



STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR

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General Counsel

ROY COOPER
GOVERNOR

June 5, 2020

VIA EMAIL DELIVERY

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Hon. Amy Scott Galey, Chair
Alamance County Commission
115 South Maple Street
Graham, NC 27253

Hon. Terry S. Johnson
Alamance County Sheriff
109 South Maple Street
Graham, NC 27253

Dear Chairwoman Galey and Sheriff Johnson:

I am writing regarding restrictions placed on the operation of sports and entertainment businesses in Executive Order No. 141 ("Phase 2 Order" or "Order"). Those restrictions apply to ACE Speedway, which is located in Alamance County and subject to the jurisdiction of the Alamance County Commission and Alamance County Sheriff Terry Johnson. Governor Cooper signed the Phase 2 Order on May 20, 2020, in response to the COVID-19 public health emergency. To date, it appears that some Alamance County officials have not sought to enforce the Order against ACE Speedway, notwithstanding that, as further explained below, ACE Speedway has continuously and flagrantly violated the plain and unambiguous language of the Phase 2 Order. Those violations pose a serious risk to the health of people in Alamance County and throughout the State.

The Phase 2 Order modified restrictions on travel, certain business operations, and Mass Gatherings. Among other things, the Phase 2 Order prohibits Mass Gatherings, defined, in pertinent part, as an event that brings together more than twenty-five (25) people at the same time in a single confined outdoor space, like a stadium or the grandstands at a race track. Section 9 of the Order specifically addresses the applicability of restrictions on the operation of entertainment and sports businesses. To be clear, the Mass Gathering prohibition applies to entertainment and sporting events held in large venues, like ACE Speedway, that have at least two entrances and exits and a stated fire capacity of at least five hundred (500) people. Such venues can hold entertainment or sporting events, like auto races, for the purpose of recording the events for broadcast to the public. Under Section 9 of the Phase 2 Order, however, outdoor venues that elect to hold such events must limit the number of spectators or other attendees to no more than twenty-

five (25) people. Those venues also must control the flow of people through common spaces to allow for social distancing. State public health officials closely consulted with the Governor's Office in crafting this language in order to minimize the risk of spread of COVID-19, while allowing for the resumption of certain commercial activities that are particularly beneficial to the State's economy and pose less serious public health risks.

Contrary to the plain and unambiguous language of the Order, numerous media outlets have reported that ACE Speedway allowed more than 2,550 spectators to attend races held at the track on May 23, 2020.¹ Photographs show spectators standing and seated side by side in ACE Speedway's grandstands. Social distancing appears not to have been practiced and most spectators appear to have not worn face coverings, notwithstanding that the Phase 2 Order identifies these two practices as essential to preventing the spread of COVID-19. Immediately after the May 23, 2020, Governor Cooper publicly stated that the May 23, 2020, event was "dangerous and reckless." After communicating with the Governor's Office Sheriff Johnson asked ACE Speedway's owners to cancel future races, while the Phase 2 Order remained in effect.

Notwithstanding the Governor's statement and Sheriff Johnson's request, ACE Speedway opened its doors to another large group of spectators on May 30, 2020.² Again, the number of admitted spectators is reported to have substantially exceeded the Phase 2 Order's Mass Gathering limit. And again, photographs of the May 30, 2020, event show many spectators standing and seated side by side, not wearing face coverings. Put simply, the May 23 and May 30, 2020, races—and any future events like them—violate the plain and unambiguous language of the Phase 2 Order. ACE Speedway's decision to continue to open its doors to thousands of spectators, in violation of the Phase 2 Order, threatens to cause immediate, foreseeable, and serious adverse health effects, including the risk of hospitalization and death, to people attending ACE Speedway and elsewhere across the State.

The Order is subject to enforcement by local law enforcement officers and violations of the Order constitute a Class 2 misdemeanor. Yet, local officials have declined to enforce the Order against ACE Speedway, even after ACE Speedway continued its flagrant violation of the Order after the Governor and Sheriff Johnson sought its compliance.

Enforcement of the Phase 2 Order against ACE Speedway is critical because Burlington, which is in Alamance County, has one of the highest average daily growth rates of coronavirus deaths **in the country** and recently topped the list with the number of COVID-19 deaths doubling

¹ Jerry Garrett, *N. Carolina Speedway Packs Its Stands, Drawing Governor's Rebuke*, N.Y. Times, May 27, 2020, available at <https://www.nytimes.com/2020/05/27/sports/autoracing/ace-speedway-crowd-coronavirus.html>.

² David Kehrl, *ACE Speedway rolls on despite being asked not to race*, The Times-News, May 31, 2020, available at <https://www.thetimesnews.com/sports/20200531/ace-speedway-rolls-on-despite-being-asked-not-to-race>

every 6.7 days.³ That fast-rising death rate indicates that COVID-19 has likely been spread widely in recent weeks among Alamance County residents. The restrictions on ACE Speedway's operations in the Phase 2 Order are critical tools to prevent the continued spread of COVID-19 among competitors and patrons at ACE Speedway, residents of Alamance County, and all North Carolinians.

In light of the foregoing, the Governor formally and specifically requests that the Alamance County Commission and Sheriff Johnson take all necessary steps to require ACE Speedway to comply with the Phase 2 Order. That includes requiring ACE Speedway to limit the number of spectators and attendees to twenty-five (25) people and to ensure that the flow of all people in and through the track allows for social distancing. In addition, ACE Speedway should be urged to encourage spectators and participants to practice the appropriate social distancing and sanitation guidelines recommended by public health officials.

I understand that the County Commission and Sheriff Johnson may have been hesitant to enforce the Order against ACE Speedway's operations out of concern that doing so might violate the Constitution. In drafting the Order, the Governor worked closely with his legal advisors to ensure that the Order did not infringe on constitutional rights. To that end, the Phase 2 Order specifically exempts worship, religious, and spiritual gatherings and other activities constituting the exercise of First Amendment rights from all requirements imposed by the Order. The recent races conducted by ACE Speedway, however, constitute commercial events, rather than gatherings falling under the auspices of the First Amendment, and therefore do not fall within that exemption. The Governor has broad authority to restrict commercial operations to address emergencies, like the public health emergency posed by COVID-19. Indeed, the Supreme Court recently emphasized the broad authority entrusted to public officials, like Governor Cooper, to address public health emergencies by declining to enjoin an executive order promulgated by the Governor of California in response to the COVID-19 emergency that restricted the size of in-person religious services. *See S. Bay United Pentecostal Church v. Newsom*, No. 19A1044, 2020 U.S. LEXIS 3041, *2 (Sup. Ct. May 29, 2020) (Roberts, C.J., concurring in the denial of application for injunctive relief). Given that the Supreme Court has indicated that COVID-19-prompted restrictions on in-person religious services—activities that lie at the core of the First Amendment's protections—likely do not violate the First Amendment, there is no question that the restrictions imposed on ACE Speedway's commercial operations by the Governor's Phase 2 Order comply with the First Amendment. Therefore, concerns about the Order's constitutionality are not a basis for declining to enforce the Order against ACE Speedway's operations.

³ Jerry Garrett, *Despite Warnings, Races Continue at a N. Carolina Speedway*, New York Times, May 31, 2020 (updated June 2, 2020), available at <https://www.nytimes.com/2020/05/31/sports/ace-speedway-north-carolina-coronavirus.html>; see also *Five Ways to Monitor the Coronavirus Outbreak in the U.S.*, The Upshot, New York Times, The Upshot, (updated June 3, 2020), available at <https://www.nytimes.com/interactive/2020/04/23/upshot/five-ways-to-monitor-coronavirus-outbreak-us.html?action=click&module=Spotlight&pgtype=Homepage>.

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The Governor has stated, since the beginning of this emergency, that local law enforcement officers should act judiciously in enforcing the Executive Orders he has promulgated, requesting that enforcement efforts focus on businesses and individuals that “continually and flagrantly” violate his Orders. ACE Speedway’s choice to conduct events in the manner they were held on May 23 and May 30, 2020—despite being publicly and directly informed that such events violated the Order—demonstrates and intentional and flagrant disregard for the Order.

As I am sure you are aware, the Governor has the authority, pursuant to N.C. Gen. Stat. § 166A-19.30(a)(2), to “give such directions to . . . local law enforcement officers . . . for the purpose of securing compliance” with executive orders promulgated in response to a state of emergency, like the Phase 2 Order. Sheriff Johnson is formally requested to do his duty under the law and enforce the Phase 2 Order. If Sheriff Johnson declines to perform that duty, the Governor will take further action to protect the health and safety of the people of Alamance County and North Carolina. Should you wish to discuss this matter further, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,


William C. McKinney

CC: Mr. Robert Turner, ACE Speedway

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