IN THE SUPREME COURT

STATE OF ARIZONA

LEGACY FOUNDATION ACTION FUND, Plaintiff/Appellant, v. ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, Defendant/Appellee.	Supreme Court No. CV-22-0041-PR Court of Appeals Division One Case No. 1 CA-CV 19-0773 Maricopa County Superior Court No. CV2018-004532 CV2018-006031 (Consolidated)

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

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Goldwater Institute (GI) was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates cases and files amicus briefs when its or its clients' objectives are directly implicated, and it has appeared in this Court and other courts representing parties and as an amicus curiae. *See, e.g.*, *Mills v. Board of Tech. Registration*, 514 P.3d 915 (Ariz. 2022); *Sun City Home Owners Ass'n v. Ariz. Corp. Comm'n.*, 252 Ariz. 1 (2021); *Legacy Educ. Grp. v. Ariz. Bd. for Charter Schools*, No. 1 CA-CV 17-0023, 2018 WL 2107482 (Ariz. App. May 8, 2018).

Among GI's priorities is the defense of individual rights against administrative agencies, which often operate outside the boundaries of evidentiary and procedural protections, and combine the legislative, executive, and judicial powers. GI has therefore participated in many cases addressing the legal and constitutional problems arising from the operations of these agencies. *See, e.g.,* *Goldwater Inst. v. U.S. Dep't of Health & Hum. Servs.*, 804 F. App'x 661 (9th Cir. 2020); *Mills, supra; Sun City HOA, supra;* ; *Vong v. Aune*, 235 Ariz. 116 (App. 2014). GI scholars have also published important research on these questions. *See, e.g.,* Jon Riches & Timothy Sandefur, *Confronting the Administrative State:*

State-Based Solutions to Inject Accountability into an Unaccountable System (Goldwater Institute, 2019); Timothy Sandefur, *The Permission Society* (2016).

Because this case involves jurisdictional questions relating to a party's ability to challenge agency authority, this case implicates matters central to GI's mission. Given its history and experience regarding these issues, GI believes its perspective will aid this Court in considering this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is commonplace law that a judgment issued by a court or agency that lacks jurisdiction is void *ab initio*. *State v. Espinoza*, 229 Ariz. 421, 424 ¶ 14 (App. 2012). A judgment that is void *ab initio* is a legal nullity—and this argument can never be waived or forfeited. *State v. Chacon*, 221 Ariz. 523, 525–26 ¶ 5 (App. 2009); *Rojas v. Kimble*, 89 Ariz. 276, 279 (1961). In fact, courts have no discretion about the matter: they must vacate a void judgment. *Martin v. Martin*, 182 Ariz. 11, 14 (App. 1994). This has always been the rule in Arizona, *see, e.g.*, *Arizona Eastern Railroad Co. v. Graham County*, 32 Ariz. 322, 326 (1927), and it should not be altered now. To elevate "finality" over "validity" as the decision below does, LFAF-APPV1-007–008 ¶ 11, is to elevate form over substance and—alarmingly—efficiency over legitimacy. And the burden of such a precedent is likely to fall hardest on unsophisticated and unrepresented parties, particularly small business owners, workers, and entrepreneurs, who are often subjected to

enforcement by regulatory agencies and often lack the wherewithal to obtain legal representation. This Court should reject a rule that would make it harder for them to defend themselves when agencies overstep their bounds.

ARGUMENT

I. Arizona has always adhered—and should continue to adhere—to the rule that a judgment without jurisdiction is void *ab initio*.

A ruling by a tribunal that lacks jurisdiction is void *ab initio*, meaning it is a legal nullity—no judgment at all, and "ineffective for any purpose." *State v. Cramer*, 192 Ariz. 150, 153 ¶ 12 (App. 1998) (citation omitted). That has been the rule in Arizona since territorial days. *See, e.g., McLean v. Territory*, 8 Ariz. 195, 199–201 (1903). And where a judgment is void *ab initio*, it may be challenged collaterally in a later proceeding; it is not subject to the usual *res judicata* rule that bars collateral attacks. *See, e.g., Lisitzky v. Brady*, 38 Ariz. 337, 342 (1931); *Brecht v. Hammons*, 35 Ariz. 383, 387–88 (1929); *Tube City Mining & Milling Co. v. Otterson*, 16 Ariz. 305, 310 (1914).

Thus, for example, in *National Metal Co. v. Greene Consolidated Copper Co.*, 11 Ariz. 108 (1907), the plaintiff sued the defendant, alleging that the defendant had sued the plaintiff in a prior proceeding, but had failed to properly serve the defendant, and therefore that the court had never acquired proper jurisdiction. *Id.* at 110–11. The plaintiff now sought an injunction to bar execution of the invalid judgment. *Id.* at 110. This Court agreed, holding that the

lack of service meant the trial court never obtained jurisdiction. *See id.* at 115 ("The nullity of the judgment here in question lies in that jurisdiction was not obtained of the judgment defendant."). Consequently, "the judgment though not void on its face, is void in fact," and because "plaintiff's only adequate protection lies in this action," the plaintiff was allowed to seek injunctive relief against execution of the void judgment. *Id.* at 114–15.

Similarly, in *Moeur v. Ashfork Livestock Co.*, 48 Ariz. 298 (1936), the parties both applied for land leases; the state land commissioner gave the lease to the plaintiff. The defendant appealed that decision, but failed to properly serve the plaintiff. *Id.* at 300. the state land commissioner decided to ignore this defect, however, and proceeded to decide the appeal anyway, this time ruling for the defendant. *Id.* The plaintiff thereupon filed a new lawsuit in superior court, seeking a writ of mandate commanding the commissioner to deliver the leases to the plaintiff. *Id.* at 300–31. The defendant argued that the petitioner was required to appeal rather than to file a new lawsuit. *Id.* at 301. The court disagreed, holding that the plaintiff was within his rights to file the second case, seeking mandamus, as a collateral attack on the (invalid) prior judgment. "A judgment rendered without jurisdiction is a nullity and the party against whom it is entered may ignore it and proceed as though no attempt had ever been made to render it." *Id.* at 304.

Here, however, the court of appeals concluded that a judgment by a tribunal lacking jurisdiction is *not* a legal nullity if the party could have raised the lack of jurisdiction in an appeal and failed to do so. *See* LFAF-APPV1-011–12 ¶ 23. But as the old saying has it, a party's laches cannot breathe life into a void judgment. *See, e.g.,* *In re Milliman's Estate*, 101 Ariz. 54, 58 (1966) (quoting 7 Moore's *Federal Practice*, § 60.25(4) (2D ED. 1955)); *see also* *Falkner v. Amerifirst Fed. Sav. & Loan Ass'n*, 489 So.2d 758, 760 (Fla. Dist. Ct. App. 1986) (Pearson, J., concurring); *Redman v. Stedman Mfg. Co.*, 181 F. Supp. 5, 10 (M.D.N.C. 1960); *Jones v. Jones*, 184 S.E. 271, 274 (Ga. 1936). Neither can anything else.[1]

II. The "fully and fairly litigated" exception does not apply to an agency's mere assertion of jurisdiction.

There is, nevertheless, an exception to the rule that jurisdictionally defective judgments can be collaterally attacked: if the court issuing the original judgment expressly addressed and resolved the question of its own jurisdiction, that finding can be given *res judicata* effect, barring later collateral attack. This rule, however, applies only where the jurisdictional question was "fully and fairly litigated" in the first case, *Jacuzzi v. Pimienta*, 762 F.3d 419, 420–21 (5th Cir. 2014), and that did not happen here. Moreover, the public policy considerations that justify giving *res*

[1] This rule is so strong that defendants are even "free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982).

judicata effect to even flawed jurisdictional determinations are counterbalanced in a case like this by public policy concerns that warrant *allowing* this kind of collateral attack.

The Commission's jurisdiction was not fully and fairly litigated in the prior case. The only tribunal to address the Legacy's jurisdictional arguments was the Commission itself, which is not a judicial body, but a party to this dispute. And it which rejected Legacy's jurisdictional arguments not in a formal adjudication, but in an administrative probable cause finding—an order, in fact, which overrode a ruling in Legacy's favor by the Administrative Law Judge. That's not what "fully and fairly litigated" means.

"'[F]ully and fairly litigated' mean[s] a case where one voluntarily appears, presents his case and is fully heard." *Biback v. Schmickler*, No. 03-99-00693-CV, 2001 WL 101499, at *2 (Tex. App. Feb. 8, 2001) (citations and quotation marks omitted). Where a party, for example, refuses to appear—because he thinks the court lacks jurisdiction—*res judicata* will not apply to the jurisdictional question, because it was not fully and fairly litigated. *Id.* "Fully and fairly litigated" also means that the issue was "expressly resolved and necessary to the outcome." *Haber v. Biomet, Inc.*, 578 F.3d 553, 557 (7th Cir. 2009). An *implicit* conclusion that jurisdiction exists, or *one party's mere assertion* that jurisdiction exists, is obviously insufficient. To hold otherwise would contradict one of the oldest and

most important principles of our law: that no party can be a judge in its own case—not even the government. *Horne v. Polk*, 242 Ariz. 226, 231 ¶ 17 (2017).

For that very reason, courts should be more *skeptical,* not more deferential, to administrative agencies' jurisdictional determinations. These agencies are fundamentally *executive* in nature, not legislative or judicial; they exist to enforce statutes. Their probable cause determinations are not the equivalent of findings by a neutral judge in a dispute between law enforcement on one hand, and a citizen on the other; they are the equivalent of a determination by the executive branch that a suspect is *subject* to enforcement. That's why they're called *probable cause* determinations.[2] To defer to these determinations in a way that converts them into "full and fair adjudications" would effectively enable agencies to be the judges of their own powers. This is one reason that the U.S. Supreme Court has said that agency jurisdictional assertions must be subject to immediate judicial review, *see U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 601–02 (2016); *Smith v. E.P.A.,* 566 U.S. 120, 127 (2012)—and why the dissenters in *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290 (2013), warned that excessive judicial deference to the jurisdictional determinations of administrative agencies would make it

[2] This alone can justify the statutory scheme whereby the agency can override an ALJ decision against it, which would otherwise be a *per se* violation of separation of powers and due process. *Cf. Horne*, 242 Ariz. at 229 ¶ 11.

impossible to ensure that the executive branch "confine[s] itself to its proper role." *Id.* at 327 (Roberts, C.J., dissenting).

Notably, the *City of Arlington* majority rejected the dissent's argument because it thought deference to agency jurisdictional determinations is required by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In fact, it said "we have applied *Chevron* where concerns about agency self-aggrandizement are at their apogee: in cases where an agency's expansive construction of the extent of its own power would have wrought a fundamental change in the regulatory scheme." *City of Arlington*, 569 U.S. at 303. But Arizona has expressly *rejected* *Chevron* deference by statute, *see* *Industrial Commission of Arizona Labor Dep't v. Industrial Commission of Arizona*, 514 P.3d 925, 927 ¶ 10 (Ariz. App. 2022), which means judicial deference to agency determinations is contrary to public policy in this state.

It is emphatically *not* the law in Arizona that courts defer to agencies' expansive construction of the extent of their own powers. *Cf.* *Sun City Home Owners Ass'n v. Ariz. Corp. Comm'n*, 252 Ariz. 1, 5 ¶ 16 (2021) ("[E]ven when acting within their spheres of express authority, all governmental bodies remain subject to constitutional constraints and requirements, both general (such as due process) and those specific to the entity. And the 'courts bear ultimate responsibility for interpreting [constitutional] provisions.'" (citation omitted)).

And because Arizona courts have held that *res judicata* can only apply to decisions by administrative agencies if that would not "contravene an overriding public policy or result in manifest injustice," *Smith v. CIGNA HealthPlan of Arizona*, 203 Ariz. 173, 179 ¶ 21 (App. 2002), this state's public policy of preventing agency overreach must take precedence over the finality considerations the court of appeals relied on. LFAF-APPV1-007–008 ¶ 11. In sum, while it might be efficient to bar Legacy from challenging the Commission's jurisdiction in these circumstances, that consideration is outweighed by the public policy concern of ensuring that agencies confine themselves to their proper role.

Even aside from policy factors, the Commission's jurisdictional assertion here cannot qualify as "full and fair adjudication." The proceedings below were not like a *judicial* hearing, in which the parties were free to brief and argue the jurisdictional question before a neutral decisionmaker who rendered judgment after hearing both sides. *Cf.* *Garrett v. Platt & Westby PC*, No. 1 CA-CV 20-0195, 2020 WL 7705607, at *3 ¶ 16 (Ariz. App. Dec. 29, 2020) (defining "full and fair adjudication" in this way). Instead, the jurisdictional finding took the form of a self-serving order by a *party* to the dispute; an order that overrode the neutral decision-maker (in a manner that this Court recognizes as "giv[ing] rise to due process concerns," *Horne*, 242 Ariz. at 230 ¶ 14), and merely asserted, in conclusory manner, that the Commission has jurisdiction. That is not the kind of

"adjudication" that the "full and fair adjudication" rule contemplates. An *adjudication* "set[s] forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." *Topanga Ass'n for a Scenic Cmty. v. Cnty. of L.A.*, 522 P.2d 12, 17 (Cal. 1974). It means a reasoned judgment—one in which "the claims of all the parties have been considered and set at rest." *Miller v. Scobie*, 11 So.2d 892, 894 (Fla. 1943). It does not mean one party's mere conclusory assertion of power.

In *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573 (1986), this Court said a matter is fully and fairly adjudicated when it is "raised by the pleadings or otherwise, and is submitted for determination, and is determined," but "in the case of a judgment entered by confession, consent or default, none of the issues is actually litigated," so it does not qualify. So, too, a judgment entered by the agency which is prosecuting the case, and which contains no reasoned determination of the other party's jurisdictional objections, is—like a confession, consent or default—not an adjudication.

To affirm the decision below also would result in a perverse set of incentives. The *res judicata* principle on which the majority relied bars not only relitigation of issues that *were* raised in a prior proceeding, but also issues that "could have" been raised. *Clem v. Pinal Cnty.*, 251 Ariz. 349, 353 ¶ 8 (App. 2021); *Norriega v. Machado*, 179 Ariz. 348, 351 (App. 1994). Affirmance here

would therefore bar a collateral challenge whenever the party *could have* raised a jurisdictional challenge in the first proceeding, even if she failed to. *See* LFAF-APPV1-008 ¶ 13 (later collateral challenge available only where a party "did not have the opportunity to raise [the jurisdictional] issue in the prior proceeding.").

That sets a trap for unsophisticated parties haled before administrative agencies for various alleged infractions. They are frequently unrepresented, because these agencies induce or compel them to undergo "informal" hearings—that is, hearings where rules of procedure and evidence don't apply, *see* A.R.S. § 41-1062(A)(1)—and (falsely) assure people that attorneys are unnecessary. The precedent set below would mean that these unsophisticated parties—say, cosmetologists[3] or engineers[4] whom agencies accuse of practicing without a license, and who are unaware that they must challenge the agency's jurisdiction in that initial, "informal" hearing—will be barred from defending themselves against the agencies in the future.

There are only two alternatives to that outcome: either to enshrine the anomalous result that the dissent identified—by allowing parties who fail (even negligently) to dispute the agency's jurisdiction to raise a later collateral challenge, while prohibiting those who *do* raise such an objection from bringing a collateral

[3] *See, e.g., Vong v. Aune*, 235 Ariz. 116 (App. 2014).
[4] *See, e.g., Mills v. Ariz. Bd. of Tech. Registration*, 514 P.3d 915 (Ariz. 2022).

challenge later, LFAF-APPV1-016 ¶ 39—or to effectively create a rule whereby the only way to preserve the right to collateral challenge is *not to appear at all* before the agency. *Cf.* *The Value of the Distinction Between Direct and Collateral Attacks on Judgments*, 66 Yale L.J. 526, 528 (1957) ("under the modern view a party in a collateral attack will be free to assert those jurisdictional defects … only if the court lacked jurisdiction over his person *and he entered no appearance* in the original proceeding, or if the court lacked jurisdiction over the res *and the complaining party did not participate* in the in rem proceeding." (emphasis added)). But that is an exceptionally risky strategy, because if a later court finds that the first court (or agency) did have jurisdiction, the party may have lost the opportunity to argue the merits. *See* William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 Md. L. Rev. 412, 426 (1994). Nor should the law reward a party for ignoring a summons to either a court or an agency.

CONCLUSION

The court of appeals' characterization of the proceedings below—that Legacy "already litigated [the jurisdictional] issue to judgment in a previous proceeding" LFAF-APPV1-009 ¶ 15—thus elevates form over substance. And its conclusion that foreclosing Legacy's jurisdictional challenge is warranted by "a system of ordered litigation and final resolution of disputes," LFAF-APPV1-010 ¶

20, disregards the more important policy considerations at stake. The decision below should be *reversed*.

Respectfully submitted this 17th day of October 2022 by:

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