STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**SEVENTH JUDICIAL CIRCUIT**
COUNTY OF SPARTANBURG	)	
	)	**Case No: 2020-CP-42-03211**
Ike's Korner Grille and Neil Hampton Rodgers,	)	
Plaintiffs	)	**ORDER DENYING REQUEST FOR A PRELIMINARY INJUNCTION**
vs.	)	
	)	
The State of South Carolina and Henry McMaster, in his official capacity of Governor of South Carolina,	)	
Defendants.	)	

This matter came before the Court pursuant to South Carolina Rules of Civil Procedure (SCRCP) Rule 65 wherein plaintiffs, Ike's Korner Grille and its owner, Neil Hampton Rodgers, seeks to immediately stop or enjoin the enforcement of certain Executive Orders issued by South Carolina's Governor, Henry McMaster, in response to the public health emergency created by the spread of the novel coronavirus (Covid-19). [1]

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[1] SCRCP Rule 65 authorizes a court to exercise its power to grant an injunction prior to a final determination of the merits of the underlying litigation. An injunction issued prior to a hearing on the litigation's merits as a preliminary injunction. A preliminary injunction can be characterized as being either prohibitory or mandatory: The plaintiff asserts they seek a prohibitory injunction. A prohibitory injunction seeks to maintain the status quo and prevent irreparable harm while a lawsuit remains pending. The defendants claim the type of injunction sought by the plaintiffs is mandatory. Mandatory injunctions seek to alter the status quo while the lawsuit is pending. Mandatory injunctions "in any circumstance" are disfavored. League of Women Voters of N.C. v N. C., 769 F. 3d 224 (2018).

This Court finds that the plaintiffs seek a mandatory injunction. They seek to stop enforcement of ongoing health related orders that have been in existence for over seven (7) months so that Plaintiff's can operate the restaurant in non-compliance with the health requirements. See Supra p.3, since March 7, 2020.

Generally, for a preliminary injunction to be granted, the plaintiff must establish that: (1) he would suffer irreparable harm if the injunction is not granted; (2) he will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. Before granting an injunction, the trial court should balance the equities: the court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief. AJG Holdings, LLC v. Dunn, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009).

The purpose of a preliminary injunction is to preserve the status quo and, thus, prevent the requesting party from suffering irreparable harm until the underlying lawsuit can be decided on its merits. In determining whether to grant a preliminary injunction, a court must deal with conflicting interest and balance the benefits of a preliminary injunction against the damage to the opposing party, and grant or deny a preliminary injunction as seen most consistent with justice and equity under the facts and circumstances of the case presented to the court. See, LeFurgy v. Long Cove Club Owners Assoc., Inc., 313 S.C. 555, 443 S.E. 2d 577 (Ct. App. 1994).

This Court acknowledges that the status quo to be preserved by a preliminary injunction, in some cases, is not the circumstances existing at the moment a lawsuit or injunction is actually filed, but rather the "last uncontested status between the parties which proceeded the controversy." Aggarao v. MOL Ship Management Co, Ltd., 675 F.3d 355, 378. In some cases, to preserve the status quo, it is necessary for a party to who has recently disturbed the status

The spread of the Covid-19 virus has caused a pandemic in South Carolina and in the United States. By definition, a pandemic is an outbreak or product of a sudden rapid spread or growth of a disease that occurs over a wide geographic area (multiply countries or continents) and affects a significant proportion of the population. https://www.merriam-webster.com/dictionary/pandemic. It is uncontested that the Covid-19 virus has infected and killed thousands of South Carolina citizens. Health experts know of no known medical treatment or vaccine to prevent the spread of the virus.

In March 2020, in response to the Covid-19 pandemic, Governor McMaster Declared a State of Emergency and began issuing Executive Orders. Governor McMaster issued successive declarations of a state of emergency every 15 days through the October 5 hearing. The National Center for Diseases Control (CDC) and South Carolina Department Health and Environmental (DHEC) officials issued precautionary health measures that attempted to prevent or slow the spread of the Covid-19 virus. These health measures included, but were not limited to, the closures and/or partial closure of certain businesses, social distancing practices within certain businesses, and the wearing of facial coverings (masks) by employees and customers at certain times within certain businesses. The Executive Orders required compliance with the precautionary health measures. From their issuance, these requirements were enforceable through citations issued by state (SLED), local (Sheriff) law enforcement and other state agencies.

Many of the Executive Orders regulated the operation of restaurants. *See* S.C. Executive Order No. 2020-10 (closing restaurants to on premises and dine-in services); S.C. Executive Order No. 2020-15 (extending the closure of restaurants); S.C. Executive Order No.

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quo to reverse its actions pending a final determination of the merits of the underlying lawsuit. The plaintiffs request for a preliminary injunction in the present case does not warrant disturbing the status quo. Plaintiff's have failed to make the proper showing to warrant altering the status quo.

2020-23 (extending for a second time the closure of restaurants); S.C. Executive Order No. 2020-29 (extending for a third time the closure of restaurants); S.C. Executive Order No. 2020-34 (lifting the previous closure of restaurants but allowing only limited indoor seating and requiring social distancing); S.C. Executive Order No. 2020-50 (ordering restaurants to take some twenty actions including social distancing, extra cleaning, capacity restrictions, and masks). It is uncontested that the plaintiff's restaurant, and businesses like the plaintiffs', have been negatively affected economically because of the pandemic and the resulting health related restriction.

Again, the Governor's Executive Orders that declared a health emergency in South Carolina were a series of Orders with the first one issued on March 17, 2020. The most recent Executive Order was issued just days before the court hearing on the present motion. Each Executive Order lasted no more than fifteen days. Each Executive Order provided a factual summary/update concerning the Covid-19 pandemic in South Carolina and stated the justifications for the need for the Executive Order. Each Order also outlined the health measures needed to attempt to stop or slow the spread of the Covid Virus and minimize infection and death among the citizenry of South Carolina.

As stated, Rodgers is the owner of Ike's Korner Grille, Inc. (Ike's). Ike's has existed in Spartanburg County for decades. Ike's is properly described as an iconic burger joint. Plaintiffs have been constantly subject to one or more Executive Orders from March 18th, 2020 to the date of the hearing.

In late August, South Carolina Stated Law Enforcement Division (SLED) and the Spartanburg County Sheriff became aware Ike's was not complying with the health measures related to Covid-19 and cited Ike's for failure to follow the Governor's Executive Orders. In early September, SLED again accused Ike's of failure to follow the Governor's Executive Orders. Ike's

is also the subject of a current investigation by the South Carolina Occupational and Safety Administration (OSHA) for alleged failure to implement a COVID-19 plan.

After the second citations, Plaintiffs filed the present lawsuit and requested a Temporary Injunction to protect them from further enforcement actions pending a decision on the lawsuit's merits.

In the underlying lawsuit, the plaintiffs' asks this Court to declare the Governor's Executive Orders invalid under existing statutory law and to declare certain code sections of South Carolina law unconstitutional as an unlawful delegation of authority to the executive branch of government. As a result, plaintiffs seek a permanent order from this Court prohibiting law enforcement and other state actors from enforcing the health measures; prohibiting the Governor from issuing similar Executive Orders; and to award plaintiff's attorney fees and cost.

As discussed herein, the plaintiff's motion for a preliminary injunction is not granted.

I. BACKGROUND

On March 13, 2020, Governor McMaster first declared a State of Emergency based on a determination that COVID-19 posed an imminent public health emergency for the State of South Carolina. See Executive Order No. 2020-08. That same day, the President of the United States declared the ongoing COVID-19 outbreak (1) was a pandemic of sufficient severity and magnitude to warrant an emergency declaration for all states, tribes, territories, and the District of Columbia, pursuant to Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5207 (the Stafford Act); and (2) constitutes a national emergency, pursuant to Sections 201 and 301 of the National Emergencies Act, 50 U.S.C. §§ 1601 et seq., and consistent with Section 1135 of the Social Security Act, 42 U.S.C. § 1320b-5, as amended, retroactive to March 1, 2020.

Less than two weeks later, the Governor asked the President to declare a major disaster exists in South Carolina pursuant to Section 401 of the Stafford Act, and on March 27, 2020, the President granted the Governor's request, issued the declaration, and ordered federal assistance to supplement state, tribal, and local recovery efforts in the areas affected by the COVID-19 pandemic, with an effective date retroactive to January 20, 2020, and continuing. Since initially declaring a State of Emergency, the Governor has issued various Executive Orders initiating, directing, and modifying specific measures designed to address the significant public health, economic, and other impacts associated with COVID-19 and to mitigate the resulting burdens on healthcare providers, individuals, and businesses in South Carolina, certain provisions of which have been extended by subsequent and distinct emergency declarations set forth in Executive Order Nos. 2020-15, 2020-23, 2020-29, 2020-35, 2020-38, 2020-40, 2020-42, 2020-44, 2020-48, 2020-53, 2020-56, 2020-59, 2020-62, 2020-65 & 2020-67.

As of the date of the present hearing, the Governor has issued thirty-eight Executive Orders since declaring a state of emergency on March 13, 2020.[2]

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[2] See Executive Order No. 2020-08 (Mar. 13, 2020); Executive Order No. 2020-09 (Mar. 15, 2020); Executive Order No. 2020-10 (Mar. 17, 2020); Executive Order No. 2020-11 (Mar. 19, 2020); Executive Order No. 2020-12 (Mar. 21, 2020); Executive Order No. 2020-13 (Mar. 23, 2020); Executive Order No. 2020-14 (Mar. 27, 2020); Executive Order No. 2020-15 (Mar. 28, 2020); Executive Order No. 2020-16 (Mar. 30, 2020); Executive Order No. 2020-17 (Mar. 31, 2020); Executive Order No. 2020-18 (Apr. 3, 2020); Executive Order No. 2020-19 (Apr. 3, 2020); Executive Order No. 2020-21 (Apr. 6, 2020); Executive Order No. 2020-22 (Apr. 7, 2020); Executive Order No. 2020-23 (Apr. 12, 2020); Executive Order No. 2020-25 (Apr. 16, 2020); Executive Order No. 2020-28 (Apr. 20, 2020); Executive Order No. 2020-29 (Apr. 27, 2020); Executive Order No. 2020-30 (May 1, 2020); Executive Order No. 2020-31 (May 3, 2020); Executive Order No. 2020-33 (May 8, 2020); Executive Order No. 2020-34 (May 8, 2020); Executive Order No. 2020-35 (May 12, 2020); Executive Order No. 2020-36 (May 15, 2020); Executive Order No. 2020-37 (May 21, 2020); Executive Order No. 2020-38 (May 27, 2020); Executive Order No. 2020-40 (June 11, 2020); Executive Order No. 2020-42 (June 26, 2020); Executive Order No. 2020-44 (July 11, 2020); Executive Order No. 2020-45 (July 11, 2020); Executive Order No. 2020-48 (July 26, 2020); Executive Order No. 2020-50 (Aug. 2, 2020); Executive Order No. 2020-53 (Aug. 10, 2020); Executive Order No. 2020-56 (Aug. 25, 2020); Executive Order No. 2020-59 (Sept. 9, 2020); Executive Order No. 2020-62 (Sept. 24, 2020); Executive Order No. 2020-63 (Oct. 2, 2020); Executive Order No. 2020-65 (Oct. 9, 2020); Executive Order No. 2020-67 (Oct. 24, 2020), available at https://governor.sc.gov/executive-branch/executive-orders. The Court takes judicial notice of the Governor's Executive Orders. See Rule 201(b), SCRE; Rule 201(f), SCRE; Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 152 (1935); Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co., 440 F. Supp. 3d 520, 524 n.2 (D.S.C. 2020).

The serious health and economic challenges caused by the Covid-19 pandemic has not been disputed before this Court. The Covid-19 pandemic has caused serious illness and resulted in death to thousands of Carolinians. This Court is aware that all three branches of our state government have taken action to address this ever-evolving public health emergency. The State's response to the pandemic was and is not static.[3]

On September 18, 2020, Plaintiffs filed an unverified complaint for declaratory and injunctive relief in this Court, challenging the Governor's authority to issue Executive Orders on statutory and constitutional grounds. Specifically, Plaintiffs contend (1) the Governor's Executive Orders run afoul of section 25-1-440 of the South Carolina Code of Laws; (2) his executive actions violate the separation-of-powers doctrine enshrined in article I, section 8 of the South Carolina

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[3] The Defendants contend that the Plaintiffs take issue with the Governor's approach to this ever-evolving public health emergency and the various impacts associated with the same. They reference this Court to media coverage concerning the Plaintiff's non-compliance with the Governor's orders. On August 26, 2020, the Spartanburg Herald-Journal published a story about Ike's not following the Governor's Executive Orders. See Dustin Wyatt, Spartanburg Restaurant Owner Rejects Gov's Mask Mandate, Calls it "Political," SPARTANBURG HERALD-JOURNAL (Aug. 26, 2020), https://www.goupstate.com/story/news/2020/08/26/spartanburg-restaurant-rejects-gov-mcmasters-mask-law/3443987001/. In the story, Rodgers was quoted as saying, "We don't wear masks" and "have not been wearing masks since this (COVID-19 pandemic) started." Id.

The next day, officials with the South Carolina Law Enforcement Division (SLED) "responded to a complaint that the owner of Ike's . . . was not in compliance with the Executive Order set forth by South Carolina Governor Henry McMaster." 8/28/2020 SLED Rep. at 1. Special Agent Raines, along with Lieutenant Satterfield of the Spartanburg County Sheriff's Office, responded to the complaint and "went into the business and observed that no employees were wearing face coverings as required by the Governor's Executive Order." Id.; see also Executive Order No. 2020-50, § 3 (Aug. 2, 2020). Rodgers received a warning for violating the face covering requirement. After receiving more complaints about workers cooking and serving food without wearing face coverings, SLED visited Ike's again on August 28, 2020. When Special Agent Raines and Lt. Satterfield spoke with Rodgers, he informed them that he would not require anyone to wear masks at his restaurant. Lt. Satterfield therefore issued Ticket 20202580104326 to Rodgers, charging him with violating the Governor's Executive Order. See S.C. Code Ann. § 16-7-10.

Soon the South Carolina Department of Revenue (DOR) also received complaints about the lack of face coverings. Following an investigation, DOR found that Ike's violated subsection 61-4-580(A)(5) of the South Carolina Code of Laws by knowingly committing an act that tends to create a public nuisance or constitutes a crime under the laws of this State. DOR assessed a $500 fine for the violation of Ike's on-premises beer and wine permit. Among other state and local agencies, the South Carolina Department of Labor, Licensing & Regulation likewise received complaints about the lack of face coverings—in violation of state law—and the state Occupational Safety and Health Administration (OSHA) is now conducting an investigation into Ike's to protect its employees and customers. The DOR and OSHA proceedings are still pending and ongoing.

Constitution; and (3) the General Assembly unlawfully delegated legislative power to the Executive in sections 25-1-440 and 1-3-420 of the South Carolina Code of Laws. Plaintiffs also moved pursuant to SCRCP Rule 65 for a temporary restraining order (TRO) and/or temporary injunction.

After conferencing with all attorneys, the Court issued an Order denying Plaintiffs' request for a TRO, finding "irreparable injury has not been clearly established to warrant a deviation from fundamental due process of notice and an opportunity to be heard from the Defendants." Order Den. TRO at 3. "Based on the singular affidavit," the Court found it "lack[ed] the ability to perform the required analysis of the alleged wrong." Id. The Court set a hearing on Plaintiffs' motion for temporary injunction for 10:00 A.M. on October 5, 2020[4] in the Spartanburg County Courthouse. Id. at 4.

During the October 5, 2020 hearing, the Court heard extensive legal presentations from all parties. The Court also received the testimony from Dr. Frank Machovec, a retired economics professor from Wofford College, on the issue of irreparable harm. The Court invited supplemental briefing on a recent Michigan case upon which Plaintiffs heavily relied for the first time during the hearing. The Court also asked counsel for Governor McMaster to provide citations to the Acts of the General Assembly referenced during arguments. On October 6, 2020, the Governor's

[4] In advance of the hearing, Governor McMaster and Plaintiffs filed memoranda with the Court outlining their respective positions. The Governor filed his brief on October 3, 2020, and Plaintiffs filed their brief on October 4, 2020. Governor McMaster also filed a motion to dismiss on October 3, 2020, but Plaintiffs objected to the Court's consideration of the motion because it was filed less than ten days before the hearing. See Rule 6(d), SCRCP. On that note, Plaintiffs filed an affidavit in support of their motion on October 4, 2020, but Defendants objected to the Court considering it because Plaintiffs filed the affidavit less than 48 hours before the hearing. See id. In an effort to apply Rule 6(d) consistently, the Court sustains both objections.

The Court nevertheless reviewed the CPA's affidavit. Even on the merits, the Court finds the conclusory affidavit is minimally relevant to the irreparable harm inquiry because Ike's is able to operate. See Executive Order No. 2020-63, § 3 (Oct. 2, 2020). The affidavit focuses on the past alleged impact of the Governor's Executive Orders, not a future threat of irreparable harm to the business absent injunctive relief.

counsel filed a letter citing and explaining the Acts in question. Plaintiffs filed a supplemental brief on October 8, 2020, and Governor McMaster filed his response the next day. Given the evolving legal landscape on these issues, counsel for the Governor subsequently filed a letter with the Court on October 16, 2020, providing notice of supplemental citations to pertinent cases out of Alabama and Wisconsin.[5]

After carefully considering the evidence, arguments of counsel, extensive briefing, and supplemental submissions, the Court finds Plaintiffs failed to meet the required burden of proof and persuasion for a SCRCP Rule 65 preliminary injunction.

II. STANDARD

"The remedy of an injunction is a drastic one and ought to be applied with caution." Strategic Res. Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation." Allegro, Inc. v. Scully, 400 S.C. 33, 45, 733 S.E.2d 114, 121 (Ct. App. 2012). For the Court to grant a preliminary injunction, Plaintiffs must establish (1) they "would suffer irreparable harm if the injunction is not granted," (2) they "will likely succeed on the merits of the litigation," and (3) no adequate remedy at law exists. Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004).

"A preliminary injunction should issue only if necessary to preserve the status quo ante." Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010). The balancing of the equities requirement is subsumed by the irreparable harm and in

[5] All parties have been represented by lawyers who have zealously and diligently advocated far their respective positions. Just days before issuing this order, this Court continued to receive unsolicited emails advocating for their respective positions.

adequate remedy at law components necessary for a preliminary injunction. Id. The U.S. Court of Appeals for the Fourth Circuit "has defined the status quo as the 'last uncontested status between the parties which preceded the controversy.'" Pashby v. Delia, 709 F.3d 307, 320 (4th Cir. 2013) (quoting Aggarao v. MOL Ship Mgmt. Co., Ltd., 675 F.3d 355, 378 (4th Cir. 2012)). "Mandatory preliminary injunctions do not preserve the status quo and normally should be granted only in those circumstances where the exigencies of the situation demand such relief." Wetzel v. Edwards, 635 F.2d 283, 286 (4th Cir. 1980). By asking the Court to alter the status quo that has existed for the last seven (7) months, Plaintiffs are seeking a mandatory preliminary injunction.

A request for a mandatory preliminary injunction is not favored and is met with even greater scrutiny from the Court. De La Fuente v. S.C. Democratic Party, 164 F. Supp. 3d 794, 798 (D.S.C. 2016). (asserting that "'application of th[e] exacting standard of review [for preliminary injunctions] is even more searching when' the relief requested 'is mandatory rather than prohibitory in nature'" (alterations in original) (quoting Perry v. Judd, 471 F. App'x 219, 223–24 (4th Cir. 2012))). "A mandatory injunction, especially at the preliminary stage of proceedings, should not be granted except in rare instances in which the facts and law are clearly in favor of the moving party." Gantt v. Clemson Agr. Coll. of S.C., 208 F. Supp. 416, 418 (W.D.S.C. 1962). "Mandatory preliminary injunctive relief in any circumstance is disfavored[] and warranted only in the most extraordinary circumstances." De La Fuente, 164 F. Supp. 3d at 798.

Plaintiffs having failed to shoulder the heavy burden of establishing they are entitled to one of the most drastic forms of relief known under the law, the Court declines to upset the status quo to issue a mandatory injunction against the defendants.

III. ANALYSIS

As one court recently noted, "the vast majority of courts that have confronted challenges to executive action regarding business closures in the midst of the COVID-19 pandemic have declined to award injunctive relief." Tigges v. Northam, No. 3:20-cv-410, 2020 WL 4197610, at *7 (E.D. Va. July 21, 2020). The Court follows suit here and declines to issue a mandatory injunction because Plaintiffs failed to make a prima facie showing of any irreparable harm. The Court further finds Plaintiffs are not entitled to injunctive relief because they failed to show a likelihood of success on the merits and have adequate legal remedies available.

A. The Court recognizes the deference owed to the Governor's policy decisions in the exercise of his emergency powers.

At the outset, the Court is mindful of the lens through which it must judge the discretionary acts of the governor and legislature in the context of a public health emergency.

It is well settled that, in South Carolina, "[a]ll political power is vested in and derived from the people only [and], therefore, they have the right at all times to modify their form of government." S.C. CONST. art. I, § 1.

> The people of this state, have, by the constitution assigned to the respective branches of the government, the several powers therein specified, according to the various provisions of that instrument, and in the exercise of those powers, each must necessarily be governed by its own judgment and discretion. The governor, in the discharge of his official duties, must follow what appears to him the most correct construction of the constitution, and wherever he has by official acts given a construction to any part of it which relates to his particular department, this court will not readily interfere to arrest the progress of his measures.

State v. Williams, 10 S.C.L. (1 Nott. & McC.) 26, 28 (1817).

When "discretion is granted or presumed to be granted to the executive department of the government by legislative enactment, the court [will] not attempt to disturb the exercise of that discretion." Hall v. Richards, 159 S.C. 34, 156 S.E. 12, 14 (1930). "The presumption is that the chief executive, in the exercise of the powers of his great office, acts with a view to the public interest, and therefore the courts should give effect to his acts to the utmost extent that they are authorized by law." McDowell v. Burnett, 92 S.C. 469, 75 S.E. 873, 878 (1912). Indeed, "[t]he same degree of caution, which [a] court would use in declaring an act of the [General Assembly] unconstitutional, ought to be observed towards the acts of the executive." Williams, 10 S.C.L. at 28. "A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." Westvaco Corp. v. S.C. Dep't of Revenue, 321 S.C. 59, 62, 467 S.E.2d 739, 741 (1995).

"[The] Court is hesitant to declare an Act of the Legislature unconstitutional and will do so only where the unconstitutionality appears beyond a reasonable doubt and there is no other recourse." Dean v. Timmerman, 234 S.C. 35, 41-42 106 S.E.2d 665, 668 (S.C. 1959). "It is a serious and solemn duty for the court to declare an act of the Legislature unconstitutional, but where the unconstitutionality appears beyond a reasonable doubt, there is no other recourse." Bramlette v. Stringer, 186 S.C. 134, 195 S.E. 257, 264 (S.C. 1938). Courts are "reluctant to declare a statute unconstitutional" and "will make every presumption in favor of finding it constitutional." Bodman v. State, 403 S.C. 60, 66, 742 S.E.2d 363, 365 (2013). To that end, "[a] possible constitutional construction must prevail over an unconstitutional interpretation." Westvaco Corp., 321 S.C. at 62, 467 S.E.2d at 741.

The "Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" S. Bay United Pentecostal

Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (mem.) (Roberts, C.J., concurring) (quoting Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905)). "To be sure, individual rights secured by the Constitution do not disappear during a public health crisis". In re Abbott, 954 F.3d 772, 784 (5th Cir. 2020). "[W]hen faced with a society-threatening epidemic, a state may implement emergency measures in the present case which are not contested. Id. at 785 (quoting Jacobson v. Massachusetts, 197 U.S. 11, 31 (1907)).

"When [state] officials 'undertake[] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'" S. Bay United Pentecostal Church, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (second alteration in original) (quoting Marshall v. United States, 414 U.S. 417, 427 (1974)). A court should be exceedingly cautious to interfere with public health related decision made by appropriate governmental officials. Id. at 1613–14. And "[t]hat is especially true where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground." Id. at 1614. And, even more true, as with the present motion, the need for health precautions is not contested. The Governor's "interest in protecting public health" during "the current global pandemic," which "has caused a serious, widespread, rapidly-escalating public health crisis," after all, "is at its zenith." In re Abbott, 954 F.3d at 795. Again, the appropriateness and need for the health related safety measures are not contested as part of the present motion.

Deference is especially appropriate in the context of an emergency. See Vill. of Orland Park v. Pritzker, No. 20-CV-03528, 2020 WL 4430577, at *7 (N.D. Ill. Aug. 1, 2020) ("The United States Supreme Court has long recognized that traditional constitutional analyses give way to a more deferential approach when courts evaluate the emergency exercise of state action during a public-health crisis."). "A law involving public health emergencies will only be struck down if it

has 'no real or substantial relation to those objects, or is beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" TJM 64, Inc. v. Harris, No. 220CV02498JPMTMP, 2020 WL 4352756, at *3 (W.D. Tenn. July 29, 2020) (quoting Jacobson, 197 U.S. at 31).

In South Carolina, the General Assembly gave the Governor certain emergency authority to meet various threats and challenges posed by a global pandemic. To grant the Plaintiffs' motion, the Court is required to interfere with the Governor's discretion and the decisions made during a public health emergency. This gives the Court great pause when the need for such health related measures, again, are not contested. Cf. McConnell v. Haley, 393 S.C. 136, 138, 711 S.E.2d 886, 887 (2011); Rose v. Beasley, 327 S.C. 197, 204, 489 S.E.2d 625, 628 (1997) (citing Guerard v. Whitner, 276 S.C. 521, 280 S.E.2d 539 (1981); Bd. of Bank Control v. Thomason, 236 S.C. 158, 113 S.E.2d 544 (1960)); Fowler v. Beasley, 322 S.C. 463, 467, 468, 472 S.E.2d 630, 633 (1996) (citing Easler v. Maybank, 191 S.C. 511, 5 S.E.2d 288 (1939)); Blalock v. Johnston, 180 S.C. 288, 185 S.E. 51, 55 (1936) (quoting State ex rel. Whiteman v. Chase, 5 Ohio St. 528, 535 (1856)).

B. Plaintiffs are not entitled to a mandatory preliminary injunction.

The Court finds Plaintiffs failed to shoulder their heavy burden of demonstrating entitlement to a mandatory preliminary injunction.

1. Plaintiffs cannot show irreparable harm.

Plaintiff's request for injunctive relief fails because they cannot make the proper showing of irreparable harm required for the granting of a mandatory preliminary injunction.[6] The facts

[6] The defendants references this Court to a case from the U.S. District Court for the Middle District of Alabama as being instructive. See Order Den. TRO, Case v. Ivey, No. 2:20-cv-00777-WKW, ECF No. 17, at 1–5 (M.D. Ala. Oct. 6, 2020). In Case, the district court issued an order denying the plaintiffs' motion for TRO to prevent Governor Kay Ivey of Alabama from enforcing Executive Orders that required them to wear a mask because the plaintiffs failed

and law do not favor the plaintiffs and equity does not establish exigencies that require immediate relief from this Court.

This court does not doubt that the Covid-19 pandemic and compliance with certain provisions of the Governor's Executive Orders have had a significant and negative economic affect on the plaintiff's business. This Court can take judicial notice of the negative economic impact the virus has had on the operation of all restaurants and other businesses in South Carolina. Many businesses, unlike the plaintiffs, have already suffered the ultimate economic injury and have closed forever. Nevertheless, a negative economic impact, standing alone, is not sufficient for a court to exercise its judicial powers to enjoin or stop enforcement of health regulations.

For purpose of an "irreparable harm" analysis for a mandatory preliminary injunction a pure economic loss is frequently not sufficient to satisfy the required showing. See District of Columbia v. E. Trans-Waste of Md., Inc., 758 A.2d 1, 15 (D.C. 2000) (observing "economic loss

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to make the requisite "showing [of] imminent irreparable harm." Id. at 3 (quoting Wreal, LLC v. Amazon.com, Inc., 840 F.3d 1244, 1248 (11th Cir. 2016)). Although the plaintiffs "had multiple opportunities" to request a TRO, they "delayed more than two months in filing their motion; at most, they delayed more than five months." Id. at 3, 4. The district court thus found they "waited an impermissible amount of time to seek the 'extraordinary and drastic remedy' of a" TRO. Id. at 4 (quoting Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000)). Indeed, as the district court observed, the "failure to act with speed or urgency in moving for [a TRO] necessarily undermines a finding of irreparable harm." Id. (quoting Wreal, LLC, 840 F.3d at 1248).

The Defendants contend, as in Case, the slow speed with which Plaintiffs pursued a motion for temporary injunction undercuts their arguments regarding irreparable harm. Governor McMaster issued an Executive Order restricting in-person dining on March 17, 2020. See Executive Order No. 2020-10. Over the next sixth months, the Governor carefully eased restrictions in response to changing facts on the ground related to COVID-19. In their complaint, Plaintiffs protested eight different Executive Orders that were issued between March and August of this year. See Pls.' Compl. ¶¶ 17–29. Yet, the Defendants contend, they waited until August to become conscientious objectors to face coverings and did not file a motion for TRO and temporary injunction until September. The week before the hearing, however, the Governor issued Executive Order No. 2020-63, removing all mandatory restrictions on restaurants except the narrowly tailored face covering requirement. The Defendants assert, given their delay, most—if not all—of Plaintiffs' case is now moot. See Sloan v. Greenville Cty., 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) (observing that mootness "arises when some event occurs making it impossible for the reviewing court to grant effectual relief"). Defendants argue, Ike's can operate at full capacity. The Defendants contend, Plaintiffs' significant delay—when coupled with the mooting effects of that delay—therefore militates against a finding of irreparable harm. The Court disagrees that the plaintiff's case is moot because of recent changes in the Governor's Executive Orders. Plaintiffs claim that the Governor's Executive Orders are invalid no matter the degree of harm suffered. The delay, however, supports, this Court's conclusion that the plaintiff's seek a mandatory preliminary injunction and, thus, must meet the more exacting standard of review. While the Court does not agree that the delay requires dismissal as in Case, the delay is an evidentiary factor in declining the issue of irreparable harm.

does not, in and of itself, constitute irreparable harm"). Our appellate courts have generally only recognized an irreparable harm where economic loss threatens the plaintiff's business as a whole. See Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 455–56, 626 S.E.2d 34, 37 (Ct. App. 2005) (holding "the complete loss of a professional practice can be an irreparable harm"). To plaintiffs benefit, and credit, their expert testified he has no concerns with the viability of Ike's as a business without the occupancy and social distancing restrictions in place. Moreover, while plaintiff's volume of business has decreased during the pandemic, based upon the testimony of Dr. Machovec, Ike's continues to remain open and Ike's appears to have a client base that is loyal and dedicated. The dedication of its client base speaks well of the plaintiff's business and its goodwill in the community even if face coverings are required.

Plaintiffs argue that without an injunction they will suffer the irreparable harm of loss of goodwill, loss of opportunity, and potentially the entire shuttering of Ike's. Plaintiffs contend that valuing the loss of goodwill, which may consist of, among other things, customer's perception of Ike's, customers' last experience at Ike's, and customers' habit, or the loss thereof, of regularly dining at Ike's, is difficult to impossible to ascertain. Plaintiffs further contend that Ike's has suffered serious financial losses in the last six months and that if the restaurant is forced to continue this trend it will slowly go bankrupt. Assuming for purposes of an irreparable harm analysis for a mandatory preliminary injunction, that the plaintiffs can establish those facts as true, the equities do not balance in plaintiffs' favor in comparison of the potential harm suffered by the community if the injunction is granted -- the likelihood of serious health consequences or death to members of the community.

As stated, the plaintiffs seek a mandatory preliminary injunction. Preliminary injunction are meant to preserve the status quo pending a final resolution on the merits of the underlying

lawsuit. A preliminary injunction requires the plaintiff to establish irreparable harm. Applying the proper analysis of irreparable harm to grant a mandatory preliminary injunction, plaintiff's must demonstrate that the law and facts favor them and the equity demands relief because exigencies exist that require the status quo to be altered. See infra, footnote 1.

Defendants contend that all Plaintiffs had to do was follow the law and comply with general public health measures that apply. Defendants contend that Plaintiffs disregarded the health precautions because they personally disagreed with wearing a face covering. Defendants also contend that Plaintiffs advertised their intention to not require face coverings at Ike's, and that the plaintiffs have developed a customer base that is loyal to them because of their disregard of the Executive Orders.

Plaintiffs' claims of irreparable harm are not consistent with the basic principles of equity that form the basis for the "extraordinary" injunctive relief they seek. See, e.g., Smith v. Barr, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007) (providing "[i]t is well known that equity follows the law"); Regions Bank v. Wingard Props., Inc., 394 S.C. 241, 259, 715 S.E.2d 348, 358 (Ct. App. 2011). Following the law, particularly during a global pandemic, does not translate into automatic irreparable harm. See, e.g., Chorazghiazad v. City of Mount Juliet, No. 3:06-0403, 2006 WL 8457634, at *2 (M.D. Tenn. Oct. 3, 2006) ("Plaintiff will not suffer irreparable harm by Defendant following the law and the public interest is served by allowing police officers to do that which is allowed under the law."); Pharm. Care Mgmt. Ass'n v. Tufte, 297 F. Supp. 3d 964, 983 (D.N.D. 2017). Moreover, our supreme court has long recognized that "the law will never, by any construction, advance a private interest to the destruction of a public interest." Richards v. City of Columbia, 227 S.C. 538, 547, 88 S.E.2d 683, 687 (1955). Instead, "it will advance the public interest, so far as it is possible, though it be to the prejudice of a private one." Id.

Our Supreme Court has likewise long held for over a century that, when statutes are "necessary for the protection of the public health, [they] do not violate the constitutional guaranty of the right of the enjoyment of liberty and property, because neither the right to liberty nor the right of property extends to the use of liberty or property to the injury of others." Kirk v. Wyman, 83 S.C. 372, 65 S.E. 387, 389 (1909). As the U.S. Supreme Court has observed,

> There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.

Jacobson, 197 U.S. at 26.

The Court finds that Plaintiffs failed to show the necessary degree of irreparable harm stemming from having to comply with the Governor's Executive Orders to warrant a mandatory preliminary injunction. As experts and officials across the country have recognized, wearing a face covering is "for the common good and not overly burdensome given the uncontested fact presently before this Court that involves the dangerousness of the Covid-19 virus. Kirk, 83 S.C. 372, 65 S.E. at 389. The law and equity requires this Court to acknowledge that we are in the middle of an unprecedented global pandemic, and the Court declines to interfere with the Governor's decision to implement this narrowly tailored public health measure, based on the record presently before it.

2. Plaintiffs cannot succeed on the merits because the Governor's Executive Orders are lawful.

Even if the Court were to move past the absence of irreparable harm, the Court nevertheless concludes Plaintiffs failed to show they are likely to succeed on the merits in this litigation.

In our system of government, "the powers of the General Assembly are plenary as to all matters of legislation unless limited by some provision of the Constitution." Clarke v. S.C. Pub. Serv. Auth., 177 S.C. 427, 181 S.E. 481, 486 (1935). Stated differently, it is up to the General Assembly "to exercise discretion as to what the law will be." Hampton v. Haley, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013). As the supreme court explained in Hampton,

> The executive branch is constitutionally tasked with ensuring "that the laws be faithfully executed." Of course, the executive branch . . . may exercise discretion in executing the laws, but only that discretion given by the [General Assembly]. Thus, while non-legislative bodies may make policy determinations when properly delegated such power by the [General Assembly], absent such a delegation, policymaking is an intrusion upon the legislative power.

Id. at 404, 743 S.E.2d at 262 (quoting S.C. CONST. art. IV, § 15).

"According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." Jacobson, 197 U.S. at 25. In exercising the State's police powers, the General Assembly may "enact laws for the general good of the citizens of the State even though the incidental effect of regulation thereunder would be to deprive some individual of liberty or property." Gasque, Inc. v. Nates, 191 S.C. 271, 2 S.E.2d 36, 39 (1939). "To be valid as a legislative exercise of police power," however, "the legislation must be clearly demanded for the public safety, health, peace, morals or general welfare." Id. "Statutes . . . calculated to better the health, safety and welfare of the people have long and universally been recognized to be within the police power." Richards, 227 S.C. at 547, 88 S.E.2d at 687.

Here, the General Assembly has given the Governor certain powers during times of emergency. See S.C. Code Ann. § 25-1-440(a)(2) ("The Governor, when an emergency has been declared, as the elected Chief Executive of the State, is responsible for the safety, security, and

welfare of the State.").[7] He is "empowered with the . . . authority to adequately discharge this responsibility, which includes, among other things, to "declare a state of emergency for all or part of the State if he finds a disaster or a public health emergency, as defined in Section 44-4-130, has occurred, or that the threat thereof is imminent and extraordinary measures are considered necessary to cope with the existing or anticipated situation."[8] Id. Under the statute, "[a] declared state of emergency shall not continue for a period of more than fifteen days without the consent of the General Assembly." Id.

As the Attorney General's office noted forty years ago, "no one would seriously challenge that such an emergency power may be needed given the ever present potential of enemy attack, epidemic, natural disaster[,] or nuclear accident." S.C. Op. Att'y Gen. 80–93, 1980 WL 81975, at *2 (Sept. 5, 1980) (emphasis added). Plaintiffs challenge this distribution and exercise of emergency power on three grounds. First, they argue the General Assembly's delegation of authority is unconstitutional. Second, they argue the Executive Orders run afoul of the authority given to the Governor. And third, they argue the Governor's actions violate the separation-of-powers doctrine. For the reasons set forth below, each contention is not likely to succeed on their merits.

a. The General Assembly's statutory delegation of emergency powers is constitutional.

The Court first finds Plaintiffs are not likely to succeed on their claim that the General Assembly unconstitutionally delegated legislative power to the Governor.

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[7] An emergency is any "actual or threatened enemy attack, sabotage, conflagration, flood, storm, epidemic, earthquake, riot, or other public calamity." S.C. Code Ann. § 25-1-430(b).

[8] A public health emergency is "the occurrence or imminent risk of a qualifying health condition." S.C. Code Ann. § 44-4-130(P); see also S.C. Code Ann. § 44-4-130(R)(2) (defining a "qualifying health condition," among other things, as "an illness or health condition that may be caused by terrorism, epidemic or pandemic disease, or a novel infectious agent or biological or chemical agent and that poses a substantial risk of a significant number of human fatalities, widespread illness, or serious economic impact to the agricultural sector, including food supply").

It is well settled that "the legislative power in this State" is "vested in two distinct branches, the one to be styled the 'Senate' and the other the 'House of Representatives,' and both together the 'General Assembly of the State of South Carolina.'" S.C. CONST. art. III, § 1. "Although the legislature may delegate its authority to create rules and regulations to carry out a law, the legislature may not delegate its power to make the law." Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 643, 528 S.E.2d 647, 652 (1999) (emphasis omitted). Our Supreme Court "has recognized the general rule that statutes that go into effect only on a certain contingency are constitutional." Id. at 645, 528 S.E.2d at 652. And the court has repeatedly held "that when an Act is complete on its face no unconstitutional delegation of legislative authority can be imputed to it by the fact that authority or discretion as to its execution is vested in an administrative officer, Commission[,] or Board." Gasque, Inc. v. Nates, 191 S.C. 271, 2 S.E.2d 36, 45 (1939).

In Compl. ¶ 84, Plaintiffs note that "[i]f the casualties of war or contagious disease render it unsafe to meet at the seat of government, the Governor, by proclamation, may appoint a more secure and convenient place of meeting." S.C. CONST. art. III, § 9. But that is not the sum total of the Governor's emergency powers. While the South Carolina Constitution provides that "the power to suspend the laws shall be exercised only by the General Assembly," it also says "or by its authority in particular cases provided for by it." S.C. CONST. art. I, § 7 (emphasis added). The Governor's emergency actions particularly at issue in the present motion, have not involved suspending any statutory provisions. Moreover, the state constitution further provides as follows:

> The General Assembly, in order to insure continuity of state and local governmental operations in periods of emergency resulting from disasters caused by enemy attack, shall have the power and the immediate duty (1) to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and (2) to adopt such other measures as may be

> necessary and proper for insuring the continuity of governmental operations. In the exercise of the powers hereby conferred, the General Assembly shall in all respects conform to the requirements of this Constitution, except to the extent that in the judgment of the General Assembly so to do would be impracticable or would admit of undue delay.

S.C. CONST. art. XVII, § 12 (emphasis added).

These provisions contemplate the General Assembly delegating emergency authority elsewhere. Here, in the context of an emergency, that delegation was understandably to the Governor. See S.C. Code Ann. § 25-1-440; see also S.C. Att'y Gen. Op., 1980 WL 81975, at *2 (Sept. 5, 1980) (observing that "[r]etained in the 1975 legislation and now found in Section 25-1-440 . . . was the express delegation of emergency powers to the Governor"). "In the unprecedented circumstances now facing our society, even a minor delay in fully implementing the state's emergency measures could have major ramifications." In re Abbott, 954 F.3d at 795. The General Assembly recognized that fact when giving the Governor emergency powers.

But the General Assembly also retained a check on this power by imposing a temporal limitation and requiring its consent for an emergency declared under Title 25 or a duration exceeding fifteen days. See, S.C. Code Ann. § 25-1-440(a)(2). In other words, this was not a total cessation of legislative power to the Executive to act with unfettered discretion. "One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances." State ex rel. McLeod v. Yonce, 274 S.C. 81, 84, 261 S.E.2d 303, 304 (1979). Proper checks and balances remain.

Plaintiffs offered a case recently decided by the Supreme Court of Michigan. See In re Certified Questions from the U.S. Dist. Ct. for the W. Dist. of Mich., No. 161492, 2020 WL

5877599, at *1 (Mich. Oct. 2, 2020).[9] The Court finds the Michigan case unpersuasive because the court there announced and applied a new standard that neither the U.S. Supreme Court nor our supreme court has adopted. See Gundy v. United States, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting). This standard, in addition to not being controlling at the federal level, is contrary to South Carolina's well-established precedent stating that "[s]eparation of powers does not require that the branches of government be hermetically sealed." S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank, 403 S.C. 640, 649, 744 S.E.2d 521, 526 (2013) (quoting 16A AM. JUR. 2d Constitutional Law § 244).[10]

Michigan bears little resemblance to South Carolina. A review of South Carolina nondelegation law is instructive, and unlike Michigan's new doctrine, it is controlling. Here, the nondelegation "doctrine is a component of the separation of powers doctrine and prohibits the delegation of one branch's authority to another branch." Hampton, 403 S.C. at 407, 743 S.E.2d at 264. And the doctrine has typically arisen in the administrative context. Simply stated, the nondelegation doctrine "prohibits the [General Assembly] from vesting unbridled, uncontrolled[,]

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[9] The underlying case from which the Supreme Court of Michigan accepted certified questions from the U.S. District Court for the Western District of Michigan was Midwest Institute of Health, LLC v. Governor of Michigan, No. 1:20-cv-414 (W.D. Mich. 2020).

[10] The Michigan court did note that, "as a general proposition, it cannot be denied that executive orders may be given the force of law if authorized by a statute that constitutionally delegates power to the executive or, indeed, as a function of any other constitutional authority, including that inherent within the executive power." In re Certified Questions, 2020 WL 5877599, at *6 n.6 (citing Cunningham v. Neagle, 135 U.S. 1 (1890)). But the Michigan Governor made no such argument there. By contrast, Governor McMaster is relying upon other statutory and constitutional provisions, as well as his inherent authority as Commander-in-Chief, Chief Magistrate, and "the supreme executive authority of this State" to exercise prerogative powers in times of emergency. See S.C. CONST. art. IV, § 1; S.C. CONST. art. IV, § 13.

In any event, the Michigan court went on to hold that a "reasonable" and "necessary" standard could not survive the plaintiffs' challenge because "[i]t neither affords direction to the Governor for how to carry out the powers that have been delegated to her nor constrains her conduct in any realistic manner." In re Certified Questions, 2020 WL 5877599, at *16. According to the court, "[g]iven the exceptionally broad scope of the EPGA, which authorizes indefinite orders that are 'necessary to protect life and property,' . . . such a standard is [] insufficient to satisfy the nondelegation doctrine when considered both in isolation and alongside the word 'reasonable.'" Id. at *17. The court found that "[t]hese facets of the EPGA—its expansiveness, its indefinite duration, and its inadequate standards—are simply insufficient to sustain this delegation." Id. at *18.

or arbitrary power in an administrative agency." Gale v. State Bd. of Med. Examiners of S.C., 282 S.C. 474, 479, 320 S.E.2d 35, 38 (Ct. App. 1984). As our supreme court has recognized, without "limitations on the agency's authority," a court, "when presented with a challenge of the agency's actions, would . . . be unable to judicially review its actions." Bauer v. S.C. State Hous. Auth., 271 S.C. 219, 233, 246 S.E.2d 869, 876 (1978). "In such a case, a citizen aggrieved by an agency action would be deprived of his due process rights under the State and Federal Constitutions."[11] Id.

Although the General Assembly "may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board 'to fill up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose." S.C. State Highway Dep't v. Harbin, 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955). "In determining whether a statute violates the doctrine, [the Court] must consider the administrative actions the act affirmatively permits and examine the entire act in light of its surroundings and objectives to ascertain express or implied standards." Gale, 282 S.C. at 479–80, 320 S.E.2d at 38.

Indeed, a court is "not restricted to the ascertainment of standards in express terms if they may reasonably be implied from the entire act." Bauer, 271 S.C. at 233, 246 S.E.2d at 876.

> The [General Assembly] has the authority to confer upon boards and commissions the power to execute laws enacted by it. "However, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration."

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[11] Plaintiffs have not raised any substantive or procedural due process challenges to the Governor's Executive Orders or the statutes pursuant to which they were issued.

Terry v. Pratt, 258 S.C. 177, 184–85, 187 S.E.2d 884, 887–88 (1972) (quoting Atl. Coast Line Ry. Co. v. S. C. Pub. Ser. Comm'n, 245 S.C. 229, 234, 139 S.E.2d 911, 913 (1965), overruled on other grounds by Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 507 S.E.2d 328 (1998)).

Any reasonable doubt must be resolved in favor of the constitutionality of a statute. Gale, 282 S.C. at 480, 320 S.E.2d at 38.

> The degree to which a legislative body must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition. There are many instances where it is impossible or impracticable to lay down criteria or standards without destroying the flexibility necessary to enable the administrative officers to carry out the legislative will; especially may such a contingency arise when the discretion conferred relates to police regulations."

Harbin, 226 S.C. at 594–95, 86 S.E.2d at 470 (emphasis added).

Of course, "[T]he issue is to be decided not on the assumption that the officer will use sound judgment in exercising the unregulated discretion with which the statute has invested him, but upon consideration of what things the statute affirmatively permits him to do." Terry, 258 S.C. at 182–83, 187 S.E.2d at 886. Our nation is one of laws, not of men. But it is equally true that "[t]he degree of authority that may lawfully be delegated to an administrative agency must in large measure depend upon circumstances of the particular case at hand, including legislative policy as declared in the statute, objective to be accomplished[,] and nature of agency's field of operation." Id. at 183, 187 S.E.2d at 886–87.

The circumstances behind the present motion are that we are in the midst of a global pandemic that, by definition, constitutes a public health emergency.[12] The existence of the

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[12] See S.C. Code Ann. § 1-3-420 ("The Governor, when in his opinion the facts warrant, shall, by proclamation, declare that, because of . . . a public health emergency, as defined in Section 44-4-130, a danger exists to the person or property of any citizen and that the peace and tranquility of the State, or any political subdivision thereof, or any particular area of the State designated by him, is threatened, and because thereof an emergency, with reference to such

pandemic and the reality that it causes serious health consequences and death are not disputed. Those are the "circumstances of the particular case at hand." Terry, 258 S.C. at 183, 187 S.E.2d at 887. As for "legislative policy as declared in the statute," id., the General Assembly did not hide the ball in enacting the Emergency Health Powers Act.[13] Indeed, in recognition that "new and emerging dangers, including emergent and resurgent infectious diseases and incidents of civilian mass casualties, pose serious and immediate threats," the General Assembly found "the government must do more to protect the health, safety, and general well being of our citizens," and the Act was thus "necessary to protect the health and safety of the citizens of this State." S.C. Code Ann. §§ 44-4-110(1)–(2) & (10). More to the point, the General Assembly concluded "this State must have the ability to respond, rapidly and effectively, to potential or actual public health emergencies." Id. § 44-4-110(5). Nevertheless, it found that "emergency health powers must be grounded in a thorough scientific understanding of public health threats and disease transmission." Id. § 44-4-110(7). "[G]uided by principles of justice, it is the duty of this State to act with fairness and tolerance toward individuals and groups," and "the rights of people to liberty, bodily integrity,

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threats and danger, exists."); S.C. Code Ann. § 44-4-130(P) (defining public health emergency as "the occurrence or imminent risk of a qualifying health condition"); S.C. Code Ann. § 44-4-130(R)(2) (defining a qualifying health condition, in relevant part, as "an illness or health condition that may be caused by terrorism, epidemic or pandemic disease, or a novel infectious agent or biological or chemical agent and that poses a substantial risk of a significant number of human fatalities, widespread illness, or serious economic impact to the agricultural sector, including food supply" (emphasis added)); S.C. Code Ann. § 25-1-430(b) (defining emergency as an "actual or threatened enemy attack, sabotage, conflagration, flood, storm, epidemic, earthquake, riot, or other public calamity" (emphasis added)); S.C. Code Ann. § 25-1-440(a)(2) (stating "[t]he Governor, when an emergency has been declared, as the elected Chief Executive of the State, is responsible for the safety, security, and welfare of the State and is empowered with the following additional authority to adequately discharge this responsibility . . . [to] declare a state of emergency for all or part of the State if he finds a disaster or a public health emergency, as defined in Section 44-4-130, has occurred, or that the threat thereof is imminent and extraordinary measures are considered necessary to cope with the existing or anticipated situation").

[13] S.C. Code Ann. §§ 44-4-100 through -570. Subsections 1-3-420 and 25-1-440(a)(2) cross-reference the Emergency Health Powers Act for the definition of "public health emergency" and, therefore, the Court must read them all in concert with one another. See Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000) ("It is well settled that statutes dealing with the same subject matter are in para materia and must be construed together, if possible, to produce a single, harmonious result."); S.C. Code Ann. § 25-1-440(e) ("In addition to the powers and duties provided in this article and in Article 7, Chapter 3 of Title 1, the declaration of a state of public health emergency authorizes implementation of the provisions of Chapter 4 of Title 44, the Emergency Health Powers Act.").

and privacy must be respected to the fullest extent possible consistent with the overriding importance of the public's health and security." Id. §§ 44-4-110(8)–(9).

And the "objective to be accomplished," Terry, 258 S.C. at 183, 187 S.E.2d at 887, is clear. The General Assembly said one purpose of the Act is "to grant state officials the authority to provide care and treatment to persons who are ill or who have been exposed to infection, and to separate affected individuals from the population at large for the purpose of interrupting the transmission of infectious disease." S.C. Code Ann. § 44-4-120(4). Another purpose is "to ensure that the needs of infected or exposed persons will be addressed to the fullest extent possible, given the primary goal of controlling serious health threats." Id. § 44-4-120(5). In light of these purposes, the Act "provide[s] state officials with the ability to prevent, detect, manage, and contain emergency health threats without unduly interfering with civil rights and liberties." Id. § 44-4-120(6). After all, the State must develop "a comprehensive plan to provide for a coordinated, appropriate response in the event of a public health emergency." Id. § 44-4-120(7).

Also clear, the "nature" of the "field of operation," Terry, 258 S.C. at 183, 187 S.E.2d at 887, is ensuring public health and safety during a public health emergency. As noted above, "this State must have the ability to respond, rapidly and effectively, to potential or actual public health emergencies." S.C. Code Ann. § 44-4-110(5). Recognizing the need for swift action, the General Assembly gave these emergency powers to the Governor. But it did not give the Governor unlimited power. Rather, the General Assembly—through the relevant provisions in Title 1, Title 25, and Title 44—carefully circumscribed the authority the Governor may exercise in leading the State of South Carolina through a public health emergency precisely like the COVID-19 pandemic with "a coordinated, appropriate response."

The Governor must take actions "necessary to protect the health and safety of the citizens of this State" while respecting "the rights of people to liberty, bodily integrity, and privacy . . . to the fullest extent possible consistent with the overriding importance of the public's health and security." S.C. Code Ann. §§ 44-4-110(9)–(10). Our supreme court has emphasized that "[t]here are many instances where it is impossible or impracticable to lay down criteria or standards without destroying the flexibility necessary to enable the administrative officers to carry out the legislative will; especially may such a contingency arise when the discretion conferred relates to police regulations." Harbin, 226 S.C. at 594–95, 86 S.E.2d at 470. This is one of those instances. The contingency was a pandemic, and the General Assembly provided "intelligible principles" through which the Governor could take action to protect the State from such public health threats.

The General Assembly was not required to contemplate or memorialize every then-conceivable extraordinary scenario when it granted the Governor emergency authority. Likewise, the General Assembly is not specifically required to reconvene for in-person meetings every two weeks in the midst of a pandemic. Had the General Assembly wanted to impose such a requirement on itself by expressly requiring governors to ask for permission to declare emergencies for specified periods, it could have done so or it could do so in the future. But those theoretical questions are not before the Court, and Plaintiffs failed to make a prima facie showing they are likely to succeed on the merits of their claim that the current delegation of emergency authority to the Governor fails to pass constitutional review.

Moreover, the Governor is not permitted to act arbitrarily, and "[a]ny abuse of this decision-making power is subject to judicial review." Bauer, 271 S.C. at 235, 246 S.E.2d at 877. And if the General Assembly disagreed with the Governor's measured response to COVID-19, it would have passed legislation with the force of law to so state. The General Assembly retains that

power. Significantly and more telling, the General Assembly continued to pass important pieces of legislation recognizing the public health emergency and tethered critical legislation to the issuance of a declaration of a state of emergency. E.g., Act No. 133 of 2020 (R-138, S. 635); Act No. 135 of 2020 (R-140, H. 3411); Act No. 142 of 2020 (R-148, H. 5202); Act No. 143 of 2020 (R-149, H. 5305); Act No. 154 of 2020 (R-170, H. 3210).[14]

Because Plaintiffs failed to make a prima facie showing that they are likely to succeed on the merits of their claim that General Assembly unconstitutionally delegated legislative authority to the Governor to combat the present pandemic, the Court declines to issue a mandatory preliminary injunction that stops enforcement of the Governor's Executive Orders.

b. The Executive Orders are consistent with section 1-3-420 and comply with subsection 25-1-440(a)(2).

The Court next finds Plaintiffs failed to make a prima face showing that they are likely to succeed on their claim that Governor McMaster exceeded his authority under the relevant statutes.

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[14] This Court notes that a Wisconsin circuit court issued an order denying a motion to temporarily enjoin Wisconsin Governor Tony Evers' Executive Order declaring a public health emergency related to COVID-19 on similar arguments presented to this Court. See Lindoo v. Evers, No. 2020CV000219, Dkt. No. 50, at 1–3 (Wisc. Cir. Ct. Oct. 12, 2020). The plaintiffs there argued "the governor exceeded his statutory authority by declaring public health emergencies on three separate occasions, each related to the same health crisis—COVID-19." Id. at 1. According to the plaintiffs, the governor could "not issue successive executive orders for the same emergency without violating the 60-day limitation of section 323.10." Id. at 2. The court, however, disagreed and found that "[n]othing in the statute prohibits the governor from declaring successive states of emergency." Id. Although the court recognized "'the governor cannot rely on emergency powers indefinitely,' he can when a public health emergency exists and the legislature lets him do it." Id. (quoting Wisc. Legis. v. Palm, 942 N.W.2d 900 (Wisc. 2020)). The Lindoo plaintiffs "counter[ed] that the 60-day limit becomes meaningless if the governor can declare successive states of emergency for the same crisis." Id. But the court rejected that argument, finding "[t]he 60-day limit serves an important function even if the governor can make successive orders" because it "prevents the governor from perpetuating emergency powers after the emergency has dissipated." Id. And "it forces the governor, before issuing another order, to reexamine the situation and publicly identify existing, present-day facts and circumstances that constitute a public health emergency." Id. "The 60-day limit provides an important check against run-away executive power, but it does not prevent the governor from issuing a new executive order when the emergency conditions continue to exist." Id. Importantly, the court observed "if the legislature is unconvinced that a state of emergency does exist, the legislature has the ultimate power to terminate it." Id. As the court noted, "[t]he legislature can end the state of emergency at anytime, but so far, it has declined to do so. As the statewide representative body of the citizens of Wisconsin, the legislature's inaction is relevant and it weighs against judicial intervention, especially when the requested intervention will have statewide impact." Id. at 3.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly]." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994). But the Court must "not construe the statute in a way which leads to an absurd result or renders it meaningless." Florence Cty. Democratic Party v. Florence Cty. Republican Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (per curiam).

Indeed, "[c]ourts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the [General Assembly] or would defeat the plain legislative intention." State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010). "If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect." Hodges, 341 S.C. at 91, 533 S.E.2d at 584 (quoting Ray Bell Constr. Co., Inc. v. Sch. Dist. of Greenville Cty., 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998)). It is well settled that "[a] possible constitutional construction must prevail over an unconstitutional interpretation." State v. Neuman, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009) (quoting Curtis v. State, 345 S.C. 557, 569–70, 549 S.E.2d 591, 597 (2001)).

The General Assembly delineated the Governor's powers to maintain peace and order in Title 1. See S.C. Code Ann. § 1-3-410 ("The Governor may take such measures and do all and every act and thing which he may deem necessary . . . to maintain peace, tranquility and good order in the State, and in any political subdivision thereof, and in any particular area of the State designated by him." (emphasis added)). As part of that power,

> The Governor, when in his opinion the facts warrant, shall, by proclamation, declare that, because of . . . a public health

> emergency, as defined in Section 44-4-130, a danger exists to the person or property of any citizen and that the peace and tranquility of the State, or any political subdivision thereof, or any particular area of the State designated by him, is threatened, and because thereof an emergency, with reference to such threats and danger, exists.

S.C. Code Ann. § 1-3-420. When the Governor issues "a proclamation as provided for in this section, [he] must immediately file the proclamation in the Office of the Secretary of State, which proclamation is effective upon issuance and remain in full force and effect until revoked by the Governor." Id.

Notably, the powers given to the Governor in section 1-3-420 have no temporal limitation. The power to declare a state of emergency in section 25-1-440, on the other hand, contains a 15-day limitation. See S.C. Code Ann. § 25-1-440(a)(2). In an attempt to harmonize the two statutes, the Governor argues he has limited the temporal scope of his emergency measures to 15-day periods since first declaring a public health emergency due to COVID-19 on March 13, 2020 to avoid any conceivable conflict between the two statutory provisions and to preempt any potential argument that he has exceeded his authority. Cf. Hodges, 341 S.C. at 91, 533 S.E.2d at 584 ("The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd.").

Plaintiffs, however, do not challenge whether the Governor complied with section 1-3-420. See Pls.' Compl. at ¶¶ 54–72. Instead, they argue the Governor ran afoul of section 25-1-440. This case, when stripped to its essence, turns on an interpretation of the 15-day consent provision in subsection 25-1-440(a)(2). Plaintiffs make two principal arguments in this regard. First, they contend the Governor cannot make multiple declarations of a State of Emergency for what, in their view, is factually a single event. Second, they contend the Governor never obtained the consent of the General Assembly as required by statute. The Court will address each in turn.

As to the multiple declarations, it is not disputed in the present motion that COVID-19 is an evolving emergency that continues to present different and additional public health, economic, and other threats. Thus, preparing for and responding to COVID-19—as well as its wide-ranging impacts—is not a static scenario or one-time event. Neither the pandemic nor the State's response can be deemed a single factual occasion. A review of the Governor's Executive Orders confirms the nature of the pandemic. E.g., Executive Order Nos. 2020-15, 2020-23, 2020-29, 2020-35, 2020-38, 2020-40, 2020-42, 2020-44, 2020-48, 2020-53, 2020-56, 2020-59, 2020-62, 2020-65 & 2020-67.

Additionally, as the Attorney General noted, "[n]othing in the statute [] prohibits the Governor, the end of a fifteen day period, from the declaration of a 'new' emergency." S.C. Att'y Gen Op., 2020 WL 2044376, at *3 (Apr. 13, 2020). Indeed, in the context of the current COVID-19 pandemic, "a declaration of emergency cannot 'foresee' what will occur at the end of the fifteen day period." Id. "Thus, it is unreasonable to assume that the General Assembly intended to limit the Governor in such dire circumstances to one 'declaration of emergency' only unless the General Assembly expressly 'consents.'" Id. As the Governor argued, by way of one example among others, that is not what happened in the aftermath of Hurricane Hugo, during which Governor Carroll Campbell issued multiple Executive Orders to marshal the State through its response to that devastating weather event.

As the Attorney General concluded, "[t]he General Assembly has delegated broad emergency powers to the Governor, pursuant to [section] 25-1-440 to manage the State's response to a declared emergency." See S.C. Att'y Gen Op., 2020 WL 2044376, at *4. Although the statute "expressly limits 'a declaration of emergency' by the Governor to fifteen days unless there is 'consent by the General Assembly,'" one "must read this language in light of the overarching

legislative purpose that the Governor is 'responsible for the safety, security and welfare of the State' during the emergency." Id. (quoting S.C. Code Ann. § 25-1-440(a)). "A pandemic certainly is not expected to end before the expiration of fifteen days," and "the Governor, therefore, must base his decision to declare a new emergency upon new circumstances and intensifying threats." Id.[15]

Moreover, the General Assembly did consent to Governor McMaster's declarations of a State of Emergency. And the Court need not infer that consent from the General Assembly's silence. Cf. id. The critical pieces of legislation the General Assembly passed this session tell the full story. On May 18, 2020, for example, Governor McMaster approved and signed H. 3411, R.140, Act No. 135 of 2020, as passed by the General Assembly and ratified on May 12, 2020, which expressly acknowledged "the public health emergency associated with the 2019 Novel Coronavirus (COVID-19)" and recognized that "given the extraordinary challenges facing our State, our nation, and the world due to COVID-19, it is necessary to take emergency measures to combat the spread of this deadly virus." Among other important features, Act 135 gave the General Assembly the authority to distribute over $1.9 billion in CARES Act funds received from the federal government. The State could have lost out on these and other federal emergency funds if the Governor had not continued to declare separate and distinct States of Emergency. The State's ability to receive critical funds from the federal government is inextricably tied to South Carolina being in a declared State of Emergency. See 42 U.S.C. §§ 5170 & 5131.

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[15] The Supreme Court of New Jersey's treatment of the issue is also instructive. In Worthington v. Fauver, that court rejected an "overly narrow interpretation" of a similar emergency powers statute akin to what Plaintiffs urge the Court to adopt here. 440 A.2d 1128, 1142 (N.J. 1982). In upholding the Governor's subsequent declaration of a state of emergency there, the court found that, "in the absence of a legislative response, such properly grounded executive actions could continue to be exercised as long as the emergency posed a threat to the public." Id. at 1138. The absence of legislative action to the contrary, in that court's view, was tantamount to implied consent to the Governor's actions. Id. So too here.

Moreover, Act 143—which the Governor signed into law on September 16, 2020—fundamentally changed the way qualified voters voted in the most recent election. Taking account of the COVID-19 pandemic, Act 143 allowed all qualified voters to vote absentee in the past November general election. The General Assembly would not have tied a critical piece of legislation changing our State's election laws to the declaration of a State of Emergency if the General Assembly (1) did not consent to that declaration or (2) believed it to be void ab initio. "The Court must presume the [General Assembly] did not intend a futile act, but rather intended its statutes to accomplish something." Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002). To that end, a more reasonable and logical conclusion is for the Court to find the General Assembly knew about and consented to the Governor's issuance of declarations of a State of Emergency in South Carolina. This Court makes such a finding.

Again, however, Plaintiffs rely upon the Michigan case in asking this Court to rule in their favor on this issue. See In re Certified Questions, 2020 WL 5877599, at *1. The Court finds the Michigan case distinguishable. Initially, the Michigan statutes bear no meaningful resemblance to the South Carolina statutes under challenge. Compare M.C.L. § 30.403(4) (requiring that "[a]fter 28 days, the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature"), with S.C. Code Ann. § 25-1-440(a)(2) (stating [a] declared state of emergency shall not continue for a period of more than fifteen days without the consent of the General Assembly"). Further, the Michigan legislature took specific action to limit the duration of Governor Whitmer's executive orders. Although Governor Whitmer asked to extend the emergency up to 72 days, the Michigan legislature only gave her an extension through April 30, 2020. The executive order thus terminated

by express action of the Michigan legislature. That same day, Governor Whitmer issued another state of emergency anyway, acting in direct contravention of the Michigan legislature's determination on the state of emergency.

The opposite is true here. Plaintiffs' sole evidence upon which they rely to show the General Assembly did not consent to Governor McMaster's actions comes in the form of a "proposed" concurrent resolution that has not been considered, amended, or adopted by the House of Representatives—where it remains in the Judiciary Committee—and only narrowly passed the Senate by a vote of 17–16 on May 12, 2020. See S. 1201, S.J. No. 42 at 35 (May 12, 2020). Concurrent resolutions, even when passed by both legislative bodies, do not have the force of law. See, e.g., S.C. Att'y Gen Op., 2013 WL 4778504, at *1 (Aug. 26, 2013) ("This Office has consistently opined that concurrent resolutions do not have the authority or force of the law.").

Significant in South Carolina, the General Assembly continued to pass laws tied to the issuance of a declaration of a state of emergency. Thus, at this stage, it appears the General Assembly explicitly—or at the very least impliedly—consented to the executive orders. If the General Assembly did not, then it would have taken binding action to limit them as the Michigan legislature did.[16]

Accordingly, Plaintiffs' attempt to draw comparisons between the Michigan case and this case for purposes of the Governor's exercise of authority within the confines of subsection 25-1-440(a)(2) is unavailing. Because it appears the General Assembly—at the very least—impliedly consented to the Governor's issuance of states of emergency to address each new challenge posed

[16] Notably, on the same day the Senate passed S. 1201, the General Assembly collectively passed Act 133, which was tied to the Governor's state of emergency, to expand absentee voting to all qualified voters for the June primary. The host of other Acts that were tied to the state of emergency due to the public health emergency stemming from COVID-19 further verifies this Court's conclusion that the General Assembly supported the Governor's efforts.

by the COVID-19 pandemic, the Court finds Plaintiffs failed to make a prima facie showing that they are likely to succeed on the merits of this claim.

c. The Governor's actions do not violate separation of powers.

Last, Plaintiffs are not likely to succeed on the merits of their claim that the Governor's actions contravene the separation of powers principles undergirding our state constitution.

"In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. CONST. art. I, § 8. "While case law within our state and across the nation involving separation of powers disputes is not a model of consistency, one theme reverberates throughout: the court's role in upholding the separation of powers doctrine is to maintain the three branches of government in positions of equality." Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control, 407 S.C. 583, 591, 757 S.E.2d 408, 412–13 (2014). That said, "[s]eparation of powers does not require that the branches of government be hermetically sealed." S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank, 403 S.C. 640, 649, 744 S.E.2d 521, 526 (2013) (quoting 16A AM. JUR. 2d Constitutional Law § 244).

In their complaint, Plaintiffs argue the South Carolina Constitution "forbids the executive branch from exercising the function of legislative powers." Compl. at ¶ 75. According to Plaintiffs, the Governor's Executive Orders "creating new rules, regulations, laws[,] and limits upon private parties and the actions they can take . . . usurp the legislative power of the General Assembly." Id. at ¶ 76. But Plaintiffs' position ignores our supreme court's carveout to this general rule that allows the Executive to engage in policymaking "when properly delegated such power by the General Assembly." Hampton, at 404, 743 S.E.2d at 262. More importantly, it

disregards our supreme court's acknowledgement that "allowing some degree of overlap between the branches has been a feature of our government since the founding of the Republic."[17] S.C. Pub. Interest Found., 403 S.C. at 649, 744 S.E.2d at 526.

In this instance, the General Assembly, in recognition that the Executive needs to quickly respond to the needs of the State in a public health emergency, gave the Governor emergency powers. See S.C. Code Ann. § 25-1-440. The Governor is the Commander-in-Chief of the organized militia of the state, S.C. Const. art. IV, § 13, and "has the power to . . . preserve the common peace," 19 S.C. JUR. Constitutional Law § 24 (2020); see also S.C. CONST. art. XIII, § 3. And "[t]he executive branch is constitutionally tasked with ensuring "that the laws be faithfully executed." Hampton, 403 S.C. at 404, 743 S.E.2d at 262 (quoting S.C. CONST. art. IV, § 15). "Of course, the executive branch . . . may exercise discretion in executing the laws, but only that discretion given by the [General Assembly]." Id.

To be sure, "non-legislative bodies may make policy determinations when properly delegated such power by the [General Assembly]." Id. Here, as noted above, Plaintiffs failed to make a prima facie showing that the Governor acted outside the boundaries of the power bestowed

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[17] "The roots of executive powers to act in case of emergency 'according to discretion for the public good, without the prescription of the law, and sometimes even against it,' extend even further back in time through state constitutions, English common law, and eventually to the writings of John Locke." William C. Bradford, "The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War, 79 NOTRE DAME L. REV. 1365, 1492 (2004). According to Locke, the Executive should hold the prerogative power—the ability to make decisions in times of emergency "to act according to discretion, for the public[] good," when no laws exist to adequately address a situation—because the Executive can act swiftly in a way that a more deliberative body, such as the legislature, cannot. See generally, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 393 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1970) (1690). "Justice Jackson's much-celebrated concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, the leading Supreme Court case on presidential powers, highlighted the significance of determining whether the president acts with the authorization of Congress, acts in a context to which Congress has not spoken, or acts in the teeth of a congressional prohibition." Richard H. Fallon, Jr., Interpreting Presidential Powers, 63 DUKE L.J. 347, 355 (2013) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–60 (1952) (Jackson, J., concurring)).

upon him by the General Assembly in responding to the evolving and wide-ranging threats posed by this unique public health emergency. Although the General Assembly has not expressly spoken on every possible detail, nobody could have foreseen the specific exigencies that arose—and continue to arise—at each step along the way in responding to COVID-19. Nevertheless, the General Assembly, in giving the Governor this emergency authority, retained a check on his exercise of emergency powers. See S.C. Code Ann. § 25-1-440(a)(2). Accordingly, the Court finds Plaintiffs failed to make a prima facie showing that a separation-of-powers violation has occurred in this setting.

In sum, the Court finds Plaintiffs have not made a prima facie showing that they are likely to succeed on the merits of their statutory and constitutional claims.

3. Plaintiffs have adequate remedies at law.

Finally, the Court finds an injunction is not appropriate because Plaintiffs failed to show their legal remedies in both the administrative and criminal settings are inadequate.

"The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule." Brown v. James, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010). "[A] generally recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of them would be a vain or futile act." Ward v. State, 343 S.C. at 19, 538 S.E.2d at 247. A party must demonstrate futility "by a showing comparable to the administrative agency taking a 'hard and fast position that makes an adverse ruling a certainty.'" Brown, 389 S.C. at 54, 697 S.E.2d at 611 (quoting Law v. S.C. Dep't of Corr., 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006)). And our supreme court has long held that "a court of equity will only restrain a criminal prosecution when (1) there is a suit pending in equity, (2) in which it is sought to try the same right in issue in the criminal

proceeding, and (3) such criminal prosecution is instituted by one party to this pending suit against the other." Palmetto Golf Club v. Robinson, 143 S.C. 347, 141 S.E. 610, 616 (1928). "But when the ordinance or statute under which the prosecutions are had is clearly void and irreparable injury to property rights may result [from] its enforcement, equity may interfere." Id.

For the reasons as discussed herein, such is not the present situation.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiffs' motion for preliminary injunction against Governor McMaster and the State of South Carolina.

AND IT IS SO ORDERED.

J. Mark Hayes, II

Chief Administrative Judge, Court of Common Pleas

Seventh Judicial Circuit of South Carolina

11/10, 2020

Spartanburg, South Carolina