

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 6422

NORTH CAROLINA BOWLING)
PROPRIETORS ASSOCIATION, INC.,)
)
Plaintiff,)
v.)
)
ROY A. COOPER, III, as Governor of the)
State of North Carolina,)
)
Defendant.)
_____)

**MOTION FOR STAY OF
ORDER GRANTING
PRELIMINARY INJUNCTION
PENDING APPEAL**

***[EXPEDITED REVIEW
REQUESTED]***

NOW COMES Defendant Roy A. Cooper, III, Governor of North Carolina, by and through the undersigned Special Deputy Attorney General, pursuant to Rule 62(c) and (e) of the North Carolina Rules of Civil Procedure, and moves this Court to stay the order that enters a preliminary injunction issued by this Court on July 7, 2020 until such time as the Court of Appeals or the Supreme Court of North Carolina may decide the appeal. Should the Court determine not to grant such a stay, the Governor requests, in the alternative, that the Court stay the effective date of the preliminary injunction until such time as the Court of Appeals or the Supreme Court can act on a request to that Court to stay the order granting the preliminary injunction.

The test for a stay of an injunctive relief has not been articulated in great detail by our appellate courts. At the same time, “[t]he test developed by the federal courts requires a party seeking a stay to establish that: 1) a substantial likelihood exists that he will prevail on appeal, 2) he will suffer irreparable harm if the stay is denied, 3) no other party will be substantially harmed by the stay, and 4) the public interest will be served by allowing the stay.” 2 *North Carolina Civil Procedure* § 62-3 (2019); see *Nken v. Holder*, 556 U.S. 418, 425–26 (2009); *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). All four of these factors weigh in the Governor’s favor.

The Governor is likely to prevail on appeal, and will suffer harm if the stay is denied. As discussed during the hearing on the Bowling Association’s motion for preliminary injunction, in Briefs and Declaration of Dr. Cohen, the Governor has determined, based on advice of scientific and medical advisors, that allowing entertainment and fitness facilities, including bowling alleys, to reopen at this time of COVID-19, even with safety precautions offered, presents an immediate danger to public health and undermines the “dimmer switch” approach to re-opening of the State’s economy currently in place. This danger is heightened now, at the critical point in the State’s management of this crisis, as the State continues to feature the highest number of COVID-19 hospitalizations that the State experienced to date accompanied by a high number of new COVID-19 infections¹. Faced with similarly negative trends, many other States are being forced to reimpose limits on business activity that poses higher risks of spreading the virus—including bowling alleys.²

¹ North Carolina Department of Health and Human Services, COVID-19 North Carolina Dashboard, available at <https://covid19.ncdhhs.gov/dashboard> (last accessed at 12:00 p.m. on July 7, 2020).

² On July 1, 2020, the State of California ordered a closure of indoor family entertainment centers, including all bowling alleys, in 19 counties that represent estimated 70% of the State’s population due to rise of COVID-19 infections. *See* California Department of Public Health Press Release No. NR20-143, “Governor Newsom Orders Additional Action to Slow Community Transmission,” (July 1, 2020), available at <https://www.cdph.ca.gov/Programs/OPA/Pages/NR20-143.aspx> (last accessed July 2, 2020); California Department of Public Health, “Guidance on Closure of Sectors in Response to COVID-19” (July 1, 2020), available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-on-Closure-of-Sectors-in-Response-to-COVID-19.aspx> (last accessed July 2, 2020) and COVID-19 Industry Guidance available at <https://files.covid19.ca.gov/pdf/guidance-family-entertainment.pdf> (June 8, 2020) (defining “family entertainment centers” as including bowling alley at p. 2) (last accessed July 2, 2020); *see also* Politico, “How California Went from Model Student to Pandemic Problem Child,” (July 1, 2020), available at <https://www.politico.com/states/california/story/2020/07/01/how-california-went-from-model-student-to-pandemic-problem-child-1296494> (last accessed July 2, 2020).

In this time of crisis it is crucial that there be no confusion as to the Governor's emergency orders. The Governor asks for the opportunity for the appellate courts to consider his deep concern about the danger to public health before that danger is realized. The harm to the Defendant, and most importantly, the public at large if the bowling alleys are allowed to re-open warrants the stay of the injunctive order.

Moreover, the likelihood of the Governor's success on appeal is high, as a vast majority of state and federal courts across the nation upheld the validity of similar and stricter executive orders. *Talleywhacker, Inc. v. Cooper*, No. 5:20-CV-218, 2020 WL 3051207 (E.D.N.C. June 8, 2020); *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2020 U.S. App. LEXIS 18862 (7th Cir. June 16, 2020); *High Plains Harvest Church v. Polis*, Docket No. 1:20-cv-01480-RM-MEH, 2020 U.S. Dist. LEXIS 105247 (D. Colo. June 16, 2020); *Calvary Chapel Dayton Valley v. Sisolak*, No. 3:20-cv-00303-RFB-VCF, 2020 U.S. Dist. LEXIS 103234 (D. Nev. June 11, 2020); *Elkhorn Baptist Church v. Brown*, 366 Or. 506 (2020); *McCarthy v. Cuomo*, No. 20-cv-2124 (ARR), 2020 U.S. Dist. LEXIS 107195 (E.D.N.Y. June 18, 2020); *Slidewaters LLC v. Wash. Dep't of Labor & Indus.*, No. 2:20-CV-0210-TOR, 2020 U.S. Dist. LEXIS 103350 (E.D. Wash. June 12, 2020); *Prof'l Beauty Fed'n. of Cal. v. Newsom*, No. 2:20-cv-04275-RGK-AS, 2020 U.S. Dist. LEXIS 102019 (C.D. Cal. June 8, 2020); *Altman v. Cty. of Santa Clara*, No. 20-cv-02180-JST, 2020 U.S. Dist. LEXIS 97535 (N.D. Cal. June 2, 2020); *League of Indep. Fitness Facilities & Trainers v. Whitmer*, 2020 U.S. App. LEXIS 19691 (6th Cir. June 24, 2020); *Ill. Republican Party v. Pritzker*, No. 20-2175 (7th Cir., July 3, 2020), *application for emergency stay denied by*, No. 19A1068 (Kavanaugh, J.) (S. Ct., July 4, 2020).

Similarly, the balance of equities and harms favors the requested stay. The United States Court of Appeals for the Seventh Circuit most recently held that the balance of harms tips

decidedly in the Governor’s favor during the current posture of COVID-19 emergency. In denying plaintiffs’ request for preliminary injunction, the court explained:

COVID-19 is “a novel severe acute respiratory illness that has killed ... more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others.” *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring). If 100 Democrats or 100 Republicans gather and ten get infected, those ten may go home and infect a local shopkeeper, a local grocery-store worker, their postal carrier, or their grandmother—someone who had no interest in the earlier gathering. Thus, the balance of harms in this instance strongly favors the governor.

Id. at 2.

WHEREFORE, Governor Cooper respectfully requests that the Court’s order granting preliminary injunction be stayed until such time as the Court of Appeals or the Supreme Court may hear and decide this matter, or, in the alternative, until such time as the Court of Appeals or the Supreme Court may grant or deny the Governor’s request for a stay from that Court. Because of important public health considerations that stem from reopening bowling alleys at this time, the possibility that the harm caused by the reopening would become irreparable, and the emergency nature of the Governor’s impending appeal, the expedited review of this motion for stay is requested.

Respectfully submitted, this 7th day of July, 2020.

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CERTIFICATE OF SERVICE

I do hereby certify that in accordance with BCR 3 the foregoing document has been electronically filed using the Court's electronic filing system, which will automatically send notification of such filing to the following counsel of record:

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This the 7th day of July, 2020.

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