STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION By MARK BRNOVICH ATTORNEY GENERAL February 17, 2021	No. I21-001 (R20-017) Re: Emergency Powers of the Governor, Counties and Municipalities

To: John Kavanagh, Representative
Arizona House of Representatives

Questions Presented

1. When the Governor declares a state of emergency, other than a state of war emergency, the emergency can be ended "*by concurrent resolution of the legislature declaring it at an end,*" as per A.R.S. § 26-303(F). Is the Legislature's only option to end the emergency and consequently terminate all of the Governor's actions related to the emergency or could the Legislature:

   A. Modify the Governor's actions by either scaling them back or expanding them under the authority of A.R.S. § 26-303(F) or any other law?

   B. Make the application of the Governor's emergency powers contingent upon the existence of specified conditions, such as in the case of an epidemic, infection levels and hospital ICU bed or ventilator availability, under which the Governor's authority would both end and even later be automatically revived based upon ongoing changes in the conditional metrics?

2. If the Legislature terminates a state of emergency declared by the Governor, thereby terminating all of the Governor's emergency actions, can the Governor:

A. Immediately declare a new state of emergency and reinstitute some or all of the previous actions? If so, would the Legislature have to reconvene to end the reinstated actions, would the actions have no force because they are illegal or would a court have to issue an order ending the Governor's reinstated actions?

B. Later in time, unilaterally declare another state of emergency in response to the same epidemic incident, if conditions worsened, or would the Legislature have to reconvene to allow such reinstatement of previously terminated gubernatorial action?

3. A.R.S. § 26-307(A) gives counties, cities and towns the power to "make, amend and rescind orders, rules and regulations necessary for emergency functions but such shall not be inconsistent with orders, rules and regulations promulgated by the governor."

A. Does this section of law give these local government bodies the same emergency powers that state law gives the Governor to deal with states of emergency, other than a state of war emergency, so long as they do not conflict with an order, rule or regulation issued by the Governor, pursuant to his or her emergency powers?

B. Are the emergency powers of counties and municipalities only available during times that the Governor has declared a state of emergency or can these local governments declare their own state of emergency and then enact emergency measures to deal with such emergency?

C. A.R.S. § 26-307(D) states, "In the absence of specific authority in state emergency plans and programs, the governing body of each county, city and town of the state shall take emergency measures as deemed necessary to carry out the provisions of this chapter." Does such "specific authority" exist in any "state emergency plans and programs" and, more importantly, are there any

provisions in any "state emergency plans and programs" that would limit county and municipal action?

D. If an emergency situation existed and the Governor did not declare a state of emergency, declared one but then rescinded it or the Legislature voted to terminate a state of emergency declared by the Governor, would that leave the counties, cities and towns free to issue orders, rules and regulations to deal with the emergency within the parameters permitted by A.R.S. § 26-307(A) as they so choose (assuming no § 26-307(D) constraints) because they would not be constrained by the legal limitation of not acting "inconsistent" with a gubernatorial order, rule or regulation?

E. Since both counties and municipalities within counties can "make, amend and rescind orders, rules and regulations necessary for emergency functions but such shall not be inconsistent with orders, rules and regulations promulgated by the governor," which local government entity is supreme? If there is inconsistency between county and municipal actions or if the county implements an action that a municipality has not enacted or even voted not to enact, which government's action prevails within that particular municipal boundary – the county or municipality emergency measure?

Summary Answers

1. Under the current statutory framework, the Legislature can only terminate or modify a duly-declared state of emergency "by [a] concurrent resolution" under A.R.S. § 26-303(F).

2. Even if the Legislature terminates a declared state of emergency, the Governor may declare a new state of emergency and re-institute prior measures so long as the conditions for the existence of a state of emergency under A.R.S. § 26-301(15) are satisfied. If the Governor were to do so, the state of emergency would terminate upon (1) a proclamation by the Governor declaring the emergency terminated, (2) a concurrent resolution of the Legislature declaring the emergency terminated, or (3) a court order finding that the conditions for a state of emergency did not exist at the time of declaration or

have since ceased to exist.

3. Regarding the emergency powers of local jurisdictions: (1) the powers granted to counties and municipalities under A.R.S. § 26-307(A) are not equivalent in scope to the Governor's powers under A.R.S. § 26-303(E); (2) local jurisdictions have statutory emergency powers independent of the Governor; (3) to the Attorney General's knowledge, there are no state emergency plans or programs granting local jurisdictions specific emergency powers; (4) local jurisdictions have independent power to declare local emergencies under A.R.S. § 26-311(A); and (5) if there is a conflict between a county and municipal rule, the municipal rule applies within the municipality and the county rule applies in unincorporated areas of the county.

Background

The coronavirus disease ("COVID-19") prompted the U.S. Department of Health and Human Services to declare a Public Health Emergency on January 31, 2020, and the World Health Organization to declare a pandemic on March 11, 2020. *See* Alex M. Azar II, *Determination that a Public Health Emergency Exists*, U.S. Dep't of Health & Hum. Serv. (Jan. 31, 2020);[1] *WHO Director-General's opening remarks at the media briefing on COVID-19*, World Health Org. (Mar. 11, 2020).[2] On March 11, 2020, Governor Ducey declared a state of emergency under Arizona law due to COVID-19. Declaration of Emergency (Mar. 11, 2020).[3]

Since then, the Governor has issued approximately 57 executive orders, many impacting the individual liberties of Arizonans and the economic sustainability of their businesses. For example, the Governor ordered the closing of certain businesses until specific public health metrics were met and the businesses complied with guidance issued by the Arizona Department of Health Services. [EO 2020-43] The Governor issued orders

[1] https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx.
[2] https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.
[3] https://azgovernor.gov/sites/default/files/declaraton_0.pdf.

prohibiting public gatherings of more than 50 people without permission[4], and postponed most eviction enforcement actions for months. [EO 2020-59, EO 2020-49.] The Governor also issued orders allowing restaurants to sell alcohol for off-premises consumption, extending the legislative termination dates for several state agencies, programs, and funds, and changing the training requirements to be certified as an assisted living facility caregiver. [EO 2020-09, 2020-46, 2020-28.]

Striking the proper balance between public health and individual liberties is a shared responsibility among the branches of government. *See* Ariz. Const. art. II, § 1 ("A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."); *id.* art. III (requiring the separation of powers). To strike the proper balance in protecting the public while respecting the rule of law, the democratic process must be utilized during times of crisis, including the current pandemic.

The Governor has not convened the State Emergency Council or sought recommendations from it regarding orders, rules, policies or procedures, or regarding whether or when the declared state of emergency should be terminated. *See* A.R.S. § 26-304(B)(1), (C). Arizonans and their elected representatives, therefore, have had to rely on the judiciary, and at times, the Attorney General, to opine on the limits of the Governor's authority and other aspects of his executive orders.

The legality of some of the Governor's executive orders has been the subject of litigation. *See, e.g.*, *Aguila v. Ducey*, No. CV-20-0335-PR (Ariz. Sup. Ct.) (challenging the executive orders restricting the business operations of the holders of series 6 and 7 liquor licenses); *Mountainside Fitness Acquisitions LLC v. Ducey*, CV2020-093916 (Maricopa Cty. Super. Ct.) (challenging restricting the business operations of indoor fitness

[4] On December 2, 2020, the Governor issued an executive order titled, "Further Mitigation Requirements for Events," which empowered the Arizona Department of Liquor Licenses and Control to resume issuing liquor licenses for special events of more than 50 people. [EO 2020-59.] Thus, large events, like the Waste Management Phoenix Open, are currently free to take place and serve alcohol, while other small businesses remain subject to significant restrictions.

centers); *Mesa Golfland Ltd. v. Ducey*, 2:20-CV-01616 (D. Ariz.) (challenging restricting the business operations of water parks).

Similarly, lawmakers have asked the Attorney General's Office whether the Governor can prevent religious worship (he cannot), Application of Executive Order 2020-18 to Religious Worship, Op. Ariz. Att'y Gen. No. I20-008 (R20-008) (2020), the extent to which a governmental entity must withhold information from the public related to employees and students who test positive for COVID-19 (it may legally release information), Extent of Permissible Disclosure by Government Entities of COVID-19-related Information to the Public and County and State Health Officials, Op. Ariz. Att'y Gen. No. I20-005 (R20-055) (2020), and which agencies enforce certain aspects of the Governor's executive orders (local law enforcement has authority but must be mindful of constitutional rights), Authority of Local Officials and County Sheriffs to Enforce Violations of Lawful Emergency Declarations Issued By Cities and Towns, Op. Ariz. Att'y Gen. No. I20-006 (R20-006) (2020).

In litigation, the Attorney General has defended claims asserted against the State of Arizona as a result of the Governor's executive orders, successfully taking the position that the State of Arizona is not a proper party to such actions. *See* State of Arizona's Resp. to Pet. for Spec. Action, *Arizona Multihousing Assoc. v. Fritz*, No. CV-20-0228-SA, filed Sept. 1, 2020 (Ariz. Sup. Ct.) (arguing in a lawsuit filed challenging the Governor's pause on evictions that the Arizona Supreme Court does not have original special action jurisdiction over the State of Arizona); *Xponential Fitness v. Arizona*, No. CV-20-01310, 2020 WL 3971908 (D. Ariz. July 14, 2020) (dismissing on sovereign immunity grounds the State of Arizona from a lawsuit challenging executive orders restricting the business operations of indoor fitness centers).

The Attorney General has also weighed in, as *amicus*, on the authority of the Governor to shut down some bars and restaurants based largely on the type of liquor license they hold. *See* Brief of Arizona Attorney General Mark Brnovich, *Aguila v. Ducey*, CV2020-010282, filed Sept. 4, 2020 (Maricopa Cty. Super. Ct.). The

Attorney General explained that even during a state of emergency, "the governor's exercise of the 'police power' under § 26-303(E)(1) cannot be used to override state statutes or existing agency rules." *Id.* at 6. The Governor, therefore, does not have "the power to issue orders that are 'arbitrary, unreasonable and discriminatory.'" *Id.*

In determining whether the Governor's restrictions on Arizona businesses have been appropriate, the Attorney General has urged the courts to consider: "(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." *Id.* at 7. This will help ensure that executive authority is not exercised arbitrarily. *Id.*

On December 26, 2020, the AGO received this opinion request (the "Request") from Representative Kavanagh asking the Attorney General to provide additional guidance on the scope of emergency powers under Arizona law possessed by the Governor, counties, and municipalities. The following analysis is informed by the background outlined above, as the questions posed can only be answered when considering the context and history in which they have been asked.

Analysis

This Opinion first addresses the relationship between the Legislature and the Governor with respect to terminating a state of emergency under existing Arizona law. The Opinion then addresses whether the Governor may declare a new state of emergency after the Legislature has terminated a prior state of emergency and how such a new emergency (in essence, a re-declared emergency) can be terminated. Finally, the Opinion addresses the powers of counties and municipalities relating to "emergency functions."

I. The Only Statutory Mechanism For Legislative Modification Of A State Of Emergency Is Termination Under A.R.S. § 26-303(F).

The Arizona Legislature has the statutory power to declare a "state of emergency" at an end through a concurrent resolution declaring the emergency at an end.[5] A.R.S. § 26-303(F). The current statutory framework does not contain any other method for the Legislature to terminate, modify, or condition the existence of a state of emergency.

In 1971, the Legislature passed a series of statutes addressing emergency management powers. Those statutes define a "state of emergency," in relevant part, 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 . . . epidemic[.]" A.R.S. § 26-301(15). The statutes provide that "[t]he 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." *Id.* § 26-303(D). Once the Governor declares a state of emergency, "[t]he 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 this state in order to effectuate the purposes of this chapter." *Id.* § 26-303(E)(1). The statutes also provide two mechanisms for terminating a state of emergency and the powers that arise therefrom: "[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, the Legislature has the statutory power to end a state of emergency through a concurrent resolution.

Whether the Legislature may use the authority contained in § 26-303(F) to modify the Governor's emergency management powers or to make the exercise of those powers contingent upon the existence of specified conditions is an issue of statutory interpretation. When interpreting a statute, courts follow the rules

[5] This Opinion does not address the constitutionality of § 26-303(F) and assumes for purposes of this analysis that a concurrent resolution under § 26-303(F) would be constitutional.

of statutory construction and first look to the statutory language. *State v. Williams*, 175 Ariz. 98, 100 (1993); *Patterson v. Mahoney*, 219 Ariz. 453, 456, ¶ 9 (App. 2008). "When construing a statute, [the courts'] goal 'is to fulfill the intent of the legislature that wrote it.'" *City of Sierra Vista v. Dir., Ariz. Dep't of Envtl. Quality*, 195 Ariz. 377, ¶ 10 (App. 1999). If the statutory language is clear and unequivocal, it is determinative. *Patterson*, 219 Ariz. at 456, ¶ 9. If a statute is ambiguous, on the other hand, courts look to rules of statutory construction and "'consider the statute's context; its language, subject matter, and historical background; its effects and consequences; and its spirit and purpose.'" *Callan v. Bernini*, 213 Ariz. 257, ¶ 13 (App. 2006).

Here, the statutory language is clear: the Governor, and not the Legislature, is granted the statutory power to declare a "state of emergency." *See* A.R.S. § 26-303(D). The statutory framework also sets forth the conditions upon which the Governor may declare a "state of emergency" and the powers he obtains once doing so. *See id.*; A.R.S. §§ 26-301(15), 26-303(E). Having passed a statute containing a definition of a "state of emergency" and setting forth the conditions upon which the Governor may declare a state of emergency, the Legislature may not later amend that statute *through concurrent resolution* to add conditions on when such a declaration may issue (of course, the Legislature could do so through *new legislation*). *See* Ariz. Const. art. IV, pt. 2, § 12 (requiring "[e]very measure" to be presented to the Governor for his "approval or disapproval"). Similarly, the statutory framework sets forth the powers the Governor obtains after declaring a state of emergency, and while § 26-303(F) grants the Legislature the authority to *end* such a declaration through concurrent resolution, that provision does not currently grant the Legislature the power to restrict or expand the Governor's actions *after* a state of emergency has been declared. And AGO is aware of no other law that grants the Legislature such power. As currently composed, § 26-303(F) leaves the Legislature with only one option for modifying the Governor's exercise of emergency powers: the Legislature may terminate those powers through concurrent resolution by declaring the state of emergency at an end. Because the statutory language is clear and unequivocal, AGO need not look to secondary tools of statutory construction.

II. The Governor May Declare A New State Of Emergency Even After Legislative Termination Under A.R.S. § 26-303(F).

The Governor's ability to declare a state of emergency is not impacted by a legislative termination of a prior state of emergency. Instead, the current statutory framework conditions the Governor's declaration of a state of emergency on the existence of certain conditions within the state—namely, conditions of disaster or extreme peril to persons or property within Arizona caused by "air pollution, fire, flood, or floodwater, storm, epidemic, riot, earthquake or other causes" that cannot be controlled by any single political subdivision and which require combined efforts of the state and political subdivisions. A.R.S. § 26-301(15). In other words, the current statutory framework does not condition a declaration of a state of emergency on the lack of a prior declaration of emergency terminated by the Legislature. Thus, even if the Legislature terminated a declaration of emergency through concurrent resolution—thereby terminating the powers granted the Governor in connection with that declaration—the Governor is not legally restricted from declaring a new state of emergency. If the Governor declared a new state of emergency, he would re-obtain the powers granted him under § 26-303(E) and could reinstitute some or all of the actions instituted under the prior declaration. And there is no requirement in the statute that the Legislature reconvene to allow reinstatement of a previously terminated state of emergency. Instead, the Governor can legally re-declare a state of emergency under the current statutory framework so long as a "state of emergency" exists as defined under § 26-301(15). *See* A.R.S. § 26-303(D).

If the Governor issued a new declaration and re-instituted previous actions, the new declaration could be terminated in three ways. First, the Governor could later terminate the new state of emergency through proclamation. *See* A.R.S. § 26-303(F). Second, the Legislature could terminate the new state of emergency through concurrent resolution. *See id.* Third, a court could issue a ruling stating that the Governor declared the new state of emergency in the absence of one or more of the conditions required by § 26-303(F) or that one or more of those conditions had since ceased to exist.

III. Counties And Municipalities Have Independent Emergency Powers, But Those Powers Granted To Them Under The Emergency Management Statutes Are Not Equivalent In Scope To The Powers Granted To The Governor.

A. The Powers Granted To Counties And Municipalities Under A.R.S. § 26-307(A) Are Not Equivalent In Scope To The Powers Granted The Governor Under A.R.S. § 26-303(E).

The powers granted the Governor upon declaration of a state of emergency are broader than the powers granted to counties and municipalities under A.R.S. § 26-307(A).

As detailed above, under A.R.S. § 26-303(E)(1), the Governor 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 this chapter."[6]

In contrast, under § 26-307(A), counties, cities and towns have the power to "make, amend and rescind orders, rules and regulations necessary for emergency functions but such shall not be inconsistent with orders, rules and regulations promulgated by the governor." Thus, this provision grants counties, cities, and towns the power to make rules, but only so long as they are "necessary for emergency functions." *See* A.R.S. § 26-307(A). This statutory language imposes two restrictions on county and municipality rulemaking. First, the order, rule or regulation must involve "emergency functions," which is a defined term in Title 26. "Emergency functions" is defined as "includ[ing]"

> warning and communications services, relocation of persons from stricken areas, radiological defense, temporary restoration of utilities, plant protection, transportation, welfare, public works and engineering, search or rescue, health and medical services, law enforcement, fire fighting, mass care, resource support, urban search or rescue, hazardous materials, food and energy information and planning and other activities necessary or incidental thereto.

[6] The issue of the scope of the Governor's powers under A.R.S. § 26-303(E) is pending before the Arizona Supreme Court in *Aguila v. Ducey*, No. CV-20-0335-PR. Consistent with AGO's practice of declining to address issues involving pending litigation, this opinion does not address the full nature of the powers granted in § 26-303(E) or whether those powers are limited by constitutional principles such as non-delegation or separation of powers. The AGO, however, has filed two amicus briefs in *Aguila*, which take the position that "any emergency orders issued under § 26-303(E)(1) must comply with existing statutes and agency rules." Brief of Arizona Attorney General Mark Brnovich Pursuant to A.R.S. § 12-1841, *Aguila v. Ducey*, No. CV-20-0335-PR, at 6 (Maricopa Cty. Super. Ct., Sept. 4, 2020).

A.R.S. § 26-301(5). Second, the order, rule, or regulation must be "necessary" for emergency functions. *See id.* § 26-307(A). Neither of those two restrictions is expressly imposed upon the Governor's authority under § 26-303(E). Because § 26-307(A) only provides for local jurisdictions to issue orders necessary for emergency functions, the power expressly granted under that statutory provision is more limited than the emergency powers granted to the Governor under § 26-303(E).

B. Local Jurisdictions Have Statutory Emergency Powers Independent Of The Governor.

The Legislature has granted local jurisdictions independent statutory authority to declare emergencies. In addition to the authority in § 26-307(A) discussed above, counties, cities, and towns—under state law and individual subdivisions' respective charters and local ordinances—have independent power to respond to local emergencies, including, under certain circumstances, the power to issue orders and for the chairman of the board of supervisors of a county or mayor of a city or town to govern by proclamation.[7] These powers exist both as part of the general emergency powers and—when responding to a health emergency such as infectious disease outbreak within that local jurisdiction—in the public health and safety provisions of Arizona law. *See, e.g.*, A.R.S. § 26-311(A) (independent powers of counties, cities, and towns to declare a local emergency); *Maricopa Cty. Health Dep't v. Harmon*, 156 Ariz. 161, 163 (App.1987) (now-A.R.S. § 36-136(J) allows county health departments to issue more restrictive orders than the Arizona Department of Health Services, including "an emergency rule … to exclude unimmunized children from select day-care centers" in response to a measles outbreak).

"In addition to the powers granted by other provisions of the law or charter," the chairman of the board of supervisors for counties or mayor of cities and towns may respond to emergencies caused by natural disasters, civil unrest, or "any other natural or man-made calamity" by issuing a proclamation "if authorized by

[7] This Opinion does not address a circumstance in which a local regulation may embrace a matter of statewide concern; in that instance, state law would prevail over a conflicting local law. *See generally State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588 (2017).

ordinance or resolution … declar[ing] an emergency or a local emergency to exist."[8] A.R.S. § 26-311(A). Where such an emergency is declared, the chairman or mayor shall "govern by proclamation and have the authority to impose all necessary regulations to preserve the peace and order" of their respective jurisdiction "including but not limited to:

1. Imposition of curfews in all or portions of the political subdivision.
2. Ordering the closing of any business.
3. Closing to public access any public building, street, or other public place.
4. Calling upon regular or auxiliary law enforcement agencies and organizations within or without the political subdivision for assistance.
5. Notifying the constitutional officers that the county office for which they are responsible may remain open or may close for the emergency."

Id. § 26-311(B). This direct statutory grant of power is independent of the Governor's emergency declaration authority under § 26-303(E), but such power is limited to the issuance of "all necessary regulations to preserve the peace and order."[9] *Id.*

Municipal charters may also be a potential source of emergency powers. *See* Ariz. Const. art. XIII, § 2 (city charter provision); *see, e.g.*, Phoenix City Charter, Ch. V, § 4(A) ("The Mayor shall govern the City during times of great emergency and shall make proclamations necessary rising out of that emergency."). These powers are potentially available during declared emergencies and do not require any declaration by the Governor. Also, under § 26-311, a county, city, or town could declare an emergency different from that declared by the Governor, assuming conditions in the local jurisdiction independently satisfy the requirements for doing so. For example, imagine the Governor declares a state of emergency in the wake of a natural disaster; a municipality within the Governor's declared disaster area experiencing rioting could, as a result,

[8] Arizona law defines a "local emergency" as "the existence of conditions of disaster or of extreme peril to the safety of persons or property within the territorial limits of a county, city or town, which conditions are or are likely to be beyond the control of the services, personnel, equipment and facilities of such political subdivision as determined by its governing body and which require the combined efforts of other political subdivisions." A.R.S. § 26-301(10).

[9] Under A.R.S. § 36-136(J), any ordinance or rule relating to public health issued by a local board of health or county board of supervisors must "not conflict with state law" and must be "equal to or more restrictive than the rules of the [director of the Department of Health Services]."

declare an independent emergency under § 26-311(A), thereby allowing its mayor to issue proclamations necessary to preserve peace and order. Under no circumstances, however, can local orders, rules, regulations, or ordinances, even in the case of a public emergency, conflict with any state statute or the Arizona Constitution.[10]

C. To AGO's Knowledge, There Are No State Emergency Plans Or Programs Granting Local Jurisdictions Specific Emergency Powers.

The emergency management statutes, at A.R.S. § 26-307(D), provide that "[i]n the absence of specific authority in state emergency plans and programs, the governing body of each county, city and town of the state shall take emergency measures as deemed necessary to carry out the provisions of this chapter." The Request asks whether any such "specific authority in state emergency plans and programs" exists. AGO has not located any state emergency plans or programs granting local jurisdictions additional emergency powers.

AGO reviewed (1) the *Arizona State Emergency Response and Recovery Plan*, (2) the *Arizona Department of Health Services Public Health Emergency Declaration Playbook*, and (3) the *Arizona Department of Health Services Infectious Diseases of High Consequence (IDHC) Plan*.[11] Those plans and playbooks do not appear to grant authority to counties, cities, or towns beyond that already granted by state

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[10] For example, in certain circumstances, emergency health orders issued by local jurisdictions may be preempted by legislation or orders issued by the Governor or the Department of Health Services. *See, e.g.*, A.R.S. §§ 36-787(A), 26-207(D), 36-136(J); *see also Associated Dairy Prods. Co. v. Page*, 68 Ariz. 393, 397 (1949) (holding that county board of supervisors did not have implied power to regulate milk products, particularly when the Legislature "appropriated the field to the exclusion of boards of supervisors"). In fact, the Pima County Superior Court recently enjoined a Pima County resolution establishing a curfew because the court concluded that the resolution conflicted with one of the Governor's prior executive orders. *See Next Level Arcade Tucson, LLC v. Pima Cty.*, No. C20210057 (Pima Cty. Super. Ct.), Under Advisement Ruling entered January 19, 2021. The Request does not ask whether any particular local rule or order is preempted, and therefore this Opinion does not address that issue.

[11] *Arizona State Emergency Response and Recovery Plan* (Nov. 18, 2019) (*available at* https://dema.az.gov/sites/default/files/publications/EM-PLN_SERRP.pdf); *Public Health Emergency Declaration Playbook*, Ariz. Dep't of Health Servs. (Dec. 2019) (*available at* https://www.azdhs.gov/documents/ preparedness/emergency-preparedness/response-plans/public-health-emergency-declaration-playbook.pdf?v2); and *Infectious Diseases of High Consequence (IDHC) Plan*, Ariz. Dep't of Health Servs. (Feb. 2020) (*available at* https://www.azdhs.gov/documents/preparedness/emergency-preparedness/response-plans/idhc-plan.pdf).

statute. On the other hand, they also do not appear to limit the statutory power of local jurisdictions to address emergencies. Given the current absence of additional authority in emergency plans and programs, A.R.S. § 26-307(D) only provides local jurisdictions with authority to carry out those statutory powers that Title 26 grants to local jurisdictions.

D. Local Jurisdictions Have Independent Power To Declare Local Emergencies Under A.R.S. § 26-311(A).

As explained above, the Legislature has granted local jurisdictions power to declare by proclamation local emergencies upon the occurrence of certain events. *See* A.R.S. § 26-311(A) (describing the circumstances under which local jurisdictions "may by proclamation declare an emergency or a local emergency to exist"). Upon such a proclamation, local jurisdictions, through the mayor or chairman of the board of supervisors, may "impose all necessary regulations to preserve the peace and order" of the local jurisdiction. *Id.* § 26-311(B). These powers are distinct from the power granted in A.R.S. § 26-307(A) to "make, amend and rescind orders, rules and regulations necessary for emergency functions," which appears to relate to the power of local jurisdictions to prepare for emergencies. Thus, in the absence of an existing state of emergency declared by the Governor, local jurisdictions may independently declare local emergencies pursuant to § 26-311 and then issue orders, but only when necessary to "preserve the peace and order."

E. In The Event Of A Conflict Between A County And Municipal Rule, The Municipal Rule Should Apply Within The Municipality And the County Rule Should Apply Within Unincorporated Areas Of The County.

A.R.S. § 26-307(A) does not specify, in the event of a conflict, which state government subdivisions' rules relating to "emergency functions" are supreme. Other sections of state law provide guidance about the hierarchy of emergency management measures in the event of a conflict. For example, the language in A.R.S. § 26-311 supports that municipal measures apply within municipalities and county measures are limited to unincorporated areas of the county:

> [W]henever the mayor of an incorporated city or town or the chairman of the board of supervisors *for the unincorporated portion of the county*[] shall deem that an emergency exists

> … the mayor or chairman of the board of supervisors, if authorized by ordinance or resolution, may by proclamation declare an emergency or a local emergency to exist.
>
> … the mayor or the chairman of the board of supervisors shall, during such emergency, govern by proclamation and shall have the authority to impose all necessary regulations to preserve the peace and order of the city, town, *or unincorporated areas of the county* ….

A.R.S. § 26-311(A)-(B) (emphasis added). Similarly, ordinances issued by cities and towns ordinarily override conflicting county ordinances:

> An ordinance adopted under this section may apply to the unincorporated and incorporated areas in the county if the ordinance is not in conflict with an existing city or town ordinance or state law or otherwise regulated by the state…. An ordinance may apply to the unincorporated areas of the county, to part or parts of such areas or to a combination of incorporated and unincorporated areas of the county, as the board deems appropriate and subject to the approval of a city or town as specified in this subsection.

A.R.S. § 11-251.05(D). While § 11-251.05(D) applies only to ordinances "adopted under this section," it confirms the hierarchy reflected in § 26-311. Therefore, where a conflict exists between a city or town's emergency rule or regulation and a county's emergency rule or regulation, the city or town's rule or regulation governs within its borders.

Conclusion

Under the current statutory framework, the Legislature cannot terminate or modify a duly-declared state of emergency other than through termination through a concurrent resolution under A.R.S. § 26-303(F). Even if the Legislature terminates a state of emergency, the Governor may re-declare a state of emergency and re-institute prior measures so long as the conditions for the existence of a state of emergency under A.R.S. § 26-301(15) are satisfied. If the Governor does so, the state of emergency would terminate upon (1) a proclamation by the Governor declaring the emergency terminated, (2) a concurrent resolution of the Legislature declaring the emergency terminated, or (3) a court order finding that the conditions for a state of emergency did not exist at the time of declaration or have since ceased existing.

Regarding the emergency powers of local jurisdictions: (1) the powers granted to counties and

municipalities under A.R.S. § 26-307(A) are not equivalent in scope to the powers granted the Governor under A.R.S. § 26-303(E); (2) local jurisdictions have statutory emergency powers independent of the Governor; (3) to AGO's knowledge, there are no state emergency plans or programs granting local jurisdictions specific emergency powers; (4) local jurisdictions have independent power to declare local emergencies under A.R.S. § 26-311(A); and (5) if there is a conflict between a county and municipal rule, the municipal rule applies within the municipality and the county rule applies within unincorporated areas of the county.

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