

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 *Assistant Attorney General*
8 2005 North Central Avenue
9 Phoenix, Arizona 85004
10 Telephone: (602) 542-8958
11 beau.roysden@azag.gov
12
13 *Attorneys for Attorney General Mark Brnovich*

14 ARIZONA SUPERIOR COURT
15 MARICOPA COUNTY

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

Case No: CV2020-010282

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

(Assigned to the Honorable Pamela Gates)

****Oral Argument: 9/4/2020 at 2:00****

23 The Attorney General files this brief pursuant to A.R.S. § 12-1841, which
24 authorizes him “to be heard” “[i]n any proceeding in which a state statute, ordinance,
25 franchise or rule is alleged to be unconstitutional.” A.R.S. § 12-1841(A), (D). This
26 lawsuit challenges the constitutionality of A.R.S. § 26-303(E)(1), and arises in the
27 specific context of the Governor’s alleged arbitrary closure of 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 and even exceed the statutory restrictions
on their license types.¹

¹ The legal issue the Court must resolve, however, is not nearly so limited. Indeed, many of the Governor’s Executive Orders during this declared emergency appear to contravene

1 Executive Order 2020-09 at ¶1. At the same time, the Governor allowed restaurants with
2 series 12 liquor licenses to begin selling spirituous liquor for off-premises consumption,
3 even though § 4-205.02(C) prohibits this for series 12 licensees. *Id.* at ¶3.

4 After briefly allowing bars to reopen, the Governor ordered entities with series 6
5 or 7 liquor licenses to “pause operations” effective June 29, 2020. Executive Order
6 2020-43 (“EO 2020-43”). This executive order prohibited series 6 or 7 licensees from
7 conducting on-site business operations (except to sell liquor for off-site use). At the
8 same time, executive orders allow series 12 licensees to stay open for on-site business
9 operations *and* to continue selling spirituous liquor off-premises, contrary to § 4-
10 205.02(C).² The Governor’s orders prohibiting series 6 and 7 licensees from conducting
11 on-site operations and allowing series 12 licensees to sell spirituous liquor off site are
12 referred to herein as the “Liquor License Orders.” These orders are based on § 26-
13 303(E)(1) as authority for their issuance.

14 The instant action, which is a challenge to the Liquor License Orders as applied to
15 series 6 and 7 licensees, was brought on August 25, 2020, alleging that § 26-303(E)(1)
16 violates the nondelegation doctrine under the state constitution by delegating the entire
17 “police power” of the state to the Governor in the event of an emergency. Compl. ¶4.
18 On August 26, 2020, counsel for Plaintiffs sent a notice under § 12-1841 to the Attorney
19 General. The Attorney General’s as-of-right brief follows that notice.

20 ARGUMENT

21 As explained below: (1) A.R.S. § 26-303(E)(1) does not constitute an
22 impermissible delegation of legislative power because it is subject to adequate limitation,
23 but (2) the Liquor License Orders’ discriminatory treatment of series 6 and 7 liquor
24 license holders versus series 12 license holders violates the limits of § 26-303(E)(1).

25
26
27
28 ² Executive orders also allow a host of other liquor license holders to remain open,
including microbreweries (series 3), hotel bars (series 11), wineries (series 13), private
clubs (series 14), distilleries (series 18), and tasting rooms (series 19). EO 2020-43;
Arizona Department of Liquor Licenses and Control, <https://azliquor.gov/forms.cfm>.

1 **I. Section 26-303(E)(1) Has Two Important Limits, Which Prevent An**
2 **Unconstitutional Delegation Of Legislative Power**

3 Section 26-303(E)(1) is not an unconstitutional delegation of legislative power. It
4 provides that, during a state of emergency, “[t]he governor shall have complete authority
5 over all agencies of the state government and the right to exercise, within the area
6 designated, all police power vested in the state by the constitution and laws of this state
7 in order to effectuate the purposes of this chapter.” A.R.S. § 26-303(E)(1).

8 Plaintiffs argue that “[t]he governor’s discretion is not cabined by this statute in
9 any way, except by the general purpose to confront and resolve emergencies.” Mot. for
10 TRO at 11. Not so. The Governor acknowledges that his police power is “guided and
11 circumscribed” by the statutes in Title 26, Chapter 2. Governor’s Motion to Dismiss at
12 5; *see also id.* at 4-8.³ In addition to the restraints acknowledged by the Governor, he
13 can only take actions *consistent with* other statutes and the constitution, under both the
14 constitutional avoidance and absurdity canons of construction. These are significant
15 limitations on the Governor’s discretion under § 26-303(E)(1). *Cf. State ex rel. Brnovich*
16 *v. City of Tucson*, 242 Ariz. 588, 602, ¶55 (2017) (requirement that city charters be
17 “consistent with, and subject to, the Constitution and the laws of the state” is a
18 “significant constitutional restraint on [their] powers”).

19 And because the Governor’s Orders must be consistent with the constitution, the
20 Legislature did not confer in § 26-303(E)(1) the power to issue orders that are “arbitrary,
21 unreasonable and discriminatory.” *Killingsworth*, 87 Ariz. at 80 (finding arbitrary action
22 unconstitutional).

23
24
25 ³ Even as to these acknowledged limitations, the Governor has never sought
26 “recommendations for orders, rules, policies and procedures” from the statutory State
27 Emergency Council related to this emergency, even though statutes provide for such
28 recommendations. *See* A.R.S. § 26-304(B). The Attorney General is one of two
members of the council who do not serve at the pleasure of the Governor. *Id.* § 26-
304(A). The other is the Secretary of State. *Id.* The President of the State Senate and
Speaker of the House of Representatives are also members (in an advisory capacity). *Id.*
The Council is also tasked with “monitor[ing] each emergency declared by the
governor.” *Id.* § 26-304 (C).

1 **A. Section 26-303(E)(1) Is Limited By The Requirement That Orders Of**
2 **The Governor Be Consistent With Other Statutes**

3 This section demonstrates that, as a matter of statutory interpretation, any
4 executive order issued under § 26-303(E)(1) must be consistent with existing statutes and
5 the constitution. This limitation is apparent from the context of the statute.
6 Significantly, § 26-303(E)(1) contains no provision allowing the Governor to suspend
7 statutes or rules for a state of emergency.

8 Section 26-303 grants the Governor powers for two types of emergencies: a
9 “state of emergency” and a “state of war emergency.” A “state of emergency” is
10 different than a “state of war emergency.” *Compare* A.R.S. § 26-301(15) (defining
11 “state of emergency”) *with* A.R.S. § 26-301(16) (defining “state of war emergency”).
12 Only in a state of war emergency does the Governor have the power to suspend statutes
13 prescribing the conduct of state business or the orders or rules of state agencies.
14 *Compare* A.R.S. § 26-303(A)(1) (authorizing the Governor to “[s]uspend the provisions
15 of any statute prescribing the procedure for conduct of state business, or the orders or
16 rules of any state agency”), *with* A.R.S. § 26-303(E)(1) (no authorization).⁴

17 And even then, this war power is carefully limited in two significant ways. First,
18 statutes and rules may only be suspended when “the governor determines and declares
19 that strict compliance with the provisions of any such statute, order or rule would in any
20 way prevent, hinder or delay mitigation of the effects of the emergency.” A.R.S. § 26-
21 303(A)(1). Second, the Governor’s powers for a state of war emergency “terminate if
22 the legislature is not in session and the Governor, within twenty-four hours after the
23 beginning of such state of war emergency, has not issued a call for an immediate special
24 session of the legislature for the purpose of legislating on subjects relating to such state
25 of war emergency.” A.R.S. § 26-303(C).

26 Because the Governor is specifically permitted to suspend state statutes and rules
27 only under a declaration of war emergency, the Governor does not have the general
28

⁴ The Governor also has the power to commandeer private property during a state of war emergency. A.R.S. § 26-303(A)(2).

1 power to suspend statutory and regulatory restrictions for declarations of other types of
2 emergencies under well-established canons of statutory construction. *See City of*
3 *Surprise v. Arizona Corp. Comm’n*, 246 Ariz. 206, 211, ¶13 (2019) (“the expression of
4 one item implies the exclusion of others” under the canon *expressio unius est exclusio*
5 *alterius*); *In re Estate of Winn*, 225 Ariz. 275, 278, ¶13 (App. 2010) (“The breadth of
6 [one statute] demonstrates that the legislature knows how to authorize [an item] when it
7 chooses to do so.”). As such, the Governor’s exercise of the “police power” under § 26-
8 303(E)(1) cannot be used to override state statutes or existing agency rules.

9 Here, the Governor has not declared a state of war emergency. As such, any
10 emergency orders issued under § 26-303(E)(1) must comply with existing statutes and
11 agency rules.

12 **B. Section 26-303(E)(1) Is Further Limited By The Requirement That**
13 **Orders Be Consistent With The Constitution**

14 Any executive order issued under § 26-303(E)(1) must also be consistent with the
15 Arizona Constitution—in particular the requirement that government action not be
16 arbitrary. *See, e.g.,* Ariz. Const. art. II, §§ 4, 13. An interpretation of § 26-303(E)(1)
17 that would permit the Governor to issue orders that discriminate against similarly
18 situated businesses, so long as there is some “rational speculation” supporting the
19 discriminatory treatment, Governor’s Motion to Dismiss at 12-13, is not contained in the
20 text of the statute and must be avoided under multiple canons of statutory construction.
21 First, it would lead to serious constitutional difficulties to construe that statute as
22 authorizing the Governor to arbitrarily discriminate. *See State v. Gomez*, 212 Ariz. 55,
23 60, ¶28 (2006) (courts “construe statutes, when possible, to avoid constitutional
24 difficulties”). Second, it would lead to an absurd result, which should also be avoided.
25 *State v. Estrada*, 201 Ariz. 247, 251, ¶17 (2001) (A result is “absurd ‘if it is so irrational,
26 unnatural, or inconvenient that it cannot be supposed to have been within the intention of
27 persons with ordinary intelligence and discretion.’”).

1 Plaintiffs persuasively cite (Motion for TRO at 15) two Arizona Supreme Court
2 cases for the proposition that government classifications cannot be arbitrary. In
3 *Killingsworth*, the court held unconstitutional a law that had “no reasonable relationship
4 ... to the purpose sought to be achieved, [and] the restriction [was] arbitrary,
5 discriminatory, and unlawful.” 87 Ariz. at 80. The Court specifically considered
6 whether there was “any valid reason for *failing to impose the same requirements upon*”
7 two similarly situated classes of businesses. *Id.* (emphases added). And in *Gila Meat*
8 *Co. v. State*, the court invalidated a statute that “impose[d] different taxes upon persons
9 engaged in the same business, without such difference being based upon a reasonable
10 classification for purposes of the public health, safety, or general welfare,” on the basis
11 that such a statute “in effect grant[ed] to certain citizens privileges and immunities which
12 are not granted to others similarly situated on equal terms.” 35 Ariz. 194, 202 (1929).
13 The Governor’s response admits that those cases are still good law in Arizona. *See*
14 *Response to Motion for TRO at 13-14.*

15 Moreover, violation of an Executive Order carries a criminal penalty. *See* A.R.S.
16 § 26-317 (“Any person who violates any provision of this chapter or who knowingly
17 fails or refuses to obey any lawful order or regulation issued as provided in this chapter
18 shall be guilty of a class 1 misdemeanor.”). As the Arizona Supreme Court reaffirmed
19 just this week in the context of substantive due process, governmental action can fail
20 under even the deferential rational-basis standard in the criminal context. *See State v.*
21 *Arevalo*, __ Ariz. __, No. CR-19-0156, Slip Op. at 6 ¶15 (Sept. 1, 2020).

22 ***Importantly***, when reviewing whether an executive order issued in an emergency
23 pursuant to the delegation of power in § 26-303(E)(1) is arbitrary and provides due
24 process, the Court should consider all relevant information regarding the order. This
25 includes: (1) the severity of the emergency, (2) the duration of the executive action
26 without legislative oversight, (3) the geographical scope of the executive action, and
27 (4) the consistency with which emergency measures are ordered. These considerations
28 will ensure that the executive authority is not exercised arbitrarily, and judicial review of

1 these factors will help fulfill the Court’s role to protect individual liberty from
2 encroachment by arbitrary governmental action.

3 As shown in the next section, the Liquor License Orders cannot be upheld as valid
4 exercises of the Governor’s authority under § 26-303(E)(1), most significantly because
5 of the lack of consistency with which emergency measures are ordered and the duration
6 of the executive action without legislative oversight.

7 **II. Discriminating Against Series 6 And 7 Licensees Versus Series 12 Licensees**
8 **Is Arbitrary, Meaning The Governor’s Orders Closing These Businesses Fail**
9 **To Meet A Core Limit Of § 26-303(E)(1)**

10 The Liquor License Orders violate the core limitations in § 26-303(E)(1)
11 discussed in Part I. Here, EO 2020-43 appears to be picking winners and losers in the
12 marketplace 1) contrary to the existing statutory and rule structure regarding liquor
13 licenses (which the Governor cannot contravene), and 2) in an arbitrary and
14 discriminatory manner and without convening the Legislature in extraordinary session in
15 the event the Governor determines the existing liquor license statutes and rules prevent
16 him from appropriately addressing the emergency.

17 First, the Liquor License Orders are contrary to the existing statutory and rule
18 structure in Title 4. The relevant difference between series 6 and 7 licensees (many of
19 which cannot open) and other types of on-sale retail liquor licensees (which can open) is
20 that series 6 and 7 license holders paid for off-premises sale privileges and do not have
21 the same food requirements. A.R.S. § 4-206.01(D); A.A.C. R19-1-101.

22 With respect to the first requirement, the Liquor License Orders impermissibly
23 contradict the express language of § 4-205.02(C) by giving series 12 licensees the right
24 to sell spirituous liquor for consumption off-premises on top of their ability to stay open
25 for on-site service, while also curtailing the on-site operations of Series 6 and 7
26 licensees. *Compare* EO 2020-09 at ¶3 (ordering that government actors “shall not
27 enforce provision of the series 12 liquor license that prohibit the sale by restaurants
28 off-premises”), *with* A.R.S. § 4-205.02(C) (“The holder of a restaurant license may sell

1 and serve spirituous liquors solely for consumption on the licensed premises.”).⁵
2 Because this aspect of the Liquor License Orders is contrary to statute, it cannot be a
3 lawful exercise of the Governor’s powers under § 26-303(E)(1). *See* Part I(A), *supra*.

4 Second, and more significantly, the Liquor license orders also contravene the
5 limitation that action under § 26-303(E)(1) must be consistent with the constitution, and
6 therefore not arbitrary or discriminatory. *See* Part I(B), *supra*. Series 6 and 7 license
7 holders could be subjected to the same strict health guidelines as other liquor license
8 holders (or other restrictions short of a complete ban that adequately protect public
9 health) if they wish to open for on-site operations even before their county reaches a
10 certain status of COVID-19 cases. As the sole justification for why the classification is
11 not arbitrary, the Governor’s response to Plaintiffs’ TRO focuses on the requirement that
12 restaurants sell a higher percentage of food:

13 Because establishments with series 6 or 7 licenses are able to primarily
14 serve alcohol (unlike series 12 licensees), patrons of bars are more likely to
15 become impaired, which can cause patrons to be less cautious of COVID-
19 mitigation strategies like physical distancing and mask wearing (not to
mention that patrons who are drinking are unable to wear a mask).

16 Response to TRO at 13-14.

17 Bare assertions that bars are more dangerous than restaurants because of a
18 requirement of selling an aggregate amount of food, fail to rebut Plaintiffs’ claim of
19 arbitrary and discriminatory treatment toward series 6 or 7 licensees. Both bars and
20 restaurants are already prohibited from serving a patron to the point of intoxication. *See*
21 A.R.S. § 4-244(14) (making it “unlawful ... [f]or a licensee or other person to serve, sell
22 or furnish spirituous liquor to a disorderly or obviously intoxicated person, or for a
23

24 ⁵ And the Liquor License Orders cannot be upheld as merely exercises of prosecutorial
25 discretion. They categorically permit certain businesses to operate while also prohibiting
26 other businesses from operating. They also purport to bind not just the state Department
27 of Liquor Licenses and Control but also “any Arizona Peace Officer Standards and
28 Training Board certified law enforcement officer” from enforcing the statute. *See* EO
2020-09 ¶3. However, § 26-303(E)(1) applies only to “agencies of state government,”
and § 4-247 also expressly states “[n]o provision in this title shall be construed as
limiting the rights and duties of any peace officer to enforce any provision of this
chapter.” The practical consequence is that, absent the Liquor License Orders, each
locality would have to make its own enforcement decision under the statutes.
Preempting local law enforcement is not “prosecutorial discretion.”

1 licensee or employee of the licensee to allow or permit a disorderly or obviously
2 intoxicated person to come into or remain on or about the premises”). And the Governor
3 can simply require series 6 and 7 licensees to meet the same aggregate food requirement
4 during the emergency as a condition of reopening, while nonetheless treating bars and
5 restaurants equally.

6 Third, the arbitrary and discriminatory treatment under the orders is problematic
7 for the additional reason that the declared emergency has gone on for months without the
8 Governor convening the Legislature into extraordinary session. Early on in an
9 emergency, when there are still many unknown unknowns, it may be permissible for the
10 Governor to make judgment calls that appear arbitrary in hindsight. But those are not the
11 present circumstances. Nearly six months into this emergency, there is simply no
12 sufficient basis to justify the continued differential and preferential treatment here. The
13 purported rewriting of the statutory scheme regarding the relevant liquor licenses, and
14 discriminatory treatment of similarly situated businesses, “must be scrutinized with
15 caution, for what is at stake is the equilibrium established by our constitutional system.”
16 *Cf. Youngstown Sheet and Tube Company v. Sawyer*, 343 U.S. 579, 637-38 (1952)
17 (Jackson, J., concurring).

18 * * *

19 The framers of the Arizona Constitution carefully designed a process to ensure
20 that our tripartite system of government operates as designed during a time of crisis. If
21 the Governor cannot faithfully execute existing law in order to manage a public health
22 crisis as mandated by the second sentence of Article 5, Section 4, the third sentence of
23 that same section directs the Governor to call the Legislature into an “extraordinary
24 session,” so that the law can be changed to provide the executive branch the tools it
25 needs to manage the emergency. *See Warner v. White*, 39 Ariz. 203, 215 (1931)
26 (recognizing that if State’s “departments ... should face the danger of not being able to
27 function, the power to call the Legislature into extraordinary session to avert such a
28 calamity would be in the hands of the state’s chief executive”).

1 No one questions that in times of emergency, the Governor may take immediate,
2 decisive action to protect health and lives. The Constitution, however, does not provide
3 the Governor any authority during a health emergency to arbitrarily discriminate
4 between similarly situated businesses for months. Absent a clear inability of the
5 Legislature to convene, it is incumbent on the Governor to promptly call the Legislature
6 into extraordinary session during this extraordinary time. *Nearly six months into* the
7 declared emergency, it is long past time for the Governor to follow the constitution and
8 convene the Legislature rather than contravene lawful statutes through executive fiat.

9 **CONCLUSION**

10 Under well-established canons of construction, the Governor cannot take actions
11 that are *inconsistent* with other statutes or the constitution when exercising the powers in
12 § 26-303(E)(1). When conferring on the Governor the power to issue orders, the
13 Legislature did not provide the power to issue orders that are “arbitrary, unreasonable
14 and discriminatory.” *Killingsworth*, 87 Ariz. at 80 (finding arbitrary action
15 unconstitutional). Accordingly, the Governor’s Liquor License Orders exceed his
16 authority because they arbitrarily discriminate between similarly situated businesses.
17 The Court should declare them unenforceable as to Plaintiffs, and order the Governor to
18 create processes for series 6 and 7 licensees that are not arbitrary or discriminatory.

19 Respectfully submitted this 4th day of September, 2020.

20 MARK BRNOVICH
21 ATTORNEY GENERAL

22 /s/ *Brunn W. Roysden III*
23 Joseph A. Kanefield
24 *Chief Deputy & Chief of Staff*
25 Brunn (Beau) W. Roysden III
26 *Assistant Attorney General*

27 *Attorneys for Arizona Attorney General*
28 *Mark Brnovich*

1 I hereby certify that the foregoing document was
2 e-filed via TurboCourt this 4th day of September, 2020.

3 I further certify that copies of the foregoing were
4 e-delivered via TurboCourt this 4th day of September, 2020 on:

5 Ilan Wurman
6 MC 9520
7 111 E. Taylor Street
8 Phoenix, AZ 85004-4467
9 ilan.wurman@asu.edu
10 (650) 384-5294

11 *Counsel for Plaintiffs*

12 Anni Foster
13 Office of the Governor
14 afoster@az.gov

15 Brett W. Johnson
16 SNELL & WILMER LLP
17 400 E. Van Buren St., Suite 1900
18 Phoenix, AZ 85004-2202
19 bwjohnson@swlaw.com

20 *Counsel for Defendant Governor Ducey*

21 Gregory W. Falls
22 SHERMAN & HOWARD
23 201 E. Washington St., Suite 800
24 Phoenix, AZ 85004
25 (602) 240-3012
26 gfalls@shermanhoward.com

27 *Counsel for Defendants Department of Liquor Licenses & Control
28 and Department of Health Services*

/s/ Brunn W. Roysden III