



OFFICE OF THE
Pima County Attorney
Civil Division
32 NORTH STONE AVENUE
SUITE 2100
Tucson, Arizona 85701-1412
(520) 724-5700
FAX (520) 620-6556

Barbara LaWall
PIMA COUNTY ATTORNEY

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Linley Wilson, Esq.
Unit Chief Counsel, Government Accountability
OFFICE OF THE ARIZONA ATTORNEY GENERAL
APPEALS & CONSTITUTIONAL LITIGATION DIVISION
2005 N. Central Ave.
Phoenix, AZ 85004
Linley.Wilson@azag.gov

Re: Notice of Investigation Under A.R.S. § 41-194.01 and Request for Response

Dear Ms. Wilson:

On May 14, 2020, Sen. Vince Leach and Reps. Mark Finchem and Bret Roberts (collectively, “Requesting Legislators”) requested that your office begin an investigation, under A.R.S. § 41-194.01, into whether a Proclamation adopted by the Pima County Board of Supervisors on May 13, 2020. You notified us of the investigation on May 15. The May 13 Proclamation was repealed on May 21, and a new, materially different Proclamation (the “May 21 Proclamation”) was adopted. The repeal of the May 13 Proclamation would appear to end the investigation and require a new request from Requesting Legislators to initiate an investigation regarding the May 21 Proclamation. Nevertheless, based on our conversations and emails, Pima County provides this response addressing the May 21 Proclamation, a copy of which is attached as Exhibit 1.¹

¹This response addresses only the subject of your office’s investigation: whether the County’s action “violates state law or the Constitution of Arizona.” A.R.S. § 41-194.01(A). By not addressing other issues with § 41-194.01—including its validity and proper interpretation—we do *not* waive the right to do so in any future proceeding.

1. Background.

A. The backdrop of the Proclamation's enactment: the worst public-health crisis in anyone's memory.

On December 31, 2019, the World Health Organization “was informed of a cluster of cases of pneumonia of unknown cause detected in Wuhan City, Hubei Province of China.”² By March 2020, the novel virus had caused a global pandemic,³ and has now spread to every continent except Antarctica.⁴ The Covid-19 pandemic has led the United States⁵ and every state in the union⁶ to declare a state of emergency. Pima County declared a state of emergency on March 19, which remains in effect.⁷

Covid-19 is widespread in Arizona and nationwide, with tens of thousands of new cases being reported every day nationwide,⁸ including hundreds a day in Arizona.⁹ It is likely that the actual number of infections is much higher.¹⁰ It would be useless to include numbers of cases or

²World Health Organization, *Novel Coronavirus (2019-nCoV)*, archived at <https://web.archive.org/web/20200202151307/https://www.who.int/westernpacific/emergencies/novel-coronavirus>.

³World Health Organization, *WHO Director-General's opening remarks at the media briefing on COVID-19* (March 11, 2020), at <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁴Joshua Berlinger, CNN, *Coronavirus has now spread to every continent except Antarctica* (Feb. 26, 2020), at <https://www.cnn.com/2020/02/25/asia/novel-coronavirus-covid-update-us-soldier-intl-hnk/index.html>.

⁵President Donald J. Trump, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak* (March 13, 2020), at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

⁶National Conference of State Legislatures, *State Action on Coronavirus (COVID-19)* (updated May 15, 2020), at <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx>. Governor Ducey declared a state of emergency in Arizona on March 11. Gov. Douglas A. Ducey, *Declaration of Emergency *COVID-19** (March 11, 2020), available at https://azgovernor.gov/sites/default/files/declaraton_0.pdf.

⁷Pima County, Ariz., Resolution 2020-18, § 1 (March 19, 2020) (copy attached as Exhibit 2).

⁸Centers for Disease Control, *Cases in the U.S.* (accessed May 16, 2020), at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁹Ariz. Dep't of Health Servs., *Data Dashboard (Summary)* (accessed May 16, 2020), at <https://www.azdhs.gov/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/covid-19/dashboards/index.php>.

¹⁰See Stacey McKenna, *What COVID-19 Antibody Tests Can and Cannot Tell Us*, *Scientific American* (May 5, 2020), at <https://www.scientificamerican.com/article/what-covid-19-antibody-tests-can-and-cannot-tell-us/>.

deaths in this response because the information will be dated almost immediately. Suffice it to say that, despite earlier models predicting lower numbers, by the time your office completes its investigation, over 100,000 Americans may well have died from Covid-19—and this will be an undercount.¹¹ Only centenarians who lived through the Spanish Influenza pandemic of 1918-20 can say they have been through anything like this.

B. Pima County's actions.

As noted above, Pima County declared an emergency on March 19. It simultaneously adopted restrictions on the operation of various businesses (as well as the County's own facilities).¹² On March 26, the County extended the initial expiration of the restrictions on businesses until April 10,¹³ and then Gov. Ducey issued his stay-home order on March 30.¹⁴

In late April, in anticipation of a phased reopening of businesses in Pima County, County Administrator C.H. Huckelberry formed a Back to Business Steering Committee, consisting of 128 members, including many representatives from large and small businesses in Pima County.¹⁵ The Steering Committee, on May 11, relying generally on the expertise of task forces consisting of local business owners, adopted physical-distancing and sanitation measures for restaurants and other dine-in establishments; pools associated with lodging establishments, gyms, fitness centers, hotels, and resorts; and attractions.¹⁶

On May 13, the Board of Supervisors adopted those recommendations in a Proclamation, providing for compliance monitoring through Health Department inspections that occur as part of the enforcement of the food and pool codes.¹⁷ Compliance results in the issuance of a "Best Practice Pledge badge" that a compliant business can display as "a visual symbol of the commitment to the community's health and well-being." The May 13 Proclamation also included a potential \$500 civil penalty for a third or subsequent violation, if it is the same as or similar to two prior violations. On May 21, the Board of Supervisors repealed the May 13 Proclamation

¹¹The CDC counts confirmed or probable Covid-19 cases, but this misses other deaths that are caused by Covid-19. For example, a preliminary study of excess-mortality data in Italy suggests actual Covid-19 deaths were about 50% higher than the reported numbers. See Chirag Modi et al., *How deadly is COVID-19? A rigorous analysis of excess mortality and age-dependent fatality rates in Italy* (preprint), medRxiv, available at <https://www.medrxiv.org/content/10.1101/2020.04.15.20067074v3.full.pdf> (accessed May 21, 2020).

¹²Proclamation of the Pima County Board of Supervisors (March 19, 2020) (copy attached as Exhibit 3).

¹³Proclamation of the Pima County Board of Supervisors (March 26, 2020) (copy attached as Exhibit 4).

¹⁴Gov. Douglas A. Ducey, Executive Order 2020-18, Stay Home, Stay Healthy, Stay Connected, *Physical Distancing to Mitigate COVID-19 Transmission* (March 30, 2020), available at <https://azgovernor.gov/file/34365/download?token=6YdWos-F>.

¹⁵See May 21 Proclamation (Exhibit 1), at 2 ¶ 7.

¹⁶*Id.* ¶ 8.

¹⁷A copy of the May 13 Proclamation is attached as Exhibit 5.

and replaced it with the May 21 Proclamation, which amended, deleted, or clarified several provisions and replaced the \$500 civil penalty with a posting of noncompliant and compliant businesses on the County website.¹⁸ Accordingly, there is no longer any prospect of a monetary penalty for violating the measures in the Proclamation.

The full list of measures adopted is in Sections 1, 3, and 4 the May 21 Proclamation. They are all consistent with what we know about how physical-distancing and sanitation measures—including maintaining a distance of at least six feet from others; avoiding large gatherings, particularly indoors; using good sanitation practices; wearing face coverings—are effective in slowing the spread of Covid-19.¹⁹ They are also consistent with the requirement in Gov. Ducey’s recent *Stay Healthy, Return Smarter, Return Stronger* order that businesses operating in Arizona adopt a variety of practices to “limit and mitigate the spread of COVID-19.”²⁰

In addition, Pima County has good reason to provide more detailed temporary measures for implementing the Governor’s guidance. Statistically, when reviewing the Arizona Department of Health Services COVID-19 Data Dashboard²¹ for May 21, 2020, Pima County has the fourth highest fatality rate, surpassed only by Apache, Navajo and Coconino counties, twice that of Maricopa County, and higher than that of the State.

2. Analysis.

Under § 41-194.01, your office must investigate whether the County’s action “violates state law or the Constitution of Arizona.” The May 21 Proclamation does not.

A. Arizona counties have broad authority to respond to public-health crises.

As political subdivisions of the State of Arizona, counties have those powers the Legislature chooses to give them. *See, e.g., Maricopa County v. S. Pac. Co.*, 63 Ariz. 342, 347 (1945). One of those powers is broad authority to regulate the public health. *See Marsoner v. Pima County*, 166 Ariz. 486, 489 (1991). County boards of supervisors can “[a]dopt provisions necessary to preserve the health of the county, and provide for the expenses thereof.” A.R.S. § 11-251(17). Indeed, the public-health authority delegated to counties and their health

¹⁸May 21 Proclamation (Exhibit 1), § 5(C)-(D).

¹⁹*See, e.g.,* Centers for Disease Control & Prevention, *Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others* (accessed May 16, 2020), at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>; Ariz. Dep’t of Health Servs., *COVID-19: What Everyone Needs to Do* (accessed May 16, 2020), at <https://www.azdhs.gov/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/index.php#novel-coronavirus-what-everyone-needs>.

²⁰Gov. Douglas A. Ducey, Executive Order No. 2020-36, *Stay Healthy, Return Smarter, Return Stronger*, at 3, ¶ 5 (May 12, 2020).

²¹<https://www.azdhs.gov/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/covid-19/dashboards/index.php>.

departments is coextensive with the authority of the Arizona Department of Health Services. *Marsoner*, 166 Ariz. at 488. Additionally, counties have emergency authority within unincorporated areas under A.R.S. § 26-311. That authority is coextensive with the governor's; the Legislature has only prohibited county actions "inconsistent" with emergency action taken by the governor. A.R.S. § 26-307(A).

B. The May 21 Proclamation *does not* violate state law.

It appears from the request submitted to your office that the requesting legislators believe the County's action is "inconsistent" with Gov. Ducey's *Stay Healthy, Return Stronger, Return Smarter* order. But it is not.

Even irrespective of the County's emergency authority under § 26-311, the County and its Health Department clearly have authority to address a public-health crisis. *See* § 11-251(17); *Marsoner*, 166 Ariz. at 488. If a County can adopt measures to prevent HIV transmission in adult-amusement establishments, which the Court said it could in *Marsoner*, surely it can adopt temporary, penalty-free measures applicable to reopening businesses to mitigate and slow the spread of Covid-19.

Based on their citation of A.R.S. § 26-307 and paragraph 7 of Executive Order 2020-36, it appears the Requesting Legislators believe that the County's action is prohibited by Governor Ducey's statement in Executive Order 2020-36 that:

Pursuant to A.R.S. § 26-307, no county, city or town may make or issue any order, rule or regulation that conflicts with *or is in addition to* the policy, directives or intent of this Executive Order, including but not limited to any order restricting persons from leaving their home due to the COVID-19 public health emergency, *or any other order, rule or regulation that was not in place as of March 11, 2020.*²² (Emphasis added.)

The emphasized text purports to prohibit not only county emergency action inconsistent with the Governor's order, but *any* county action related to Covid-19 that was not in place as of March 11. This the Governor lacks authority to do.

The legislative, executive, and judicial powers in Arizona must remain "separate and distinct," Ariz. Const. art. III, and a member of one branch cannot "encroach[] upon or usurp[] the functions properly belonging to another branch," *State v. Montes*, 226 Ariz. 194, 196, ¶ 8 (2011). Only the Legislature and the People have lawmaking power. Ariz. Const. art. IV, pt. 1, § 1(1). The Legislature chose to give counties broad authority to address all manner of public-health concerns, including surely the worst pandemic in 100 years. If the Legislature, of whose 90 members Requesting Legislators are only 3, wanted to take that authority away, it could. It has not.

²²Executive Order 2020-36, at 3, ¶ 7 (emphasis added).

The Governor lacks the “power to make legislative decisions.” *Rios v. Symington*, 172 Ariz. 3, 12 (1992) (quoting *Litchfield Elementary Sch. No. 79 v. Babbitt*, 125 Ariz. 215, 220 (App. 1980)). And in executing the laws, the Governor can’t act in a way that would “compromise the achievement of underlying legislative purposes and goals.” *Id.* (quoting *Opinion of the Justices to the Senate*, 376 N.E.2d 1217, 1223 (Mass. 1978)).

The *Legislature* has granted the County broad public-health and emergency authorities, with the only arguably applicable limitation here being that the County’s emergency actions cannot be “inconsistent” with orders of the Governor. § 26-307(A). Governor Ducey has no authority to, with the stroke of a pen, prohibit additional, consistent emergency actions by a county or swipe away public-health authority granted by the Legislature. To the extent Governor Ducey, in paragraph 7 of Executive Order 2020-36, purported to prohibit emergency actions by counties other than those inconsistent with his order, or to take away counties’ broad public-health authority, he plainly overreached.

As explained above, in the case of a *public-health emergency* (as opposed to other types of emergency), the County’s authority to act comes not only from Title 26, but also the broad public-health authority delegated to counties in § 11-251(17) and Title 36. Thus, the County quite likely has authority to act independently under its public-health authority unconstrained by the “inconsistent orders” provision in § 26-307(A).

But the Attorney General need not address that because, although the County’s orders are *in addition to* the Governor’s orders in the sense that they provide more detailed implementation of his requirements, they are not *inconsistent* with the Governor’s orders. The table below shows all the County’s orders (with similar ones grouped together) side-by-side with the requirement in Executive Order 2020-36 they are consistent with. In reviewing the table below, your office should apply the common meaning of “inconsistent” and determine whether the orders in Executive Order 2020-36 and the measures in the County’s May 21 proclamation can coexist.²³ Plainly, they can.

County Measures	Governor’s Order
<ul style="list-style-type: none"> • “Wellness/symptom checks, including temperature checks for all restaurant personnel, and when possible for vendors, contractors, third party delivery service workers, etc. as they arrive on premises and before opening of a restaurant.” (Section 1(A)(1); similar provisions in Sections 3(A)(1) and 4(A)(1)) • “Any patron exhibiting symptoms of COVID-19 is prohibited from entering the facility.” (Section 4(A)(3)) 	Businesses must “[m]onitor[] for sickness” (§ 5(c))

²³See, e.g., INCONSISTENT, *Black’s Law Dictionary* (11th ed. 2019) (“Lacking agreement among parts; not compatible with another fact or claim.”); INCONSISTENT (1) & (2), www.merriam-webster.com (accessed May 17, 2020) (“not compatible with another fact or claim”; “containing incompatible elements”).

<p>(applicable only to “attractions”))</p> <ul style="list-style-type: none">• “Similar symptoms and temperature checks for guests are optional.” (Section 3(A)(2))• “Pima County Health Notice – Posting of the ‘STOP Please do not enter if you have COVID-19 symptoms’ at the entrance of the facility.” (Section 1(A)(3); similar provision in Section 4(A)(3))• “Physical and/or electronic signage posting at the restaurant entrance of public health advisories prohibiting individuals who are symptomatic from entering the premises.” (Section 1(B)(4); similar provisions in Sections 3(B)(4) and 4(B)(4))	
<ul style="list-style-type: none">• “Cloth masks and gloves and/or frequent hand-washing is required for all servers and restaurant personnel. Develop or follow handwashing policy for servers as it exists in the Pima County Food Code.” (Section 1(A)(2); similar provisions in Sections 3(A)(3) and 4(A)(2))• “Menus must be in a format that does not promote potential virus transmission e.g. menu boards, single use menus.” (Section 1(B)(9))• “Elimination of self-service stations including salad bars and buffets.” (Section 1(B)(10))• “Hand sanitizers available at or adjacent to entrances to the facility, restrooms and in employee work areas, or soap and running water readily accessible to staff and customers and marked locations.” (Section 1(B)(12); similar provisions in Sections 3(B)(9) and 4(B)(9))• “Sanitize customer areas after each sitting with EPA-registered disinfectant, including but not limited to: tables, tablecloths, chairs/both seats, table-top condiments and condiment holders.” (Section 1(B)(13); similar provisions in Sections 3(B)(10) and 4(B)(11))• “Implement touchless payment methods if possible.” (Section 1(C)(14); similar provisions in Sections 3(B)(11) and 4(C)(1))• “Restaurant personnel to have a national certification in food safety and handling, as well as specific training in the prevention of COVID-19.”²⁴ (Section 1(C)(15))• “Frequently touched indoor/outdoor exhibits or any exhibit that would not allow physical distancing should be closed.” (Section 4(B)(8))	<p>Businesses must “[p]romot[e] healthy hygiene practices” and “[i]ntensify cleaning, disinfection and ventilation practices” (§ 5(a) & (b))</p>

²⁴This is a measure for restaurants to “consider.”

<ul style="list-style-type: none"> • “Elimination of self-service stations including water fountains, unless touchless. Nothing prohibits the serving of bottled water.” (Section 3(B)(8); similar provisions in Section 4(B)(10)) 	
<ul style="list-style-type: none"> • “Indoor occupancy limited to 50 percent unless meeting physical distancing standards allows a higher occupancy.” (Section 1(B)(5); similar provisions in Sections 3(B)(5) and 4(B)(5)) • “Physical distancing of 6 feet minimum between tables. Bar top or counter seating is not allowed, unless each party is spaced 6 feet apart.” (Section 1(B)(6)) • “Clearly marked 6-foot spacing marks and/or signage along entrances, hallways, restrooms and any other location within a restaurant where ques [sic] may form or patrons may congregate.” (Section 1(B)(7); similar provisions in Sections 3(B)(6) and 4(B)(8)) • “Parties no larger than 10 allowed per table.” (Section 1(B)(8)) • “Expansion of outdoor service areas to increase physical distancing standards.” (Section 1(B)(12)) • “Physical distancing of 6 feet minimum between fitness equipment, deck loungers, chairs and/or tables.” (Section 3(B)(7)) • “Attendance by reservation or advance ticketing is strongly encouraged to control guest entry and exit to comply with physical distancing.” (Section 4(B)(6)) • “Physical distancing of 6 feet minimum throughout the attraction.” (Section 4(B)(7)) • “Frequently touched indoor/outdoor exhibits or any exhibit that would not allow physical distancing should be closed.” (Section 4(B)(8)) 	<p>Businesses must “[e]nsur[e] physical distancing” and “[l]imit[] the congregation of groups of no more than 10 persons when feasible and in relation to the size of the location.” (§ 5(d) & (h))</p>

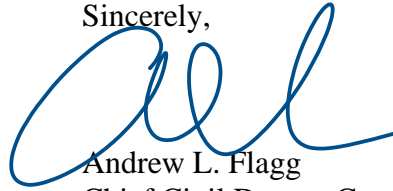
The consistency becomes even more apparent when we add in *Governor Ducey’s own guidance*, which is more specific than the language in his order. Attached Exhibit 6 provides a detailed side-by-side comparison including Governor Ducey’s own guidance into the analysis.

These side-by-side comparisons demonstrate that the measures in the May 21 Proclamation merely implement, and can coexist with, the Governor’s requirements in Executive Order 2020-36. Therefore, the County’s measures are not “inconsistent” with the Governor’s requirements. Even if § 26-307(A) applies to the County’s exercise of its independent public-health authority during a pandemic, it is no impediment to the County’s action.

C. Conclusion

The Attorney General must conclude that the May 21 Proclamation *does not* violate state law.

Sincerely,



Andrew L. Flagg
Chief Civil Deputy County Attorney