

1 MARK BRNOVICH
2 ATTORNEY GENERAL
3 Firm State Bar No. 14000
4 Joseph A. Kanefield (Bar No. 15838)
5 *Chief Deputy & Chief of Staff*
6 Brunn (Beau) W. Roysden III (Bar No. 28698)
7 *Solicitor General*
8 2005 North Central Avenue
9 Phoenix, Arizona 85004
10 Telephone: (602) 542-8958
11 beau.roysden@azag.gov

12 *Attorneys for Attorney General Mark Brnovich*

13 ARIZONA SUPERIOR COURT
14 MARICOPA COUNTY

15 JAVIER AGUILA, et al.,
16 Plaintiffs,
17 v.
18 DOUGLAS A. DUCEY, in his official
19 capacity as the Governor of the State of
20 Arizona, et al.,
21 Defendants.

Case No: CV2020-010282

**SUPPLEMENTAL BRIEF OF
ARIZONA ATTORNEY GENERAL
MARK BRNOVICH PURSUANT TO
A.R.S. § 12-1841**

(Assigned to the Honorable Pamela Gates)

22 The Attorney General (“AG”), who is not a party, files this supplemental brief
23 pursuant to A.R.S. § 12-1841, which authorizes the AG “to be heard” “[i]n any
24 proceeding in which a state statute, ordinance, franchise or rule is alleged to be
25 unconstitutional.” A.R.S. § 12-1841(A), (D). This lawsuit challenges the
26 constitutionality of A.R.S. § 26-303(E)(1), and arises in the specific context of the
27 Governor’s alleged arbitrary imposition of certain restrictions on bars (holders of series 6
28 and 7 liquor licenses) while at the same time permitting similarly situated restaurants
(holders of series 12 licenses) to remain open free from those restrictions, and even
ordering that they may exceed a *statutory* restriction on their license type (A.R.S. § 4-

1 205.02(C), which prohibits series 12 licensees from selling spirituous liquor for
2 consumption off-premises). The AG’s prior brief is fully incorporated herein by
3 reference, and its arguments will not be repeated.

4 To avoid rendering § 26-303(E)(1) (the “Statute”) unconstitutional, and to
5 preserve the separation of powers, which “[n]owhere in the United States is ... more
6 explicitly and firmly expressed than in Arizona,” *Mecham v. Gordon*, 156 Ariz. 297, 300
7 (1988), this Court should interpret § 26-303(E)(1) as conferring authority to carry out
8 emergency functions and closely related activities, not as an indefinite grant of
9 legislative authority. The Statute, properly construed, does not authorize the continued
10 disparate treatment of bars and restaurants, as contained in Executive Order 2020-43
11 (“EO 2020-43”), seven months into this emergency. While the Governor certainly may
12 take into account future secondary economic effects of an emergency when directly
13 addressing the exigencies of the emergency, the Statute does not allow the Governor to
14 take any and all legislative action that could be justified as mitigating secondary effects,
15 particularly when the initial exigency has passed and there has been ample time for the
16 Legislature to be convened to pass legislation. It strains the Statute’s requirement of
17 “effectuat[ing] the purposes of this chapter” to read it as conferring a general power to
18 legislate to avoid secondary effects of an emergency long after the initial exigency has
19 subsided. Otherwise, the Statute becomes a general grant of legislative authority, which
20 would violate the non-delegation doctrine.

21 Three key facts have become clear from Thursday’s evidentiary hearing: 1) the
22 Governor unquestionably used his “state of emergency” power to excuse restaurants
23 from complying with a *statutory* requirement, specifically A.R.S. § 4-205.02(C), while at
24 the same time discriminating in other respects against similarly situated bars; 2) there are
25 no set criteria for ending this emergency, confirming that—seven months into it—the
26 Governor has claimed for himself the indefinite power to act legislatively; and 3) if § 26-
27 303(E)(1) really is as broad as the Governor claims, then it is unconstitutional, as the
28 Michigan Supreme Court held just ten days ago when interpreting a similar statute. *In re*

1 *Certified Questions From U.S. Dist. Court*, --- N.W.2d ---, 2020 WL 5877599, at *3
2 (Mich. Oct. 2, 2020) (The “act is an unlawful delegation of legislative power to the
3 executive branch in violation of the Michigan Constitution.”).

4 There is a better way—one that preserves the constitutionality of § 26-303(E)(1)
5 and respects the separation of powers. This Court should conclude as a matter of
6 statutory interpretation that § 26-303(E)(1) provides a much more temporally constrained
7 power that must be exercised even-handedly to address the exigencies of the emergency.
8 *See* AG’s 9/4/2020 Brief at 4-11. After adopting that construction, the Court should
9 uphold the constitutionality of the Statute, but conclude that EO 2020-43, as applied to
10 Plaintiffs, exceeds the Governor’s statutory authority. The Governor can call the
11 Legislature into special session to address through legislation the secondary economic
12 effects of the COVID-19 pandemic that his current EO attempts to address through
13 executive fiat.

14 If a narrow construction of the Statute is not adopted, then it is likely subject to
15 constitutional attack under the Arizona Constitution based on the non-delegation doctrine
16 for the reasons set forth in *In re Certified Questions*. Like Arizona, the Michigan
17 constitution contains an express statement of the separation of powers. *See In re*
18 *Certified Questions*, 2020 WL 5877599 at *12 (quoting Mich. Const. art. 3, § 2).
19 Arizona’s constitutional provision goes even further, providing that the three
20 “departments *shall be separate and distinct*.” Ariz. Const. art. 3 (emphasis added).
21 Moreover, the fundamental principles that the Michigan Supreme Court relied on are
22 equally valid in Arizona. The Michigan Supreme Court relied on Cooley’s
23 *Constitutional Limitations* for the proposition that “one of the settled maxims in
24 constitutional law is, that the power conferred upon the legislature to make laws cannot
25 be delegated by that department or any other body or authority.” *In re Certified*
26 *Questions*, 2020 WL 5877599 at *12. The Arizona Supreme Court has relied on that
27 treatise in its own jurisprudence, including when interpreting legislative power.¹

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¹ *See e.g., Citizens Clean Elections Comm’n v. Myers*, 196 Ariz. 516, 521 ¶18 (2000)
(principle of implied limitation of legislative power is embedded in state constitution);

1 To analyze the non-delegation question, courts must look at the “scope *plus* the
2 specificity of the standards governing its exercise.” *In re Certified Questions*, 2020 WL
3 5877599 at *14. The court further reasoned that “[w]hen the scope increases to immense
4 proportions ... the standards must be correspondingly more precise.” *Id.* (citation
5 omitted). The court continued, “it is one thing if a statute confers a great degree of
6 discretion, *i.e.*, power over a narrow subject; it is quite another if that power can be
7 brought to bear on something as ‘immense’ as an entire economy.” *Id.* The court further
8 recognized that “the area of permissible indefiniteness narrows ... when the regulation
9 invokes criminal sanctions....” *Id.* (citation omitted). Finally, the court recognized that
10 “the conferral of indefinite authority accords greater accumulation of power than does
11 the grant of temporary authority.” *Id.* In sum, the Michigan Supreme Court looked at
12 the 1) scope, 2) duration, and 3) standards of the delegated power to determine if it was a
13 lawful delegation. *See id.* at *15-*18.

14 The court ultimately concluded that “the delegation of power to the Governor to
15 ‘promulgate reasonable orders, rules, and regulations as he or she considers necessary to
16 protect life and property,’ constitutes an unlawful delegation of legislative power to the
17 executive and is therefore unconstitutional.” *Id.* at *18 (quoting Mich. Compiled Laws
18 § 10.31(1)). And, today, the Michigan Supreme Court made clear in two subsequent
19 decisions that the governor’s orders were being struck down immediately.²

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21 *Hudson v. Kelly*, 76 Ariz. 255, 263 (1953) (same); *see also City of Phoenix v. Pensinger*,
22 73 Ariz. 420, 422 (1952); *Bethune v. Salt River Valley Water Users’ Ass’n*, 26 Ariz. 525,
535 (1924).

23 ² *See House of Representatives and Senate v. Governor*, No. 161917 (Mich. Oct. 12,
2020), available at
24 <https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/RecentCourtOrders/20-21%20Orders/161917%202020-10-12%20or.pdf>; *In re Certified Questions*, No.
25 161492 (Mich. Oct. 12, 2020), available at
26 <https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/RecentCourtOrders/20-21%20Orders/161492%202020-10-12%20or.pdf>; *see also* Paul Egan, *Michigan Supreme Court strikes down Gov. Whitmer’s emergency orders, effective immediately*,
27 DETROIT FREE PRESS (Oct. 12, 2020),
28 <https://www.freep.com/story/news/local/michigan/2020/10/12/gretchen-whitmer-emergency-orders-struck-down/5970811002/>

1 The Arizona Statute at issue here—A.R.S. § 26-303(E)(1)—could be susceptible
2 to the same constitutional problems as the Michigan statute. Portions of its language are
3 quite broad. Specifically it confers “the right to exercise, within the area designated, all
4 police power vested in the state by the constitution and laws of this state.” *Id.* However,
5 to save the Statute from constitutional infirmity, the Court must give meaning to the last
6 part of the subsection which says “to effectuate the purposes of this chapter,” and the
7 Court should construe that limitation as conferring authority to carry out emergency
8 functions and closely related activities. For example, when the pandemic hit, the
9 Governor was well within his authority to declare an emergency and close down all non-
10 essential businesses in an even-handed manner until health officials could better
11 determine the nature of this novel virus.³ But that need for immediate, decisive action in
12 the face of massive uncertainty bears no resemblance to the world we now live in—
13 *seven months* into the declared emergency. Instead, based on Thursday’s hearing, it is
14 clear that we are now in a world where the Governor is picking winners and losers
15 regarding the economic recovery from the emergency, not reacting to the emergency
16 itself. But that is a legislative function, and not within the proper scope of the
17 emergency powers that are conferred to address the exigencies of emergencies when they
18 first arise.

19 The Governor’s arguments to the contrary primarily rest on certain definitions.
20 *See, e.g.,* Governors 9/3/20 Motion to Dismiss at 5 (relying on definitions in § 26-301 of
21 “emergency management,” “mitigation,” “recovery,” and “response”). But these
22 arguments prove too much. Rather than reading the definitions of terms to their
23 maximum possible breadth, and then importing that breadth into § 26-303(E)(1), the
24 Court should instead interpret “to effectuate the purposes of this chapter” to mean

25
26 ³ When reviewing whether an executive order issued in an emergency pursuant to the
27 delegation of power in § 26-303(E)(1) is arbitrary and provides due process, the Court
28 should consider all relevant information regarding the order. This includes: (1) the
severity of the emergency, (2) the duration of the executive action without legislative
oversight, (3) the geographical scope of the executive action, and (4) the consistency
with which emergency measures are ordered. *See* AG’s 9/4/2020 Brief at 7.

1 addressing the exigencies of the emergency itself. Similarly, *State v. Arizona Mines*
2 *Supply Co.*, 107 Ariz. 199, 205 (1971), does not stand for the proposition that the
3 Legislature can constitutionally delegate power to regulate all aspects of private behavior
4 to mitigate against future secondary effects of an emergency. Instead, under the three-
5 part framework from the Michigan Supreme Court, the scope, duration, and standards of
6 such an emergency power go far beyond the power to regulate air pollution at issue in
7 *Arizona Mines*.

8 It is important to note that the foregoing arguments do not depend on whether one
9 thinks a particular executive order is good or bad policy. Nor should the Court buy into
10 the false idea that somehow our State either must be governed through executive order or
11 not at all. Instead, our Constitution clearly vests in the Legislature the power to pass
12 laws, including those to take effect immediately due to emergency, Ariz. Const. art. IV,
13 pt. 1, § 1(3), and it vests in the Governor the power to call the Legislature into special or
14 extraordinary session, *id.* at pt. 2, § 3 and art. V § 4, to address the economic fallout from
15 the COVID-19 pandemic. While it is constitutional for the Legislature to confer on the
16 Governor a statutory power to declare an emergency and take action to address the
17 exigencies of such an emergency, it is not constitutional to confer general legislative
18 power. The Court should not interpret § 26-303(E)(1) as attempting to confer that
19 power.

20 * * *

21 “Madison wrote that ‘[n]o political truth is certainly of greater intrinsic value, or
22 is stamped with the authority of more enlightened patrons of liberty than’ the separation
23 of powers. ‘The accumulation of all powers, legislative, executive, and judiciary, in the
24 same hands, ... may justly be pronounced the very definition of tyranny.’” *Dep’t of*
25 *Transp. v. Ass’n of Am. Railroads*, 575 U.S. 43, 74 (2015) (Thomas, J., concurring)
26 (quoting The Federalist No. 47). “At the center of the Framers’ dedication to the
27 separation of powers was individual liberty. ... This was not liberty in the sense of
28 freedom from all constraint, but liberty as described by Locke: ‘to have a standing rule to

1 live by ... made by the *legislative power*,’ and to be free from ‘the inconstant, uncertain,
2 unknown, arbitrary will of another man.’ At the heart of this liberty were the Lockean
3 private rights: life, liberty, and property. If a person could be deprived of these private
4 rights on the basis of a rule (or a will) not enacted by the legislature, then he was not
5 truly free.” *Id.* at 75–76 (quoting Locke § 22, at 13).

6 Arizona finds itself seven months into this emergency, and, as was testified to at
7 Thursday’s hearing, this state of affairs could continue for much longer. The precedent
8 that the courts set when determining the proper scope of legislative and executive power
9 here will govern not just this emergency but future emergencies and future generations.
10 The Attorney General respectfully requests that, to preserve § 26-303(E)(1)’s
11 constitutionality, the Court interpret the Statute as conferring authority to carry out
12 emergency functions and closely related activities, not as an indefinite grant of
13 legislative authority.

14 Respectfully submitted this 12th day of October, 2020.

15 MARK BRNOVICH
16 ATTORNEY GENERAL

17 /s/ Brunn W. Roysden III

18 Joseph A. Kanefield
19 *Chief Deputy & Chief of Staff*
20 Brunn (Beau) W. Roysden III
21 *Solicitor General*
Attorneys for Arizona Attorney General
Mark Brnovich

22 I hereby certify that the foregoing document was
23 e-filed via TurboCourt this 12th day of October, 2020.

24 I further certify that copies of the foregoing were
25 e-delivered via TurboCourt this 12th day of October, 2020 on:

26 Ilan Wurman
27 MC 9520
28 111 E. Taylor Street
Phoenix, AZ 85004-4467
ilan.wurman@asu.edu
(650) 384-5294
Counsel for Plaintiffs

1 Anni Foster
2 Office of the Governor
3 afoster@az.gov

4 Brett W. Johnson
5 SNELL & WILMER LLP
6 400 E. Van Buren St., Suite 1900
7 Phoenix, AZ 85004-2202
8 bwjohnson@swlaw.com

9 *Counsel for Defendant Governor Ducey*

10 Gregory W. Falls
11 SHERMAN & HOWARD
12 201 E. Washington St., Suite 800
13 Phoenix, AZ 85004
14 (602) 240-3012
15 gfalls@shermanhoward.com

16 *Counsel for Defendants Department of Liquor Licenses & Control
17 and Department of Health Services*

18 /s/ Brunn W. Roysden III