IN THE SUPREME COURT

STATE OF ARIZONA

AMANDA ROOT; GRANVILLE and GEORGIA MONTGOMERY, a married couple; CHARLES PARRISH; and CHARLES PARRISH o/b/o ROBERT DREESZEN, Plaintiffs/Appellants/Petitioners, v. CITY OF SIERRA VISTA, Defendant/Appellee/Respondent.	Supreme Court No. CV-22-0210-PR Court of Appeals Division Two Case No. 2 CA-CV 2021-0130 Department A Cochise County Superior Court No. CV2021-00078

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 is a public policy foundation dedicated to advancing the principles of individual liberty and limited government. Through its Scharf-Norton Center for Constitutional Litigation, the Institute often represents parties in seeking prospective equitable relief against unconstitutional government actions. *See, e.g.*, *Schires v. Carlat*, 250 Ariz. 371 (2021) (successfully seeking prospective injunctive relief against future expenditures); *Vangilder v. Ariz. Dept. of Revenue*, 252 Ariz. 481 (2022) (successfully seeking prospective injunctive relief against an illegal tax); *Korwin v. Cotton*, 234 Ariz. 549, 560 ¶ 37 (App. 2014) ("we enjoin the City from rejecting Appellant's advertisement" where such rejection violated freedom of speech). The Institute therefore has a direct stake in the questions presented, and believes its policy expertise and experience will aid this Court in considering this petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is blackletter law that when the government "threatens" to enforce an unconstitutional law, the victim may take preventative measures by obtaining an injunction against that enforcement. *See, e.g.*, *City of Glendale v. Betty*, 45 Ariz. 327, 331–32 (1935); *Boruch v. State ex rel. Halikowski*, 242 Ariz. 611, 616–19 ¶¶ 17–30 (App. 2017). Likewise, when a court dismisses a complaint for lack of standing or lack of jurisdiction, that dismissal is a final, appealable judgment,

regardless of how it's labeled. *Callanan v. Sun Lakes Homeowners' Ass'n No. 1, Inc.*, 134 Ariz. 332, 335 (App. 1982); *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 208 Ariz. 176, 181 ¶ 20 (App. 2004). Yet the superior court disregarded the first rule, and the court of appeals ignored the second. The result was a pair of decisions that, though short and unassuming, mark an egregious—and, if left undisturbed, radical—departure from this longstanding Arizona law.

These two rulings would effectively block all pre-enforcement actions for declaratory and injunctive relief when government is about to act in ways litigants allege are unconstitutional. Instead, litigants would be forced to await the completion of the threatened injury before suing—which has never been the rule, and should not be.

The trial court dismissed because "the City hasn't done anything to [the plaintiffs] to harm them at this point. [It] threatened to, but [it] [hasn't] done anything." App. 064:14-16. But it has never been the law in Arizona that citizens must wait for government to carry out its threat to violate their constitutional rights before they can seek relief. Rather, anyone who is likely to suffer an irreparable injury may seek pre-enforcement relief in the form of a preventative injunction. This principle is codified in Arizona's Declaratory Judgment Act, which says "[a]ny person … affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the …

statute [or] ordinance … and obtain a declaration of rights, status or other legal relations thereunder." A.R.S. § 12-1832. *See also* A.R.S. § 41-1034(A) ("[a]ny person who is or *may be* affected by a rule may obtain a judicial declaration of the validity of the rule" (emphasis added)). Thus prospective relief is routinely granted when the government threatens to enforce an unconstitutional law. *See, e.g.*, *Schires*, *supra*; *Vangilder*, *supra*; *Korwin*, *supra*. The superior court's ruling to the contrary was clearly erroneous.

Then the court of appeals compounded this error by holding that the dismissal was not final or appealable, because the superior court labeled it "without prejudice." App. 64:19–20. This was also clearly erroneous. A dismissal without prejudice *is* final and appealable when premised on lack of jurisdiction, *Callanan*, 134 Ariz. at 335, or lack of standing, *Robert Schalkenbach Found.*, 208 Ariz. at 181 ¶ 20, because such a ruling "in effect determines the action and prevents final judgment from which an appeal might be taken." *State v. Boehringer*, 16 Ariz. 48, 51 (1914). That is what happened here.

If the decision below is allowed to remain, the consequence will be to bar litigants who have perfectly legitimate claims for prospective injunctive relief against future government actions from seeking the equitable protection to which they are entitled. This Court should make clear that that is not the law.

ARGUMENT

Both the superior court and court of appeals were so clearly in error as to warrant summary reversal. This brief separately addresses the errors by each court below.

I. Why the Superior Court was wrong: Equity allows plaintiffs to seek pre-enforcement relief against unconstitutional actions by the government.

Prospective injunctive or declaratory relief against future unconstitutional acts by the government is a routine procedure. The federal case most famously associated with this practice, *Ex Parte Young*, 209 U.S. 123 (1908), is four years older than Arizona, and it was hardly new then. *See, e.g.*, *City of Springfield v. Edwards*, 84 Ill. 626, 628 (1877) (injunction to prevent city from incurring illegal debt); *Terrett v. Town of Sharon*, 34 Conn. 105, 106 (1867) (injunction to prevent illegal expenditure).

The practice traces back to the origin of the common law system, which consisted largely of royal writs issued commanding public officials to act or refrain from acting. *See, e.g.*, 1 J. Story, *Commentaries on Equity Jurisprudence* § 50 at 54 (14th ed. 1918) ("[The royal writ] was not an usurpation for the purpose of acquiring and exercising power, but a beneficial interposition, to correct gross injustice and to redress aggravated and intolerable grievances."). It was well known to Arizona's founders. *Cf. City of Bisbee v. Arizona Ins. Agency*, 14 Ariz.

313, 317 (1912) ("Had it been made to appear that … the city of Bisbee, 'under the pretense of seeking the good of that particular portion of society which is intrusted to its supervision,' was attacking the vested property rights of the appellees," prospective injunctive relief would be appropriate).

It was also well known then that equity can prevent future injuries just as much as it can stop ongoing ones. 1 J. Pomeroy, *Treatise on Equity Jurisprudence* § 112 at 116 (2d ed. 1892) (equity includes "*Preventative Remedies*, or those by which a violation of a primary right is prevented before the threatened injury is done."); *Vicksburg Waterworks Co. v. Mayor of Vicksburg*, 185 U.S. 65, 82 (1902) ("it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable.").

Simply put, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Commw. of Pa. v. State of W. Virginia*, 262 U.S. 553, 593 (1923). Accordingly, courts regularly issue pre-enforcement injunctions to protect people when government threatens to enforce unconstitutional laws against them. *See, e.g.*, *Schires*, *supra*; *Vangilder*, *supra*; *Korwin*, *supra*; *see further* *Crane Co. v. Ariz. State Tax Comm'n*, 63 Ariz. 426, 446 (1945) ("'if [government] officers were

in fact acting illegally, it is … within the power of the court to restrain their acts.'" (citation omitted)).

In *Boruch*, a group of homeowners sued the city and the state, seeking an injunction to bar diversion of storm water onto their property. 242 Ariz. at 613 ¶ 1. The defendants argued that this case for prospective equitable relief was barred by statute—specifically, A.R.S. § 12-1802, which forbids courts from enjoining the enforcement of valid laws. The court of appeals rejected that argument, finding that courts have authority to issue prospective relief to bar government officials from acting "arbitrarily or unreasonably," or "in a manner that exceeds [their] power," *id.* at 617 ¶ 22, 616 ¶ 16. Quoting from *Wales v. Tax Comm'n*, 100 Ariz. 181, 186 (1966), the *Boruch* court explained that equitable relief "'is an appropriate remedy to determine whether rights have been *or will be* affected by the arbitrary or unreasonable action of an administrative officer or agent.'" 242 Ariz. at 619 ¶ 28 (emphasis added).

Boruch also cited *Bd. of Regents v. City of Tempe*, 88 Ariz. 299 (1960), and *Rivera v. City of Douglas*, 132 Ariz. 117 (App. 1982), both of which make clear that Arizona trial courts—like all courts in the United States—can grant pre-enforcement relief by issuing injunctions to prevent the enforcement of unconstitutional laws.

In *Rivera*, plaintiffs challenged a city's demand that employees take a lie-detector test or be fired. 132 Ariz. at 118. Just as in this case, the city said the court lacked jurisdiction because the city had not yet done anything to the plaintiffs. *See id.* at 119 ("[a]ppellants' argument that appellees did not have a justiciable controversy stems from the fact that appellees did not ever refuse to take the polygraph test, nor were they ever actually dismissed."). The court rejected that argument, making clear that "[d]eclaratory judgment relief is an appropriate vehicle for resolving controversies as to the legality of acts of public officials" and "injunction is an appropriate remedy to determine whether rights have been or *will be* affected by arbitrary or unreasonable [government] action." *Id.* (emphasis added). Because the city had sent the plaintiffs letters saying they were required to take the tests or face termination, the court found that they were "entitled to seek injunctive relief, and a declaration of their rights under [the Declaratory Judgments Act]." *Id.* That is precisely the situation here.[1]

City of Tempe involved university officials renovating ASU; city officials insisted on certain permits. The Board of Regents said these requirements were unlawful and refused to comply. The City threatened enforcement, so the Board sued. 88 Ariz. at 301. The City said the court lacked jurisdiction because it had

[1] The City sent letters to the Plaintiffs in this case saying that if they did not comply with the City's demands, they would "be subject to further enforcement action." App. 78 ¶ 82.

not yet taken action against the Regents, and again that argument was rejected—because plaintiffs can seek prospective injunctive and declaratory relief to "require [government] officials to comply with the statutes and constitutions of Arizona and of the United States." *Id.* at 302–03 (citation omitted). *See also Ariz. Fence Contractors Ass'n v. City of Phoenix Advisory & Appeals Bd.*, 7 Ariz. App. 129, 130 (1968) (prospective declaratory relief appropriate to adjudicate legality of city ordinance); *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269 (2019) (reversing denial of prospective relief against enforcement of unconstitutional law).

True, prospective relief is typically only available where the plaintiff "face[s] a real threat of being prosecuted," *id.* at 280 ¶ 39, but there's no doubt that these Plaintiffs *do* face a real threat of enforcement: *the trial court admitted that*, acknowledging that the City "threatened to" enforce the challenged zoning laws against them. App. 64:16. That should have been enough to let the case proceed. Nevertheless, the trial court said the Plaintiffs would have to wait for the City to "file a complaint and … start fining [the Plaintiffs]." *Id.* ln. 17. This was obviously erroneous.

The superior court's alternative ground for dismissal was also clearly wrong. It made a merits finding that the zoning code is constitutional because "[t]his Court presumes that when the zoning was coming up in the 70s, that they had lawyers

then who looked through it and tried to make sure it was okay. And there we go." App.64:7–10. But on the contrary, while zoning laws are typically presumed constitutional, *Anderson v. Pima Cnty.*, 27 Ariz. App. 786, 788 (1976), that presumption is not insurmountable. *See, e.g.*, *State v. Brown*, 250 Ariz. 121, 125 ¶ 13 (App. 2020) (presumption of constitutionality is rebuttable); *State v. Burgess*, 245 Ariz. 275, 278–79 ¶ 12 (App. 2018) (plaintiff can "overcom[e] [a] statute's presumed constitutionality by a 'clear showing of arbitrariness or irrationality.'" (citation omitted)); *Biggs v. Betlach*, 242 Ariz. 55, 58 ¶ 5 n.4 (App. 2017) (taking judicial notice of the fact that presumption of constitutionality is rebuttable); *State v. Panos*, 239 Ariz. 116, 119 ¶ 9 (App. 2016) (a plaintiff "may overcome [the] presumption [of constitutionality].").

That means plaintiffs are entitled to try to prove that even laws that "lawyers looked through … and tried to make sure [were] okay" are nonetheless unconstitutional, either facially or as applied. *See generally* T. Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity,"* 25 Geo. Mason U. Civ. Rts. L.J. 43, 45 (2014) ("So long as the pleading itself is not flawed, a plaintiff in a rational basis case must have the chance to meet her difficult, but not impossible, burden of proving that the challenged law is irrational.").

For the court to dismiss simply because it presumed that lawyers okayed the zoning code fifty years ago[2] was the kind of "unreasoning action, without consideration and in disregard for facts and circumstances" that has been defined as "a manifest abuse of discretion," *Tucson Pub. Sch. v. Green*, 17 Ariz. App. 91, 94 (1972), and mandates reversal.

II. Why the Court of Appeals was wrong: A dismissal without prejudice is final if it is jurisdictional.

Although dismissals without prejudice are usually not final judgments, that is not true when a dismissal "in effect determines the action and prevents final judgment from which an appeal might be taken." *Boehringer*, 16 Ariz. at 51. That includes dismissals for lack of jurisdiction, since these *do* preclude the plaintiffs from refiling the same action. *Robert Schalkenbach Found.*, 208 Ariz. at 181 ¶ 20; *Callanan*, 134 Ariz. at 335. As the *Callanan* court said, "If … the [dismissal] motion is sustained and the effect is to dismiss the action for want of jurisdiction, either of the person or subject matter … although the dismissal is without prejudice, the judgment is final." *Id.* (quoting 9 Moore's *Federal Practice*, ¶ 110.08[1]).

[2] That is, before such seminal property rights cases as *Wonders v. Pima Cnty.*, 207 Ariz. 576 (App. 2004); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); or *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

The superior court's ruling that it lacked jurisdiction to issue prospective relief did fully adjudicate the dispositive jurisdictional question. That's why that ruling would have preclusive effect if the Plaintiffs tried to file a new suit today for prospective relief. *See id.* Such re-filing would be immediately dismissed, because the superior court's jurisdictional determination would be *res judicata*.

In *Robert Schalkenbach Found.*, plaintiffs sued trustees for not complying with the trust conditions. 208 Ariz. at 178 ¶ 2. The court dismissed "without prejudice" on the grounds that they lacked standing. *Id.* at 179 ¶ 5. When they sought to amend, the superior court said the amendment would be futile, and again dismissed, purportedly without prejudice. *Id.* ¶ 6. The plaintiffs then filed a new lawsuit, this time in Probate Court—and the defendants moved to dismiss, saying the earlier decisions about standing should be given *res judicata* effect. *Id.* ¶ 8. The Probate Court granted that motion, *again* purportedly without prejudice. *Id.* ¶ 9. On appeal, the question was whether the trial courts' standing determinations were *res judicata*. One element of *res judicata* is, of course, that the former ruling be a final order. The court of appeals said there *was* a final order on standing, notwithstanding being labeled "without prejudice," because the standing determination was "essential to the dismissal … even though there was not an 'on the merits' determination of the underlying issue." *Id.* at 181 ¶ 20. And if it was final for *res judicata* purposes, it was also final for appeal purposes, because the

alleged fatal defect in the complaint was incurable, so the dismissal was actually a final decision respecting jurisdiction—and therefore appealable. *See also* *Callanan*, 134 Ariz. at 335 (dismissal "without prejudice" was still a final judgment because "the plaintiff was unable to file an appropriate amended complaint," meaning that "the judgment completely disposed of the case and terminated the action.")

True, the Plaintiffs could (as the trial court said) wait for the City to injure them, and then file a *new* lawsuit, but that would be a fundamentally different lawsuit; that would be a case for *retrospective*, or compensatory relief. That would not be refiling *this* case for *prospective* relief—because *this* case has been fully terminated by the dismissal.

The Florida appellate court addressed that point in *Carlton v. Wal-Mart Stores, Inc.*, 621 So.2d 451 (Fla. App. 1993). There, the trial judge dismissed, purportedly without prejudice, but the court of appeals said the dismissal was still final and appealable because it "disposed of" the case entirely, and although labeled without prejudice, "it is clear that it is 'without prejudice' to file *another, separate, action*, rather than 'without prejudice' to file an amended complaint in the *first* action." *Id.* at 452 (emphasis added). When a purportedly non-prejudicial dismissal is "intended to be 'without prejudice' to file *another* action, rather than to amend the complaint in the *first* action," the court said, the dismissal *is* final and

appealable, notwithstanding being labeled "without prejudice." *Id.* (emphasis added; citation omitted). That is *precisely* the situation here.

As *Flynn v. Johnson*, 3 Ariz. App. 369, 373 (1966), said, the rule that nonprejudicial dismissals are non-appealable "contemplate[s] that there is a possibility of an amendment to the pleading … so that the [dismissal] … would not be one which 'in effect determines the action and prevents judgment from which an appeal might be taken.'" But where no such possibility exists, and all the plaintiffs can do is to file a *different* lawsuit, then in *Carlton*'s words, "the dismissal ends the judicial labor in the first action," and is therefore "sufficiently 'final' to permit an appeal." 621 So.2d at 452. Or, as the Tenth Circuit put it, where a trial court "determine[s] that the action [can] not be saved by an amendment of the complaint," so that the plaintiff "[has] no choice but to stand on his complaint," the dismissal is final, even if labeled "without prejudice." *Sherman v. Am. Fed'n of Musicians*, 588 F.2d 1313, 1315 (10th Cir. 1978).

Here, the superior court said the Plaintiffs, as a matter of law, cannot sue. No amendment could cure what it considered a fatal defect in the complaint: the fact that they have not yet been subject to enforcement. App. 64. That determination did indeed "determine[] the action and prevent[] final judgment from which an appeal might be taken." *Boehringer*, 16 Ariz. at 51. There is no way amendment could overcome that barrier. Although the Plaintiffs might still

sue if some future event occurs, that would be a different case. In *this* case, they must stand on their complaint. Thus, not only *could* the Plaintiffs appeal the superior court's order in this case, they *had* to, to avoid waiver.

This case is like a hypothetical situation in which a plaintiff files a lawsuit for an injunction to prevent a defendant from converting her personal property, or building a factory that will pollute her land, and the superior court tells her the case is unripe because no theft or pollution has yet occurred—before adding, "come back after your property *has* been stolen or ruined." Such a dismissal would obviously be a final, appealable order even if the court labeled it "without prejudice." So, too, here: the dismissal was clearly final and appealable.

Likewise, Arizona courts have consistently held that a purportedly "without prejudice" dismissal is appealable if the statute of limitations precludes refiling. *See, e.g.*, *Maher v. Urman*, 211 Ariz. 543, 550 ¶ 20 (App. 2005). The reason? Because, again, such a purportedly nonprejudicial dismissal does, in fact, preclude the plaintiff from refiling the same lawsuit. The only sense in which it was non-prejudicial is that the plaintiff could "file *another, separate, action*," which is not enough to render the dismissal non-appealable. *Carlton*, 621 So.2d at 452 (emphasis added).

In *Sunwest Bank of Albuquerque, N.M. v. Nelson*, 958 P.2d 740 (N.M. 1998), the New Mexico Supreme Court put it succinctly: if an order "terminate[s]

the suit [so that] the proceeding was completely disposed of so far as the court had power to dispose of it," that is final and appealable. *Id.* at 742. (citations omitted). *Sunwest* emphasized that in determining whether a dismissal is appealable, judges should give the order "a practical rather than a technical construction." *Id.* Here, the court of appeals forgot that rule, and clearly misapplied the law. "The misapplication of the law to undisputed facts is an example of an abuse of discretion," *LaFaro v. Cahill*, 203 Ariz. 482, 485 ¶ 10 (App. 2002), and requires reversal.

CONCLUSION

This is the rare case in which both the superior court and court of appeals abused their discretion and committed clear legal error. The petition should be granted and the judgments reversed forthwith.

Respectfully submitted this 15th day of November 2022 by:

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