STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 6422

NORTH CAROLINA BOWLING PROPRIETORS ASSOCIATION, INC. d/b/a BOWLING PROPRIETORS ASSOCIATION OF THE CAROLINAS AND GEORGIA,

Plaintiff,

v.

ROY A. COOPER III in his capacity as Governor of the State of North Carolina,

Defendant.

ORDER GRANTING PRELIMINARY INJUNCTION

1. THIS MATTER is before the Court on Plaintiff's Motion for Preliminary Injunction (the "Motion"), requesting that Defendant Governor Roy Cooper ("Defendant," the "Governor," or "Governor Cooper") be enjoined from enforcing Executive Order 141 ("EO 141" or "Phase 2 Order") against Plaintiff—the North Carolina Bowling Proprietors Association, Inc. ("Plaintiff" or "NCBPA")—and its 75 member entertainment facilities. (Mot. Prelim. Inj., ECF No. 8.)

2. The Motion has been fully briefed, both Plaintiff and Defendant have submitted affidavits, the Court held a hearing via videoconference on July 1, 2020 (the "Hearing"), and both Plaintiff and Defendant submitted additional materials after the Hearing.

3. Having considered the Motion, briefs, verified complaint, affidavits, and all materials offered in support of and in opposition to the Motion, the relevant

authorities, and the arguments of counsel, the Court GRANTS the Motion IN PART, allowing Plaintiff's members to reopen subject to the conditions stated below and so long as other indoor businesses sharing common risk factors for the potential spread of COVID-19 are allowed to remain open.

I. INTRODUCTION

4. Plaintiff avers a series of claims challenging the Governor's right to continue to issue emergency executive orders pursuant to the North Carolina Emergency Management Act ("EMA"), arguing that the EMA is unconstitutional as presently applied. The Court resolves the Motion on the more narrow ground that Plaintiff has demonstrated that it is likely to succeed on its claim predicated on the "fruits of their own labor" and equal protection clauses of Article 1 of the North Carolina Constitution, that there is no longer a reasonable basis to refuse to allow NCBPA members to resume bowling operations now that they have committed to implement guidelines and practices that mitigate those risks the Governor identified when he initially decided that bowling alleys should remain closed during Phase 2 of reopening North Carolina's economy. As such, there is no reasonable basis to treat Plaintiff and its members differently than other businesses sharing common risk factors that are currently allowed to remain open under EO 141.

5. In its earlier order involving a challenge to EO 141 brought by private bars, this Court explained why claims grounded on the North Carolina Constitution require the Court to employ a reasonable relationship standard of review, rather than the more relaxed rational basis test the federal courts have applied when rejecting

attacks on COVID-19-related executive orders and which the Governor argues this Court should apply here. (*See* Order Mot. Prelim. Inj., *North Carolina Bar and Tavern Association v. Roy A. Cooper*, *III*, 2020 CVS 6358, at 24–27 (N.C. Super. Ct. June 26, 2020).)

6. In that Order, the Court explained that the reasonable relationship standard may accommodate a degree of judicial deference to the Governor's actions, but nevertheless the Court must be satisfied by the evidentiary basis on which the Governor has acted and that he has not made distinctions among classes of business without a reasonable basis for doing so.

7. The Governor continues to adhere to his argument that he is entitled to the less exacting and more deferential rational basis standard of review under which the Governor's orders are presumed to be lawful and must be upheld unless the Plaintiff meets the high and often insurmountable burden of proving that there is no conceivable rational basis for the challenged executive order.

8. Applying the proper reasonable relationship test, the Court concludes that Plaintiff is entitled to a tailored preliminary injunction because it has demonstrated that it is likely to succeed in proving that there is no evidentiary basis from which the Governor can reasonably prohibit bowling if conducted under the operational guidelines to which Plaintiff's members commit while allowing other businesses with common risks to remain open during Phase 2.

9. The Governor cannot fairly defend the continued prohibition without affording due consideration to operational guidelines and practices to which Plaintiff

and its members have committed after the Phase 2 Order was implemented. Dr. Mandy Cohen ("Dr. Cohen") has summarized by affidavit the factors on which the Governor initially determined that bowling facilities should remain closed during Phase 2. Plaintiff and its members now commit to operational changes to address those factors, including procedures for social distancing and sanitation, and, most significantly, requiring employees and bowlers to wear face coverings. This last commitment directly responds to Dr. Cohen's claim that the greatest risk bowling presents is potential spread of the COVID-19 virus through increased respiratory effort.

10. The Court has been required to assess the current evidentiary record without the benefit of Dr. Cohen's expert review and commentary on the changes Plaintiff commits to implement as the Governor has steadfastly refused to review and respond to Plaintiff's proposed operational changes. Having itself compared Dr. Cohen's explanation of the medical basis for initially excluding bowling alleys from Phase 2 reopening against those operational changes that Plaintiff proposes, the Court concludes that Plaintiff has demonstrated that it is likely to succeed on its claim that the Governor has no reasonable basis to continue to treat bowling alleys differently than businesses sharing common risks which he has allowed to reopen during Phase 2.

11. The Court will then issue a tailored preliminary injunction while retaining jurisdiction to modify it as may be required.

II. FINDINGS OF FACT

12. In compliance with Governor Cooper's executive orders, Plaintiff's members closed their operations by March 25, 2020 and have remained closed since. (Verified Compl. ¶ 39 ("Compl."), ECF No. 3.)

13. The Governor implemented Phase 2 of the reopening of the North Carolina economy on May 22, 2020. Plaintiff was unsuccessful in its efforts to promote bowling alleys to be added to those businesses allowed to reopen under Phase 2. Plaintiff then commenced this action by a verified complaint filed on June 5, 2020, seeking to enjoin Defendant from continuing to enforce his mandate that Plaintiff's members remain closed. Among its other claims, Plaintiff asserts that the Governor's executive orders violate the North Carolina Constitution because they deprive Plaintiff's members of the enjoyment of the fruits of their own labor and violate equal protection and separation of powers. Plaintiff also avers that the Governor no longer has emergency powers under the EMA, or alternatively that the EMA and particularly section 166A-19.30(c), which grants the Governor power to assume powers initially delegated to local governments, is unconstitutional as applied if it may be read to have authorized the Governor to issue executive orders 120–21, 131, 135, 138, and 141.[1]

[1] Plaintiff argues that the Governor's power under the EMA erodes as the extent of the underlying emergency dissipates and as the passage of time allows for a legislative rather than an executive response because the EMA cannot constitutionally be interpreted to allow the Governor to take executive action that frustrates legislative response. The Court does not reach those claims when ruling on the Motion, and it has not been necessary to consider the various factual and legal arguments advanced through the issuance and veto of the several bills addressing the Governor's phased approach to reopening the economy.

14. The United States confirmed its first case of COVID-19 on January 20, 2020, and North Carolina confirmed its first case on March 3, 2020. (Compl. ¶ 26.)

15. On March 10, 2020, Governor Cooper issued Executive Order No. 116 declaring a State of Emergency in order to coordinate the State's response to the COVID-19 pandemic.[2] (Compl. ¶ 27.)

16. On March 23, 2020, Governor Cooper issued Executive Order No. 120 ("EO 120"), (Compl. ¶ 34), relying on the power granted him under N.C.G.S. § 166A-19.30(c), (Compl. ¶ 36).[3] EO 120 closed all barber shops, beauty salons, and entertainment facilities, including bowling alleys, effective as of 5:00 PM on March 25, 2020. (Compl. ¶ 34.)

17. On March 27, 2020, Governor Cooper issued Executive Order No. 121, which included a general directive that all businesses close, subject to a list of excepted "essential" businesses and ordered all persons in North Carolina to stay at their places of residence except for enumerated "essential activities." (Compl. ¶ 40.)

18. The Governor decided to reopen North Carolina's economy on a phased basis. On May 5, 2020, Governor Cooper issued Executive Order No. 138 ("EO 138"), initiating Phase 1 of North Carolina's phased reopening. (Compl. ¶ 46.) Governor

[2] The Court excludes from its summary executive orders which did not directly impact the operation of bowling alleys.

[3] The EMA defines the Governor's powers in three tiers once an emergency has been declared. Section 19.30(a) vests certain powers exclusively in the Governor. Section 19.30(b) delineates specific powers that are to be exercised with the concurrence of the Council of State. If the Governor determines that a state-wide response to the emergency is required, section 19.30(c) grants the Governor discretion to exercise powers specified in section 19.31(b), which include declarations that prohibit or restrict the operation of business establishments.

Cooper loosened restrictions on some businesses but extended his prohibition against the operation of "personal care and grooming businesses" and "entertainment facilities" including bowling alleys except that entertainment facilities were allowed to operate the retail sales and restaurant portions of their businesses. (Compl. ¶ 46.) EO 138 became effective at 5:00 PM on May 8, 2020 and was to remain effective until 5:00 PM on May 22, 2020, unless repealed, replaced or rescinded. (Compl. ¶ 46.)

19. EO 138 recites the Governor's decision to assume the emergency powers of local governments in order to address the pandemic on a state-wide basis. Under section 166A-19.31(b), those powers include the authority to prohibit and restrict the movement of people in public places; the operation of offices, business establishments, and other places to and from which people may travel or at which they may congregate; and other activities or conditions, the control of which may be reasonably necessary to maintain order and protect lives or property during a state of emergency.

20. Plaintiff's members expected that they would be allowed to reopen in Phase 2 when EO 138 was to expire on May 22, 2020 and began preparing guidelines and best practices to modify their facilities and operations in light of the COVID-19 pandemic. (Compl. ¶ 57.)

21. On May 20, 2020, Governor Cooper issued EO 141, initiating Phase 2 of the reopening of the North Carolina economy. (Compl. Ex. E ("EO 141"), ECF No. 3.) EO 141 permits the operation of retail businesses; restaurants including for indoor, on-premise service; personal care, grooming, and tattoo businesses; indoor and outdoor pools; child care facilities; children's day and overnight camps; parks, trails,

and beaches; entertainment and sporting events in large venues; and allows professional and scholarship athletes to train at indoor facilities so long as they do not exceed the Mass Gathering limit.

22. Section 4 of EO 141 exempts "[w]orship, religious, and spiritual gatherings, funeral ceremonies, wedding ceremonies, and other activities constituting the exercise of First Amendment rights" from EO 141 while "strongly" urging "entities and individuals engaging in these exempted activities [to] follow the Recommendations to Promote Social Distancing and Reduce Transmission."

23. Section 8 of the Phase 2 Order lists several types of businesses within the category of Entertainment and Fitness Facilities that were required to remain closed because, "by their very nature[,]" they "present greater risks of the spread of COVID-19." Except as otherwise allowed by Section 8(A), Section 8(A)(2) of EO 141 prohibits the operation of entertainment and fitness facilities including but not limited to bingo parlors, bowling alleys, indoor exercise facilities, gyms, indoor fitness facilities, health cubs and fitness centers, movie theaters, skating rinks, gaming and business establishments which allow gaming activities, venues for receptions or parties, museums, amusement parks, bars and night clubs, dance halls, and music halls where patrons are not seated. Section 8(A) permits the dining and retail components of bowling alleys and other fitness and entertainment facilities to operate conditioned upon the restrictions of Section 6 of EO 141.

24. The Phase 2 Order came into effect at 5:00 PM on May 22, 2020, to expire on June 26, 2020, unless repealed, replaced, or rescinded.

25. On May 26, 2020, counsel for Plaintiff wrote the Governor a letter. (Compl. Ex. F ("Pre-Suit Letter"), ECF No. 3.) The letter requested that the Governor allow Plaintiff's members "to resume bowling operations under the same standards as other commercial operations and under the same standards [the Governor] . . . set for the retail and restaurant portions of their business." (Pre-Suit Letter 1.) Plaintiff offered to work cooperatively with the State of North Carolina. Plaintiff also provided the Governor with proposed operational guidelines and restrictions for bowling alleys prepared by the Bowling Proprietors of the Carolinas and Georgia, ("BPACGA") and the Bowling Proprietors Association of America ("BPACGA COVID-19 Manual"). (Pre-Suit Letter 4; Compl. Ex. C ("BPACGA COVID-19 Manual"), ECF No. 3.)

26. The BPACGA COVID-19 Manual, which was prepared in May 2020, called for:

a. Maintaining at least one empty lane between each group bowling;

b. Improving shoe sanitation from spraying with Lysol (pre-COVID-19) to thorough inner and outer shoe cleaning and sanitizing (current);

c. Removing balls from the concourse and placing them behind counters so that each ball is given directly to the customer that will use the ball for their game and is then returned after use for thorough cleaning and sanitation;

d. Removing unnecessary touch points from bowling centers;

e. Offering all employees at least two safety classes to teach how to safely work and provide a safe environment for patrons; and

f. Installing floor clings, plexiglass, and signs to encourage and enforce social distancing throughout venues. (Compl. ¶ 22.)

27. The Governor's Office replied to the Pre-Suit Letter on May 29, 2020. (Compl. Ex. G ("Pre-Suit Resp. Letter"), ECF No. 3.) In its response, the Governor's Office asserted that EO 141 bears a rational relationship to a proper governmental purpose because, in response to "a public-health emergency[,]" "the order temporarily closes business whose operation during this pandemic would endanger the public health," but did not further delineate the basis on which the Governor distinguished bowling alleys from businesses he had allowed to reopen. The Governor's office did not comment and apparently did not review the operational guidelines and restrictions Plaintiff's counsel provided. (Pre-Suit Resp. Letter 1–2.)

28. Plaintiff then filed its suit on June 5, 2020 and requested a prompt hearing on its request for injunctive relief.

29. The Court scheduled a hearing on Plaintiff's motion for injunctive relief to be held on June 19, 2020. (ECF No. 7.) At the parties' request, the Court rescheduled the Hearing for July 1, 2020, with supporting memoranda and affidavits to be filed in advance. (ECF No. 23.)

30. Plaintiff filed multiple affidavits and a supporting brief on June 15, 2020. (Mem. Supp. Mot. Prelim. Inj. ("Br. Supp."), ECF No. 9.) Plaintiff's brief was largely dedicated to its attack on the Governor's authority under the EMA. However,

Plaintiff also restated its position that the Governor failed to demonstrate a basis for his finding that bowling presents a greater risk than businesses which he allowed to reopen, and that he had unfairly refused to address the BPACGA COVID-19 Manual furnished with the Pre-Suit Letter. (Br. Supp. 34.)

31. As of June 15, 2020, bowling facilities were open in 37 states with reopening soon expected in other states. (Compl. ¶ 75; Decl. Nancy Schenk, ECF No. 9.1.)

32. The Governor filed his response to Plaintiff's Motion on June 17, 2020, (Governor Cooper's Br. Opp'n Mot. Prelim. Inj., ECF No. 13), which included an affidavit of Dr. Cohen, (Decl. Mandy K. Cohen, MD, MPH ("Decl. Dr. Cohen"), ECF No. 12.1), with multiple supporting exhibits, none of which mentioned or were specific to bowling alleys, (*see* Exs. A–X, ECF Nos. 12.2–12.25).

33. Dr. Cohen is unquestionably an expert in the field of public health. She heads Governor Cooper's COVID-19 task force, which includes other experts in the fields of epidemiology, virology, and public safety. (Decl. Dr. Cohen ¶¶ 9–12.)

34. Dr. Cohen's affidavit includes extensive information on the COVID-19 pandemic in general and dangers it may present to the public if left unchecked.[4]

[4] The Court does not address those portions of Dr. Cohen's affidavit directed to the question of why the Governor determined that it was necessary that he assume the powers provided by section 19.30(c) of the EMA in order to issue directives on a state-wide rather than permit local governments to respond, or why and how the Governor elected to implement a phased or "dimmer switch" approach to reopening the economy. Those matters were discussed in detail by this Court in its previously cited Order on the Motion for Preliminary Injunction in *North Carolina Bar and Tavern Association v. Roy A. Cooper*, *III,* 2020 CVS 6358.

35. Speaking generally without application to specific businesses, Dr. Cohen explains that the latest science suggests that the virus that causes COVID-19 is mainly spread through respiratory droplets, although the virus can also spread through touching surfaces contaminated with respiratory droplets. (Decl. Dr. Cohen ¶¶ 13–14; *see also* Decl. Dr. Cohen Ex. A ("CDC COVID-19 Fact Sheet"), ECF No. 12.2 (stating that COVID-19 is primarily spread through respiratory and oral droplets, but may also be spread by "touching a surface or object that has the virus on it . . . [though t]his is not thought to be the main way the virus spreads[.]").)

36. In light of this, Dr. Cohen explains that there are several ways to limit the transmission of the virus, including but not limited to: (1) "limit[ing] the number of people who are in one place at the same time to decrease the chance of an infected person coming into contact with a non-infected person[;]" (2) "keep[ing] people six feet away from each other to decrease the chance that respiratory droplets will travel from person-to-person[;]" (3) "wear[ing] face coverings to decrease the spread of respiratory droplets[;]" (4) "increas[ing] air circulation to decrease the spread of respiratory droplets[;]" (5) "limit[ing] the amount of time people are in close contact with one another[;]" (6) "enhanc[ing] cleaning and disinfection to decrease the chance of a person touching a contaminated surface and carrying that contamination to that person's respiratory system[;]" and (7) "limit[ing] the exposure of the virus for people with high risk of severe complications due to COVID-19." (Decl. Dr. Cohen ¶ 21; *see also* CDC COVID-19 Fact Sheet (stating that the best ways to prevent contracting COVID-19 are to maintain social distancing, wash one's hands often preferably with

soap and water or with hand sanitizer, and to routinely clean and disinfect frequently touched surfaces).)

37. Dr. Cohen's affidavit then includes several paragraphs which seek to document the basis for her conclusion that "bowling centers and bowling alleys may carry higher risks for spreading infection." (Decl. Dr. Cohen ¶¶ 76–83.)

38. She asserts that there are certain risks specific to bowling. Namely, "[w]ithin bowling centers, patrons typically congregate near each other at the benches, tables, ball returns and scoreboards inside each lane. These 'touch points' place bowlers and spectators in close proximity to one another." (Decl. Dr. Cohen ¶ 78.) Dr. Cohen argues that, first, "[e]ven if every other alley was blocked off to promote social distancing, bowlers and spectators still are likely to gather at these shared locations beside each lane." (Decl. Dr. Cohen ¶ 78.) Second, Dr. Cohen states that patrons often share equipment, "including shoes, bowling balls, the ball return, benches, tables and chairs. For example, players may use bowling balls of different weights during a game's progression, or between games. This means that players may potentially be sharing, touching and reaching into finger holes that were touched by other players." (Decl. Dr. Cohen ¶ 79.) Third, some bowling centers serve alcoholic beverages, and alcoholic beverages reduce compliance with personal protection measures. (Decl. Dr. Cohen ¶ 80.) Fourth, "[b]owling is a physical activity and therefore can result in increased respiratory effort. People sometimes shout in excitement, [or] to be heard over background noise or music, which can also increase his or her respiratory effort." (Decl. Dr. Cohen ¶ 81.) Finally, Dr. Cohen states that

"[w]hen people are indoors and their respiratory efforts are elevated from exertion or excitement, that can increase the spread of respiratory droplets and therefore viral transmission." (Decl. Dr. Cohen ¶ 81.)

39. Dr. Cohen's affidavit did not mention the BPACGA COVID-19 Manual that was furnished to the Governor's office prior to litigation. She has not to date provided the Court with any opinion regarding the operational guidelines and policies to which Plaintiff and its members have committed after the Phase 2 Order was entered. Those guidelines and policies include undertakings specifically responding to each of the factors Dr. Cohen states in her affidavit as the basis for not including bowling alleys business among those the Phase 2 order allowed to reopen.

40. The Governor's office has never provided any expert opinion as to what further restrictions the Court might employ should it determine that it should issue an injunction.

41. The Court notes significant relevant omissions in Dr. Cohen's affidavit. While she included alcohol as one of the risk factors bowling alleys present, Dr. Cohen made no attempt to distinguish how alcohol consumption at bowling centers creates any greater risk than at businesses which serve alcohol that the Governor allowed to reopen under Phase 2. While Dr. Cohen places significant importance on increased physical exertion, she did not compare the degree of increased respiration expected from the lower level of physical exertion bowling demands in comparison to other sports or physical undertakings that are, again, allowed under Phase 2. She likewise did not discuss how the wearing of masks might mitigate against that risk.

42. The BPACGA COVID-19 Manual did not address the use of face coverings when outlining a comprehensive set of procedures directed to implementing social distancing and potential contact transmission. At the Hearing, however, Plaintiff committed on behalf of its members that they would require bowlers to wear masks or face coverings if allowed to reopen.

43. At the Hearing, the Court asked if the Governor could identify any data, study, report, or anecdotal evidence supporting Dr. Cohen's generalizations about bowling alleys, their heightened risk of spreading the COVID-19 virus, and their inability to adequately minimize risk by making operational changes of the type Plaintiff had offered. No such material was presented at the Hearing nor do materials submitted after the Hearing include such material.

44. The legislature has drafted and ratified several bills tailored towards modifying particular aspects of EO 141. (*See, e.g.*, Exs. C–D, ECF No. 9.3–9.4.) During the pendency of this action, on June 19, 2020, the General Assembly ratified Senate Bill 599, "An Act to Authorize Skating Rinks and Bowling Alleys to Resume Operations and to Modify the Capacity of Temporary Outdoor Seating for Food and Drink Establishments." (Ex. A ("SB599"), ECF No. 20.1.) In addition to calling for bowling alleys to reopen with certain operational restrictions, Senate Bill 599 also included provisions that would limit the Governor's ability to issue future executive orders without the concurrence of the Council of State.

45. On June 24, 2020, the Governor issued EO 147, extending Phase 2 through July 17, 2020 unless repealed, replaced or rescinded.[5]

46. On July 2, 2020, the Governor vetoed Senate Bill 599, giving the following veto message:

> Tying the hands of public health and executive branch officials in times of pandemic is dangerous, especially when case counts and hospitalizations are rising at a concerning rate. As we see in other states with surging COVID-19 case counts, state and local officials must be able to take swift action during this emergency to prevent a surge of patients from overwhelming hospitals and endangering the lives of North Carolinians. At this critical time, opening bowling alleys, skating rinks, and other indoor entertainment facilities runs contrary to both the troubling trends regarding COVID-19 deaths in North Carolina as well as scientific and medical data, which established that COVID-19 is significantly more likely to be transmitted in these setting. Bowling alleys and skating rinks exhibit many of the risk factors under the best available scientific and medical data. In these places, people gather in close proximity, are indoors with recirculating air, stay in the space for extended period[s] of time, and engage in physical exertion. Opening these higher-risk facilities would spread COVID-19 and endanger the State's flexibility to open the public schools. Given the rapidly evolving nature of this pandemic, executive officials are best positioned to make emergency determinations about public health. The bill is intended to restrict leaders who need to respond quickly to outbreaks and new scientific information to protect public health and safety.

(Def. Ex. B, ECF No. 27.2.)

47. The surging case counts to which the Governor refers cannot fairly be assigned to bowling alleys, which have been closed since March 25, 2020. While the Court recognizes the Governor's expressed concern regarding current trends, his message did not provide any supplemental medical or scientific support for why

[5] The Court takes judicial notice of EO 147, which is not yet a part of the pleadings or record in the case.

bowling alleys must remain closed while other businesses presenting comparable risks continue to be allowed to remain open.[6]

48. Every business that the Governor has allowed to reopen under Phase 2 presents a varying degree of risk, four of which Dr. Cohen has highlighted with respect to bowling alleys: indoor facilities, proximity, duration, and increased respiratory effort. Three of those four risk factors are also present in other indoor businesses which have been allowed to reopen: restaurants (indoors, proximity, extended period of time), tattoo parlors (indoors, proximity, extended period of time), and indoor pools (indoors, proximity, physical exertion). Furthermore, several businesses or clubs that serve food and alcoholic beverages present risks associated with alcohol at least to the same extent as bowling alleys. For each of the business categories the Governor allowed to reopen in Phase 2, the Governor mandated certain operational restrictions to mitigate but not eliminate some of the inherent risks presented by these businesses. The Phase 2 Order recognizes that those risks cannot be totally eliminated even under the best of circumstances.

49. The Court acknowledges that the Governor's interest in taking special precautions regarding businesses which have been associated with super spreading

[6] Following the Hearing, the Governor provided the Court with orders of Governors in other states that have reversed early reopening orders. Significantly, while bowling alleys may have been included within the scope of those orders, the orders also closed the range of other indoor businesses which the Governor's Phase 2 Order allowed to reopen. The Court expresses no opinion on whether the Governor can or should return North Carolina to an earlier phase of its reopening and whether bowling alleys might then be subjected to restrictions equal to but no greater than restrictions on business with common risk factors. The Court's injunction rather requires that bowling alleys be treated comparably with those businesses.

events. But the Court has been advised of no instance associating bowling facilities or activities with COVID-19 outbreak clusters or super spreading events although bowling alleys have now been open in several states for a sustained period. In fact, the Governor was unable to point to any single instance where a COVID-19 infection has been reported to have been traced to bowling.

50. While not conclusive, Plaintiff submitted evidence in support of its argument that, in fact, bowling alleys present a lesser risk than businesses allowed to reopen under the Phase 2 Order, citing to a report of an assessment by four Michigan health experts. (Ex. B, ECF No. 9.2.) Dr. Cohen did not address that article.

51. Neither the 27 exhibits attached to Dr. Cohen's affidavit nor the one article submitted after the Hearing address bowling alleys specifically. (*See* Exs. A–X, ECF Nos. 12.1–12.25 (discussing "supers-spreader" events linked to bars, nightclubs, ships, nursing homes, meatpacking plants, ski resorts, churches, restaurants, hospitals, prisons, and Zumba classes but not bowling alleys).)

52. As to the burden the Phase 2 Order places on Plaintiff's members, Plaintiff has offered evidence that Plaintiff's members "face imminent insolvency" and the "imminent permanent loss of their livelihood" if they are not allowed to reopen. (Pre-Suit Letter 1.) As an example, one of Plaintiff's members has invested more than $50 million dollars in three facilities, has been required to furlough and lay off 350 employees, and is presently losing approximately $450,000 per facility for every month he is required to remain closed. (Ex. A ("Spare Time Letter"), ECF No.

26.1.) Other members with smaller investments nevertheless face a total loss of, for some, multi-generational business. (Compl. 1–2, ¶ 127; Pre-Suit Letter 1.)

III. CONCLUSIONS OF LAW

A. Preliminary Injunction Standard

53. "[A] preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation." *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 577, 561 S.E.2d 276, 281 (2002). A court may grant a preliminary injunction only when all of three factors are satisfied: (1) the plaintiff has shown a likelihood of success on the merits, (2) the plaintiff will sustain irreparable loss unless the injunction is issued, and (3) a careful balancing of the equities shows that the public interest supports issuing an injunction. *See Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977); *see also State v. Fayetteville St. Christian School*, 299 N.C. 351, 357–58, 261 S.E.2d 908, 913 (1980). The party moving for a preliminary injunction bears the burden of establishing entitlement to the relief. *Pruitt v. Williams*, 25 N.C. App. 376, 379, 213 S.E.2d 369, 371 (1975).

B. Constitutional Standard of Review

54. The Court's decision to grant a tailored preliminary injunction is founded upon Plaintiff's claims brought pursuant to the "fruits of their own labor" and equal protection clauses of North Carolina's Constitution.[7] As to those claims,

[7] Because the Court grants preliminary injunctive relief under Plaintiff's equal protection argument, it need not and does not reach Plaintiff's argument challenging the constitutionality of section 166A-19.30(c) as applied.

our appellate courts require that the Court conduct an evidentiary review when measuring the reasonableness of the Governor's orders rather than presuming their constitutionality until Plaintiff has rebutted any conceivable rational basis upon which those orders might rest.

55. In its earlier *North Carolina Bar and Tavern* Order, the Court explained in detail why it was required to reject the Governor's invitation to employ the lower standard of review various federal courts have used to reject challenges to executive orders grounded on federal constitutional claims.[8] Nevertheless, the Court further indicated that it is appropriate that the Court, upon an adequate evidentiary basis, defer to the decisions of public officials both charged with the duty to manage an emergency and better equipped with the expertise to do so. But that deference has a limit and that limit is exceeded in this case as there is no longer a rational evidentiary basis to which the Court may defer.

56. Article I, Section 1 of the North Carolina Constitution establishes that all persons are afforded the "inalienable rights [of] . . . life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." N.C. Const. art. I, § 1. "[T]he 'fruits of their labor' provision protects the[ ] 'right to earn a livelihood[.]' " *Sanders v. State Pers. Comm'n*, 197 N.C. App. 314, 327, 677 S.E.2d 182, 191 (2009); *see also State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949) (explaining

[8] The Court here repeats but condenses its earlier discussion of why it concludes that it should neither employ a strict scrutiny standard nor the least exacting form of a rational basis test where the government is given the benefit of being presumed to have acted lawfully and the plaintiff is burdened with the obligation of proving that the government had no conceivable rational basis for acting. To the extent necessary for appellate review, the Court references and adopts its reasoning and holding in *North Carolina Bar and Tavern*.

that, under the N.C. Constitution, liberty "includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; [and] to pursue any livelihood or vocation[.]"). "The right to conduct a lawful business or to earn a livelihood is regarded as fundamental." *Roller v. Allen*, 245 N.C. 516, 518–19, 96 S.E.2d 851, 854 (1957) (quoting *McCormick v. Proctor*, 217 N.C. 23, 31, 6 S.E. 2d 870, 876 (1940)); *see also State v. Warren*, 252 N.C. 690, 692–93, 114 S.E.2d 660, 663 (1960) (same); *Sanders*, 197 N.C. App. at 327, 677 S.E.2d at 191 (same).

57. The equal protection clause of the North Carolina Constitution provides that "[n]o person shall be . . . deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws[.]" N.C. Const. art. I, § 19.[9] Such as here, "[w]hen a statute or ordinance is challenged on equal protection grounds, the first determination for the court is what standard of review to apply in determining constitutionality." *Transylvania Cty. v. Moody*, 151 N.C. App. 389, 397, 565 S.E.2d 720, 726 (2002). That standard of review depends on the nature of the right being restricted. *White v. Pate*, 308 N.C. 759, 766–67, 304 S.E.2d 199, 204 (1983); *see also Liebes v. Guilford Cty. Dep't of Public Health (In re Civil Penalty)*, 213 N.C. App. 426, 428–29, 724 S.E.2d 70, 72–73 (2011) (same).

[9] The "fruits of their own labor" clause of Article I, section 1, is also protected by the "law of the land" clause of Article I, section 19. "The law of the land, like due process of law, serves to limit the state's police power to actions which have a real or substantial relation to the public health, morals, order, safety or general welfare." *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988) (internal quotation marks omitted). "These constitutional protections have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose." *Id.*

58. Our Court of Appeals has specifically rejected the argument that the Court should apply a strict scrutiny standard to claims of the type Plaintiff asserts here. *Affordable Care, Inc. v. N.C. State Bd. of Dental Examiners*, 153 N.C. App. 527, 536–37, 571 S.E.2d 52, 59–60 (2002). A careful review of North Carolina precedent likewise demonstrates that, as to the claims premised on the North Carolina Constitution, it should not apply the lowest most deferential standard of review for which the Governor continues to advocate.

59. The proper standard is a rational relationship test through which the Court examines the evidentiary basis to determine whether the government has reasonably restricted a plaintiff's right to engage in business.

60. "Statutes are void as class legislation when persons who are engaged in the same business are subject to different restrictions or are treated differently under the same conditions." *Poor Richard's*, 322 N.C. at 67, 366 S.E.2d at 700 (citing *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E. 2d 18 (1968)). However, "[c]lassifications are not offensive to the Constitution 'when the classification is based on a reasonable distinction and the law is made to apply uniformly to all the members of the class affected.' " *Id.* at 67, 366 S.E.2d at 700–01 (citation omitted); *see also State v. Harris*, 216 N.C. 746, 758–59, 6 S.E.2d 854, 863 (1940) ("[R]egulation of a business or occupation under the police power must be based on some distinguishing feature in the business itself or the manner in which it is ordinarily conducted, the natural and probable consequence of which, if unregulated, is to produce substantial injury to the

public peace, health, or welfare," and "[w]hen such classifications are made, the Court will pass on their reasonableness and determine as to the validity of the legislation.").

61. As demonstrated in *Poor Richards,* the Court looks to the evidentiary record to make such determinations rather than relying exclusively on presumptions or potential rational bases.

62. Admittedly, judicial review of government action in the face of an emergency has typically been more deferential. *See State v. Allred*, 21 N.C. App. 229, 236, 204 S.E.2d 214, 219 (1974) (holding that, during a period of rioting catalyzed by tensions resulting from the desegregation of public schools in New Hanover County in 1971, a restraint on the right to assembly in public parks during nighttime hours was "[u]nder the circumstances, . . . clearly reasonable"); *State v. Dobbins*, 277 N.C. 484, 497–98, 178 S.E.2d 449, 457 (1971) ("[I]t is not necessary or appropriate in the present instance to attempt to draw sharply, throughout its entire length, the line between the right of the individual to travel and the authority of the State to limit travel. It is sufficient, for the present, to hold, as we do, that the Asheville curfew proclamation falls well over on the side of reasonable restriction.").

63. However, "the power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it. . . . When this field has been reached, the police power is severely curtailed[.]" *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 551, 193 S.E.2d 729, 735 (1973) (holding that there was no "*reasonable relation* between the denial of the right of a person, association or corporation to construct and operate upon his or its own

property, with his or its own funds, an adequately staffed and equipped hospital and the promotion of the public health" (emphasis added)).

64. In summary, whether the exercise of police power is valid

> is a question of degree and of reasonableness in relation to the public good likely to result from it. To deny a person, association or corporation the right to engage in a business, otherwise lawful, is a far greater restriction upon his or its liberty than to deny the right to charge in that business whatever prices the owner sees fit to charge for service. Consequently, such a deprivation of his liberty requires a substantially greater likelihood of benefit to the public in order to enable it to survive his attack based upon Article I, § 19 of the Constitution of North Carolina.

Id. at 550, 193 S.E.2d at 735.

65. The Court acknowledges that many federal court opinions to which the Governor cites employ a less restrictive standard of review.[10] *See, e.g.*, *S. Bay United Pentecostal Church v. Newsom*, No. 19A1044, slip op. at 2 (U.S. May 29, 2020) (Roberts, C.J., concurring). But those federal opinions do not address claims grounded on the North Carolina Constitution, which, unlike the U.S. Constitution, recognizes a fundamental right to the fruit of one's labor. *See, e.g.*, *Talleywhacker, Inc. v. Cooper*, No. 5:20-CV-218-FL, 2020 U.S. Dist. LEXIS 99905, at *4–16 (E.D.N.C.

[10] Most recently, the Governor has relied on the Sixth Circuit's decision in *League of Independent Fitness Facilities and Trainers, Inc. v. Whitmer*, No. 20-1581, 2020 U.S. App. LEXIS 19691 (6th Cir. June 24, 2020). Although this decision was rendered on June 24, 2020, the Governor did not submit it for the Court's consideration until after the July 1, 2020 Hearing. There, the district court overturned Governor Whitmer's executive order refusing to allow a gym to reopen because the Governor had failed to present any evidence to support her order when she had allowed other gyms to reopen but not the plaintiff's. The district court held that the deferential standard of review afforded the executive great latitude, but not so great as to withstand a challenge without presenting any evidence. The Sixth Circuit reversed noting that even "rational speculation" can satisfy the more relaxed rational basis standard. That standard contrasts with the decisions of the North Carolina Supreme Court cited above that clearly ground their holdings on an actual review of the evidentiary record offered in support of the government's exercise of its police power.

June 8, 2020) (disposing of equal protection as a basis for preliminary injunction because there is no fundamental right to earn a livelihood under the United States Constitution and not reaching state law claims because of Eleventh Amendment restrictions).

66. Therefore, the Court measures Plaintiff's right to a preliminary injunction by reviewing the evidence pursuant to the appropriate reasonable relationship standard.

C. Plaintiff's Entitlement to a Preliminary Injunction

(1) Likelihood of Success on the Merits

67. The Court has assessed the likelihood that Plaintiff will succeed on its claim that the Phase 2 Order unconstitutionally deprives Plaintiff and its members of their fundamental right to the fruits of their labor in violation of the equal protection clause by denying them the same opportunity as others to reopen in light of their having committed to operational guidelines and practices mitigating against the risks the Governor assigned to them.

68. The Court begins with its examination of Dr. Cohen's explanation of the factors that motivated the initial choice to require bowling alleys to remain closed during Phase 2 of the reopening of the economy. Beyond explaining risk factors shared with other higher-risk indoor businesses that were allowed to reopen, Dr. Cohen asserted that the Governor determined that bowling presents an increased risk of spreading COVID-19 because it involves some degree of virus spread through contact but more so through increased respiratory effort.

69. The Court finds it significant that Dr. Cohen acknowledges that sanitization practices can be effective in regard to virus transmission by surface contact, and finds it particularly significant that both the Governor and Dr. Cohen champion face coverings as the single most effective defense against the spread of the virus through respiration. Notably, the Phase 2 Order relied on the effectiveness of face coverings when allowing close-contact indoor businesses to reopen, such as hair salons and tattoo parlors. Plaintiffs have now committed to requiring bowlers and employees to wear face coverings.

70. The Court's review of the evidentiary basis for continuing to restrict the right of Plaintiff's members to reopen has not had the benefit of any expertise offered by Dr. Cohen or other members of the Governor's task force. They have chosen on multiple occasions not to comment on the guidelines and practices Plaintiff offers to adopt on behalf of its members. Had the Governor commented on the proposed guidelines or offered others that should be considered, the Court would have given them substantial weight and consideration. Unaided by any contrary opinion, the Court concludes that Plaintiff on behalf of its members has fairly and effectively responded to the Governor's initial concern for not allowing bowling alleys to reopen and that the Governor has not shown a reasoned basis for finding that those guidelines and practices do not effectively limit bowling alleys from presenting any greater risk that other indoor business with similar risk factors that are presently allowed to remain open during Phase 2.

71. While it continues to adhere to the principle that it should not engage in second-guessing of the Governor's response to an emergency, here the Court finds that it has not second-guessed the Governor's determination when finding that the Governor initially rested on operational assumptions that have been fairly and adequately rebutted with operational changes. The Court simply has not deferred to those rebutted assumptions and has noted that the Governor has elected not to present additional evidence as to the necessity of continuing to refuse bowling alleys a similar right to reopen.

72. As to the Governor's argument that he should not be hampered in his ability to take prompt action in the face of an emergency, the Court freely acknowledges that emergencies by their nature require responses that may be based on informed judgment rather than proven fact. But there are occasions when it is appropriate to test initial assumptions against facts which develop only after government action has been taken. Those occasions may be few, but the Court believes this case to be one such occasion. The Court has been influenced by the Governor's choice not to revisit his earlier determination and to offer an expert assessment as to why bowling alleys must be required to remain closed even after adopting the guidelines and policies to which Plaintiff has committed. The Court finds that the risky characteristics of bowling alleys as operated pre-COVID-19 will be effectively modified when the new operational guidelines and policies are implemented. The Governor has presented no evidence to the contrary. The Court has then been unable to discern an evidentiary basis on which the Governor has

reasonably distinguished bowling alleys from those businesses with common risks that have been allowed to open. Plaintiff is therefore likely to prevail on its claim that the Governor has implemented an improper classification among similarly situated businesses, and as *Poor Richard's* teaches, that classification will likely fail because it appears to infringe on Plaintiff's members' right to enjoy the fruits of their own labor and to be treated equally under the law.

(2) Irreparable Harm

73. The irreparable harm inquiry overlaps substantially with the burden side of the risk/burden analysis under the reasonable relationship test. Plaintiff argues that its members will suffer irreparable harm should the Court decline to grant preliminary injunctive relief because they will continue to suffer severe economic losses and may be forced to close their businesses permanently. (*See, e.g.*, Spare Time Letter.)

74. The Governor argues that economic harm is not irreparable harm and that bowling alleys have been able to make some revenue since they were permitted to reopen their retail and dining facilities, as well as accommodate professional bowling leagues. When making that argument, the Governor has not suggested a pathway by which Plaintiff's members will ever recoup the economic losses they have suffered and will continue to suffer if they do not reopen.

75. Further, there is case law suggesting that the mere deprivation of a constitutional right can in some instances constitute irreparable harm. *Holmes v. Moore*, 840 S.E.2d 244, 265–66 (N.C. Ct. App. 2020).

76. The Court concludes that Plaintiff has adequately demonstrated that after over 100 days of being closed, its members will suffer irreparable harm should they be forced to remain closed during the pendency of this action.

(3) Balance of Equities

77. The Court concludes that the balance of equities weighs in favor of issuing the requested tailored preliminary injunction. When so concluding, the Court need not minimize the public benefit from efforts to contain the spread of the COVID-19 virus. But imposing the cost of closing on Plaintiff's members requires that that public benefit be significantly advanced to justify that restriction.

78. The Court acknowledges the Governor's expressed concern that there is now evidence that the partial reopening of the economy has generated a spike in COVID-19 cases and hospitalizations. But, as noted, this spike did not result from Plaintiff's members remaining closed since March 25, 2020. If the Governor's intent is to restrict risk by restricting the economy, it does not follow that one business should be favored over another one presenting comparable risk.

79. The tailored preliminary injunction the Court enters does not minimize powers the Governor may have to respond as necessary to any increased emergency so long as he does not make distinctions between classes of business without a reasonable basis to do so. (*See, e.g.*, Ex. A, ECF No. 25.1 (June 29, 2020 order from New Jersey Governor Murphy rescinding permission for food and beverage establishments to offer in-person service in indoor areas while allowing bowling alleys to remain open).)

IV. CONCLUSION

80. The Court hereby ORDERS that Defendant, and all administrative agencies under his control are hereby immediately enjoined from enforcing section 8(A) of Executive Order 141, as extended by Executive Order 147, against Plaintiff and its members. Plaintiff and its members shall be permitted to immediately resume operation of their bowling alleys[11] so long other similarly situated business are allowed to remain open and provided that they comply with the following mandatory operational guidelines and practices:

a. The number of patrons inside any facilities shall be limited to Emergency Maximum Occupancy as defined by section 6(B)(1)(a)(i)–(ii) of EO 141;

b. All employees and patrons over the age of two (2) that are not excepted under section 3.5(c) of EO 147[12] shall be required to wear a face covering as defined by section 3.5(a) of EO 147 at all times unless seated in the designated dining area;

c. Food and beverage shall be consumed only in the designated dining area;

[11] This Order does not affect that portion of the Governor's orders prohibiting operation of arcade or other gaming areas within Plaintiff's members' facilities. (*See* Compl. ¶ 3 ("Most [of Plaintiff's] members also feature retail sales, restaurants and video arcade services at their entertainment centers.").)

[12] The Court does not construe bowling as "strenuously exercising" under section 3.5(c) of EO 147.

d. At least one empty lane shall be maintained between each group bowling;

e. Rental shoes shall be thoroughly cleaned between uses with a disinfectant approved for COVID-19 sanitation, to include inner and outer shoe cleaning and sanitizing;

f. Patrons other than immediate family members shall not be allowed to share a bowling ball;

g. All bowling balls shall be removed from the lane concourse area after usage. Any bowling ball loaned or rented by the facility to a patron shall be returned after use for thorough cleaning and sanitation;

h. When allowing a patron to choose a bowling ball for use, once touched by a patron, the ball shall be thoroughly cleaned and sanitized before being allowed to be touched by another patron;

i. All unnecessary touch points throughout the concourse shall be eliminated, and those that cannot be eliminated, included seating areas, will be wiped between use by groups and thoroughly cleaned and sanitized each twenty-four hour period;

j. Hand sanitizer stations shall be made available throughout each establishment. All hand sanitizer must be comprised of at least sixty percent (60%) alcohol;

k. Any employee shall have access to at least two safety classes which teach how to safely work and provide a safe environment for patrons;

l. Social distancing throughout the venue shall be encouraged and enforced, including through installing appropriate signage, partitions, and plexiglass screening as may be required, and including necessary efforts to avoid congregating and close social gathering in any area, including but not restricted to the concourse area;

m. All employees must answer a health questionnaire and have their temperature taken daily prior to working. Any employee showing symptoms or with a fever shall not be allowed to enter the establishment;

n. Adequate precautions shall be taken to guard against the presence of any employee or patron known or reasonably believed either to be exhibiting symptoms of infection with the COVID-19 virus or to have been exposed to the COVID-19 virus within the preceding 14 days; and

o. Unless otherwise provided in this Order, Plaintiff's members shall comply with section 6 of EO 141 as applicable and section II of EO 147.

81. The Court retains continuing jurisdiction to modify or enforce this Order as to all or some of Plaintiff's members.

82. The effect of this Order is presently limited to Plaintiff and its members.

83. Plaintiff shall not be required to post security for this injunction.

84. WHEREFORE, consistent with the reasoning and limitations set forth above, the Court hereby GRANTS Plaintiff's Motion.

IT IS SO ORDERED, this the 7th day of July 2020.

/s/ James L. Gale

James L. Gale
Judge Presiding