LOUISIANA DEPARTMENT OF HEALTH	**SUIT NO. 167,638**
VERSUS	**21ST JUDICIAL DISTRICT COURT**
GOD'S TABLE, LLC, EUNICE BUNCH, AND DANIELLE BUNCH	**PARISH OF LIVINGSTON** **STATE OF LOUISIANA**

AMICUS CURIAE **BRIEF OF ATTORNEY GENERAL JEFF LANDRY**

This case is not about whether masks or face coverings are a good idea. It is about what the Governor and the Department of Health ("LDH") can do during an extended public health emergency and – importantly – *how* it can constitutionally do it. Although one other State court judge recently denied a temporary restraining order regarding 89 JBE 2020's closing of "bars" (but not bars in restaurants), the trial court conducted no meaningful analysis of the statutory scheme. And while two federal cases are currently pending related to bar closures, the federal courts have no authority to enjoin the state to follow State law. *See Pennhurst St. Sch. & Hosp. v. v. Halderman*, 465 U.S. 89 (1984).[1]

Louisiana Code of Civil Procedure Article 3601 provides that, "an injunction shall issue in cases where irreparable injury, loss or damage may otherwise result to the applicant." The moving party must show the following to obtain injunctive relief:

(1) that it will suffer irreparable harm if the injunction is not issued,

(2) that it is entitled to the relief sought; and,

(3) that it will likely prevail on the merits of the case.

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[1] On Monday, August 17, Judge Feldman issued a ruling denying a preliminary injunction requested by 10 bar owners in an as-applied challenge that includes state constitutional claims. *See* 4 Aces Enterprises, LLC, et.al. v. John Bel Edwards, No. 20-2150 (August 17, 2020) (order and reasons). The injunctive relief sought related only to the federal claims due to *Pennhurst* restrictions on the federal court's jurisdiction over State law. In footnote 4 of the opinion, the District Court acknowledged that 25 legislators filed an amicus brief contenting that 89 JBE 2020 violates separation of powers under the Louisiana Constitution and observing "the legislators' argument is best made in a state court," and quoting *In re Abbott*, 956 F.3d 696, 720-21 (5th Cir. 2020), which cautioned "that any relief ordering a state official to comply with state law would be barred by the *Pennhurst* doctrine." Of course, this Court *does* have jurisdiction to issue that relief. The Legislator's federal *amicus* brief further supports some of the points made here and is attached for the Court's reference. The ruling issued Monday emphasized the limited nature of its review and its application only of the *federal* constitutional standard under *Jacobson*.

The issuance of an injunction is a "harsh, drastic and extraordinary remedy which is only issued where the petitioner is threatened with irreparable loss or injury without adequate remedy at law." Whether a preliminary injunction should issue is addressed to the sound discretion of the trial court, which will not be disturbed absent a showing of a clear abuse of discretion. *Lassalle v. Daniels*, 673 So.2d 704 (La. App. 1 Cir. 1996); *Paradigm Insurance Company v. Louisiana Patients Compensation Fund*, 680 So.2d 783, 785 (La. App. 1 Cir. 1996); *Lassalle v. Daniels*, 673 So.2d 704, 709 (La.App. 1 Cir. 1996) *Anselmo v. Louisiana Comm'n of Ethics*, 435 So.2d 1082 (La. App. 1 Cir. 1983); Before issuing a preliminary injunction, the trial court should consider whether the threatened harm to plaintiff outweighs the potential for harm or inconvenience to the defendant, and whether issuance of a preliminary injunction will disserve the public interest. *Chandler v. State Dept. of Transp. and Development*, 844 So. 2d 905, 909 (La. App. 1 Cir. 2003).

Firehouse meets these standards.

I. LDH HAS NO AUTHORITY TO CLOSE FIREHOUSE BARBECUE BASED ON THE GOVERNOR'S LEGALLY FLAWED MASK MANDATE.

The enforcement action against Firehouse, at bottom, rests on an unsound and faulty legal foundation because it relies on the legally-flawed Mask Mandate issued by Executive Proclamation 89 JBE 2020 ("the Proclamation"). *Jacobsen v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), does not save the Proclamation's Mask Mandate, because *Jacobsen* does not speak to or override the *State*'s constitution or the statutory law from which the Governor's powers emanate, nor does it displace the federal constitution.[2] While *Jacobsen* permits the government

[2] Judge James Ho, concurring in *Spell v. Edwards*, recently observed that "Officials may take appropriate emergency public health measures to combat a pandemic. *See Jacobson v. Massachusetts*, 197 U.S. 11, 30–31 (1905). *See also Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944). But '[n]othing in *Jacobson* supports the view that an emergency displaces normal constitutional standards.' *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 942 (9th Cir. 2020) (Collins, J., dissenting) (emphasis omitted)." *Spell v. Edwards*, 962 F.3d 175, 181 (5th Cir. 2020) Though the District Court in 4 Aces Enterprises declined to issue a preliminary injunction based on the *Jacobsen/Abbott* framework, it notably found that the Governor justified the closures under that federal framework "but barely so," and found that, under Fifth Circuit precedent, a "constitutionally protected property interest in the profits of their business," such that "bar owners enjoy the right to meaningful post-deprivation process." *See* 4 Aces Enterprises, n.1, *supra*. The federal court did not address whether a state restaurant operator's licenses constitutes a state-created property interest subject to procedural due process, but under state law they clearly do. *See Paillot v. Wooton*, 559 So.2d 758 (La. 1990) (finding due process violation in when an individual's beer and liquor permits and occupational license were suspended by parish officers without prior notice).

some flexibility in the exercise of its police powers free from federal judicial interference, it still presumes that a *valid authorization to act in the first place*. In the absence of such authorization for the government action (or where, as here, the Legislature has expressly limited the Governor's emergency powers), the government's conduct is arbitrary and capricious, denies Firehouse fair notice and procedural due process, and constitutes an *ultra vires* act that should be enjoined. Even if this Court finds a legal basis for the Governor and LDH's regulatory actions regarding the Mask Mandate generally, the Governor still must enforce his rules fairly and evenhandedly.[3] And, finally, if his and LDH's actions against Firehouse retaliate for its speech or are designed to muzzle it from criticizing the Governor's *ultra vires* order, such actions clearly violate Firehouse's First Amendment rights.

A. The Flawed Mask Mandate Is Inadequate as a Matter of Law to Support Closure of Firehouse.

The Governor and LDH should be enjoined from taking or authorizing any further enforcement actions based on the legally-flawed Proclamation.

1. The Governor exceeded his limited authority under the emergency powers acts.

This Court need not look past the emergency statutes' text to conclude the Governor and LDH acted without legal authority because the emergency powers acts do not confer authority to impose a Mask Mandate, much less to co-opt businesses as Mask Enforcement Police. Nor do they authorize the Governor to deploy the Fire Marshall and LDH employees to threaten businesses and to close them when they refuse to act as the Governor's Mask Enforcers. Neither the Governor,

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[3] Judge Ho also noted this with regard to the limits on people gathering, where he observed that "It is common knowledge, and easily proved, that protestors do not comply with social distancing requirements. But instead of enforcing the Governor's orders, officials are encouraging the protests—out of an admirable, if belated, respect for First Amendment rights. The Governor himself commended citizens for "appropriately expressing their concerns and exercising their First Amendment Rights." And he predicted that "we will continue to see peaceful, nonviolent demonstrations and protests where people properly exercise their First Amendment rights. *Spell v. Edwards*, 962 F.3d 175, 182 (5th Cir. 2020), citing Melinda Deslatte, *Louisiana governor praises state's peaceful Floyd protests*, AP News (June 3, 2020), https://apnews.com/51fd29f1cd6bd7e6d2bea8799117fec8. Judge Ho also noted that "Under his logic, the Governor would allow tens of thousands of LSU fans to assemble this fall under the open sky at Tiger Stadium, while forbidding countless others from cheering on the Saints under the Superdome."

nor the Department can cite to any authority that permits the Governor to threaten the license of private businesses who refuse to be his Mask Enforcers.

Legislation is the solemn expression of legislative will, and therefore, interpretation of a law involves primarily a search for the legislature's intent. La. R.S. 1:4; La. Civ.Code art. 2; *Conerly v. State*, 97–0871, p. 3 (La.7/8/98), 714 So.2d 709, 710. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law must be applied as written. La. Civ. Code art. 9; *Conerly*, 97–0871 at 3, 714 So.2d at 710. The fundamental question in all cases of statutory interpretation is legislative intent and ascertaining the reason that prompted the legislature to enact the law. *In re Succession of Boyter*, 99–0761, p. 9 (La.1/7/00), 756 So.2d 1122, 1128. The rules of statutory construction are designed to ascertain and enforce the intent of the legislature. *Id.; Stogner v. Stogner*, 98–3044, p. 5 (La.7/7/99), 739 So.2d 762, 766. The meaning and intent of a law is determined by considering the law in its entirety and all other laws on the same subject matter and placing a construction on the provision that is consistent with the express terms of the law and with the obvious intent of the legislature in enacting it. *Boyter*, 99–0761 at 9, 756 So.2d at 1129; *Stogner*, 98–3044 at 5, 739 So.2d at 766.

Here, there is no ambiguity in the emergency powers acts and so the search for legislative intent need not go far. The Legislature granted the Governor *enumerated* powers under the Louisiana Homeland Security and Emergency Powers Act ("LHSEPA"). La. R.S. 29:729-739, and the Louisiana Health Emergency Powers Act ("LHEPA"). La. R.S. 29:760-772. These Acts both delegate certain powers to the Governor to protect public safety and public health. *See* La. R.S. 29:724 (Powers of the Governor under LHSEPA); La. R.S. 29:766 (Declaration of a state of public health emergency under LHEPA); La. R.S. 29:769 (special powers during public health emergency). The statutes authorize the Governor to declare an emergency by proclamation or executive order. Publication of the order is sufficient to give notice, and the order or proclamation then has the "force and effect of law." La. R.S. 29:724(A). In the event someone violates an emergency proclamation or order declared by the governor pursuant to LHSEPA, "any person or representative of any firm, partnership, or corporation violating any order, rule or regulation promulgated pursuant to this Chapter, shall be fined not more than five hundred dollars or confined in the parish jail for not more than six months, or both. La. R.S. 29:724(E). However, should this

provision be misconstrued, the Legislature clearly cabined the Governor's authority in the very next sentence*: "No executive order, proclamation, or regulation shall create or define a crime or fix penalties."*

LHEPA is more limited, refers to the State Operations Emergency Plan (to which the Governor has never cited), and contains no corresponding provision as 29:724(E) that provides a statutory misdemeanor; nevertheless, it permits the Governor to issue a declaration of emergency after consultation with the "public health authority." It authorizes the Governor's Office of Homeland Security, pursuant to the Louisiana Administrative Procedures Act ("LAPA"), to "adopt such rules and regulations as are necessary to implement [the director's] authority under the provisions of this Chapter and such authority as the governor shall designate to him pursuant to this Chapter and the Louisiana Homeland Security and Emergency Assistance and Disaster Act, as amended…." *See* La. R.S. 29:764, 29:766, and 29:767.

In summary, in a public health emergency, these two acts create a combined statutory scheme that permit the Governor to take certain *enumerated* actions–but only those actions–by executive order or proclamation. *Neither* permits the Governor to make law with an Executive Order or Proclamation, *even during an emergency*. The statutory penalty is the only authorized penalty for violation of a proclamation containing one of these enumerated restrictions is a criminal misdemeanor citation.[4] And because this legislative scheme is a derogation from common rights and procedures (*i.e*, the ordinary means of creating law through the legislative process or promulgating regulations pursuant to procedures outlined in the Louisiana Administrative Procedures Act, subject to legislative oversight) it must strictly construed. *See e.g., State, Dep't of Transp. & Dev. v. Estate of Griffin,* 95-1464 (La. App. 1 Cir. 2/23/96), 669 So. 2d 566, 568 ("expropriation 'is special and exceptional in character, in derogation of common right, and must be strictly construed.'"); *see also Billeaudeau v. Opelousas Gen. Hosp. Auth.,* 2016-0846 (La. 10/19/16), 218 So. 3d 513, 520 (Louisiana Medical Malpractice Act's limitations on the liability

[4] The LHSEPA does not state who enforces the citation provision, but because the statutes establishes violation as criminal misdemeanor, enforcement by default would fall to individuals who investigate and enforce *criminal* laws, such as local sheriffs and local law enforcement. As stated in the Attorney General's opinion, this also triggers all the constitutional rights and duties associated with any criminal investigation, arrest, or citation. Neither LDH nor the Governor have any criminal investigatory or enforcement power.

of health care providers are special legislation in derogation of the rights of tort victims, and as such, the coverage of the act should be strictly construed).

The statutes enumerate only *certain* content that may be included in such orders or proclamations. Any other rule making, to the extent it may fall within the scope of a more generalized power, must comply with the requirements of the LAPA to have the force and effect of law. *See, e.g.,* La. R.S. 29:725(D) and (I); 29:767; and 29:977 (all referencing promulgation of rules pursuant to the APA). *See also* La. R.S. 49:951(6)(defining "rule" for purposes of the APA promulgation requirement under 49:953); 49:953 (procedures for adoption or rules); La. R.S. 49:954 (no rule shall be effective, nor may it be enforced, unless it was adopted in substantial compliance with the provisions of the Louisiana Administrative Procedures Act)..

Requiring individuals across the State to wear face coverings does not fall within any of the Governor's enumerated powers. Nor does anything in these collected statutes reasonably include such a requirement. Perhaps recognizing the difficulty in enforcing such an unauthorized and broad individual mandate, the Governor's proclamation did not stop with the individual mandate–it threatened "citations" (undefined) of *private businesses* who refuse to enforce the Mask Mandate against their employees and patrons or customers. But nothing in either Act permits such an action by executive order or proclamation. To the contrary, the LHSEPA's express limit on creating law or fixing a penalty clearly prohibit (1) *creating* the mandate, which is a new requirement imposed on people; (2) imposing *enforcement* obligations on businesses, which did not previously exist; and (2) fixing a *penalty* by threating suspension or revocation of business licenses.[5]

In addition to the express limit on using an order, proclamation, or regulation to create or define a crime or fix penalties, the LHSEPA also expressly states that "nothing in this Chapter shall be interpreted to diminish the rights guaranteed to all persons under the Declaration of Rights of the Louisiana Constitution, or the Bill or Rights of the United States Constitution. This Chapter shall not violate Article II (Distribution of Powers), Article III (Legislative Branch), or Article V

[5] Relatedly, nothing in the statutes authorizing and establishing the powers of the Fire Marshall authorize him to act as the Governor's Proclamation enforcer either. But as this particular action was not taken by the Fire Marshall, those *ultra vires* acts are not addressed here.

(Judicial Branch) or the Louisiana Constitution….” Apart from the express statutory limitation and invocation of the State constitution, the First Circuit has held that the separation of powers limits the power of the Governor to make law with an executive order. *See Louisiana Dep't of Justice v. Edwards*, 2017-0173 (La. App. 1 Cir. 11/1/17), 233 So. 3d (nothing prohibits the Governor from establishing *policy* through executive orders; however, the limited power of the Governor to issue executive orders does not inherently constitute authority to exercise the legislative lawmaking function, citing La. Const. art. 4, § 5(A) and La. R.S. 49:215(A)); *see also State v. Broom*, 439 So. 2d 357 (La. 1983) (statute governing penalties for possession of explosives contrary to regulation and statute delegating authority to director of public safety to define felony offenses punishable under such statute were unconstitutional because they violated separation of powers). Thus, limits on the Governor's powers are spelled out both in the structure of State government and in the Acts : *first*, the Governor has *no* authority to create law with any executive order; *second*, the Governor has no authority to impose *any* criminal law or penalty by executive proclamation or order; and *third*, his exercise of limited enumerated powers cannot violate rights protected by the state or federal constitutions (even if a broad view of constitutional power permits him wide discretion in the federal system).

To the extent any of his actions have the force and effect of law, then, it can *only* be the *enumerated* actions.[6] Any *other* action, to the extent it is necessary, reasonable, and within the scope of *other authority* to protect the public health, safety, and welfare of the people, must comply with the LAPA. Alternatively, if no authority exists, the Legislature may call itself into session or

[6] This is consistent with constitutional restrictions on the delegation of legislative authority. *See State v. All Pro Paint & Body Shop, Inc.*, 93-1316 (La. 7/5/94), 639 So. 2d 707 (Delegation of authority to administrative agency is constitutionally valid if enabling statute contains clear expression of legislative policy, prescribes sufficient standards to guide agency in execution of that policy, and is accompanied by adequate procedural safeguards to protect against abuse of discretion by agency.") *See* also La. Const. art. 2, § 1. Reading the statutes in a manner that conferred open-ended discretionary authority upon the Governor during a declared emergency would create constitutional problems with the law. The statutes should be read in a manner that renders them constitutional. When the constitutionality of a statute is at issue, and under one construction it can be upheld while under the other it cannot, a court must adopt the constitutional construction. *State v. Rochon*, 2011-0009 (La. 10/25/11), 75 So. 3d 876, 889, citing *State v. Interiano*, 03–1760, p. 4 (La.2/13/04); 868 So.2d 9, 13, and *State v. LeCompte*, 406 So.2d 1300, 1311 (La.1981). A court may avoid constitutional problems by adopting a narrowing construction of the statute as long as that interpretation remains consistent with the overall purpose behind the legislation. *Id.*

the Governor may call it into session to address the issue. *See* La. Const. art. 3, §2 (B)(C). As a corollary to the limits on the Governor's power, the Louisiana Supreme Court also has clearly held that the Governor cannot delegate power he does not have. *See, Louisiana Hosp. Ass'n v. State*, 2013-0579 (La. App. 1 Cir. 12/30/14), 168 So. 3d 676, 686, *writ denied sub nom. Louisiana Hosp. Ass'n v. State ex rel. Dep't of Ins*., 2015-0215 (La. 5/1/15), 169 So. 3d 372.

There can be no doubt that the Mask Mandate is intended to be a substantive requirement with the force and effect of law, or Firehouse would not find itself embroiled in this fight for survival as a business with all its constitutional rights intact. But reading the LHSEPA as a whole, it is clear that the legislature did not intend to convey legislative authority upon the Governor during a state of emergency. While La. R.S. 29:724(D)(1) permits the governor to "[s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of state business ... if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency**,**" this provision relates to *internal* State operating procedures and no provision in La. R.S. 29:724 permits the Governor to enact substantive law. Had the legislature deemed it appropriate for the governor to enact substantive legislation, it could have included that authority in the series of items designated La. R.S. 29:724(D).[7] And as the First Circuit stated in *Louisiana Hospital Association,* this Court must apply the well-settled doctrine of statutory construction, *expressio unius et exclusio alterius,* which teaches that when the legislature specifically enumerates a series of things, the legislature's omission of other items, which could have been included in the statute, is deemed intentional. *Sensebe v. Canal Indem. Co.,* 2010–0703, p. 16 (La.1/28/11), 58 So.3d 441, 451. And, like *Louisiana Hospital Association* where Governor Jindal had no authority pursuant to enact substantive law or to transfer it to the Department of Insurance, Governor Edwards similarly has no authority to transfer non-existent authority to the Department of Health.

2. *The Mask Mandate allows businesses to rely on representations of patrons and employees, and therefore it does not provide a basis upon which to shutter a business that is "non-compliant" with enforcing the mandate*

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[7] But see note 6, *supra*, regarding limits on delegation of legislative authority. The Legislature, within those constitutional constraints, could have granted rule-making authority and indeed it has done so already relative to GOHSEP and LDH.

The Attorney General outlined in detail in Attorney General Opinion 20-0068 (Exhibit F to Firehouse's Answer) the many ways the Governor's Mask Mandate is vague and overbroad.[8] Here, the subjective nature of the Mandate is particularly relevant. The order contains a long list of exceptions to the Mandate, all of which are *subjectively determined by the wearer*. For a notable example, an individual wearer who has *any* health condition that the *wearer* determines makes wearing a face covering infeasible, is categorically exempt from the requirement. Also, a wearer who is consuming food or drink is exempt. As Firehouse is a restaurant, its patrons are there for that purpose. And, as LDH has now conceded, as it must due to the plain language of the order, Firehouse is *entitled* under the plain terms of the Proclamation to rely upon the representation of it patrons and employees *and* cannot be cited for relying on such representations. Moreover, the Proclamation creates no obligation to ask, nor does it require an individual to provide a reason if asked (requirements that would have the same defects discussed here if they did exist.) And while that concession is important for Firehouse's case, it also serves to show how the Governor and LDH's exercise of power in such an arbitrary and capricious manner, where it concedes the target of its action has not violated the order but shuttered it anyway, may continue to threaten *any* business.[9]

Given this safe harbor provided to businesses, it is difficult to find *any* grounds for the emergency order LDH issued to Firehouse. The Proclamation does not require business owners *to even ask* patrons or employees what their reason is for not wearing a mask. Indeed, such a question

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[8] This Court, as part of the judicial branch of government, is not bound by the AG Opinion, but neither the Governor nor LDH can cite to any authority showing why both are not bound by the opinion of the constitutionally-designated chief legal officer of the State on the constitutional limitations of the Proclamation. It is the duty of the Attorney General to uphold the state and federal constitution. Issuing opinions as the final arbiter of open questions relative to executive branch activities is one way he carries out this duty. The Governor, as chief executive officer, and LDH, as a State agency, are bound as State officers subject to the State constitutional allocation of powers to the Attorney General, *who is expressly granted the power of the last word on questions of law inside the executive branch*. Moreover, the LHSEPA establishes the Attorney General as the statutory legal advisor to GOHSEP, but he was neither advised in advance of the Mask Mandate nor consulted on its drafting before or after he issued his opinion.

[9] This is especially true given the fact that the Fire Marshall has taken it upon himself to visit and issue "warnings" or cite "violations" to thousands of businesses based, in part, upon complaints *invited* by the Governor to be submitted from individuals regarding perceived "violations" of the subjective Mask Mandate. On the the Unified Command Group telephone conference call August 13, 2020, the Fire Marshall reported that as of that date, the Fire Marshall was working with 21,000 businesses on safe protocols. His office had conducted an inspection of 9,800 businesses. The top 3 violations were reported as masks, social distancing and overcrowding.

would seem to be unnecessary as the business has no obligation to ask but to the extent a reason is offered it can rely on whatever reason provided. Likewise, it has no obligation whatsoever to refuse to allow an employee to work or to refuse service to a patron.

The Department of Health public health laws authorize the State Health Officer ("SHO") to "take all necessary steps to execute the sanitary laws of the state and to carry out the rules, ordinances, and regulations as contained in the state sanitary code." La. R.S. 40:3. The SHO, pursuant to La. R.S. 40:4, through the office of public health of the LDH, "shall prepare, promulgate, and enforce rules and regulations embodied within the state's Sanitary Code covering all matters within his jurisdiction as defined and set forth in La. R.S. 40:5 (listing enumerated powers). Notably, La. R.S. 40:4 *mandates* that "[t]he promulgation of this Sanitary Code *shall* be accomplished *in strict accordance with the provisions of the Administrative Procedures Act* . . . ." *Id*. (emphasis added). That is important because no statute or existing regulation imposes any duty upon businesses serving the public to require employees or patrons to wear face coverings under the Sanitary Code as a condition of operating and no such emergency regulations have been promulgated. *See* La. R.S. 49:954(A)(2) (An emergency rule shall become effective on the date of its adoption, or on a date specified by the agency to be no more than sixty days in the future from the date of its adoption).

The Emergency Order issued July 31, 2020, to Firehouse by State Health Officer Jimmy Guidry (co-singed by Secretary Phillips) (Exhibit B to Defendant's Answer and Reconventional Demand), *recognizes no such rules exist* as it references *only* the Mask Mandate contained in the 89 JBE 2020, then cites *generally* to La. R.S. 40:4(A)(13) (authority of the SHO *through the office of public health* to issue emergency rules and orders when necessary and for the purpose of controlling nuisances dangerous to the public health and communicable, contagious, and infectious diseases, and any other danger to the public life and health and safety) and La. R.S. 40:5(A)(1) (power to isolate or quarantine for the care and control of communicable disease within the state) and (2) (power to take "such action as is necessary to accomplish the subsidence and suppression of diseases of all kinds in order to prevent their spread). The authority to issue "orders," such as the Emergency Order issued to Firehouse, however, does not permit the SHO to unilaterally insert the Governor's Proclamation into the Sanitary Code as a substitute for compliance with the

mandatory statutory directive that he *strictly* comply with promulgation of rules pursuant to the LAPA.

What is perhaps even more revealing is the proposed "Agreement to Comply with Emergency Order" submitted to Firehouse as a condition to being allowed to re-open. That document contains clear content-based restrictions on Firehouse's speech, which it seeks to impose upon Firehouse by "consent" as a condition remaining open. The restrictions include a requirement that Firehouse "remove signs at the facility, and posts on social media, stating or indicating that compliance with the mask/face covering order requirements of the Governor's Covid-19 related Proclamations do not have to be adhered to at the facility by employees or customers or patrons." Another "consent" restriction proposed is that Firehouse "not replace or remove any such removed signs without substantially similar substitutes" and it proposes that Firehouse must agree to enforce the Proclamations at the facility "by ejecting from the Facility any employees or customers who fail or refuse to wear masks/face coverings as required by such proclamations."

So, to summarize:

- The Governor issued a Proclamation with an unlawful Mask Mandate that exceeds his authority.
- The Mask Mandate, as written, *expressly permits* individuals to exempt themselves.
- The Mask Mandate, as written, *expressly permits* businesses to rely on the subjective decision of any individual *not to wear* a mask/face covering.
- The Mask Mandate, as written, imposes no express duty upon any business owner to inquire of any employee or customer/patron regarding their decision.
- Neither LDH nor the Office of Public Health promulgated any rules or regulations relative to mask mandates (and the Governor has no authority to promulgate rules).
- The Emergency Order closing Firehouse cites only the Governor's Proclamation as the basis for Firehouse's substantive duty and as a basis for the SHO's exercise of authority pursuant to the Sanitary Code.
- LDH's proposed "Agreement to Comply with Emergency Order" threatens long-term closure and potential bankruptcy of Firehouse if it refuses to stop *criticizing* the Governor's orders and saying they are unlawful;
- LDH's proposed "Agreement to Comply" also imposes a vague and overbroad restriction on replacing any removed signs with "*substantially similar substitutes*," a content-based judgment presumably left entirely to the Department's (or the Governor's) discretion as to whether the speech is offensive enough to be "substantially similar," *and*

- It forces Firehouse to agree to discriminate against and eject its employees and patrons if they fail to wear a face covering, even though the Proclamation expressly permits those same individuals not to wear one.

The State Health Officer, as discussed above, did not have authority to interject the Proclamation into the Sanitary Code and impose it *by reference* in an Emergency Health Order. To the extent any such requirements are authorized as necessary to manage a threat to the public health, the SHO was required, through the Office of Public Health, to *strictly* comply with the APA and *promulgate rules*. Yet for nearly *six full months, he has failed to promulgate a single rule,* by emergency or ordinary rulemaking.[10]

The Governor's Proclamation, as discussed above, is insufficient to support Firehouse's closure and LDH has not pointed to any other legal authority for the closure or other restriction on it carrying on its operations.[11] The proposed consent order, which proposes to muzzle Firehouse's speech, is telling. It imposes government-supervised restrictions on speech and particularly of criticism of the Governor's orders[12] and it extorts compliance by threating to bankrupt the business

[10] While the State Health Officer did issue a number of generally applicable "SHO Orders," to the best of the Attorney General's knowledge those orders were never promulgated as emergency or ordinary rules subsequent to being issued. And while the LAPA permits "substantial compliance" with its terms, the public health statutes regarding the sanitary code require "strict compliance." The more specific statute therefore governs. *See, e.g., Liberty Mut. Ins. Co. v. Louisiana Ins. Rating Commission*, 96-0793 at 10 (La. App. 1 Cir. 2/14/1997), 696 So.2d 1021, 1027.

[11] The emergency powers Acts specifically permit commandeering of private property, but also provide for compensation. Commandeering of property by executive order of the governor falls within the definition of a "taking". *La Bruzzo v. State*, 14-262 (La. App. 5 Cir. 11/25/14), 165 So.3d 166, *writ denied,* 162 So.3d 385, 2014-2702 (La. 3/27/15). But the Governor has never expressed any intent to commandeer businesses as his enforcement police (which would be constitutionally questionable anyway). To the contrary, he has only ever expressed his exercise of authority as a raw exercise of police power he believes is authorized by and emanates from the emergency powers granted to him by the Acts in Title 29.

[12] In the Petition for a TRO, the LDH quotes from a post on Firehouse's Facebook page as part of its allegations supporting the "imminent threat to the public health." It is difficult to see how Firehouse's speech, which is clearly protected by the First Amendment and the State Constitution, constitutes an imminent threat to the public health and safety, especially given LDH and the Governor's admission that the business can rely on individual's representations. Nor does Firehouse's conduct. As discussed above, the Mask Mandate as written permits *any individual* to opt out of the mandate based upon a subjective determination and the Proclamation imposes no individual duty to communicate one's reasons to anyone as a condition or service. So Firehouse has *nothing to enforce even pursuant to the plain terms of the Proclamation.* Moreover, if virtually anyone is permitted to subjectively exempt themselves, it is difficult to conclude why it is necessary to protect public health or that not wearing it poses an "imminent threat to the public health.' The Proclamation makes no such pronouncement, which would be inconsistent with its many exemptions. The Proposed Consent Agreement goes much further than the Proclamation and threatens to bankrupt the business if it does not *eject* an employee or customer who is not wearing a mask, even if that individual is fully compliant by falling within one the many subjective exemptions. That could expose the business to liability both for acting as an agent of the

with a long-term, open-ended shut down for the duration of the emergency. That is not how government is permitted to operate under our State or federal constitutions.

II. LDH HAS NOT COHERENTLY OR CONSISTENTLY ENFORCED *ANY* RESTRICTIONS RELATIVE TO PUBLIC HEALTH "MANDATES" SINCE THE PANDEMIC BEGAN.

Prior to 89 JBE 2020, neither the Governor nor LDH took any actions to enforce any Proclamations or SHO orders, other than authorizing a handful of investigations related to elective procedures and then changing the SHO order to permit them. Consequently, compliance has been inconsistent from the beginning. Indeed, even the proclamations were vague and internally inconsistent, as they "required" people to stay home, while permitting thousands to move freely about.[13] The Governor issued proclamations demanding many business close, but left thousands that fell into vaguely referenced categories of "essential businesses" open without any apparent restrictions. (For example, Albertsons, Wal-Mart, Lowes, and many others, had no form of social distancing measures in place for months.) Although the emergency powers Acts both permit restricting sale of alcoholic beverages, the Governor has elected not to restrict the sale or consumption of alcohol anywhere. Instead, he closed some bars statewide, while leaving open bars in restaurants, casinos (with or without bars), and permitted video poker to continue anywhere it is ordinarily allowed. The Governor criticized some crowds, like in church gatherings, but *encouraged* others, like in protests. *See, e.g. Spell v. Edwards*, 962 F.3d 175, 181 (5th Cir. 2020). Until Firehouse publicly *criticized* the Governor's *ultra vires* acts, it operated without government interference.[14] But apparently the one action that *does* trigger enforcement is *publicly* stating the

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government *and* for violating public accommodation laws by discriminating against individuals based on their physical condition.

[13] At one point in May during a press conference the Governor stated that his orders did not in fact close many businesses, after he had for months prior in daily press conferences confirmed should remain closed (and at a minimum never said could remain open). See Sara Pagones, Governor says small 'nonessential' businesses never had to close, surprising some St. Tammany merchants, May 1, 2020. https://www.nola.com/news/communities/st_tammany/article_6ef06ac6-8bbb-11ea-ac46-8f550365ef8f.html (last visited August 18, 2020).

[14] How the LDH came to "investigate" the alleged violations at Firehouse is an interesting question. The Governor and LDH's pleadings indicate complaints were received about the post on the door. The LDH TRO request references the "OpenSafely.la.gov" website, which permits businesses to "register" and generates a compliance certification, but nothing about that website has been promulgated so the piece of paper it generates appears to be nothing more than something to make the public feel better. To the extent the Governor encourages complaints against businesses to be filed there that lead to further government action, the site invites a whole separate set of constitutional problems.

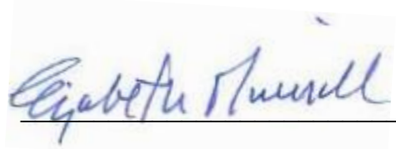
Proclamation is unenforceable and *publicly* refusing to comply with it. That triggered a closure order purportedly based on non-existent regulations and a threat to bankrupt the business if it will not accede to LDH oversight of content-based restrictions on its speech and agree to become the Governor's Mask Enforcer. There simply is no basis in our law or constitution for such conduct. The Governor's conduct and LDH's complicity with it support an injunction against the Mask Mandate that not only would protect Firehouse, but also protect the thousands of other businesses that are currently threatened with closures, or being extorted with *ultra vires* "agreements" simply to remain open.

CONCLUSION

For the reasons stated above, Firehouse's motion for a preliminary injunction against the Defendant's in reconvention should be granted.

Respectfully submitted:

JEFF LANDRY
ATTORNEY GENERAL

By: 

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