

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

CRYSTAL WALDRON,
and CLUB 519,

Plaintiffs,

v.

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

Defendant.

**VERIFIED
COMPLAINT**

INTRODUCTION

“A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.” N.C. Const. art. I, § 35. Recurrence to the fundamental principles of due process, equal protection, and the separation of powers is now due to reaffirm Plaintiffs’ blessings of liberty and the right to the fruits of their labor after nine months in which the Governor has exercised extraordinary powers related to COVID-19.

A public health crisis, even of the magnitude of COVID-19, cannot empower the Governor to issue arbitrary edicts that micromanage the physical, mental, and economic health of over 10 million North Carolinians. In our constitutional system of government, the people’s representatives in the General Assembly must weigh the trade-offs of different policy responses to COVID-19 through the deliberative process and make what are inherently legislative decisions. By usurping the legislative power

from the people's representatives and thwarting the General Assembly from its attempts to legislate a policy response to COVID-19, the Governor has subverted the separation of powers and constitutional order of the state.

Freed from the debate and compromise that accompanies the legislative process, Governor Cooper has issued numerous executive orders that arbitrarily pick winners and losers. He has touted his closure of "bars" time and again throughout the phases of "reopening"—yet the vast majority of "bars" in the state of North Carolina are open. "Bars" in restaurants and other eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, and wine shops have served alcoholic beverages to their customers—indoors, and out—since as early as May 22, 2020. It is only "private bars," a small class of about 1,000 ABC licensees, which Governor Cooper has singled out for less favorable treatment and essentially forced to stay shuttered. Thus, North Carolinians may freely enter a Buffalo Wild Wings or Applebee's for a beer or enjoy cocktails at their neighborhood distillery, but they are prohibited from entering a neighborhood members-only private bar, like Plaintiff Club 519.

The General Assembly has attempted to reassert its legislative prerogative to reopen private bars shuttered by Governor Cooper and to reign in his unilateral rule—to no avail. Plaintiffs ask the Court to protect their fundamental rights from Governor Cooper's arbitrary actions and to enforce the structural protections for individual liberty established by the North Carolina Constitution.

PARTIES

1. Plaintiff Crystal Waldron is the co-owner and vice president of Club 519, and is a citizen of Pitt County, North Carolina.

2. Plaintiff Club 519 is a North Carolina corporation with its principal place of business in Greenville, Pitt County, North Carolina. Club 519 operates under a private bar retail permit.¹

3. Roy A. Cooper, III, is the Governor of the State of North Carolina. Governor Cooper is sued in his official capacity because he issued the Executive Orders challenged in this lawsuit and because he is responsible for implementing and enforcing the Emergency Management Act. Governor Cooper's official residence and office are located in Raleigh, Wake County, North Carolina.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to N.C. Gen. Stat. § 1-253 and because it seeks a determination of rights under Article I, Sections 1, 6, 19, and 36, of the North Carolina Constitution and these rights are self-executing.

5. Article I, Section 21, of the North Carolina Constitution further entitles Plaintiffs to inquire into the lawfulness of the Governor's actions and to obtain removal of his restraints if found unlawful.

¹ A "private bar" is "[a]n establishment that is organized and operated as a for-profit entity and that is not open to the general public but is open only to the members of the organization and their bona fide guests for the purpose of allowing its members and their guests to socialize and engage in recreation." N.C. Gen. Stat. § 18B-1000 (4e).

6. This Court has personal jurisdiction over all parties pursuant to N.C. Gen. Stat. § 1-75.4(1).

7. Venue is proper in the Superior Court of Wake County pursuant to N.C. Gen. Stat. §§ 1-77 and 1-82.

8. Governor Cooper does not have sovereign immunity because Plaintiffs seek declaratory and injunctive relief under the Declaratory Judgment Act and the North Carolina Constitution and no other adequate remedy at law is available or appropriate.

9. Injunctive relief is proper to stop Defendant's continued disparate treatment of Plaintiffs and to prevent Defendant from causing irreparable harm to Plaintiffs by denying them the ability to earn a living and to pursue the fruits of their labor in an ordinary occupation, sufficient to invoke the equity jurisdiction of the Court.

10. A controversy exists between the parties as to the constitutionality of the challenged orders as applied to Plaintiffs.

11. Pursuant to N.C. Gen. Stat. §§1-253 through 1-267 and N.C. R. Civ. P. 57 and 65, Plaintiffs are entitled to a judgment declaring that the disputed actions are unconstitutional and void, and a temporary, preliminary, or permanent injunction enjoining their enforcement.

12. Other than the claims asserted in this action, Plaintiffs have no adequate state remedy to redress their constitutional rights.

FACTUAL ALLEGATIONS

GOVERNOR COOPER'S EXECUTIVE ORDERS

13. On March 10, 2020, Governor Cooper declared a State of Emergency pursuant to the Emergency Management Act (EMA) “to coordinate the State’s response and protective actions to address the” COVID-19 pandemic.

14. On March 17, 2020, Governor Cooper issued the first of many closure orders, Executive Order 118 (First Closure Order), which closed “bars” entirely, and required “restaurants” to limit the sale of food and beverages to carry-out, drive-through, and delivery only. EO 118, § 1(a)(vi).

15. “Restaurants” are defined in the First Closure Order as “permitted food establishments, under N.C. Gen. Stat. § 130A-248, and other establishments that both prepare and serve food, including but not limited to, restaurants, cafeterias, food halls, dining halls, food kiosks at airports and shopping centers, or educational institutions, (“food courts”), as well as private or members-only clubs where food and beverages are permitted to be consumed on premises.” EO 118, § 1(b).

16. “Bars” are defined in the First Closure Order as “establishments that are not restaurants and that have a permit to sell alcoholic beverages for onsite consumption, under N.C. Gen. Stat. § 18B-1001.” EO 118, § 1(c).

17. Any violation of the First Closure Order constituted a Class 2 misdemeanor, punishable by a \$1,000 fine and up to 60 days in jail. Violation of subsequent closure orders are also considered Class 2 misdemeanors.

18. There are several types of businesses that sell alcoholic beverages for on-premises consumption in North Carolina, including restaurants and other eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, and wine shops. Under the First Closure Order, every class was fully closed apart from those that qualified as a restaurant or other eating establishment, which could sell food for off-premises consumption.

19. Plaintiff Club 519 falls under the definition of a “bar,” and therefore closed upon the effective date of the First Closure Order.

20. The First Closure Order stated that it would remain in effect until March 31, 2020, unless rescinded or replaced. EO 118, § 1(a)(vi).

21. On March 27, 2020, Governor Cooper issued Executive Order No. 121, which divided the state into “essential” and “non-essential” businesses.

22. EO 121 defined “essential businesses” as those businesses “essential to the response to COVID-19, to the infrastructure of the State and nation, and to the day-to-day life of North Carolinians.” EO 121, § 2.C.19.

23. The Non-Essential Business Order included the same definition for “restaurants” and “bars” as the First Closure Order. It categorized “restaurants” as essential businesses, and thus restaurants remained open for delivery, drive-through, curbside pick-up and carry-out. “Bars” were deemed “non-essential” and remained closed entirely. EO 121, § 2.C.19.

24. Thereafter, Governor Cooper issued a series of Executive Orders extending the status quo until May 20, 2020, when Governor Cooper instituted Phase 2 of his

“three-part plan” to gradually re-open businesses. *See* EO 141. Phase 2 authorized various businesses to re-open for on-premises services with restrictions—including retail businesses; restaurants; personal care, grooming and tattoo businesses; indoor and outdoor pools; childcare facilities; and day camps and overnight camps. EO 141, § 6.

25. “Restaurants” were again defined as “permitted food establishments, under N.C. Gen. Stat. § 130A-248, and other establishments that both prepare and serve food, including but not limited to, restaurants, cafeterias, food halls, dining halls, food kiosks at airports and shopping centers, or educational institutions, (“food courts”), as well as private or members-only clubs where food and beverages are permitted to be consumed on premises.” EO 141, § 1, ¶ 7.

26. “Bars” were defined as “establishments that are not eating establishments or restaurants [. . .] that have a permit to sell alcoholic beverages for onsite consumption [. . .], and that are principally engaged in the business of selling alcoholic beverages for onsite consumption.” EO 141, § 1, ¶ 1.

27. The Phase 2 Order allowed “restaurants” to offer limited indoor and outdoor seating, but imposed maximum capacity restrictions, required adherence to social distancing protocols, and imposed other health and safety procedures. EO 141, § 6.C.2. “Bars” remained fully closed.

28. After Governor Cooper issued his Phase 2 Order, various lobbyists and trade associations began to request “clarification” about whether they were required to stay closed.

29. On May 22, 2020, two days after issuing the Phase 2 Order, Governor Cooper released “guidance” clarifying that any business that “produces alcoholic beverages for commercial sale off-premises” and had a permit to operate as a winery, brewery, or distillery under N.C. Gen. Stat. §§ 18B-1101 to 18B-1105 would not be considered a “bar” regardless of what it called itself and regardless of whether it was in fact “principally engaged in the business of selling alcoholic beverages for onsite consumption.” Governor Cooper reasoned that merely because these types of establishments produce alcoholic beverages for off-premises consumption, he would not consider them “principally engaged in selling alcoholic beverages for onsite consumption.” A copy of the Phase 2 Guidance document is attached as Exhibit A.

30. On May 24, 2020, The N.C. Alcohol Beverage Control Commission confirmed this interpretation of Governor Cooper’s Phase 2 Guidance in its “ABC Commission Guidance for Executive Order 141.” A copy of the ABC Commission Guidance document is attached as Exhibit B.

31. The Commission also clarified that private clubs² were allowed to open so long as their pre-Emergency Declaration operations typically included food and drink service and so long as they complied with the Phase 2 Order’s safety requirements.

² A “private club” is an organization that “(i) maintains selective members, is operated by the membership, does not provide food or lodging for pay to anyone who is not a member or a member’s guest, and is either incorporated as a nonprofit corporation in accordance with Chapter 55A of the General Statutes or is exempt from federal income tax under the Internal Revenue Code as defined in G.S. 105-130.2(1)” or “(ii) meets the definition of a private club set forth in G.S. 18B-1000(5). *See* G.S. 130A-247(2). Under G.S. 18B-1000(5), an establishment is a private club if it “qualifies under Section 501(c) of the Internal Revenue Code, as amended, 26 U.S.C. § 501(c), and . . . has been in operation for a minimum of 12 months prior to application for an

32. Thus, under Phase 2, many “bars” were permitted to open, including:

- a. Bars within restaurants and other eating establishments;
- b. Bars in wineries;
- c. Bars in breweries;
- d. Bars in distilleries; and
- e. Bars in private clubs.

33. These categories include a vast array of sellers, from traditional wineries, breweries, and distilleries to brewpubs, taprooms, cideries, and meaderies who sell alcohol on premises and effectively act as bars.

34. Many other entities that sell alcohol for on-premises consumption were also permitted to open so long as they were not “principally” engaged in selling alcoholic beverages for onsite consumption. Thus, most bottle shops and wine shops that had “bars” inside or that otherwise served alcohol onsite were permitted to open under Phase 2.

35. “Private bars,” like Club 519, were required to stay closed entirely.

36. The Phase 2 Order and Guidance do not require patrons at bars in restaurants, eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, or wine shops to purchase food. Nor does the Phase 2 Order require them to purchase alcohol for off-premises

ABC permit.” According to ABC, examples of private clubs that were permitted to open under Phase 2 include VFW Posts, American Legions, Elks/Moose Lodges, and Country Clubs.

consumption. Patrons may frequent these establishments solely for the purpose of consuming alcohol onsite.

THE GENERAL ASSEMBLY RESPONDS

37. A majority of the legislature opposed Governor Cooper's Phase 2 Order and attempted to curtail his broad use of unilateral authority.

38. 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 re-open, but with restrictions deemed necessary and appropriate by the legislature. As such, the bill represented a legislative judgment that the public interest would be best served in allowing bars to reopen with certain restrictions.

39. Governor Cooper vetoed HB 536 on June 5, 2020.

40. On June 10, 2020, the General Assembly responded with House Bill 594. Like its predecessor HB 536, HB 594 would have allowed bars to reopen with certain restrictions.

41. In addition to signaling the General Assembly's desire to reopen private bars, 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).

42. Governor Cooper rejected this attempt by the General Assembly to exercise its legislative authority when he vetoed HB 594 on June 18, 2020.

GOVERNOR COOPER'S UNILATERAL CONTROL CONTINUES UNABATED

43. After extending his Phase 2 Order several times (EOs 147, 151, 155), Governor Cooper issued a Phase 3 Order on September 30, 2020. A copy of that order, EO 169, is attached as Exhibit C.

44. The Phase 3 Order finally allowed private bars to begin operating outdoors to a limited extent.

45. But 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 capacity restrictions, it prohibits private bars from serving *any* patrons indoors. EO 169, § 3.2.C.1; Phase 2 Guidance; ABC Commission Guidance.

46. Even outdoor operations are severely restricted for private bars compared to the restrictions on every other establishment that serves alcohol onsite. In fact, for most private bars, the strict restrictions on outdoor service mean staying closed entirely.

47. Under the Phase 3 Order, outdoor seating capacity for bars in restaurants, eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, wine shops, and any other establishment not “principally engaged in the business of selling alcoholic beverages

for onsite consumption” is limited to the lesser of 50% of stated fire capacity or, for spaces without a stated fire capacity, no more than 12 customers for every 1,000 square feet of the location’s total square footage. EO 169, § 3.13.A (incorporating EO 163, § 3.B.I.1).

48. By comparison, outdoor seating for private bars is limited to the lesser of: 100 people for the total seating area; 30% of outside capacity; or, for spaces without a stated fire capacity, no more than 7 customers per 1,000 square feet. That’s just over half the capacity of restaurants, eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, and wine shops. EO 169, § 3.2.D.1.

49. Under this standard, 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).

50. Out of 93 private bars surveyed by the North Carolina Bar and Tavern Association (NCBATA), only six qualified to have more than twenty customers under the Phase 3 Order. Fifty-nine of those surveyed qualified for a dozen outside seats or fewer. Many private bar owners testified that they could not afford to open at all at such low capacity. A copy of the NCBATA September 30, 2020, press release is attached as Exhibit D.

51. But operating outdoors is not an option for private bars that do not have any outdoor space, like Club 519. Thus, even under Phase 3, Club 519 and many others must stay closed entirely.

52. 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.”

53. 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.

54. In his Phase 3 Order, Governor Cooper 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. 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.”

55. 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.

56. During Phase 3, Governor Cooper has issued a series of Executive Orders that have continued this disparate treatment of private bars, most recently EO 181. *See* EOs 170, 180, 181. A copy of EO 181 is attached as Exhibit E.

57. As of the date of this Complaint, bars in restaurants, eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, wine shops, and any other establishment not “principally engaged in the business of selling alcoholic beverages for onsite consumption,” are all permitted to serve patrons alcohol, inside and outside, at 50% of capacity. A private bar is only permitted to serve outside, and only at 30% capacity. For Club 519, that means staying closed entirely.

A NEIGHBORHOOD BAR

58. Crystal Waldron is a native North Carolinian and proud alumna of East Carolina University. A former second-grade schoolteacher, she has been a co-owner of Club 519 for the past eighteen years.

59. Family owned and operated, Club 519 is a long-standing cornerstone of the Uptown Greenville district and broader Greenville community. This small business has operated as a private bar in Greenville for over eighteen years.

60. Despite the name, Club 519 is not a dance or night club. It is a casual, neighborhood bar that appeals broadly to Greenville residents, visitors, ECU graduate students and upperclassmen at ECU. In keeping with this casual air, Club 519 denies patrons below the age of 21—even as many other Greenville clubs permit younger guests over the age of 18.

61. Club 519 has roughly 2,726 square feet of indoor space and its maximum indoor capacity, per the fire marshal, is 290 people. But Club 519 has no outdoor

space for patrons, which means it has been prohibited from serving any customers since March 17, 2020.

62. 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. If permitted, Club 519 would open immediately and follow the Phase 3 safety guidance. But Club 519 has not opened because its owners are unwilling to risk fines and other penalties.

63. Club 519 was a profitable bar for almost eighteen years until March 17, 2020, when Governor Cooper's Executive Order forced Club 519 to close. Club 519's doors remain closed to this day.

64. May is one of Club 519's busiest months of the year. In May, 2019, Club 519 had \$62,402.11 in total income. By comparison, Club 519 had no income for May, 2020.

65. Based on income from 2019, Club 519 is losing between approximately \$38,000 and \$62,000 in total income for each month it remains closed.

66. Club 519 has fixed costs it must pay despite its closure. The commercial lease and utilities total approximately \$3,000 a month.

67. Club 519 has survived thus far because it was able to secure a forgivable Paycheck Protection Program (PPP) loan. Club 519 has also relied on support from a community fundraiser; however, all of those funds have run dry.

68. Now that Club 519 has exhausted all monies in its business account, Club 519's owners will be forced to dip into personal savings, or close permanently, barring some unforeseen intervention.

69. Club 519 and Waldron will face irreparable harm if the current state of affairs remains unchanged.

COUNT I
DECLARATORY JUDGEMENT
EXECUTIVE ORDER NO. 181 IS *ULTRA VIRES* AND VIOLATES THE
EMERGENCY MANAGEMENT ACT
(N.C. Gen. Stat. § 166A-19.74)

70. Plaintiffs repeat and incorporate the preceding paragraphs by reference.

71. The EMA explicitly forbids unequal treatment. 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.”

72. It further states that, “State 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).

73. With regards to the re-opening of private bars like Club 519, Governor Cooper has not carried out his emergency management functions in an equitable or impartial manner.

74. Rather than treat all establishments permitted to sell alcohol in an equitable and impartial manner, Executive Order 181 grants preferential treatment

to restaurants, eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, and wine shops.

75. There is no health or safety rationale underlying this disparate treatment. Private bars like Club 519 are ready, willing, and able to operate under the same safety criteria as other bars and other establishments currently allowed to operate indoors, to impose additional safety protocol to mitigate any conceivable risks, and to enforce those protocols strictly.

76. The only reason for Governor Cooper's discriminatory treatment is economic favoritism.

77. Governor Cooper has been candid that the reason for his preferential treatment is economic favoritism. In previous lawsuits challenging the Governor's orders, Governor Cooper submitted declarations from Wit Tuttell, Vice President of Tourism and Marketing for the Economic Development Partnership of North Carolina. A copy of Wit Tuttell's declaration is attached as Exhibit F.

78. In his declaration, Tuttell explains, "[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.

79. When evaluating the economic impact of breweries versus private bars in the state, Tuttell states: “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.

80. Ironically, in a time when Governor Cooper has urged citizens to *avoid travel*, including trips to visit family over Thanksgiving holiday, Tuttell proffers:

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.

Moreover, “Wineries and Breweries are listed in our VisitNC.com database, whereas most bars are not.” Tuttell Decl. at ¶¶ 8, 11.

81. There is no other explanation for the disparate treatment apart from outright favoritism 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. The only explanation for Governor Cooper’s unequal treatment of private bars is his favoritism towards the other entities, his belief that they have a higher economic importance, and those entities’ relative lobbying power.

82. In short, the EMA forbids the Governor from picking winners and losers solely based on an entity’s economic status. And yet that is exactly what Governor Cooper has done, in violation of N.C. Gen. Stat. § 166A-19.74.

COUNT II
DECLARATORY JUDGEMENT
EXECUTIVE ORDER NO. 181 DEPRIVES PLAINTIFFS OF THEIR
FUNDAMENTAL RIGHT TO ENJOY THE FRUITS OF THEIR LABOR
(Art. I, §§ 1 and 19, of the North Carolina Constitution)

83. The North Carolina Constitution enshrines the right to earn a living in the Fruits of Their Labor provision, N.C. Const. Article I, Section 1., which states that “We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.” This is a fundamental right under North Carolina law.

84. The Law of the Land provision of the North Carolina Constitution guarantees that “[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.” N.C. Const. art. I, § 19.

85. No person may be deprived of a fundamental right unless the restriction is narrowly tailored to a compelling state interest.

86. Since March 17, 2020, Plaintiffs have been arbitrarily prohibited from reopening their private bar by Governor Cooper’s Executive Orders, and thereby deprived of their fundamental right to enjoy the fruits of their labor.

87. Governor Cooper’s Executive Orders are not narrowly tailored.

88. Club 519 can operate safely indoors under the same safety protocols implemented at other businesses that have been allowed to open indoors throughout Phase 2 and Phase 3, including:

- a. Limiting the number of customers in indoor and outdoor seating areas to “Emergency Maximum Capacity,” as defined by those orders.
- b. Limiting the number of people and arranging tables and seats at countertops so that groups are able to stay 6 feet apart;
- c. Requiring patrons to stay seated at their table or assigned spot at the bar and not permitting them to mingle with other parties;
- d. Generally limiting seating to a maximum of 10 people at a single table;
- e. Following the Core Signage, Screening, and Sanitation Requirements of the Executive Orders, including screening employees for COVID-19 symptoms and not allowing anyone with symptoms or who has been exposed to someone with COVID-19 to work;
- f. Increasing disinfection during peak times or high customer density times, and disinfecting all shared objects between each use;
- g. Promoting frequent handwashing and hand sanitizer for staff throughout the shift and upon reporting to work;
- h. Requiring all workers to wear face coverings; and
- i. Requiring all customers wear face coverings when they are not actively eating or drinking.

89. Moreover, Club 519 can implement additional safety precautions to mitigate any supposed concerns about private bars. Specifically, Club 519 can:

- a. refrain from playing any music or sounds from televisions, thereby reducing the volume levels;

- b. provide sanitizer on each table;
- c. take temperature scans of all guests;
- d. follow all other additional guidelines provided in “The North Carolina Bar and Tavern Association’s Proposed Health Guidance to Allow Bars to Reopen Safely.” A copy of NCBATA’s Proposed Health Guidance to Allow Bars to Reopen Safely is attached as Exhibit G.

90. Any health and safety rationales for Governor Cooper’s Executive Orders are further undermined by the fact that Governor Cooper has allowed similarly situated businesses, numbering in the thousands, to operate indoors for months. Club 519 is willing and able to operate under the same restrictions as the several other classes of bars that are currently allowed to serve patrons indoors, and there is no distinguishing feature of a private bar that poses a unique risk to the public health or that cannot be mitigated by the safety protocol listed above.

91. Over nine months into the pandemic, Governor Cooper must be able to provide actual evidence that allowing private bars to operate under such criteria presents a health or safety risk over and above any other entities currently allowed to operate, otherwise his orders are arbitrary and irrational. And yet Governor Cooper can provide no evidence apart from speculation that private bars or their patrons may flout the safety protocol.

92. Governor Cooper’s actions fail even the reasonable relation test, which asks whether the State has acted with a proper governmental purpose, and if so, whether his actions were reasonable when viewed against the balance between the

likely public benefit to be achieved and the burden imposed. This test looks at the evidentiary record to assess the balance between the public good and private burden.

93. Governor Cooper can provide no reliable health or safety evidence in his favor apart from speculation.

94. Governor Cooper's Executive Orders have disproportionately burdened a small class of businesses for well over eight months, to the point that many remaining private bars in North Carolina, like Plaintiffs, face imminent risk of shuttering indefinitely.

95. The burden on private bars far exceeds the purported benefit of continued closure, especially considering the small number of private bars and their willingness to open under safety protocol applied to other businesses.

96. The Executive Orders therefore unlawfully deprive Plaintiffs of their right to the fruits of their labor.

**COUNT III
DEECLARATORY JUDGMENT
EXECUTIVE ORDER NO.181 DENIES
PLAINTIFFS EQUAL PROTECTION
(Art. I, §§ 1 and 19, of the North Carolina Constitution)**

97. Plaintiffs repeat and incorporate the preceding paragraphs by reference.

98. The Equal Protection provision of the North Carolina Constitution guarantees that “[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.” N.C. Const. art. I, § 19.

99. Government actions violate the equal protection provision when persons who are engaged in the same business are subject to different restrictions or are given different privileges. The regulation of a business or occupation must be based on some distinguishing feature of the business itself, which, if unregulated, will produce substantial injury to the public peace, health, or welfare.

100. While private bars are prohibited from reopening their bar indoors and may only serve patrons outdoors at 30% capacity, restaurants, eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, and wine shops have all been allowed to re-open both indoors and outdoors at 50% capacity for months.

101. There is no feature of private bars that distinguishes them from the myriad similarly situated bars and entities now permitted to open that reasonably relates to the public health purpose of the Executive Orders.

102. The discriminatory treatment is not related to curbing the spread of COVID-19, because Club 519 is able to follow the same health and safety protocols as bars, restaurants, eating establishments, wineries, distilleries, breweries, taprooms, brewpubs, cideries, meaderies, private clubs, bottle shops, and wine shops.

103. The discriminatory treatment is not based on a business's capacity to serve food because neither wineries, distilleries, breweries, taprooms, cideries, meaderies, bottle shops, nor wine shops are required to serve food.

104. Moreover, even at restaurants, eating establishments, or private clubs, which do serve food, there is nothing in Governor Cooper's Executive Orders requiring

these entities to serve food to any given patron. Patrons can consume alcohol at these establishments for hours on end without food under Governor Cooper’s Executive Orders.

105. The discriminatory treatment is not based on a business’s status as primarily being engaged in selling alcohol for off-premises consumption because restaurants and hotels are not primarily engaged in selling alcohol for off-premises consumption, and because wineries, distilleries, breweries, taprooms, brewpubs, meaderies, and cideries were granted a wholesale exemption from the definition of “bar” regardless of whether they were primarily engaged in selling alcohol for off-premises consumption.

106. Similarly, Governor Cooper has allowed “lounges, music halls, night clubs, adult entertainment facilities, and stadiums” to open for indoor operations despite acknowledging that these venues “share many of the same risks of [private] Bars.” EO 169. It is discriminatory, arbitrary, and irrational to deny private bars the ability to open if they, like these facilities, implement restrictions to “counteract the tendency of Guests . . . to mingle and spread COVID-19 among one another.”

107. The General Assembly has recognized that private bars do not pose a unique risk to the public and should be able to operate on equal terms with other similarly situated businesses that are now permitted to open. And that’s exactly why it attempted to pass House Bills 536 and 594, which Governor Cooper vetoed.

108. Governor Cooper’s continued unequal and discriminatory treatment of private bars does not further any legitimate justification.

109. The only end furthered by Governor Cooper's discriminatory treatment is economic favoritism.

110. Governor Cooper's discriminatory treatment of Plaintiffs violates the Equal Protection Clause of the North Carolina Constitution.

**COUNT IV
DECLARATORY JUDGMENT
EXECUTIVE ORDER NO. 181 VIOLATES THE
SEPARATION OF POWERS PROVISION
(Art. I, § 6, of the North Carolina Constitution)**

111. Plaintiffs repeat and incorporate the preceding paragraphs by reference.

112. Under the North Carolina Constitution, "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6.

113. Article II, Section 1, of the North Carolina Constitution vests legislative power solely in the General Assembly.

114. Article III, Section 1, of the North Carolina Constitution vests executive power solely in the Governor.

115. The clearest violation of the Separation of Powers Clause occurs when one branch exercises power that the constitution vests exclusively in another branch. But there is also a separation of powers violation when the actions of one branch prevent another branch from performing its constitutional duties.

116. Governor Cooper's Executive Order 181 violates the Separation of Powers Clause in two ways. First, the Governor is exercising broad police powers

reserved for the General Assembly to determine the State's policy response to COVID-19.

117. For example, Governor Cooper is making legislative decisions about which businesses should stay open and which should stay closed and imposing detailed protocol on each place of business. Such decisions not only consider health and safety concerns, they also weigh economic costs and benefits with health and safety considerations. Such decisions are policy decisions that properly belong to the General Assembly. The General Assembly is capable of making such legislative judgments at this time—as we are nearly a year into this global pandemic.

118. Second, Governor Cooper's Orders, his exercise of broad legislative power nearly a year into his declared emergency, and his vetoes of HB 536 and HB 594 in favor of his own unilateral action, have prevented the General Assembly from legislating a policy response to the public health issues caused by COVID-19.

119. The North Carolina General Assembly is capable of convening and in fact has convened since March 23, 2020. A new session will convene on January 13, 2021.

120. Governor Cooper has not worked with the North Carolina General Assembly in an effort to have any of his §166A-19.30(c) Executive Orders or policy recommendations passed into law.

121. Governor Cooper has repeatedly vetoed legislative attempts to pass laws to curb the emergency and to reign in his use of legislative authority.

122. Governor Cooper has determined it is more expedient or otherwise preferable to unilaterally issue Executive Orders to determine North Carolina's policy response to COVID-19 rather than work with the people's representatives in the General Assembly to pass laws that do the same.

123. Such actions, as applied to Plaintiffs, violate the Separation of Powers provision of the North Carolina Constitution.

COUNT V
DECLARATORY JUDGEMENT
THE EMERGENCY MANAGEMENT ACT VIOLATES THE
NONDELEGATION DOCTRINE
(Art. I, § 6, of the North Carolina Constitution)

124. Plaintiffs repeat and incorporate the preceding paragraphs by reference.

125. “[T]he people, in the Constitution of North Carolina, art. II, § 1, have conferred their legislative power upon the General Assembly. This power it may not transfer to another officer or agency without the establishment of such standards for his or its guidance so as to retain in its own hands the supreme legislative power.” *Guthrie v. Taylor*, 279 N.C. 703, 712, 185 S.E.2d 193, 200 (1971) (internal citations omitted).

126. Under the non-delegation doctrine, the General Assembly must offer adequate guidance for the officer or agency to follow and must provide meaningful procedural safeguards on the exercise of that power.

127. Through the EMA, the General Assembly has delegated authority to the Governor to unilaterally declare a state of emergency in North Carolina if he “finds that an emergency exists.” N.C. Gen. Stat. § 166A-19.20(a).

128. The EMA further provides that a “state of emergency declared pursuant to this section shall expire *when it is rescinded by the authority that issued it.*” N.C. Gen. Stat. § 166A-19.20(c) (emphasis added).

129. The EMA provides the Governor with unilateral authority to determine what constitutes a state of emergency, declare that a state of emergency exists, and determine when such a state of emergency should end, without any standards or guidance from the General Assembly.

130. The Governor may continue a state of emergency in perpetuity, as N.C. Gen. Stat. § 166A-19.30(c) contains no temporal limitations to the Governor’s declaration of an emergency.³

131. Once the Governor declares an emergency, he can exercise broad and unchecked legislative powers across the entire state.

132. Under N.C. Gen. Stat. §166A-19.30(c), if the Governor determines that “local control of the emergency is insufficient to assure adequate protection for lives and property,” he may then exercise broad powers, including prohibitions and restrictions:

- a. Of movements of people in public places, including any of the following:

³ On June 26, 2020, the Assembly ratified SB 105, which aimed to clarify the geographic and temporal limits to a gubernatorially declared state of emergency. SB 105 set an automatic expiration period for “statewide” states of emergency, which was defined as an emergency affecting more than two-thirds of the counties in North Carolina. SB 105 required that if a governor declares a statewide state of emergency without the concurrence of the Council of State, the declaration would expire after 48 hours; however, if a statewide state of emergency was declared *with* concurrence of the Counsel of State, the declaration could be extended for 30 days at a time. On July 2, 2020, Governor Cooper vetoed SB 105.

- i. Imposing a curfew.
 - ii. Directing and compelling the voluntary or mandatory evacuation of all or part of the population from any stricken or threatened area within the governing body's jurisdiction.
 - iii. Prescribing routes, modes of transportation, and destinations in connection with evacuation.
 - iv. Controlling ingress and egress of an emergency area, and the movement of persons within that area.
 - v. Providing for the closure, within the emergency area, of streets, roads, highways, bridges, public vehicular areas, or other areas ordinarily used for vehicular travel, except to the movement of emergency responders and other persons necessary for recovery from the emergency.
- b. Of the operation of offices, business establishments, and other places to or from which people may travel or at which they may congregate.
 - c. Upon the possession, transportation, sale, purchase, and consumption of alcoholic beverages.
 - d. Upon the possession, transportation, sale, purchase, storage, and use of gasoline, and dangerous weapons and substances; and,
 - e. Upon other activities or conditions the control of which may be reasonably necessary to maintain order and protect lives or property during the state of emergency.

133. There are no guiding standards channeling the exercise of the Governor's discretion in deciding what constitutes "inadequate" local control.

134. Once the Governor, in his own estimation, deems local control "inadequate," he can effectively exercise unlimited power without any check by any public official or body in the state, apart from the courts.

135. Pursuant to N.C. Gen. Stat. § 166A-19.30(c), Governor Cooper has exercised broad, unilateral legislative powers to issue Executive Orders that deny Plaintiffs of their constitutional right to earn a living and equal protection of the laws, and have denied Plaintiffs of the constitutional guarantee of separation of powers.

136. The Emergency Management Act, as exercised by Governor Cooper through Executive Order 181, and applied to Plaintiffs, violates the non-delegation doctrine.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray the Court:

1. Adjudicate the constitutional claims asserted herein on an expedited, emergency basis given the subject matter, public interest, and irreparable harm suffered by Plaintiffs;

2. Issue temporary and preliminary injunctions to enjoin the validity and enforceability of Executive Order 181, any extensions thereof, and any similarly predicated Executive Orders during the pendency of this action, at least as applied to Plaintiffs;

3. Enter a declaratory judgment and permanent injunction, pursuant to N.C. Gen. Stat. § 1-253, *et. seq.*, and N.C. R. Civ. P. 57 and 65, declaring that Executive

Order 181, as well as any future Executive Orders that purport to do the same or that rely on the same authority; were and are null, void, and without legal effect; and remain only advisory in nature, at least as applied to Plaintiffs;

4. Enter an order awarding Plaintiffs their reasonable attorney fees and costs, pursuant to applicable statutory and common law, including N.C. Gen. Stat. §§ 6-20 and 1-263; and

5. Grant Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted this 21st day of December, 2020.

Respectfully submitted,

/s/ Jessica L. Thompson
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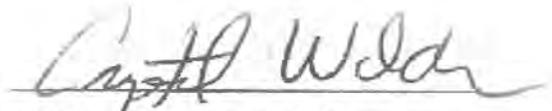
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**Pro hac vice applications to be filed*

Attorneys for Plaintiffs

VERIFICATION

The undersigned Crystal Waldron, affirming under penalties of perjury, that that she has read the foregoing document and that the contents of the foregoing Complaint are true to her own knowledge, except as to matters stated on the information and belief, and to those matters, she verily believes them to be true.


CRYSTAL WALDRON

this 20th day of December, 2020.