

19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

CASE NO.:

DIVISION: “ ”

JUSTIN MOLAISSON, ET. AL.

V.

JOHN BEL EDWARDS, in his official capacity as
GOVERNOR OF THE STATE OF LOUISIANA

FILED: _____

DEPUTY CLERK

**VERIFIED PETITION
FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

NOW INTO COURT, through undersigned counsel, come Plaintiffs, who submit this petition for an injunction and temporary restraining order pursuant to the *Louisiana Code of Civil Procedure, Art. 3603*, as more specifically outlines below:

PARTIES

I.

Plaintiffs herein are:

- A. JUSTIN E. MOLAISSON, an adult resident of the Parish of Jefferson, State of Louisiana;
- B. JENNIFER LABELLA TUSA, an adult resident of the Parish of Jefferson, State of Louisiana;
- C. TINA’S BAJA CANTINA, LLC, a registered Louisiana Limited Liability Company with a principal place of business located in the Parish of Jefferson, State of Louisiana;
- D. RONALD DALLEO, an adult resident of the Parish of Jefferson, State of Louisiana.

(collectively hereinafter “PETITIONERS”)

II.

Defendant herein is JOHN BEL EDWARDS, in his official capacity as GOVERNOR OF THE STATE OF LOUISIANA (hereinafter “GOVERNOR EDWARDS”) (sometimes hereinafter “DEFENDANT”).

JURISDICTION AND VENUE

III.

Venue and jurisdiction is proper.

FACTUAL ALLEGATIONS

IV.

COVID-19 is an infectious disease that original in Wuhan, China in 2019 and was present in the United States by early 2020.

V.

In response to the COVID-19 pandemic, the Secretary of the United States, Department of Health and Human Services, declared a public health emergency on January 31, 2020, and the President of the United States declared a national emergency on March 13, 2020.¹

VI.

Governor Edwards likewise declared a statewide public health emergency on March 11, 2020.² Governor Edwards then issued a series of “Stay at Home” orders that, among other things, ordered the people of Louisiana to stay at their homes unless taking essential trips or to travel to or from a place of employment, ordered some non-essential businesses to be closed, and places limitations on other businesses that were allowed to remain open.

VII.

The Stay at Home orders were driven largely by concerns that ventilators, hospital capacity, and personal protective equipment (“PPE”) supplied would be exhausted, and the orders were at least colorably authorized by the statute.

VIII.

Since the time of the original Stay at Home order, the number of new COVID-19 cases and COVID-related hospitalizations in Louisiana have decreased, with the peak of hospitalizations occurring on or near April 13, 2020.³

¹ *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 14337 (Mar. 18, 2020).

² Proclamation 25 JBE 2020.

³ *See* Proclamation 74 JBE 2020.

IX.

The severity and adverse outcomes of COVID-19 infections appear to have decreased. Experts have identified several factors driving that trend. Increased testing allows for earlier intervention when available treatments seem to work best. Earlier, more effective treatments also reduce pressure on medical professionals and hospitals, thereby allowing better treatment of patients who are seriously ill. The medical profession has also gained a better handle on how to treat COVID-19 via techniques such as proning, blood thinners, and administration of certain steroids. These same factors have greatly reduced the concerns that drive the Stay at Home orders.

X.

On May 15, 2020, consistent with guidance issued by the White House Coronavirus Task Force, the Governor ordered the State of Louisiana into Phase I of recovery and reopening. As part of his Phase I order, the Governor lifted portions of the Stay at Home orders.

XI.

On June 4, 2020, consistent with guidance issued by the White House Coronavirus Task Force, the Governor ordered the State of Louisiana into Phase II of recovery and reopening. As part of his Phase II order, the Governor lifted additional portions of the Stay at Home orders.

XII.

In May and June, large numbers of medical professionals departed from the CDC's advice and urged that the political benefits of certain protests outweighed the epidemiological costs of further spreading COVID-19. Elected officials followed along, supporting the protests without expressing any concern for the COVID-19 infections that would inevitably result, or for violations of existing emergency orders.

XIII.

Judge James Ho, of the US Court of Appeals for the Fifth Circuit noted the disparate treatment between churches and protestors in *Spell v. Edwards*, 963 F.3d 175 (5th Cir. 2020):

In recent weeks, officials have not only tolerated protests - they have encouraged them as necessary and important expressions of outrage over abuse of government power.

For people of faith demoralized by coercive shutdown policies, that raises a question: If officials are now exempting protestors, how can they justify continuing to restrict worshipers? The answer is that they can't. Government does not have carte blanche, even in a pandemic, to pick and choose which First Amendment rights are "open" and which remain "closed."

See *Spell v. Edwards*, 962 F.3d 175 (5th Cir. 2020) (Ho, J., concurring).

XIV.

The wearing or not wearing of masks has become deeply imbued with political overtones, including respect for individual liberties and self-determination in contrast to blindly following the latest government orders.

89 JBE 2020

XV.

On July 11, 2020, nearly six months since COVID-19 was detected in the United States, four months after the Governor declared an emergency, and two months after the Governor began reopening the State of Louisiana, Governor John Bel Edwards issued Proclamation 89 JBE 2020, attached hereto as Exhibit "A" (hereafter "89 JBE 2020") amending his pre-existing order, in essence issuing a statewide mask mandate, limiting indoor and outdoor gatherings to 50 people, and closing bars.

XVI.

For the reasons set forth herein, 89 JBE 2020 has no legal basis or authority.

XVII.

89 JBE 2020 is unconstitutionally vague, riddled with many exceptions, all of which are subjectively determined, such that "men of common intelligence must necessarily guess at its meaning and differ as to its application." See Bode, et al. V. Kenner City, et. AL., 3030 F. Sup. 3d 484 (E.D. La.03 /19/19).

XVIII.

Many citizens, including Plaintiffs, will comply with the Order only to avoid the penalties threatened in the Order.

XIX.

On July 15, 2020, Attorney General, Jeff Landry, issued Opinion 20-0068, attached hereto as Exhibit “B” (hereafter “the Opinion Letter”) regarding the unconstitutionality of certain provisions of 89 JBE 2020.

IRREPARABLE HARM

XX.

The Stay at Home orders were economically devastating, including to Plaintiffs. Indeed, according to the United State Bureau of Labor Statistics, over 200,000 Louisiana jobs were lost between December 2019 and May 2020, and the unemployment rate rose from 5.2% to 13.3%. The Order threatens further severe economic and business disruption.

XXI.

Compounding the disruption caused by the Order itself, consumers have threatened to boycott business that comply with the Order in view of the potent political symbolism that is associated with masks. This could result in a loss of good will to these businesses with masks, and for other individual reasons.

XXII.

Business Interruption claims have been almost universally denied and it is quite possible that Insurance companies will not be responsible for business interruptions claims due to governmental shutdowns and arbitrary and vague rules regarding COVID-19 restrictions. With the uncertainty of the length of time these governmental shutdowns and COVID-19 restrictions will remain in place, irreparable harm is imminent as many business owners navigate how to keep their businesses and good will viable with many business closing their doors permanently.

XXIII.

Recently it has been reported that extreme violence, sometimes ending in fatalities, are occurring due to the mask mandate implemented across the country. In Michigan, on Tuesday, July 14, 2020, a subject who refused to wear a mask at Michigan store stabbed another customer who

confronted him. That subject was later shot and killed by a Sheriff deputy who he later confronted and attacked. Days prior, in California, a security guard shot and killed a customer who was not wearing a face mask. The security guard has subsequently been charged with murder. In early May, in Michigan, Governor Whitmer mandated all customers and employees must have face coverings inside grocery stores. A security guard at a grocery store in Michigan was subsequently shot and killed for denying entry to a family refusing to wear masks. Even in Shreveport, a convenience store clerk is facing charges for discharging a firearm after a dispute with a customer not wearing a mask in his store. When business owners lives are in jeopardy due to arbitrary and vague penalties and enforcement, irreparable harm is clearly exigent.

XXIV.

Furthermore, uncertainty over the lawfulness of the Order, including vis-a-vis the contrary command of La. R.S. 14:313, will cause some Plaintiffs to cease doing business until the uncertainty is resolved.

XXV.

Regardless, Plaintiffs are “entitled to injunctive relief without the requisite showing of irreparable injury [because] the conduct sought to be restrained is unconstitutional or unlawful.” *Jurisch v. Jenkins*, 749 So.2d 597, 599 (La. 1999) (citing *S. Cent. Bell Tel. Co. V. La. Pub. Serv. Commn*, 555 So.2d 1370 (La. 1990)).

ULTRA VIRES ORDER

XXVI.

The preceding allegations are incorporated in full as if fully set forth.

XXVII.

Governor Edwards has no inherent authority to command any conduct by citizens.

XXVIII.

The Proclamation is not authorized by Louisiana Constitution or any Louisiana law, specifically, La. R.S. 29:721 et seq., and La R.S. 29:760 et seq. No authority authorizes Governor Edwards to impose arbitrary and vague penalties for violation of the Proclamation. In fact, Governor

Edwards is specifically excluded from diminishing the rights guaranteed to all persons under the Declaration of Rights of the Louisiana Constitution or the Bill of Rights of the United States Constitution. See La. R.S. 29:736(D).

XXIX.

To the extent the Order is authorized by law, it is procedurally defective, such that it is null and void.

RIGHT TO DUE PROCESS OF LAW

XXX.

The preceding allegations are incorporated in full as if fully set forth.

XXXI.

Article I, Section 2, of the Louisiana Constitution provides that “No person shall be deprived of life, liberty, or property, except by due process of law.”

XXXII.

The Order purports to permit enforcement by undefined measures.

XXXIII.

The Order threatens to terminate or suspend businesses or alcohol permits of any businesses, amounting to a violation of due process as these permits are recognized property interests protected under the due process clause and also result in a constructive taking via government regulation.

XXXIV.

The Order poses as direct conflict with La. R.S. 14:313 and hereby presents the enforcers of these mandates, namely business owners, the following conundrum: to arbitrarily determine the intent of a mask wearer whether or not his intent is to conceal his identity, a violation of La. R.S. 14:313, or in compliance with the COVID-19 Order.

EQUAL PROTECTION

XXXV.

The preceding allegations are incorporated in full as if fully set forth.

XXXVI.

The Order applies arbitrarily, capriciously, and without rational basis.

XXXVII.

The Order cites no data to support the closures of a single business type statewide in violation of the Equal Protection clause of the Louisiana Constitution.

RIGHTS TO FREE EXPRESSION AND TO ASSEMBLE PEACEFULLY

XXXVIII.

The preceding allegations are incorporated in full as if fully set forth.

XXXIX.

Article I, Section 7, of the Louisiana Constitution provides: “No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom.”

XL.

Article I, Section 9, of the Louisiana Constitution provides: “No law shall impair the right of any person to assemble peaceably[.]”

XLI.

On its face the Order is in violation of the right to free expression and the right to assemble peacefully as it has no rational basis and fails to serve a legitimate governmental purpose. Limitations in the Order are not distinguished by indoor space capacity, outdoor available space, and exempts thousands of businesses regardless of their size.

XLII.

Church services are allowed to be held without masks, but you cannot have another constitutionally protected group gathering or outing.

XLIII.

Furthermore, those that are exempt from wearing masks due to medical reasons and/or exemptions spelled out in the Order are being denied access to basic fundamental human needs such as grocery shopping due to blanket no mask policies brought on as a result of the Order, however erroneous it may be.

RIGHT TO PRIVACY

XLIV.

The preceding allegations are incorporated in full as if fully set forth.

XLV.

Article I, Section of the Louisiana Constitution provides: Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

TEMPORARY RESTRAINING ORDER

XLVI.

As stated herein, there is no requirement of showing of irreparable harm for the granting of a temporary restraining order as the conduct being restrained is unconstitutional in nature. Nevertheless, as stated herein, there is still a clear showing of irreparable harm to individuals and their businesses due to the arbitrary and vague nature of the Order from Governor Edwards.

XLVII.

Plaintiffs show that the temporary restraining order and injunction should issue without bond, as the restriction is illegal and violates constitutional liberties.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that:

1. Declare 89 JBE 2020 null, void, and unenforceable in its entirety;
2. Enter a temporary restraining order (without bond as the proclamation is illegal and violates constitutional liberties), preliminary injunction, and, in due course, a permanent injunction against any enforcement or action on 89 JBE 2020;


3. A hearing be set within the time limits allowed by law to determine whether or not to grant a preliminary injunction; and
4. Award Plaintiffs all costs and attorneys' fees incurred as permitted by law.

RESPECTFULLY SUBMITTED,



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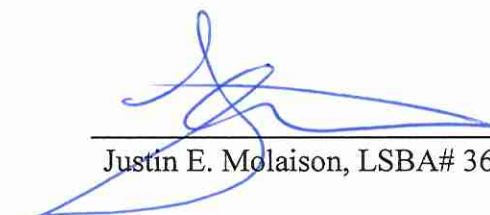
- AND -



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CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing pleading have been served on all counsel of record by hand delivery, and/or by facsimile transmission, and/or by email, and/or by placing same in the United States mail, postage prepaid and properly addressed, this 20 day of July, 2020



Justin E. Molaison, LSBA# 36314



EXECUTIVE DEPARTMENT

PROCLAMATION NUMBER 89 JBE 2020

***COVID-19 PUBLIC HEALTH EMERGENCY
ADDITIONAL PHASE 2 MITIGATION MEASURES***

- WHEREAS,** pursuant to the Louisiana Homeland Security and Emergency Assistance and Disaster Act, La. R.S. 29:721, *et seq.*, the Governor declared a public health emergency on March 11, 2020 in Proclamation Number 25 JBE 2020 in response to the threat posed by COVID-19;
- WHEREAS,** pursuant to the Louisiana Homeland Security and Emergency Assistance and Disaster Act, La. R.S. 29:721, *et seq.*, on March 11, 2020 in Proclamation Number 25 JBE 2020, the Governor declared that a statewide public health emergency existed in the State of Louisiana because of COVID-19 and expressly empowered the Governor's Office of Homeland Security and Emergency Preparedness and the Secretary of the Department of Health and/or the State Health Officer to take all actions authorized under state law;
- WHEREAS,** La. R.S. 29:761 provides that "[b]ecause the government must do all that is reasonable and necessary to protect the health and safety of its citizens; because new and emerging dangers, including emergent and resurgent infectious diseases . . . pose serious and immediate threats; because a renewed focus on the prevention, detection, management, and containment of public health emergencies is essential; and because emergency health threats . . . may require the exercise of extraordinary government powers and functions, the state must have the ability to respond, rapidly and effectively, to potential or actual public health emergencies";
- WHEREAS,** on March 22, 2020, in Proclamation Number 33 JBE 2020, the Governor issued a Stay at Home order that, among other things, ordered the people of Louisiana to stay at their homes unless taking essential trips or to travel to or from a place of employment, ordered some non-essential businesses to be closed, and placed limitations on other businesses that were allowed to remain open, which was ultimately extended until May 15, 2020;
- WHEREAS,** on April 16, 2020, the White House Coronavirus Task Force issued guidelines entitled "Opening Up America Again" that provided guidance to the states on how various parts of the economy could be re-opened;
- WHEREAS,** this guidance calls for the re-opening to occur in three phases, with the criteria for movement into the first phase being a 14-day downward trajectory in influenza-like and COVID-like symptoms, a 14-day downward trajectory in cases or positive tests as a percent of total tests, and the ability for hospitals to treat all patients without crisis care;
- WHEREAS,** the criteria also calls for the state to have a robust testing program in place, including testing for at-risk healthcare workers;
- WHEREAS,** pursuant to Proclamation Number 58 JBE 2020, the State of Louisiana moved into Phase 1 of recovery on Friday, May 15, 2020;
- WHEREAS,** pursuant to Proclamation Number 74 JBE 2020, the State of Louisiana moved into Phase 2 of recovery on Friday, June 4, 2020;

- WHEREAS,** since the Phase 2 order, Louisiana has seen an alarming increase in the number of new COVID-19 positive tests, with increasing positivity rates, and hospitalizations, requiring that the state remain in Phase 2 so as to maintain the progress the state has made while at the same time slowing down the recent spread of COVID-19;
- WHEREAS,** in the last seven days alone, Louisiana has seen an increase of 13,514 cases and over 200 new hospitalized patients with COVID-19, with the highest current amount of hospitalized patients since the middle of May;
- WHEREAS,** the rise in new cases of COVID-19 is not uniform across age groups as it was in the initial weeks of the outbreak, with young adults aged 18-29 years and children under 18 accounting for the majority of new cases since entering Phase 2;
- WHEREAS,** this age-group has seen a significant increase in the number of cases per capita from 207 per 100,000 in March to 1058 per 100,000 in June;
- WHEREAS,** this age-group specific increase may reflect, in part, the effect of opening and expanding sectors related to amusement, with at least 36 known outbreaks across the state occurring in bars;
- WHEREAS,** poor adherence to mask wearing appears to be a significant problem and recurrent theme in case interviews conducted through contact tracing;
- WHEREAS,** there is an increased risk of infection at large gatherings, with a significant number of the new COVID-19 cases being traced back to such events, necessitating a reduction in the number of people who can gather in a single space at a single time, where strict social distancing is unable to occur;
- WHEREAS,** this restriction is based upon the White House Coronavirus Task Force guidance which recommends that any gatherings of over 50 people in Phase 2 be limited;
- WHEREAS,** this gradual re-opening is based upon the advice and expertise of medical experts at the Louisiana Department of Health;
- WHEREAS,** should there be an increase in the number of confirmed COVID-19 cases or should the number of COVID-19 related hospitalizations threaten the ability of the health care system to properly respond, it may be necessary to go back to the full restrictions in the Stay at Home order in Proclamation Number 52 JBE 2020; and
- WHEREAS,** these measures are necessary to protect the health and safety of the people of Louisiana.

NOW THEREFORE, I, JOHN BEL EDWARDS, Governor of the State of Louisiana, by virtue of the authority vested by the Constitution and the laws of the State of Louisiana, do hereby order and direct as follows:

SECTION 1: This order is meant to supplement the declaration of emergency in Proclamation 83 JBE 2020 and the mitigation measures therein, therefore, Proclamation 83 JBE 2020 shall remain in full force and effect until it expires on July 24, 2020, unless extended.

SECTION 2: Sections 2(G)(1)(c) and (d) of Proclamation 83 JBE 2020 are hereby amended to the following:

No bar, with or without a food service permit from the Louisiana Department of Health, shall allow for on premises consumption of any food or drinks. However, any bar shall be allowed to provide for takeout through drive-thru or curbside delivery, including alcoholic beverages.

SECTION 3: Section 2(H) of Proclamation 83 JBE 2020 is hereby amended to the following:

Crowd sizes are limited to no more than 50 people in any single indoor space at the same time. Crowd sizes are limited to no more than 50 people in any single outdoor

space where individuals will be in close proximity to one another and unable to maintain strict social distancing of six feet apart from individuals who are not immediate household members. This crowd size limitation shall not apply to those businesses deemed essential as defined by the Cybersecurity and Infrastructure Security Agency or any businesses and organizations operating at 50% capacity pursuant to Paragraphs (1) through (6) of Subsection (G) of Section 2 of 83 JBE 2020, including churches and other faith-based organizations.

SECTION 4: FACE COVERING ORDER

- A)** Every individual in Louisiana shall wear a face covering over the nose and mouth when inside a commercial establishment or any other building or space open to the public, whether indoor or outdoor. This shall include public or commercial modes of transportation.
- B)** This requirement does not apply to the following:
 - 1) Any individual who will not come in contact with any other individual (outside of their immediate household members) or who will be able to maintain strict social distancing of six feet apart from any other individual (outside of their immediate household members);
 - 2) Any child under the age of eight, however all children between the ages of two and seven years old are strongly encouraged to wear a face covering in accordance with Subsection (A) of this Section;
 - 3) Any individual with a medical condition that prevents the wearing of a face covering;
 - 4) Any individual who is consuming food or drinks;
 - 5) Any individual seeking to communicate with someone who is hearing impaired;
 - 6) Any individual giving a speech for broadcast or to an audience; and
 - 7) Any individual temporarily removing his or her face covering for identification purposes.
- C)** All businesses or organizations, including all offices of the State of Louisiana, its political subdivisions, and all other governmental offices, shall require all persons who enter the premises to wear a face covering, unless either of the following apply:
 - 1) The individual is not required to wear a face covering pursuant to Subsection 4(B) of this order.
 - 2) The business or organization is located in a parish that has opted out of the face covering requirements pursuant to Subsection 4(F) of this Emergency Proclamation.
- D)** Citations under this Section shall be written only to businesses or organizations, other than religious organizations, that fail to enforce the requirement to wear face coverings. Operators of businesses and organizations are entitled to rely on the representations of their customers, patrons, or employees regarding whether or not they qualify for an exception from the face covering requirements. Businesses and organizations that rely on such a representation shall not be deemed to be in violation of this Emergency Proclamation.
- E)** If a business or organization does not allow entry to a worker, customer, or patron because that person refuses to wear a face covering, and if that worker, customer, or patron enters the premises or refuses to leave the premises, law enforcement personnel may enforce the trespassing laws and any other laws that the worker, customer, or patron may violate.
- F)** This order shall apply statewide. However, if a parish has less than 100 new positive cases of COVID-19 per 100,000 people in the parish for the immediate preceding two-week cumulative period, as determined by the Louisiana Department of Health, the parish may opt out of this face covering requirement

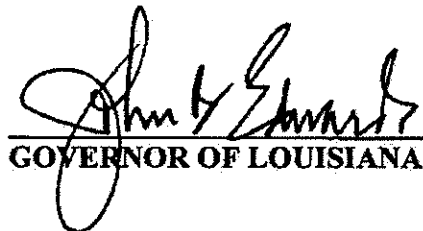
by sending written notice from the governing authority of the parish to the Director of the Governor's Office of Homeland Security and Emergency Preparedness. The Louisiana Department of Health shall publish on its COVID-19 dashboard a rolling list of the two-week incidence of cases per 100,000 residents in each parish.

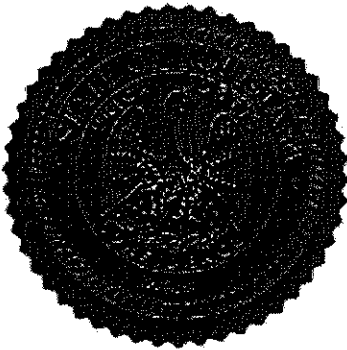
SECTION 5: The Governor's Office of Homeland Security and Emergency Preparedness and the State Fire Marshal are directed to ensure compliance with this order, and are empowered to exercise all authorities pursuant to La. R.S. 29:721, *et seq.*, and La. R.S. 29:760, *et seq.*

SECTION 6: All departments, commissions, boards, agencies and officers of the state, or any political subdivision thereof, are authorized and directed to cooperate in actions the state may take in response to the effects of this event.

SECTION 7: Unless otherwise provided in this order, these provisions are effective from Monday, July 13, 2020 to Friday, July 24, 2020, or as extended by any subsequent Proclamation, unless terminated sooner.

IN WITNESS WHEREOF, I have set my hand officially and caused to be affixed the Great Seal of Louisiana in the City of Baton Rouge, on this 11th day of July, 2020.


GOVERNOR OF LOUISIANA



ATTEST BY THE
SECRETARY OF STATE


SECRETARY OF STATE



Jeff Landry
Attorney General

State of Louisiana

DEPARTMENT OF JUSTICE
CIVIL DIVISION
P.O. BOX 94005
BATON ROUGE
70804-9005

July 15, 2020

OPINION 20-0068

Honorable Larry Bagley
State Representative
Louisiana House of Representatives
671 Hwy. 171, Ste. E
Stonewall, LA 71078

Honorable Rick Edmonds
State Representative
Louisiana House of Representatives
3931 S. Sherwood Forest Blvd., Ste. 200
Baton Rouge, LA 70816

Honorable Alan Seabaugh
State Representative
Louisiana House of Representatives
401 Market St., Ste. 1120
Shreveport, LA 71101

Honorable Charles "Chuck" Owen
State Representative
Louisiana House of Representatives
P.O. Box 55
Rosepine, LA 70659

Honorable Dodie Horton
State Representative
Louisiana House of Representatives
954 Hwy. 80, Ste. 400
Haughton, LA 71037

Dear Representatives Bagley, Beaulieu, Edmonds, Horton, Miguez, Owen, Seabaugh, and Senator Mills:

We received your requests for Attorney General Opinions and/or inquiries related to mask mandates and 89 JBE 2020, and we determined that guidance for business owners and law enforcement is warranted.

15-A CONSTITUTIONAL LAW

La. R.S. 29: 721, *et seq.*
La. R.S. 29: 760, *et seq.*

Certain provisions of 89 JBE 2020 may be unconstitutional and unenforceable.

Honorable Blake Miguez
State Representative
Louisiana House of Representatives
410 N. Broadway St.
Erath, LA 70533

Honorable Beau Beaulieu, IV
State Representative
Louisiana House of Representatives
800 S. Lewis St., Ste. 206
New Iberia, LA 70560

Honorable Robert Mills
State Senator
Louisiana Senate
105 Harvey's Way
Minden, LA 71055

EXHIBIT "B"

INTRODUCTION

Over the past several months both myself and the professional staff at the Louisiana Department of Justice have worked tirelessly to provide the citizens and public officials of Louisiana with guidance regarding the COVID-19 pandemic. We have worked hard to ensure a balance between protecting constitutional liberties and the overall health and welfare of the public.

When the COVID-19 pandemic started, the goal of government action was to ensure that our healthcare capacity to treat citizens was not overrun. Executive orders and mandates were put in place under our laws and Constitution with that simple goal in mind. I supported those actions. To that end, we seem to have achieved that purpose.

Today I am concerned that additional restrictions are being placed on our citizens, while we no longer have a set benchmark with which to measure our success.

The Governor's recent mandates do not appear to serve achieving any type of goal or mission in a manner consistent with statutory authority and Constitutional provisions. I am sending this guidance in large part as a response to the many calls and inquiries I have received from you, private citizens, and other elected officials regarding the Governor's most recent Proclamation that purports to impose a statewide "face covering" requirement (hereinafter referred to as the "mask mandate"), limit gatherings indoors and outdoors to 50 people, and significantly restrict "bars" from their normal operations. Most importantly, this guidance is for the many law enforcement agencies that have contacted me regarding their concerns about enforcement. After careful consideration, it is my opinion as the chief legal officer of the State that the order does not pass the constitutional test. It is unfortunate that, despite the fact that I am the statutory legal advisor to the Governor's Office of Homeland Security and Emergency Preparedness ("GOHSEP"), I was not consulted prior to the issuance of any Executive Order during COVID-19, including the most recent Proclamation.

ANAYLYSIS

Let me begin by first emphasizing that this guidance in no form should be taken to discredit or reduce the significance of any protections taken by an individual, including the wearing of a face mask for the purpose of preventing infection from COVID-19. However, all mandates that carry enforcement penalties against the public must be rationally related to achieving a legitimate public purpose. To the extent they impinge upon the exercise of constitutionally protected rights, they must meet an even stricter test and be narrowly tailored to achieve a compelling government interest to such a degree that they justify the concomitant reduction in individual liberty.

For that reason, I urge all law enforcement (including the Fire Marshal and other individuals acting under the color of law) to exercise extreme caution when responding to calls related to violations of facemask orders. While face coverings may be

EXHIBIT "B"

recommended, the mask mandate cannot be enforced with criminal or financial sanctions. Furthermore, threats to a business' occupational license or other forms of threats to the business (cutting off water or sewer service, for example) also would violate basic due process and could expose the government actor to civil liability.

89 JBE 2020

On July 11, 2020, Governor John Bel Edwards issued 89 JBE 2020, a Proclamation amending a pre-existing order, issuing a statewide mask mandate, limiting indoor and outdoor gatherings to 50 people (with exceptions), and limiting service in "bars." As a general matter, the order does not define numerous terms, contains minimal statistics in support, and contains no geographical data. It vaguely references *possible* sources of outbreaks based on vague hearsay from "contact tracers." This foundation is a flimsy one upon which to build a criminal regulatory edifice.

It is even more vague as to penalties and enforcement. At the same time, it is riddled with many exceptions, all of which are subjectively determined, such that "men of common intelligence must necessarily guess at its meaning and differ as to its application." See *Bode, et al. v. Kenner City, et al.*, 303 F. Supp. 3d 484 (E.D. La. 3/19/19). Among other restrictions on the Governor's authority, which will be addressed relative to each requirement, prohibitions must be clearly defined and government should articulate its aims with a reasonable degree of clarity. The restrictions contained in this Proclamation fail this basic test. Similarly, the Proclamation must provide fair notice so that those who wish to follow the order may avoid its prohibitions. The Proclamation also fails this test because citizens not only cannot predict which actions are prohibited, but also they face potential unlawful arrest and unlawful searches and seizures for "trespassing" or "any other laws" that a person "may violate" even if they are fully compliant. Arbitrary and discriminatory enforcement is not only possible, but it is *highly probable* and even *encouraged* by the order. At the same time, the order is also unconstitutionally overbroad. Moreover, government's legitimate purpose to validly control and prevent some conduct cannot be accomplished by means that sweep unnecessarily broadly and invade the areas of freedoms protected by the First Amendment. The Proclamation fails this fundamental constitutional norm.

Louisiana courts have also noted other limits on the Governor's powers and consequences of exercising powers not granted to him. For example, the Governor has no power to make substantive law through an executive order, even in an emergency. And if the Governor's actions amount to a constructive taking of private property, then the State may have to pay for it.¹

¹ The Louisiana First Circuit specifically stated, "[r]eading the HSEDA as a whole, it is clear that the legislature did not intend to convey legislative authority upon the governor during a state of emergency. As previously indicated, La. R.S. 29:724(A) permits the governor to issue executive orders, proclamations, and regulations to "effectuate the provisions of [the HSEDA]." *Louisiana Hosp. Ass'n v. State*, 2013-0579 (La.App. 1 Cir. 12/30/14), 168 So. 3d 676, 687, *writ denied*, 2015-0215 (La. 5/1/15),

The Mask Mandate

The order states: “Every individual *shall wear a face covering* over the nose and mouth when inside a *commercial establishment* or *any other building or space open to the public*, whether *indoors or outdoors*.” The order does not define “commercial establishment,” nor does it define “face covering” - suggesting anything will suffice as long as it covers the “nose and mouth.”² After limiting its application only to “commercial establishments,”³ it then broadly applies to “any other building” or “space” that is “open to the public.”⁴ The mask mandate then proceeds to list numerous exemptions, which are all subjectively determined by the wearer.

Initially, it exempts “any individual who will not come in contact with any other individual.” It is unclear *when* an individual can make this determination, and whether a person who subjectively believes, in good faith, that he or she will not come into contact with another individual, but does so due to no fault of his or her own would be in violation of the Proclamation. It further exempts individuals “who will be able to maintain strict social distancing of six feet apart from any other individual.” Again, it is unclear *when* an individual can make this determination and whether a person who subjectively believes, in good faith, that he or she can maintain strict social distancing but due to no fault of his or her own finds himself or herself within less than six feet of another individual would be in violation of the Proclamation.

169 So. 3d 372. The specific powers granted to the governor under the HSEDA are set out in La. R.S. 29:724(D).

While Section (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**,” there is no provision in La. R.S. 29:724 that permits the governor to enact substantive law, *Id.* (Emphasis added.) As pointed out by LHA in brief to this court, had the legislature deemed it appropriate for the governor to enact substantive legislation, it could have easily included same in the series of items designated in La. R.S. 29:724(D). This court must apply the well-settled doctrine of statutory construction, *expressio unius et exclusio alterius*, which teaches us that when the legislature specifically enumerates a series of things, the legislature’s omission of other items, which could have been easily included in the statute, is deemed intentional. *Sensebe v. Canal Indem. Co.*, 2010-0703, p. 16 (La.1/28/11).”

Louisiana Hosp. Ass’n v. State, 168 So. 3d 676, 687.

See also *LaBruzzo v. State, ex.rel. Governor*, 2014-262 (La.App. 5 Cir. 11/25/14), 165 So.3d 166 (Commandeering of property by executive order pursuant to HSEDA falls within the definition of a taking.)

² To illustrate the vagueness of this reference, a piece of mesh fabric with holes in it would cover the nose and mouth and, therefore, technically comply as a face covering under the Proclamation.

³ “Commercial establishment” has different definitions (and exemptions) depending on the statutory context in which the term is used. The term generally appears to encompass those places engaging in “commerce” (*i.e.*, the sale or distribution of goods to the public).

⁴ “Open to the public” is also unclear. Many non-commercial organizations could simply close their activities “to the public.”

It also exempts the following categories of individuals: all children under eight; any individual with "a medical condition that prevents the wearing of a face covering;" any individual who "is consuming food or drinks;" any individual "who is seeking to communicate with someone who is hearing impaired;" any individual who is "giving a speech for broadcast or to an audience;" and any individual "temporarily removing his or her face covering for identification purposes." All of these exemptions appear to be vague, subjective, and/or unenforceable. The rule does not permit anyone to demand parents *prove* the child is "under eight," and it does not define medical condition (while other state and federal laws prohibit demanding or forced sharing of personal health information). Any individual carrying around a Diet Coke or a pack of crackers is apparently exempt. Any person who generally and subjectively "seeks to communicate" with any other person who may be hearing impaired is exempt. (The rule apparently only requires one to "seek" to have such interaction, not to actually *know* someone with whom they may communicate is hearing impaired, much less have immediate plans to communicate with them face to face. "Communicate" is also a broad term, and could include communicating by text, phone, Zoom, or carrier pigeon, but in any event, the communicator is exempt.) And if an individual plans to "give a speech" (undefined) to an "audience" (also undefined), then that individual is also exempt. In short, virtually any individual *may* fall within one or more of these exemptions.

Although the rule contains exemptions that would or could apply to the vast majority of the public, it then purports to require both compliance and *enforcement* by "*commercial establishments*," upon threat of the business (not the mask-less individual) being issued a "citation." The Proclamation does not say who would issue the citation and for what. It is likewise silent as to what the sanction may be, or the legal basis for conscripting businesses to enforce executive orders.⁵

After threatening "citations" to businesses, however, it says "citations" may be written "*only to businesses or organizations (other than religious organizations- also undefined) that fail to enforce the requirement*." In other words, the order purports to turn private businesses into the Governor's Proclamation enforcement arm. Having threatened businesses "that fail to enforce the requirement" (which is riddled with subjective exceptions, making it difficult even for experienced attorneys to discern its contours), it goes on to further muddy the water by providing a safe-harbor. Businesses are "entitled to rely" on the representations of their employees, customers, and patrons with regard to whether they qualify for an exemption.

⁵ The emergency powers act in La. R.S. 29:724(E) provides, "[i]n the event of an emergency declared by the governor pursuant to this Chapter, 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. No executive order, proclamation, or regulation shall create or define a crime or fix penalties." The first sentence requires promulgation of any "order, rule, or regulation" before the statutory penalty can be enforced. That is consistent with due process. The second provision makes clear that no executive order or proclamation can define or create a crime. Because the emergency powers act derogates from the norm with regard to separation of powers as well as ordinary limits on executive authority, the statute is strictly construed.

Neither the Louisiana Homeland Security and Emergency Assistance and Disaster Act ("LHSEADA"), La. R.S. 29:721, *et seq.*, nor the Louisiana Health Emergency Powers Act ("LHEPA"), La. R.S. 29:760, *et seq.*, authorize the Governor, unilaterally, by executive *proclamation*, to make businesses his proclamation enforcement police. And they may not be threatened with "citations" or otherwise sanctioned for refusing to be his enforcement arm.

Although the order provides a safe harbor for businesses to rely on the representations of customers, patrons, or employees, it does not provide any such safe harbor for individuals. To the contrary, after threatening businesses with sanctions if they "fail to enforce the requirement," it ambiguously states, without any citation to authority, that "law enforcement personnel may enforce trespassing laws or any other laws the patron, employee or customer may violate." Thus, it threatens businesses who refuse to become gubernatorial enforcement agents and encourages businesses to call in local law enforcement for help. The order purports to make it unlawful if any person enters the businesses without a mask and refuses to leave, even if the individual has a physical or mental condition that conflicts with wearing a face covering or is otherwise exempt. It purports to graft the mask requirement onto pre-existing criminal statutes by authorizing police to enforce "trespassing" or "other applicable laws" to deal with allegedly non-compliant individuals, even though the Proclamation contains numerous exemptions that could exempt virtually any individual. It even appears to convert a dispute over the applicability of the mask requirement into a trespassing violation, even though it is not the property owner's terms and conditions that are being violated.

Another issue, which should be of specific concern to law enforcement, is the reference to "citation." The only enforcement provided for in La. R.S. 29:724(E), *et seq.*, is a criminal provision found in La. R.S. 29:724. This provision establishes that any violations of such executive orders are misdemeanors. This raises serious concerns related to both Fourth Amendment rights to be free from search and seizure without a warrant and the Fifth Amendment Right against self-incrimination and other constitutional concerns. As such, all of the protections afforded suspects in criminal investigations are required. Any agency should understand that the violation of a valid executive order (within the proper scope of the governor's powers) should be treated as a criminal investigation *ab initio* and proceed accordingly. Additionally, any agency engaged in enforcement of these orders should also recognize that federal civil liabilities associated with law enforcement also apply. Relatedly, the State may incur liability relative to the activities of the State Fire Marshal. Louisiana Revised Statutes 40:1563.1 sets out the authority of the Fire Marshal and his deputies to make arrests. It specifically outlines those offenses for which the Fire Marshal has investigative authority. Nothing in this section references enforcement of executive orders as described in La. R.S. 29:271, *et seq.*, nor does LSEADA itself grant him such authority. To the extent that the order purports to deputize business owners to interrogate their customers and make on-the-spot compliance enforcement determinations, the business owners may be found to have been acting under color of state law and themselves be

EXHIBIT "B"

subjected to civil rights and/or private tort liability, spawning a significant amount of costly and distracting litigation for which hard-pressed businesses are neither prepared nor insured.

The upshot of these fatally ambiguous and legally unauthorized provisions is potentially lethal. It exposes law-abiding individuals to confrontational encounters with business owners (who fear enforcement against their businesses) as well as encounters with police (who have been called to deal with mask-less individuals), *even though the individual may be fully compliant with the order*. It exposes individuals to unlawful searches and seizures, as well as burdens them with exposing potentially sensitive personal health information and having it exposed to others in a public and disputatious setting.

The mask mandate flatly violates due process, separation of powers, the delegation clause, state public accommodation anti-discrimination laws, and La. R.S. 29:724(E); and it is unenforceable. *To the contrary, the LHSEADA specifically prohibits any order from creating a crime or fixing penalties*; and, to this degree, the order is *ultra vires*. Moreover, any law enforcement agency – and importantly any business – may be exposed to liability under state and federal civil rights laws for violating an individuals' constitutional rights under color of law.⁶ Such a massive liability expansion is clearly a matter for legislative balancing and accountability, not executive fiat.

The 50-person Limit

The 50-person limit is also too vague to be constitutional.⁷ Moreover, the exceptions to the rule swallow any rational basis for it. The Proclamation initially states that "crowd sizes are limited to no more than 50 people in any single *indoor* space at the same time." It does not distinguish between the size of the *indoor* space and its capacity. Thus, the Superdome and a 10 x 10 room are treated the same.

It goes on to say that "crowd sizes are limited to 50 people in any *outdoor* space where individuals will be in close proximity to one another and unable to maintain strict social distancing of six feet apart from individuals who are not immediate household

⁶ The business may become liable because it is acting as a government enforcement agent. Although the right of protection against unreasonable searches and seizures is designed to protect against governmental intrusion, in certain situations, private citizens can be considered to have acted as government agents. Useful criteria in determining whether an individual was acting as a private party or as an agent of the government are as follows: (1) whether the government knew of and acquiesced in the intrusive conduct; (2) whether the private party's purpose in conducting the search was to assist law enforcement agents or to further its own ends; (3) whether the private actor acted at the request of the government; and (4) whether the government offered the private actor a reward. *See State v. Lavergne*, 2008-0044 (La.App. 1 Cir. 5/2/08), 991 So.2d 86. Here, the Governor certainly knows of and has gone beyond acquiescing in the conduct – he is demanding it to further his own objective. And avoiding being cited, for the business, is their reward for assisting in enforcing the order.

⁷ The blanket limits on the number of people who may assemble has First Amendment implications because it sweeps constitutionally protected conduct (such as a protest) as well as the basic right to assemble into its reach.

members.” Again, it does not distinguish between outdoor spaces, it does not define “close proximity,” and it does not define the scope of the phrase “unable to maintain strict social distancing.”

The larger defect in this provision is that it categorically exempts thousands of businesses - those that are “essential” pursuant to CISA and those that are operating at 50% capacity, regardless of their size, from the gathering requirements of the order.⁸ Thus, under the terms of the order, any indoor or outdoor facility operating at 50%, even if 100% amounts to 100,000 people and 50% to 50,000, the crowd is exempt. The order is both over-inclusive and under-inclusive at the same time, a characteristic that frequently defines unconstitutionally vague and overbroad statutes. In addition, the large number of exemptions (Albertsons, Lowes, Ace Hardware, alcoholic beverage stores, to name a few stores that have remained open for months without restrictions), undermine any rational basis for the rule. A rule that has so many exceptions that it undermines its very purpose is unconstitutional because it is irrational and fails to serve a legitimate government interest.

Closure of “bars”

The bar closure is also problematic for several reasons. First, the Proclamation provides little data to support a statewide closure of a single type of business, without regard to whether the business is operating with the utmost care and a perfect record, operates exclusively with outdoor service, or operates in a geographical location with little data showing spikes related to bars. The Proclamation vaguely refers to a handful of outbreaks traced to “bars” but does not say where those outbreaks occurred and does not place the minimal data in the context of the total number of facilities that qualify as a “bar.” It also only vaguely connects outbreaks by stating they “may be” related to bars based on hearsay from contact tracing. Without stating adequate data to support it, the Governor has singled out one type of business and punished hundreds of law-abiding business owners. While the data and the public health statutes may permit targeted closures of *individual* businesses where outbreaks are documented to have occurred, the Governor has no authority to discriminate against a single business type statewide in the absence of far more data to support such a draconian and arbitrary exercise of

⁸ As an illustration of the vagueness of this exemption, thousands of businesses closed after the Governor’s stay-at-home order was issued. That order also had a CISA “essential business” exception. Governor Edwards, disclaimed the scope of the order’s restriction and announced April 30, 2020, that thousands of businesses *never were* required to close. Numerous business owners reacted with shock and dismay that after months of saying businesses must stay closed and never once providing any specificity, the Governor said many of those businesses *never were required* to close. Many businesses were bankrupted during this time. During the past four months – since the first COVID-19-related order was issued, the Governor has issued broadly restrictive orders but has not enforced them. Recently however, he directed the State Fire Marshal to visit businesses who are alleged to be non-compliant (by whom no one knows). We are not aware of any statutory authority authorizing the Fire Marshal as an enforcement agent for executive orders, or otherwise permitting the Fire Marshal to threaten a business license without due process for allegedly violating an executive proclamation. At the same time, however, the Governor encouraged protests and did not limit any of those gatherings or even suggest they should be limited.

power. Moreover, suspending or threatening the business or alcohol permit of any business would likely amount to violation of due process as these permits are recognized property interests protected under the due process clause. It could also result in a "constructive taking" via government regulation.⁹

SUMMARY

In summary, the three provisions of the executive order - the mask mandate, the 50-person indoor/outdoor gathering limit, and the bar closure - are likely unconstitutional and unenforceable. Although the mask mandate and the 50-person limit may be good recommendations for personal safety, they may not be enforced with financial or criminal penalties. Both businesses acting under color of law as mask police and actual police acting as mask police could face liability if individual civil rights are violated due to the Proclamation.

With best regards,



JEFF LANDRY
ATTORNEY GENERAL

⁹ In *Avenal v. State*, 2003-252' (La. 10/19/04), 886 So.2d 1085, *cert. denied*, 544 U.S. 1049, 125 S.Ct. 2305, (1995), the Louisiana Supreme Court discussed the concept of taking under La.Const. art. I, §4. Justice Weimer explained in his concurring opinion in *Avenal*, 04-2185, p. 7, 886 So.2d at 1113, "La. Const. art. 1 §4, using both words, 'taken' and 'damaged,' encompasses damage claims that would not necessarily qualify as a taking under the Fifth Amendment. Under Louisiana law, a damage claim is compensable although it is not a taking."

19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

CASE NO.:

DIVISION: “ ”

JUSTIN MOLAISON, ET. AL.

V.

JOHN BEL EDWARDS, in his official capacity as
GOVERNOR OF THE STATE OF LOUISIANA

FILED: _____

DEPUTY CLERK

ORDER

PETITIONERS have filed a motion for temporary restraining order against JOHN BEL EDWARDS, in his official capacity as GOVERNOR OF THE STATE OF LOUISIANA (“GOVERNOR EDWARDS”) alleging that GOVERNOR EDWARDS entered a Proclamation on July 11, 2020 (“89 JBE 2020”) which is unconstitutional and would put PETITIONERS at significant risk of irreparable damage, and that this restraining order is necessary in an attempt to preserve their first amendment constitutional rights as well as preserve the businesses and other significant investments while relief is sought. PETITIONERS also show that GOVERNOR EDWARDS could continue to cause significant irreparable damage to the businesses of PETITIONERS.

CONSIDERING THE ABOVE AND FOREGOING Petition and accompanying Affidavits and Memorandum:

IT IS ORDERED that a Temporary Restraining Order is GRANTED and GOVERNOR EDWARDS is ORDERED to:

- 1.) Refrain from enforcing 89 JBE 2020, including, without limitation, via any penalty;
- 2.) Refrain from issuing further Proclamations and Executive Orders which institute a Statewide Mask Mandate;
- 3.) Refrain from issuing further Proclamations and Executive Orders which impose a limitation on crowd size for indoor gatherings;

- 4.) Refrain from issuing further Proclamations and Executive Orders which impose a limitation on crowd size for outdoor gatherings;
- 5.) Refrain from issuing further Proclamations and Executive Orders of any and all “bar related” businesses;
- 6.) Refrain from taking any action or inaction that could or may result in irreparable damage to businesses and individuals within the State of Louisiana.

IT IS FURTHER ORDERED that an evidentiary hearing is set for the _____ day of _____, 2020 at _____ a.m./p.m. to determine whether to convert the Temporary Restraining Order into a Preliminary Injunction;

IT IS FURTHER ORDERED that GOVERNOR EDWARDS is ordered to respond to the motion for preliminary injunction prior to the hearing by 5:00 p.m. on the _____ day of _____, 2020.

IT IS FURTHER ORDERED that GOVERNOR EDWARDS are direct that they may file a reply to GOVERNOR EDWARDS’ response by 5:00 p.m. on the _____ day of _____, 2020.

ORDERED AND SIGNED this _____ day of July, 2020 at Baton Rouge, East Baton Rouge Parish, Louisiana.

JUDGE

PLEASE RUSH SERVICE:

GOVERNOR JOHN BEL EDWARDS
900 NORTH 3RD STREET
#4
BATON ROUGE, LOUISIANA 70802

JEFF LANDRY
OFFICE OF THE ATTORNEY GENERAL
1885 NORTH 3RD STREET
BATON ROUGE, LOUISIANA 70802

19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

CASE NO.:

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FILED: _____

DEPUTY CLERK

ATTORNEY CERTIFICATION PURSUANT TO LA.C.C.P. 3603

Pursuant to La. C.C.P. Art. 3603, Attorneys for the PETITIONERS in the above captioned proceedings, upon the completion of their Petition, do hereby certify that they made appropriate effort to give notice to JOHN BEL EDWARDS, in his official capacity as GOVERNOR OF THE STATE OF LOUISIANA, and JEFF LANDRY, in his official capacity as ATTORNEY GENERAL OF THE STATE OF LOUISIANA by first attempting to contact the Office of the Governor for an email and/or fax number to send our Petition prior to filing. A voicemail and email to constituent services was made. A true and correct copy of the instant petition and accompanying affidavits and memorandum was emailed and faxed to the Office of the Attorney General, JEFF LANDRY, and also faxed to GOSHEP prior to this filing.


STEPHEN M. PETIT, JR. - #29381

- AND -


JUSTIN E. MOLAISON - #36314