Nos. 20-6341

UNITED STATES COURT OF APPEALS
for the SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY, Attorney General Daniel Cameron, ex rel. DANVILLE CHRISTIAN ACADEMY, INC.,

Plaintiffs-Appellees

v.

ADNREW G. BESHEAR, in his official capacity as Governor of the Commonwealth of KY

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
No. 3:20-cv-00075

GOVERNOR ANDREW G. BESHEAR'S EMERGENCY MOTION FOR A STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

Under Federal Rule of Appellate Procedure 8(a)(2), Defendant Governor Andy Beshear, by and through counsel, moves this Court for an emergency stay of the Preliminary Injunction entered by the District Court in this matter. Governor Beshear respectfully moves this Court to stay the lower court's Order enjoining him from closing all schools to in-person instruction for approximately three weeks

due to the high risk of transmission of COVID-19. The lower court's order not only immediately impedes the Commonwealth's ability to enact public health measures to protect the public from the spread of COVID-19, but also eviscerates free exercise jurisprudence to call into question any neutrally-applicable public health measure a state would enact to protect children and staff of religiously-affiliated schools.

A party may first move for a stay pending appeal where a motion before the District Court would be "impracticable." F.R.A.P. 8(a)(2)(A)(i). In this case, such a motion would be impracticable because the District Court just entered its erroneous ruling after full briefing and a hearing. Moreover, review before this Court is urgent, because the District Court's Order will cause imminent irreparable harm to the people of Kentucky beginning Monday, November 30, 2020, by facilitating the spread of a deadly disease.

Background

Kentucky is experiencing a deadly surge of COVID-19 cases that has led to new daily record highs of cases over and over again. On November 25, Kentucky reported 3,408 new cases, with 1,734 people currently hospitalized for COVID-19, with 409 people in the intensive care unit and 216 people on a ventilator.[1] This

[1] KY COVID-19 Daily Summary 11/25/2020, Nov. 25, 2020, available at https://chfs.ky.gov/agencies/dph/covid19/COVID19DailyReport.pdf *Beshear announces 2,690 new COVID-19 cases, makes last-ditch plea on* Thanksgiving,

case concerns the urgent public health measures Governor Beshear has implemented at the advice of public health officials, to prevent our healthcare system from becoming overwhelmed from this surge.

I. COVID-19 Spreads Through In-Person Contact.

Most cases of COVID-19 are spread by people who have no symptoms at all. (Declaration of Dr. Steven J. Stack ("Stack Decl."), D.E. 24-1, Page ID#: 435, ¶ 7.) COVID-19 spreads primarily on tiny droplets transmitted through close contact, which means being within 6 feet of an infected person for a cumulative total of 15 minutes or more over a 24-hour period. (*Id.* at Page ID##: 434-35, ¶ 5.) The CDC recently concluded, however, that COVID-19 sometimes spreads through airborne transmission, when small droplets and particles linger in the air for minutes to hours. (*Id.* at Page ID#: 435, ¶ 6.) This means the virus may be able to infect people who are further than 6 feet away from the person who is infected or after that person has left the space, particularly if the space is indoors and poorly ventilated. (*Id.*)

As the disease has progressed, studies have shown that places where people congregate near each other indoors for extended periods of time are the locations most associated with spread of COVID-19, especially if people are not wearing

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Nov. 24, 2020, available at https://chfs.ky.gov/agencies/dph/covid19/COVID19DailyReport.pdf (last visited Nov. 25, 2020).

masks the entire time. (*Id.* at PageID##: 435-36, ¶ 8.)[2] Studies have linked catastrophic outbreaks to restaurants, weddings, funerals, and worship services. (*Id.*) Importantly, these outbreaks do not just affect those who choose to attend these settings. The outbreaks spread through the community, affecting those who did not choose to assume any risk related to attendance at the events. (*Id.*)[3]

Taken together, this evidence shows that certain interventions can reduce the spread of disease. Social distancing eliminates close contacts, although airborne transmission remains a threat. (*Id.* at PageID#: 436, ¶ 10.) Requiring facial coverings ensures that fewer infectious particles are traveling through the air. (*Id.* ¶ 9.) And ensuring that symptomatic people do not attend in-person events helps reduce the risk of disease. However, asymptomatic and presymptomatic individuals, who do not know they are infectious, spread most cases of COVID-19.

[2] By contrast, transient encounters – where people are near each other for less than 15 minutes – appear less likely to cause the spread of disease, especially when individuals are wearing facial coverings and maintaining distance from each other. (*Id.* ¶ 9.) Retail locations and similar settings with transient encounters have not been linked to significant spread. (*Id.*)

[3] As Dr. Stack's Declaration explains, a genetic study has traced 20,000 cases in Boston to a single healthcare conference with only 175 attendees. And a single wedding in rural Maine attended by 55 people ultimately led to infections of at least 177 people, including at a long-term care facility 100 miles away and at a correctional facility approximately 200 miles away, and ultimately caused at least seven deaths. None of the seven people who died had attended the wedding reception. (Stack Decl., D.E. 24-1, PageID##: 435-36, ¶ 8.)

(*Id*. ¶ 7.) Importantly, none of these steps can entirely prevent the spread of disease.

II. Kentucky Responds To COVID-19 With Emergency Public Health Measures.

Kentucky, like most other states, is currently in the midst of a potentially catastrophic third wave of COVID-19. The first wave came in the Spring, when the disease first reached the United States. (*Id.* at PageID#: 437, ¶ 14.) In response, the Governor declared a State of Emergency on March 6, 2020, and Kentucky imposed a number of public health measures, including closing non-life-sustaining businesses and prohibiting mass gatherings. (*Id.*)[4] The Governor also recommended that all public and private schools cease providing in-person instruction, and all public school districts and the vast majority of private schools followed that recommendation, including Danville Christian Academy, which ceased in-person instruction for two months.[5] The intervention helped flatten the curve, but the disease continued to spread and Kentuckians continued to die from it. (*Id.* ¶ 14.)

A second surge occurred this summer. Consistent with recommendations from the CDC, the White House, and the Kentucky Department for Public Health

[4] *See generally* Kentucky's Response to COVID-19, available at https://governor.ky.gov/covid19 (last visited Nov. 25, 2020).
[5] *See id.*

("DPH"), the Commonwealth instituted a facial coverings mandate and briefly closed indoor service at restaurants and bars. (*Id.* at PageID##: 437-38, ¶ 15.)[6] Again, Kentuckians flattened the curve.

The reopening of schools this Fall posed a significant risk of increased cases. (*Id.* at PageID#: 438, ¶ 16.) In response, DPH and the Kentucky Department of Education promulgated rules and recommendations for schools to follow to ensure safety, including mandating facial coverings and distancing.[7] DPH promulgated a regulation requiring all schools – public or private – to self-report positive cases or quarantined individuals so that DPH and the public can track the spread in the school setting. *See* 902 KAR 2:220E.[8] DPH's self-reporting portal reflects that Danville Christian Academy has never reported a single case under this regulation even though it admits in its Complaint there have been at least 5 infections among students and faculty.[9]

The White House has "commended" Governor Beshear for taking active measures.[10] And, in rejecting a challenge to these measures brought by the

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[6] *See id.*
[7] *See id.*
[8] *See* Healthy at School: Guidance on Safety Expectations and Best Practices for Kentucky Schools (K-12), available at https://govstatus.egov.com/ky-healthy-at-school (last visited Nov. 22, 2020).
[9] https://public.tableau.com/profile/chfs.dph#!/vizhome/COVID19SchoolSelfReportingData/SchoolSelfReportCovid19DB (last visited Nov. 22, 2020).
[10] White House Kentucky State Report, Nov. 15, 2022, available at https://cdn.govstatus.site/381d0fbb43b611527

Attorney General, the Kentucky Supreme Court unanimously held that Governor Beshear's "orders were, and continue to be, necessary to slow the spread of COVID-19 and protect the health and safety of all Kentucky citizens." *Beshear v. Acree*, --- S.W.3d ---, No. 2020-SC-0313-OA, 2020 WL 6736090, at *37 (Ky. Nov. 12, 2020).

III. COVID-19 Is Surging Again Across Kentucky And America.

Kentucky is in the midst of the third wave of COVID-19. (Stack Decl., D.E. 24-1, PageID##: 438-39, ¶ 17.) Kentucky is setting new records for positive COVID-19 cases on a nearly daily basis, reflecting exponential growth of the disease. (*Id.*) This spread will eventually cause hundreds of additional preventable deaths, as deaths generally lag diagnosis by about three weeks. (*Id.* at PageID#: 441, ¶ 23.) And the widespread disease threatens to overwhelm our healthcare system by filling up essential hospital beds and sidelining critical healthcare workers who catch the disease. (*Id.* at PageID##: 439-41, ¶¶ 18, 24.) Hospitals have already begun curtailing procedures and closing operating rooms as hospitalizations due to COVID-19 have gone up.[11] Notably, the local hospital in

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a8f1c329301ef51fd555fcf/Kentucky%20%2011.17.pdf (last visited Nov. 22, 2020).

[11] Alex Acquisto, *UK Hospital closing 5 operating rooms to free up resources for COVID-19 patients*, Lexington Herald-leader, available at https://www.kentucky.com/news/coronavirus/article247400680.html (last visited Nov. 25, 2020);*UofL opening floor of hospital unused for 12 years in preparation for expected surge*, WLKY News, available at

Danville, the home of Appellee Danville Christian Academy, has struggled during this third wave with a full COVID-19 ward, warning that it may not have enough nurses to care for all patients.[12] This third wave comes at a particularly dangerous time, as we approach the Thanksgiving holiday. In Canada, which celebrated Thanksgiving last month, the holiday kicked off exponential growth of the disease, despite warnings ahead of time from public health officials. (*Id.* ¶¶ 19-22.)

The Governor and public health officials initially responded to this surge with recommendations. The Governor implemented a Red Zone Reduction plan on October 26, 2020.[13] Under this plan, DPH provided recommendations of steps for Kentuckians to take if they live in "red zone" counties, meaning the county has a daily average of more than 25 cases per 100,000 people over a seven-day period.[14] Among the recommendations are that Kentuckians in these areas cease in-person gatherings, and that schools provide remote instruction.[15]

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https://www.wlky.com/article/expected-increase-in-patients-prompts-uofl-to-open-floor-of-hospital-unused-for-12-years/34775594 (last visited Nov. 26, 2020).

[12] *COVID-19 Unit Full at Ephraim McDowell, 2 on Vents*, WKYT News, October 16, 2020, available at https://www.wkyt.com/2020/10/16/covid-19-unit-full-at-ephraim-mcdowell-in-danville-two-on-vents/ (last visited Nov. 25, 2020).

[13] *Gov. Beshear: Kentuckians, Communities Urged to Follow New Red Zone Reduction Recommendations to Stop COVID Spread, Protect One Another*, Oct. 26, 2020, available at https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=433 (last visited Nov. 25, 2020).

[14] *Id.*

[15] Red Zone Recommendations, available at https://governor.ky.gov/attachments/Red-Zone-Reduction-Recommendations.pdf (last visited Nov. 25, 2020); COVID-19 Mode of Instruction Metrics for K-12

These recommendations did not stop the exponential growth of COVID-19. On October 26, 2020, when the recommendations took effect, 55 counties were in the "red zone" and Kentucky had 953 new cases.[16] By November 20, 2020, when Governor Beshear's additional mandatory health measures took effect, Kentucky had 113 "red zone" counties and 3,825 new cases of COVID-19.[17] As of November 25, 2020, the day the injunction issued, Kentucky had 117 "red zone" counties, 3,408 new cases, 26 new deaths, and a total of 1,835 Kentuckians lost to COVID-19.[18] Dr. Stack attributes this spread to fatigue, noncompliance, and cooler temperatures leading people to spend more time indoors. (Stack Decl., D.E. 24-1, PageID##: 438-39, ¶ 17.) This widespread disease has overwhelmed contact

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Education, Sept. 29, 2020, available at https://chfs.ky.gov/agencies/dph/covid19/cv19ModeofInstructionMetricsforK-12Education.pdf (last visited Nov. 25, 2020).

[16] *Beshear makes new recommendations for 'red zones' as COVID-19 surge continues*, Oct. 26, 2020, available at https://www.kentucky.com/news/coronavirus/article246730976.html (last visited Nov. 25, 2020).

[17] *Gov. Beshear: Another Frightening, Record Day for New COVID-19 Cases*, Nov. 20, 2020, available at https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=477 (last visited Nov. 25, 2020); COVID-19 Current Incidence Rate in Kentucky, Nov. 20, 2020, available at https://chfs.ky.gov/agencies/dph/cv19maps/incidencemap1120.pdf (last visited Nov. 25, 2020).

[18] KY COVID-19 Daily Summary 11/25/2020, available at https://chfs.ky.gov/agencies/dph/covid19/COVID19DailyReport.pdf (last visited November 26, 2020).

tracers, who are now largely unable to identify and contact everyone who must quarantine. (*Id.* at PageID# 437, ¶¶ 11-12.)

IV. Kentucky Implements New Public Health Measures To Combat The Surge.

At the recommendation of public health officials, on November 18, 2020, the Governor issued two executive orders to respond to this potentially catastrophic surge. Executive Order 2020-968, which lasts until December 13, 2020, prohibited social gatherings of more than eight people from more than two households; closed indoor dining; limited capacity at theaters, venues, and similar establishments; cut capacities and canceled group classes at gyms, fitness centers, and other recreational facilities; and mandated that office-based businesses cease in-person operations and provide telecommuting to the greatest extent possible.[19]

Executive Order 2020-969 requires all schools to cease in-person instruction and transition to remote or virtual instruction beginning November 23, 2020.[20] Elementary schools in non-red zone counties, where the risk of transmission in school is lower, may return to in-person instruction beginning December 7, 2020.[21]

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[19] Ky. Exec. Order 2020-968, Nov. 18, 2020, available at https://governor.ky.gov/attachments/20201118_Executive-Order_2020-968_State-of-Emergency.pdf (last visited Nov. 25, 2020).
[20] Ky. Exec. Order 2020-969, Nov. 18, 2020, available at https://governor.ky.gov/attachments/20201118_Executive-Order_2020-969_State-of-Emergency.pdf (last visited Nov. 25, 2020).
[21] *Id.*

Middle and high schools must remain in virtual instruction until 2021. The Order contains an exception permitting schools to provide in-person "targeted services," which includes therapy, assistance to vulnerable populations, and remedial instruction.[22] This Order applies to public and private schools alike.[23]

Schools are a particularly difficult problem for public health officials. (Stack Decl., D.E. 24-1, PageID#: 443, ¶ 32.) Most importantly, compliance with facial coverings and social distancing requirements is difficult to maintain, as Danville Christian Academy's social media confirms.[24] And even at schools that try harder to comply with these rules, students must eat, removing their masks and creating a risk of disease transmission – just as in restaurants. (*Id.* ¶ 32.) And while schools are generally safer than some other settings, the CDC has observed that when states meet certain criteria, the state is at increased risk of transmission in schools. (*Id.* at PageID##: 442-43 ¶ 30 & PageID##:470-71, Ex. 3.) And Kentucky is firmly within those criteria. (*Id.*)

Kentucky is unusually vulnerable to the problem of spread at schools. Kentucky leads the nation in children living with relatives other than their parents – including grandparents and great-grandparents, who are especially vulnerable to

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[22] *Id.*
[23] *Id.*
[24] *See* Photographs 1-4, Danville Christian Academy Facebook Page, D.E. 24-2, PageID##: 500-03, and publicly available at https://www.facebook.com/DCAWarriors/ (last visited Nov. 25, 2020).

the disease. (*Id*. at PageID#: 444, ¶ 35.) Kentuckians also have high rates of comorbidities that can lead to severe cases of COVID-19, including heart and lung conditions. (*Id.*) The public health measures imposed under Executive Orders 2020-968 and -969 are intended to prevent the unnecessary loss of life among these vulnerable populations, and among all Kentuckians. (*Id.* ¶ 34.)

V. Proceedings In The District Court.

Plaintiffs filed this action on the evening of November 20, 2020. (D.E. 1, PageID##: 1-67.) They allege a violation of the Free Exercise Clause of the First Amendment to the United States Constitution, a violation of the First Amendment right to religious autonomy, a violation of the Establishment Clause of the First Amendment, violations of Sections 1 and 5 of the Kentucky Constitution, and a violation of the Kentucky statutory Right to Religious Freedom Act. Plaintiffs also moved for a temporary restraining order. (D.E. 3, PageID##: 71-104.) Governor Beshear responded to the motion on November 23, 2020. (D.E. 24, PageID#: 402-31.) That day, the District Court heard oral argument from the parties. (D.E. 29.)

On November 25, 2020, at 7:09 p.m. on the eve of the Thanksgiving holiday, the District Court issued its Opinion and Order enjoining Executive Order 2020-969 – but only as applied to religious schools. (D.E. 35, Page ID##: 714-35) (attached as Exhibit A). Governor Beshear filed this appeal the same night, because the District Court's Order granting religious schools a special exemption

from a generally applicable public health measure is contrary to law, favors religion over non-religion, and endangers the health and safety of all Kentuckians, not just those who choose to attend the sectarian schools subject to the order.

STANDARD OF REVIEW

Under Federal Rule of Appellate Procedure 8(a), this Court may enter an order suspending, modifying, restoring, or granting an injunction while an appeal is pending. The Court must balance four factors in deciding whether to grant a stay: (1) whether the movant "has made a strong showing that he is likely to succeed on the merits"; (2) whether the movant "will be irreparably injured absent a stay"; (3) whether issuance of a stay will "substantially injure" other interested parties; and (4) "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). The first two factors "are the most critical." *Id.*

ARGUMENT

Governor Beshear's Motion clearly merits a stay.[25] The District Court's decision ignores binding precedent because it grants special privileges to a religious group and impermissibly favors religion over non-religion by relieving it of the obligation to comply with neutral, generally applicable public health

[25] As set forth above, seeking relief from the District Court would be "impracticable," F.R.A.P. 8(a)(2)(A)(i), because the District Court just entered its erroneous ruling after full briefing and a hearing, and review before this Court is urgent.

measures. By permitting all religious schools to open during this pandemic while other schools must remain closed, the District Court has bestowed a new right on the faithful: the right to put countless people outside the religious school at an increased risk of exposure to deadly disease.

I. The District Court's Order Is Contrary to Binding Precedent.

The District Court's Order granting preliminary injunctive relief disregards Supreme Court precedent and relies on a complete rewriting of the Free Exercise Clause. Under the District Court's reasoning, any individual holding a sincere religious belief may be excused from complying with neutral and generally applicable public health measures that interfere with their belief, even during an emergency. Moreover, the District Court erroneously concluded that requiring remote instruction for about 15 days is a substantial burden on Plaintiffs' religious beliefs – despite the fact that Plaintiffs were engaged in remote instruction for two months in the Spring and two weeks leading up to the Executive Order. By granting special privileges to religious schools, the District Court has impermissibly favored specific religious sects, in violation of the Establishment Clause. For these reasons, Governor Beshear will succeed on the merits on appeal.

A. The District Court's Order Fails To Defer To Public Health Officials In An Emergency.

The District Court's Order fails to apply binding Supreme Court precedent, which instructs courts to uphold public health measures responding to the COVID-

19 emergency unless the measure (1) "has no real or substantial relationship to [the emergency]" or (2) "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law[.]" *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905). At the bare minimum, Plaintiffs fail to clear this hurdle with respect to a public health measure that ceases in-person instruction at all public and private K-12 schools. Indeed, less than a week ago, the Sixth Circuit confirmed this conclusion by declining to enjoin orders by the Michigan Department of Health and Human Services closing a private Christian school, which challenged the orders under the First Amendment. *Libertas Classical Assoc. v. Whitmer*, No. 20-2085 (6th Cir. Nov. 20, 2020).[26] The District Court's order prevents Governor Beshear from taking the very same steps.

In times of an emergency, the *Jacobson* standard is intended to be a heavy burden. And now, nine months into the COVID-19 emergency, nearly every court in the country has deferred to state public health officials charged with responding to the emergency. Nearly all courts in America, including the Supreme Court of

[26] Absurdly, the District Court attempted to distinguish *Libertas Classical* on the grounds that the school in that case had voluntarily complied with a closure order. (DE 35, Page ID#: 727.) But the school in that case only did so when faced with penalties. And Danville Christian Academy has regularly ceased in-person instruction, too, and suggested it would in the future to protect its community from COVID-19. Danville Christian Academy just wants to make the decision as to when it is safe for its school to teach in-person, which it is unequipped to do. (*See* D.E. 24-2.).

Kentucky, take their cue from Chief Justice Roberts' concurring opinion in *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (Mem.) (2020).In *South Bay*, the Court denied a religious organization injunctive relief from a California order prohibiting, then limiting, religious gatherings based upon the number of individuals involved. Concurring in the Court's denial, Chief Justice Roberts stated:

> Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

Id. He continued:

> Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson*, 197 U.S. 11, 38, 25 S.Ct. 358, 49 L.Ed. 643 (1905).When those officials "undertake[] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985).

Id. at 1613-14. The Court denied a similar application on the same day in *Elim Romanian Pentecostal Church v. Pritzker, Gov. of Illinois*, 19A1046 (Order List 590 U.S.) (U.S. May 29, 2020), and again on July 24, 2020, in *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada, et al*., 591 U.S. ___ (2020). This Court and others have applied that standard in reviewing executive actions protecting the public health and safety during the COVID-19 pandemic. *See, e.g., League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 127-28 (6th Cir. 2020) (citing *Elim Romanian Pentecostal Church v. Pritzker*, 2020 WL 2517093, at *1 (7th Cir. May 16, 2020)); *In re Rutledge*, 956 F.3d 1018, 1031–32 (8th Cir. 2020); *In re Abbott*, 956 F.3d 696, 704–05 (5th Cir. 2020).[27]

[27] Courts throughout the country overwhelmingly have rejected free exercise clause challenges to public health measures – even where the public health measure directly targets religious practice, unlike the neutral and generally applicable Executive Order in this case. *South Bay Pentecostal Church v. Newsom*¸2020 WL 2687079 (9th Cir. May 22, 2020), *aff'd* 140 S. Ct. 1613, 1613 (May 29, 2020) (denying TRO and upholding religious restrictions due to equivalent restrictions upon comparable secular activities such as theaters); *Harvest Rock Church, Inc. v. Newsom*, 2020 WL 5835219 (9th Cir. Oct. 1, 2020) (denying preliminary injunction on limits to in person worship); *Robinson v. Murphy*, 2020 WL 5884801 (D.N.J. Oct. 2, 2020) (denying injunctive relief and upholding religious restrictions); *High Plains Harvest Church v. Polis*, No. 1:20-cv-01480-RMMEH,2020 WL 4582720, (D. Colo. Aug. 10, 2020) (denying preliminary injunction and upholding religious restrictions); *Murphy v. Lamont*, 3:20-CV-0694 (JCH), 2020 WL 4435167 (D. Conn. Aug. 3, 2020) (denying preliminary injunction); *Ass'n of Jewish Camp Operators v. Cuomo*, 1:20-CV-0687 (GTS/DJS), 2020 WL 3766496 (N.D.N.Y. July 6, 2020) (denying preliminary injunction and upholding restrictions); *Legacy Church, Inc. v. Kunkel*, 2020 WL 3963764 (D.N.M. July 13, 2020) (denying preliminary injunction and injunctive relief), and 2020 WL 1905586 (D.N.M. Apr. 17, 2020) (denying TRO and

upholding religious restrictions); *High Plains Harvest Church v. Polis*, No. 1:20-cv-01480-RM-MEH, 2020 WL 3263902 (D. Colo. June 16, 2020) (denying TRO); *Bullock v. Carney*, No. 20-674-CFC, 2020 WL 2813316 (D. Del. May 29, 2020) (denying TRO), *aff'd*, 806 Fed. Appx. 157 (Mem) (3d Cir. 2020) (denying emergency motion for TRO and/or a preliminary injunction); *Antietam Battlefield KOA v. Hogan,* 2020 WL 2556496 (D. Md. May 20, 2020) (denying TRO and upholding religious restrictions); *Spell v. Edwards*, 2020 WL 2509078 (M.D. La. May 15, 2020), *vacated as moot*, 962 F.3d 175 (5th Cir. 2020) (denying preliminary injunction and dismissing appeal); *Elim Romanian Pentecostal Church v. Pritzker*, 2020 WL 2468194 (N.D. Ill. May 13, 2020) (denying TRO and upholding religious restrictions); *Calvary Chapel of Bangor v. Mills*, 2020 WL 2310913 (D. Me. May 9, 2020) (denying TRO and upholding religious restrictions); *Our Lady of Sorrows Church v. Mohammad*, No. 3:20-cv-00674-AVC (D. Conn. May 18, 2020);*Crowl v.. Inslee*, No. 3:20-cv-5352 (W.D. Wash. May 8, 2020) (denying TRO); *Cross Culture Christian Ctr. v. Newsom*, , 2020 WL 2121111 (E.D. Cal. May 5, 2020) (denying TRO and upholding religious restrictions); *Cassell v. Snyders*, 2020 WL 2112374 (N.D. Ill. May 3, 2020) (denying TRO and preliminary injunction, upholding religious restrictions); *Lighthouse Fellowship Church v. Northam*, 2020 WL 2110416 (E.D. Va. May 1, 2020) (denying TRO and preliminary injunction, upholding religious restrictions); *Gish v. Newsom*, No. 5:20-cv-755, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020) (denying TRO and affirming religious restrictions due to equivalent restrictions upon comparable secular activities such as theaters); *Davis v. Berke*, No. 1:20-cv-98, 2020 WL 1970712 (E.D. Tenn. Apr. 17, 2020) (denying TRO); *Abiding Place Ministries v. Wooten*, No. 3:20-cv-683-BAS-AHG, ECF No. 7 (S.D. Cal. Apr. 10, 2020) (denying TRO); *Tolle v. Northam*, 2020 WL 1955281 (E.D. Va. Apr. 8, 2020) (reaffirming and explaining denial of preliminary injunction on the grounds that the public interest outweighs any harm suffered by religious restrictions upon the plaintiff); *Nigen v. New York*, 2020 WL 1950775 (E.D.N.Y. Mar. 29, 2020) (denying TRO); *Elkhorn Baptist Church v. Brown*, 366 Or. 506 (2020) (preliminary injunctive relief vacated); *Hughes v. Northam*, No. CL 20-415 (Va. Cir. Ct. Russell Co. Apr. 14, 2020) (denying TRO on the grounds that the public interest outweighs any harm suffered by religious restrictions upon the plaintiff); *Hotze v. Hidalgo,* No. 2020-22609 (Tex. Dist. Ct. Apr. 13, 2020) (denying TRO); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020) (denying preliminary injunction).

The District Court ignored this precedent when it concluded that the Governor's closure of all schools in Kentucky – public and private, regardless of any affiliation, religious or otherwise – violates Plaintiffs' First Amendment rights. That argument leads to an absurd and dangerous expansion of the Free Exercise Clause, and ignores the Establishment Clause. A public health emergency is no time to engage in such absurdity. *See Jacobson*, 197 U.S. at 30.

B. Executive Order 2020-969 Does Not Violate The Free Exercise Clause.

The District Court held that Governor Beshear's Order closing in-person instruction at all schools unlawfully burdened Plaintiffs' free exercise right to provide religious education. Because the Order applies to all schools equally, the District Court was wrong.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. CONST., amend. I. The Free Exercise Clause embodies a liberty applied to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). However, the clause "does not include liberty to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (citation omitted). Nor does the clause "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes

(or proscribes).'" *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982)). This is because the clause "embraces two concepts – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell*, 310 U.S. at 303-04 (citing *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 144 U.S. 33 (1890)).

The holding of "religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Minersville School Dist. Bd. of Educ. v. Gobitis*, 30 U.S. 586, 594-95 (1940). Under the prevailing standard, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Smith*, 494 U.S. 872).

Governor Beshear's Executive Order requiring all schools – public and private – to move to remote learning for three weeks is plainly a neutral order of general applicability under this standard. Indeed, there is simply no basis to contend otherwise. The District Court's holding to the contrary depends on comparing religious K-12 schools not to other similarly-situated

K-12 schools, but to preschools, colleges, offices, and lecture halls. (*See, e.g.*, D.E. 35, PageID#: 721 ("This Court wonders why under this executive order, one would be free to attend a lecture, go to work, or attend a concert, but not attend socially distanced chapel in school or pray together in a classroom that is following strict safety procedures and social distancing.") Specifically, the District Court credited Plaintiffs' claim that religious schools must be permitted to operate if other, different entities which pose different public health risks are open – despite admitting in the hearing that such policy decisions are not for the courts.[28] The District Court's comparison of K-12 schools to colleges and universities is also nonsensical, because colleges are different from K-12 schools and because the vast majority colleges and universities – public, private, secular and sectarian – in Kentucky have ceased or will soon cease in-person instruction until beyond the January 4, 2021 expiration date of Executive Order 2020-969.[29] As Dr.

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[28] *See, e.g.*, D.E. 34, Page ID#: 693:2-5 ("I'm not in a good position to weigh the efficacy of any different policy decision. That should be left to the political branches.").

[29] Nearly all public colleges or universities in Kentucky transitioned to completely remote learning beginning Thanksgiving break until January 2021 (http://cpe.ky.gov/covid-19/index.html). As additional examples: Asbury College ceased in-person instruction from November 20, 2020 until January 11, 2021 (https://www.asbury.edu/about/offices/student-services/registrar/academic-calendar/); Kentucky Wesleyan College ceased in-person instruction from November 24, 2020 until January 13, 2021 (https://kwc.edu/academics/academic-calendar/academic-calendar-2020-2021/); Campbellsville University ceased in-

Stack's uncontroverted declaration makes clear, K-12 schools pose different dangers than other entities, and the Executive Order is designed to respond to those dangers. (Stack Decl., D.E. 24-1, PageID##: 442-45, ¶¶ 29-36.) The District Court's substitution of its own policy judgment concerning those restrictions has no basis in the Free Exercise clause and is contrary to *South Bay* and *Jacobson*.[30] Further, compulsory attendance is required for all K-12

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person instruction from November 25, 2020 until January 19, 2021 (https://www.campbellsville.edu/academics/academic-calendar/); The Southern Baptist Theological Seminary ceased in-person instruction on November 23, 2020 (https://www.sbts.edu/backtocampus/); Transylvania University ceased in-person instruction on November 24, 2020 until January 6, 2020 (https://www.transy.edu/1780/2020/11/healthy-at-transy-update-to-2020-21-academic-calendar/); Georgetown College ceased in-person instruction from November 24 until January 11 (http://www.georgetowncollege.edu/sites/default/files/docs/20_21%20Academic%20Calendar%20%28undergraduate%29%20updated.pdf).

[30] During the hearing on the motion for a temporary restraining order, the District Court recognized differences between schools and such places a movie theaters and malls, and the inappropriateness of a court judging policy decisions. The District Court stated:

> I think what the Governor would say is, Well, there are distinctions between the gatherings you've identified. The distinctions have nothing to do with the religious purpose of those gatherings. The distinctions deal with the ability to distance or the dynamic -- in schools, you have kind of this unique dynamic in which you have a population that appears to be largely asymptomatic, even when they have the virus. And they're going home -- you know, they may catch it from somebody at school, not even knowing about it – and then going home to a population that may get the symptoms, and it's more serious for more than students. So there may be some logistically unique things about schools that don't exist, for example, in the worship context on Sunday that require a different approach.…

schools in Kentucky – unlike preschools and colleges.[31]

But most importantly, the District Court's comparison of K-12 schools with preschools and colleges in the context of a Free Exercise challenge makes no sense because the distinction being drawn has nothing to do with religion. Indeed, any number of religious preschools are continuing to operate, as are their secular counterparts. The decision to cease in-person instruction for K-12 schools while leaving other schools open therefore cannot give rise to a Free Exercise claim.

The Executive Order is consistent with the Free Exercise Clause because it does not impose burdens upon religious schools beyond what it requires of all schools. Even the justices who dissented in the interlocutory appeal in *Calvary Chapel* acknowledged that so long as secular and religious organizations' activities are treated the same, a restriction does not infringe

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> At some point, though, that leads to me making policy judgments. I mean, part of the argument here that I hear is that the CDC actually has contrary advice potentially for states like Kentucky as it relates to school closing. Is it really my job to try to sort through all of that and decide, well, here's -- here's what I think. I think we can protect the public if we -- if the school'll just follow these five things. I mean, I'm -- I'm designed to be terrible at that, right?

(DE 35, Page ID#: 696:13-699:18.)

[31] Moreover, preschools and colleges operate under separate, generally applicable restrictions – regardless of whether they are religious or secular. The District Court's holding that religious institutions are not subject to the same restrictions as secular ones calls into question whether those restrictions are enforceable.

the Free Exercise clause. *See Calvary Chapel*, 2020 WL 4251360, at *6 (Kavanaugh, J., dissenting) ("a State's closing or reopening plan may subject religious organizations to the *same* limits as secular organizations").

Executive Order 2020-969 plainly meets this test. The Executive Order requires that in-person instruction at *all* schools must cease until January 4, 2021, a total of about 15 days of in-person instruction. It does not target religious schools or practice in any way. During the time period of the order, all schools – public, private, secular, parochial – may continue all instruction virtually, just like schools such as Danville Christian have done throughout this public health emergency. The order treats all Kentucky schools alike. Here, all schools are required to provide remote instruction to protect public health.

In concluding otherwise, the District Court ignored the plain language of Executive Order 2020-969, twisting it into one that targeted religious schools' decisions to provide "socially distanced chapel in school or pray together in a classroom." (D.E. 35, PageID#: 721.) The Executive Order does no such thing, and the District Court ignores the case law concerning animus to reach a contrary conclusion. State action is non-neutral if the purpose "is to infringe upon or restrict practices because of their religious motivation," or "the purpose . . . is the suppression of religion or religious

conduct." *New Doe Child #1 v. Congress of United States*, 891 F.3d 578, 591 (6th Cir. 2018) (quoting *Lukumi*, 508 U.S. at 533). "A law is not of general applicability if it 'in a selective manner impose[s] burdens only on conduct motivated by religious belief[.]'" *Michigan Catholic Conference and Catholic Family Serv.'s v. Burwell*, 755 F.3d 372 (6th Cir. 2014). None of those conditions applies here. Executive Order 2020-969 is plainly neutral toward religious institutions; plainly not targeted at religious practice; and plainly not applied selectively.

The District Court's reliance on *Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6th Cir. 2020) and *Roberts v. Neace*, 758 F.3d 409 (6th Cir. 2020) expanded those holdings to illogical results in stark conflict with Supreme Court precedent. Both *Maryville* and *Roberts* analyzed a mass gatherings order that prevented groups of individuals from congregating in churches, theaters, sporting events, etc. *See generally* 957 F.3d 610; 958 F.3d 409. Those courts ultimately found that churches must be treated similarly to "law firms, laundromats, liquor stores, gun shops," 957 F.3d at 614, and "airlines, mining operations, funeral homes and landscaping businesses" *Roberts*, 958 F.3d at 414. That reasoning has since been rejected by the Supreme Court in at least three cases – most notably in *South Bay*, 140 S.Ct. at 1613 (Roberts, C.J., concurring).

The Supreme Court's November 25, 2020 order in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 592 U.S. __ (2020) (per curiam) yet again confirms that the Executive Order is consistent with the Free Exercise Clause, and that the District Court has missed the mark. Governor Cuomo's order in Roman Catholic Diocese imposed capacity limits on church attendance, specifically, limits at odds with and drastically lower than other similarly-situated gatherings. In other words, Governor Cuomo's limits were not neutral on their face – they specifically addressed religious gatherings. *Id*., Slip Op. at 2-4; *see also id.* at 16-17 (Kavanaugh, J., concurring) (explaining that New York's restrictions are "discriminatory" because they impose restrictions on houses of worship that "do not apply to some secular buildings in the same neighborhoods"). By contrast, Governor Beshear's Executive Order requiring remote learning for three weeks is neutrally applicable to all schools.

Further, in the order granting emergency relief to the Roman Catholic Diocese, the Court specifically distinguished the restrictions on churches at issue in *Calvary Chapel* and *South Bay* as possible viable alternatives for Governor Cuomo notwithstanding their direct and non-neutral applicability to religious gatherings. *Id*., Slip Op. at 4. The District Court's apparent belief

that even mild restrictions on in-person attendance at religious institutions are impermissible is contrary to the Supreme Court's holding.

The measure in this case is remarkably different from the restriction in *Roman Catholic Diocese of Brooklyn*. The issue here is the requirement for all K-12 schools to move to remote instruction for a three-week period, beginning the week of the Thanksgiving holiday, where exposure to and spread of COVID-19 is expected to increase dramatically. Instruction can occur remotely. Indeed, Danville Christian Academy voluntarily instructed its students remotely at the beginning of the COVID-19 pandemic and again this Fall when students and staff tested positive. Plaintiffs and the District Court merely disagree with the policy decisions of the Governor and public health officials in combatting the disease, which is not actionable.

Moreover, in the case of schools, the Governor can point to a direct comparison to demonstrate the order's neutrality and general applicability: all K-12 schools are closed to in-person instruction. Schools in this state – whether religious, private or secular – are remarkably similar and may be regulated as a class, different from businesses.

The District Court's holding would exempt religious schools from any measures that do not apply to *all businesses*, regardless of whether those measures apply to other schools. Under the District Court's reasoning, a

health department could *never* close a religious school for health code violations that apply only to schools – even if those violations put the community at large at significant risk.

For example, KRS 214.034 requires public and private schools to ensure all students are vaccinated, but imposes no such requirement on other businesses.[32] And DPH regulations impose specific sanitation requirements on public and private schools, including rules related to water quality, sewage disposal, restroom facilities, lighting, and availability of First Aid supplies. *See* 902 KAR 45:150. These rules protect the entire community. But a school holding a sincerely held religious belief to teach in person despite being unable to provide adequate water supply to its students or safe sewage disposal could *never* be closed to in-person instruction under the District Court's Order.

The District Court's Order would also invalidate other generally applicable statutes that protect the community at large. For instance, KRS 159.040 requires public and private schools to maintain a list of all students,

[32] As the Supreme Court held in *Prince*, when specifically upholding immunization requirements, States "have a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; … this includes, to some extent, matters of conscience and religious conviction." 321 U.S. at 166-67.

to ensure compliance with truancy laws.[33] KRS 158.080 requires that private and parochial schools teach in English and provide, at a minimum, the basic courses provided by public schools.

Furthermore, the Supreme Court has ruled in favor of First Amendment claimants seeking accommodation only after confirming that no substantial harm would be imposed on others, a significant consideration with respect to the Governor's Order. For instance, in holding that Amish parents were entitled to an exemption from a compulsory-school-attendance law, in *Wisconsin v. Yoder*, the Court explained that "[t]he record strongly indicate[d] that accommodating the religious objections of the Amish . . . will not impair the physical or mental health of the child . . . ***or in any other way materially detract from the welfare of society***." 406 U.S. 205, 234 (1972) (emphasis added). Similarly, in holding that the Free Exercise Clause prohibited the state in *Sherbert v. Verner* from denying unemployment benefits to a Seventh-Day Adventist because of her refusal to work on her Sabbath, the Court noted that its ruling would not "serve to abridge any other person's religious liberties" or otherwise significantly harm anyone. 374 U.S. 398, 406-09 (2015).

[33] In *Wisconsin v. Yoder*, the Supreme Court reiterated the States' authority to enact generally applicable compulsory school attendance statutes. 496 U.S. 205, 236.

The District Court's Order goes much further by inventing a constitutional right to put countless people outside the religious school at greater risk of exposure to deadly disease, simply by asserting the dangerous behavior is a sincerely held religious belief. As Dr. Stack's declaration makes clear, people who assume the risk to attend private gatherings *put other people* at risk. One wedding in Maine led directly to the infection and death of seven people – *none of whom* attended the wedding. Put simply, no degree of religious conviction excuses compliance with neutrally applicable public health measures designed to save the lives of the community at large.

Plaintiff's contention that they are not subject to such laws is absurd. And the District Court's conferral of special relief from a neutral, generally applicable public health directive is similarly absurd, and has no basis in the Free Exercise Clause. This Court has repeatedly rejected claims for such special treatment. *See, e.g.*, *Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419, 422 (6th Cir. 1996) ("Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now."); *Kissinger v. Bd. of Trustees of Ohio State Univ., Coll. of Veterinary Med.*, 5 F.3d 177, 179–80 (6th Cir. 1993) (declining to grant a student at Ohio State University

a religious exemption from a curriculum requirement that was "generally applicable, was not aimed at particular religious practices, and did not contain a system of particularized exemptions").

Declining to provide such exemptions is necessary to a functioning society. "[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988). The District Court's Order to the contrary risks the health of the members of the community.

This Court must reverse the District Court's Order. Governor Beshear's Order is a rational, neutral and generally applicable public health regulation that does not impermissibly infringe on Plaintiff's exercise of their religion.

C. Executive Order 2020-969 Does Not Burden Religious Practice.

The District Court's Order holds that Executive Order 2020-969 is invalid because it impermissibly burdens Plaintiffs' exercise of their religious beliefs. That argument applies the wrong standard and misconstrues the facts.

First, there is no requirement that a neutral, generally applicable public health measure not burden religious practice to survive Free Exercise

Clause claims.[34] The District Court's focus on the sincerity of Plaintiffs' religious beliefs entirely misses the point. Specifically, the District Court appears to believe that all neutrally applicable public health restrictions must fall away when they encounter sincere religious beliefs: "Maryville Baptist Church was motivated by a sincerely held belief that Christians should have the ability to meet in person. Similarly, Danville Christian is motivated by a sincerely held religious belief that it is called by God to have in-person religious and academic instruction for its students." (D.E. 35, Page ID#: 720.)

That holding eviscerates longstanding Supreme Court precedent. The plaintiffs in *Lukumi* presumably sincerely believed in the importance of animal sacrifice, and the plaintiff in *Smith* presumably held a sincere belief in the importance of peyote. But the Supreme Court upheld neutral, generally applicable statutes prohibiting those practices because those

[34] By focusing on the question of burden, the District Court appears to have applied the test laid out in the Religious Freedom Restoration Act. But that that statute does not apply to states. *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997). And Governor Beshear is immune from suit in federal court under Kentucky's analogous statute, as the District Court correctly held. *Edelman v. Jordan*, 415 U.S. 651, 673 (1977) (a state must specify "by the most express language" its intent to waive Eleventh Amendment immunity and subject itself to suit in federal court.). Even if he were not immune, state statutes (like KRS 446.350) that conflict with his emergency orders are suspended. *See Beshear v. Acree*, --- S.W.3d ---, No. 2020-SC-0313-OA, 2020 WL 6736090, at *23 (Ky. Nov. 12, 2020).

statutes protected public health. *See Lukumi*, 508 U.S. at 531(citing *Smith*, 494 U.S. 872). Executive Order 2020-969 protects public health, too, and therefore must be upheld.

In reaching this conclusion, the District Court misconstrues the Supreme Court's opinion in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049, 2061 (July 8, 2020). That case applies to some laws that would otherwise govern ***internal*** disputes within a religious organization. But the Court in that case expressly held that the First Amendment "does not mean religious institutions enjoy a general immunity from secular laws …." *Id.*

The District Court's Order holds otherwise, by allowing religious schools to avoid neutral and generally applicable public health guidelines. Put simply, the Court in *Morrissey-Berru* did not expand religious autonomy to exempt religious institutions from complying with orders related to the public health. *See Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171 (2012), 190-91 (distinguishing government regulation of outward physical acts, such as criminalizing use of peyote, with regulation of internal church disputes). Religious institutions are subject to a host of broadly applicable laws even if those allegedly violate their sincerely held religious beliefs. *See e.g. United States v. Lee*, 455 U.S. 252, 256–261

(1982) (holding religious institutions must pay Social Security taxes for employees); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603–605 (1983) (denying non-profit status to religious entities that discriminate because of race), *Bowen v. Roy*, 476 U.S. 693, 699–701 (1986) (finding no violation of the Free Exercise Clause to require applicants for certain public benefits to register with Social Security numbers); *Prince*, 321 U.S. at 166–170, (upholding enforcement of child-labor protections does not violate freedom of religion); *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303–306 (1985) (holding minimum-wage and recordkeeping laws do not violate the Free Exercise Clause).

Second, even under the District Court's erroneous standard, Danville Christian Academy cannot plausibly claim that the Executive Order substantially burdens religious practice. Plaintiffs' claim that the order substantially burdens their religious freedom is particularly unconvincing given their voluntary closure for a two-month period in the Spring and recent 10-day closure due to positive cases within the school.[35] The substantial burden Plaintiffs allege must be seen for what it is: a burden, not

[35]Indeed, Danville Christian Academy has touted its ability to provide remote instruction. Photographs 1-4, Danville Christian Academy Facebook Page, (D.E. 24-2), and publicly available at https://www.facebook.com/DCAWarriors/ (last visited Nov. 23, 2020).

because the school must cease in-person instruction, but because they do not get to decide when to cease in-person instruction. Yet, Plaintiffs do not allege a sincerely held religious belief to pick-and-choose which public health measures it will follow. Thus, the sincerity of Danville Christian Academy's belief in in-person education is not the issue. The issue is whether their religious belief was burdened because the Governor ordered them to cease in-person instruction, rather than the school making the decision on their own. For good reason, the law requires more. *See Living Water Church of God*, 258 F. App'x 729, 734 (6th Cir. 2014) (holding that the "'substantial burden' hurdle is high" and not met where government action does not coerce violation of religious beliefs or penalize religious action by denying equal share of rights and privileges enjoyed by other citizens).

D. The District Court's Order Violates The Establishment Clause.

By holding that religious schools are exempt from *any* generally applicable public health measure, the District Court has improperly favored religious adherents, in violation of the Establishment Clause.[36] Such favoritism is prohibited.

[36] In addition to their Free Exercise claim below, Plaintiffs also contended that any exception for worship service in Executive Order 2020-968 impermissibly favored religion. That argument is without merit. The efforts of Governor Beshear to ensure that Executive Order 2020-968 does not violate the Free Exercise clause cannot possibly give rise to an Establishment Clause claim. To hold otherwise is to

See, e.g., *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987) (holding that government violates the Establishment Clause when "government itself has advanced religion through its own activities and influence").

Indeed, the District Court has turned the Establishment Clause on its head by requiring the Governor to favor religious institutions over public and private secular institutions when issuing public health measures. Under the District Court's Order, religiously-affiliated schools may reopen, while public and secular private schools remain closed. (Doc. 35, PageID#: 734.) Now, the Commonwealth is forced to favor religion over non-religion, which the Establishment Clause expressly forbids.

E. Plaintiffs' State Law Claims Were Meritless, As The District Court Held.

Just as with their federal constitutional claims, Plaintiffs' state law claims must fail. The Governor is immune from suit in this Court with respect to Plaintiffs' claims that Executive Order 2020-969 violates Sections 1 and 5 of the Kentucky Constitution and KRS 446.350. With respect to the state claims brought by the Attorney General, this Court recently held as much, finding that the

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eliminate the "play in the joints" between the Establishment and Free Exercise Clauses. *Locke v. Davey*, 540 U.S. 712, 718 (2004) (citation omitted).

Attorney General could only maintain a suit against the Governor in federal court "in order to vindicate [a] federal right." *W.O. v. Beshear*, 459 F.Supp.3d 833, 838 (E.D. Ky. 2020) (relying on *Virginia Office of Prot. & Advocacy v. Stewart*, 563 U.S. 247). The state law claims asserted here do not provide a federal right.

In particular, Governor Beshear is immune because the Eleventh Amendment to the United States Constitution bars suits against the state. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 97-98 (1984). State officials sued in their official capacities are "arms of the state" entitled to assert the State's sovereign immunity on their own behalf. *See Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005). The Supreme Court acknowledges three exceptions: suits against state officials for injunctive relief challenging the constitutionality of the official's action, *see Ex parte Young*, 209 U.S. 123 (1908), suits to which states consent, *see Pennhurst*, 465 at 98, and suits invoking Congressional statutes pursuant to the Fourteenth Amendment, *see Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001).

These exceptions are not applicable to Plaintiffs' state law claims. The *Ex Parte Young* exception does not apply "because the purposes of *Ex parte Young* do not apply to a lawsuit designed to bring a State into compliance with state law, the States' constitutional immunity from suit prohibits all state-law claims filed against a State in federal court, whether those claims are monetary or injunctive in nature."

Ernst, 427 F.3d at 368 (citing *Pennhurst*, 465 U.S. at 106). This conclusion applies even if supplemental jurisdiction otherwise exists. *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 438 (6th Cir. 2000).

Kentucky has not waived its immunity to suit under Sections 1 and 5 of the Kentucky Constitution or KRS 446.350 in federal court. The Kentucky Constitution provides that the Commonwealth cannot waive immunity except by express legislative action. Ky. Const. § 231. *See also Edelman v. Jordan*, 415 U.S. 651, 673 (1977) (a state must specify "by the most express language" its intent to waive Eleventh Amendment immunity and subject itself to suit in federal court.) The Commonwealth has not done so. Indeed, as to the state constitutional claims, "Kentucky law does not recognize a private cause of action under its Constitution[.]" *Jackson v. Murray State Univ.*, 834 F.Supp.2d 609, 615 (W.D. Ky. 2011) (citing *Welch v. Gill,* No. 5:03CV–73–R, 2006 WL 861295, at *4 (W.D. Ky. Mar. 28, 2006) (no private cause of action under section one of Kentucky Constitution); *Tallman v. Elizabeth Police Dep't,* 344 F.Supp.2d 992, 997 (W.D. Ky. 2004) (no private right of action under the section one or two); *Baker v. Campbell Cnty. Bd. of Educ.,* 180 S.W.3d 479, 482–84 (Ky. App. 2005) (no private right of action under section one).[37]

[37] Plaintiffs do not plead a claim under a congressional statute.

The Governor's immunity is not the only reason Plaintiffs state claims fail, however. The Kentucky Supreme Court recently addressed the Governor's emergency powers as a result of other challenges filed by the Attorney General against the Governor regarding the response to COVID-19. *See Beshear v. Acree*, --- S.W.3d ---, No. 2020-SC-0313-OA, 2020 WL 6736090 (Ky. Nov. 12, 2020). In particular, the Court applied *Jacobson* and *South Bay* to recognize the deference owed to public health measures designed to slow the spread of COVID-19. *Id*. at *27-28. The Court also held the emergency statutes under which the Governor acts supersedes other statutes. *Id.* at *23. Indeed, KRS 39A.180(2) suspends any statute conflicting with an emergency order issued by the Governor. When deciding an issue of state law, the law of the state controls. *Brown v. Cassens Transport Co.*, 546 F.3d 347, 363 (6th Cir. 2008). And, under state law, the Governor has authority to close schools in order to slow the spread of COVID-19. KRS 39A.100(1)(j) (providing the Governor with power to perform any function deemed necessary to promote and secure the safety of the civilian population).

That aside, the Governor's school closure order does not otherwise violate the plain language of Sections 1 and 5 of the Kentucky Constitution or KRS 446.350. The school closure order, as detailed above, applies generally and neutrally to all schools, regardless of any religious instruction or practice. As such, under Sections 1 and 5 of the Kentucky Constitution, the orders must have a

rational basis. *See Gingerich v. Commonwealth*, 382 S.W.3d 835, 844 (Ky. 2012). Here, the rational basis is obvious: to slow the spread of COVID-19 at the most dangerous time of this pandemic in the Commonwealth.

Furthermore, even if it were applicable, the Governor has not violated KRS 446.350. That statute forbids government action that "substantially burdens" a person's freedom of religion without a compelling interest and using the least restrictive means of achieving that interest. KRS 446.350. Kentucky law does not define a substantial burden, other than to define a "burden" to include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities. KRS 446.350. But interpretation of the federal counterpart indicates a "substantial" burden requires more. To wit, the order here does not compel behavior violating Plaintiffs' religious beliefs. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014) (finding order requiring employer to cover insurance for birth control to substantially burden religious beliefs because it required employer to engage in conduct in violation of religious belief). Here, Plaintiffs do not assert a religious belief against public health measures to slow the spread of COVID-19.

II. Governor Beshear And The Commonwealth He Represents Will Be Irreparably Injured Absent A Stay.

Governor Beshear's Executive Order 2020-969 is intended to slow the spread of a deadly disease. Kentucky is at an absolutely critical juncture in its

battle against COVID-19. Positive cases and deaths are skyrocketing. Hospital beds and resources are nearing capacity. And currently, more than 10,000 school-age kids are in quarantine due to exposure.[38] Because Governor Beshear represents the people of the Commonwealth of Kentucky and is charged with protecting the public health, *see South Bay*, 140 S.Ct. at 1613-14, his interest and the public interest favor a stay.

The District Court's Order exempting Danville Christian Academy and other religiously affiliated schools from these public health measures will cause substantial harm to the public that encounters the children and staff of these schools. At this point of the pandemic, in Boyle County, a gathering of 15 individuals – smaller than a class at Danville Christian Academy – has a 37% percent of including an individual with COVID-19.[39] The risk increases with more people.

Without intervention, individuals – including children and teachers and staff – will contract COVID-19 over the Thanksgiving holiday and then return to their schools on the following Monday. And there can be no doubt that disease will

[38] K-12 School Covid-19 Self-Reported Data, available at https://public.tableau.com/profile/chfs.dph#!/vizhome/COVID19SchoolSelfReportngData/SchoolSelfReportCovid19DB (last visited Nov. 25, 2020).
[39] *See* COVID-19 Event Risk Assessment Planning Tool, Georgia Institute of Technology, et al., available at https://covid19risk.biosci.gatech.edu/ (last visited Nov. 25, 2020).

spread: As shown above, Danville Christian Academy has failed to adhere to other less restrictive means necessary to slow the spread of COVID-19 – including by failing to comply with social distancing and facial coverings requirements.

The public interest heavily favors the State's ability to take steps to prevent the spread of a deadly disease. *Jacobson*, 197 U.S. at 29. Accordingly, this Court should enter a stay of the District Court's erroneous Order.

III. Plaintiffs Are Not Harmed By Conducting 15 Days of Remote Instruction.

On an application for a stay of an injunction, this Court also considers whether a stay will injure the opposing party. Here, Plaintiffs cannot show injury from such a stay.

Most importantly, Plaintiffs have repeatedly provided remote instruction to their students. During a two-month period in the Spring, and during a ten-day period when the school had to close because of multiple cases of COVID-19, Danville Christian Academy provided the remote instruction required under Executive Order 2020-969. Thus, there can be no argument that Danville Christian Academy is unable or unwilling to provide such services. What Danville Christian Academy apparently opposes is being *ordered* to provide such services remotely. But that interest cannot possibly outweigh the public interest in preventing the spread of disease or the overwhelming of hospitals.

Moreover, any claim by Danville Christian Academy that it is harmed by not providing in-person instruction must be discounted because Danville Christian Academy has failed to comply with generally applicable public health requirements for such instruction. Danville Christian Academy has never complied with the reporting requirement in 902 KAR 2:220E, which is designed to alert families and the community at large about the danger of COVID-19 within the community. Danville Christian Academy has also failed to ensure that students and visitors wear facial coverings and maintain social distance, as the photographs in Exhibit B (D.E. 24-2) to the Governor's Response to the motion for a temporary restraining order show. Danville Christian's dangerous refusal to take these small steps to protect its staff, its students, and its community underscores the threat of failing to stay the relief granted by the District Court.

Plaintiffs' interest, which is known not to exclude the possibility of remote instruction, but to exclude who can order it cease in-person instruction, cannot outweigh the ability to prevent the spread of a deadly disease. The Governor sufficiently controlled the first surge of cases with the help of religious and secular schools voluntarily ceasing in-person instruction in the Spring. The public interest supports the measure again, even if some schools now disagree.

CONCLUSION

The District Court's Order is contrary to the First Amendment and places the people of Kentucky at risk beginning Monday, November 30, 2020. Accordingly, Governor Beshear respectfully requests that this Court stay the District Court's injunction pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2020 the foregoing Emergency Motion for a Stay of Preliminary Injunction Pending Appeal was electronically filed with the Clerk of this Court and served to counsel of record via the Court's CM/ECF system. Parties may access the filing through the court's CM/ECF system.

/s/ S. Travis Mayo
S. Travis Mayo