ARIZONA SUPREME COURT

MARCIE A. REDGRAVE, individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. DOUG DUCEY, Governor; THOMAS J. BETLACH, in his official capacity as Director of the Arizona Health Care Cost Containment System; ARIZONA DEPARTMENT OF ECONOMIC SECURITY; ARIZONA DIVISION OF DEVELOPMENTAL DISABILITIES, Defendant-Appellees.	Arizona Supreme Court No. CV-20-0082-CQ U.S. Court of Appeals for the Ninth Circuit No. 18-17150 U.S. District Court for the District of Arizona No. CV-18-01247-DLR

COMBINED RESPONSE TO BRIEFS OF AMICI CURIAE BY STATE APPELLEES

J. Mark Ogden (Bar No. 17018)
LITTLER MENDELSON, P.C.
2425 East Camelback Road
Suite 900
Phoenix, AZ 85016
Telephone: (602) 474-3600
Facsimile: (602) 957-1801

Attorney for Doug Ducey, Governor

MARK BRNOVICH
ATTORNEY GENERAL
Firm Bar No. 14000

Drew C. Ensign
Deputy Solicitor General
Robert J. Makar
Assistant Attorney General
2005 North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-3333
Facsimile: (602) 542-8308
drew.ensign@azag.gov

Attorneys for Thomas J. Betlach, ADES and ADDD

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

INTRODUCTION

State Appellees (collectively, the "State") hereby respond to the filings of *amici curiae*. Amici's briefs advance arguments that are both meritless and waived, since Redgrave never raised them herself. Amici provide no basis to deviate from the entire 112-year history of the State, in which consent to *any* federal cause of action—let alone *all* of them—has never been found by this Court. Instead, this Court should continue to recognize that the State has waived sovereign immunity as to *tort* claims under *Arizona* law consistent with its Tort Claims Act, A.R.S. §§ 12-820 to -820.05 (the "Act").

Amicus Kimberly Spitler (hereinafter, "Spitler") readily admits that her argument is not properly presented, as it was "not addressed by the parties in the present case." Spitler Br. 2. Her argument should be denied on that ground alone. *Ruiz v. Hull*, 191 Ariz. 441, 446, ¶15 (1998) (en banc).

In any event, Spitler's arguments fail on the merits. Nothing in A.R.S. § 23-391 provides the requisite "*most express language* or by *such overwhelming implications* from the text as will leave no room for any other reasonable construction.'" *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 678 (1999) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)(cleaned up) (emphasis added)).

Amici Arizona Center for Law in the Public Interest and Arizona Association for Justice / Arizona Trial Lawyers Association (hereinafter, "Trial Lawyers") delve into the history of Arizona's Act and its precursors, and claim that "the notice-of-claim system covers tort, contract, and other claims" against the State, and therefore constitutes waiver of immunity regarding the same. But that merely provides a broadly applicable *statute of limitations*, not a broad waiver of sovereign immunity.

ARGUMENT

I. NO ARIZONA ENACTMENT RAISED BY AMICI CONSTITUTES A WAIVER OF SOVEREIGN IMMUNITY TO SUIT UNDER FLSA

As discussed in State Appellees' Supplemental Brief, nothing in the Act waives the State's sovereign immunity as to Plaintiff's FLSA claims (or any other federal claim). State Supp. Br. 1. Amici variously proffer the Act's predecessors and unrelated statutes as alternative avenues to waiver. None were actually raised by Redgrave, and thus all are waived. They also lack merit if this Court is inclined to overlook the waivers.

Spitler argues that Arizona's substantive overtime laws and regulations impliedly waive the State's sovereign immunity to federal FLSA claims. But nothing in those provisions comes close to satisfying the governing waiver standards. A.R.S. §§ 23-350 *et seq*. and 23-391 reference federal law with respect to the number of hours worked where federal law requires overtime pay, so as not

to cause conflict for the remaining state-defined statutory scheme. *See* A.R.S. § 23-391(A)(1). But that hardly amounts even to a wholesale adoption of the entire FLSA, let alone a blanket waiver of immunity.

Spitler additionally points to ADOA regulations incorporating two federal regulations. The incorporated CFR provisions are self-explanatory, and expressly permit State employers more latitude than non-state employers in complying with FLSA. 29 CFR § 553.20 (FLSA "provides an element of flexibility to State and local government employers...regarding compensation for statutory overtime hours"). As with the statute, partial reference to federal law where it benefits the State does not constitute waiver of immunity to unrelated provisions, let alone to the *entire federal act*. *See*, *e.g.*, *College Sav. Bank*, 527 U.S. at 676 ("We have even held that a State may, absent any contractual commitment to the contrary, alter the conditions of its waiver and apply those changes to a pending suit").

Spitler finally proposes that Arizona law provides a cause of action for plaintiffs like Redgrave who allegedly have a reasonable expectation to receive overtime. Spitler Br. 4-5. But even if that were true, a *state* cause of action does not amount to consent to suit under a *federal* claim.

With respect to the Trial Lawyers' historical narrative, the Act's notice-of-claim predecessors are no longer in force and have since been supplanted by the Act. The vast majority of Trial Lawyers' discussion cites such defunct

predecessors and cases interpreting the same.

Trial Lawyers also strangely argue that A.R.S. § 12-821, whose solitary clause is a *statute of limitations*, was intended "to expand the universe of permissible claims against the State to *all actions*." Trial Lawyers Br. 14 (emphasis added) (quotations omitted). This is apparently the interpretation of the author of a law review article, unsupported by any judicial decision. *Id.* (quoting 3 Phoenix L. Rev. 229, 239 (2010)).

But a statute of limitations is just that—it *limits, by time period*, the causes of action that can be brought against defendants (there the State). It hardly *expands* the *character*/*subject matter* of a waiver of sovereign immunity. It thus does not even conceivably amount to a "constructive waiver"—which itself would still be insufficient. *College Sav. Bank*, 527 U.S. at 678 ("[T]here is 'no place' for the doctrine of constructive waiver in our sovereign-immunity jurisprudence[.]")

II. NO CASE CITED BY AMICI EVINCES A REASONED WAIVER OF IMMUNITY TO FEDERAL SUIT UNDER THE ACT

In addition to those cases listed by the Ninth Circuit in its certification order, APP-10-11, Amici submit additional cases purportedly to show Arizona courts recognize waivers of sovereign immunity outside of the tort context. But as the Ninth Circuit has already recognized, none provide a *reasoned* waiver of immunity to *federal* suit. APP-11 ("[I]t is not apparent from these cases whether the state defendants raised the issue of the []Act's application to non-tort claims"). Instead,

they all amount to unreasoned waivers of immunity to *state* causes of action—and are at best unbinding, unreasoned dicta. And "[b]reath spent repeating dicta does not infuse it with life." *Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 300 (1995).

Valencia was not an immunity case, but was evaluating post-*Stone* changes to sovereign immunity as they affected the underpinnings of equitable estoppel. *See Valencia Energy Co. v. Arizona Dep't of Revenue*, 191 Ariz. 565 (1998).

Andrew S. preceded *Fields* for the premise that the predecessor of the Act "does not bar class actions against public entities." *City of Phoenix v. Fields*, 219 Ariz. 568, 571, ¶10 (2009) (en banc) (quoting *Andrew S. Arena, Inc. v. Superior Court*, 163 Ariz. 423, 426 (1990)). Neither involved federal statutory claims.

Yakima construed A.R.S. § 12-820.01 (absolute immunity) narrowly where a county contract itself made the county liable for its breach. *County of La Paz v. Yakima Compost Co., Inc.*, 224 Ariz. 590, 603, ¶36 (App. 2010).

Harris involved a *dismissed* breach of contract claim, which was rejected for failure to comply with the Act's notice of claim requirement. *Harris v. Cochise Health Sys.*, 215 Ariz. 344 (App. 2007); *see also Madrid v. Concho Elementary Sch. Dist. No. 6 of Apache Cty.*, 439 F. App'x 566, 567 (9th Cir. 2011). But dismissing on notice-of-claims grounds hardly constitutes a binding precedent that immunity does not apply. For those cases, their actual silence as to questions of immunity is precisely the effect they should be given.

Amici's analysis of *Standard Construction* repeats the same error. Trial Lawyers Br. 18-19. The application of the notice of claim requirement does not silently waive sovereign immunity. Trial Lawyers quibble that it is "unfair" for state defendants to employ one affirmative defense (notice of claim/statute of limitations) rather than another (immunity). *Id.* But the government's litigation strategy in a few cases hardly results in binding precedent in countless others. And that should be particularly true for sovereign immunity, where the standards for finding waiver/consent are so strict.

Trial Lawyers' long foray into the scope of *former* statutory waivers of sovereign immunity is irrelevant to the question of whether the Act waives immunity to FLSA claims. Indeed, Redgrave points to the Act as comprehensively governing the scope of the State's waiver. *See* Redgrave Br.4-5. Also similarly irrelevant are Trial Lawyers' string cited cases from the mid-20th Century, which all applied long-past predecessors of the Act. Trial Lawyers Br. 15-16.

CONCLUSION

The arguments of Plaintiff's Amici should be rejected as unpersuasive.

RESPECTFULLY SUBMITTED this 2nd day of October, 2020.

Mark Ogden
LITTLER MENDELSON, P.C.
2425 East Camelback Road
Suite 900
Phoenix, AZ 85016
Telephone: (602) 474-3600
Facsimile: (602) 957-1801

Attorney for Doug Ducey, Governor

MARK BRNOVICH
ATTORNEY GENERAL

/s/ Drew C. Ensign
Drew C. Ensign
Deputy Solicitor General
Robert J. Makar
Assistant Attorney General
2005 North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-3333
Facsimile: (602) 542-8308
drew.ensign@azag.gov

Attorneys for Thomas J. Betlach, ADES and ADDD