

No. 20 1579

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

ANTIETAM BATTLEFIELD KOA, et al

Plaintiffs–Appellants

v.

LAWRENCE J. HOGAN, et al.,

Defendants–Appellees

On Appeal from the United States District Court
for the Northern District of Maryland
In Case No. 1:20 cv 01130 before The Honorable Catherine Blake

**APPELLANTS' EMERGENCY MOTION FOR
INJUNCTION, OR ALTERNATIVELY, STAY OF
DISTRICT COURT PROCEEDINGS
PENDING APPEAL**

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CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1 and Rule 26.1 of this Court, Plaintiffs—Appellants state that they are not a subsidiary or affiliate of a publicly owned corporation, and that no publicly owned corporation, not a party to the appeal, has a financial interest in its outcome.

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<i>Jacobson v. Massachusetts</i> , 197 U.S. 11, 39	19, 23, 30
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<i>Marshall v. United States</i> , 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974),	18, 20
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Trump v. Hawaii, 138 S. Ct. 2392, 2424, 201 L.Ed.2d 775
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<https://goci.maryland.gov/wp-content/uploads/sites/2/2020/05/Faith-Based-Recommendations.pdf>, accessed 6/2/202023

600 Physicians Say Lock-downs Are A Mass Casualty Incident, May 22, 2020, <https://www.forbes.com/sites/gracemarieturner/2020/05/22/600-physicians-say-lockdowns-are-a-mass-casualty-incident/#6d4ae91150fa> accessed 6/4/2015

Carbon Dioxide Poisoning, NIH study, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5380556/> accessed 6/2/202015

CNBC interview of Dr. Fauci, 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).14

DHS critical infrastructure guidance, (available at: <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19> , accessed on May 26, 2020).31

Dr. Scott W. Atlas, Data Is In, Stop the Panic and End the Total Isolation Now, April 22, 2020, (available at: <https://thehill.com/opinion/healthcare/494034-the-data-are-in-stop-the-panic-and-end-the-total-isolation> accessed 5/22/2020).15

Journal of Chem. Health Safety; Dept. of Occupational Medicine, Univ. of Cincinnati: (available at: <https://pubs.acs.org/doi/10.1021/acs.chas.8b13507>, accessed 6/2/2020.....16

McMillan, Herb, Maryland Reporter, *“Questions For Authority During A Pandemic”*, June 3, 2020 <https://marylandreporter.com/2020/06/03/questions-for-authority-during-a-pandemic/> accessed June 3, 2020 (Sweden has the same rate of death as Maryland per capita – without locking down the economy).30

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Fed. R. App. P. 8(a)(2)(A)(ii)13

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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/ublrvol7/iss2/4>, last accessed May 26,
2020)28

Rehnquist, William H., *All the Laws But One* (New York: Knopf, 1998),
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RELIEF SOUGHT

Appellants, on an emergency basis pursuant to 4th Cir. R. 8 and 27, seek relief of this Court by means of an Injunction or, alternatively, stay of the proceedings in the lower court pending briefing and argument in this Court.

The Appellants move the Court:

Pursuant to Fed. R. App. P. 8(a)(2), for an injunction or, alternatively, stay of proceedings pending appeal (I/SPA) of the district court's May 20, 2020 Order denying relief ("PI Order," Exhibit 1), which is a subject of the Appellants' Notice of Appeal to this Court (Exhibit 2), to restrain and enjoin Appellees and their designees ("Appellees"), from unconstitutionally enforcing against the Appellants the Governor's Proclamations of Catastrophic Emergency Powers (March 5th – June 3rd, 2020), and his related Stay-At-Home and Gathering Orders (Executive Orders 20-30-01; 20-05-06-01; 20-05-13-01; 20-05-27-01; and 20-06-03-01), Delegation of Authority to Local Officials Orders (Executive Orders 20-04-05-01; and each of the "gathering" orders, as amended), Mask/Face Covering and Physical Distancing Orders (Executive Orders 20-04-15-01; and each of the "gathering" orders, as amended) ("the "Orders")(Exhibit 5).

FACTUAL GROUNDS FOR RELIEF

We are now at the 97th Day of Catastrophic Emergency Powers. Thirty days ago was Mother's Day – where we didn't see our mothers under the stay-in-home

order; sixty days ago was Good Friday – where we were banned from church by the large gathering ban for “non-essential” activities order. Ninety days ago was leading up to St. Patrick’s Day – where we were banned from restaurants and bars by order.

Still today, the lockdown continues to deny Maryland memories and the progression of society, by its cancelation of high school graduations and killing the romance of June weddings, the prevention of final goodbyes at funerals, all by executive orders extending the 10-person gathering limitation – while the sting of it all snickers at us like a bad dream that won’t end.

Good cause for the relief exists, as supported by Appellants’ Amended Complaint, (“Amend. Complaint,” Exhibit 3), Appellants’ Motion for Preliminary Injunction and Memorandum of Law filed in response to opposition, and exhibits (“PI Motion,” Exhibit 4, attached), the Governor’s Executive Orders (Exhibit 5, attached), local officials’ Orders (Exhibit 7, attached), (collectively, the “Orders”), Supreme Court recent rulings (Exhibit 8), and other court rulings (Exhibit 9).

A. Satisfaction of Fed. R. App. P. 8(a).

Appellants did not first move for an I/SPA in the district court under Fed. R. App. P. 8(a)(1)(C), because (a) time did not permit such a motion; (b) the PI Order constituted a denial of emergency relief; (c) the order has irreparable consequences, denying Appellants the right to hold in-person worship services, the right to contract and commerce, and the right to free speech and assembly; and (d) the order can only

be effectively stayed and challenged by this appeal. See, e.g., *Abbott v. Perez*, 138 S. Ct. 2305, 2319 (2018) (quoting *Carson v. American Brands, Inc.*, 450 U.S. 79, 83-84 (1981)).

The PI order by the district court satisfies the condition that “the district court ... failed to afford the relief requested,” Fed. R. App. P. 8(a)(2)(A)(ii), justifying Appellants’ seeking an emergency I/SPA. Moreover, Appellants could be excused from first seeking an I/SPA in the district court for impracticability under Fed. R. App. P. 8(a)(2)(A)(i), if not futility, because the district court has already ruled against the Appellants, without a hearing.

B. Factual Summary.

Appellants incorporate their declarations and all pleadings and motions in the lower court, and the initial application for TRO in this Court, as if fully set forth herein.

The need for injunctive relief is immediate and ongoing. On June 3, 2020, Governor Hogan said he was ordering a continued ban on gatherings of more than 10 people, but that “no one is following it though” or similar statement. Yet, the Orders remain in place and are knowingly and selectively enforced by Appellees.

Also, on June 3, 2020, during the Joint Legislative COVID Oversight Hearing, Appellee Deputy Secretary Fran Phillips testified that the 500,000 COVID-19 test kits are “secured” for “use this fall” as “part of a very long-term strategy” to deal with “seasonal influenza”. See, Md. Joint Legislative Oversight hearing of June 3, 2020,

available at <https://www.youtube.com/watch?v=CgidImHcO40&feature=youtu.be> accessed June 3, 2020. (44:11 mark; 52:40 mark to 59:50 mark). This continued state of emergency, which the Deputy Secretary testified to, is now tied to *potential* “seasonal influenza...this fall” without basis in the law or evidence.

On the contrary, Dr. Anthony Fauci now supports ending lock-downs as “stay at home orders [are] causing irreparable damage”. CNBC interview of Dr. Fauci, 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).

On April 22, 2020, Dr. Scott W. Atlas wrote in The Hill stating, “isolation policies” now have no basis in lowering risk of death from COVID-19. Dr. Scott W. Atlas, “Data Is In, Stop the Panic and End the Total Isolation Now,” April 22, 2020, (Available at: <https://thehill.com/opinion/healthcare/494034-the-data-are-in-stop-the-panic-and-end-the-total-isolation> accessed 5/22/2020).

The data is growing that to keep the state locked-down under Executive Orders and delegated executive orders, is causing an irreversible mass casualty event. See Forbes article, 600 Physicians Say Lock-downs Are A Mass Casualty Incident, May 22, 2020, <https://www.forbes.com/sites/gracemarieturner/2020/05/22/600-physicians-say-lockdowns-are-a-mass-casualty-incident/#6d4ae91150fa> accessed 6/4/20).

Consequences of the face coverings Orders can lead to long-term lung problems or even death. See, Carbon Dioxide Poisoning, NIH study, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5380556/> accessed 6/2/2020 (“Carbon dioxide does not only cause asphyxiation by hypoxia but also acts as a toxicant. At high concentrations, it has been shown to cause unconsciousness almost instantaneously and respiratory arrest within 1 min.”); see also, 2006 study, published in the Journal of Chem. Health Safety; Dept. of Occupational Medicine, Univ. of Cincinnati): "Carbon dioxide levels are significantly higher and oxygen levels are significantly lower [wearing an N95 mask]..." <https://pubs.acs.org/doi/10.1021/acs.chas.8b13507>, accessed 6/2/2020).

The Executive Orders burden the pastors and their congregations herein by closing them down and deeming the worship of God “nonessential”.

The Maryland Legislators and veterans herein are burdened by the Executive Orders because they were required to stay in their homes, and to not attend any assembly, gathering or protest greater than 10 people, and to be free from the Executive ordering them to wear masks under criminal penalty outside of any statutory or constitutional authority.

Appellant veterans that they have no executive-order-stated-right to exemptions from the Orders¹, nor free speech beyond virtual or an assembly of 10 persons or less, without citing a single statute or authority for such unheard-of arbitrary power.

Under the Orders golf courses and tour boats frequented by older clientele are allowed to be open, with inside boat dining and golf cart sharing, while “miniature golf” and “amusement parks” such as Appellant Adventure Park USA and restaurant members of Reopen Maryland, LLC, were mandated to stay closed.

Violations of any Executive Order are punishable by \$5000 fines for each violation and/or imprisonment up to one (1) year or both. Md. Code Ann. §14-3A-08.

LEGAL ARGUMENT

In deciding whether to grant interlocutory injunctive or stay relief pending appeal this Court will look to see if the jurisdiction is “firmly established” for interlocutory review of the issues presented. *Pense v. Md. Dep't of Pub. Safety & Corr. Servs.*, 926 F.3d 97 (4th Cir. 2019). (The district court accepted the Department’s motion and entered a stay)(internal citations omitted).

While “when [state] officials undertake[] to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation,” *Marshall v. United States*, 414 U.S. 417,

¹ Although the court referenced an “interpretative guidance” from the Maryland Health Department allowing for “ADA” exemptions from the mask requirement, and the Appellees claimed the same, the facts before the Court are that no such exemptions exist in the Governor’s Executive Orders, and now County Executives are making masks/coverings mandatory for all without regard to health conditions or concerns. See Exhibit 1, Order, pg. 5, fn 10.

427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974), cited by the holding in *South Bay United Pentecostal Church v. Newsom*, 590 U.S. _____ (2020), it is equally true that in those times, like the instant time, when “[t]he inescapable fact is that there is no agreement among members of the medical profession,” *Marshall v. United States*, 414 U.S. 417, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974), citing *Powell v. Texas*. The Supreme Court held in *Powell* concerning a disputed extension of emergency powers that “[w]e cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized” and the rights of all under law are always to be protected. *Powell v. State of Texas*, 392 U.S. 514, 522, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968). This is because during times when “local officials are actively shaping their response to changing facts on the ground,” *South Bay* at 2, “[i]t is simply not...the time to write [new] Constitutional formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.” *Powell* at 537. The protections of the Constitution apply in times of averred crisis or they are not actually the law of the land. See, *Ex Parte Merryman*, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (No. 9487).

Contrary to the assertion in *South Bay*, courts are competent to consider whether executive orders against citizens are “cruel and inhuman” in their issuance and/or application. *Jacobson v. Massachusetts*, 197 U.S. 11, 39(1905). “We are not to be understood as holding that the statute was intended to be applied to such a case, or,

if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned. 'All laws,' this court has said, 'should ... be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.'" *Id.*

The Governor at his press conference on June 10, 2020 called the Baltimore County Executive's orders keeping small businesses closed "absurd". See <https://youtu.be/vHZqpJgC0g4> accessed June 10, 2020. Appellants agree with the Governor. Here, the Orders' absurd consequences have impacted both the lives and livelihoods of each Marylander in long-term financial and emotional damage in their careers, employment and business. While the rest of America begins to bounce back with over 2.5 million jobs added and businesses re-opening, Maryland's unemployment rate is reported at 11%, or over 600,000 people. *Id.*

As noted by Chief Justice Roberts, *South Bay United Pentecostal Church v. Gavin Newsom, Governor of California*, 590 U.S. ____ (May 29, 2020), "a stay...simply suspend[s] judicial alteration of the status quo...", citing, *Respect Maine PAC v. McKee*, 562 U.S. 996 (2010). Here, the lower court's alteration of the status quo is its support for broad executive orders never before contemplated. The federal courts must ensure the Governor's constitutional "limits are not exceeded" under a perceived constitutional "broad" "latitude". *South Bay* at 2, citing, *Marshall v. United States*, 414 U.S. 417, 427 (1974).

The sole medical authority providing a declaration for the Governor in this matter is completely untested by cross-exam or a Daubert challenge. See, *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). Yet, Appellants have proffered significant evidence by Stanford University's Dr. Atlas, Dr. Fauci, CDC studies, and in addition, over 600 physicians, opposing, upon medical science, the universal lock-down.

If the Governor's Office of Legal Counsel is competent to issue executive orders then the Court is also competent to re-draft or strike those same Orders.

I. THE REVERENDS AND CONGREGANTS HAVE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE THE GOVERNOR'S ORDERS ARE IN CONFLICT WITH THE DELEGATED LOCAL ORDERS AND ARE THEREFORE UNENFORCEABLE, AND THEY VIOLATE THE REVERENDS' AND THEIR CONGREGATIONS' FREE EXERCISE RIGHTS, WHILE THEY ALSO ARE FAR MORE RESTRICTIVE THAN THE RECENT 5-4 DECISION OF THE SUPREME COURT HELD WAS TEMPORARILY NOT SUPPORTIVE OF A TRO ON THE FACTS AS KNOWN.

A. The County Executive Orders are in Conflict, Are Causing Confusion, and are Unenforceable Under the Statewide Order(s).

The Governor of Maryland's Executive Order number 20-06-03-01 designates religious entities as able to reopen in Maryland "up to 50% capacity" of their facility. (Ex. 5). That Order, and Executive Orders 20-05-27-01 and 20-05-13-01, specifically delegate the authority of the Governor to local jurisdictions to "to issue orders that are more restrictive than this Order". Ex. 5 (EO 20-05-13-01, p. 3, ¶ I.d.).

For example, several counties have issued conflicting executive orders which continue at this moment. Ex. 7.

In Frederick County houses of worship are arbitrarily capped at 50% but no more than “250 people” unless you obtain a special exception from the County Administrative Officer who has arbitrary power to determine whether “all relevant precautions have been satisfied”, and masks/face coverings are mandated for religious congregants and leaders even while singing, and no hymnals, going beyond the Governor’s Order making the same voluntary by ministers as they should be. *Id.* Just recently, the Howard County Executive gave “permission” to churches to celebrate the Eucharist, but only because the Governor gave permission to restaurants and people to eat outdoors. (Ex. 7).² Businesses have no 250 person cap.

The contradictory executive orders create confusion under state emergency law. See Md. Code Ann. Pub. Safety § 14-107(d)(1)(i) (“the Governor...may: suspend the effect of any statute or rule or regulation of an agency of the State or a political subdivision”). Since the executive orders continue the state of emergency, while delegating power to local authorities, this complicates the public’s understanding of what is a criminal violation of an executive order and what is not.

B. The Governor’s Orders Burden Appellants’ Free Exercise Rights Under the First Amendment.

² For example, the Frederick County Executive began “Stage 2 reopening” on June 5, 2020, while Governor Hogan begins the same statewide on June 12, 2020 – a week later. This appears to be by mistake, since County Exec. Gardner claims she is following Governor Hogan’s Stage 2 plan. See, <https://www.frederickcountymd.gov/CivicAlerts.aspx?AID=4600> accessed June 11, 2020.

Appellants, reverends, pastors and congregants, have demonstrated they have sincerely held religious beliefs, rooted in Holy Scripture's commands. Ex. 3 (Amend. Compl. ¶¶ 12, 13; Decls., Exs. to PI Motion).

The Supreme Court ruled in its order in pending case, *Elim Romanian Church, et al v. Pritzker, Gov. of Il*, 590 U.S. _____ (May 29, 2020), that "if circumstances warrant" reverends and congregants being denied church services may seek injunctive relief. *Id.*

There, and in *South Bay*, the Supreme Court upheld the principle that "no rule prescribed by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in the case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures", *Jacobson* at 25; citing, *Gibbons v. Ogden*, 9 Wheat. 1, 210 L. Ed. 23, 73 (1824). Here, there are alleged "rule[s]...local enactment or regulation", *Jacobson* at 25, which contravene the free exercise of religion in the Constitution. Not even California is limiting a pastor from calling a congregation to worship unless it is 10 or less people, or outdoor only, preventing singing of congregants, nor preventing the taking of the Holy Sacraments, as Maryland executives are doing. See *South Bay*,

Roberts, C.J. holding, *supra*.

1. The Governor's Orders are subject to strict scrutiny under the First Amendment.

“At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs....” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (emphasis added).

Under the First Amendment, the Governor's Orders “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.” *Lukumi*, 508 U.S. at 531–32. “Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied.” *Lukumi*, 508 U.S. at 531. The Governor's Orders are not facially neutral, issuing “Faith-Based Recommendations” which have been distributed to the local authorities and have been implemented in delegated executive orders as mandates under criminal penalty. See, <https://goci.maryland.gov/wp-content/uploads/sites/2/2020/05/Faith-Based-Recommendations.pdf>, accessed 6/2/2020. Those draconian rules have included, the following implementations which violate the religious beliefs of Appellants: no singing in worship to God, no worshipping God with your face uncovered, no hugging or extending the right hand of fellowship. This shows the Orders also are not generally applicable, else one would be banned from singing at all establishments, or from hugging someone goodbye at the airport.

Similarly, showing discriminatory applicability, this Court would not uphold a ban on dating and sexual relations, during COVID-19. It would not since “we do not accept the State's contention that these statutes should be upheld if there is *any possible basis* for concluding that they serve a rational purpose.” *Loving v. Commonwealth of Virginia*, 388 U.S. 1, 8, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967)(emphasis added); see also, *Meyer v. State of Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and *Skinner v. State of Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Therefore, the Orders should not ban churches from consensual handshakes, hugs and halleluiahs.

The executive orders do not “exempt or treat more leniently only “dissimilar activities.” *South Bay* at 2. An injunction is merited.

C. The Governor’s Orders Cannot Withstand Strict Scrutiny, and the *SMITH II* Hybrid Claims Exist In The Instant Matter.

Because the Governor’s Orders are neither neutral nor generally applicable, and the instant case is strengthened by the assembly (association) and free speech claims, then strict scrutiny applies under the Court’s free exercise hybrid test. Appellants’ “present such a hybrid situation” because their free exercise claims are connected with speech and association rights under the Fourteenth Amendment. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 882, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

The Governor’s orders mandated that parents cover the faces of all of their

children “age 2 and up”, to stay inside and out of sunlight and off playgrounds, abstaining from athletics and school and church, and even proscribing Sunday School of any kind. Ex. 5. There is no rational basis for such orders, as just two months ago it was urged by all government advisors not to cover the face for health concerns in doing so. Leading science shows sunlight and exposure to fresh air actually kills the COVID-19 virus in about 90 seconds³, asymptomatic carriers do not transmit the virus⁴, and children are shown to not transfer the virus to others easily,⁵ and that masks/face coverings are potentially dangerous to health, *supra*, each showing the lack of efficacy under science for any benefit of the Orders.

In the Orders, the hybrid rule is violated, repeatedly targeting the faith, speech and assemblies of each Appellant – each right having the highest protections under the First Amendment. *Cantwell v. Connecticut*, 310 U.S., at 304-307, 60 S.Ct., at 903-905; *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

Similar to the instant case, the hybrid test has been shown to support a protection for religious free exercise where speech is also involved. *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). *Smith II*

³ <https://medicalxpress.com/news/2020-04-sunlight-coronavirus-quickly-scientists.html>, accessed June 10, 2020.

⁴ <https://www.cnn.com/2020/06/08/health/coronavirus-asymptomatic-spread-who-bn/index.html>, accessed June 10, 2020.

⁵ <https://www.reuters.com/article/us-health-coronavirus-britain-epidemiolo/children-with-covid-19-may-be-less-contagious-than-adults-two-uk-epidemiologists-say-idUSKBN22V1K1> accessed June 10, 2020.

at 881. Cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 3251-52, 82 L.Ed.2d 462 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed"). *Smith II*, 494 at 882.

Having no rational basis, nor neutral and general applicability, the Orders are also not narrowly tailored to accomplish any compelling government interest. See *First Baptist Church v. Kelly*, 2020 WL 1910021, at *8; *On Fire Christian Ctr., Inc. v. Fischer*, 2020 WL 1820249, at *7-8, citing, Hebrews 10:25 ("Not forsaking the assembling of ourselves together").

Furthermore, at his press conference on June 10, 2020, the Governor praised only those businesses which displayed his own "Maryland Strong" messaging "in their storefronts", appearing to indicate favoritism for businesses, like the churches on his ministry "faith-based" team, which support his reopening plan. Such is patently unconstitutional as viewpoint discrimination. See *Matel v. Tam*, 582 U.S. _____ (2017) ("by mandating positivity, the law here might silence dissent and distort the marketplace of ideas.")(Justice Kennedy, concurring).

Americans need faith. Just as America cannot survive without the First Amendment and the Bill of Rights, to the faithful, Holy Communion is one of the sacraments or ordinances of faith. It is not acceptable solely in a virtual or drive-in

service. Neither is intimate corporate prayer, or genuine fellowship one with another. Only in true presence and association may religious practice be protected.

II. 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 under the State Constitution Must Be Enforced.

Appellants incorporate their initial application for TRO (Ex. 6) and each declaration of Appellants (Docs: 18-2 to 18-17) as if fully set forth herein.

It was just about flattening the curve. This is not a case where upholding “all the laws but one,” that one being Executive power, would jeopardize the very existence of the State, where 158 years ago legislators were arrested during the great Civil War. *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487); see also, William H. Rehnquist, *All the Laws But One* (New York: Knopf, 1998), pp.27–39 (“Civil Liberties in Wartime”); see also, “Names of the Arrested Members of the Maryland Legislature,” NYT article Sept. 19, 1861, <https://www.nytimes.com/1861/09/19/archives/names-of-the-arrested-members-of-the-maryland-legislature.html> accessed June 10, 2020).

Here, however, the threats of arrest by the state executive power were instead to violate a Legislator’s, Pastors’ and businesses’ rights to exercise *their Federally protected rights*, not to prevent them from undermining the federal or state authority.

Contrary to the Appellees' arguments below, see Defs. Dist. Mot., ECF 26-1, pg. 46 ¶ 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 businesses⁶, 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 worship⁷, and by never mandating restrictions on the right to travel, speech or assembly. Instead, recommendations from the CDC and the national emergency declaration have been voluntary and provide States with disaster money.

**a. Non-Suspension of Constitutional Protections and Form of Governance
Claims Under State Law.**

Appellees argue in error 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). Statutes and executive orders

⁶ [https://ballotpedia.org/States_that_did_not_issue_lockdown_or_stay-at-home_orders_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020](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.

⁷ 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, <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.

do not trump constitutions. *Id.* See, art. IV, section 4, of the United States' Constitution; Md. Const. Decl. of Rights, Arts. 5, 8, 10, 13, 24, 32, 40 and 44. See also, Rees, Charles A. (1978) "State Constitutional Law...: Individual Civil Rights," University of Baltimore Law Review: Vol. 7: Iss. 2, Article 4; Available at: <http://scholarworks.law.ubalt.edu/ublrvol7/iss2/4>, last accessed May 26, 2020).

The lower court improperly rejected the Constitutional form of governance claims and individual rights that apply at all times, even during emergencies.

III. Appellants' Commerce Clause Claim Requires Governor's Orders Be Enjoined or Stayed Because the Governor Has No Dormant or Other Commerce Clause Power to Pick and Choose Between Businesses He Favors, Relying Errantly on a DHS List in The Reverse of Its Intent.

Appellants incorporate their commerce clause argument in their PI memorandum (Ex. 4) as if fully set forth herein.

The Governor has not met his 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 **secured** by the Constitution:

“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 court below cites *Jacobson* at 30, where the City of Cambridge required by statute that every person remaining in the City receive a vaccination for smallpox. Ex. 1, pg. 25-6, fn 33. The footnote shifts the focus to declining as a court to choose “which one of two modes” should be used to fight disease, *Id.*; when the issues in this case have nothing to do with choosing one of two options, nor any statute, with exemptions, mandating vaccinations. The issues are that Maryland has a population of 6 million and a death rate of 42.1 per 100,000 from COVID-19, and comparably, Sweden has a population of 10 million and a death rate of 42.3 per 100,000. Yet Maryland now has skyrocketing unemployment at 11%, rising suicide and overdose deaths, and a disastrous loss of businesses. The overreaches of the executive orders must end immediately. See McMillan, Herb, Maryland Reporter, “Questions For Authority During A Pandemic”, June 3, 2020 <https://marylandreporter.com/2020/06/03/questions-for-authority-during-a-pandemic/> accessed June 3, 2020 (Sweden has the same rate of death as Maryland per capita – without locking down the economy).

“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). Any lawful exception to this general rule would require evidence to affirmative, not speculative, harm to society. *Id.* “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 [constitutional] 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 commerce clause protects American businesses’ rights from State overreach in providing “The Congress shall have Power...to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3. The federal rule protecting all businesses is that States may not “discriminate against” business, nor “impose undue burdens” on businesses in interstate commerce. *Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018).

The Appellees’ rely on Dr. Mitchell’s statement that because COVID19 “droplets” can spread via person to person (like most viruses and colds), that somehow provides justification for the closure of all businesses deemed by the Governor to be “non-essential” or “non-life sustaining”, Defs. Dist. Ct. Mot. Dis. Pg. 17 (ECF 26-1); 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

mere “temporary” harm of Appellants, merit an immediate injunction and/or, stay of the lower court’s proceedings.

Appellees rely errantly on the DHS “essential businesses” list to shut down business. 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, *not which businesses they may close*. 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.

Additionally, the Md. executive office has 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. See article, Reopen Maryland 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). The Executive’s decisions were 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 executive 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).

In addition to the above cases, recent case law from the Supreme Courts of Wisconsin, Michigan and Texas have all held that it is unconstitutional for state Governors to shut down the livelihoods of businesses by executive order. See Ex. 9.

An injunction of the executive orders is warranted to save lives and livelihoods.

Injunctive relief request:

IV. THE APPELLANTS WILL SUFFER IRREPARABLE INJURY ABSENT AN I/SPA ENJOINING THE GOVERNOR.

The irreparable injury to the Appellants resulting from the Governor’s Orders here is actual, immediate, and has been ongoing since the issuance of the Orders.

“The loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The pastors, businesses, state delegates and veteran Appellants herein are each suffering and will continue to suffer irreparable harm by the Governor’s Orders as stated hereinabove because he has continued his state of emergency and overreaching orders.

Appellants satisfy this element for injunctive relief.

V. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST WARRANT AN I/SPA.

The likelihood of harm to the Appellants here greatly exceed any potential for

harm to the State. Appellants have suffered irreparable harm to their fundamental constitutional rights. By contrast, the State will incur no real harm to any legitimate government interest, because the Appellants' gatherings, speech, businesses and activities will be conducted with reasonable care to ensure health and safety.

An I/SPA is in the public interest, too. "[A]n injunction is in the public interest", when...the Proclamation has deleterious effects on" multiple industries and cultural heritages, such as "our higher education system; national security; healthcare; artistic culture; and the Nation's technology industry and overall economy." *Trump v. Hawaii*, 138 S. Ct. 2392, 201 L.Ed.2d 775 (2018).

Here, the deleterious impact occurs against the Appellants as set forth herein.

Thus, the balance of the equities tips decidedly in Appellants' favor, and an I/SPA is in the public interest.

CONCLUSION

The Appellants respectfully requests that the Court (1) issue an injunction pending appeal, enjoin any enforcement of Executive Orders named herein or any other order to the extent it prohibits in-person worship services, or in the alternative, (2) stay the lower court case and order expedited briefing, oral argument, and ultimate disposition of this appeal for injunctive relief.

Respectfully submitted,

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DATED this June 11, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was emailed to the Attorney General's counsel, Adam Snyder, Esq., at the address listed below, and served upon all counsel of record via the ECF system:

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DATED this June 11, 2020.

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