NO. 95770-3

SUPREME COURT OF THE STATE OF WASHINGTON

KING COUNTY CITIZENS AGAINST FLUORIDATION,

Petitioner,

v.

WASHINGTON STATE PHARMACY QUALITY ASSURANCE COMMISSION,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

King County Citizens Against Fluoride (Citizens) petitioned for rulemaking under RCW 34.05.330 to the State of Washington Pharmacy Quality Assurance Commission (Commission) requesting a new rule classifying fluoridating substances added to drinking water and fluoridated bottled water as drugs. The Commission denied Citizens' Petition based in part on *Protect the Peninsula's Future v. Port Angeles,* 175 Wn. App. 201, 215-16, 304 P.3d 914 (2013), *review denied,* 178 Wn.2d 1022, 312 P.3d 651(2013), which decided that fluoridating substances added to drinking water are not drugs. Citizens petitioned for judicial review in Thurston County Superior Court and the Court of Appeals.

Judicial review of the Commission's denial of the Petition for Rulemaking is under RCW 34.05.570(4)(c) of the Administrative Procedure Act (APA), specifically the arbitrary or capricious standard in RCW 34.05.570(4)(c)(iii). Citizens has the burden to establish that the Commission's denial was arbitrary or capricious. RCW 34.05.570(1)(a). Both lower Courts decided that the Commission was not arbitrary or capricious to deny the rulemaking petition based on prior case law.

Review of the Court of Appeals decision by this Court is unwarranted. The Court of Appeals correctly affirmed the Commission's denial, recognizing that the Commission's reliance on prior case law in

making its decision is not arbitrary or capricious. As shown below, the Court of Appeals decision does not present an issue of substantial public interest to justify this Court's review.

II. IDENTITY OF RESPONDENT

Respondent is the State of Washington Pharmacy Quality Assurance Commission.

III. COUNTERSTATEMENT OF THE ISSUE

Is it arbitrary or capricious for an administrative agency to deny a petition for rulemaking when it uses a reasoned process, relying on case law, to reject the petition?

IV. COUNTERSTATMENT OF THE CASE

Citizens petitioned the Commission under RCW 34.05.330 to adopt a rule declaring that fluoridating substances in drinking water and fluoridated bottled water are drugs. Administrative Record (AR) at 0015-89. The Commission denied the Petition for Rulemaking, based in part on language in *Protect the Peninsula's Future*, 175 Wn. App. at 216, that was directly on point: "[F]luorides in drinking water are not drugs under Washington law." AR at 0147-148. In addition, the Commission cited several statutes to support its decision, i.e. "*See also,* RCW 18.64.011(12), 69.04.008, 69.04.009, and 69.41.010(9)." AR at 0148.

Petitioner sought judicial review of the Commission's decision under the APA, RCW 34.05. Both Thurston County Superior Court and the Court of Appeals affirmed the Commission's denial of the Petition for Rulemaking, specifically stating that the Commission's reliance on *Protect Peninsula's Future* in denying the rulemaking petition was not arbitrary or capricious under RCW 34.05.570(4)(c)(iii). *King County Citizens Against Fluoridation v. Wash. State Pharmacy Quality Assur. Comm'n*, No. 50022-1-II, slip op. at 5 (Wash. Div. II, March 27, 2018).

The Court of Appeals, in examining the Commission's decision under the arbitrary or capricious standard, said that relying on existing case law "was a reasoned basis for the Commission's decision." *Id.* at 6. Therefore, the Commission's denial was not arbitrary or capricious.

In its Petition for Review, Citizens again argues that *Protect the Peninsula,* 175 Wn. App. at 216, erroneously relied on a statement in *Kaul v. City of Chehalis,* 45 Wn.2d 616, 625, 277 P.2d 352 (1954) that fluoridating substances in drinking water "are not drugs." Citizens believes that this language in *Kaul* is dicta and argues that the Commission was arbitrary or capricious in relying on *Protect the Peninsula* as a basis for denying its rulemaking petition. However, when presented with Citizens' arguments, the Court of Appeals applied the arbitrary or capricious standard of review to the Commission's denial of the rulemaking petition and held

that the "the existence of a contrary interpretation of the case law does not render the Commission's decision arbitrary or capricious so long as the Commission reached its decision through some process of reason." *King County Citizens,* slip op. at 6.

The Court of Appeals also rejected Citizens' invitation to overrule, clarify, or distinguish prior case law, explaining that the judicial review of the Commission's denial of rulemaking is limited to the question of whether that decision was arbitrary or capricious and it was not necessary to "conclusively determine the meaning of prior case law." *King County Citizens,* slip op. at 7. The Court of Appeals thus recognized that the arbitrary or capricious standard under RCW 34.05.570(4)(c)(iii) does not provide a means to review and reconsider prior case law upon which an agency relied in making its decision.

V. REASONS WHY THE COURT SHOULD DENY REVIEW

Citizens claims that review should be accepted based on Rules of Appellate Procedure (RAP) 13.4(b)(4), i.e. "an issue of substantial public interest that should be determined by the Supreme Court." Petition at 12-15. However, Citizens provides no good reason why this Court should review an agency action denying a rulemaking petition when the denial is consistent with prior case law and subject only to the highly deferential arbitrary or capricious standard in RCW 34.05.570(4)(c)(iii). The Court of

Appeals correctly recognized that the Commission's denial based on prior case law was a reasoned decision; therefore, the Commission's denial was neither arbitrary nor capricious. The Court of Appeals also correctly noted that the arbitrary or capricious standard of review in RCW 34.05.570(4)(c)(iii) is limited and did not warrant an extensive review of prior case law. Rather, the standard of review found in RCW 34.05.570(4)(c)(iii) is not an avenue for addressing the validity of prior case law.

However, in making its claim of "substantial public interest," Citizens relies extensively on its position that prior case law has been misinterpreted or misapplied. But it fails to tether that argument to the limited arbitrary or capricious standard of review in RCW 34.05.570(4)(c)(iii), applicable to the Commission's decision. As the Court of Appeals correctly said, in reviewing whether the Commission's denial was "reached though some process of reason," it does not matter whether Citizens can argue a different interpretation of prior case law nor does the court review the "entire precedential body of case law." *King County Citizens,* slip op. at 6 and 8.

In short, this case does not warrant review by the Supreme Court because the Court of Appeals correctly decided that the Commission's denial of a rulemaking petition was not arbitrary or capricious, and that

ruling properly applies the APA standard of review to the unique facts of the Commission's denial of rulemaking.

1. The Court of Appeals appropriately declined to exceed the scope of review under the APA

Judicial review of agency action under the APA is limited and "invokes the appellate, not the general or original jurisdiction" of the courts. *Reeves v. Dep't of General Admin.,* 35 Wn. App. 533, 537, 667 P.2d 1133 (1983). *See Mader v. Health Care Auth.,* 149 Wn.2d 458, 468, 70 P.3d 931 (2003). Judicial review of the Commission's denial of Citizens' Petition for Rulemaking is limited by the standards found in RCW 34.05.570(4)(c). The specific standard of review is the arbitrary or capricious standard in RCW 34.05.570(4)(c)(iii).

Citizens' claim that the Commission was arbitrary and capricious is premised on its disagreement with an interpretation of the case upon which the Commission relied in denying its Petition for Rulemaking. However, as held in *Squaxin Island Tribe v. Washington State Dep't of Ecology,* 177 Wn. App. 734, 741, 312 P.3d 766 (2013), the arbitrary or capricious standard in RCW 34.05.570(4)(c)(iii) does not "transform the agency's mandatory requirement to explain its denial into a mechanism to review the substance of the agency's discretionary decision."

As the Court of Appeals recognized when choosing to not address the majority of Citizens' briefing, the arbitrary or capricious standard in RCW 34.05.570(4)(c)(iii) does not provide a means to collaterally challenge the appellate court decision upon which the Commission relied in making its decision. Nor, as a general matter, should judicial review under RCW 34.05.470(4)(c) provide a means to ask appellate courts to address the merits of prior case law in order to force an agency to engage in rulemaking that would contradict such case law. Therefore, judicial review was properly rejected as a means to revisit, revise, or reverse this Court's denial of the petition for review in *Protect the Peninsula's Future*. Contrary to what Citizens argues, the APA is a means to obtain review of agency actions based on their immediate context and not a means to obtain judicial reconsideration of prior case law.

Citizens, nevertheless, seeks to expand the scope and focus of review under RCW 34.05.570(4)(c) by asking this Court to reverse or revise its 1954 decision in *Kaul*, and force the Commission to adopt proposed rules declaring that fluoridating substances added to drinking water are drugs. Citizens made similar requests to the Court of Appeals to revisit the decision in *Protect the Peninsula's Future.* The Court of Appeals correctly declined to consider Citizens' request because the scope of review under the arbitrary or capricious standard in RCW 34.05.570(4)(c)(iii) is limited to

ascertaining if the Commission reached its decision by a reasoned process. Here, that standard was met because the Commission examined prior case law and statutes and fairly denied the rulemaking petition because it was contrary to case law.

Citizens' request for this Court to revisit, revise, or review prior case law exceeds the scope of review in RCW 34.05.570(4)(c)(iii). That issue involves no substantial public interest, as it is uniquely presented by Citizens' desire to leverage its interpretation of prior case law to force rulemaking by the Commission. But there is no public interest that warrants this Court addressing an issue so unique and so contrary to the deferential scope of arbitrary and capricious review.

2. The Court of Appeals correctly applied the standard of review

The Court of Appeals applied the arbitrary or capricious standard in RCW 34.05.570(4)(c)(iii) and found that the Commission was neither arbitrary nor capricious in denying Citizens' Petition for Rulemaking based on prior case law. Arbitrary or capricious action is defined as "willful and unreasoning action and taken without regard to the attending facts and circumstances." *Wash. Indep. Tele. Ass'n v. Wash. Utils. & Transp. Comm'n,* 148 Wn.2d 887, 905, 64 P.3d 606 (2003). In applying this standard, as said in *Aviation West Corp. v. Dep't of Labor & Industries,*

138 Wn.2d 413, 432, 980 P.2d 701 (1999), "[t]he court must scrutinize the record to determine if the result was reached through a process of reason." The Court of Appeals recognized that the Commission "engaged in a process of reason . . . by relying on the plain language of the case law to support its decision;" therefore, the Commission's decision was not arbitrary or capricious. *King County Citizens,* slip op. at 6.

Under the arbitrary or capricious standard, the reviewing court does not review the "substance of the agency's discretionary decision." *Squaxin Island Tribe,* 177 Wn. App. at 741. Neither "the existence of contradictory evidence nor the possibility of deriving conflicting conclusions from the evidence renders an agency decision arbitrary and capricious." *Rios v. Wash. Dep't of Labor & Indus.,* 146 Wn.2d 483, 504, 39 P.3d 961 (2002). Furthermore, "an agency has wide discretion in deciding to forego rulemaking." *Squaxin Island Tribe,* 177 Wn. App. at 742; *Rios,* 146 Wn.2d at 507. The Court of Appeals ruling is on all fours with these principles. *See King County Citizens,* slip op. at 4-5 ("We review the agency record to determine only whether the agency reached its decision 'through a process of reason, *not whether the result was itself reasonable in the judgment of the court.*" *Squaxin Island Tribe*, 177 Wn. App. at 742 [quoting *Rios,* 146 Wn.2d at 501] [emphasis in opinion]; "An agency action is not arbitrary or capricious simply because of contradictory evidence or the possibility of

deriving conflicting conclusions from the evidence." *Squaxin Island Tribe,* 177 Wn. App. at 742).

The case at bar thus presents no significant issue warranting further review. When presented with the Petition for Rulemaking submitted by Citizens, the Commission discussed the *Kaul* and *Protect the Peninsula's Future* cases and decided to deny the Petition for Rulemaking based on those cases, relying on the statement that fluoridating substances added to drinking water are not drugs. AR at 0147-48. The Court of Appeals held that the Commission's reliance on a fair reading of *Protect the Peninsula's Future* in denying the rulemaking petition was not willful nor unreasoning. *King County Citizens,* slip op. at 5-6. The Commission's decision was reached through a process of reason. *Id.* at 6. Therefore, the Court of Appeals decision was correct. But, more to the point, the issue presented in the Petition for Review does not meet any of the criteria for this Court's review under RAP 13.4(b).

VI. CONCLUSION

At the proceeding before the Commission, Citizens admitted that it intended to use the Commission's denial of its Petition for Rulemaking as a means to "take this up to the Court of Appeals or the Supreme Court again and try to get them to change their minds . . . ." Report of Proceedings (RP) at 16:22-25. The Court of Appeals properly declined Citizens' invitation to

use this case to exceed the scope and ignore the standards of review under the APA, and to revisit, review or revise prior cases deciding that fluoridating substances in drinking water are not drugs. Instead, the Court of Appeals correctly applied the standards of review for denial of a rulemaking petition in RCW 34.05.570(4)(c)(iii) to find that the Commission's denial was derived through a reasoned process and, therefore, neither arbitrary nor capricious. Additional judicial review is not needed to review this application of the arbitrary and capricious standard again.

In the context of a petition for rulemaking to declare fluoridating substances added to drinking water a drug, the Commission must be entitled to examine relevant case law and rely upon it. The Commission is not, as Petitioner claims, arbitrary or capricious for failing to reexamine existing case law. To allow otherwise leads to a poor result, where parties file rulemaking petitions asking agencies to revise or reverse prior case law and then, on judicial review under the APA, petition the court to substitute its decision for that of the agency on a request to adopt rules. The arbitrary or capricious standard cannot be met simply because Citizens offers an alternative view that past case law was wrongly decided where the Commission declines to embrace Citizens' perspective.

For all these reasons, Citizens' Petition does not meet the standard for acceptance of review under RAP 13.4(b)(4). Citizens' disagreement with prior case law is not properly before this Court in this APA judicial review of the Commission's denial of a petition for rulemaking. The Court of Appeals was correct in declining to engage in a review of prior case law under the arbitrary and capricious standard of RCW 34.05.570(4)(c)(iii).

RESPECTFULLY SUBMITTED this 25th day of May 2018.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of May 2018, at Olympia, Washington.

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