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# **SUPREME COURT OF ALABAMA**

**OCTOBER TERM, 2021-2022**

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**1200685**

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**Ex parte Space Race, LLC**

**PETITION FOR WRIT OF MANDAMUS**

**(In re: Alabama Space Science Exhibit Commission d/b/a U.S.  
Space & Rocket Center**

**v.**

**Space Race, LLC)**

**(Madison Circuit Court, CV-19-900316)**

**SELLERS, Justice.**

The Alabama Space Science Exhibit Commission d/b/a U.S. Space & Rocket Center ("ASSEC") commenced an action in the Madison Circuit

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Court ("the trial court") against Space Race, LLC ("Space Race"), seeking to avoid an arbitration award entered in favor of Space Race and against ASSEC by an arbitration panel in New York. Space Race filed a motion to dismiss ASSEC's action, asserting that a New York court had already entered a final judgment confirming the arbitration award. The trial court denied Space Race's motion to dismiss, and Space Race petitioned this Court for a writ of mandamus directing the trial court to dismiss ASSEC's action. We grant the petition and issue the writ.

In July 2016, Space Race agreed to produce an animated series for ASSEC aimed at promoting the interest of children in space exploration and science. The series was to be created and released to the public over a three-year period. In exchange, ASSEC agreed to compensate Space Race with funds ASSEC would receive from a grant from the National Aeronautics and Space Administration ("NASA"), which had contracted with ASSEC to provide funding for the series. The compensation was to be paid to Space Race annually as the series episodes were created during the three-year contract term. The parties' agreement provides that it "shall be governed" by Alabama law.

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After the first season of animated shows proved to be a success, Space Race agreed to produce the remainder of the three-year series on an expedited basis. ASSEC, however, would not be required to pay the full amount owed to Space Race until the end of the three-year contract term. Space Race produced the rest of the series before the contract term expired, but ASSEC failed to pay the amount owed for the last year of the series. Space Race claims that ASSEC still owed Space Race approximately \$1.3 million when the contract term expired.

The parties' agreement contains an arbitration provision. Accordingly, in December 2017, after being notified by ASSEC that it would no longer make payments to Space Race because the grant from NASA had been terminated, Space Race commenced arbitration proceedings against ASSEC in New York. During the arbitration hearing, one of the arbitrators asked counsel for ASSEC if it was asserting a sovereign-immunity defense against Space Race's claims. Counsel responded that ASSEC was not.

Instead, ASSEC asserted that its agreement with Space Race required ASSEC to pay Space Race only to the extent that ASSEC

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received grant funds from NASA and that NASA had terminated its agreement with ASSEC and had stopped providing those funds. According to Space Race, however, NASA had terminated its agreement with ASSEC because ASSEC, in bad faith, had failed to provide NASA with documentation required to continue funding the project.

The arbitrators ruled in favor of Space Race. They suggested that ASSEC had intentionally breached its agreement with NASA and had therefore breached its agreement with Space Race. The arbitrators awarded Space Race the balance due under the parties' agreement, plus prejudgment interest. They also noted that ASSEC had waived any argument based on sovereign immunity.

In December 2018, Space Race filed a petition in the Supreme Court of New York County, New York ("the New York trial court"), requesting that court to confirm the arbitration award. In February 2019, while Space Race's action to confirm the arbitration award was pending in New York, ASSEC commenced the present action in the trial court, seeking to vacate the arbitration award. The trial court, however, stayed the matter pending resolution of the New York action.

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At a hearing before the New York trial court, in contrast to the representation made during the arbitration hearing, counsel for ASSEC stated that ASSEC was indeed asserting sovereign immunity in defense of Space Race's efforts to confirm the arbitration award. The court, however, noted that ASSEC had waived that defense during the arbitration proceedings. In any event, the court ruled that ASSEC is not the equivalent of the State of Alabama for purposes of sovereign immunity. Accordingly, the court confirmed the arbitration award in favor of Space Race. ASSEC appealed that ruling to the appellate division of the New York Supreme Court, which affirmed the New York trial court's decision. The New York Court of Appeals, that state's highest court, declined to consider ASSEC's final appeal.

In the trial court, Space Race filed a motion to dismiss ASSEC's action to vacate the arbitration award. Space Race argued that a New York state court had rendered a final judgment that was entitled to res judicata effect under the Full Faith and Credit Clause of the United States Constitution. In response, ASSEC argued that it enjoys sovereign immunity, that it cannot waive that immunity, and that its alleged

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immunity deprived the New York trial court of subject-matter jurisdiction over the action to confirm the arbitration award. The trial court denied Space Race's motion to dismiss; this mandamus petition followed.

"The standard governing our review of an issue presented in a petition for the writ of mandamus is well established:

"'[M]andamus is a drastic and extraordinary writ to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.'"

"Ex parte Cupps, 782 So. 2d 772, 774-75 (Ala. 2000) (quoting Ex parte Edgar, 543 So. 2d 682, 684 (Ala. 1989))."

Ex parte Webber, 157 So. 3d 887, 891 (Ala. 2014). There appears to be no dispute that mandamus is an appropriate avenue for reviewing the trial court's ruling. Id. ("A petition for a writ of mandamus is an appropriate method by which to seek this Court's review of the denial of a motion to dismiss or for a summary judgment predicated on the doctrine of res judicata."). As Space Race points out in its mandamus petition, "the whole

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point of the Full Faith and Credit Clause and res judicata is that, having litigated a matter to final judgment in the courts of one State, the victorious party should not have to litigate the same case to a final judgment again in the courts of a second State."

The United States Constitution requires courts in Alabama to give full faith and credit to the judicial proceedings of every other State. U.S. Const. art. IV, § 1.

"Regarding judgments ... the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force."

Baker v. General Motors Corp., 522 U.S. 222, 233 (1998) (footnote omitted). "'Full faith and credit ... generally requires every State to give to the judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it.'" Omega Leasing Corp. v. Movie Gallery, Inc., 859 So. 2d 421, 422 (Ala. 2003) (quoting Durfee v. Duke, 375 U.S. 106, 109 (1963)). In New York, a judgment confirming an

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arbitration award is entitled to res judicata effect. See In re Aetna Cas. & Sur. Co. v. Mantovani, 240 A.D.2d 566, 569, 658 N.Y.S.2d 926 (1997).

ASSEC, however, asserts that the New York trial court's judgment confirming the arbitration award is not entitled to full faith and credit and res judicata effect because, ASSEC asserts, that court did not have "adjudicatory authority over the subject matter." Baker, 522 U.S. at 233. See also Pirtek USA, LLC v. Whitehead, 51 So. 3d 291, 295 (Ala. 2010) (acknowledging that, "'[w]hile Alabama courts are generally required to give a judgment entitled to full faith and credit at least the res judicata effect accorded in the rendering court's jurisdiction, Alabama courts are permitted to inquire into the jurisdiction of the rendering court'" (quoting Menendez v. COLSA, Inc., 852 So. 2d 768, 771 (Ala. Civ. App. 2002))).

According to ASSEC, the New York trial court did not have subject-matter jurisdiction over Space Race's action to confirm the arbitration award because, ASSEC claims, ASSEC is immune from suit in New York state courts. ASSEC points to Franchise Tax Board of California v. Hyatt, 587 U.S. \_\_\_, \_\_\_ 139 S. Ct. 1485, 1497 (2019), in which the United States Supreme Court held that states are immune from private suits in the

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courts of sister states, noting that "[t]he Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design."

ASSEC argues that it should be equated with the State of Alabama for purposes of interstate sovereign immunity. In support of that assertion, ASSEC relies on Barnhart v. Ingalls, 275 So. 3d 1112 (Ala. 2018), in which this Court held that employees of ASSEC were entitled to State immunity under Article I, § 14, Ala. Const. 1901 (Off. Recomp.). The Court in Barnhart said:

"[ASSEC] was created as a State agency in 1965 by the Alabama Legislature to provide for and manage 'facilities to house and display such visual exhibits of space exploration and hardware used therefor as may be made available by the National Aeronautics and Space Administration.' § 41-9-430, Ala. Code 1975. In accordance with that purpose, [ASSEC] opened the U.S. Space & Rocket Center ('the Rocket Center') in March 1970 and, since that time, has continued to operate the popular museum and learning center in Huntsville. At the time this action was initiated, [ASSEC] employed approximately 120 individuals at the Rocket Center."

275 So. 3d at 1116 (emphasis added).

Whether the New York trial court's judgment is entitled to full faith and credit does not necessarily turn on whether this Court agrees with the

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New York trial court's conclusion that ASSEC should not be considered the equivalent of the State of Alabama for purposes of interstate sovereign immunity. Rather, the judgment is entitled to full faith and credit if the immunity issue was fully and fairly litigated in New York.

"[T]he [United States Supreme] Court made it clear that whether a state extends full faith and credit to a judgment of another state depends only upon the existence of a full and fair litigation in the foreign state of the issues resolved by that judgment:

" '[A] judgment is entitled to full faith and credit -- even as to questions of jurisdiction -- when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.' "

Omega Leasing Corp., 859 So. 2d at 422 (quoting Durfee, 375 U.S. at 111) (emphasis added). See also Pirtek USA, LLC, 51 So. 3d at 295 (indicating that, in deciding whether a foreign court's judgment should not be given full faith and credit because of a lack of jurisdiction, the inquiry is limited to determining whether the jurisdictional issues were fully and fairly litigated by the foreign court and whether those issues were finally decided by the foreign court).

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It is clear that the jurisdictional issue was indeed fully and fairly litigated in the New York trial court. In considering whether ASSEC is entitled to interstate sovereign immunity, the New York trial court first noted that some federal district courts have ruled that ASSEC is not an "arm of the state" for purposes of immunity under the Eleventh Amendment to the United States Constitution and federal diversity jurisdiction. See Parker v. Alabama Space Sci. Exhibit Comm'n, No. 5:15-cv-02261-AKK, June 16, 2016 (N.D. Ala. 2016) (not reported in Federal Supplement); Alabama Space Sci. Exhibit Comm'n v. Odysseia Co., No. 5:14-CV-00413-MHH, Aug. 19, 2016 (N.D. Ala. 2016) (not reported in Federal Supplement); Alabama Space Sci. Exhibit Comm'n v. Odysseia Co., No. 5:14-CV-00413-MHH, Apr. 26, 2017 (N.D. Ala. 2017) (not reported in Federal Supplement). See also Alabama Space Sci. Exhibit Comm'n v. Merkel Am. Ins. Co., 400 F. Supp. 3d 1259 (N.D. Ala. 2019) (decided after the New York trial court issued its judgment confirming the arbitration award). But see Ingalls v. U.S. Space & Rocket Ctr., No. 2:14-CV-699-WKW, July 27, 2015 (M.D. Ala. 2015) (not reported in Federal Supplement) (concluding that "Alabama courts would determine

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that [ASSEC] functions as an arm of the state and is, therefore, entitled to Eleventh Amendment immunity").<sup>1</sup>

The New York trial court acknowledged that the issue whether ASSEC is an agency of Alabama for purposes of State immunity under § 14 of the Alabama Constitution is relevant to the interstate-sovereign-immunity analysis. But the court ultimately concluded that ASSEC is not a State agency for purposes of § 14. In doing so, the court pointed to Rodgers v. Hopper, 768 So. 2d 963 (Ala. 2000), in which this Court said:

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<sup>1</sup>ASSEC asserts that whether an entity is considered an arm of the state for purposes of Eleventh Amendment immunity and diversity jurisdiction is not necessarily determinative of whether that entity is entitled to State immunity under § 14 of the Alabama Constitution. See Ex parte Alabama Dep't of Youth Servs., 880 So. 2d 393, 404 (Ala. 2003) ("'[T]he Alabama Constitution provides sovereign immunity to entities that do not possess Eleventh Amendment immunity.'") (quoting Powers v. CSX Transp., Inc., 105 F. Supp. 2d 1295, 1299 n.2 (S.D. Ala. 2000))). But, even taking into account the fact that the parties' agreement states that it "shall be governed as to all matters ... by the laws of the State of Alabama," the Court is not convinced that the analysis employed in determining whether ASSEC is an arm of the state for purposes of Eleventh Amendment immunity and diversity jurisdiction is completely irrelevant to whether it enjoys interstate sovereign immunity under Franchise Tax Board of California v. Hyatt, 587 U.S. \_\_\_, 139 S. Ct. 1485 (2019). In any event, independent of that analysis, the New York trial court fairly and fully considered whether ASSEC should be considered a State agency for purposes of State immunity under § 14.

"The test for determining whether a legislatively created body is an immediate and strictly governmental agency for purposes of a [§ 14] sovereign-immunity analysis involves an assessment of (1) the character of the power delegated to the body; (2) the relation of the body to the State; and (3) the nature of the function performed by the body."

768 So. 2d at 966. Some common characteristics of entities that are not entitled to § 14 immunity include the "(1) the power to sue and be sued; (2) the power to enter into contracts; (3) the power to sell and dispose of property; (4) the power to issue bonds; and (5) exclusive responsibility for [the entity's] financial obligations." Id.

In confirming the arbitration award, the New York trial court stated:

"Now [ASSEC] is saying that it can't waive [interstate sovereign immunity], but that brings me back to the finding that they are not a government agency.

"And let me just go through the factors for that. So [ASSEC] hires its own personnel, it raises and spends money, it owns property, including the space center, it can sue and be sued, it can have its own counsel, it's not limited to representation by the State Attorney General's Office, although I understand you are standing in the shoes of the attorney general today. So I would say it operates more like a private public corporation.

"And, in fact, this transaction couldn't be more of a commercial transaction where [ASSEC] was paying the cost of making a children's program about space and NASA and the

parties designated [the American Arbitration Association for dispute resolution].

"....

"Under Rodgers v. Hopper, which is 768 So. 2d 963, an Alabama case, the Supreme Court of Alabama held that the qualities to determine whether it's a state agency or not are whether the entity had the power to [sue] or be sued, the power to enter into contracts. Clearly, [ASSEC] has sued and been sued. They have entered into contracts; precisely the contract here. They have the power to sell and dispose of property. They own the property -- their property in Alabama. The fourth thing is the power to raise and issue bonds, and it has responsibility for its financial obligations."

The New York trial court took the relevant considerations into account in determining that ASSEC is not a State agency for purposes of State immunity under § 14. The court acknowledged Barnhart, but correctly pointed out that the parties and this Court had simply assumed in that case that ASSEC was a State agency for purposes of § 14 immunity. Regardless of whether this Court agrees or disagrees with the New York trial court, it is clear that the parties and the court fully and fairly litigated the immunity issue.<sup>2</sup>

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<sup>2</sup>In Barnhart, former employees of ASSEC sued ASSEC officers, seeking in part to recover tort damages from the officers based on theories

In response to the proposition that even jurisdictional adjudications are entitled to full faith and credit, ASSEC asserts that an exception applies when the court issuing the judgment lacked jurisdiction specifically because of a party's sovereign immunity. In other words,

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alleging negligence and breach of fiduciary duty in failing to pay compensation allegedly owed to the former employees. The former employees alleged the tort claims against the ASSEC officers in their individual capacities and sought to recover from the officers' personal funds. The former employees also asserted claims against the ASSEC officers in their official capacities, seeking the backpay allegedly owed. This Court held that the officers were not entitled to State immunity under § 14 with respect to the claims against them in their official capacities because payment of the allegedly owed funds was merely a "ministerial act" not involving discretion. 275 So. 3d at 1125. With respect to the tort claims, however, this Court determined that the officers were entitled to State immunity because, even though the employees sought to recover from the officers' personal funds, the tort claims were in essence brought against the officers in their official capacities because the duties allegedly breached were owed "only because of the positions the ... officers held." Id. at 1126. But, there was no express determination in Barnhart that ASSEC is indeed a State agency for purposes of State immunity. There was no discussion of the factors courts consider in determining whether an entity is a State agency for purposes of § 14 immunity. The parties and the Court simply assumed that ASSEC was a State agency for purposes of considering the officers' immunity. We also note that the present case does not involve tort-based claims against ASSEC or its officers. It involves the confirmation of an arbitration award entered after ASSEC breached its contract with Space Race by failing to pay the final amount due under that contract.

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according to ASSEC, "sovereign immunity presents an exception to the finality of jurisdictional determinations."

ASSEC relies primarily on United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940). In that case, the United States Supreme Court held that a judgment entered against the United States, which was acting on behalf of the Choctaw and Chickasaw Nations, was not entitled to res judicata effect. The Court's decision was based on its conclusion that the court that had entered the judgment at issue, a federal district court in Missouri, had lacked subject-matter jurisdiction because the United States and the Choctaw and Chickasaw Nations enjoyed sovereign immunity. However, unlike the New York trial court in the present case, the court in Missouri never considered sovereign immunity because the United States never raised it as a defense. In contrast, the New York trial court fully and fairly considered ASSEC's claim of immunity.

We acknowledge that the United States Supreme Court in Durfee, *supra*, noted that "the general rule of finality of jurisdictional determinations is not without exceptions" and that "[d]octrines of federal

pre-emption or sovereign immunity may in some contexts be controlling."  
375 U.S. at 114. As an example, the Court pointed to United States Fidelity & Guaranty Co. But the Court in Durfee made sure to note that the immunity issue had not been litigated by the trial court in United States Fidelity & Guaranty Co. 375 U.S. at 114 n.12. Thereafter, the Court pointed to factors set out in the Restatement of Conflict of Laws that courts have considered in deciding whether a judgment involving jurisdictional issues may be collaterally attacked, one of which is whether the jurisdictional questions were actually litigated before the court that issued the judgment. Id. The jurisdictional issue in the present case undoubtedly was litigated in the New York trial court.<sup>3</sup>

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<sup>3</sup>The New York trial court also noted that ASSEC had purported to expressly waive reliance on sovereign immunity during the arbitration proceedings. According to ASSEC, however, it was incapable of waiving immunity. In support of that assertion, ASSEC relies on precedent indicating that State immunity under § 14 of the Alabama Constitution cannot be waived. See, e.g., Atkinson v. State, 986 So. 2d 408, 410 (Ala. 2007). ASSEC asserts that "[t]he New York court's conclusion regarding waiver directly contravenes Alabama law and cannot bind Alabama courts." But ASSEC does not point to legal authority indicating that our decisions holding that State immunity under § 14 cannot be waived should apply to the type of interstate sovereign immunity recognized in Franchise Tax Board of California v. Hyatt, 587 U.S. \_\_\_, 139 S. Ct. 1485 (2019). For

Finally, ASSEC relies on the Restatement (Second) of Judgments § 12 (Am. L. Inst. 1982), which provides:

"When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:

"(1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or

"(2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or

"(3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should

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its part, Space Race describes waiver as a "matter of procedure" and asserts that the New York trial court was free to apply its own rules regarding waiver. See generally Belfand v. Petosa, 196 A.D.3d 60, 148 N.Y.S.3d 457 (2021) (holding that a New Jersey agency had waived Hyatt interstate sovereign immunity in a New York court by participating in litigation in that court). In any event, it is not necessary to opine on that question, because it is clear that, independent of waiver, the New York trial court fully and fairly litigated the substantive merits of ASSEC's immunity defense.

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have opportunity belatedly to attack the court's subject matter jurisdiction."

The comments to this section of the Restatement indicate that, when the issue implicating subject-matter jurisdiction was actually raised and considered by the court that issued the judgment under attack, that judgment is typically entitled to res judicata effect. Comment a provides, in relevant part, as follows:

"The modern rule on conclusiveness of determinations of subject matter jurisdiction gives finality substantially greater weight than validity .... It gives different weight to finality when the tribunal is one of limited legal capacity ... and when the parties have not contested the action, i.e., in the case of a default judgment."

Restatement (Second) of Judgments § 12 cmt. a. Comment c further provides:

"When the question of the tribunal's jurisdiction is raised in the original action, in a modern procedural regime there is no reason why the determination of the issue should not thereafter be conclusive under the usual rules of issue preclusion. The force of the considerations supporting preclusion is at least as great concerning determinations of the issue of jurisdiction as it is with respect to other issues. ... Beyond this, there is virtually always available a procedure by which to obtain review of the original tribunal's determination of the issue, either by appeal or by injunction or extraordinary writ. Thus, the opportunity for an independent determination

of the issue of subject matter jurisdiction that was protected in traditional doctrine remains available under the rule that the tribunal's determination of its own competency is res judicata. At the same time, applying the rule of preclusion considerably reduces the vulnerability of the judgment to subsequent attack and thus furthers the policy of finality."

Restatement (Second) of Judgments § 12 cmt. c.

Even if the Restatement were somehow binding on this Court, we are not convinced that any of the three circumstances justifying relitigation of a court's jurisdiction apply here. The New York trial court provided the parties with a full and fair opportunity to litigate the sovereign-immunity issue, and the court fully and fairly considered the parties' arguments and relevant law. Its determination that ASSEC should not be considered the equivalent of the State of Alabama for purposes of interstate sovereign immunity is, at the very least, defensible. We simply cannot conclude that the New York trial court was "so plainly" without subject-matter jurisdiction that it committed a "manifest abuse of authority," that its judgment substantially infringes on the authority of another tribunal or agency of government, or that it lacked the

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capability to make an informed determination regarding the sovereign-immunity issue. Restatement (Second) of Judgments § 12.

Because the New York judgment confirming the arbitration award against ASSEC is entitled to full faith and credit and res judicata effect, we grant Space Race's mandamus petition. The trial court is directed to vacate its order denying Space Race's motion to dismiss and to enter an order granting that motion.

**PETITION GRANTED; WRIT ISSUED.**

Parker, C.J., and Bolin, Wise, Mendheim, Stewart, and Mitchell, JJ., concur.

Shaw and Bryan, JJ., concur in the result.

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SHAW, Justice (concurring in the result).

I concur in the result and write specially to note the following.

In this matter, a New York trial court entered and confirmed as a judgment an arbitration award rendered in favor of Space Race, LLC ("Space Race"), against the Alabama Space Science Exhibit Commission ("the ASSEC") in a contract dispute. The ASSEC maintains that it is a State agency and thus is afforded State immunity under Article I, § 14, Ala. Const. 1901 (Off. Recomp.), which provides "[t]hat the State of Alabama shall never be made a defendant in any court of law or equity." "Under § 14, the State and its agencies are absolutely immune from suit." Lyons v. River Rd. Constr., Inc., 858 So. 2d 257, 261 (Ala. 2003) (emphasis added). "[T]he use of the word 'State' in Section 14 was intended to protect from suit only immediate and strictly governmental agencies of the State." Thomas v. Alabama Mun. Elec. Auth., 432 So. 2d 470, 480 (Ala. 1983). Although the immunity provided in § 14, which is referred to as "State immunity," has at times been labeled as providing "sovereign immunity," Lyons, 858 So. 2d at 259 n.2, it is not a waivable, affirmative defense like certain forms of common-law sovereign immunity. Instead,

" '[§ 14] immunity may not be waived.' Patterson [v. Gladwin Corp.], 835 So. 2d [137,] 142 [(Ala. 2002)]. [State] immunity is, therefore, not an affirmative defense, but a 'jurisdictional bar.' Ex parte Alabama Dep't of Transp., 985 So. 2d 892, 894 (Ala. 2007). The jurisdictional bar of § 14 simply 'preclud[es] a court from exercising subject-matter jurisdiction' over the State or a State agency. Lyons v. River Road Constr., Inc., 858 So. 2d 257, 261 (Ala. 2003). Thus, a complaint filed solely against the State or one of its agencies is a nullity and is void ab initio. Ex parte Alabama Dep't of Transp. (In re Russell Petroleum, Inc. v. Alabama Dep't of Transp.), 6 So. 3d 1126 (Ala. 2008)."

Alabama Dep't of Corr. v. Montgomery Cnty. Comm'n, 11 So. 3d 189, 191-92 (Ala. 2008).

This Court has stated that the ASSEC "was created as a State agency in 1965 by the Alabama Legislature." Barnhart v. Ingalls, 275 So. 3d 1112, 1116 (Ala. 2018). In Barnhart, this Court unambiguously held that claims raised against certain ASSEC officers were barred by § 14 because "not only do the State and its agencies have absolute immunity from suit in any court, but State officers and employees, in their official capacities and individually, also are immune from suit when the action against them is, in effect, one against the State." 275 So. 3d at 1122. However, whether the ASSEC is an "immediate and strictly

governmental" agency of the State to which § 14 immunity would apply, Thomas, 432 So. 2d at 480, was not specifically addressed in that case.<sup>4</sup> See Rodgers v. Hopper, 768 So. 2d 963, 966 (Ala. 2000) (providing a test to determine whether a legislatively created body is an immediate and strictly governmental agency). Although I believe that a strong argument can be made that the ASSEC is a State agency,<sup>5</sup> ultimately, as discussed

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<sup>4</sup>The trial court in Barnhart dismissed the ASSEC as immune under § 14. 275 So. 3d at 1118 n.3. It appears that this Court proceeded under the assumption that § 14 immunity applied to the ASSEC. Although this Court on its own motion will confirm that a court had subject-matter jurisdiction, it is not required to examine a lower court's holding that it lacked jurisdiction unless the issue is properly raised on appeal. Crutcher v. Williams, 12 So. 3d 631, 635 (Ala. 2008) ("[T]his Court is not obligated to embark on its own expedition beyond the parties' arguments in pursuit of a reason to exercise jurisdiction.").

<sup>5</sup>I note that Ala. Code 1975, § 41-9-430, which created the ASSEC, provides: "There is hereby created and established a state agency to be known as the Alabama Space Science Exhibit Commission ...." (Emphasis added.) Further, various Code sections governing the ASSEC indicate a close relationship to the State, including that its commissioners are appointed by the Governor, Ala. Code 1975, § 41-9-431; that it has the power to issue general obligation bonds that are obligations of the State, Ala. Code 1975, § 41-9-432(5); that its personnel are provided certain benefits of state employees, § 41-9-432(13); and that its records and books are subject to audit by the Alabama Department of Examiners of Public Accounts. Ala. Code 1975, § 41-9-437.

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below, whether it is a State agency entitled to State immunity is not material to this Court's decision in this case.

According to the materials before us, the New York trial court held that, under Alabama law, the ASSEC was not entitled to "sovereign immunity" because it was not a State agency. It further held that the ASSEC had waived any "sovereign immunity," and that holding was upheld by a New York appellate court, which, because of the purported waiver, pretermitted discussion of whether the ASSEC was a State agency. In re Space Race LLC v. Alabama Space Sci. Exhibit Comm'n, 185 A.D.3d 403, 126 N.Y.S.3d 465 (2020). Thus, the arbitration award was confirmed.

Space Race contends that the New York judgment is entitled to res judicata effect; if so, it would essentially bar ASSEC's action in the Madison Circuit Court challenging the award. Generally, under the Full Faith and Credit Clause of the United States Constitution, art. IV, § 1, a court must give res judicata effect to a prior judgment of a court of another state. Pirtek USA, LLC v. Whitehead, 51 So. 3d 291, 295 (Ala. 2010). However, the second court may generally determine whether the

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original court lacked jurisdiction, and, if the second court in fact determines that the original court lacked jurisdiction, res judicata does not apply to the original court's judgment. That said, according to the United States Supreme Court, such an inquiry into the original court's jurisdiction is not permitted if the issue of that court's jurisdiction was already decided by the original court:

"[W]hile it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry. From these decisions there emerges the general rule that a judgment is entitled to full faith and credit -- even as to questions of jurisdiction -- when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."

Durfee v. Duke, 375 U.S. 106, 111 (1963) (emphasis added). The Court noted that, absent fraud, there is no reason a court should reexamine another court's earlier determination of a jurisdictional issue; that there is a need to end litigation; and that, after a party has had the ability to present its case, a collateral attack on the prior jurisdictional holding "merely retries the issue previously determined. There is no reason to

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expect that the second decision will be more satisfactory than the first.' "  
Durfee, 375 U.S. at 114 (quoting Stoll v. Gottlieb, 305 U.S. 165, 172 (1938)).

However, the Supreme Court in Durfree indicated that this rule was not absolute: "To be sure, the general rule of finality of jurisdictional determinations is not without exceptions. Doctrines of federal pre-emption or sovereign immunity may in some contexts be controlling." 375 U.S. at 114 (emphasis added). This appears to suggest that an exception applies to cases involving sovereign immunity; that is, when sovereign immunity is at issue, the original court's judgment is not final and may be inquired into by another court. However, in support of this proposition, the Supreme Court cited Kalb v. Feuerstein, 308 U.S. 433 (1940), and United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940), in which, as the Supreme Court noted, the jurisdictional issues had not actually been litigated by the original court rendering judgment. 375 U.S. at 115 n.12. I read this to mean that an exception to the finality rule allowing a court to inquire into the original court's jurisdiction when sovereign immunity is involved exists only when the issue was not

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litigated in the original court. See also Sterling v. United States, 85 F.3d 1225, 1231 n.7 (7th Cir. 1996) (Flaum, J., concurring in the judgment) ("If the question of sovereign immunity was actually litigated in the original suit, the parties may be precluded from relitigating the issue in a subsequent proceeding."). No authority has been provided to this Court that would avoid that result here; thus, because the New York courts held that the ASSEC was not entitled to immunity, we cannot reexamine that issue now, and I must reluctantly concur in the result.