

NORTH CAROLINA GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

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CRYSTAL WALDRON and CLUB 519,) COUNTY OF WAKE  
)  
v. ) 20-CVS-500171  
)  
ROY A. COOPER, III, in his )  
official capacity as )  
Governor of North Carolina. )  
)

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TRANSCRIPT, Volume 1 of 1

Thursday, February 18, 2021

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February 18, 2021, Business Court Session  
Honorable James L. Gale, Presiding Judge  
Hearing on Motion for Preliminary Injunction  
(Held Via WebEx Teleconferencing Software)

A P P E A R A N C E S

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1 P R O C E E D I N G S

2 (WebEx hearing commenced at 2:30 p.m.)

3 THE COURT: Good afternoon, everyone.

4 I'm glad to say I'm not sitting here under a phone  
5 tree or an ice man today. Early in the morning, I wasn't  
6 quite sure. We were up and about early this morning trying  
7 to figure out whether we could have court or not. It's a  
8 little bit worse here in Greensboro.

9 Ms. Thompson, you're in -- are you in Virginia?

10 MS. THOMPSON: I am. I'm in Arlington, Virginia.  
11 We're getting quite a bit of ice.

12 THE COURT: Yeah, we've got a lot of ice here.  
13 Fortunately, it's not as bad as I was afraid it might be.

14 Let me start out by saying first, though, several  
15 thanks I want to give. I do want to thank a lot of the  
16 people behind the scenes that have made court happen today  
17 on a day that the law school where my court is, is closed.  
18 So we had people come in early in the morning just for us.  
19 The courthouses in Guilford County are closed, but we are  
20 going forward. A lot of people did a lot of things to get  
21 us up and about.

22 The court reporter, always underappreciated, but  
23 particularly today we had a hearing that started at 10:00.  
24 And with the exception of a couple opportunities to step up  
25 and stretch our legs, we ran up to about 1:45. So we have

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1 just had an opportunity to get a quick bite to eat and come  
2 back to you. We are very much appreciative of that.

3 Judge Young, you might want to mute yourself so I  
4 won't hear you talking on your phone there.

5 JUDGE YOUNG: Sorry about that, Judge.

6 THE COURT: All right. And so what we have before  
7 us here this morning -- this afternoon is -- is the  
8 plaintiff's motion. I think we understood that while the  
9 plaintiff has reserved the opportunity to challenge the  
10 facial and validity of the Emergency Management Act, if that  
11 becomes necessary, that is not before the Court today.

12 Also, I know that the -- the State has disagreed  
13 with my prior opinions when I indicated what I believed the  
14 standard of review was when claims of this nature were made.  
15 Unfortunately, the Supreme Court decided to moot that case.  
16 I was looking forward to the appellate review to give me the  
17 guidance. I did the best I could to understand the law as  
18 it existed. So I don't intend to revisit where I have been  
19 in those prior cases.

20 And so today I think the question before the Court  
21 narrows down to the question of whether or not private bars  
22 can be treated differently under the Emergency Management  
23 Act in the executive orders in place if they adhere to  
24 exactly the same standards of conduct, same standards of  
25 safety as other facilities that are allowed to serve

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1 alcoholic beverages or whether or not there's some  
2 distinction between private bars and other classes of that  
3 nature so that they can be said not to be similarly situated  
4 so as to make a distinction in terms of how they would be  
5 treated. And that claim's been presented under the fruits  
6 of the labor clause, has been presented under the due  
7 process and equal protection clauses, and that, I believe,  
8 is the argument that is before the Court today.

9           If I have not phrased the issue as you guys  
10 understand it, then certainly you want to clarify that, but  
11 I believe that's where we are and what we have before the  
12 Court.

13           That being the case, let me start out by allowing  
14 the counsel to make appearances for the plaintiff and to  
15 introduce your client, should you wish to do so.

16           MS. THOMPSON: Thank you, Judge Gale. My name is  
17 Jessica Thompson. I'm an attorney for the Pacific Legal  
18 Foundation. My client is here today, Crystal Clark Waldron,  
19 and she also is the co-owner of Club 519.

20           THE COURT: And are any other counsel appearing  
21 with you or are you appearing on your own behalf this  
22 morning?

23           MS. THOMPSON: I'm appearing, but Luke Wake and  
24 Anastasia Boden, both from the Pacific Legal Foundation, are  
25 here with me.

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1 THE COURT: And I can see them on the screen.

2 There you go.

3 So, Mr. Wood?

4 You're muted, Mr. Wood.

5 MR. WOOD: I apologize. I'm Michael Wood with the  
6 Attorney General's Office. I'm representing the Governor in  
7 this case. Several of my DOJ colleagues are on the line  
8 and, I believe, representatives of the Governor's Office are  
9 on mute on the line as well.

10 THE COURT: And let me, again, indicate that this  
11 is -- while we're appearing virtually, it is the equivalent  
12 of being in open court. And in open court, only the court  
13 reporter is authorized to make a recording of the case. And  
14 so I would recognize that you should not be recording this.  
15 And if you need to get a transcript, you should go to the  
16 court reporter.

17 I would ask for those who are not speaking  
18 directly to the Court, at the time you're not speaking, if  
19 you will keep your microphone muted. It will keep us from  
20 having feedback.

21 I do not follow the appellate process of giving  
22 you a specific number of minutes in going forward, and that  
23 goes to we'll take whatever time it takes. We will go back  
24 and forth as many times as it takes.

25 I recognize that both the plaintiff and the

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1 defendant think this matter of incredible importance to them  
2 personally and to the State in general. And so we'll try to  
3 take the time that it takes to -- to fully air our  
4 positions.

5 I have had the opportunity to review the  
6 complaint. I have had an opportunity to review the briefs  
7 and the attachments to the briefs, including the recent  
8 affidavits. I have not studied all of the underlying  
9 studies that were cited in Dr. Tilson's affidavit. I have  
10 read what their summary is. So I don't know -- if you  
11 expected me to know the details of those studies, I do not.  
12 I know what's said about them in the brief.

13 I am curious, just as a matter of curiosity, I'm  
14 not sure it makes any difference, but, Ms. Thompson, if I  
15 were to allow your client to open under the guidelines you  
16 have mentioned, how many people would she be able to have in  
17 her bar at any given time? I just don't know -- have enough  
18 feel for her facility.

19 I certainly would think it would be right much  
20 different than what we have seen in the pictures when she  
21 had the gatherings at Greenville in the good times when we  
22 had no pandemic, but what would the -- what would that bar  
23 look like if the injunction were allowed to be entered?

24 You're still muted, Ms. Thompson, I'm afraid.

25 MS. THOMPSON: Sorry about that.

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1           It would be 50 percent of the stated fire  
2 capacity. I do not have that number right in front of me at  
3 the moment. The last I recall, I think it was around 200,  
4 but, again, I don't have that number in front of me at the  
5 moment. I apologize.

6           THE COURT: But in terms of she had raised  
7 capacity -- because normally this is a, in many respects, a  
8 stand-up bar with a bar counter, et cetera. If I understand  
9 your proposal, it is that everyone would be seated at tables  
10 that were 6 feet apart from each other, that they would  
11 be -- as they go to place orders, they would be separated by  
12 distance. And so I just didn't have a feel for the facility  
13 to know what that would mean.

14           MS. THOMPSON: That's --

15           THE COURT: And I know some facilities are allowed  
16 to open at 30 percent capacity and others at 50 percent  
17 capacity. So, you know, if we ever get to the point where  
18 we're talking about issuing an injunction, we will talk  
19 about those details, but that was just a curiosity that I  
20 did not have a feel for.

21           MS. THOMPSON: Yes. And, Your Honor, you're  
22 correct, because it is the lesser of the capacity. And so  
23 they would have to arrange the bar stools and tables that  
24 they do have and measure all of that out to see the exact  
25 number. So it would even be less than that number, most

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1 likely.

2 THE COURT: So, again, in rephrasing the issue,  
3 this is a bit different than the case that was before me in  
4 the initial time that the bar owners association came in the  
5 sense that they were hoping they could do almost business as  
6 usual at that time. It was early in the pandemic situation.

7 You're -- you're not arguing that I should allow  
8 bars to go back to just doing business as general as bars?

9 MS. THOMPSON: Absolutely, Your Honor, that's  
10 exactly our position. We just want to open under the same  
11 safety precautions that bars across the country -- or across  
12 the state have been allowed to open.

13 THE COURT: So one of the things I'll want, as you  
14 proceed through your argument today, is I can't tell which  
15 of those studies would address bars as we think of them in  
16 the traditional sense as relatively a crowded, stand-up,  
17 close gatherings versus bars as you -- as you purport you  
18 would open. And I just want to make sure as we step through  
19 that, that I have an understanding of what we are talking  
20 of. Okay.

21 Let me -- with that being said, let me be quiet  
22 and listen to your argument.

23 MS. THOMPSON: Thank you, Your Honor.

24 This case is about fairness. As we appear here  
25 today, we're a month shy of the one-year anniversary of



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1 Governor Cooper's orders closing Club 519. And for the last  
2 eight months, Governor Cooper has permitted bars across the  
3 state to reopen, indoors and outside, at 50 percent  
4 capacity, except for my client and other private bars like  
5 them.

6           This isn't just bars located inside of  
7 restaurants, although there are many thousands of those open  
8 across the state. At least 11 -- at least 11 other types of  
9 bars are allowed to open currently, including distilleries,  
10 bottle shops, private clubs, and even brewpubs, like Natty  
11 Greene's in downtown Greensboro. The same health and safety  
12 precautions that have kept North Carolinians safe at those  
13 bars can keep customers safe at private bars, and the  
14 Governor presents no evidence that says otherwise.

15           The Governor has failed to show that private bars  
16 present a risk to the public even if they implement safety  
17 measures, including those measures applicable to every other  
18 class of bar open across the state. In fact, the Governor  
19 has failed to show how private bars are distinguishable from  
20 every other bar allowed to operate indoors for the last  
21 months.

22           The Governor has claimed he's taking a "dimmer  
23 switch" approach to reopening the economy. The private bars  
24 are the only business in the state that are completely  
25 prohibited from operating indoors, 11 months into the State

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1 of Emergency. Simply put, Governor Cooper's arbitrary and  
2 discriminatory treatment of private bars is threatening to  
3 turn out the lights for good of Club 519.

4           Absent an injunction, plaintiffs will soon become  
5 insolvent, preventing them from pursuing their fundamental  
6 constitutional rights in this litigation. And considering  
7 the balance of equities, on one side we have a total  
8 deprivation of the rights to the fruits of their labor,  
9 equal protection, and the guarantee of separation of powers,  
10 as well as the bankruptcy of an 18-year-old business that's  
11 the primary source of income for my clients. And while the  
12 public interest in slowing the spread of COVID-19 is  
13 undeniable, the Governor has no evidence that his  
14 discriminatory treatment of a small, insular group of  
15 business advances that public interest, especially when the  
16 vast majority of bars across the state are open. Moreover,  
17 the public interest is always served by enforcing the  
18 Constitution.

19           And I'll pause here to see if there are questions  
20 before I proceed to the rest of the argument.

21           THE COURT: I certainly admit that's a summary of  
22 the argument you've presented in your brief.

23           I will say that as you go forward, and just,  
24 again, where I recognize the State and the Court may have a  
25 little bit different perspective as to what the role of the

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1 evidence is under the standard that I adopted in both the  
2 bar association case and in the bowling alley case, I  
3 thought that it is an evidence look but I did not impose a  
4 burden of proof of trying the case, et cetera, is that it  
5 must be more than a -- a perceived rational basis. Needs to  
6 show some evidence to advance it.

7           There has been a suggestion, indirect, and I'll  
8 pose it more directly, that I want you to address as we go  
9 forward, and that is, should the Court have any concern  
10 about the ability to enforce the limitations of an  
11 injunction should I issue it?

12           And I will tell you that I'm just motivated by  
13 things such as -- you know, you put forward some of the  
14 e-mail traffic of some of the people who would love to urge  
15 your client to just open and disregard the authorities, and  
16 your client said no, I believe I want to stick with the  
17 system a bit longer.

18           We've got the situations of where there are many  
19 people who would say that Carolina beating Duke is worth  
20 celebration, but perhaps not as it was celebrated on  
21 Franklin Street in light of the pandemic.

22           So if I were to issue an order that a thousand  
23 bars in North Carolina could open up, including those in  
24 university towns, et cetera, how would I be satisfied that,  
25 once open, they would abide by the restrictions?

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1           So I'm not asking you to answer that on the front  
2 end, but as you go through your argument, I will tell you  
3 that the concern -- the Court has some concern. The last  
4 thing the Court wants to do is to substitute its judgment  
5 for either the legislature or the executive. That is not my  
6 role to be the policymaker. And I certainly wouldn't want  
7 to issue anything that would lead to an increase of the  
8 pandemic, nor do I think you would want me to. But that is  
9 a concern that the Court has, and I would want both of you  
10 to address it.

11           MS. THOMPSON: Absolutely, Your Honor. And if I  
12 may go ahead and address that head-on.

13           We are committed, Club 519 as a private bar, are  
14 committed to following the safety guidelines that other  
15 restaurants have employed to keep their customers safe, not  
16 only because that's the right thing to do as far as the law,  
17 but because it's -- these restrictions, these safety and  
18 health precautions, are instituted to keep customers safe  
19 and that's what keeps businesses in business.

20           Moreover, the ABC Commission is very active in  
21 Pitt County enforcing ALE laws already, and they can also  
22 enforce the Governor's restrictions and health and safety  
23 precautions that are in place.

24           THE COURT: Well, in that regard -- in that  
25 regard, if the Court were to issue an injunction that makes

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1 it a condition of the injunction that you abide by the  
2 specifics, either as you proposed or as modified by the  
3 Court, and there was a violation, would that be grounds for  
4 the ALE Officer on the spot to pull your license?

5 MS. THOMPSON: I believe so. I think the Court  
6 could absolutely structure an injunction in that fashion as  
7 we are seeking the Court to -- to make a declaration that  
8 the equal protection clause of the Constitution demands  
9 equal treatment. And I absolutely think that that's within  
10 the Court's --

11 THE COURT: Because --

12 MS. THOMPSON: -- function.

13 THE COURT: -- because I would tell you that the  
14 Court has personal experience, and that's not relevant, it's  
15 not evidence in the case, but I certainly have personal  
16 experience of seeing any number of people that have chosen  
17 to not follow the emergency declarations of whether it be  
18 Guilford County or otherwise. It is not hard to still go to  
19 various places where the recommendation is, the purpose of  
20 the order is, to wear a mask and you find people that are  
21 not wearing it.

22 MS. THOMPSON: Absolutely, Your Honor.

23 And I might say that while there were a thousand  
24 private bars at the start of the COVID-19 State of  
25 Emergency, it's unlikely that a thousand private bars still

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1 exist in the state today. After eight months of complete  
2 closure, while their direct competitors have been allowed to  
3 operate and substitute their former role in the community,  
4 there's not many private bars that economically are going to  
5 be able to reopen.

6 THE COURT: Well, in that regard, if I were to  
7 issue an injunction -- and, again, by asking these  
8 questions, I certainly am not saying the Court knows what  
9 it's going to do, by any means. But if it were to go to  
10 issue an injunction, could it put a provision in its  
11 injunction that upon demonstration that the reopening of the  
12 bars has resulted in anything approaching an unusual  
13 increase in COVID infections, would I be within my rights to  
14 then immediately withdraw the injunction?

15 MS. THOMPSON: That is a -- I want to take the  
16 Court's question seriously and I want to think through all  
17 of the implications of that.

18 I think that it would require possibly setting  
19 forth some standards that are clear and applicable, but as  
20 long as those standards are clear and applicable from the  
21 outset, I believe that's within the --

22 THE COURT: I mean --

23 MS. THOMPSON: -- of the Court.

24 THE COURT: -- clearly what you're asking me to do  
25 is to apply the law, which is my job, my obligation. But in

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1 that effect, you're asking me to impose a judicial order  
2 that two-thirds of the legislators in North Carolina don't  
3 agree with. You cannot get two-thirds of the legislators to  
4 agree to order what you're asking me to order as an  
5 individual. That's why I'm asking these questions. You're  
6 asking me to do what you were not able to persuade a  
7 sufficient number of the North Carolina legislature to  
8 order.

9 MS. THOMPSON: Yes, sir. And I would add that  
10 with the -- with the potential reopening of private bars, if  
11 a court -- the Court could structure the preliminary  
12 injunction to focus on the equal protection clause of the  
13 North Carolina Constitution. And so if the Governor decided  
14 to treat all bars in one way or another -- so, for instance,  
15 to lower capacity to 30 percent for all bars, or to lower  
16 capacity to 20 people indoors, no matter the size, that  
17 could apply equally.

18 I imagine that that would be another way that even  
19 on top of the preliminary injunction the Governor would  
20 still be able to exercise authority and -- and to decrease  
21 or increase safety precautions as necessary.

22 THE COURT: Tell me why -- go ahead and tell me  
23 why you think the law demands that I give you the injunction  
24 you've asked for.

25 MS. THOMPSON: Yes, sir. So I believe under the

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1 reasonable relation test that this Court put forward in the  
2 *North Carolina Bar and Tavern* as well as the bowling case,  
3 that our bar should win.

4           Plaintiff's win under the reasonable relation test  
5 because in that test the Court asked whether the Governor  
6 has acted with a proper government purpose, and if so,  
7 whether those actions, when viewed against the balance  
8 between the likely public benefit and the burden imposed,  
9 who wins out in that balance? And the likely public benefit  
10 of keeping a small and insular group of private bars closed  
11 when the vast majority of bars across the state have been  
12 allowed to open, is a very small benefit in comparison to  
13 the burden imposed on these individuals when they have lost  
14 their entire livelihood, they have lost their constitutional  
15 right to the fruits of their labor and for no -- no rational  
16 or reasonable reason. It's simply economic favoritism and  
17 unsupported by evidence.

18           THE COURT: Let me ask this: Would you believe  
19 that the law is such that if the Governor were able to  
20 appoint -- to point to a case that there was an increased --  
21 proportional increase percentage chance of infection created  
22 by a private bar that would not be created by these other  
23 classes of businesses that can serve alcohol, if that  
24 evidence was there, would the Court more properly deny the  
25 injunction?



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1 MS. THOMPSON: I -- yes, I believe so. If there  
2 is evidence that this specific type of license, ABC  
3 licensee, creates a different risk profile than bars that  
4 allow -- or bars that are open throughout the state, I think  
5 that's the sort of evidence that we are looking for but has  
6 not been presented here in this case. That's exactly the  
7 type of evidence.

8 THE COURT: But if there were such evidence of  
9 that, it would be appropriate for the Court to support the  
10 judgment of the Governor, provided that the Emergency  
11 Management Act is constitutional?

12 MS. THOMPSON: Yes, Your Honor.

13 THE COURT: What do you think your strongest case  
14 is for your argument?

15 MS. THOMPSON: Your Honor, I would say that's  
16 *Cheek v. The City of Charlotte* where the -- whenever the  
17 equal protection of the North Carolina Constitution applies,  
18 laws must be uniform, fair and impartial in their operation.  
19 And here, we want to focus on the operation of these laws.

20 In *Cheek*, the provision of massages to customers  
21 by the opposite sex was outlawed except in certain  
22 businesses. So it was allowed to be given at the YMCA, the  
23 WCA, and in barber shops and beauty salons. And that's much  
24 like here.

25 The provision of alcohol for consumption indoors

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1 is allowed at certain bars while one other group is  
2 prohibited from operating, and that fails the equal  
3 protection analysis under the North Carolina Constitution.

4 The relationship --

5 THE COURT: Have you studied the different studies  
6 and medical literature that's cited in Dr. Tilson's  
7 affidavit?

8 MS. THOMPSON: I have been through all of the  
9 exhibits for the declaration.

10 THE COURT: Are you representing to the Court  
11 having looked at that you believe all of them deal with bars  
12 of a different nature and none of them speak to a bar as you  
13 intend to operate?

14 MS. THOMPSON: Yes, that's correct. In fact --

15 THE COURT: And what -- and what is different  
16 about the operation that you propose be allowed and the  
17 karaoke bars that had the testing temperature, and the  
18 Plexiglas, social distancing, and those criteria and yet  
19 were traced by contact tracing to be sources of  
20 contamination? How do you distinguish that study from what  
21 you're proposing?

22 MS. THOMPSON: Well, Your Honor, in the karaoke  
23 bars, the point of a karaoke bar is for people to get  
24 together and to sing out loud, and remove their mask, and to  
25 be able to --

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1           THE COURT: But -- but there's Plexiglas there.  
2 And so is there evidence -- I have not read the study. I  
3 told you I have not read the study. But, for example, I'm  
4 sitting in -- and the rule generally that's been imposed is  
5 that in court, in court proceedings, to wear masks as well.  
6 I happen to be sitting in a courtroom that has a great big  
7 Plexiglas shield, and I'm in a courtroom where there's  
8 nobody here but me. So I'm choosing to do it without a  
9 mask, as you are, in order to be safe.

10           Is there anything in that study that -- that shows  
11 that in the karaoke bar it wasn't one person singing at a  
12 time, and 6 feet away from anyone else, and was protected by  
13 a Plexiglas shield? Is there anything in that case that  
14 says it was group singing without masks on?

15           MS. THOMPSON: No, Your Honor. It doesn't say --  
16 well, and I think that's a problem -- that's an issue with  
17 all of this evidence that we have here, is that these are  
18 anecdotal examples. And so these studies can't be certain  
19 whether it was the one person singing, or the group behind  
20 the other Plexiglas that was singing. They can just  
21 describe the situation that existed and say that that is  
22 where a COVID outbreak took place.

23           And I might add that Club 519 has offered to not  
24 play music, and to keep the volume low. And it is not a  
25 karaoke bar. And with those precautions, the State -- the

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1 Governor hasn't addressed how, you know, those precautions  
2 address that issue raised by the karaoke bar study.

3 THE COURT: What do you think the holding of *Cheek*  
4 most broadly stated is?

5 MS. THOMPSON: That when a regulation seeks to  
6 prohibit the provision of services, that that must apply to  
7 similarly-situated businesses equally.

8 THE COURT: Let me give you a proposition of law  
9 which has been argued to me before and ask you whether you  
10 think *Cheek* stands for this proposition, and that is,  
11 that -- that a government entity, whether it be legislative  
12 or executive, has the authority to implement economic  
13 legislation that applies to different participants in the  
14 marketplace, and as long as there is economic justification,  
15 that exercise of authority would be upheld, but as the  
16 distinctions between similarly-situated businesses become so  
17 narrow as to essentially be meaningless, that the action of  
18 regulation becomes arbitrary and capricious.

19 Does *Cheek v. The City of Raleigh* [sic] stand for  
20 that proposition?

21 MS. THOMPSON: That as distinctions become so  
22 negligible --

23 THE COURT: As they become so negligible, that  
24 that rises to the level of a finding that the distinctions  
25 are arbitrary and capricious?

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1 MS. THOMPSON: Yes. As the Court --

2 THE COURT: Which is -- which is to say, they  
3 don't satisfy even the equal protection?

4 MS. THOMPSON: Yes, that sounds right.

5 THE COURT: Do you read *Cheek* that way?

6 MS. THOMPSON: Yes, Your Honor. I mean, I would  
7 -- it's difficult without an example to apply that rule to  
8 about how narrow the distinction is. I think -- well, and,  
9 actually, it's not that broad. It's that the distinction  
10 doesn't -- it doesn't correspond to the rationale for the  
11 regulation.

12 And so here we're interested in COVID-19 safety  
13 precautions, and those have to be reasonably related to  
14 keep people safe from COVID-19. And so if the distinctions  
15 between the business have nothing to do with keeping people  
16 safe from COVID-19, as I would say here, because I can draw  
17 distinctions between private bars and from breweries. Sure,  
18 breweries might make beer, and they sell beer and kegs to  
19 go, but that has nothing to do with keeping customers safe  
20 from COVID-19.

21 We are discussing what their -- what the business  
22 is, sitting indoors at a bar, consuming alcohol, and whether  
23 you do that at a bar that is inside of a restaurant, inside  
24 of a brewery, a distillery, or a private bar, that behavior  
25 is the same core behavior.

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1           So I would say *Cheek* is not quite that broad.  
2 It's the regulation imposed must be related to that  
3 distinction that you're drawing. And so I would make it  
4 more narrow -- I'd have a more narrow reading.

5           THE COURT: Was *Cheek* -- was *Cheek* an equal  
6 protection case or fruits of the labor case?

7           MS. THOMPSON: It was an equal protection case, I  
8 believe, as I recall.

9           THE COURT: Okay.

10          MS. THOMPSON: Focusing as well on fruits of the  
11 labor. I mean, as the Court has -- has seen and noted in  
12 the bowling case, which I also might say is a very strong  
13 case in our favor considering it's dealing with these  
14 executive orders specifically.

15          THE COURT: But not strong enough to make the  
16 Supreme Court review it after the 30 percent capacity?

17          MS. THOMPSON: Well, there may be judicial economy  
18 and good reasons under the mootness doctrine for not  
19 addressing that case at the moment.

20          We all hoped that, you know, in August that we  
21 were reaching the end of this pandemic and the State of  
22 Emergency, but, unfortunately, almost a year later, here we  
23 are.

24          THE COURT: I don't want to interrupt you. I have  
25 been asking you a lot of questions. But before we move, I

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1 certainly do want to hear your argument as to whether or not  
2 the Governor has exceeded his authority under the Emergency  
3 Management.

4 MS. THOMPSON: Yes. So -- and I'm happy to take  
5 more questions, but as to the --

6 THE COURT: But I don't want to take you off equal  
7 protection/fruits of the labor clause argument if you have  
8 not finished. I interrupted you several times. So I'm  
9 giving you the opportunity to close that argument before we  
10 move to the other.

11 MS. THOMPSON: Sure.

12 So, again, there's -- there's no health or safety  
13 rationale underlying the disparate treatment between private  
14 bars and bars operated -- the rest of the bars that have  
15 been allowed to open. This is a purely arbitrary  
16 distinction. The Governor presents no evidence that  
17 without -- if we were to implement the exact same safety  
18 precautions, that we would not present -- that we would  
19 present more of a risk than any of the other bars. And he's  
20 not presented any distinguishing feature between private  
21 bars and the rest of the bars that have been allowed to  
22 operate throughout the state.

23 And turning to the separation of powers clause, I  
24 would just note that the purpose is to preserve individual  
25 liberty, and that's exactly what is asked to be preserved

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1 here, is the individual right to the fruits of their labor.

2           There's two forms of violations of the separation  
3 of powers clause. The first is a straightforward question,  
4 yes or no, has one branch exercised the power of another  
5 that's exclusively vested in another branch. And the  
6 determination --

7           THE COURT: Let me stop you right there on the  
8 first branch.

9           Do you agree that North Carolina law allows the  
10 legislative branch to delegate a portion of its authority to  
11 the executive branch?

12           MS. THOMPSON: Yes, sir, that's correct.

13           THE COURT: Okay.

14           MS. THOMPSON: The problem here becomes when the  
15 Governor is exercising legislative judgments and balancing  
16 the public interest and in the duration of time that has --  
17 that this treatment has occurred. We are nearly a year into  
18 the State of Emergency --

19           THE COURT: Who made the judgment to give him that  
20 authority without a restriction as to time? Who made that  
21 judgment?

22           MS. THOMPSON: When it was initially passed, that  
23 would have just been the General Assembly because that was  
24 before the Governor's veto. And then --

25           THE COURT: And what -- what do you believe to be



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1 the significance of the veto?

2 MS. THOMPSON: In -- as far as the  
3 constitutional --

4 THE COURT: On your separation of powers  
5 argument --

6 MS. THOMPSON: Sure.

7 THE COURT: -- you agreed that the legislature can  
8 delegate authority, that the General Assembly, when it  
9 passed the EMA, elected to give him that authority without a  
10 time temporal limitation. You're now arguing that somehow  
11 it's different because the legislature passed a bill that  
12 the judge -- I mean, that the Governor vetoed. What's the  
13 significance of legislation that's vetoed?

14 MS. THOMPSON: Yes. So -- well, for one thing, it  
15 has indicated that the intent of the legislature was  
16 different, that they would have drawn a different policy  
17 balance whenever -- as it relates to private bars.

18 THE COURT: Right. And they still have the  
19 authority to do that, right?

20 MS. THOMPSON: That is correct.

21 THE COURT: But our Constitution says if they are  
22 going to do that, they have to come up with enough votes to  
23 override a veto; correct?

24 MS. THOMPSON: Yes, Your Honor.

25 THE COURT: So are you asking me to do what you

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1 couldn't get two-thirds of the legislature to do? You're  
2 asking me to, in essence, overrule the Governor's veto?

3 MS. THOMPSON: Well, Your Honor, I think that the  
4 line-drawing of when the separation of powers violation  
5 occurs is extremely difficult. The timing of this issue is  
6 tough. Is it -- has he violated the separation of powers  
7 when he exercises legislative authority under the EMA, or  
8 when he vetoes, or is it when he continues to exercise  
9 legislative authority after the veto and after the General  
10 Assembly has attempted to rein-in his authority under the  
11 EMA?

12 THE COURT: You would agree that the North  
13 Carolina Constitution gives him the right to veto; correct?

14 MS. THOMPSON: Yes.

15 THE COURT: So the exercise of a right of veto is  
16 not a violation of separation of powers doctrine, is it?

17 MS. THOMPSON: It alone would not be. But, Your  
18 Honor, under the McCrory and Cooper line of cases, the  
19 second type of separation of powers violation is a  
20 functional test, and it looks to the text of the  
21 Constitution, the constitutional history, the facts. It's  
22 very fact-specific. And it asks has one branch interrupted  
23 and disrupted another branch from exercising its core  
24 powers.

25 Now, if we were to fast forward a year and the

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1 Governor is still continuing to dictate, and let's say the  
2 Coronavirus has become worse, and he has decided which  
3 businesses would be forced closed and what businesses may be  
4 allowed to reopen and under what circumstances they may be  
5 allowed to reopen. Looking at that on its face, it's  
6 obvious that that's a separation of powers problem.

7 THE COURT: Except here the Governor has not tried  
8 to claim any authority other than that's expressly given him  
9 by the legislature; correct?

10 So the unconstitutional act would not be the  
11 Governor's? The unconstitutional act which you're  
12 challenging is the act of the legislature?

13 MS. THOMPSON: Well, I would -- I would add to  
14 that, that just because there is a delegation, that -- that  
15 may be -- may be broad, that doesn't mean that the  
16 Governor's actions -- that he needs to take the fullest  
17 extent of the authority granted to him by the EMA. And so I  
18 would argue that he is acting at the apex of his authority  
19 under the EMA. And as such, if he continues -- there's no  
20 limitation in the EMA, and if he continues to --

21 THE COURT: There is a limitation. The  
22 legislature can change the law.

23 MS. THOMPSON: Which -- and they have attempted to  
24 do so.

25 THE COURT: Help me here. The Court feels as if

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1 it's being placed in a position that the separation of  
2 powers does not condone when you're asking me to do for you  
3 what the legislature has been incapable of doing because  
4 they can't sustain enough to overturn the veto. I'll just  
5 get the judge to overturn the veto.

6 MS. THOMPSON: Well, Your Honor, there is still a  
7 problem when -- when the Governor is exercising legislative  
8 powers of an unlimited duration and of such a broad breadth  
9 as he's exercising here.

10 THE COURT: So don't get me wrong. I'm  
11 sympathetic and understand and have asked certain questions  
12 on the equal protection argument. And I need to be  
13 satisfied as to the fairness of the regulations and  
14 justified. That's why I came up with the standard that I  
15 did and rejected the entire deference standard. And I feel  
16 like the Court's role is to ask some of those piercing  
17 questions as to whether or not this advances the purpose of  
18 the Governor does. So that's why -- that's why the State  
19 was not happy with me adopting a test different than what  
20 they promoted.

21 But that same sense of keeping the courts within  
22 its lane of authority, its proper role in the balance of  
23 separation of powers, the argument that says that somehow or  
24 another I ought to give significant credence to the fact  
25 that the legislature couldn't muster two-thirds of a

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1 majority to overcome a veto, so you do it kind of cuts  
2 against my sense of the fact that I -- my role is not to be  
3 an activist. I'm very much a part of the judiciary that  
4 says my role is not to be an activist. And I feel in some  
5 respects -- and I'm inviting you to make me feel better by  
6 the fact you're not asking me to be somewhat of a  
7 policymaker activist.

8 MS. THOMPSON: Absolutely, Your Honor. And I  
9 think that in a way that I can maybe assuage your fears is  
10 that the reason that there is a separation of powers issue  
11 here is because the Governor is a one single person, he is  
12 not the deliberative body that the General Assembly is and  
13 is slated to be under our Constitution. The Governor is  
14 acting arbitrarily in picking and choosing economic winners  
15 and losers here.

16 THE COURT: Well, and if it's, in fact, that's all  
17 we're talking about, economic winners and losers -- and I  
18 think I have expressed myself when I said earlier that the  
19 decision I made in the bowling alley case was not influenced  
20 in any respect by economic argument of one set of industry  
21 being more economically viable than the other. That was not  
22 an argument I rejected, but I said I certainly did not  
23 consider it at that point in time, and I remain somewhat  
24 dubious of the last two paragraphs of Dr. Tilson's  
25 affidavit. All right.

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1           But the -- I think there's a separate policy  
2 argument, when you're looking at it strictly from a policy  
3 standpoint, is that when you're dealing with an emergency --  
4 and I understand the argument -- does emergency have a  
5 temporal aspect to it? That's been argued to me in these  
6 cases as well.

7           But if, in fact, you're dealing in the face of an  
8 emergency, you know, is it really better to say that every  
9 time you want to respond to an emergency, the right way to  
10 do it is to make sure the entire legislature chews that up  
11 in its process as a policy initiative or do they make the  
12 chosen decision we're going to give the responsibility and  
13 authority, both of those words are used in the EMA,  
14 responsibility and authority. You do it, because we don't  
15 need to have a long deliberative policy approach as we need  
16 somebody that's going to take the bull by the horns and deal  
17 with it.

18           MS. THOMPSON: Yes, Your Honor. And I would say  
19 that that sort of legislative determination does make sense  
20 in emergency situations. But I think that's why we point to  
21 the passage of House Bills 536 and 594 and Senate Bill 105  
22 is because that was an indication by the General Assembly  
23 that we are available to address this emergency and we want  
24 to address this emergency. So when the legislature --

25           THE COURT: It also represents the fact that there

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1 is a substantial disagreement as to the best way to protect  
2 the health and safety of North Carolinians.

3 MS. THOMPSON: That's correct.

4 THE COURT: The fact that you could not sustain  
5 the veto shows that there is no unanimity in terms of what's  
6 the best thing to do.

7 MS. THOMPSON: That's correct.

8 THE COURT: And so if you want me to say I think  
9 the Governor or that part of the legislature is more right  
10 from a policy perspective for the health, that's the policy  
11 argument that I don't think is the right thing for the judge  
12 to engage himself in.

13 Now, if it gets to the point where the Governor is  
14 just arbitrary, he's got nothing to support what he says,  
15 then that's when the law steps in. But I don't think that I  
16 go in and say, well, it seems to me the legislature was more  
17 right than the Governor was, even though they couldn't get  
18 two-thirds majority.

19 MS. THOMPSON: Well, Your Honor, the -- and that  
20 point is well taken.

21 The point that I would point to is that  
22 emergencies do have to come to an end at some point. And I  
23 think that's why we offer the passage of those bills as an  
24 indication that that might be a proper time to draw the  
25 line.

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1           THE COURT:  And -- and I would suggest to you back  
2 that the person who makes the determination when the time  
3 has come to say there's no longer an emergency, or that it  
4 has a temporal expiration, or that at some point in time you  
5 have to justify it through some sort of environment -- that  
6 is to say, we should have a different legislative process  
7 than that which we gave you the first time in the EMA which  
8 says, Governor, we want you to make that determination and  
9 here's how you do it.  You look at it, is it adequate that  
10 we give you that authority?

11                 So I agree that there is a reasoned debate as to  
12 how long it should last, but isn't that a debate for the  
13 legislature and not the Court?

14           MS. THOMPSON:  I think that that would -- that  
15 judicial philosophy and point makes a ton of sense.  I think  
16 the problem is when people's individual liberties are at  
17 risk.  And as we continue on in this emergency for almost a  
18 year and with no end in sight, and that's why I mentioned  
19 the "dimmer switch" at the beginning --

20           THE COURT:  And that's why I wanted you to  
21 understand is the fact that I have trouble with the  
22 separation of powers argument does not diminish that I  
23 remain concerned about the equal protection right.

24           MS. THOMPSON:  Absolutely.

25                 And if I might just add to that.  You know, like



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1 the plaintiffs in the bowling case, Club 519 is likely to  
2 succeed in proving there's no evidentiary basis that the  
3 Governor can reasonably prohibit private bars from operating  
4 indoors under the same operational guidelines that they have  
5 committed to while he's allowing other bars and  
6 similarly-situated businesses with common risk to remain  
7 open nearly a year into this declared emergency.

8           THE COURT: Which makes an interesting observation  
9 as to what your lawsuit, where it leads me. My choices are  
10 I can deny the injunction on the basis that you do not --  
11 are not likely to prove that and that the Governor has come  
12 up with adequate authority, at which point in time it then  
13 becomes incumbent upon me to ask the Superior Court of Wake  
14 County to convene a three-judge panel to determine whether  
15 the entire Emergency Management Act is unconstitutional.  
16 And if it is, is an improper delegation of authority, every  
17 single one of the executive orders that the Governor has  
18 entered become null.

19           The other option is I can grant you an injunction,  
20 do like I did in the bowling alley case, and say it's  
21 immediately effective, and then -- and let the State scurry  
22 around to see whether they can get a stay, or I can issue an  
23 injunction saying I'm concerned about it but I'm going to be  
24 sufficiently concerned about me not just being little old me  
25 overruling everything is to take it to the Supreme Court and

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1 let the Supreme Court say as to what they think for the  
2 separation of authority. Those are the three choices that I  
3 have.

4 MS. THOMPSON: Yes, Your Honor.

5 And I might add to that, that since the ruling in  
6 the bowling case, the State doesn't -- and the *North*  
7 *Carolina Bar and Tavern Association* case, the State has had  
8 over seven months to come up with additional evidence of why  
9 private bars present more of a risk, why they cannot issue  
10 or follow these additional safety protocols and operate as  
11 safely, and they have not presented that evidence.

12 And so I think that the Court can feel comfortable  
13 moving forward issuing this injunction and treat -- allowing  
14 the State to treat all bars equally and open under the same  
15 safety precautions.

16 THE COURT: I'm going -- I'm going to promise you  
17 that I am now willing to sit here and be quiet for whatever  
18 time it takes to let you summarize your argument and not  
19 interrupt you.

20 MS. THOMPSON: Your Honor, I mean, I believe that  
21 we have covered a lot. I will just hit some of the high  
22 points, and if there are any additional questions, I'm happy  
23 to take them as we go.

24 But I might add that we didn't talk about the  
25 Emergency Management Act, Subsection 19.74, that prohibits

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1 the impartial and inequitable application of emergency  
2 services.

3 THE COURT: I would say that I'm open to the  
4 argument that the first sentence of Section 74 is  
5 applicable, but I'm not sure that the second sentence is.

6 MS. THOMPSON: Understood.

7 And I might say that still the Governor's conduct  
8 closing private bars, much in the same way that it violates  
9 the equal protection clause of the Constitution, it's  
10 inequitable and it is partial. It's blanket economic  
11 favoritism. And in the declaration of Wit Tuttle, the  
12 Governor admits as much. They say that the GDP  
13 contributions from breweries and wineries is greater than  
14 private bars. And I might add that in the declaration they  
15 say that GDP contribution is greater because of  
16 manufacturing. So it's not about the employees have a  
17 greater contribution to the GDP; it's about the  
18 manufacturing.

19 But that doesn't justify the opening of bottle  
20 shops where you go and grab whatever type of beer that you  
21 would like to consume and you sit at a table and you drink  
22 with friends or -- as opposed to under these safety  
23 precautions the bartender would bring you the bottle that  
24 you like and you'd enjoy it with friends. So that  
25 manufacturing aspect does not --

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1 THE COURT: And I know --

2 MS. THOMPSON: -- open to.

3 THE COURT: -- I know that some of the people that  
4 argue that from the standpoint of the people who want to go  
5 and drink, that I ought to be concerned about their rights.  
6 I'm not particularly impressed about that. If somebody's  
7 dying to have a beer, you can go sit down and buy a bag of  
8 French fries and get a beer at many places. It's the owners  
9 of the bars are the ones that have got the rights that I  
10 need to pay attention to.

11 MS. THOMPSON: That's understandable, Your Honor.

12 And yes, and I might add, you know, we have  
13 mentioned in our papers and in our complaint, and I think  
14 this goes to the balance of the equities, there -- I mean,  
15 my client is just one example, but they have been in  
16 business for the last 18 years. This has been their dream  
17 to own a business and to, you know, set their own hours and  
18 just to run a -- a family-owned business in the town and  
19 community that they love. And they are threatened to be put  
20 out of business permanently.

21 And so the risks are extremely high here. It's  
22 not just their constitutional rights, but their financial  
23 ability to continue forward and in a time that, you know,  
24 COVID has had such economic devastating effects on people.  
25 I think those are important considerations to consider when

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1 balancing the equities.

2           But I might also, just to continue on with the  
3 economic favoritism, the Governor hasn't only advanced that  
4 it's the GDP contribution from breweries and wineries, but  
5 it's also that they bring in tourism. At a time when the  
6 Governor is asking people not to travel to see family at  
7 Christmas and Thanksgiving, I think it's ridiculous to point  
8 to the fact that breweries and wineries bring in tourism  
9 while my private bar client is forced to close for a year.

10           And so these are -- this economic favoritism, one  
11 final thing, is that it was clarified that the Governor's  
12 Phase 2 order permitted breweries and wineries to reopen.  
13 And that's after some special lobbying interests were able  
14 to clarify that they should be able to open under -- under  
15 the law. And so the ABC Commission's guidance document and  
16 the Governor's guidance document makes clear that the  
17 distinction that they drew to allow breweries and wineries  
18 to operate their bars inside have to do with the fact that  
19 they sell alcohol for offsite consumption. But, again, as  
20 we were discussing with *Cheek*, that distinction between  
21 these businesses has nothing to do with COVID and nothing to  
22 do with keeping customers safe. And so private bars should  
23 be afforded the equal opportunity to open under those exact  
24 same safety precautions.

25           At the moment, I believe that I have hit the

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1 highlights of our argument. I may have additional points to  
2 raise after a conversation with the Governor's counsel, if  
3 you would permit me to do so.

4 THE COURT: Mr. Wood?

5 MR. WOOD: Thank you, Your Honor.

6 And just for the record, again, I'm Michael Wood  
7 with the Attorney General Office -- Attorney General's  
8 Office representing the Governor.

9 Let me clarify one point, and then I want to talk  
10 about the science and the data because that is critical to  
11 this Court's analysis, and I think it's being misinterpreted  
12 and certainly interpreted in a way that the public health  
13 team does not see the same.

14 Several times there has been reference to private  
15 bars being completely closed. And let's just be clear,  
16 that's not accurate. So right now private bars are allowed  
17 to be open outdoors with restrictions and private bars are,  
18 likewise, allowed to be open to do to-go sales and delivery  
19 sales.

20 So this isn't a complete prohibition and a  
21 complete shutdown. These restrictions are in place, you  
22 know, much like hours restriction on sales and other  
23 restrictions to operations. It's quite distinct from a  
24 complete shutdown.

25 Let me jump right to the data and the science that

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1 Dr. Tilson --

2 THE COURT: Let me, before we go to the science  
3 and data, and I really am going to allow you. I found it  
4 very interesting.

5 Do you agree now that there needs to be an  
6 evidentiary basis to distinguish private bars operating  
7 under the conditions that they have put forward that  
8 contrast them to businesses that are similarly situated  
9 under the same guidelines serving alcohol? And it's not the  
10 mere service of alcohol alone that justifies the  
11 distinction; is that correct?

12 MR. WOOD: I agree in part, Your Honor. There  
13 needs to be a rational basis to show why private bars are  
14 inherently more risky than restaurant bars, for example.

15 THE COURT: That's right. And if there is no  
16 evidentiary basis to make that argument, then equal  
17 protection would say they should be treated the same;  
18 correct? That's what *Cheek* says.

19 MR. WOOD: I disagree again, Your Honor. You're  
20 saying evidentiary basis. The *Poor Richard's* case says  
21 quite clearly the government doesn't have to have scientific  
22 evidence to back a decision. It does have to have a  
23 rational basis.

24 And other cases say --

25 THE COURT: And I have already --

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1 MR. WOOD: -- conceivable basis --

2 THE COURT: -- and I have already disagreed with  
3 you on that.

4 So if you were -- if my standard that I adopted in  
5 the bowling alley cases were to withstand appellate  
6 scrutiny, which I understand I believe it would not, I'm  
7 simply saying is, is that what I want -- what I'm inviting  
8 you to do and I'm asking would you agree or would you  
9 maintain that you can satisfy the fact that not so much of a  
10 burden of proof, but on a reasonable evidentiary basis  
11 looking at the data, looking at the science, we believe we  
12 have an informed basis to say private bars are different  
13 than the other businesses that are allowed to operate  
14 without the same restrictions? Do you believe you can do  
15 that?

16 MR. WOOD: Yes, sir, I do. And in a nutshell that  
17 is the State's argument -- the Governor's argument. We have  
18 science and data to justify the decision-making that the  
19 Governor's team has recommended and that the Governor --

20 THE COURT: And what I really wanted to hear -- I  
21 am not sympathetic to the argument at all to go and reopen  
22 bars as usual, to see the gatherings that were in the  
23 June 2019 paragraph at the plaintiff's bar, to have all the  
24 people do the barhopping like they did in Baton Rouge, to  
25 see people go out on Franklin Street like they did after the



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1 Duke-Carolina game. They would get no sympathy from this  
2 Court to justify that conduct.

3 I'm dealing with the fact is can we look for the  
4 distinction to say not bars in general, but bars operating  
5 under the guidelines that have been imposed, at least given  
6 the evidence that says that set of business is different  
7 than the others. That's what I'm looking for.

8 MR. WOOD: Okay. Very good, Your Honor. That's  
9 what I would be happy to talk about first.

10 THE COURT: And I'll be quiet.

11 MR. WOOD: Okay.

12 So plaintiff's counsel a few times said the  
13 Governor has no evidence or, on the other hand, the Governor  
14 has some evidence, but it's really just anecdotal evidence  
15 and that's not really good enough. I reject both of those  
16 categorizations completely.

17 Dr. Tilson, and most particularly in paragraphs 36  
18 and 37 of her declaration --

19 THE COURT: Hold on just a second. Hold on just a  
20 second.

21 MR. WOOD: Yes, sir.

22 THE COURT: Got it right here. Which paragraph,  
23 sir?

24 MR. WOOD: 36 and 37.

25 And let me explain the difference there, Your

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1 Honor. And I appreciate Your Honor said you haven't delved  
2 into those articles yet.

3 THE COURT: I have not.

4 MR. WOOD: And I'm sure you will. I know you're a  
5 careful reader.

6 We summarized them in the papers, and I will be  
7 glad to talk more about them right now.

8 THE COURT: Because I will tell you, I would -- I  
9 would benefit from somebody telling me what I'm supposed to  
10 be looking at.

11 MR. WOOD: Okay. So paragraph 36 collects a  
12 number of not just anecdotal, you know, picking facts out of  
13 a newspaper article. There are scientific studies. There  
14 are statistical analyses. There's a MIT professor named  
15 Harris who ran a regression analysis based on mobility data  
16 and infection rate data. There's a different analysis that  
17 the *Washington Post* did using a similar statistical method.

18 And what these comparisons in multiple empirical  
19 data points tell the public health team is the following:  
20 They're comparing bars to restaurants, and the data is very  
21 clear --

22 THE COURT: And this is -- this is where I want  
23 you to draw the distinction for me. I immediately jump to a  
24 distinction between bars in the traditional sense where it's  
25 a crowded establishment, college bars, college towns, where

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1 people go and they stand up and they walk from table to  
2 table and they hug each other and they talk and that whole  
3 social endeavor. I don't have any trouble at all  
4 understanding the distinction between that and a sit-down  
5 restaurant.

6           What I want to see is the evidence that says what  
7 I'm comparing is not bars in the generic sense, but a bar  
8 that is limited to a table configuration exactly as it is in  
9 a restaurant, subject to the same that you can't walk  
10 around, you have to be seated, you have to be wearing a mask  
11 when you're standing up, you can't go to the bathroom and  
12 whatever, and you can't socially congregate, and you can't  
13 get together. It looks like a restaurant; the only  
14 difference is there's no food on the table.

15           What I'm looking for, is there any study that's  
16 compared those two things?

17           MR. WOOD: Your Honor, the way you specify that,  
18 that pinpoint level of precision does not exist in the data  
19 that we're aware of, but the studies we have do support that  
20 conclusion. And those comparisons and contrasts that are  
21 being drawn between bars on the one hand, types of college  
22 bars and the collegial environment that you just explained,  
23 and restaurant on the other hand, has to recognize that the  
24 restaurant side of that analysis included restaurants that  
25 have bars in them.

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1 THE COURT: Yes.

2 MR. WOOD: And so when Professor Harris looked at  
3 a cluster of 68 bars -- I'm sorry -- a cluster of 20 bars in  
4 comparison --

5 THE COURT: It's something more than alcohol  
6 that's going on, right?

7 MR. WOOD: Yes, I think that's right, Your Honor.  
8 It's not just the alcohol. There is something inherently  
9 different in a bar setting than there is in a restaurant bar  
10 setting.

11 THE COURT: What -- what is it?

12 MR. WOOD: Well, all of these articles kind of  
13 hint at what it is. There's different human behaviors.  
14 That's probably the number one issue. There are also  
15 different physical attributes between --

16 THE COURT: Can you tell me whether any of these  
17 bars were other than what we're talking about in terms of  
18 where it's not spacing, it's the full social environment of  
19 a bar as we traditionally -- are all these -- I mean, you  
20 tell me that you've got more COVID by people who go  
21 barhopping in Baton Rouge than go eat in a restaurant. You  
22 don't even have to cite a study for me to understand that.

23 MR. WOOD: Okay, Your Honor. But we do have the  
24 science that shows bars are riskier than restaurant bars.  
25 That's the implication and the conclusion that the public

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1 health team that advises the Governor has reached from  
2 reading those articles and data that we have in paragraph  
3 36.

4 THE COURT: Has anyone at the State asked the  
5 question of whether a bar set up just like a restaurant,  
6 through the same restrictions as the restaurant, is more  
7 risky where the only difference is one has food and one has  
8 not? Has that question been asked?

9 MR. WOOD: In paragraph 37, Your Honor, they  
10 answer that within bars it is not possible to mitigate the  
11 risks in a way that it is possible to mitigate the risks  
12 within a restaurant. So your precise question I don't think  
13 there are empirical, double-blind studies precisely on that  
14 point. But we do know, and Dr. Tilson did collect in  
15 paragraph 37, two bits of data that suggest very strongly  
16 that hers, due to the nature of the bars, something inherent  
17 in a private bar that is not inherent in a restaurant bar,  
18 shows that even with Plexiglas and spacing and temperature  
19 checks --

20 THE COURT: It's not even --

21 MR. WOOD: -- still super-spreader events.

22 THE COURT: It's not even just bar and  
23 restaurants, whatever. We're down to the point where  
24 private bars is the only business in the State of North  
25 Carolina that's subject to these same restrictions. There's

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1 no other business subject to these restrictions.

2 MR. WOOD: And the answer to that, Your Honor, is  
3 these pieces of data, this empirical evidence, all of these  
4 opinions given by Dr. Fauci and other leading  
5 epidemiologists, uniformly conclude that bars themselves are  
6 monumentally logarithmically more dangerous than  
7 restaurants. So that's the distinction. The science of the  
8 Governor's team, through Dr. Tilson, has considered leads  
9 them to the inescapable conclusion that private bars are  
10 inherently riskier than any other setting. And so that's,  
11 to state it another way, the restaurant bar is safer than a  
12 private club or bar like Club 519. And that science drives  
13 the decision-making that the Governor has followed.

14 Governor Cooper has said from early on in this  
15 pandemic that he would be following the advice of his  
16 scientific and medical team. Dr. Tilson explains there's  
17 more than 40 people on that team, epidemiologists and  
18 scientists and doctors. They look at this data, and it  
19 alarms them more about bars than anywhere else.

20 THE COURT: And, again, I fundamentally accept  
21 that bars in the general sense that you and I would talk  
22 about them and think about in general, are fundamentally  
23 different than restaurants. I've got that and don't  
24 struggle with it.

25 I'm asking you, can you based on data and science,

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1 et cetera, if you input all of the restrictions, spacing,  
2 remain seated, no music, all those things, if you input all  
3 those safety mechanisms, what is there inherently different  
4 about a bar than a restaurant that justifies the  
5 distinction? I'm just -- don't keep telling me bars in  
6 general. I'm asking you can you tell me, can you isolate  
7 something about bars specifically? You say, well, it must  
8 be something because logarithmically they are different.  
9 But what's being compared is bars more in the traditional  
10 sense.

11           Can anybody give me -- and that may very well be.  
12 I mean, I haven't decided the case. I'm begging you, if you  
13 have got it, to give me the evidence that says I can show  
14 you empirically. I'm even asking you to tell me where in  
15 paragraph 36 and 37 Dr. Tilson says, I can input all those  
16 safety mechanisms and isolate for you why it's still  
17 logarithmically different. I didn't see her say that.  
18 Maybe she did. I didn't find it.

19           I'm really -- I'm not arguing with you as much as  
20 I am begging you to give me something to work with.

21           MR. WOOD: Two points, Your Honor. The type of  
22 pinpoint specific study that you're asking for where in a  
23 vacuum would take a perfect bar and set it up to match a  
24 perfect bar restaurant --

25           THE COURT: I didn't ask you for -- I didn't ask

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1 you for the pinpoint evidence. I asked you for the pinpoint  
2 opinion. You haven't given me that.

3 MR. WOOD: If I misunderstood, Your Honor, I  
4 apologize. The data in paragraph 36 makes perfectly clear  
5 that bars are riskier than almost every other venue,  
6 including restaurant bars.

7 Your Honor asked about how do we know that private  
8 bars -- what makes private bars inherently more risky, and  
9 it comes back to a question that Your Honor asked the  
10 plaintiffs' counsel. Human behavior within bar environments  
11 is a major factor here. How can Your Honor -- how could  
12 Your Honor craft an injunction and put into place certain  
13 restrictions and be sure that they would be followed?

14 That's precisely the same concern that the public  
15 health team had when it knows that bars are risky, riskier  
16 than everything else, and within bars human behavior, the  
17 inevitable gathering effect, the idea that you go to a bar  
18 to drink alcohol and socialize, which is going to mean  
19 lingering and mingling and talking, maybe talking too loud,  
20 maybe talking too closely --

21 THE COURT: The whole thing --

22 MR. WOOD: -- inherit -- I'm sorry, sir.

23 THE COURT: -- the whole thing about jumping from  
24 table to table, mingling and all that sort of stuff, that's  
25 what's being taken away.



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1           Again, what I really would like to do is I would  
2 really like to know if Dr. Tilson were here, and ask Dr.  
3 Tilson I want you to set up where a bar is sitting here.  
4 The only difference between a bar and a restaurant is one  
5 serving food and one is not. Otherwise, the layout, the  
6 environment, the operational guidelines are exactly the  
7 same. You can't have mingling. You can't have free  
8 socialization.

9           What is there in the bar setting that makes it  
10 more dangerous? What would she say?

11           MR. WOOD: I think I said already, Your Honor, the  
12 human behavior within a bar setting seems to be a major  
13 factor. There are physical characteristics, right? The  
14 typical bar would likely to be smaller or darker or fewer  
15 windows than a typical restaurant, which may be larger. I  
16 mean, there are physical attributes that one could compare,  
17 but the human characteristics within the bar environment,  
18 those human behaviors, the inevitable gathering effect.

19           Your Honor acknowledged earlier that you can't  
20 control human behavior. And if your team scores a goal on  
21 the television in a bar and you excitedly are happy about  
22 that, right? There's no bar, despite COVID-19 saying we are  
23 going to do everything we can to enforce these capacity and  
24 sanitation rules and do everything safely. I'm sure that's  
25 well-intentioned. But human behavior doesn't kowtow to

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1 etiquette all the time. And there's something different  
2 about a private bar, according to this empirical data, than  
3 there is to a restaurant bar. That's the distinction that  
4 concern the public health team, and that's the data that  
5 backs that.

6           Thirty-six of Tilson's declaration lists all that  
7 data, and 37 lists the two karaoke bars, even with  
8 restrictive protective measures in place in those bars,  
9 there was a resulting super-spreader event.

10           There's a third data point in that Wall Street  
11 Journal article that we included, which I think is Exhibit  
12 9. And that one said a bar in East Lansing, Michigan, that  
13 was putting into place 45 percent capacity restrictions to  
14 be safe resulted in 158 infections traced to that exact bar  
15 which did have in place capacity restrictions.

16           So, again, Your Honor it's got to come back to  
17 there's something different in the private bars, and it's  
18 the human behavioral effect. That's what the Governor's  
19 team is concerned by. The Governor can't just assume full  
20 compliance, hundred percent compliance. We know from seeing  
21 students dancing in the streets after games that just  
22 doesn't happen. That has to be factored in as part of the  
23 Governor's "dimmer switch" analysis, which takes into  
24 account all of these risks that we are talking about.

25           It's not true, as plaintiffs seem to read it, that

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1 the science says every single indoor bar setting carries  
2 identical risks and, therefore, plaintiffs say every one of  
3 those individual settings need to be treated identically,  
4 otherwise, we have an equal protection problem.

5           The data and the science from Dr. Tilson and our  
6 team, who are advising the Governor, very much reach the  
7 opposite conclusion and very much show that private bars are  
8 riskier, as one doctor said, logarithmically riskier. As  
9 Dr. Fauci said, We should be closing the bars and opening  
10 the schools. These are the public health experts that are  
11 telling us what we should be concerned about.

12           And it's not just anecdotal and it's not just, you  
13 know, the best available empirical data. And I acknowledge,  
14 Your Honor, the studies aren't perfect. In the world of  
15 public health, they can't be. Public health officials have  
16 to rely upon what they have available. And in the middle of  
17 a fast-moving, deadly pandemic where we have had  
18 10,000 deaths in North Carolina, and the *Washington Post*  
19 reported we had one death every 28 seconds in America during  
20 the month of January, we don't have time to wait for better  
21 studies so that we can double-blind and do that kind of  
22 pinpoint accurate study. That would be great. We just  
23 don't have that luxury.

24           So based on that data --

25           THE COURT: So you'll know where I am, Mr. Wood,

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1 is, you know, the Court is put in a difficult position.  
2 I'll assure you I've tried to make clear that I don't want  
3 to accept the invitation to be an activist and say, oh, I  
4 think I will tell you what the policy ought to be. That  
5 certainly is not my role.

6           If I were to issue an injunction without a  
7 confidence that it could be done safely, that's not  
8 something I get excited about. If you get down to the point  
9 of where I read the *Cheek* case, which took very different  
10 lines of business, well, comparing a brewery and comparing a  
11 meadery, and comparing others, you know, very different  
12 lines of business all engaged in massage, and Justice Sharp  
13 said we treat them all the same.

14           As you know, when you get as many people saying  
15 that COVID is a bad actor but I'm being put out of business  
16 as well, I mean, the Court does reach a point where it does  
17 have to be sympathetic, as I believe the Governor is  
18 sympathetic.

19           And so at this point in time, as you look at what  
20 the general public good is, I don't think that I ought to be  
21 the single arbitrator of what's good or bad. And so at this  
22 point in time where I have got the choice, is to deny the  
23 injunction. And at that point in time, we go to a  
24 three-judge court and say, okay, do we want to just throw  
25 out the Emergency Management Act altogether and every single

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1 one of the orders, or do I issue an injunction saying at  
2 this point in time it's at the margin without studies and  
3 have the Supreme Court say that's enough, then the people  
4 that are really high-level people look at the justification,  
5 look at all this. I don't want the responsibility  
6 individually to say who's right or wrong. I can go in all  
7 these directions. That's the distinction I drew between the  
8 original bar and the bowling alley and the Governor's case.

9           And so, you know, frankly, you know, I'm -- I'm  
10 not able to sit on a panel that determines the  
11 constitutionality of the Emergency Management Act. I have  
12 got my own personal opinion as to whether that Act is  
13 constitutional or not. I have been applying the Emergency  
14 Management Act since I very first began working on these  
15 cases. But I would say what a mess the State would be faced  
16 with if that -- if that Emergency Management Act was thrown  
17 out as unconstitutional.

18           MR. WOOD: Your Honor's concern about how you  
19 could enter an order and be sure -- or know one way or the  
20 other whether it will be followed, I would say is precisely  
21 the consideration that the public health team had here.  
22 Knowing what human behavior is, knowing that bars are  
23 riskier than anywhere else, and knowing that some people are  
24 never going to follow any rules of etiquette, let alone  
25 pandemic rules of etiquette, that drives and did drive the

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1 Governor's decision-making as to why private bars are  
2 uniquely dangerous and need to be treated differently.

3           To Your Honor's point about should this Court be  
4 intervening, again, it's the, you know, what we would  
5 maintain is the *Poor Richard's* rational basis test, and I do  
6 acknowledge Your Honor has the reasonable relation test.  
7 When there is data and science behind the Governor's  
8 decision-making, as I have shown that there is here, it's  
9 not capricious, it's not arbitrary by definition. It's  
10 based on science and data. It's based on the experience of  
11 other unfortunate states that opened their bars earlier than  
12 they should have, but they didn't know that at the time so  
13 they ended up with spiked infection rates and alarming  
14 conditions requiring Texas Governor Abbott, Arizona  
15 Governor, Iowa's Governor to shut things down again  
16 completely after improperly reopening them.

17           That decision-making is the Governor's  
18 responsibility. That "dimmer switch" kind of analysis  
19 between how can we be safe and protect lives while at the  
20 same time doing everything we can to keep our economy  
21 running is the type of "dimmer switch" analysis that this  
22 Governor and his team have been delegated to undertake.

23           And that's what --

24           THE COURT: Lastly, and I'm pushing you beyond the  
25 record, and you may say, Judge, I don't think it's

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1 appropriate question, but just curious.

2           Has the health team looked at what data they would  
3 have to have before them to feel as if the "dimmer switch"  
4 is such that they could allow bars to reopen as well under  
5 restriction?

6           MR. WOOD: It's an excellent question, Your Honor,  
7 and I don't know the answer. I'm certain they don't have in  
8 mind, you know, if we reach 4.7 percent daily infection  
9 rates, then bingo, we would be able to do a certain amount  
10 of reopening.

11           It's -- the "dimmer switch" inherently involves a  
12 lot of cost-benefit weighing. The health and the health  
13 risks are certainly part of that, but as we have explained,  
14 there's also considerations like is it a retail outlet and  
15 do we want retail to go? Is it a manufacturer where we're  
16 selling on site?

17           THE COURT: And that's -- there's no way --  
18 there's no way that the Court could be the one to come in to  
19 say, you know, we really are down at that margin. Because,  
20 again, I accept, and I easily accept, frankly -- I know that  
21 some of Ms. Thompson's clients would disagree with it -- but  
22 I do accept that bars in the general sense. I just don't  
23 have any problem understanding that barhopping in Baton  
24 Rouge is going -- or going to a bar half full but in the  
25 traditional sense of mingling and doing all that sort of

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1 stuff, you are going to run into problems. I'm persuaded.

2 We're really down at that margin of where it  
3 really is where every element of the business setting is  
4 exactly the same, except one's a bar and one's a restaurant  
5 as to whether the patronage and the human behavior. If it  
6 really gets down to where that is the only distinction and  
7 we don't have the studies, gosh, I suppose I can't ask the  
8 bar association, tell you what, why don't you give me 20  
9 guinea pigs and we will let 20 of you open up and we will  
10 study you and -- and create that. I sure wish that I had  
11 that data because it would make my job easier. Make your  
12 job easier.

13 MR. WOOD: And what Your Honor is struggling with  
14 mirrors exactly what the public health team is struggling  
15 with. They are making their best guess --

16 THE COURT: I don't want to take the risk of  
17 having ten deaths to prove which one of you is right and  
18 which one of you is wrong.

19 MR. WOOD: Right.

20 THE COURT: But, I mean, for me to say that I'm  
21 not sympathetic at all to Ms. Thompson's client who bear the  
22 economic brunt of this, and many situated like her, I feel  
23 that pain.

24 I'm fortunate. My job and situation is my job has  
25 gone right along. I've not suffered economic consequences



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1 as a result of this. I have suffered tremendous personal  
2 inconvenience. I'm lucky. I'm old enough that I've had  
3 both doses of the vaccine. I mean, I'm a lucky guy.

4 But, gosh, you know, I could certainly understand  
5 having to take all those inconveniences that I have and add  
6 to it I don't know whether my business is going to survive,  
7 and what I -- my whole life and livelihood is no longer  
8 there. I understand. I really do.

9 MR. WOOD: It is incredibly tough and this  
10 pandemic has had an incredibly big impact all across the  
11 globe, Your Honor. It is very difficult questions.

12 On the equal protection point, Your Honor,  
13 plaintiff's counsel opened by saying it's a question of  
14 fairness, that she says our bar is being singled out and  
15 it's not fair. With due respect, Your Honor, fairness is  
16 not the judicial standard, and that's not the test that Your  
17 Honor is being asked to apply here.

18 Under the equal protection, numerous cases have  
19 said need to be able to draw lines. And yes, whenever you  
20 draw a line, you are always going to have close calls and  
21 similarly-situated folks that fall on both sides, on either  
22 side of the line, and that's going to seem inequitable at  
23 times. But it is not a constitutional offense to draw a  
24 line where there's a basis that justifies it. So the  
25 rational basis test, the reasonable relation test --

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1           THE COURT:  And what you're telling me now is the  
2 basis for that distinction is there's just something  
3 inherently different in human nature about bars that the  
4 Court needs to say -- to which it defers?

5           MR. WOOD:  That's part of it, yes, Your Honor.  
6 The other part is the empirical data and studies that we  
7 have in Tilson 36 and 37.

8           THE COURT:  Which you say that justify a statement  
9 that there's something different empirically about human  
10 nature, even though I don't have two guinea pigs in cages  
11 next to each other just alike?

12          MR. WOOD:  Right.

13          THE COURT:  Is that there's still -- I've got to  
14 -- you're asking me I have got to defer to medical judgment  
15 as opposed to empirical proof?  That's where I am.

16          MR. WOOD:  And on that point, Your Honor, the  
17 studies are clear that bars are more risky than restaurant  
18 bars.  And then many of those experts are, like, Well, why  
19 would that be?  What is the real difference?  How can we  
20 drill down to find out what that secret sauce is within the  
21 private bars that make them uniquely risky?  And that's a  
22 much harder data question, question to answer, I think, and  
23 I don't know that we have hard answers as to the why.  There  
24 is speculation about human behavior, physical  
25 characteristics, gathering effect, all that's there and all

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1 that's in the Tilson attachments, Your Honor.

2 But, again, that's -- you know, the human behavior  
3 thing is a harder thing to quantify. What's real Dr. Tilson  
4 talks about it, Dr. Fauci talks about it, but -- and the  
5 public health team takes that seriously. If the public is  
6 not going to fully comply, we need to take that into  
7 account.

8 THE COURT: All right. Why don't you -- you know,  
9 I think we have got to the point of where our points of  
10 agreement/disagreement have come out. Why don't you address  
11 the arguments that Ms. Thompson's put forward on the  
12 separation of powers.

13 MR. WOOD: Okay, Your Honor.

14 Again, the State -- the Governor does not believe  
15 the plaintiffs can sustain. It's their burden of proof to  
16 prove likelihood of success for this extraordinary remedy  
17 they want. We don't believe they have and can do that.

18 I will say that -- so the points that are reserved  
19 are a non-delegation claim, and it's not being presented  
20 today. It wasn't briefed. That's going to go to a  
21 three-judge panel.

22 THE COURT: And in order just to frame your  
23 discussion, I do believe honestly that -- that a difference  
24 between the two of you boils down to this: Is you believe  
25 that the distinction that's being made is a health and

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1 public safety policy determination that's being made and  
2 judgment being deferred to, and the plaintiffs' argument is  
3 that it's simply an economic legislative policy choice that  
4 you're making.

5 MR. WOOD: I agree with that framing, yes, Your  
6 Honor.

7 And so on the separation of powers claim, the  
8 non-delegation aspect, which is not before Your Honor today,  
9 I think gets very, very close into what is being talked  
10 about in front of Your Honor today, which is what does the  
11 face of the Emergency Management Act say how much was  
12 delegated to the Governor and are there applicable  
13 standards.

14 That case that we cited, the *Philip Morris, Morris*  
15 *v. Tolson* case, said that to resolve this kind of separation  
16 of powers argument, question one is what is the scope of the  
17 delegation and was that proper? And so it's very hard to  
18 get beyond that as a facial challenge. And so as we noted  
19 in our brief, Your Honor, I'm not certain that, you know,  
20 intellectually Your Honor can or should reach that point for  
21 purposes of today's preliminary injunction.

22 If Your Honor does get there, then we need to  
23 examine the Emergency Management Act and see whether it has  
24 any sort of applicable standards that guide or cabin the  
25 authority that the General Assembly has delegated to the

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1 Governor.

2           As we put into our brief, and as I don't intend to  
3 spend a lot of time on now, Your Honor, there are numerous  
4 instances within the Emergency Management Act that provide  
5 the types of standards that cabin the Governor's authority.  
6 And if we look at the purpose of the Act, which is to  
7 protect health and public safety during an emergency  
8 condition, that calls for a deliberately broad set of  
9 standards so that you give flexibility to the on-ground  
10 emergency people who are handling that emergency.

11           THE COURT: Let me -- let me -- this is a question  
12 that I would like guidance from both sides.

13           If I were to decide that the law requires me to  
14 accept the State's argument that this is a health and public  
15 policy judgment issue on which the State has adequately come  
16 forward with the demonstration that it is rationally related  
17 to the Governor's focus so that the plaintiff is not  
18 entitled to an injunction because she's not likely to  
19 succeed on the merits of her claim, that's not a final  
20 judgment. That's a denial of a preliminary injunction.

21           What I don't want to do is to put Ms. Thompson's  
22 client in the kind of a deep freeze where she can't even get  
23 a court to look at it. So what do I do? Do I need to make  
24 a -- how do I -- if I don't grant the injunction, is it  
25 ready to go to the three-judge panel because the three-judge

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1 panel only looks at it when I resolve every issue short of  
2 that, or do I have to say not only is she not entitled to a  
3 preliminary injunction, but I rule as a matter of law that  
4 the Governor's act must be upheld so it's a final judgment  
5 in that regard? How does it get to the three-judge court if  
6 I don't grant an injunction?

7 I really don't think that Ms. Thompson's client  
8 needs to deserve to sit in purgatory where she can't get  
9 anybody else to look at her case. If I grant the  
10 injunction, then y'all can go to the Supreme Court and get  
11 what you need. Tell me where I am.

12 MR. WOOD: I think there are options here, Your  
13 Honor. One that occurs to me is that the plaintiff could  
14 dismiss their facial claim and the injunction could be  
15 denied and then there would be the right to appeal because  
16 it wouldn't have the three-judge panel process to happen  
17 first.

18 THE COURT: That is, that the grant or denial of  
19 an injunction is a -- is a substantial right entitled to  
20 being appealed?

21 MR. WOOD: That would be the argument, I think,  
22 Your Honor, right.

23 THE COURT: I certainly, if I go that route, would  
24 be prepared to certify it under Rule 54.

25 We're dealing with something that the clerk for

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1 Chief Justice Martin who may be our expert on appellate  
2 procedure here.

3 MR. WOOD: Okay. And returning to the rest of the  
4 separations of power argument, Your Honor, it's absolutely  
5 true that the Emergency Management Act as written does not  
6 include any sort of time limitation. Plaintiffs seem to  
7 suggest that it should fade over time and that the  
8 Governor's powers should recede the more number of days or  
9 months go by, and it's just not written that way. There's  
10 no support in the --

11 THE COURT: The argument has been made to me that  
12 the mere word "emergency" has implicit in it a temporal  
13 power. I do wish that America was not facing an emergency  
14 situation for a pandemic. I do wish that.

15 MR. WOOD: We all wish it, Your Honor.  
16 Unfortunately, it's still an emergency in the eyes of the  
17 federal government. It's still an emergency in the eyes of  
18 North Carolina, the World Health Organization, the Center  
19 for Diseases Control, right? It's still an emergency.

20 The numbers today are slightly trending downward,  
21 we hope, we think, but that doesn't mean we are out of the  
22 woods, and we know that we have had downward trends that  
23 quickly rebounded to upward trends again. So the conditions  
24 on the ground are not relenting and this emergency is far  
25 from over.

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1           The conflict to that, Your Honor, would be so  
2 plaintiffs are saying the more time goes by, the less  
3 deferential that courts should be to the Governor or no  
4 deference due to the Governor because of the passage of  
5 time. You could really flip that around and say the  
6 Governor and his public health team --

7           THE COURT: It's more than the passage of time.  
8 It is time that is accompanied by economic consequence to  
9 her client that becomes devastating. The more devastating  
10 economic consequence, the greater the justification needs to  
11 be to justify it. I think that's the argument.

12           MR. WOOD: I understand that to be the argument,  
13 Your Honor. And what I was just trying to say is the public  
14 health team as time goes by has become more sophisticated  
15 and more knowledgeable, and we have more data with which to  
16 base decision-making that the Governor's executive orders  
17 reflect.

18           So, for example, as time has gone by, the Governor  
19 has done everything he's able within the "dimmer switch"  
20 safety concept to reopen parts of the economy that were  
21 previously needing to be closed.

22           When the Governor's order in Phase 3, I think it  
23 was, allowed bars to be opened outdoors, it allowed bars to  
24 sell to go, that was in light of more information learned  
25 over time. And so the Governor's team can be more pinpoint



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1 specific and do more as time goes by to tailor any  
2 restrictions to the least minimum and invasive standards  
3 that still also protect public health. That's all part of  
4 the "dimmer switch" concept.

5           So there's no case law support, there's no EMA  
6 support for this concept that the Governor's powers must  
7 stand back over time. And the point that the general --

8           THE COURT: You say there's no North Carolina  
9 authority. There is authority outside the State of North  
10 Carolina.

11           MR. WOOD: There's no North Carolina authority and  
12 there's nothing in the Emergency Management Act to support  
13 it.

14           THE COURT: But the Supreme Court of Michigan has  
15 gone a different way on that.

16           MR. WOOD: Right.

17           Okay. And my final point on that, Your Honor, is  
18 they try to make a kind of a bizarre argument that the  
19 Governor's veto power is thwarting the constitutional reach  
20 of the General Assembly. The General Assembly to this  
21 moment retains its power, and with enough votes it can  
22 change the Emergency Management Act. That has not changed.  
23 That remains true.

24           So it's not a separation of powers situation here.  
25 It's not a valid claim in that regard. And there's no

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1 likelihood of success on the merits of that kind of claim.

2 Last, very briefly, Your Honor, I will just  
3 mention plaintiffs' first claim, which is the theory that  
4 the Governor is violating 19.74, the anti-discrimination  
5 language in the Emergency Management Act.

6 As we briefed, Your Honor, we just think it's a --  
7 a non applicable clause and Your Honor can interpret it as a  
8 matter of law. We can look to see that those attributes --

9 THE COURT: I have already indicated I do not  
10 believe the second sentence of Section 19.74 is implicated.

11 MR. WOOD: Right.

12 THE COURT: But that does not mean that the first  
13 sentence of 19.74.

14 MR. WOOD: Okay. And so that's the equitable and  
15 impartial manner sentence, Your Honor.

16 Your Honor, the point is the same as under the  
17 protection analysis.

18 THE COURT: But to say that -- let me make you a  
19 corollary. To say that I don't think the second sentence of  
20 19.74 is not applicable does not mean that that means I  
21 believe the economic distinction that you can justify that  
22 treating bars differently based on an economic  
23 justification. On the merits, I remain somewhat  
24 skeptical -- skeptical of using relevant economic  
25 contributions and strengthen the state of North Carolina's

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1 economy as justification of closing one and keeping another  
2 open. That has not been a particularly persuasive argument  
3 to me from the beginning and it isn't any longer.

4 MR. WOOD: And you have been consistent in that,  
5 Your Honor.

6 Under the "dimmer switch" approach, right, as I  
7 have said a couple times now, the Governor's team takes in  
8 all the costs and all the benefits and all the risks that  
9 they can consider and makes a determination in the interest  
10 of safety and the interest of the economy.

11 THE COURT: Yeah, let me say it differently, Mr.  
12 Wood. If I felt as if there was not something inherently  
13 different about bars compared to restaurants, if I didn't --  
14 if I thought they were exactly the same, would I -- would I  
15 allow a distinction between the two of them, one stay  
16 closed, one open, because one had greater economic  
17 contribution than the other one? I would not go there.

18 It is the inherent difference from a health  
19 standpoint that drives the Court's analysis, not the  
20 relevant economic contribution. So I'm not -- I'm not --  
21 I'm just saying, it doesn't -- it doesn't really influence  
22 my decision-making one way or the other.

23 MR. WOOD: I hear what you're saying, Your Honor,  
24 and you have been consistent in that position. But if the  
25 Governor's team considered multiple factors as part of its

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1 "dimmer switch" analysis, including public health, including  
2 retail, manufacturing, including economic factors, all of  
3 that goes into what they'd thought about. If Your Honor is  
4 going to just reject that out of hand, then you're in effect  
5 substituting the judicial judgment for the judgment of the  
6 Governor's team. And the case law says that's a very  
7 dangerous area and where there's a rational basis or a  
8 reasonable relationship and scientific evidence behind it,  
9 then that's not anywhere for the judiciary to intrude into.

10 So, Your Honor, as we've said, to take this --

11 THE COURT: Let me say -- let me say it to you a  
12 different way, Mr. Wood.

13 MR. WOOD: Uh-huh.

14 THE COURT: Is that if we were down to the point  
15 where the only thing I had to decide whether to grant the  
16 injunction or not was relative economic strength, I would  
17 not grant or deny a decision to issue an injunction on that  
18 basis. I am not saying that economic considerations cannot  
19 be part of the mix that the -- that the Governor's team  
20 looks at. I'm simply saying that if you get down to the  
21 point where the only distinction between the two is economic  
22 justification and you're asking me to deny an injunction on  
23 that basis, I wouldn't do it.

24 MR. WOOD: Your Honor, if you didn't  
25 credit scientific evidence --

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1           THE COURT: But that's not where we are. We are  
2 talking about a hypothetical that's not on the table.

3           MR. WOOD: I know. I'm trying to repeat it back.  
4           If the public health considerations were  
5 completely missing from this case, Your Honor, and the only  
6 issue were economics, I still think plaintiffs have a major  
7 problem in that they have picked one measure of economic  
8 comparison, but that -- but what's the standard? On what  
9 basis are we going to compare economics? There are multiple  
10 ways you can look at a brewery's economics compared to a  
11 private bar's economics and read them. And the statute  
12 doesn't say what that comparison point would be. Economists  
13 could probably come up with a dozen different ways in which  
14 that comparison could happen.

15           THE COURT: Let me -- let me say it to you yet a  
16 different way, then. If the only distinction between these  
17 two was economic distinction, I don't believe we would be  
18 dealing with an emergency situation.

19           MR. WOOD: I think that's right, Your Honor. It  
20 wouldn't be an emergency situation. It's the public health  
21 crisis that's driving here and the lines the Governor has  
22 drawn.

23           THE COURT: Yes, sir. And I am sensitive to that.

24           MR. WOOD: Okay.

25           So then we just stand on our brief on the rest of

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1 that argument pertaining to the nondiscrimination clause,  
2 Your Honor. I think the briefs ventilate the issue  
3 properly.

4 THE COURT: Okay.

5 MR. WOOD: And I'll rest there, Your Honor. I  
6 think the briefs and the argument points today so far have  
7 covered what I intended to cover.

8 THE COURT: Ms. Thompson?

9 MS. THOMPSON: Thank you, Your Honor. I'd just  
10 like to briefly respond to a couple of different points from  
11 the discussion between you and Mr. Wood.

12 The distinctions that are drawn in paragraph 36  
13 and 37, I just want to be clear that we are talking about  
14 bars, as bars how you said the traditional sense of what we  
15 think of bars. That's the evidence that's been presented  
16 here. It is not -- I just want to be clear that it is not  
17 any specific evidence about private bars, which I might add,  
18 in private bars in North Carolina, they very greatly.  
19 There's not a one general characterization that you can  
20 paint for private bars that's true across North Carolina.  
21 As a North Carolinian, I have been to many private bars and  
22 they are not the same in different towns and cities.

23 Another thing I might add is that for many bar  
24 goers, they don't know what type of ABC permit that the bar  
25 that they are going to holds. And so we might go to Natty

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1 Greene's and grab a beer and not know that that's also a  
2 brewery rather than just a bar or just a restaurant.

3           Many college bars are restaurants, but the people  
4 going to them are going to them as a bar. And in our brief,  
5 in our opening brief as well as in our reply brief, we cite  
6 to news evidence or news reports that evidence this fact.  
7 Specifically here in North Carolina, there was an instance  
8 where a sushi restaurant was acting as a bar and,  
9 unfortunately, there's many people getting up and dancing,  
10 going through tables and that sort of thing, things that are  
11 clearly against the safety protocols.

12           Restaurants are having a substitute effect because  
13 private bars are closed. And just like enforcement is  
14 important for the private bars ensuring that they follow the  
15 safety precautions the Governor has set out, it's important  
16 that those are applied to restaurants as well.

17           So this inevitable gathering effect that the  
18 Governor speaks of, which I believe is from some articles  
19 earlier on in the pandemic before we began to live with this  
20 virus, unfortunately, for almost a year now.

21           I might also add that the whole point of the  
22 restrictions under the Governor's emergency orders is to  
23 change human behavior so that we can safely interact and  
24 continue business to some increment and to change that human  
25 behavior so we can be safe, or safer at least, and to

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1 minimize the risk from COVID-19.

2           And so that's what Club 519 and private bars are  
3 asking, is just for that same opportunity to adapt and  
4 respond and put in health and safety precautions that are  
5 keeping North Carolinians safe at bars inside of wineries,  
6 breweries, distilleries, brewpubs. I could go on.

7           And so -- let's see. There are a couple more  
8 points, if Your Honor would just indulge me for a second.

9           The distinction has been drawn by opposing counsel  
10 between bars and restaurants, but, again, that inevitable  
11 human gathering effect, if you were able to go into the bar  
12 and order a drink without ordering food, that inevitable  
13 gathering effect could apply just as reasonably to a  
14 restaurant as a bar. And I might note that the Governor has  
15 not instituted any regulations to address that effect.

16           So, for instance, Governor Cuomo in New York had a  
17 requirement that if you were going into a restaurant, you  
18 must order food. So there's a minimum amount of food that  
19 you must order if you are going to consume alcohol. There's  
20 no such restriction here. And I think that highlights the  
21 arbitrary treatment of private bars, that I can go into a  
22 Buffalo Wild Wings in North Carolina and watch the UNC-Duke  
23 game and enjoy alcoholic beverages inside at 50 percent  
24 capacity with my friends and there's no problem there, but,  
25 again, private bars are not able to open indoors at all.



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1           And while we're on this point, I might also add  
2 that the capacity restriction that opposing counsel  
3 mentioned, for one, that wasn't instituted until October.  
4 So when all the other breweries in the state were allowed to  
5 open in the beginning of June, private bars sat closed,  
6 completely closed, until the beginning of October when right  
7 around the time North Carolina starts getting cold. So that  
8 distinction is still unequal treatment.

9           And even when private bars were allowed to open,  
10 the reason I say that Club 519 has been prohibited from  
11 opening is, unfortunately, we do not have outdoor space at  
12 Club 519. And even under the extremely strict restrictions  
13 for outdoor spacing, it is disparate treatment as well. So  
14 a brewery can have 50 percent outdoor capacity, but a  
15 private bar is only allowed 30 percent outdoor capacity.  
16 And another equation where it's seven customers per a  
17 thousand feet, that would require a basketball-court size  
18 outdoor space to just serve seven customers.

19           So these changes to the complete and total  
20 shutdown of private bars that the Governor has instituted,  
21 while they may be coming from a good place, are not actually  
22 helping private bars who have immense costs, such as paying  
23 for permit upkeep and insurance. If they are only allowed  
24 to serve one to-go cocktail or serve seven people in an  
25 outdoor space the size of a basketball court, it's just not

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1 financially feasible. But we're not even in that situation  
2 because we do not have an outdoor space.

3           And I might also add that there's reason to have  
4 concern that the Governor's orders suspending laws that  
5 allow -- or that prohibit the sale of to-go cocktails has  
6 been called into question by the Sheriff's Association. So  
7 it's understandable that the private bar doesn't feel  
8 comfortable selling to-go cocktails.

9           I just -- I think I should just reiterate again  
10 here that all the evidence presented is applying to bars  
11 equally -- oh, this was a big one.

12           That the governors that have reopened too soon  
13 regretted it and closed. Well, as we mention in our reply  
14 brief, many of these governors have once again reopened  
15 bars. And, again, whenever they did close, they did not  
16 distinguish between certain types of bars. They  
17 distinguished that all bars that sell alcohol are closed and  
18 now we need -- now we can start to reopen them, and they  
19 went back and forth. But, again, Club 519 and private bars  
20 have been shuttered this entire time. So the constitutional  
21 deprivation is much larger.

22           And I might add that I believe -- I want to be  
23 sure that I am accurate with the numbers here. So at the  
24 time of our reply brief, there were 14 states that had bars  
25 closed for indoor alcohol service. But Louisiana, now that

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1 Mardi Gras season is over, has allowed bars to resume  
2 alcohol service inside.

3           And so if the best public health data and --  
4 reflects that bars should be closed in North Carolina, there  
5 are 38 states and the District of Columbia that disagree  
6 with that evidence or have found health and safety  
7 precautions that they can institute that make bars safe.

8           And I also think that the inevitable gathering  
9 effect and the -- how effective the safety precautions are  
10 is evidenced by the fact that we have so many bars open  
11 across the State of North Carolina and we do not have news  
12 reports or as many news reports as the Governor has cited of  
13 places of outbreaks in North Carolina at these bars that  
14 have been allowed to open with the correct safety  
15 precautions.

16           And I might also note that on the equal protection  
17 argument, opposing counsel mentioned that there are close  
18 calls when drawing lines, and that's understandable. But *In*  
19 *Re Aston Park* says that whenever there's a prohibition from  
20 engaging in a business, courts require substantially greater  
21 likelihood of benefit to the public. And if bars are  
22 allowed to open throughout the state, just not private bars,  
23 I don't think that there's evidence that there is a  
24 likelihood of public benefit by just targeting this one  
25 select group of bars. And I think that that counsels

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1 towards another reason that there should be this deference  
2 granted to the Governor's position whenever he doesn't have  
3 evidence to support it.

4 I might also add that a request to -- for the  
5 courts to grant deference and not vindicate the rights, the  
6 constitutional rights, of individuals who's acting  
7 unilaterally, also raises separation of powers concerns.

8 And so we would just, respectfully, ask this Court  
9 to grant the injunction and allow private bars to open under  
10 the same health and safety precautions that other bars have  
11 kept North Carolinians safe. And we are happy to answer any  
12 additional questions.

13 THE COURT: I think I have asked my questions,  
14 with the one exception just because I, in all seriousness  
15 would ask. I don't know -- again, I'm going to take this  
16 under advisement and go back and read -- I always go back  
17 and read the material again after the argument for the  
18 points raised and go back through the affidavits and et  
19 cetera.

20 If I were to deny the injunction, what would be  
21 the best -- how would you proceed from there? In other  
22 words, if I were to do that, is that just something you have  
23 to accept, or do I have to rule -- because, I mean,  
24 technically all I have to do is to say that you do not --  
25 have shown a likelihood of success. It doesn't mean that

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1 it's a summary judgment. And that would not trigger or  
2 would it trigger -- if I deny the injunction, does that  
3 alone give you a right to appeal?

4 MS. THOMPSON: Because it affects a substantial  
5 right, I believe it would, sir.

6 THE COURT: But even though there are claims that  
7 have not been resolved? In other words, would the pendency  
8 of the three-judge claim keep you from getting an appellate  
9 review?

10 MS. THOMPSON: As it's an interlocutory order  
11 affecting a substantial right, I don't believe that it  
12 would.

13 THE COURT: Okay. So that seems to me that it's  
14 likely then -- so what you're saying is that you would have  
15 the choice as to whether to have an immediate appeal or go  
16 to the three-judge court. But I certainly know that if I  
17 grant the injunction, that the State will appeal. Okay.

18 Well, I have to tell you that this particular case  
19 at this stage of the pandemic, while the case is similar to  
20 that was before me that I dealt with the bar association  
21 case on the front end of the pandemic, this case is a more  
22 difficult one for me because it is, as the issue has become  
23 more narrow and the time has extended and the harm's been  
24 done, I'm not sure what the effect of it is. The law -- the  
25 law remains the same. Applying it is what's different.

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1           And so I want to commend both of you. You have  
2 done an extraordinarily good job of representing your  
3 client. And -- and both of you have drawn upon public  
4 interest. And I think you -- and I think you understand  
5 that how easy this job would be if I said, okay, I have got  
6 the power of the robe, my policy judgment is the one that  
7 counts, but that is not my view of the role of the judiciary  
8 in our system.

9           So I will take this under advisement and let you  
10 know what my ruling is. Whichever way I rule was not gotten  
11 to easily.

12           MS. THOMPSON: Thank you, Your Honor.

13           MR. WOOD: Thank you for your time, Your Honor.

14           THE COURT: Thank you.

15           Madam Court Reporter, it's been a long day for  
16 you, but I thank you very much.

17           Goodbye.

18           MR. WOOD: Thank you. Goodbye.

19                           (The WebEx hearing was adjourned at  
20                           4:17 p.m.)

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22

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## CERTIFICATE

1  
2  
3 I, Donna T. Chandler, RMR, CRR, the officer before  
4 whom the foregoing proceeding was taken, do hereby certify  
5 that the foregoing transcript taken at the February 18,  
6 2021, Session of Wake County Superior Court, consisting of  
7 pages 1 through 78 inclusive, is a true, correct, and  
8 verbatim transcript of said proceeding.

9 I further certify that I am neither counsel for,  
10 related to, nor employed by any of the parties to the action  
11 in which this proceeding was heard; and further, that I am  
12 not a relative or employee of any attorney or counsel  
13 employed by the parties thereto, and am not financially or  
14 otherwise interested in the outcome of the action, this the  
15 25th day of February, 2021.

16  
17  
18 

19 \_\_\_\_\_  
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