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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA

NEXT LEVEL ARCADE TUCSON, LLC, et al.,

Plaintiffs,

v.

PIMA COUNTY, et al.,

Defendants.

No. C20210057

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PLAINTIFFS AND IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

(The Honorable Paul Tang)

INTRODUCTION AND SUMMARY OF ARGUMENT[1]

Arizona law specifies how to address public health emergencies, at both state and local levels. But the Curfew Ordinance, however well-intended, violates those laws in two independent ways.

First, A.R.S. § 26-311(B) only allows counties to implement emergency curfews where "necessary … to preserve the peace and order." The Curfew Ordinance, however, is not and does not purport to be, adopted in order to preserve peace and order. Indeed, there has been no *dis*order for the curfew to address. The curfew therefore exceeds the County's powers.

[1] The identity and interest of amicus curiae is set forth in the accompanying motion for leave to file.

Second, A.R.S. § 26-307(A) expressly prohibits counties from adopting measures that conflict with the Governor's executive orders. But the Curfew Ordinance explicitly contradicts Executive Order 2020-36, which forbids counties from adopting "any order, rule or regulation that … is in addition to" the provisions of that Executive Order. The County's only response to this is to point to its general regulatory authority. But that does not authorize the Curfew Ordinance, because Section 26-307(A) requires that county ordinances yield to the Governor's executive orders, and because the Curfew Ordinance is not a general sanitation measure, but an emergency measure, which must therefore comply with Sections 26-311 and 26-307.

ARGUMENT

I. The County has no lawful authority to impose a curfew absent breaches of the peace.

A. The Emergency Management Act does not authorize an indefinite "public health" curfew.

County governments "may exercise no powers except those specifically granted by statute and in the manner fixed by statute." *Mohave Cnty. v. Mohave–Kingman Estates, Inc.*, 120 Ariz. 417, 420 (1978). But no statute authorizes Pima County to adopt a curfew under these circumstances.

The Emergency Management Act specifies the powers county governments may exercise in emergencies. Although Section 26-311(B)(1) does include power to impose curfews, it does so with an express limitation: counties may adopt curfews only "to preserve the peace and order." This curfew, however, is not aimed at preserving peace and order, and is therefore beyond the scope of this authority.

Peace and order is not synonymous with public health. Public health can be endangered by a pandemic without disrupting peace and order, and peace and order can be disrupted without endangering public health—by a riot, for example. The "preserv[ation of] peace and order" contemplates the restoration of law and calm in circumstances of

actual or potential *violence*.[2] The statute itself makes this clear, when it refers to the County's powers as applying to cases of "fire, conflagration, flood, earthquake, explosion, war, bombing, acts of the enemy or any other natural or man-made calamity or disaster" such as "riots, routs, affrays or other acts of civil disobedience which endanger life or property within the city." A.R.S. § 26-311(A).

This statutory language cannot be disregarded, because the Court must interpret the statute in a manner that gives effect to all of its terms. *TDB Tucson Grp., L.L.C. v. City of Tucson*, 228 Ariz. 120, 123 ¶ 9 (App. 2011) (courts must not read statutes "in such a way as to … render [any word, phrase, clause, or sentence] superfluous, void, insignificant, redundant or contradictory.'" (citation omitted)).

A public health emergency does not necessarily involve—and in this case, plainly does *not* involve—violence, unrest, or disorder. In the absence of *dis*order, of course, the County cannot *restore* order through a curfew. Section 26-311(B)(1)'s specification of "preserv[ing] the peace and order" therefore withholds from the County any authority to adopt a curfew that is not aimed at preserving peace or order. *See Transamerica Title Ins. Co. v. Cochise Cty.*, 26 Ariz. App. 323, 326 (1976)(The only powers possessed by boards of supervisors are those expressly conferred on them by statute or necessarily implied therefrom.")

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[2] Emergency curfews are, of course, a traditional method of restoring order in times of civil disruptions. *See, e.g., In re Juan C.*, 33 Cal. Rptr. 2d 919, 922 (Cal. App. 1994) (curfew to prevent "[r]ioting, looting and burning."). But indefinite curfews that lack a connection to such an urgent circumstance intrude on privacy rights, the right to travel, the right to earn a living, and other crucial individual rights and cannot be justified on the basis of such emergency statutory powers. When curfews are adopted in nonemergency situations, they must satisfy constitutional standards, such as narrow tailoring. *Compare Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 947–49 (9th Cir. 1997) (permanent curfew for juveniles was invalid because it was not narrowly targeted at restoring order), *with Matter of Appeal In Maricopa Cnty., Juvenile Action No. JT9065297*, 181 Ariz. 69, 78 (App. 1994) (juvenile curfew upheld because it was narrowly tailored).

In other words, the Arizona Emergency Management Act allows for curfews when addressing *acute and violent* circumstances such as riots, fires, etc.—not *chronic and nonviolent* hazards, such as pandemics, where there has been no disruption of order, and civil peace is not threatened, and therefore does not need to be "preserved."

The rules of *noscitur a sociis* and *ejusdem generis* require the Court to interpret the powers to preserve peace, as granted by Section 26-311, in this manner. Those rules say that when courts interpret statutory terms, they do so in context of, and consistent with, the other terms in the statute. *See Estate of Braden ex rel. Gabaldon v. Stat*e, 228 Ariz. 323, 326 ¶ 13 (2011). Thus, for instance, where a statute used the phrase "corporation, partnership, association, [or] labor union," and then referred to "other legal entit[ies]," the phrase "other legal entit[ies]" was best interpreted as referring to organizations akin to corporations, partnerships, unions, and so forth—not to the government. *Id.* For the same reason, the references in Section 26-311 to fire, earthquake, riot, and other *acute and violent* crises or instances of lawbreaking militate in favor of interpreting the statute as giving the County power to impose curfews that preserve order against similarly acute and violent crises—as opposed to a nonviolent, ongoing, and indefinite disaster that has already lasted for almost a year.

However dire the public health situation in Pima County may be, it does not amount to a violent threat to public order as contemplated by the statute, and therefore falls outside the County's Section 26-311 curfew power.

B. Where the state has chosen to authorize a County to limit freedom in response to communicable diseases, it has done so expressly—and it has not done so here.

Another Latin phrase is also relevant: the *exclusio alterius* rule. This rule provides that the inclusion in a law of a list of items necessarily excludes items that are not on the list. *See Cent. Hous. Inv. Corp. v. Fed. Nat. Mortg. Ass'n*, 74 Ariz. 308, 310–11 (1952). Thus where a document referred to "heating, plumbing, and lighting fixtures and equipment," *id.* at 310, the word "fixtures" could *not* be interpreted to refer to evaporative coolers, which are not heating, plumbing, or lighting devices. *Id.* at 312.

Exclusio alterius applies here because when the legislature chooses to give counties powers to deal with contagious diseases, it does so expressly. Chapter 6, article 6 of Title 36 of the Arizona Statutes sets forth rules for counties to control tuberculosis. It gives county officials power to arrest people who may transmit tuberculosis, *see* A.R.S. § 36-725, and to place them in quarantine or confinement. A.R.S. §§ 36-726, 36-731. Notably, it also includes extensive provisions to protect the due process rights of people who might be confined. *See* A.R.S. §§ 36-727 through 36-736. In other words, when state lawmakers want to give counties the power to control the spread of disease, they have done so—and in a measured way that ensures procedural protections for individual rights.

But they have not done so with regard to COVD-19. And even the Tuberculosis Control Act did not authorize counties to adopt across-the-board curfews. Pursuant to the *exclusio alterius* rule, therefore, the conclusion must be that Section 26-311 does not entitle the County to adopt this curfew.

II. The curfew ordinance conflicts with Executive Order 2020-36 and is therefore unlawful.

The Emergency Management Act allows the Governor to exercise "all police power vested in the state by the constitution and laws." A.R.S. § 26-303(E)(1). It also empowers the Governor to override the authority of local governments. Section 26-307(A) provides that counties may make rules and regulations in emergencies, "but such shall not be inconsistent with orders, rules and regulations promulgated by the governor."

The Curfew Ordinance directly conflicts with Executive Order 2020-36, which Governor Ducey issued on May 12, 2020. That Order requires "[a]ny business" that "operates in this state" to develop and implement policies to prevent the spread of COVID-19, and expressly forbids counties from "mak[ing] or issu[ing] any order, rule or regulation" that is "in addition to the policy, directives or intent of this Executive Order." *See* Exec. Order 2020-36 ¶¶ 5-7. It also expressly forbids counties from adopting "any order restricting persons from leaving their home[s]." *Id.* ¶ 7.

The Curfew Ordinance unquestionably conflicts with the Executive Order. It purports to add to the obligations that the Executive Order imposes on businesses, which is not permitted. Indeed, the Ordinance declares any business that obeys the Governor's order to be a "public nuisance" subject to having its license revoked. The Ordinance also restricts persons from leaving their homes, since it prohibits them from being outdoors during the hours of 10 p.m. to 5 a.m.

The Ordinance therefore violates not only the terms of Executive Order 2020-36, but also A.R.S. § 26-307(A), which forbids any inconsistency between the County's rules and the Governor's emergency orders. It is therefore unlawful.

III. The County's general public health authority does not authorize the curfew.

In an effort to evade its express violation of the Executive Order, the County attempted to characterize the Ordinance as a non-preempted general health measure, instead of a preempted local emergency order. It did so by inserting into the Ordinance several citations to its general authority to regulate public health. It cited *Marsoner v. Pima Cnty*., 166 Ariz. 486 (1991), as well as A.R.S. §§ 36-183.02, 11-251, and in the entirety of Article 4, Chapter 1 of Title 36. None of these provisions authorize the County to violate the Governor's Executive Order or otherwise permit the Curfew Ordinance.

First, Section 11-251(31) says that counties may make and enforce sanitary regulations, but only as long as such regulations are "not in conflict with general law." The Curfew Ordinance is in direct conflict with A.R.S. § 26-307(A) and Executive Order 2020-36, and therefore is outside the scope of this provision. Second, Title 36 also provides that state law takes precedence; A.R.S. § 36-186(5) provides that the director of the County Health Department must "[e]nforce and observe the…*laws of the state*," (emphasis added), meaning that the County must comply with the Emergency Management Act.

As for *Marsoner*, it did not involve the Emergency Management Act, or any state of emergency. Instead, it involved a county ordinance that imposed a licensing requirement on adult businesses, with the intent of limiting the spread of AIDS. 166 Ariz.

at 487–88. The plaintiff argued that no statute expressly gave the county power to require licenses of such businesses. *See Marsoner v. Pima Cnty.*, 166 Ariz. 195, 196–97 (App. 1990). The held, however, that the statutes authorizing counties to protect public health inherently included power to impose licensing requirements. 166 Ariz. at 489. The County's general authority to license businesses is not in dispute in this case, so *Marsoner* is simply irrelevant—although that the *Marsoner* Court did say that county health regulations are valid "*as long as they do not conflict with state law*," and the Curfew Ordinance does conflict with state law. *Id*. (emphasis added). *Marsoner* makes clear that state authority takes precedence over county authority in the event of conflict—and here, there is a conflict.

Finally, if there were any doubt that the Emergency Management Act—with its preemptive effect—must govern here, rather than the general regulatory authority the County cites, that doubt is resolved by the longstanding rule that specific statutes take precedence over general ones. *See, e.g., Mercy Healthcare Ariz., Inc. v. Ariz. Health Care Cost Containment Sys.*, 181 Ariz. 95, 100 (App. 1994). The statutes the County cites all relate to its *general* power to adopt sanitary measures in the ordinary course of affairs, whereas the Emergency Management Act is more specific, and applies particularly to local and statewide emergencies such as the pandemic. Also, later statutes take precedence over earlier statutes in the event of conflict. The general regulatory authority the County cites, A.R.S. § 11-251, dates back to territorial days. The Emergency Management Act, by contrast, was adopted in 1971. In the event of conflict—which exists here, given the County's direct violation of A.R.S. § 26-307(A)—"the more recent, specific statute governs over [an] older, more general statute." *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 333 ¶ 29 (2001) (citations and quotation marks omitted).

The Curfew Ordinance itself acknowledges that it is an emergency measure, and therefore subject to Sections 26-307(A) and 26-311, as opposed to being a general health regulation subject to Sections 11-251 or 36-183.02. The Ordinance says it is a "limited" curfew, and it is expressly temporary. It also states explicitly that it relates to the COVID-

19 pandemic. These time and subject limitations make clear that this is not a general sanitation law, but an emergency ordinance. That means the relevant governing statute is the Emergency Management Act—including that Act's preemption provision—rather than the laws that give the county general power to regulate businesses.

To hold otherwise would gut Section 26-307(A)'s prohibition on county orders that conflict with the Governor's orders. After all, counties have such broad general powers that virtually anything they adopt could be rationalized as falling within their general regulatory powers. For example, Section 11-251(24) allows counties to conduct county fairs, but if a Governor were to order the closure of county fairs due to a pandemic, no county could cite this statute as authorizing it to open fair anyway. And Section 11-251(4) lets counties "manage public roads." But obviously in an emergency, the County could not close off a highway that the state needs for fire trucks.

In short, the curfew's lawfulness does not hinge on the County's overall regulatory power, but on the Emergency Management Act. The curfew violates that act because the County has no authority to impose curfews that are not aimed at preserving public order, and because the Executive Order expressly prohibits the County from adopting a curfew.

CONCLUSION

The Court should issue the preliminary injunction.

DATED this 7th day of January, 2020.

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CERTIFICATE OF SERVICE

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