

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. _____

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)

Plaintiffs,)

v.)

ROY A. COOPER, III, in his official)
capacity as Governor, STATE OF)
NORTH CAROLINA,)

Defendants.)

COMPLAINT

NOW COME the Plaintiffs, 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, and Phillip Henry and wife, Shannon Henry, complaining of the Defendants and allege and say:

PARTIES

1. Plaintiffs, Edward T. Smith, Jr. and wife, Robin Smith, are natural persons residing in Carteret County, North Carolina. They own and operate several gyms across eastern North Carolina.

2. The Plaintiff, Richard J. Hooton, III, is a natural person residing in Pitt County, North Carolina. Mr. Hooton is the part owner and operator of a personal training studio. Mr. Hooton works one on one with his clients, including numerous clients with serious medical conditions

which are exacerbated by the closing of his facility by the Defendants.

3. Plaintiffs, Neil Strother and wife, Ann Strother, are natural persons residing in Wilson County, North Carolina. They own and operate two gyms in Eastern North Carolina. They have been threatened with criminal prosecution by the police if they operate their gym.

4. Plaintiffs, Paul Humphreys, Jr. and wife, Kelli Humphreys, are natural persons residing in Wake County, North Carolina. They are owners and operators of several gyms across eastern North Carolina. Many of their clients have serious medical conditions which are treated by exercise.

5. Plaintiffs, Phillip Henry and wife, Shannon Henry, are owners and operators of a martial arts studio. Many of their students have special needs, including autism, and have been referred by their physicians to take the training at the martial arts studio. The training these students receive helps with their special needs.

6. Defendant, Roy A. Cooper, III, is a natural person and is sued only in his official capacity as Governor of the State of North Carolina whose official residence and office are located in Wake County, North Carolina. The Executive Orders complained of by the Plaintiffs were issued by Gov. Cooper in Wake County, North Carolina.

7. The State of North Carolina is a state of the United States with the right to sue and be sued. The capital and principal offices of the State of North Carolina are located in Wake County, North Carolina.

FACTS

8. On March 10, 2020, the Defendant, Roy A. Cooper, III (hereinafter “Defendant Cooper” or “Cooper”) issued Executive Order No. 116 in which Defendant Cooper declared a

state of emergency to “prevent the spread of COVID-19”. A copy of the Executive Order No. 116 is attached hereto as Exhibit 1 and incorporated herein by reference.

9. On March 23, 2020, the Defendant Cooper issued Executive Order No. 120 which, *inter alia*, ordered the closure of indoor exercising facilities, including gyms and martial arts facilities. A copy of the Executive Order No. 120 is attached hereto as Exhibit 2 and incorporated herein by reference.

10. On April 23, 2020, the Defendant Cooper issued Executive Order No. 135 which extended the closure of indoor exercising facilities until May 8, 2020. A copy of the Executive Order No. 135 is attached hereto as Exhibit 3 and incorporated herein by reference.

11. On May 5, 2020, the Defendant Cooper issued Executive Order No. 138 which ordered that “entertainment facilities” were to remain closed. Entertainment facilities was defined by the Order to include Indoor Exercise Facilities, including gyms and martial arts facilities, Health Clubs, Fitness Centers, and Gyms. This Executive Order remained in effect until May 22, 2020 at 5:00 p.m. A copy of the Executive Order No. 138 is attached hereto as Exhibit 4 and incorporated herein by reference.

12. On May 20, 2020, Defendant Cooper extended his order to keep “Entertainment and fitness facilities” closed until at least June 26, 2020 by issuing Executive Order 141.

“Entertainment and fitness facilities” which were ordered to remain closed included indoor exercise facilities (including martial arts facilities), gyms, health clubs, and fitness centers. A copy of the Executive Order No. 141 is attached hereto as Exhibit 5 and incorporated herein by reference.

13. Each of the Plaintiffs are owners and operators of indoor exercise facilities (including

martial arts facilities), gyms, health clubs, or fitness centers which have been ordered to close by the above-referenced Executive Orders.

14. Each of the Plaintiffs have suffered financial damages due to the closing of their respective businesses.

JURISDICTION

15. The Court has jurisdiction over this action pursuant to N.C. Gen. Stat. § 1-253.

16. The Court further has jurisdiction over this action as it is brought to determine rights under Art. I, sec. 1 and sec. 19 of the North Carolina Constitution. These rights, as part of the Declaration of Rights of the Constitution, are self-executing.

17. Injunctive relief is proper as the actions of the Defendants in prohibiting the Defendants from engaging in ordinary occupations present a substantial encumbrance on economic activity which constitutes a manifest threat of irreparable harm sufficient to invoke the equity jurisdiction of the Court.

18. Injunctive relief is further proper in that the Plaintiffs will suffer irreparable harm due to the actions of the Defendants as it deprives the Plaintiffs of their Constitutional right to work and enjoy the fruits of their labor. The Plaintiffs have no plain, speedy, and adequate remedy at law. Damages would not fully redress any harm suffered by Plaintiffs because they are unable to engage in constitutionally protected activities.

19. The Defendants do not have sovereign immunity under the Declaratory Judgment Act, nor do the Defendants have sovereign immunity as this action is brought directly under the North Carolina Constitution.

FIRST CAUSE OF ACTION
(Right to earn a living)

20. Paragraphs 1-19 of this Complaint are incorporated herein by reference.

21. The Plaintiffs are each owners and operators of facilities relating to exercise and to treatment of serious medical conditions by the use of exercise. These facilities include indoor exercise facilities (including martial arts facilities), gyms, health clubs, or fitness centers.

22. By his issuance of various Executive Orders, the current Order being Executive Order 141, Defendant Cooper has ordered that the facilities of the Plaintiffs be closed.

23. Executive Order 141 deprives the Plaintiffs of their inalienable right to earn a living as guaranteed by Art. I, sec. 1 and 19, of the North Carolina Constitution.

24. Art. I, sec. 1 of the Constitution provides that: “We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.”

25. Art. I, sec. 19 of the Constitution provides that: “No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.”

26. Executive Order 141 is unconstitutional as applied to owners and operators of indoor exercise facilities (including martial arts facilities), gyms, health clubs, and fitness centers as neither the State of North Carolina nor the Governor of the State possess the authority to deprive

the Plaintiffs of their right to pursue an ordinary vocation and earn a living.

SECOND CAUSE OF ACTION
(Unconstitutionality of N.C. Gen. Stat. § 166A-19.31(b)(2))

27. Paragraphs 1-26 of this Complaint are incorporated herein by reference.

28. Defendant Cooper in his Executive Order 141 has determined that municipalities and counties are unable to handle control of the COVID-19 emergency. Pursuant to N.C. Gen. Stat. § 166A-30(c), Defendant Cooper has therefore availed himself of the powers given to municipalities and counties under N.C. Gen. Stat. § 166A-19.31.

29. N.C. Gen. Stat. § 166A-31(b)(2) provides that municipalities and counties, and in this case Defendant Cooper, have the authority to prohibit the operation of business establishments and therefore to prohibit individuals from pursuing an ordinary vocation.

30. The General Assembly does not possess the authority to prohibit the right of individuals to pursue an ordinary vocation and earn a living. It therefore cannot give that right to municipalities and counties, and in this case to the Governor.

31. To the extent that N.C. Gen. Stat. § 166A-31(b)(2) allows the Defendants to order the closure of the Plaintiffs' businesses, it violates the Plaintiffs' right to earn a living as guaranteed by Art. I, sec. 1 and 19 of the North Carolina Constitution.

32. N.C. Gen. Stat. § 166A-31(b)(2) is unconstitutional as applied to the Plaintiffs as owners and operators of indoor exercise facilities (including martial arts facilities), gyms, health clubs, and fitness centers.

WHEREFORE, the Plaintiffs, 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, and Phillip Henry and wife, Shannon Henry, pray the Court as follows:

1. That the Court grant a declaratory judgment that Executive Order 141 ordering the closure of the Plaintiffs' businesses, including indoor exercise facilities (including martial arts facilities), gyms, health clubs, and fitness centers, is a violation of Art. I, sec. 1 and 19, of the North Carolina Constitution in violation of the Plaintiffs' right to earn a living.

2. That the Court grant a declaratory judgment that N.C. Gen. Stat. § 166A-31(b)(2) is unconstitutional as applied to Plaintiffs and their businesses, including indoor exercise facilities (including martial arts facilities), gyms, health clubs, and fitness centers, as a violation of Art. I, sec. 1 and 19, of the North Carolina Constitution.

3. That a temporary restraining order, preliminary injunction, and permanent injunction be issued preventing the Defendants and their officers, officials, and employees from enforcing Executive Order 141 as it applies to the Plaintiffs and their businesses, including indoor exercise facilities (including martial arts facilities), gyms, health clubs, and fitness centers.

4. That the costs of this action be taxed to the Defendants.

5. For such other and further relief as the Court deems mete and proper.

This the 27th day of May, 2020.

KITCHEN & TURRENTINE, PLLC

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VERIFICATION

Robin Smith being first duly sworn, deposes and says:

That the contents of the foregoing Complaint are true to her own knowledge, except as to matters stated on information and belief, and as to those matters, she verily believes them to be true.

Robin Smith

Sworn to and subscribed before me
this the _____ day of May, 2020.

Notary Public

My commission expires: _____