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NCLA Amicus Brief Says ‘Police Power’ Belongs with Arizona Legislature, Not with the Governor

Javier Aguila, et al. v. Doug Ducey, et al.

Washington, DC (February 26, 2021) – “Police Power” in the hands of the governor does not include the power to legislate, argues the [amicus brief](#) filed today by the New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, in the Arizona Supreme Court. NCLA’s brief in the case of *Javier Aguila, et al. v. Doug Ducey, et al.*, enumerates serious constitutional concerns about the statute under which Governor Ducey issued pandemic executive orders.

On March 11, 2020, Governor Ducey declared a state of emergency in Arizona and subsequently issued numerous executive orders containing restrictions and prohibitions which severely harmed small businesses across the state. To do so, he heavily relied on the “Emergency Management” statute, [A.R.S. § 26-303\(E\)](#), under which the legislature gave him lawmaking power—what Arizona’s Constitution is designed to forbid.

NCLA contends that the phrase “police power” from the statute does not—because it may not—grant the governor the authority to legislate. The concept of “police power” is foreign to the Arizona and United States Constitutions in the first place. Arizona’s constitutional convention rejected a broad concept of “police power” previously. There is neither textual nor historical basis to say “police power” includes legislative power in the hands of the executive.

Article 3 of Arizona’s Constitution divides governmental power among three branches and does not allow the chief executive to create law. The statute also revives the constitutionally forbidden “suspending” and “dispensing” powers under which English monarchs made laws applicable to certain classes of people and suspended generally applicable statutes for the others. Under Article 4 of Arizona’s Constitution, such powers are withheld even from the legislature—protecting Arizonans’ rights and civil liberties from arbitrary decisions.

NCLA is asking the court to resolve these multiple constitutional issues and confine A.R.S. § 26-303(E)—and the resulting executive orders—within the bounds of the Arizona Constitution. The court will hold in-person oral arguments in this case on March 9, 2021 at 9:30 am at the Arizona Supreme Court, 1501 W. Washington St. Fourth Floor, Phoenix, AZ 85007. The oral argument will also be live-streamed [here](#).

NCLA released the following statement:

“The Arizona Constitution requires the difficult choices during the pandemic to be made by the legislature, not by the governor. In shirking its constitutional responsibility by divesting lawmaking to the governor in times of emergency, the legislature that passed Section 26-303(E) has failed to protect the very people it exists to serve. The Arizona Supreme Court must correct course and return legislative authority to where it properly belongs: the legislature.”

— **Adi Dynar, Litigation Counsel, NCLA**

For more information about this case visit [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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