

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV2020010282

09/08/2020

HON. PAMELA GATES

CLERK OF THE COURT

S. Ortega

Deputy

JAVIER AGUILA, ET AL.

ILAN WURMAN

v.

DOUG DUCEY, ET AL.

BRETT W JOHNSON

GREGORY W FALLS
COLIN PATRICK AHLER
ANNI L FOSTER
CRAIG A MORGAN
BRUNN W ROYSDEN III
JOSEPH KANEFIELD ATTORNEY
GENERAL
COURT ADMIN-CIVIL-ARB DESK
DOCKET-CIVIL-CCC
JUDGE GATES

RULING

Plaintiffs are small business owners all over Arizona whose businesses were shut down by the executive orders of Arizona Governor Doug Ducey. What differentiates Plaintiffs from other business owners is the fact that their primary business is the sale or dispensing of alcoholic beverages and Plaintiffs hold either a series 6 and 7 liquor license¹ from the Arizona Department of Liquor License and Control (“ADLLC”).

¹ A series 6 “bar license” allows for the retail sale of spirituous liquor (which includes hard alcohol as well as beer and wine) for consumption on the premises and in original, unopened containers for consumption off the licensed premises. Ariz. Admin. Code (“A.A.C.”) R19-1-101(A)(2). A series 7 “beer and wine bar license” operates similarly to a series 6 license (including allowing

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Plaintiffs have requested a temporary restraining order, to enjoin the Governor of the State of Arizona (“Governor”) and the Defendant Arizona Department of Health Services (“ADHS”) and ADLLC from implementing and enforcing Executive Order 2020-43 (the “EO”) and its related orders against Plaintiffs specifically named in this action and their businesses.²

The court denies Plaintiffs’ request of a Temporary Restraining Order.

Our world is facing an unrelenting spread of the novel coronavirus, which causes a communicable infectious disease known as COVID-19. To better understand Plaintiffs’ request for relief, the court provides a timeline of relevant events and Executive Orders.

On January 30, 2020, the World Health Organization (“WHO”) declared a Public Health Emergency of International Concern related to the worldwide spread of the virus. *See* Defendants ADHS and ADLLC’s Response to Plaintiffs’ Corrected Motion for Temporary Restraining Order and for Order Setting Hearing on Preliminary Injunction at Exhibit 2, Declaration of Dr. Cara Christ at ¶ 20. On January 31, 2020, the United States Department of Health and Human Services declared a Public Health Emergency in the United States. *Id.* On March 11, 2020, Arizona’s Governor issued a declaration of a Public Health State of Emergency due to the necessity to prepare for, prevent, respond to, and mitigate the spread of COVID-19. *Id.* at ¶ 22.

Following his declaration of a State of Emergency, the Governor issued a series of Executive Orders intending to limit the community spread of COVID-19. *Id.* at ¶ 24.

On March 19, 2020, Governor Ducey issued EO 2020-09 “Limiting the Operation of Certain Businesses to Slow the Spread of COVID-19.” This EO 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. EO 2020-09 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. The EO recognized the direct economic consequences for businesses across the State and acknowledged the Governor’s commitment to protecting Arizonans and

sale for off-site consumption), but only allows for sale of beer and wine, not other spirituous liquors. *Id.* at (A)(3). A series 12 “restaurant license” allows a restaurant to sell spirituous liquors for consumption on the premises only. *Id.* at (A)(39). To be eligible for a restaurant license, a licensee must derive “at least forty percent of its gross revenue from the sale of food.” *See* A.R.S. § 4-205.02(J)(2).

² Following the hearing, Plaintiffs informed the court they had no objection to Defendant Governor Ducey’s Motion for Judicial Notice. Therefore, pursuant Rule 201 of the Arizona Rules of Evidence, the court takes judicial notice of the facts specified in Defendant Governor Ducey’s Motion for Judicial Notice.

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mitigating the economic harm caused by the presence of the virus in our community. EO 2020-09 also ordered that beginning on March 20, 2020, in counties of the State with confirmed cases of COVID-19, ADLLC and any Arizona Peace Officer Standards and Training Board certified law enforcement officer shall not enforce provisions of the series 12 liquor license that prohibit the sale by restaurants of beer, wine, and spirituous liquor off-premises if the alcohol is sold to an individual over the age of 21 and is in a sealed container.

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

On May 4, 2020, Governor Ducey issued EO 2020-34 allowing barbers, cosmetologists, and dine-in restaurants to resume operations. However, bars and indoors gyms were not allowed to resume normal operations.

On May 12, 2020, Governor Ducey issued EO 2020-36, “Stay Healthy, Return Smarter, Return Stronger.” This EO rescinded prior restrictions and allowed 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.

As a result of EO 2020-36, Plaintiffs began to operate.

Following issuance of the Executive Orders allowing businesses to resume operations, there was exponential growth of COVID-19 infections reported in Arizona. *See* Defendants ADHS and ADLLC’s Response to Plaintiffs’ Corrected Motion for Temporary Restraining Order and for Order Setting Hearing on Preliminary Injunction at Exhibit 2, Declaration of Dr. Cara Christ at ¶ 27. In fact, from May 25, 2020 to June 30, 2020, the number of COVID-19 cases in Arizona increased by 478%. *See* Defendant Governor Ducey’s Motion for Judicial Notice at ¶ II(A)(7) and Exhibit 1.

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On June 29, 2020, Governor Ducey issued Executive Order No. 2020-43, "Pausing of Arizona's Reopening – Slowing the Spread of COVID-19." EO 2020-43 ordered that various businesses including bars pause operations until at least July 27, 2020. The Executive Order clarified that "bars" meant any entity holding a series 6 or 7 liquor license from ADLLC and whose primary business is the sale or dispensing of alcoholic beverages. EO 2020-43 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. EO 2020-43 stated that to receive authorization to reopen, entities must 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. Further, EO 2020-43 also stated that "[n]otwithstanding any other law or executive order, this executive order allows law enforcement and any regulatory agency, pursuant to their regulatory authority, to take immediate enforcement action against any business that fails to follow this Executive Order or any guidance issued by [ADHS] . . . relating to COVID-19 for the protection of the public, health, safety and welfare up to and including summary suspension for any license that the business holds."

On July 9, 2020, Governor Ducey issued Executive Order No. 2020-47, which ordered that every restaurant with indoor seating in the State of Arizona operate at less than 50% of the permitted fire code occupant load and ensure at least six feet of separation between parties or groups at different tables, booths, or bar tops, unless the tables are separated by glass or plexiglass. *See* Defendant Governor Ducey's Motion for Judicial Notice at 2 ¶ II(C)(56) and Exhibit 29. EO 2020-47 further ordered that every restaurant with outdoor dining areas must ensure at least six feet of physical distance between tables, benches, or other areas for patrons to sit while dining or waiting to be seated. *Id.* Moreover, restaurants were required to eliminate any indoor standing room where patrons could congregate. *Id.* For purposes of EO 2020-47, "restaurant" was defined as an establishment regularly open for the serving of food to guests for compensation and that has kitchen facilities connected with the restaurant for keeping, cooking, and preparing foods required for ordinary food service. *Id.*

On July 23, 2020, citing White House Coronavirus Task Force metrics, Governor Ducey issued EO 2020-52 extending the provisions of EO 2020-43, subject to review for repeal or revision every two weeks. *See* Complaint at Exhibit K.

On August 10, 2020, ADHS promulgated guidelines for the eventual reopening of businesses ordered closed by Executive Order. *See* Defendant Governor Ducey's Motion for Judicial Notice at 2 ¶ II(A)(1) and (E)(69) and Complaint at Exhibit L. The guidelines identified two components for resuming business operations that included the quality of the establishment's implementation of COVID-19 mitigation strategies tailored for specific types of business operations and the level of spread of the virus occurring in the community. "Substantial community spread" was defined as large scale, controlled community transmission, including

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communal settings. *Id.* “Moderate community spread” was defined as sustained transmission with high likelihood or confirmed exposure within communal settings and potential for rapid increase in cases. *Id.* “Minimal community spread” was defined as evidence of isolated cases or limited community transmission, case investigations underway and no evidence of exposure in large communal settings. *Id.*

The guidelines require that bars and nightclubs enforce physical distancing of more than six feet between customers who do not live in the same household, including prohibiting open seating in which the customer can choose their own seat or have the ability to move seats. *Id.* The guidelines require that patrons should stay seated throughout the duration of their visit except to visit the bathroom and may not stand, mingle, or dance. *Id.* Bars and nightclubs are also prohibited from allowing games and activities such as pool, darts, and karaoke. *Id.*

Under the ADHS guidelines, bars and nightclubs are allowed to reopen immediately when county positivity rates fall below 3% if the owners of the bars or nightclubs sign an attestation form and agree to abide by ADHS regulations. *Id.* Bars or nightclubs in counties with “moderate community spread” can operate at 50% capacity if the business holds a county food permit. *Id.* A business that must remain closed pursuant to the metrics set forth in ADHS guidelines may apply to ADHS for approval to reopen if the business can prove that it has taken or will take extra steps to prevent the spread of COVID-19. If a business does not want to agree to the terms contained in the attestation form, the business may file an application to reopen with ADHS, describing why the business should be allowed to reopen and providing additional information for ADHS to consider in assessing the safety associated with reopening of the business. *See Defendants ADHS and ADLLC’s Response to Plaintiffs’ Corrected Motion for Temporary Restraining Order and for Order Setting Hearing on Preliminary Injunction at Exhibit 2, Declaration of Dr. Cara Christ at ¶¶ 42-43 and Exhibit 2-B.*

After the application, ADHS determines whether to permit the reopening. If ADHS denies the request to reopen, the petitioner can request a settlement conference and thereafter seek administrative relief before an administrative law judge. If the administrative law judge denies the requested relief, the business can seek judicial review of the administrative law judge’s decision. *Id.*

As of September 3, 2020, ten counties, Mohave, Pinal, Santa Cruz, Apache, Cochise, Coconino, Maricopa, Navajo, Pima, and Yavapai were in the “moderate” transmission level and two counties, La Paz and Greenlee, were in the “minimal” transmission level. *Id.* at ¶ II(A)(12) and Exhibit 5.

The virus that causes COVID-19 spreads very easily between people. *Id.* at ¶ II(B)(19) and Exhibit 13. The virus is mainly transmitted via respiratory droplets, including during coughing,

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sneezing, heavy breathing, talking, or exercising.” *Id.* at ¶ II(B)(20). Recent studies also suggest COVID-19 may be spread through aerosol transmission. *See* Defendants ADHS and ADLLC’s Response to Plaintiffs’ Corrected Motion for Temporary Restraining Order and for Order Setting Hearing on Preliminary Injunction at Exhibit 2, Declaration of Dr. Cara Christ ¶ 15. “Aerosol” transmission is similar to droplet transmission, except that aerosols are so small they can linger in the air for much longer than droplets. *Id.* The virus has been detected in asymptomatic persons, meaning COVID-19 may be spread by people who are not aware they have it. *Id.* at ¶ 16. To limit the spread of the virus, the CDC recommends that individuals stay at least six feet apart, avoid large gatherings, wear face coverings, and wash or sanitize hands regularly. *Id.* at ¶¶ II(B)(17), (21), (23) and (31). The more closely a person interacts with others and the longer the interaction, the higher the risk of COVID-19. *Id.* at ¶ II(B)(22).

Bars are placed routinely in the highest risk category for transmitting COVID-19 by government agencies. *Id.* at ¶¶ II(A)(32-33). Experts opine that bars often have high risk environments for COVID-19 transmission because bars: 1) are often small with few windows; 2) tend to be poorly ventilated spaces; 3) have floorplans and environments that are incompatible with physical distancing and result in individuals mixing with other groups with whom they did not arrive; and 4) are often loud, which causes individuals to draw closer to hear one another and to speak louder, thus increasing the risk of transmission. Moreover, mask wearing is incompatible with drinking, and drinking alcohol impairs decision-making. *Id.* at ¶¶ II(A)(63-64) and (66-68).

Courts do not make policy. Courts do not determine whether the decisions of our policymakers are wise. In this instance, the court’s role is to evaluate whether the Plaintiffs established a sufficient basis for the court to order a temporary restraining order.

INJUNCTION STANDARDS

The party seeking injunctive relief is obligated to establish four equitable criteria: 1) a strong likelihood of success at trial on the merits; 2) the possibility of irreparable injury not remediable by damages if the requested relief is not granted; 3) a balance of hardships favors the movant; and 4) public policy favors the injunction. *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990); *Burton v. Celentano*, 134 Ariz. 594, 595 (App. 1982). The balance of hardships is the crucial element and can be met by demonstrating either: (1) a combination of probable success on the merits and the possibility of irreparable injury; or (2) the existence of serious questions going to the merits and the balance of hardships tips sharply in the moving party’s favor. *Id.*, 167 Ariz. at 63.

Injunctive relief is also appropriate when a public official violates Arizona law in a manner that exceeds his authority. *See McChuskey v. Sparks*, 80 Ariz. 15, 20-21 (1955); *Boruch v. State*

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ex rel. Halikowski, 242 Ariz. 611, 616-18 ¶¶ 16-19 (App. 2017); *Williams v. Superior Court in and for Pima County*, 108 Ariz. 154, 157 (1972).

I. PROBABLE SUCCESS ON THE MERITS

Plaintiffs claim that “Executive Order 2020-43, and most of Defendant’s other executive orders, are unconstitutional” because either A.R.S. § 26-303 violates the non-delegation doctrine or the Governor’s Executive Orders violate Article 2, Section 13 of the Arizona Constitution. *See* Plaintiffs’ Corrected Temporary Restraining Order and for Order Setting Hearing on Preliminary Injunction at 10.

a. The Non-Delegation Doctrine

The non-delegation doctrine is anchored in the principle of separation of powers. *See* Ariz. Const. Art. III (“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.”). The legislature possesses lawmaking power and the non-delegation doctrine prohibits the complete delegation of this power to any other body or branch of government. *State v. Ariz. Mines Supply Co.*, 107 Ariz. 199, 205 (1971). However, the non-delegation doctrine does not prevent the legislature from obtaining the assistance of its coordinate branches of government. In fact, the “[d]elegation of ‘quasi-legislative’ powers . . . within proper standards fixed by the legislature, are normally sustained as valid . . .” *Id.*

Arizona Revised Statutes § 26-303 grants the Governor certain powers in two types of emergencies: 1) a state of war emergency; and 2) a state of emergency. 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 emergency. The governor may direct such agencies to provide supplemental services and equipment to political subdivisions to restore any service in order to provide for the health and safety of the citizens of the affected area.

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Plaintiffs assert that the Governor's discretion under A.R.S. § 26-303 is either unlimited and thus, unconstitutional or the Governor exceeded his statutory authority by issuing executive orders that are "arbitrary, unreasonable, and discriminatory." *Killingsworth v. West Way Motors, Inc.*, 87 Ariz. 74, 80 (1959).

In evaluating Plaintiffs' argument that A.R.S. § 26-303(E)(1) constitutes an impermissible delegation of legislative power, the court does not find a probable success on the merits or a serious question going to the merits. The court finds the delegation of power as set forth in A.R.S. § 26-303 is subject to adequate limitation.

First, the Governor's powers under A.R.S. § 26-303 are limited to a state of war emergency or a state of emergency. *See* A.R.S. § 26-303(A) and (E). A "state of 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 . . . epidemic . . . 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 required the combined efforts of the state and the political subdivision."

In a state of war emergency, the governor is expressly permitted to suspend any provision of any statute prescribing the procedure for conduct of state business or the orders or rules of any state agency, if the governor determines and declares that strict compliance with the provision of any such statute or order or rule would in any way prevent, hinder or delay mitigation of the effects of the emergency. *See* A.R.S. § 26-303(A)(1). The legislature did not grant a similar authority to the governor in a state of emergency. Therefore, employing well-established canons of statutory construction establishes that the Governor's powers in a state of emergency are further limited to actions consistent with existing law and the Arizona Constitution. *In re Estate of Winn*, 225 Ariz. 275, 278 ¶ 13 (App. 2010)(The breadth of [one statute] demonstrates that the legislature knows how to authorize [an item] when it chooses to do so.").

Moreover, the delegation of powers during a state of emergency is limited to only those powers required "to effectuate the purposes of this chapter." The referenced chapter is Title 26, Chapter 2, Emergency Management, which consists of 24 separate statutes. *See* A.R.S. §§ 26-01 through A.R.S. § 26-320.

Because the Governor's emergency powers are constrained, the court finds that A.R.S. § 26-303(E) does not violate the non-delegation doctrine.

The court finds a serious question, however, on whether one provision in EO 2020-09 exceeds the Governor's authority under A.R.S. § 26-303. As acknowledged by the Governor, his power under A.R.S. § 26-303(E) is "guided and circumscribed" by the statutes in Title 26, Chapter

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2. *See* Governor’s Motion to Dismiss at p. 5. A clear purpose of Chapter 2 is to grant to the Governor emergency powers and the authority to establish an agency to plan for and coordinate the state’s response to natural or manmade disasters and to alleviate extreme peril to persons or property. *See also* 1971 Ariz. Sess. Laws, ch. 51 § 1(A) (1st Reg. Sess.). The court finds the executive order banning enforcement of a series 12 licensee’s violation of off-premises sale of spirituous liquors impermissibly stretches the Governor’s power under A.R.S. § 26-303(E). Said another way, the court fails to find that the enforcement ban against series 12 licensees in EO 2020-09 effectuates the purposes of Chapter 2 in Title 26.

b. The Privileges and Immunity Clause

As a result of the allegedly arbitrary and unequal treatment of businesses under the Executive Orders, Plaintiffs argue that EO 2020-43 and ADHS’ guidelines effectively grant “to some citizens ‘privileges or immunities’ to pursue a lawful occupation on the ‘terms’ that they engage in proper sanitary measures, while denying to other citizens the same privilege to pursue *the same* lawful occupation ‘upon the same terms’ of complying with such sanitary measures.” *See* Corrected Motion for Temporary Restraining Order and for Order Setting Hearing on Preliminary Injunction at 14 (emphasis in original); *see also Gila Meat Co. v. State*, 35 Ariz. 194, 198-99 (1929)(noting the purpose of the privileges and immunities clause is to secure equality of opportunity and rights to all persons similarly situated); *Killingsworth v. West Way Motors, Inc.*, 87 Ariz. 74, 85 (1959)(invalidating a state law, finding that the limitation was “arbitrary, unreasonable and discriminatory”).

Plaintiffs assert that an Executive Order that shut down only bars owned by African Americans or bars owned by women would be arbitrary and unconstitutional. The court unreservedly agrees.

Here, however, the Governor asserts without contradiction that he relied on CDC and White House Coronavirus Task Force guidance to support his decision to impose a different set of restrictions and regulations on bars with a series 6 or 7 liquor license from the ADLLC if the primary business of the establishment is the sale or dispensing of alcoholic beverages.³

³ ADHS and ADLLC assert that the Attestation and Guidelines requirement of the Emergency Measure 2020-02 equally applies “to all businesses operating with a liquor license, no matter what the series of license is held.” *See* Defendants ADHS and ADLLC’s Response to Plaintiffs’ Corrected Motion for Temporary Restraining Order and for Order Setting Hearing on Preliminary Injunction at Exhibit 2, Exhibit 2-B at n.1. Executive Orders 2020-43 and 2020-52 address the closure and reopening of bars with a series 6 or 7 license if the primary business is the sale or dispensing of alcoholic beverages. Because the attestation is a precondition to reopening bars and nightclubs covered by EOs 2020-43 and 2020-52 (unless otherwise allowed by ADHS), the court

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As support for the Governor's decision, Dr. Marjorie Bessel, Chief Clinical Officer at Banner Health submitted a declaration stating that bars "pose a uniquely dangerous environment for the spread of COVID-19." See Defendant Governor Ducey's Response to Motion for Temporary Restraining Order and for Order Setting Hearing on Preliminary Injunction at Exhibit A ¶¶ 16 and 19. Dr. Bessel cited nine factors that make bars a high-risk setting for COVID-19 transmission:

- A bar is a social setting where groups convene, linger, and mix with other groups for hours.
- Bars are often cramped indoor spaces with poor ventilation.⁴
- Bars often have layouts that make it difficult to physically distance.
- Alcohol consumption slows brain activity, reduces inhibition, and impairs judgment, which may result in a person forgetting to exercise precautions to reduce the risk of spreading the virus.
- Bars typically feature loud environments caused by music or other ambient noise which result in raised voices and greater projection of orally emitted viral droplets and cause people to lean in to each other when speaking, posing a greater threat of transmission.
- Dancing when coupled with limited ventilation and turbulent airflow patterns results in an environment where the respiratory droplets are more easily spread.
- Bars tend to attract a younger adult population, which currently represents the highest demographic carrying COVID-19 in Arizona.

Id. at ¶¶ 19-27. Dr. Bessel also cited information in the public realm of hundreds of people testing positive for COVID-19 after visiting bars in other states and countries. She also noted that contact at a bar does not consistently provide sufficient information to allow effective contact tracing of

does not find the attestation requirement for all businesses with a liquor license relevant to its analysis at this time. Of note, at issue in this litigation is Plaintiffs' request to enjoin the Governor, ADHS, and ADLLC from implementing and enforcing EOs 2020-43 and 2020-52 against Plaintiffs who are series 6 and 7 licensees. The issue of the legality and constitutionality of decisions by ADHS and ADLLC to require attestations from all holders of liquor licenses and to direct the closure or suspend the license of any holder of a non-series 6 or 7 licensee is not before the court.

⁴ Judicial Notice at Exhibit 33 noted in the public realm articles noting bars having fewer windows, weaker ventilation systems, and less space to "squeeze by another person."

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a person testing positive for COVID-19 who may have come into contact with many individuals unknown to him or her when visiting a bar. *Id.* at ¶¶ 28-29 and 33-34.⁵

Among other experts, Dr. Andrew Carroll also submitted a declaration noting that the mitigation factors to reduce the spread of COVID-19 include a face covering or mask that protects as a filtration medium, maintaining social distance of 1.5 to 2 meters, reducing unnecessary trips, activities, gatherings, and avoiding enclosed spaces. *Id.* at Exhibit N at ¶ 15.

According to Plaintiffs, the only legal distinction between series 6 and 7 licensees and series 3, 11, 12, 13, 14, 18 and 19 licensees is that “series 6 and 7 licensees paid valuable consideration for the privilege of not having to have a minimum number of food sales and of ‘off-sale.’” *See* Corrected Motion for Temporary Restraining Order and for Order Setting Hearing on Preliminary Injunction at 16 (emphasis in original). Plaintiffs assert that they are singled out and prohibited from having karaoke or dancing when a business with a series 12 or series 14 license can advertise and permit this type of activity. However, the difference between Plaintiffs and other licensees as identified in EO 2020-43 is not merely the license but the primary focus of the business. Plaintiffs’ primary business is the selling or dispensing of alcoholic beverages.⁶ The declaration of the Director of DLLC, John Cocca, further established that the following criteria is used to distinguish a bar from a restaurant:

- More than 60% of the public seating area consists of barstools, cocktail tables, and similar seating indicating that the area is used primarily for consumption of spirituous liquor;
- Name, signage, or promotional materials of the proposed business premises contain a term such as bar, tavern, pub, spirits, club, lounge, cabaret, or saloon that denotes sale of spirituous liquor;
- Proposed business premises has a jukebox, live entertainment, or dance floor; and
- Proposed business premises contains bar games and equipment.

⁵ The court takes judicial notice of news articles to demonstrate the information in the public realm at the time the articles were published. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F. 3d 954, 960 (9th Cir. 2010)(citation omitted).

⁶ The declaration of John Cocca, Director of ADLLC states that it is not uncommon for a licensee originally licensed as a restaurant (a series 12) to modify operations and engage in activities that more closely mirror operations of a business that holds a series 6 or 7 license. The post-license conduct of some licensees does not invalidate the rationally related factors used by the Governor in EO 2020-43 to order the closure and structured reopening of certain liquor-license holding businesses.

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See Defendants ADHS and ADLLC's Response to Plaintiffs' Corrected Motion for Temporary Restraining Order and for Order Setting Hearing on Preliminary Injunction at Exhibit 1, Declaration of John J. Cocca at ¶ 32; *see also* Ariz. Admin. Code § R19-1-206.

Unlike restaurants, while in bars, patrons often linger for hours, mixing with different individuals and groups. The consumption of alcohol, even when not to the point of intoxication, can dull one's sense of caution. In addition, mask wearing is incompatible with sipping and sharing drinks. Unlike restaurants where a server routinely and regularly arrives to tend to patrons, bar-goers often mingle throughout the bar and seek out a new drink from the bar top or a server spotted across the establishment.

Government action must not be not arbitrary, capricious, unreasonable, or discriminatory. *See State v. Double Seven Corp.*, 70 Ariz. 287, 293 (1950); *Killingsworth v. West Way Motors, Inc.*, 87 Ariz. 74, 80 (1959). Here, the delayed opening of businesses with series 6 or 7 license and whose primary business is the sale or dispensing of alcoholic beverages is not arbitrary and it is reasonably intended to reduce the spread of COVID-19. "Protection of the health and safety of the public is a paramount governmental interest which justifies summary administration action. Indeed, deprivation of property to protect the public health and safety is '[o]ne of the oldest examples of permissible summary action.'" *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300 (1981); *Arizona Downs v. Arizona Horsemen's Found.*, 130 Ariz. 550, 555 (1981) (Under the rational basis test, a court will uphold a law "if it has any conceivable rational basis to further a legitimate governmental interest.").

When considering the action from the Governor in reopening bars differently than restaurants, the court notes that the severity of the emergency prompting the Governor's action in this instance is a global pandemic that has resulted in 203,953 diagnosed cases of COVID-19 reported in Arizona as of September 3, 2020 and 5,130 deaths. The order is subject to review every two weeks, allows impacted parties to seek review of their individual safety measures, and establishes a geographical impact based on the spread of the virus on a county-by-county basis. Moreover, the court has considered that "[t]here is no inherent right in a citizen to . . . sell intoxicating liquors by retail." *Staton v. Superior Court*, 55 Ariz. 514, 516 (1940). Furthermore, the court has considered that "[t]he right to pursue a particular occupation or to operate a particular business . . . is not a fundamental right." *See Caldwell v. Pima County*, 172 Ariz. 352, 355 (App. 1991).

Plaintiffs provide excellent examples of the precautions they have taken to prevent the spread of COVID-19 in their establishments. For those businesses, a mechanism is provided to allow the businesses to apply to ADHS for permission to open. The question before the court is not whether the Governor should have treated bars differently than restaurants. The question is not whether the Governor should have enacted an Executive Order distinguishing between

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business that have karaoke versus those that do not. Instead, the court evaluates whether the Governor's decision to restrict the reopening of bars and nightclubs is consistent with existing statutes, whether it is reasonably related to a legitimate government purpose, and whether the decision is consistent with the Arizona Constitution. The court finds it is.

After deliberation and review of the various orders, case law and statutes, the court finds Plaintiffs are unlikely to succeed on their request that the court enjoin "Defendants from ordering Plaintiffs to shut down their businesses or otherwise citing them for violating executive orders that are illegal and void." *See* Corrected Amended Complaint for Declaratory and Injunctive Relief at ¶ 145. Similarly, the court finds Plaintiffs are unlikely to succeed on the merits of their request to enjoin Defendants from establishing restrictions on an establishment if the primary business is the sale or dispensing of alcoholic beverages that are different from restaurants and other businesses. *Id.* at ¶ 146.

II. IRREPARABLE INJURY

At the time of the hearing, a significant number of Plaintiffs were no longer closed under EO 2020-43.⁷ The court finds that Plaintiffs did not show irreparable harm related to restrictions imposed by EO 2020-43 and EO 2020-52. Moreover, Plaintiffs did not show irreparable harm to Plaintiffs related to the provision in EO 2020-09 that prohibits ADLLC and law enforcement officers from enforcing provisions of the series 12 liquor license that bans the sale by restaurants of beer, wine, and spirituous liquor off-premises.

III. THE BALANCE OF THE HARDSHIPS AND PUBLIC INTEREST

The economic hardships to Plaintiffs and many Arizona businesses experienced since March 2020 have been severe. Some businesses have been disproportionately impacted. The public and Arizona residents have a great interest in restoring our economy and allowing businesses to return to normal operations. The public also has a strong interest in ensuring that elected officials do not overstep their boundaries or abuse their powers. The public also has a strong interest in having our elected officials act in a way that protects public health. The hardships could become even more immense if the spread of the virus is not curtailed. *See In re Abbott*, 954 F.3d 772, 795 (5th Cir. 2020) ("In the unprecedented circumstances now facing our society, even

⁷ Of the Plaintiffs' bars listed in Appendix A to the Complaint, 93 have submitted attestations and are permitted to reopen, 13 submitted applications that have been denied, 2 submitted applications that are under review or have been notified they need to execute the attestation, and 20 have neither submitted an application nor an attestation and have not sought permission to reopen. *See* Defendants ADHS and ADLLC's Response to Plaintiffs' Corrected Motion for Temporary Restraining Order and for Order Setting Hearing on Preliminary Injunction at 13-14 n. 4-6.

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a minor delay in fully implementing the state's emergency measure could have major ramifications...").

The court finds, at this time, the balance of hardships and public interest tip sharply in favor of upholding EO 2020-43 and 2020-52.

CONCLUSION

Attempting to balance the harms to both the public at large and individuals, the Governor has issued numerous Executive Orders, including EOs 2020-43 and 2020-52. Executive Orders 2020-43 and 2020-52 impose restrictions and are rationally related to expert data and guidance on minimizing the spread of COVID-19 in our community.

Plaintiffs have failed to show that EOs 2020-43 or 2020-52 violate the Arizona Constitution or cause irreparable harm to Plaintiffs. Moreover, the public interest is overwhelmingly in favor of the continuation of EO 2020-43 and 2020-52.

IT IS ORDERED denying Plaintiffs' request for a temporary restraining order.