

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.

GOVERNOR ROY A. COOPER, III, in
his official capacity as Governor of the
State of North Carolina; and THE
STATE OF NORTH CAROLINA

Defendants.

**VERIFIED AMENDED
COMPLAINT**

INTRODUCTION

Until this case was filed, Club 519 had been closed for nearly a year and its owners threatened with financial ruin, all due to the whim of one man. Since March of 2020, Governor Cooper has unilaterally exercised legislative powers—and there’s no end in sight. In support of his actions, the Governor relies on the Emergency Management Act, which confers unfettered powers during a state of emergency without any temporal limitations. But in conferring such sweeping powers on the Governor to decide what businesses must close, when they may re-open and under what conditions, the Emergency Management Act violates the separation of powers section of the North Carolina Constitution.

The problem with one man making all the rules—without sufficient guidance from the General Assembly, without a deliberative process and without an opportunity for public participation to ensure accountability—is that it is all too easy

to arbitrarily pick winners and losers. The Governor only recently allowed private bars to open indoors, even though every other class of bars were permitted to operate indoors since last June. But even now, the Governor continues to impose more restrictive rules on private bars. And he continues to unilaterally dictate the rules for social and economic activity without legislative involvement. Such one-man rule is antithetical to our system of divided government and cannot be tolerated.

“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 principle of the separation of powers is now due to reaffirm Plaintiffs’ blessings of liberty after a year in which the Governor has exercised extraordinary powers related to COVID-19.

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. Defendant 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

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).

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.

4. Defendant State of North Carolina is a sovereign state with its capital in Wake County, North Carolina. The State's laws, as enacted by the General Assembly, are being challenged as unconstitutional in this action.

JURISDICTION AND VENUE

5. 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 6, 19, and 36, of the North Carolina Constitution and these rights are self-executing.

6. 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.

7. Because this Amended Complaint presents a facial challenge to the validity of the Emergency Management Act, this claim should be heard before a three-judge panel, pursuant to N.C. Gen. Stat. § 1-267.1.

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

9. Venue is proper in the Superior Court of Wake County pursuant to N.C. Gen. Stat. §§ 1-77 and 1-81.1(a1).

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

11. The State of North Carolina does not have sovereign immunity because Plaintiffs seek a declaratory judgment under the Declaratory Judgment Act and the North Carolina Constitution and no other adequate remedy at law is available or appropriate.

12. A controversy exists between the parties as to the constitutionality of the challenged orders and Plaintiffs have suffered and continue to suffer harm from Defendant's executive orders issued pursuant to the Emergency Management Act.

13. 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 Emergency Management Act is unconstitutional and void, and a permanent injunction enjoining the enforcement of any Executive Orders issued pursuant to purported authority granted by the Emergency Management Act.

14. 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

15. 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.

16. On March 17, 2020, Governor Cooper issued the first of many closure orders, Executive Order 118 (First Closure Order), which closed "bars" entirely and imposed restrictions on restaurants. EO 118, § 1(a)(vi).

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

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

21. 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.

22. The Non-Essential Business Order included the same definition for “restaurants” and “bars” as the First Closure Order. For example, it categorized “restaurants” as essential businesses because they were permitted to remain open for delivery, drive-through, curbside pick-up and carry-out. By contrast, other industries,

including “bars,” were deemed “non-essential” and remained closed entirely. EO 121, § 2.C.19.

23. 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 the economy. *See* EO 141. Phase 2 authorized various businesses (including many previously deemed “non-essential”) 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.

24. Under E.O. 141, § 6.C.2, “[B]ars” remains fully closed. “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.

25. 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.

26. 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-1101–18B-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.

27. 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.

28. The ABC Commission also clarified that other bars that “sell at retail alcohol beverages for consumption off the premises” such as “Bottle Shops[] [and] Wine Shops” were also permitted to open under Executive Order 141. Exhibit B.

29. Thus, under Phase 2, many “bars” were permitted to open. But “Private bars,” like Club 519, were required to remain entirely closed—even as most other industries were permitted to operate indoors, subject to restrictions as deemed appropriate by the Governor.

30. The Phase 2 Order and Guidance did 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 consumption. As of the date of this Amended Complaint, patrons may still frequent these establishments solely for the purpose of consuming alcohol on-site.

THE GENERAL ASSEMBLY RESPONDS

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

32. 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.

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

34. 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.

35. 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).

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

37. On June 26, 2020, the General Assembly ratified SB 105, which aimed to clarify the geographic and temporal limits to a gubernatorially declared state of emergency.

38. 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, §§ 1–2.

39. 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 Council of State, the declaration could be extended for 30 days at a time. SB 105, §§ 2–3.

40. On July 2, 2020, Governor Cooper vetoed SB 105.

GOVERNOR COOPER’S UNILATERAL CONTROL CONTINUES UNABATED

41. After extending his Phase 2 Order several times (EOs 147, 151, 155), Governor Cooper issued EO 169, a Phase 3 Order, on September 30, 2020.

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

43. But while the Phase 3 Order and related guidance allowed 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 still prohibited private

bars from serving *any* patrons indoors. EO 169, § 3.2.c.1.; Phase 2 Guidance; ABC Commission Guidance.

44. Yet under the Phase 3 Order, even outdoor operations were severely restricted for private bars as compared to the restrictions on every other establishment serving alcohol on-site. In fact, for most private bars, the strict restrictions on outdoor service meant staying closed entirely for almost a year.

45. Under the Phase 3 Order and to the date of this Amended Complaint, 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, §§ 3.2(b) and 6.3.

46. By comparison, under the Phase 3 Order and to the date of this Amended Complaint, 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).

47. 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).

48. 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 C.

49. 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.”

50. 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.

51. During Phase 3, Governor Cooper issued a series of Executive Orders that continued this disparate treatment of private bars. *See* EOs 170, 180, 181, 188, and 189.

52. The Governor's total prohibition on indoor operations for private bars continued until February 26, 2021, when the Governor issued EO 195.

53. The Governor issued EO 195 only eight days after Judge Gale of the North Carolina Business Court held a preliminary injunction hearing on February 18, 2020, in *Waldron v. Cooper*, wherein Plaintiffs contested the Governor's discriminatory treatment of private bars.

54. Plaintiffs have now amended their Complaint in light of EO 195. As of the date of this Amended Complaint, private bars are limited to 30% capacity, even as similar establishments are permitted to operate at 50% capacity.

55. The Governor continues to impose restrictions on various other industries across the State on an on-going basis.

A NEIGHBORHOOD BAR

56. 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.

57. 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.

58. 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 was prohibited from serving any customers from March 17, 2020, to February 26, 2021.

59. 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.

60. 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.

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

62. Club 519 has fixed costs it must pay despite its limited re-opening. The commercial lease and utilities total approximately \$3,000 a month.

63. While Club 519 is now permitted to operate at limited capacity, it is still subject to disparate treatment compared to other similarly situated businesses. Moreover, Club 519 is unable to invest in necessary repairs or make other capital investments because it does not know what to expect from the Governor going forward. It is unclear how long Plaintiffs will remain subject to occupancy restrictions under the Governor's regime, whether the Governor will impose new and more burdensome restrictions, or whether Club 519 will be subject to total closure orders again in the coming months. Club 519 is suffering a continuing injury and reasonably fears a return to indoor closure orders.

COUNT I
DECLARATORY JUDGMENT
THE EMERGENCY MANAGEMENT ACT VIOLATES THE
NONDELEGATION DOCTRINE AND SEPARATION OF POWERS
(Art. I, § 6 and Art. II, § 1 of the North Carolina Constitution)

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

65. 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.

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

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

68. The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch.

69. Under the non-delegation doctrine, when the General Assembly delegates power to the Governor, it must offer adequate guidance for the officer or agency to follow and must provide meaningful safeguards to ensure accountability and to limit the scope of conferred legislative powers.

70. The EMA fails that standard.

71. 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).

72. 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).

73. The EMA provides the Governor with unilateral authority to determine what constitutes a state of emergency, to declare that a state of emergency exists,

and to determine when such a state of emergency should end, without adequate guiding standards or procedural safeguards from the General Assembly.

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

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

76. 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 assume the power to impose prohibitions and restrictions:

- a. Of movements of people in public places, [. . .]
- 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.

77. N.C. Gen. Stat. §166A-19.30(c) lacks adequate guiding standards or procedural safeguards channeling the exercise of the Governor’s discretion in deciding what constitutes “insufficient” local control.

78. Once the Governor, in his own estimation, deems local control “insufficient,” he can effectively exercise unlimited power—imposing restrictions as he pleases on businesses—without any procedural safeguards or check by any public official or body in the state, apart from the courts.

79. Not even the General Assembly can rein in the Governor when it disagrees with his legislative judgments as to what restrictions businesses should face during this ongoing pandemic. While other states require legislative authorization to continue a state of emergency after a defined time-period elapses or allow for the state legislature to revoke emergency powers by mere resolution, there is no such accountability mechanism in the EMA.

80. The EMA also lacks any procedural rule requiring notice-and-comment or any other mechanism ensuring transparency and opportunity for public involvement when issuing and enforcing orders during an ongoing state of emergency of indefinite duration.

81. Pursuant to N.C. Gen. Stat. §§ 166A-19.30(b) and 166A-19.30(c), Governor Cooper has exercised broad, unilateral legislative powers to issue Executive Orders that have denied Plaintiffs of the constitutional guarantee of separation of powers.

82. The Emergency Management Act, as exercised by Governor Cooper through Executive Order 195, violates the non-delegation doctrine and the separation of powers clause of the North Carolina Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray the Court:

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

2. 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 the Emergency Management Act is unconstitutional and that Executive Order 190 and 195, 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;

3. 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

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

Respectfully submitted this 5th day of March 2021.

/s/ Jessica L. Thompson
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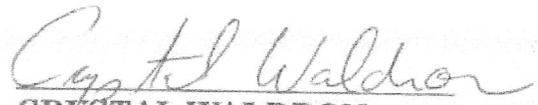
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**Pro hac vice applications pending*

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 information and belief, and to those matters, she verily believes them to be true.


CRYSTAL WALDRON

Dated: this 4th day of March, 2021.

Guidance on Section 8(A) of Executive Order No. 141

May 22, 2020

Section 8(A) of Executive Order No. 141 orders that entertainment and fitness facilities, including but not limited to Bars, must remain closed. “Bars” is defined in Section 1 of the Executive Order as follows:

[E]stablishments that are not eating establishments or restaurants as defined in N.C. Gen. Stat. §§ 18B-1000(2) and 18B-1000(6) ... and that are principally engaged in the business of selling alcoholic beverages for onsite consumption.

Some restaurants call themselves “breweries” or “bars;” some breweries call themselves “restaurants” or “bars;” and some bars call themselves “restaurants” or “breweries.” As a result, we have received questions about how to interpret whether an establishment is within the Executive Order’s definition of “bar” and must remain closed.

An establishment shall not be considered to be “principally engaged in the business of selling alcoholic beverages for onsite consumption” — and it may be open under Executive Order No. 141 — if it meets the following test:

- It produces alcoholic beverages for commercial sale off-premises and is, therefore, permitted by the ABC Commission under N.C. Gen. Stat. §§ 18B-1101 to 18B-1105.

The import of this Guidance is that eating establishments and restaurants as defined in N.C. Gen. Stat. §§ 18B-1000(2) & (6) and breweries, wineries, and distilleries permitted under N.C. Gen. Stat. § 18B-1100 et. seq. are allowed to open under Section 8(A) of Executive Order 141.

NOTE: If any customers consume food and/or beverages on-premises at the commercial winery, brewery, or distillery, the Emergency Maximum Occupancy requirements, Core Screening, Signage, and Sanitation requirements, and other regulations for restaurants under Section 6(C)(2) of Executive Order No. 141 apply. Therefore, any customers consuming food or beverages on-premises must be in seated groups that are spaced at least six feet apart, and customers or guests will be limited to 50% fire capacity.

Those seeking further guidance regarding Section 8(A) of Executive Order should contact the NC ABC Commission.



Announcement

ABC Commission Guidance for Phase 2 - Executive Order 141

Thursday, July 2, 2020

The below guidance was issued on May 24th and updated on July 2nd to remind restaurants that food must be available at all times that alcoholic beverages are being served. (14B NCAC 15B.0105)

ABC Commission Guidance – Executive Order 141

Some restaurants call themselves "breweries" or "bars"; some breweries call themselves "restaurants" or "bars"; and some bars call themselves "restaurants" or "breweries." As a result, we have received questions about how to interpret whether an establishment is within the Executive Order's definition of "bar" and must remain closed.

The following are categories of establishments that are exempt from the closure order, and so may legally operate now, if fully compliant with applicable safety guidelines ([Section 6, Executive Order 141](#)). This guidance does not override any order from Governor Cooper, the NC Department of Health and Human Services, any ABC laws or regulations, or any local ordinances.

Excluded from definition of Bar:

An establishment shall not be deemed "principally engaged in the business of selling alcoholic beverages for onsite consumption" (and thus **may be open under Executive Order No. 141**) if it meets one of the following tests:

- It produces alcoholic beverages pursuant to a commercial permit issued by the ABC Commission (G.S. §§ 18B-1101 to 18B-1105) and is authorized by such permit to also have retail sales to consumers.
 1. Examples: Breweries, Wineries, Distilleries
- Its primary business purpose is to sell at retail alcohol beverages for consumption off the premises. Occasional tastings or consumption during an educational seminar, as authorized by ABC permits, may be a part of the business model, so long as the majority of total sales are not derived from alcohol for on-premises consumption.
 1. Examples: Bottle Shops, Wine Shops

Included within definition of Restaurant:

Announcements / Events

Announcements

Upcoming Events



definition of "Restaurant" (Sec. 1.7.) and so **may continue to serve food and drink** if:

- Their pre-Emergency Declaration normal operations typically included service of food and drink, and
- They are in full compliance with applicable safety requirements of EO141 (Sec. 6).
- Example establishments that may operate if they satisfy the above requirements:
 1. VFW Posts, American Legions, Elks/Moose Lodges, Country Clubs

NOTE:

Any restaurant that is open and serving alcohol should have an open kitchen. Food from the restaurant must be available at all times that alcoholic beverages are being served. Please see [14B NCAC 15B .0105](#) (SPECIAL REQUIREMENTS FOR RESTAURANTS) for more information.

Additionally, if any customers or guests consume food and/or beverages on-premises at any of the establishments identified above during this Emergency Declaration, the Emergency Maximum Occupancy requirements for restaurants under Executive Order No. 141 apply. Therefore, any customers consuming food or beverages on-premises must be in seated groups that are spaced at least six feet apart, and customers or guests will be limited to 50% fire capacity.

Private Club Guidance

Am I a Private Club or a Bar? May I open & operate, safely & legally?

Bars are closed by Section 8.A.2 of EO141. The following criteria are intended to help determine if a private club business is acting more like a bar or more like a restaurant. The more these criteria are satisfied by a permittee, the more likely an establishment will be treated as a restaurant that may operate pursuant to Section 1.7.

1. **Avoids people congregating on premises simply to drink alcoholic beverages and socialize**
 1. Observes spacing & group sizes per EO141.
2. **Avoids patrons sharing touched spaces**
 1. Bar counter, pinball/games, etc.
3. **Patrons remain seated at tables**
 1. Spaced according to EO141 health & safety guidance.
4. **Does not exceed Emergency Maximum Occupancy (Section 1.3)**
 1. In most cases this will be 50% of stated fire capacity.
5. **Has some type of food/health inspection for on-site food preparation**
 1. Provided food services prior to Declaration of Emergency

In these unprecedented times, **the health of all of us depends on the actions of each of us.** These guidelines are intended to provide clarity for ABC Commission Permittees that may legally operate their businesses during this COVID-19 emergency period. If ABC Permittees in the identified categories of business follow the health guidelines set forth in EO141, businesses may safely operate while

responsible patrons will help make Phase 2 a success. **We all must do our part to be healthy!**

Attachments

ABC Commission Guidance for Phase 2 - Executive Order 141.pdf

- [Home](#)
- [About the Commission](#)
- [Contact Us](#)
- [Directions to the Commission](#)
- [ABC Stores](#)

Contact Us

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NCBATA

NORTH CAROLINA BAR AND TAVERN ASSOCIATION

 North Carolina Bar and Tavern Association

September 30 · 🌐

SEPTEMBER 30, 2020
 FOR IMMEDIATE RELEASE
 30% Outdoor-Only Bar Reopening is Pointless, NCBATA Says

Gov. Roy Cooper had a chance to do the right thing today and give North Carolina bar owners a chance to survive. Instead, he chose an unworkable path.

The governor is allowing private bars to open at 30 percent capacity outside with absolutely no inside service. Most municipalities don't issue occupancy certificates for outdoors, so under the rules, those bars will be limited to seven customers per 1,000 square feet. That's seven. It is virtually impossible to pay for staff and overhead with fewer than 20 customers. To have 20 customers, a bar would need to have at least 60 seats outside, or 3,000 square feet of patio space. Out of 93 bars surveyed by the N.C. Bar and Tavern Association, only six qualify to have more than 20 customers. Fifty-nine have a dozen outside seats or fewer.

Were this decision made back in May, NCBATA would happily comply. Were this decision based strictly on safety issues, NCBATA would understand. But how are private bars the only ones held to these standards while restaurant bars and breweries have been open to indoor

PLAINTIFF'S EXHIBIT
C



NCBATA

NORTH CAROLINA BAR AND TAVERN ASSOCIATION

alcohol service since May?

During the governor's phase two reopening, outdoor events have been allowed to host up to 50 people. The Carolina Panthers were allowed more than 5,000 fans in their stadium. A bar would need more than 7,000 square feet of outdoor space to host 50 customers. To put that in perspective, a bar patio the size of an NCAA basketball court would be allowed just 35 customers. That is about six picnic tables.

"This is a slap in the face," said NCBATA President Zack Medford. "Serving food does not protect you from covid19. Ninety percent of the bars in North Carolina can't possibly afford to open under this new guidance. Many have no outdoor seating at all. We urge the governor to incorporate the proposed NCBATA Health & Safety Guidance and allow bars to open indoors at 50 percent capacity--just like our competitors."

Bars and taverns across North Carolina have been closed for 196 days--half a year.

"We won't rest until bars get equal treatment with the other 85 percent of the industry," said Medford. "Bars are ready to open safely, and we know how to do it. We just need a real chance."

NCBATA Proposed COVID-19 Health Guidance:
<https://ncbata.org/.../Proposed-NCBATA-Health-Guidelines...>

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