IN THE SUPREME COURT

STATE OF ARIZONA

GREG MILLS and SOUTHWEST ENGINEERING CONCEPTS, LLC, Plaintiffs/Appellants/Petitioners, v. ARIZONA BOARD OF TECHNICAL REGISTRATION; JUDITH STAPLEY, in her official capacity as Executive Director of the Arizona Board of Technical Registration; JACK GILMORE, NEAL JONES, CARMEN WYCKOFF, STEPHEN NOEL, DR. ALEJANDRO ANGEL, ANDREW EVERROAD, CLARENCE MCALLISTER and HELMUTH HACK, all in their official capacities as members of the Arizona Board of Technical Registration, Defendants/Appellees/Respondents.	Supreme Court No. CV-21-0203-PR Court of Appeals Division One Case No. 1 CA-CV 20-0598 Maricopa County Superior Court No. CV2020-010282

BRIEF AMICUS CURIAE OF THE GOLDWATER INSTITUTE IN SUPPORT OF PETITION FOR REVIEW

Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
Timothy Sandefur (033670)
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
Litigation@goldwaterinstitute.org
Counsel for Amicus Curiae Goldwater Institute

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INTEREST AND IDENTITY OF AMICUS

The Goldwater Institute is a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty and limited government. Among the Institute's priorities is to ensure accountability and limitations on the administrative state. Through its Scharf-Norton Center for Constitutional Litigation, the Institute represents parties and participates as amicus curiae in this and other courts in cases involving that issue. *See, e.g.*, *Phillip B. v. Ariz. Dep't of Child Safety*, No. 1 CA-CV 20-0569 (pending, 2021); *Sun City Home Owners Assn. v. Ariz. Corp. Comm'n*, 252 Ariz. 1 (2021); *Baldwin v. United States*, 140 S. Ct. 690 (2020). Goldwater believes its policy expertise and experience will aid this Court in considering this petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals' erroneous application of the administrative exhaustion requirement creates a new and dangerous precedent for Arizonans who seek relief from unconstitutional actions by regulatory agencies. If left undisturbed, it will effectively deprive many of them of the opportunity to petition state courts for redress of constitutional grievances imposed by the improper expansion of administrative authority.

The decision also ignores important recent changes in Arizona administrative law—changes regarding which lower courts need guidance.

Exhaustion is supposed to give agencies the opportunity to resolve disputes in ways that obviate the need for judicial intervention. *Coconino Cnty. v. Antco, Inc.*, 214 Ariz. 82, 86 ¶ 9 (App. 2006). It does *not* exist to block litigation in cases where agencies act outside their authority or enforce unconstitutional procedures or laws. That is why courts have long recognized that exhaustion is not required where litigants challenge the constitutionality of agency authority. *See id.* at 86 ¶ 8 ("The [exhaustion] doctrine does not apply… when the jurisdiction of the agency is being contested."); *Pub. Util. Comm'n v. United States*, 355 U.S. 534, 540 (1958) ("where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought."). To force someone to submit to an allegedly unconstitutional administrative process before letting her make her constitutional arguments in court would be illogical, futile, and fundamentally unfair, because it would drastically increase the time and cost of vindicating her rights.

What's more, the legislature recently amended A.R.S. § 12-910 in ways that fundamentally change how administrative exhaustion works. These amendments entitle individuals who appeal an agency decision to a trial *de novo,* in which the court decides all questions of law and fact *de novo*—and also entitles the individual to supplement the administrative record. Thus in a case like this, which involves the purely legal question of the Board's statutory and constitutional powers,

exhaustion is now "permissive" instead of mandatory. *Walters v. Maricopa Cnty.*, 195 Ariz. 476, 479–81 ¶¶ 13–25 (App. 1999) (detailing distinction between permissive and mandatory exhaustion).

Because the amendments to Section 12-910 are new, lower courts need guidance as to the effect they have on the exhaustion analysis. This Court should grant the petition and reverse the decision below to make clear that where a party challenges an agency's jurisdiction, and where the risk of enforcement is sufficient to ripen the case, that party may seek prospective equitable relief.

ARGUMENT

I. The decision below confused a case for prospective relief against the Board's jurisdictional determination with a challenge to a specific agency finding.

Exhaustion is a matter of judicial policy, not of court jurisdiction. *Medina v. Ariz. Dep't of Transp.*, 185 Ariz. 414, 418 (App. 1995). Courts prudentially withhold consideration of unripe cases—i.e., those where parties have failed to exhaust—because administrative procedures enable agencies to bring their expertise to bear, which can be helpful in technical matters, and because the agency may resolve a dispute without litigation. *Farmers Inv. Co. v. Ariz. State Land Dep't*, 136 Ariz. 369, 373 (App. 1982). But exhaustion does not apply where the plaintiff argues that the agency's action is *ultra vires*. After all, it makes no sense to require someone to "inferentially admit [the] binding force" of an agency

proceeding before challenging it. *Manning v. Reilly*, 2 Ariz. App. 310, 312 (1965).[1]

Not only would that be illogical, but it would impose an expensive and time-consuming burden on people whose rights are being violated by an agency. That would deter people who cannot afford the time and expense of that cumbersome administrative process from challenging the agency's wrongful actions, and it would give agencies unjustified leverage to impose demands on people. Also, because an agency's efforts to expand its power beyond lawful limits will affect the whole regulated community, any rule that deters legal challenges to unjustifiable exercises of agency authority will cause third parties to fear triggering an enforcement action—i.e., it would have a chilling effect.

Such considerations have led this Court to make clear that exhaustion is to be analyzed on a case-by-case basis, with an eye to the realities of the litigation, rather than as a bright-line rule. *Univar Corp. v. City of Phoenix*, 122 Ariz. 220, 224 (1979).

[1] Here, the Court of Appeals acknowledged that rule, but declared it inapplicable on the grounds that Mills was "not facially challenging applicable statutes (instead, challenging them as applied). App.027 ¶ 18. This was simply not true: Mills's complaint asserted both facial and as-applied challenges. *See, e.g.*, Complaint at ¶¶ 175, 218, 271, and Prayer for Relief, App.078, 084, 093–94.

Estate of Bohn v. Waddell, 174 Ariz. 239, 248–50 (App. 1992), did say that constitutional issues must be submitted to the agency first, but the question there was whether the Department of Revenue could have "applied constitutional doctrines" when analyzing the tax refund claims at issue. *Id.* at 249–50. That is unlike this case, which asks the purely legal question of whether the Board has jurisdiction over Mills's business in the first place. That is a legal question, and courts are the proper forum for it.

Moreover, Mills is not seeking to challenge any prior enforcement action by the Board, so he is not confined to an appeal; instead, he may bring his challenge to the Board's jurisdictional determination as a plaintiff. The court below confused these two things. It seems to have thought that there was an unfinished, ongoing proceeding that Mills must complete before appealing. But the opposite is true: *no* enforcement proceeding is ongoing, and that means he need *not* complete any such proceeding. The fact that the Board has investigated him shows that there is a realistic likelihood of future enforcement sufficient to ripen his case, and its jurisdictional determination is a final agency action that he may challenge. *Sanchez v. City of Phoenix*, No. CV-12-1454-PHX-GMS, 2013 WL 308749, at *3 (D. Ariz. Jan. 25, 2013).

Federal courts have let plaintiffs in analogous situations sue to challenge "jurisdictional determinations" by agencies. In *Sackett v. EPA*, 566 U.S. 120

(2012), the EPA argued that property owners could not challenge its assertion of jurisdiction, because that was not a final agency action. Instead, it said they were required to wait instead for the agency to bring an enforcement suit against them—even though, by the time it decided to do so, the potential penalties for failure to comply with the agency's demands would have accrued into enormous fines. *Id.* at 132 (Alito, J., concurring). The Court, however, said the EPA's assertion of jurisdiction *itself* "mark[ed] the '"consummation"' of the Agency's decisionmaking process," and entitled the property owners to sue. *Id.* at 127 (citation omitted). Later, in *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590 (2016), it said that an agency's jurisdictional determination was itself a final agency action that entitled the party to sue. "[P]arties need not await enforcement proceedings," it said, but may challenge the agency's assertion of authority, because that is itself a substantive agency decision. *Id.* at 600. [2]

Here, the Board's determination that it has authority over Mills's business is sufficiently final agency action—the "consummation" of its process, *Sackett*, 566 U.S. at 127, and should entitle Mills to sue. The decision below, however, will deny Mills any opportunity to challenge its assertion of jurisdiction until it "drop[s]

[2] The Court emphasized "the 'pragmatic' approach we have long taken to finality," *id.* at 599 (citation omitted), which echoes this Court's holding that exhaustion requirements are to be applied in a realistic, rather than a formalistic fashion. *Medina*, 185 Ariz. at 418–19.

the hammer" by bringing an action against him. *Id.* Until then, the cloud of potential punishment would hover over him.

That should not be the rule. The Court of Appeals said that "no final Board decision has issued and the Board has taken no final action that plaintiffs challenge," App.031 ¶ 30, but far from showing that his case is premature, that shows why it *can* proceed: Mills is not challenging a conviction, but the Board's assertion of authority. That assertion certainly *is* final, and on that question, nothing remains to be exhausted.

II. Given the de novo review requirements of A.R.S. § 12-910(F), administrative exhaustion is not required here.

Another reason exhaustion would be pointless is that if Mills submitted to a Board proceeding, the Board's factual and legal conclusions would be subject to *de novo* review in court anyway, under A.R.S. § 12-910(E) and (F).

That statute was recently amended, out of widespread concerns that administrative agencies tend to expand their power beyond statutory warrant, and that deference doctrines have prevented courts from acting as checks against them. *See, e.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1143 (10th Cir. 2016); *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting); *Stambaugh v. Killian*, 242 Ariz. 508, 512 ¶ 25 (2017) (Bolick, J., concurring). First, Section 12-910(E) was amended in 2018 to provide that in all judicial review of agency decisions, *legal* questions would be subject to *de novo* review. Then, in

2021, it was amended again to declare that all *factual* findings by the agency are also subject to *de novo* review.[3]

These changes to the rules governing appeals from agency actions have consequences for administrative exhaustion. Yet lower courts have received no guidance yet with respect to applying these new provisions of Section 12-910 to the common law exhaustion requirements.

Arizona courts have distinguished between cases in which administrative exhaustion is mandatory and those in which it is merely "permissive"—i.e., optional. *Walters*, 195 Ariz. at 479–81 ¶¶ 13–25. In the latter situation, a plaintiff may go to court first, instead. The distinction between mandatory and permissive administrative proceedings turns on several factors, *see id.*, and is to be made on a case-by-case basis. *Univar Corp.*, 122 Ariz. at 224. Moreover, courts presume *against* imposing an exhaustion requirement, unless the legislature makes it clear that such exhaustion is mandatory. *Walters*, 195 Ariz. at 479 ¶ 15. By altering how administrative agency appeals work, the legislature has changed the mandatory/permissive calculus, at least for cases that—like this one—involve the legal question of agency jurisdiction.

[3] The bill establishing *de novo* review of factual determinations was signed on April 26, 2021, after briefing was completed below. Because this is a procedural statute, it has "retroactive" effect on pending cases. *State Comp. Fund of Ariz. v. Fink*, 224 Ariz. 611, 614 ¶¶ 12–15 (App. 2010).

The Court of Appeals made no mention of these recent statutory changes, but their consequences are decisive, because they show that, at least in a case like this, which involves a purely legal question of Board jurisdiction, "independent judicial and administrative remedies can coexist successfully." *Walters*, 195 Ariz. at 479 ¶ 17. A person in Mills's position—that is, someone practicing a trade that he thinks falls outside of the Board's authority—may *choose* to submit to a Board proceeding, believing that the agency can be persuaded that the business is not within its jurisdiction. And the Board may "appl[y] constitutional doctrines" as part of that analysis. *Estate of Bohn*, 174 Ariz. at 250–51. But the individual may instead choose to ask a court to decide that question.

The court below concluded that even if the Board lacks authority to resolve Mills's constitutional arguments, exhaustion was still required in order to establish "a fully developed record so courts 'will not have to decide "important and difficult" questions of constitutional law in the absence of a factual background.'" App.029 ¶ 23 (quoting *Estate of Bohn*, 174 Ariz. at 250). But under these new amendments, any appeal Mills files after a final Board determination would be subject to non-deferential judicial review of facts and law, and Mills would be free to supplement whatever record is developed before the Board.

That does not mean that recent changes to Section 12-910 eliminate administrative exhaustion requirements entirely. On the contrary, not all agencies

are subject to these provisions, and it has always been the law that "[t]he exhaustion doctrine is subject to numerous exceptions which may require case-by-case analysis." *Medina*, 185 Ariz. at 418. Thus the question is whether exhaustion is mandatory or permissive under the circumstances of this case. Given Mills's factual and procedural situation, it is permissive. The court below said there are "unresolved factual disputes" about "whether [Mills is] violating legal obligations, and … [r]esolution of those factual disputes (which turns on evidence not yet presented in the administrative process) is a prerequisite to resolving whether the statutes even apply," App.028 ¶ 20, but this is a case about the Board's jurisdiction under the statutes and the Constitution—a legal question—and any factual determinations helpful for resolving that matter would be subject to *de novo* review and to supplementation, anyway. There is no reason, therefore, to view exhaustion as mandatory here.

In *Farmers Inv. Co.*, the Court of Appeals ruled that the plaintiff was not required to exhaust administrative remedies in challenging the legality of an auction of groundwater rights. The plaintiff argued that the auction was unlawful because it imposed illegitimate conditions on bidders, and therefore any sale would be legally void. 136 Ariz. at 371. The state replied that the plaintiff should have submitted an appeal from the decision of the State Land Commissioner, pursuant to statute, instead of filing a case as a plaintiff. *Id.* at 372. But, after weighing

various factors, the court found that such exhaustion was permissive, not mandatory. First, the statutory language providing an administrative remedy was not compulsory, because it used the word "may." *Id.* at 373–74. Second, there was no higher administrative authority to which the plaintiff could have appealed the agency's action. Instead, any such appeal would be to the superior court, which meant, in effect, that the administrative process had already "run its course." *Id.* at 374. Finally, "the purposes of the exhaustion doctrine would not be advanced" by requiring the plaintiff to appeal instead of filing a lawsuit, because there was nothing for the agency to "apply its expertise" to. *Id.*

A similar analysis applies here. There is no pending proceeding against Mills, but if he were to submit to some Board proceeding, he would be entitled to appeal to Superior Court (again, in permissive "may" language, A.R.S. § 41-1092.08(H)). And in that appeal, he would be entitled to an entirely *de novo* trial, including supplementation of the record. Finally, there would be little point in any of that, because the relevant administrative proceeding has essentially run its course already: the Board has made clear its legal position that Mills's business is within its jurisdiction. There are no technical questions about electronic components to be resolved. Rather, the questions here are purely legal ones, just as in *Farmers Inv. Co.*, and there is little to be gained by further delay. In short, considering the circumstances of this case, the recent amendments to Section 12-

910 make clear that whatever administrative options might exist for Mills are permissive at most.

To hold otherwise and establish an exhaustion requirement even for challenges to the constitutionality of agencies' assertions of jurisdiction, would bar the courthouse doors to plaintiffs whose rights are violated by agencies. A person who contends that her business does not fall within the agency's authority would be required to submit to a time-consuming hearing requirement before going to court to argue what is only a legal question over which the agency does not even get deference. It goes without saying that if this case involved other constitutional rights—for example, if an agency tried to force people to obtain licenses before speaking or praying—the courts would not force someone who sought to challenge the constitutionality of such a demand to first apply for a license. Such a plaintiff would obviously be free to seek immediate, equitable, pre-enforcement relief. *Zwickler v. Koota*, 389 U.S. 241, 252 (1967) (plaintiff may go to court in free speech case instead of submitting to state enforcement process); *Dombrowski v. Pfister*, 380 U.S. 479, 486–87 (1965) (same). To force the person to exhaust administrative remedies first would, in many instances, "effect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler*, 389 U.S. at 252.

Given the expense, delay, and futility of submitting to such a procedure, it is likely that imposing an exhaustion requirement will erect a barrier against legitimate efforts to vindicate individual rights in court. That should not be—and no longer is—the law, under these amendments to Section 12-910. But because those amendments are so recent, lower courts need guidance in reconciling the new availability of *de novo* review with existing precedent regarding exhaustion—precedent that was based on earlier and more deferential versions of Section 12-910.

CONCLUSION

The petition should be *granted*.

Respectfully submitted this 3rd day of January 2022 by:

/s/ *Timothy Sandefur*
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE