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Why the ‘Reopen Maryland’ lawsuit failed

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On Wednesday, U.S. District Judge Catherine Blake rejected the lawsuit filed by Emmitsburg attorney and District 4 delegate Daniel Cox on behalf of businesses, lawmakers and clergy challenging Gov. Larry Hogan's use of emergency public health powers. In some other states, challengers have won rulings striking down at least some portions of state stay-home orders. But this suit’s claims failed all down the line, and here’s why.

To begin with, the U.S. Constitution does not generally bar restrictive state public health measures. Under the leading Supreme Court case of Jacobson v. Massachusetts, on mandatory vaccination, such laws fail only if they have “no real or substantial relation” to preventing disease. Courts will substitute their judgment for that of public health officials only in a few circumstances, as when they conclude that the orders have no real relationship to battling a health risk, or even that the whole emergency is imaginary.

In what you might call a long-shot move, Cox’s suit did seek to minimize the seriousness of what it called the “*alleged* on-going catastrophic health pandemic” — which has killed more than 2,000 Marylanders so far — and drew sharp rebuke from the judge, who wrote: “even if these assertions were true, the plaintiffs ignore the likelihood that the restrictions that were put in place reduced the number of deaths and serious disability the State has experienced.”

In his statements outside the court, Del. Cox has told a radio audience that “ninety-nine percent of the population is not in danger with this virus," and has said on Twitter that "Studies show up to 70-86% of the public already have or had coronavirus." Many medical authorities would sharply disagree with both contentions.

In Wisconsin, Oregon, and Ohio, challengers were able to convince judges that governors overstepped the authority granted under state emergency laws, which may require, for example, legislative say-so for an emergency order’s extension. But Maryland grants its governor broader power than many other states, one good reason being that ours is not a year-round legislature. The General Assembly has been adjourned for weeks and is not going to reconvene in Annapolis every 30 days — in the middle of a pandemic! — to give thumbs up or down on each Hogan order. Nor should it have to. The judge found Hogan had not overstepped Maryland law.

In some states, challengers have successfully argued that governors' orders were too restrictive toward churches. Those claims failed here too.

Under the relevant standard, articulated by the late Justice Antonin Scalia in a 1990 Supreme Court opinion, neutral and general laws that burden religion do not violate the U.S. Constitution so long as 1) they are not improperly motivated by a wish to restrict religion, and 2) they do not arbitrarily restrict religious activity when genuinely similar non-religious activity is permitted. This court, like other federal courts, rejected the argument that if stores are to stay open to sell plywood or soft drinks, all other gatherings must be permitted as well. As the judge pointed out, the federal government's own guidelines designate sale of food and cleaning supplies as essential. And shop-and-leave arrangements can be rationally distinguished from gatherings whose whole point is to congregate closely for a lengthy period. (Religious gatherings have been an important source of outbreaks both in the U.S. and abroad.)

An unusual aspect of the suit was Del. Cox's claim to have been personally threatened by an aide to Gov. Hogan. Shortly before filing the lawsuit Cox repeatedly asked the aide if he, Cox, could be arrested for speaking at a Reopen rally, and the aide answered that the delegate should read the text of the relevant order if he wanted to know what it said. Cox characterized this exchange as a threat. (No one was arrested for speaking at the rally.)

Judge Blake ruled that the restriction on large gatherings is what the law calls a "time, place, and manner" restriction not based on the content of speech, noted that "there is no evidence that the order is being applied selectively to discourage speech that the Governor disagrees with," and summed things up: "the Governor has not silenced Cox or any other legislator."

The court made short shrift of most of the suit's other claims, some of which seemed thrown against the wall to see what might stick. For instance, the constitution's Commerce Clause might come into play had the governor arranged the rules so as to discriminate against out-of-state merchants, but he hadn't.

The text of this lawsuit was full of rhetorical flights and digressions into points not germane to law. It appeared to be written with some audience in mind other than federal judges.

That's one reason, when Cox takes the case to the Fourth Circuit federal appeals court — as he has vowed to do — he will find his work cut out for him.

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