IN THE UNITED STATES DISTRICT COURT DISTRICT OF MARYLAND NORTHERN DIVISION

ANTIETAM BATTLEFIELD KOA, et al., Plaintiffs, v. LAWRENCE HOGAN, in his official capacity as Governor of Maryland, et al., Defendants.	Civil Action No. 1:20-cv-01130 Hon. Catherine Blake

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs, by and through counsel, set forth the following reasons for the denial of the Defendants' Motion to Dismiss for failure to state a claim, and, incorporating fully herewith as if set forth herein their Memorandum in support of a TRO previously filed (ECF 32), say respectfully:

BACKGROUND

Plaintiffs are Maryland and United States citizens who come before the Court for the purpose of saving lives, preventing the loss of their businesses, worshipping God with their churches as God requires, and pleading this case for protecting their natural and Constitutional rights for all Marylanders. The data is growing that to

keep the state locked-down under Executive Orders and delegated executive orders, people will continue to be irreparably harmed and will soon begin to die in greater numbers than the coronavirus has claimed, and indeed some have begun to already. (**Exhibit A**, attached and incorporated herewith, 600 Doctors Sign Letter Detailing Deaths/Risks By Cancer/ Suicide Rising). Since the filing of the Complaint in the instant matter, and even the drafting and filing of Defendants' memorandum in support of its motion to dismiss (ECF 26-1) on May 8, 2020, the evidence has continued to become overwhelming that it would be premature to dismiss this matter without discovery and a trial.

The issues presented are such that the case is a novel one, not "seen for a hundred years" and is considered to be matters in "extraordinary times" (Memorandum, ECF 40, Blake, J.).

On each claim presented, the evidence has continued to demonstrate significant support for the Plaintiffs' complaint.

Last Friday, the President of the United States has now overruled the Governors of the States which have continued to lock-down or delegate powers to lock-down the churches and houses of worship in the states. Presidential Announcement, White House, May 22, 2020 (available at: https://www.facebook.com/watch/live/?v=303782800626282&ref=watch_permalink , accessed May 22, 2020). If the Governors do not rescind their unconstitutional

orders and delegation of powers to keep churches shut down or limited in attendance – under threat of criminal sanction, such as those congregations of Plaintiff pastors, the President will take action against such Governors. *Id.*

Last Friday, the nation's premier medical advisor Dr. Anthony Fauci directly supported injunctive relief in cases such as ours when he announced that the State's Stay-at-Home Orders are causing more harm than good, both medically speaking and financially (with the requisite medical and mental health problems accompanying those issues). "Stay-at-home orders intended to curb the spread of the coronavirus could end up causing **"irreparable damage",** White House health advisor Dr. Anthony Fauci said. CNBC interview 5/22/2020 (available at: https://www.cnbc.com/2020/05/22/dr-anthony-fauci-says-staying-closed-for-too-long-could-cause-irreparable-damage.html , accessed May 22, 2020).

All 50 states have now taken initial steps in reopening, but several, including Maryland, are lagging behind the leaders in protecting all citizens including the most vulnerable, and now the most likely to be vulnerable in the coming economic and health care debacle the state lock-downs are poised to cause. NY Times article (available at: https://www.nytimes.com/2020/05/20/us/coronavirus-reopening-50-states.html accessed 5/22/2020). It is important to note that the last state to reopen in any manner was Connecticut, and the photograph with the NY Times shows they are already allowing restaurants to host out-door dining for patrons – something not

permitted today under the Governor's overreaching orders, which are severely damaging the Maryland restaurant industry and outdoor opportunities such as Adventure Park USA, LLC.

Last Friday, in Maryland, the Department of Labor released data showing that the unemployment is skyrocketing at near 10% with available known data, and equals 349,000 Marylanders sitting at home without work, many still under Stay-At-Home orders delegated by the Governor to the County Executives. Bryan Renbaum, Maryland's Labor Report: 349,300 Jobs Lost In April; Maryland Reporter, 5/22/2020 ("It's a reflection of the incredibly serious consequence of closing down the most successful and profitable economy in our lifetime," Frederick County Chamber of Commerce President and CEO Rick Weldon said.") (Available at: https://marylandreporter.com/2020/05/22/marylands-labor-report-349300-jobs-lost-in-april/ , accessed 5/22/2020). In some states, particularly the locked-down states like Maryland of Michigan, Nevada, and Hawaii and the unemployment rate has already exceeded 20%. (Available at: https://www.marketwatch.com/articles/coronavirus-news-updates-51590149870?fbclid=IwAR2bf_P7eEpTGVIuKQJg45Dso3Od-JZjbLu6d7I9eEEfGk_SwhvEKeRuQsM accessed 5/22/2020).

Additionally, the legal landscape has changed, with dozens of lawsuits all over the country being filed to rein in the overreach of many Governor's orders under the

state and federal constitutions, and statutory law. Democratic governors hit with flurry of legal challenges to coronavirus lockdowns

(Available at: https://www.politico.com/news/2020/05/17/democratic-governors-coronavirus-lockdown-legal-challenges-261428 accessed 5/22/2020).

The Department of Justice has now announced potential investigations into the State of California for unlawful discrimination against churches. Assistant Attorney General Eric Drieband, who heads the DOJ's Civil Rights Division, wrote a letter of warning to Governor Newsom stating his restrictions showed discrimination against religious communities. The letter also said the Governor had not given proper evidence for keeping California's churches shuttered. "California has not shown why interaction in offices and studios of the entertainment industry, and in-person operations to facilitate nonessential ecommerce, are included on the list as being allowed with social distancing where telework is not practical, while gatherings with social distancing of religious worship are forbidden, regardless of whether remote worship is practical or not." The letter also warned that under the U.S. Constitution and civil rights law, California must "mandate equal treatment of persons and activities of a secular and religious nature."

(Available at: https://www.newsweek.com/doj-accuses-california-governor-newsom-discriminating-against-religion-tells-state-reopen-1505294 accessed 5/22/2020).

Secretary of Health and Human Services Alex Azar has now announced it is a public health danger to continue the lock-down in place like we have in Maryland. He wrote just last week in his Op-Ed in the Washington Post, *We Have to Reopen, For Our Health*, the following:

> "The covid-19 response has also restricted access to health care. Data suggests the numbers of Americans receiving important preventive services are down significantly, with mammograms down 87 percent and colonoscopies down 90 percent. More than 1.7 million new cancer cases are diagnosed per year in the United States. If we're seeing an 80 percent drop in cancer cases identified, approximately, we could already have 200,000 or more undiagnosed cancer cases as a result. According to Medicare data, breast cancer surgeries are down approximately two-thirds since January. A Centers for Disease Control and Prevention report found that vaccine administrations were down approximately 60 percent from early January to mid-March; that puts millions of American infants and children at risk for serious illnesses. We have a strategy for how to move forward…[which] means we will continue making progress against the virus in the months to come. As we learn more about the virus, we are developing new ways to protect the vulnerable, including the elderly, and ensure Americans can seek needed health care. Your doctor, for instance, will have precautions in place to protect you if you have a young child who needs an in-person visit. Americans are rightly concerned about the risks of covid-19 — just as they're frustrated about their inability to return to normal life. It's because we care about Americans' health and well-being above all that we have to safely reopen our country. We cannot allow the virus to impose intolerable costs in terms of drug, suicide and alcohol deaths; forgone health care; and more lost jobs. Under the president's leadership, we can safely reopen our country, protecting every American's overall health and well-being today and in the years ahead.[1]

[1] Available at: https://www.washingtonpost.com/opinions/reopening-isnt-a-question-of-health-vs-economy-when-a-bad-economy-kills-too/2020/05/21/c126deb6-9b7d-11ea-ad09-8da7ec214672_story.html accessed 5/22/2020).

Over one month ago today, on April 22, 2020, Dr. Scott W. Atlas published a medical opinion article in The Hill entitled "The Data Is In, Stop the Panic and End the Total Isolation Now." In that document he argues "**Fact 1:** The overwhelming majority of people do not have any significant risk of dying from COVID-19. The recent Stanford University antibody study now estimates that the fatality rate if infected is likely 0.1 to 0.2 percent, a risk far lower than previous World Health Organization estimates that were 20 to 30 times higher and that motivated isolation policies." (Available at: https://thehill.com/opinion/healthcare/494034-the-data-are-in-stop-the-panic-and-end-the-total-isolation accessed 5/22/2020).

Accordingly, to save lives and protect the public health, the Defendants' motion to dismiss for failure to state a claim is premature and should be denied.

I. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires a complaint need only assert "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957); *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 550 U.S. 544 (2007).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.*, at 570, 127 S.Ct. 1955. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*, at 556, 127 S.Ct. 1955. "The plausibility standard is not akin to a "probability requirement," *Id.*, and requires facts, taken as true, which indicate not only liability but also 'entitlement to relief.' " *Id.*, at 557, 127 S.Ct. 1955 (brackets omitted). *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 173 L.Ed2d 868, 556 U.S. 662, 77 USLW 4387 (2009). Here, there is direct evidence, uncontroverted, that each Plaintiff has plead not only facts sufficient to demonstrate the liability of the Defendants as actors and aggressors, but also that the well-pleaded facts and declarations show that the Plaintiffs have both standing and right to obtain relief. *Id.* Neither are controverted and Defendants' bald assertion of disdaining the civil rights of Plaintiffs does nothing for them to ignore the law of right of court review of these "extraordinary" and ongoing acts of the Executive Orders against Plaintiffs' way of life as Americans.

Defendants assert, in contravention to FRCP 8(a)(2) that Plaintiffs complaint is subject, at the motion to dismiss stage, to extra-record considerations by the Court including "matters properly subject to judicial notice…". Defs. Mot. Pg. 6, ¶ 3. However, that would shift the burden improperly away from the rule that

the Court must accept as true well-pleaded allegations in the complaint, *Twombly* at 570, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), including the Declarations provided that show without contravention "direct and plausible allegations" such that the legal claims are able to be sustained. *Twombly* at 570.

The Governor avers that Plaintiffs claims should be dismissed because they do not "contain direct and plausible allegations respecting all material elements" under a "viable legal theory." Defs. Mot. D., pg. 7, ¶ 1. For the Court to agree with such a disdaining statement of Plaintiffs and their well-plead causes of action, it would have to ignore the uncontested declared facts that this Court itself has said stem from facts not "seen for a hundred years" and which are considered to be matters in "extraordinary times" (Memorandum, ECF 40, Blake, J.). We would add, while the Governor has not sworn in this Court anything that directly contradicts any of the declarations of plaintiffs, including failing to deny he sought to threaten arrest of or intimidate the Legislator and churches herein, he has had his agents declare opposing testimony such that discovery is necessary.

Any dismissal of Plaintiffs claims at this early point in the novel case at Bar, without any discovery yet obtained, would be impermissible and premature.

II. Plaintiffs Are On The Right Side of History and Law and Shall Prevail On The Merits.

Last Friday – four days ago, the President of the United States ended the Governor's impermissible and unconstitutional orders prohibiting churches from

being open. He ordered Governors to rescind their orders preventing worship, or he would take action against such Governors to overrule them. The debate is over. It is axiomatic that the Executive power of the presidency to protect federal rights exceeds that of the Governors which are alleged to be imposing upon those federal right, during any extraordinary times of emergency. *See generally, Ex Parte Vallandingham,* 68 U.S. 1 Wall. 243 243 (1863)(President of the United States had superseding power over State of Ohio and citizen thereof during civil war)*; Ex Parte Milligan*, 71 U.S. 2, 18 L.Ed. 281, 4 Wall. 2 (1866).

But in the case of any executive powers during emergencies, our Constitution prohibits overreaching by Executives, as explained by the Supreme Court:

> So sensitive were our Revolutionary fathers on this subject, although Boston was almost in a state of siege, when General Gage issued his proclamation of martial law, they spoke of it as an 'attempt to supersede the course of the common law, and instead thereof to publish and order the use of martial law.' The Virginia Assembly, also, denounced a similar measure on the part of Governor Dunmore 'as an assumed power, which the king himself cannot exercise; because it annuls the law of the land and introduces the most execrable of all systems, martial law.'

Ex parte Milligan, 71 U.S. 2, 128, 18 L.Ed. 281, 4 Wall. 2 (1866).

Governor Hogan has no authority under the Constitution or any statute to order all healthy Marylanders to remain at home under a lock-down, unable to leave except for reasons he deems necessary. Marylanders are right to oppose this tyranny, unheard of in American history. Not even the historical case the Court cites as its

primary authority to deny injunctive relief, *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), provides any support for such an outrageous and incredibly invasive seizure of liberty as a universal house arrest order of United States citizens, under penalty of criminal prosecution as this Court noted (Memorandum, ECF 40, pg 4, ¶ 3, Blake, J.), and as the Governor has executed and enforced via his State Troopers, which ultimately answer to him alone.

The Defendants' reliance upon *Jacobson* is misguided for the following reasons: *Jacobson* allowed for the quarantine of the suspected sick, who were on a long enclosed-space voyage with yellow fever, for only enough time to ascertain whether they were in fact sick – a period under medical science today which we know to be about four to five days and no more than fourteen days, maximum[2]. *Id.* at 29.

> "An American citizen arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever … he, although apparently free from disease himself, may yet, in **some circumstances**, be held in quarantine against his will on board of such vessel or in a quarantine station, **until it be ascertained by inspection, conducted with due diligence**, that the danger of the spread [by the passenger] of the disease among the community at large has disappeared.

Henning Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, 3 Ann.Cas. 765 (1905)(emphasis added).

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[2] **"The incubation period for COVID-19 is thought to extend to 14 days, with a median time of 4-5 days from exposure to symptoms onset."** CDC, Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19) (https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html#:~:text=The%20incubation%20period%20for%20COVID,CoV%2D2%20infection accessed on 5/26/2020).

Thus, the due diligence standard of law – even though from 115 year-old case law – mandates this Court release all Marylanders from stay-in-home arrest under penalty of the Governor's crime enforcement by the MSP and local officials – immediately. Marylanders, including Plaintiffs, have been locked in their homes, except for deemed "essential" activities such as grocery shopping and exercise, since March 30, 2020 under the Governor's illegal executive order "directing us to remain in our homes." There is nothing in *Jacobson* or the present Executive Orders that comes close to authorizing, more less warranting, a forcible lock-down of businesses deemed "non-essential" and the Governor's stay-in-home house arrest of each and every Maryland – now delegated primarily to counties and localities with high minority populations including Montgomery, Prince Georges, Baltimore City and Frederick City.

Additionally, cases are few that have cited *Jacobson*, but one of interest in the Fifth Circuit involved forcible vaccination and/or treatment of inmates without due process of law. *McCormick v. Stalder*, 105 F.3d 1059 (5th Cir. 1997). That case improperly "under-ruled" by reference the Supreme Court's decision in *Washington v. Harper*, 494 U.S. 210 (1990), where the Court upheld Fourteenth Amendment due process rights for prisoners whenever the state forces medical decisions on inmates, by then citing to *Jacobson* in support of its decision to dismiss the inmate's appeal which was based upon constitutional violations and forcible vaccination or treatment

while in custody. However, *Washington v. Harper*, made it clear that prisoners are afforded the same due process rights as all Americans in mandating a three-part constitutional test, while also expanding those rights to whatever the state law provides for protection of constitutional rights. Here in Maryland, our Constitution adds additional and stronger due process protection of rights than the federal constitution. Defendants cite *McCormick*, which purports to grant prison officials broad power to administer drugs to inmates against their will is inapplicable for two reasons. First, the healthy population of Maryland are not to be treated as prisoners. Second, it is wrongheaded and unconstitutional to allow the State to not provide due process to all its citizens, whether prisoners or residents. See also, *Turner v. Safley*, 482 U.S. 78, 89-90, 107 S.Ct. 2254, 2261-62, 96 L.Ed.2d 64 (1987) (identifying criteria that must be met if a prison regulation impinges on an inmate's constitutional rights).

The Governor's logic and the evidence presently before the Court fails to meet his burden that all healthy people must be required to submit to emergency Executive Orders because of a pandemic, allowing the Governor to mandate a state vaccine, isolation, quarantine or wearing of a mask, banning of large gatherings, banning of legislative speech and assembly beyond 10 people, threatening arrest of those who travel without papers showing them to be "essential", all supposedly "to prevent the spread of disease." *Washington v. Harper*, 494 U.S. 210, 227, 110 S.Ct. 1028, 1039-

40, 108 L.Ed.2d 178 (1990)(test and forcible measures by government for medical purposes require due process for prisoners, and by implication, all residents).

Even in times of emergency or averred medical necessity "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks and citation omitted). There, the Court held that the determination by this Court whether the procedures were constitutionally sufficient required analysis of the government and private interests involved. *Matthews*, 424 U.S. at 334. "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* The Court has found that "[i]t is well established that "a fair trial in a fair tribunal is a basic requirement of due process." *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) (internal quotation marks and citation omitted).

Here, there has yet to be any procedural safeguards permitted Plaintiffs and as such the constitutional claims of Plaintiffs must proceed to discovery and a trial, and will prevail on the merits.

a. The Executive Orders Are Neither Neutral Nor Laws of General Application Because They Target Churches For 7' Distancing, No Singing, No Sacraments and No Assemblies Greater Than 10 (now 250 in some counties), While No Such Requirements Exist for "Big Box" Stores, and neither is such an overreach narrowly tailored to accomplish any rational or compelling government interest .

Writing with the majority upholding the constitutionality of a suspension of certain federal policies for national security purposes, Justice Anthony Kennedy affirmed the Executive's duty to protect the constitutional guarantees from "disregard" *Trump v. Hawaii*, 138 S. Ct. 2392, 2424, 201 L.Ed.2d 775 (2018). Justice Kennedy wrote that:

> "The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. **It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions... An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.**

Id. (bold emphasis added).

Here, the Governor may not claim a right of disregard nor has he claimed his actions are not able to be reviewed by this Court for constitutionality or lawfulness. His Executive Orders impermissibly burden the free exercise of religion by delegating powers of closure of places of worship to local authorities under his own

reservation of Emergency powers and Executive Orders banning religious and large gatherings. The Governor impermissibly burdens the free exercise of religion by promulgating "recommended" but now enforced "guidelines" that is developed, including mandating no singing, no choir, chorales may sing with only face coverings on, no more than 10 people in worship (or 50, 250, depending on the Governor's decisions from time to time), no in person or no inside worship (still in many counties), no sacraments or collection of funds – which are essential to the faith of millions and the life-blood of ministers, required standing of seven (7') feet apart (because the 6' social distancing rule will only protect you in Walmart or a big box store, we suppose), and a myriad of other minute regulations that are not rationally related nor the least restrictive means to accomplishing any rational or compelling government interest. It is imperative, considering the weight and nature of the laws he has suspended, including the claim the Governor makes in his arguments to suspend the Maryland Constitution itself by power of assumed state law jurisdiction, that this Court deny his motion to dismiss and allow discovery and a trial.

Neither *Jacobson*, nor the other cited cases *In re Abbott*, 954 F.3d 772 (5th Cir. 2020) and *Robinson v. Attorney Gen.*, -- F.3d – 2020 WL 1952370, at *5 (11th Cir. April 23, 2020) support the unprecedented actions of Governor Hogan to overreach and trample on the Bill of Rights for each and every Plaintiff and Marylander.

Similarly, Maryland State law, Transportation Article 5-1001, provides a right to travel, albiet via air. "Section 5-1001. Lawfulness of operation. (a) Legislative policy. -- There is a public right to freedom of transit in air commerce through the airspace of this State." MD Code Transp. 5-1001 Lawfulness of operation (Maryland Code (2019 Edition)). By implication, there is no rational basis to allow for the right to travel only by air, when the recognition of the right is founded in federal due process rights under the 5th and 14th Amendments, and therefore also under the Maryland Constitutional provisions. See, Rees, Charles A. (1978) "State Constitutional Law for Maryland Lawyers: Individual Civil Rights," University of Baltimore Law Review: Vol. 7: Iss. 2, Article 4. Available at: http://scholarworks.law.ubalt.edu/ublr/vol7/iss2/4, last accessed May 26, 2020)(Attachment 1, herewith). There, professor Reese writes: "The state constitution, to the extent that it is more protective of individual rights than the federal constitution, may provide the only protection for individual rights." *Id.* Under state equal protection constitutional law, Marylanders have more protection than under the federal constitution from "provisions that have no counterpart" including the right to not have "local" or "special" laws passed "in any case" not directly supported by an "existing general law," Md. Const. art. III, § 33; as mentioned, *supra*, the right to travel; to have the right of English Common law, art. 5; due process beyond the federal protections, which state provision includes the due

process excerpt from the Magna Carta mandating our protection from being "imprisoned…in any manner" nor "deprived of life, liberty or property" except after a jury trial or by the Law of the land, art. 24; and even to not have the provisions of either the federal or state constitutions violated or suspended during any time including times of necessity, art. 44. This Court should not overlook these expanded protections of Plaintiffs and should deny the Defendants' motion to dismiss.

Here, imprisoning all Marylanders in our homes by way of an Executive Order mandating "house arrest" and leaving the home only upon permission of the Governor by way of a few limited, "deemed-safe" activities, violates the Maryland Constitution, Decl. of Rights, Article 24. This is because the language of art. 24 states "imprisoned *in any manner*" and gives no exception for pandemics, particular when reading *in para Materia* with art. 44. Additionally, the plain language of the constitutional provision requires the citizen to be provided a jury trial and/or a duly promulgated law prior to the loss of liberty – not an executive order without specific basis in law. It is telling that the Governor has never cited to any specific statutory language giving him precise power to lock us in our homes under criminal threat, to prevent large gatherings under criminal threat, to force us to cover our faces under criminal threat. This is because he cannot do so. Instead, he ill-advisedly states he has "broad" emergency powers, to do basically whatever he wishes from time to time. Marylanders have time and again forbidden such behavior by their

government officials, as has the United States ("…any departure therefrom, or violation thereof..is subversive of good government, and tends to anarchy and despotism."). Md. Const., Decl. of Rights, art. 44; see also, *Strickland v. Washington*, 466 U.S. 668, 704, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)("Recognizing the unique seriousness of [a death penalty] proceeding, we have repeatedly emphasized that " **'where discretion is afforded** a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'")(emphasis added). The court went on to quote Justice Marshall: ""This Court has always insisted that the need for procedural safeguards is particularly great where life is at stake. *Id*., citing, *Barefoot v. Estelle*, 463 U.S. 880, 913-914, 103 S.Ct. 3383 3405, 77 L.Ed.2d 1090 (1983) (dissenting opinion).

Here, both the Governor, intervenors and Plaintiffs have agreed that the matters before the Court impact the saving of lives. All parties want the elderly and the infirm or those with comorbidities to be protected, especially considering the outrageous death rate in nursing homes by COVID-19. All parties, or at least Plaintiffs, recognize the historic and grave health and safety impacts that locking all of Maryland up in their homes, shutting down businesses, forcing face coverings, preventing worship and in-person gatherings larger than 10, preventing access to

health care, preventing access to those family members receiving health care, and so on. These latter issues are causing Maryland to stand at the brink of not only total disaster medically and financially for all its citizens, but are now openly seen as the source of potential civil breakdown, devastation and poverty, homelessness, suicide, and the destruction of our way of life. In short, the largest group of medical professionals on record in the United States are proclaiming the Governors' Executive Orders as causing a "mass casualty event". See Exhibit A.

Additionally, under state law, allowing for anyone who is wealthy enough to fly to leave their homes to travel for any reason ***as a matter of right***, while preventing all others from leaving their homes, violates due process under both the federal and state provision, as well as the equal protection clauses of the federal and state constitutional provisions. *Id.*

The proper application of the historic case of *Jacobson*, supra, for quarantine is supported directly by Maryland law, where the statute mandates that sick people must be given due process of law if they are quarantined. Md. Code Ann. Public Safety 14-3A-05. To be clear, the Plaintiffs are petitioning this Court to apply the due process rights they possess under their own federal and state constitutions which also mandate that state law must be applied and done so equally. "…[C]ertain rights, such as "liberty" and "property," that are within the procedural protections of the due process clause of the fourteenth amendment, may be defined with reference to state

law." *See Reese*, supra, pg. 301, citing, *Paul v. Davis*, 424 U.S. 693 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975); *Riger v. L&B Ltd. Partnership*, 278 Md. 281, 363 A.2d 481 (1976).

Contrary to the specious arguments of the Governor and defendants, and respectfully contrary to this Court's footnote 17 in its memorandum, ECF 40, page 12 in the instant matter, it is clear that the Governor violated Public Safety Article, Title 14 and 14-3A-01 et seq., by ordering, "directing" and mandating, under penalty of criminal law, all Marylanders' to remain in their houses unless he says that we can come out. This egregious violation of constitutional rights also violated Titles 14 and 14-3A-01 et seq. because that statute does not provide for such an Executive Order. And even if this Court were to now discover such powers within those state Articles, the law under Public Safety Title 14-3A-05 – which is titled "Directive for Isolation *or* Quarantine" - mandates both the notice and a hearing to all such "isolated" persons – which would include Plaintiffs and, by application, the entire state of Maryland. The Legislature mandated that in any time of Executive-Ordered isolation, those affected must be provided due process, and the Governor has failed and refused to do so, violating the rights of all residents of Maryland. Therefore, there is not a rational basis for a constitutional ruling that permits the Governor to exercise such powers when no power as such exists. Md. Code Ann. Public Safety 14-3A-05(emphasis added). Merely because of the novelty of the fact that no

Governor has ever tried to isolate the entire population of this State before, under penalty of criminal prosecution, without due process or notice and a right to a hearing or jury trial, does not mitigate nor should it cause this Court to be swayed against the law to dismiss the case as the Governor has demanded. Even if the Court is believes the Governor has such extraordinary powers – to isolate healthy Marylanders without due process while providing due process to those sick who are quarantined – it must still permit discovery and a trial on the matter to ascertain whether such powers were carried out unlawfully and with factual discrimination or defect, as Plaintiffs have plainly and affirmatively alleged he has done.

Additionally, respectfully contrary to this Court's footnote 10 on page 5 of its Memorandum (ECF 40), there are no exceptions in the Governor's Executive Orders for anyone regarding wearing a face covering. Plaintiffs have been turned away from stores for refusing to wear a mask even when requesting a reasonable accommodation for a health-related matter, which is protected information under HIPAA. Instead, the Court points to "guidance" from the Md. Dept. of Health – which no business in Maryland is provided directly, and which is not included as a matter of law in any Executive Order. Businesses are therefore left to look at the actual wording of Executive Orders – which cite within themselves to the criminal code of "1 year in jail and/or a $5000 fine" misdemeanor and may not in good faith look to any "guidance" for exceptions, absent an express declaration of the Governor

himself within the "binding" executive orders mandating face coverings.

For these reasons and more which shall be proven at trial after discovery is permitted, the Plaintiffs' case must go forward.

b. The Stay-In-Home, Large Gathering and Facial Covering Orders Have No Basis in Either State Statute or Constitutional Executive Powers, and No Crisis Grants the Executive Powers to Force House Arrests Of 6 Million Marylanders or threaten its duly elected members of the Legislature with arrest for assembling and speaking in groups greater than 10 people; and Form of Governance Claims are valid under State law.

Not since September 17, 1861 – 158 years ago – when seven members of the House of Delegates, including the Speaker of the House, clerks and even a Maryland Senator were arrested during the Civil War and taken to Ft. McHenry and/or Ft. Monroe, has a member of the Legislature of Maryland, or have pastors, been threatened with arrest if they were to assemble and speak to constituents or exercise their bona fide religious convictions with congregants peaceably. Here, however, the threats by Governor Hogan were to instead to violate a Legislator's, Pastors and businesses' right to exercise ***their Federally protected rights***, not to prevent them from undermining the federal authority. The Defendants and Court are mistaken to claim that the President of the United States is to blame for the Governor's Executive Orders mandating – under penalty of criminal prosecution – the church and business lock-down, stay-at-home house arrests, masks to cover faces when in public retail stores. See Defs. Mot., ECF 26-1, pg. 46, ¶ 2, (*"the federal government—and the*

President himself—has repeatedly left it to the States to determine how best to respond to the pandemic"); and, ECF 40, Memorandum, pg. 9, ¶ 3 (*"COVID-19 has been labeled by…the President as a public health emergency." Citing, www.whitehouse.gov proclamation on national emergency.)*

The failure of this attack against Plaintiffs claims are at least two-fold: 1) such arguments by the Governor and Defendants that the existence of a pandemic or a national emergency provides "broad" and unfettered powers to shutter businesses the Governor gets to pick and choose from, to order people into their homes on house arrest, to close churches indefinitely and monitor their religious practice including singing, hugging, praying, and number of souls allowed to hear preaching, or threaten Legislators and former members of the military with arrest if they assemble to exercise their first amendment rights; 2) the President of the United States has actually ordered the *opposite* of the Governor's actions – and has not mandated the closure of any businesses, with at least seven states not ordering any stay-in-home orders this entire time of national emergency and one of them – South Dakota – not closing businesses[3], that Governor's must respect and cease and desist their actions against the right to worship God by rescinding any executive orders that limit such worship[4], and by never mandating restrictions on the right to travel, speech or

[3] https://ballotpedia.org/States_that_did_not_issue_lockdown_or_stay-at-home_orders_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020, last accessed May 26, 2020.
[4] Attorney General of the United States issues Statement of Interest for churches; https://www.justice.gov/opa/pr/attorney-general-william-p-barr-issues-statement-religious-practice-and-social-distancing-0 , last accessed May 26, 2020; President Trump Directs Governors to Cease Orders Closing Churches,

assembly. Instead, recommendations from the CDC and the national emergency declaration have been voluntary and provide States with disaster money.

Additionally, it is of great importance to note that neither the CDC, nor President Trump, go so far as the arrogated powers of the Governor and Defendants to both completely close religious summer camps and to delegate authority to local officials to close and/or limit church services, forbid singing, penalize or threaten any pastor for meeting with congregants, mandate under penalty of criminal law masks or face coverings in church or elsewhere, or pick and choose businesses which are allowed to reopen and those which are not.

Non-Suspension of Constitutional Protections and Form of Governance Claims Permissible Under State Law

Defendants argue that state law, Pub. Safety 14-107(d)(1)(i) provides the Governor an unfettered right to suspend *constitutional* law in Maryland which he deems "obstruct the State's COVID [sic] response". Def. Mot. Dis. Pgs. 37-8. This claim by Governor Hogan is nothing short of beyond legal recognition. See, *Trump v. Hawaii*, 138 S. Ct. 2392, 2424, 201 L.Ed.2d 775 (2018).

Federal case law does not preclude state constitutional claims under the State Constitution's guarantee of the federal right under art. IV, section 4, of the United

https://www.facebook.com/WhiteHouse/videos/303782800626282/, last accessed May 26, 2020; CDC updated guidelines for churches, https://www.cdc.gov/media/releases/2020/s0522-cdc-releases-recommendations-faith.html, last accessed May 26, 2020.

States' Constitution, and under Md. Const. Decl. of Rights, Arts. 5, 8, 10, 13, 24, 32, 40 and 44. *See Reese, supra.*

For these reasons and more which shall be proven at trial after discovery is permitted, the Plaintiffs' case must go forward.

c. Plaintiffs' Commerce Clause Claim Must Be Heard Because The Governor Has No Dormant or Other Commerce Clause Power To Pick and Choose Between Businesses He Favors, Relying Errantly on the DHS Essential Business List In The Reverse of Its Intent.

The Governor has not met any burden to prove "cases of actual necessity…[constituting] grave threats to the lives and property of others" such as would support the unilateral shutting down and destruction of the property of all Marylanders. *Bowditch v. Boston*, 101 U.S. 16, 18-19 (1880); *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905). There the Court prevented "the guise" of police powers to violate rights:

> "as the laws there involved went beyond the necessity of the case, and, under the guise of exerting a police power, invaded the domain of Federal authority, and violated rights secured by the Constitution, this court deemed it to be its duty to hold such laws invalid."

Henning Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 28, 25 S.Ct. 358, 49 L.Ed. 643, 3 Ann.Cas. 765 (1905).

The gravamen of the Commerce Clause claim is that Governor has erred in both his dormant commerce clause argument and general police powers argument, by

claiming a right to pick and choose businesses that he deems are essential in order to advance his own speculations of how to protect the public during the COVID-19 state of emergency. This is in error on several grounds in fact and law and it is premature to dismiss the complaint without discovery permitted to inquire into and perhaps verify, or disprove, the broad claims of the Governor and his team.

"Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. *Nebbia v. People of State of New York*, 291 U.S. 502, 523, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469 (1934). At no time does the Governor provide the Court with any lawful exception to this general rule, which would require evidence to affirmative, not speculative, harm to society. *Id.* The Governor hangs his hat on Dr. Mitchell's statement that because COVID19 "droplets" can spread via person to person (like most viruses and colds), that somehow provides justification of the closure of all businesses deemed by the Governor to be "non-essential" or "non-life sustaining", Defs. Mot. Dis. Pg. 17; and that "any harm that Plaintiffs might suffer" are "a result of…temporary restrictions." *Id.* at pg. 48. These broad and ubiquitous assertions, and false claims of "temporary" harm of Plaintiffs who are facing permanent closure and potential for bankruptcy should the closures not be immediately lifted, merit discovery and a trial.

"The power over commerce, including navigation, was one of the primary objects

for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late." *Gibbons v. Ogden*, 22 U.S. 1, 190, 9 Wheat. 1, 6 L.Ed. 23 (1824).

The Governor and Defendants cite to his assembled "expert panel," and the United States Department of Homeland Security list of "essential" business industries needed to maintain infrastructure in case of an attack or natural disaster. Defs. Mot. Pgs. 35-6. The Governor writes in his motion to dismiss, "Based [sic] on their advice, the Governor adopted the federal definition of "critical infrastructure sectors" as the basis for distinguishing between essential and non-essential businesses…And because *any* contact with other people risks infection, it is rational to limit the potential for even passing contact to those activities and industries that cannot be closed without serious societal effects. That is, if a person must risk infection by interacting with others in a retail setting, it is rational to enact policy motivated by the conclusion that that risk should be taken only to supply the basic necessities of life or critical infrastructure." In support of his claims that his team and the President of the United States advised "the conclusion that that risk should be taken only to supply the basic necessities of life or critical infrastructure" it is important to note that the Governor cites the Declaration of Dr. Mitchell. However, that declaration is unsupported by any rational or medical evidence of any kind, nor

any additional supportive declarations from the Governor's so-called expert medical team.

Nor is there any evidence before this Court that the President's national security infrastructure list of critical infrastructure was intended to actually be used by the Governor of Maryland to shut down any business. In fact, the only language in that document for "non" essential businesses is that it is not requiring any shut down and that it is used for guidance as to which businesses to keep open – not which to shut down.

The purpose of the DHS critical infrastructure guidance is to guide the Governors of the states to determine, in times of national attack, natural disaster or other national emergency, which areas of critical infrastructure must be immediately kept open at all costs. "There are 16 critical infrastructure sectors whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof. Presidential Policy Directive 21 (PPD-21): PPD-21 identifies 16 critical infrastructure sectors." See, *https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19 , accessed on May 26, 2020.* As written, the critical, or "essential", infrastructure sector are those businesses which *must* be up and running even if the owners are incapacitated because of some national emergency.

Contrary to his bald factual arguments in his motion to dismiss, it has nothing to do with granting any power or persuasion to the Governor to shut down businesses. Particularly when those businesses are fully capable of performing any health recommendations and CDC guidelines that every other business is capable of doing.

Additionally, not only are the factual averments of Dr. Mitchell disputed on their face as bald conclusions unsupported by any medical evidence before this Court, the Governor has refused and rejected an MPIA request by Reopen Maryland, LLC for the minutes, records, proceedings and notes of its so-called expert panel upon which it claims it relied to make these unprecedented shut-down decisions. **Exhibit B**, attached hereto, Letter of denial of MPIA; article, Protestors Rally, *Maryland Matters (available at: https://www.marylandmatters.org/2020/05/15/protesters-at-annapolis-reopen-rally-call-for-an-end-to-tyranny/ , last accessed May 26, 2020).*

Therefore, the Governor may not argue in this Court that his decisions were not arbitrary and capricious "based upon" advice received from what he is also claiming is a "nongovernmental unit" and thus not subject to MPIA disclosure. *Id.* The very nature of the existence of this secretive group indicates that discovery is mandated in this case.

Additionally, at least as of today when the Governor's Chief of Staff resigned, a peculiar and unconstitutional process for gaining approval from the Governor's

office for reopening of businesses includes Tweeting at the Governor's spokesman, Mike Ricci, and seeking to obtain special consideration for businesses. **Exhibit C**, attached and incorporated herewith. These proceedings, via Twitter, and at other times before an off-the-record "Star Chamber" hearing or petition with the Governor's Office of Legal Counsel Mike Pedone, are laborious, arbitrary and unconstitutional towards all Maryland businesses.

Contrary to Defendants' specious and limitless claim to power, the Governor does not hold unfettered "latitude" in such impure "economic regulation" and in unequal application of its police powers. *American Entertainers, LLC* v. *City of Rocky Mount,* 888 F.3d 707, 720, 723 (4th Cir. 2018).

III. Conclusion.

For the foregoing reasons, and additional arguments to be made at a hearing on this matter, the Plaintiffs urge the Court to DENY the Defendants' motion to dismiss as premature.

Respectfully submitted,

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Dated: May 26, 2020

CERTIFICATE OF SERVICE

I hereby certify, that on this day of May 26, 2020, I served, via ECF, a copy of Plaintiffs' Response in Opposition to Motion to Dismiss upon all counsel of record.

/s/_____
Daniel L. Cox