

Hogan, has issued a series of executive orders designed to slow the spread of the disease and protect the health of Anne Arundel County residents. In so doing he has consulted with and relied on the advice of acknowledged public health professionals, notably the County's Health Officer, Dr. Nilesh Kalyanaraman, a board certified physician in internal medicine with nearly ten years of senior health management experience. Dr. Kalyanaraman has over 13 years of experience in Federally Qualified Health Centers managing population health and has served as the Research Chair of the National Health Care for the Homeless Council. Based on the advice of Dr. Kalyanaraman and the data related in the rate and number of infections and hospitalizations, County Executive Pittman has made extremely difficult choices that affect the County and its residents in order to slow the spread of the virus and save lives.

Plaintiffs are entities that own and operate restaurants in Anne Arundel County. They have filed their Complaint at the eleventh hour seeking a TRO to prohibit portions of Executive Order 39 issued by County Executive Pittman from taking effect mandating the closure of indoor and outdoor dining at restaurants in Anne Arundel County, effective Wednesday, December 16, 2020 at 5:00 p.m.

Plaintiffs do not challenge the legal authority of County Executive Pittman to issue the provision limiting the operations of restaurants. Rather, Plaintiffs contend that the science relied upon by County Executive Pittman is wrong and incorrectly believe that the public would be better served with restaurants operating in their current status.

Plaintiffs do not represent the general public such as restaurant workers or those who seek to dine at their restaurants. They do not represent those elderly County residents or those residents who are immune-compromised who are at the greatest risk of dying from coronavirus. Plaintiffs are limited to restaurant owners and have no standing to assert the rights of others.

II. STANDARD FOR GRANTING A TEMPORARY RESTRAINING ORDER

Maryland Rule 15-504 provides that a temporary restraining order may be granted only if it appears from specific facts shown by affidavit or other statement under oath that immediate, substantial, and irreparable harm will result to the person seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction. The Court of Appeals created four factors that a court must find to exist before it may issue a TRO. *Fuller v. Republican Central Committee of Carroll County*, 444 Md. 613, 635-36, 120 A.3d 751, 764 (2015) (citing *Dep't of Transp. v. Armacost*, 299 Md. 392, 404-05, 474 A.2d 191, 197 (1984)). The Court of Appeals has enumerated these factors as follows:

(1) the likelihood that the plaintiff will succeed on the merits; (2) the 'balance of convenience' determined by whether greater injury would be done to the defendant by granting the injunction than would result from its refusal; (3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and (4) the public interest.

Armacost, 299 Md. at 404-05; *Fuller*, 444 Md. at 635-36.

Maryland Rule 15-504(a) also requires that a court find “immediate, substantial, and irreparable harm,” before granting a temporary restraining order. *Fuller*, 444 Md. at 636. This “standard supplements the four-factor test for interlocutory injunctions established in *Armacost* rather than replaces it,” and a plaintiff must show the existence of both “immediate, substantial, and irreparable harm” and the four factors. *Id.*

III. ARGUMENT

A. THE PLAINTIFFS WILL NOT SUCCEED ON THE MERITS.

In the Complaint filed by Plaintiffs, they contend that the order issued by County Executive Pittman “endangers the citizens of Anne Arundel County by subjecting them to a greater risk of the spread of COVID-19 and by destroying the lives of many financially, emotionally, and

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psychologically.” Complaint at para. 21. The case of *Antietam Battlefield KOA v. Hogan*, 461 F.Supp.3d 214 (D. Md. 2020) challenging executive orders of Governor Hogan issued in an attempt to curb the pandemic is instructive.

The federal court in *Antietam* stated:

COVID-19 has been labeled by both the Governor and the President as a public health emergency. *See Proclamation on Declaring National Emergency Concerning the COVID-19 Outbreak*, <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last accessed May 14, 2020). Numerous cases have applied the standard in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905), when reviewing measures that curtail constitutional rights during the COVID-19 pandemic. *See, e.g., In re Abbott*, 954 F.3d 772, 784–85 (5th Cir. 2020); *see also Robinson v. Attorney Gen.*, 957 F.3d 1171, 1178–80 (11th Cir. 2020).

...

Since the challenged orders are public health measures to address a disease outbreak, *Jacobson* provides the proper scope of review. Therefore, the plaintiffs must demonstrate that they are likely to succeed in showing that the Governor's orders have either no “real or substantial relation” to protecting public health or that they are “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”

Antietam Battlefield KOA v. Hogan, 461 F.Supp.3d 214, 228 (D. Md. 2020), appeal dismissed, No. 20-1579, 2020 WL 6787532 (4th Cir. July 6, 2020).

Plaintiffs will be unable to show that County Executive Pittman’s Executive Order affecting the operations of restaurants has either no “real or substantial relation” to protecting public health or that it is “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” The basis for Plaintiffs’ challenge is purely factual. With life and death at issue for County residents, such a factual dispute may only be determined after a full and fair evidentiary hearing and should not be based upon one-sided affidavits.

Furthermore, the factual allegations made by the Plaintiffs are speculative and not based on any accepted metrics. Neither of the affiants submitting medical testimony have treated any COVID-19 patients or had prior experience in addressing the COVID-19 pandemic. They cite anecdotal statistics without citation to any type of authority. The opinions they express are general opinions not based on the treatment of COVID-19 patients in Anne Arundel County or professional experience in public health.

By contrast, the affidavit of County Health Officer Dr. Nilesh Kalyanaraman is based on his nine months of direct experience in addressing the COVID-19 pandemic on a local level and generally accepted statistical information from the Maryland Department of Health and the Centers for Disease Control. Notably, his affidavit directly rebuts the unsubstantiated allegations in the affidavits and in the Motion.

B. GREATER INJURY WILL BE DONE BY GRANTING THE INJUNCTION.

The Plaintiffs are seeking a TRO and/or preliminary injunction that will permit restaurants in the County to operate both indoors and outdoors. They incorrectly claim that restaurants are not a significant source of transmission of the coronavirus. Health Officer Dr. Nilesh Kalyanaraman, a public health professional whose daily job has been to protect the public from the health effects of the global pandemic since the onset of the pandemic and the public official with the most knowledge of the coronavirus believes that Plaintiffs' views are incorrect. *See* Affidavit of Dr. Nilesh Kalyanaraman attached hereto as Exhibit 1. If the TRO is granted and the restaurants are permitted to operate as they have been doing, the potential consequences may be deadly to many County residents. There will be no way to reverse the deaths that could occur.

Executive Order 39 was based on information received and analyzed by the Department of Health as to projected hospitalizations due to the current and projected increase in the spread of

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COVID-19. Exhibit 1, Affidavit of Dr. Nilesh Kalyanaraman, M.D., para 4 and attached Dec. 15, 2020 Presentation, pp. 6-8, 14-17.

The determination that hospitalizations may exceed the number of available beds was based on projections on the number of beds used and projected to be needed, number of hospitalizations, and the rise in COVID-19 cases. Exhibit 1, Affidavit of Dr. Nilesh Kalyanaraman, M.D., JH Report, pp. 18-23; 51-68. The rate of hospitalizations have increased over the last month, projecting to the catastrophic level as shown on page 15 of the Dec. 15, 2020 Presentation. Hospitalizations are increasing rapidly and at the pace of projection, will exceed the number of beds in the State in early 2021. Exhibit 1, Affidavit of Dr. Nilesh Kalyanaraman, M.D., para 5, Dec. 15, 2020 Presentation, p. 17.

Based on research and data reviewed and obtained by the Department, restaurants have been determined to be a significant source of COVID infections. Indoor and outdoor dining have been shown to be in the top five high risk locations. Exhibit 1, Affidavit of Dr. Nilesh Kalyanaraman, M.D., para 6. Dec. 15, 2020 Presentation, p. 12; *see also* JH Report, pp. 25-28; 35-44.

Based on contact tracing data compiled by the Department, restaurants have been shown as increasing as a disproportionate location for COVID-19 cases. Exhibit 1, Affidavit of Dr. Nilesh Kalyanaraman, M.D., para 7, Dec. 15, 2020 Presentation, p. 13.

C. WHETHER THE PLAINTIFFS WILL SUFFER IRREPARABLE INJURY UNLESS THE INJUNCTION IS GRANTED.

While Plaintiffs purport to represent the interests of individual County residents and those unaffiliated with its restaurants, they have no standing to do so. Plaintiffs are a group of restaurant owners. Their interests they are seeking to protect are financial. "Where the harm suffered by the moving party may be compensated by an award of money damages at judgment, courts generally

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have refused to find that harm irreparable. *See, e.g., Morton v. Beyer*, 822 F.2d 364, 371–72 (3d Cir.1987); *Foxboro Co. v. Arabian Am. Oil Co.*, 805 F.2d 34, 36 (1st Cir.1986). Monetary relief typically may be granted as easily at judgment as at a preliminary injunction hearing, and a party does not normally suffer irreparable harm simply because it has to win a final judgment on the merits to obtain monetary relief." *Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 694 (4th Cir. 1994).

D. THE PUBLIC INTEREST NECESSITATES THE DENIAL OF A TEMPORARY RESTRAINING ORDER.

The public interest necessitates the denial of the requested TRO. County residents are becoming infecting with, suffering the effects of, and dying every day from the coronavirus. The numbers are spiking. Unless the County slows the virus, which it is attempting to do through County Executive Pittman's Executive Order, many more will become infected, suffer, and may die. This Court should not jeopardize lives of County residents by accepting the unsupported and at times illogical arguments set forth in the affidavits submitted by Plaintiffs. This Court should base its decision on the affidavit of Dr. Nilesh Kalyanaraman, the most knowledgeable health official who is an expert on the coronavirus.

E. PLAINTIFFS WILL NOT SUFFER IMMEDIATE, SUBSTANTIAL AND IRREPARABLE HARM IF A TRO DENIED.

If the request for a TRO is denied, Plaintiffs will not suffer immediate, substantial and irreparable harm. Their restaurants' operations will be limited, but their harm will be limited to lost business. Lost business is not the type of harm that a TRO is designed to redress.

IV. CONCLUSION

The federal court in *Antietam* aptly stated the issues as follows:

The court's role is not to “usurp the functions of another branch of government” in deciding how best to protect public health, as long as the measures are not arbitrary or unreasonable. *Jacobson*, 197 U.S. at 28, 25 S.Ct. 358. It might be, as the plaintiffs contend, that the prohibitions in place are not necessary to ensure public health and safety, or it might be that even stricter prohibitions are warranted. But although there may be more than one reasonable way to respond to the COVID-19 outbreak, it is clear that the Governor's orders have at least a real and substantial relation to protecting public health.

Antietam Battlefield KOA v. Hogan, 461 F. Supp. 3d 214, 230 (D. Md. 2020), *appeal dismissed*, No. 20-1579, 2020 WL 6787532 (4th Cir. July 6, 2020).

For the reasons stated herein Defendant County Executive Steuart Pittman respectfully requests that this Honorable Court DENY Plaintiffs’ Motion for a Temporary Restraining Order and Preliminary Injunction, and such other and further relief as justice and his cause may require.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that this submission does not contain any restricted information and that on this 16th day of December, 2020, a copy of the foregoing was emailed to the attorney for Defendant:

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