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Rear-View Mirror: Statutory and Constitutional Issues Raised Amidst Governor Roy Cooper's COVID-19 Shutdown Orders

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ABSTRACT

The COVID-19 pandemic rattled the world. Upon its arrival in the United States, the virus resulted in governors across the country using broad emergency powers to deal with the pandemic. North Carolina Governor Roy Cooper's executive orders, beginning in March of 2020, pushed statutory and constitutional boundaries. This Comment assesses the limits of Governor Cooper's emergency authority under the North Carolina Emergency Management Act and the North Carolina Constitution. Additionally, this Comment evaluates whether the North Carolina Emergency Management Act should be amended and whether Governor Cooper's orders violated individuals' rights under both the North Carolina Constitution and the Federal Constitution.

INTRODUCTION

In March 2020, COVID-19 reared its ugly head in the United States. The virus brought with it the fear of the unknown and ultimately led to nationwide shutdowns. Businesses took massive hits, many individuals were laid off from work, and state governors faced unprecedented challenges. North Carolina, of course, was no exception. Many questions arose: How was our state supposed to respond to the pandemic? What sorts of restrictions were to be implemented to ensure the safety of North Carolinians? These questions needed to be answered quickly, and consequently, Governor Cooper took action, issuing seventeen COVID-19 executive orders from March 10 to May 18.[1] The orders, discussed in more detail below, encompassed everything from business shutdowns and church closures to restrictions on mass gatherings.[2] Governor Cooper unilaterally issued these orders under the purported authority of the North Carolina Emergency Management Act, which directly impacted the lives of nearly every North Carolina resident.[3] After a reading of the executive orders, beginning with Executive Order 116, it becomes abundantly clear that the powers exercised in these emergency orders were immense. Consequently, these orders must be carefully scrutinized. After all, the fate of a North Carolinian's day-to-day life rests largely on the decisions made by the governor in response to an emergency.

Before delving into the specific power and rights issues presented by Governor Cooper's orders, it is important to have a general understanding of the North Carolina governor's emergency powers. For this, one can turn

1. *COVID-19 Orders & Directives*, NC.GOV, https://www.nc.gov/covid-19/covid-19-orders-directives [https://perma.cc/MNT8-XS62].

2. *See id.*

3. *See, e.g.*, Exec. Order No. 120 (Mar. 23, 2020).

to the North Carolina Emergency Management Act ("NCEMA"), which came into effect in 1977.[4] The NCEMA grants the governor very broad authority amidst a declared emergency. For example, the governor may declare a state of emergency if he "finds that an emergency exists."[5] Additionally, an "emergency" is defined by section 166A-19.3(6) as "an occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made" cause.[6] If an emergency is presented, the governor has the authority to declare a state of emergency, which triggers the governor's additional emergency powers delineated in the Act.[7]

The NCEMA grants the governor general emergency powers under section 166A-19.10.[8] For example, this provision gives the governor the power to "exercise general direction and control of the State Emergency Management Program"[9] as well as the power to "make, amend, or rescind the necessary orders, rules, and regulations within the limits of the authority conferred upon the Governor . . . with due consideration of the policies of the federal government."[10] The governor is also granted additional powers on top of the ones granted in section 166A-19.10. These additional powers can be found in section 166A-19.30.[11] In 19.30(a)(1)–(5), the governor is given the power to, among other things, "utilize all available State resources as reasonably necessary to cope with an emergency, including the transfer and direction of personnel or functions of State agencies or units thereof for the purpose of performing or facilitating emergency services,"[12] and "[t]o take steps to assure that measures, including the installation of public utilities, are taken when necessary to qualify for temporary housing assistance from the federal government when that assistance is required to protect the public health, welfare, and safety."[13] For each of the additional powers under 19.30(a)(1)–(5), the governor may exercise them in his sole discretion.[14]

4. North Carolina Emergency Management Act of 1977, N.C. GEN. STAT. ANN. § 166A-1 (West 2018) (repealed 2012) (recodified as N.C. GEN. STAT. § 166A-19).

5. N.C. GEN. STAT. ANN. § 166A-19.20 (West 2018).

6. § 166A-19.3(6).

7. *See* § 166A-19.30.

8. § 166A-19.10.

9. § 166A-19.10(b)(1).

10. § 166A-19.10(b)(2).

11. § 166A-19.30.

12. § 166A-19.30(a)(1).

13. § 166A-19.30(a)(3).

14. *See* § 166A-19.30(a).

The remaining powers within 19.30, however, have a specific requirement that must be met before they can be exercised.[15]

According to section 166A-19.30(b), during a gubernatorially-declared state of emergency, the governor also has seven more powers, but each one may only be exercised with the concurrence of the Council of State.[16] In other words, for the powers listed under 19.30(b)(1)–(7), the governor—before exercising any of them—must obtain concurrence of the Council of State. The Council of State consists of ten elected officers: the governor; lieutenant governor; secretary of state; state auditor; treasurer; superintendent of public instruction; attorney general; and commissioners of agriculture, labor, and insurance.[17] This provision has been a recurring point of issue in many of Governor Cooper's executive orders; these issues will be discussed in greater detail further below, but for now, it is important just to note this requirement.

Section 166A-19.30(c), which is perhaps the most troublesome provision within the NCEMA, vests *even more* powers in the governor during a state of emergency. This provision provides that if the governor determines that "local control of the emergency is insufficient to assure adequate protection of lives and property," the governor may assume the power granted specifically to municipalities and local authorities under section 166A-19.31, and subsequently exercise any of the prohibition and restriction powers set out in 166A-19.31(b).[18]

All the governor must do to assume local powers is determine that either (1) necessary control "cannot be imposed locally because local authorities responsible for preservation of the public peace have not enacted appropriate ordinances," (2) local authorities "have not taken implementing steps under such ordinances or declarations, if enacted or declared, for effectual control of the emergency that has arisen," (3) the area in which the emergency exists "has spread 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," or (4) the scale of the emergency is "so great that it exceeds the capability of local authorities to cope with it."[19] Simply put, if the governor determines in his sole discretion that *any one* of these

15. *See* § 166A-19.30(b).

16. *Id.*

17. John V. Orth, *Council of State*, NCPEDIA (Jan. 1, 2006), https://www.ncpedia.org/council-state [https://perma.cc/U3RL-WK2Q].

18. § 166A-19.30(c).

19. *Id.*

four scenarios is present, he can unilaterally utilize the prohibition and restriction powers granted to municipalities.

As one might imagine, this provision is extremely powerful; in fact, the power is so great that it has raised concerns among scholars.[20] As will be discussed in greater detail within the Section II(A) of this Comment, Governor Cooper has been utilizing this provision to his advantage, citing to it in almost all of his orders.[21] Section 19.30(c) in particular has given the governor broad authority to shut down businesses across the state.[22] When all of the powers previously discussed are taken into account, the governor's powers seem to be nearly infinite. These powers are what ultimately allowed for the rather restrictive executive orders issued by Governor Cooper throughout the pandemic.

I. OVERVIEW OF GOVERNOR COOPER'S COVID-19 EXECUTIVE ORDERS

Between March 10, 2020, and November 23, 2020, Governor Roy Cooper issued forty-five executive orders in response to COVID-19.[23] This Comment discusses a select group, as many are not pertinent to the underlying statutory and constitutional issues to be argued. To begin, on March 10, 2020, Governor Cooper issued Executive Order 116.[24] Through this order, Governor Cooper placed North Carolina under a state of emergency.[25] Given the timing of COVID-19 and the imminent threat it presented to North Carolina and the United States as a whole, this declaration was undoubtedly legitimate. To be sure, the order came shortly after a report that twenty-one California cruise passengers contracted the virus and

20. *See, e.g.*, Jon Guze, *Time to Amend the Emergency Management Act*, *Part One,* JOHN LOCKE FOUND. (May 21, 2020), https://www.johnlocke.org/update/time-to-amend-the-emergency-management-act [https://perma.cc/3UHB-99YC] ("[E]ven if the crisis gradually diminishes and eventually fades away, as we must all hope and pray it will, we need to ensure this kind of abuse of power never happens again. Either way, the General Assembly's task is clear. It must amend the Emergency Management Act . . . .").

21. *See, e.g.*, Exec. Order No. 121 (Mar. 27, 2020).

22. *See* § 166A-19.30(c)(1) (granting the governor the power to "impose any of the types of prohibitions and restrictions enumerated in G.S. 166A-19.31(b)"); § 166A-19.31(b)(2) ("The ordinances authorized by this section may permit prohibitions and restrictions: [o]f the operation of offices, business establishments, and other places to or from which people travel or at which they may congregate.").

23. *COVID-19 Orders & Directives*, *supra* note 1.

24. Exec. Order No. 116 (Mar. 10, 2020); *see also id.*

25. Exec. Order No. 116.

additional news that the virus was beginning to penetrate the U.S.[26] The order also came roughly two weeks after the CDC expressed that the virus was heading towards pandemic status.[27] Based on the NCEMA's definition of "emergency"—as discussed above—it seems clear the COVID-19 threat did qualify as an emergency, thereby giving the Governor the power to declare a state of emergency. The issues discussed in this Comment, of course, do not concern the declaration of the state of emergency. Rather, the issues discussed in this Comment concern later executive orders.

On March 14, 2020, Governor Cooper issued Executive Order 117, which restricted mass gatherings.[28] The order specified that a "mass gathering" was to be defined as "any event or convening that brings together more than one hundred (100) persons in a single room or single space at the same time . . . ."[29] In addition to urging social distancing, the order also closed all K-12 public schools statewide.[30] Then, just three days after Order 117, Order 118 was issued.[31] This order unilaterally shut down bars that did not serve food and also halted dine-in service at restaurants; the order required restaurants to limit their services to take-out and delivery.[32]

Next, on March 23, the Governor signed Order 120 into action.[33] This order closed down salons and other businesses; it also reduced the "mass gathering" limit to fifty people.[34] Four days later, Governor Cooper issued the notorious "stay-at-home" order: Order 121.[35] This order is critical to note for several reasons: First, it initiated the stay-at-home order, which directed individuals to stay at home except to visit what were defined in the order as "essential businesses," to exercise outdoors, or to help a family

26. *A Timeline of COVID-19 Developments in 2020*, AM. J. OF MANAGED CARE (Jan. 1, 2021), https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020 [https://perma.cc/4LK6-ZRAL] (noting that on Mar. 21, 2020, twenty-one passengers on a California cruise ship tested positive).

27. *Id.* (noting that on Feb. 25, 2020, the CDC stated that COVID-19 was headed toward pandemic status).

28. Exec. Order No. 117 (Mar. 14, 2020); *see also COVID-19 Orders & Directives*, *supra* note 1.

29. Exec. Order No. 117.

30. *Id.*

31. *COVID-19 Orders & Directives*, *supra* note 1.

32. Exec. Order No. 118 (Mar. 17, 2020).

33. Exec. Order No. 120 (Mar. 23, 2020); *see also COVID-19 Orders & Directives*, *supra* note 1.

34. Exec. Order No. 120.

35. Exec. Order No. 121 (Mar. 27, 2020); *see also COVID-19 Orders & Directives*, *supra* note 1.

member.[36] Second, Order 121 specified which businesses qualified as "essential" businesses that were allowed to remain open.[37] Among the categories of businesses described as essential were healthcare and public health operations, essential governmental operations, stores that sold groceries and medicine, and businesses involved in food and beverage production and agriculture.[38] Any business that was excluded from one of the listed "essential" categories was required to direct requests to be included as an essential business to the North Carolina Department of Revenue.[39] Additionally, "mass gatherings" were reduced yet again in Order 121—this time to ten people.[40]

A. North Carolina Enters "Phase 1"

Executive Order 135, signed on April 23, extended the stay-at-home order to May 8.[41] Under Order 135, restaurants remained take-out only, and salons and similar business remained shut down.[42] After the first week of May, however, restrictions finally began to ease off. On May 5, Order 138 was issued.[43] Order 138—known widely as the "Phase 1" order—loosened up some restrictions, primarily restrictions on travel.[44] The order still required, however, that restaurants only serve to take-out customers. The order additionally continued the ten-person mass gathering limit, and it also somewhat mandated that meetings, including religious gatherings for worship, take place outdoors "unless impossible."[45]

B. North Carolina Enters "Phase 2"

North Carolina entered "Phase 2" on May 20 upon the execution of Order 141.[46] The order not only lifted the stay-at-home order, but it also adjusted the mass gathering restriction to ten people indoors and twenty-five

36. Exec. Order No. 121.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. Exec. Order No. 135 (Apr. 23, 2020).
42. *Id.*
43. Exec. Order No. 138 (May 5, 2020); *see also COVID-19 Orders & Directives*, *supra* note 1.
44. *See* Exec. Order No. 138.
45. *Id.*
46. Exec. Order No. 141 (May 20, 2020).

people outdoors.[47] Moreover, it allowed salons and grooming businesses to reopen with certain restrictions in place, such as maximum occupancy caps.[48] Bars and gyms, on the other hand, remained closed, and restaurants were finally reopened for dine-in services (but at fifty percent of the restaurant's stated fire capacity).[49]

As one might imagine, from this point forward, Governor Cooper's orders continually eased up on restrictions. For example, Order 163 was issued on September 4 and took North Carolina into "Phase 2.5," which increased the mass gathering limits to twenty-five people indoors and fifty people outdoors.[50] While bars still remained closed, gyms were finally reopened but at thirty percent maximum capacity.[51] It wasn't until Order 169—the "Phase 3" order—that bars were allowed to operate.[52]

Governor Cooper's orders appear at first blush to be a sound response to the COVID-19 pandemic. However, upon closer examination, it is clear that the Governor pushed not only his statutory authority to its outer limits, but also his constitutional authority. Several of the orders issued between March and May give rise to many serious issues. These issues must be addressed to ensure that the Governor of North Carolina, even amidst a pandemic, will respect the constitutional rights endowed to each North Carolinian and not abuse his or her authority under congressionally delegated power. This Comment begins with a discussion of issues of power, starting at the statutory level and finishing at the North Carolina constitutional level. This Comment will then analyze Governor Cooper's infringement on individual rights guaranteed by the North Carolina Constitution and the Federal Constitution.

47. *Id.*

48. *Id.*

49. *Id.*

50. *COVID-19 Orders & Directives*, *supra* note 1; *see* Exec. Order No. 163 (Sept. 4, 2020).

51. Exec. Order No. 163.

52. Exec. Order No. 169 (Sept. 30, 2020).

II. POWER ISSUES IN GOVERNOR COOPER'S COVID-19 EXECUTIVE ORDERS

A. Power Issues under the North Carolina Emergency Management Act

As previously mentioned, several of Governor Cooper's COVID-19 orders raise issues of power in connection with the NCEMA. First, Executive Order 118. Recall that this order unilaterally shut down bars that did not serve food and shut down dine-in services at restaurants, forcing restaurants to resort to take-out and delivery.[53] To find the power for these business restrictions, we must turn first to the governor's basic emergency powers listed in section 166A-19.10. Upon perusal of the powers listed under section 166A-19.10(b), no such power grants the governor specific authority to issue unilateral business closures or business restrictions.[54] The governor also has additional powers under section 166A-19.30. Here, section 166A-19.30(b)(1) states that the governor has the additional power during a state of emergency to "direct and compel the evacuation of all or part of the population from any stricken or threatened area within the State . . . and to control ingress and egress of an emergency area, the movement of persons within the area, and the *occupancy of premises therein*."[55] This provision could indeed be read as giving the governor power over businesses. However, the governor must obtain concurrence from the Council of State *before* exercising this power.[56]

According to Order 118, Governor Cooper allegedly received concurrence from the Council for sections two and three of the Order.[57] However, Governor Cooper, in fact, had not received concurrence. Governor Cooper's staff emailed his proposed order to the Council of State members via email around 12:45 p.m. on March 17, 2020.[58] "The [G]overnor sought a response within 30 minutes, then announced the order during a 2:00 p.m. news conference. The order took effect at 5 p.m."[59] Despite six of the ten

53. Exec. Order No. 118 (Mar. 17, 2020).

54. N.C. GEN. STAT. ANN. § 166A-19.10(b) (West 2018).

55. § 166A-19.30(b)(1) (emphasis added).

56. *See* § 166A-19.30(b).

57. Exec. Order No. 118.

58. Mitch Kokai, *Pandemic Doesn't Eliminate the Need for Constitutional Safeguards*, CAROLINA J. (Mar. 24, 2020, 4:02 AM), https://www.carolinajournal.com/opinion-article/pandemic-doesnt-eliminate-the-need-for-constitutional-safeguards [https://perma.cc/35V2-SVBF].

59. *Id.*

members of the Council voting *against* Governor Cooper's Order, he executed it anyway.[60] The question thus arose as to whether Governor Cooper's action constituted a direct violation of the concurrence requirement within the statute. Unfortunately, there is little to no case law or legislative history spelling out what "concurrence" entails. Does it require a majority vote? Does it require unanimity? There is no definition as to what it precisely means, but it certainly does not equate to majority opposition.

In response to the Council's complaints, Governor Cooper cited a provision of the Act that allegedly gave him the power to issue the business restrictions under section one of the Order: section 166A-19.30(c).[61] This provision in the NCEMA is in desperate need of amendment, for it provides the governor with virtually limitless power during an emergency. As stated earlier, by deeming local authorities' responses to the pandemic "insufficient," the governor can subsume the power of local municipalities and issue all the restrictive orders delineated under section 166A-19.31(b).[62] The combination of 19.30(c) and 19.31(b) is an immensely powerful amalgamation, one that gives the governor specific authority to single-handedly close down businesses. Governor Cooper used this broad power in virtually all of his COVID-19 executive orders following Order 118.[63] Indeed, throughout many of Governor Cooper's orders following Order 118, the Governor stopped claiming to have received concurrence altogether. Rather, in most of the orders, he simply cites to 19.30(c) and issues restrictions.[64] For example, in Order 120, no reference to the Council of State can be found.[65] In the final two paragraphs preceding the ordering line, Governor Cooper just invokes 19.30(c) and 19.31(b)(1), (2), and (5).[66]

The ability of the North Carolina Governor to invoke these powers during a declared emergency is rather troublesome. Indeed, writers and scholars have expressed concern with such powers. Jon Guze, director of legal studies at the John Locke Foundation, commented on Governor Cooper's circumscription of the Council:

> This is an abuse of power and due process. The governor has been citing 19.30(c), not because he has determined that local control is insufficient, but simply to avoid the necessity for Council of State concurrence. But, if

60. Guze, *supra* note 20.

61. *Id.*

62. N.C. GEN. STAT. ANN. § 166A-19.30(c) (West 2018).

63. *E.g.*, Exec. Order No. 121 (Mar. 27, 2020); Exec. Order No. 141 (May 20, 2020).

64. *E.g.*, Exec. Order No. 120 (Mar. 23, 2020); Exec. Order No. 141; Exec. Order No. 163 (Sept. 4, 2020); Exec. Order No. 169 (Sept. 30, 2020).

65. Exec. Order No. 120.

66. *Id.*

> all that's required to invoke the governor's powers under 166A-19.30(c) is a pro forma claim of insufficient local control, the procedural check on gubernatorial power provided by 19.30(b) is a nullity, which can't be right.[67]

The fact that 19.30(c) allows the governor to cut the Council out of the picture raises serious questions. After all, what is the point of the concurrence requirement if the governor can effectively ignore it? Executive Orders 138, 141, 163, and 169 all cite 19.30(c), and none of them make a reference to the Council.[68] This was also concerning to Lieutenant Governor Dan Forest, who filed suit against Cooper back in July 2020 and raised these issues in his complaint.[69] Further, just to add even more power to the governor, the NCEMA provides no sunset requirement on the gubernatorially declared state of emergency; the governor is empowered to keep the state of emergency declared for as long as he or she wishes.[70] Seeing as how the NCEMA has been abused during the COVID-19 pandemic, it seems clear the Act needs to be amended to prevent the governor from wielding as much unchecked power as he is currently allowed to wield. This presents a separation of powers issue in and of itself, which will be discussed later in this Comment. But before moving to the discussion of separation of powers, other statutory issues must first be addressed.

Many of Governor Cooper's executive orders utilized quarantine powers.[71] This raises the question as to whether, under the NCEMA, the governor can actually exercise these types of powers. The NCEMA only specifically deals with "quarantine" and "isolation" measures under section 166A-19.12.[72] Per this provision, the governor may delegate to the Division of Emergency Management the power to "[c]oordinat[e] with the State Health Director to amend or revise the North Carolina Emergency Operations Plan regarding public health matters."[73] Any amendments to this plan

67. Guze, *supra* note 20; *see also* Kokai, *supra* note 58.

68. Exec. Order No. 138 (May 5, 2020); Exec. Order No. 141; Exec. Order No. 162 (Aug. 31, 2020); Exec. Order No. 169.

69. Complaint and Motion for Temporary and Permanent Injunction at 5, Forest v. Cooper, No. 20-CVS-07272 (July 1, 2020) [hereinafter Complaint] (dismissed Aug. 11, 2020).

70. *Editorial: Governor's Powers Remain Unchecked*, CARTERET CNTY. NEWS-TIMES (July 12, 2020), https://www.carolinacoastonline.com/news_times/opinions/editorials/article_cad4b2dc-c2e0-11ea-939b-df7eebad2afc.html [https://perma.cc/MHQ3-QX9X] ("An additional flaw in the current act is the absence of a sunset or time restriction on the use of the governor's emergency powers.").

71. *See, e.g.*, Exec. Order No. 118 (Mar. 17, 2020); Exec. Order No. 121 (Mar. 27, 2020).

72. N.C. GEN. STAT. ANN. § 166A-19.12 (West 2018).

73. § 166A-19.12(3).

can provide for "appropriate conditions for quarantine and isolation in order to prevent further transmission of disease."[74] But who, specifically, is granted the power to *execute* quarantine measures? The answer seems to lie in N.C. Gen. Stat. § 130A-145.

N.C. Gen. Stat. § 130A-145 specifically vests the State Health Director and a given local health director with the power to exercise quarantine and isolation measures.[75]The statute further states that "[n]o person other than a person authorized by the State Health Director or local health director shall enter quarantine or isolation premises."[76] In light of this statute, it appears as though Governor Cooper was assuming this authority under several of his COVID-19 orders. For example, in Order 118, he stated that "pursuant to N.C. Gen. Stat. § 130A-145(a), the State Health Director has the power to exercise quarantine and isolation authority when the public health is endangered."[77] Cooper further stated that "[p]er N.C. Gen. Stat. § 130A-145(a), the state health director is exercising quarantine and isolation authority to limit access to facilities that sell food and beverage to carry-out, drive-through and delivery services only."[78] Here, although Governor Cooper is referencing the state health director, he seems to be assuming her authority in order to place restrictions on food services.

In the stay-at-home order—Order 121—Governor Cooper never referenced the state health director or N.C. Gen. Stat. section 130A-145. Instead, he invoked his broad power under section 166A-19.30(c) of the NCEMA and unilaterally ordered North Carolinians to stay at home and only leave their homes for "essential" activities.[79] Again, this seems to be an assumption of the quarantine authority that is specifically vested in the state health director. Notably, section 130A-145 has a built-in notice requirement if quarantine authority is to be exercised. The statute states that "[t]he official who exercises the quarantine or isolation authority shall give the persons known by the official to be substantially affected by the limitation *reasonable notice* under the circumstances of the right to institute an action to review the limitation."[80] According to the attorneys who represented Dan Forest in his suit against Governor Cooper,[81] no notice had been given to any person who was affected by the stay-at-home order. It is unclear as to

74. *Id.*
75. N.C. GEN. STAT. ANN. § 130A-145(a) (West 2018).
76. § 130A-145(b).
77. Exec. Order No. 118 (Mar. 17, 2020).
78. *Id.*
79. Exec. Order No. 121 (Mar. 27, 2020).
80. § 130A-145(d) (emphasis added).
81. Complaint, *supra* note 69, at 7.

what this "notice" would entail, but it is worth mentioning that this statutory provision was not followed.

Another major issue that should be pointed out pertains to N.C. Gen. Stat. § 130A-145(d). A portion of this subsection provides that a quarantine or isolation implementation "shall not exceed 30 calendar days."[82] The statute further provides that if the state health director or the local health director determines that a 30-calendar-day quarantine order is not sufficient, the state health director or local health director "*must* institute in superior court in the county in which the limitation is imposed an action to obtain an order extending [the quarantine order]."[83] One may recall that in Order 121, Governor Cooper issued the stay-at-home order.[84] On April 23, Cooper issued Order 135, which *extended* the stay-at-home order until May 8.[85] Since Order 121 was issued on March 27, and Order 135 extended the stay-at-home order until May 8, this was clearly a quarantine order spanning more than thirty days. Based on the statute, this extension should have required an action by the state health director or local health director in superior court to be valid. However, neither the state health director, nor Governor Cooper (who was purporting to exercise the health director's authority), issued an action to extend this quarantine order.[86] Even during a state of emergency, this is unacceptable; statutory formalities were crafted by the legislature, and the executive branch is in no position to ignore these requirements. Under Article III, Section V of the North Carolina Constitution, the governor is required to "take care that the laws be faithfully executed."[87] By ignoring certain statutory formalities, it cannot be said that Governor Cooper executed his authority under these statutes in good faith.

B. Separation of Powers Issue Under the North Carolina Constitution

In addition to raising statutory issues, Governor Cooper's COVID-19 executive orders also gave rise to a serious separation of powers issue under the North Carolina Constitution. As a whole, the North Carolina Constitution embodies most of the central aspects of the Federal Constitution, including the critical separations of power.[88] The North Carolina Constitution

82. § 130A-145(d).
83. *Id.* (emphasis added).
84. Exec. Order No. 121.
85. Exec. Order No. 135 (Apr. 23, 2020).
86. Complaint, *supra* note 69, at 8.
87. N.C. CONST. art. III, § 5, cl. 4.
88. *See* N.C. CONST. arts. I–III.

breaks down the legislative and executive powers under Articles II and III, respectively.[89] In order to maintain the necessary balance of power between the branches, it is vital that each branch of government—even at the state level—stays within its granted sphere of authority. If any unconstitutional encroachment upon another branch occurs, the nondelegation doctrine protects the branch's granted powers.

Within the past few years, scholars have recognized that the nondelegation doctrine is alive and well at the state level.[90] Even during a pandemic, this doctrine stands as a barrier against unconstitutional delegations of power within a state's government. To be sure, this doctrine was the ultimate reason the Michigan Supreme Court struck down many of Governor Gretchen Whitmer's COVID-19 executive orders in October 2020 in *Midwest Institution of Health v. Governor of Michigan*.[91]

A delegation of emergency power from the legislative branch to the executive branch that lacks both an intelligible guiding principle and sunset provision is a violation of the nondelegation doctrine.[92] In *Midwest*, the Michigan Supreme Court ruled on the constitutionality of Governor Whitmer's COVID-19 executive orders in light of the nondelegation doctrine.[93] Whitmer's various executive orders deployed a stay-at-home mandate, forced restaurants to close down, prohibited Michigan residents from engaging in "nonessential travel," and prohibited public gatherings of persons not part of a single household.[94] After a close examination of the delegated authority by Michigan's Emergency Powers of the Governor Act

89. *See id.*

90. *See* Randolph J. May, *The Nondelegation Doctrine is Alive and Well in the States*, REGUL. REV. (Oct. 15, 2020), https://www.theregreview.org/2020/10/15/may-nondelegation-doctrine-alive-well-states/ [https://perma.cc/HU5P-3H27] (noting that a survey revealed many state courts have struck down statutes that were in violation of the nondelegation doctrine); *see also* James M. Rice, *The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations,* 105 CALIF. L. REV. 539, 545 n.38 (2017) (pointing out that numerous states have their own nondelegation doctrines).

91. *See* Midwest Inst. of Health, PLLC v. Governor of Mich. (*In re* Certified Questions), 958 N.W.2d 1, 6 (Mich. 2020) ("[T]he Governor does not possess the authority to exercise emergency powers under the Emergency Powers of the Governor Act . . . because that act is an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution." (internal citation omitted)).

92. *Id.* at 18–20.

93. *Id.* at 16–17.

94. *Id.* at 20–21.

(EPGA), the court held that the delegated authority to the governor was far too broad, and thus violated the nondelegation doctrine.[95]

In its analysis, the court applied the rule reiterated by the Supreme Court of the United States in *Mistretta v. United States* where the Court stated: "[s]o long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power."[96] Because the delegation allowed the Michigan Governor, upon declaration of emergency, to promulgate any and all "reasonable" orders that the governor considered "necessary" to deal with the emergency, the court held that insufficient guidance was given to the governor on how to execute the powers.[97] Moreover, the court noted that there was no time limit on these powers; the governor could keep the emergency declared as long as he or she deemed necessary.[98] The lack of a guiding principle, coupled with the fact that the governor could essentially utilize these powers for as long as she desired, ultimately led the court to hold that the delegation of power under the EPGA ran afoul of the nondelegation doctrine; thus, the court held the delegation violated the Michigan Constitution.[99]

Governor Cooper's delegated emergency authority under the NCEMA is analogous to Governor Whitmer's delegated emergency authority under the EPGA. Under the NCEMA, the North Carolina Governor is given the authority to, among other things, control the ingress and egress of traffic throughout emergency areas and place many types of restrictions on businesses, with or without concurrence from the Council of State.[100] If the governor "determines" that local response to the emergency is "insufficient," the governor is given vast additional powers, none of which require any sort of check from the Council of State.[101] Just like the court in *Midwest*, which held that the words "reasonable" and "necessary" failed to give adequate guidance for the execution of the governor's emergency powers, a North Carolina court should similarly find that section 19.30(c) of the NCEMA does not offer sufficient guidance for the execution of the emergency powers granted therein.

95. *Id.* at 31.
96. *Id.* at 18 (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)).
97. *Id.* at 29–30.
98. *Id.* at 26.
99. *Id.* at 31.
100. N.C. GEN. STAT. ANN. § 166A-19.30(b)(1) (West 2018).
101. § 166A-19.30(c).

As explained earlier, under section 19.30(c), the North Carolina governor is granted broad additional powers. If the governor "determines" any one of the four stated scenarios is present, the provision allows the governor to deem local response to the emergency "insufficient" and subsume all the powers under section 166A-19.31(b).[102] These four scenarios, of course, are nothing more than an illusory check on the governor's powers; after all, the word "determines" indicates that the governor can make the determination in his or her sole discretion. If the governor makes this "determination," the law provides that the governor "may, in . . . [his] discretion, as *appropriate* to deal with the emergency, impose any of the types of prohibitions and restrictions enumerated in G.S. 166A-19.31(b)."[103] Here, the word "appropriate" gives virtually no guidance to the governor whatsoever; as with the four given scenarios, this word places a largely (if not entirely) illusory limitation upon the governor's discretion to use the powers delineated under section 19.31(b). This word is somewhat analogous to the word "reasonable" in *Midwest*; "appropriate" is a subjective term, and through section 19.30(c), the governor can issue all kinds of restrictive regulations on travel and private businesses (listed within section 19.31(b)) so long as the restrictions pass the "appropriateness" filter. But what should the governor actually consider in making this "appropriateness" determination? Is there any sort of check on the governor's ability to use these liberty-infringing powers? The NCEMA does not offer any clear answers here. As such, it would seem the word "appropriate" does not qualify as an intelligible guiding principle under *Mistretta.*

The Supreme Court of the United States gave additional guidance on assessing a nondelegation issue in *Whitman v. American Trucking Associations*. In *Whitman*, the Court noted that the scope of the delegation is also relevant when assessing the sufficiency of the standards; the Court stated, "[T]he degree of agency discretion that is acceptable varies according to the scope of the power . . . conferred."[104] Indeed, when the scope of delegated authority increases, the guiding standards provided must correspondingly be more precise.[105] Under the NCEMA, section 19.30(c) gives the governor

102. *Id.*

103. § 166A-19.30(c)(1) (emphasis added).

104. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001).

105. Synar v. United States, 626 F. Supp. 1374, 1386 (D.D.C. 1986); *see also* Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 293 (4th Cir. 2018) (Gregory, C.J., concurring) ("When broad power is delegated with few or no constraints, the risk of an unconstitutional delegation is at its peak. . . . Therefore, whether a delegation is unconstitutional depends on two factors—the amount of discretion and the scope of authority." (quoting *Whitman*, 531 U.S. at 474–75)), *vacated* 138 S. Ct. 2710 (U.S. 2018).

all the powers granted to municipalities under section 19.31(b). These powers include the power to control the movement of people in public places, impose curfews, and impose restrictions on businesses.[106] These are broad powers that can infringe on an individual's own livelihood. Since these powers are so broad, there should be a relatively precise standard governing the governor's use of such powers. Here, there seems to be no such guidance; as was just mentioned, the four scenarios featured under section 19.30(c), as well as the words "determines" and "appropriate," cannot be read as qualifying as true intelligible, guiding principles. One might argue that because the powers granted under section 19.30(c) are limited primarily to those listed under section 19.31(b), there is a clear restriction on the delegation that keeps the provision from violating the nondelegation doctrine. The flaw in this argument, however, is that the governor's *ability* to use these broad liberty-infringing powers is under virtually no restriction.

Lastly, just like the EPGA in *Midwest*, here the NCEMA provides no time sunset on the governor's emergency powers; the governor may keep the state of emergency declared for as long as he or she wishes and continue to execute the aforementioned powers which contain no true guiding principle. As the Michigan Supreme Court in *Midwest* held that delegated emergency powers that lacked a time sunset and an intelligible, guiding principle violated the nondelegation doctrine under the Michigan Constitution,[107] a court in North Carolina should likewise hold that section 166A-19.30(c) of the NCEMA violates the nondelegation doctrine of the North Carolina Constitution since there is neither a time sunset on the emergency powers nor a guiding principle with which the governor should adhere to in executing the broad powers delegated under sections 19.30(c) and 19.31(b).

While there is particularly no "on-point" case law in this area in North Carolina, North Carolina courts have nonetheless dealt with nondelegation doctrine issues over the years.[108] Given the rules set forth by our Supreme Court, the outcome should be the same as it was under *Midwest*. Indeed,

106. § 166A-19.31(b)(1)–(2) (West 2018).

107. Midwest Inst. of Health, PLLC v. Governor of Mich. (*In re* Certified Questions), 958 N.W.2d 1, 24 (Mich. 2020).

108. *See, e.g.*, Conner v. N.C. Council of State, 716 S.E.2d 836, 842 (N.C. 2011) ("[T]he legislature may not abdicate its power to . . . delegate its *supreme* legislative power to any . . . coordinate branch or to any agency which it may create." (quoting Adams v. N.C. Dep't of Natural & Econ. Res., 249 S.E.2d 402, 410 (N.C. 1978) (emphasis added); Durham Provision Co. v. Daves, 128 S.E. 593, 594 (N.C. 1925) (holding that a North Carolina statute that authorized county government, at its discretion, to extend jurisdiction of recorder's court to civil matters was an unconstitutional delegation of the legislature's power to allocate jurisdictional powers of the state courts).

the nondelegation doctrine, even in North Carolina, prohibits legislative delegations of power without adequate guiding principles.[109]

III. CONSTITUTIONAL RIGHTS ISSUES IN GOV. COOPER'S COVID-19 EXECUTIVE ORDERS

A. Governor Cooper's Business Shutdowns Ran Afoul of the North Carolina Constitution's "Fruits of Their Labor" Clause

Several of Governor Cooper's COVID-19 Executive Orders infringed on the ability of businesses to freely operate within the state—most notably Order 121.[110] An October 2020 survey of small businesses found that, while most respondent businesses were open, two-thirds had seen a decrease in revenue and eighty percent had changed the way they operate.[111] Nearly half of businesses surveyed were still "extremely concerned" that they might have to close permanently.[112] Additionally, on October 23, 2020, total job postings in the state had decreased by 6.3% compared to January 2020.[113] These figures, of course, represent more than just a substantial hit on small businesses within the state; they also represent a hit on the livelihood of hundreds of thousands of North Carolinians. The Tar Heel State boasts roughly 900,000 small businesses, and together, they make up ninety-nine percent of all businesses within the state.[114] As such, for the sake of the health of North Carolina's economy, it is critical to protect small businesses and preserve the jobs of small business owners and employees.

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109. *See, e.g.*, WidenI77 v. N.C. Dep't of Transp., 800 S.E.2d 441, 448 (N.C. App. 2017) (holding that the General Assembly's delegation of power to the N.C. Department of Transportation was a constitutional delegation of power because there were adequate guiding standards and procedural safeguards in the applicable statute to regulate the exercise of authority for a project).

110. *See* Exec. Order No. 121 (Mar. 27, 2020) ("Businesses that are not COVID-19 Essential Businesses and Operations are required to cease all activities within the State except Minimum Basic Operations.").

111. ECONOMIC DEVELOPMENT INITIATIVE FOR SMALL BUSINESS RESILIENCY, N.C. MAIN ST. & RURAL PLAN. CTR., COVID-19 IMPACTS ON NORTH CAROLINA SMALL BUSINESSES: 2020 SURVEY RESULTS 6, 4 (2020).

112. *Id.* at 11.

113. *Percent Change in Job Postings,* OPPORTUNITY INSIGHTS, https://www.tracktherecovery.org [https://perma.cc/T9WG-8L8W].

114. *Gov. Cooper Proclaims May 5–11 Small Business Week in North Carolina,* NC GOVERNOR ROY COOPER (May 7, 2019), https://governor.nc.gov/news/gov-cooper-proclaims-may-5-%E2%80%93-11-small-business-week-north-carolina [https://perma.cc/7ZQG-2W9V] [hereinafter *Gov. Cooper Proclaims*].

Fortunately, there is a unique provision within the North Carolina Constitution that protects an individual's ability to prosper from his or her occupation—the "Fruits of Their Labor" Clause.

The North Carolina Constitution houses the "Fruits of Their Labor" Clause specifically to provide occupational rights to North Carolinians. Article I, Section I of the North Carolina Constitution states, "[w]e 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."[115] The emphasized portion of this provision is a vital component of the North Carolina Constitution; undoubtedly, its purpose is to protect the ability of a North Carolinian to both pursue a living and to enjoy the profits reaped from his or her labor. While the case law in this area is somewhat sparse, the Supreme Court of North Carolina has issued several rulings—some within the past few years—that support the argument that Governor Cooper's business restrictions within several of his COVID-19 orders fail to satisfy the "Fruits of Their Labor" Clause.[116] Indeed, the Supreme Court of North Carolina is no stranger to striking down regulations because of this clause.[117]

In the past, the Supreme Court of North Carolina has recognized a fundamental right in a North Carolinian's ability to bear the fruits of their own labor.[118] In the 1950s, the Court even pointed out that the state cannot, under the guise of protecting the public, unreasonably interfere with private

115. N.C. CONST. art. I, § 1 (emphasis added).

116. *See, e.g.*, Tully v. City of Wilmington, 810 S.E.2d 208, 215 (N.C. 2018) (holding that the plaintiff had stated a claim under the "Fruits of Their Labor clause because "he allege[d] that the City arbitrarily and capriciously denied him the ability to appeal an aspect of the promotional process").

117. *See* N.C. Real Estate Licensing Bd. v. Aikens, 228 S.E.2d 493, 495 (1976) (striking down a statute imposing licensing requirements because they were not "reasonably relevant" to the business regulated and "repugnant" to the fruits-of-labor guarantee); State v. Ballance, 51 S.E.2d 731, 735–36 (N.C. 1949) (striking down statute restricting photography practice as not "reasonably necessary" to advance the public interest); Palmer v. Smith, 51 S.E.2d 8, 12 (N.C. 1948) (striking down law imposing licensing fee on opticians because it lacked a "real or substantial relation" to the stated purpose).

118. *See* King v. Town of Chapel Hill, 758 S.E.2d 364, 371 (N.C. 2014) ("This 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." (first citing N.C. CONST. art I, §1; and then citing Roller v. Allen, 96 S.E.2d 851, 859 (N.C. 1957)).

businesses.[119] These prior holdings led the Court in 2018 to rule in favor of a public employee based solely on the "Fruits of Their Labor" clause.[120]

In *Tully v. City of Wilmington*, a police officer sued the city of Wilmington, North Carolina, after he was arbitrarily denied a promotion to the rank of sergeant.[121] In finding that the officer stated a viable claim, the Supreme Court of North Carolina stressed that it was not relying on substantive due process or equal protection.[122] Instead, the Court stated that it was relying solely on the "Fruits of Their Labor" Clause,[123] which serves as a protection against irrational labor interference by the government.[124] The Court tactfully stated that the right to pursue an occupation and garner the wages from that occupation is a vital right:

> Section 1, Article I, of the Constitution of North Carolina guarantees to the citizens of the State "the enjoyment of the fruits of their own labor" and declares this an inalienable right. The basic constitutional principle of personal liberty and freedom embraces the right of the individual to be free to enjoy the faculties with which he has been endowed by his Creator, to live and work where he will, to earn his livelihood by any lawful calling, and to pursue any legitimate business, trade or vocation. This precept emphasizes the dignity, integrity and liberty of the individual, the primary concern of our democracy.[125]

What makes *Tully* remarkable is that, although the case involved a public employer and a public employee, the Court, in citing to *King v. Chapel Hill*, seems to hint that this clause may actually apply to private businesses as well.[126] Eugene Volokh, professor at UCLA School of Law, noted in an article that the Supreme Court of North Carolina appears to have opened this clause as a defense for private businesses. Volokh noted, among other things, that thanks to *Tully*, "the Clause can be used by private businesses that want to challenge economic regulations as well."[127]

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119. *Roller*, 96 S.E.2d at 859 ("A state cannot under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions on them." (quoting Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 113 (1928)).

120. *See Tully*, 810 S.E.2d at 215.

121. *Id.* at 212.

122. *Id.* at 213 n.4.

123. *Id.*

124. *Id.* at 215.

125. *Id.* at 214 (quoting State v. Warren, 114 S.E.2d 660, 663 (N.C. 1960)).

126. *Id.* at 215 (quoting King v. Town of Chapel Hill, 758 S.E.2d 364, 371 (N.C. 2014)).

127. Eugene Volokh, *The Fruits-of-Their-Labor Clause*, REASON: THE VOLOKH CONSPIRACY (Mar. 2, 2018, 5:49 PM), https://reason.com/volokh/2018/03/02/the-fruits-of-their-labor-clause [https://perma.cc/7PBZ-ZKEF].

In the future, if a private business does choose to challenge a regulation under the "Fruits of Their Labor" Clause—such as an executive order—some requirements will likely need to be met. In *Poor Richard's Inc. v. Stone*, the Supreme Court of North Carolina delineated a two-prong test for claims under Article I, Section I of the North Carolina Constitution.[128] The Court stated that in order for a government business regulation to satisfy any provision under Article I, Section I of the North Carolina Constitution, (1) the State must have a "proper governmental purpose," and (2) the "means chosen to effect that purpose [must be] reasonable."[129] Although the Court applied this test in relation to a statutory regulation, the test may reasonably be applied to executive orders as well, as these orders have the force of law.

For several of Governor Cooper's COVID-19 executive orders, it seems as though the first prong of the test under *Stone* is met, but the second prong is not. Take, for example, Order 121. Recall that this order purported to define what the "essential" businesses were and ordered "non-essential" businesses to cease operation.[130] Clearly, the first prong of the test is met due to the very nature of COVID-19; reducing persons' exposure to a relatively unknown (at the time) virus certainly would qualify as a proper purpose. However, in terms of the second prong, it can be argued that the means used in this order were not reasonable. This reasonableness question is a question of degree; "[t]he 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."[131]

Here, if we balance the public good against the burden on the businesses that were forced to close down completely, the burden seems to outweigh the public good to be achieved. Although the order could have allowed many citizens to avoid potentially infectious situations in certain businesses, the shutdowns in the order hit North Carolina businesses extremely hard; North Carolina businesses had to lay off employees, and overall, North Carolina lost over 500,000 jobs just between March and April 2020.[132] It can thus be argued that this immense burden outweighs the public good in this situation, and thus the second prong of the test under *Stone* is not met.

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

129. *Id.*

130. Exec. Order No. 121 (Mar. 27, 2020).

131. *Poor Richard's, Inc.*, 366 S.E.2d at 700.

132. Joshua Levy, *A Closer Look at NC's Pandemic Job Losses*, N.C. DEP'T OF COM. (Jan. 13, 2021), https://www.nccommerce.com/blog/2021/01/13/closer-look-ncs-pandemic-job-losses [https://perma.cc/3BCJ-WK83].

In *Stone*, the court also noted that a given business regulation should "not [be] irrational or arbitrary."[133] Here, Order 121's business shutdowns likely fail this requirement. To be sure, the order gives no objective and singular definition as to what "essential" actually means or how the certain "essential" businesses were even chosen.[134] The order simply states thirty different categories of "essential" businesses, and states that in addition to reducing instances of human contact inconsistent with social distancing requirements, "it is necessary that certain businesses, essential to the response to COVID-19, to the infrastructure of the State and nation, and to the day-to-day life of North Carolinians, remain open."[135] This does not, however, pinpoint a singular defining factor that all essential businesses should possess.

If the previously mentioned statement is how the order is defining "essential," each word should be scrutinized—namely the word "necessary." Merriam-Webster's dictionary defines "necessary" as "absolutely needed[;] REQUIRED."[136] For several of the businesses categorized as "essential," it seems questionable that they could be considered "required" to ensure the health of North Carolina's infrastructure. For example, how can a small store that only sells beer or wine, such as Peabody's in Boone, be considered "necessary" to the infrastructure of North Carolina, yet a small mom-and-pop hair salon is not? Can it truly be argued that the former is more "necessary" to the infrastructure of the state than a privately owned salon that potentially has hundreds of dependent clients? As previously noted, small businesses make up the vast majority of businesses within the state (ninety-nine percent),[137] and privately owned salons (assuming they have fewer than 500 employees) would fall within this category.[138] In total, North Carolina's 900,000 small businesses employ roughly 1.6 million people, just shy of forty-five percent of private-sector workers.[139] If the order was truly focused on keeping the infrastructure of the state intact, perhaps it should have delineated a more broadened and precise definition of "essential" or required certain social distancing measures within certain types

133. *Poor Richard's*, 366 S.E.2d at 699.

134. Exec. Order No. 121.

135. *Id.*

136. *Necessary,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/necessary [https://perma.cc/E9PY-RGAF].

137. *Gov. Cooper Proclaims*, *supra* note 114.

138. OFF. OF ADVOC., U.S. SMALL BUS. ADMIN., NORTH CAROLINA SMALL BUSINESS PROFILE 137 (2016) ("Small businesses are defined as firms employing fewer than 500 employees.").

139. *Gov. Cooper Proclaims*, *supra* note 114.

of small businesses, such as salons, bowling alleys, and private exercise facilities, rather than closing them down completely.

B. Order 138 Ran Afoul of the Free Exercise Clause of the First Amendment to the Federal Constitution

One of the first rights guaranteed by the Federal Constitution that was violated by one of Governor Cooper's COVID-19 executive orders was the right to freely practice religion, as guaranteed under the First Amendment in the Free Exercise Clause. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the *free exercise thereof*."[140] Under the Supreme Court of the United States' ruling in *Employment Division v. Smith*, no free exercise claim will arise unless the law burdening religion singles out religion for discriminatory treatment.[141]

Order 138 proved to be a potential violation of the Free Exercise Clause in May 2020.[142] Under section 6(A) of the order, religious services were exempted from the mass gathering restriction.[143] However, section 6(C) provided that "any gatherings of more than ten (10) people that are allowed under Subsection 6(A) *shall take place outdoors unless impossible*."[144] This provision, on its face, because of the word "shall" in conjunction with "unless impossible" essentially forced church congregations to hold their services outside, or be subject to a Class 2 Misdemeanor.[145] As one might imagine, this raised serious First Amendment concerns, and led Berean Baptist Church of Winston-Salem, North Carolina, to challenge the order in May 2020.

In *Berean Baptist Church v. Cooper*, the United States District Court for the Eastern District of North Carolina held in favor of Berean Baptist on the ground that Order 138 could be a potential violation of the Free Exercise Clause.[146] Judge James Dever, III reasoned that because section 6(C) essentially mandated that church services be held outside, yet allowed people to congregate in other businesses such as grocery stores, where outdoor

140. U.S. CONST. amend. I. (emphasis added).

141. Emp't Div. v. Smith, 494 U.S. 872, 879 (1990).

142. Berean Baptist Church v. Cooper, 460 F. Supp. 3d 651, 663 (E.D.N.C. 2020).

143. Exec. Order No. 138 (May 5, 2020).

144. *Id.* (emphasis added).

145. *See id.* ; *see also* Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637, 650 (2021) (noting that requirement that worship services be held outdoors "unless impossible" represents "a very large loophole").

146. *Berean Baptist Church*, 460 F. Supp. 3d at 654.

congregation would literally be "impossible," the order discriminated against churches, and therefore ran afoul of the Free Exercise Clause.[147] Surprisingly, Governor Cooper did not appeal the decision of the court. Instead, in Order 141, he expressly exempted religious services from all aspects of future orders.[148]

In the future, governors must take particular care in the execution of their orders. Sweeping provisions that may result in religious discrimination must be quickly amended before such an order is executed. As Judge Dever stated in *Berean*, "[t]here is no pandemic exception to the Constitution of the United States or the Free Exercise Clause of the First Amendment."[149]

C. Order 121's Stay-at-Home Order Potentially Violated the Due Process Clause of the 14th Amendment to the Federal Constitution

Issued on March 27, 2020, Order 121 mandated that North Carolinians self-quarantine in their homes and only leave for "essential" activities such as activities related to health and safety and activities for necessary supplies and services.[150] Any violation of the order could have resulted in a Class 2 Misdemeanor.[151] This particular provision of the order caused concern among many North Carolinians; many persons desired to travel purely for leisure, but were prohibited—for an indefinite period of time—from doing so.[152] This raises a Fourteenth Amendment issue. Indeed, the Due Process Clause of the Fourteenth Amendment protects states from infringing on fundamental rights, and the right to intrastate travel arguably qualifies as one of these fundamental rights.

Over the years, courts, including the Supreme Court of the United States, have recognized that beyond the mere "right to travel" there is an additional fundamental right to simply be out and about in public.[153] The

147. *Id.* at 661.

148. Exec. Order No. 141 (May 20, 2020).

149. *Berean Baptist Church*, 460 F. Supp. 3d at 654.

150. Exec. Order No. 121 (Mar. 27, 2020).

151. *Id.*

152. *Id.*

153. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 164–65 (1972) (referencing a Walt Whitman poem and upholding the fundamental right to loiter, wander, walk or saunter about the community); Bykofsky v. Borough of Middletown, 429 U.S. 964, 964 (Marshall, J., dissenting) ("The freedom to leave one's house and move about at will is of the very essence of a scheme of ordered liberty, . . . and hence is protected against state intrusions by the Due Process Clause of the Fourteenth Amendment." (citations omitted)), *cert. denied*, 535 F.2d 1245 (3d Cir. 1976); Waters v. Barry, 711 F. Supp. 1125, 1134 (D.D.C.

Court has also recognized a fundamental right to travel from state to state.[154] However, the question has begun to arise in recent years as to whether there is an inherit right to *intrastate* travel lurking within the right to *interstate* travel. Sadly, the Court has not specifically answered this question as of this writing.[155] Consequently, in terms of the right to intrastate travel, courts have differed on whether or not this right is truly recognized, and if it is, what level of scrutiny any infringement on the right should be subject to. Lower federal courts and state courts alike have ruled on the matter.

One of the most notable circuit court cases in this area is *Lutz v. City of New York*. There, the United States Court of Appeals for the Third Circuit specifically held that the right to intrastate travel was a fundamental right.[156] In *Lutz*, the Third Circuit was tasked with examining an ordinance that outlawed continual cruising around a loop of certain major public roads in the heart of the city.[157] The Third Circuit held unequivocally that "the right to move freely about one's neighborhood or town, even by automobile, is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history.'"[158] The interesting wrinkle in the court's analysis was that, despite concluding that the right to intrastate travel was fundamental under the Due Process Clause, the court chose to borrow from well-settled free speech law, and apply intermediate scrutiny after concluding the cruising ordinance was "content neutral."[159] Although the court noted that the

1989) ("The right to walk the streets, or to meet publicly with one's friends for a noble purpose or for no purpose at all—and to do so whenever one pleases—is an integral component of life in a free and ordered society." (first citing *Papachristou*, 405 U.S. at 164; then citing *Bykofsky*, 429 U.S. at 964; and then citing Coates v. City of Cincinnati, 402 U.S. 611 (1971))).

154. Crandall v. Nevada, 73 U.S. 35, 49 (1868) ("[U.S citizens] have the right to pass and repass through every part of [the United States] without interruption, as freely as in [their] own States.").

155. *See* Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 255–56 (1974) (declining to consider whether there is a constitutional difference between intrastate and interstate travel); *see also* Richard McAdams, *Tying Privacy in Knotts: Beeper Monitoring and Collective Fourth Amendment Rights*, 71 VA. L. REV. 297, 324 (1985) ("[T]he Supreme Court has never addressed whether this liberty interest[, the right to travel,] encompasses intrastate travel. . . ."); Charles Gray, *Keeping the Home Team at Home*, 74 CALIF. L. REV. 1329, 1352 (1986) ("[T]he Supreme Court has never explicitly extended the right to travel to movement entirely within a state.").

156. Lutz v. City of York, 899 F.2d 255, 268 (3d Cir. 1990).

157. *Id.* at 256.

158. *Id.* at 268.

159. *Id.* at 256.

ordinance would fail under strict scrutiny, the court ended up upholding it under intermediate scrutiny.[160]

As opposed to the Third Circuit, the Fourth Circuit has, at the time of this writing, declined to rule whether intrastate travel is a fundamental right. The issue was presented to the Fourth Circuit in *Willis v. Town of Marshall*, but the court concluded that the issue need not be decided and thus declined to hold whether there was a fundamental right to intrastate travel.[161] Despite its decision, the court still noted that there was language in several U.S. Supreme Court cases that could support the assertion that intrastate travel is a fundamental right under the Due Process Clause; the court provided several cases to back this assertion.[162] As such, it seems as though the Fourth Circuit in *Willis* was implicitly stating that there very well may be such a fundamental right.

The Supreme Court of North Carolina has also spoken on this issue. In *State v. Dobbins*, the Court held that "the right to travel upon the public streets of a city is a part of every individual's liberty, protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution . . . " and that the right to intrastate travel was thus a "fundamental segment of liberty."[163] The Court further fleshed out this issue in *Standley v. Town of Woodfin* back in 2008; there, the Court was faced with a town ordinance that prohibited registered sex offenders from knowingly entering a public park.[164] The Court, quoting the Sixth Circuit, stated that "[t]he right to intrastate travel is . . . 'an everyday right, a right we depend on to carry out our daily life activities. It is, at its core, a right of function.'"[165] In adopting this definition, the Court held that a sex offender's right to knowingly enter a public park was not a "right of function" in which one would depend on to carry out his or her daily life activities.[166] Therefore, the Court concluded that the right was not encapsulated under the right to intrastate travel,

160. *Id.* at 270 ("[T]he city need only write a narrowly tailored ordinance, not the *least* restrictive ordinance.").

161. Willis v. Town of Marshall, 426 F.3d 251, 265 (4th Cir. 2005).

162. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 358 (1983) (noting that a statute requiring those wandering the streets to provide police, upon request, with credible and reliable identification "implicates consideration of the constitutional right to freedom of movement"); Williams v. Fears, 179 U.S. 270, 274 (1900) ("[T]he right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.").

163. State v. Dobbins, 178 S.E.2d 449, 456–58 (N.C. 1971).

164. Standley v. Town of Woodfin, 661 S.E.2d 728, 729 (N.C. 2008).

165. *Id.* at 730 (quoting Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002)).

166. *Id.*

and thus the ordinance would only be subject to rational basis scrutiny—which it survived.[167] Consequently, the Court ended up affirming the ruling of the North Carolina Court of Appeals.[168]

Based on the case law available thus far, it is difficult to settle on a definitive answer as to whether the Governor's stay-at-home order violated a key right protected by the Fourteenth Amendment. Of course, an argument can be made that despite the Supreme Court of North Carolina's ruling in *Standley*, any form of infringement on intrastate travel should be subject to strict scrutiny. When *Standley* was before the North Carolina Court of Appeals, Judge Martha Geer delivered a robust dissent, arguing that, per *Dobbins*, the Supreme Court of North Carolina had clearly defined intrastate travel as a fundamental right, and consequently, *any* regulation of this right should be subject to strict scrutiny.[169] Additionally, since the Supreme Court has ruled on multiple occasions that infringement on the fundamental right to *interstate* travel calls for strict scrutiny,[170] an analogous argument can be made that *intrastate* travel, which similarly involves freedom of movement, should receive the same level of scrutiny.

If a court does not choose to apply strict scrutiny to infringements on the right to intrastate travel, the court should, at minimum, apply intermediate scrutiny, as the Third Circuit did in *Lutz*.[171] Intermediate scrutiny, of course, is a less demanding standard than strict scrutiny, and under such a standard, Governor Cooper's stay-at-home order would likely be upheld. For intermediate scrutiny, the Governor would only have to show that (1) the challenged order furthered an important government interest, and (2) the means used to achieve that interest were narrowly tailored.[172] In the case of Order 121, the first prong would easily be satisfied; COVID-19 caused a

167. *Id.* at 731–32.

168. *Id.* at 729.

169. *See* Standley v. Town of Woodfin, 650 S.E.2d 618, 634 (N.C. App. 2007) (Geer, J., dissenting), *aff'd*, 661 S.E.2d 728 (N.C. 2008).

170. *See* Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 262–69 (1974) (applying strict scrutiny to a residency requirement statute which infringed upon fundamental right of interstate travel); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (reviewing statutes affecting the fundamental right to interstate travel under a strict scrutiny standard); Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (holding that when voters are required to meet durational residency requirements as a prerequisite to voting eligibility it is unconstitutional under the equal protection clause because the requirement was an infringement upon voters' right to interstate travel); United States v. Guest, 383 U.S. 745, 757 (1966) ("The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union.").

171. *See* Lutz v. City of York, 899 F.2d 255, 256 (3d Cir. 1990).

172. *See* Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989).

pressing pandemic, and at the time of the order, it was critical to slow the spread of the virus while research was conducted on it. This certainly qualifies as an important interest. Furthermore, the second prong would likely be satisfied as well; the order specifically lists the various activities that a person could leave his or her home for, and thus, the order seems to meet the standard of narrow tailoring. But if strict scrutiny applies—and arguably it should, assuming the court considers intrastate travel to be a fundamental right under the Due Process Clause of the Fourteenth Amendment—the order would likely fail.

Under strict scrutiny, the Governor would have to show that (1) the order furthered a compelling government interest, and (2) the means used to achieve that interest were the *least restrictive means*.[173] In regard to the first prong, slowing the spread of a deadly virus would likely rise to the level of "compelling." Thus, the first prong would be satisfied. Unfortunately for the Governor, Order 121 would be unlikely to satisfy the second prong, which is extremely difficult to meet. According to the order, the only activities one is permitted to engage in outside the home are: activities essential to health and safety, activities for "necessary supplies and services," "outdoor activity" (including walking, running and hiking), "certain types of work," activities to take care of others, worship activities, receiving goods from essential businesses, travel between places of residence, and volunteering for charities.[174] Upon close examination, it appears as though the restriction to these limited activities does not pass the second prong of strict scrutiny.

Take, for example, "outdoor activities." The order allows for outdoor activities such as hiking or running as long as the person practices "social distancing." It could very well be argued that another purpose for leaving the home, such as, for example, to go to an outdoor zoo, could be done so long as social distancing measures were implemented. After all, the zoo would be outdoors, and persons would be social distancing from one another, just as they would be at a public park (which was permitted). Order 121 thus allows for certain types of outdoor activities as long as social distancing measures are taken, yet the order seems to bar other activities that could likewise be done with the same precautionary measures. Thus, because the order could potentially use less restrictive means to achieve its

173. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 727 (6th ed. 2019) (citing Palmore v. Sidoti, 466 U.S. 429, 432 (1984)) ("Under strict scrutiny, a law is upheld if it is proved necessary to achieve a compelling government purpose. The government . . . must show that it cannot achieve its objective through any less discriminatory alternative.").

174. Exec. Order No. 121 (Mar. 27, 2020).

purpose of slowing the spread of the virus, the order would likely not survive strict scrutiny.

D. Orders 121 and 135's "non-essential" Business Closures Run Afoul of the Due Process Clause of the 14th Amendment to the Federal Constitution

The last constitutional issue to be discussed concerns that of the various business shutdowns in several of Governor Cooper's orders—namely Orders 121 and 135. As discussed previously, Order 121 shut down businesses not defined as "essential."[175] Order 135 extended Order 121.[176] In short, each of the business shutdowns in these orders violate the right to pursue an occupation guaranteed under the Due Process Clause of the Fourteenth Amendment.

Over a century ago, the Supreme Court of the United States recognized a right to work for a living.[177] In *Meyer v. Nebraska*, in striking down a law banning the teaching of foreign languages in school, the Supreme Court also observed that the Fourteenth Amendment guaranteed the right, *inter alia*, "to engage in any of the common occupations of life . . . ."[178] This right, of course, became subject to rational basis scrutiny following the demise of the *Lochner* era, yet courts have still struck down orders and regulations while using this standard of review. Take, for example, another COVID-19 case from 2020: *County of Butler v. Wolf.*

In *Wolf*, Judge William Stickman IV, presiding over the United States District Court for the Western District of Pennsylvania, ruled on several constitutional claims brought by the County of Butler, Pennsylvania, against Governor Thomas Wolf following several of his COVID-19 executive orders.[179] One of the claims brought by the county was a substantive due process claim; the claimants alleged that Governor Wolf's business shutdown orders, which shutdown businesses not designated as "life-sustaining," violated their Due Process right to pursue their occupation.[180] Judge Stickman, after applying rational basis review, held that because there was no set end date on the order, and because the Governor's choices between "life-sustaining" and "non-life-sustaining" businesses were arbitrary

175. *Id.*

176. *See* Exec. Order No. 135 (Apr. 23, 2020).

177. *See* Truax v. Raich, 239 U.S. 33, 41 (1915) (holding that a state anti-alien labor statute violated both the equal protection and due process clauses).

178. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

179. Cnty. of Butler v. Wolf, 486 F. Supp. 3d 883, 891 (W.D. Pa. 2020).

180. *Id.* at 919.

since "life-sustaining" was not reduced to an objective, written definition, that portion of the order violated the Due Process Clause.[181] Judge Stickman made a point to note that while rational basis review is a low standard, "it is not a toothless one."[182]

A similar argument can be made for Governor Cooper's Orders 121 and 135. Rational basis review requires the Governor to show that the order "bears a rational relation to some legitimate end."[183] Actions which are irrational, arbitrary, or capricious do not bear a rational relationship to any end.[184] Like the court in *Wolf*, which held that Governor Wolf's categorization of "life-sustaining" and "non-life-sustaining" businesses was arbitrary, a court could similarly find that Governor Cooper's categorization of certain businesses as "essential" vs. "non-essential" was arbitrary.

As discussed in Section III(A) of this comment, Order 121, on its face, gives no objective or singular definition as to what "essential" actually means, or how the certain "essential" businesses were even chosen.[185] Again, the order merely states thirty different categories of "essential" businesses and states that in addition to reducing instances of human contact inconsistent with social distancing requirements, "it is necessary that certain businesses, essential to the response to COVID-19, to the infrastructure of the State and nation, and to the day-to-day life of North Carolinians, remain open."[186] Moreover, this broad list of essential businesses resulted in a divergence of the definition of "essential" across county lines.[187] As such, because the order lacks a true singular defining factor for "essential," the choice of "essential" businesses in the order seems shockingly arbitrary, so much so that rational basis scrutiny would probably fail to be satisfied. This, of course, would be a violation of the Due Process Clause.

CONCLUSION

COVID-19 led to unprecedented times and called for, at least initially, widespread pandemic measures to be taken by governors across the United States. The measures taken by Governor Cooper in response to the virus

181. *Id.* at 926.

182. *Id.* at 922 (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)).

183. Romer v. Evans, 517 U.S. 620, 631 (1996) (citing Heller v. Doe, 509 U.S. 312, 319–20 (1993)).

184. Cnty. Concrete Corp. v. Town of Roxbury, 442 F.3d 159, 169 (3d Cir. 2006) (quoting Pace Resources, Inc., v. Shrewsbury Twp., 808 F.2d 1023, 1035 (3d Cir. 1987)).

185. *See supra* Part III, Section A.

186. Exec. Order No. 121 (Mar. 27, 2020).

187. *See Governor's Powers Remain Unchecked, supra* note 70.

have made it abundantly clear how faulty certain provisions within the NCEMA are. In the future, the Act should be amended to provide time sunsets on the governor's emergency powers and provide clarification on the actual significance of the Act's Council of State requirement under section 166A-19.30(b). It should be noted that Senate Bill 105, proposed in mid-2020, would have cured many of the Act's flaws addressed in this Comment.[188] Governor Cooper vetoed this bill, however, and the override attempt failed.[189]

Fortunately, legislators are yet again attempting to amend the NCEMA.[190] As of October 2021, House Bill 264 has passed the House and the Senate.[191] The Bill proposes a few alterations to the NCEMA, one of which would place time restraints on the governor's executive orders.[192] Specifically, the Bill delineates that the governor has seven days from issuing an emergency executive order under section 19.30(c) to get the concurrence of the *majority* of the Council of State, without which it would automatically expire.[193] Should the Bill be passed—and not vetoed[194]—future executive orders amidst pandemics would likely be more controlled, and much less likely to infringe on the rights of North Carolina residents. However, should the Bill not become law, it will become all the more important for the presiding governor of North Carolina to be extremely precise and diligent in the drafting of executive orders; the constitutional rights of the people must be protected at all costs. No pandemic, no matter how unprecedented or unnerving, should rob citizens of their guaranteed constitutional rights.

E. Hampton Crumpler III[*]

188. *Id.*

189. *Id.*

190. *See* Emergency Powers Accountability Act, H.B. 264, 2021 Gen. Assemb., 2021–22 Sess. (N.C. 2021).

191. *House Bill 264*, N.C. Gen. Assemb., https://www.ncleg.gov/BillLookUp/2021/H264 [https://perma.cc/M583-CC8B].

192. H.B. 264, sec. 2, N.C. Gen. Stat. § 166A-19.20(c)(2).

193. *Id.*

194. As of the date of publication, House Bill 264 has been vetoed by Governor Roy Cooper. The veto was issued on November 1, 2021.

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