UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION
Electronically filed

DANVILLE CHRISTIAN ACADEMY, INC. and **COMMONWEALTH OF KENTUCKY**, *ex rel.* Attorney General Daniel Cameron *Plaintiffs* v. **ANDREW BESHEAR**, in his official capacity as the Governor of the Commonwealth of Kentucky *Defendants*	Civil Action No. _____

PLAINTIFFS' MOTION FOR EMERGENCY HEARING AND TEMPORARY RESTRAINING ORDER

Danville Christian Academy, Inc. and the Commonwealth of Kentucky, *ex rel.* Attorney General Daniel Cameron respectfully move the Court to hold an emergency hearing prior to November 23, 2020 and to enter an immediate temporary restraining order against Governor Beshear to restrain him and his administration from enforcing the provisions of his November 18, 2020 executive order (Exec. Order 2020-969) to the extent it prohibits in-person instruction at Plaintiff Danville Christian

Academy and other religious institutions that adhere to generally applicable social distancing and hygiene guidelines.[1]

BACKGROUND

1. The Governor's executive orders.

This case concerns an executive order that Governor Beshear issued on November 18, 2020. The order prohibits all religious schools, kindergarten through grade 12, from offering in-person instruction starting on Monday, November 23, 2020. The order states: "All public and private elementary, middle, and high schools (kindergarten through grade 12) shall cease in-person instruction and transition to remote or virtual instruction beginning November 23, 2020." [Ex. 1 to Verif. Compl. at 2]. If this language left any doubt, the order reiterates that it "shall apply to *all* institutions of public and private elementary and secondary education." [*Id.* (emphasis added)]. Thus, come Monday morning, every religious elementary, middle, and high school in the Commonwealth of Kentucky must stop providing in-person instruction.

Also on November 18, 2020, Governor Beshear issued another executive order that takes effect at 5:00 p.m. today. This executive order allows many businesses to stay open subject to restrictions. Under this order, gyms, fitness centers, swimming and bathing facilities, bowling alleys, and other indoor recreation facilities can remain open as long as they abide by a 33 percent capacity limitation and "ensure that individuals not from the same household maintain six (6) feet of space between

[1] The Plaintiffs incorporate by reference their Verified Complaint under Rule 10(c).

each other." [Ex. 2 to Verif. Compl. at 2]. Indoor venues, event spaces, and theaters can remain open too, if they "are limited to 25 people per room." [*Id.*]. Thus, for example, size-restricted weddings can continue. A similar rule prevails for "[a]ll professional services and other office-based businesses." [*Id.* at 3]. They can remain open if "no more than 33% percent of employees are physically present in the office [on] any given day." [*Id.*]. This executive order also makes clear that it does not prohibit churches from worshipping in-person. The order states that it "does not apply to in-person services at places of worship, which must continue to implement and follow the Guidelines for Places of Worship . . . ." [*Id.* at 2–3].

These two executive orders, taken together, demonstrate that Governor Beshear's across-the-board ban of in-person instruction at religious schools stands in stark contrast to his allowance of other activities. Upon receiving the Governor's executive orders, the Attorney General's Office followed up with the Governor's Office to confirm that Governor Beshear in fact prohibited religious schools from opening their doors while also allowing various other activities to continue. The Governor's General Counsel confirmed this interpretation of the Governor's orders. She wrote:

> The order concerning schools applies to all public and private schools engaged in primary or secondary education (K-12), regardless of whether they are religiously affiliated. The order does not apply to other forms of instruction or places of worship. Accordingly, a place of worship that provides religious instruction as part of its services—for example, Sunday school or [B]ible study—may do so.

[Ex. 3 to Verif. Compl.].

Shortly after Governor Beshear ordered religious schools to close their doors, Kentucky's top education official warned certified school personnel who violate the

Governor's executive order of potential licensure consequences. Specifically, Kentucky's Commissioner of Education wrote that "[c]ertified school employees are bound by the Professional Code of Ethics and may be subject to disciplinary action by the Education Professional Standards Board (EPSB) for violation of the Professional Code of Ethics." [Ex. 4 to Verif. Compl.]. The EPSB is responsible for "issuing, renewing, suspending, and revoking Kentucky certificates for professional school personnel."[2]

2. This lawsuit.

In response to these actions, the Plaintiffs filed this lawsuit. The Plaintiffs are Danville Christian Academy, Inc. ("Danville Christian") and the Commonwealth of Kentucky, by and through Attorney General Daniel Cameron.

Danville Christian is a Christian school that has served Danville and the surrounding community since 1996. [Verif. Compl. ¶ 57]. Danville Christian's vision is "to mold Christ-like scholars, leaders, and servants who will advance the Kingdom of God." [*Id.* ¶ 59]. Danville Christian endeavors to "provide students with a Christ-centered environment along with academic excellence so they may grow spiritually, academically, and socially." [*Id.* ¶ 60]. Danville Christian has a sincerely held religious belief that it is called by God to have in-person instruction for its students, and it believes that "its students should be educated with a Christian worldview in a communal in-person environment." [*Id.* ¶ 68].

[2] http://www.epsb.ky.gov/ (last visited Nov. 20, 2020).

Danville Christian has 234 students that range from preschool through grade 12. [*Id.* ¶¶ 75–76]. Class sizes at Danville Christian range from four students to 20 students, with most classes being between 12 and 17 students. [*Id.* ¶ 76].

Danville Christian has gone to great lengths to safely provide in-person instruction to its families this school year. DCA's COVID-19 policies are lengthy and comprehensive, [*see* Ex. 5 to Verif. Compl.], and include:

- Two temperature checks upon entering the school.
- Except for pre-school students, requiring masks to be worn when entering, exiting, and moving about the school.
- Student work areas in each classroom are socially distanced. Where that is not possible, plexiglass dividers are installed.
- Students can remove masks only if seated and socially distanced, and then only if parental permission has been provided.
- Teachers must wear masks or faceshields while instructing students and maintain social distancing.
- Before leaving a classroom, all students must wipe down their desk with a disinfectant spray.
- Lunch is held in the gymnasium, which has assigned-seat cubicles that are divided by plexiglass.
- An additional staff person has been hired to provide extra cleaning throughout the school day.

[Verif. Compl. at ¶ 81]. Danville Christian has spent between $20,000.00 and $30,000.00 to operationalize this safety plan. [*Id.* at ¶ 82]. It has been approved by the director of the Boyle County Health Department, who has repeatedly stated that Danville Christian is "doing it right." [*Id.* at ¶ 78].

Danville Christian takes safety so seriously that, after a teacher and three students tested positive for COVID-19 earlier this month, Danville Christian ceased all in-person instruction for ten days so that it could monitor student health. [*Id.* at ¶ 84]. Danville Christian began bringing its students back two days ago, and all students are scheduled to return this coming Monday. [*Id.*].

Unless this Court grants an immediate temporary restraining order, Danville Christian and every other religious school in the Commonwealth will be forced to close their doors to all of their students in kindergarten through grade 12. This will cause immediate irreparable harm. [*E.g.*, *id.* ¶ 86 ("The governor's recent order for schools to cease in-person instruction beginning November 23 will prevent DCA from carrying out its religious purpose and mission, implementing its Kingdom Education philosophy, and fulfilling its religious vision.")]. Danville Christian and the Commonwealth seek an emergency hearing and a temporary restraining order to preserve the status quo—namely, to allow in-person learning to continue in religious schools if appropriate social-distancing and hygiene guidelines, such as those followed by Danville Christian, are followed.

ARGUMENT

This Court is well-versed in the standard that governs whether to grant a temporary restraining order. The Court must consider:

> 1) whether the movant has shown a strong likelihood of success on the merits; 2) whether the movant will suffer irreparable harm if the injunction is not issued; 3) whether the issuance of the injunction would cause substantial harm to others; and 4) whether the public interest would be served by issuing the injunction.

Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear, 459 F. Supp. 3d 847, 853 (E.D. Ky. 2020). "These factors are not prerequisites, but are factors to be balanced against each other." *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). However, where, as here, a violation of the Constitution is alleged, the first factor—the likelihood of success on the merits—largely dominates the analysis. *See City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam). Even so, for the reasons that follow, all four factors decidedly favor granting a temporary restraining order to preserve the status quo.

In addition, the Court can grant a temporary restraining order without notice to the other side if (i) "specific facts in an affidavit or verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition," and (ii) "the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required." Fed. R. Civ. P. 65(b)(1). As discussed above and below, the Plaintiffs' verified complaint clearly establishes immediate and irreparable injury—religious schools in Kentucky will have to close their doors on Monday morning absent

emergency injunctive relief from this Court. This will cause profound and irreparable harms. Moreover, undersigned counsel certify that, prior to filing, this motion and the Plaintiffs' verified complaint were emailed to Amy Cubbage, Governor Beshear's General Counsel. Undersigned counsel further certify that, upon filing the Plaintiffs' verified complaint and this motion, the Plaintiffs will accomplish same-day conventional service of both filings on Governor Beshear.

I. The Plaintiffs have demonstrated a strong likelihood of success on the merits.

The Plaintiffs have established a strong likelihood of success on the merits because the Governor's executive order violates the Free Exercise Clause and Kentucky's equivalent constitutional guarantee; the First Amendment's guarantee of autonomy for religious organizations; the Establishment Clause; and Kentucky's Religious Freedom and Restoration Act.

A. The Governor's executive order violates the Free Exercise Clause and Kentucky's equivalent constitutional guarantee.

The First Amendment prohibits the government from burdening one's "free exercise" of religion. *See Cantwell v Connecticut*, 310 U.S. 296, 303 (1940). In doing so, it "protect[s] religious observers against unequal treatment." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, --- U.S. --- , 137 S. Ct. 2012, 2019 (2017) (citation omitted). That means the government generally cannot discriminate against religious conduct. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). When it does, strict scrutiny applies. *Id.* And a law that discriminates against religion "will survive strict scrutiny only in rare cases." *Id.* at 546. Just like when

Governor Beshear used his pen to close down houses of worship earlier this year, this is not one of those cases.

1. The school-closure order burdens religious exercise.

"Religious education is vital to many faiths in the United States." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, --- U.S. --- , 140 S. Ct. 2049, 2064 (2020). Whether it's Christianity, Judaism, Islam, or one of the many more religions that have flourished under the "audacious guarantee[]" of the First Amendment, *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 906 (W.D. Ky. 2020), the Supreme Court has recognized the "close connection that religious institutions draw between their central purpose and educating the young in the faith," *Our Lady of Guadalupe*, 140 S. Ct. at 2066. Because of this, operating a "private religious school" is not a distinct venture that courts can analytically separate from worship or other aspects of religious exercise. *See id.* at 2064. The First Amendment protects religious schooling just as it does weekend worship services—because for many believers, those are simply two different facets of fulfilling the obligations of their faith. *Id.*

Governor Beshear's executive order burdens the free exercise of religion—"and plainly so." *See Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (per curiam). Parochial schools across the Commonwealth share deep, sincere religious beliefs about the importance of religious education. That is, "[r]eligion motivates the [schooling]." *See id.*; [Verif. Compl. ¶¶ 57–74]. But Governor Beshear's school-closure order prohibits religious organizations from educating their children according to the tenets of their faith. *See Maryville Baptist Church*, 957 F.3d at 615

("But who is to say . . . that every member of the congregation must see [online tools] as an adequate substitute for what it means when 'two or three gather in my Name.'" (citing Matthew 18:20)). Though the Governor might believe that religious instruction only occurs at a "[B]ible study" or "Sunday School," [Ex. 3 to Verif. Compl.], it is not for him or this Court to decide "how individuals comply with their own faith as they see it," *see Maryville Baptist Church*, 957 F.3d at 615. Providing private religious education is a core part of the religious freedom protected by the First Amendment, and the Governor's shutdown order plainly burdens such freedom.

A key component of Danville Christian's mission, purpose, and educational philosophy is its belief that its students should be educated with a Christian worldview in a communal, in-person environment. [Verif. Compl. ¶ 68]. Danville Christian cannot fulfill its religious purpose and mission or implement its religious educational philosophy—and its religious beliefs will be substantially burdened—if it is prohibited from offering in-person instruction to its students. [*Id.* ¶ 69]. All of Danville Christian's elementary, middle school, and high school students receive daily Bible classes. Danville Christian high school students are required to earn four credits of Bible courses in order to graduate. Danville Christian uses Biblically-based curriculum for many of its courses, and all Danville Christian teachers are required to incorporate Biblical worldview and instruction into all classes and subject matters taught. [*Id.* at ¶ 70]. All Danville Christian students attend one of two socially distanced chapel services every week in the gymnasium. Chapel services include religious instruction and preaching, corporate prayer, musical worship, and

communal recognition and encouragement of individual students. [*Id.* at ¶ 71]. Danville Christian holds corporate prayer at the beginning of each school day as a school, followed by corporate prayer in each individual classroom. Danville Christian also holds corporate prayer before school events. [*Id.* at ¶ 72]. Danville Christian's student activities include outreach and mercy ministries such as Operation Christmas Child and the Day of Giving, which provide evangelism and material goods to people in need. [*Id.* at ¶ 73].

Without in-person instruction, Danville Christian will be unable to provide the Christ-centered, creative, loving, academic environment required for its students to grow and develop in accordance with Danville Christian's religious purpose, mission, and vision. [*Id.* at ¶ 87]. It will be unable to have the weekly in-person chapel services and corporate prayer that are a key component to implementing its Kingdom Education philosophy. [*Id.*]. It will be unable to provide the in-person group experiences central to developing Christ-like scholars, leaders, and servants who will advance the Kingdom of God. [*Id.*]. It will be unable to provide the in-person interaction with Danville Christian's carefully selected Christian instructors and staff needed to inspire its students to know and love God and to empower its students to live a life characterized by love, trust, and obedience to Christ. [*Id.*]. It will be unable to assemble together in-person with staff and students as it believes God through the Bible commands it to do. [*Id.*]. Simply put, in-person attendance is an integral part of Danville Christian's sincerely held beliefs about its religious mission

and exercise, and the inability to meet in person for schooling prevents Danville Christian from fulfilling these religious practices.

2. The school closure order is not neutral or generally applicable.

"Faith-based discrimination can come in many forms." *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (per curiam). Some laws are motivated by animus toward religion, while others "single out religious activity alone for regulation." *Id.* But not all discrimination is so overt. One particularly invidious kind of discrimination is a generally applicable law that is "riddled with exemptions." *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012). "At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny." *Roberts*, 958 F.3d at 413–14 (quoting *Ward*, 667 F.3d at 740).

Much of this discussion is all too familiar to this Court. Months ago, Governor Beshear issued a series of executive orders that prohibited all forms of in-person religious worship throughout the state. *See Maryville Baptist Church*, 957 F.3d at 612–13. But the Governor allowed many kinds of secular activities to continue even though they "pose[d] comparable public health risks to worship services." *Id.* at 614. That was enough to overcome *Employment Division v. Smith*, 494 U.S. 872 (1990), and require the Governor to "run the gauntlet of strict scrutiny." *See Roberts*, 958 F.3d at 413–14; *Maryville Baptist Church*, 957 F.3d at 614. If the Governor's goal was to limit the spread of COVID-19, the Sixth Circuit explained, he must do so in a way

that treats the risks created by religious activity the same as the risks created by other secular activities. *Id.*; *see also Tabernacle Baptist Church,* 459 F. Supp. 3d at 855 ("There is ample scientific evidence that COVID-19 is exceptionally contagious. But evidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking.").

The prior cases enjoining Governor Beshear's bans on religious worship made one thing perfectly clear: the *reason* that people gathered in groups is immaterial to the analysis under *Smith*. *See Maryville Baptist Church*, 957 F.3d at 615. That's because "the virus does not care why [people] are" gathered together. *Id.* COVID-19 is just as contagious when sitting in a laundromat or office as it is when sitting in a pew, or Sunday School, or a classroom. *Id.* So if the Governor wants to regulate religious activity in a way that is neutral and generally applicable, he must regulate the *risks* of gathering in groups, rather than regulating the *reason* that such gatherings take place. *Maryville Baptist Church* settled this issue:

> So long as [the virus does not care why they are there], why do the orders permit people who practice social distancing and good hygiene in one place but not another? If the problem is numbers, and risks that grow with greater numbers, then there is a straightforward remedy: limit the number of people who can attend a service at one time.

Id.[3]

[3] The Governor may argue that a one-justice concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (Mem.) (2020), which arose in a different procedural context, somehow changes this conclusion. This Court has already rejected that argument. *Ramsek v. Beshear*, No. 3:20-cv-36, 2020 WL 3446249, at *4–*6 (E.D. Ky. June 24, 2020), *appeal filed* No. 20-5749 (6th Cir.). And the Sixth Circuit recently reiterated that its decisions in *Maryville Baptist* and

Like his prior orders banning religious worship, Governor Beshear's order shutting down religious schools does not satisfy this basic test. The terms of the order are clear: *all* in-person religious schooling must end, regardless of whether the religious school is taking safety precautions, practicing social distancing, implementing appropriate hygiene standards, or otherwise following all of the requirements imposed on the secular activities that have not been shut down despite "pos[ing] comparable public health risks." *See Maryville Baptist Church*, 957 F.3d at 614.

And the list of permissible secular activities is long. On the same day that Governor Beshear closed religious schools, he issued an order allowing "office-based businesses" to operate in person so long as they limit capacity to 33 percent of their employees. [*See* Ex. 2 to Verif. Compl., at 3]. His other preexisting regulations for offices require that employees wear masks while interacting with co-workers or in common areas, and he urges businesses to limit in-person contact with customers "to the greatest extent practicable." [*See* Ex. 6 to Verif. Compl. at 1]. He has not imposed time limitations that prohibit employees from working together in the same workspace for more than four, six, eight, or even ten hours at a time. He simply asks "office-based businesses" to abide by simple social-distancing rules and a capacity limit.

Roberts remain binding. *See Maryville Baptist Church, Inc. v. Beshear*, 977 F.3d 561, 563 (6th Cir. 2020) (per curiam).

What's more, Governor Beshear has also issued an order allowing venues and event spaces to continue operating with up to "25 people per room"—this is more people than in any classroom at Danville Christian and the same size as many classrooms in many other religious schools. [*See* Ex. 2 to Verif. Compl. at 2; Verif. Compl. at ¶ 76 (stating that no class at Danville Christian has more than 20 students)]. Again, Governor Beshear's order does not impose a time limit on how long people can gather in a venue or event space. So long as this basic capacity limitation is adhered to, and people follow generally applicable social-distancing and hygiene requirements, they are free to gather in public spaces of no more than 25 people per room.

Gyms also are free to continue operating so long as they limit capacity to 33 percent of their occupancy limits. *See id.* That means Kentuckians are allowed to run on treadmills, six feet apart, for unlimited durations, but they cannot sit in a classroom with the same amount of space between them. The Governor is likely to point out that he has banned "group activities" in gyms, which is more like a classroom. But as the Sixth Circuit has clearly explained, the virus does not care *why* people are gathered in an indoor space. It certainly does not know if the person six feet from you on the treadmill is there on his or her own accord or participating in a group exercise class. What matters is how close you are, or how many people are in the room. But those considerations have nothing to do with why a person is there. COVID-19 does not grow more contagious because people exercising in the same room are doing so as a group instead of individually. *See Maryville Baptist Church*, 957

F.3d at 615 ("We doubt that the reason a group of people go to one place has anything to do with it.").

Starting on November 23 in Kentucky, one is free to crowd into retail stores, go bowling with friends, attend horse shows, go to the movies, attend concerts, tour a distillery, or get a manicure or massage or tattoo.[4] Although there are limits and restrictions that govern how those in-person activities must operate, the Governor has not prohibited them. Yet, starting on November 23, no one in Kentucky is permitted to attend in-person school, even when religious education is a deep and sincere facet of one's faith, and even when those operating religious schools are abiding by strict social distancing and hygiene standards. It takes only one trip to a retail store or shopping mall in Kentucky during this holiday season to find oneself utterly perplexed at this state of affairs, witnessing the crowds of people who are free to spend hours in a store but prohibited from spending hours in a religious classroom. The former, of course, does not "benefit from constitutional protection," but the latter does. *See Tabernacle Baptist Church*, 459 F. Supp. 3d at 855.

All of this adds up to a simple case—one that is nothing more than re-tread of the cases enjoining Governor Beshear's ban on religious worship. If it is safe for an individual to show up at an office for eight hours a day, five days a week, so long as the office abides by generally applicable capacity limits, why is it unsafe to show up for religious schooling under the same safety standards? If it is safe to gather at an

[4] *See* Healthy at Work, Reopening Kentucky, online at https://govstatus.egov.com/ky-healthy-at-work (last visited Nov. 11, 2020).

indoor venue so long as no more than 25 people attend, why is it unsafe if that gathering takes place in a classroom? And if it is safe for individuals to stand six feet apart on a treadmill, why is it unsafe to sit six feet apart at a school desk? The Governor "has no good answers."[5] *See Maryville Baptist Church*, 957 F.3d at 615.

Governor Beshear likely will argue that his order shutting down parochial schools is neutral and generally applicable because it applies to all schools—not just those that are religious. The problem with this argument is that it relies on exactly the same premise that the Sixth Circuit already rejected—namely, that courts should consider *why* people are gathering together when comparing COVID-19 related restrictions. As the Sixth Circuit explained, the question is not whether the Governor has also restricted secular activities that have a similar purpose. That is, the Governor's restrictions are not generally applicable simply because he is imposing the same regulation on people who gather together *for the purpose of education*. Rather, *Smith* requires the Governor to regulate religious activity in the same way as secular activities that "pose comparable public health risks"—regardless of

[5] In one of Governor Beshear's daily press conferences in August 2020, a reporter asked him about a legal opinion that Attorney General Cameron issued advising a state legislator that it would be unconstitutional to close religious education institutions. Governor Beshear responded: "Nobody's trying to close any school that's complying with guidelines and preventing outbreaks." *See* Gov. Andy Beshear – Media Briefing 08.19.2020, at 30:20, *available at* youtube.com/watch?v=QSMC2iumJL8 (last visited Nov. 20, 2020). The Plaintiffs are simply asking to continue with such a common-sense proposition. If a religious school can comply with the applicable health guidelines, there is no plausible reason to close that school down while allowing daycares, libraries, movie theaters, and offices to continue operating.

whether those secular activities share the same purpose as the religious conduct. *See Maryville Baptist Church*, 957 F.3d at 614. Here, the Governor clearly has not done so.

Even if the Governor is right that comparing private schools with public schools is appropriate because both activities share a similar purpose (a proposition that the Sixth Circuit rejected), the Governor nevertheless falls short in light of his decision to allow daycares and universities to continue operating. [Ex. 1 to Verif. Compl. at 2 (applying only to "kindergarten through grade 12")]. If a classroom of preschoolers can safely operate by adhering to social-distancing guidelines and hygiene standards, why can a religious school not do the same for its kindergarteners? Indeed, in some or many instances, institutions operate *both* religious daycares and religious elementary, middle, and high schools. Such is the case at Danville Christian. [Verif. Compl. at ¶ 75]. Why should one be allowed and the other be banned? And surely a university, housing its students in dormitories and shared living spaces, is not *less risky* than a parochial school. Yet the Governor allows the former and prohibits the latter. This turns the First Amendment on its head.

3. The school closure order does not survive strict scrutiny.

Because the Governor's school shutdown order is not a neutral and generally applicable restriction on gatherings, he must satisfy strict scrutiny. That means the Governor must demonstrate that the executive order is the "least restrictive means" of accomplishing his ends. *Roberts*, 958 F.3d at 415. For all the reasons that the Sixth

Circuit has articulated before with respect to the Governor's ban on religious worship, his ban on religious schooling similarly fails strict scrutiny.

The Governor could, for example, impose limits on the number of students who can sit in any area based on the square footage. He could require every individual in a school to adhere to social-distancing requirements and other hygiene standards that apply to other in-person activities. These kinds of restrictions would be tailored to the actual risks of COVID-19 spreading, rather than being tailored toward the reason that people are congregating—something that COVID-19 does not care about. Or as this Court put it:

> There is ample scientific evidence that COVID-19 is exceptionally contagious. But evidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking. If social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious [schooling] which, unlike the foregoing, benefit from constitutional protection.

See Tabernacle Baptist Church, 459 F. Supp. 3d at 855. There are plenty of less-restrictive ways to limit the spread of COVID-19 that do not prevent religious schools from operating while similarly risky secular activities continue. The Governor's shutdown order cannot satisfy strict scrutiny.

Likewise, the Plaintiffs are likely to succeed on their claim brought under Sections 1 and 5 of the Kentucky Constitution. Section 1 of the Kentucky Constitution provides Kentuckians with the "inherent and inalienable . . . right of worshipping Almighty God according to the dictates of their consciences." Section 5 guarantees Kentuckians the right of religious freedom and states that "the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged,

on account of his belief or disbelief of any religious tenet, dogma, or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience."

Despite the broad language of these constitutional protections, the Supreme Court of Kentucky has held that they offer Kentuckians the same religious freedom protections as the United States Constitution. *Gingerich v. Commonwealth*, 382 S.W.3d 835, 839 (Ky. 2012). For all of the reasons stated above, the Governor's November 18 order also violates Sections 1 and 5 of the Kentucky Constitution.

B. The Governor's executive order violates religious entities' First Amendment right to religious autonomy.

Governor Beshear's executive order impermissibly infringes on the autonomy of religious institutions and churches in violation of the First Amendment. The Governor, consistent with the First Amendment, cannot tell religious institutions and churches that they *can* hold in-person worship services but *cannot* hold in-person schooling. That is to say, Governor Beshear cannot decide for religious institutions which expressions of religious faith they can and cannot hold. Yet that is exactly what the Governor's executive order does.

As summarized above, Governor Beshear's November 18 executive order bans in-person schooling at all religious schools starting on Monday, November 23, 2020. [Ex. 1 to Verif. Compl. at 2]. The order is susceptible of no other interpretation. In another executive order issued by Governor Beshear on November 18, he ordered that his new limits on gatherings "do[] not apply to in-person services at places of worship, which must continue to implement and follow the Guidelines for Places of Worship."

[Ex. 2 to Verif. Compl. at 1–2]. Thus, viewing the Governor's two executive orders together, he has prohibited all in-person religious schooling while simultaneously allowing in-person worship services to continue. This he cannot do.

Earlier this year, the Supreme Court, by a 7–2 vote, held that the First Amendment protects the right of religious institutions and churches to make decisions about how to direct religious schooling. *Our Lady of Guadalupe*, 140 S. Ct. at 2055. The question presented in *Our Lady of Guadalupe* was whether "the First Amendment permits courts to intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in their faith." *Id.* The Court held that "[t]he religious education and formation of students is the *very reason for the existence of most private schools*, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission." *Id.* (emphasis added). As a result, the Court concluded that a religious institution's decision about who educates its children about religious faith is "an internal church decision that affects the faith and mission of the church." *Id.* at 2062 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012)). It, in other words, is a decision that is "essential to the organization's central mission." *Id.* at 2060. The First Amendment "outlaws . . . intrusion" into such matters. *Id.*

In reaching this conclusion, the Court emphasized the centrality of religious schooling to religious faith. The Court explained that "educating young people in their faith, inculcating its teachings, and training them to live their faith are

responsibilities that lie *at the very core* of the mission of a private religious school." *Id.* at 2064 (emphasis added). "Religious education," the Court continued, "is vital to many faiths practiced in the United States." *Id.* For example, "in the Catholic tradition, religious education is 'intimately bound up with the whole of the Church's life.'" *Id.* at 2065 (quoting Catechism of the Catholic Church 8 (2d ed. 2016)). "Similarly, Protestant churches, from the earliest settlements in this country, viewed education as a religious obligation." *Id.* In fact, "[m]ost of the oldest educational institutions in this country were originally established by or affiliated with churches, and in recent years, non-denominational Christian schools have proliferated with the aim of inculcating Biblical values in their students." *Id.* The Court also discussed the centrality of religious schooling to other faiths, including Judaism, Islam, the Church of Jesus Christ of Latter-day Saints, and Seventh-day Adventists. *Id.* at 2065–66. The Supreme Court thus discerned a "close connection that religious institutions draw between their central purpose and educating the young in the faith." *Id.* at 2066; [*see also* Verif. Compl. at ¶¶ 57–74].

If religious institutions get to decide for themselves who teaches their children about religious faith, as *Our Lady of Guadalupe* holds, it follows that religious institutions get to determine in the first instance whether to provide religious schooling. The government can no more tell religious institutions not to provide religious schooling than it can tell them to employ certain people to accomplish this mission. Each is "essential to the institution's central mission." *See Our Lady of Guadalupe*, 140 S. Ct. at 2060. More to the point, because the First Amendment

guarantees religious institutions the "autonomy" to select the "individuals who play certain key roles" at religious schools, *id.*, the First Amendment likewise protects the religious institution's "autonomy" to decide whether to open its doors to schoolchildren. The First Amendment right safeguarded by *Our Lady of Guadalupe* would be empty if the government could simply ban religious institutions and churches from providing in-person religious schooling.

Governor Beshear's executive orders tell religious institutions and churches that they cannot open their doors to schoolchildren, and they do so in an especially pernicious way.[6] Not only has Governor Beshear told religious schools that they cannot hold in-person classes, but he is simultaneously permitting religious institutions to hold in-person worship services. That is to say, Governor Beshear has declared that certain religious activities are legal—namely, in-person worship—while others are illegal—specifically, in-person religious schooling. The First Amendment forbids this direct intrusion onto the "autonomy" of churches and religious institutions.

To illustrate this point, imagine a church that provides the following gatherings each week: a worship service and Sunday school on Sunday morning, a Wednesday night worship service, small group Bible studies throughout the week, and a religious school from Monday through Friday. The Commonwealth, of course, has many churches just like this. Under Governor Beshear's executive orders, Sunday

[6] On November 19, 2020, Governor Beshear asked churches to voluntarily cease in-person services.

morning worship and Sunday school can continue. So can Bible studies and Wednesday night worship services. But the religious school *must close*. That is to say, Governor Beshear has decided for the Commonwealth's churches and religious institutions what kinds of services they can and cannot provide.

The Governor, for his part, has not hidden from this aspect of his executive orders. After the Governor issued these orders, the Attorney General's Office followed up with the Governor's General Counsel for clarification. She acknowledged that Governor Beshear is dictating what services religious institutions can and cannot provide. According to the Governor's General Counsel, in-person schooling is off-limits, but in-person "religious instruction as part of its services—for example, Sunday School or [B]ible study" is permissible.[7] [Ex. 3 to Verif. Compl.].

This divvying up of religious services as legal and illegal by Governor Beshear irretrievably intrudes on religious institutions' "autonomy." It is hard to imagine a more profound affront to it. At present, religious institutions and churches do not decide what services to provide; the Governor does. Under *Our Lady of Guadalupe*, religious institutions and churches have a First Amendment right to make internal decisions that "are essential to the institution's central mission." 140 S. Ct. at 2060. The First Amendment gives them this "independence." *Id.* Here, that "independence" has been replaced with state-imposed directives. Just as the state cannot tell religious

[7] Even trying to apply this rule would "would risk judicial entanglement in religious issues." *Our Lady of Guadalupe*, 140 S. Ct. at 2069. Is the government going to decide whether a religious institution's schooling is "part of its services?" That would surely be incompatible with the Supreme Court's recognition that religious education is a "central purpose" of many faiths. *See id.* at 2066.

institutions *who* teaches religion to their students, so the state cannot tell those same institutions *whether* they can open their doors to schoolchildren.

C. The Governor's executive orders violate the Establishment Clause.

The Establishment Clause demands neutrality by the government toward religious groups. *See Larsen v. Valentine*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). The Governor's executive orders violate this core principle by favoring religious organizations that provide in-person worship services over those that provide in-person schooling. When, as here, "the state passes laws that facially regulate religious issues, it must treat individual religions and religious institutions 'without discrimination or preference' . . . ." *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) (McConnell, J.) (citation omitted).

The facts of *Colorado Christian University* demonstrate this point. The Tenth Circuit there considered a Colorado law that "provide[d] scholarships to eligible students who attend any accredited college in the state—public or private, secular or religious—other than those that the state deem[ed] 'pervasively sectarian.'" *Id.* at 1251. Under this statute, Colorado had given scholarships to students attending a Methodist university and a Catholic university, but had refused scholarships to otherwise eligible students at a Protestant university and a Buddhist university. *Id.* Writing for the Tenth Circuit, Judge McConnell explained that Colorado's law impermissibly discriminated between and among religions. As he explained, "[b]y giving scholarship money to students who attend sectarian—but not 'pervasively'

sectarian—universities, Colorado necessarily and explicitly discriminates among religious institutions, extending scholarships to students at some religious institutions, but not those deemed too thoroughly 'sectarian' by government officials." *Id.* at 1258 (footnote omitted). This, the Tenth Circuit concluded, "is discrimination 'on the basis of religious views or religious status' and is subjected to heightened constitutional scrutiny." *Id.* (internal citation omitted); *see also Spencer v. World Vision, Inc.*, 633 F.3d 723, 728–29 (9th Cir. 2011) (O'Scannlain, J., concurring) (holding that interpreting a statute to "require[] an organization to be a 'church' to qualify for the exemption would discriminate against religious institutions which 'are organized for a religious purpose and have sincerely held religious tenets, but are not houses of worship'" (citation omitted)).

Similar discrimination is occurring here. As explained above, Governor Beshear's executive orders permit all manner of in-person worship to continue—Sunday services, Sunday school, Bible studies, and Wednesday night services. However, if a religious organization desires to open its doors to schoolchildren, as Danville Christian does, it is forbidden. The Establishment Clause prohibits Governor Beshear from favoring some religious organizations—those that offer in-person worship services—and disfavoring others—those that offer in-person schooling. Neutrality toward religious organizations is the standard, and the Governor's executive orders are anything but.

D. The Governor's executive order violates Kentucky's RFRA statute.

Governor Beshear's school-closure order also violates Kentucky law. Kentucky's Religious Freedom Restoration Act ("RFRA") is clear: "Government shall not substantially burden a person's freedom of religion." Ky. Rev. Stat. 446.350. A "burden" is defined to include even "indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities." *Id*. In cases brought under RFRA, judges "may question only the sincerity of a plaintiff's religious belief, not the correctness or reasonableness of that religious belief." *On Fire Christian*, 453 F. Supp. 3d at 913. "And as with the strict scrutiny analysis in the constitutional context above, to survive under RFRA the government must 'show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases.'" *Id*. (citing *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 727 (2014)); *see also Maryville Baptist Church*, 957 F.3d at 612 ("[T]he purpose of the Kentucky RFRA is to provide more protection than the free-exercise guarantee of the First Amendment . . . .").

There is no question that the Governor's executive order bars "access" to religious facilities—the Governor, after all, has ordered that no children may attend in-person instruction. [Ex. 1 to Verif. Compl. at 2]. The Governor's General Counsel described it best in an email, explaining that the order "applies to all public and private schools engaged in primary or secondary education (K-12), regardless of whether they are religiously affiliated." [Ex. 3 to Verif. Compl.]. There is, likewise, no question that the Governor's order has imposed penalties. The Beshear

administration has threatened to revoke the certifications for school employees that do "not follow the Governor's order." [Ex. 4 to Verif. Compl.]. In a November 19, 2020 email, the Commissioner of the Department of Education ominously warned that "[c]ertified school employees . . . may be subject to disciplinary action by the Education Professional Standards Board (EPSB) for violation of the Professional Code of Ethics" and that "KRS 156.132 provides for the removal or suspension of public school officers, including local board members, for immorality, misconduct in office, incompetence, willful neglect of duty or nonfeasance." [*Id.*].

Thus, the question becomes whether the Governor is likely to prove "by clear and convincing evidence that [he] has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest." Ky. Rev. Stat. 446.350. In other words, can the Governor's order survive strict scrutiny? Simply put, it cannot. As described above, the Governor cannot meet his evidentiary burden. That is particularly so in light of his decision to permit the continued operation of "[g]yms, fitness centers, swimming and bathing facilities, bowling alleys, and other indoor recreation facilities" at reduced occupancy levels and his decision to permit the continued operation of "[i]ndoor venues, event spaces, and theaters" if limited to "25 people per room." [Ex. 2 to Verif. Compl. at 2–3]. For these reasons and those discussed above, banning in-person religious instruction is not the least restrictive means.

II. The other injunction factors favor the Plaintiffs.

"[W]hen a party seeks a [temporary restraining order] on the basis of a violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor." *Tabernacle Baptist*, 459 F. Supp. 3d at 853 (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)). That is true here. Nevertheless, in light of the First Amendment violations discussed above, the other factors governing the issuance of a temporary restraining order necessarily support injunctive relief as well.

Start with irreparable harm. "The Supreme Court has held 'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injuries.'" *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringements upon First Amendment values constitutes injury sufficient to justify injunctive relief."). As discussed above, the Plaintiffs have demonstrated a strong likelihood of success on the merits of their First Amendment claims. The same goes for the Plaintiffs' Kentucky RFRA claim and their claim under the Kentucky Constitution. Consequently, the Plaintiffs have established irreparable harm. And that irreparable harm is immediate—schools across the Commonwealth are currently being forced to alert parents about what will happen on Monday morning, at which time the schools will have to cease in-person instruction.

Next, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *See Winter v. Nat. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The Governor will argue that banning in-person religious schooling will stop COVID-19 from spreading. But the Governor cannot offer any good reason for "refusing to trust [the religious institutions] who promise to use care [in teaching children] in just the same way [the Governor] trusts accountants, lawyers, and laundromat workers to do the same." *See Maryville Baptist Church*, 957 F.3d at 615. That is to say, the Governor cannot explain why closing all religious schools will cause substantial harm while simultaneously allowing other activities to continue—such as, daycares, gatherings under 25 people, and gyms and office environments at less than 33 percent capacity—will not cause similar harms. For this reason, a temporary restraining order will "appropriately permit[] [in-person religious schooling to continue] with the same risk-minimizing precautions as similar secular activities, and permits the Governor to enforce social-distancing rules in both settings." *See id.* at 616.

This leads to the final factor, the public interest. Simply put, "the public interest favors the enjoinment of a constitutional violation." *Tabernacle Baptist*, 459 F. Supp. 3d at 856 (citing *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982)). Moreover, the "treatment of similarly situated entities in comparable ways serves public health interests at the same time it preserves bedrock [First Amendment] guarantees." *See Maryville Baptist Church*, 957 F.3d at 616.

III. The Court should issue a statewide temporary restraining order.

This Court recently recognized its ability to grant a statewide temporary restraining order where Governor Beshear's executive order operates statewide. As this Court summarized, the Supreme Court has established that "one of the 'principles of equity jurisprudence' is that 'the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.'" *Tabernacle Baptist*, 459 F. Supp. 3d at 856 (quoting *Rogers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019)). The Court further explained that a temporary restraining order is "an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *See id.* (quoting *Trump v. Int'l Refugee Assist. Project*, --- U.S. --- , 137 S. Ct. 2080, 2087 (2017)).

Here, Governor Beshear's executive order closing religious schools undeniably harms Danville Christian. But the executive order applies statewide, and thus affects religious institutions in all corners of the Commonwealth. *See id.* ("In the present case, the Executive Order at issue does not just affect Tabernacle Baptist Church. The Executive Order applies to all churches."). Because religious schools in Harlan, Benton, and everywhere in between will soon have to close their doors, "injunctive relief may extend statewide because the violation established impacts the entire state of Kentucky." *See id.*

Any temporary restraining order granted by the Court should apply statewide. This is not a case where a single entity in a single location alone is asking the Court

for statewide relief. True, Danville Christian is seeking such relief. But so is the Commonwealth through its duly elected Attorney General. Kentucky's high court has recognized that Attorney General Cameron has a "common-law obligation to protect public rights and interests by ensuring that our government acts legally and constitutionally." *Commonwealth ex rel. Beshear v. Commonwealth Office of Governor ex rel. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016). More to the point, when the Attorney General takes legal action, he is acting on behalf of the Commonwealth and all of its citizens. *See Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 173 (Ky. 2009) (describing Kentucky's Attorney General as the "attorney for the people of the State of Kentucky" (citation omitted)). In light of the Attorney General's duty to vindicate the constitutional rights of all Kentuckians, the Court accordingly should issue statewide injunctive relief to remedy the statewide constitutional and statutory violations at issue here.

CONCLUSION

The Court should schedule an emergency hearing before Monday, November 23, 2020 and immediately grant the Plaintiffs' motion for a temporary restraining order.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I certify that, immediately prior to filing the foregoing on November 20, 2020, I served it via email to the following:

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I further certify that, on November 20, 2020, I accomplished service of this motion under Federal Rule of Civil Procedure 4 and applicable Kentucky law on the following:

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/s/ Carmine G. Iaccarino