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ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. KELLIE JOHNSON

CASE NO. C20210057

DATE: January 19, 2021

NEXT LEVEL ARCADE TUCSON, LLC, ET AL.
Plaintiff,

vs.

PIMA COUNTY, A BODY POLITIC IN THE STATE OF ARIZONA, ET AL.
Defendant(s)

UNDER ADVISEMENT RULING

UNDER ADVISEMENT RULING ON PRELIMINARY INJUNCTION

Plaintiffs, owners and operators of establishments in Pima County that serve food and operate bars, apply for a preliminary injunction barring Defendant Pima County (the County), from enforcing a county-wide curfew between the hours of 10 p.m. and 5 a.m., as set forth in Pima County Resolution No. 2020-98.[1] Plaintiffs argue the County is without legal authority to impose the curfew, and that the curfew is unreasonable and unconstitutional on several grounds. The Court considered the Application, Response, and Reply, the evidence and testimony admitted at the January 15, 2021 hearing, and the arguments of counsel. Because the Court concludes the Resolution was adopted without statutory authority, and is in violation of the Governor's Executive Order, the Court grants Plaintiffs' application.

BACKGROUND AND RELEVANT FACTS

On March 11, 2020, Governor Ducey issued a declaration of Public Health Emergency to address the Covid-19 pandemic. Following the declaration, the Governor issued multiple executive orders related to the pandemic. The executive orders have included complete and partial shutdowns of businesses, and orders regarding re-opening of those businesses. In Executive Order 2020-36, the Governor, citing A.R.S. § 26-307, ordered that:

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> 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 Executive Order, including but not limited to any order restricting persons from leaving their home due to the COVID-19 public health emergency…

To date, more than 1000 people have died from Covid-19 in Pima County, and tens of thousands of others have been infected with it. Since the pandemic began, public health professionals throughout the United States have recommended various mitigation measures aimed to slow the spread of this dangerous and deadly virus and to protect healthcare systems from becoming overburdened with patients. Arizona is no exception.

Arizona has seen a new surge in Covid-19 cases. Since October, cases and deaths in the State have continued to climb, while hospital and intensive care resources have reached alarmingly low levels. On November 24, 2020, the Pima County Health Department issued an advisory asking people to stay home between 10 p.m. and 5 a.m. On December 4, 2020 the Pima County Board of Supervisors voted to continue this "voluntary curfew." The Board of Supervisors also passed Resolutions calling for civil penalties for violations of face covering mandates and accelerating enforcement against establishments that violate Arizona Department of Health Safety (ADHS) guidelines.

Dr. Francisco Garcia, Deputy Pima County Administrator and Chief Medical Officer, testified that after continuing the "voluntary curfew," county inspectors investigated compliance with it and the City's mandatory curfew by observing all establishments "across the jurisdiction" holding a series 6, 7 or 12 liquor licenses."[2] According to Dr. Garcia, inspectors saw noncompliance at approximately 30% of the locations observed. He indicated inspectors saw large congregations of people and took photographs to document their observations. However, no photographs were admitted into evidence. Additionally, the Resolution cites a separate investigation from December 11 and 12, 2020. According to the Resolution, that investigation showed non-compliance at approximately 15% of the locations observed. During his testimony, Dr. Garcia did not provide any specific detail about the locations observed. There is no evidence that any of the locations on either weekend included Plaintiffs' businesses.

After seeing the noncompliance, and noting cases continuing to trend upward, the Board of Supervisors adopted Resolution 2020-98 ("the Resolution") on December 15, 2020, mandating a county-wide curfew

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[1] Plaintiffs applied for a temporary restraining order. The parties stipulated to consolidate the request for a temporary restraining order with the preliminary injunction hearing.

[2] Over the December 4, 2020 weekend, the City of Tucson implemented a mandatory curfew, which has since expired.

between 10 p.m. and 5 a.m. The Resolution applies to both unincorporated and incorporated areas of the county. The curfew prohibits businesses such as Plaintiffs' from having patrons in their establishments during those hours. However, those businesses may remain open for takeout. The curfew is to remain in effect until "the Pima County Health Department first reports that the number of confirmed Covid-19 infections in Pima County fall below 100 per 100,000 people, based on a 7-day moving average."

The parties agree on several relevant facts. Plaintiffs own and operate establishments within Pima County that serve food and operate bars. Following the Governor's initial emergency orders, each of Plaintiffs' establishments closed for several months at the beginning of the pandemic and reopened in August or September 2020. Since reopening, each of Plaintiffs' businesses have operated under ADHS guidelines requiring they operate at 50% capacity, adhere to social distancing measures, and require patrons to wear masks unless seated at their table to eat and drink. It is also undisputed each of Plaintiffs' businesses operated under these guidelines until 2 a.m. prior to the Resolution. Plaintiffs all testified they had no barriers to enforcing the ADHS guidelines, and at no time prior to the curfew were their businesses overcrowded.

It is also undisputed that since the County issued the Resolution imposing the curfew, each of the Plaintiffs' businesses have closed at 10 p.m., and not remained open for takeout services. Although the exact figure for each of the Plaintiffs' businesses is unclear, a significant percentage of their sales generally occur after 10 p.m. It is also clear the curfew financially harms each business. All testified they are in jeopardy of closing due to economic strain if the curfew does not expire, albeit unclear as to how quickly that will happen.

The parties don't dispute the seriousness of Covid-19. There is no dispute the virus is dangerous and deadly. It is undisputed that SARS-Cov-2, the virus that causes Covid-19, is highly contagious and spreads easily between humans, primarily through respiratory droplets or aerosolized droplets. It is largely undisputed that it is especially likely to spread indoors where people congregate for substantial periods of time.

To support the curfew, in addition to the investigation revealing noncompliance with the curfew as a voluntary measure, Dr. Garcia opined that people are less likely to wear masks and observe safety measure at bars and parties due to eating and drinking not being conducive to wearing masks. He also based this opinion on the undisputed fact that alcohol impairs judgment. While Dr. Garcia testified in general terms regarding the County's infection numbers and contact tracing efforts, he was unable to opine or offer evidence that a significant number of cases could be attributed specifically to activity citizens engage in after 10 p.m. He indicated he is merely able, based on contact tracing, to identify behaviors that put people at risk. He did not specifically indicate being out after 10 p.m. was one of those risk factors.

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INJUNCTIVE RELIEF STANDARDS

To obtain a preliminary injunction, Plaintiffs must demonstrate a strong likelihood of success on the merits, a possibility of irreparable injury if the request is not granted, and that both the balance of hardships and public policy favor their request. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990). The balance of hardships is the critical element and can be met by demonstrating either a combination of 1) probable success on the merits and the possibility of irreparable injury, or 2) the existence of a serious questions going to the merits, and the balance of hardships tips sharply in the moving party's favor. *Id.* This Court has the power to enjoin violations of the Arizona Constitution. *See, e.g., Williams v. Superior Court in and for Pima County*, 108 Ariz. 154, 157, 494 P.2d 26, 29 (1972).

ANALYSIS

I. PROBABLE SUCCESS ON THE MERITS

Plaintiffs assert several arguments in support of their Application. First, Plaintiffs argue as a matter of law, the County does not have the authority to mandate curfews, and that even if that authority exists, the current Resolution is unlawful because it conflicts with the Governor's Executive Order 2020-36.

a. The County's statutory authority to adopt the resolution.

Plaintiffs argue the Resolution is unlawful because it conflicts directly with Executive Order 2020-36 and its prohibition against any county issuing an "order restricting persons from leaving their home due to the COVID-19 public health emergency." Plaintiffs argue that the Resolution's inconsistency with Executive Order 2020-36 standing alone is enough to grant the preliminary injunction.

In response, the County argues that it has authority to issue its curfew provision in the Resolution, and that the power to do so is implied by the County's broad authority to regulate public health. Additionally, the County argues it may adopt the curfew in the Resolution under its own emergency powers under A.R.S. § 26-311. Finally, the County argues that the Governor's order barring counties from issuing orders restricting people from leaving their homes in Executive Order 2020-36 does not affect its ability to issue the Resolution because it is not inconsistent with the Order. Alternatively, the County argues the Governor exceeded his authority in issuing the provision, and as a result, the County is free to ignore it.

The Court first considers whether counties have powers independent of Title 26 emergency power to require curfews. Counties are political subdivisions of the State who derive their authority from the legislature. *Rodgers v. Huckleberry*, 243 Ariz. 427, 429 ¶ 5, 409 P.3d 298, 300 (App. 2017). "Our courts have consistently

required counties and county boards of supervisors to show an express grant of power whenever they assert that such statutory authority exists." *Marsoner v. Pima County,* 166 Ariz. 486, 488, 803 P.2d 897, 899 (1991). They have only the powers that are expressly or by necessary implication delegated to them by the legislature. *Id.*

The County agrees there is no express provision delegating it the authority to impose curfews as a public health measure. The County argues its authority to impose the curfew in the Resolution is necessarily implied within the statutes allowing it to regulate public health. The Resolution and the County's brief cite A.R.S. § 11-251(17) and A.R.S. § 36-183.02 as authority for its position. A.R.S. § 11-251(17) states the Board of Supervisors, "***under such limitations and restrictions as are prescribed by law*** may adopt provisions necessary to preserve the health of the county and provide for the expenses thereof." A.R.S. § 36-183.02 gives counties the authority to investigate causes of sickness and make regulations necessary for public health.

While A.R.S. Titles 11 and 36 clearly delegate some authority to counties to regulate and control public health, cases addressing that authority deal largely with regulatory functions. *See Marsoner*, 166 Ariz. at 489, 803 P.2d at 900 *(*licensing requirements for adult amusement establishments) and *Davis v. Hidden*, 124 Ariz. 546, 548, 606 P.2d 36, 38 (App. 1979) (regulation of septic-tank installation). Such regulations are far different than imposing a curfew on its citizens. Imposing a curfew goes well beyond regulatory measures. Additionally, A.R.S. Title 36 grants counties specific powers to deal with contagious diseases. Such powers include the power to arrest people who may transmit tuberculosis, and to place them in quarantine or confinement. *See A.R.S. §§ 36-726 and -731*. Significantly to the Court, it does not include authority to impose a curfew. The legislature expressly provided counties the authority to impose curfews in other circumstances. Given the legislature expressly mentions curfew in other statutes, it is difficult to conclude public health statutes imply the County has the power to impose curfews generally. The Court concludes the statutes cited by the County do not give it authority to regulate public health by imposing curfews.

The Court next considers whether the County's power to adopt the Resolution is supported by the Emergency Management Act contained in A.R.S. Title 26, Chapter 2, Article 1, and whether the County is bound by the portion of the Governor's Executive Order citing A.R.S. § 26-307(A). A.R.S. Title 26 specifically addresses epidemics and states of emergency. A.R.S. § 26-301(15) defines "state of emergency" as "the duly proclaimed existence of conditions of disaster or extreme peril" caused by numerous events, including an epidemic. The statute defines "local emergency" in a similar manner but limits the danger or peril within the territorial limits of a county, city, or town. A.R.S. § 26-301(10). A.R.S. § 26-303(D) allows the Governor to proclaim a state of emergency, and § 26-303(E) sets forth specific powers the Governor may exercise during a

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state of emergency. A.R.S. § 26-311 applies to local emergencies and the powers of local governments during such emergencies. Finally, A.R.S. § 26-307 sets forth additional powers of counties and the limits on those powers. For example, A.R.S. § 26-307(A) states "… counties, cities, and towns may make, amend, and rescind orders, rules, and regulations necessary for emergency functions but such shall not be inconsistent with those promulgated by the governor."

The County argues that because A.R.S. § 26-307(A) deals specifically with "emergency functions" as defined in § 26-301(5) it does not address regulations imposed by local governments under A.R.S. § 26-311(B). Here, the Governor declared a statewide public health emergency. Under A.R.S. § 26-303(E)(1), the governor may exercise "all police power vested in the state by the constitution and laws." Emergency functions, as defined in A.R.S. § 26-301(5) include "welfare" and therefore include orders aimed at addressing the existing emergency. Additionally, A.R.S. § 26-311 addresses the powers of a local government during a local emergency. While that section gives local governments powers in a *local* emergency, that provision must be read in context with other statutes within Title 26. While a County may declare a local emergency under Title 26, a comprehensive reading of Title 26 makes clear that orders of the Governor control during statewide emergencies. If a county were permitted to impose any regulation it wished during a statewide emergency, there would be no need for the language found in § 26-307(A).[3] Furthermore, A.R.S. § 36-787 states the State Department of Health shall coordinate *all* matters pertaining to the emergency response of the State.

Next, the County argues it is free to disregard the Executive Order's prohibition against orders restricting people from leaving their homes and impose its curfew because the Governor exceeded his statutory authority in issuing that order. Specifically, the County argues the order prohibiting "all" local orders rather than those for emergency functions and prohibiting any orders "in addition to" or that "conflict with" the Executive Order strips the County of its authority independent of an emergency to regulate public health. The Court, having found no such authority exists, and having found counties are bound by the Governor's orders during a state of emergency, finds this argument unpersuasive.

Finally, the Court notes the County's position relies to some extent on this Court declaring the Governor's Executive Order unlawful. This matter is at the preliminary injunction stage and being decided on an expedited basis. However, asking this Court to declare the Governor's Order unlawful raises issues regarding

[3] The emergency powers for counties during a local emergency set forth in A.R.S. § 26-311 extend only to unincorporated areas of the County, making the Resolution's inclusion of incorporated areas arguably invalid on that basis. Because that issue is not dispositive to the issues presented here, the Court does not address that argument fully in this ruling.

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notice requirements in actions for declaratory relief, which may raise significant hurdles for the County to prevail at trial on the merits.

The Court concludes that, based on the law discussed above, the County does not have the authority to impose the Resolution. The Court finds Plaintiffs have demonstrated a substantial likelihood on the merits on their arguments challenging the County's authority to impose the curfew.

b. Plaintiff's constitutional claims and the reasonableness of the Resolution.

Because the Court has decided there is no statutory authority for the County to adopt the resolution, an analysis of the Constitutional claims is arguably not necessary. However, the Court will discuss these claims briefly. The Court concludes that if these claims were to be considered, they do not bear the same likelihood of success on the merits as the statutory authority claim.

Plaintiffs argue that if the County does have the authority to adopt its Resolution, the Resolution is unlawful because it is unreasonable. Defendants cite numerous cases for the proposition that this Court has the authority to review the actions of a local government for reasonableness. *See e.g., Globe School District No. 1 v. Board of Health of City of Globe*, 20 Ariz. 208, 179 P. 55 (1919). Plaintiffs also argue the Resolution violates procedural due process and the Privileges and Immunities clause.

The Arizona Constitution provides that "(n)o law shall be enacted granting to any citizen, class of citizens or corporations other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Ariz. Const. art. 2, § 13. The Privileges and Immunities clause prohibits public entities from unconstitutionally discriminating against a person or class. *Arizona Downs v. Arizona Horsemen's Found.*, 130 Ariz. 550, 557, 637 P.2d 1053, 1060 (1953). To present a prima facie case of discrimination, Plaintiffs must allege an unlawful classification by government action. *Aegis of Ariz. LLC., v. Town of Marana*, 206 Ariz. 557, 570-71, 81 P.3d 1916, 1029-30 (App. 2003).

Plaintiffs allege the Resolution violates the Privileges and Immunities Clause because it "grants citizens who own establishments that both serve food and operate bars on their premises, but which have business models that generate the bulk of their revenue before 10 p.m., privileges and immunities it denies arbitrarily to citizens who own similar establishments but who generate the bulk of their business after 10 p.m." The Court does not find the argument persuasive. The Resolution on its face applies broadly to all individuals and businesses in Pima County. That the Resolution impacts some businesses more than others does not render the provision discriminatory and unconstitutional. As noted in the County's response to Plaintiffs' application, the cases Plaintiffs cite to support their position involved statutes which, on their face, applied differently to

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different businesses of the same type. The court finds the Privileges and Immunities Clause is not implicated by the Resolution.

In their brief, Plaintiffs also argue the Resolution violates procedural due process because it provides no procedural process by which they can appeal the closure of their business. However, the Resolution does not mandate closure of their business, but rather sets forth a curfew for all citizens in the county. As noted by the County, process would be due to Plaintiffs if any of them are cited for a violation of the curfew. Furthermore, even if the Resolution implies Plaintiffs businesses are mandated to close, to implicate the Due Process Clause regarding the closure of their businesses, the Resolution must implicate a property right protected by that clause. The Supreme Court of the United States has held that the *activity* of doing business or making a profit is not a protected property right. *See College Savings Bank v. Florida Prepaid Post-Secondary Education Expense Board*, 527 U.S. 666, 119 S. Ct. 2219 (1999). This Court also finds Plaintiffs arguments regarding the interest in their liquor licenses to be unpersuasive.

Even if the Privileges and Immunities Clause or Due Process Clause were implicated by the Resolution, the legal test evaluating the Resolution's constitutionality, is, as noted by the County, deferential to the government. Because the Resolution does not involve a suspect class or a fundamental right, it need only be rationally related to a legitimate government purpose." *Loncar v. Ducey*, 244 Ariz. 519, 523 ¶ 11, 422 P.3d 1059, 1063 (App. 2018); *See also Governale v. Lieberman*, 226 Ariz. 443, 448 ¶ 13, 250 P.3d 220, 225 (App. 2011).

Here, the County certainly has an interest in protecting public health and slowing the spread of Covid-19. Therefore, to prevail on their constitutional claims, Plaintiffs would have to "make a clear showing or arbitrariness and irrationality." *Governale*, 226 Ariz. at 449, 250 P.3d at 226. The Plaintiffs' establishments are adhering to ADHS guidelines regardless of the time of day, and it is undisputed the virus may be passed at any time of day. Therefore, many may reasonably disagree with wisdom of the curfew. However, it is also undisputed that medical professionals have recommended curfews as potentially helpful mitigation measures. Given the virus spreads easily in indoor settings, arguably ***any*** amount of time the ability to congregate indoors is prohibited will reduce the risk of the virus spreading. While the argument for its rational basis may be weak, the test is deferential to the government, who relied on medical professionals in adopting the Resolution.

Plaintiffs argue that local government action should not be given the deference of the rational basis test, and that this Court should evaluate the Resolution for reasonableness without the deference of the rational basis standard. The Court rejects this argument. *City of Tucson v. Rineer*, 193 Ariz. 160, 971 P.2d 207 (App. 1998),

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cited by Plaintiffs in support of this argument is unpersuasive, as *Rineer* applied a rational basis test to uphold an ordinance as a legitimate exercise on the City's police power.

The Court finds Plaintiffs failed to demonstrate a substantial likelihood of success on the merits of their reasonableness and constitutional claims.

II. IRREPERABLE HARM

Irreparable injury is harm not remediable by damages and for which there is no adequate legal remedy. *See IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. Partnership*, 228 Ariz. 61, 65 ¶ 10, 263 P.3d 69, 73 (App. 2011). While monetary damages may provide an adequate legal remedy, monetary damages may be inadequate where loss is uncertain. *Id.* "To determine whether damages would be an adequate remedy at law, the court should consider 'the difficulty of proving damages with reasonable certainty.'" *Id.* (citing *Restatement (Second) Contracts*, § 360).

Plaintiffs argue they have suffered and will suffer irreparable harm due to their constitutional and economic injury. As noted above, the Court does not find Plaintiffs have suffered any constitutional injury. The issue is therefore whether the economic impact of the curfew and the possibility of closing their business demonstrates irreparable harm.

There is no dispute that the pandemic has caused significant financial loss to Plaintiffs and their businesses. It is also undisputed the curfew continues to add to those loses and impact. The Court finds that calculating the monetary damages caused by the curfew during this pandemic would be difficult. It would be difficult for Plaintiffs to prove with certainty how many customers would come to their businesses past 10 p.m., and how much money those customers would spend. Also, the permanent loss of their businesses is likely to cause harm that money cannot remedy. Plaintiffs each testified that if the curfew continues, their businesses are likely to close permanently. None of the Plaintiffs indicated, and therefore did not prove, how imminent permanent closures are. However, with no end to the curfew in sight based on Pima County's rate of infection, Plaintiffs have demonstrated a real threat of closure and of forever losing their businesses. The Court finds Plaintiffs have demonstrated the possibility of irreparable harm. *See Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990).

III. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST

The Court finds the hardships imposed on the Plaintiffs by the curfew are severe. Additionally, the hardships are arguably unfair because the Court finds Plaintiffs can adhere to the ADHS required safety

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measures both before and after 10 p.m. Moreover, the virus is spread just as easily late at night as it is during the day. Bar patrons can drink excessively during the day just as easily as they can at night.

In its response to Plaintiffs' application and in its argument, the County argues that the curfew is a question of "life and death," and that it has a strong interest in protecting the public. The Court finds that the County certainly has a strong interest in protecting the public and controlling the spread of Covid-19. The Court also agrees the virus is a serious and a significant threat to public health and carries with it a risk of death to Pima County residents. However, in evaluating the balance of hardships, the County must demonstrate, and the Court must weigh the hardship it will suffer if it is not allowed to enforce the curfew. To this point, the County only points to a risk of increased cases. The County could not demonstrate in testimony or other evidence that more cases are contracted after 10 p.m. Nor has it demonstrated specifically that its current hardships are worsened by people and businesses engaging in conduct after 10 p.m. To the contrary, the burden the County faces in managing this pandemic will continue until the pandemic is under control. The County has simply failed to demonstrate how the curfew not being enforced would cause it additional hardship. Additionally, the State has an equally strong interest in protecting all its citizens, including those living in Pima County. The ADHS has not recommended a curfew, nor is the State currently under a curfew order from the Governor. Furthermore, to the Court's knowledge no other county in Arizona has imposed one. While there are certainly public policy arguments weighing in favor of denying the application, on balance, the Court finds the balance of hardships tip in Plaintiffs' favor given the strength of their legal argument, and the lack of evidence supporting the risk in cases increasing after 10 p.m. This is especially true considering the undisputed fact that Plaintiffs are adhering to and will be required to continue adhering to ADHS guidelines regardless of the time of day it serves its patrons.

BOND

Ariz. R. Civ. P. 65(c)(1) requires the moving party to give security in "such amount as the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The County, asks for a bond of no less than $10,000, citing the potential increase in contact tracing and case investigation. Plaintiffs ask for no bond at all. While the County's increased costs are speculative, the Court finds the amount of the bond requested is not unreasonable.

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CONCLUSION

Opinions regarding mitigation measures during this pandemic are varied and widespread. So too are opinions about the curfew imposed in Resolution 2020-98. Many believe the mitigation measures in place are unreasonable and over-restrictive. Many believe the measures fall short of protecting public health and need to be more restrictive. It is undisputed Covid-19 is a serious public health concern that must be controlled. However, it is not the Court's role to decide or opine whether it agrees or disagrees with the County's Resolution. Rather, the Court must determine whether is a valid under the law, and whether injunctive relief is appropriate. Because the Court finds the Resolution is not statutorily authorized and violates the Governor's Executive Order, and that the Plaintiffs have demonstrated the possibility of harm, the Court finds the Plaintiffs are entitled to relief.

Accordingly,

IT IS ORDERED Plaintiffs Application for Preliminary Injunction is GRANTED. It is ordered Pima County is prohibited from enforcing the curfew set forth in Resolution 2020-98.

IT IS FURTHER ODERED Plaintiffs post bond in the amount of $10,000 pursuant to Ariz. R. Civ. P. 65(c)(1).

/s/
HON. KELLIE JOHNSON
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