



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**Aguila et al. v. Ducey, Arizona Department of Health Services and the  
Arizona Department of Liquor Licenses and Control,  
Case no. CV-20-0335**

**PARTIES:**

*Appellants:* Javier Aguila, et al.

*Respondents:* The Arizona Department of Health Services, the Arizona Department of Liquor Licenses and Control and Governor Douglas A. Ducey

*Amici Curiae:* Attorney General Mark Brnovich

**FACTS:**

Appellants are small business owners operating throughout Arizona whose businesses were shut down by the executive orders of the Governor. Appellants serve alcohol having either a series 6 liquor license (authorizing the sale of spirituous liquor) or a series 7 liquor license (authorizing the sale of wine and beer) from the Arizona Department of Liquor License and Control (“ADLLC”).

On January 30, 2020 the World Health Organization declared a Public Health Emergency of International Concern arising from COVID-19. On January 31, 2020, the United States Department of Health and Human Services declared a Public Health Emergency in the United States. On March 11, 2020, Governor Ducey issued a declaration of Public Health State of Emergency due to the necessity to prepare for, prevent, respond and mitigate the spread of COVID-19. Thereafter, he issued a series of executive orders intending to limit the community spread of COVID-19.

On March 19, 2020, the Governor issued Executive Order (“EO”) 2020-09 “Limiting the Operation of Certain Businesses to Slow the Spread of COVID-19.” This executive order required that all bars, movie theatres, indoor gyms and fitness clubs close access to the public on March 20, 2020 if the business was located in a county with a confirmed case of COVID-19. It also required that all restaurants in counties of the State with confirmed cases of COVID-19 close access to on-site dining until further notice and suspended enforcement of rules prohibiting the sale of “to-go” liquor by series 12 liquor license-holders, which is for restaurants deriving at least forty percent of their gross revenue from the sale of food.

On March 30, 2020, the Governor issued EO 2020-18, “Stay Home, Stay Healthy, Stay Connected: Physical Distancing to Mitigate COVID-19 Transmission.” This executive order provided that all individuals in the State were to stay home except to engage in essential activities and closed many businesses.

On May 4, 2020, the Governor issued EO 2020-34 allowing barbers, cosmetologists, and dine-in restaurants—but not bars or indoors gyms—to resume operations.

On May 12, 2020, the Governor issued EO 2020-36, “Stay Healthy, Return Smarter, Return Stronger.” This order rescinded prior restrictions and directed businesses including bars “to limit and mitigate the spread of COVID-19” by:

- Promoting healthy hygiene practices;
- Intensifying cleaning, disinfecting, and ventilation practices;
- Monitoring for sickness;
- Ensuring physical distancing;
- Providing necessary protective equipment;
- Allowing for and encouraging teleworking where feasible;
- Providing plans, where possible, to return to work in phases; and
- Limiting the congregation of groups of no more than 10 persons when feasible and in relation to the size of the location.

Under EO 2020-36, Appellants were able to reopen. However, from May 25, 2020 to June 30, 2020 the number of COVID-19 cases in Arizona increased 478%.

On June 29, 2020, the Governor issued EO 2020-43, “Pausing of Arizona’s Reopening – Slowing the Spread of COVID-19.” The order required various businesses including bars to pause operations until at least July 27, 2020. It clarified that “bars” meant any entity holding a series 6 or 7 liquor license whose primary business is the sale or dispensing of alcohol. The order allowed bars to continue to serve the public through pick-up, delivery, and drive-thru operations as provided for series 12 liquor licenses in EO 2020-09. It also stated that to receive authorization to reopen, entities must complete and submit a form as prescribed by the Arizona Department of Health Services (“ADHS”) that attests the business is in compliance with the agency’s guidelines. Further, EO 2020-43 authorized law enforcement action against any business that failed to comply with the executive order or ADHS guidelines.

In July, the Governor issued EO 2020-47 which authorized restaurants to open and operate at less than 50% capacity and with social distancing protocols, and then EO 2020-52 which extended the provisions of EO 2020-43, subject to repeal or revision every two weeks.

On August 10, 2020, ADHS promulgated guidelines for the eventual reopening of businesses ordered closed by the executive orders. The guidelines allowed for reopening when county positivity rates fell below 3% if the owners of the bars or nightclubs signed an attestation form and agreed to abide by ADHS guidelines. The requirements varied depending on the level of spread of the virus occurring in the community. If unable to meet the requirements of the guidelines, business owners could seek approval from ADHS to reopen by explaining how they would otherwise operate safely, and, if ADHS denied a request, the owner could request a settlement conference. If no agreement was reached, the business owner could seek relief before an administrative law judge. And if the administrative law judge denied relief, the business could seek judicial review of the administrative law judge’s decision.

Appellants filed suit against the Governor and the defendant agencies seeking declaratory

relief, a temporary restraining order and preliminary injunction. First, they argued that EO 2020-43 and all related executive orders were illegal and void because the authorizing statute, A.R.S. § 26-303(E)(1), violates the non-delegation doctrine. Second, they argued that the orders and A.R.S. § 26-303(E) as applied violate the privileges and immunities clause of Article 2, Section 13 of the Arizona Constitution. They represented that under the executive orders, all 130 Appellants were closed from mid-March to mid-May and for most of July and August, and that many were able to reopen in September under restrictions they argued were unlawful. Others had still not reopened.

The court conducted a hearing. After evaluating Appellants' probable success on the merits, the likelihood of irreparable injury, the balancing of hardships, and the public interest, the court denied the request for a temporary restraining order. The trial court subsequently conducted an evidentiary hearing on the request for a preliminary injunction.

The court found that Arizona law expressly prohibits off-premises sale of alcohol for businesses operating with a series 12 license. Therefore, the executive orders' provisions authorizing such sales exceeded the Governor's delegated powers. The court enjoined the enforcement of any provision that authorized such sales. But the court otherwise dismissed the nondelegation claims, finding that § 26-303(E)(1) only allowed the Governor to take actions 'necessary' to mitigate the emergency and was thus a permissible delegation."

In its findings, the court considered the evidence presented. It observed that the COVID-19 pandemic has caused catastrophic loss, and that when the Governor issued EO 2020-43, Arizona's health care system was near crisis. The court noted testimony to the effect that Arizona was the "hottest hotspot of COVID in the world which carried with it a significant strain and stress on the citizens of our community as well as the health care delivery system," and concluded that immediate mitigation measures were necessary to reduce the exponential spread of COVID-19 and to ensure that the medical needs of Arizona's residents did not exceed medical resources. Also, the court observed that the Appellants had reopened or been given an opportunity to apply for permission to reopen.

Observing that bars and nightclubs are businesses that have been identified as likely high-risk environments for the spread of virus, the court noted that bars may have cramped indoor spaces with poor ventilation and high touch areas. Patrons often move between groups and tables and mix with other people. Such establishments are often loud, which require individuals to draw closer to one another. Patrons tend to be younger which represented a significant demographic carrying the disease. Also, masking was incompatible with drinking, and drinking alcohol impairs decision making. Finally, efforts to engage in contact tracing are often ineffective because people may come into contact with others unknown to them when visiting a bar. The court concluded that there was a rational basis to distinguish the Appellants from other businesses and concluded that such treatment did not violate Arizona's equal privileges and immunities provision. Based on the testimony and evidence presented, the court concluded that other restrictions in the executive orders were within the delegated authority of A.R.S. § 26-303(E) and denied the remaining requests for preliminary injunction.

Plaintiffs appealed and filed a motion to transfer the appeal to this Court which the Court granted.

## 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?

## APPLICABLE LAW:

A.R.S. § 26-303 provides in part:

*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). The non-delegation doctrine is in Article Three of the Arizona Constitution and reads:

*The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.*

Ariz. Const. art. 3. The equal privileges and immunities clause is in Article Two and reads:

*§ 13. Equal privileges and immunities*

*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.*

Ariz. Const. art. 2, § 13.

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