SUPREME COURT OF ARIZONA

JAVIER AGUILA, *et al.*, Appellants, v. **DOUG DUCEY**, in his official capacity as the Governor of the State of Arizona; **THE ARIZONA DEPARTMENT OF HEALTH SERVICES**; and **THE ARIZONA DEPARTMENT OF LIQUOR LICENSES AND CONTROL**, Appellees.	Arizona Supreme Court Case No. CV-20-0335-PR Court of Appeals, Division One Case No. 1 CA-CV 20-0598 Maricopa County Superior Court Case No. CV2020-010282

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF APPELLANTS FILED WITH CONSENT OF ALL PARTIES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil rights organization devoted to defending constitutional freedoms from violations by the administrative state. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by elected lawmakers through constitutionally prescribed channels rather than by a governor who is acting outside those channels. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication, for they have been trampled upon for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Arizona and U.S. Constitutions were designed to prevent. This unconstitutional state within the state and federal government is the focus of NCLA's concern.

No one other than the *amicus curiae* authored any part of this brief, or financed the preparation of this brief. Counsel for all parties provided written consent via email to NCLA's submission of this *amicus* brief.

ARGUMENT

The Arizona Constitution imposes judicially manageable limits on executive authority. Any statute or executive order repugnant to those constitutionally set limits ought to be declared ineffectual. That is true of A.R.S. § 26-303(E) and the executive orders issued in pursuance thereof. Executive authority is limited, as it pertains to A.R.S. § 26-303(E), in at least four respects: (1) "all police power" does not include the power to legislate when exercised by the executive; (2) if it did, the legislature may not constitutionally divest such legislative power to the governor; (3) the chief executive may not create laws; and (4) A.R.S. § 26-303(E) may not revive the constitutionally forbidden suspending and dispensing powers, if it is construed to validly divest legislative power to the governor. In short, A.R.S. § 26-303(E) and the resulting executive orders have multiple—and serious—constitutional problems that are unsustainable under the Arizona Constitution.

I. "POLICE POWER" IN THE HANDS OF THE GOVERNOR DOES NOT INCLUDE THE POWER TO LEGISLATE

A. Arizona's Constitution Does Not Contain a Broad Concept of "Police Power"

The phrase "police power" appears nowhere in the Arizona Constitution. Instead, it states the following:

- "The legislative authority of the state shall be vested in the legislature," Ariz. Const. art. 4, pt. 1, § 1 (Vesting Clause);
- "The governor shall transact all executive business with the officers of the government, civil and military" and "shall take care that the laws be

faithfully executed," Ariz. Const. art. 5, § 4 (Executive Business and Take Care Clauses);

- "The judicial power shall be vested in an integrated judicial department," Ariz. Const. art. 6, § 1 (Vesting Clause); and
- "The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others," Ariz. Const. art. 3 (Separation of Powers Clause).

In A.R.S. § 26-303(E)(1) (emphasis added), the legislature gave the governor, "[d]uring a state of emergency," "complete authority over all agencies of the state government and the right to exercise, within the area designated, *all police power* vested in the state by the constitution and laws of this state in order to effectuate the purposes of this chapter." What is this "police power"? This Court has not previously answered that question definitively.[1] It should.

The term "police" entered the English common law through men such as William Blackstone, who were steeped in the Continental civil law. The English had defeated "police power" by the 17th century. They successively confined (in Magna Carta, and onwards) absolute monarchy in favor of a system of checks and balances

[1] *See McKinley v. Reilly*, 96 Ariz. 176 (1964); *Elfbrandt v. Russell*, 94 Ariz. 1 (1963), *on remand*, 97 Ariz. 140 (1964), *reversed by*, 384 U.S. 11 (1966); *Killingsworth v. West Way Motors, Inc.*, 87 Ariz. 74 (1959); *Industrial Commission v. Navajo County*, 64 Ariz. 172 (1946); *State v. Arizona Mines Supply Co.*, 107 Ariz. 199 (1971).

wielded by the Parliament. And Americans more thoroughly vanquished it in their state and federal constitutions by rejecting even the notion of Parliamentary supremacy and replacing it with Constitutional supremacy under which the power belonged to the people. Philip Hamburger, *Is Administrative Law Unlawful?* 446 note a (The University of Chicago Press 2014).

The Continental concept of "police power" is foreign to the Arizona and United States Constitutions.[2] In America, all general domestic power belongs to the people rather than the government. Americans further "split the atom of sovereignty," *Gamble v. United States*, 139 S. Ct. 1960, 1968 (2019), not once but thrice. First, between the state and federal governments. Second, at the federal level, divided among the Article I Congress, Article II President, and Article III judiciary. Third, within each state, divided among the state legislature, state executive, and state judiciary.[3]

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[2] "Police power" is the Continental term—Continental refers to Europe minus England—for the general power of the state to secure *Ordnung*, or order. *See* Philip Hamburger, *Is Administrative Law Unlawful?* 445 (The University of Chicago Press 2014). The Prussian code put it as follows: "To make the necessary provisions for preserving public peace, security, and order, and for averting dangers threatening the public or individuals, is the police function." *Id.* In Germany, this sweeping "police power" did not differentiate legislative, judicial, and executive roles, and it seemed to vindicate an undifferentiated administrative authority, including executive legislation and adjudication. *Id.* at 445–46 & 611 n.14 (citing original sources). *Policey* or *polizei* was a word used since the 15th century by French and German lawyers to refer to the domestic interests of civil government. *Id.* at 446 note a. Being derived from the Greek word *polis*, it could reach the full range of domestic concerns and was often used for the full domestic sovereign power of the state. Accordingly, when Continental jurisdictions transformed the monarch's absolute authority into the state's administrative authority, they often spoke in terms of the police power.

[3] When Americans initially established their state constitutions, they did not mention the "police power" without making clear that this general domestic power belonged to the people rather than any one part of government. The 1776 Pennsylvania

Keeping with that storied American tradition, Arizona's constitutional convention *rejected* the Continental concept of "police power." Like predecessor constitutions in other states, Article 3 of Arizona's constitution divides governmental power among three departments. Article 3, therefore, is the proper tool this Court should use in making sense of A.R.S. § 26-303(E)'s "all police power" formulation.

B. This Court's Prior Cases Have Not Subscribed to the Notion that the Executive Controls the "Police Power"

While this Court has never subscribed to the notion that the state's chief executive can wield legislative power, this Court has not decided a case directly turning on that issue. The Court should definitively clear up the confusion that has developed surrounding the concept of "police power" because existing precedent has misled lawmakers and the chief executive alike. There is no textual or historical basis to say police power is to be found in the hands of the executive. Police power remains a legislative power. The legislature cannot divest that power to the executive. The

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Constitution recited, "the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same." Pa. Decl. of Rights III (1776), https://avalon.law.yale.edu/18th_century/pa08.asp. That same provision was also adopted in North Carolina, Delaware, Maryland, and Vermont. Hamburger at 446 note a. The 1777 New York Constitution stated that the power to establish "a new form of government and internal police" belonged to "the people." N.Y. Const. (1777), https://avalon.law.yale.edu/18th_century/ny01.asp.

Nineteenth-century Americans began to attribute "police power" to the states and even, partly, to the federal government. The word "police" offered a technical-sounding name for a general governmental power in domestic matters, and this increasingly attracted American lawyers. This consolidated vision of government commingled the separated powers (not to mention mixing the enumerated and reserved powers), and it thereby set the stage for "administrative absolutism." *Baldwin v. United States*, 140 S. Ct. 690, 695 (2020) (Thomas, J., dissenting from denial of certiorari).

executive may only enforce specific laws written by the legislature in exercise of the people's police power.

In *McKinley*, the Court evaluated the *legislature*'s power to enact statutes regulating funeral directors and embalmers. 96 Ariz. at 178. *McKinley* concluded that the relevant statutes were constitutional. Because that case dealt with the *legislature*'s power to legislate, it should have no bearing on the *executive*'s exercise of legislative power.

McKinley says, 96 Ariz. at 179, that the definition of police power comes from *Sweet v. Rechel*, 159 U.S. 380 (1895). *McKinley* does not point to any textual basis in *Arizona*'s Constitution for that definition. It cannot be said that this Court implicitly and without explanation endorsed an A.R.S. § 26-303(E)-style transfer of legislative power from the legislature to the executive. Nor does *Sweet* talk of "police power" in terms of the state executive's legislative authority; it talks about the state legislature's legislative authority.

State legislatures are fundamentally different than the Congress of the United States. State legislatures have general legislative power subject to limits imposed by the state constitution; Congress, on the other hand, has only those powers granted to it by the federal constitution, *United States v. Comstock*, 560 U.S. 126, 133 (2010). Thus, *McKinley* talks about the Arizona legislature's *legislative authority* to "make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances either with penalties or without as shall be judged to be good for the welfare of the state and its residents." 96 Ariz. at 179. *McKinley* does not sanction executive lawmaking.

Likewise, *State v. Arizona Mines Supply Co.*, when it refers to "police power," is discussing legislative power vested in the legislature "to enact all manner of wholesome

and reasonable laws." 107 Ariz. at 204. *Killingsworth*, too, talks of "police power" as the power of the legislature to legislate, 87 Ariz. at 78, and concludes that when the legislature legislates "unreasonabl[y]," such legislation "is not within the police power of the legislature to enact it." *Id.* at 80.

Elfbrandt, talks about police power in the context of the state legislature's authority, not in the context of the state executive's authority. When it talks about the state legislature's authority, it discusses whether and how it is limited by the Arizona and United States Constitutions. 94 Ariz. at 9. *Elfbrandt* operated under the premise that the state legislature cannot overthrow or impair the rights secured or protected by the United States Constitution. *Id.* This Court concluded that the state statute requiring schoolteachers to take an oath of office and promise that they will not obtain membership in the Communist Party was constitutional because the statute only minimally invaded schoolteachers' First Amendment rights. *Id.* at 9–10.

The U.S. Supreme Court asked this Court to reconsider "in light of *Baggett v. Bullitt*, 377 U.S. 360 (1964)." *Elfbrandt v. Russell*, 378 U.S. 127 (1964). In *Baggett* the Supreme Court had struck down as unconstitutional for vagueness Washington state statutes requiring schoolteachers to take loyalty oaths. On remand, this Court in *Elfbrandt II*, 97 Ariz. 140, concluded that Arizona's loyalty-oath statute was not void for vagueness. *Elfbrandt II* contains no language about police power. The U.S. Supreme Court reversed *Elfbrandt II*, concluding that Arizona's loyalty-oath statute violated the First Amendment. *Elfbrandt III*, 384 U.S. 11 (1966)

In this entire trajectory of the case, the only premise that survives from *Elfbrandt* is that the state legislature cannot overthrow or impair the rights secured or protected

by the United States Constitution—in other words, that the state legislature's police power is limited by the federal constitution. 94 Ariz. at 9. That premise should be as noncontroversial and universal as the notion that *Elfbrandt* sanctions neither A.R.S. § 26-303(E), nor the resulting executive lawmaking.

Next comes *Industrial Commission v. Navajo County*, 64 Ariz. 172 (1946)—a case brought by a state agency against a political subdivision of the state. When *Industrial Commission v. Navajo County* talks of "police power," this Court is actually speaking about *executive* power to hire personnel "to provide medical attendance for the indigent sick." *Id.* at 179. Because that executive power to hire personnel is "*inalienable* and cannot be surrendered or delegated, by affirmative action, by inaction, by contract, or otherwise," *id.* at 180 (emphasis in original; citing secondary sources), the court concluded that the doctors the county board of supervisors hired cannot be independent contractors; they must be considered employees of the county. *Id.* at 181.

In sum, this Court has talked loosely about "police power" without much thought given to whether the nature of the power being exercised is legislative, executive, or judicial, and which department is exercising that power. But in recent years, this Court has been acutely sensitive to precisely that inquiry under Article 3 of the Arizona Constitution. If this Court is inclined to keep the four-factor separation-of-powers test, then applying that functionalist test should lead the Court to conclude that the challenged statute and the executive orders issued under it are unconstitutional.

II. ARIZONA'S CONSTITUTION CABINS THE CHIEF EXECUTIVE'S FUNCTIONS

A. Arizona Constitution's Article 3 Is a Department-Neutral Test that Prohibits Divestiture of Legislative Authority

A.R.S. § 26-303(E) suffers from at least one principal defect under Article 3: divestiture of legislative functions from the legislature and their attempted investiture in the executive. To determine whether a statutory scheme violates separation of powers, Arizona courts "examine: (1) the essential nature of the power being exercised; (2) the legislature's degree of control in the exercise of that power; (3) the legislature's objective; and (4) the practical consequences of the action." *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 593 ¶ 14 (2017). While the language quoted above in the second and third factors says "*legislature*'s … control … [and] objective," *id.* ¶ 14 (emphasis added), the test is and should be department neutral. This is why:

Article 3 of the Arizona Constitution (emphasis added) states that "no one of such departments shall exercise the powers *properly belonging* to either of the others." The Court of Appeals in *Hancock* had "adopt[ed]" the "legislature's degree of control" language from the Kansas Supreme Court's formulation of a *non-exhaustive* list of four factors. *J.W. Hancock Enterprises, Inc. v. Registrar of Contractors*, 142 Ariz. 400, 405 (App. 1984) (adopting the test articulated in *State ex rel. Schneider v. Bennett*, 547 P.2d 786 (Kan. 1976)). Eventually, this Court endorsed the *Hancock* test in *State ex rel. Woods v. Block*, 189 Ariz. 269 (1997).

The Kansas case was a "usurpation" case, *Hancock*, 142 Ariz. at 405, where the question was whether the *legislature* had arrogated to *itself* a function "properly belonging to either of the othe[r]" two branches, Ariz. Const. art. 3. That is why *Hancock* talked

about the *legislature*'s degree of control and the *legislature*'s objective. *Woods* and *Brnovich*, also were "usurp[ation]" cases: whether the legislature's objective was to "usurp executive or judicial authority," *Brnovich*, 242 Ariz. at 593 ¶ 16; whether the legislature wanted "to take over an executive function." *Woods*, 189 Ariz. at 277.

The Article 3 test is department neutral, however, because it looks to which department performs which *function*. This Court has always applied such functional analysis—and that analysis applies here. A *Hancock*/*Woods*/*Brnovich*-style "usurpation" is where the court is asked to evaluate whether the *legislature* has arrogated to *itself* a power or function "properly belonging" to one of the other departments. Ariz. Const. art. 3. But "usurpation" can also occur when an executive-branch agency arrogates to itself a power or function "beyond what is granted by the legislature." *Enterprise Life Ins. Co. v. ADOI*, 248 Ariz. 625, 629 ¶ 22 (App. 2020).

A divestiture situation occurs where the legislature divests functions from itself or from a sister department and attempts to give them to another department (here, the chief executive). Such divestiture is distinctly defective under the Arizona Constitution's Article 3.

The Court should clarify what the Article 3 test truly is: a department-neutral functional analysis. The *Brnovich* test looks, first, to the nature of the function (legislative authority in times of an emergency) and which department or official (the governor or the governor's designee) is performing that function. The second, or the degree-of-control, factor looks to what control the *department* to which the function "properly belongs" (the legislature) has over the *function* (legislative authority in times of an emergency). *See Hancock*, 142 Ariz. at 406 (analyzing the degree-of-control factor);

Woods, 189 Ariz. at 277 (explaining that the legislature, by "retain[ing] dominant control" over the Constitutional Defense Council, unconstitutionally usurped the executive's function and arrogated it to itself); *Brnovich* ¶ 15 (Senate Bill 1487 is constitutional because the legislature did not usurp, allocate to itself, or "contro[l] the 'exercise' of the executive branch's investigative and enforcement power"). The third, or the hegemony-in-practice factor, evaluates whether the *department* (the governor or the governor's designee)[4] exercising another's (the legislature's) function "establish[es]" the governor's "superiority over the [legislature] in an area essentially [legislative] in nature." *Hancock*, 142 Ariz. at 405. The fourth or the practical-effect-of-blending-of-powers factor evaluates the "practical result of the blending of powers as shown by actual experience over a period of time where such evidence is available." *Id.*

Here, to evaluate the four factors, *viz.*, nature of function, degree of control, hegemony in practice, practical effect of blending of powers, the Court should look at each of the challenged executive orders and the combined effect of those executive orders and A.R.S. § 26-303(E) to evaluate whether those violate Arizona's Article 3. If A.R.S. § 26-303(E), in giving "all police power" to the governor, gives the executive department legislative power during an emergency, then such divestiture is unconstitutional under Article 3—and Article 4, pt. 1, § 1 (Legislature's Vesting Clause) of the Arizona Constitution, as explained below.

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[4] *See also J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 405 (1928) ("*Delegata potestas non potest delegari*": no delegated powers can be further delegated).

B. A.R.S. § 26-303(E) Effects an Unconstitutional Divestiture of Legislative Authority

A.R.S. § 26-303(E) fails to constitutionally guide the executive's discretion. The legislature cannot divest itself of the power that the Arizona Constitution vests in it. The legislature's legislative authority as well as the executive's executive authority are "inalienable" from the departments to which each "properly belong[s]." *Industrial Commission*, 64 Ariz. at 179; Ariz. Const. art. 3. The Court should not permit the legislature to divest itself of legislative power—most basically because the Arizona Constitution vests this power in the legislature, Ariz. Const. art. 4, pt. 1, § 1, but also because the legislature cannot evade Arizona's unique system of bicameralism and presentment, which includes the people's power to enact initiatives and referenda.

While this Court has in the past described aspects of the question it is tasked to solve in this case as the "nondelegation doctrine," that phrase is a misnomer under Article 3, and the Court should consider abandoning the term. "Delegation doctrine" is a doubly imprecise and misleading phrase: first, it is used to describe a statute that actually *divests* lawmaking authority to the executive; second, it implies that the limits on executive-branch lawmaking are rooted in a court-created doctrine rather than the text of the Arizona Constitution.

"Delegation" falsely implies an easily revocable transfer. When a political or governmental entity "delegates" its powers, it always retains the authority to unilaterally revoke its delegation. An A.R.S. Title 32 board, for example, that "delegates" statutorily authorized powers to a subordinate (such as the board's executive director) has the right to terminate that arrangement at any time, for any reason, and without any need to secure the assent of the delegatee or any other person or institution.

That is not the case when a *statute* purports to confer lawmaking powers on the executive. Although the legislature may revoke this arrangement, it may do so only by repealing or amending the statute (A.R.S. § 26-303(E)) through bicameralism and presentment, or voter-enacted initiatives or referenda. For legislation that is not an initiative or a referendum, the governor is empowered to veto any effort to withdraw powers that a statute vests in the executive, so the legislature cannot unilaterally revoke a transfer of authority that a predecessor legislature made via statute. Ariz. Const. art. 4, pt. 1, § 1(6)(A). The legislature must obtain the governor's assent, or it must secure veto-proof supermajorities in both the House and the Senate, to undo any previous transfer of authority. Ariz. Const. art. 5, § 7.

A statutory transfer of lawmaking power to the executive thus ties the hands of the legislature. When the legislature by statute transfers legislative power to the executive, it cannot recall that transferred power easily. Thus, despite the term 'nondelegation,' a statutory transfer of legislative power does not merely delegate legislative power, it divests that power—for it limits the legislature's freedom to reassert its legislative powers.

It is widely accepted that one legislature cannot bind a future legislature except by passing a statute (or an initiative or referendum, Ariz. Const. art. 4, pt. 1, § 1(6)(C)). So, for example, neither the House nor the Senate can pass a rule that forces a future legislature to follow certain procedures. Yet permitting delegation to the executive allows this forbidden outcome. By transferring legislative power to the executive department, a current legislature can get the executive to make law without going

through bicameralism and presentment—policies that a future legislature cannot reverse without taking extremely difficult steps.

The Court should reject the phrase "delegation" in favor of employing the Constitution's terminology for it: divestment. *See* Ariz. Const. art. 4, pt. 1, § 1 ("The legislative authority of the state shall be *vested* in the legislature") (emphasis added); Ariz. Const. art. 6, § 1 ("The judicial power shall be *vested* in an integrated judicial department") (emphasis added). Statutes like A.R.S. § 26-303(E) that divest the legislature of legislative authority by conferring it on the executive are violating the Arizona Constitution itself—not merely some judicially-created "doctrine" or precedents. Hence, using the term "nondelegation doctrine" both misdescribes and understates the problem with statutes that give lawmaking authority to the executive, and the widespread use of this nomenclature stacks the deck in favor of the executive and against the judicial enforcement of the Article 4 and Article 6 Vesting Clauses. At the very least, this Court should be as forthright as was the legislature that enacted A.R.S. § 26-303(E)(1) (emphasis added) when it stated that the "governor shall have … all police power *vested* in the state by the constitution and laws of this state in order to effectuate the purposes of this chapter."

Instead of addressing whether A.R.S. § 26-303(E) violates the "nondelegation doctrine," the Court should ask whether it contravenes Article 4's Vesting Clause (in addition to asking whether it contravenes Article 3). For example, the U.S. Supreme Court's terminology is no different from the language it employs when discussing statutes that impermissibly transfer U.S. Constitution's Article II power from the President to Congress. When *Myers v. United States*, 272 U.S. 52 (1926), disapproved a

federal statute that forbade the President from removing executive officers without the advice and consent of the Senate, the U.S. Supreme Court declared that the statute contravened the "vesting" and "take-care" clauses in Article II, not some court-created "non-arrogation doctrine." 272 U.S. at 163–64.

The Arizona Constitution similarly forbids arrangements that transfer legislative power from the legislature to the executive. A statute cannot reallocate authority that the Arizona Constitution itself has established—regardless of whether the statute is moving executive powers into the legislature or legislative powers into the executive—and statutes that improperly allocate powers among the branches offend the command of the relevant vesting clause, rather than a mere judicial "doctrine" or precedent. And it does not matter that the branches themselves have assented to this power transfer, because the people forbade it in the constitution to protect *their* liberty.

When a statute transfers legislative powers to the executive (as in this case)—or when a statute transfers executive powers to the legislature (as in *Myers*, 272 U.S. at 163–64, or *Woods*, 189 Ariz. at 277), it is "divesting" rather than "delegating" the powers that the respective constitutions vest in a specific branch of government. No one would say that President Grant "delegated" his removal powers to the Senate when he signed the law that forbade the removal of postmasters without Senate consent. *See* Act of Congress of July 12, 1876, 19 Stat. 80, 81, *declared unconstitutional in Myers*, 272 U.S. at 107. That is because neither President Grant nor his successors could have rescinded this divestiture of presidential power without first persuading Congress to repeal or amend the earlier statute. It is equally misleading to say that Arizona's legislature has

"delegated" its legislative authority by enacting A.R.S. § 26-303(E) that it cannot revoke without securing the governor's assent or overriding the governor's veto.

Arizona Constitution's Article 4 "vest[s]" the legislative authority in the legislature. Legislative authority "properly belong[s]" in the legislature—and executive authority, in the executive—under Arizona Constitution's Article 3. A.R.S. § 26-303(E), if it confers legislative authority on the governor, contravenes Articles 3 and 4 by "divesting" the legislature of its powers and assigning them to other institutions.

III. THE CHIEF EXECUTIVE MAY NOT CREATE LAWS

A. Arizona's Constitution Does Not Allow the Chief Executive to Create Legislation

The Court should repudiate the three main legal fictions that have sustained the legislature's divestiture of lawmaking powers to the executive. The Court has been asked to sustain the executive orders at issue here because the executive department can point to a statute that authorizes (or that could be reasonably construed to authorize) the practice of executive lawmaking. The fictitious character of these three ideas makes them poor excuses for the legislature's attempt to divest itself of authority that the Arizona Constitution vested uniquely in it. The Court should reconsider—or at least call into question—the most commonly invoked fictions that are used to justify executive lawmaking.

1. The Challenged Executive Orders Cannot Be Characterized as Merely "Executing" the Law

The first fictitious idea is that the executive is "executing" the law whenever the executive department regulates pursuant to legislative authorization—even when the

underlying statute empowers the executive to enact rules (as seen in the challenged executive orders here) that carry the force of a legislatively enacted statute, and even when it gives the executive vast discretion ("all police power") to choose the rules that will be enacted. Not even James Landis, the leading expositor and defender of administrative power during the twentieth century, believed this fiction. Landis wrote that "[i]t is obvious that the resort to the administrative process is not, as some suppose, simply an extension of executive power" and that "[c]onfused observers have sought to liken this development to a pervasive use of executive power." James M. Landis, *The Administrative Process* 15 (Yale U. Press 1966).

Landis is right. The notion that an executive is merely "executing" the law when it is choosing policies and imposing those policy choices in the form of rules is a transparent fiction and is incompatible with the jurisprudence of the U.S. Supreme Court and this Court. The executive department acts as the lawmaker when issuing rules that bind the public, which is why courts and commentators describe such executive work product as "legislative rules." *See, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("We described a substantive rule—or a 'legislative-type rule'—as one 'affecting individual rights and obligations.'" (citations omitted)); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) ("Legislative, or substantive, regulations are issued by an agency pursuant to statutory authority. … Such rules have the force and effect of law." (cleaned up)); Kenneth Culp Davis, 2 Administrative Law Treatise § 7:8 at 36 (2d ed. 1979) ("A legislative rule is the product of an exercise of delegated legislative power to make law through rules. … [V]alid legislative rules have about the same effect as valid statutes; they are binding on courts.").

The U.S. Supreme Court described the executive department's rulemaking and adjudicatory powers not as "executive" but as "quasi-legislative" and "quasi-judicial." *See, e.g.*, *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (describing executive rulemaking as "legislative or quasi-legislative activities"); *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). In short, there is nothing "executive" about the challenged executive orders. They are, in the main, suspect executive lawmaking.

2. The Challenged Executive Orders Do Not Merely Fill Gaps Left Open by Statutes

The second fiction is the idea that executive lawmaking is merely "specifying" or "filling in the details" of a statutory standard that cannot be written in advance to account for all contingencies. *See, e.g.*, *United States v. Grimaud*, 220 U.S. 506, 517 (1911) ("[W]hen Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations."). But even where authorizing statutes offer governing standards, the authorized executive is not merely specifying or filling in details. As is widely understood, such statutes typically leave the most difficult legislative questions to the executive—indeed, legislators notoriously use such statutes precisely to avoid making difficult legislative decisions. *See* David Schoenbrod, *Power Without Responsibility*, 9–19, 55–59, 72–94, 102–105, 157–59 (Yale U. Press 1993).

Specification is especially fictitious here because A.R.S. § 26-303(E) does not even provide a governing standard for the governor to "specify." The statute seemingly utters the magic words "all police power" in an attempt to give the governor *carte blanche*

to decide what—if anything—should be done during a pandemic like Covid-19. The executive is not "specifying" or "filling in the details" of anything. It is creating brand new law. The legislature divested these quintessentially legislative choices to the executive department—which it had no constitutional right to do.

3. A.R.S. § 26-303(E) Provides Neither a "Sufficient Basic Standard" Nor an "Intelligible Principle"

The third fiction is the idea that the executive cannot be involved in lawmaking if the legislature has provided a "sufficient basic standard" (or an "intelligible principle") that may "be inferred from the statutory scheme as a whole" to inform the executive's discretion. *Arizona Mines*, 107 Ariz. at 205–06; *Ethridge v. Ariz. St. Bd. of Nursing*, 165 Ariz. 97, 104 (App. 1989) (applying the "intelligible principle" standard). Acts of lawmaking and legislation do not depend on whether some other entity has supplied an "intelligible principle" that purports to guide the legislative decision. Every legislative act is guided and controlled by an "intelligible principle" supplied by the enumerated-powers regime, or specific prohibitions imposed on the legislature (*see, e.g.*, Ariz. Const. art. 2, §§ 4, 13 (Due Process and Equal Privileges and Immunities Clauses); Ariz. Const. art. 4, pt. 2, § 19 (Special Law Clause)). The legislature must always connect its statutes to one or more of those "intelligible principles" that define and limit what the legislature may do. But the legislature is most assuredly "legislating" when it enacts statutes, even though it does so pursuant to a vesting of authority (by the Arizona Constitution) that limits and controls it with a series of "intelligible principles." The result is no different when the executive issues an edict under a statute that confers powers defined by a "sufficient basic standard"—such as an instruction to "exercise … all police power

vested in the state." A.R.S. § 26-303(E)(1). Every lawmaking entity has power that is authorized or vested in it by *somebody*, and there is almost always some semblance of an "intelligible principle" that defines the boundaries of those powers. But that does not change the legislative character of the resulting edict.

Besides, the Arizona Constitution's prohibition on executive lawmaking is not a prohibition on *how* laws are made (*e.g.*, by reference to an "intelligible principle" or "sufficient basic standard"), it is a prohibition on *who* makes the laws. Only the legislature itself is empowered to do so. The separation of powers is also a physical separation of who exercises each power. Rather than perpetuate the notorious fictions critiqued above, this Court should recognize that the legislature has asked the governor to exercise legislative authority in its stead, and the governor has complied—all in violation of the Arizona Constitution's vesting of legislative power in the legislature.

B. A.R.S. § 26-303(E) Violates the Arizona Constitution by Authorizing the Governor to Act as Both Lawmaker and Law Enforcer

The constitutional problem with A.R.S. § 26-303(E) is both simple and obvious. It allows the chief executive and/or his designees to act as both lawmaker and law enforcer. The governor—and the governor alone—gets to decide whether and to what extent Arizonans' rights and civil liberties are curtailed. At the same time, the governor's designees are empowered to decide whether to prosecute those who violate governor-made law.

When heads of administrative agencies enjoy both rulemaking power and oversight on agency enforcement under their authorizing statutes, this combination is defended on the theory that the Arizona Constitution's Article 3 requires only a

separation of functions. From this perspective, it is said that the Administrative Procedure Act, A.R.S. § 41-1001–1092.12, sufficiently segregates the different legislative, executive, and adjudicatory functions within agencies as to leave few serious concerns about the combination of lawmaking and prosecution in a single agency. But unlike the authorizing statutes of administrative agencies, which make at least some effort to allocate different governmental functions to different persons, A.R.S. § 26-303(E) empowers a single person—the governor—personally to make the rules and enforce them. A.R.S. § 26-303(E) thus does not keep the functions separate. On the contrary, it combines them in violation of the theories that are said to justify administrative power.

Indeed, A.R.S. § 26-303(E)'s combination of powers in a single person violates the Arizona Constitution. By vesting legislative and executive powers in different branches of government, the Arizona Constitution bars the combination of these powers in one agency, let alone one person. Nor should this be a surprise, for the combination of such powers in one body (institutional or personal) has long been considered very dangerous. *See* Montesquieu, *The Spirit of the Laws* (1748) ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."); Hamburger at 261 ("The combination of powers … gives them a power of extortion"; for example, the executive, "by threatening executive or legislative action" can "pursu[e] one power by threatening the use of another."). But the strongest arguments against A.R.S. § 26-303(E)'s combination of lawmaking and prosecutorial

powers in the governor do not rest merely on the administrative theory of separated functions, nor even on general ideas about the Arizona Constitution's separation of powers.

A.R.S. § 26-303(E) is incompatible with the chief executive's duties. The governor is not just another head of a state agency. He is the *chief* executive. Only the governor has the obligation to "take care that the laws [are] faithfully executed." Ariz. Const. art. 5, § 4. That duty is in tension with this supposed A.R.S. § 26-303(E) duty to enact law. By enacting binding rules under A.R.S. § 26-303(E) (as evidenced in the challenged executive orders), the chief executive will inevitably be inclined in favor of his own enactments, in favor of their rigorous enforcement, and in favor of their constitutionality. The chief executive therefore cannot be expected to objectively "take care that the laws be faithfully executed." The chief executive cannot personally make a law without jeopardizing the chief executive's take-care duty.

A.R.S. § 26-303(E) creates, in other words, an unconstitutional conflict of interest. Under the Arizona Constitution, the chief executive has a duty to the people to take care that the laws are faithfully executed. By locating the governor's office outside of the legislature, the Arizona Constitution enables the chief executive to do his duty without the conflict of interest that would be inevitable if he also enacted the laws. In contrast, when the governor makes law, the governor acquires an interest in that law that conflicts with the governor's ability to do his duty to the people—a conflict that the Arizona Constitution carefully avoided in the first place by separating his office from the legislature.

Put more generally, the combination of powers in the governor at work here reveals how this notion of "all police power" corrupts executive power. By transferring lawmaking power to the state's chief executive, A.R.S. § 26-303(E) not only divests the legislature of the power that the Arizona Constitution vested in it, but it also gives the governor a legislative role that is incompatible with the duties that the Arizona Constitution vests in the chief executive—in particular, the duty to take care that the laws be faithfully executed and to transact all executive business with government personnel.

IV. A.R.S. § 26-303(E) REVIVES THE CONSTITUTIONALLY FORBIDDEN SUSPENDING AND DISPENSING POWERS

A.R.S. § 26-303(E) empowers the governor to exclude persons from the ambit of generally applicable statutes and thereby confers upon the governor the long-forbidden suspending and dispensing powers. In allowing the governor to make the statute applicable to certain classes of persons or entities and then change his mind, A.R.S. § 26-303(E) permits him to suspend generally applicable statutes. And in authorizing the governor initially or later to pick and choose which classes of persons or entities are not covered and even to relax hand-picked provisions of generally applicable statutes, A.R.S. § 26-303(E) allows him to dispense with the state's statutes.

This revival of the monarchical suspending and dispensing powers violates Article 4's vesting of legislative authority in the legislature. Early English kings claimed an absolute power to suspend statutes for all persons and to dispense with statutes for particular persons, and these powers came to be viewed as incompatible with legislative power. Hamburger at 69 (quoting, for example, Sir William Williams: "Is there anything

more pernicious than the dispensing power? There is an end of all legislative power, gone and lost."). The exercise of such powers did much to provoke the English Revolution of 1688, and in response, the English Declaration of Rights in 1689 barred any exercise of the dispensing or suspending powers unless authorized by Parliament. *Id.* ("That the pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament is illegal" and that "no dispensation by non obstante of or to any statute or any part thereof shall be allowed but that the same shall be held void and of no effect except a dispensation be allowed of in such statute.") (quoting Declaration of Rights, 1 William & Mary, sess. 2, cl. 2 (1689)).

Early American state constitutions vested legislative power in their legislatures and thereby generally defeated executive dispensations and suspensions of statutes. But about half the early state constitutions followed the English Declaration of Rights in leaving room for executive suspensions of statutes with legislative authorization. The Maryland Constitution, for example, provided that "no power of suspending Laws, or the execution of Laws, unless by, or derived from the Legislature, ought to be exercised, or allowed." Md. Decl. of Rights, Art. 9. The suspending and dispensing powers were not entirely abolished in England. These two powers were illegal if merely asserted by the Crown, but perhaps could come back to life if allowed by Parliament. Hamburger at 69. In other words, if the English rule were viewed as being adopted in America, at most only the legislature has the power to suspend or dispense with statutes—and it may not divest that power to the executive.

The United States Constitution is less generous than the English Revolution of 1688, however. It leaves space only for a suspension of *habeas corpus*, only in extreme

circumstances, and only when Congress itself suspends the writ. U.S. Const. art. I, § 9. The U.S. Constitution thus bars any executive dispensing or suspending of statutes. The Arizona Constitution's Article 3 categorically rejects executive suspension or dispensation. Put differently, under Arizona's Constitution, the state legislature can enact a law. So too can it temporarily or permanently repeal or otherwise contradict it, the new enactment being the means of displacing the old, and subject to limits imposed on such lawmaking by the state constitution. The chief executive can only take care that the law enacted by the legislature is faithfully executed.

Arizona's Constitution does not have a provision like the one contained in the Massachusetts Constitution: "The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for." Mass. Const. pt. 1, art. 20. Assume for the sake of argument that Arizona's Constitution implicitly gives the legislature the power to suspend laws and that such authority could be validly divested by the Arizona legislature to the Arizona chief executive. Under this assumption, A.R.S. § 26-303(E) at most permits the governor to *suspend* the law for all in a true emergency, but he certainly may not *dispense with* the law by applying it to some, and not to others. The Massachusetts Supreme Judicial Court said the following in this regard almost two centuries ago:

> [I]t ought not to be presumed that the legislature intended to do what by the constitution they have no authority to do, and we think it very clear that they have no authority by the constitution to suspend any of the general laws, limiting the suspension to an individual person, and leaving the law still in force in regard to every one else. This would not be

> suspending a law by virtue of their constitutional power so to do in cases of emergency, but it would be to dispense with the law in favor of an individual, leaving all other subjects of the government under obligation to obey it; and we do not find any such dispensing power in the constitution.

In re Picquet, 22 Mass. 65, 69–70 (1827). "The soundness of this salutary principle has never been questioned." *Paddock v. Brookline*, 197 N.E.2d 321, 324 (Mass. 1964). If a law is suspended, it has no generally applicable force or operation. *In re Picquet*, 22 Mass. at 69–70. Dispensation, however, does not apply equally to all—it favors some over others. It is "the epitome of the absolute and unconstitutional prerogative." Hamburger at 65.

A.R.S. § 26-303(E) attempts to give the governor suspending *and* dispensing powers that the Arizona Constitution withheld even from the legislature. *See, e.g.*, Ariz. Const. art. 4, pt. 2, § 19 ("No local or special laws shall be enacted … [w]hen a general law can be made applicable."); Ariz. Const. art. 2, § 13 ("No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."). The challenged executive orders, however, seem to have taken this attempted legislative divestment of police powers to include the power to *dispense with* generally applicable laws. That power is foreign to the structure of government in America. But more importantly, under the Arizona Constitution, the legislature having no such power itself, could not have transferred a power it never possessed to the executive department. *Nemo dat quod non habet*: the legislature cannot give what it does not have.

The challenged executive orders do not merely suspend the law; they dispense with it. For example, the governor could suspend the annual fees payable by licensed professionals to the respective licensing boards.[5] Such a full suspension might be permissible with sufficient legislative authorization for it. However, were the governor to pick winners and losers by suspending the laws for some but not all individuals or entities to whom such laws are applicable, that would be an unlawful dispensation. *See In re Picquet*, 22 Mass. at 70 ("It is obvious that this article [Mass. Const. pt. 1, art. 20] gives no authority to dispense with the obligations of any particular law, in favor of individual citizens or strangers, leaving the law still in force in regard to all other members of the community.").

Very few would object to reasonable limitations placed on the enjoyment of Arizonans' rights and civil liberties for purposes of protecting Arizona from Covid-19. But burdens on rights may only flow from an otherwise constitutionally valid, legislatively enacted, generally applicable law. Neither A.R.S. § 26-303(E), nor the executive orders issued in pursuance thereof, pass constitutional muster.

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[5] *But see* Ariz. Const. art. 9, § 1 ("The power of taxation shall never be surrendered, *suspended* or contracted away.") (emphasis added).

CONCLUSION

The Court should confine A.R.S. § 26-303(E) and the resulting executive orders within the bounds of the Arizona Constitution.

Respectfully submitted, on February 26, 2021.

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SUPREME COURT OF ARIZONA

JAVIER AGUILA, *et al.*, Appellants, v. **DOUG DUCEY**, in his official capacity as the Governor of the State of Arizona; **THE ARIZONA DEPARTMENT OF HEALTH SERVICES**; and **THE ARIZONA DEPARTMENT OF LIQUOR LICENSES AND CONTROL**, Appellees.	Arizona Supreme Court Case No. CV-20-0335-PR Court of Appeals, Division One Case No. 1 CA-CV 20-0598 Maricopa County Superior Court Case No. CV2020-010282

CERTIFICATE OF COMPLIANCE
FOR
BRIEF *AMICUS CURIAE* OF THE
NEW CIVIL LIBERTIES ALLIANCE
IN SUPPORT OF APPELLANTS
FILED WITH CONSENT OF ALL PARTIES

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I hereby certify that the attached Brief complies with Arizona Rules of Civil Appellate Procedure 4(b) and 14(a)(4) because it is double spaced, uses a proportionately spaced 14-point Garamond typeface, and has a word count of **7,608** words, which does not exceed the applicable 12,000-word limit.

Dated: February 26, 2021

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CERTIFICATE OF SERVICE
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I hereby certify that on February 26, 2021, I electronically filed the attached Brief via the Court's electronic filing system. Counsel for all parties are registered users of TurboCourt and service will be accomplished by TurboCourt. I also emailed courtesy copies of the attached Brief to counsel for all parties, *viz.*,

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