ARIZONA SUPREME COURT

JAVIER AGUILA, *et al.* Appellants, v. DOUG DUCEY, *et al.*, Appellees.	CV-20-0335-PR Court of Appeals No. 1 CA-CV 20-0598 Maricopa County Superior Court No. CV2020-010282

AMICUS CURIAE BRIEF OF ATTORNEY GENERAL MARK BRNOVICH IN SUPPORT OF APPELLANTS

MARK BRNOVICH
Attorney General
(Firm State Bar No. 14000)

Joseph A. Kanefield (Bar No. 15838)
Chief Deputy & Chief of Staff
Brunn (Beau) W. Roysden III (Bar No. 28698)
Solicitor General
2005 North Central Avenue
Phoenix, Arizona 85004
(602) 542-7751
beau.roysden@azag.gov

Attorneys for Amicus Curiae State of Arizona

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The Attorney General files this as-of-right amicus brief under ARCAP 16(b)(1)(B) because this case presents issues of statewide importance concerning separation of powers, the constitutionality of executive action, and the scope of the Governor's emergency powers under Arizona law.

INTRODUCTION

The Court is here confronted with extremely weighty issues about separation of powers and the protection of individual liberties under the Arizona Constitution. During the last eleven months, many Arizonans, Appellants included, have seen their way of life forever altered through the executive actions of the Governor and other state, county and local officials. Some may claim that impact was necessary to protect public health. But under the Arizona Constitution, striking the proper balance between public health, on the one hand, and individual liberty and livelihood, on the other, particularly almost a year removed from the onset of a pandemic, is *not* the sole province of the Governor.

The Arizona Constitution starts with the following foundational statement: "A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." Ariz. Const. art. II, § 1. Our founding documents, including the Declaration of Independence, the United States Constitution, and the Arizona Constitution, each teach that the individual

liberties of the People should not be restrained in the manner seen in the last eleven months without some participation from the People through their representatives in the lawmaking branch of government.

The power the Governor claims here—the power to amend or suspend numerous state statutes—is unsupported. Under Arizona's Constitution, that power is a *legislative* power. Melding the powers of two branches into one, as the Governor here seeks, is constitutionally problematic. As Madison explained, "[W]here the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted." The Federalist No. 47 (James Madison). The People of Arizona, recognizing that same threat, *expressly* required the division of governmental power among three branches. Ariz. Const. art. III. The Court must ensure that elected officials act consistent with that constitutional structure, especially when exercising governmental power during an emergency. *See Arizonans for Second Chances v. Hobbs*, 249 Ariz. 396 ¶102 (2020) (Lopez, J., concurring) ("Petitioners' requested cure—effective suspension of constitutional and statutory law and recrafting of essential election provisions on the fly by judicial fiat—is worse than the disease.").

More specifically, this case requires the Court to interpret the statutory grant of power to the Governor during a state of emergency. Under A.R.S. § 26-303(E),

in a state of emergency, the Governor obtains "the right to exercise, within the area designated, all police power vested in the state by the constitution and laws of this state[.]" The issue the Court must resolve is whether that statutory grant includes the power to amend or suspend—or as the Governor has expressed it, "pause"—Arizona statutes.

Such statutes include the detailed statutory framework for the sale, distribution, and marketing in Arizona of alcoholic beverages. Those statutes establish the Department of Liquor Licenses and Control ("DLLC"), along with its Board and Director, and set forth the powers of each. *See* A.R.S. § 4-112. The statutes establish numerous types of liquor licenses and the qualifications for each. *See, e.g.*, A.R.S. §§ 4-203 (licensing generally), 4-205.01 (hotel-motel license), 4-205.02 (restaurant license), 4-206.01 (bar, beer and wine bar, or liquor store licenses). Pursuant to those statutes, DLLC has promulgated detailed rules setting forth the privileges attached to each type of license and assigned each a series number. The two types of licenses at issue here are series 6 licenses (also called "bar licenses") and series 7 licenses (also called "beer and wine bar licenses").

The Legislature also created a detailed framework for the suspension or revocation of a liquor license. *See* A.R.S. § 4-210. Thereunder, DLLC ordinarily can only suspend a liquor license "[a]fter notice and hearing." *Id.* § 4-210(A). The statutes set forth detailed reasons—there are sixteen of them—why DLLC can

suspend a license. *Id.* And the statutes contain detailed procedural requirements to follow before the State suspends a liquor license. *See id.* § 4-210(H).

The Governor claims the power under § 26-303(E) to sweep aside this statutory framework and to—not even on an individual license-by-license basis, but on a series-by-series basis—suspend hundreds of Arizona liquor licenses with no notice and hearing and no due process. On July 27, 2020, the Governor issued Executive Order 2020-43 ("EO 43") requiring that "[b]ars, meaning an entity who holds a series 6 or 7 liquor license from [DLLC] and whose primary business is the sale or dispensing of alcoholic beverages" must "pause operations." For all practical purposes, all series 6 and series 7 licenses issued in Arizona, and the due process provisions for suspending those licenses, were thereby suspended, and they continue to be suspended to this day.

The Governor does not have the power to do this. The power to amend or suspend statutes is a core legislative, not an executive, power, and A.R.S. § 26-303(E) does not purport to grant such legislative power. Instead, it grants the Governor "all police power," which, while perhaps increasing the scope of *executive* powers the Governor can exercise during times of emergency, cannot confer upon the Governor both executive *and legislative powers*.

Moreover, the statutory structure and history of § 26-303(E) eliminate the possibility that the Legislature intended such a significant shift of power. Unlike

in § 26-303(E), the Legislature did purport to grant the Governor the power to suspend Arizona law during a state of war. The state of war provision, A.R.S. § 26-303(A), expressly states that during a state of war "the governor may . . . [s]uspend the provisions of any statute prescribing the procedure for conduct of state business, or the orders or rules of any state agency" in the Governor's discretion. That the Legislature included such a clear statement with respect to states of war, but not states of emergency, and all within the same statute, strongly supports that the Governor does not have the power under § 26-303(E) to suspend the operation of state statutes during times of emergency.

Statutory history further eliminates any chance that the Legislature's decision to grant the power to suspend legislation with respect to a state of war, but not a state of emergency, was accidental. The Arizona Legislature adopted the current emergency management statutes in 1971 and borrowed heavily—including the "police powers" language—from a California statute enacted the year before. Under that California statute, however, the power to suspend statutory provisions arose during states of war *and* states of emergency. Rather than copy that provision wholesale, thereby allowing the Arizona governor to suspend state law during states of war *and* emergencies, the Arizona Legislature took a different route and granted that power only during states of war *and not* during states of emergency. The Court should respect that intentional legislative decision.

Well-established rules of statutory construction also undermine the Governor's interpretation of § 26-303(E). While separation of powers is not absolutely required in all circumstances, whether the Legislature can ever, including during a state of emergency, hand to the executive branch the core legislative power to amend or suspend state law raises significant constitutional concerns. Moreover, as Appellants explain, the Governor's interpretation would cast a significant constitutional pall over § 26-303(E) under the non-delegation doctrine. Judicial restraint counsels against deciding those difficult issues when a statute can be interpreted in a manner to avoid them.

EO 43 also violates the Arizona Constitution's privileges or immunities clause by discriminating against series 6 and 7 license holders without adequate justification. While the Governor should be given significant leeway to act at the beginning of a pandemic, he must comply with the Court's standard for differential treatment even where a suspect classification or fundamental right is not at stake. And as the pandemic stretches on, that leeway should decrease. As the Attorney General suggested to the trial court below, in determining whether the Governor has gone too far in choosing economic winners and losers, the Court should consider all relevant factors, including: (1) the severity of the emergency, (2) the duration of the executive action, (3) the geographical scope of the executive action, and (4) the consistency with which emergency measures are ordered. These

considerations will ensure that executive authority is not exercised arbitrarily. Here, those factors should result in the Court holding that EO 43 is unconstitutionally arbitrary because, on a statewide basis, it discriminates among nearly identical businesses and for an indeterminate amount of time.

ARGUMENT

I. The Governor Does Not Have The Power, Even During A State Of Emergency, To Amend Or Suspend Arizona Law.

A. The Statutory Framework During A State Of Emergency.

In 1971, the Arizona Legislature passed a series of emergency management measures to, among other things, confer emergency powers "upon the governor and upon the executive officer or governing body of a political subdivision of this state." *See* Ariz. Laws 1971, Ch. 51, § 1(A)(1). As presently constituted, § 26-301(15) defines a "state of emergency" as "the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons or property within the state caused by air pollution, fire, flood or floodwater, storm, epidemic, riot, earthquake or other causes . . . which are or are likely to be beyond the control of the services, personnel, equipment and facilities of any single county, city or town, and which require the combined efforts of the state and the political subdivision."

If the definition of a "state of emergency" is satisfied, the Governor may proclaim a state of emergency in the area affected: "The governor may proclaim a state of emergency which shall take effect immediately in an area affected or likely

to be affected if the governor finds that circumstances described in § 26-301, paragraph 15 exist." A.R.S. § 26-303(D). Once the Governor declares a state of emergency, the statute grants him "complete authority over all agencies of the state government." *Id.* § 26-303(E)(1). This includes the authority to "direct all agencies of the state government to utilize and employ state personnel, equipment and facilities for the performance of any and all activities designed to prevent or alleviate actual and threatened damage due to the emergency." *Id.* § 26-303(E)(2). It also includes the authority to direct state "agencies to provide supplemental services and equipment to political subdivisions to restore any services in order to provide for the health and safety of the citizens of the affected area." *Id*. Finally, once the Governor declares a state of emergency, the Governor also has "the right to exercise, within the area designated, all police power vested in the state by the constitution and laws of this state in order to effectuate the purposes of [the emergency management statutes]." *Id.* § 26-303(E)(1).

The statutes also provide that "[t]he powers granted the governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated by proclamation of the governor or by concurrent resolution of the legislature declaring it at an end." *Id.* § 26-303(F).

Thus, as relevant here, A.R.S. § 26-303(D) and (E) have three parts: (1) a condition precedent (the existence of a "state of emergency"), (2) a grant of power

("all police power vested in the state"), and (3) a limitation on that power, although very narrow (any action must be consistent with the purposes of the emergency management statutes). This case requires the Court to interpret the scope of part 2, the grant of power.

B. EO 43 Amends Or Suspends Numerous Arizona Statutes.

Over the course of decades, the Arizona Legislature has created a detailed statutory framework for the manufacture, distribution, and sale of alcoholic beverages. Arizona's first alcohol regulations were written into territorial law by jurist William Thompson Howell in 1864—the same year Alexander Lewin started Tucson's first brewery. Following the end of prohibition, in the spring of 1933, the Arizona Legislature organized the Temperance Enforcement Commission and authorized the State Tax Commission to enforce liquor laws, issue licenses and collect fees and taxes. *See* Ariz. Laws 1933, Ch. 76. In 1939, the Legislature granted the newly created Department of Liquor Licenses and Control ("DLLCC") the statutory authority to enforce laws relating to spirituous liquor, including licensing, regulation, manufacture and sale. *See* Ariz. Laws 1939, Chapter 64.

Current Arizona law provides that "[t]he department of liquor licenses and control is established consisting of the state liquor board and the office of director of the department." *See* A.R.S. § 4-111(A). The statutes set forth in detail the powers and duties of the liquor board and director, including that the board shall

"[g]rant and deny applications in accordance with the provisions of this title." *Id.* § 4-112(A) (powers and duties of board), § 4-112(B) (powers and duties of directors).

The Legislature has created numerous different types of liquor licenses and set forth the requirements for each. *See, e.g.*, A.R.S. §§ 4-203 (licensing generally), 4-205.01 (hotel-motel license), 4-205.02 (restaurant license), 4-206.01 (bar, beer and wine bar, or liquor store licenses). Generally speaking, "[a] spirituous liquor license shall be issued only after satisfactory showing of the capability, qualifications and reliability of the applicant and . . . that the public convenience requires and that the best interest of the community will be substantially served by the issuance." *Id.* § 4-203(A). In A.R.S. § 4-206.01, the Legislature created bar and beer and wine licenses and detailed regulations regarding the issuance and use of those licenses. That statute provides that "[b]ar licenses and beer and wine bar licenses shall be issued and used only if the clear primary purpose and actual primary use is for on-sale retailer privileges." *Id.* § 4-206.01(G). Pursuant to its statutory authority, DLLC has promulgated rules further regulating the use of the various liquor licenses created by the Legislature. *See, e.g.*, Ariz. Admin. Code § R19-1-101. DLLC refers to bar licenses as "Series 6" licenses and beer and wine bar licenses as "Series 7" licenses. *Id.* R19-1-

101(A)(2), (3) (setting forth the allowable uses for both series 6 and series 7 licenses). Those two types of licenses are at issue in this litigation.

The Arizona Legislature has also created a detailed statutory framework for the revocation or suspension of liquor licenses. Notably, there is no statutory provision allowing the board or director of DLLC to wholesale suspend an entire series of liquor licenses. Rather, the statute grants authority to suspend liquor licenses on an individual license or license holder basis. Specifically, the Arizona Legislature has provided that the director may suspend a liquor license "after notice and hearing" and for one or more of sixteen grounds. *See* A.R.S. § 4-210(A).[1] After any necessary investigation, the director "may cause a complaint and notice of a hearing to be directed to the licensee that states the violations alleged against the licensee and directing the licensee, within fifteen days . . ., to appear by filing with the director an answer to the complaint." *Id.* § 4-210(G). "The director may set the hearing before the director or an administrative law judge." *Id.* The hearing must conform with the requirements of the uniform administrative hearing procedures contained in A.R.S. § 41-1092 *et seq*. And the

[1] Arizona law does "permit a summary suspension without notice or a pre-suspension hearing when emergency circumstances imperatively require such action before a hearing can be provided." *Dahnad v. Buttrick*, 201 Ariz. 394, 399 ¶18 (App. 2001). Even then, however, "§ 41–1092.11 requires a formal post-suspension hearing process to be 'promptly instituted and determined.'" *Id.*

license holder is entitled to judicial review, pursuant to A.R.S. § 12-901 *et seq.*, of any final decision suspending a license. A.R.S. § 4-211(A).

The Governor, through EO 43, suspended all series 6 and 7 liquor licenses from Monday, June 29, 2020 until at least July 27, 2020. In so doing, the Governor purported to suspend or amend numerous Arizona statutes, including those discussed above. Specifically, EO 43 creates a new definition of the term "Bars" to mean "an entity who holds a series 6 or 7 liquor license from [DLLC] and whose primary business is the sale or dispensing of alcoholic beverages." *See* EO 2020-43 ¶3(a). EO 43 then suspends the duly-issued licenses of any person holding a series 6 or 7 license and falling within the Governor's new definition of "Bars." In suspending all series 6 and 7 licensees whose primary business is selling or dispensing alcoholic beverages, the Governor has effectively suspended operation of A.R.S. §§ 4-203 and 4-206.01, or at a minimum, amended these statutes, for an indefinite period of time.

The EO further suspends hundreds, if not thousands, of licenses without notice or hearing and regardless of whether one or more of the statutory grounds for suspension is present. The EO does not allow for a pre-deprivation hearing of any type, let alone one that is held consistent with the uniform administrative hearing procedures or judicial review. Thus, the Governor, through EO 43, has also effectively suspended A.R.S. § 4-210 and the various statutory due process

provisions incorporated therein by reference (e.g., A.R.S. § 41-1092 *et seq*. and A.R.S. § 12-901 *et seq.*). The question, then, is whether A.R.S. § 26-303(E)(1) grants the Governor the power to amend or suspend Arizona statutes during a state of emergency.

C. The Power To Amend Or Suspend Statutes Is A Legislative Power.

The federal Framers correctly perceived that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self[-]appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47 (James Madison). Similarly, "[w]here the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted." *Id*. To stem governmental abuses, the Framers vested the executive, legislative, and judicial powers in separate branches.

Arizona's framers similarly perceived the risk to individual liberty of concentrating government power in the hands of the few. But Arizona's framers went one step further and expressly enshrined separation of powers in the Arizona Constitution: "The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be

separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." Ariz. Const. art. III. "This article mandates that each department act with the powers and functions properly belonging to it and that it not encroach on the power and functions delegated to the other departments." *State v. Ramsey*, 171 Ariz. 409, 412 (App. 1992).

"The Arizona Legislature is vested with the legislative power of the state[.]" *Giss v. Jordan*, 82 Ariz. 152, 159 (1957); *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 595 ¶27 (2017) ("[T]he legislature has plenary power to deal with any topic unless otherwise restrained by the Constitution[.]"). "The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct." *SW Eng'g Co. v. Ernst*, 79 Ariz. 403, 417 (1955) (quoting *Opp Cotton Mills, Inc. v. Admin. of Wage and Hour Div.*, 312 U.S. 126, 145 (1941)). The power to amend, repeal, or suspend a statute is as much a legislative power as the power to enact a statute in the first place. *Hernandez v. Frohmiller*, 68 Ariz. 242, 256 (1949) (explaining that any legislative enactment that vests in an official or agency the power to suspend its terms "is unconstitutional as a delegation of the power reposed exclusively in the legislature"); *cf. Carr v. Frohmiller*, 47 Ariz. 430, 444 (1936) (the appropriation process "cannot have the effect of amending or repealing or suspending a general law"). In fact, this principle is inherent in courts' sound refusal to amend statutes

or excise statutory provisions under the guise of judicial interpretation. *See Special Fund Div. v. Indus. Comm. of Ariz.*, 240 Ariz. 104, 107 ¶11 (App. 2016) ("Our legislature, however, did not include these additional words and we will not engage in 'judicial legislation.'"); *Devenir Assocs. v. City of Phoenix*, 169 Ariz. 500, 503 (1991) ("The court must, if possible, give meaning to each clause and word in the statute or rule to avoid rendering anything superfluous, void, contradictory, or insignificant.").

That the power to amend or suspend statutes is a legislative power is firmly established in case law from this Court and the U.S. Supreme Court. In *Hernandez*, the Court held unconstitutional a statute granting a civil service board the "power to 'regulate all conditions of employment in the state civil service.'" 68 Ariz. at 254. In so holding, the Court first determined whether the statute attempted to pass legislative powers to an executive board. The Court concluded that the statute indeed did so because it granted the board the power "to say what the law shall be" and "[c]learly this is a legislative function." *Id.* at 254-55. The Court further explained that the statute granted the board the legislative power to amend or repeal legislation: "Suppose the board should decide that a day's work should consist of ten hours or five hours instead of eight hours as provided by law. There is nothing to prevent such under the broad powers so given. The board could thus amend or repeal our eight-hour law." *Id.* at 255.

The Court has even held that the executive branch is not permitted to amend or re-write an appropriation because to do so would allow the Governor to encroach on the Legislature's territory. In *Rios v. Symington*, the Court reviewed the constitutionality of Governor Symington's reversion orders, which "directed certain state agencies to 'impound' specific sums of money and to revert those sums to the general fund at the end of the fiscal year." 172 Ariz. 3, 11-12 (1992). The Court first observed that "our Constitution vests the lawmaking power with the Legislature" and that "nothing in article 5, section 4 gives the Governor any 'power to make legislative decisions.'" *Id.* at 12. The Court then struck down as unconstitutional each of the Governor's reversion orders, explaining that the Governor "has no power to *alter* an appropriation in the sense that he lines out an item *and replaces it with his own, different amount*." *Id.* at 13; *see id.* at 15 ("The Governor's desire to assist in the fight against drugs and gangs does not permit him to restructure the Legislature's allocation of appropriated monies.").

The U.S. Supreme Court has similarly held that the power to alter, amend, or repeal laws is a legislative power. In *Clinton v. New York*, which involved the constitutionality of the Line Item Veto Act, the Court, in striking down the Act, observed that "in both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each." 524 U.S. 417, 438 (1998). The Court explained that "[t]here is no provision in the Constitution that authorizes the

President to enact, to amend, or to repeal statutes," and, therefore, "[t]here are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition." *Id.* at 438-39. Justice Kennedy, concurring, was more forceful in his conclusion that Congress, in attempting to give the President the unilateral power to amend or repeal laws, was attempting to cede legislative powers: "That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow." *Id.* at 452 (Kennedy, J., concurring). Even Justice Scalia in dissent agreed that the power to unilaterally cancel a law is not an executive power and is not permitted under the Constitution. *See id.* at 464 (Scalia, J., concurring in part and dissenting in part) ("Article I, § 7, of the Constitution obviously prevents the President from canceling a law that Congress has not authorized him to cancel. Such action cannot possibly be considered part of his execution of the law[.]").

Finally, in the famous case of *Youngstown Sheet and Tube Co. v. Sawyer*, the Court, in striking down President Truman's executive order "directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills," held the order invalid as an attempted exercise of legislative authority by the executive branch. 343 U.S. 579, 587-89 (1952). The Court explained that

"[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." *Id.* at 588. The Court observed that the executive order, much like EO 43 here, read like a statute: "The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution." *Id.* The Court struck down this attempted exercise of legislative power, during a national emergency no less, because "[t]he Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times." *Id.* at 589; *see also id.* at 655 (Jackson, J., concurring) ("With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.").

D. The Grant Of Power In § 26-303(E) During A State Of Emergency Does Not Include The Legislative Power To Amend Or Suspend Arizona Law.

As explained, EO 43 legally and practically speaking amends and suspends numerous provisions of Arizona law for an indeterminate amount of time. If the Governor has the power to exercise the legislative power to amend or suspend Arizona law during a state of emergency, that power must be found in § 26-303(E)'s statement that during a state of emergency, the Governor has "the right to exercise . . . all police power vested in the state by the constitution and laws of this state." Whether such power includes the legislative power to amend or suspend state law is primarily a question of statutory interpretation.

The Court's "primary goal in interpreting statutes is to effectuate the legislature's intent as expressed in the statute's text." *Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 559 ¶22 (2018) (internal quotation marks omitted). To achieve that end, the Court uses "fundamental principles of statutory construction, the cornerstone of which is the rule that the best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction." *Duff v. Lee*, __ Ariz. __, 476 P.3d 315, 318 ¶13 (2020). The Court "interpret[s] statutory language in view of the entire text, considering the context and related statutes on the same subject." *Molera v. Hobbs*, 250 Ariz. 13, 24 ¶ 34 (2020). If statutory language is capable of

more than one reasonable meaning, the Court "appl[ies] secondary interpretive principles, such as examining 'the statute's subject matter, historical background, effect and consequences, and spirit and purpose.'" *State of the Neth. v. MD Helicopters, Inc.*, __ Ariz. __, 478 P.3d 230, 233 ¶8 (2020).

Here, at most, the phrase "exercise . . . all police power" is ambiguous, but secondary interpretive principles compel the conclusion that § 26-303(E) does not grant the Governor the power to amend or suspend statutes.

1. The Phrase "Exercise All Police Power" Is At Most Ambiguous.

The grant of power in § 26-303(E) is, at best for the Governor, ambiguous. The statute does not unequivocally authorize the Governor to assume the powers of other branches during a state of emergency. The statute also does not define the phrases "exercise" or "all police power," and certainly does not define those terms to include the legislative power to amend or suspend statutes *See generally* A.R.S. § 26-301.

The Court recently described the "police power" as "[t]he protection of life, liberty, and property, and the preservation of the public peace and order, in every part, division, and subdivision of the state." *State ex rel. Brnovich*, 242 Ariz. at 600 ¶47 ; *see also Am. Fed. of Labor v. Am. Sash & Door Co.*, 67 Ariz. 20, 27 (1948) ("This undefined power of government covering the health, safety, or welfare of the people bears the same relation to the state that the principle of self-

defense bears to the individual."). Similarly, the U.S. Supreme Court has explained that "the traditional police power of the States is defined as the authority to provide for the public health, safety, and morals[.]" *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); Santiago Legarre, THE HISTORICAL BACKGROUND OF THE POLICE POWER, 9 U. Pa. J. Const. L. 745, 795 (2007) ("HISTORICAL BACKGROUND") ("Nowadays, insofar as the expression is used in American constitutional law, the phrase 'police power' normally refers to the authority of the states for the promotion of public health, public safety, public morals, and public welfare.").[2]

Not only has this Court referred to the term "police power" as "undefined," *see Am. Fed. of Labor*, 67 Ariz. at 27, but the U.S. Supreme Court has long acknowledged the difficulty of defining the scope of the "police power." *See, e.g.*, *Slaughter House Cases*, 83 U.S. 36, 62 (1872) (observing as to the police power that "it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise"); *W. Union Tel. Co. v. James*, 162 U.S. 650, 653 (1896) ("This power is somewhat generally described as the police power of the state, a detailed definition of which has been said to be

[2] Chief Justice Marshall first coined the term "police power" in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 442-43 (1827), where he explained "[t]he power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States." *See* HISTORICAL BACKGROUND at 783.

difficult, if not impossible, to give."); *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless[.]").[3]

The Court, however, need not detail the precise scope of the term "police power" here because, under no circumstances, can that use of that term permit the executive branch to exercise the core powers of the legislative branch. While "police power" refers both to certain ends to be achieved by the government (*i.e.*, protection of health, safety, morals or welfare) and its power to achieve those ends in various ways (*i.e.*, statute, executive order, ordinance, resolution, rule, opinion), there is *no support* for any claim that the term "police power" can alter the means used to achieve those ends by individual branches or political subdivisions, such that the Governor can suddenly act as the Legislature when he declares a state of emergency.

For example, the Court has explained that the Legislature has empowered counties and municipalities to exercise the police power in various ways. *See, e.g.*, *State ex rel. Brnovich*, 242 Ariz. at 600 ¶49 ("The Tucson Police Department's disposition of property (whether forfeited or unclaimed) is an exercise of police

[3] *See* HISTORICAL BACKGROUND at 747 ("The meaning and implications of the term ["police power"] are far from clear; hence Thayer's oft-quoted remark made as long ago as 1895: '[d]iscussions of what is called the 'police power' are often uninstructive . . . .'").

power granted by the state."); *Indus. Comm. v. Navajo Cty.*, 64 Ariz. 172, 179 (1946) ("It is therefore apparent that the duty of caring for the indigent sick . . . is an exercise of the police power, and such powers and duties are vested in the board of supervisors."). But the Court has never suggested that a statutory grant of "police power" comes with any implied authority to exercise core legislative powers to amend or suspend legislation. Similarly, "[u]nder proper circumstances, the police power may be exercised by the executive department." 16A Am. Jur. 2d Constitutional Law § 341 (2020). And this Court, in exercising its constitutional authority to regulate the practice of law, could fairly be said to be exercising the police power. *See id.* ("Under proper circumstances, the courts may make orders involving exercise of the police power."); *In re Smith*, 189 Ariz. 144, 146 (1997) ("The State Bar exists only by virtue of this court's rules, adopted under authority of article III and article VI, §§ 1 and 5 of the Arizona Constitution."). No one would suggest though that the ability of the executive or judicial branches to exercise the "police power" in certain situations also gives them the power to act as the Legislature.

Thus, under § 26-303(E), the Governor can exercise the entirety of the "police power" to address the COVID-19 pandemic, but he must do so consistent with executive powers and functions. For example, he can likely exercise statutory powers that the Legislature has previously granted to state boards, departments, or

agencies or even to counties and municipalities, *so long as any resulting action is consistent with the statutes under which those Legislative grants occurred and otherwise consistent with executive powers*.[4] The Governor, therefore, cannot take any action that effectively amends or suspends prior legislation, because to do so would be inconsistent with existing state law and would overstep the bounds of executive power.

The trial court below correctly recognized that "the governor may not exercise his police power in violation of the constitution or in violation of existing law." [11/4/20 Minute Entry at 11]. The court was also correct that "[a]n interpretation of A.R.S. § 26-303(E) that allows the governor during a state of emergency to make new laws or violate existing laws, even if necessary to respond to or recover from a disaster, emergency, or contingency, would create an unconstitutional delegation of lawmaking power." [*Id.* (citing *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693-94 (1892))]. The trial court, therefore, enjoined that portion of the Governor's executive orders allowing restaurants to sell alcohol

[4] For example, the Governor (or his delegee) could issue rules dealing with alcohol distribution or sales that normally would need to be made by DLLC. But those rules would still have to be *consistent with Arizona statutes*, including notice and comment rulemaking under A.R.S. § 41-1023. The Governor or agencies could even issue emergency rules, so long as the applicable procedures are complied with.

for off-premises consumption.[5] While that particular ruling was correct, the trial court failed to properly apply its conclusion to the entirety of EO 43. As explained, EO 43 amends or suspends numerous other statutory provisions. The language in § 26-303(E) should not be interpreted to allow the Governor to do so, thereby dooming EO 43's attempt to wholesale suspend series 6 and 7 licenses.

2. The Structure Of § 26-303 Does Not Support The Power Exercised.

The structure of § 26-303 does not support that the Governor has the power to amend or suspend state law during a state of emergency. The Legislature knows how to give the Governor the power to suspend certain state laws during emergency circumstances when it so intends. We know this because the Legislature did so in *another portion* of § 26-303 following a "declaration of war" by the Governor. That provision states that "[d]uring a state of war emergency, the governor may . . . [s]uspend the provisions of any statute prescribing the procedure for conduct of state business, or the orders or rules of any state agency[.]" A.R.S. § 26-303(A).[6] But there is also an important structural check on that power: "The powers granted the governor by this chapter with respect to a state of war emergency shall terminate if the legislature is not in session and the governor, within twenty-four hours after the beginning of such state of war emergency, has

[5] This portion of the trial court's order is not at issue on appeal.
[6] The Attorney General does not address the constitutionality of § 26-303(A).

not issued a call for an immediate special session of the legislature[.]" *Id.* § 26-303(C).

Unlike in a state of war emergency, the statutory provisions setting forth the Governor's powers during a state of emergency do not include the power to suspend state statutes. *See* A.R.S. § 26-303(E). They also do not contain the same procedural protections limiting the exercise of that power only after a short period of time. *See id.* § 26-303(F). Thus, not only does the structure of § 26-303 not support the existence of the power to amend or suspend state statutes, the structure supports that the Legislature intentionally refused to provide that power. *See City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 211 ¶13 (2019) ("Expressio unius est exclusio alterius—the expression of one item implies the exclusion of others—is appropriate when one term is reasonably understood as an expression of all terms included in the statutory grant or prohibition."); *Jimmy G. v. Dept. of Child Safety*, No. 16-0494, 2017 WL 2374681, at *4 ¶26 (App. June 1, 2017) ("We presume the legislature acts intentionally and purposefully when it includes language in one section of a statute, but omits it in another."); Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107-11 (2012).

3. The History Of § 26-303 Does Not Support The Power Exercised.

The historical development of the language in § 26-303 does not support that the Governor has the power under § 26-303 to amend or suspend state law. In January 1943, at the height of World War II, Governor Earl Warren of California called the California Legislature into extraordinary session to further define the powers of the California Governor during times of war or emergency. 1943 Cal. Laws at 3375. During that session, the California Legislature passed the California War Powers Act. In relevant part, that Act provided the following:

> During a period of a state of extreme emergency the Governor shall have complete authority over all agencies of the State Government and the right to exercise within the protective regions designated all police power vested in the State by the Constitution and the laws of the State of California, in order to effectuate the purposes of this chapter. In exercise thereof he is authorized to promulgate, issue and enforce rules, regulations and orders which he considers necessary for the protection of life and property.

Id. at 3385. Two years later, in 1945, Governor Warren signed the California Disaster Act, which contained identical language to that quoted above from the War Powers Act. *See* 1943 Cal. Military & Veterans Code § 1500 (California Stats. 1945, ch. 1024).

In 1970, California Governor Ronald Reagan signed the California Emergency Services Act, which superseded the California Disaster Act. That Act, like the California Disaster Act before it, provided (and still provides today) that

"[d]uring a state of emergency the Governor shall . . . have complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California in order to effectuate the purposes of this chapter." Cal. Gov't Code § 8627. The Act also provided the California Governor with broad authority to suspend state law, including during a state of emergency: "During a state of war emergency *or a state of emergency* the Governor may suspend the provisions of any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency[.]" Cal. Stats. 1970, ch. 1454, at 2849 (emphasis added).

Just one year later, in 1971, the Arizona Legislature enacted its emergency management statutes. The Arizona Legislature borrowed heavily from the language in the California Disaster Act. For example, the Arizona Legislature copied verbatim the "police powers" language in § 26-303(E) from Cal. Gov't Code § 8627. The Arizona Legislature also copied some of the suspension language in § 26-303(A)(1) from the California statute. But the Arizona Legislature chose not to copy that language verbatim. Instead, the Arizona Legislature removed any reference to "a state of emergency" and to "any regulatory statute." *See* A.R.S. § 26-303(A)(1). Thus, it came to be that the only time under Arizona law when the governor can claim the power to suspend state

law is following declaration of a state of war emergency. This enactment history strongly supports that the Legislature's decision not to grant the suspension power during a state of emergency was intentional. The Court should not give what the Legislature intentionally withheld.

4. Constitutional Avoidance Does Not Support The Power Exercised.

If the Court were to interpret § 26-303(E) to provide the Governor with the power to amend or suspend state law, it would cast a constitutional pall over that statute. The Court can, and should, avoid that result by rejecting such an interpretation. *See, e.g.*, *Slayton v. Shumway*, 166 Ariz. 87, 92 (1990) ("[W]here alternate constructions are available, we should choose that which avoids constitutional difficulty."); *Greyhound Parks of Ariz., Inc. v. Waitman*, 105 Ariz. 374, 377 (1970) (explaining and applying canon of constitutional avoidance); READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247–51.

There are at least three ways § 26-303(E) will likely be rendered constitutionally infirm if it is interpreted to allow the Governor to amend or suspend state statutes. First, as Appellants explain, the statute would then likely result in an unconstitutional delegation of legislative powers, even under the Court's current non-delegation test. *See* Appellants' Op. Br. at 18-27. Under that test, a statute passes constitutional muster if it establishes a "sufficient basic standard, i.e., a definite policy and rule of action which will serve as a guide for the

administrative agency." *State v. Ariz. Mines Supply Co.*, 107 Ariz. 199, 205-06 (1971). But even under that test, which allows the legislature wide berth, "the legislature alone possesses the lawmaking power" and "it cannot completely delegate this power to any other body." *Id.* at 205. Instead, it may only delegate the ability "to fill in the details of legislation already enacted." *Id.*

EO 43 does not "fill in the details of legislation already enacted"; it amends or suspends existing legislation for an indefinite amount of time. As Appellants explain, under the Governor's interpretation of § 26-303(E), he "could order everyone to stay home for six months. He can pick and choose what businesses to leave open and what businesses to close. He can tax the rich and redistribute to the poor to help them seek shelter." Op. Br. at 22. And the Governor has offered no grounding principle to restrain the unlimited powers he claims to be able to exercise pursuant to § 26-303(E).

The Court should avoid an interpretation of § 26-303(E) that gives the Governor unfettered power, including to amend or suspend statutes, and should instead interpret that statute as granting the Governor broader *executive powers* than he would ordinarily have. *See State v. Marana Plantations, Inc.*, 75 Ariz. 111, 115 (1953) ("[T]he attempt by the legislature to . . . give the board unrestrained power to regulate sanitation and sanitary practices and promote public health and prevent disability and mortality is a constitutional relinquishment of its

legislative power[.]"); *Hernandez*, 68 Ariz. at 256 (any legislative enactment that vests in an official the power to suspend its terms "is unconstitutional as a delegation of the power reposed exclusively in the legislature"); *In re Certified Questions From U.S. Dist. Ct., W. Dist. of Michigan, S. Div.*, __ N.W.2d __, 2020 WL 5877599, at *24 (Mich. Oct. 2, 2020) ("[T]he delegation of power to the Governor to 'promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property,' constitutes an unlawful delegation of legislative power to the executive and is therefore unconstitutional[.]").

Second, interpreting § 26-303(E) to give the Governor the power to amend or suspend statutes would violate the separation of powers in Article III of the Arizona Constitution. In evaluating separation of powers claims, the Court examines: "(1) the essential nature of the power exercised; (2) the Legislature's degree of control in exercising the power; (3) the Legislature's objective; and (4) the practical consequences of the action." *San Carlos Apache Tribe v. Super. Ct.*, 193 Ariz. 195, 211 ¶37 (1999). The Governor's interpretation of § 26-303(E) would render that statute constitutionally suspect under that test. The essential nature of the power the Governor would thereby exercise is legislative; as Appellants explain, the Legislature has virtually no control over the powers exercised under § 26-303(E) (*see* Op. Br. at 21-27); under the Governor's interpretation, the Legislature's objective was apparently to hand all government

power to one branch of government for an indeterminate amount of time; and the practical consequences of giving the Governor that power would be to upend for months the structure of government reflected in the Arizona Constitution and to prevent the Legislature from determining the correct balance between public health and individual liberty. Thus, all four factors would support a separation-of-powers violation.

Third, interpreting § 26-303(E) to allow the Governor to unilaterally amend or suspend statutes would violate the constitutional requirements of bicameralism and presentment. The Arizona Constitution provides that "[a] majority of all members elected to each house shall be necessary to pass any bill" and that "[e]very measure when finally passed shall be presented to the governor for his approval or disapproval." Ariz. Const. art. IV, pt. 2 § 15; id. art. IV, pt. 2 § 12; *see also McDonald v. Frohmiller*, 63 Ariz. 479, 489 (1945) ("The lawmaking power in Arizona is composed of the two houses of the legislature and the governor in the exercise of his veto power, and all laws, either creating or repealing, must have the approval of all three of these branches of the lawmaking power."). These requirements are violated when the Governor exercises lawmaking power to unilaterally amend or suspend state law. *See Clinton*, 524 U.S. at 447 (holding that the Line Item Veto Act violated the federal presentment clause because it "gives the President the unilateral power to change the text of duly enacted statutes");

I.N.S. v. Chadha, 462 U.S. 919, 957 (1983) ("[T]he bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps.").

The Court can, and should avoid, these thorny constitutional issues by rejecting the Governor's broad interpretation of the term "police power" and instead interpreting that term consistent with the statute's language, structure, and history and consistent with the historical understanding of the executive power.

II. EO 43 Discriminates Against Series 6 And 7 License Holders In Violation Of Arizona's Privileges Or Immunities Clause.

In EO 43, the Governor singled out holders of series 6 and 7 liquor licenses without adequate justification in violation of the Arizona Constitution. Article 2, Section 13, Arizona's Privileges or Immunities Clause, provides: "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." That Clause guarantees that all persons subject to state action "shall be treated alike under similar circumstances and conditions in privileges conferred and liabilities imposed." *Valley Nat. Bank of Phoenix v. Glover*, 62 Ariz. 538, 554 (1945). The government may apply "different sets of rules for different classes, or discriminat[e] in favor of, or against, a certain class, provided the classification or discrimination is reasonable, rather

than arbitrary[.]" *Id.* at 555. For example, in *Killingsworth v. West Way Motors, Inc.*, the Court held unconstitutional a law that had "no reasonable relationship . . . to the purpose sought to be achieved, [and] the restriction [was] arbitrary, discriminatory, and unlawful." 87 Ariz. 74, 80 (1959). Similarly, in *Gila Meat Co. v. State*, the Court invalidated a statute that "impose[d] different taxes upon persons engaged in the same business, without such difference being based upon a reasonable classification for purposes of the public health, safety, or general welfare." 35 Ariz. 194, 202 (1929).

In applying the Privileges or Immunities Clause, the Court should first determine whether the state action at issue is discriminatory. EO 43 clearly satisfies that requirement because it discriminates between series 6 and 7 licensees, on one hand, and all other holders of liquor licenses, on the other. It is only series 6 and 7 licensees, and not other liquor license holders (including those identically situated), who were forced to "pause" operations under EO 43. EO 43 even discriminates among series 6 and 7 licensees: only those series 6 or 7 license holders "whose primary business is the sale or dispensing of alcoholic beverages" were shuttered. *See Killingsworth*, 87 Ariz. at 80 (finding discrimination when new car dealers were required to own or lease certain property and used car dealers were not so required).

Appellants' privileges or immunities claim, therefore, turns on whether that discrimination has a reasonable relationship to the means sought to be achieved or whether it is arbitrary. This Court has never applied the Privileges or Immunities Clause to unilateral executive action taken pursuant to an emergency grant of power. Regardless of the statutory authority for doing so, an emergency situation may require the executive to take swift action without prolonged deliberation, and the Court should craft a test that both recognizes that reality and yet protects Arizonans from arbitrary, even if well meaning, executive actions. That test should take into account all relevant information, but should focus on (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. Utilizing these factors will help fulfill the Court's role to protect individual liberty from arbitrary government encroachment. Applying those factors, the targeted restrictions on series 6 and 7 licenses contained in EO 43 are arbitrary.

The COVID-19 pandemic is a serious health crisis and "[s]temming the spread of COVID–19 is unquestionably a compelling interest." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). But the pandemic has now been ongoing for over eleven months and the Governor issued his first executive order relating to COVID-19 on March 19, 2020. [*See* Executive Order

2020-07.] Since then, the Governor has issued approximately 57 executive orders relating to COVID-19. EO 43 was issued over seven months ago and has been amended several times since. While early on in a serious emergency there may be many unknowns, thus justifying judgment calls that may appear arbitrary in hindsight, the Governor has now had plenty of time, with no legislative oversight, to deliberate about how to stem COVID-19, including in bars, in a manner that is not arbitrary. *See S. Bay United Pentecostal Church v. Newsom*, __ S. Ct. __, 2021 WL 406258, at *4 (Feb. 5, 2021) (Gorsuch, J. Statement) ("Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner. As this crisis enters its second year—and hovers over a second Lent, a second Passover, and a second Ramadan—it is too late for the State to defend extreme measures with claims of temporary exigency, if it ever could.").

The geographic scope of EO 43 is similarly arbitrary. The restrictions contained therein apply statewide, with almost no attempt to treat those hampered by its restrictions differently based on material differences in geography. It is not as if geography does not matter when it comes to bars. A bar located in Old Town Scottsdale likely presents a materially different risk than a bar located on a corner in Winslow. And yet EO 43 treats those two bars identically.

Finally, EO 43 is highly inconsistent in numerous respects. The Governor has attempted to justify differential treatment of series 6 and 7 licensees on grounds that they do not serve food, and that consuming food prevents customers from becoming overly intoxicated and accidentally spreading COVID-19. Both bars and restaurants are already prohibited from serving a patron to the point of intoxication. *See* A.R.S. § 4-244(14).

In any event, the evidence below does not support that discriminating against nearly all series 6 and 7 licensees is reasonably tailored to prevent consumers with empty stomachs from consuming alcohol in public. For example, the DLLC director testified that many other types of licensees—breweries (series 3), hotel bars (series 11), restaurant bars (series 12), and private clubs (series 14)—are in the primary business of selling or dispensing alcoholic beverages and act like bars. [Hr'g Tr. 193:8-194:15.] Consumers may still enjoy multiple cocktails on an empty stomach at those establishments. Similarly, certain series 6 or 7 license holders can remain open, regardless of whether they serve food to consumers, because they are located on a golf course or in a hotel or bowling alley. [*Id.* 196:16-197:24, 202:11-16.] Thus, publicly consuming a six pack of beer without food remains an option if a golf club or bowling ball is also involved. EO 43 has even been interpreted to prevent those holding a series 6 or 7 license from re-

opening even if they agree not to serve alcohol until the Governor permits them to do so. [R.134 at -002; R. 143; R. 210 at -003.]

To add insult to injury, in early December 2020, the Governor issued executive order 2020-59, which continues to allow local governments to approve special events with attendance in excess of 50 people (with no cap on attendance). That executive order expressly amends EO 43 to allow DLLC to issue a series 15 or 16 liquor license for those special events. Neither of those licenses has a requirement that special events serve food and the executive order does not add such a requirement. Thus, through executive fiat, the Governor allowed thousands of Arizonans to consume alcohol, regardless of whether they also consumed food (and many surely did not), at the Waste Management Open in Scottsdale last week, while the Palo Verde Lounge[7] in Tempe remained shuttered.[8] The Privileges or Immunities Clause was designed to prevent the government from discriminatorily

[7] *See* Ed Masley, *A legendary Tempe dive bar is on the brink of closing. How the community is trying to help*, ARIZONA REPUBLIC (7:00 AM, Feb. 10, 2021) (available at https://www.azcentral.com/story/entertainment/music/2021/02/10/tempe-dive-bar-covid-19-palo-verde-lounge/4459609001/).

[8] As the District of Pennsylvania recently explained in striking down certain COVID-19 restrictions issued by Governor Wolf, "Closing R.W. McDonald & Sons did not keep at home a consumer looking to buy a new chair or lamp, it just sent him to Walmart. Refusing to allow the Salon Plaintiffs to sell shampoo or hairbrushes did not eliminate the demand for those products, it just sent the consumer to Walgreens or Target. In fact, while attempting to limit interactions, the arbitrary method of distinction used by Defendants almost universally favored businesses which offered more, rather than fewer products." *Cty. of Butler v. Wolf*, __ F. Supp. 3d __, 2020 WL 5510690, at *31 (W.D. Pa. Sep. 14, 2020).

choosing winners and losers in this manner. *Cf. S. Bay United Pentecostal Church*, 2021 WL 406258, at *3 (Gorsuch, J., Statement) ("So, once more, we appear to have a State playing favorites during a pandemic, expending considerable effort to protect lucrative industries (casinos in Nevada; movie studios in California) while denying similar largesse to its faithful.").

CONCLUSION

The Court should reverse and remand for entry of a preliminary injunction preventing the Governor from further enforcing those provisions of EO 43 that purport to suspend state liquor laws and that discriminate against series 6 and 7 licensees.

RESPECTFULLY SUBMITTED this 18th day of February, 2021.

MARK BRNOVICH
Arizona Attorney General

/s/ *Brunn W. Roysden III*
Joseph A. Kanefield
Chief Deputy and Chief of Staff
Brunn (Beau) W. Roysden III
Solicitor General