STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

20 CVS 500171

CRYSTAL WALDRON,
and CLUB 519,

Plaintiffs,

v.

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

Defendant.

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Plaintiffs, by and through counsel, respectfully submit this memorandum in support of their Motion for Preliminary Injunction.

INTRODUCTION

Club 519 has been forcibly closed for nearly a year under Governor Cooper's continuing orders, even though similarly situated businesses—*i.e.*, bars located inside of restaurants, eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, and wine shops—have been allowed to operate throughout the State since June 2020. There is simply no legitimate basis for requiring total closure of indoor services at private bars while allowing the public to drink indoors under certain health and safety protocol at every other alcohol-serving establishment. And while Governor Cooper has called this a "dimmer switch" approach, in reality, it threatens to turn the lights off on many private bars for good.

As applied to Club 519 and other private bars, the Governor's Orders violate the Emergency Management Act's (EMA) vital protection against discriminatory action. Moreover, in arbitrarily singling-out private bars for more burdensome regulation (*i.e.*, total closure of indoor operations and more restricted outdoor operations), the Governor has deprived Plaintiffs of their fundamental right enjoy the fruits of their labor and their constitutional right to equal protection. Finally, by exercising broad, unilateral authority properly vested with the legislature and by thwarting the General Assembly's attempts to create a legislative response to COVID-19, the Governor has violated the separation of powers.

On January 6, 2021, Governor Cooper once again extended his Orders, which keep Club 519 closed entirely. If Governor Cooper's arbitrary and unequal treatment of Plaintiffs continues unabated, Plaintiffs will soon become insolvent, preventing them from pursuing their fundamental constitutional rights in this litigation. This Court should issue a preliminary injunction to prevent further irreparable harm during the pendency of this litigation.

FACTUAL AND LEGAL BACKGROUND

Plaintiffs fully incorporate all facts presented in their Verified Complaint and briefly recount the facts here for ease of reference. Plaintiff Crystal Waldron is co-owner of Club 519. [Complaint ¶ 58.] Family owned and managed, Plaintiff Club 519 is a popular cornerstone of the Greenville community that has profitably operated as a private bar[1] in the city for over eighteen years. [Complaint ¶ 59.]

Club 519 was the primary source of income for Ms. Waldron's family until March 10, 2020, when Governor Cooper declared a State of Emergency pursuant to the EMA, Chapter 166A, *et seq.*, and closed bars entirely a week later. [Complaint ¶¶ 13–14.] On March 27, 2020, Governor Cooper issued Executive Order No. 121, which divided businesses in the State into "essential" and "non-essential" categories. The Order categorized "restaurants" as essential businesses, and thus restaurants

[1] A private bar is a class of establishments permitted to sell alcoholic beverages but not required to serve food. N.C. Gen. Stat. § 18B-1000 (4e). To qualify as a "restaurant," by contrast, an establishment's gross receipts from food and nonalcoholic beverage sales must constitute at least 30% of all total receipts from food, alcoholic beverage, and nonalcoholic beverage sales, combined. N.C. Gen. Stat. § 18B-1000 (6).

remained open for delivery, drive-through, curbside pick-up, and carry-out. "Bars" such as Club 519, were deemed "non-essential" and remained closed entirely. EO 121, § 2.C.19.

Governor Cooper instituted Phase 2 of his "three-part plan" to gradually reopen businesses across the state on May 20, 2020. *See* EO 141. "Restaurants" were allowed to reopen for on-premises services with restrictions, while "bars" remained closed. [Complaint ¶¶ 24–26.] After Governor Cooper announced his Phase 2 Order, various alcohol industry lobbyists and trade associations began to request "clarification" about whether they were required to stay closed. [Complaint ¶ 28.] Under subsequent guidance from the Governor and the ABC Commission, bars located inside of restaurants, eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, or wine shops were all permitted to open at 50% capacity, both indoors and outdoors. [Complaint ¶¶ 29–34; Complaint Exhibit A.] "Private bars," like Club 519, were required to stay closed entirely throughout Phase 2. [Complaint ¶ 35.]

Just eight days after Governor Cooper issued the Phase 2 Order, the General Assembly ratified House Bill (HB) 536 on May 28, 2020, which would have allowed private bars to reopen, but with restrictions deemed necessary and appropriate by the legislature. Governor Cooper vetoed HB 536 on June 5, 2020.

On June 10, 2020, the General Assembly responded with HB 594. Like its predecessor HB 536, HB 594 would have allowed bars to reopen with certain restrictions. In addition to signaling the General Assembly's desire to reopen private

bars, HB 594 sought to establish a check on the Governor's exercise of emergency powers under the EMA. The bill provided that the "Governor may, *with a concurrence of the majority of the Council of State,* exercise powers granted under G.S. 166A-19.30(b) or (c) related to bars and gyms, should there be a resurgence of COVID-19, provided he obtains concurrence of the Council of State." HB 594, § 3 (emphasis added). Governor Cooper vetoed HB 594 on June 18, 2020.

After extending his Phase 2 Order several times, Governor Cooper issued a Phase 3 Order on September 30, 2020. [Complaint ¶ 43.] The Phase 3 Order finally allowed private bars to begin operating outdoors to a limited extent, but unfortunately for Plaintiffs, Club 519 does not have outdoor space to serve its customers. [Complaint ¶¶ 44, 51.] Worse yet, while the Phase 3 Order and related guidance allows bars in restaurants, eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, and wine shops to serve alcohol *both outdoors and indoors* with more lenient capacity restrictions, it prohibits private bars from serving any patrons indoors. EO 169, § 3.2.c.1; Phase 2 Guidance; ABC Commission Guidance. Under the Phase 3 Order, a private bar would need a patio the size of an NCAA basketball court (4,700 square feet) to serve about 30 patrons (or 5 tables, each seating 6 patrons). [Complaint ¶ 49.] For most private bars, the stricter restrictions on outdoor service, as compared to their direct competitors, mean staying closed entirely. [Complaint ¶ 46.]

In his Phase 3 Order, Governor Cooper stated that "bars" (meaning private bars) must remain closed for indoor service because "people's risk of spreading

COVID-19 is higher for many reasons, including because people traditionally engage in activities in Bars that result in increased respiratory effort, because people traditionally mingle in Bars and are in close physical contact for an extended period of time, and because people are less cautious when they drink alcoholic beverages." [Complaint ¶ 52.] Yet the Governor's Order does not allow private bars to operate indoors even if they impose temporal and spatial limitations, and regardless of whether they eliminate music or keep televisions off so as to limit volume levels and therefore respiratory effort. [Complaint ¶ 53.] Governor Cooper also acknowledged that "lounges, music halls, night clubs, adult entertainment facilities, and stadiums share many of the same risks of Bars," yet these entities were also permitted to open in Phase 3. Governor Cooper stated that at these facilities, the "risks can be mitigated if capacity restrictions are put in place and if the facility is required to be seated which will counteract the tendency of Guests in these facilities to mingle and spread COVID-19 among one another like they are in a Bar." [Complaint ¶ 54.] But Governor Cooper did not afford bars the same opportunity to limit risk by imposing capacity restrictions or requiring patrons to stay in a designated area. [Complaint ¶ 55.]

Club 519 is willing and able to abide by the same requirements imposed on bars in restaurants, eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, and wine shops. [Complaint ¶ 62.] If permitted, Club 519 would open immediately and follow the Phase 3 safety guidance as well as implement additional safety precautions to mitigate any supposed concerns about private bars. Specifically, Club 519 would

strictly enforce all distancing requirements, refrain from playing music or sounds from televisions, and follow the guidelines provided in The North Carolina Bar and Tavern Association's "Proposed Health Guidance to Allow Bars to Reopen Safely." [Complaint ¶ 62.] But Governor Cooper has prohibited them from doing so, and last week he extended that prohibition. [EO 188; *see also* EO 181.] Plaintiffs now ask this Court to issue a preliminary injunction and grant private bars the opportunity to open safely under the same standards applicable to every other bar in the state.

STANDARD OF REVIEW

A court shall issue a preliminary injunction "(1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 573 (1977). Issuance of a preliminary injunction "is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *State v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS

Plaintiffs are likely to succeed on the merits of their claims that the Governor's Orders (1) violate the EMA and are therefore ultra vires, (2) deprive them of the fruits of their labor, (3) deny them equal protection of the laws, and (4) violate the Constitution's promise of the separation of powers. First, Governor Cooper's

Executive Orders discriminate against Club 519 and other private bars on the basis of their economic status, meaning Governor Cooper has failed to carry out his emergency management functions in an equitable and impartial manner as required by the EMA. The Act forbids the Governor from treating entities differently merely on the basis of their economic status, and yet the Governor is treating other classes of establishments that sell alcoholic beverages more favorably based only on economic favoritism and their relative lobbying power.

Second, the Governor's Executive Orders arbitrarily deny Plaintiffs their fundamental right to enjoy the fruits of their labor and equal protection of the laws. Private bars are perfectly capable of opening safely under the same guidelines that apply to *every other class of alcohol-serving establishments*, as well as implementing additional measures to mitigate any supposed concerns unique to private bars. And yet the Governor continues to forbid them from operating indoors (as myriad other establishments are permitted to do) based on the unsupported assumption that private bars and their patrons will flout the rules. While early on in the pandemic, this Court deferred to the Governor despite his lack of scientific or concrete evidence, something more than mere conjecture is needed to justify the continued denial of Plaintiffs' fundamental rights nearly a year into ongoing emergency rule.

Last, arbitrary and discriminatory government actions are the inevitable consequence of prolonged and unchecked one-man rule. The Governor's continued exercise of legislative power and repeated efforts to supplant the General Assembly's

legislative choices with executive action demonstrates that Plaintiffs are likely to succeed on their Separations of Powers claim.

A. Governor Cooper's Executive Orders Are *Ultra Vires* and Violate N.C. Gen. Stat. § 166A-19.74

Governor Cooper is without statutory authority to issue Executive Orders 181, 188, or any similar order, as applied to Plaintiffs and other private bars because the EMA explicitly forbids unequal treatment in emergency management. Section 166A-19.74 of the EMA requires "[s]tate and local governmental bodies and other organizations and personnel who carry out emergency management functions under the provisions of this Article . . . to do so in an equitable and impartial manner." Moreover, "[s]tate and local governmental bodies, [. . .] and personnel shall not discriminate on the grounds of race, color, religion, nationality, sex, age, or *economic status*." N.C. Gen. Stat. § 166A-19.74 (emphasis added).

This limitation under the EMA makes good sense since the General Assembly cannot delegate authority to regulate that it does not have itself under the North Carolina Constitution. And in *Cheek v. City of Charlotte*, 273 N.C. 293, 297, 160 S.E.2d 18, 21 (1968), the North Carolina Supreme Court affirmed that the General Assembly cannot subject "persons engaged in the same business" to "different restrictions."

Yet with regards to the closure and "reopening" of private bars, Governor Cooper has not carried out his emergency management functions in an equitable or impartial manner. Executive Orders 181 and 188 grant preferential treatment to

restaurants, eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, and wine shops by granting them higher outdoor occupancy limits and allowing them to open for indoor service.

The Governor has suggested that patrons at private bars tend to flout the rules, but he lacks any concrete evidence to support this conjecture. Moreover, common sense suggests that the purported "inevitable gathering effect" attributable to alcohol occurs regardless of whether a person consumes their beverage in a restaurant bar, brewery, private club, or private bar.[2] If restaurant bars, breweries, private clubs, and others are given the opportunity to thwart these tendencies with strict enforcement of health and safety protocols, private bars should be given the same opportunity.

The Governor has also suggested that patrons at bars engage in "increased respiratory effort"—apparently because some private bars may be loud and patrons may therefore need to speak with elevated voices to be heard. Those concerns are inapposite here because Club 519 is a casual neighborhood bar—not a nightclub. Moreover, any such concerns should apply equally across the board to *all* businesses serving alcohol, especially given that other businesses are currently functioning as

[2] Restaurants and other establishments are now acting as de facto bars, and thus present the same risk that patrons will violate social distancing requirements. *See, e.g.*, 'It was packed': Patrons say they may have contracted virus at South End sushi bar, http://bit.ly/38DrlCU (last visited Jan. 12, 2021). Where people threaten to break the rules, the answer should be equal enforcement of generally applicable rules for all businesses serving alcohol.

replacements for private bars and yet those establishments have no limit on noise levels. The answer should be reasonable and *generally applicable* regulation of indoor noise levels—not an arbitrary rule shuttering one disfavored (*i.e.*, politically weak) class of bars.

There is simply no valid public health or safety rationale for the Governor's unequal treatment. The only possible explanation for the Governor's discriminatory Orders is private bars' disfavored economic status. And in fact, the Governor has been candid that, in his opinion, private bars occupy a less favorable economic status than bars in other classes of businesses and other entities that sell alcohol for on-site consumption. In previous litigation, Governor Cooper submitted a declaration from Wit Tuttell, Vice President of Tourism and Marketing for the Economic Development Partnership of North Carolina, which he used in support of his decision to shutter private bars but not others similarly situated. Tuttell explained that the unequal treatment was due to the fact that the "[t]he State has invested significant resources to help attract and develop breweries and wineries[,]" and "award[ed] loans and provide[d] incentives to attract these businesses to North Carolina." Tuttell Decl. at ¶¶ 3–4. When evaluating the economic impact of breweries versus private bars in the state, Tuttell stated that "data shows that each person employed at a brewery is estimated to contribute $244,162 to North Carolina's Gross Domestic Product (NC GDP) annually. This is about 6 times the amount contributed by each employee of a bar." Tuttell Decl. at ¶ 5. In other words, Tuttell and Governor Cooper consider these entities more valuable to the economy than they consider the owners and employees

of private bars. The result is private bars across the state are subject to discrimination based on their economic status.

In fact, despite that Governor Cooper continues to urge citizens to *avoid travel*, including trips to visit family over Thanksgiving and Christmas holidays,[3] Tuttell cited the economic benefit of tourism from other states to justify opening bars in breweries and wineries, but not private bars:

> From a tourism perspective, breweries and wineries are attractions that generate travel and spending. Their presence draws visitors and helps them to choose to visit North Carolina as opposed to other states. [. . .] [T]he qualitative distinction between bars and breweries/wineries for tourism marketing is that breweries/wineries factor into the travel selection decisions and bars typically do not.

He added, "Wineries and Breweries are listed in our VisitNC.com database, whereas most bars are not." Tuttell Decl. at ¶¶ 8, 11.

There is no viable explanation for this disparate treatment apart from naked favoritism and discrimination based on economic status. There is no evidence that private bars cannot or will not abide by the same safety standards as other entities that are currently permitted to operate indoors. And 9 months into the pandemic, Governor Cooper possesses no evidence that private bars, when operating under the safety standards currently applied to other establishments, present a higher risk of transmission of COVID-19. Moreover, Plaintiffs have agreed to implement measures to mitigate any hypothesized risks related to private bars.

---

[3] 'Christmas could be even worse': Gov. Cooper urges N.C. residents not to travel, gather during holidays, http://bit.ly/35K8LHp (Dec. 15, 2020).

Governor Cooper's unequal treatment of private bars does not speak to any legitimate public health concern, but rather the relative lobbying strength of restaurants, eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, and wine shops.[4] The EMA forbids the Governor from picking winners and losers solely based on an entity's economic status. Yet that is exactly what Governor Cooper has done, in violation of N.C. Gen. Stat. § 166A-19.74. For this reason, his orders are ultra vires.[5]

B. Governor Cooper's Executive Orders Deprive Plaintiffs of Their Fundamental Right To Enjoy the Fruits of Their Labor

Plaintiffs' ability to operate Club 519 is their means of earning a living. Nearly a year into the pandemic, Governor Cooper continues to deprive Plaintiffs and other private bars of economic opportunity without any rational, real, or substantial relation to public health or safety, thus depriving them of their right to the fruits of their labor in violation of art. I, §. 1 and 19 of the North Carolina Constitution.

The right to pursue the fruits of one's labor is a fundamental right under the state constitution. *King v. Town of Chapel Hill*, 367 N.C. 400, 408–09, 758 S.E.2d 364, 371 (2014); *Roller v. Allen*, 245 N.C. 516, 518–19, 96 S.E.2d 851, 853–54 (1957). The ability to "be free to enjoy [one's] faculties" to "earn [a] livelihood by any lawful

---

[4] *NC Breweries Seek Clarification to Reopen in Phase II***,** http://bit.ly/3osbYT7 (May 21, 2020); *New guidance means North Carolina breweries can reopen in phase 2*, https://bit.ly/3jh8YWa (May 22, 2020).

[5] Because the court has a duty "to construe a statute, if possible, in a constitutional fashion[,]" *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001), the court should resolve the preliminary challenge on this statutory basis, even though Plaintiffs' constitutional arguments are well supported.

calling" emphasizes "the dignity, integrity and liberty of the individual, the primary concern of our democracy." *State v. Warren*, 252 N.C. 690, 693, 114 S.E.2d 660, 663 (1960). And the right's placement in N.C. Const. art. I, § 1, alongside other fundamental rights like the rights to "life," "liberty," and "the pursuit of happiness" highlights its importance.

While the government may exercise its police power where reasonably necessary to promote the public welfare, it "may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." *See Cheek*, 273 N.C. at 296, 160 S.E.2d at 21; *see also Warren*, 252 N.C. at 693, 114 S.E.2d at 663 (same). Any restriction on a person's right to earn a living "must have a rational, real, or substantial relation to the legitimate governmental purpose and must be reasonably necessary to promote the accomplishment of a public good or prevent the infliction of a public harm." *State v. McCleary*, 65 N.C. App. 174, 180–81, 308 S.E.2d 883, 888–89(1983); *see also State v. Ballance*, 229 N.C. 764, 769–70, 51 S.E.2d 731, 735 (1949) (same); *Treants Enter's, Inc. v. Onslow Cty.*, 83 N.C. App. 345, 354–57, 350 S.E.2d 365, 371–72 (1986) (same). And where the government excludes a person from engaging in a business, courts "require[] a substantially greater likelihood of benefit to the public." *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 550, 193 S.E.2d 729, 735 (1973).[6]

[6] North Carolina courts "have not hesitated to strike down regulatory legislation as repugnant to the state constitution when it is irrational and arbitrary." *Real Estate Licensing Bd. v. Aikens,* 31 N.C. App. 8, 11, 228 S.E.2d 493, 495 (1976) (citing *Roller v. Allen*, 245 N.C.

The "rational, real, or substantial relation" test requires a meaningful fit between the ends and the means rooted in record evidence rather than supposition. For example, in *Treants Enter's, Inc. v. Onslow Cty.*, 83 N.C. App. at 354–57, 350 S.E.2d at 371–72, the plaintiffs challenged a law that regulated companionship businesses. The government asserted a number of rationales, including preventing minors from visiting companionship businesses, discouraging prostitution, and preventing the spread of disease. The court ruled that while these were legitimate ends, the regulation went "far beyond what [was] necessary to accomplish that objective." *Id.* at 355. For example, it imposed administrative and licensing fees and created onerous photographing, fingerprinting, and detailed record-keeping requirements. These burdens not only applied to places engaged in illegal conduct; they applied to legitimate businesses as well, including nursing homes and support groups. The court ruled that the government could not burden the rights of innocent businesses merely "because some other businesses…are a subterfuge for illegal activity." *Id.*

Moreover, the Court reasoned that the law did not actually effectuate its goals. It did not, for example, relate to curbing the spread of disease because it applied to businesses where companionship services were not likely to lead to sexual conduct.

---

at 96 S.E.2d 851 (striking down restriction on tile contractors); *Ballance* 229 N.C. 764, 51 S.E.2d 731 (striking down license requirement for photography); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940) (striking down restrictions on dry cleaners); *In re Aston Park Hospital,* 282 N.C. at 550–51, 193 S.E.2d at 735 (invalidating certificate of need program for hospitals)).

Id. at 356. And it did not relate to preventing "excessive sums" of money from being spent at illegitimate companionship businesses because it did not regulate prices. *Id.*

Here, the Executive Orders likewise bear no real, rational, or substantial relationship to curbing the spread of COVID-19. First, private bars can operate under the same standards as restaurants, eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, or wine shops—all of which are currently permitted to operate indoors under certain conditions. And the Governor possesses no evidence that bars present any more of a risk than these entities should they operate under the same guidelines. Notably, the General Assembly agrees that private bars do not present any more of a risk, and in fact, would have allowed them to operate like others similarly situated had not the Governor twice vetoed its legislation. HB 536; HB 594.

In earlier litigation, Dr. Cohen, Secretary of Department of Health and Human Services, testified that patrons in private bars yield to "an inevitable gathering effect" and engage in increased respiratory effort due to things like loud music, singing, or shouting. But the Executive Orders apply regardless of whether a bar agrees to strictly enforce distancing protocol, the bar's character (rowdy or neighborhood), and whether it even plays television or music. Club 519, for example, is a neighborhood bar, and it has promised to mitigate any concerns about "increased respiratory effort" by keeping music and television off or on low volume. These concerns simply don't apply to Club 519.

Moreover, the Governor's expert earlier provided testimony assuming that people would flout the safety precautions applicable to restaurants. wineries, distilleries, breweries, and others. But Plaintiffs have vowed to enforce those precautions, and the Governor may not shut down lawful businesses merely on the assumption that some may flout the rules. *See Treants Enterprises*, 83 N.C. App at 355, 350 S.E.2d at 372.

Plaintiffs, in this case, are analogous to the plaintiffs in *North Carolina Bowling Proprietors Assoc. v. Cooper*, Order Mot. Prelim. Inj., 20-CVS-006422 (N.C.B.C. July 7, 2020) (*Bowling* Order). There, the Court ruled that the Plaintiff was entitled to a preliminary injunction because it "demonstrated that it [was] 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 Plaintiffs' members commit while allowing other businesses with common risks to remain open during Phase 2." *Bowling* Order, ¶ 9 at 3. Plaintiffs are fully capable of implementing the safety protocol applicable to every other type of establishment that sells alcohol and shares the same risks.

In prior litigation closer to the onset of the pandemic, the court articulated the need to be deferential to the Governor.[7] But nine months later, there is no longer reason to be deferential. At that time, the court noted that "the balance between government power and individual liberties tips more in favor of the rational exercise

[7] *See* Order Mot. Prelim. Inj., *North Carolina Bar and Tavern Ass'n v. Roy A. Cooper*, *III*, 2020 CVS 6358, ¶ 44 at 25–26 (N.C.B.C. June 26, 2020) (*NCBATA* Order).

of police powers when the government is *required to act in the face of an emergency*." *NCBATA* Order, ¶ 45 at 26. But nearly a year into the pandemic, the Governor is not required to act at all. Indeed, the General Assembly is fully capable of legislating and *has* attempted to legislate to curb the spread of COVID-19—even seeking to reopen private bars. *Id.*, ¶ 52 at 29.

Moreover, much more is now known about the spread of COVID-19, and Governor Cooper has had time to collect data and compare policies pursued in other states. At this point, Governor Cooper should be able to support his policies with actual evidence rather speculation, eliminating the need for deference. Thus, while the Governor's expert once "opine[d]" that people in private bars (but purportedly *not* people imbibing alcohol in restaurants, distilleries, wineries, breweries, and others) yield to the "inevitable gathering effect,"[8] the Governor must now provide evidence that this is true in order to continue denying Plaintiffs their fundamental rights. And while it may have once been reasonable for Dr. Cohen to assume that the "pervasive negative effect of pre-COVID-19 learned behavior that does not involve regular and disciplined social distancing"[9] would be most prevalent in private bars, that justification is no longer viable after months during which the public has observed consistent social-distancing policies. While "anecdotal evidence"[10] about a bar in Alabama, or about bars, gyms, dance clubs, and other venues in *other countries*, may have once been adequate in lieu of "empirical data or scientific or medical studies,"

[8] *See id.*, ¶ 52 at 29.
[9] *See id.*, ¶ 52 at 30.
[10] *See id.*, ¶ 53 at 30.

that will no longer suffice.[11] The North Carolina Constitution requires something more before the state may deprive individuals of their livelihoods. If the Governor cannot provide any evidence at this time and instead relies on generalizations about certain private bars or bad actors, his Orders are arbitrary, unreasonable, and lack a "real, rational, or substantial" relationship to protecting the public.

Indeed, when affording the Governor deference in earlier cases, the Court cited to the Supreme Court's opinion in *S. Bay United Pentecostal Church v. Newsom,* 140 S.Ct. 1613, 1613–14, 207 L.Ed.2d 154 (2020). *See NCBATA* Order, ¶ 44 at 26. But the U.S. Supreme Court has since begun scrutinizing pandemic-related measures more closely, even enjoining one such measure in *Roman Catholic Diocese of Brooklyn v. Cuomo*. *See* 141 S.Ct. 63, 68, 592 U.S. ___ (2020) ("Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten"); *see also id.* ("[W]e have a duty to conduct a serious examination of the need for such a drastic measure."). More scrutiny with the passage of time is proper. *See Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603, 2605, 207 L.Ed.2d 1129 (2020) (Alito, J., dissenting from denial of application for injunctive

[11] Dr. Cohen also suggested that those entities that are allowed to open because they purportedly serve a smaller population of customers, and therefore present a smaller risk of spreading COVID-19. [*NCBATA* Order, ¶ 54 at 30–31.] This assertion is belied by the fact private bars comprise less than a thousand or so licensees, compared to the thousands of alcohol-serving establishments now open for indoor service. Moreover, now that private bars have been closed for nine months, restaurants, eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, and wine shops are simply acting as *replacements* for the population that would have frequented private bars.

relief) ("As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.").

Other courts have struck down closure orders where the government lacks the necessary evidence. *See, e.g.*, Order Mot. Prelim. Inj., *Mark's Engine Co. No. 28 v. Cty. of Los Angeles*, 20-STCV-45134, at 52 (Cal. Sup. Ct. Dec. 15, 2020) (striking down outdoor dining ban as arbitrary and lacking evidence) (Attached as Exhibit A); *McCarthy v. Baker*, No. 1:20-cv-10701-DPW, 2020 WL 2297278 (D. Mass. May 7, 2020) (striking down closure of ammunition sellers as overly restrictive); *Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't*, No. 20-4300, 2020 WL 7778170, at *2–*3 (6th Cir. Dec. 31, 2020) (striking down school closure where "gyms, tanning salons, office buildings, and the Hollywood Casino" remained open). Some courts have even struck down closure orders when applying the laxer rational basis test under the federal Constitution. *See Cty. of Butler v. Wolf*, No. 2:20-cv-677, 2020 WL 5510690, at *25 (W.D. Pa. Sept. 14, 2020) ("Even with this forgiving [rational basis] standard as its guide, the Court nevertheless holds that the March 19, 2020, Order closing all 'non-life-sustaining' businesses was so arbitrary in its creation, scope and administration as to fail constitutional scrutiny.").

In sum, whatever deference the Governor was entitled to in June, no deference should be afforded to the Governor's one-man rule nine months into the pandemic, especially when it contradicts legislation duly passed by the General Assembly.

Lacking any concrete evidence, the Governor's Orders bear no rational, real, or substantial relationship to his ends.

C. Governor Cooper's Executive Orders Deny Plaintiffs Equal Protection

For largely the same reasons, the Order denies Plaintiffs equal protection of the laws. Under the equal protection provision of the North Carolina Constitution, laws must be "uniform, fair, and impartial in [their] operation." *Cheek,* 273 N.C. at 298, 160 S.E.2d at 23. Even though a law may be "passed in the interest of the public health, safety, or morals," it will be "void as class legislation wherever [it is] made to apply arbitrarily only to certain persons or classes of persons or to make an unreasonable discrimination between persons or classes. *Id.*; *see also id.* ("Statutes and ordinances 'are void as class legislation whenever persons engaged in the same business are subject to different restrictions or are given different privileges under the same conditions.").[12] Any time the government makes a distinction between similarly situated groups, it must show that its classification "could provide a reasonable means to a legitimate state objective." *Sanders v. State Personnel Comm'n*, 197 N.C. App. 314, 324–25, 677 S.E.2d 182, 189 (2009) (quoting *Power v. Odell*, 312 N.C. 410, 412, 322 S.E.2d 762–63 (1984)). The relationship between the

[12] Where a statute is challenged on the basis that it denies a person equal protection under the law, the level of judicial scrutiny depends on whether the alleged denial involves a fundamental right or a suspect class. *See Texfi Industries v. City of Fayetteville,* 301 N.C. 1, 11–12, 269 S.E.2d 142, 149 (1980). This Court should apply heightened scrutiny because—as set forth above—the Governor's orders impinge Plaintiff's fundamental right to enjoy the fruits of their labor.

government's ends and means cannot be "so attenuated as to render the distinction arbitrary or irrational." *Id.* (quoting *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8–9 (2004)).

Applying these "fundamental rules of constitutional law," the North Carolina Supreme Court once struck down a law which prohibited a person of one sex from giving a massage to a patron of the opposite sex in massage parlors, health salons, or physical culture studios, but not in barbershops, beauty parlors, Y.M.C.A. and Y.W.C.A. health clubs. *See Cheek,* 273 N.C. at 298, 160 S.E.2d at 23; *see also McCleary,* 308 S.E.2d at 896, 65 N.C. App. at 194 (invalidating a law permitting homeowner or property owner associations to conduct bingo games or raffles but not others). In *Cheek*, the Court ruled that there was no reasonable ground for such a distinction, and instead the law served only to "mechanically split into two groups persons in like situations with regard to the subject matter dealt with but in sharply contrasting positions as to the incidence and effect of the law." 273 N.C. at 299, 160 S.E.2d at 23 (quoting *State v. Glidden Co.*, 228 N.C. 664, 668, 46 S.E.2d 860, 862 (1948)).

Like the ordinance in *Cheek*, there is no health or safety rationale underlying the disparate treatment between private bars and bars operating inside of restaurants, eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, and wine shops. The Governor has made a "purely arbitrary selection" by treating private bars differently

from other bars operating inside and outside at 50% capacity across the state. *Cheek*, 273 N.C. at 299, 160 S.E.2d at 23.

Governor Cooper also acknowledged that in addition to restaurants, eating establishments, wineries, distilleries, breweries, and others, "lounges, music halls, night clubs, adult entertainment facilities, and stadiums share many of the same risks of [private] Bars." EO 169. Yet he permitted these entities to open on the theory that the "risks can be mitigated if capacity restrictions are put in place and if the facility is required to be seated which will counteract the tendency of Guests in these facilities to mingle and spread COVID-19 among one another like they are in a Bar." *Id*. But the Governor never explained why those risks cannot likewise be mitigated in private bars with these same restrictions. Club 519 is ready, willing, and able to operate under the same safety criteria as other bars and other business establishments currently allowed to operate indoors. Club 519 would enforce such protocol strictly. Further, Plaintiffs are even willing to make further changes to their operations if necessary to ensure the safety of their patrons and their staff. *Bowling* Order, ¶ 9 at 3. The Governor's discriminatory treatment of private bars violates equal protection.

D. Governor Cooper's Executive Orders Violate the Separation of Powers Clause

Plaintiffs are also likely to prevail on the merits of their claim that Governor Cooper has violated the constitutional promise of the separation of powers. *See* N.C. Const. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State

government shall be forever separate and distinct from each other."). This provision "preserves individual liberty by safeguarding against the tyranny that may arise from the accumulation of power in one person or one body." *Cooper v. Berger*, 371 N.C. 799, 804, 822 S.E.2d 286, 291 (2018) (*Cooper II*) *citing* Montesquieu, *The Spirit of the Laws* 151-52 (Thomas Nugent trans., Hafner Press 1949) (asserting that "there can be no liberty" where two or more of these governmental powers "are united in the same person"). Whether a law violates the separation of powers clause is fact-specific, and Courts must resolve every separation of powers challenge "by carefully examining its specific factual and legal context." *McCrory v. Berger*, 368 N.C. 633, 646–47, 781 S.E.2d 248, 257 (2016).

A separation of powers clause violation occurs "when one branch of government attempts to exercise the constitutional powers of another or when the actions of one branch prevent another branch from performing its constitutional duties." *Cooper v. Berger*, 2020 WL 7414675, 315PA18-2, Slip Op. at 35 (Dec. 18, 2020) (*Cooper III).* Governor Cooper has violated the separation of powers clause in both ways. First, he has exercised inherently legislative powers in his Executive Orders closing Club 519. Second, he has prevented the General Assembly from fulfilling its core constitutional duties.

1. Governor Cooper Is Exercising Legislative Power

"The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch." *McCrory*, 368 N.C. at 645, 781 S.E.2d at 256. Whether such a violation has

occurred "is a binary question, not a question of degree; one branch either is, or is not, exercising power vested exclusively in another branch." *Cooper II*, 371 N.C. at 804, 822 S.E.2d at 292; *see also State ex rel. Wallace v. Bone*, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982) (finding legislators' service on a Commission "violated the per se rule prohibiting one branch of government from exercising powers vested exclusively in another branch" when it was "crystal clear" the functions and duties of the Commission were "administrative or executive in character.").

Here, Governor Cooper has violated the per se rule by exercising quintessential legislative power for nearly a year. *See Rhyne*, 358 N.C. at 169–70, 594 S.E.2d at 8–9 (stressing that the General Assembly is the appropriate forum for policy-making, and emphasizing that it is the role of the General Assembly "to weigh all the factors" and to "balance competing interests" in "full and open debate, and address all of the issues at one time.") (cleaned up). The Governor alone has decided what businesses may operate and under what conditions—literally micromanaging every aspect of the North Carolina economy. His Executive Orders do not simply make an objective judgment as to which businesses must necessarily close to curb the spread of COVID-19, as contemplated in the EMA; they go further because they consider the relative benefits of various industries to the North Carolina economy.

But only a legislative body can make such legislative judgments in picking winners and losers or create the standards under which businesses are allowed to operate. *See S. v. Harris*, 216 N.C. 746, 6 S.E.2dat 860 (emphasizing that only the Legislature can create the standards" for "admitting or excluding persons from a

business, trade, or profession."). Moreover, the Governor has continued to make these legislative judgments in contravention of the General Assembly's judgment that private bars should be allowed to reopen. As such, the Governor has violated separation of powers in deciding for himself what policies best serve the public interest. *Cf. Jackson v. Guilford Cty. Bd. of Adjustment*, 275 N.C. 155, 165, 166 S.E.2d 78, 85 (1969) (affirming that only a legislative body may decide what serves the public interest); *Guthrie v. Taylor*, 279 N.C. 703, 712, 185 S.E.2d 193, 200 (1971) (emphasizing that although the General Assembly may divest power to an agency, officer, or municipality, it must "retain in its own hands the supreme legislative power.") (internal citations omitted).

2. Governor Cooper Is Thwarting the General Assembly from Performing Its Constitutional Duties

A separation of powers violation also occurs "when the actions of one branch prevent another branch from performing its constitutional duties." *McCrory*, 368 N.C. at 645, 781 S.E.2d at 256. Under this analysis, courts examine "whether the challenged [action] satisfies the functional separation of powers test set forth in *McCrory*—which, unlike *Wallace*'s per se rule, *is* a question of degree." *Cooper II*, 371 N.C. at 806, 822 S.E.2d at 293; *McCrory*, 368 N.C. at 646–47, 781 S.E.2d at 256–57 (looking to the "degree of control" that one branch has exerted over the other). Thus, this Court must decide whether Governor Cooper has unreasonably disrupted the General Assembly from exercising its core power to deliberate and craft policies for the promotion of health and the general welfare. *See Cooper II*, 371 N.C. at 806, 822 S.E.2d at 293.

The Governor's Orders have improperly wrestled ultimate control from the General Assembly. First, the Governor has exercised his control longer than necessary. *See In re Alamance Cty. Ct. Facils.*, 329 N.C. 84, 100–01, 405 S.E.2d 125, 133 (1991) (one branch "must minimize the encroachment" on another branch "in appearance and in fact"). To the extent the Governor was justified in *temporarily* exercising broad legislative powers given the necessity for immediate action, those conditions no longer exist. It has been clear since June 2020 that the General Assembly is capable of responding to the ongoing pandemic.[13] Nonetheless, the Governor continues to make legislative judgments in weighing the social value of businesses with his ongoing Executive Orders.

Second, Governor Cooper has used the veto power to sideline the General Assembly and to replace its legislative judgment with his unilateral control. Although the Governor generally has power to veto legislation, *McCrory* and *Cooper v. Berger*, 370 N.C. 392, 809 S.E.2d 98 (2018) (*Cooper I*), demonstrate that a separation of powers violation occurs where one branch goes *too far* in wielding otherwise legitimate powers so as to usurp another branch's constitutional role. In *McCrory*, the Court affirmed that it was within the broad powers of the General Assembly to enact statutes allowing for legislative appointment of statutory officers. 368 N.C. at 644, 781 S.E.2d at 255. Likewise, *Cooper I* emphasized that it was generally within the prerogative of the General Assembly to decide how to structure commissions. 370

[13] Governor Cooper has never called the General Assembly into a special session during times that they have adjourned. *See* N.C. Const. art. III, § 5(7).

N.C. at 417, 809 S.E.2d at 113. Nonetheless, these cases held that the General Assembly abuses these powers—in violation of the separation of powers clause—if it goes so far as to wrestle ultimate control over enforcement of state law from the Governor. *McCrory*, 368 N.C. at 635–36, 781 S.E.2d at 250. *See also Cooper I*, 370 N.C. at 417–18, 809 S.E.2d at 113–14. The same functional analysis must apply when the Governor has wrestled ultimate control over the General Assembly's core function to "enact[] laws that promote the health, morals, order, safety, and general welfare of society." *Ballance*, 229 N.C. at 769, 51 S.E.2d at 734.

Here, Governor Cooper has issued three vetoes to defeat the General Assembly's efforts to reclaim its prerogative to decide what is in the public interest for the State. Just eight days after Governor Cooper issued the Phase 2 Order that began the discriminatory treatment between bars (and that kept private bars completely closed), the General Assembly ratified HB 536. [Complaint ¶ 38.] The bill represented a legislative judgment that the public interest would be best served in allowing bars to reopen with certain restrictions. [*Id.*] It also demonstrated that the General Assembly was capable of convening, deliberating, and balancing competing interest to craft a policy response to COVID-19. Governor Cooper vetoed HB 536 on June 5, 2020. [Complaint ¶ 39.]

On June 10, 2020, the General Assembly responded with HB 594, which would also have allowed bars to reopen with certain restrictions. [Complaint ¶ 40.] Additionally, HB 594 aimed to re-establish a check on the Governor's exercise of emergency powers under the EMA. The bill provided that the "Governor may, *with a*

concurrence of the majority of the Council of State, exercise powers granted under G.S. 166A-19.30 (b) or (c) related to bars and gyms, should there be a resurgence of COVID-19, provided he obtains concurrence of the Council of State." HB 594, § 3 (emphasis added). Thus, HB 594 represented both an attempt to reassert the legislature's prerogative to decide the State's policy response to COVID-19 and to reign in the Governor's unilateral executive actions. But again, Governor Cooper insulated his legislative business closure rules from the General Assembly's police power prerogatives in vetoing HB 594 on June 18, 2020. [Complaint ¶ 42.]

On June 26, 2020, the legislature tried once again to wrestle legislative power back from Governor Cooper when it ratified Senate Bill (SB) 105, which would have clarified geographic and temporal limits on a gubernatorially declared state of emergency. SB 105 set an automatic expiration period for a "statewide" emergency, which was defined as an emergency affecting more than two-thirds of the counties in North Carolina. Moreover, SB 105 would have limited a statewide emergency to no more than 48 hours, absent concurrence from the Council of State for the emergency declaration to continue further; such authorization would permit an emergency declaration to continue for only 30 days at a time. Yet on July 2, 2020, Governor Cooper vetoed SB 105.

Taken together, Governor Cooper's actions have "unreasonably disrupted a core power" of the General Assembly—the power to decide fundamental policy for the State. *See Cooper II*, 371 N.C. at 806, 822 S.E.2d at 293. By repeatedly vetoing bills that would have reopened businesses and cabined the Governor's authority, Governor

Cooper has improperly prevented the legislature from reasserting its legislative prerogative and insulated his extraordinary assertion of unilateral lawmaking powers indefinitely. The separation of powers doctrine—constitutionally enshrined for more than 200 years before the gubernatorial veto power[14]—does not permit the Governor to wield the veto power so as to replace the General Assembly's judgments with his own detailed policy for business operations across the state. *See Cooper I*, 370 N.C. at 415, 809 S.E.2d at 112 (emphasizing that courts must apply the separation of powers provision so as to avoid rendering core prerogatives of any branch "completely nugatory").

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION AND A PRELIMINARY INJUNCTION IS NECESSARY FOR THE PROTECTION OF PLAINTIFF'S RIGHTS DURING LITIGATION

As detailed above, Governor Cooper's decision to bypass the legislative process has cost Plaintiffs their right to enjoy the fruits of their labor and enjoyment of equal protection of the laws and violated the separation of powers. This irreparable harm to Plaintiffs' constitutional rights can only be vindicated with finality by the courts. *See Corum v. Univ. of N. Carolina Through Bd. of Governors*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) ("It is the state judiciary that has the responsibility to

[14] *See Wallace*, 304 N.C. at 595, 286 S.E.2d at 81 ("Since North Carolina became a state in 1776, three constitutions have been adopted: In 1776, in 1868 and in 1970. [E]ach of our constitutions has explicitly embraced the doctrine of separation of powers"); s*ee* N.C. Const. art. II, § 22(1); s*ee* Act of March 8, 1995, ch. 5, §§ 3, 4, 1995 N.C. Sess. Laws 6, 8 (establishing referendum to amend the constitution to provide gubernatorial veto to take effect 1 January 1997).

protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State.").

Without a preliminary injunction, Plaintiffs may not be able to vindicate their constitutional rights due to the irreparable financial harm caused by Governor Cooper's Executive Orders. Based on income from 2019, Club 519 is losing between approximately $38,000 to $62,000 in total income for each month that it remains closed. [Complaint ¶ 65]. Beyond this financial loss, Club 519 continues to incur expenses despite its closure. Among these, the commercial lease and utilities total approximately $3,000 a month. [Complaint ¶ 66]. Club 519 has survived thus far because it was able to secure a forgivable Paycheck Protection Program (PPP) loan, and with financial support from a community fundraiser. [Complaint ¶ 67]. But these funds have run dry, and Plaintiff Waldron has been without her family's primary source of income for nearly a year.

Plaintiffs are at the end of their financial rope and absent an injunction from this Court, they likely will not remain solvent to survive the duration of this litigation. Plaintiffs did not bring suit to vindicate their constitutional rights earlier because they did not have the financial resources to hire an attorney or contribute to a joint litigation fund to do so. Even now, after securing *pro bono* representation, the costs of keeping Club 519 "open" without any income may soon force Club 519 to close its doors permanently. Plaintiffs have suffered irreparable harm in the deprivation of their constitutional rights. And without a preliminary injunction, they may lose both their livelihood and opportunity to substantiate their constitutional rights.

Finally, by singling out private bars for disparate treatment in response to COVID-19, Governor Cooper has besmirched the reputation of Plaintiffs, compounding the irreparable harm suffered each day they remain closed. Governor Cooper's continued closure of private bars, while other bars throughout the State remain open, promotes an unwarranted cloud of uncertainty as to the ability of these businesses to adapt to COVID-19 and protect their customers. The doubt raised by Governor Cooper's discriminatory Executive Orders resounds to the benefit of Plaintiffs' direct competitors who operate bars inside of restaurants, eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, and wine shops.

III. THE BALANCE OF EQUITIES FAVORS AN INJUNCTION

The balance of equities weighs heavily in favor of a preliminary injunction for the Plaintiffs. As described above, Plaintiffs have already suffered irreparable harm, and are currently on the verge of insolvency.

Governor Cooper will likely argue that his actions are for the benefit of the public health of North Carolina. But not only does he lack any evidence that his restrictions are necessary to curb the spread of disease, such an argument does not justify unconstitutional actions against a small, politically, and economically insular group. Governor Cooper has completely deprived Plaintiffs of their primary source of income by shuttering their business for ten months, while permitting their direct competitors to operate, albeit at restricted capacity, for well over seven months. Any marginal gains to public health by closing such a small percentage of businesses,

while almost all businesses in the state can operate at some capacity indoors, cannot justify the overwhelming burden placed on private bars like Club 519.

CONCLUSION

For the above reasons, Plaintiffs pray the Court grant its motion for preliminary injunction and allow Plaintiffs to resume business operations.

DATED: January 15, 2021.

Respectfully submitted:

/s/ Jessica L. Thompson
JESSICA L. THOMPSON
NC Bar No. 48112
Pacific Legal Foundation
3100 Clarendon Blvd
Ste. 610
Arlington, VA 22201
Tel: 916.500.2862
JLThompson@pacificlegal.org

ANASTASIA P. BODEN*
Cal. Bar No. 281911
LUKE A. WAKE*
Cal. Bar No. 264647
Pacific Legal Foundation
930 G Street
Sacramento CA 95814
Tel: (916) 419-7111
ABoden@pacificlegal.org
LWake@pacificlegal.org

**Pro hac vice* applications pending

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2021, I electronically filed the foregoing document with the Clerk of the Court via the e-filing system, which will cause a copy to be served upon counsel of record. Undersigned also served the opposing party by sending the foregoing document via email, and addressed as follows:

Michael T. Wood
Special Deputy Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6900
mwood@ncdoj.gov
Counsel for Governor Cooper

By */s/ Jessica L. Thompson*
JESSICA L. THOMPSON