



MEMORANDUM

Date: April 8, 2021

To: The Honorable Chair and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator 

Re: **Attempt to Restrict the County's Authority with Regard to Public Health and Mask Mandate**

I'm enclosing an April 6, 2021 communication from the State Attorney General's Office to three state legislators who had questioned the County's ability to require masks to prevent the spread of COVID-19 based on the Governor's Executive Order prohibiting same.

The County on Tuesday, April 6 released the confidential attorney client communication that indicated the County's public health authority could not be overridden by the Governor's Executive Order. This opinion of the Attorney General confirms this analysis and advice from our County Attorney.

If necessary, the County is prepared to defend our mask requirement in the various courts of Arizona as we certainly believe it is a scientifically proven method of reducing the spread of COVID-19.

The informal legal opinion of the Attorney General outlines a path for the Governor and the Arizona Department of Health Services to circumvent the County's local public health authority. We certainly believe that this is not a path they would choose to follow based on the continuing support for masks and the various public pronouncements at press conferences of Dr. Cara Christ, as well as Arizona Department of Health Services' Facebook and Twitter posts encouraging the use of masks.

We very much appreciate their acknowledgment and support of public health science associated with the wearing of masks and believe as the public health agency for the state they will continue to support same. It is also important that county local public health agencies have the autonomy to make these decisions based on the facts within their specific community or county.

CHH/dym

Attachment

c: The Honorable Laura Conover, Pima County Attorney
Dan Jurkowitz, Deputy County Attorney, Pima County Attorney's Office
Lesley Lukach, Deputy County Attorney, Pima County Attorney's Office
Jan Leshner, Chief Deputy County Administrator
Francisco García, MD, MPH, Deputy County Administrator & Chief Medical Officer,
Health and Community Services
Terry Cullen, MD, MS, Public Health Director, Pima County Health Department



MARK BRNOVICH
ATTORNEY GENERAL

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April 6, 2021

VIA EMAIL

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**Re: Opinion No. I21-003/Request Nos. R21-004, R21-005
Executive Order 2021-06 and Pima County Resolution No. 2020-96**

Dear Senator Ugenti-Rita, Senator Leach, and Representative Roberts:

On March 30, 2021, you requested an opinion on whether Pima County Resolution 2020-96 is unenforceable due to conflict with Executive Order 2021-06. Because of the time-sensitive nature of your request and because this issue is closely related to one in litigation, the Attorney General's Office is responding with an informal opinion.¹

Background

On March 11, 2020, Governor Ducey issued a "Declaration of Emergency" declaring a State of Emergency throughout Arizona due to the COVID-19 outbreak. The order was issued pursuant to A.R.S. § 26-303(D) and A.R.S. § 36-787. The State of Emergency remains in effect at the time of this informal opinion.

On June 17, 2020, the Governor issued Executive Order 2020-40, which stated, in part, that "[n]otwithstanding directives in Executive Order 2020-36, *Stay Healthy, Return*

¹ In the past, the Attorney General's Office has issued an informal opinion when the question must be answered on an expedited basis. *See, e.g.*, I20-002. The Attorney General's Office also generally does not respond to questions that are in litigation. At the time of the request, there was ongoing litigation over a Pima County curfew; the issues in that litigation and this opinion are closely related in some respects, further weighing in favor of providing an informal opinion. *See Next Level Arcade Tucson, LLC v. Pima County*, 2 CA-CV 2021-0034 (Ariz. Ct. App.).

Smarter, Return Stronger, regarding A.R.S. § 26-307, a county, city or town may, based on conditions in its jurisdiction, adopt policies regarding the wearing of face coverings in public for the purpose of mitigating the spread of COVID-19....” On June 19, 2020, Pima County adopted Resolution 2020-49, requiring, among other things, that when a person not exempted by the resolution “is in a public place and cannot easily maintain a continuous distance of at least six feet from all other persons[,]” the person “must wear a face covering.” This order was incorporated into Resolution 2020-96, adopted on December 4, 2020, which updated the previously adopted face-covering mandate.

On March 25, 2021, the Governor issued Executive Order 2021-06, rescinding many of the previous orders, including 2020-40. Executive Order 2021-06 also provided:

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 or any other Executive Order relating to the COVID-19 public health emergency, or any other order, rule or regulation that was not in place as of March 11, 2020. This includes but is not limited to mandated use of face coverings. Any city, town or county that has a rule, regulation or ordinance not in []place as of March 11, 2020 that is in conflict with the provisions of this order shall not be enforced. Political [subdivisions] maintain the right to set and enforce mitigation policies in their own government buildings and on public transportation, including, but not limited to, requiring face coverings.

On March 30, 2021, Pima County issued a bulletin indicating that despite Executive Order 2021-06, Pima County Resolution 2020-96 “is still in effect.”

Summary Answer

The Governor may have the authority to preempt counties on the issue of requiring face coverings for public health reasons, but that authority appears to rest in A.R.S. Title 36—Public Health and Safety, not Title 26—Military Affairs and Emergency Management. The County Resolution cites public health authority under Titles 11 and 36, and not Title 26, to require face coverings. Title 26 does not appear to allow the Governor to use emergency orders to preempt county regulations issued pursuant to Title 36. The Arizona Department of Health Services (“ADHS”), however, has broad authority under A.R.S. § 36-787 to set statewide health policy through rules or regulations, which could likely preempt the County’s face-covering mandate.

That the Governor is attempting to preempt counties solely through Executive Order, and did not instruct ADHS to issue rules, has created serious issues regarding preemption here. Therefore, this informal opinion concludes that it is unlikely Pima

County Resolution 2020-96 is unenforceable due to conflict with Executive Order 2021-06. However, the Governor likely has the authority to preempt the county resolution through ADHS rules and regulations promulgated and enforced by ADHS. And furthermore, the Governor has constitutional authority to enforce Title 26 directly if he disagrees with this analysis.

Analysis

I. Executive Order 2021-06 relies only on Title 26 preemption, but Pima County Asserts Authority Outside of Title 26.

Executive Order 2021-06 explicitly rests its authority to prohibit local governments from mandating the use of face coverings in A.R.S. § 26-307, which reads, in relevant part:

State agencies when designated by the governor, and counties, cities and towns may make, amend and rescind orders, rules and regulations necessary for emergency functions but such shall not be inconsistent with orders, rules and regulations promulgated by the governor.

A.R.S. § 26-307(A).² This statute falls under Title 26, which addresses “Military Affairs and Emergency Management.”

But Pima County does not rely upon Title 26 in Resolution 2020-96 (or 2020-49). Pima County instead cites to its “broad authority to take action to protect the public health and safety of all Pima County’s inhabitants[.]” In support of this authority, the Resolution relies upon two statutory sources. First, it cites A.R.S. § 11-251(17): “The board of supervisors, under such limitations and restrictions as are prescribed by law, may: ... 17. Adopt provisions necessary to preserve the health of the county, and provide for the expenses thereof.” Second, it cites Title 36, Chapter 1, Article 4, which regards “Local Health Departments.” In particular, the Resolution cites A.R.S. § 36-183.02, which reads in relevant part: “Each county shall investigate all nuisances, sources of filth

² “Emergency functions” is defined to include “warning and communications services, relocation of persons from stricken areas, radiological defense, temporary restoration of utilities, plant protection, transportation, welfare, public works and engineering, search or rescue, health and medical services, law enforcement, fire fighting, mass care, resource support, urban search or rescue, hazardous materials, food and energy information and planning and other activities necessary or incidental thereto.” A.R.S. § 26-301(5).

and causes of sickness and make regulations necessary for the public health and safety of the inhabitants.” § 36-183.02(A).³

Because Pima County asserts that its Resolution was not enacted pursuant to authority in Title 26, but was instead enacted pursuant to a separate grant of authority, the preemption clause in § 26-307(A), which expressly applies to those “orders, rules and regulations necessary for emergency functions[,]” does not appear to invalidate the Resolution.

It is important to note, however, that the Governor retains constitutional authority to enforce his orders under Title 26, including against Pima County, if he disagrees and believes that his Executive Order directly preempts the County’s face mask requirement. *See Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 469-70 ¶¶35-37 (App. 2007) (recognizing that “the Governor has the constitutional obligation to ‘take care that the laws be faithfully executed’ and to ‘transact all executive business with the officers of the government’” and that Governor is often a proper party in litigation) (citing Ariz. Const. art. 5, § 4).

II. The Governor’s Declaration of An Emergency Under A.R.S. § 36-787 Could Result in Preemption of Pima County’s Resolution through Rules and Regulations Promulgated and Enforced by the Arizona Department of Health Services.

Even if Pima County Resolution 2020-96 stands under a separate grant of authority, the Governor appears to be able to override that authority through Title 36 and ADHS. Section 36-787 grants ADHS broad authority during a declared state of emergency involving public health. The statute in part reads as follows:

During a state of emergency ... declared by the governor in which there is an occurrence or imminent threat of an illness or health condition caused by bioterrorism, an epidemic or pandemic disease or a highly fatal infectious agent or biological toxin and that poses a substantial risk of a significant number of human fatalities or incidents of permanent or long-term disability, the department shall coordinate all matters pertaining to the public health emergency response of the state. The department has primary jurisdiction, responsibility and authority for:

³ This informal opinion assumes that the cited statutory authority provides the counties some authority to require face coverings. *See Associated Dairy Prods. Co. v. Page*, 68 Ariz. 393, 397 (1949) (“The boards of supervisors of the various counties of the state have only such powers as have been expressly or by necessary implication, delegated to them by the state legislature.”).

1. Planning and executing public health emergency assessment, mitigation, preparedness response and recovery for this state.
2. Coordinating public health emergency response among state, local and tribal authorities. . . .

A.R.S. § 36-787(A).

As noted above, the Governor issued the Declaration of Emergency on March 11, 2020, pursuant to authority found both in Title 26, regarding Emergency Management, and Title 36, regarding Public Health and Safety. ADHS therefore has the authority to “coordinate all matters pertaining to the public health emergency response of the state[.]” and ADHS has “primary jurisdiction, responsibility and authority” for “[p]lanning and executing public health emergency . . . mitigation[.]” ADHS also has authority to enact emergency measures. A.R.S. § 36-136(H) (“[T]he director may define and prescribe emergency measures for detecting, reporting, preventing and controlling communicable or infectious diseases or conditions if the director has reasonable cause to believe that a serious threat to public health and welfare exists. . .”).⁴ This language in § 36-787 to “coordinate all matters” and the express statutory conferral of “primary jurisdiction” evidences a clear legislative intent that once ADHS has been empowered by the Governor’s declaration of a public health emergency, it may establish a statewide policy.

This informal opinion therefore concludes that the best way to harmonize that statute with the County’s claimed authority for establishing its own mask policy during a public health emergency—A.R.S. § 11-251(17) and A.R.S. § 36-183.02—is that if ADHS exercises its “primary jurisdiction,” it can override the separate jurisdiction of the counties to set health policy during such an emergency. *See UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 329 ¶11 (2001) (“When two statutes appear to conflict, we will attempt to harmonize their language to give effect to each.”); *Sw. Soil Remediation v. Tucson*, 201 Ariz. 438, 442 ¶13 (2001) (“The primary jurisdiction doctrine, on the other hand, ‘determines *who* should initially determine a case.’”). Any such decision by ADHS may well be subject to challenge in court, but the statutory scheme appears to confer authority on ADHS, if it chooses to exercise it, to establish a statewide policy in the first instance. Here, however, the Governor, not ADHS, issued Executive Order 2021-06, so ADHS has not exercised its authority under § 36-787 and any preemption that might result if it does so has not occurred.

⁴ See, e.g., <https://www.azdhs.gov/documents/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/novel-coronavirus/emergency-measure-2020-02.pdf>.

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Conclusion

Although Pima County Resolution 2020-96 requiring face coverings conflicts with Governor Ducey's statements in Executive Order 2021-06, the Pima County Resolution is not likely preempted under Executive Order 2021-06. This is because the preemption clause in Executive Order 2021-06 rests its authority exclusively on A.R.S. § 26-307, but Resolution 2020-96 cites independent authority outside of Title 26. Because the current State of Emergency was declared pursuant to both Title 26 and Title 36, ADHS has broad authority under A.R.S. § 36-787 to set statewide policy through rules or regulations regarding face coverings. Thus, the Governor could likely act through ADHS to preempt Pima County Resolution 2020-96.

Sincerely,

/s/ Brunn (Beau) Roysden

Solicitor General

Arizona Attorney General's Office