence, examine or cross-

examine witnesses or other parties, or present argument on the matters subject to the hearing.

The dispute in J-W Power's ARB hearings,[11] for example, was the same question that took Archrock four years and a trip to this Court to resolve: proper construction and application of Sections 23.1241 and 23.1242 of the Tax Code. *See EXLP Leasing, LLC v. Galveston Cent. Appraisal Dist.*, 475 S.W.3d 421 (Tex. App.—Houston [14th Dist.] 2015), *rev'd*, 554 S.W.3d 572 (Tex. 2018). Parties cannot hope to even articulate such questions fully, let alone litigate them adequately, in their allotted portion of a single fifteen-minute hearing that includes deliberation and decision time. *See, e.g.*, Travis Appraisal Rev. Bd. Formal Hearing Procedures 2 (May 3, 2023), https://traviscad.org/wp-content/uploads/2023-TARB-Hearing-Procedures-final_20230503.pdf ("Formal hearings are limited to a total of 15 minutes (includes owner's time, TCAD's time, and panel's questions and deliberation)"); Harris Cent. Appraisal Dist., *Important Information About the Protest Process* (July 2016), https://owners.hcad.org/pdf/forms/GTA-IAD-001.pdf ("Hearings are generally limited to 15 minutes total duration"); Bexar Cnty. Appraisal Rev. Bd. Protest Hearing Procedures 2 (May 3, 2023), https://www.bcad.org/data/_uploaded/file/PDFs/2023%20ARB%20HEARING%2

[11] J-W Power's relevant ARB hearings occurred in 2013-2016. *See* Pet. 8-9.

oPROCEDURES.pdf ("Usually the ARB hearing is scheduled for 15 minutes").

This observation is meant in no way to impugn ARB panels or their members. The reality is that short time limits are a necessity. In Harris County, for example, nearly half a million property tax protests are filed each year.[12] If ARB panels are to hear even a fraction of those protests, short time limits are critical to their being able to complete all protest hearings in the few months after mid-May, when annual notices of appraised value go out. But that very necessity of holding such compressed hearings is precisely why ARB orders do not satisfy *Utah Construction*'s "adequate opportunity to litigate" prong.

The Texas Workforce Commission, whose wage-claim orders were given preclusive effect in *Igal*, provides a helpful counterpoint. *Igal* observed that "TWC's procedures are designed to resolve claims expeditiously and inexpensively, and it uses abbreviated mechanisms of an adversarial judicial process to adjudicate wage claims." 250 S.W.3d at 82. Fair enough. But TWC hears nowhere near the number of wage claims in a year as a single ARB for a large county does. In fiscal year 2013, for example, only 2,785 wage claims statewide were appealed to a TWC hearings officer (only 809 of which were

[12] *See* Gwendolyn Wu, *How to Protest Your Houston Home's Appraisal Value and Pay Lower Property Taxes*, Houston Chronicle (Mar. 24, 2022), https://www.houstonchronicle.com/business/houston-how-to/article/how-to-protest-your-home-property-tax-value-17023304.php.

appealed to the Commission). *See* Tex. Workforce Comm'n, *Sunset Advisory Commission: Staff Report with Final Results* 41 (July 2015), https://www.sunset.texas.gov/public/uploads/files/reports/TWC_TWIC%20Final%20Results.pdf.

Perhaps the most fundamental element of having an adequate opportunity to litigate one's position is the assurance that the tribunal is impartial and wholly independent. After all, the "protection of property rights, central to the functioning of our society, should not—indeed, cannot—be charged to the same people who seek to take those rights away." *Stewart*, 361 S.W.3d at 580-81 (internal footnote omitted). While ARBs and appraisal districts are separate entities, created by the legislature in separate sections of the Tax Code, *see* Tex. Tax Code § 6.01 (establishing appraisal districts); *id.* § 6.41 (establishing ARBs), complete independence and impartiality of ARBs is undermined by other provisions. Specifically, the appraisal district:

- controls the ARB's budget and compensates ARB members, *see* Tex. Tax Code § 6.42(c);
- provides "clerical assistance to the appraisal review board, including assisting the board with the scheduling and arranging of hearings," *id.* § 6.43(f);
- "may specify in its budget whether the appraisal review board may employ legal counsel or must use the services of the county attorney," *id.* § 6.43(e);

- houses the ARB (and sets ARB hearings) in the appraisal district's own offices, *see Appraisal Review Board Manual*, *supra* p. 13, at 14.

On top of that, this Court recently held that—at least for purposes of the Texas Unemployment Compensation Act ["TUCA"]—ARB members are employees of the appraisal districts because, although the appraisal district "does not, and cannot, control the content or result of any decision the Board makes," it does "'ha[ve] the right to direct or control the worker, both as to the final results and as to the details of when, where, and how the work is done,'" which is the test under TUCA. *Harris Cnty. Appraisal Dist. v. Tex. Workforce Comm'n*, 519 S.W.3d 113, 119 (Tex. 2017) (citation omitted). In reaching its conclusion, the Court took note of the items listed above, as well as evidence provided by the ARB member claimants that:

- "they were directed which disputes to hear, where to hear them, and the date and time such disputes were to be heard," *id.* at 123;
- "they were instructed as to the procedures they were to follow in conducting the hearings and issuing decisions, such as what evidence should be considered, how many minutes each side should be given to present their case, how long each hearing should last, and when the decision should be issued," *id.*;
- "the training sessions were conducted in [the appraisal district]'s office building, and [the appraisal district] paid for the training," *id.*;
- "they are required to be present at called meetings in accordance with an attendance policy adopted by [the appraisal district]," *id.* at 125;
- they "are entitled to per diem set by the appraisal district budget for each day the [ARB] meets and to reimbursement for actual and

necessary expenses incurred in the performance of board functions as provided by the district budget," *id.* at 126 (quoting Tex. Tax Code § 6.42(c))

- "[the appraisal district] paid them on an hourly basis," *id.*;

What's more, when ARBs need legal advice, they get it from the "county attorney for the county in which the appraisal district is established." Tex. Tax Code § 6.43(c). The law recognizes the inherent conflict of interest in having one party's lawyer advise the tribunal but allows it anyway: the county's lawyer "may provide legal services to the appraisal review board *notwithstanding that the county attorney or an assistant to the county attorney represents or has represented the appraisal district or a taxing unit that participates in the appraisal district in any matter*." *Id.* (emphasis added). Given these realities, a taxpayer appearing before an ARB cannot reasonably be faulted for doubting that the tribunal is both independent and impartial.

The Texas Workforce Commission once again provides a useful counterpoint. The TWC *Hearing Officer Handbook* prescribes that, when adjudicating wage disputes between claimants and employers, "[t]o preserve the atmosphere of impartiality and prevent undue influence, hearings are never scheduled at an employer's place of business, a claimant's home, union hall or any other place not considered to be a completely neutral site." Tex. Workforce Comm'n, *Appeal Hearing Officer Handbook* § 206.2,

https://tinyurl.com/bd67977y. Nor, of course, do TWC hearings officers receive clerical assistance, legal advice, or office space from the Texas employers or employees whose wage claims TWC adjudicates.

In short, the perfunctory nature of ARB hearings and the potential for something less than complete independence by ARBs cast doubt on whether taxpayers have an "adequate opportunity to litigate" their claims such that ARB orders should have preclusive effect in separate court proceedings brought later under different Tax Code provisions.[13] At a minimum, Texas courts should have carefully applied *Utah Construction* before "extend[ing] the principle of res judicata to this particular area of law for the first time."[14]

C. The authority on which the court of appeals relied does not hold that ARB decisions have *res judicata* effect.

As it eluded *Utah Construction*'s three-prong inquiry for deciding whether extending preclusive effect to county ARB orders is appropriate, the court of appeals cited a string of cases that support only the more general (and undisputed) position that *some* agency decisions can have such preclusive effect. Op. 5. The opinion's case parentheticals concede as much. The court

[13] To be clear, none of the argument above suggests that J-W Power should not have sought direct judicial review of the adverse ARB orders within the 60-day period allotted under Texas Tax Code Chapter 42. Nor do *amici* disagree that J-W Power's failure to timely seek judicial review bars it from appealing those ARB orders. But J-W Power's waiver of its right to judicial review of the ARB orders is a separate matter from whether ARB orders can preclude property owners from later pursuing different statutory remedies in court.

[14] Talwani, *supra* p. 1.

of appeals cited *Igal* as holding only that "*certain* final orders of Workforce Commission are *res judicata*." *Id.* (first emphasis added). And it cited *Willacy County Appraisal District v. Sebastian Cotton & Grain, Ltd.*, 555 S.W.3d 29, 50 (Tex. 2018) and *Beltran Gutierrez v. City of Laredo*, No. 04-17-00838-CV, 2019 WL 691443, at *2 (Tex. App.—San Antonio Feb. 20, 2019, pet. denied) (mem. op.) as merely "referring to county appraisal review board as [a] *type of administrative agency*". *Id.* at 5 n.3 (emphasis added).[15]

But it's not enough simply to say that because *some* decisions by *some* agencies can have preclusive effect and because the body in question has been referred to as a "type of administrative agency," its orders must therefore have *res judicata* effect, barring Texas courts from hearing cases brought by claimants under different statutory provisions so long as the basic nature of the matters is similar.[16] The *Utah Construction* inquiry is necessary because

[15] The other case cited in footnote 3 of the opinion, *Cameron Appraisal District v. Rourk*, did not deal with *res judicata* at all. 194 S.W.3d 501, 502 (Tex. 2006) (per curiam). It was purely an exhaustion-of-remedies case holding that a class action lawsuit could not be used to bypass the ARB protest procedure. It said nothing of the preclusive effect of ARB orders on later collateral proceedings.

[16] Whether "J-W Power concede[d] this point on appeal," in its reply brief, as the court of appeals suggested, Op. 5, may limit the arguments J-W Power can make here. But it makes this Court's review even more important—to make clear to Texas courts that determining whether orders of an administrative body can have preclusive effect in the first instance is a legal question that requires the court to apply the *Utah Construction* test. *Cf. Flowers v. Flowers*, 407 S.W.3d 452, 457 & n.2 (Tex. App.—Houston [14th Dist.] 2013, no pet.) ("An appellee's concession of a legal issue involved in an appeal does not relieve th[e] court of its obligation to independently determine whether the appellee's concession is based on sound analysis.").

it bridges the gap from the undisputed general proposition that *some* agency decisions can be preclusive to the specific issue of whether *this tribunal's* decisions can be. This Court should grant review here because none of the courts in any of the related J-W Power cases performed *Utah Construction*'s inquiry before extending preclusive effect to county ARB decisions.

II. Abandoning a strict adherence to the *Utah Construction* test would handicap the Texas judiciary and erode the rights of Texans.

The court of appeals' approach to agency *res judicata*, if allowed to creep unchecked, could significantly erode both the judicial power and the rights of Texans. There are, after all, myriad administrative bodies in Texas whose decisions it would be absurd to grant *res judicata* effect precisely because they lack the characteristics that this Court and the United States Supreme Court held could be a competent substitute for a judicial tribunal.

The architectural review authority of a subdivision with a property owner's association (POA), for example, is empowered to approve or reject applications for construction of improvements in the subdivision. *See* Tex. Prop. Code § 209.00505(a). A property owner who, with that body's approval, builds something on his lot that creates a genuine nuisance cannot thereafter avoid judicial review of the nuisance by arguing that the POA's approval is preclusive on all questions related to construction on his lot.

This Court should grant review if only to reiterate that deciding that the orders of an administrative body can have preclusive effect must be done deliberately and only after a court is confident that *Utah Construction*'s three prongs are met.

CONCLUSION

None of the courts below made the three-pronged inquiry that this Court adopted in *Igal* for determining whether an administrative agency's decisions can have preclusive *res judicata* effect in a later, separate court proceeding. This Court should grant review, apply that test here, and render judgment that county ARB orders are not the sort of final judgments that can have preclusive effect. Alternatively, the Court should reverse the judgment below and remand the case to the court of appeals to apply the *Utah Construction* test to county ARB decisions.

Dated: October 23, 2023 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), I certify that, according to the word count of the computer program used to prepare this document, the document contains 5,873 words.

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