STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 6358

NORTH CAROLINA BAR AND TAVERN ASSOCIATION; CAPITAL CITY CENTER, INC. d/b/a Work; DANIEL LOVENHEIM; NOIR HOLDINGS LLC d/b/a Milk Bar, MATTHEW KENNER; 603 GLENWOOD, INC d/b/a Cornerstone Tavern; PLUS DUELING PIANOS, INC. d/b/a PLUS Dueling Piano Bar; TONY BASFORD; NICOLE LUKENS; PETER RIVERA; TIMOTHY NORTON; TIFFANY HOWELL; TRH, INC. d/b/a Tee Time Sports & Spirits, CHESTER'S, INC. d/b/a Burke St Pub; JOHNNY MARTIN; iNETWORK LLC d/b/a The Scorpio; JASON HOWARD; HYBRID HOSPITALITY GROUP, LLC d/b/a The Atlantic Lounge; ALAN R. SNEAD; CHARLIE BROWN TAVERN LLC d/b/a Charlie Browns Tavern; HOLLY WHITLEY; GYPSY WOMEN LLC d/b/a Legends Pub; JASON RUTH; BIG BOYZ, L.L.C. d/b/a Tinyz Tavern; JACQUELINE DANIELLE BULL; J DANIELLE LLC d/b/a Bulls Tavern; MARK DALRYMPLE; DAL-BAR INC. d/b/a Small Bar; ASHLEY TIPPER; RLTIPPER LLC d/b/a The Blind Elephant; BYRA WHEELOCK; GREY GHOST ENTERTAINMENT LLC d/b/a Tailgators Bar & Billiards; STEVE GIMELL; ROCCO'S CIGAR BAR; JEFFREY LARIA; BUCKET SHOP LLC d/b/a Jeff's Bucket Shop; SHAWN SHRADER; THE KILTED BUFFALO; MICHAEL LOMBARDO; B.GIANNI 13 INC. d/b/a/ Lucky B's Around the Corner; WENDY HARRIS; BRU2U LLC d/b/a Crafty Beer, Wine & Spirits; ANDREW BROTHERS; AB FAMILY VENTURES INC. d/b/a RedDogs and d/b/a The Dubliner Pub and Patio; ANTHONY KEAREY; 2AK ENTERPRISES LLC d/b/a Tilt on Trade; WHITNEY VENTURES GROUP, LLC d/b/a The Union; IAN PURDY; REBOOT ARCADE BAR LLC d/b/a Reboot Arcade

ORDER ON MOTION FOR PRELIMINARY INJUNCTION

Bar; DREWRY WOFFORD IV; NC HOUSE PARTY LLC d/b/a Chemistry Nightclub; ROBERT KLEIN; STUMPTOWN STATION; KATHERINE KAFER; AYKA LLC d/b/a The Palm Room; CALVIN G. FERGUSON; BUCKWILD TAVERN, LLC d/b/a Buck Wild Tavern; KAYLOR CLARK; PLAZA TAVERN; THOMAS PATTERSON; PATTERSON CAPITAL INVESTMENTS, LLC d/b/a TimeOut Tavern; BARBARA HOLZAPFEL; ISLAND TIME TAVERN LLC d/b/a Island Time Tavern; RUSSELL HENDRIX; PLAN B; JOHN BOVA; BLACK ROSE TAVERN; TESHA WICHTL; NORRIS TAVERN; JOSEPH APKARIAN; POUR HAUS LLC d/b/a The Pour House; BRIAN BEATTY; CHRISTY BEATTY; EASTBEAT ENTERPRISES LLC d/b/a Happy Hours; ROBERT SEARCY; ORIAN CORPORATION, INC. d/b/a Rack N' Rolls; KIMBERLY CAIN; JOHN CAIN; RLC CONCEPTS INC. d/b/a Second and Green Tavern; MICHAEL PATELLA; 61 INC. d/b/a The Tap; PATRICIA DEWBERRY; ON-AFTER PUB & GRUB; ANTHONY FLOYD; CRICKETS DART ROOM. LLC d/b/a Crickets Dart Room; TODD M. HARR; THEE BACKDOOR BAR & GRILL, LLC d/b/a 22 Klicks Bar & Grill; MICHAEL PUTNAM; POWER UP LLC d/b/a Powercade Arcade + Bar; BARBARA HUMPHREY GARRETT; HUMPHREY FARM; JEFF SWINSON; HOOLIGANS JAX LLC d/b/a Hooligans; JDS GLOBAL LLC d/b/a GoodFellas Bar and Lounge; ROBERT NICHOLS d/b/a Blacksheep Tavern; ANDREW THOMPSON; CRÈME DE LA CRÈME LLC d/b/a Secret Island Tavern; TRACY RAILEY; RAILEY'S INVESTMENT LLC d/b/a Rack-M Darts and Billiards; THOMAS N. GREB; CORNER POCKETS; DANIEL ALVIS; LISA ALVIS; MAPLE STREET TAVERN; DUSTIN COOK; TYRELL CORPORATION d/b/a Pravda and KGB; ROCKY CHRISTY;

COUNTRY SALOON; RUBEN AGUIRRE; BIG DADDY'S ROADHOUSE; JANICE BYNUM; TACKLE BOX TAVERN LLC d/b/a Tackle Box Tavern; ANTHONY CARDON; JKORP INVESTMENTS, LLC d/b/a The Brickyard; MATTHEW PAPURCA; TWIN RAVENS TAVERN; CAROLYN H. MORTON; BESSEMER BILLIARDS; SCOTT BLALOCK; CINC ENTERPRISES, LLC d/b/a Infused Charlotte; ASHLIE CADE; TRIPRESTO INC. d/b/a Bison Bar; BLOWFISH INC d/b/a Blowfish; GREG CLUTE; GREG CLUTE LLC d/b/a The Turn Sports Lounge and d/b/a East End Sports Bar & Billiards; BENJAMIN REESE; MR ENTERTAINMENT, LLC d/b/a Off the Wagon Dueling Piano Bar; CODY BRIDGES; CODY'S NORTH LLC d/b/a Cody's North; LUCK'S TAVERN; NICOLE BRUNS; SIN SITY LLC d/b/a Jeans and d/b/a Bikes, Babes & Beers; JAMIE JORDAN; THE COAT OF ARMS LOUNGE; TINA LAWSON; CLEAN SLATE BILLIARDS LLC d/b/a Clean State Billiards; STAN MATTHIAE; CODY'S III; MATT STOJIC; REVIVAL 1869, LLC d/b/a Revival 1869; KARI COHOON; AMBER ENGLAND; WHITE RABIT PUB LLC d/b/a White Rabbit Lounge and Red Monkey Lounge; JAMES MANLEY; JIMMY'S BAR AND GRILLE INCORPORATED d/b/a The Salty Hawg; CLAYTON PITCHER; PITCHER'S BAR LLC d/b/a Pitchers; BRIAN TIDWELL; SMOKEY'S BAR; LAWRENCE HAGUE; DOWNTOWN SPORTS BAR & LOUNGE; JAMES CARTER; JBST, LLC d/b/a Lagerheads Tavern; WAYNE ANSTEAD; ANSTEAD'S TOBACCO, INC. d/b/a Cigar Lounge; WILLIAM MULLIS; SNC LLC d/b/a The Cobbler; LSB GROUP LLC d/b/a The Post Sports Bar & Grill; DAVID THOMPSON; DOUBLED BURNOUT SALOON; GERALD FEEST; FEEST, INC. d/b/a Spanky's Sports Bar and Grill; WANDA BRIDGEMAN; SUNDOGZ SPORTS BAR

AND TAVERN INC. d/b/a Sundogz Sports Bar and Tavern; BRIAN WOLFE; MISTYLOU INVESTMENTS, LLC d/b/a Tobies; LECTOR BENNETT; B AND F WINE AND BEER CORPORATION d/b/a Cape Fear Wine and Beer; TRAVIS BICKFORD; CHARLOTTE PUPS & PINTS, INC. d/b/a The Dog Bar; DANNY L. DALTON; RIZZO'S LLC d/b/a Rizzo's; CHARLES KRUEGER; 42ND STREET TAVERN; KIRSTEN MONAST; FBSBGM LLC d/b/a Brown Derby Pub; STAN MCDOWELL; BMC EVENTS, L.L.C. d/b/a Burnt Mill Creek Wine & Billiards; BMC EVENTS II, LLC d/b/a The Wild Goose Bar & Lounge; ZELMA L. RYAN; Z & J ENTERPRISE INC. d/b/a Zee's Tavern; JOSEPH LEONE; CLUB CHUBZ LLC d/b/a Chubby Buddha Sports Bar; CONNIE MCGRATH; SKILL SHARP TECHNOLOGIES, LLC d/b/a The Trap Bar & Billiards; TABITHA PERKINS; THIS IS FOR US CORP. d/b/a Buster's Billiards; JONATHAN WOODS; THE PEACE PIPE, LLC d/b/a The Peace Pipe; JUSTIN MARTIN; J&L EVENTS, LLC d/b/a The Heritage; SAMUEL HODGE; WELL TRAVELLED BEER, LLC d/b/a Well Travelled Beer; DAVID J. SCHEARER; FIRST STREET TAVERN LLC d/b/a First Street Tavern; DONALD LIEBES; GATE CITY BILLIARDS CLUB, LLC d/b/a Gate City Billiards Club; BELINDA HARRIS; HARRIS PAVILION, INC. d/b/a Baxter's Tavern; RONALD WAYNE EDWARDS; WIILLOW TREE MUFFLER CENTER LLC d/b/a Willow Tree Service Center; JOHNNIE ALLIE MICHAELS; 3 THIRTY 3 SPORTS BAR; MOON SHINER-z LLC d/b/a Moon Shiner-z; HARRIKA'S BREW HAUS, INC. d/b/a Treehouse Beer Company; MATTHEW WRIGHT; HOOK & ANCHOR INDIAN BEACH LLC d/b/a Anchor Drafthouse; SUSAN COOKE; S. COOKE AMUSEMENTS, INC. d/b/a Sawmill II; ZACK T. MEDFORD; COMMON 414

INCORPORATED d/b/a Isaac Hunter's Tavern; BRAD BOWLES; 322 GLENWOOD INC. d/b/a Parliament; BEN YANNESSA; 200 MARKET STREET ILM INC. d/b/a Coglin's Wilmington,

Plaintiffs,

v.

Roy A. Cooper, III, in his official capacity as Governor of North Carolina,

Defendant.

1. THIS MATTER is before the Court on Plaintiffs' Renewed Motion for Temporary Restraining Order and/or Preliminary Injunction ("Motion"). (ECF No. 12.) Plaintiffs are private bars, their owners, employees, and trade association, (Am. Verified Compl. 5, 6, ECF No. 8), whose businesses have been closed by executive orders issued by Defendant, Governor Cooper, in response to the Coronavirus Disease 2019 ("COVID-19") since March 17, 2020, (Am. Verified Compl. ¶¶ 16–45). Plaintiffs seek a preliminary injunction allowing them to reopen while complying with restrictions placed on other businesses under Executive Order 141 issued on May 20, 2020, ("EO 141" or "Phase 2 Order"), and as extended by Executive Order 147 ("EO 147") issued on June 24, 2020.

2. Having considered the Motion, briefs, verified pleadings, affidavits, other materials submitted in support of and in opposition to the Motion, the relevant

authorities, and the arguments of counsel at a hearing held via videoconference on June 19, 2020, the Court DENIES the Motion.[1]

A. Introduction

3. Plaintiffs commenced this action on June 4, 2020, to enjoin Defendant from applying and enforcing executive orders mandating a closure of their bars. (Verified Compl. & Mot. TRO & Prelim. & Permanent Inj., ECF No. 3.)

4. Plaintiffs' bars initially closed March 17, 2020, in compliance with Executive Order No. 118 ("EO 118"), and remain closed pursuant to section 8 of EO 141 ("Section 8"). At present, EO 141 is to remain in effect until July 17, 2020, and it remains uncertain whether Plaintiffs will be allowed to reopen their bars after that date during Phase 3.

5. Plaintiffs focus their claim on the assertion that they should be treated equally with all the other categories of businesses licensed for the sale of alcoholic beverages for on-site consumption (collectively "Licensees" or "On-Premises Licensees"), which were allowed to reopen under EO 141, and agree that any order allowing them to reopen should implement the same operational restrictions imposed on those other Licensees. Specifically, Plaintiffs seek declaratory and temporary, preliminary, and permanent injunctive relief declaring that the Governor's actions under the Phase 2 Order violate Plaintiffs' rights under the North Carolina

[1] Plaintiffs separately moved to strike affidavits the Governor offered in support of his executive orders. (*See* ECF No. 17.) At the hearing held on June 19, 2020, the Court denied that motion but indicated that it would give the affidavits no more than appropriate weight in ruling on the Motion. The Court places significant weight on portions of the affidavit of Dr. Mandy Cohen but little to no weight on the Governor's additional affidavits, as will be explained below.

Constitution to the enjoyment of the fruits of their labor; constitute an unlawful taking of property; deny Plaintiffs' right to equal protection of the law by irrationally treating Plaintiffs differently from restaurants, hotels, wineries, distilleries, taprooms, brewpubs, breweries, private clubs, and eating establishments; and also violate the First and Fourteenth Amendments to the United States Constitution.

6. Governor Cooper maintains that circumstances dictate that the North Carolina economy be opened to no greater degree than the ability of its healthcare system to respond to the increase in infections that will inevitably result from that reopening, requiring a phased or "dimmer switch" approach which permits the Governor to draw distinctions as to which businesses will be allowed to open. The Governor explains that he has followed a "data-driven and evidence-based process" and further explains that once the determination was made that not all higher-risk businesses could be open in the initial phases of the reopening, the choice of those that would be allowed to open or required to remain closed included a comparative balance of the risk posed by a particular business reopening against the economic benefit that flows from that reopening. (Decl. Mandy K. Cohen, MD, MPH ¶¶ 38, ("Decl. Dr. Cohen"), ECF No. 14.1.) Private bars were included among that category of Entertainment and Fitness Facilities that were ordered to remain closed by Section 8.

7. Plaintiffs challenge that the distinction between their businesses and other Licensees is arbitrary and unreasonable, unsupported by any data or evidence, particularly because there is no functional difference in their capacity to adhere to

rules for reopening from the other types of bars that have been allowed to reopen under Phase 2 (i.e., restaurants, hotels, wineries, distilleries, taprooms, brewpubs, breweries, private clubs, and eating establishments). (Mem. Law Supp. Prelim. Inj. and/or TRO 2, ECF No. 13; Amended Verified Compl. ¶¶ 44–45.)[2] With respect to the Governor's risk/reward approach, the Governor contends that the larger number of persons served by bars present a significantly greater risk than the smaller numbers served at breweries, wineries, and distilleries, and further that the social setting in private bars encourages certain ingrained societal behaviors that yield less confidence that private bars can, in fact, successfully implement the restrictions imposed on the Licensees who have already been allowed to open. As to reward, the Governor argues that private bars collectively do not yield the same public economic benefit as other Licensees.[3]

8. Governor Cooper does not seek to minimize the economic burden imposed on Plaintiffs but contends that this burden is necessary during the initial phases of reopening North Carolina's economy because the risk of widespread public infection by opening too early is a greater public harm that must be prevented. The

[2] The Governor's brief discusses a line of cases holding that no one has a protected right to sell and serve alcohol. That line of cases is essentially irrelevant when comparing how one On-Premises Licensee has been treated in comparison to other On-Premises Licensees.

[3] As discussed below, the Court finds the risk side of this equation much more significant and has not placed significance on the comparative economic benefits of private bars and other Licensees, particularly considering the relative economic loss private bars are being required to absorb. Likewise, the Court has given no weight to the photographs of pre-COVID operation of a random set of Plaintiffs' private bars, as they do not document operation under the reopening rules Plaintiffs have indicated they would implement. Accordingly, the Court has given little to no weight to the affidavits of Wit Tittell and Pamela Collier. The Court has also not found the affidavit of Tami Clifton probative of any point the Court has considered on the present Motion.

Governor challenges that no court should second guess such a judgment made with the advice and support of a multi-disciplinary task force headed by experts in public health.

9. Governor Cooper has issued his executive orders pursuant to the North Carolina Emergency Management Act ("EMA"), N.C.G.S. §§ 166A-19–19.79. Plaintiffs contend that the Governor has exceeded any powers he may have under the EMA by failing to treat them equally with other businesses who have been allowed to reopen. Plaintiffs argue that, as to them, there is no "dimmer switch," but only an "off switch" that for many may not be capable of ever being turned back on.

(1) The closing and phased reopening of the economy

10. On March 10, 2020, Governor Cooper issued Executive Order No. 116 ("EO 116"), declaring a State of Emergency in order to coordinate the State's response and protective actions to address the COVID-19 pandemic. (Exec. Order No. 116; *see* Am. Verified Compl. Ex. B.)

11. On March 17, 2020, Governor Cooper issued Executive Order No. 118 ("EO 118"), effective that day, mandating that "bars" close entirely and limiting restaurants to selling food and beverages only through carry-out, drive-through, and delivery. (Am. Verified Compl. Ex. C, at § 1(a)(vi).) EO 118 defines "bars" 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." (Am. Verified Compl. Ex. C, at § 1(c).) EO 118 did not close retail venues that "provide for the sale of beer, wine, and liquor for off-site consumption only" and also did not "require the

closure of production operations at breweries, wineries, or distilleries." (Am. Verified Compl. Ex. C, at § 1(d).) All of the establishments that Plaintiffs own, operate, or are employed by fall within the definition of "bars" under EO 118. Pursuant to EO 118, Plaintiffs' businesses closed entirely.

12. In EO 118, the Governor recited the authority provided by section 19.30(c) of the EMA "to restrict or prohibit the operation of business establishments and other place[s] to or from which people may travel or at which they may congregate[.]" (Am. Verified Compl. Ex. C, at § 1(a)(i).)[4]

13. On March 27, 2020, Governor Cooper issued Executive Order No. 121 ("EO 121"), which included a general directive that all businesses close, subject to a list of excepted "essential" businesses. Restaurants were included on the list of essential businesses, but were again limited to delivery, drive-through, curbside pick-up, and carry-out. (Am. Verified Compl. Ex. D, at § 2.C.19.) EO 121 stated that it was "consistent with and does not amend or supersede prior COVID-19 related Executive Orders restricting the operations of restaurants and temporarily closing bars." (Am. Verified Compl. Ex. D, at § 2.C.19.) The Governor again cited sections 19.30(c) and 19.30(b)(2) of the EMA as authority for prohibiting and restricting the operation of business establishments. (Am. Verified Compl. Ex. D, at 2.)

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

14. On April 23, 2020, Governor Cooper issued Executive Order No. 135 ("EO 135"), declaring that the provisions in EO 118 and EO 121 requiring bars to close would remain in effect until 5:00 p.m. on May 8, 2020. (Am. Verified Compl. Ex. E, at § 1.) EO 135 includes a citation to EMA section 19.10(b)(2) which grants the Governor the authority to make, amend, or rescind necessary orders, rules, and regulations. (Am. Verified Compl. Ex. E, at 2.)

15. On May 5, 2020, Governor Cooper issued Executive Order No. 138 ("EO 138"), initiating Phase 1 of North Carolina's phased reopening. (Am. Verified Compl. Ex. F.) EO 138 directed that restaurants could remain open for off-premises consumption only, and that bars must remain closed. (Am. Verified Compl. Ex. F, at §§ 4.A–B.) EO 138 contained a definition of "restaurants" that is substantially identical to the definition contained in EO 118. (Am. Verified Compl. Ex. F, at § 1, ¶ 7.) However, EO 138 changed the definition of "bars" to "establishments that are not eating establishments or restaurants as defined in N.C. Gen. Stat. §§ 18B-1000(2) and 18B-1000(6) and have a permit to sell alcoholic beverages for onsite consumption under N.C. Gen. Stat. § 18B-1001." (Am. Verified Compl. Ex. F, at § 1, ¶ 2.) All of the establishments that Plaintiffs own, operate, and are employed by fall within the definition of "bars" under EO 138.

16. EO 138 became effective at 5:00 p.m. on May 8, 2020, and was to remain effective until 5:00 p.m. on May 22, 2020, unless repealed, replaced or rescinded. (Am. Verified Compl. Ex. F, at § 1.) EO 138 recites that the Governor made those determinations required by EMA section 19.30(c) as a condition of the Governor

assuming the emergency powers of local governments in order to address the emergency on a state-wide basis. Specifically, the Governor recited that he determined that local control of the emergency was insufficient to assure adequate protection for lives and property of North Carolinians because (1) not all local authorities have enacted such appropriate ordinances or issued such appropriate declarations restricting the operation of business and limiting person-to-person contact, *see* EMA § 19.30(c)(i); (2) some but not all local authorities have taken implementing steps under such ordinances or declarations, if enacted or declared, in order to effectuate control over the emergency that has arisen, *see* EMA § 19.30(c)(ii); (3) the area in which the emergency exists spreads across local jurisdictional boundaries and the legal control measures of the jurisdictions are conflicting or uncoordinated to the extent that efforts to protect life and property are, or unquestionably will be, severely hampered, *see* EMA § 19.30(c)(iii); and (4) the scale of the emergency was so great that it exceeds the capability of local authorities to cope with it, *see* EMA § 19.30(c)(iv). (Am. Verified Compl. Ex. F, at 3.) In EO 138, the powers specified in 19.30(c) include the authority to prohibit and restrict the movement of people in public places; the operation of offices, business establishments, and other places to and from which people may travel or at which they may congregate; and other activities or conditions, the control of which may be reasonably necessary to maintain order and protect lives or property during a state of emergency. (Am. Verified Compl. Ex. F, at 3.)

17. On May 20, 2020, Governor Cooper issued EO 141, initiating Phase 2. (Amended Verified Compl. Ex. G.) The Phase 2 Order contained definitions of "bars" and "restaurants" that are substantially identical to those contained in EO 138. (Am. Verified Compl. Ex. G, at § 1, ¶¶ 1, 7.) It also listed several categories of businesses that would be allowed to reopen when EO 141 became effective at 5:00 p.m. on May 22, 2020, including retail businesses; private clubs; restaurants; personal care, grooming and tattoo businesses; indoor and outdoor pools; childcare facilities; and day camps and overnight camps. (Am. Verified Compl. Ex. G, at § 6.) The Phase 2 Order allowed restaurants and private clubs to reopen for on premises consumption, subject to the following requirements:

a. Limit the number of customers in indoor and outdoor seating areas to "Emergency Maximum Capacity," as that phrase is defined in the Phase 2 Order;

b. Limit the number of people and arrange tables so that groups are able to stay 6 feet apart;

c. Generally limit seating to a maximum of 10 people at a single table;

d. Encourage workers to wear face coverings when they are within 6 feet of others; and

e. Follow the Core Signage, Screening, and Sanitation Requirements set forth in the Phase 2 Order (regarding increased

use of disinfectant, hand-washing, etc.). (Am. Verified Compl. Ex. G, at § 6.C.2.)

18. Section 8 of the Phase 2 Order lists several other types of businesses within the category of Entertainment and Fitness Facilities, which includes "bars," and requires that they remain closed because "by their very nature" they "present greater risks of the spread of COVID-19." (Am. Verified Compl. Ex. G, at 2.)

19. The Phase 2 Order came into effect at 5:00 p.m. on May 22, 2020, to expire on June 26, 2020, unless repealed, replaced, or rescinded. (Am. Verified Compl. Ex. G, at § 16.)

20. On May 22, 2020, the Governor released guidance regarding the interpretation of the Phase 2 Order in order to confirm that breweries, taprooms, wineries, distilleries, and brewpubs were permitted to reopen under the Phase 2 Order. (Am. Verified Compl. Ex. H.)

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

22. Under North Carolina's statutory and regulatory scheme, there are at least eight types of facilities that may be licensed for the sale of alcohol for on-premises consumption including:

a. Bars connected to restaurants (having 30% or greater food sales);

b. Bars in hotels;

c. Bars in distilleries;

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

d. Bars in wineries;

e. Bars in breweries;

f. Bars in private clubs;

g. Bars that are "eating establishments" (having less than 30% food sales); and

h. Private bars. *See* N.C.G.S. § 18B-1001.

23. The Phase 2 Order allows each of these to open other than private bars.

(2) The evidentiary record

24. Plaintiffs challenge Governor Cooper's Phase 2 Order as it is applied to them. "A party making a facial challenge 'must establish that a "law is unconstitutional in all of its applications." ' " *State v. Grady*, 372 N.C. 509, 522, 831 S.E.2d 542, 554 (2019). "In contrast, 'the determination whether a statute is unconstitutional as applied is strongly influenced by the facts in a particular case.' " *Id.*

25. In support of their Motion, Plaintiffs submitted affidavits from many of the Plaintiff bar owners demonstrating the significant economic hardship that they have suffered with the closing of their bars since EO 118 was issued. (*See* Notice of Filing, ECF No. 10.)

26. The Governor does not offer testimony challenging those losses, but has offered a series of affidavits, that of Dr. Mandy Cohen being chief among them, to demonstrate why he implemented a phased approach to reopening North Carolina's economy and why private bars are among those businesses that must remain closed

until a later phase of the reopening. In summary, Dr. Cohen concludes that private bars are among that class of business that presents greater risk for the spread of COVID-19 because of the very nature of their operation activity, the way that patrons of such businesses typically act and interact with each other, and the duration that patrons remain in the establishment. She distinguishes private bars from restaurants, breweries, wineries, distilleries, taprooms, brewpubs, private clubs, and eating establishments both as to potential public risk and potential public benefit. The Court addresses her specific assertions in greater detail in the analysis section below.

B. Preliminary Injunction Standard

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

C. Constitutional Principles

28. Plaintiffs move for preliminary injunction pursuant to their claims under Article I, Sections 1, 19, and 34 of the North Carolina Constitution, which constrain the manner in which government may exercise its power when private rights are restricted for a public purpose. The Parties disagree as to the appropriate standard of review the Court should utilize in determining whether Plaintiffs will likely succeed on their claims.

(1) Fruits of their own Labor and Equal Protection

29. Article I, Section 1 of the North Carolina Constitution establishes that all persons are afforded the "inalienable rights [of] . . . life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." N.C. Const. art. I, § 1.

30. "[T]he 'fruits of their labor' provision protects the[ ] 'right to earn a livelihood[.]' " *Sanders v. State Pers. Comm'n*, 197 N.C. App. 314, 327, 677 S.E.2d 182, 191 (2009); *see also State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949) (explaining that, under the N.C. Constitution, liberty "includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; [and] to pursue any livelihood or vocation[.]"). "The right to conduct a lawful business or to earn a livelihood is regarded as fundamental." *Roller v. Allen*, 245 N.C. 516, 518–19, 96 S.E.2d 851, 854 (1957) (quoting *McCormick v. Proctor,* 217 N.C. 23, 6 S.E. 2d 870 (1940)); *see also State v. Warren*, 252 N.C. 690, 692–93, 114 S.E.2d 660, 663 (1960) (same); *Sanders*, 197 N.C. App. at 327, 677 S.E.2d at 191 (2009) (same).

31. Plaintiffs rely on the equal protection clause within Article 1, Section 19, which provides that "[n]o person shall be . . . deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws[.]" N.C. Const. art. I, § 19.[6] Such as here, "[w]hen a statute or ordinance is challenged on equal protection grounds, the first determination for the court is what standard of review to apply in determining constitutionality." *Transylvania Cty. v. Moody*, 151 N.C. App. 389, 397, 565 S.E.2d 720, 726 (2002). That standard of review depends on the nature of the right being restricted.

> Courts traditionally have employed a two-tiered scheme of analysis when evaluating equal protection claims. *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E. 2d 142 (1980); *see generally* L. Tribe, American Constitutional Law §§ 16-2, 16-6 (1978). The upper tier of equal protection analysis requiring strict scrutiny of a governmental classification applies only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 49 L. Ed. 2d 520, 524, 96 S. Ct. 2562, 2566 (1976); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16, 36 L. Ed. 2d 16, 33, 93 S. Ct. 1278, 1288 (1973). The "strict scrutiny" standard requires that the government demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest. *Texfi Industries v. City of Fayetteville*, 301 N.C. at 11, 269 S.E. 2d at 149.

[6] The "fruits of their own labor" clause of Article I, section 1, is also protected by the "law of the land" clause of Article I, section 19. "The law of the land, like due process of law, serves to limit the state's police power to actions which have a real or substantial relation to the public health, morals, order, safety or general welfare." *Poor Richard's, Inc. v. Stone,* 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988) (internal quotation marks omitted). "These constitutional protections have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose." *Id.* While Plaintiffs have not expressly stated a substantive due process claim, the Court refers to substantive due process cases for support where the analytical framework overlaps with that under North Carolina's equal protection clause.

> When a governmental classification does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the lower tier of equal protection analysis requiring that the classification be made upon a rational basis must be applied. *Vance v. Bradley*, 440 U.S. 93, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979); *Texfi Industries v. City of Fayetteville*, 301 N.C. at 11, 269 S.E. 2d at 149. The "rational basis" standard merely requires that the governmental classification bear some rational relationship to a conceivable legitimate interest of government. Additionally, in instances in which it is appropriate to apply the rational basis standard, the governmental act is entitled to a presumption of validity. *Vance v. Bradley*, 440 U.S. at 97, 59 L. Ed. 2d at 176, 99 S. Ct. at 942–43.

White v. Pate, 308 N.C. 759, 766–67, 304 S.E.2d 199, 204 (1983); *see also Liebes v. Guilford Cty. Dep't of Public Health (In re Civil Penalty)*, 213 N.C. App. 426, 428–29, 724 S.E.2d 70, 72–73 (2011) (same).

32. Therefore,

> [w]hen there is no suspect class or fundamental right, the equal protection clause is satisfied if the classification provided by the legislature "could provide a reasonable means to a legitimate state objective." *Powe v. Odell,* 312 N.C. 410, 412, 322 S.E.2d 762, 763 (1984). In *Rhyne v. K-Mart Corp.,* our Supreme Court explained that a rational basis review requires " 'a plausible policy reason for the classification,' " pertinent legislative facts that " 'rationally may have been considered to be true by the governmental decisionmaker,' " and a " 'relationship of the classification to its goal' " that is " 'not so attenuated as to render the distinction arbitrary or irrational.' " 358 N.C. 160, 180–81, 594 S.E.2d 1, 15 (2004) (quoting *Texfi Indus., Inc. v. City of Fayetteville,* 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980)).

Sanders, 197 N.C. App. at 324–25, 677 S.E.2d at 189–90; *see also Ballance*, 229 N.C. at 769–70, 51 S.E. 2d at 735 ("If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare. In brief, it must be reasonably

necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm.").

33. The courts have often been asked to review governmental regulation of commercial interests both pursuant to attacks grounded on a lack of adequate police power for the regulation in the first instance, or the failure to exercise such power fairly by treating those affected by the regulation equally. As a general proposition, "regulation of a business or occupation under the police power must be based on some distinguishing feature in the business itself or the manner in which it is ordinarily conducted, the natural and probable consequence of which, if unregulated, is to produce substantial injury to the public peace, health, or welfare." *State v. Harris*, 216 N.C. 746, 758–59, 6 S.E.2d 854, 863 (1940). "When such classifications are made, the Court will pass on their reasonableness and determine as to the validity of the legislation." *Id.* at 759, 6 S.E.2d at 863.

34. "Statutes are void as class legislation when persons who are engaged in the same business are subject to different restrictions or are treated differently under the same conditions." *Poor Richard's*, 322 N.C. at 67, 366 S.E.2d at 700 (citing *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E. 2d 18 (1968)). The validity of legislative classification "depends upon its being reasonably related to a proper object of the legislation. Classifications are not offensive to the Constitution 'when the classification is based on a reasonable distinction and the law is made to apply uniformly to all the members of the class affected.' " *Id.* at 67, 366 S.E.2d at 700–01 (citation omitted). Therefore, "[c]lassification is permitted when (1) it is based on

differences between the business to be regulated and other businesses and (2) when these differences are rationally related to the purpose of the legislation." *Id.* at 67, 366 S.E.2d at 701.

35. A challenge grounded on either due process or equal protection inquires first as to whether the government had the power to act.

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

In re Certificate of Need for Aston Park Hosp., Inc., 282 N.C. 542, 550, 193 S.E.2d 729, 735 (1973); *see also Poor Richard's*, 322 N.C. at 66, 366 S.E.2d at 700 ("The means used must be measured by balancing the public good likely to result from their utilization against the burdens resulting to the businesses being regulated.").

36. Furthermore, "the power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it. . . . When this field has been reached, the police power is severely curtailed. . . .." *In re Certificate of Need for Aston Park*, 282 N.C. at 551, 193 S.E.2d at 735 (quoting *Harris*, 216 N.C. at 759, 6 S.E.2d at 863) (holding that there was no "*reasonable relation* between the denial of the right of a person, association or corporation to construct and operate

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

37. Based on these principles, the Court of Appeals was invited to apply the strict scrutiny standard—the same standard Plaintiffs invite the Court to employ here—to an economic regulation of a business. The Court held that

> [there is] no authority for the proposition that a regulation affecting one's ability to engage in otherwise lawful business or other economic regulation is subject to strict scrutiny. To the contrary, the [North Carolina Supreme Court's *Aston Park*] case establishes the appropriate analysis is the rational relation test. While the [*Aston Park*] court did observe that, "to deny a person, association or corporation the right to engage in a business, otherwise lawful, is a far greater restriction upon his or its liberty than to deny the right to charge in that business whatever prices the owner sees fit to charge for service," it determined the only consequence of this fact is that the party seeking to apply the law must show a greater likelihood of public benefit. Nevertheless, the court applied the rational relation test.

Affordable Care v. N.C. State Bd. of Dental Examiners, 153 N.C. App. 527, 536–37, 571 S.E.2d 52, 59–60 (2002) (internal citation omitted);

38. Stated differently and more recently by the North Carolina Supreme Court, the "Court's duty to protect fundamental rights includes preventing *arbitrary* government actions that interfere with the right to the fruits of one's own labor." *King v. Town of Chapel Hill*, 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014) (emphasis added); *see also Sanders*, 197 N.C. App. at 327, 677 S.E.2d at 191 (affirming dismissal of plaintiffs' "fruit of their labor" clause claim because "nothing in the governmental action at issue . . . arbitrarily or irrationally limited plaintiffs' rights to earn a livelihood. Plaintiffs [were not] barred from earning a living, denied pay for their employment, or deprived of bargained-for benefits.").

(2) Monopolies

39. Article I, Section 34 of the North Carolina Constitution provides that "[p]erpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."

> Monopoly, as originally defined, consisted in a grant by the sovereign of an exclusive privilege to do something which had theretofore been a matter of common right. 41 C. J., 82. The exclusion of others from such common right is still considered a prominent feature of monopoly, and the consequent loss to those excluded of opportunity to earn a livelihood for themselves and their dependents, the danger of becoming a public charge, with attendant humiliation and insecurity, has been considered the prime reason for the public policy then adopted into the Constitution. But here, the Constitution itself does not analyze—it condemns. The ordinary trades and occupations are specialized forms of service developed through the necessity of division of labor in civilized life. The Government did not create them, does not own them, and the grant of the privileges of such trades and occupations to a limited group of citizens is "contrary to the genius of a free State and ought not to be allowed."

Harris, 216 N.C. at 761–62, 6 S.E.2d at 864.

40. An exercise of police powers regulating an occupation in order "to protect or promote the health, morals, order, safety and general welfare of society" must have "a rational, real or substantial relation to one or more of the purposes for which police power is exercised and . . . the occupation to be regulated [must be] clothed with a substantial public interest. The Act must be reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of public harm." *State v. Warren*, 252 N.C. 690, 694, 114 S.E.2d 660, 664 (1960); *see also Ballance*, 229 N.C. at 772 (holding that a statute that "unreasonably obstruct[ed] the common right of all men to choose and follow one of the ordinary lawful and harmless occupations of life

as a means of livelihood, and b[ore] no rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare[,] . . . addressed . . . the interests of a particular class rather than the good of society as a whole, and tend[ed] to promote a monopoly in what [wa]s essentially a private business" in violation of Article I, Section 34).

D. Analysis

41. The Court must now determine whether Plaintiffs are likely to succeed on their claims. When doing so, the Court first concludes that the claims raise two separate issues, although they are related. The first question is whether the Governor has demonstrated a reasonable basis for reopening the North Carolina economy in a phased manner as necessary to protect the ability of the overall North Carolina health system to respond as demands upon it may grow as the economy reopens. (*See* Cohen Dec. ¶ 71 ("Our 'dimmer switch' approach reflects the critical need for a staggered, phased approach to reopening in order to minimize the short-term impact upon people, hospitals, health care workers, available PPE, etc.").) If a phased reopening was appropriate, then the Governor was necessarily required to determine how to implement a phased reopening, and the second issue relates to the reasonableness of the Governor's choice in that regard.

42. The Court must determine the proper standard of review for resolving those issues. Plaintiffs urge the Court to apply the strict scrutiny standard, arguing that its required by our courts having accepted that rights guaranteed by Article I, Sections 1 and 19 of the North Carolina Constitution are "fundamental." The

Governor contends that the Court should apply the lower standard of a rational basis test that demands only that the Governor demonstrate some rational relationship between his order and the public good sought to be achieved.

43. The Court concludes that neither Party has appropriately articulated the standard of review the Court must follow. The correct standard is neither strict scrutiny nor the lowest level of rational basis test that can be satisfied by any conceivable rational basis. Rather, the proper standard is a reasonable relation test in which the Court inquires first whether the Governor has acted with a proper government purpose, and if so, second, whether his actions were reasonable when viewed against the balance between the likely public benefit to be achieved and the burden imposed. This is the essence of the review undertaken in both *Poor Richard's*, where the claim was grounded on a due process challenge to the exercise of police power to regulate the civilian sale of military property, and in *In re Certificate of Need for Aston Park*, where the claim challenged the legislature's authority to authorize a state board to forbid persons from using their own private property and funds to construct a medical facility. In each, the court looked to the evidentiary record to assess the balance between the public good and private burden.

44. When undertaking its review, the Court must be mindful that the Governor has been called upon to act in the face of the COVID-19 pandemic. As Chief Justice Roberts recently cautioned, state officials must be given broad latitude as they assume their duties in fashioning emergency responses "in areas fraught with medical and scientific uncertainties," such that courts should be especially reluctant

to engage in "second-guessing" because they do not have the "background, competence, and expertise to assess public health." *S. Bay United Pentecostal Church v. Newsom*, No. 19A1044, slip op. at 2 (U.S. May 29, 2020) (Roberts, C.J., concurring).

45. Chief Justice Roberts' caution is consistent with a long line of federal and North Carolina cases that have recognized that the balance between government power and individual liberties tips more in favor of the rational exercise of police powers when the government is required to act in the face of an emergency. *See, e.g.*, *Talleywhacker, Inc. v. Cooper*, No. 5:20-CV-218-FL, 2020 U.S. Dist. LEXIS 99905, at *4–16 (E.D.N.C. June 8, 2020) ("Indeed, over a century ago, during the midst of the smallpox epidemic, the Supreme Court 'recognized the authority of a state to enact quarantine laws and health laws of every description.' " (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905))); *see also Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2020 U.S. App. LEXIS, at *6 (7th Cir. June 16, 2020) (also relying on *Jacobson*); *State v. Allred*, 21 N.C. App. 229, 236, 204 S.E.2d 214, 219 (1974) (holding that, during a period of rioting catalyzed by tensions resulting from the desegregation of public schools in New Hanover County in 1971, a restraint on the right to assembly in public parks during nighttime hours was "[u]nder the circumstances, . . . clearly reasonable"); *State v. Dobbins*, 277 N.C. 484, 497–98, 178 S.E.2d 449, 457 (1971) ("[I]t is not necessary or appropriate in the present instance to attempt to draw sharply, throughout its entire length, the line between the right of the individual to travel and the authority of the State to limit travel. It is sufficient,

for the present, to hold, as we do, that the Asheville curfew proclamation falls well over on the side of reasonable restriction.").

46. However, even in the face of an emergency, fundamental rights are not relegated to only a "matter of semantics" as the Governor's counsel has suggested. Nevertheless, the Court concludes that Plaintiffs' assertion that the labeling of the right to the fruits of one's labor as "fundamental" compels strict scrutiny is at odds with the Court of Appeal's rejection of that standard in *Affordable Care*.

47. The first step of judicial review inquires whether the Governor has acted with a proper purpose. The Court is satisfied that there is a clear public purpose in implementing measures to contain the impact of COVID-19 and the EMA has charged the Governor with the responsibility to do so. Accordingly, the question of whether Plaintiffs have demonstrated that they are entitled to an immediate injunction because they are likely to prevail on their claims turns on whether the Governor has acted reasonably.

48. Whether the Governor has acted reasonably is a two-step inquiry. The first question is whether the Governor reasonably determined that the economy should be opened in stages rather than all at once in order to guard the public health system's ability to respond to the need for more medical care, including but not limited to treating patients affected by COVID-19.[7] The second question is, if the Governor's choice to reopen the economy in phases was reasonable, whether the

[7] A lack of capacity would affect the full spectrum of medical needs.

manner in which he implemented that reopening—by choosing to open certain businesses and not others—was also reasonable.

49. The Court finds that Dr. Cohen has demonstrated that Plaintiffs are unlikely to prevail on their claim that the Governor acted unreasonably when determining to reopen the economy in phases. (*See* Cohen Dec. ¶¶ 38, 64, 71.) That decision was debatable when first made, and the debate has intensified as many states have begun to reopen their economies, accompanied by public reports on the impact of those reopenings. The Court's role is not to take either side of the wider public debate, but rather to determine whether the Governor's choice was sufficiently reasonable so as not to be immediately enjoined.

50. Necessarily, once the choice to implement a phased reopening has been made, choices must be made on the manner of implementation. Again, the Court's inquiry is to determine whether Plaintiffs are likely to prove that the Governor's determinations were unreasonable.

51. Dr. Cohen's testimony details some of the emerging experience and data that define the potential scope of the COVID-19 pandemic and why the Governor determined that it presents an extraordinary health risk with severe potential absent an aggressive response to contain the spread of the virus, (Decl. Dr. Cohen ¶¶ 13–21; Decl. Dr. Cohen Ex. A, ECF No. 14.2; Decl. Dr. Cohen Ex. B, ECF No. 14.3), and how the Governor has relied on a multi-disciplinary team, including experienced health care experts, which has stayed abreast of evolving information regarding the COVID-19 virus, (Decl. Dr. Cohen ¶¶ 9–11); including both scientific study and the type of

anecdotal evidence upon which epidemiologists and virologists consider. She identifies certain factors that the Governor considered in determining his approach to reopening the economy, including that it has now been generally accepted that the primary means of spreading COVID-19 virus is through respiratory droplets from close personal contact with one who has been infected with the virus, (Decl. Dr. Cohen ¶ 13); a person could be asymptomatic, yet infected and able to spread the virus, (Decl. Dr. Cohen ¶¶ 13, 15); the risk of exposure is greater in indoor environments than in outdoor environments and may increase while remaining stationary, (Decl. Dr. Cohen ¶¶ 40–42); that there is a possibility of a "super-spreading event" where a single person exposes a large number of other persons, thereby increasing the risk of an exponential spread, (Decl. Dr. Cohen ¶ 66); that such "super-spreading" events have occurred in a variety of settings ranging from business meetings, to worship services, to large gatherings such as entertainment events, and social clubs, including but not limited to bars, (Decl. Dr. Cohen ¶¶ 28, 32, 44, 52, 66); and that there are certain methods which may be effective in minimizing exposure to the virus, including social distancing, use of face coverings, sanitation, increased air circulation, and limiting the duration of contact between persons, (Decl. Dr. Cohen ¶ 21).

52. Dr. Cohen opines that individuals are less likely to follow public health recommendations when consuming alcohol, but further that in some environments, including private bars, persons yield to "the inevitable gathering effect," because their "very nature is to share comradery, fellowship or other close personal contact," and that the tendency is exacerbated when respiratory projection increases because of the

need to be heard over loud music, singing, or shouting, which is more prevalent in private bars than in other settings which serve alcohol for on-premise consumption. (Decl. Dr. Cohen ¶ 62.) When compared to other On-Premises Licensees, she concludes that patrons of private bars would be less likely to comply with those procedures because of the "pervasive negative effect of pre-COVID-19 learned behavior that does not involve regular and disciplined social distancing." (Decl. Dr. Cohen ¶ 62.)

53. Dr. Cohen does not offer empirical data or scientific or medical studies to support her assertions regarding the greater likelihood that bar patrons will not conform to the restrictions being imposed by EO 141. She rather refers to more anecdotal evidence drawn from news articles which appear to report a link between reopening bars and increased spread of COVID-19, including an event in Alabama after the reopening of private bars, and events in Korea, Japan, and Germany that may have included not only bars, but also gyms, dance clubs, and other venues. (Decl. Dr. Cohen ¶¶ 63, 67.)[8]

54. The Governor and his supporting task force used this combination of information to determine that those categories of businesses grouped in Section 8 of EO 141 were those that should remain closed to a later phase in the reopening of the economy because they present a higher risk of increased exposures affecting the health care system which are not adequately counterbalanced by an economic benefit

[8] The Court notes that daily press reports demonstrate that the knowledge base regarding COVID-19 and its spread and impact is dynamic. Usually, a court is able to decide whether emergency injunctive relief is appropriate on a more static record.

to justify the increased risk. In addition to characterizing the social environment which private bars promote, within the category of On-Premises Licensees, the Governor also concluded that breweries, wineries, and distilleries serve a smaller population of customers than private bars so as to present a smaller risk of COVID-19 exposures and represent a more vital and necessary overall contribution to North Carolina's economy. (Decl. Dr. Cohen ¶¶ 69–74.) The Court has found any comparison of economic contributions to be of marginal significance.

55. Having considered the overall record pursuant to the appropriate judicial standard of review, the Court concludes that Plaintiffs have not demonstrated that they are likely to succeed on their claim that the Governor's restriction on their ability to reopen before July 17, 2020 is unlawful and should be immediately enjoined. While the Governor's choices may be debatable, at this time, the Court finds no adequate basis to conclude that Plaintiffs are likely to succeed on any claim that the Governor's strategy in addressing the COVID-19 pandemic was sufficiently irrational so as to be outside the realm of reasonableness within which the law allows the Governor to act.

56. The Court determines that the analysis undertaken above also controls its determination that Plaintiffs are not likely to succeed on their claim that the Governor's executive orders have created an unlawful monopoly.

57. The Court need not now consider the likelihood of Plaintiffs' success on their claim that they are entitled to compensation because the restrictions on their

businesses constitutes a taking, as those claims do not serve as a basis for injunctive relief.

E. Conclusion

58. The Court therefore determines that Plaintiffs' Renewed Motion for Temporary or Preliminary Relief must be DENIED.

IT IS SO ORDERED, this the 26th day of June, 2020.

/s/ James L. Gale

James L. Gale
Judge Presiding