SUPREME COURT OF ARIZONA

JAVIER AGUILA, et al., Appellants, v. DOUG DUCEY, in his official capacity as the Governor of the State of Arizona; THE ARIZONA DEPARTMENT OF HEALTH SERVICES; and THE ARIZONA DEPARTMENT OF LIQUOR LICENSES AND CONTROL, Appellees.	Case No. CV-20-0335-PR Court of Appeals Case No. 1 CA-CV 20-0598 Maricopa County Superior Court No. CV2020-010282

Appellants' Opening Brief

Ilan Wurman (#034974)
Sandra Day O'Connor College of Law*
Arizona State University
MC 9520
111 E. Taylor St.
Phoenix, AZ 85004
(480) 965-2245
ilan.wurman@asu.edu

Attorney for Appellants

*Affiliation provided for identification purposes only.

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INTRODUCTION

Plaintiffs are series 6 and 7 liquor licensees who were shut down by Governor Ducey's coronavirus-related executive orders for almost five months of last year. All 130 of them were closed for most of July and August, after having been closed from mid-March to mid-May. Many were able to reopen in September under restrictions they argue are unlawful. Some remain shut down to this day because they do not serve food or cannot operate under the restrictions.

After months of closure, and after the Arizona Department of Health Services (ADHS) promulgated "guidelines" on August 10 making it almost impossible for many Plaintiffs to open or to operate under reasonable conditions, Plaintiffs filed an action in Maricopa County Superior Court seeking declaratory and injunctive relief. On October 8, Judge Gates held an evidentiary hearing on their application for preliminary injunction, and on November 9, Judge Gates granted in part and denied in part Plaintiffs' request.

Plaintiffs appeal Judge Gates' partial denial of their preliminary injunction request. There are two principal issues on appeal: a statutory interpretation and related nondelegation claim, and a privileges or immunities clause claim.

As to the first: Judge Gates correctly held that A.R.S. § 26-303(E)(1), the emergency statute which delegates to the Governor "all police power" of the state in an emergency, would be an unlawful delegation of authority if it were interpret-

ed to authorize the Governor to be a lawmaker or to violate existing law. Judge Gates then correctly invalidated a part of Executive Order 2020-09 that had granted the privilege of selling alcohol for off-premise consumption ("off-sale") to series 12 restaurant licensees, contrary to existing statutory law.

Judge Gates, however, did not invalidate the various orders and emergency measures and guidelines promulgated by the Governor and ADHS that have shut Plaintiffs down or severely restricted their ability to operate. Executive Order 2020-43 ("EO 2020-43") ordered most Plaintiffs closed for over two months—and some remain shut down because of that order. Emergency Measure 2020-02 ("EM 2020-02") and the accompanying August 10 "guidelines," promulgated by ADHS to implement EO 2020-43, ordered Plaintiffs to remain closed until various coronavirus metrics were met in a given county. At that stage, the guidelines imposed numerous pages of restrictions on Plaintiffs. Such mandatory "guidelines" cannot be described as anything but "laws." ADHS has promulgated, without public comment and even without notice in the Administrative Register, a regulatory code for the bar industry—and codes for the gym, movie theater, and water park industries—on the basis of no more concrete a requirement than that the Governor has "all police power" of the state in what he proclaims to be an emergency.

This case is about the separation of powers: about *who* in our representative system of government gets to make fundamental policy decisions about important

questions over which reasonable people can and do disagree. It may be that bars, gyms, movie theaters, and waterparks need to follow new regulations in the coronavirus era, regulations more rigorous than those that must be followed by restaurants, grocery stores, hotels, airlines, and Wal-Mart. If so, the legislature should make the call.

Plaintiffs, to be clear, do not argue as some formalists and originalists have that the legislature can never delegate power to make regulations affecting private rights and conduct. What Plaintiffs argue here is that if private conduct is to be regulated by the executive, three conditions must be met: (1) the legislature must specifically authorize the regulation of private conduct; (2) the range of conduct to be regulated must be narrow; and (3) the statutory standards must be more precise than when the legislature authorizes the regulation of official conduct. Plaintiffs' proposed test is consistent with constitutional text, historical as well as much modern practice, and many judicial precedents both from this Court and other courts. Under this test, a delegation of "all police power"—which is not a specific authorization to regulate private conduct, and which encompasses the entire range of human conduct—violates the nondelegation doctrine, especially given the extraordinarily broad standards in the statute.

Fortunately, it is possible to avoid the constitutional problem. Although Plaintiffs concede that the Governor's interpretation of the emergency powers stat-

ute is plausible, the best construction of the statute—and certainly an alternative plausible construction—is that it confers authority only over the emergency services and personnel of the state. The statute deals primarily with emergency "assistance" and "recovery operations," A.R.S. § 26-301(14), and with activities that are "beyond the control of the services, personnel, equipment and facilities of any single county, city or town." *Id.* § 26-301(15). The statute gives the Governor "complete authority over all agencies of the state government" in the same sentence that it purports to give him "all police power." *Id.* § 26-303(E)(1). And it empowers him 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," and to "direct such *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.* § 26-303(E)(2) (emphases added).

The statute, in other words, deals with emergent threats, emergency services and operations, and the marshaling of the services, personnel, equipment, and facilities of the State. The best reading of the statute is that it is directed to official conduct. It does not specifically authorize the regulation of private conduct. And, under these circumstances, an interpretation to the contrary would violate the nondelegation doctrine.

Plaintiffs also argue that Defendants' orders singling out series 6 and 7 licensees for closure violate the privileges or immunities clause of the State Constitution (Art. 2, § 13). The director of the Department of Liquor Licenses and Control (DLLC) testified at the preliminary injunction hearing that series 3, 11, 12, and 14 licensees—those traditionally associated with breweries, hotel bars, restaurant bars, and private clubs—often act like series 6 or 7 licensees. Yet the Defendants' various orders and regulations continue to single out series 6 and 7 licensees, and continue in particular to single out those who do not serve any food despite the testimony that food-serving establishments often operate like bars and nightclubs. In short, the government has given some privileges and immunities to certain citizens that it has denied to other, similarly situated citizens. The State Constitution requires more: it requires that *every* competitor in the same general market be given a chance to meet the same reasonable health measures.

In ignoring this evidence, the trial court recited the "rational basis" test. But Plaintiffs argue that test does not apply to actions of the executive, acting alone, as opposed to the legislature. They also argue the rational basis test does not apply to privileges or immunities claims: it applies to substantive due process claims, not to claims involving an express constitutional prohibition. This Court should clarify the law and find that Plaintiffs are likely to succeed on the merits of their claims.

STATEMENT OF THE CASE

Plaintiffs filed this lawsuit in Maricopa County Superior Court on August 25, 2020. On October 8, the superior court held a full-day evidentiary hearing on Plaintiffs' request for a preliminary injunction. In addition to hearing the testimony of the ADHS and DLLC directors, the court heard testimony from three "Testifying Plaintiffs" principally on irreparable harm. On October 16, the Court heard argument on Defendants' various motions to dismiss. On November 9, 2020, the Court entered the order at issue in this appeal. That order granted in part Defendants' motion to dismiss, granted in part Plaintiffs' application for preliminary injunction, and denied the remainder of Defendants' motion to dismiss and Plaintiffs' request for preliminary injunction.

Specifically, the Court granted Defendants' motion to dismiss Plaintiffs' nondelegation claim and denied Defendants' motion to dismiss Plaintiffs' privileges or immunities claim. The Court then granted Plaintiffs' request to enjoin the provision of Executive Order 2020-09 that had granted the off-sale privilege to restaurants contrary to existing law.

The Court, however, denied Plaintiffs' request to enjoin EO 2020-43 and the related ADHS guidelines and measures, which Plaintiffs argue exceed the authority delegated in the emergency statute and violate the privileges or immunities clause of the State Constitution. Plaintiffs appeal that partial denial. They continue to

maintain that EO 2020-43, EM 2020-02, and the ADHS guidelines exceed statutory authority and, if they do not, then the emergency statute violates the nondelegation doctrine.[1] They further argue that these orders and measures violate the privileges or immunities clause. Plaintiffs' filed a petition to transfer to this Court, which the Court granted on December 1, 2020.

STATEMENT OF FACTS

a. The Governor's executive orders.

In March of last year, Governor Ducey began issuing executive orders that purported to implement strategies and safety measures that would stem the spread of the novel coronavirus. On March 19, 2020, Governor Ducey issued Executive Order 2020-09. This EO provided that all bars, movie theaters, and indoor gyms and fitness clubs had to close in counties with confirmed coronavirus cases; and that restaurants in such counties had to close access to on-site dining. R.127.

On March 30, 2020, Governor Ducey issued Executive Order 2020-18, which provided that all individuals in the State were to stay home except to engage in essential activities. On April 29, Governor Ducey issued Executive Order 2020-

[1] The Court has jurisdiction to reach the question whether the statute violates the nondelegation doctrine. The trial court necessarily rejected Plaintiffs' argument to that effect in denying their preliminary injunction request. To the extent the Court disagrees, it can also review the trial court's non-final dismissal of the nondelegation claim by *sua sponte* accepting special action jurisdiction. *Dabrowski v. Bartlett*, 246 Ariz. 504, 512 (Ct. App. 2019), *review denied* (Feb. 11, 2020).

33, which continued the requirement of EO 2020-18, and further provided that non-essential businesses, which included Plaintiffs' businesses, could only operate to-go services. On May 4, Governor Ducey issued Executive Order 2020-34, allowing barbers, cosmetologists, and dine-in restaurants to resume operations—but not bars or indoor gyms. R.128.

On May 12, Governor Ducey issued Executive Order 2020-36. This EO rescinded, as of midnight on May 16, EO 2020-18 and 2020-33. Paragraph 5 of EO 2020-36 ordered businesses "to limit and mitigate the spread of COVID-19" by implementing a variety of mitigation measures. As a result of EO 2020-36, Plaintiffs finally began operating their businesses, after nearly two months of being shut down.

On June 29, 2020, however, Governor Ducey issued Executive Order 2020-43. This order remains in force and is the primary order challenged by Plaintiffs. This EO once again closed bars with series 6 or 7 liquor licenses "and whose primary business is the sale or dispensing of alcoholic beverages," as well as indoor gyms, movie theaters, and water parks. Bars could continue to serve the public through "pick up, delivery, and drive-thru operations." R.130. The Order further provides that "[t]o receive authorization to reopen, entities shall complete and submit a form as prescribed by the Arizona Department of Health Services that at-

tests the entity is in compliance with guidance issued by ADHS related to COVID-19 business operations." *Id.*

As a result of this order, Defendant DLLC promulgated guidance that explained that not all series 6s and 7s were in the "primary business" of selling or dispensing alcohol. In their guidance document, DLLC explained that the "primary purpose" of "[c]ertain businesses" with series 6 or 7 licenses "is clearly not the sale of alcohol." R.134 at 2. "For example, golf courses, resorts, salons, and barbershops may have little trouble determining that they meet the 'primary purpose' test. A bar and grill, on the other hand, will have a difficult time meeting the test." *Id.* In other words, two identical bars were treated differently simply on the basis of whether the bar happened to be on a golf course or in a hotel. Executive Order 2020-52, promulgated on July 23, 2020, continued EO 2020-43 indefinitely. R.132.

b. The ADHS "guidelines."

On August 10, 2020, ADHS promulgated "Emergency Measure 2020-02" and a variety of "guidelines" to implement EO 2020-43. R.135; R.136. These guidelines make it virtually impossible for Plaintiffs who do not serve food to open, and for those who do to open on terms that make it possible for them to survive. Those guidelines provide that series 6 and 7 licensees without a food permit cannot open at all until coronavirus positivity rates dip below 3 percent for two

weeks in their county. In addition, the guidelines provide that, when positivity rates drop below 3 percent, these licensees can open only at 50 percent capacity and with numerous other restrictions. Series 6 and 7 licensees who have food permits can begin operating at 50 percent capacity, with other restrictions, if the county positivity rate drops below 10 percent, which is the "moderate" transmission level. R.136 at -001–006, -012–013, -025–048.

Plaintiffs cannot open until they sign an attestation, under penalty of perjury, that they will abide by the various restrictions of the August 10 guidelines. R.135 at -003; R.136 at -023–024; R.137; R.203 ¶¶ 40-41. ADHS has issued a form that allows individual licensees who live in counties that do not meet the current positivity rates to petition for reopening if they can attest that they will take measures above and beyond the requirements already set forth in the guidelines. Whether to permit opening is entirely in the discretion of ADHS. There are no clear standards guiding their discretion. R.135 at -004; R.136 at -024.

c. The October 8 preliminary injunction hearing.

On October 8, 2020, the superior court held a full-day preliminary injunction hearing. At that hearing, Dr. Cara Christ, the director of ADHS, testified that she could not say at what point the emergency would be at an end on the basis of the department's own metrics (positivity rates, cases per 100,000 population, and hospitalizations). ASC Dkt. 8, 10-08-2020 Reporter's Transcript (hereinafter "Hr'g

Tr."), at 26:2-12; *see also id.* 18:16-20 (no discussions with Governor over whether to repeal or revise EO 2020-43 since August 10); *id.* 19:17-20 (can't predict when it will be time to repeal or revise).

DLLC director John Cocca testified that series 3, 11, 12, and 14 licensees—traditionally associated with breweries, hotel bars, restaurant bars, and private clubs—"oftentimes" and "not [] uncommon[ly]" act like "bars," that is, like series 6 or 7 establishments whose primary purpose is the sale of alcohol. R.203 ¶¶ 33-34; Hr'g Tr. 193:8–194:14. Further, there are series 3, 11, 12, and 14 establishments that meet all the administrative criteria defining a bar. Hr'g Tr. 195:4–196:15. Director Cocca could not tell the difference between series 6 and 12 establishments merely by looking at photos of various bars. Hr'g Tr. 218:1–219:25; R.144, R.148, R.150, R.156 (exhibits); R.66-68 (stipulation). The hard evidence also revealed that series 12 and 14 establishments often act like "bars"—numerous series 12 and 14 establishments advertised karaoke nights, R.151, R.152, R.154, which is a bar-like activity, Hr'g Tr. 194:15-18, 220:11-13, 224:24–225:1. And photographic and video evidence of a series 12 in Tucson demonstrated ongoing nightclub activities. R.145, R.146; Hr'g Tr. 225:15-19; R.157-161. Defendants' experts testified that the risk of coronavirus transmission is not reduced in such establishments merely because they have a different license number. Hr'g Tr. 34:17–35:6; 162:3-10.

STATEMENT OF THE ISSUES

1. Is there a possibility of irreparable injury when damages might not be available to Plaintiffs if they win on the merits of their claim?

2. Are the executive orders and regulations at issue in this case void because they were promulgated pursuant to a statute that purports to delegate to the Governor "all police power" of the state in violation of the nondelegation doctrine and Articles 3 and 4 of the State Constitution?

3. Can the constitutional question be avoided because Defendants' orders and regulations violate the best, or at least a plausible alternative, construction of the statute, which would authorize only the regulation of official conduct?

4. Does the rational basis test apply to actions of the executive, acting alone, or to privileges or immunities clause claims?

5. When the correct legal standard is applied, are Plaintiffs likely to succeed on the merits of their claim that Defendants' orders and regulations grant more privileges and immunities to some citizens than to other, similarly situated citizens, in violation of Article 2, Section 13 of the Arizona Constitution?

ARGUMENT

"The party seeking a preliminary injunction is obligated to establish four traditional equitable criteria: 1) A strong likelihood that he will succeed at trial on the merits; 2) The possibility of irreparable injury to him not remediable by dam-

ages if the requested relief is not granted; 3) A balance of hardships favors himself; and 4) Public policy favors the injunction." *Shoen v. Shoen*, 167 Ariz. 58, 63 (Ct. App. 1990). "The critical element in this analysis is the relative hardship to the parties. To meet this burden, the moving party may establish either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and 'the balance of hardships tip sharply' in his favor." *Id.* (internal citation omitted). The courts apply a sliding scale: "The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be. Conversely, if the likelihood of success on the merits is weak, the showing of irreparable harm must be stronger." *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 411 (2006).

Appellate courts review the grant of a preliminary injunction for an abuse of discretion. *TP Racing, L.L.L.P. v. Simms*, 232 Ariz. 489, 492 (Ct. App. 2013) (citing *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 366 (1999)). An abuse of discretion exists "if the superior court applied the incorrect substantive law." *Id.* The Court further reviews "underlying statutory interpretation issues de novo." *Id.* (citing *Kromko v. City of Tucson*, 202 Ariz. 499, 501 (Ct. App. 2002)). There is also an abuse of discretion if the trial court "based its decision on an erroneous material finding of fact . . . ." *Id.* (citing *McCarthy W. Constructors, Inc. v. Phx. Resort Corp.*, 169 Ariz. 520, 523 (Ct. App. 1991)).

The issues in this appeal are almost entirely legal. ***First***, the trial court agreed that Plaintiffs' harm from the granting of the off-sale privilege to restaurants is likely to be irreparable because no damages follow from a win on the merits. R.105 (Ruling) at 12. The same is true of Plaintiffs' harm from being closed as a result of EO 2020-43 and from operating under restrictions. The trial court held that Plaintiffs are not irreparably harmed by these other orders because those orders were not in fact discriminatory. *Id.* at 17. This conflates the harm inquiry with the merits. There is no question that Plaintiffs are financially harmed by being shut down or operating under restrictions—harm that is possibly irreparable because no damages claim follows from a declaration that Defendants' actions are unlawful. Thus if Plaintiffs are correct on the merits—that the orders exceed the statute or unconstitutionally discriminate—then they *are* irreparably harmed.

Second, A.R.S. § 26-303(E)(1) violates the nondelegation doctrine if it authorizes the Governor's actions in this case. That is so because under the Governor's interpretation, the statute delegates to the Governor broad powers over important and controversial policy questions, including those affecting private rights and conduct, for an indefinite time. Plaintiffs argue that the legislature *can* delegate power to regulate private conduct and private rights. But the legislature must specifically authorize such regulations; such regulations must be limited to narrow

categories of conduct; and the legislature must adopt more precise guidance in the statute than when the legislature authorizes the regulation of official conduct.

Third, the constitutional question can be avoided because the best construction of the statute—or at least a plausible alternative construction—precludes EO 2020-43 and EM 2020-02 to the extent they regulate private conduct and create codes of regulation for various industries. These orders and measures have nothing to do with marshaling the emergency services and personnel of the state. They have nothing to do with directing officials or public resources. They therefore exceed statutory authority.

Fourth, the rational basis test does not apply to Plaintiffs' discrimination claim. The rational basis test historically applied to actions of the state legislature, not to other governmental actors exercising power delegated by the legislature. The rational basis test therefore does not apply to the unilateral actions of the executive. Additionally, the historical record demonstrates that the rational basis test should only apply in the absence of express constitutional prohibitions: it should apply to substantive due process claims, not to discrimination claims under the privileges or immunities clause.

Fifth, Plaintiffs have shown a likelihood of success on their discrimination claim under the correct standard. The trial court focused on the *intent* of the Defendants to treat all licensees equally in their August 10 "guidelines." R.105 at 16.

But EO 2020-43 is still in force and still discriminates against series 6 and 7 licensees, and some Plaintiffs are still closed as a result. The Governor also maintains his right to single out series 6 and 7 licensees. Additionally, the evidence showed that the guidelines only apply to businesses "paused" by EO 2020-43. Even recent revisions to the guidelines do not clearly apply to series 3, 11, or 14 licensees. Finally, the guidelines continue to discriminate against establishments that do not serve any food.

I. Financial harm is irreparable if damages are not available.

In enjoining the Governor's granting of the off-sale privilege to Plaintiffs' competitors, the trial court recognized that Plaintiffs' harm was irreparable, noting that "the Governor's immunity will likely preclude Plaintiffs from collecting damages." R.105 at 12. After ruling against Plaintiffs' discrimination claim on the merits, however, the trial court found that Plaintiffs were not irreparably harmed by having to follow the various guidelines and restrictions imposed on them. The court held that "[c]ompetitors' failure to comply with applicable Guidelines does not constitute a basis for the court to find irreparable injury." *Id.* at 16. "The court heard no credible testimony to support that the Plaintiffs' reductions in profit or goodwill arise from continued restrictions *that are different than the restrictions of other liquor licensees*." *Id.* at 17 (emphasis added).

This finding on irreparable injury is erroneous for two reasons. First, Plaintiffs do not merely allege unconstitutional discrimination; they allege that the orders exceed statutory (or constitutional) authority. Thus even if the restrictions apply to all licensees equally, Plaintiffs are still harmed by them. The judge did not deny that Plaintiffs suffer a reduction in profits from being closed or operating under restrictions—they obviously do.

Second, even on the privileges or immunities claim, the court conflated the merits and injury inquiries. Plaintiffs allege they are unconstitutionally discriminated against. The trial court disagreed, pointing to Defendants' testimony that they *intended* the various restrictions and guidelines to apply to all license series. R.105 at 16. But *if* Plaintiffs are correct on the merits, then their financial injury from operating under restrictions is irreparable.

Such financial injury is irreparable because, as Plaintiffs explained in the court below, there are no damages if they succeed on the merits. This is not a tort or contract claim. There is no state equivalent to 42 U.S.C. § 1983, which provides a damages claim for federal constitutional violations. Simply put, if the Plaintiffs win on their statutory interpretation, nondelegation, or privileges or immunities arguments, *no damages follow*. Their harm by definition is irreparable.[2]

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[2] To be sure, Plaintiffs filed a notice of claim pursuant to state law notifying the government that they intend to seek damages under a *different* claim—a regula-

Moreover, Plaintiffs' constitutional injury is inherently irreparable. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (quoting 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2948, at 440 (1973)). Thus, "[i]rreparable harm is often presumed where a constitutional injury is at stake." *Donohue v. Paterson*, 715 F. Supp. 2d 306, 314–15 (N.D.N.Y. 2010). Here, therefore, *if* Plaintiffs are likely to succeed on their constitutional claim, their discriminatory treatment is inherently irreparable.

II. If the Governor's interpretation of A.R.S. § 26-303(E) is correct, then the statute violates the nondelegation doctrine.

It is black-letter law that the legislature cannot delegate its legislative power. Under Arizona law, if a statute establishes a "sufficient basic standard, i.e., a definite policy and rule of action which will serve as a guide for the administrative agency," then it does not unconstitutionally delegate legislative power. *State v.*

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tory takings claim. But their harm stemming from the constitutional and statutory violations is still irreparable because there are no damages for *those* violations. Put another way, Plaintiffs might not win their takings claim even if they win on the constitutional claims because the regulatory takings analysis is distinct. Plaintiffs need only show a *possibility* of irreparable harm. *Shoen*, 167 Ariz. at 63. Indeed, if damages are "uncertain," Plaintiffs are entitled to preliminary relief. *Cf. Christakis v. Mortg. Elec. Registration Sys., Inc.*, No. 2 CA-CV 2013-0127, 2014 WL 5408424, at *4 (Ariz. Ct. App. Oct. 22, 2014) ("[W]here a loss is uncertain, monetary damages may be inadequate."); *see also Sec. Pest & Termite Sys. of S. Ariz., Inc. v. Reyelts*, No. 1 CA-CV 14-0237, 2015 WL 2381253, at *2 (Ariz. Ct. App. May 14, 2015) (harm that is "not remediable by damages" is irreparable).

Ariz. Mines Supply Co., 107 Ariz. 199, 205–06 (1971). This test is similar to the federal intelligible principle test, which provides that "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). This test has been notoriously ineffective at reining in broad delegations to the executive. "In the history of the [U.S. Supreme] Court we have found the requisite 'intelligible principle' lacking in only two statutes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001); *id.* (observing that the Court has upheld delegations to regulate in the "public interest"). Arizona courts do not appear to have invalidated a legislative delegation of power since the 1950s. *State v. Marana Plantations*, 75 Ariz. 111, 115 (1953) (invalidating a delegation).

The "sufficient basic standard" and "intelligible principle" tests, however, were likely never intended to authorize such broad delegations. Even in *Arizona Mines*, this Court held, "Under the doctrine of 'separation of powers' the legislature alone possesses the lawmaking power and, while it cannot completely delegate this power to any other body, it may allow another body *to fill in the details* of legislation already enacted." *Arizona Mines*, 107 Ariz. at 205 (emphasis added). This language evoked Chief Justice Marshall's observation in *Wayman v. Southard* that Congress cannot delegate "exclusively legislative" power over "important sub-

jects," which "must be entirely regulated by the legislature itself," but Congress could delegate matters "of less interest" by making "a general provision" and giving other departments the power "to fill up the details." 23 U.S. 1, 42–43 (1825). In other words, ordinarily the presence of standards in a statute will indicate that the legislature has resolved the *important* questions, leaving only matters of *detail* to the executive. As several U.S. Supreme Court Justices recently explained, historically, "as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.'" *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting). The federal "intelligible principle" test was not understood "to effect some revolution" in the nondelegation doctrine, and the inquiries remained discerning the line "between policy and details, lawmaking and fact-finding." *Id.* at 2138–39.

This Court should clarify the law of nondelegation. It should hold that, as Chief Justice Marshall observed, the legislature must resolve "important subjects" for itself. Contrary to what some formalist scholars and judges have argued, Plaintiffs contend that the legislature *can* delegate authority to regulate private rights and conduct. But it can only do so on three conditions: (1) it must *specifically* authorize such regulations; (2) the authorization must be narrow and cannot permit a roving commission over a wide range of conduct; and (3) such authorization must have more precise standards than when the legislature delegates power over offi-

cial conduct. The legislature will have resolved the important policy questions if those three conditions are met. Under the Governor's interpretation of A.R.S. § 26-303(E), however, the statute does not meet these conditions.

a. The scope of the Governor's powers under his interpretation.

The emergency statute pursuant to which the Governor promulgated his executive orders delegates "all police power vested in the state" to the Governor during an "emergency," A.R.S. § 26-303(E)(1). Specifically, the statute provides:

> During a state of emergency:
>
> 1. 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 this state in order to effectuate the purposes of this chapter.
>
> 2. The governor may 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. The governor may direct such 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.

A.R.S. § 26-303(E)(1)–(2). An "emergency" is defined 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, except those resulting in a state of war emergency, 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.

Id. § 26-301(15).

On its face, the statute does not specifically authorize any regulation of private conduct; it instead delegates "all police power" to the Governor. Nor does this grant of authority have any meaningful limits. The Governor is empowered to do anything that in his mind is necessary to resolve the emergency. He is empowered to direct agencies to perform activities—including, in his view, the making of regulations affecting private conduct—"designed to prevent or alleviate actual and threatened damage due to the emergency." *Id.* § 26-303(E)(2). Almost anything can be so designed. The Governor 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. The Governor has even argued that he can let restaurants sell alcohol to-go contrary to existing law because doing so alleviates the secondary *economic* damage due to the emergency.

The Governor argues there are further standards in the statute. The "definitions" section defines "Emergency management" as "the preparedness, response, recovery and mitigation activities necessary to respond to and recover from disasters, emergencies or contingencies." *Id.* § 26-301(6). It defines "Mitigation" as "measures taken to reduce the need to respond to a disaster and to reduce the cost of disaster response and recovery," *id.* § 26-301(11)—a cross-reference to "re-

sponse" and "recovery." Recovery is defined as "short-term activities necessary to return vital systems and facilities to minimum operating standards and long-term activities required to return life to normal or improved levels," *id.* § 26-301(13), and "response" is defined as "activities that are designed to provide emergency assistance, limit the primary effects, reduce the probability of secondary damage and speed recovery operations," *id.* § 26-301(14).

But these broad definitions have nothing to do with the actual grant of power to the Governor. Even if they did, there is still almost nothing under the sun the Governor could not do under them. Almost anything can reduce the "secondary damage" or limit the "primary effect" of the emergency, *id.*, especially if damage refers to economic, social, and other kinds of secondary and tertiary damage. That standard is no different than the standard that the Governor's actions must aim "to prevent or alleviate actual and threatened damage due to the emergency." *Id.* § 26-303(E)(2).

The very regulations at issue in this case illustrate the breadth of the statute on the Governor's reading. Under EO 2020-43 and EM 2020-02, the Governor first ordered Plaintiffs' shut down for two months, and then ADHS created an entirely new code of regulations for the bar, gym, theater, and water park industries under the vague label of "guidelines" without any notice and comment. This code of laws provides that gyms must stay closed in counties that have not yet entered "moder-

ate" transmission, at which time they can operate at 25 percent capacity. When transmission finally reaches no more than 3 percent positivity—and as far as Plaintiffs are aware, it has only ever been that low in two Arizona counties for this entire pandemic—gyms can finally open at 50 percent capacity. And there they will languish for the foreseeable future, all while airplanes, hotels, and Wal-Mart operate with barely any restrictions at all. The guests themselves are required by this regulatory code to wear masks while working out, notwithstanding potential health risks from doing so. R.136 at -011.

As for bars and nightclubs that cannot operate as a restaurant, the code of laws provides that they are to remain entirely closed until positivity rates reach 3 percent, at which point they will have to operate for the indefinite future at 50 percent capacity. And they will then have to operate with further restrictions—no open seating, every patron has to be seated, karaoke is permitted if the singer is wearing a mask and is twelve feet away from anyone else, and on and on. R.104. And when the metrics are insufficient for reopening, the bars must apply for special permission to reopen on the basis of no published standards whatsoever. Put differently, Defendants' position is that the emergency statute delegates to them total discretion as to how to handle entire industries and even individual participants within industries.

To further illustrate the breadth and importance of the authority the Governor has purported to exercise, the Governor, without citation to specific authorities, has also issued executive orders imposing novel requirements on health insurers, EO 2020-07; prohibiting price gouging, *id*.; prohibiting "non-essential or elective" surgeries, EO 2020-10; suspending some of the legal requirements for obtaining unemployment insurance, EO 2020-11; prohibiting local governments from interfering with businesses he defines as "essential," EO 2020-12; delaying enforcement of eviction actions, EO 2020-14, EO 2020-49; requiring individuals to stay home unless for essential activity, EO 2020-18; prohibiting pharmacists and medical professionals from prescribing certain medications notwithstanding their medical judgment, EO 2020-20; prohibiting the commercial eviction of small businesses, EO 2020-21; suspending regulatory requirements to allow restaurants to increase profits by selling grocery items, EO 2020-25; immunizing healthcare workers from civil liability contrary to existing statutes, EO 2020-27; delaying the start of the school year and waiving regulatory requirements related to education, EO 2020-41, EO 2020-44; and funding and extending programs, such as those administered by the Arizona Department of Environmental Quality, without legislative approval, EO 2020-46.

The breadth of the asserted authority is even more striking because the statute also authorizes a declaration of an emergency stemming from "air pollution."

Id. § 26-301(15). The Governor's position appears to be that it therefore authorizes him to declare an air pollution emergency for the foreseeable future, order the closure of all manufacturing plants, order people to stay home or take only public transportation. All such orders, after all, would, according to the Governor, alleviate "extreme peril to safety of persons and property" due to air pollution, *id.*, "reduce the need to respond to [air pollution]," *id.* § 26-301(11), and "limit the primary effects" of air pollution and "reduce the probability of secondary damage," *id*. § 26-301(14). This would be a staggering delegation of authority.

The Governor's powers under his interpretation of the statute are still more expansive because they are indefinite as to time. The superior court held that the Governor's authority is limited because it is "temporary." R.105 at 3. But it is only temporary in the sense that everything, over time, eventually passes. In his July 26 press conference, the Governor repeated that his actions and current conditions constitute a "new normal" that will exist for the "foreseeable future":

> What we've gone through and the challenges that I'm sharing with you really is Arizona's new normal. And it's our new normal for the foreseeable future. I really want to ask people to get their heads around that. That this is going to be a challenge that's going to be ongoing for the foreseeable future. . . . There's no end in sight today. That's why I keep talking about the foreseeable future.

Gov. Doug Ducey, Press Conference, at 0:10:39–59, 0:20:55–21:01 (July 16, 2020), https://azgovernor.gov/video. Several months later, nothing about the Governor's position has changed. The simple fact is the Governor has purported to re-

solve policy questions of legislative importance for months on end without establishing a criterion by which to judge that the emergency has ended.

To be sure, the legislature will soon be convening—after nine months of emergency rule. But that does not resolve the constitutional problem. Even if the legislature *could* get involved but chooses not to, that would not answer the question of whose power and duty it is to address the important policy questions the Governor has sought to address. That power is *the legislature's*, whether or not its members *want* to exercise their power for political or other reasons.

Moreover, it is not even clear that the legislature has the power to declare the emergency at an end. The statute purports to give them the authority to do so by concurrent resolution. A.R.S. § 26-303(F). This would be an impermissible legislative veto. *INS v. Chadha*, 462 U.S. 919, 956 (1983). The legislature can only change the legal landscape through bicameralism and presentment. It is not at all clear that a concurrent resolution declaring the emergency at an end would bind a Governor who believed the emergency to be ongoing.

In short, under the Governor's reading of the statute, it grants him enormous power over important and controversial political, economic, and moral policy questions, including the power to regulate private rights and conduct, under a broad delegation with minimal guiding standards and for an indefinite time.

b. The statute would delegate power over "important subjects," including a broad range of private conduct, without specific authorization and without sufficiently precise standards.

On the Governor's reading, the emergency powers statute violates the nondelegation doctrine because it allows the Governor to decide "important subjects" that should be resolved by the legislature. Some formalist and originalist judges and scholars have argued that regulations affecting private rights and conduct are all legislative, and always must be enacted by the legislature. *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 70–83 (2015) (Thomas, J., concurring in the judgment) ("the Executive may not formulate generally applicable rules of private conduct"); *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (the framers understood legislative power to be the "power to adopt generally applicable rules of conduct governing future actions by private persons"); *see also* Philip Hamburger, Is Administrative Law Unlawful? 83–90 (2014) (arguing that regulations "binding" on subjects as opposed to officials are legislative).

This Court need not go that far. Plaintiffs argue instead that *if* the legislature is going to delegate to the executive the power to make regulations governing private conduct, such a delegation must meet three conditions. First, it must be made *specifically*: the authorization cannot be hidden in a broad and general delegation to regulate in the "public interest," or in a general grant of "all police power." Second, the range of conduct that the executive may regulate must be narrow: the leg-

islature cannot grant a roving commission to regulate a wide range of conduct. Third, the guiding standards must be more precise than when private rights are not at issue. This understanding of the nondelegation doctrine is the most consistent with constitutional text and structure, with historical practice, and with the precedents of both this Court and other courts. Importantly, adopting such a standard does not require the wholesale invalidation of the modern administrative state. Many modern statutes do specifically authorize regulations over a narrow category of private conduct and have sufficiently precise standards.

1. Historical examples.

To illustrate Plaintiffs' proposed test, it is helpful to begin with examples of constitutional statutes that authorize the regulation of private conduct. In 1852, to combat an epidemic of steamboat explosions, Congress passed an extremely detailed law respecting the engineering and placement of boilers and forcing pumps on steamboats. 10 Stat. 61, §§ 2-3 (Aug. 30, 1852). The law also, however, authorized inspectors to establish passenger limits on ships. *Id.* § 9. And it authorized a board of supervising inspectors "to establish such rules and regulations to be obeyed by all such vessels in passing each other, as they shall from time to time deem necessary for safety." *Id.* § 29. These latter two provisions authorized the regulation of private rights and conduct. But the authorizations were made specifi-

cally, and they were *narrow*, each dealing with a very particular kind of private conduct (passenger limits, rules for passing ships).

Similarly, in *Jacobson v. Massachusetts*—often cited in support of broad executive authority in emergencies even though the case was about substantive due process and not about the separation of powers—the state legislature *specifically* authorized compulsory vaccination whenever a municipal board of health thought such vaccinations "necessary for the public health or safety." 197 U.S. 11, 12 (1905). Whatever else *Jacobson* might stand for, it assuredly does not stand for the proposition that the legislature may authorize the regulation of private conduct through a delegation of authority as broad as one that delegates "all police power" of the state. The delegation in *Jacobson* specifically authorized the regulation of a narrow category of private rights.

Finally, consider A.R.S. § 26-311(B), in the statute at issue here. In that provision, the Arizona state legislature *specifically* authorized city mayors, in an emergency, to "[o]rder[] the closing of any business" when "necessary . . . to preserve the peace and order of the city." This delegation (1) specifically authorizes a (2) narrow category of regulation of private rights—the closing of businesses—and does so (3) under relatively more precise circumstances, when necessary to preserve peace and order. In contrast, A.R.S. § 26-303(E), which under the Governor's reading allows him to regulate private rights and conduct because it delegates

to him "all police power" of the state, is nothing like this much narrower delegation. It does not *specifically* authorize the regulation of private rights, let alone any particular private right. And it certainly does not do so under sufficiently narrow circumstances; the statutory standards (on the Governor's reading) are much broader.

2. The meaning of "legislative power."

The above statutes all meet the proper test for the nondelegation doctrine, while A.R.S. § 26-303(E) does not, for the additional reason that the framers of the U.S. Constitution, whose views on the matter can be imputed to the framers of the Arizona Constitution,[3] understood that certain specificity was required of "laws," particularly laws affecting private conduct. In arguing that the Alien and Sedition Acts violated nondelegation principles, James Madison explained,

> Details, to a certain degree, are essential to the nature and character of a law; and, on criminal subjects, it is proper, that details should leave as little as possible to the discretion of those who are to apply and to execute the law. If nothing more were required, in exercising a legislative trust, than a general conveyance of authority, without laying down any precise rules, by which the authority conveyed, should be carried into effect; it would follow, that the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for laws. A delegation of power in this latitude, would not be denied to be a union of the different powers.

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[3] If anything, Arizona's own founders were even stricter about the separation of powers, drafting a separation of powers clause that is absent from the federal Constitution. Ariz. Const. art. 3.

James Madison, The Report of 1800, in 17 The Papers of James Madison 303, 324 (David B. Mattern, J. C. A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991).

In other words, a certain amount of specificity is necessary for a law genuinely to be a "law." If the legislature could make laws with insufficient standards, Madison argued, its "laws" would effect a *transfer* of legislative power to the executive. And, Madison argued, all this is particularly true of criminal laws, and more generally of laws that affect private liberty. Madison added:

> To determine then, whether the appropriate powers of the distinct departments are united by the act . . . , it must be enquired whether it contains such details, definitions, and rules, as appertain to the true character of a law; *especially, a law by which personal liberty is invaded, property deprived of its value to the owner, and life itself indirectly exposed to danger*.

*Id.*at 325 (emphasis added). Simply put, laws require a certain amount of detail, and the more a law affects private conduct or liberty, the more specificity the law requires. Perhaps for this reason, Congress almost never delegated authority over private conduct in the first half-century after Ratification. *See* Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559867. The requirement of more detail and specificity when "personal liberty is invaded" is consistent with the general understanding of legislative power as the power to make rules for the government of society, and particularly of private citizens and subjects. *Dep't of*

Transp., 575 U.S. at 70–83 (Thomas, J., concurring in the judgment); *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting); Hamburger, *supra*, at 83–90.

3. Judicial precedents.

Although most state and federal judicial precedents focus on the sufficient basic standard or intelligible principle test, many precedents are consistent with the more accurate account of nondelegation proposed here: that the legislature may delegate the authority to make rules governing private conduct only if the legislature (1) specifically authorizes such regulations (2) over a relatively narrow category of conduct and (3) uses more precise standards than when it delegates authority over official conduct.

For example, in *State v. Marana Plantations*, this Court invalidated as an unlawful delegation of legislative power the following statutory provision:

> Sec. 6. Rules and regulations. (a) The board shall have power to adopt, promulgate, repeal, and amend rules and regulations consistent with law to: 1. define and control communicable diseases; 2. prevent and control public health nuisances; 3. regulate sanitation and sanitary practices in the interests of public health; 4. cooperate with local boards of health and health officers; 5. protect and promote the public health and prevent disability and mortality; 6. isolate any person affected with and prevent the spread of any contagious or infectious disease; 7. govern the transportation of dead bodies; 8. establish quarantine; and, 9. carry out the purposes of this Act.

75 Ariz. 111, 112 (1953). The regulations at issue in *Marana Plantations* provided that agricultural labor camps must have a clean water supply, a toilet system, ade-

quate hot water for bathing, and a garbage disposal system. The regulations also specified a variety of requirements for housing at the camp. *Id.* at 112–13.

This Court held the delegation of authority invalid: "The portion of Section 6 . . . which gives the board power by rule and regulation to 'regulate sanitation and sanitary practices in the interests of public health' and to 'protect and promote the public health and prevent disability and mortality,'" the Court held, "permits the board to wander with no guide nor criterion, with no channel through which its powers may flow." *Id.* at 114–15. The Board "may flood the field with such sanitary laws as its unrestrained discretion may dictate. It may upon investigation discover what it might think are evil conditions and proceed to adopt whatever remedial legislation might suit its fancy." *Id.* at 115. The 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 and to such extent is violative of constitutional principles." *Id.*

The problem in *Marana Plantations*, then, was that the authorization to regulate private conduct, although specifically made, was over an extraordinarily broad range of conduct, and the standards were insufficiently precise. So too with A.R.S. § 26-303(E). According to their interpretation, ADHS and the Governor may "wander with no guide nor criterion" and impose "such sanitary laws as

[their] unrestrained discretion may dictate." ADHS and the Governor "may upon investigation discover what [they] might think are evil conditions and proceed to adopt whatever remedial legislation might suit [their] fancy." The statutory delegation of authority gives the Governor and agencies "unrestrained power to regulate sanitation and sanitary practices." Why bars and gyms and not hotels or Wal-Marts? Why one set of requirements for bars that serve food and another for those that do not? Why water parks but not rodeos? The point is that the statute, under Defendants' interpretation, gives them unfettered discretion to roam at large, pick and choose problems they will tackle, and shape policies in their unfettered discretion.

In *Globe Sch. Dist. No. 1 v. Bd. of Health of City of Globe*, decided during the Spanish Flu epidemic, this Court first reaffirmed the nondelegation doctrine: it held that the state legislature could not delegate authority to local authorities to "declare what is or what is not a nuisance," because the power to so declare is "legislative power." 20 Ariz. 208, 211 (1919). (Executive Order 2020-47 states that "failure to comply with this order and any other guidance issued by [ADHS] related to . . . COVID-19 shall constitute a public nuisance," R.131; here, then, the Governor has clearly assumed a legislative power.) The Court upheld, however, a citywide school closure order made pursuant to a delegation of authority to the state and local health boards "to make and enforce all needful rules and regulations

for the prevention and cure, and to prevent the spread of any contagious, infectious, or malarial diseases among persons." 20 Ariz. at 216, 218.

The breadth of that delegation makes it dubious, but regardless it is nothing like the grant of "all police power" pursuant to which Defendants have acted here. In *Globe* there was a specific authorization for the regulation of private conduct, the range of conduct that could be regulated was narrower (even if not narrow enough) than the range covered by the Governor's interpretation of Title 26, and the standards were at least arguably somewhat more precise.

The Michigan Supreme Court also recently invalidated that state's emergency powers statute, a statute that was strikingly similar to Arizona's. "Concerning the subject matter of the emergency powers conferred by the EPGA [Michigan's statute], it is remarkably broad, authorizing the Governor to enter orders 'to protect life and property or to bring the emergency situation within the affected area under control.'" *In re Certified Questions From U.S. Dist. Court , W. Dist. of Michigan, S. Div.*, No. 161492, 2020 WL 5877599, at *15 (Mich. Oct. 2, 2020). "It is indisputable that such orders 'to protect life and property' encompass a substantial part of the entire police power of the state." *Id.* Thus, Michigan's statute was very much like Arizona's, which grants the Governor "all police power" of the state. And, the Michigan Supreme Court explained, "the police power is legislative in nature." *Id.* Further, "The invocation of a curfew or restriction on the right to assemble or pro-

hibiting the right to carry on businesses licensed by the State of Michigan involves the suspension of constitutional liberties of the people." *Id.* (quoting *Walsh v. River Rouge*, 385 Mich. 623, 639 (1971)). The court then described the wide variety of powers the Governor of Michigan purported to exercise under this broad delegation, from requiring residents to stay home and wear masks to closing a variety of businesses. *Id.*

Critical to the court's analysis was the indefinite nature of the duration of the emergency. "Concerning the duration of the emergency powers conferred by the EPGA, those powers may be exercised until a 'declaration by the governor that the emergency no longer exists.'" *Id.* at *16. "Thus," the court concluded, "the Governor's emergency powers are of indefinite duration." *Id.* As the present circumstances illustrate, the court continued, "if the emergency is unresolved for a period of months or longer, the emergency powers under the EPGA may be exercised for a period of months or longer. The fact that the EPGA authorizes indefinite exercise of emergency powers for perhaps months—or even years—considerably broadens the scope of authority conferred by that statute." *Id.* Thus "under the EPGA, the state's legislative authority, including its police powers, may conceivably be delegated to the state's executive authority for an indefinite period." *Id.* The exact same analysis can be made of Arizona's statute which, under the Governor's reading, delegates to him all the police power of the state for an indefinite period.

In short, the Michigan statute did not specifically authorize the regulation of private rights and conduct, its authorization broadly covered the entire police power of the state for an indefinite time, and the "guiding" standards were correspondingly broad. If Michigan's statute violates nondelegation principles, so does Arizona's under the Governor's interpretation.

Finally, the U.S. Supreme Court has held that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475. And that Court has struck down a similarly broad delegation of authority at the height of another crisis, the Great Depression. In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Supreme Court struck down a delegation of authority to the President to make "codes of fair competition" for various industries. Justice Cardozo explained in concurrence that "[h]ere in effect is a roving commission to inquire into evils and upon discovery correct them." *Id.* at 551 (Cardozo, J., concurring). So too here. Again, why does a Wal-Mart or hotel get stay open, but a bar that does not serve food is not even given the chance to implement social distancing measures? Why gyms but not dance studios? Why 25% capacity and not 10% or 50% capacity? The Defendants have a roving commission to decide what evils to correct and how to correct them, even though reasonable people can disagree about such policy choices. In *Schechter*, although the legislature specifically authorized the regulation of pri-

vate conduct, the authorization was so broad that it encompassed the entire regulatory power of the government and with minimal guiding standards.

Precedents and historical practice thus confirm that A.R.S. § 26-303(E) violates the nondelegation doctrine on the Governor's interpretation because (1) there is no specific authorization to regulate private rights or conduct; (2) even if there were such an authorization, the grant of "all police power" is far too broad, encompassing any and all possible human conduct, for an indefinite period of time; and (3) the standards in the statute impose no serious limits. This Court need not hold that all regulations of private conduct are legislative. It need only hold that if private rights are to be regulated, the authorization to do so must be specific, the range of conduct must be narrow, and the guiding standards must be more specific than when the executive regulates official conduct.

Simply put, in light of the breadth of the authorities the Governor has purported to exercise, can it be said that the legislature resolved all the "important subjects," leaving matters of mere "detail" to the executive to fill in? Obviously not. The Governor has purported to resolve important and controversial policy questions, including by regulating private conduct and interfering with personal liberty for the foreseeable future. None of this is to say that the executive orders and regu-

lations are *necessarily bad*—only that whether to have such regulations should be up to the people's representatives.[4]

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[4] ADHS purports to rely on A.R.S. § 36-136(H) for additional statutory support for Emergency Measure 2020-02 and the guidelines. R.97 at 7-8; R.135. That provision states that the ADHS director "may define and prescribe emergency measures for detecting, reporting, preventing and controlling communicable or infectious diseases or conditions if the director has reasonable cause to believe that a serious threat to public health and welfare exists"; such regulations can last up to eighteen months. A.R.S. § 36-136(H). Moreover, such "emergency measures" need not go through the notice-and-comment process. A.R.S. § 41-1026. Plaintiffs think this statutory provision is also of dubious constitutionality. If it permits a regulatory code for a period of eighteen months for a whole variety of industries, then the range of conduct that is captured by this delegation is vast. And the guiding standard is hardly precise. The Court in *Marana Plantations* invalidated a similarly broad delegation of authority in the public health context. 75 Ariz. at 14–15. The lower court did not consider this statutory provision, however, and this Court need not rule on it. The Emergency Measure and the guidelines on their face implement Executive Order 2020-43, which provides in its fifth paragraph that "[t]o receive authorization to reopen, entities shall complete and submit a form as prescribed by [ADHS] that attests the entity is in compliance with guidance issued by ADHS related to COVID-19 business operations." R.130. The August 10 guidelines implement this provision.

Without the authority of EO 2020-43, the guidelines would be invalid for two reasons unrelated to A.R.S. § 36-136(H) or the nondelegation doctrine. First, the guidelines are not themselves official regulations and have no legal force. To give them legal effect, ADHS would have to promulgate them at least as "emergency measures." Such measures would have to be approved by the Attorney General, filed with the Secretary of State, and published in the Arizona Administrative Register. A.R.S. § 41-1026. Second, Emergency Measure 2020-02 itself was apparently never approved by the Attorney General—at a minimum it was never published in the Register. Nevertheless, in an abundance of caution, this Court should rule on Plaintiffs' privileges or immunities claim even if it agrees with Plaintiffs' nondelegation claim, to ensure the invalidation of the "guidelines" to the extent Defendants plan to rely on A.R.S. § 36-136(H) in the future.

III. The constitutional question can be avoided because A.R.S. § 26-303(E) is best read as relating to official conduct only, precluding the Governor's executive orders.

There is a plausible, narrower reading of the emergency statute that does not violate the State Constitution. *Slayton v. Shumway*, 166 Ariz. 87, 92 (1990) ("[W]here alternate constructions are available, we should choose that which avoids constitutional difficulty."). Under that narrower reading—which Plaintiffs argue is in fact the best reading of the statute—the Governor's relevant executive orders exceed statutory authority.

The emergency statute gives the Governor "all police power" of the state in the event of a declared emergency. A.R.S. § 26-303(E)(1). But it does so entirely in the context of directing agencies and other officers of the government. "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 . . . ." *Id.* (emphasis added). Further, "[t]he governor may 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) (emphasis added). Finally, "[t]he governor may direct such 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.* (emphasis added). The statute is all about directing officers, not regulating private conduct.

This reading of the statute makes sense of the statutory definition of emergency, which comprises circumstances that "are or are likely to be beyond the control of the services, personnel, equipment and facilities of any single county, city or town." *Id.* § 26-301(15). The whole point is that the Governor, in an emergency, must be able to marshal the services, personnel, equipment, and facilities of the entire state. He can deploy, coordinate, and direct emergency resources to combat immediate and imminent situations. Is creating regulatory guidelines, and shutting down Plaintiffs' businesses, "direct[ing]" the "utiliz[ation] of "state personnel, equipment, and facilities"? Can cities and counties not handle sanitation measures and tailor the response to local circumstances? The answers to these questions suggest that the guidelines and executive orders are invalid. The statute authorizes the Governor to direct official conduct—to direct public employees and officials. It does not by its terms authorize the creation of rules governing private conduct.

This reading also makes sense in context of the usual emergencies such as fires, floods, and earthquakes. The Governor can direct where emergency personnel and resources go. He can order the construction of shelters. Private rights might be *incidentally* affected, as when firefighters issue an evacuation or exclusion order from areas of operations. But private rights are not *directly* regulated.

The air pollution example is again instructive. It cannot be that the Governor has authority to order people to stay home, pick and choose which businesses stay open, and order people to take public transportation only, for months on end, in the event of an air pollution "emergency." The statute must have contemplated something more like the Great London Fog of 1952, where, over a five-day period, "lethal smog that covered the city of London . . . , caused by a combination of industrial pollution and high-pressure weather conditions, . . . brought the city to a near standstill and resulted in thousands of deaths." Julia Martinez, "Great Smog of London," Encyclopedia Britannica (Nov. 28, 2020), https://www.britannica.com/event/Great-Smog-of-London. For those five days perhaps the government could have ordered businesses closed and people to stay home, only because such actions would be incidental to emergency assistance and operations by state personnel.

This narrower reading of the statute also makes the most sense of Title 36, which is about public health specifically. In a nutshell, A.R.S. § 36-624 gives counties the primary authority to "adopt quarantine and sanitary measures consistent with department rules and sections 36-788 and 36-789 to prevent the spread of the disease." A.R.S. § 36-787(A) then gives ADHS "primary jurisdiction" over "coordinating public health emergency responses" during "a state of emergency or state of war emergency declared by the governor." A.R.S. § 36-787(B) gives the

Governor and ADHS authority to ration medicine and vaccines and related authorities. And A.R.S. § 36-787(C) gives the Governor and ADHS authority to mandate vaccinations and to quarantine or isolate persons. A.R.S. § 36-788 then limits this last authority, requiring that quarantine orders be only for exposed or sick individuals and be the least restrictive means available. A.R.S. § 36-789 requires due process. The Governor's interpretation of A.R.S. § 26-303(E) would make a hash out of Title 36. Why specify the authorities in Title 36 if the Governor can do whatever he wants anyway, and direct the agencies accordingly?

In sum, the Governor's interpretation of the emergency statute is certainly a plausible interpretation. But it is not the best interpretation. And the Governor's interpretation would create an unconstitutional delegation of legislative power.

IV. The rational basis test does not apply to an executive acting alone, nor to privileges or immunities clause claims.

Article 2, Section 13 of the State Constitution 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." This state's privileges or immunities clause, like the privileges or immunities clauses in several other states, requires equality in the privileges and immunities of state citizenship, which encompass all civil (but not political) rights. *See* Ilan Wurman, The Second Founding: An Introduction to the Fourteenth Amendment 49–56 (2020) (describing privileges or immunities claus-

es). These clauses were products of Jacksonian-era antipathy to special privileges and, in the Reconstruction constitutions in the Southern states, to the insidious Black Codes that systematically denied the same civil rights to black Americans as white Americans enjoyed. The clauses require that similarly situated citizens be treated equally. This does not mean that all discriminations are prohibited, only that there can be no unreasonable discriminations.

In evaluating their privileges or immunities claim, the trial court recited the "rational basis test," or the "any conceivable basis test." R.105 at 13, 16. To the extent the rational basis test ever applies, however, Plaintiffs argue it applies only to state legislatures. Further, this deferential test applies (if at all) only to substantive due process claims, not to claims involving express constitutional prohibitions.

a. The rational basis test historically applied to actions of a state legislature, not to governmental actors exercising power delegated by the legislature.

Defendants did not cite a single case squarely addressing whether immense deference applies to actions of an executive acting alone. The famous *Steel Seizure Case*—where the Supreme Court rebuffed President Truman's seizure of the steel mills in *wartime*—suggests otherwise: In emergencies, the executive does *not* get wide deference. Emergencies do "not create power," they "merely mark[] an occasion when power should be exercised." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629 (1952) (Douglas, J., concurring).

In *Globe*, this Court explained that it was for the judicial branch to scrutinize the actions of the municipalities and state agencies during a pandemic to ensure no unreasonable interference with the liberty of the citizen:

> The rules, regulations, and by-laws which are adopted by such boards must, however, be reasonably adapted to secure the object in view. They must not unreasonably interfere with the liberty, property, and business of the citizen. *And whether such regulations are reasonable, impartial, and consistent with the state policy is a question for the court*.

20 Ariz. at 219 (emphasis added, internal citations omitted). *Youngstown* and *Globe* together suggest that courts should rigorously review the actions of the executive to ensure reasonableness, even in emergencies.

Limiting the rational basis test to the legislature is also consistent with historical judicial practice. In the antebellum period, state legislatures were theoretically limited to reasonable exercises of the police power, but what counted as reasonable was entirely within the legislative wisdom. *See* Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. Chi. L. Rev. 815, 856–59 (2020); Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 584 (1868). When the legislature delegated authority to municipal corporations, however, the courts rigorously reviewed the acts of these local governments to ensure they were reasonable and not in restraint of trade, and were legitimate exercises of the police power. Wurman, *Origins of Substantive Due Process*, *supra*, at 826–36; *see also City of Tucson v.*

Stewart, 45 Ariz. 36, 46 (1935) (reviewing city regulations to ensure they "are reasonable and not monopolistic or oppressive" and "are a proper exercise of the city's police power"); *City of Tucson v. Rineer*, 193 Ariz. 160, 166 (Ct. App. 1998) (similar).

The reason for such treatment is because when the legislature delegates authority, it is presumed not to have intended to delegate authority to act unreasonably. Wurman, *Origins of Substantive Due Process*, *supra*, at 826–36. Thus if the legislature expressly authorizes unreasonable actions, there is nothing the courts can do to stop the delegee from exercising that power (absent an express constitutional prohibition); but where there is a more general grant of power, the exercise of that power must be reasonable. A leading treatise on municipal corporations explained it thus: "[W]hat the legislature distinctly says may be done cannot be set aside by the courts because they may deem it unreasonable," but "where the power to legislate on a given subject is conferred, but the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." John F. Dillon, Treatise on the Law of Municipal Corporations 84 (1872).

Here, in short, the executive is more like a municipal corporation in that the Governor is exercising power delegated by the legislature, a conclusion supported

by both *Youngstown* and *Globe*. The legislature may get the benefit of the rational basis test, but the Governor does not.

b. The rational basis test applies only to substantive due process claims, not to claims involving express constitutional prohibitions.

In numerous privileges or immunities clause claims, where discrimination was at issue, this Court has decided for itself whether the discrimination was in fact reasonable; this Court simply followed the text and decided whether a government action granted some citizens more privileges than other similarly situated citizens.[5] For example, in *Gila Meat Co. v. State*, the Supreme Court struck down 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," on the basis that such a statute "in effect grant[ed] to certain citizens privileges and immunities which are not granted to others similarly situated on equal terms." 35 Ariz. 194, 202 (1929).

In *Killingsworth v. W. Way Motors, Inc.*, 87 Ariz. 74 (1959), this Court, while upholding numerous exercises of the police power, invalidated a state law requiring dealers of new cars to own their buildings in fee simple, or lease build-

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[5] Although this Court often treats equal protection and state privileges or immunities claims under the same standards, the Court has never held that they are always coextensive. *See Coleman v. Mesa*, 230 Ariz. 352, 362 (2012) (applying same standard, but noting that "the Colemans have not argued that another standard should apply").

ings with space sufficient to display two or more vehicles, with the ostensible purpose of preventing fraud. The Court held the law had "no reasonable relationship . . . to the purpose sought to be achieved, the restriction [was] arbitrary, discriminatory, and unlawful." *Id.* at 80. Indeed, the Court asked, was "there any valid reason for *failing to impose the same requirements* upon a dealer engaged in the business of buying and selling used motor vehicles?" *Id.* (emphases added). The opportunity to defraud customers was certainly "as great" for the used car dealer as for the new car dealer. Thus, the limitation was "arbitrary, unreasonable and discriminatory and violate[d] . . . Article 2, Section 13 of the state constitution." *Id.*

It is consistent with historical judicial doctrines for courts to ensure reasonableness when the legislature is faced with an express constitutional prohibition. As noted, what was a reasonable exercise of the police power was generally within the legislative wisdom. Where specific federal constitutional prohibitions were at issue, however—as with the Contracts Clause or the prohibition on states regulating interstate commerce—the federal courts rigorously reviewed the state regulation to ensure it was a genuine and reasonable exercise of the police power and not an infringement of the constitutional right or prohibition. Wurman, *Origins of Substantive Due Process*, *supra*, at 837–848, 856–59. The exact same analysis would apply, as it did in Arizona in cases such as *Gila Meat* and *Killingsworth*, to state constitutional prohibitions.

The rational basis test, to the extent it applies at all, therefore applies only to substantive due process claims, to unwritten limits on state power. It does not apply when an express constitutional prohibition is at issue. Plaintiffs, in other words, are not arguing that this Court may review all legislation and all regulations for reasonableness. But when there is a *discrimination*, the Court can and must engage in rigorous review. To put the point another way, the majority in *Lochner*—where the maximum hours law was equally applicable to all bakers—may have been wrong for second-guessing the legislature. *Lochner v. New York*, 198 U.S. 45 (1905). But the *Slaughter-House* dissenters could still have been right: that case involved a monopoly given to one group of butchers to the economic disadvantage of other butchers, thereby "abridging" the privileges of some citizens by giving greater privileges to other, similarly situated citizens. *The Slaughter-House Cases*, 83 U.S. 36 (1873); U.S. Const. amend. XIV; *see also* Wurman, The Second Founding, *supra*, at 138–39 (arguing that *Lochner* was wrongly decided, but so was *Slaughter-House*).

The distinction between a "regulation" and a "discrimination" may not always be obvious. But the distinction was articulated in a famous case, *City of Chicago v. Rumpff*, rejecting the grant of a slaughterhouse monopoly by a municipal corporation. "Where that body have made the necessary regulations required for the health or comfort of the inhabitants, all persons inclined to pursue such an oc-

cupation should have the opportunity of conforming to such regulations, otherwise the ordinance would be unreasonable and tend to oppression." 45 Ill. 90, 97 (1867). "We regard it neither as a regulation nor a license of the business," however, "to confine it to one building, or to give it to one individual. Such action is oppressive, and creates a monopoly that never could have been contemplated by the general assembly." *Id.*

Distinctions based on immutable characteristics are therefore classic examples of discrimination. An African-American who is discriminated against cannot "conform" to the purported "police power regulation" because she cannot change her skin color. Monopolies are also discriminations because they prevent similarly situated individuals from being able to "conform" to a genuine police power regulation. That is what we have here: a purported "police power regulation" that benefits some citizens while discriminating against other, similarly situated citizens without giving them an equal opportunity to "conform" to reasonable health measures.

In sum, this Court should reject the rational basis test for privileges or immunities claims under the State Constitution. It should follow the text instead: if the government grants privileges to one set of citizens that it denies to other similarly situated citizens, it has infringed on constitutionally protected liberty. It is for the *courts* to decide, once there is an apparent discrimination, whether that discrim-

ination is reasonable or unconstitutional. Whatever the Court wants to call the test—a "police powers" analysis, rational basis with "bite,"[6] or something else—the point is the legislature does not get excessive deference. When the supposed rights of the legislature intersect with and affect the liberties of the people as guaranteed by an express constitutional provision, it is precisely the role of the courts to ensure that the legislature has not overstepped. And that is all the more true when it is the executive acting pursuant to a delegation of power.

V. Plaintiffs have shown a likelihood of success on their discrimination claim when the correct legal standard is applied.

As noted above, the DLLC director testified that series 3, 11, 12, and 14 licensees—traditionally associated with breweries, hotel bars, restaurant bars, and private clubs—"oftentimes" and "not [] uncommon[ly]" act like "bars," that is, like series 6 or 7 establishments whose primary purpose is the sale of alcohol. Cocca Decl. ¶¶ 33-34; Hr'g Tr. 193:8–194:14. Further, there are series 3, 11, 12, and 14 establishments that meet all the administrative criteria defining a bar. Hr'g Tr. 195:4–196:15. The hard evidence also revealed that series 12 and 14 establishments often act like "bars"—numerous series 12 and 14 establishments advertised karaoke nights, R.151, R.152, R.154, which is a bar-like activity, Hr'g Tr. 194:15-18, 220:11-13, 224:24–225:1. And photographic and video evidence of a series 12

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[6] *See* Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 20–21 (1972).

in Tucson demonstrated ongoing nightclub activities. R.145, R.146; Hr'g Tr. 225:15-19; R.157-161.

The only disputed question was therefore whether Plaintiffs' competitors with different series of liquor licenses receive more privileges and immunities than Plaintiffs do. On this score, the evidence at the preliminary injunction hearing was overwhelming. First, as Director Cocca testified, none of the series 3, 11, 12, and 14 establishments that operated like a bar or nightclub had to pause operations under EO 2020-43 and none had to file an attestation under the August 10 Guidelines. Hr'g Tr. 199:21–200:19; 212:7–213:6. Even the latter distinction creates a real discriminatory harm. The attestations are filed *under penalty of perjury.* R.203 ¶ 41.

Second, EO 2020-43 does not apply to series 6 and 7 licensees whose primary purpose is *not* the sale of alcohol. Director Cocca testified that a series 6 or 7 where all the administrative criteria are met may nevertheless be exempt from EO 2020-43 if the bar is on a golf course or resort or in a bowling alley because then it could have a different primary purpose. Hr'g Tr. 196:16–197:4, 197:19-24, 202:11-16; R.134 at -002 (June 30 DLLC Guidance). In other words, Defendants have simply shut down or restricted *some* establishments that act like bars, arbitrarily leaving *many others* open or unrestricted—not only series 3, 11, 12, and 14 licensees, but also a series 6 or 7 licensee that acts like a bar but which happens to be on a golf course or resort or in a bowling alley.

Third—adding insult to injury—while many establishments that acted like bars remained open, DLLC interpreted EO 2020-43 to prohibit series 6s and 7s whose primary purpose was the sale of alcohol from modifying their behavior and reopening only with parlor games and no alcohol, the allegedly risky factor. R.134 at -002; R.143; R.210 at -003; Hr'g Tr. 201:1-13, 203:12-19.

Fourth, the evidence showed that the August 10 Guidelines did not apply to any establishment other than ones that had to "pause operations." ADHS claims to have applied those guidelines to all licensees, including restaurants, in a buried footnote in Emergency Measure 2020-02. R.135 at -003. But the press release announcing the guidelines referred only to businesses paused under EO 2020-43 and did not cite the Emergency Measure, which itself was never even published in the Arizona Administrative Register. R.163; Hr'g Tr. 44:2-14. The Introduction to the Guidelines speak only of EO 2020-43, and the benchmarks speak of "resuming business operations." R.136 at -03, -04. The attestation process itself is for "resuming operations" and "reopening." *Id.* at -023; Hr'g Tr. 45:12-20. At the time, there was also no dropdown menu on the attestation form for restaurants or other licensees that were not required to pause. R.137; R.66 ¶ 4. And the guidelines that were supposedly for "restaurants," too, were stamped with "Requirements for Bars and Nightclubs Providing Dine-In Services" on every page. R.136 at -026–036.

Despite all this evidence, the trial court found it sufficient that ADHS *intended* the guidelines to apply to all liquor license series. R.105 at 16. In any event, likely because of the trial testimony, ADHS updated its Guidelines on October 20, 2020, so that they now more clearly *say* that they apply to other liquor license series. R.104. Plaintiffs consider this revision to be an important vindication of part of their legal claims.

The revision does not, however, go far enough, for three reasons. First, EO 2020-43 is still in force, and that order still singles out series 6 and 7 licensees. Some Plaintiffs are still shut down *directly as a result of that order* because they do not serve food or cannot other adhere to the guidelines promulgated pursuant to that order. Indeed, the Governor maintains his right to continue singling out series 6 and 7 licensees. This Court should therefore invalidate that executive order.

Second, although there is now an "attestation form" for restaurants, there is still no such form for series 3 breweries, series 11 hotels, or series 14 private clubs, making it unclear whether the guidelines really do apply to those entities and whether those entities have any reason to know the guidelines apply to them if that was the agency's intent.[7] And the trial court explicitly found that any disparate

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[7] The attestation form can be viewed at the ADHS website, of which this Court can take judicial notice if necessary: https://medsisprod.azdhs.gov/EO2020-43AttestationFormSubmission/Category?_=MjAyMDEyMjIxNzU1&__=0.3064837275548371.

treatment regarding attestations does not violate the privileges or immunities clause of the State Constitution. R.105 at 15.

Third, the various orders and measures and guidelines still discriminate against series 6 and 7 licensees who do not serve food. Such establishments still cannot open in most counties without special dispensation from ADHS, and the grounds of any ADHS decision remain locked in its own breast. The question is, why are establishments that serve liquor but no food discriminated against? If they can meet the same guidelines—no open seating, every patron must sit, karaoke must be done with masks, and so on—why does it matter that they cannot serve food? The testimony of the DLLC director to the effect that many restaurants act *like* bars with a series 6 or 7 license demonstrates that the ability to sell food during some parts of the day really does not determine the safety and health of the environment. If a restaurant can turn *into* a nightclub on the weekends, or at 8:00 PM, then bars that do not serve food should be open, too. Defendants have violated the privileges or immunities clause: their orders and guidelines have granted more privileges and immunities to some citizens that they arbitrarily and unreasonably deny to other, similarly situated citizens.

NOTICE UNDER RULE 21(A)

Plaintiffs give notice that they intend to seek attorney's fees and costs for this appeal, as well as for such fees and costs incurred at the trial court, under the

private attorney general doctrine. That doctrine "is an equitable rule which permits courts in their discretion to award attorney's fees to a party who has vindicated a right that: (1) benefits a large number of people; (2) requires private enforcement; and (3) is of societal importance." *Arnold v. Ariz. Dep't of Health Servs.*, 160 Ariz. 593, 609 (1989). "The purpose of the doctrine is 'to promote vindication of important public rights.'" *Id.* (quoting Comment, *Equitable Attorney's Fees to Public Interest Litigants in Arizona*, 1984 Ariz. St. L.J. 539, 554). Here all three requirements are met. Plaintiffs are seeking to vindicate "important public rights" of "societal importance," rights which require "private enforcement" because they are against the government. Additionally, a large number of people—indeed, the entire citizenry—will benefit from enforcement of fundamental separation of powers principles.

CONCLUSION

This Court should clarify the various legal issues in this case and grant the injunctive relief that Plaintiffs-Appellants seek.

Respectfully submitted,

/s/ *Ilan Wurman*

Ilan Wurman
Sandra Day O'Connor College of Law*
Arizona State University
MC 9520
111 E. Taylor St.
Phoenix, AZ 85004
(480) 965-2245
ilan.wurman@asu.edu

Attorney for Appellants

*Affiliation provided for identification purposes only.

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2021, I filed the foregoing Opening Brief electronically with:

Clerk of the Arizona Supreme Court
1501 W Washington St., Suite 402
Phoenix, AZ 85007

Governor Doug Ducey
1700 W Washington St.
Phoenix, AZ 85007
afoster@az.gov
bwjohnson@swlaw.com
thobbs@swlaw.com
cahler@swlaw.com

Arizona Department of Health Services
Office of Administrative Counsel and Rules
150 N. 18th Ave., Ste. 200
Phoenix, AZ 85007
Phone: (602) 542-1020
CMorgan@shermanhoward.com
gfalls@shermanhoward.com

Arizona Department of Liquor Licenses and Control
Administration Division
800 W. Washington, 5th Floor
Phoenix, AZ 85007
Phone: (602) 364-1952
CMorgan@shermanhoward.com
gfalls@shermanhoward.com

Dated: January 6, 2021

/s/ *Ilan Wurman*
Ilan Wurman

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

The foregoing Opening Brief complies with Arizona Rules of Civil Appellate Procedure 4(b) and 14(a) in that it is double spaced and uses a proportionately spaced typeface of Times New Roman, 14-point font, and has a word count of 13,973 words.

Dated: January 6, 2021

/s/ *Ilan Wurman*
Ilan Wurman