STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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| EDWARD T. SMITH, JR. and wife, ROBIN SMITH; RICHARD J. HOOTON, III; NEIL STROTHER and wife, ANN STROTHER; PAUL HUMPHREYS, JR. and wife, KELLI HUMPHREYS; PHILLIP HENRY and wife, SHANNON HENRY,<br><br>Plaintiffs,<br><br>v.<br><br>ROY A. COOPER, III, in his official capacity as Governor, STATE OF NORTH CAROLINA,<br><br>Defendants. | 20 CVS 6035 |
| OLD AMERICAN FISH, INC. d/b/a AMERICAN FISH COMPANY,<br><br>Plaintiff,<br><br>v.<br><br>GOVERNOR ROY COOPER, in his official capacity,<br><br>Defendant. | 20 CVS 6036 |

IREDELL COUNTY

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| JET FITNESS 24/7, LLC, and JENNIFER L. DURST,<br><br>Plaintiffs,<br><br>v.<br>ROY A. COOPER, III, as Governor of the State of North Carolina, and the STATE OF NORTH CAROLINA,<br><br>Defendants. | 20 CVS 1353 |

**ORDER DENYING TRO MOTIONS**

1. THIS MATTER is before the Court following argument on Plaintiffs' motions for temporary restraining order in each of the three above-captioned cases heard on an expedited basis on June 4, 2020 (the "TRO Motions"). (20 CVS 6035, ECF No. 4; 20 CVS 6036, ECF No. 2; 20 CVS 1353, ECF No. 7.) While the Court received and reviewed affidavits and briefs from all parties, arguments of counsel at the hearing extended beyond the matters of record and Plaintiffs suggested that they would have filed additional materials in response to Governor Cooper's filing had time allowed.

2. Having considered the motions, briefs, verified pleadings, affidavits, other timely materials submitted in support of and in opposition to the Motions, and the arguments of counsel, the Court DENIES the TRO Motions and will allow submission of additional materials prior to ruling on pending motions for a preliminary injunction.

A. Background

3. The Court provides only a bare summary of facts upon which the parties have argued their positions in order to provide context for its ruling. Governor Cooper issued Executive Order 141 ("EO 141") on May 20, 2020 to implement Phase II of North Carolina's response to the virus, which allows certain businesses to open on a limited basis while requiring that other businesses, including Plaintiffs', to remain closed.[1] The reader may find a more comprehensive history of the progression of Governor Roy Cooper's executive orders responding to the COVID-19 virus leading to the one on which these lawsuits focus by review of the complaints as well as public reports and the recent opinion in *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).

4. Plaintiffs challenge both Governor Cooper's initial and continuing authority to order business closings, and now his choice of which businesses to allow to open when implementing what has been referred to as a "dimmer switch" approach to the phased reopening of North Carolina's economy. (20 CVS 6036, Aff. Mandy K. Cohen, M.D., MPH ¶ 35, ECF No. 6.) Plaintiffs urge that those choices have been arbitrary, particularly because their businesses present no greater risk than those businesses that have been allowed to open when fairly assessed by the medical and

[1] Collectively, Plaintiffs represent indoor exercise facilities, martial arts facilities, gyms, health clubs, fitness centers, and a primarily outdoor bar, and further advance the interest of others who have filed affidavits affirming the importance of those businesses. The Court is aware of other cases in federal and North Carolina courts brought by other businesses which EO 141 requires to remain closed, including certain cases that have been or will be assigned to this Court. (*See, e.g.*, *Morgan v. Cooper*, 20 CVS 1637, Order (June 3, 2020) (Hanover County order denying TRO in gym case before case was assigned to the undersigned as a 2.1 exceptional case).)

scientific data upon which Governor Cooper has apparently relied. Governor Cooper in turn maintains that the distinctions EO 141 draws are proper, necessary, and rationally made from reasoned analysis of his team of experts in public health and public safety in order to guard the public interest. The TRO Motions ask that Plaintiffs' businesses be allowed to reopen immediately.

5. The different complaints in these three cases vary, but collectively present multiple grounds based on the North Carolina Constitution.[2] Governor Cooper has relied on powers vested in him by the North Carolina Emergency Management Act ("EMA"). N.C.G.S. §§ 166A-19–19.79. Plaintiffs do not challenge Governor Cooper's power to declare that the COVID-19 virus has created an emergency, as indeed such an emergency has been declared on a national and international basis. But they do challenge whether Governor Cooper has exceeded those powers in not allowing gyms, health clubs, fitness centers, and at least outdoor bars to open along with other businesses allowed during Phase II. (20 CVS 6035, Br. Supp. Mot. TRO 6–7, ECF No. 7; 20 CVS 1353, Mem. Law Supp. Pls.' Mot. TRO 11, ECF No. 5.)

[2] Other lawsuits have been presented in the federal courts based on the due process and equal protection clauses of the United States Constitution. To the Court's knowledge, with the exception of *Berean Baptist Church v. Cooper*, No. 4:20-CV-81-D, 2020 U.S. Dist. LEXIS 86310, at *30–31 (E.D.N.C. May 16, 2020), no plaintiff has obtained an order restraining the governmental orders responding to the COVID-19 virus. *Talleywhacker*, 2020 U.S. Dist. LEXIS 99905, at *38 (E.D.N.C. June 8, 2020); *see e.g., S. Bay United Pentecostal Church v. Newsom*, No. 19A1044, slip op. at 2–3 (U.S. May 29, 2020) (Roberts, C.J., concurring); *In re Rutledge*, 956 F.3d 1018, 1027 (8th Cir. 2020); *Antietam Battlefield KOA v. Hogan*, No. CV CCB-20-1130, 2020 U.S. Dist. LEXIS 88883, at *45 (D. Md. May 20, 2020).

6. The EMA is structured so as to provide the Governor emergency powers in three different tiers. The Governor is given initial and primary authority to declare an emergency. N.C.G.S § 166A-19.20. EMA Section 19.30(b) grants the Governor additional powers to be exercised with the concurrence of the Council of State. EMA Section 19.30(c) allows the Governor to exercise broad powers initially delegated to local governments, conditioned on his first determining that the emergency demands that the Governor act on a state-wide basis.

7. At least some of the Plaintiffs argue that Governor Cooper did not have the initial authority to close businesses and that while EO 141, as well as prior executive orders, summarily recite that the Governor made a determination that state-wide enforcement required he act, he did not recite and, in fact, did not have a basis for, such determination. Plaintiffs further contend that even if Governor Cooper possessed statutory authority to close businesses under the EMA, he exercised that power arbitrarily and outside the constitutional boundaries that restrain him.

8. Cognizant that other plaintiffs relying on the U.S. Constitution have failed, here Plaintiffs invoke provisions of the North Carolina Constitution which do not have a direct federal analogue. In particular, Plaintiffs anchor their claims on guarantees in the North Carolina Constitution to due process, equal protection, and a right to enjoy the fruits of their labors.

> Article I, Section 1 of the North Carolina Constitution provides that "life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness" are among those rights of the people that are inalienable. Section 19 of the same Article provides that "[n]o person shall be . . . deprived of his . . . liberty, or property, but by the law of the land."

*Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988).

9. Governor Cooper urges that the Court should not restrain his executive orders, particularly as they are based on the careful and reasoned analysis to implement a phased approach to reopening the economy and have been rational choices reasonably related to the emergency presented. The Governor has not sought to minimize the economic harm that Plaintiffs have and may for some limited time continue to suffer, but rather finds that such harm is necessary to protect the greater public good and urges the Court to defer to those choices rationally made.

B. Analysis

10. A court is vested with broad equitable powers, including the right to restrain unlawful exercises of government power. However, exacting standards of proof limit the use of those equitable powers, particularly in the earliest stages of litigation. A court may issue a preliminary injunction to maintain a status quo as the litigation progresses, but only where:

> (1) [Plaintiffs are] able to show likelihood of success on the merits of [their] case and (2) [Plaintiffs are] likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of [Plaintiffs'] rights during the course of litigation.

*A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759–60 (1983); *see also* N.C. R. Civ. P. 65(b).

11. A TRO is a more "drastic" procedure that "operates within an emergency context which recognizes the need for swift action." *State ex rel. Gilchrist v. Hurley*, 48 N.C. App. 433, 448, 269 S.E.2d 646, 655 (1980); *see also Leonard E. Warner, Inc.*

*v. Nissan Motor Corp.*, 66 N.C. App. 73, 76, 311 S.E.2d 1, 3 (1984) (noting that a TRO has been called an "extraordinary privilege").

12. It is now manifest that public opinion is strongly divided as to the manner in which Governor Cooper has developed and implemented his phased approach. Some feel strongly that he has fairly imposed economic burden on businesses to protect the greater good and acted consistently and prudently based on the dynamic body of emerging evidence and experience. Others equally and just as strongly feel that the risks of the COVID-19 virus are not adequate to justify the economic burdens imposed by the Governor's executive orders, particularly now that EO 141 gives the green light to some businesses but not others that present indistinguishable risks to the public health.

13. The Court must wade into this divergent opinion cautiously, cognizant that it is not vested with legislative authority. As Chief Justice Roberts recently observed: "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement." *S. Bay United Pentecostal Church v. Newsom*, No. 19A1044, slip op. at 2 (U.S. May 29, 2020) (Roberts, C.J., concurring). Chief Justice Roberts cautioned that a court should be especially reluctant to impose its own judgment in order to set aside acts of those better trained and charged with responsibility to respond to matters "fraught with medical and scientific certainties," and in the face of those uncertainties, the latitude given those officials "must be

especially broad." *Id.* (denying church's application for injunctive relief from California Governor's executive order aimed at limiting spread of COVID-19).

14. Our North Carolina Supreme Court has expressed the same caution in other contexts. In *Rhyne v. K-Mart Corp.*, the court observed that "despite the evidence presented by plaintiffs that the rationality of section 1D-25 is questionable, 'they cannot prevail so long as "it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable." ' " 358 N.C. 160, 182, 594 S.E.2d 1, 16 (2004) (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 66 L. Ed. 2d 659, 669, 101 S. Ct. 715 (1981) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)) (alteration in original))). Nevertheless, as guardians of personal freedoms, courts are often required to assess the degree to which they have been infringed in the name of a greater public harm. *See State v. Dobbins*, 277 N.C. 484, 497, 178 S.E.2d 449, 457 (1971) ("The police power of the State extends to all the compelling needs of the public health, safety, morals and general welfare. Likewise, the liberty protected by the Due Process and Law of the Land Clauses of the Federal and State Constitutions extends to all fundamental rights of the individual. It is the function of the courts to establish the location of the dividing line between the two by the process of locating many separate points on either side of the line.").

15. The grant, exercise, or limit on governmental power raise questions of degree. The legitimacy of powers justified in the face of a temporal emergency may erode as the emergency subsides. *See, e.g.*, *State v. Allred*, 21 N.C. App. 229, 236, 204

S.E.2d 214, 219 (1974) ("[T]he only restraint imposed on the right of assembly was the prohibition against use of public parks during nighttime hours. Under the circumstances, this very limited restriction was clearly reasonable."); *Dobbins*, 277 N.C. at 497–98, 178 S.E.2d at 457 ("[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.").

16. Based on these balances, both federal and North Carolina courts have adopted different standards of review which afford judicial deference to rational exercises of governmental power so long as they are rationally related to the public purpose but demand more searching judicial inquiry when the exercise of government power intrudes on certain protected rights, such as speech or the exercise of religion, or call for disparate treatment premised on suspect classifications, such as race.[3]

17. Although rights guaranteed by Section 19 have sometimes been labeled "fundamental," *see Roller v. Allen*, 245 N.C. 516, 518–19, 96 S.E.2d 851, 854 (1957);

[3] Generally, the cases in which the deferential rational basis test has been developed arise in the context of attacks on legislative enactments. Here, Plaintiffs, and particularly Jet Fitness, urge that the relaxed judicial standard cannot appropriately be applied to a challenge based on the assertion that the Governor has exceeded powers granted to him under the EMA, but in seizing powers delegated to local authorities, he has invaded powers reserved to the legislature. In other contexts, the Legislature has adopted a standard based on reasonableness which confine rule making authority to those "reasonably necessary to implement" the legislative purpose. N.C.G.S. § 150B-21.9. Our Supreme Court has applied a rational basis test to executive action as well as to legislative action. *See Allred*, 21 N.C. App. at 236, 204 S.E.2d at 219; *Dobbins*, 277 N.C. at 497–98, 178 S.E.2d at 457; *Affordable Care v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 531, 571 S.E.2d 52, 56 (2002).

*State v. Ballance*, 229 N.C. 764, 768–69, 51 S.E.2d 731, 733–34 (1949), they have not been interpreted to trigger the strict scrutiny standard of judicial review employed where a law impermissibly "burden[s] the exercise of a fundamental right or operate[s] to the peculiar disadvantage of a suspect class," *White v. Pate*, 308 N.C. 759, 766, 304 S.E.2d 199, 204 (1983); *see also Texfi Indus., Inc. v. Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980) ("[The strict scrutiny] standard requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest.").

18. Rather, the "fruits of their own labor" clause has been recognized 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*, 322 N.C. at 64, 366 S.E.2d at 699 (citing *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 258 S.E. 2d 444 (1979)); *see also Rhyne*, 358 N.C. at 181, 594 S.E.2d at 15 ("Principles of substantive due process dictate that 'the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained.' . . . Similar to the rational basis test for equal protection challenges, 'as long as there could be some rational basis for enacting [the statute at issue], this Court may not invoke [principles of due process] to disturb the statute.' " (internal citations omitted)); *Affordable Care v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 536, 571 S.E.2d 52, 59 (2002).

19. In reviewing such restrictions on one's right to engage in business, and an attack grounded on the fruits of the labor clause of the North Carolina

Constitution, the North Carolina Supreme Court has employed a two-part test that requires first that the restriction is rationally related to a proper governmental purpose, and, if so, whether the means to affect that governmental purpose are reasonable. *Poor Richard's*, 322 N.C. at 64, 366 S.E.2d at 699. While the inquiry is a question of degree, the courts have upheld government regulation distinguishing between businesses so long as there is a rational basis for doing do. *Id.* at 65, 366 S.E.2d at 699 (collecting cases).[4]

20. Plaintiffs urge the Court to adopt the more searching standard of review. (20 CVS 6035, Br. Supp. Mot. TRO 4–7, ECF No. 7; 20 CVS 6036, Mem. Law Supp. TRO 2–5, ECF No. 8, 20 CVS 6035, Br. Supp. Mot. TRO 6–7; 20 CVS 1353, Mem. Law Supp. Supp. Pls.' Mot. TRO 9–10, ECF No. 5.) The Governor contends that the traditional deferential rational basis standard of review must control, particularly where, as here, the Governor has only proceeded with considered expert guidance rationally related to his responsibility and need to protect the public health and welfare. (20 CVS 6035, Mem. Law Governor Cooper Opposing Pls.' Request TRO 12–14, ECF No. 8; 20 CVS 6036, Mem. Law Governor Cooper Opposing Pls.' Request TRO 17–19, ECF No. 9.) While EO 141 distinguishes between businesses, the

[4] When recently denying the attack by other businesses on EO 141, Judge Flanagan of the Eastern District of North Carolina referenced a long line of federal cases upholding economic regulation on the basis of a rational relationship test. *Talleywhacker*, 2020 U.S. Dist. LEXIS 99905. She cited to one particular case of the Fourth Circuit Court of Appeals which views the rational basis test as imposing on a plaintiff "the burden 'to negate every conceivable basis which might support' " the challenged governmental action. *Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008). Under this standard, the government's exercise may be upheld even where "it results in some inequality." *Id.* (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).).

Governor asserts that those distinctions have a rational basis. (*See, e.g.*, 20 CVS 6035, Mem. Law Governor Cooper Opposing Pls.' Request TRO 2–9 (discussing the perceived risks of reopening gyms); 20 CVS 6036, Mem. Law Governor Cooper Opposing Pls.' Request TRO 9–11 (discussing the perceived risks of reopening bars).)[5]

21. At this juncture, and on this record, the Court finds that Plaintiffs have not met the high standard for issuing a TRO mandating that they be allowed to reopen immediately.

22. At the hearing on the TRO Motions, the Court allowed counsel in their arguments to address matters that had not been filed of record, including evidence that may to a greater degree inform as to the basis on which the Governor distinguished between and among businesses in balancing public and private interests. In response to the Court's questions at argument, Plaintiffs' counsel suggested that they had not had adequate time to respond to matters submitted on the Governor's behalf.

23. The Court will defer ruling on Plaintiffs' motions for preliminary injunction until allowing, but not requiring, Plaintiffs to present a more complete record in support of their claims. Any party may therefore file additional supporting materials, whether testimony, documentary evidence, or supplemental briefing, on or

[5] In *Talleywhacker,* plaintiffs presented testimony from a health care expert challenging the conclusions of the experts on Governor Cooper's COVID-19 response team. Guided by Chief Justice Robert's admonition for caution, Judge Flanagan responded by stating that "the court declines plaintiffs' invitation to weigh medical and scientific evidence in usurpation of the executive's role." *Talleywhacker*, 2020 U.S. Dist. LEXIS 99905, at *29. While quickly denying the request for an immediate TRO, Judge Flannagan did, however, allow plaintiffs a full opportunity to develop a record before denying a preliminary injunction.

before June 12, 2020. If such material is filed, the opposing party may, but is not required to, file on or before June 17, 2020 rebuttal materials limited to new matters that could not have been earlier anticipated. The Court will then determine whether additional oral argument is necessary before ruling on the motions for preliminary injunction.

24. For the reasons stated, the Court DENIES the TRO Motions.

SO ORDERED, this the 9th day of June, 2020.

/s/ James L. Gale
James L. Gale
Senior Business Court Judge