IN THE SUPREME COURT
OF THE STATE OF ARIZONA

CLINTON ROBERTS and **DONNA CHRISTOPHER-HALL,** individually and on behalf of themselves and as representatives for similarly situated class members, Plaintiffs/Appellants, v. **STATE OF ARIZONA,** a political entity, Defendant/Appellee.	Arizona Supreme Court No. CV-21-0077-PR Court of Appeals, Division One No. 1 CA-CV 20-0060 Maricopa County Superior Court No. CV2019-005879

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt, California corporation established to litigate matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited constitutional government, private property rights, and individual freedom.

PLF has vast experience defending the constitutional principle of separation of powers in the arena of administrative law in courts throughout the nation. PLF has obtained important administrative-law victories from the U.S. Supreme Court.

This case implicates grave concerns about administrative overreach and separation of powers. PLF discusses these principles in this brief. After oral argument, the Court ordered the parties, and invited amici, to submit briefs addressing three questions. Both parties agree that federal law incorporated via state regulation resolves this case in their favor. Neither party is expected to have much interest in addressing the serious constitutional problems with incorporation by reference. PLF does. So PLF's amicus brief supports neither party.

PLF will also file a separate motion for leave to participate in oral argument if the Court sets the case for re-argument. Any clarification PLF can provide during oral argument will aid the Court in resolving the nondelegation and separation-of-powers issues of first importance to Arizona. No party or its counsel authored this brief, in whole or in part. ARCAP 16(a), 16(b)(1)(A).

ARGUMENT

Constitutional problems do not arise if this Court were to empty the legal toolkit to interpret A.R.S. § 23-392. Since the state statute trumps state regulations and because

the state statute fully resolves the questions of law, the Court should simply interpret and apply the state statute as written. The Court should vacate the Court of Appeals' and Superior Court's dangerous conclusion that Section 392 delegates authority to a state agency to incorporate federal law. But it should affirm the Court of Appeals' judgment that the motion to dismiss was erroneously granted so that the case can proceed through discovery and trial as needed in Superior Court.

A.R.S. § 41-1028 and its implementing regulation A.A.C. § R1-1-414, while they permit incorporation by reference, are mere tools an agency can use to incorporate by reference policy developed by a separate sovereign or a private party *provided* there is express delegated authority to incorporate in the first place. There is *no* specific, express incorporation-by-reference authority in Section 392. Nor can it be found in the statute giving the Department of Administration generic rulemaking authority, A.R.S. § 41-743(B). To the contrary, Section 392 tugs against incorporation.

More fundamentally, any statute delegating the authority to incorporate by reference—expressly or impliedly—is constitutionally suspect. It violates the nondelegation doctrine and the Separation-of-Powers Clause of the Arizona Constitution to outsource the state's legislative power. The Court should so hold and vacate the decision below.

I. Resort to State Regulations or Incorporation by Reference Is Inapposite Because a Plain Reading of the State Statute Resolves this Case

A.R.S. § 23-392 fully resolves this case. The Court should "empty" the "legal toolkit" to interpret Section 392 to avoid constitutional problems that otherwise arise. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

Section 392(A)(1) instructs the state employer to look at the state employee's "job classification" in "federal law." Federal statute, 29 U.S.C. § 213, classifies employees as exempt or non-exempt.[1] Section 392(A) simply states that if the state employee would be classified as non-exempt under 29 U.S.C. § 213, then that employee "shall be compensated" for overtime pay at 1.5 times the regular rate, A.R.S. § 23-392(A)(1), or at 1.0 times the regular rate if the employee would be classified as exempt, A.R.S. § 23-392(A)(2). "When a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty." *Kingdomware Technologies, Inc. v. United States*, 579 U.S. 162, 172 (2016).[2] The words "shall be compensated" leave no room for discretion to incorporate a body of law that would make certain categories of work non-compensable. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112–15 (Thompson/West 2012) ("Mandatory words impose a duty; permissive words grant discretion.").[3]

It does not matter whether federal regulations, federal-agency interpretive bulletins (which do not carry the force and effect of law), federal cases, or state regulations make non-compensable certain categories of work performed by employees. Section 392 makes time spent working mandatorily compensable—"shall be compensated"—for state employees at varying rates depending on their

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[1] "The provisions of sections 206 [minimum wage] … and 207 [overtime compensation] of this title shall not apply with respect to … [defined categories of employees]." 29 U.S.C. § 213 (section titled "Exemptions").

[2] A.R.S. § 23-392 uses "shall" in subsections (A), (A)(2), (D), (D)(2), (G), and "may" in subsections (B), (E), (F).

[3] *See also* William N. Eskridge, Jr., *et al.*, *Legislation and Statutory Interpretation* 266–67 (2d ed. 2006) (same).

(non)exempt "job classification." Granted, whether an employee should be categorized as exempt or nonexempt can be a complicated question. But it is a different question than whether, once an employee is classified, that employee is eligible or entitled to overtime compensation for employer-required security screenings.

By operation of A.R.S. § 23-392, federal statute, 29 U.S.C. § 213, provides the answer to the former question—whether Plaintiffs' "job classification" is exempt or non-exempt. And that question is *not* before this Court. The parties do not dispute the Plaintiffs' job classification under 29 U.S.C. § 213. They instead dispute whether this particular *activity*—security screenings—is work.

A.R.S. § 23-392 provides the answer to the latter question, which *is* before this Court—whether time spent in employer-required security screenings is "work" such that it is mandatorily compensable. Whether Plaintiffs "worked" when they spent time in that activity is chiefly a question of law but could also be viewed as a mixed question of law and fact. The point is, this Court as per its usual practice must interpret the undefined and generic word "worked" in Section 392 as having an ordinary public meaning; resort to state regulations or incorporation by reference is inapposite to that inquiry.

This Court ascribes the ordinary public meaning to generic undefined words such as "worked." It is therefore the state judiciary's prerogative—not that of a state agency—to determine the meaning of the generic word "work" in the "context" in which it arises. *BSI Holdings, LLC v. Arizona Dep't of Transportation*, 244 Ariz. 17, 18, 20 ¶¶ 1, 13 (2018) (concluding that the "ordinary meaning" of the word "day" "can be construed only in the context of the days an aircraft is 'based in' the state"). In *BSI*

Holdings, this Court remanded to the trial court for further factual development. 244 Ariz. at 21 ¶ 22, 22 ¶ 27 ("statutory or factual context"). The Court should do the same here if it appears that factual development would benefit the Court in resolving whether time spent in employer-mandated security screenings is "wor[k]" for purposes of A.R.S. § 23-392. If it does, then Section 392 requires payment of overtime.[4]

The case comes to this Court on the initial grant of a motion to dismiss, which the Court of Appeals reversed. No factual development has occurred. Plaintiffs have plausibly pled that time spent in employer-required security screenings is "wor[k]" and therefore their case should survive the motion to dismiss. This Court should affirm the Court of Appeals' judgment reversing the Superior Court's order dismissing the complaint but vacate the Court of Appeals' decision because of its flawed reasoning, and remand to the Superior Court so that the parties can proceed to discovery and trial as needed. *Roberts v. State*, 250 Ariz. 590 ¶ 38 (App. 2021) ("Decision").[5]

II. A.R.S. §§ 23-392, 41-743(B), 41-1028 Do Not Delegate Incorporation-By-Reference Authority to the Department of Administration

Nothing in A.R.S. §§ 23-392, 41-743(B) delegates to the Department of Administration the authority to incorporate federal law by reference. In fact, Section 392 is carefully crafted to preclude reading any such delegation into its words.

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[4] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)—the case from which the federal *Skidmore* deference doctrine gets its name—was a Fair Labor Standards Act (FLSA) case. Leaving aside the deference doctrine it spawned, on the FLSA question, *Skidmore* concluded that (1) it is the court's job, not any agency's, to determine whether time spent on specific activities is compensable as overtime for work performed, and (2) that question is a "question of fact to be resolved by appropriate findings of the trial court." *Id.* at 136–37.

[5] The Superior Court's ruling granting the motion to dismiss is referred to as "Ruling."

A comparison to statutes that expressly delegate incorporation-by-reference authority is helpful. For example, A.R.S. § 11-251(38) (emphasis added) delegates to Arizona counties the authority to "establish salary and wage plans" for "county employees, including those employees covered by [A.R.S. § 23-391 *et seq*.]," by "*incorporating* classifications and conditions prescribed by the fair labor standards act." A.R.S. § 23-392 contains no such delegatory language. So, Arizona counties have the discretion—"may"—to "incorporat[e]" by reference "classifications and conditions prescribed by the fair labor standards act." A.R.S. § 11-251(38). The Department of Administration does not. Scalia & Garner, *supra*, at 112–15 (concluding that "[m]andatory words" like "shall" "impose a duty" and "permissive words" like "may" "grant discretion").

Another example: The Arizona Board of Psychologist Examiners has incorporated by reference the ethics code written by a private industry group, the American Psychological Association, because the statute itself refers to the ethics code of that private organization. A.R.S. § 32-2061(16)(z); A.A.C. § R4-26-301. These examples show that the Arizona legislature knows how to delegate incorporation-by-reference authority to an executive agency. Such delegatory language is lacking from A.R.S. §§ 23-392, 41-743(B).

Furthermore, the legislature has already strictly confined the incorporation-by-reference practice in Arizona. A.R.S. § 41-1028 gives at least seven separate criteria for valid incorporation by reference, all of which must be met. The Secretary of State, via rulemaking, has added more criteria to carefully cabin the incorporation-by-reference practice. Those are contained in A.A.C. § R1-1-414.

Relevant here, the statute says that a state agency can incorporate by reference only "a code, standard, rule or regulation" adopted by "an agency of the United States." A.R.S. § 41-1028(A). That is, the agency cannot incorporate by reference any federal statutes, federal guidance documents, or federal case law. *See* Scalia & Garner, *supra*, at 93–100 (describing the omitted-case canon; "a matter not covered is not covered"); *id.* at 107–11 (describing the negative-implication canon; "[t]he expression of one thing implies the exclusion of others"). Via A.A.C. § R2-5A-404, the Department could not have incorporated by reference the Fair Labor Standards Act (29 U.S.C. §§ 201–219) or the Portal-to-Portal Act (29 U.S.C. §§ 251–262), interpretive bulletins, or federal case law because those are not "a code, standard, rule or regulation of an agency of the United States."

A.R.S. § 41-1028 and A.A.C. § R1-1-414 lay down only the *procedure* for incorporation by reference. The agency must point to some statute that gives it the *substantive* delegated power to incorporate in the first place. Here, the state argues that the delegated power comes from A.R.S. § 23-392 when that section grants the Department no such substantive authority. To the contrary, A.R.S. § 23-392, as discussed above, has all the textual indicia withholding delegation. The word "shall" in subsection (A) leaves no room for agency discretion. *Kingdomware*, 579 U.S. at 172; Scalia & Garner, *supra*, at 112.

In granting the Department's motion to dismiss, the Superior Court relied on federal statutes, regulations, and federal cases instead of relying on Section 392. Ruling at 6 ("*Bus*[*k*] and the federal 'Portal-to-Portal Act', and … provisions of the Code of Federal Regulations" show that the Plaintiffs' "claims for

overtime compensation … are not compensable.") (citing *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513 (2014)). In reversing the Superior Court, the Court of Appeals did the same. Decision ¶ 25. But while the Superior Court concluded that "Arizona has *implicitly* adopted the 'Portal-to-Portal Act' by the references set forth in the Arizona Administrative Code," Ruling at 5 (emphasis added), the Court of Appeals concluded that there is "*explicit* reference to 'federal law' in [A.R.S. § 23-392] along with the express incorporation of C.F.R. pts. 553 and 778," which "allow" the court to afford *Christensen* deference in this case even to "interpretive bulletins" that are "not controlling." Decision ¶ 25 (quoting *Christensen v. Harris County*, 529 U.S. 576 (2000)) (emphasis added). According to the lower court, an agency can smuggle in federal deference doctrines via such incorporation by reference despite Arizona's firm rejection of deference. *See* A.R.S. § 12-910(F).

The court below assumed that the legislature gave the Department of Administration the authority to incorporate by reference—through the "explicit reference to 'federal law'" in A.R.S. § 23-392 and the Department's generic authority "to adopt rules and procedures regarding the administration of state personnel" found in A.R.S. § 41-743(B). Decision ¶¶ 24–25. Neither section can sustain incorporation by reference. A much clearer statement from the legislature is needed for that. Given all the ways in which federal courts defer to or acquiesce in federal administrative agencies' edicts, even they "expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (*per curiam*) (quoting *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). No deference doctrine survives in Arizona. A.R.S. § 12-

910(F). This Court should also require the state legislature to provide a clear statement that it is conferring the incorporation-by-reference authority on an agency. *See, e.g.*, A.R.S. §§ 11-251(38); 32-2061(16)(z). Were it otherwise, any state agency could point to its generic rulemaking authority (such as A.R.S. § 41-743(B))[6] to override A.R.S. § 12-910(F), enact vast swaths of law, and not worry about the bicameralism-and-presentment or Voter Protection Act procedure of Arizona's Constitution. Ariz. Const. art. 4, pt. 1, § 1; Ariz. Const. art. 5, § 7.

III. If Read Broadly, A.R.S. §§ 23-392, 41-743(B) Would Violate Article 3 of the Arizona Constitution

No party disputes that this Court should read A.R.S. §§ 23-392, 41-743(B) broadly to grant the Department of Administration open-ended incorporation-by-reference authority. But reading Sections 392 and 743 broadly would violate Article 3 of the Arizona Constitution. This Court applies the constitutional-doubt canon to read statutes narrowly if reading them broadly would cast doubt on the statute's constitutionality. *State v. Arevalo*, 249 Ariz. 370, 373 ¶ 9 (2020) (quoting Scalia & Garner, *supra*, at 247–51). The Court should construe Sections 392 and 743 as withholding the delegation of any incorporation-by-reference authority to the Department of Administration.

[6] *See also* A.R.S. § 41-1030(D)(2) (forbidding agencies ("shall not") from using "a general grant of rulemaking authority" to "[m]ake a rule … to supplement a more specific grant of rulemaking authority").

A. Read Broadly, Sections 392 and 743 Would Violate the Nondelegation Doctrine

The nondelegation doctrine as annunciated by federal courts states that agency action "must always be grounded in a *valid* grant of authority from [the legislature]" and the U.S. Constitution is understood to "bar" the legislative power's "further delegation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (emphasis added); *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). Arizona cases have alluded to the same "sufficient basic standard" and "intelligible principle" formulations as are used by federal courts. *State v. Arizona Mines Supply Co.*, 107 Ariz. 199, 205–06 (1971); *Ethridge v. Ariz. St. Bd. of Nursing*, 165 Ariz. 97, 104 (App. 1989).

The legislature cannot leave the matter to the agency "without standard or rule, to be dealt with as [the agency] please[s]." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 418 (1935). *Panama Refining* struck down a statute granting the President authority to outlaw transportation of excess oil without providing "definition of circumstances and conditions in which the transportation is to be allowed or prohibited." *Id.* at 430. *A.L.A. Schechter Poultry Corp. v. United States* struck down a statute enabling the President to approve codes of fair competition, leaving him free to "exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable." 295 U.S. 495, 537–38 (1935).

If A.R.S. §§ 23-392 and 41-743 allow the Department of Administration to incorporate by reference any federal acts, federal regulations, federal interpretive bulletins, or federal case law relating to employer–employee relations and deference doctrines, then it grants even broader authority than the statutes in *Panama Refining* and *Schechter* that the U.S. Supreme Court struck down. Almost *any* labor-relations law—the

Fair Labor Standards Act, the Portal-to-Portal Act, the National Labor Relations Act—and the thousands of pages of federal regulations issued by federal agencies, the agencies' guidance documents which are not law, and any federal-court cases including the deference doctrines on which those cases rely—could wholesale be incorporated by reference into Arizona law via these two sections if an agency chose to do so. A.R.S. §§ 23-392, 41-743(B). The executive agency would possess limitless discretion to make law concerning anything that could conceivably lead to overtime compensation or paid time off—from sick leave to maternity/paternity leave, to release time. *Cf. Cheatham v. DiCiccio*, 240 Ariz. 314 (2016) (describing the practice of paying government salaries to government employees working for private unions as "release time").[7] The clause "if by the person's job classification overtime compensation is mandated by federal law" is a wafer-thin reed on which to rest such sweeping power.

Moreover, Section 392 does not define "work." Nor does the statute indicate that the term "work" has a technical meaning. From the time spent in donning and doffing uniforms or protective gear for work, to security screenings to get to work, to employer-recommended social-media etiquette, employers, government or private, will always have some job requirements and responsibilities that could be considered work. Yet the statute does not limit as compensable only the time that federal law or the

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[7] If this Court concludes that time spent in employer-required security screenings to get to work is *not* "wor[k]" for purposes of A.R.S. § 23-392, and the Plaintiffs' union were to negotiate a contract making that non-work nonetheless compensable, there would be an open question whether such a compensation plan "agreed to by the employer and the person engaged in law enforcement activities, at the option of the employer" is an illegal subsidy under the Arizona Constitution. *See* Ariz. Const. art. 9, § 7; *Schires v. Carlat*, 250 Ariz. 371 (2021).

Department thinks is compensable. The statute makes "each hour worked" mandatorily compensable ("shall be compensated"). A.R.S. § 23-392(A)(1).

A.R.S. § 41-743(B) also contains no clear statement that the Department is authorized to incorporate by reference anything that fits within the enumerated subject categories. Compare, for example, A.R.S. § 11-251(38) (emphasis added), which specifically permits counties to "incorporat[e] classifications *and* conditions prescribed by the federal fair labor standards act."

If incorporation-by-reference authority can somehow be read into A.R.S. § 41-743(B)(3)(a) ("compensation plans"), a state-agency *rule* incorporating the Fair Labor Standards Act and the Portal-to-Portal Act would be at cross-purposes with two state *statutes*: A.R.S. §§ 23-392 and 41-1028. Between a statute and a rule promulgated by an executive-branch agency, the statute governs. *See, e.g.*, *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act … unless and until Congress confers power upon it."). A.R.S. § 23-392 governs over A.A.C. § R2-5A-404.

The lower court's conclusion that A.R.S. § 41-743(B) endorses incorporation by reference also sets up a triangular conflict between A.R.S. §§ 23-392, 41-743(B), and 41-1028. So that cannot be the best reading of these statutes. This Court interprets statutes to avoid inter-statutory conflicts and makes them "harmonious and consistent" with each other. *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122 (1970); *State v. Patel*, 251 Ariz. 131, 486 P.3d 188, 194 ¶ 24 (2021) ("whenever possible, this Court interprets apparently conflicting statutes in a way that harmonizes them and gives rational meaning to all")

(simplified); Scalia & Garner, *supra*, at 252–55 (describing the related-statutes canon; "[s]tatutes *in pari materia* are to be interpreted together, as though they were one law").

According to the Court of Appeals, the Department can go far beyond determining facts or carrying out "declared legislative policy"—functions that can be validly delegated to an agency under the federal nondelegation doctrine—to wholesale incorporate federal law. *Panama Refining*, 293 U.S. at 426; Decision ¶¶ 24–25. If that reading is correct, Sections 392 and 743 do not give the agency instructions on what to do should a certain set of circumstances arise, leaving the agency to decide when those circumstances occur. They do not limit the factual conditions under which a particular job-related activity ought to be considered "work." It would be "delegation running riot" if Sections 392 and 743 were read so. *Schechter*, 295 U.S. at 553 (Cardozo, J., concurring). More ominously, if read so, Arizona's judicial department would enable a state executive agency to outsource the state's legislative power to a federal executive agency, the Department of Labor. That cannot be the right answer.

The statute delegates, under the broad reading the parties ask this Court to adopt, "an unfettered discretion to make whatever laws [the Department of Administration] thinks may be needed or advisable." *Schechter*, 295 U.S. at 537–38. If read broadly, these state statutes would be void for vagueness, which is another way of applying the intelligible-principle test. *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting). The statutes would allow the agency to pay or not pay employees for performing widespread and commonplace employer-required activities, and rewrite the state's fiscal responsibilities in myriad ways—big or small. But the legislature "does not … hide" such giant "elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468

(2001). Indeed, "[w]e expect [the legislature] to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Alabama Ass'n*, 141 S. Ct. at 2489 (*per curiam*) (quoting *Utility Air*, 573 U.S. at 324).

The legislature has already spoken clearly: all non-exempt employees (so classified under 29 U.S.C. § 213) are to be paid ("shall be compensated") overtime times 1.5 their regular rate and times 1.0 their regular rate if they are classified as exempt. A.R.S. § 23-392(A)(1) & (2). No administrative discretion or delegation to amend that statutory formula can be extracted from that plain language.

B. Arizona Constitution's Article 3 Prohibits Outsourcing of the State's Legislative Power

The nondelegation doctrine is stronger under the Arizona Constitution. Article 3 of the Arizona Constitution prohibits any department from performing the function "properly belonging" to another department. If read to allow broad incorporation by reference, Sections 392 and 743 would transfer the function of legislating government-employer–employee relations, along with its attendant fiscal implications, to the Department of Administration, an executive-branch agency. But both functions—legislating and the power of the purse—properly belong to the state legislature, not to any executive agency. The divestiture of legislative functions from the legislature and their investiture in an executive agency violates the Separation-of-Powers Clause. *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 593 ¶ 14 (2017). It is also a separation-of-powers violation under Article 3 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).

The legislature's legislative authority is "inalienable" from the legislative department to which it "properly belong[s]." *Industrial Commission v. Navajo County*, 64 Ariz. 172, 180 (1946); Ariz. Const. art. 3. The Court should not allow the Department's incorporation by reference to go unchecked in this case. The Court should remain skeptical of any legislative act that divests the legislature 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, by assigning the legislative function to an executive agency. *Cf. City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting) (It is the judiciary's "critical" "duty to police the boundary between the Legislature and the Executive" and it is the judiciary's "task … to fix the boundaries of delegated authority; that is not a task we can delegate to the agency.") (simplified).

The problem with incorporation by reference is not simply a nondelegation-doctrine issue. It is a separation-of-powers question. Executive lawmaking is very different from legislative lawmaking—in structure, substance, and the process used. When an executive agency enacts law, there is no question that the executive department is "exercis[ing] the power [that] properly belong[s] to" the legislative department. Ariz. Const. art. 3. Not even James Landis, the leading expositor and defender of administrative power during the twentieth century, believed the fiction that the executive is "executing" the law whenever an executive agency enacts rules in performance of delegated legislative power. James M. Landis, *The Administrative Process* 15 (Yale U. Press 1966) ("It is obvious that the resort to the administrative process is

not, as some suppose, simply an extension of executive power. … Confused observers have sought to liken this development to a pervasive use of executive power.”).

Landis is right. The notion that an executive agency is merely “executing” the law when it is choosing policies and imposing policy choices in the form of rules is a transparent fiction that is incompatible with the Arizona Constitution’s guarantee that Arizonans will be governed by laws enacted by the legislature or through initiatives or referenda. The federal nondelegation doctrine glosses over the obvious substantive and structural difference between the legislative and executive departments in ways that Arizona’s Article 3 does not. This Court has repeatedly looked at which department is performing which function and evaluated whether that function properly belongs to another department—if it does, then it violates the Separation-of-Powers Clause. *J.W. Hancock Enterprises, Inc. v. Registrar of Contractors*, 142 Ariz. 400, 405 (App. 1984); *State ex rel. Woods v. Block*, 189 Ariz. 269 (1997); *Brnovich*, 242 Ariz. 588.

Substantive or structural differences aside, the executive-lawmaking process is different than the legislative-lawmaking process. When an executive agency adopts rules to perform the delegated lawmaking function, it does so through the statutory rulemaking process contained in Arizona’s Administrative Procedure Act, which is crafted for speed and efficiency, and performed by unelected bureaucrats unaccountable to the people. The legislative lawmaking process must comply with Arizona Constitution’s bicameralism and presentment procedure and is performed by elected legislators and a governor, all of whom are fully accountable to the people.

An agency, however, does not even have to follow the rulemaking requirements of the Administrative Procedure Act. Here, the Department did not follow the regular

statutory process that makes rules at least a little bit accountable to the people, so the nondelegation and separation-of-powers concern is even more pronounced.[8]

Incorporation by reference is a transfer of legislative power to an executive-branch agency. Incorporation by reference has run amok in Arizona, as PLF's research has found, and many such rules have used the "exempt rulemaking" process. PLF, Arizona Admin. Code, Incorporation by Reference, https://bit.ly/3r0VK74. Regulatory incorporations are rampant in many areas: health care, transportation, environmental law, agriculture, education, to name a few. There are deep-rooted political and societal disagreements regarding these topics, which strongly suggests that the legislature could not have accomplished what the Department has accomplished in A.A.C. § 2-5A-404 through the legislative process due to the contentious nature of the issue and its fiscal implications for the state. A.R.S. §§ 23-392, 41-743(B), and 41-1028

[8] It appears that the Department of Administration adopted A.A.C. § 2-5A-404 by using the "exempt rulemaking" process. *See* Arizona Secretary of State, Rules, Arizona Administrative Register Volume 18, Issue 44 (2012), https://bit.ly/3IG5ABx; Notice of Exempt Rulemaking, https://bit.ly/3tW7hGM (cited as 18 A.A.R. 2782); 18 A.A.R. 2785 ("[T]his rulemaking is exempt from the requirements of the Administrative Procedure Act"). Using the exempt rulemaking process also means that "no [agency] response to [public] comments is required." 18 A.A.R. 2786. The "[u]nofficial version" of the same rules, which is also available on the Secretary of State's website (Chapter 5, Department of Administration, State Personnel System, https://bit.ly/32xaEbP), contain the following editor's note: "Exemption from [the Administrative Procedure Act] means the Department of Administration did not submit these rules to the Governor's Regulatory Review Council for review; the Department did not submit notice of proposed rulemaking to the Secretary of State for publication in the Arizona Administrative Register; and the Department is not required to hold public hearings on these rules." Thus, adoption of A.A.C. § R2-5A-404 has every indication of midnight rulemaking by an executive agency that was exempt from even the flexible and fast rulemaking requirements of the Administrative Procedure Act.

are hopelessly insufficient to bear the load of such a sweeping transfer of power to an executive agency.

The Court of Appeals assumed that the "legislature is aware of the [Department's] regulations" and concluded that, because the legislature "has not modified or revoked any references to federal law in those regulations," such legislative silence denotes the legislature's endorsement of the Department's overtime-pay regulation, A.A.C. § R2-5A-404. Decision ¶ 24. But legislative silence means only that the legislature did not act. In many cases an issue does not even get to the full legislature and there is no basis to infer anything from the inaction of ninety representatives of the people. Inaction could mean many things: from ambivalence, to laziness, to lack of agreement among the people's representatives regarding which policy to adopt.

Many more bills die than become law. Even more are never even introduced. The Court of Appeals' notion that silence implies assent to the Department's adoption of federal law via incorporation by reference can only apply in a narrow set of circumstances, all of which are absent here. Legislative silence is not an endorsement of the agency's unilateral and wholesale adoption of some other sovereign's policy. Legislative silence cannot be a delegation authorizing the agency to enact laws via incorporation by reference—and cannot be the reason for this Court to legitimize the incorporation by reference contained in A.A.C. § R2-5A-404. This Court should put a stop to such agency abuse of power for it violates the Arizona Constitution's Separation-of-Powers Clause, Ariz. Const. art. 3.

As explained above, the legislature has *not* been silent on the topic. It has made overtime mandatorily compensable for work performed by listed state employees

(A.R.S. § 23-392(H)(1) & (2)) and has left this Court free to construe the generic undefined word "work" without deference to any prior construction given to that word by any federal or state agency or by any federal court.

* * *

In sum, to answer the questions posed by this Court in its Order dated December 17, 2021:

- The Department of Administration could not have incorporated by reference the Portal-to-Portal Act by referencing "the Fair Labor Standards Act" and "FLSA Regulations 29 CFR 553 and 778 (July 2012)." A.A.C. § R2-5A-404. Nor do A.R.S. §§ 23-392(A), 41-743(B), and 41-1028 incorporate the Portal-to-Portal Act.
- The clause "if by the person's job classification overtime compensation is mandated by federal law" refers at most to the non(exempt) job classifications created by 29 U.S.C. § 213, nothing more. Section 392's plain terms make mandatorily compensable overtime "wor[k]" performed by listed government employees at differing formulas depending on whether the employee would be classified as exempt or non-exempt. This Court should decide whether time spent in employer-required security screenings to get to work is "wor[k]."
- The Arizona Administrative Code is not binding because it is at cross-purposes with the statute. More fundamentally, the legislature has not constitutionally delegated to the Department the authority to incorporate by reference federal law and the Code of Federal Regulations. Any statute purporting to delegate such authority should be narrowly construed to avoid rendering the statute

unconstitutional under Arizona's nondelegation doctrine and the Article 3 Separation-of-Powers Clause.

CONCLUSION

The Court should call out the grave constitutional problems inherent in incorporation by reference. The Court should vacate the decision below to firmly reject the lower courts' dangerous conclusion that A.R.S. §§ 23-392, 41-743(B) delegate authority to the Department of Administration to incorporate federal statutes, federal regulations, interpretive bulletins that do not carry the force or effect of law, and federal decisional law interpreting them using the federal deference doctrines, which have no purchase in Arizona. The Court should affirm the Court of Appeals' judgment that the motion to dismiss was erroneously granted—because the Plaintiffs have plausibly pled that they "worked" during the time they spent in employer-required security screenings to get to work—so that the case can proceed through discovery and trial as needed in Superior Court. PLF will file a motion for leave to participate in oral argument if the Court sets the case for re-argument.

Respectfully submitted, on January 26, 2022.

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