# MEMORANDUM

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To: C.H. Huckelberry, County Administrator

Cc: Laura Conover, Pima County Attorney

From: Jonathan Pinkney, Deputy County Attorney

Date: March 26, 2021

Subject: Governor's Executive Orders and the Ability of Pima County to Continue to Enforce Certain Public Health Mandates During a Public Health Emergency Related to the Coronavirus Pandemic

On March 25, 2021, Governor Ducey issued Executive Order 2021-06, rescinding his prior COVID-19 executive orders 2020-09, 2020-36, 2020-40, 2020-43, 2020-47, 2020-52, and 2020-59, and providing,

> Pursuant to A.R.S. § 26-307, no county, city or town may make or issue any order, rule, or regulation that conflicts with or is in addition to the policy, directives or intent of this or any other Executive Order relating to the COVID-19 public health emergency, or any other order, rule or regulation that was not in place as of March 11, 2020. This includes but is not limited to mandated use of face coverings. Any city, town, or county that has a rule, regulation or ordinance not inplace [sic] as of March 11, 2020 that is in conflict with the provisions of this order shall not be enforced. Political subdvisions [sic] maintain the right to set and enforce mitigation policies in their own government buildings and on public transportation, including, but not limited to, requiring face coverings.

Although A.R.S. § 26-307(A) provides that "counties, cities and towns may make, amend and rescind orders, rules and regulations necessary for emergency functions but

such shall not be inconsistent with orders, rules and regulations promulgated by the governor," it does not mean what the Governor apparently thinks it means. Most critically, it is inconceivable that § 26-307 should be read to give the Governor authority to nullify, by executive order, the County's statutory authority to enact reasonable public health measures.

Counties are political subdivisions of the state that derive their authority from the Legislature. They have those authorities expressly granted by statute or necessarily implied from an express grant. *Rodgers v. Huckelberry*, 243 Ariz. 427, 429, ¶ 5 (App. 2017). Various statutes give counties broad authority to regulate the public health. Counties may:

- "[a]dopt provisions necessary to preserve the health of the county, and provide for the expenses thereof," A.R.S. § 11-251(17);
- "[m]ake and enforce all local, police, sanitary and other regulations not in conflict with general law," § 11-251(31); and
- "make regulations necessary for the public health and safety of [its] inhabitants," A.R.S. § 36-183.02(A).

Indeed, the Arizona Supreme Court held that the authority of county health departments is coextensive with that of the Arizona Department of Health Services (ADHS) and recognized that counties may enact public health measures "equal to or more restrictive" than ADHS rules. *Marsoner v. Pima County*, 166 Ariz. 486, 488-89 (1991); see also A.R.S. § 36-136(J) (counties can adopt "ordinances and rules [that] do not conflict with state law and are equal to or more restrictive than the rules of the director").

Even with respect to measures promulgated under a state of emergency declaration rather than pursuant to general statutory authority, the prohibition in A.R.S. § 26-307(A) is limited to local orders "necessary for emergency functions" that are "inconsistent with orders, rules and regulations promulgated by the governor." And the orders at issue here are unrelated to "emergency functions," as narrowly defined in A.R.S. § 26-301(5)[1]. Thus, although Governor Ducey's order cites § 26-307, it attempts to go much further, purporting to apply to "all" local orders rather than just those "necessary for emergency functions" under Title 26, and purporting to prohibit not just local orders that "conflict with" his order, but also any that are "in addition to" his orders. But he has no authority to go further than the statute.

It is also notable that, as written, Executive Order 2021-06 purports to remove the County's authority to enforce mitigation measures on its own property other than in its "buildings," contrary to the County's broad statutory powers to "[m]ake such orders for the disposition or use of its property as the interests of the inhabitants of the county

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1 "'Emergency functions' includes warning and communications services, relocation of persons from stricken areas, radiological defense, temporary restoration of utilities, plant protection, transportation, welfare, public works and engineering, search or rescue, health and medical services, law enforcement, fire fighting, mass care, resource support, urban search or rescue, hazardous materials, food and energy information and planning and other activities necessary or incidental thereto." A.R.S. § 26-301(5).

require," A.R.S. § 11-201(A)4, and specifically to "take care of and manage" property for the use of county fairs, A.R.S. § 11-251.

It is up to the Legislature, not the Governor, to decide what authority it wants to delegate to counties. It has delegated counties broad public health authority, as well as authority over their own property. The Governor cannot, through the exercise of his executive authority, take that away. *See Rios v. Symington*, 172 Ariz. 3, 12 (1992) (Governor lacks the "power to make legislative decisions" and cannot "compromise the achievement of underlying legislative purposes and goals") (internal quotation marks and citations omitted).

Thus, per the table below, County measures based on the County's statutory public health authority remain in effect until rescinded by the Board of Supervisors, while measures relying on authority from the Governor's rescinded Executive Orders should be considered to have been rescinded.

| Date | Title | Authority | Status |
|---|---|---|---|
| March 19, 2020 | State of Emergency Resolution 2020-18 | A.R.S. § 26-311 | In effect |
| May 13, 2020 | Measures for Reopening of Businesses Proclamation | EO 2020-33, 2020-34 | Superseded by May 21 Proclamation |
| May 21, 2020 | Measures for Reopening of Businesses Proclamation | EO 2020-33, 2020-34 | Superseded by July 15 Proclamation |
| June 19, 2020 | Face Covering Resolution 2020-49 | A.R.S. §§ 11-251, 36-183.02 | Superseded by Res. 2020-96 |
| July 15, 2020 | Minimum Health Standards for Businesses Proclamation | EO 2020-43, 2020-47 | Superseded by December 4 Proclamation |
| December 4, 2020 | Face Covering Resolution 2020-96 | A.R.S. §§ 11-251, 36-183.02 | In effect |
| December 4, 2020 | Minimum Health Standards for Businesses Proclamation | EO 2020-59 | Rescinded per EO 2021-06 |
| December 15, 2020 | Curfew Resolution 2020-98 | A.R.S. §§ 11-251, 36-183.02 | Subject to judicial stay / Expired |