

1 Jonathan Riches (025712)
2 John Thorpe (034901)
3 **Scharf-Norton Center for**
4 **Constitutional Litigation at the**
5 **GOLDWATER INSTITUTE**
6 500 E. Coronado Rd.
7 Phoenix, Arizona 85004
8 (602) 462-5000
9 litigation@goldwaterinstitute.org

Aditya Dynar (031583)
Joshua M. Robbins* (P240258)
PACIFIC LEGAL FOUNDATION
3100 Clarendon Boulevard, Suite 1000
Arlington, Virginia 22201
(202) 888-6881
adynar@pacificlegal.org
jrobbins@pacificlegal.org

Attorneys for Plaintiff
**Pro Hac Vice Motion Pending*

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF MARICOPA**

9 UNION LLC d/b/a UNION HOSPITALITY
10 GROUP, an Arizona limited liability
11 company; and GRANT KRUEGER, an
12 individual,

11 Plaintiffs,

12 vs.

13 STATE OF ARIZONA; and PAUL E.
14 BRIERLEY, Director of Arizona
15 Department of Agriculture, in his official
16 capacity,

16 Defendants.

Case No. CV2023-018151

**PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

(Assigned to the Honorable
Scott Blaney)

19 **INTRODUCTION**

20 The Arizona Department of Agriculture (“AZDA”) has decided to completely upend
21 the state’s egg production and sales regulations—imposing economic costs on producers
22 and consumers alike—without the necessary authorization from the Arizona Legislature.
23 As of January 1, 2025, with limited exceptions, all egg-laying hens in Arizona must be
24 housed in a cage-free manner and all eggs sold in the state must come from hens housed the
25 same way. This significant policy decision is properly the responsibility of the Legislature
26 to address. Because the Legislature abandoned its responsibility to set policy on this
27 economically consequential question, AZDA’s cage-free housing regulation meets neither
28 the statutory requirements for validity nor the constitutional minimum for avoiding an

1 impermissible delegation of legislative power. That restricts the rights of Plaintiffs Union
2 LLC and Grant Krueger and leaves them to endure the increased egg prices AZDA says its
3 rule causes—when this rule cannot exist in the first place.

4 Plaintiffs move for summary judgment pursuant to Arizona Rule of Civil Procedure
5 56 on all five counts in Plaintiffs’ complaint. Plaintiffs’ claims raise issues of statutory and
6 constitutional law that do not require discovery to resolve and can be decided now. Because
7 A.R.S. Section 3-710(J) does not authorize AZDA’s cage-free egg rule under either the
8 statutory or constitutional standards, Plaintiffs’ Motion for Summary Judgment should be
9 granted on all counts.

10 BACKGROUND

11 I. Arizona regulates the production and sale of eggs and egg products.

12 AZDA has various regulatory responsibilities for eggs and egg products. *See* A.R.S.
13 §§ 3-701–739. In 2008, the Arizona Legislature revised those responsibilities by directing
14 AZDA to “adopt rules for poultry husbandry and the production of eggs sold in [Arizona].”
15 A.R.S. § 3-710(J). The statute exempts from such rules egg producers that have “fewer than
16 twenty thousand egg-laying hens producing eggs.” *Id.*

17 In January 2022, AZDA proposed and, in April 2022, AZDA finalized, a new rule
18 for “poultry husbandry” and egg production—the regulation at issue in this case (the
19 “Rule”). Pls.’ Statement of Facts (“PSOF”) ¶¶ 1– 2. The Rule requires that as of October 1,
20 2022, all egg-laying hens in Arizona must be housed “with no less than one square foot of
21 usable floor space per egg-laying hen” and all eggs and egg products sold in Arizona must
22 come from hens housed in the same manner. PSOF ¶ 3. Additionally, by January 1, 2025,
23 all egg-laying hens in Arizona must be “housed in a cage-free manner” with the amount of
24 floor space provided for in guidelines from the United Egg Producers (“UEP”) and all eggs
25 and egg products sold in Arizona must come from hens housed in the same way. PSOF ¶¶ 4–
26 5. Eggs and egg products must be certified as complying with the Rule, and out-of-state
27 producers must provide for government or third-party certification to sell eggs and egg
28

1 products in Arizona. PSOF ¶ 6. Consistent with A.R.S. § 3-710, the Rule exempts egg
2 producers with fewer than 20,000 egg-laying hens. PSOF ¶ 7.

3 **II. The cage free egg rule has a negative economic impact.**

4 AZDA acknowledged that the Rule would have a substantial economic impact on
5 egg producers and consumers. PSOF ¶¶ 8–15. AZDA found that the move to cage-free egg
6 production would increase the wholesale cost of a dozen eggs by 39 cents—an increase that
7 would be passed on to retailers and ultimately to consumers. PSOF ¶ 8–9. The Rule would
8 also impose “hundreds of millions of dollars” of capital costs on one producer to convert to
9 cage-free egg production. PSOF ¶ 10. Production costs would also increase, including up
10 to a 41% increase in labor input costs. PSOF ¶ 11.

11 AZDA projects the Rule will increase yearly egg costs for each consumer by \$2.71
12 to \$8.79 based on an increased cost of cage-free eggs (1 to 3.25 cents per egg). PSOF ¶¶ 12–
13 13. AZDA assumes that consumption will shift entirely to cage-free eggs. *See* PSOF ¶ 13.
14 AZDA also anticipates a reduction in consumer surplus of \$4.81 to \$11.05 per household.
15 PSOF ¶ 14. AZDA notes that the exemption for egg ranches with less than 20,000 egg-
16 laying hens will limit the impact of the cage free egg rule *on small egg ranchers* without
17 addressing any consumer impact. *See* PSOF ¶ 15.

18 **III. Plaintiffs are injured by the cage free egg rule.**

19 Plaintiff Union LLC is a restaurant group based in Tucson, AZ, operating three
20 restaurants and employing approximately 225 people. PSOF ¶¶ 17, 18, 20. Union purchases
21 significant quantities of eggs for its menu items, particularly for its brunch service. PSOF
22 ¶ 21–22. From November 2022 through October 2023, Union purchased 578 cases (104,040
23 eggs) for its restaurants. PSOF ¶ 22. Union has also purchased egg products as a substitute
24 for eggs. PSOF ¶ 23. When purchasing eggs or egg products, Union does not specifically
25 seek out eggs produced in a cage-free manner. PSOF ¶ 24. AZDA’s anticipated price
26 increase from the Rule will negatively impact Union through increased egg and egg product
27 costs. PSOF ¶ 26. The Rule will also restrict Union from buying non-cage free eggs and
28 egg products originating from large producers it would otherwise buy. PSOF ¶ 25.

1 Restauranteur Grant Krueger, another Plaintiff in this case, manages Union. PSOF
2 ¶ 19. Mr. Krueger began his career in the restaurant business 34 years ago as a dishwasher
3 and bus boy and worked his way up to operating his own restaurant group. First Am. Compl.
4 (“FAC”) ¶ 71. Mr. Krueger also buys eggs for his own personal consumption and does not
5 specifically seek out cage-free eggs when he does so. PSOF ¶¶ 27–28. Like Union, the
6 anticipated price increases from the Rule will negatively impact Mr. Krueger’s personal
7 finances and will restrict what eggs he can buy, and from whom, for his personal
8 consumption. PSOF ¶¶ 29–30.

9 LEGAL STANDARD

10 A motion for summary judgment “shall” be granted “if the moving party shows that
11 there is no genuine dispute as to any material fact and the moving party is entitled to
12 judgement as a matter of law.” Ariz. R. Civ. P. 56(a). A plaintiff is permitted to move for
13 summary judgment after a 12(b)(6) motion to dismiss is filed by the defendant. Ariz. R. Civ.
14 P. 56(b)(1).

15 ARGUMENT

16 I. The Rule is not specifically authorized by statute.

17 In 2022, the Legislature amended the APA to prohibit any agency from “[m]ak[ing]
18 a rule that is not specifically authorized by statute.” A.R.S. § 41-1030(D)(3). This
19 amendment was not meaningless or “superfluous.” *Nicaise v. Sundaram*, 245 Ariz. 566, 568
20 ¶ 11 (2019). It changed the standard for analyzing a regulations’ validity. While there is little
21 authority construing this new requirement, *as a constitutional minimum* a statute must at
22 least “declare[] policies” through “fixed primary standards.” *DeHart v. Cotts*, 99 Ariz. 350,
23 351 (1965). But the Rule fails to do this. *See infra* § III. So, it certainly cannot survive a
24 statute requiring specifically authorized regulations.

25 There are no standards at all in Section 3-710(J) by which AZDA can develop
26 regulations. The statute simply authorizes AZDA to make whatever regulations it wishes on
27 the subjects of “poultry husbandry” and the “production of eggs sold in this state.” A.R.S.
28 § 3-710(J). “Poultry husbandry” is simply a category of conduct to be regulated. The two

1 relevant dictionary definitions of the word “husbandry” are: (1) “the cultivation or
2 production of plants or animals”; and (2) “the scientific control and management of a branch
3 of farming and especially of domestic animals.”¹ Neither of these definitions provide any
4 context for how poultry or eggs should be “cultivat[ed] or produc[ed]” that could guide
5 AZDA’s development of poultry husbandry regulations. The statute also does not provide
6 its own definition of “poultry husbandry” that might specifically authorize the Rule. A.R.S.
7 § 3-701. The phrase “production of eggs sold in this state” is similarly devoid of any
8 legislative standard. A.R.S. § 3-710(J). The statute is no more than an enabling act
9 authorizing AZDA to “pass the law it thinks appropriate.” *State v. Marana Plantations, Inc.*,
10 75 Ariz. 111, 114 (1953).

11 Agencies have *never* been allowed to enact rules without more specific legislative
12 standards than are provided in Section 3-710(J). *See id.* And the Legislature went beyond
13 that baseline requirement when it enacted § 41-1030(D)(3), requiring agencies to ground
14 their rules not in sweeping delegations of power, but in concrete and definite language
15 providing a standard to regulate a specific issue.

16 It is insufficient under Section 41-1030(D)(3) to say that Section 3-710(J)
17 specifically authorizes the Rule because the Rule is a rule for poultry husbandry. Indeed, it
18 cannot be because such an approach is not even constitutional. *See infra* § III. Moreover,
19 “authorized” is not the same thing as “*specifically* authorized.” Treating Section 3-710(J)’s
20 broad instruction to “adopt rules for poultry husbandry and the production of eggs sold in
21 this state” as satisfying A.R.S. § 41-1030(D)(3) would read the word “specifically” out of
22 the statute. *See Ariz. St. Univ. Bd. of Regents v. Ariz. St. Retirement Sys.*, 242 Ariz. 387, 389
23 ¶ 7(App. 2017) (the court must “give meaning to each word, phrase, clause, and sentence”
24 (citation & quotations omitted)); *see* A.R.S. § 41-1030 (using “specifically” five times).

25 The legislative history of Section 3-710(J) is also unavailing. Legislative history
26 “cannot supersede the unambiguous words in [this] statute.” *Qasimyar v. Maricopa Cnty.*,

27
28 ¹ *Husbandry*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/husbandry> (last visited March 26, 2024).

1 250 Ariz. 580, 590 ¶ 33 (App. 2021); *see also Roberts v. State*, 253 Ariz. 259, 266 ¶ 20
2 (2022). Section 3-710(J) “is ‘clear and unambiguous’” in its blanket authorization.
3 *Qasimyar*, 250 Ariz. at 590 ¶ 33. An agency cannot cobble together specific authorization
4 from legislative fact sheets or speculation about legislators’ intent.

5 A comparison to other authorizing statutes also highlights the failure of Section 3-
6 710(J) to specifically authorize the Rule. For example, A.R.S. § 41-1822(A)(3) provides
7 much more specific regulatory authorization than Section 3-710(J). The statute requires the
8 Peace Officer Standards and Training Board to establish “minimum qualifications” for
9 peace officers that “shall relate to [their] physical, mental and moral fitness.” A.R.S. § 41-
10 1822(A)(3). This statutory language is sufficiently specific to authorize a rule on drug use
11 for peace officers, *see* A.A.C. § R13-4-105, and it is much more specific than Section 3-
12 710(J)’s phrase, “adopt rules for poultry husbandry and the production of eggs sold in this
13 state.”

14 **II. The Rule is not reasonably necessary to carry out the purpose of Section 3-
15 710(J).**

16 The Legislature added a second requirement in 2022: a regulation must be
17 “reasonably necessary to carry out the purpose of the statute.” A.R.S. § 41-1030(A). The
18 requirement of reasonable necessity is not satisfied automatically by the mere existence of
19 an authorizing statute. There must be some standard in the statute by which a regulation’s
20 reasonable necessity can be judged. Again, statutes must provide “fixed primary standards”
21 as the constitutional minimum. *DeHart*, 99 Ariz. at 351. Because there is no standard in
22 Section 3-710, *see supra* § I, there is no way to determine if the Rule is “reasonably
23 necessary to carry out [its] purpose,” A.R.S. § 41-1030(A). If all it took to satisfy the
24 reasonable necessity requirement was for the legislature to identify a topic for regulation,
25 then the requirement is meaningless, and Section 41-1030(A) is superfluous.

26 Plaintiffs anticipate Defendants will continue to rely on the same cases from their
27 Motion to Dismiss and those cases are inapposite because they involve regulations far more
28 closely tied to the statutes in question than the Rule here. Maricopa County’s ban on “the

1 keeping of pigstys within 300 feet of inhabited dwellings” was reasonably necessary “to
2 control animal diseases transmittable to man.” *State v. Kelsall*, 22 Ariz. App. 97, 100–01
3 (1974) (citation omitted). And a rule requiring leftover crops to be “shredded, chopped, and
4 cut and plowed under to the depth of four inches or more” after harvest was reasonably
5 necessary “to control ... crop pest or disease.” *State v. Wacker*, 86 Ariz. 247, 249–51
6 (1959). In contrast, there is no way for Section 3-710(J) itself to determine whether the
7 Rule is reasonably necessary.

8 **III. Section 3-710 unconstitutionally delegates legislative authority to AZDA.**

9 Among the three departments of the Arizona government, the Arizona Constitution
10 reserves the legislative power exclusively for the Arizona Legislature. Ariz. Const. art. IV,
11 pt. 1 § 1. The executive and judicial departments are expressly prohibited from exercising
12 the legislative power. *Id.* art. III. As a result, the Arizona Legislature cannot delegate the
13 “power to make the law” to another department. *Roberts*, 253 Ariz. at 268 ¶ 29.

14 **A. The legislature must make major policy decisions and provide fixed** 15 **primary standards to regulators.**

16 To avoid an unconstitutional delegation of legislative power and empower
17 “administrative bodies ... to prescribe rules and regulations,” the legislature must at least
18 “declare[] policies” through “fixed primary standards.” *DeHart*, 99 Ariz. at 351. The
19 “standards, limitations, and policies” enacted by the legislature establish the “boundaries”
20 within which an administrative agency “may ... act.” *Hernandez v. Frohmiller*, 68 Ariz.
21 242, 255 (1949). Those boundaries are only effective if they are judicially administrable,
22 *see Tillotson v. Frohmiller*, 34 Ariz. 394, 403 (1928), and “enable every person, by reading
23 the law, to know what his rights and obligations are,” *see State v. Birmingham*, 95 Ariz. 310,
24 312–13 (1964). The standards must also be sufficient to decide the “major policy
25 question[s]” raised by the statute. *Roberts*, 253 Ariz. at 270 ¶ 40.

26 The Legislature’s authorization for AZDA to create rules for “poultry husbandry”
27 and the “production of eggs sold in this state” is an invalid delegation of legislative power
28 to AZDA. A.R.S. § 3-710; *see DeHart*, 99 Ariz. 351. Section 3-710(J) fails to provide any

1 standard for the promulgation of such rules.² *See supra* § I. And even if the statute could be
2 read to provide *some* standard, no major policy questions relevant to poultry husbandry
3 have been resolved in the statute. *See Roberts*, 253 Ariz. at 270 ¶ 40.

4 **B. Section 3-710 provides no fixed primary standards.**

5 Section 3-710(J) is an entirely standardless delegation of legislative power to AZDA.
6 *See Hernandez*, 68 Ariz. at 256. On its face, it permits AZDA to adopt any poultry
7 husbandry and egg production rule it desires. A.R.S. § 3-710(J). “Poultry husbandry” is just
8 a generic subject of regulation that does not inherently provide any standards, nor is the
9 term defined in the statute. *See supra* § I. The phrase “production of eggs sold in this state”
10 provides even less direction. A.R.S. § 3-710(J). Legislative fact sheets and other legislative
11 history outside the statute also cannot supply the constitutionally required standard because
12 the statutory language is unambiguous. *See supra* § I; *Roberts*, 253 Ariz. at 266 ¶ 20.

13 Section 3-710(J) provides neither a goal for the regulation of poultry husbandry and
14 egg production, nor a means to attain such a goal. *See DeHart*, 99 Ariz. at 351. Poultry
15 husbandry could be regulated to achieve, among other goals, certain egg production levels,
16 healthy hens, or quality eggs. And the statute could have provided criteria by which AZDA
17 balances between such goals. *See, e.g., Wacker*, 86 Ariz. at 249–50. For example, the statute
18 in *Wacker* authorized “necessary” regulations for controlling “crop pest or disease” that
19 “menaces or threatens serious injury to” agriculture. *Id.* But here, any goals and criteria are
20 simply missing. *See supra* § I.

21 Nevertheless, AZDA determined in the Rule that the “benefits to public and animal
22 welfare, outweigh the potential economic costs.” PSOF ¶ 16. This balancing was all
23 AZDA’s own because there are no “fixed primary standards” in Section 3-710(J). *DeHart*,

24
25 ² The only conceivable limitations, in fact, are the “specifically authorized” and “reasonably
26 necessary” requirements the Legislature added to the APA in 2022. A.R.S. § 41-1030(A)
27 and (D)(3). Those provisions offer no insights into how AZDA *should* regulate, but they
28 make clear that AZDA should *not* enact rules such as the Rule at issue—and thus, faithfully
applying Section 41-1030 would allow the Court to avoid reaching the constitutional issues
briefed here. *See Hayes v. Cont’l Ins. Co.*, 178 Ariz. 264, 273 (1994) (“[I]f possible we
construe statutes to avoid unnecessary resolution of constitutional issues.”).

1 99 Ariz. at 351. But under Arizona’s Constitution, AZDA “cannot be ‘a roving commission
2 to inquire into evils’” in the poultry husbandry business ““and upon discovery correct
3 them.”” *Marana Plantations*, 75 Ariz. at 114.

4 Statutes similar to an authorization to “adopt rules for poultry husbandry and the
5 production of eggs sold in this state,” A.R.S § 3-710(J), have been struck down as
6 unconstitutional delegations of legislative power. In *Hernandez*, the Civil Service Board
7 was authorized to ““regulate all conditions of employment in the state civil service.”” 68
8 Ariz. at 254. The statute was unconstitutional because it established “no standards or
9 boundaries within which it must exercise its discretion.” *Id.* at 256, 259. Similarly, a statute
10 authorizing a state board to ““regulate sanitation and sanitary practices in the interests of
11 public health”” and to ““protect and promote the public health and prevent disability and
12 mortality”” unconstitutionally “permit[ed] the board to wander with no guide nor criterion.”
13 *Marana Plantations*, 75 Ariz. at 114.

14 Moreover, cases on which Plaintiffs anticipate Defendants will continue to rely all
15 address statutes that either provided more guidance than Section 3-710(J) or are
16 inapplicable. *State v. Arizona Mines Supply* approved a statute that authorized ““necessary
17 and feasible”” pollution standards. 107 Ariz. 199, 206 (1971). *Sw. Eng’g Co. v. Ernst*, 79
18 Ariz. 403, 415–16 (1955) and *3613 Ltd. v. Dep’t of Liquor Licenses & Control*, 194 Ariz.
19 178, 183 ¶ 22 (App. 1999) both involve statutes that took “effect upon the ascertainment of
20 a fact,” a permissible legislative approach “so generally recognized as to have universal
21 application.” Finally, *Cleckner v. Ariz. Dep’t of Health Servs.*, 246 Ariz. 40, 44 ¶ 14 (App.
22 2019), is inapposite as it does not address a delegation claim.

23 **C. If Section 3-710(J) provides a standard, it is constitutionally insufficient.**

24 Even if Section 3-710(J) provides a standard, it is not sufficient to avoid
25 unconstitutionally delegating legislative power. *See DeHart*, 99 Ariz. at 351; *Roberts*, 253
26 Ariz. at 270 ¶ 40. The Arizona Legislature must—at a minimum—resolve “major policy
27 question[s].” *Roberts*, 253 Ariz. at 270 ¶ 40. The phrase “poultry husbandry and the
28

1 production of eggs sold in this state” leaves unresolved several major policy questions
2 regarding the regulation of those subjects. A.R.S. § 3-710(J).

3 One such major policy question is the housing requirements for egg-laying hens. The
4 Arizona Supreme Court recently explained that the question of “whether time spent on
5 certain activities is compensable—is the very definition of the type of major policy question
6 that the legislature alone may determine.” *Roberts*, 253 Ariz. at 270 ¶ 40. How egg-laying
7 hens are housed is of analogous significance and itself a major policy question. *Id.* The Rule
8 is imposing hundreds of millions of dollars in capital costs on one Arizona egg producer
9 and AZDA expects it will increase wholesale and consumer egg prices—a per-year price
10 increase of about \$1,040 to \$3,381 just for Union. *See* PSOF ¶¶ 13, 22. So, this question
11 must be decided by the legislature “alone.” *Roberts*, 253 Ariz. at 270 ¶ 40.

12 Additionally, the standard for a statute to avoid an unconstitutional delegation can
13 be synthesized, as Illinois has, into the following three items a statute must contain: “(1) the
14 persons and activities potentially subject to regulation; (2) the harm sought to be prevented;
15 and (3) the general means intended to be available to the administrator to prevent the
16 identified harm.” *Stofer v. Motor Vehicle Cas. Co.*, 369 N.E.2d 875, 879 (Ill. 1977). Section
17 3-710(J) fails all three factors: (1) the phrases “poultry husbandry” and “production of eggs”
18 are too broad to put industry participants on notice of the specific actions to be regulated;
19 (2) the statute does not identify any harm to be remedied through “poultry husbandry” or
20 egg production regulation; and (3) the open-ended regulatory authorization does not
21 sufficiently identify the means by which these subjects are to be regulated. To the extent
22 this test reflects a stricter standard than currently applicable, Arizona should adopt this test.
23 Plaintiffs expressly preserve this issue for appeal.

24 CONCLUSION

25 For the foregoing reasons, Plaintiffs request that the Court grant Plaintiffs’ Motion
26 for Summary Judgment.

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RESPECTFULLY SUBMITTED this 28th day of March 2024.

GOLDWATER INSTITUTE

/s/ John Thorpe
Jonathan Riches (025712)
John Thorpe (034901)
Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, Arizona 85004

/s/ Aditya Dynar
Aditya Dynar (031583)
Joshua M. Robbins* (P240258)
PACIFIC LEGAL FOUNDATION
3100 Clarendon Boulevard, Suite 1000
Arlington, Virginia 22201
(202) 888-6881
adynar@pacificlegal.org
jrobbins@pacificlegal.org

Attorneys for Plaintiff
**Pro Hac Vice Motion Pending*

CERTIFICATE OF SERVICE

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ORIGINAL E-FILED this 28th day of March, 2024, with a copy delivered via the ECF system to:

Hayleigh S. Crawford
Joshua M. Whitaker
Luci D. Davis
Office of the Arizona Attorney General
2005 N. Central Avenue
Phoenix, Arizona 85004
Hayleigh.Crawford@azag.gov
Joshua.Whitaker@azag.gov
Luci.Davis@azag.gov
ACL@azag.gov
Attorneys for State of Arizona

Deanie J. Reh (005170)
Dena R. Benjamin (015421)
2005 N. Central Ave.
Phoenix, Arizona 85004
Telephone: (602) 542-8322
Facsimile: (602) 542-4385
Deanie.Reh@azag.gov
Dena.Benjamin@azag.gov
AdminLaw@azag.gov
*Attorneys for Paul E. Brierley, Director of
Arizona Department of Agriculture*

/s/ Kris Schlott
Kris Schlott, Paralegal