

1 Joseph Martin McGhee
2 P.O. Box 91
3 Flagstaff, AZ 86002
4 Tel: (928) 600-0954
5 mcghee.v.city.of.flagstaff.et.al@gmail.com

6 Plaintiff, *in Pro Per*

7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE DISTRICT OF ARIZONA**

9 Joseph Martin McGhee,
10 Plaintiff,

11 vs.

12 The City of Flagstaff; Coral Evans, Sued in
13 her Official Capacity as Mayor of the City of
14 Flagstaff; Doug Ducey, Sued in his Official
15 Capacity as Governor of the State of Arizona,
16 Defendants.

No. 3:20-cv-08081-GMS

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF’S AMENDED
EMERGENCY *EX PARTE*
MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

Assigned to the Hon. G. Murray Snow

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1 I. ISSUES PRESENTED

2 1. Whether or not Executive Order #2020-33 violates the Fifth and
3 Fourteenth Amendments of the United States Constitution.

4 2. Whether or not Executive Order #2020-33 is a *per se* summary mass
5 quarantine in violation of Arizona law.

6 3. Whether or not immediate injunctive relief is reasonable, appropriate, just,
7 and warranted.

8 II. ARGUMENT

9 **A. Executive Order #2020-33 Is An Unlawful And Unconstitutional *Per Se* Mass**
10 **Quarantine. It Violates The Fifth And Fourteenth Amendments To The United**
11 **States Constitution.**

12 Quarantine is “the separation and restriction of movement of persons who, while
13 not yet ill, have been exposed to an infectious agent and therefore may become
14 infectious.”¹ In contrast to isolation which separates sick people with a contagious
15 disease from people who are not sick,² quarantine confines those who are asymptomatic
16 and healthy.³ Under Arizona law, the word “quarantine” as applied to persons – as
17 opposed to livestock or plants – is defined under a single statute as “the restriction of
18 activities of persons who have been exposed to an afflicted person.”⁴

19 The U.S. Supreme Court has repeatedly upheld the rights of state public health
20 authorities to impose quarantines for the protection of the public.⁵ Clearly, a

21 ¹ See Rosen, George. *A History of Public Health*. Baltimore: Johns Hopkins
University Press, 1993

22 ² Quarantine and Isolation, U.S. Centers for Disease Control, [https://www.cdc.gov/
quarantine/index.html](https://www.cdc.gov/quarantine/index.html), Accessed April 26, 2020

23 ³ See Kathleen S. Swendiman & Jennifer K. Elsea, Cong. Res. Serv., Federal and
24 State Quarantine and Isolation Authority (2007), [https://biotech.law.lsu.edu/cases/
pp/RL33201.pdf](https://biotech.law.lsu.edu/cases/pp/RL33201.pdf), Accessed April 26, 2020

25 ⁴ See A.R.S. § 36-711(19)

26 ⁵ See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25, 25 S.Ct. 358,
49 L.Ed. 643 (1905) (recognizing the "authority of a state to enact quarantine laws and
27 health laws of every description") (internal quotations and citations omitted); see also
Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health, 186 U.S. 380,

1 symptomatic person who is infected with a serious disease that will spread from person
 2 to person rightly prompts the severe governmental action of isolation. In those cases
 3 individual liberty interests necessarily give way to protect the public in an emergency.⁶
 4 Nevertheless, Due Process requirements are not abridged by the imposition of a
 5 quarantine.⁷

6 **1. Quarantine And Due Process Rights**

7 The Fifth and Fourteenth Amendments prohibit governments at all levels from
 8 depriving individuals of any constitutionally protected liberty interest without due
 9 process of law. Federal and state quarantine laws are therefore subject to constitutional
 10 due process constraints. Procedural due process requires that a deprivation of liberty be
 11 "accompanied by minimum procedural safeguards, including some form of notice and a
 12 hearing."⁸

13 The U.S. Supreme Court declared being free from physical detention by one's
 14 own government is "the most elemental of liberty interests."⁹ It is well settled that
 15 freedom from physical restraint is a "liberty interest" protected by the due process clause
 16 of the Fourteenth Amendment.¹⁰ Due process generally requires notice and a hearing in
 17 advance of a deprivation of liberty.¹¹ This is most salient in the context of quarantining
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387, 22 S.Ct. 811, 46 L.Ed. 1209 (1902) ("[T]he power of States to enact and enforce
 21 quarantine laws for the safety and the protection of the health of their inhabitants ... is
 beyond question."); *Ogden v. Gibbons*, 22 U.S. (9 Wheat.) 1,203, 6 L.Ed. 23 (1824) (a
 state has the power "to provide for the health of its citizens" by quarantine laws)

22 ⁶ See Michelle A. Daubert, Comment, Pandemic Fears and Contemporary
 Quarantine: Protecting Liberty Through a Continuum of Due Process Rights, 54 Buff. L.
 Rev. 1299, 1318 (2007)

23 ⁷ See *Mugler v. Kansas* 123 U.S. 623, 661 (1887)("It does not at all follow that
 24 every statute enacted ostensibly for the promotion of [public health, morals or safety] is
 to be accepted as a legitimate exertion of the police powers of the state.")

25 ⁸ *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 624, 94 S.Ct. 1895, 40 L.Ed.2d 406
 (1974)

26 ⁹ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004)

27 ¹⁰ See *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)

28 ¹¹ *Zinerman v. Burch*, 494 U.S. 113, 127, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990)

1 asymptomatic individuals given that asymptomatic individuals are most at risk for
2 unnecessary loss of their liberty and procedural due process violations.¹²

3 Quarantine is not a mere inconvenience. Like a prisoner, a quarantined individual
4 is not free to engage in daily activities or to leave a place, perhaps except under a narrow
5 set of circumstances. The effect of quarantine therefore is that it essentially detains and
6 commits an individual to the custody of the government although no crime has been
7 committed.¹³ The government may not intend for a quarantine to be punitive, but it
8 nevertheless is so, and quarantined individuals exhibit a high prevalence of
9 psychological distress.¹⁴ Even short durations of quarantine can cause post-traumatic
10 stress disorder (PTSD) and depression.¹⁵ Studies show 28.9% of quarantined individuals
11 experience symptoms of post-traumatic stress disorder (PTSD) and 31.2% exhibit signs
12 of depression.¹⁶

13 In quarantine, the tension between individual liberties and public necessity is
14 balanced by requiring health measures to be reasonable and not arbitrary and is tested
15 there must be demonstrated: (1) a public health necessity, (2) an effective intervention
16 with a demonstrable connection between means and ends, (3) proportionality (i.e., that

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19 ¹² *Carey v. Phipps*, 435 U.S. 247, 259 (1978) ("Procedural due process rules are
20 meant to protect persons not from the deprivation, but from the mistaken or unjustified
21 deprivation of life, liberty, or property.") (citing: *Mathews v. Eldridge*, 424 U.S. 319, 344
22 (1976))

23 ¹³ See *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)
24 (considering standard of proof required by the Fourteenth Amendment in a civil
25 proceeding brought under state law to commit an individual involuntarily for an
26 indefinite period to a state mental hospital, "civil commitment for any purpose
27 constitutes a significant deprivation of liberty that requires due process protection.")
28 (emphasis added)

¹⁴ See, e.g., Laura Hawryluck et al., SARS Control and Psychological Effects of
Quarantine, Toronto, Canada, 10 Canadian J. Psychiatry 1206, 1209–11 (2004)

¹⁵ Emma Robertson et al., The Psychosocial Effects of Being Quarantined Following
Exposure to SARS: A Qualitative Study of Toronto Health Care Workers, 49 Canadian J.
Psychiatry 403, 404–06 (2004)

¹⁶ *Id.* at 1206. ("Longer durations of quarantine have been associated with an
increased prevalence of PTSD symptoms.")

1 the intervention is neither too broadly nor too narrowly tailored), and (4) that the
2 quarantine or isolation is in the least restrictive setting while accomplishing its purpose.¹⁷

3 **2. Requirements Under Arizona Law For Quarantine**

4 Under Arizona law the governor may order a quarantine “during a state of
5 emergency ... in which there is an occurrence or the imminent threat of smallpox,
6 plague, viral hemorrhagic fevers or a highly contagious and highly fatal disease with
7 transmission characteristics similar to smallpox” upon consultation with the director of
8 the department of health services.¹⁸

9 During a state of emergency where the disease does not meet this “smallpox
10 standard” a quarantine may only be issued by the Arizona Department of Health Services
11 and only through one of two ways: (1) court order; or (2) written directive “if any delay
12 in the isolation or quarantine of the person would pose an immediate and serious threat
13 to the public health.”¹⁹

14 **a. Quarantine By Court Order**

15 The Department of Health Services may obtain a quarantine order from a court by
16 filing a petition which specifies the following: (1) the identity of the person or persons
17 subject to quarantine; (2) the premises subject to quarantine; (3) the date and time at
18 which quarantine commences; (4) the suspected contagious disease, if known; (5) a
19 statement of compliance with the conditions and principles for quarantine; and (6) a
20 statement of the basis on which quarantine is justified. The petition must be
21 accompanied by the sworn affidavit of the department attesting to the facts asserted in
22 the petition together with any further information that may be relevant and material to

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24 ¹⁷ Daubert, MA. Pandemic fears and contemporary quarantine: protecting liberty
through a continuum of due process rights. *Buff L Rev.* 2007;54:1299–353; See also
Shelton v. Tucker, 364 U.S. 479, 488 (1960) (“[E]ven though the governmental purpose
25 be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle
fundamental personal liberties when the end can be more narrowly achieved.”)

26 ¹⁸ See A.R.S. § 36-787(C)(2)

27 ¹⁹ See generally A.R.S. §§ 36-788, 36-789

1 the court’s consideration.²⁰ Notice to the person or group of persons identified in the
2 petition must be completed within twenty-four hours after filing the petition and in
3 accordance with the rules of civil procedure²¹ and a hearing must be held on this petition
4 within five days after filing of the petition except under “extraordinary circumstances
5 and for good cause shown.”²²

6 A court order authorizing quarantine may do so only for a period not to exceed
7 thirty days and the order must: (1) identify the isolated or quarantined person or group of
8 persons by name or shared or similar characteristics or circumstances; (2) specify factual
9 findings warranting isolation or quarantine including any conditions necessary to ensure
10 that isolation or quarantine is carried out within the stated purposes and restrictions; (3)
11 be served on the affected person or persons in accordance with the rules of civil
12 procedure.²³

13 A person or persons quarantined pursuant to A.R.S. § 36-789 may apply to the
14 court for an order to show cause why the person or persons should not be released. The
15 court must rule on the application to show cause within forty-eight hours after it is filed
16 and if the court grants the application it must schedule a hearing within twenty-four
17 hours after the order to show cause is issued.²⁴ A person so quarantined may request a
18 court hearing regarding the person's treatment and the conditions of the quarantine.”²⁵

19 **b. Summary Quarantine**

20 A quarantine order summarily issued by the Department of Health Services
21 requires that within ten (10) days after issuing the written directive the department “shall
22 file a petition for a court order authorizing the initial or continued isolation or quarantine
23

24 ²⁰ See A.R.S. §§ 36-789(B), 36-789(C)

25 ²¹ See A.R.S. §§ 36-789(D)

26 ²² See A.R.S. § 36-789(E)

27 ²³ See A.R.S. § 36-789(B)

28 ²⁴ See A.R.S. § 36-789(I)

²⁵ See A.R.S. § 36-789(J)

1 of a person or group of persons.”²⁶ Moreover, the summary issuance of a quarantine
2 order by the Department of Health Services does not in any manner waive the due
3 process requirements set forth under A.R.S. § 36-789.

4 **3. Executive Order #2020-33 Is A *Per Se* Summary Mass Quarantine**

5 Executive Order 2020-33 attempts to create an entirely new term of art – the “stay
6 at home order” – while infringing upon fundamental rights in the exact same manner as a
7 quarantine. Regardless, the injury from a punch – for example – is not attenuated by
8 referring to it instead as a “fist kiss.” Likewise, the use of doublespeak to characterize
9 Executive Order 2020-33 as something other than a quarantine does not change objective
10 reality. Nor does it magically create from thin air a constitutional exception to Due
11 Process requirements. Yet this appears to be exactly what this Order seeks to do.

12 Executive Order 2020-33 was directly and expressly predicated upon Governor
13 Ducey's declaration of a Public Health State of Emergency. It explicitly prohibits all
14 persons who reside in the state of Arizona from leaving their homes except under a very
15 narrow set of exceptions. Under any objectively reasonable definition of quarantine
16 including under Arizona law²⁷ Executive Order #2020-33 is a quarantine. That is *exactly*
17 what it is. Governor Ducey's own words offered on live television conclusively support
18 this claim.²⁸

19 **4. Executive Order #2020-33 Infringes Upon The Fifth Amendment**
20 **Because It Restricts Freedom Of Movement Without Procedural Due Process**

21 ²⁶ See A.R.S. § 36-789(A)

22 ²⁷ See A.R.S. § 36-711(19)(quarantine defined as “the restriction of activities of
23 persons who have been exposed to an afflicted person.”)(emphasis added); Presupposing
24 that Covid-19 infection is widespread, which is implicit in the words “based on an
25 epidemiological assessment” stated on page two of the Executive Order.

26 ²⁸ Covid-19 Town Hall Meeting, 12 News, <https://www.youtube.com/watch?v=dmOMXQjqKco>, Accessed April 25, 2020 (quoting Governor Ducey: “In terms of
27 quarantining, anyone who is sick should be staying home, anyone who has symptoms
28 should be staying home, and anyone that violates those types of directions, there's
escalating authority that the governor has. We can work with law enforcement so that
they won't be ... it's in place whenever we put it in place. Whenever we have someone
violating it.”)

1 The fundamental right to travel at home and abroad is an important aspect of
 2 liberty guaranteed in the Due Process Clause of the Fifth Amendment.²⁹ “Freedom of
 3 movement is akin to the right of assembly and to the right of association.”³⁰ This right
 4 exists whether that travel be international,³¹ interstate,³² or intrastate,³³ and any
 5 infringement must pass strict scrutiny.³⁴ “The right to travel, to go from place to place as
 6 the means of transportation permit, is a natural right subject to the rights of others and to
 7 reasonable regulation under law. A restraint imposed by the Government of the United
 8 States upon this liberty, therefore, must conform with the provision of the Fifth
 9 Amendment that ‘No person shall be **deprived of liberty** without due process of law.’”³⁵

10 **5. Executive Order #2020-33 Violates The Substantive Due Process**
 11 **Requirements Of The Fourteenth Amendment**

12 The language of the Fourteenth Amendment requires the provision of substantive
 13 due process when an interest in one’s “life, liberty or property” is threatened.³⁶

14 Substantive due process “serves to prevent governmental power from being ‘used for

15 ²⁹ See *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972)(affirming the existence of a
 16 “fundamental personal right, the right to travel.”); *United States v. Guest*, 383 U.S. 745,
 17 758 (1966) (“[t]he constitutional right to travel from one State to another ... occupies a
 18 position fundamental to the concept of our Federal Union. It is a right that has been
 19 firmly established and repeatedly recognized.”); *Miller v. Reed*, 176 F.3d 1202 (9th
 20 Cir.1999)(recognizing “the fundamental right to interstate travel”)(citing *Monarch*
 21 *Travel Servs., Inc. v. Associated Cultural Clubs, Inc.*, 466 F.2d 552, 554 (9th Cir.1972))

22 ³⁰ *Aptheker v. Sec. of State*, 378 U.S. 500, 520 (1964)

23 ³¹ See *Kent v. Dulles*, 357 U.S. 116, 125–26 (1958) (“The right to travel is a part of
 24 the ‘liberty’ of which the citizen cannot be deprived without the due process of law
 25 under the Fifth Amendment. . . . Freedom of movement across frontiers in either
 26 direction, and inside frontiers as well . . . is basic in our scheme of values.”)

27 ³² *Paul v. Virginia*, 75 U.S. 168 (1869)(affirming the “right of free ingress into other
 28 States, and egress from them.”); See also *Crandall v. State of Nevada*, 73 U.S. 35 (1867)
 (upholding fundamental right to interstate travel, “We are all citizens of the United
 States, and as members of the same community must have the right to pass and repass
 through every part of it without interruption”)

³³ See *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002)(“[I]ntrastate
 travel ... is an everyday right, a right we depend on to carry out our daily life activities.
 It is, at its core, a right of function.”)

³⁴ See *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969)(the right to interstate travel is
 a fundamental right that triggers strict scrutiny review)

³⁵ *Shachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955) (emphasis in original)

³⁶ Amendment XIV, United States Constitution

1 purposes of oppression.”³⁷ The “touchstone of due process is protection of the individual
2 against arbitrary action of government.”³⁸ Substantive due process can be used to
3 challenge abuses of executive power.³⁹

4 In the Ninth Circuit, plaintiffs can establish a substantive Due Process violation
5 either by proving violation of a specific liberty or property interest, or by showing that
6 the state’s conduct “shocks the conscience.”⁴⁰ Executive Order #2020-33 satisfies both
7 requirements.

8 **a. Executive Order #2020-33 Violates A Specific Liberty Interest**

9 Executive Order #2020-33 sets forth the specific criteria under which Arizonans
10 are “permitted” to leave their homes:

11 “All persons may leave their place of residence only for Essential
12 Activities, to participate in or receive Essential Governmental Functions,
13 or to participate in or fulfill Essential Functions outlined in Executive
14 Order #2020-12.”

14 ...

15 “Essential Activities include:

- 16 a. Obtaining necessary supplies and services for family,
17 household members and pets, such as groceries, food and
18 supplies for household consumption and use, supplies and
19 equipment needed to work from home, assignments for
20 completion of distance learning and products necessary to
21 maintain safety, sanitation and essential maintenance of the
22 home and residence.
- 23 b. Engaging in activities essential for the health and safety of
24 family, household members and pets, including things such
25 as seeking medical, behavioral health or emergency services
26 and obtaining medical supplies or medication.

22 ³⁷ See *Daniels v. Williams*, 474 U.S. 327, 331 (1986)(quoting *Murray’s Lessee v.*
23 *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856))

23 ³⁸ *County of Sacramento v. Lewis* , 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d
24 1043 (1998)

24 ³⁹ *Id.* (“Since the time of our early explanations of due process, we have understood
25 the core of the concept to be protection against arbitrary action ... ”)

25 ⁴⁰ See *Martinez v. City of Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003) (“The
26 Fourteenth Amendment’s Due Process Clause protects individuals from state action that
27 either ‘shocks the conscience’ or interferes with rights ‘implicit in the concept of ordered
28 liberty.’”)(citation omitted) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952))

- 1 c. Caring for a family member, friend, or pet in another
- 2 household or residence, which includes but is not limited to
- 3 transportation of a family member, friend or their pet for
- 4 essential health and safety activities and to obtain necessary
- 5 supplies and services for the other household.
- 6 d. Engaging in outdoor exercise activities, such as walking,
- 7 hiking, running, biking or golfing, but only if appropriate
- 8 physical distancing practices are used.
- 9 e. Attending or conducting work or volunteering in Essential
- 10 Functions which includes but is not limited to transporting
- 11 children to child care services for attending work in an
- 12 essential service.
- 13 f. Constitutionally protected activities such as speech and
- 14 religion and any legal or court process provided that such is
- 15 conducted in a manner that provides appropriate physical
- 16 distancing to the extent feasible.

17 Notwithstanding that “constitutionally protected activities such as speech and
18 religion” are specifically “provided for” in this Order, this provision is oxymoronic to
19 the Order itself. The Order specifically prohibits the constitutionally-protected right to
20 free movement and travel. To accept therefore that constitutionally-protected activities
21 are indeed exempted from this Executive Order necessarily requires one to disregard the
22 Order entirely, since the entirety of the Order is a manifest infringement upon a
23 fundamental liberty guaranteed under the Constitution of the United States. “Freedom
24 from imprisonment—from government custody, detention, or other forms of physical
25 restraint—lies at the heart of the liberty that [the Due Process] Clause protects.”⁴¹

26 This very obvious failure of basic logic in the Order and which presents a clear
27 paradox, would probably be quite humorous were it not for the fact that Executive Order
28 #2020-33 very clearly violates the substantive due process requirement of the Fourteenth
Amendment and being unlawfully restrained in the exercise of basic rights by heavy-
handed government acts is **not at all funny.**

41 *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)(emphasis added)

1 A fundamental right, such as the right to be free from arbitrary and unjustified
 2 mass detention, is inalienable – it is “implicit in the concept of ordered liberty.”⁴² The
 3 U.S Supreme Court states very plainly that “the state cannot diminish rights of the
 4 people”⁴³ and that “statutes that violate the plain and obvious principles of common right
 5 and common reason are null and void.”⁴⁴

6 **b. Executive Order #2020-33 Shocks The Conscience**

7 Executive Order #2020-33 acts with deliberate indifference to individual rights. It
 8 criminalizes ordinary behavior to include the exercise of basic constitutionally-protected
 9 freedoms, such as the freedom to leave one’s home and wander about without any
 10 specific purpose.⁴⁵ Under Executive Order #2020-33, this is a crime.⁴⁶

11 Where government officials have time to deliberate yet act with deliberate
 12 indifference to individual rights,⁴⁷ they have engaged in conscience-shocking behavior
 13 that triggers liability.⁴⁸ “Freedom from bodily restraint has always been at the core of the
 14 liberty protected by the Due Process Clause from arbitrary governmental action.”⁴⁹

15 Arizona law has set forth a clearly-established procedure for imposing
 16 quarantine⁵⁰ with clearly-established standards to ensure that due process rights are

19 ⁴² *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937)

20 ⁴³ *Hertado v. California*, 110 U.S. 516 (1884)

21 ⁴⁴ *Bennett v. Boggs*, 1 Baldw. 60 (1830)

22 ⁴⁵ See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972)

23 ⁴⁶ Ariz. Exec. Order No. 2020-33 (April 29, 2020); Covid-19 Town Hall Meeting,
 24 12 News, <https://www.youtube.com/watch?v=dmOMXQjqKco>, Accessed April 25, 2020
 (quoting Governor Ducey: “[I]f someone is not listening to the order law enforcement
 can suggest that they begin listening to the order and if they don't they're going to have a
 class 1 misdemeanor which is a \$2500 fine and and up to six months in jail, and we will
 enforce that.”)

25 ⁴⁷ See *Lewis*, 523 U.S. 833

26 ⁴⁸ *Hicks v. Churchich*, 161 F.3d 1030, 1040–42 (7th Cir. 1998) (noting that, although
 27 *Lewis* rejected negligence as a standard, deliberate indifference should be employed
 whenever actual deliberation is practical)

28 ⁴⁹ *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)

⁵⁰ See §§ A.R.S. § 36-787(C)(2), 36-788

1 protected.⁵¹ Governor Ducey instead chose to ignore this law and these standards and to
2 disregard the fundamental constitutional rights of all Arizonans.

3 Even if it could be reasonably argued that Executive Order #2020-33 serves a
4 legitimate government purpose, it is not the “least restrictive means”⁵² it is simply the
5 most expedient to accomplish the intent of mass quarantine. This order offers not even a
6 single provision that substantively ensures that constitutional rights are upheld, including
7 the right to due process. This is conscience-shocking.

8 **B. Governor Ducey's Declaration Of Emergency Is Unsupported By Law**

9 Arizona law grants the governor the sole authority and discretion to declare a
10 state of emergency:

11 “The governor may proclaim a state of emergency which shall take effect
12 immediately in an area affected or likely to be affected if the governor
finds that circumstances described in [A.R.S. §26-301(15)] exist.”⁵³

13 'State of emergency' means the duly proclaimed existence of conditions of
14 disaster or of extreme peril to the safety of persons or property within the
15 state caused by air pollution, fire, flood or floodwater, storm, epidemic,
16 riot, earthquake or other causes, except those resulting in a state of war
17 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 require the combined efforts of the state and the political
subdivision.”⁵⁴

18 “During a state of emergency ... The governor shall have complete
19 authority over all agencies of the state government and the right to
20 exercise, within the area designated, all police power vested in the state by
21 the constitution and laws of this state in order to effectuate the purposes of
22 this chapter ... 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

23 51 See A.R.S. § 36-789 (titled: “Due process for isolation and quarantine during a
24 state of emergency or state of war emergency”)

25 52 The "least restrictive means" test comes from the Supreme Court's decision in
26 *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960)(holding that even a
27 legitimate government "purpose cannot be pursued by means that broadly stifle
28 fundamental personal liberties when the end can be more narrowly achieved.")

53 A.R.S. §26-303(D)

54 A.R.S. §26-301(15) (emphasis added)

1 equipment to political subdivisions to restore any services in order to
provide for the health and safety of the citizens of the affected area.”⁵⁵

2 **1. The (Ordinary) Meaning Of “Extreme Peril”**

3 “Extreme peril” as set forth under A.R.S. § 26-301(15) is defined neither by
4 Arizona statute nor Arizona court opinion. It is not defined under any federal statute nor
5 federal court opinion. “Extreme peril” is not a term of art. It has no accepted meaning in
6 the area of law addressed by the statute⁵⁶ nor any common law meaning.⁵⁷ It has not been
7 borrowed or adopted from another statute.⁵⁸ Its definition is therefore its ordinary
8 meaning.⁵⁹

9 “Extreme” means “existing in a very high degree”⁶⁰ and the legal definition of
10 “peril”⁶¹ is “exposure to the risk of death, destruction, or loss.”⁶² For the purposes of
11 A.R.S. §§ 26-303(D) and 26-301(15), the ordinary meaning of “extreme peril” is
12 therefore “a very high degree of exposure to the risk of death.”

13 **2. The COVID-19 Pandemic Does Not In Any Manner Represent “A
14 Very High Degree Of Exposure To The Risk Of Death”**

15 As set forth previously herein, the most credible scientific evidence presently
16 available in fact suggests that the fear and panic gripping the world is wholly unjustified.

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19 ⁵⁵ A.R.S. §26-303(E)

20 ⁵⁶ See *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990) (five-Justice majority holding
that “child support” in the AFDC statute is restricted to that term’s specialized use in the
Child Support program under the Social Security Act)

21 ⁵⁷ See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989)
(relying on traditional common law agency principles for meaning of term “employee”).

22 ⁵⁸ See *Carolene Products Co. v. United States*, 323 U.S. 18, 26 (1944)(“adoption of
the wording of a statute from another legislative jurisdiction carries with it the previous
23 judicial interpretations of the wording.”)

24 ⁵⁹ See *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)(in the absence of a statutory
definition “we construe a statutory term in accordance with its ordinary or natural
meaning.”)

25 ⁶⁰ “Extreme” Merriam-Webster.com Dictionary, Merriam-Webster,
<https://www.merriam-webster.com/dictionary/extreme>, Accessed March 20, 2020.

26 ⁶¹ “Peril”, Merriam-Webster’s Dictionary of Law (1996)

27 ⁶² “Destruction” and “loss” clearly refer to property.

1 Certainly an infectious disease, where the overwhelming majority of those who are
2 infected – by some estimates more than 99.88% in one-hundred⁶³ – will recover without
3 any medical intervention, cannot reasonably be characterized as a condition of “extreme
4 peril.”

5 Covid-19 does not kill randomly and indiscriminately. Its has well-established
6 risk factors – the elderly with chronic serious health conditions. Certainly no amount of
7 hysterical fear-mongering will change the basic fact of objective reality that under not
8 even the most liberal definition of “extreme peril” could COVID-19 even remotely be
9 characterized in such a way.

10 **C. The Court Should Grant Preliminary Injunctive Relief**

11 The purpose of a preliminary injunction is to preserve the status quo and the
12 rights of the parties until a final judgment on the merits.⁶⁴

13 A preliminary injunction should issue where a plaintiff establishes: (1) a high
14 likelihood of suffering irreparable harm in the absence of preliminary relief; (2) a high
15 likelihood of success on the merits; (3) that the balance of equities tips favorably towards
16 plaintiff(s); and (4) an injunction is in the public interest.⁶⁵

17 Alternatively, a court may grant the injunction if the plaintiff demonstrates either
18 a combination of probable success on the merits and the possibility of irreparable injury
19 or that serious questions are raised and the balance of hardships tips sharply in his
20 favor.⁶⁶

21 **1. Plaintiff Will Suffer Irreparable Injury Should Enforcement Of**
22 **Executive Orders #2020-33 Not Be Enjoined.**

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24 ⁶³ British Medical Journal, COVID-19 Antibody Seroprevalence in Santa Clara
25 County, California, <https://www.medrxiv.org/content/10.1101/2020.04.14.20062463v1>,
Posted April 17, 2020, Accessed April 26, 2020

26 ⁶⁴ See *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010).

27 ⁶⁵ See *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012)

28 ⁶⁶ See *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

1 Irreparable injury is “harm not remediable by damages.”⁶⁷ Federal circuit courts
2 have repeatedly stated that irreparable injury may be presumed in cases involving an
3 alleged violation of a constitutional right.⁶⁸

4 **a. The Unlawful Infringement Upon A Constitutional Right Is An**
5 **Irreparable Harm Sufficiently Giving Rise To Injunctive Relief.**

6 When a government rule, policy, or conduct is alleged to infringe upon a
7 constitutionally protected expressive right, the plaintiff can demonstrate the requisite
8 irreparable injury by showing that he and others are precluded from exercising that right.

9 Executive Order #2020-33 subjects persons to arrest for exercising their
10 constitutionally-protected right to free movement. This is an irreparable injury.⁶⁹

11 Plaintiff has satisfactorily demonstrated an exigency that warrants immediate
12 intervention by the Court. A temporary restraining order and preliminary injunctive relief
13 against Defendants is the now the only reasonable course of action.

14 **2. Plaintiff Has Established A High Likelihood Of Success On The**
15 **Merits Of His Claims**

16 Plaintiff has made a sufficiently-clear showing that Executive Order #2020-33
17 constitutes a violation of Plaintiff’s constitutional rights and has demonstrated a high
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19 ⁶⁷ See *Sec. Pest & Termite Sys. of S. Ariz., Inc. v. Reyelts*, No. 1 CA-CV 14-0237
20 (Ariz. Ct. App. May. 14, 2015)(citing *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990)); see
21 also *Hess Newmark Owens Wolf, Inc. v. Owens*, 415 F.3d 630, 632–34 (7th Cir.2005)
22 (reversing district court order denying injunction to enforce restrictive covenant);
23 *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 24 (5th Cir. 1992).

24 ⁶⁸ See, e.g., *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir.
25 2005) (“We therefore assume that plaintiffs have suffered irreparable injury when a
26 government deprives plaintiffs of their commercial speech rights.”); see also *Brown v.*
27 *Cal. Dep’t of Trans.*, 321 F.3d 1217, 1225 (9th Cir. 2003)

28 ⁶⁹ See *Steffel v. Thompson*, 415 U.S. 452, 463 n.12 (1974) (“[A] showing of
irreparable injury might be made in a case where . . . an individual demonstrates that he
will be required to forgo constitutionally protected activity in order to avoid arrest.”);
United States v. Bogle, 855 F.2d 707, 710–711 (11th Cir. 1988) (holding that the
“unnecessary deprivation of liberty clearly constitutes irreparable harm”); *Cobb v. Green*,
574 F.Supp. 256, 262 (W.D. Mich. 1983) (“There is no adequate remedy at law for a
deprivation of one’s physical liberty. Thus the Court finds the harm asserted by Plaintiff
is substantial and irreparable.”).

1 probability that this Order is in fact unconstitutional.

2 **3. The Balance Of Equities Tips Favorably Towards Preliminary**
3 **Injunctive Relief**

4 Should Governor Ducey be enjoined and restrained, there is no possibility for
5 potential harms to be suffered by him. There is no inherent constitutional right to
6 government protection and Governor Ducey is immune from any liability for his failure
7 to act under well-settled precedent, even if such failure was negligent.⁷⁰

8 Should the Court not grant the relief as request by Plaintiff however, immediate
9 and irreparable harm will befall him in that the infringement upon his Fifth and
10 Fourteenth Amendment rights will continue.

11 This showing alone is sufficient for the Court to grant a preliminary relief based
12 upon established U.S. Supreme Court precedent.⁷¹

13 **4. Preliminary Relief Is In The Public Interest – It Will Serve The Public**
14 **Interest And Will Not Harm Govenor Ducey**

15 “It is always in the public interest to prevent the violation of a party’s
16 constitutional rights.”⁷² Overwhelming federal precedent⁷³ treats the amelioration of
17 constitutional violations to be in the public interest.⁷³ Moreover, there is no potential

18 ⁷⁰ See *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1007
19 (1989) (finding no duty to protect individuals not in custody of the state); *Daniels v.*
20 *Williams*, 474 U.S. 327 (1986)(construing mere negligence as insufficient to establish
violation of due process).

21 ⁷¹ See *Elrod v. Burns* :: 427 U.S. 347 (1976)

22 ⁷² *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012) (quoting
and citing cases).

23 ⁷³ See *Giovani Carandola v. Bason*, 303 F.3d 507, 521(4th Cir. 2002) (“[W]e agree
with the district court that upholding constitutional rights surely serves the public
interest.”); *G & V Lounge v. Michigan Liquor Control Comm.*, 23 F.3d 1071, 1079 (6th
Cir. 1994) (“[I]t is always in the public interest to prevent the violation of a party’s
constitutional rights.”); *Freedberg v. United States Dept. of Justice*, 703 F. Supp. 107, 111
24 (D.D.C. 1988) (“[I]t is in the public interest to uphold a constitutionally guaranteed
right.” (quotations and citation omitted); see also, e.g., *Wiley Mission v. New Jersey,*
25 *Dep’t of Cmty. Affairs*, 2011 U.S. Dist. LEXIS 96473, at * 59 (D.N.J. Aug. 25, 2011)
(granting permanent injunction against state agency in part because “requiring the
26 Department to abide by the Constitution serves the public interest”); *Glatts v.*
27 *Superintendent Lockett*, 2011 U.S. Dist. LEXIS 1910, at *18-19 (W.D. Pa. 2011)

1 harm that could befall Governor Ducey should the Court grant this Motion. There is no
2 legitimate argument for why an exception to established precedent should be created this
3 matter.

4 **III. RELIEF REQUESTED**

5 A. Preliminarily enjoin enforcement of Executive Order #2020-33.

6 B. Preliminarily enjoin Governor Ducey from issuing any future Executive
7 Order which is substantively the same as Executive Order #2020-33.

8 C. Preliminarily enjoin Governor Ducey from issuing any future Executive
9 Order which is a quarantine or a per se quarantine excepting under the conditions as set
10 forth under A.R.S. §§ 36-787, 36-788, and 36-789.

11 **IV. CONCLUSION**

12 Constitutional rights are not subject to summary disregard by government
13 officials, even during pandemics. Executive Order #2020-33 clearly violates the Fifth
14 and Fourteenth Amendments of the United States Constitution and is a *per se* summary
15 mass quarantine in violation of Arizona law. Plaintiff and indeed all Arizonans have now
16 suffered, and continue to be placed at risk of suffering, immediate, irreparable harm.
17 Preliminary injunctive relief is therefore reasonable, appropriate, just, and warranted,
18 and is in the public interest.

19 For all the foregoing reasons as set forth herein, Plaintiff respectfully requests that
20 the Court enter the attached Order enjoining enforcement of Executive Order #2020-33
21 and restraining Governor Ducey from issuing any subsequent Executive Orders which
22 are substantively the same as Executive Order #2020-033.

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26 _____
27 (“[H]aving a State’s employees follow the Federal Constitution is also in the public
28 interest.”).

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Dated: April 30, 2020

Respectfully Submitted,

By: /s/ Joseph M. McGhee
Plaintiff, *in Pro Per*

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April 2020, I caused the foregoing document to be filed electronically with the Clerk of Court through the CM/ECF System for filing; and served on counsel of record via the Court’s CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users and that I have e-mailed the foregoing document to that user this same day and the document will be mailed the 30th day of April 2020.

Michele Molinario
Derek R. Graffious
JONES, SKELTON & HOCHULI, P.L.C.
40 North Central Avenue, Suite 2700
Phoenix, Arizona 85004
Telephone: (602) 263-1700
Fax: (602) 200-7831
mmolinario@jshfirm.com
dgraffious@jshfirm.com

*Attorneys for Defendants City of Flagstaff
and Mayor Coral Evans*

Brett W. Johnson (#021527)
Colin P. Ahler (#023879)
Tracy A. Olson (#034616)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
Telephone: 602.382.6000
Facsimile: 602.382.6070
bwjohnson@swlaw.com
cahler@swlaw.com

Anni L. Foster (#023643)
General Counsel
Office of Arizona Governor Douglas A. Ducey
1700 West Washington Street
Phoenix, Arizona 85007
Telephone: 602-542-4331
afoster@az.gov

*Attorneys for Defendant Douglas A. Ducey,
Governor of the State of Arizona*

/s/ Joseph M. McGhee