IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANTIETAM BATTLEFIELD KOA, *et al.*	*	
	*	Civil Action No. CCB-20-1130
v.	*	
	*	
LAWRENCE J. HOGAN, *et al.*	*	
	*	

MEMORANDUM

This action brought by citizens, business owners, and religious leaders is a challenge to the constitutionality of a series of executive orders issued by Maryland Governor Lawrence Hogan aimed at preventing the spread of COVID-19. The plaintiffs seek both declaratory relief and to enjoin the enforcement of these orders. The court has already denied the request for a preliminary injunction. *See Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214 (D. Md. 2020). Now pending before the court is the defendants' motion to dismiss the plaintiffs' amended complaint. (ECF 54). The matter has been fully briefed and no oral argument is necessary. *See* Local Rule 105(6). For the reasons discussed herein, the court will grant the defendants' motion.

FACTS AND PROCEDURAL HISTORY

This action was instituted on May 2, 2020. (ECF 1). The plaintiffs assert a number of claims under federal law for violations of: (1) the First Amendment's Free Exercise Clause; (2) the First Amendment's guarantee of the freedom of assembly; (3) the First Amendment's Free Speech Clause; (4) the First Amendment's Establishment Clause; (5) the Fourteenth Amendment's Equal Protection Clause; (6) Article IV's guarantee of a republican form of government; (7) the Commerce Clause; and (8) the Fifth Amendment's Takings Clause. In addition, the plaintiffs assert several violations of rights protected by the Maryland Constitution.

On May 20, 2020, this court denied the plaintiffs' request for a preliminary injunction, holding that the plaintiffs, with respect to their free exercise, free assembly, free speech, and

Commerce Clause claims, had not shown a likelihood of success on the merits. *See generally Antietam Battlefield KOA*, 461 F. Supp. 3d 214. Specifically, the court found that the plaintiffs failed to show that the Governor's executive orders[1] lacked a real or substantial relation to protecting public health and that they failed to show that the orders effected a plain and palpable invasion of their rights. *See id*. at 242.

Since the plaintiffs' request for a preliminary injunction was denied, the plaintiffs have filed an amended complaint (ECF 50), which the defendants have moved to dismiss (ECF 54). The amended complaint does not entail any substantive revisions, but merely removes a defendant, adds an attorney, and deletes an unnecessary reference to Virginia Governor Ralph Northam. Accordingly, the court incorporates its previous memorandum opinion for a full recitation of the facts of this case and the applicable legal analysis. Though the substance of the plaintiffs' claims has not changed, the public health context in which those claims arose has. Since May, the number of positive cases in Maryland has risen to 167,656 and the number of deaths has risen to 4,160.[2] After a more stable period in late summer and early fall, the state's positivity rate is now over six percent, with some counties reporting an even higher local rate.

[1] The restrictions about which the plaintiffs originally complained were relaxed as the public health crisis abated—and, unfortunately, may go back into effect as the threat to public health continues to worsen. *See, e.g.*, Executive Order 20-05-06-01 (issued May 6, 2020); Executive Order 20-05-13-01 (issued May 13, 2020); Executive Order 20-06-03-01 (issued June 3, 2020); Executive Order 20-07-29-01 (issued July 29, 2020); Executive Order 20-11-10-01 (issued Nov. 10, 2020). The frequent issuance of revised public health measures—tightening the restrictions as the severity of the crisis increases and loosening the restrictions as the severity of the crisis decreases—is indicative of narrow tailoring.

[2] This data is according to the Maryland Department of Health's Coronavirus Dashboard. *See* Maryland Department of Health, Coronavirus Disease 2019 (COVID-19) Outbreak, http://coronavirus.maryland.gov (last accessed Nov. 16, 2020).

STANDARD OF REVIEW

To survive a motion to dismiss, the factual allegations of a complaint "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). "To satisfy this standard, a plaintiff need not 'forecast' evidence sufficient to prove the elements of the claim. However, the complaint must allege sufficient facts to establish those elements." *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012) (citation omitted). "Thus, while a plaintiff does not need to demonstrate in a complaint that the right to relief is 'probable,' the complaint must advance the plaintiff's claim 'across the line from conceivable to plausible.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). Additionally, although courts "must view the facts alleged in the light most favorable to the plaintiff," they "will not accept 'legal conclusions couched as facts or unwarranted inferences, unreasonable conclusions, or arguments'" in deciding whether a case should survive a motion to dismiss. *U.S. ex rel. Nathan v. Takeda Pharm. North Am., Inc.*, 707 F.3d 451, 455 (4th Cir. 2013) (quoting *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012)).

DISCUSSION

This case concerns the "freedom of some and the public health of all." *Calvary Chapel San Jose v. Cody*, No. 20-cv-03794-BLF, 2020 WL 6508565, at *1 (N.D. Cal. Nov. 5, 2020).[3] The Supreme Court has explained that "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others." *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 26 (1905). Thus, when faced with a public health crisis, a state may implement measures—such as quarantine laws and public health orders—that

[3] Unpublished opinions are cited for the soundness of their reasoning and not for their precedential value.

give effect to the community's "right to protect itself against an epidemic of disease[.]" *Id.* at 27. Notably, though, this does not give governments an "absolute blank check for the exercise of government power[,]" *Robinson v. Attorney General*, 957 F.3d 1171, 1179 (11th Cir. 2020), as the police power of a state may be exercised in the form of "regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression[,]" *Jacobson*, 197 U.S. at 38.

Though the Fourth Circuit Court of Appeals has not directly addressed the standard of review for constitutional claims challenging health orders during a pandemic, the Supreme Court in a recent plurality opinion invoked the *Jacobson* standard when denying an application for injunctive relief against California Governor Gavin Newsom's executive order aimed at limiting the spread of COVID-19, *see S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), and other circuit courts have applied the framework from *Jacobson* in a similar context, *see*, *e.g.*, *Robinson*, 957 F.3d at 1179–80 (11th Cir. 2020); *In re Rutledge*, 956 F.3d 1018, 1027 (8th Cir. 2020); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 925–27 (6th Cir. 2020) (petition for certiorari filed); *In re Abbott*, 954 F.3d 772, 783–88 (5th Cir. 2020).[4] Because this case involves several constitutional challenges to a health order promulgated by the Governor in response to a public health crisis, the court will—consistent with its earlier analysis—apply *Jacobson* to determine whether the plaintiffs' constitutional claims survive the motion to dismiss.

To overturn the Governor's orders under *Jacobson*, then, a plaintiff must show either (1) that they have "no real or substantial relation" to protecting public health, or (2) that they are

[4] The court notes the existence of some contrary authority. In *Savage v. Mills*, for example, the District of Maine characterized *Jacobson* as "capacious precedent" and expressed its belief that *Jacobson* will not turn out to "be the Rosetta Stone for evaluating the merits of a challenge to any COVID-19-related government regulation." ___ F. Supp. 3d ___, No. 1:20-cv-00165-LEW, 2020 WL 4572314, at *5 (Aug. 7, 2020). And in *Calvary Chapel Dayton Valley v. Sisolak*, Justice Alito, writing in dissent and joined by Justices Thomas and Kavanaugh, expressed the view that the language in *Jacobson* is not the last word on what the Constitution allows public officials to do during the COVID-19 pandemic. 140 S. Ct. 2603, 2608 (2020). Nevertheless, the weight of authority suggests that—for now at least—*Jacobson* remains the proper framework.

"beyond all question, a plain, palpable invasion of rights secured by the fundamental law." 197 U.S. at 31. The Constitution, Chief Justice Roberts has reiterated, entrusts "'[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (citing *Jacobson*, 197 U.S. at 38). "When those officials 'undertake[ ] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'" *Id.* (citing *Marshall v. United States*, 414 U.S. 417, 427 (1974)). Accordingly, courts are not to "second-guess the wisdom or efficacy" of public health measures lest they usurp the functions of the politically accountable branches. *In re Abbott*, 954 F.3d at 785. Still, "to prevent misapprehension of our views," it is worth reiterating that the court has a duty to "give effect to the Constitution" and prevent "wrong and oppression" where the state enacts regulations that are "arbitrary and oppressive." *Jacobson*, 197 U.S. at 31, 38. In short, a pandemic does not present the government with a "blank check" to deny constitutional rights. *Robinson*, 957 F.3d at 1179.

As to the first *Jacobson* test, the plaintiffs have not plausibly alleged that there is no real and substantial relationship between the Governor's orders and the public health; instead, as the court stated previously, it is "clear that the Governor's orders have at least a real and substantial relation to protecting public health." *Antietam Battlefield KOA*, 461 F. Supp. 3d at 230. The stated objective of the Governor's executive order was "[t]o reduce the spread of COVID-19" and "to protect and save lives[.]" Executive Order 20-03-30-01 ("EO").[5] The Governor chose to achieve this goal by, among other measures, imposing restrictions on the size of indoor gatherings and imposing a stay-at-home order. Because these limitations restrict in-person contact, they are

[5] The amended complaint lacks specificity as to which of the Governor's executive orders are actually being challenged. The amended complaint generally refers to the Governor's orders in a collective sense without distinguishing between them, except where the plaintiffs make one reference to the effect of the Governor's March 30 Executive Order (No. 20-03-30-01) on plaintiff Antietam Battlefield KOA. The court will therefore rely on the March 30 order but will reference the Governor's other orders where appropriate.

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