

5216 OPERATIONS, LLC
d/b/a 5216 TABLE AND TAPS

VERSUS

LOUISIANA OFFICE OF ALCOHOL
AND TOBACCO CONTROL

SUIT NO. 816-089 DIV: M

24TH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

AMICUS CURIAE BRIEF OF ATTORNEY GENERAL JEFF LANDRY
IN SUPPORT OF PLAINTIFF

Neither the Governor nor the ATC has the power to unilaterally make law under the Louisiana Constitution. But the ATC’s position in this case relies entirely on that unfounded proposition. Plaintiff correctly argues that the ATC’s actions in this case were unlawful, and the Attorney General joins those arguments in full. *See* Plaintiff’s Memo in Support of Mot. for TRO and Prelim. Inj.; Plaintiff’s Supp. Memo in Support of Mot. for a Prelim. Inj. The Attorney General writes separately to emphasize the separation of powers issues raised by the ATC’s position on the merits in this case.

ARGUMENT

The ATC, an executive agency,¹ says it can rely on The Alcoholic Beverage Control Law, La. R.S. 26:1, *et seq.*, to enforce an emergency gubernatorial proclamation. Ex. A (Notice of Suspension), Verified Pet. for Declaratory Jmt.; ATC’s Memo in Support of Exceptions, at 1. This reflects a fundamental misunderstanding of constitutional law. First, the Legislature, *not* the Governor, makes the law. Second, although the Legislature *can* delegate limited quasi-legislative powers to the Governor, it *cannot* delegate the power to amend, via *emergency proclamation*, entire statutory schemes. And third, even if the Legislature *could* delegate the power to amend hundreds of statutes in one fell swoop—it cannot—it did not do so in either of the Acts under which the Governor has promulgated emergency proclamations this past year. The ATC’s position therefore rests on a house of cards.

¹ The ATC is an “administrative unit” of the Department of Revenue. La. R.S. 26:791. And the Department of Revenue is a part of the State’s executive branch. La. R.S. 36:4. The Governor exercises authority over both as the chief executive officer of the State. La. Const. art. IV, § 5(A).

I. THE LEGISLATURE, NOT THE GOVERNOR, MAKES THE LAW.

Under the Louisiana Constitution, there are three branches of government: legislative, executive, and judicial. La. Const. art. II, § 1. No one of the branches, “nor any person holding office in one of them, shall exercise power belonging to either of the others.” *Id.* art. II, § 2.

Within this tripartite system, “it is axiomatic that the legislature is vested with the *sole* law-making power of the State.” *Krielow v. La. Dep’t of Agric. & Forestry*, 2013-1106, p. 19 (La. 10/15/13), 125 So. 3d 384, 397 (emphasis added); *see* La. Const. art. III, §§ 1, 14-20. Because the Legislature exercises the State’s *legislative* power, the Governor—the State’s chief *executive* officer—cannot make law.² *State v. Miller*, 2003-0206, p. 5 (La. 10/21/03), 857 So. 2d 423, 427 (“[U]nless the constitution expressly grants an enumerated legislative power to the executive or the Legislature has enacted a statute expressly authorizing another branch to exercise its power, the executive does not have the power to perform a legislative function.”). Instead, the Governor’s job is to enforce the law as written by the Legislature. La. Const. art. IV, § 5(A).

II. THE GOVERNOR CAN ONLY TAKE ACTION THAT RESEMBLES LAW-MAKING UNDER VERY LIMITED CIRCUMSTANCES.

Despite the Constitution’s express separation of powers clause, the Louisiana Supreme Court has held that executive officials can occasionally, under specific circumstances, take action that resembles legislating. For such quasi-legislative action to be constitutional, it must stem directly from a statute—an “enabling” statute—which itself must be able to withstand the “three-prong test” first explained by the Louisiana Supreme Court in *Schwegmann Brothers Giant Super Markets v. McCrory*, 112 So.2d 606 (La. 1959). To pass the *Schwegmann* test, an enabling statute must: (1) contain a clear expression of legislative policy; (2) prescribe sufficient standards to guide an official’s execution of that policy; and (3) be accompanied by adequate procedural safeguards to protect against abuse of discretion by the official. *Miller*, 857 So.2d at 430.

If the executive’s action has no statutory grounding, it is a plain violation of the separation of powers doctrine. La. Const. art. II, § 2. If, however, there *is* statutory authority for the executive’s action, but the statute *itself* contains an over-delegation of legislative authority to an executive, then the statute is unconstitutional under the non-delegation doctrine. *Miller*, 857 So.2d

² The Governor’s law-making role is limited to the veto power. La. Const. art. III, §§ 17-18.

at 430. In the latter case, the *executive's* action is *still* unconstitutional because the only way it occurred in the first place is pursuant to the unconstitutional statute. To come full circle, a quasi-*legislative* act done by an *executive* official pursuant to an *invalid* statute is the same as an executive act taken with no statutory authority whatsoever—a plain violation of the separation of powers doctrine.

III. THE LEGISLATURE DID NOT DELEGATE TO THE GOVERNOR THE POWER TO CLOSE BUSINESSES THAT DO NOT FOLLOW THE GUIDELINES IN HIS PROCLAMATIONS.

In gubernatorial proclamations issued over the last year—including the one at issue in this case, 17 JBE 2021—Governor John Bel Edwards has routinely cited to two legislative acts to support his executive actions. The first is the Louisiana Homeland Security and Emergency Assistance and Disaster Act (“Disaster Act”), 1993 La. Acts, No. 800, § 1, effective June 22, 1993 (codified at La. R.S. 29:721-25). The second is the Louisiana Health Emergency Powers Act (Health Emergency Act), 2003 La. Acts, No. 1206, § 1, effective August 15, 2003 (codified at La. R.S. 29:760-72). Neither law confers upon the Governor the power to unilaterally establish mask mandates, social distancing rules, and restaurant capacity limits and then strip businesses, including restaurants and bars, of their authority to operate if they allegedly violate his directives.

In fact, both acts delegate to the Governor the same limited powers. *Compare* La. R.S. 29:724(C)-(D) (Disaster Act) *with* La. R.S. 766(D) (Health Emergency Act). The only power that touches alcohol regulation appears in La. R.S. 724(D)(6) of the Disaster Act and La. R.S. 766(D)(8) of the Health Emergency Act, which state that the Governor may “[s]uspend or limit the sale, dispensing, or transportation of alcoholic beverages[.]” Forcing restaurants to observe mask mandates is not limiting the “sale, dispensing, or transportation” of alcohol under the most liberal interpretations of the statutes. Accordingly, the Legislature did not delegate to the Governor the power, under either the Disaster Act or the Health Emergency Act, to *unilaterally* create such rules and force businesses to comply with them under the threat of permanent closure. He therefore does not possess such authority.

IV. IF THE LEGISLATURE HAD DELEGATED SUCH POWER TO THE GOVERNOR, THE DELEGATION WOULD ITSELF VIOLATE THE NON-DELEGATION DOCTRINE.

Even if the Legislature *had* delegated to the Governor the power to make businesses, including restaurants and bars, enforce his mask mandates and social distancing rules, among

others, through this lone alcohol-related provision in the acts, the delegation itself would violate the non-delegation doctrine. This is because such a delegation would fail all three elements of the *Schwegmann* test.

First, the statutes contain no “clear expression of legislative policy” that the Governor be given the sole authority to both invent arbitrary rules and haphazardly enforce them on local restaurants. *See Krielow*, 125 So.3d at 397. On the contrary, they contain express “purpose” statutes that reflect a clear intent to provide coordinated, consistent services to the People of Louisiana during an unprecedented situation. La. R.S. 29:722; La. R.S. 29:761. Second, the acts do not “prescribe sufficient standards to guide” the Governor’s execution of his policies—he can simply issue them by proclamation without asking for anyone’s permission. *See Krielow*, 125 So.3d at 397. Third, and finally, given the fact that the Governor has sued to challenge the only legislative safeguard to protect against an abuse of his discretion, certainly the third element cannot be established. *See id.* (holding that a delegation contained insufficient legislative review to survive *Schwegmann*’s third prong); La. R.S. 29:768(B) (legislative review provision in Health Emergency Act); *Edwards v. Louisiana Legislature, et al.*, No. C-700923, 19th JDC (Governor Edwards’s suit challenging the constitutionality of La. R.S. 29:768(B)).

It is therefore clear that even if the Governor *had* been delegated the power ATC suggests he has, that delegation would have created a serious constitutional problem for the Governor, because the acts he has been relying on would *themselves* constitute invalid over-delegations of legislative power. But the Louisiana Supreme Court has made it clear that courts *must* interpret statutes in a way that keeps them constitutional when feasible. *State v. Rochon*, 2011-0009, p.19 (La. 10/25/11), 75 So. 3d 876, 889 (citing *State v. Interiano*, 2003-1760, p. 4 (La.2/13/04); 868 So.2d 9, 13). This is part and parcel of rule that statutes must be presumed constitutional—a presumption that is “especially forceful” in the public health context. *Carver v. Louisiana Dep’t of Pub. Safety*, 2017-1340, p. 5 (La. 1/30/18), 239 So.3d 226, 230. By interpreting the statutes at issue as Plaintiff proposes, this Court would be honoring the canon of constitutional avoidance.

CONCLUSION

This Court should grant the relief sought by Plaintiff because no emergency gubernatorial proclamation could have authorized the ATC to punish Plaintiff the way it did.

Respectfully submitted:

JEFF LANDRY
ATTORNEY GENERAL

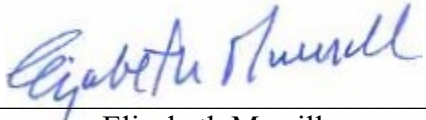
By:  _____

ELIZABETH B. MURRILL (#20685)
Solicitor General
BEN WALLACE (#39516)
Asst. Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, LA 70804
Tel: (225) 326-6766
murrille@ag.louisiana.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing Amicus Curiae Brief and Motion has been served upon all known counsel of record in this suit by electronic mail, and/or depositing same in the United States mail, postage prepaid, and properly addressed.

Baton Rouge, Louisiana, this 14th day of April, 2021



Elizabeth Murrill
La. Bar No. 20685
My commission ends at death.