COURT OF APPEAL, 5th CIRCUIT
STATE OF LOUISIANA
DOCKET NO. 2021-CA-520

5216 OPERATIONS, LLC D/B/A 5216 TABLE AND TAPS,

Plaintiff-Appellee

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF REVENUE, OFFICE OF ALCOHOL AND TOBACCO CONTROL,

Defendant-Appellant

On appeal from the 24th Judicial District,
Parish of Jefferson, Division "M," State of Louisiana
Docket No. 816-089
Honorable Shayna Beevers Morvant, Presiding

***AMICUS CURIAE* BRIEF BY ATTORNEY GENERAL JEFF LANDRY IN SUPPORT OF PLAINTIFF-APPELLEE**

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SUMMARY OF ARGUMENT

The district court correctly held that the ATC lacks the power to enforce Governor John Bel Edwards's emergency proclamations. In doing so, the court properly rejected the ATC's tortured interpretations of the provisions of Titles 26 and 29 of the Louisiana Revised Statutes at issue in this suit. Plaintiff-Appellee Table & Taps defends the judgment below and the district court's reasoning in its brief. The Attorney General joins those arguments in full and believes that this Court can affirm the district court's judgment on those grounds.

The Attorney General writes separately, however, as *amicus curiae* to emphasize the constitutional problems raised by the ATC's position in this case. As a threshold matter, the Governor's mask wearing and social distancing mandates are unenforceable because they violate the separation of powers clause in Louisiana's Constitution. So it's not just that the ATC cannot enforce them; no one can. Additionally, accepting ATC's arguments about the scope of its powers would create both over-delegation and Due Process problems. For these reasons, in addition to those identified by the district court, the lower court's judgment enjoining the ATC from enforcing the Governor's emergency proclamations should be affirmed.

ARGUMENT

I. THE LEGISLATURE MAKES THE LAW, THE GOVERNOR ENFORCES IT, AND EXECUTIVE AGENCIES LIKE THE ATC CAN ONLY ACT PURSUANT TO AND CONSISTENT WITH THEIR ENABLING STATUTES

In Louisiana, the State derives its governing power directly from its People. La. Const. art. I, § 1. The Louisiana Constitution divides these powers among three separate branches of state government: legislative, executive, and judicial. *Id.* art. II, § 1. Generally speaking, the legislative branch makes the law, the executive branch enforces the law, and the judicial branch interprets the law. *Id.* art. III, § 1 (vesting legislative power in Legislature); *id.* art. IV, § 5 (vesting executive power in Governor); & *id.* art. V, § 1 (vesting judicial power in courts). Under the Constitution's strict separation of powers clause, no one of these three branches can exercise power belonging to either of the others. *Id.* art. II, § 2.

A. THE LEGISLATURE IS THE STATE'S SOLE LAWMAKING BRANCH OF GOVERNMENT

"The legislative power is the power to make laws." *State ex rel. Guste v. Legislative Budget Comm.*, 347 So.2d 160, 165 (La. 1977). Under the Louisiana Constitution's separation of powers clause, "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). Strictly speaking, therefore, any attempt by an officer or arm of the State's *executive* branch—including the Governor or the ATC—to legislate or "make law" violates

the Constitution's separation of powers clause. *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.").

B. THE EXECUTIVE BRANCH'S QUASI-LAWMAKING POWERS ARE VERY LIMITED WHERE THEY EXIST AT ALL

Despite the Constitution's express separation of powers clause, the Louisiana Supreme Court has held that executive officials can occasionally, with the Legislature's permission, take action that *resembles* legislating if it is "administrative" or "ministerial" in nature. *State v. Alfonso*, 1999-1546, p. 6 (La. 11/23/99), 753 So.2d 156, 160 ("Primary legislative power, strictly speaking, may not be delegated, but administrative and ministerial functions may, by statute, be delegated to an agency in the executive branch."). Still, such action remains unconstitutional unless it can be traced directly from a statute—an "enabling" statute—that itself does not over-delegate legislative power under the now-familiar "three-prong test" first explained by the Louisiana Supreme Court in *Schwegmann Brothers Giant Super Markets v. McCrory*, 112 So.2d 606 (La. 1959). For an enabling statute to pass constitutional muster under *Schwegmann*, it 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 an executive's quasi-legislative action has no statutory grounding, it is a plain violation of the Constitution's separation of powers clause. 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 at 430. In the latter case, the *executive*'s action is *still* unconstitutional because the only way it occurred in the first place was pursuant to the unconstitutional statute. To come full circle, a quasi-legislative act done by an *executive* official pursuant to a statute that violates the non-delegation doctrine is equivalent to an executive act taken with no statutory authority whatsoever—both violate the Louisiana Constitution's separation of powers clause.

C. EXECUTIVE AGENCIES LIKE THE ATC ARE STATUTORY CREATURES WHOSE POWERS ARE NOT "INHERENT" BUT INSTEAD ARE LIMITED TO THOSE EXPRESSLY DELEGATED TO THEM BY THE LEGISLATURE

The ATC argues in this case that is possesses "inherent" authority to regulate alcohol. ATC Br. at 2, 7, 8, 11, and 18. It doesn't. As an executive agency, none of its power is "inherent" in any sense of the word. Instead, all of the ATC's "authority" stems directly and entirely from the legislation that created it—its enabling statute—which is within Title 26 of the Louisiana Revised Statutes. La. R.S. 26:791-92

(creating the ATC and laying out the powers of its commissioner); *see Alfonso*, 753 So.2d at 162 (explaining that agencies may only act pursuant to and consistent with their enabling statutes). If the Legislature wanted to eliminate the ATC, it could. By definition, an agency that lives and dies at the whim of the Legislature does not possess "inherent" authority to do anything.

The ATC also suggests that it derives power from the 21st Amendment of the United States Constitution. ATC Br. at 1, 7, 11-13, and 18. In the broadest sense of the word "derive," it's true that there would be no ATC without the 21st Amendment. Because without the 21st Amendment, the sale of alcohol would still be prohibited nationwide, so there would be no alcohol market to regulate. *Compare* U.S. Const. amend. XVIII (prohibiting the sale of alcohol) *with* U.S. Const. amend. XXI (repealing the 18th Amendment). But for the purposes of this lawsuit, the 21st Amendment is irrelevant. To borrow the ATC's phrasing, it's a red herring. *Cf.* ATC Br. at 8. The scope of the ATC's powers has nothing to do with federal law; it is entirely a matter of state law.

II. THE GOVERNOR LACKS THE POWER TO MANDATE MASK WEARING AND SOCIAL DISTANCING

A. THE GOVERNOR'S EMERGENCY POWERS ARE LIMITED TO THOSE ENUMERATED IN TITLE 29

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). Because these statutes grant the Governor the power to act quasi-legislatively under limited circumstances when he declares emergencies, his powers are limited to those provided by the Acts. *See supra*, Section I.B.

B. TITLE 29 DOES NOT EMPOWER THE GOVERNOR TO MANDATE MASK WEARING AND SOCIAL DISTANCING

Both the Disaster Act and Health Emergency Act delegate to the Governor the same limited quasi-legislative powers. *Compare* La. R.S. 29:724(C)-(D) (Disaster Act) *with* La. R.S. 29:766(D) (Health Emergency Act). The only power that touches alcohol regulation appears in La. R.S. 29:724(D)(6) of the Disaster Act and La. R.S. 29:766(D)(8) of the Health Emergency Act. Both provisions state that the Governor may "[s]uspend or limit the sale, dispensing, or transportation of alcoholic beverages[.]"

Ordering bars to enforce mask mandates and social distancing rules is not limiting the "sale, dispensing, or transportation" of alcohol under the most liberal interpretation 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. And because the Legislature never delegated such power to him, he doesn't have it.

C. If Title 29 had provided the Governor with the broad lawmaking power he claims he has, it would violate the non-delegation doctrine

Even if the Legislature *had* delegated to the Governor the power to make bars enforce his mask mandates and social distancing rules, the delegation itself would violate the non-delegation doctrine. This is because such a delegation would fail all three elements of the *Schwegmann* test. *See supra*, Section I.B.

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 bars. *Krielow*, 125 So.3d at 397. On the contrary, the Acts 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; *id.* at 29:761. Second, the acts do not "prescribe sufficient standards to guide" the Governor's execution of his policies. *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, the third element also cannot be established. *See id.* (holding that a statutory delegation contained insufficient legislative review mechanisms 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 the legislative oversight provisions contained in La. R.S. 29:768(B)).

In sum, even if the Disaster Act or Health Emergency Act actually *did* empower the Governor to issue mask wearing and social distancing mandates like the ones Table & Taps was accused of violating, the delegation of such power would be unconstitutional. And unconstitutional statutes, by definition, are legally unenforceable.

III. THE ATC LACKS THE AUTHORITY TO ENFORCE THE GOVERNOR'S EMERGENCY PROCLAMATIONS

A. BECAUSE THE GOVERNOR'S MASK WEARING AND SOCIAL DISTANCING PROVISIONS ARE UNENFORCEABLE, THE ATC CAN'T ENFORCE THEM

The Governor's orders mandating mask wearing and social distancing are unenforceable because the Legislature did not delegate to him the power to issue such rules and, even if it had, that delegation itself would be unconstitutional. As a straightforward matter, because the orders are unenforceable, the ATC cannot enforce them. And because the ATC cannot enforce the orders, its administrative prosecution of Table & Taps was invalid, and the district court's judgment should be affirmed.

B. THE GOVERNOR'S PROCLAMATIONS THEMSELVES PROHIBIT THE ATC FROM ENFORCING ANY POTENTIALLY ENFORCEABLE PROVISIONS IN THEM

Although the Disaster and Health Emergency Acts do not give the Governor the power to mandate mask wearing or social distancing, they do grant him *some* limited quasi-legislative powers once he declares an emergency. For example, because the Acts grant him the express power to "[s]uspend or limit the sale" of "alcoholic beverages," his orders requiring bars to close by 11 p.m. are at least arguably within his statutory grant of authority. La. R.S. 29:724(D)(6); *id.* at 29:766(D)(8); *see, e.g.*, 17 JBE 2021 § 2(C)(4)(c) (ordering bars to close by 11 p.m.).

Nevertheless, the Governor's emergency proclamations—*by their own terms*—do not grant *the ATC* the power to enforce his orders. Instead, they expressly grant that power to "[t]he Governor's Office of Homeland Security and Emergency Preparedness [GOHSEP] and the State Fire Marshal." *E.g.*, 17 JBE 2021 § 5. This makes sense because the Health Emergency Act orders the director of GOHSEP to enforce public health emergency declarations. La. R.S. 29:767.

More importantly, in the Disaster Act, the Legislature *expressly limited* the penalties for violating emergency proclamations to a maximum of six months in jail and a $5,000 fine. La. R.S. 29:724(E). As the Louisiana Supreme Court has "repeatedly" stated, "as a general rule of statutory interpretation, a specific statute controls over a broader, more general statute." *Catahoula Par. Sch. Bd. v. Louisiana*

Mach. Rentals, LLC, 2012-2504, p. 3 (La. 10/15/13), 124 So.3d 1065, 1079. Therefore, the fact that Title 26 *generally* grants the ATC the authority to enforce the State's alcohol permitting regime is irrelevant in this context because the Legislature explicitly limited the penalties for emergency executive proclamation violations by statute. The ATC's argument to the contrary, ATC Br. at 8, ignores this tenet of statutory interpretation and should be rejected by this Court.

C. THE ATC'S STRAINED INTERPRETATION OF TITLE 26, TITLE 29, AND THE PROCLAMATIONS WOULD CREATE ADDITIONAL SEPARATION OF POWERS AND DUE PROCESS PROBLEMS

Ultimately, the ATC asks this Court to read various provisions of Title 26, Title 29, and the Governor's executive proclamations in a vacuum to conclude that it has the authority to strip business owners of their livelihood based on orders that even the Governor lacked the authority to issue. But the ATC's interpretation of the law would render the same statutes they rely on—the "good character" and "improper" conduct statutes—unconstitutional in two separate respects. *See* La. R.S. 26:80(A)(1) (requiring permit holders to be "of good character"); *Id.* at 26:90(A)(13) (prohibiting permit holders from allowing "improper . . . conduct" on their premises). And because courts must construe statutes to preserve their constitutionality "when it is reasonable to do so," the ATC's arguments in this case should be rejected. *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 2007-2371, p. 22 (La. 7/1/08), 998 So.2d 16, 31.

First, relying on these statutes to penalize permit holders for alleged proclamation violations raises a separation of powers problem similar to the one created by the Governor issuing *ultra vires* executive rules by fiat. *See supra*, Section II.B-C. But these statutes would actually be *worse* from a constitutional perspective. Under the emergency acts, the Legislature at least authorized the Governor to act quasi-legislatively in limited respects during emergencies. It has given no such authority to the ATC. But even if it had, delegating the power to essentially create vague legislative rules out of whole cloth without legislative oversight would fail all three prongs of the *Schwegmann* test. *See supra*, Section II.C.

Second, a "law is fatally vague and offends due process when a person of ordinary intelligence does not have a reasonable opportunity to know what is prohibited so that he may act accordingly or if the law does not provide a standard to prevent arbitrary and discriminatory application." *Med Exp. Ambulance Serv., Inc. v. Evangeline Par. Police Jury*, 1996-0543, p. 11 (La. 11/25/96), 684 So.2d 359, 367. This vagueness doctrine applies even to businesses and even in the civil context. *See id.* And here, interpreting the good character and improper conduct statutes in Title 26 to permit penalties based on emergency proclamations would offend the most basic notions of Due Process. *See Mudge v. Plaquemines Par. Council*, 2015-0983, p. 2 (La. App. 4 Cir. 3/23/16), 192 So.3d 172, 174 (discussing trial court's holding that zoning ordinance was unconstitutionally vague). At bottom, a person of

ordinary intelligence would not know that having "good character" requires adherence to proclamations that are themselves lacking in legal authority. Nor would such a person expect that failing to comply with such proclamations constitutes "improper" conduct that could put their livelihood in peril.

Because ATC's interpretations of the good character and improper conduct provisions in Title 26 would render those statutes unconstitutional on separate grounds, this Court should apply the canon of constitutional avoidance and reject their arguments.

CONCLUSION

Because the ATC lacks the authority to enforce the Governor's emergency proclamations, this Court should affirm the district court's judgment enjoining the ATC from enforcing the proclamations against Table & Taps.

Respectfully submitted:

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/s/ Elizabeth Murrill
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing Amicus Brief has been served upon all known counsel of record in this suit by electronic mail and by electronic filing with this Court.

Baton Rouge, Louisiana, this 27th day of September, 2021.

/s/ Elizabeth Murrill

_____

Elizabeth Murrill
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