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

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INTRODUCTION

In *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384 (1963), this Court abolished the State's sovereign immunity for Arizona-law tort claims. *See Glazer v. State*, 237 Ariz. 160, 163, ¶10 (2015) (*Stone* "abolished … sovereign immunity *for tort liability* in 1963." (emphasis added)). In the ensuing 57 years, no court has held that *Stone* waived sovereign immunity for federal statutory claims.

The Legislature largely codified this abolition of immunity for tort liability in the 1984 Public Entity Act, A.R.S. §§ 12-820 to -820.05 (the "Act"), while creating provisions for absolute and qualified immunity. Much like *Stone*, in the 36 years since the Act was passed, no court has held that the Act waived sovereign immunity for federal claims, although the Ninth Circuit has now certified that question. Indeed, this Court has characterized the Act as a "tort claim[] act," *City of Tucson v. Fahringer*, 164 Ariz. 599, 600 (1990), and explained that it governs "immun[ity] *from tort liability*." *Glazer*, 237 Ariz. at 163 ¶11 (emphasis added).

The resolution of the certified question is thus fairly straightforward. The Act, by its text, does not speak in terms of federal claims—the term "federal" is nowhere to be found, and there is no evidence that the Legislature ever contemplated a waiver of the State's immunity to federal laws. Instead, the Act expressly refers to itself as addressing "rules of *tort immunity*." A.R.S. § 12-820.05(A) (emphasis added). And the Legislature's express statement of purpose

speaks in terms of the "liab[ility] for acts and omissions … in accordance with the statutes and common law *of this state*" and directed that the Act must "be construed with a view to carry out [this] legislative purpose." 1984 Ariz. Sess. Laws, ch. 285, § 1 (emphasis added).

The Act thus does not provide the requisite "unequivocal" waiver of sovereign immunity from federal claims, which could be found only in "the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (cleaned up). Instead, the best—and *at least reasonable* alternative construction—of the Act is that it waives immunity only for Arizona-law tort claims. Indeed, that is precisely how this Court has read it. Nor is there any reason for this Court to dilute the federal standard for finding waiver, since this Court should be at least as protective of this State's sovereignty as the federal courts are.

This Court should answer the certified question in the negative.

CERTIFIED QUESTION

On August 26, 2020, this Court accepted jurisdiction over the following certified question: "Has Arizona consented to damages liability for a State agency's violation of the minimum wage or overtime provisions of the federal Fair Labor Standards Act … 29 U.S.C. §§ 206–207?" App-3.

BACKGROUND

This case is a putative class-action asserting claims under the Fair Labor Standards Act, 29 U.S.C. §§ 206–207 ("FLSA"). The background of Redgrave's claims are set forth by the order certifying the question here. App-4–7. The certified question does not turn on Redgrave's specific allegations and claims, however. Instead, a brief overview and history of sovereign immunity is useful to frame this dispute.

Sovereign Immunity In The United States In General

"'Dual sovereignty is a defining feature of our Nation's constitutional blueprint.'" *Sossamon v. Texas*, 563 U.S. 277, 283 (2011) (citation omitted). Thus, "our federalism requires that [the federal government] treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999).

"'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (quoting The Federalist No. 81, p. 487 (C. Rossiter ed. 1961)) (cleaned up). These principles are so fundamental to the U.S. system of government that "it is difficult to conceive that the Constitution would have been adopted if it had been understood to strip the States of immunity from suit in their own courts and cede to the Federal Government a power to subject nonconsenting States to private suits in

these fora." *Alden*, 527 U.S. at 743. Indeed, the "power to press a State's own courts into federal service to coerce the other branches of the State … is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals." *Id.* at 749.

Sovereign Immunity In Arizona

The Arizona Constitution provides that "[t]he legislature shall direct by law in what manner and in what courts suits may be brought against the state." Ariz. Const. art. IV, Pt. 2 § 18 (hereinafter, the "Immunity Clause").

The Legislature did not initially exercise this power through legislation, but the State generally possessed immunity against all suits from statehood in 1912 to 1963. *Stone*, 93 Ariz. at 389–90. In 1963, this Court engaged in "a thorough re-examination of the rule of governmental immunity from tort liability." *Id.* at 387.

Although *Stone* contained some sweeping language suggesting that sovereign immunity was completely abolished,[1] this Court has repeatedly explained that *Stone* addressed only the State's liability/immunity with respect to tort law. *See*, *e.g.*, *Glazer*, 237 Ariz. at 163; *infra* at 12-13.

Recognizing the confusion that *Stone* had engendered, this Court invited the Legislature to "intervene" in this context. *Ryan v. State*, 134 Ariz. 308, 309, 311

[1] *See*, *e.g.*, *id.* at 392 ("[T]he substantive defense of governmental immunity is now abolished not only for the instant case, but for all other pending cases.").

(1982). Governor Babbitt created the "Governor's Commission on Governmental Tort Liability" shortly thereafter. *Doe ex rel. Doe v. State*, 200 Ariz. 174, 175 ¶3 (2001). That commission created a report and proposed legislation, which served as the template considered by the Legislature. *Id.*

The Act was passed by the Legislature and approved by the Governor in 1984. 1984 Ariz. Sess. Laws, ch. 285, § 3. This Court has referred to the Act as a "form of a 'Tort Claim Act'" and observed "all fifty states have enacted" one. *Clouse ex rel. Clouse v. State*, 199 Ariz. 196, 199 ¶¶13-14 (2001); *Redgrave v. Ducey*, 953 F.3d 1123, 1126 (9th Cir. 2020). Although the Legislature removed some of the committee's references to "tort" liability, the text of the Act continues to refer the Act as addressing "rules of tort immunity." A.R.S. § 12-820.05(A).

The Act's stated purpose declares it "to be the public policy of this state that public entities are liable for the acts or omissions of public employees in accordance with the statutes and common law of this state" and directs that the Act must "be construed with a view to carry out [this] legislative purpose." 1984 Ariz. Sess. Laws ch. 285, § 1 (emphasis added).

Because the Act created or codified defenses of absolute and qualified immunity, it was challenged as violating the Anti-Abrogation Clause, Ariz. Const. art. XVIII, § 6. *See Clouse*, 199 Ariz. at 198 ¶¶1, 5. This Court rejected that challenge. It first agreed with other states with equivalent provisions that

Arizona's Immunity Clause "'constitutionalizes' the doctrine of sovereign immunity and confers upon the legislature the exclusive authority to waive sovereign immunity and that, absent legislative action, suits against the state cannot proceed." *Id.* at 200, ¶16, 203 ¶¶24-25. This Court further held that because the Immunity Clause "directly addresses the authority of the legislature in relation to actions against the state," it controlled over the more general Anti-Abrogation Clause. *Id.* at 199 ¶11.

Immunity To Federal Suits

In the 57 years since *Stone* was decided and 36 years since the Act was passed, it does not appear that any court has ever held that either *Stone* or the Act waived the State's sovereign immunity with respect to federal suits (and Redgrave has not cited one to date). Instead, multiple courts have recognized the State's immunity in that context. *See*, *e.g.*, *Strojnik v. State Bar of Arizona*, 446 F. Supp. 3d 566 (D. Ariz. 2020) (state bar immune to other federal claims); *Ramirez v. Arizona State Treasurer*, No. CV-17-02024-PHX-SPL, 2018 WL 6348411, at *1-2 (D. Ariz. June 20, 2018) (holding State was immune to FSLA) (collecting cases holding same); *Wennihan v. AHCCCS*, 515 F. Supp. 2d 1040, 1049 (D. Ariz. 2005) (no waiver of immunity with respect to federal claims).

ARGUMENT

I. CONSENT TO FEDERAL SUIT MUST BE UNEQUIVOCALLY EXPRESSED

Because of the fundamental federalism issues presented by any waiver of state sovereign immunity as to federal claims, federal courts apply an extremely strict standard for determining whether such a waiver has been made. This Court should apply that same standard here, which is consistent with its own jurisprudence and the Arizona Constitution.

A. The Governing Standard For Waiving Sovereign Immunity Is Exceptionally Strict

Because sovereign immunity "implicates the fundamental constitutional balance between the Federal Government and the States … [the U.S. Supreme Court's] test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238–41 (1985). Indeed, the Court has repeatedly stressed that stringency through multiple formulations, including:

- Courts "'find waiver only where stated by *the most express language* or by *such overwhelming implications* from the text as will leave no room for any other reasonable construction.'" *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 678 (1999) (quoting *Edelman,* 415 U.S. at 673 (cleaned up) (emphasis added)).

- "[T]here is 'no place' for the doctrine of constructive waiver in our sovereign-immunity jurisprudence[.]" *Id.* at 678.
- "[A] State's express waiver of sovereign immunity [must] *be unequivocal*." *Id.* at 680 (emphasis added)
- "[W]here a statute is susceptible of multiple plausible interpretations, including one preserving immunity, [courts] will not consider a State to have waived its sovereign immunity." *Sossamon*, 563 U.S. at 287.

Under this exacting standard, "a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation. Nor does it consent to suit in federal court merely by stating its intention to 'sue and be sued,' or even by authorizing suits against it 'in any court of competent jurisdiction.'" *College Savings Bank*, 527 U.S. at 676 (citations omitted).

B. This Court Should Follow The Governing Standard

As explained below, Redgrave cannot prevail under this governing standard. Indeed, she barely even tried in the Ninth Circuit. Instead, she appears to argue that this Court should apply "a lesser standard" more solicitous of federal encroachment. APP-60. This Court should reject that invitation.

Although this Court has not addressed sovereign immunity as frequently as the U.S. Supreme Court, this Court's jurisprudence is consistent with the federal high court. In particular, this Court has endorsed the majority approach of

requiring affirmative "legislative action" to waive immunity, without which "suits against the state cannot proceed." *Clouse*, 199 Ariz. at 200, ¶16 & n.8. In doing so, this Court favorably cited cases in other states requiring an "'express act'" or "'explicit legislative authorization'" to waive immunity. *Id.* at 200 n.8 (citations omitted).

Clouse is thus consistent with the U.S. Supreme Court's stringent test, which this Court should adopt expressly. To the extent the issue remains open, this Court should ratify that test so for four reasons.

First, there is no cause for Arizona courts to be less vigilant in their defense of Arizona's sovereignty than federal courts are. Indeed, part of the reason for federal courts existing is to vindicate *federal* interests. *See*, *e.g.*, 28 U.S.C. § 1331, 1441-42. And while Arizona judges are obviously required to apply federal law where applicable, U.S. Const. art. VI, there is no reason that Arizona state courts should apply federal law in a manner promoting *more* encroachment on the State's sovereignty.

Indeed, far from inviting federal intrusion, Arizona courts attempt to preserve state sovereignty whenever possible. This Court, for example, has explained that under "our federalist system of dual sovereignty" it "strive[s] whenever possible to uphold [Arizona constitutional] provisions" against federal preemption challenges. *Simpson v. Miller*, 241 Ariz. 341, 345 ¶8 (2017). The

court of appeals has similarly cited favorably the U.S. Supreme Court's decision in *Raygor v. Regents of Univ. of Minnesota*, which held that where "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government, it must make its intention to do so 'unmistakably clear in the language of the statute." 534 U.S. 533, 543 (2002) (cleaned up) (cited favorably by *Morris v. Giovan*, 225 Ariz. 582, 584 ¶¶9-13 & nn.5-6 (App. 2010)).

More generally, this Court has stressed "that decisions of the United States Supreme Court have great weight in interpreting those provisions of the state constitution which correspond to the federal provisions. We acknowledge that uniformity is desirable." *Pool v. Superior Court In & For Pima Cty.*, 139 Ariz. 98, 108 (1984). Here such uniformity is easily achievable by holding that the standard for waiving sovereign immunity under the Immunity Clause is the same as the standard applied by the U.S. Supreme Court for waiving sovereign immunity under federal law.

Second, the Arizona Constitution has other provisions that confirm the charter's hostility to federal infringement. For example, in 2010 Arizona voters "enact[ed] by voter referendum two state constitutional provisions intended to protect the rights of Arizonans … against the federal government." Clint Bolick, *Vindicating the Arizona Constitution's Promise of Freedom*, 44 Ariz. St. L.J. 505, 512 (2012) (citing Ariz. Const. art. II, § 37; art. XXVII, § 2).

Third, the stringent federal standard promotes separation-of-powers principles. As the U.S. Supreme Court has explained, "A State is entitled to order the processes of its own governance, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts." *Alden*, 527 U.S. at 752. Waivers of sovereign immunity, however, potentially result in courts usurping this constitutional prerogative of the legislature.

In addition, this Court has recognized "the express authority the Arizona Constitution confers upon the legislature to define those instances in which public entities and employees are entitled to immunity." *Clouse*, 199 Ariz. at 203, ¶25. The stringent federal standard serves to ensure that this power is only invoked by the Legislature itself, thereby serving the State's strict separation of powers. *Cf. Sossamon*, 563 U.S. at 284 ("Only by requiring this 'clear declaration' by the State can we be 'certain that the State in fact consents to suit.'" (citation omitted)). By contrast, the diluted standard Redgrave advocates may effectively transfer that power to consent to federal suits to the federal and state judiciaries.

Fourth, a rigorous standard is appropriate because the risk of potential trampling upon the State's sovereignty and principles of federalism are manifest in this context. The Supreme Court, for example, has notably refused to permit the exception of *Ex Parte Young* to apply to state law claims, explaining that "*it is difficult to think of a greater intrusion on state sovereignty* than when a federal

court instructs state officials on how to conform their conduct to state law. Such a result *conflicts directly with the principles of federalism*." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (emphasis added). But if the State's sovereign immunity is frequently waived—as it undoubtedly would be under Redgrave's loose standard—these "great[] intrusions" could easily become commonplace (since parties need not squeeze within the exception of *Ex Parte Young* if they State has waived sovereign immunity entirely).

II. THE STATE HAS NOT CONSENTED TO SUIT UNDER THE FLSA

Under the prevailing standard, or even Redgrave's proposed diluted one, Arizona has not consented to suit under the FLSA for six reasons.

First, the text of the Public Entity Act does not specifically address the FLSA—or indeed any federal statute—*at all*. Indeed, the word "federal" does not appear anywhere in its text. *See* A.R.S. §§ 12-820 to -820.05. That alone should bar any waiver of sovereign immunity as to federal claims.

The Legislature's focus on state and not federal law is confirmed by the Act's statement of purpose, "in which the Legislature declared it 'to be the public policy of this state that public entities are liable for the acts or omissions of public employees in accordance with the statutes and common law *of this state*.'" *Redgrave*, 953 F.3d at 1127 (quoting 1984 Ariz. Sess. Laws 1091–92) (emphasis added by Ninth Circuit); *accord Doe*, 200 Ariz. at 175-76. The final prepositional

phrase is simply inconsistent with the Legislature consenting to any—and ultimately *all*—federal claims for monetary damages. That federal/state distinction is important and should be given effect. *See*, *e.g.*, *Ronwin v. Shapiro*, 657 F.2d 1071, 1073–74 (9th Cir. 1981) ("[C]onsent to be sued in state court does not necessarily imply consent to be sued in federal court." (citing *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-80 (1946)).

Notably, even if the Act had affirmatively authorized suit against the State in "any court of competent jurisdiction'"—which by its literal terms would include federal courts—that would *not* suffice. *College Savings Bank*, 527 U.S. at 676. But the Act is far more limited: its text does not appear to contemplate federal law claims at all—let alone "unequivocally" consent to them. It is therefore *at least* a reasonable interpretation that the Act does not waive sovereign immunity for federal claims. That alone should foreclose waiver of sovereign immunity. *Sossamon*, 563 U.S. at 287.

Second, the Act speaks expressly in terms of *tort* liability. Specifically, the Act provides: "Except as specifically provided in this article, this article shall not be construed to affect, alter or otherwise modify *any other rules of tort immunity* regarding public entities and public officers as developed at common law and as established under the statutes and the constitution of this state." A.R.S. § 12-820.05(A) (emphasis added). This provision—along with the absence of any

discussion of *non-tort* immunity—confirms the Legislature was solely focused on tort liability/immunity in the Act. And the district court expressly held as much. APP-71–72.[2]

Third, the Act's context strongly supports reading it as being limited to tort liability. The Act was passed in response to this Court's decision in *Stone*. *Clouse*, 199 Ariz. at 199, ¶¶13-14. *Stone* itself explained that it was a "re-examination of the rule of governmental immunity *from tort liability*." 93 Ariz. at 387 (emphasis added). And this Court's central premise in *Stone* was that "[t]here is perhaps no doctrine more firmly established than the principle that *liability follows tortious wrongdoing*." *Id.* at 392 (emphasis added).

This Court's subsequent case law confirms the tort-specific nature of *Stone* and its progeny. *See*, *e.g.*, *Glazer*, 237 Ariz. at 163 ¶10 ("This Court [in *Stone*] abolished the doctrine of sovereign immunity *for tort liability* in 1963." (emphasis

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[2] The Ninth Circuit noted that "many references to 'tort liability; were removed from the bill during the drafting process," *Redgrave*, 953 F.3d at 1126, which Redgrave argues should mean that the Act reaches *all* liability under the *Russello* presumption. APP-53–55. But the remaining reference to "*rules of tort immunity*," A.R.S. § 12-820.05(A) (emphasis added), is still sufficient to make clear the Legislature's focus on tort liability, and the express statement of purpose makes clear the Legislature's focus on *state* law liability alone. *Supra* at 12-13. Those other deleted references to "tort" were ultimately superfluous in light of the absence of any intent to reach beyond tort liability—and complete absence of evidence to consent to federal causes of action. The idea that the Legislature has enacted a blanket consent to *all* federal suits because it deleted some—but not all—references to "torts" under Arizona law from the draft bill is simply not a plausible interpretation of the Legislature's intent.

added)); *Ryan*, 134 Ariz. at 311 ("[T]he state and its agents will be subject to the *same tort law* as private citizens." (emphasis added)); *Doe*, 200 Ariz. at 175 ¶3 ("[In *Ryan*] we held … *governmental tort liability* is coextensive with the liability of private actors." (emphasis added)).

Furthermore, the Act notably was enacted in response to the "report" of the "Governor's Commission *on Governmental Tort Liability*." *Id.* (emphasis added). The Commission's very name thus further supports that no broader—indeed blanket—waiver of sovereign immunity vis-à-vis federal law was contemplated for a commission considering "Governmental *Tort Liability*."

The context thus confirms that the Legislature was focused on insuring that the State was accountable for its own negligence under Arizona tort law. But there is no indication that the Legislature intended *any* surrender of sovereign authority to the federal government in the Act—let alone the blanket and abject capitulation that Redgrave necessarily argues for. *See infra* Section III.[3]

[3] The Ninth Circuit observed that "Arizona courts have from time to time applied the Public Entities Act's provisions to non-tort [Arizona law] claims." *Redgrave*, 953 F.3d at 1126. But, as that court properly noted, it is "not apparent from these cases whether the state defendants raised the issue." *Id.* at 1127. Because the issue was unraised and unexamined in those cases, they provide no meaningful insight as to what the Act means. Indeed, "[b]reath spent repeating dicta does not infuse it with life." *Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 300 (1995). Moreover, even if the Act applies to other claims under *Arizona* law, it is still an enormous and unsustainable leap to the Act waiving immunity under all *federal* law.

Fourth, subsequent court decisions have widely recognized the Act as addressing tort liability only. This Court, for example, has explained that the Act was a response to *Stone* and its progeny, and that it too was concerned with the State's *tort* liability. *See Clouse*, 199 Ariz at 199 ¶¶13-14 (observing that "all fifty states have enacted some form of a '*Tort Claims Act*'" and characterizing the Act as Arizona's) (emphasis added)); *Glazer*, 237 Ariz. at 163. This Court further recognized the Act's focus on tort law by explaining that it "specifies circumstances in which governmental entities and public employees are immune *from tort liability*. The Act leaves intact the common-law rule that the government is liable *for its tortious conduct* unless immunity applies." *Id.* (emphasis added) (citation omitted).

Fifth, the history both pre- and post-Act supports the State's interpretation. In the 21 years between *Stone* and the Act, there is no evidence that *Stone* was ever read to waive sovereign immunity for federal claims. Nor is there any question that the State had not waived such immunity in the 51 years from statehood until the *Stone* decision. Similarly, Redgrave has not cited *any* authority in the 36 years since the Act was passed in which a court has concluded that the Act waived the State's immunity for federal claims. And there are many cases recognizing that the State had retained its immunity to the FSLA. *Supra* at 6.

Given the complete absence of activity by the Legislature to correct the prevailing interpretation of the Act—*i.e.*, that it did not waive immunity to federal claims—it is a fair inference that the Legislature approves. *Lowing v. Allstate Ins. Co.*, 176 Ariz. 101, 106 (1993) ("It makes sense to infer that the legislature approves judicial interpretation of a statute when we have some reason to believe that the legislature has considered and declined to reject that interpretation.").

Relatedly, the fact that accepting Redgrave's interpretation of the Act would cause a radical rupture with past practice strongly counsels against accepting it. It is, after all, a "fair assumption that [a legislature] is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones v. United States*, 526 U.S. 227, 234 (1999). And Redgrave's interpretation would result in upending 108 years of unbroken history from statehood to the present day—during which Redgrave has pointed to *zero* instances of the State being found to have consented to suit under federal claims.

Sixth, Redgrave's rationale often lapses into the unserious. For example, she argued in the Ninth Circuit that "[o]ther than greed, no such reason exists" for recognizing sovereign immunity. APP-33. But principles of federalism are fundamental to the U.S. system of shared sovereignty between the federal government and the States. Vindicating bedrock constitutional principles is not mere "greed." It is respecting the core principles of our federal system.

III. THE CONSEQUENCES OF ACCEPTING REDGRAVE'S ARGUMENTS WOULD BE PROFOUND

The collateral damage from accepting Redgrave's arguments would not be limited to the FLSA, or even all federal law. Instead, it would represent the most severe surrender of the State's sovereignty in its entire 108-year history.

Redgrave's arguments notably have no limiting principle. In particular, she does not offer any basis for concluding that the State has waived immunity for the FLSA that would not apply to *all* other federal statutes. The State would thus be subject to money damages under potentially *every* federal statute.

Put more starkly, under Redgrave's interpretation, the State has not only consented to every encroachment by Congress upon its sovereignty to date, but further has acquiesced in every incursion future Congresses might conceive—and no matter how ill-conceived or half-baked.

Notably, in rejecting an attempt by Congress to abrogate state sovereign immunity, the U.S. Supreme Court described Congress's attempted abrogation as "an unwarranted response to a perhaps inconsequential problem" and held it unconstitutional. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000). But Redgrave's interpretation would have the State affirmatively consent to that "unwarranted response." And just last Term, the Supreme Court explained that two of Congress's attempts to abrogate state sovereign immunity were laws of "'indiscriminate scope' [that were] 'out of proportion' to any due process

problem." *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020) (quoting *College Savings Bank*, 527 U.S. at 646-47).

Put simply, Congress is often neither restrained nor respectful in its attempted encroachments upon the sovereignty of the States. The concept the Legislature has affirmatively consented to any and all such trespasses is ultimately unserious.

The mischief of Redgrave's interpretation is not limited to federal law, however. Under the *Pennhurst* limitation to *Ex Parte Young*, federal courts cannot, consistent with state sovereign immunity, "instruct[] state officials on how to conform their conduct to state law." *Pennhurst*, 465 U.S. at 106; *accord supra* at 11. But under Redgrave's reading of the Act, the State has waived all such sovereign immunity. Instead, state officials would potentially be subject to micromanagement by *federal* courts as to their administration of *state* law whenever a plaintiff could invoke diversity or supplemental jurisdiction. There is, however, no reason to believe that the Legislature has actually consented to such extensive federal micromanagement of Arizona's administration of its own laws.

* * * * *

Ultimately, the abdication of sovereignty inherent in accepting Redgrave's arguments would be both enormous and entirely unprecedented. There is not the slightest indication that the Legislature intended such unconditional surrender to

federal infringement of Arizona's sovereignty. But Redgrave does not offer any means of avoiding such drastic consequences if her arguments are accepted.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the negative.

RESPECTFULLY SUBMITTED this 18th day of September, 2020.

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