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

SUPPLEMENTAL BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS CURIAE

The identity and interest of amicus Goldwater Institute (Goldwater) is set forth in Goldwater's amicus brief in support of the Petition for Review.

INTRODUCTION AND SUMMARY OF ARGUMENT

It's a commonplace rule of exhaustion that litigants need not exhaust administrative remedies "when the 'very administrative procedure under attack is the one which the agency says must be exhausted.'" *Touche Ross & Co. v. S.E.C.*, 609 F.2d 570, 577 (2d Cir. 1979) (citation omitted). In such cases, there is "no need for the agency to make determinations of fact or to apply its expertise" before a court can "determine the constitutionality of the administrative procedure," so exhaustion is therefore not necessary. *Id.* Obviously nothing would be accomplished by requiring someone who contends that an agency lacks authority over her to first submit to that authority—thereby incurring significant cost and delay—rather than simply asking a neutral court to resolve that issue.

The Court of Appeals purported to acknowledge this rule, but concluded, based on *Estate of Bohn*, 174 Ariz. 239 (App. 1992), that it doesn't apply here, because it's possible the Board could "consider at least some constitutional arguments and grant some form of relief" that might resolve the dispute without actually deciding the constitutional issue. *Mills v. Ariz. Bd. of Tech. Registration*, No. 1 CA-CV 20-0510, 2021 WL 3557298, at *5 ¶ 23 (Ariz. App. Aug. 12, 2021).

But the mere possibility of mootness does not mean courts lack power to decide the case. *See* *Fla. ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp.2d 1120, 1147 (N.D. Fla. 2010). Were it otherwise, litigants would *always* be required to submit disputes to the agency, on the off chance that the agency *might* grant "some form of relief."

Moreover, the considerations animating *Estate of Bohn* are not present here. That case turned on the fact that the plaintiffs were seeking tax refunds—i.e., monetary relief calculated through the application of highly technical statutes and regulations—whereas this case seeks only a legal determination of whether the Board is acting within its statutory and constitutional authority. On the latter issue, the Board is owed no deference—either on law or fact—thanks to recent amendments to A.R.S. § 12-910(F). Consequently, there is no good reason for denying Mills the right to a determination before a neutral body of the purely legal question he raises.

ARGUMENT

I. The goals of exhaustion would not be served by requiring Mills to submit to the Agency's jurisdiction.

Federal and state courts and legal scholars have long recognized that exhaustion is not typically required where the plaintiff alleges that the agency is acting beyond its jurisdiction. Such a requirement would, in the words of the Court of Appeals, force the plaintiff "to inferentially admit" the very jurisdiction

that she denies. *Manning v. Reilly*, 2 Ariz. App. 310, 312 (1965). *See also State v. Super. Ct.*, 524 P.2d 1281, 1290 (Cal. 1974) ("It would be heroic indeed to compel a party to appeal before an administrative body to challenge its very existence and to expect a dispassionate hearing before its preponderantly lay membership on the constitutionality of the statute establishing its status and functions."). *See also* Louis Jaffe, *Judicial Control of Administrative Action* 437 (1965) ("It would … be appropriate whenever an agency lacks jurisdiction 'upon the undisputed facts' to short circuit costly [exhaustion] proceedings").

Instead, the rule is that when someone is targeted by an agency for enforcement, or seeks to resolve a dispute within the agency's purview, she may be required to submit to the agency's proceedings—but if she contends that the agency has no authority over her in the first place, or that its enabling legislation is unconstitutional, she may raise those legal arguments in a lawsuit seeking equitable relief without submitting to the authority. As the U.S. Supreme Court has put it, "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 as the only effective way of protecting the asserted constitutional right." *Pub. Utilities Comm'n of Cal. v. United States*, 355 U.S. 534, 540 (1958). That is what Mills did here.

In *Gibson v. Berryhill*, 411 U.S. 564 (1973), the U.S. Supreme Court held that the plaintiffs were not required to exhaust administrative remedies before presenting arguments in the District Court that the statutory scheme the agency was enforcing was unconstitutional. *Id.* at 569–70. The Court said exhaustion was not required: "the question of the adequacy of the administrative remedy … was for all practical purposes identical with the merits of appellees' lawsuit." *Id.* at 575. In a footnote, the Court observed that exhaustion is not necessary "where the state administrative body … [has] predetermined the issue before it," *id.* at 575 n.14—that is, where it is clear that what the agency's position on the relevant point of dispute is. Here, the Board has obviously determined the question that forms the basis for Mills's lawsuit—i.e., whether it has jurisdiction over his business: it believes it does have that authority.[1]

Likewise, in *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 511–12 (1947), the Court said that where the agency had already acted in ways that "constituted 'an unequivocal assertion of power' to regulate," the private party "was not required to await a further regulatory order before contesting the Commission's jurisdiction," but could go to court instead. Here, again, the Board

[1] The Court below purported to distinguish various cases holding exhaustion not to be required because, among other things, "the Board action in this case was pending and had not been resolved during the entirety of the superior court action." *Mills*, 2021 WL 3557298, at *4 ¶ 18. But that was also true in *Berryhill*.

has unequivocally asserted power to regulate Mills, which he disputes—and he is not required to await a further regulatory order before challenging that authority.

In *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 562 (1919), the Court said exhaustion is not required where the plaintiff does not seek "relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory"—which indeed *would* require exhaustion—but instead argues that the regulatory agency "has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the [agency]." In this case, Mills does not argue that some regulation or other is unreasonable, but that the Board is exceeding its authority by purporting to regulate his business. He therefore should not be forced to undergo a Board proceeding.

And in *Middle S. Energy, Inc. v. Ark. Pub. Serv. Comm'n*, 772 F.2d 404, 418 (8th Cir. 1985), the Court of Appeals said the plaintiff did not need to exhaust remedies after the agency asserted regulatory authority over it because that "mere assertion of jurisdiction by the [agency] had a negative impact on [the plaintiff]'s ability to obtain investors and complete its project." Because the plaintiff alleged that the agency's assertion of authority conflicted "with the exclusive federal scheme for governing" the industry, the plaintiff could bring that purely legal

question before a court without first exhausting administrative remedies. *Id.* Here, also, the Board's assertion of authority over Mills obviously interferes with his ability to exercise his economic liberty—and he asserts that this interference is unconstitutional. He should therefore also be free to seek equitable relief in court without submitting to the very authority he contends is illegitimate. *See also In re Jet Sales W. LLC*, No. 20-12179-TA11, 2022 WL 188296, at *6 (Bankr. D.N.M. Jan. 20, 2022) ("Constitutional challenges may be raised in court without first exhausting administrative remedies."); *Mobil Oil Corp. v. Dep't of Energy*, 469 F. Supp. 1119, 1123–24 (D.C.N.Y.1979) ("where a case presents fundamental legal questions" such as "whether the [agency]'s action exceeded its statutory authority," "exhaustion is unnecessary" because "the resolution of [such questions] does not require administrative expertise but rather a judicial determination."); *Coca-Cola Co. v. FTC*, 475 F.2d 299, 303 (5th Cir. 1973) ("The most widely recognized exception to the general rule against judicial consideration of interlocutory agency rulings is the class of cases where an agency has exercised authority in excess of its jurisdiction or otherwise acted in a manner that is clearly at odds with the specific language of a statute."); *Dragna v. Landon*, 209 F.2d 26, 28 (9th Cir. 1953) ("where the action of an administrative body is void and ultra vires, it is unnecessary that a plaintiff seeking relief against such action should exhaust his administrative remedies.").

State courts follow the same rule.[2] For instance, in *Charles L. Harney, Inc. v. Contractors' State License Bd.*, 247 P.2d 913 (Cal. 1952), an engineer challenged a regulation whereby the state agency subdivided engineering into categories and required contractors to obtain special licenses in each category. *Id.* at 914. The consequence was "to prohibit a licensed general contractor from undertaking any contract which involves specialty work alone, unless the general contractor first obtains the appropriate specialty license." *Id.* A contractor sued, arguing that the agency lacked statutory authority to impose this requirement.

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[2] *See, e.g.*, *Colorado-Ute Elec. Ass'n, Inc. v. Air Pollution Control Comm'n of Colo. Dep't of Health*, 648 P.2d 150, 153 (Colo. App. 1981) ("Because it is the province of the court to interpret and determine the limits of organic enabling legislation … exhaustion of administrative remedies as a prerequisite to judicial review is not required when the issues presented to the court depend upon such interpretation."); *Marley v. Cannon*, 618 P.2d 401, 407 (Okla. 1980) (courts have never "required exhaustion of administrative remedies in every case where a challenge was made to the power of the agency to act at all."); *Gulf Pines Mem'l Park, Inc. v. Oaklawn Mem'l Park, Inc.*, 361 So.2d 695, 699 (Fla. 1978) ("it is pointless to require [parties] to endure the time and expense of full administrative proceedings … before obtaining a judicial determination as to the validity of [the] statutory prerequisite."); *Watergate II Apartments v. Buffalo Sewer Auth.*, 385 N.E.2d 560, 563 (N.Y. App. 1978) ("exhaustion … need not be followed … when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power."); *Tex. State Bd. of Pharmacy v. Walgreen Tex. Co.*, 520 S.W.2d 845, 848 (Tex. Civ. App. 1975) (exhaustion not required if "the agency's action is [alleged to be] unconstitutional or beyond its jurisdiction."); *Odom v. Pac. N. Airlines, Inc.*, 393 P.2d 112, 118 n.23 (Alaska 1964) ("where the claim is made that the administrative agency has exceeded its statutory authority, the courts have jurisdiction even if the plaintiff has not first sought redress before the agency."); *Farm to Mkt. Truckers Ass'n v. Perrine*, 176 N.E.2d 625, 631–32 (Ill. App. 1961) (where plaintiffs did not dispute *aspects* of their license, but scope of agency's authority, exhaustion was not required).

Citing California's declaratory relief statute (which is similar in relevant respects to Arizona's) the court found that the plaintiff was "not required to violate the administrative regulation and thereby subject itself to possible criminal prosecution or disciplinary action in order to obtain a declaration of its rights and duties." *Id.* at 915. Or, as another California court summarized, when citing this case, "[a]n aggrieved party is not required to exhaust administrative remedies before bringing a declaratory relief action where the party can positively state what the administrative agency's decision would be." *Baxter Healthcare Corp. v. Denton*, 15 Cal. Rptr.3d 430, 448 (Cal. App. 2004). Mills can positively state what the Board's position is with respect to the question at issue—i.e., that it has jurisdiction over his business—and should not be forced into any exhaustion process.

The court below cited *Estate of Bohn*, 174 Ariz. 239, for the proposition that exhaustion is required if an agency can "consider at least some constitutional arguments and grant some form of relief"—the rationale being that the agency might render the constitutional dispute moot by finding some non-constitutional basis for ruling in favor of the plaintiff. *Mills*, 2021 WL 3557298, at *5 ¶ 23. But the mere *possibility* of mootness cannot deprive a court of jurisdiction. *All* cases are potentially moot, *always*—so that cannot be the standard. *See Fla. ex rel. McCollum*, 716 F. Supp.2d at 1147 ("it is easy to conjure up hypothetical events

that could occur to moot a case," but "the 'vagaries' of life" cannot bar jurisdiction; otherwise, "courts would essentially never be able to engage in pre-enforcement review."); *accord,* *Mead v. Holder*, 766 F. Supp.2d 16, 24 (D.D.C. 2011); *Calvey v. Obama*, 792 F. Supp.2d 1262, 1269 (W.D. Okla. 2011).

As Professor Jaffe observed, the idea that exhaustion is justified by the principle of constitutional avoidance (because the "plaintiff might win below on the other issues") is unpersuasive, because such a bare possibility is "hardly sufficient to put the plaintiff to the great expense and hardship of a complicated administrative proceeding. … Where the administrative process has nothing to contribute to the decision of the issue and there are no special reasons for postponing its immediate decision, exhaustion should not be required." *Supra* at 439-40. That is true here.

What's more, the potential for mootness in Mills's case is inextricable from the question of his standing. He's injured by being subjected to the Board's jurisdiction—and the Board has made its position on that question clear. He is therefore—as Goldwater argued in its amicus brief in support of the Petition for Review (at 5-7)—in a position analogous to that of the landowners in cases such as *Sackett v. EPA*, 566 U.S. 120 (2012), and *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016), who were subjected to jurisdictional determinations by agencies, and were accordingly allowed to challenge those determinations in court.

In any event, absent any realistic prospect of imminent mootness—which does not appear here—Mills should be free to challenge the Board's jurisdictional determination before a neutral court.

II. *Estate of Bohn* provides no basis for forcing Mills to undertake unnecessary exhaustion.

The purposes of exhaustion are to enable the agency to bring its expertise to bear on technical or scientific issues, and to give parties the opportunity to resolve disputes without need for judicial intervention. *Estate of Bohn*, 174 Ariz. at 246. But neither goal is served in a case where the private party contends that the agency lacks authority over her to begin with—as in this case. No question of scientific expertise is involved in such a question, and there can be no compromise on the purely legal issue of the agency's jurisdiction. Nor can the bare possibility that the Board might change its mind—after unequivocally asserting the regulatory jurisdiction that Mills denies it has, *Mills*, 2021 WL 3557298, at *2 ¶¶ 5–7—justify withholding from him the right to litigate that question. Nothing is to be gained by mandating exhaustion, therefore.

Nor was that what *Estate of Bohn* had in mind. In that case, taxpayers brought a variety of legal and constitutional arguments against the tax in question, and they sought damages and refunds. 174 Ariz. at 242. The refunds obviously predominated over the equitable relief they also sought. Here, by contrast, Mills

seeks no refund or any other kind of monetary relief. His sole goal is equitable relief.

The *Estate of Bohn* court found that the taxpayers first had to exhaust administrative procedures before the Department of Revenue and the Board of Tax Appeals, in part because Arizona has a public policy "that discourages suits for the refund of taxes even when illegally collected." *Id.* at 245. But no analogous policy exists here: there is no policy discouraging people from seeking declaratory and injunctive relief to bar agencies from enforcing *ultra vires* restrictions on a person's business practice. On the contrary, Arizona public policy favors such relief. *See, e.g.*, A.R.S. § 41-1093.03(A) (authorizing affected individuals to bring lawsuits challenging regulations that infringe on the right to engage in an occupation); § 12-910(F) (entitling such an individual to non-deferential judicial review when appealing an agency determination); cf. A.R.S. § 41-1038 (barring agencies from adopting new rules that restrict the right to engage in a lawful occupation and entitling appellants to de novo review).

Estate of Bohn also noted that taxpayers are held to a strict standard when seeking refunds: they must "scrupulously follow the statutory procedures" because "'the refund of taxes paid is by virtue of governmental grace rather than by reason of any legal right.'" *Id*. at 245–46 (citation omitted). But no such standard exists in a case like this. Quite the opposite: Mills asserts that the Board is violating his

right to earn a living, a right protected by the common law, and statutes in derogation of common law rights are strictly construed. *Walker v. City of Scottsdale*, 163 Ariz. 206, 211 (App. 1989). Thus the legal presumption here is against the Board, not against Mills, *Cochise County v. Kirschner*, 171 Ariz. 258, 261–62 (App.1992) ("An agency ... has no powers other than those the legislature has delegated to it."), and the Board is not owed deference on either the facts *or* the law. A.R.S. § 12-910(F). It is the Board, not Mills, who must, as the saying has it, "turn square corners" when dealing with citizens. *United States v. Winstar Corp.*, 518 U.S. 839, 886 n.31 (1996) (quotation marks and citations omitted).

Finally, *Estate of Bohn* said exhaustion was required *of the refund/damages claims*—not of purely equitable claims. The section of the opinion in which the Court of Appeals said exhaustion was mandated was entitled "Mandatory Administrative Remedy Could Determine Refund Issue," 174 Ariz. at 248 (emphasis added), and that section ended with the statement "[h]ere, the taxpayers challenged discriminatory taxation of their pension income. *However, they also sought a refund* of taxes. ... The issue involved the application of the constitutional doctrines … to each taxpayer's *right to a refund*. It was a proper subject for the

administrative process." *Id.* at 250 (emphasis added). Mills, however, seeks no refund or monetary relief.[3]

What the *Estate of Bohn* court had in mind was that the relief taxpayers were seeking was monetary—the refund would have entirely resolved their concerns—and therefore, given the tax refund context, the Department of Revenue's expertise should be brought to bear, and constitutional considerations could be a factor in that proceeding. That is wholly different from a case like this, which seeks nothing more than equitable relief to prevent an allegedly *ultra vires* and unconstitutional assertion of agency authority. The considerations that went into *Estate of Bohn*'s exhaustion requirement are therefore absent, and no such requirement should apply.

III. New amendments to A.R.S. § 12-910(F) make any exhaustion requirement here permissive, not mandatory.

Finally, recent amendments to A.R.S. § 12-910(F) make administrative exhaustion "permissive" rather than "mandatory" in this case. *See further* Goldwater's Amicus Br. in Supp. of Pet. for Review at 7–13. An administrative proceeding is permissive when it is optional—that is, where there is no indication that the legislature meant to force litigants to present their arguments to the agency

[3] Similarly, in *Moulton v. Napolitano*, 205 Ariz. 506 (App. 2003), which relied heavily on *Estate of Bohn*, the court said exhaustion was required because the monetary relief was "inextricably intertwined" with the constitutional arguments. *Id.* at 512 ¶ 16. That is not true here.

first. *Farmers Inv. Co. v. Ariz. State Land Dep't*, 136 Ariz. 369, 373 (App. 1982). Arizona courts have said an administrative proceeding is "permissive" if nothing in the law "is intended to bind the complainant by limiting his access to the courts," *Bentivegna v. Powers Steel & Wire Products, Inc.*, 206 Ariz. 581, 585 ¶ 14 (App. 2003), or where the statute does not require the litigant, on pain of waiver, to offer specific arguments to the agency. *See Aguirre v. Indus. Comm'n of Ariz.*, 245 Ariz. 587, 591–92 ¶¶ 16-18 (App. 2018), *aff'd*, 247 Ariz. 75 (2019).

To be precise, the question of whether exhaustion is mandatory or permissive depends on whether the legislature intended to deprive the courts of jurisdiction they otherwise would have had over the case. *Walters v. Maricopa Cnty.*, 195 Ariz. 476, 479 ¶ 15 (App. 1999).

Recent amendments to A.R.S. § 12-910(F) make clear that—with certain specified exceptions[4]—the legislature did not intend to force litigants, on pain of waiver, to make legal or factual arguments to the agency, or to deprive courts of jurisdiction to adjudicate challenges such as this one. On the contrary, that Section now provides that courts apply independent, non-deferential review to both legal *and* factual arguments after an agency resolves a matter, and also that the parties may supplement the record by introducing evidence in the reviewing court that was not submitted to the agency. This indicates the legislature's wish to keep the

[4] For example, actions arising under Sections 20-2530, 40-301, or 40-360.

courts open as independent fact- and law-finders—that is, the legislature did not mean to "limit[ ] [Mills's] access to the courts," *Bentivegna*, 206 Ariz. at 585 ¶ 14, or to obligate him "to include any specific arguments" before the agency "to preserve them for appellate review." *Aguirre*, 245 Ariz. at 591 ¶ 16.

Under these amendments, agency adjudication still has a place—it can be a helpful means of hashing out technical questions about regulations or resolving disputes informally—but it is not a mandate intended to shut the courthouse doors to litigants. Even someone who does submit to the administrative procedure is entitled to provide new evidence to the Superior Court on appeal, and is entitled to *de novo* review of legal and factual questions. To force Mills, therefore, to submit to the Board the (purely legal) question of whether his business falls within the Board's jurisdiction can at most fall within the "permissive" rather than the "mandatory" category of exhaustion.[5]

[5] In its supplemental brief, the Board says this is wrong because "by the Goldwater Institute's logic, it would be equally 'pointless' for the Superior Court to decide a motion to dismiss because the appellate court would simply review the motion *de novo* anyway." Board Supp. Br. at 8 n.4. But appellate courts do not apply *de novo* review of *factual* findings by trial courts, nor are appellants allowed to introduce new evidence in the Court of Appeal. The new Section 12-910(F), by contrast, entitles people to non-deferential review of *facts* and to introduce *new* evidence in the Superior Court. Thus the Board's argument by analogy must fail. Goldwater does not contend that exhaustion is "pointless" in all cases—we have expressly said the opposite—but that it would be pointless in this case, where the sole dispute is legal, the sole remedy is equitable, and the only thing to be gained by exhaustion would be delay.

The California Supreme Court addressed similar concerns in a decision this past December, which examined the theory of administrative in detail. In *Hill RHF Housing Partners, L.P. v. City of Los Angeles*, 500 P.3d 294, 302–10 (Cal. 2021), it explained that, alongside the policy rationales widely recognized as justifying the exhaustion requirement (it "gives due respect to the autonomy of the executive and legislative branches, … can secure the benefit of agency expertise, mitigate damages," etc., *id.* at 303), exhaustion also avoids giving litigants "an incentive to 'sandbag'—in other words, to 'avoid securing an agency decision that might later be afforded deference' by sidestepping an available administrative remedy." *Id.* at 303–04 (citation omitted) But, it continued, where a reviewing court applies a non-deferential standard to the appeal of an agency's decision (which California courts call the "independent judgment standard"), that consideration does not apply. *See id.* at 308–09. Because recent amendments to A.R.S. § 12-910(F) eliminate such deference, such "sandbagging" concerns also have no weight here.

The California court also declined to require exhaustion where the documentary record was already sufficient for a reviewing court to resolve the legal dispute, *Hill RHF Hous.*, 500 P.3d at 308—which is true here—and it observed that "the exhaustion doctrine does not apply in every situation in which an abstract possibility exists that an objection lodged through some channel will

alter or otherwise affect an agency action." *Id.* at 309. In other words, the mere possibility that the agency might find in the individual's favor and thereby avoid the constitutional question—which is the rationale the Court of Appeals employed, based on its reading of *Estate of Bohn*—is insufficient to require exhaustion. This Court, like the California court, should declare that no exhaustion requirement applies here.

CONCLUSION

The judgment of the Court of Appeals should be *reversed*.

Respectfully submitted this 21st day of April 2022 by:

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