APPENDIX

APPENDIX

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APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0175p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-6028

[Filed August 14, 2023]

PLEASANT VIEW BAPTIST CHURCH; PLEASANT VIEW BAPTIST SCHOOL; PASTOR DALE MASSENGALE; VERITAS CHRISTIAN ACADEMY; MARYVILLE BAPTIST CHURCH; MICAH CHRISTIAN SCHOOL; PASTOR JACK ROBERTS; MAYFIELD CREEK BAPTIST CHURCH; MAYFIELD CREEK CHRISTIAN SCHOOL; PASTOR TERRY NORRIS; FAITH BAPTIST CHURCH; FAITH BAPTIST ACADEMY; PASTOR TOM OTTO; WESLEY DETERS and MITCH DETERS, on behalf of themselves and their minor children M.D., W.D., and S.D.; CENTRAL BAPTIST CHURCH; CENTRAL BAPTIST ACADEMY; PASTOR MARK EATON; CORNERSTONE CHRISTIAN SCHOOL; CORNERSTONE CHRISTIAN CHURCH; JOHN MILLER, on behalf of himself and his minor children B.M., E.M., and H.M., *Plaintiffs-Appellants*,	)
v.	)

ANDY BESHEAR, in his individual capacity, *Defendant-Appellee*.

Appeal from the United States District Court for the Eastern District of Kentucky at Covington.
No. 2:20-cv-00166—Gregory F. Van Tatenhove, District Judge.

Argued: December 8, 2022

Decided and Filed: August 14, 2023

Before: MOORE, STRANCH, and MURPHY, Circuit Judges.

COUNSEL

ARGUED: Christopher Wiest, CHRIS WIEST, ATTY AT LAW, PLLC, Crestview Hills, Kentucky, for Appellants. Taylor Payne, OFFICE OF THE GOVERNOR, Frankfort, Kentucky, for Appellee. **ON BRIEF:** Christopher Wiest, CHRIS WIEST, ATTY AT LAW, PLLC, Crestview Hills, Kentucky, Thomas B. Bruns, BRUNS CONNELL VOLLMAR & ARMSTRONG, Cincinnati, Ohio, for Appellants. Taylor Payne, Travis Mayo, OFFICE OF THE GOVERNOR, Frankfort, Kentucky, for Appellee.

MOORE, J., delivered the opinion of the court in which STRANCH, J., joined in full. MURPHY, J. (pp. 20–25), delivered a separate concurring in the judgment.

OPINION

KAREN NELSON MOORE, Circuit Judge. A group of churches, private religious schools, affiliated pastors, and the parents of students who sued on behalf of themselves and their minor children (collectively "Plaintiffs") sued Governor Andy Beshear of Kentucky in his individual capacity for alleged violations of their free-exercise rights, their rights to private-school education, and their rights to assemble peacefully and associate freely. Plaintiffs allege that the Governor violated these rights when he issued Executive Order 2020-969 ("EO 2020-969"), a public-health measure that temporarily barred in-person learning at all private and public elementary and secondary schools in Kentucky in response to a surge in COVID-19 transmission in the winter of 2020. After the parties litigated Plaintiffs' request for a preliminary injunction, Governor Beshear moved to dismiss the case and argued that qualified immunity shielded him from liability. The district court granted the Governor' motion. We **AFFIRM**.

I. BACKGROUND

On November 18, 2020, Governor Beshear issued EO 2020-969, which temporarily required all elementary and secondary schools to transition to remote learning for a few weeks during the COVID-19 surge in the winter of 2020. This was not the Governor's or Kentucky's first order aimed at curbing the spread of COVID-19. In prior emergency decisions,

this court determined that some of those prior orders likely violated individuals' free-exercise rights. Because Plaintiffs' pleadings and arguments heavily rely on those prior orders, as well as our review of those orders, we begin with a brief overview of them.

A. The March 2020 Orders: *Maryville* and *Roberts*[1]

On March 19, 2020, Kentucky prohibited "[a]ll mass gatherings," defined as "any event or convening that brings together groups of individuals, including, but not limited to, community, civic, public, leisure, *faith-based*, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities."[2] R. 40-2 (Am. Compl. ¶¶ 8–9) (Page ID #416) alteration in original) (emphasis added). "[A] mass gathering does not include normal operations at airports, bus and train stations, medical facilities, libraries, shopping

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[1] We rely on Plaintiffs' Amended Complaint as the basis for their factual allegations, including—where applicable—*factual* description of events before a court. We do not, however, treat the Amended Complaint's description of courts' decisions, holdings, or reasoning as factual allegations.

[2] Plaintiffs alleged that Governor Beshear issued the March 19, 2020 order "acting through Secretary Eric Friedlander of the Cabinet for Health and Family Services." R. 40-2 (Am. Compl. ¶ 8) (Page ID #416). Acting under statutory authority as well as authority granted by Governor Beshear under Executive Orders No. 2020-215 and 2020-243, Kentucky's Cabinet for Health and Family Services issued the March 19, 2020 order. March 19, 2020 Order, https://governor-ky.gov/attachments/20200319_Order_Mass-Gatherings.pdf [https://perma.cc/WRM6-H2RH]. Commissioner of Public Health Steven J. Stack, M.D., and Acting Cabinet Secretary Eric Friedlander signed the order. *Id.*

malls and centers, or other spaces where persons may be in transit," or other spaces "where large numbers of people are present, but maintain appropriate social distancing." *Id.* ¶¶ 11–12 (Page ID #416–17).

On March 25, 2020, the Governor issued Executive Order 2020-257, which "require[d] organizations that [were] not 'life-sustaining' to close." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 611 (6th Cir. 2020) (order) (per curiam). The EO identified nineteen categories of life-sustaining organizations, which included organizations such as gas stations, banks, shipping and delivery services, funeral services, "[l]aundromats, accounting services, law firms, hardware stores, and many other entities [that] count as life-sustaining." *Id.*; *see also Roberts v. Neace*, 958 F.3d 409, 411–12 (6th Cir. 2020) (order) (per curiam); Ky. Exec. Order No. 2020-257 ¶ 1 (Mar. 25, 2020). These life-sustaining organizations could continue operating with the implementation of protective measures. Ky. Exec. Order No. 2020-257 ¶ 3; *Maryville*, 957 F.3d at 614. Religious organizations were considered life-sustaining organizations only "when they function as charities by providing 'food, shelter, and social services'" otherwise, EO 2020-257 required that they cease in-person operations. *Maryville*, 957 F.3d at 611; *see also* Ky. Exec. Order No. 2020-257 ¶¶ 1(d), 4. Through these two orders ("March 2020 Orders"), which explicitly "prohibit[ed] 'faith-based' mass gatherings by name," *Maryville*, 957 F.3d at 614, Kentucky prohibited both in-person and drive-in church services, *see id.* at 611.

This court considered the legality of both orders on an emergency basis on May 2, 2020, when reviewing a district court's order denying an "emergency motion for a temporary restraining order" and an injunction to stop enforcement of the two orders pending appeal. *Maryville*, 957 F.3d at 611. We determined that the Free Exercise Clause likely prohibited the ban on *drive-in* religious services and enjoined "enforc[ement of the] orders prohibiting drive-in services at" the plaintiffs' churches "during the pendency of th[e] appeal" as long as "the public health requirements mandated for 'life-sustaining' entities" were followed. *Id.* at 616; *see also id.* at 614. One week later, in *Roberts*, we addressed the March 2020 Orders' in-person prohibition on "'faith-based' 'mass gatherings.'" 958 F.3d at 411. We concluded that the March 2020 Orders'" restriction on *in-person* worship services likely 'prohibits the free exercise' of 'religion,'" and enjoined enforcement of "orders prohibiting in-person services at" the plaintiffs' churches so long as they implemented the mandated public-health protective measures during the pendency of the appeal. *Id.* at 413, 416 (emphasis added) (quoting U.S. Const. amends. I, XIV).

B. Executive Orders 2020-968 and 2020-969, Plaintiffs' Original Complaint, and the *Danville* Lawsuit

We turn now to the executive orders at issue here. On November 18, 2020, citing "a potentially catastrophic surge in COVID-19 cases which threaten[ed] to overwhelm our healthcare system and cause thousands of preventable deaths," Governor Beshear issued Executive Orders 2020-968 and 2020-

969. R. 40-2 (Am. Compl., Ex. A (EO 2020-968)) (Page ID #436); *id.* at Ex. B (EO 2020-969) (Page ID #439); *id.* ¶ 27 (Page ID #421).

Executive Order 2020-968[3]: EO 2020-968 imposed restrictions on restaurants and bars; social gatherings; fitness and recreation centers; venues, event spaces, and theaters; and professional services from November 20, 2020, until December 13, 2020. R. 40-2 (Am. Compl., Ex. A ¶¶ 3–8) (Page ID #437–38). EO 2020-968 either prohibited entirely or restricted indoor activities, imposed occupancy limits on these activities, and/or required the implementation of protective measures. *Id.* It *expressly* excluded houses of worship from these restrictions. *Id.*, Ex. A ¶ 7 (Page ID #437–38). It ordered offices to "mandate that all employees who are able to work from home do so, and close their businesses to the public when possible." *Id.*, Ex. A ¶ 8 (Page ID #438). Offices that remained open could not have "more than 33% of employees . . .

[3] Plaintiffs point to the secular activities regulated by EO 2020-968 in arguing that EO 2020-969 violated their constitutional rights but do not argue that EO 2020-968 independently deprived them of their constitutional rights. *See generally* Appellants Br.; Reply Br. Plaintiffs' issues-presented section specifically asks whether the "order" shutting down religious schools deprived them of their constitutional rights. Appellants Br. at 1–2. Plaintiffs' headings in their reply brief confirm that EO 2020-968 is relevant for the free-exercise claim but does not support an independent claim. *See* Reply Br. at 2 (referencing EO 2020-968 and EO 2020-969), *id.* at 18 (referencing only EO 2020-969), *id.* at 23 (referencing only EO 2020-969). For clarity, our analysis below considers whether to compare the secular conduct restricted under EO 2020-968 as well as other conduct unaffected by the executive orders with the temporary closure of in-person religious schooling.

physically present in the office any given day." *Id.* The order "d[id] not apply to education, childcare, or healthcare, which operate under separately issued guidance and orders." *Id.*, Ex. A ¶ 2 (Page ID #437).

Executive Order 2020-969: Plaintiffs challenge the constitutionality of EO 2020-969. EO 2020-969 ordered "[a]ll public and private" "middle[] and high schools" to move from *in-person* learning to *remote* learning from November 23, 2020, until January 4, 2021. R. 40-2 (Am. Compl., Ex. B ¶¶ 1–2) (Page ID #440). "All public and private elementary . . . schools" also began remote learning on November 23, 2020, and could return to in-person learning if the schools fell outside the "red zone" and implemented various protective measures between December 7, 2020, and January 4, 2021. *Id.*, Ex. B ¶¶ 1, 3 (Page ID #440). By January 4, 2021, all schools would return to in-person learning. *Id.* ¶ 3 (Page ID #440). The EO permitted all schools to "provide[] small group in-person targeted services, as provided in [Kentucky Department of Education] guidance" and allowed "private schools conducted in a home solely for members of that household" to continue operating in person. *Id.*, Ex. B ¶¶ 4–5 (Page ID #440). EO 2020-969 does not reference religion or religious activity in any way. *See generally id.*

On November 23, 2020—the day schools were set to begin remote learning—Plaintiffs filed this lawsuit and moved for a temporary restraining order and preliminary injunction barring, among other things, enforcement of EO 2020-969 against private religious schools. R. 1 (Original Compl.) (Page ID #1–44); R. 3 (Mot. for Prelim. Inj.) (Page ID #52–74). The original

complaint—which is no longer the operative complaint—was filed on behalf of additional plaintiffs and included additional claims and requests for relief. *Compare* R. 1 (Original Compl.) (Page ID #1–44), *with* R. 40-2 (Am. Compl.) (Page ID #413–40).

Two days later, in a different lawsuit also addressing EO 2020-969, the U.S. District Court for the Eastern District of Kentucky preliminarily enjoined Governor Beshear "from enforcing the prohibition on in-person instruction with respect to any religious private school in Kentucky that adheres to applicable social distancing and hygiene guidelines." *Danville Christian Acad., Inc. v. Beshear*, 503 F. Supp. 3d 516, 531 (E.D. Ky. 2020). We stayed the preliminary injunction pending appeal on November 29, 2020, allowing EO 2020-969 to go into effect. *Commonwealth v. Beshear* (*Danville*), 981 F.3d 505, 507 (6th Cir. 2020) (order) (per curiam). We held that EO 2020-969, unlike the March 2020 Orders before it, likely did not violate the plaintiffs' free-exercise rights. *Id.* at 509. We explained that "Executive Order 2020-969 applies to all public and private elementary and secondary schools in the Commonwealth, religious or otherwise; it is therefore neutral and of general applicability and need not be justified by a compelling governmental interest." *Id.* The Supreme Court declined to vacate our stay on December 17, 2020, leaving EO 2020-969 in effect. *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 527–28 (2020).

C. Proceedings After Executive Order 2020-969 Expired on January 4, 2021

The same day that EO 2020-969 expired, R. 40-2 (Am. Compl., Ex. B) (Page ID #439–40), Governor Beshear moved to dismiss this action under Federal Rule of Civil Procedure 12(b)(6), R. 35-1 (Mem. in Support of Beshear Mot. to Dismiss) (Page ID #379–400). The Governor argued that the action was moot, that certain plaintiffs lacked standing, that the EO did not violate Plaintiffs' constitutional rights, and that the Governor was entitled to qualified immunity. *Id.* In response, Plaintiffs moved for leave to amend their original complaint to withdraw parties, claims, and requests for relief. R. 40 (Pls.' Mot. for Leave to Am.) (Page ID #408–11). Their proposed amended complaint would allege "three claims, which seek declaratory relief and damages." *Id.* at 2 (Page ID #409).

Plaintiffs' Amended Complaint alleged that Governor Beshear violated their free-exercise rights, rights to private education, and rights to freedom of association and peaceable assembly when he issued EO 2020-969. R. 40-2 (Am. Compl. ¶¶ 61–80) (Page ID #430–34). It alleged that the Governor "ban[ned] in-person religious education and instruction" while "permit[ting] a number of comparable secular activities of varying sizes." *Id.* ¶ 29 (Page ID #421). Plaintiffs compared and contrasted EO 2020-969's temporary in-person religious school closure with the following:

(1) activities subject to restrictions under EO 2020-968 (*e.g.*, permitting in-person

gyms to operate at 33% capacity, *id.* ¶¶ 29, 33 (Page ID #421–22));

(2) activities subject to other regulations (*e.g.*, permitting in-person child-care programs to continue at limited occupancy, *id.* ¶ 30 & nn.3–4 (Page ID #421)); and

(3) activities that "remain[ed] open" (*e.g.*, "[g]as stations, grocery stores, [and] retail establishments," *id.* ¶¶ 35–37 (Page ID #422)).

Plaintiffs alleged that they hold sincere religious beliefs, which include "the importance of in-person instruction." *Id.* ¶¶ 42–49 (Page ID #423–27). They also alleged that they had implemented protective measures and that "there is absolutely no evidence of any community spread of COVID-19 within the school[s]." *Id.* They further alleged that their religious beliefs "would be substantially burdened, if the schools were prohibited from offering in-person, in-class instruction to their students." *Id.* ¶ 50 (Page ID #428).

The Governor opposed the motion for leave to amend, arguing that the proposed amendment was futile because the claims were moot and could not survive a motion to dismiss. R. 44 (Beshear's Opp'n to Pls.' Mot. for Leave to Am.) (Page ID #484–94). The district court granted Plaintiffs leave to amend and treated the Amended Complaint as operative. *Pleasant View Baptist Church v. Beshear*, No. 2:20-cv-00166-GFVT-CJS, 2021 WL 4496386, at *1–3 (E.D. Ky. Sept. 30, 2021). Turning to the Governor's motion to

dismiss, the district court found that Plaintiffs' requests for declaratory relief were moot. *Id.* at *4–6. It then determined that their three claims for monetary damages were not moot, but Governor Beshear was entitled to qualified immunity on those claims. *Id.* at *6–9. The district court therefore granted the Governor's motion to dismiss and dismissed the case. *Id.* at *1, 9. Plaintiffs filed a timely notice of appeal, seeking review of the dismissal of their three claims for monetary damages against Governor Beshear in his individual capacity on the basis of qualified immunity. R. 62 (Notice of Appeal) (Page ID #669).

II. STANDARD OF REVIEW

"We review de novo the district court's grant of a motion to dismiss." *Daunt v. Benson*, 999 F.3d 299, 307 (6th Cir. 2021) (quotation omitted). "[W]e must determine whether the complaint 'fail[s] to state a claim upon which relief can be granted,' in which case dismissal is warranted." *Id.* at 307–08 (second alteration in original) (quoting Fed. R. Civ. P. 12(b)(6)). Our review "construe[s] the complaint in the light most favorable to the Plaintiffs," *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009) (quoting *Hill v. Blue Cross & Blue Shield of Mich.*, 409 F.3d 710, 716 (6th Cir. 2005)), and "[w]e accept all of the complaint's factual allegations as true but 'need not accept as true legal conclusions or unwarranted factual inferences,'" *Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 533 (6th Cir. 2002) (citation omitted) (quoting *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987)). "[A] court may consider the complaint and any exhibits attached thereto in determining whether

dismissal under Rule 12(b)(6) is proper." *Cagayat v. United Collection Bureau, Inc.*, 952 F.3d 749, 755 (6th Cir. 2020).

III. QUALIFIED IMMUNITY

On appeal, we consider whether the district court erred when it dismissed Plaintiffs' three claims on the basis of qualified immunity. "Whether qualified immunity applies to an official's actions is a question of law that this Court reviews *de novo*." *Rhodes v. Michigan*, 10 F.4th 665, 672 (6th Cir. 2021) (quoting *Virgili v. Gilbert*, 272 F.3d 391, 392 (6th Cir. 2001)). "Where a defendant raises the defense of qualified immunity, 'it is the plaintiff's burden to show that the defendants are not entitled to qualified immunity.'" *Moody v. Mich. Gaming Control Bd.*, 871 F.3d 420, 425 (6th Cir. 2017) (quoting *Burgess v. Fischer*, 735 F.3d 462, 472 (6th Cir. 2013)).

Qualified-immunity analysis has two prongs. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). "First, taken in the light most favorable to the party asserting the injury, do the facts alleged show that the offic[ial]'s conduct violated a constitutional right?" *Rhodes*, 10 F.4th at 672 (quoting *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006)). Under the second prong, we evaluate whether "the right [was] clearly established" at the time of the challenged conduct. *Id.* at 672, 679 (quoting *Silberstein*, 440 F.3d at 311). For a right "[t]o be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action

in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.'" *Id.* at 679 (second alteration in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Though a plaintiff need not "point to a case 'on all fours with the instant fact pattern to form the basis of a clearly established right,'" there must be "a sufficiently analogous case (or cases) from which a 'reasonable official would understand that what he is doing violates that right.'" *Id.* (first quoting *Vanderhoef v. Dixon*, 938 F.3d 271, 278 (6th Cir. 2019); and then quoting *Anderson*, 483 U.S. at 640).

A. Free-Exercise Claim

The Supreme Court makes clear that qualified-immunity' two prongs can be considered in any order. *Pearson*, 555 U.S. at 236. Some jurists generally prefer to answer the constitutional question first, fearing that answering only the clearly established prong "risks constitutional stagnation" and can prevent a constitutional guarantee from becoming clearly established in the future. *See* Paul W. Hughes, *Not A Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. Colo. L. Rev. 401, 402 (2009) (explaining that a court's decision to answer the clearly established prong first "risks constitutional stagnation," *id.* at 402, and the "fail[ure] to articulate constitutional rights . . . deprive[s future litigants of] the benefit of knowing the content and scope of their rights," *id.* at 429); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 23–25, 35–38 (2015) (finding that

"post-*Pearson* constitutional law continues to develop, but the finding of constitutional violations (when granting qualified immunity)—the pure *Saucier* development of constitutional law—as decreased," *id.* at 38, and finding "some stagnation with respect to rights-making," *id.* at 52); *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (explaining before *Pearson* "that if the policy of [constitutional] avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals").

Some scholars have noted the value in courts articulating their "reasons for exercising (or not) their *Pearson* discretion to reach constitutional questions." Nielson & Walker, *supra*, at 52. Accordingly, we explain why we choose to exercise our *Pearson* discretion and consider the free-exercise claim under the clearly established prong. Just days after the Governor issued EO 2020-969, on November 29, 2020, this court considered this exact same free-exercise argument under the preexisting law and held that EO 2020-969 likely did not violate the Free Exercise Clause. *Danville*, 981 F.3d at 507–10.[4] In light of that ruling and other precedents, we find it doubtful, even implausible, that on November 18, 2020, the "constitutional question" of whether EO 2020-969

[4] Plaintiffs argue that *Danville* is an "unreported panel decision" that we can and should ignore. Reply Br. at 5. Contrary to Plaintiffs' assertion, however, *Danville* is a published decision. *See generally Danville*, 981 F.3d 505–11.

violated the Free Exercise Clause was "beyond debate." *See Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Because of *Danville*, we bypass the constitutional-violation prong and adjudicate Governor Beshear's qualified-immunity defense under the clearly established prong. *See Pearson*, 555 U.S. at 236.

We start by providing an overview of the law as it existed on November 18, 2020, because the "clearly established" inquiry mandates that even without "requir[ing] a case directly on point . . . existing precedent must have placed the statutory or constitutional question beyond debate," "at the time of the challenged conduct." *Al-Kidd*, 563 U.S. at 741. It is in that context, under the "pre-existing law," that "the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640. We must therefore confine our analysis to the law as it stood on November 18, 2020.[5] *See id.*; *Al-Kidd*, 563 U.S. at 741; *Rhodes*, 10 F.4th at 679.

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground

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[5] In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Supreme Court issued further guidance on First Amendment free-exercise analysis. As Plaintiffs acknowledge, "*Tandon* had not been decided at the time Defendant Beshear issued his orders at issue in this case, and so [Plaintiffs] do not rely on it under the clearly established prong." Reply Br. at 16. For that reason, we decline to address Judge Murphy's discussion about *Tandon*. Nothing should be inferred from our silence on this point.

that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). Thus, a law that is neutral, generally applicable, and "incidentally burdens religious practices usually will be upheld," whereas "a law that discriminates against religious practices usually will be invalidated [unless] it is the rare law that can be 'justified by a compelling interest and is narrowly tailored to advance that interest.'" *Roberts*, 958 F.3d at 413 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 553 (1993)). When reviewing neutral laws of generally applicability, we do not apply a heightened standard of review because doing so would:

> open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes; to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.

Smith, 494 U.S. at 888–89 (citations omitted).

A law is not neutral if it discriminates on its face, if it is facially neutral but "targets religious conduct for distinctive treatment," or if its "object . . . is to infringe

upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533–34; *see also Roberts*, 958 F.3d at 413. To determine neutrality, we consider, "among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Lukumi*, 508 U.S. at 540. A seemingly neutral "general ban[] that cover[s] religious activity," *Maryville*, 957 F.3d at 614, is not, however, generally applicable when the ban "in practice is riddled with," *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012), "exceptions for comparable secular activities," *Roberts*, 958 F.3d at 413. To determine whether a law is riddled with secular exceptions, we identify the similar secular activities to compare against the restricted religious activities—the appropriate secular analogue.

The parties disagree on what secular activities are similar to the temporary closure of in-person learning at religious schools. The Governor argues that because elementary and secondary schools are distinct in their environment and made up of students who cannot reliably comply with protective measures, they present unique COVID-19 risks, and therefore the secular activity with comparable COVID-19 risks to religious schools is secular schools. *See* Beshear Br. at 2, 10–11. That comparison echoes this court's analysis of EO 2020-969 in *Danville*. 981 F.3d at 509. Plaintiffs, on the other hand, argue for a broader analogue, urging the comparison between the treatment of religious schools against all other activities that were permitted

to continue operating with or without restrictions. Appellants Br. at 16–19, 21–22. The problem for Plaintiffs, however, is that Governor Beshear issued EO 2020-969 amid an active and energetic constitutional debate regarding the selection of the appropriate secular analogue when adjudicating free-exercise claims.

Contrary to Plaintiffs' contention, our May 2, 2020 and May 9, 2020 orders in *Maryville* and *Roberts* did not make "sufficiently clear t[o] a reasonable official," *Anderson*, 483 U.S. at 640, that temporarily mandating remote learning for all elementary and secondary schools—religious and secular alike—ran afoul of the Free Exercise Clause. As an initial matter, lurking in the pages of our *Maryville* and *Roberts* orders is our concern that the two March 2020 Orders explicitly targeted religion. We described the March 2020 Orders as "hav[ing] several potential hallmarks of discrimination." *Maryville*, 957 F.3d at 614. For example, *Maryville* identified with apprehension the March 2020 Orders' facial reference to religious institutions, as they expressly "prohibit[ed] 'faith-based' mass gatherings by name." *Id.*; *see also* Appellants Br. at 6–7 (describing the March 2020 Orders as facially targeting religious activities). We continued to communicate our concern about the March 2020 Orders' perceived hostility towards religious exercise in *Roberts*. *Roberts*, 958 F.3d at 414 (stating that the "congregants just want to be treated equally," "don't seek to insulate themselves from the Commonwealth's general public health guidelines," and should not be subject to the worst assumptions "when [they] go to worship but" the best assumptions "when

[they] go to work or go about the rest of their daily lives in permitted social settings"). Both of our decisions also substantially detailed law enforcement's role in the potential criminal enforcement of the March 2020 Orders. *Maryville*, 957 F.3d at 611–12 (explaining that during "a drive-in Easter service" while the orders were in effect, "Kentucky State Police arrived in the parking lot[,] . . . issued notices to the congregants that their attendance at the drive-in service amounted to a criminal act," and "recorded congregants' license plate numbers and sent letters to vehicle owners requiring them to self-quarantine for 14 days or be subject to further sanction"); *id.* at 613 (stating later that "[o]rders prohibiting religious gatherings, enforced by police officers telling congregants they violated a criminal law and by officers taking down license plate numbers, amount to a significant burden on worship gatherings"); *Roberts*, 958 F.3d at 412, 415 (same). In *Danville*, we found *Maryville*'s and *Roberts*'s concerns about the March 2020 Orders' facial references to and perceived hostility towards religion noteworthy and distinguishable from EO 2020-969, which "cannot be plausibly read to contain even a hint of hostility towards religion." *Danville*, 981 F.3d at 509 ("In *Roberts*[] and *Maryville*, the challenged COVID-19 orders . . . appl[ied] *specifically* to houses of worship." (citations omitted) (emphasis added)).

It is of course true that when considering whether restrictions on in-person and drive-in religious mass-gatherings would likely violate the Constitution, *Maryville* and *Roberts* treated—as comparable secular activities to church services—locations like "law firms, laundromats, liquor stores, gun shops, airlines, mining

operations, funeral homes, and landscaping businesses" that could operate while implementing protective measures. *Roberts*, 958 F.3d at 414; *see also Maryville*, 957 F.3d at 614. But neither *Maryville* nor *Roberts* stated a standard or discussed an approach for how to identify an appropriate secular analogue. We merely observed—without any legal citations—that "*many* of the [March 2020 Orders'] serial exemptions for secular activities pose comparable public health risks to worship services." *Maryville*, 957 F.3d at 614 (emphasis added); *Roberts*, 958 F.3d at 414 (same). Contrary to Plaintiffs' contention, Appellants Br. at 16–17, however, we did not hold or make any controlling statement of law that any secular activity that posed the same COVID-19 risks was per se similar for the purpose of our analysis. *Maryville*, 957 F.3d at 614; *Roberts*, 958 F.3d at 414. Rather, we relied on *Ward*, 67 F.3d at 738, in support of the proposition that "the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law." *Maryville*, 957 F.3d at 614; *Roberts*, 958 F.3d at 413. We also told the Governor that he could consider the ability to enforce social-distancing and mitigation efforts when responding to the COVID-19 pandemic. *See Roberts*, 958 F.3d at 414 ("Some groups in some settings, we appreciate, may fail to comply with social-distancing rules. If so, the Governor is free to enforce the social-distancing rules against them for that reason and in that setting, whether a worship setting or not."). In short, after *Maryville* and *Roberts*, uncertainty and debate remained active regarding how to identify the appropriate secular analogue, thus failing to clearly establish that it might constitute a constitutional violation to close all schools including temporarily close

in-person religious schools, while leaving open with restrictions locations like restaurants, theaters, gas stations, grocery stores, retail establishments, and gyms.

This is reenforced by Justice Alito's own observation, made a few months after the issuance of EO 2020-969, that "identifying the secular activities that should be used for comparison has been *hotly contested*" by the courts, particularly in the context of COVID-19. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1921–22 (2021) (Alito, J., concurring) (emphasis added) (collecting cases and detailing their conflicting approaches when identifying comparators). In making this point, Justice Alito offered numerous examples. *Id.* at 1922. His first example of the "hotly contested" debate occurred on May 29, 2020, just a few days after *Maryville* and *Roberts*, when the Supreme Court decided *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). In *South Bay*, the Court refused to enjoin a California order that imposed "temporary numerical restrictions on public gatherings," including a limit of "25% of building capacity or a maximum of 100 attendees" at houses of worship. 140 S. Ct. at 1613 (Roberts, C.J., concurring). The Chief Justice's concurring opinion identified the comparable secular activities as "lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time." *Id.* The California order exempted "only *dissimilar* activities, such as operating grocery stores, banks, and laundromats"—activities that the Chief Justice described as those "in which people neither congregate

in large groups nor remain in close proximity for extended periods." *Id.* (emphasis added). The Chief Justice's analysis distinguished between large group environments in which people remained in close proximity for a prolonged period of time from other public environments where, despite the large quantity of people, they neither congregate together nor remain in close proximity for a prolonged period of time. *Id.* The dissenting justices disagreed, however, and found those same activities comparable to houses of worship for the purposes of the free-exercise analysis. *S. Bay*, 140 S. Ct. at 1615 (Kavanaugh J., dissenting). The justices' disagreement and treatment of religious gatherings as "dissimilar" from grocery stores, banks, and laundromats, undermines any suggestion that *Maryville* and *Roberts* (issued **before** *South Bay*), clearly established how to determine which secular conduct to compare. *South Bay* reflects a continued disagreement regarding how to *apply* our legal principles and *conduct* that comparison.

Another one of Justice Alito's examples of the "hotly contested" debate was *Danville* itself. *Fulton*, 141 S. Ct. at 1922 (Alito, J., concurring). Though our decision in *Danville* is not part of the retrospective legal landscape that we consider in our clearly established analysis (because it was decided eleven days *after* Governor Beshear issued the EO[6]), this court's analysis of the

[6] Plaintiffs argue that *Danville* should be ignored for the purposes of assessing whether the right was clearly established because of its purported "deviation" from the other panels' decisions. Appellants Br. at 32. This argument fails. In addition to the fact that *Danville* does not conflict with prior precedent, neither

exact conduct at issue here and the precedent that controlled when Governor Beshear issued EO 2020-969 both demonstrate the live debate on this exact constitutional question on November 18, 2020. *Danville*'s ruling shows that three judges of this court engaged in scholarly review of the "pre-existing law," *Anderson*, 483 U.S. at 640, and concluded that EO 2020-969 was constitutional under the Free Exercise Clause. This further provides strong evidence that unlawfulness was not apparent and that an active and vibrant debate on the constitutional question existed at the time of the challenged conduct. *See Wilson v. Layne*, 526 .S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject [officials] to money damages for picking the losing side of the controversy."). Even outside the qualified-immunity context, we have recognized the impact that "judicial disagreement" and the circuit's "unsettled jurisprudence" have on government officials. *See United States v. Reed*, 993 F.3d 441, 444 (6th Cir. 2021) (quoting *United States v. Hodge*, 246 F.3d 301, 309 (3d Cir. 2001) (Alito, J.)) (explaining judicial disagreement and the circuit's "'unsettled jurisprudence'" permitted an official to reasonably rely on what might otherwise be an unconstitutional

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Plaintiffs' cited authority, *King v. Taylor*, 694 F.3d 650, 660, n.7 (6th Cir. 2012), nor this court's precedent supports excluding certain cases from the clearly established legal landscape. Plaintiffs point to a pre-merits portion of *King* that addresses whether a party forfeited its service-of-process defense, 694 F.3d at 655, 658–60, where we explained that if "more recent cases might suggest" a different forfeiture rule, the prior case controlled, *id.* at 660 n.7. Only later did we turn to the merits and consider qualified immunity. *Id.* at 661–65.

warrant as the court coul not expect officials "to know better than judges," *id.* at 452 (first quoting *Hodge*, 246 F.3d at 309)).

Neither this court's nor the Supreme Court's precedent clearly established that temporarily closing in-person learning at all elementary and secondary schools would violate the Free Exercise Clause when Governor Beshear issued EO 2020-969 on November 18, 2020. As the Governor points out, Plaintiffs have not provided this court with any cases denying a government official qualified immunity for their immediate public-health response to the COVID-19 pandemic. Beshear Br. at 6. Because the Governor issued EO 2020-969 in the midst of a vibrant debate on this constitutional issue, he is thus entitled to a qualified-immunity defense. Accordingly, because Plaintiffs cannot demonstrate that a clearly established right existed at the time Governor Beshear issued EO 2020-969, we **AFFIRM** the district court's dismissal of Plaintiffs' free-exercise claim.

B. Private-Education Claim

Plaintiffs' claim that Governor Beshear violated their rights to private education under the Fourteenth Amendment also fails. In a short section of their brief, Plaintiffs argue that parents were denied their rights to send their children to in-person private religious school. Appellants Br. at 37. The constitutional right to a private education concerns a parent's choice regarding whether to send their children to private school and direct their curriculum. *See Meyer v. Nebraska*, 262 U.S. 390 (1923) (addressing parental rights to direct and control education of children);

Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (addressing parental rights against children's compelled attendance at public school); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (addressing parents' right against children's compelled schooling above a certain age). EO 2020-969 deprived the parent plaintiffs of neither a choice to send their children to private school over public school nor input in their children's curriculum. Plaintiffs do not allege that any children were precluded from enrolling in private schools while the EO was in effect or that the government intervened in the schools' curriculum. *See* R. 40-2 (Am. Compl. ¶¶ 74–75). Under these circumstances, EO 2020-969 did not implicate Plaintiffs' rights to private education. The non-parent plaintiffs point to no authority establishing that this right exists outside the parental context. Nonetheless, even if Plaintiffs could establish a constitutional violation, their claim would still fail because they have not demonstrated that the right was clearly established. Because Governor Beshear is also entitled to qualified immunity on this claim, we **AFFIRM** the district court's dismissal of Plaintiffs' claim that the Governor violated their rights to private education.

C. Peaceful-Assembly and Freedom-of-Association Claims

Plaintiffs' final claim is that EO 2020-969 violated their rights to assemble peacefully and associate freely. But, because Plaintiffs' brief addresses this final claim "in a perfunctory manner, unaccompanied by some effort at developed argumentation," they have forfeited their claim. *United States v. Reed*, 167 F.3d 984, 993

(6th Cir. 1999) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)). Their one-page section on this claim simply names the Constitution's two forms of association (intimate and expressive), incorrectly states that strict-scrutiny analysis applies to their intimate-association claim, and then ends with the conclusory statement that a prohibition on gatherings violated their expressive-association rights. Appellants Br. at 39. The failure to develop any actual arguments on these points, including articulation of which rights are implicated and how the EO interfered with or burdened those rights, renders the argument forfeited.

Even so, Plaintiffs' claims would fail on the merits. "The Constitution protects two distinct types of association: (1) freedom of *expressive* association, protected by the First Amendment, and (2) freedom of *intimate* association, a privacy interest derived from the Due Process Clause of the Fourteenth Amendment but also related to the First Amendment." *Anderson v. City of LaVergne*, 371 F.3d 879, 881 (6th Cir. 2004) (emphases added). Under the right to intimate association, "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State." *Id.* (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984)). The right protects interpersonal relationships, including "those that attend the creation and sustenance of a family—marriage; childbirth; the raising and ducation of children; and cohabitation with one's relatives." *Jaycees*, 468 U.S. at 619 (citations omitted); *Johnson v. City of Cincinnati*, 310 F.3d 484, 499 (6th Cir. 2002). "The kinds of personal associations entitled to constitutional protection are characterized by 'relative

smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.'" *Anderson*, 371 F.3d at 881 (quoting *Jaycees*, 468 U.S. at 620). After identifying an "intimate association," we next determine whether the challenged law "direct[ly] and substantial[ly] interfere[s]" with the intimate association. *Id.* at 882. If there is "[a] 'direct and substantial interference' with intimate associations" the law "is subject to strict scrutiny, while lesser interferences are subject to rational basis review." *Id.* (quoting *Akers v. McGinnis*, 352 F.3d 1030, 1040 (6th Cir. 2003)).

Plaintiffs point to one intimate association—a "family member's right to participate in child rearing and education." *Johnson*, 310 F.3d at 499; Appellants Br. at 39. But, "we will find 'direct and substantial' burdens on intimate associations 'only where a large portion of those affected by the rule are absolutely or largely prevented from [forming intimate associations], or where those affected by the rule are absolutely or largely prevented from [forming intimate associations] with a large portion of the otherwise eligible population of [people with whom they could form intimate associations].'" *Anderson*, 371 F.3d at 882 (alterations in original) (quoting *Akers*, 352 F.3d at 1040). Plaintiffs fail to allege or argue how all plaintiffs can raise this intimate-association claim, rather than just the parents. Even the parent plaintiffs fail to address how the temporary transition to remote learning "absolutely or largely prevented" parents from forming these intimate associations. *Id.* Moreover, temporary remote learning did not affect the parents' choices of which

schools to enroll their children in or the content of the curriculum. Accordingly, Plaintiffs have not demonstrated a direct and substantial interference with a right of intimate association. EO 2020-969 is rationally related to the legitimate government interest of curbing the spread of COVID-19. Plaintiffs' intimate-association argument fails.

The right to expressive association provides "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Anderson*, 371 F.3d at 881 (quoting *Jaycees*, 468 U.S. at 618). Plaintiffs also briefly state that EO 2020-969 violated their association rights by denying them expressive association. The Supreme Court has recognized that the right "protects more than just a group's membership decisions," and it has held unconstitutional "laws . . . requir[ing] disclosure of membership lists for groups seeking anonymity," laws that "impose penalties or withhold benefits based on membership in a disfavored group," and "[t]he forced inclusion of an unwanted person in a group." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 69 (2006) (citations omitted); *Miller v. City of Cincinnati*, 622 F.3d 524, 537 (6th Cir. 2010) (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000)). Plaintiffs neither asserted one of these protected forms of expressive association nor identified how EO 2020-969's temporary-remote-schooling requirement interfered with their expressive-association rights beyond using the phrase "a prohibition to gather." We

cannot guess for them. Accordingly, this argument fails as well.

The Governor did not violate Plaintiffs' rights to assemble peacefully or associate freely. Here too, even if the Governor had violated these rights, Plaintiffs have failed to carry their burden to demonstrate that the rights were clearly established. Accordingly, we **AFFIRM** the district court's dismissal of Plaintiffs' peaceful-assembly and freedom-of-association claims.

IV. CONCLUSION

For the foregoing reasons, we hold that Governor Beshear is entitled to qualified immunity on the Plaintiffs' free-exercise claim because the temporary closure of in-person learning at all elementary and secondary schools, including private religious schools, during a surge in COVID-19 transmission did not violate clearly established rights. We further hold that the Governor did not violate Plaintiffs' rights to private education or rights to assemble peacefully and associate freely. We therefore **AFFIRM** the judgment of the district court.

CONCURRENCE

MURPHY, Circuit Judge, concurring in the judgment. In November 2020, Kentucky Governor Andy Beshear temporarily barred in-person instruction at all schools (including religious schools) to slow the spread of COVID-19. A group of religious schools and a few parents (whom I will call the "Schools" sued him

over this closure. The Schools now seek damages from the Governor. They allege that his ban on in-person instruction violated their right to the "free exercise" of religion. U.S. Const. amend. I. To overcome the Governor's qualified-immunity defense, however, the Schools must do more than show that he violated the Free Exercise Clause. They must also show that he violated "clearly established" free-exercise law. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). I agree with my colleagues that the Schools cannot make the second showing. But I reach that result through different reasoning.

*

In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Court held that a "neutral" and "generally applicable" law does not violate the Free Exercise Clause even if the law restricts conduct undertaken for religious reasons. *Id.* at 878–80. Since *Smith*, the Court has subjected to strict scrutiny only those regulations that flunk its "neutral" and "generally applicable" test. *See, e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47 (1993). This case thus requires us to ask whether the Governor's school closure qualified as a neutral and generally applicable ban under *Smith*. I see two ways to look at that question: from our perspective today and from his perspective in 2020. This timing makes a critical difference.

Today, we have the benefit of *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam). That decision

offers clear guidance on how to decide whether a regulation is neutral and generally applicable. A ban on in-person instruction at religious schools cannot satisfy this test if the government has regulated "*any* comparable secular activity" with a lighter touch. 141 S. Ct at 1296. In other words, a regulation that burdens religiously motivated conduct will "trigger strict scrutiny" even if contains just *one* comparable secular exception to its restrictions. *See id.* In effect if not in name, *Tandon* adopted a "most-favored nation status" for religious exercise: the government must treat religious conduct as favorably as the least-burdened comparable secular conduct. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2611 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) (citation omitted).

Tandon next gives clear guidance on how to decide whether secular conduct is "comparable" to religious conduct. "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* That is, we must identify the *reason* why the government has burdened religion. We then must ask whether that reason extends to the unburdened secular conduct. *See id.* If so, the law is not generally applicable. *See id.* That is true even if the religious conduct (say, going to a prayer group) and the secular conduct (say, going to a bar) are quite different. *See id.* at 1297. In this respect, *Tandon* adopted our reasoning in *Monclova Christian Academy v. Toledo-Lucas County Health Department*, 984 F.3d 477 (6th Cir. 2020) (order). There, we recognized that the test for comparing more-restricted religious conduct and

less-restricted secular conduct turns on "the *interests* the State offers" for its restriction. *Id.* at 480. The test does not turn on "whether the religious and secular conduct involve similar forms of activity." *Id.*

Tandon lastly explained how this comparability test operates in the COVID-19 context. Because COVID-19 regulations exist to fight the disease's spread, "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather." *Tandon*, 141 S. Ct. at 1296. If a regulation limits religious conduct more strictly than secular conduct that poses a similar risk of COVID-19 spread, it is not generally applicable. *See id.* For example, if a government decides that it must sharply limit the attendance at churches to stop the spread of COVID-19, it must extend these sharp limits to all similarly risky secular gatherings. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66–67 (2020) (per curiam).

According to the Schools, their complaint alleges that the Governor's orders flunk this test. He did not prohibit all in-person attendance at many secular venues, from childcare centers to gyms to retail stores. Yet the complaint says that these venues posed "the same or even greater potential risk" of COVID-19 than the Schools. Am. Compl., R.40-2, PageID 431. The Schools had seen "no evidence of any community spread of COVID-19" at their locations. *Id.*, PageID 424–28. The Director of the Centers for Disease Control and Prevention also opined that the "existing data" at the time showed that "K-12 schools [were] not transmission pathways for the virus, in part due to

safety protocols in place[.]" *Id.*, PageID 415 n.2 (summarizing press briefing). Because we must accept these allegations at this stage, the Schools argue, the Governor's orders triggered strict scrutiny by regulating comparable secular activities less strictly than the Schools.

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Yet we need not decide whether the Schools allege a free-exercise violation under current law. To defeat the Governor's qualified-immunity defense, they must prove that *Tandon*'s legal framework was "clearly established *at the time*" that the Governor acted. *Wesby*, 138 S. Ct. at 589 (citation omitted) (emphasis added). This requirement disqualifies most of the decisions that clarify existing law. The Governor issued the challenged order on November 18, 2020. So we may not look to the principles announced in *Tandon*. The Supreme Court issued that decision in April 2021. Nor may we look to the principles in the case on which *Tandon* relied: *Roman Catholic Diocese of Brooklyn*. The Court issued that decision a week after the Governor's order. And we may not fall back on the similar principles we announced in *Monclova*. We issued that opinion over a month after the Governor's order. 984 F.3d at 479.

Unlike my colleagues, I read several earlier decisions to clearly establish one part of *Tandon*'s framework: that a secular activity is "comparable" to religious conduct if it poses a similar risk of COVID-19 spread. As far back as *Lukumi*, the Court held that this general-applicability test turns on whether unbanned secular conduct "endangers" the interests advanced by

the law "in a similar or greater degree" than the burdened religious conduct. 508 U.S. at 543. And because COVID-19 regulations advanced the government's interest in public health, we asked in this context whether the regulations exempted secular activities that "pose[d] comparable public health risks" to banned worship services. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020) (per curiam); *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (per curiam).

Critically, though, no decision clearly established the "most-favored nation" part of *Tandon*'s legal rule: that regulations do not qualify as "neutral and generally applicable" if "they treat *any* comparable secular activity more favorably than religious exercise." 141 S. Ct. at 1296. Thus, no earlier decision clearly barred the Governor's logic that a school regulation qualified as neutral and generally applicable as long as it covered religious and non-religious schools alike.

Start with the Supreme Court's precedent. In *Smith*, which first adopted the "neutral and generally applicable" test, the Court considered a ban on controlled substances that "obviously" satisfied this test. Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 5 (2016); *see Smith*, 494 U.S. at 874. In the decades after *Smith*, the Court offered further guidance on this test only once, in *Lukumi*. *See* Laycock & Collis, *supra*, at 5–6. But *Lukumi* provided little help on this topic because it involved an equally obvious religious "gerrymander." 508 U.S. at 536. The effect of the relevant ordinances left no doubt that city officials

had written them to ban only the practices of a specific religion. *See id.* at 531–46. *Lukumi* thus did not need to "define with precision the standard used to evaluate whether a prohibition is of general application" because the ordinances would fail any standard. *Id.* at 543.

Until recently, then, the Court had not explained in detail how we should apply its general-applicability test when a government edict falls in between a regulation that was obviously general (as in *Smith*) and one that was obviously not (as in *Lukumi*). This lack of precedent had produced "confusion and disagreement" in this area by the time of the Governor's orders. *Calvary Chapel*, 140 S. Ct. at 2610 (Kavanaugh, J., dissenting from denial of application for injunctive relief); *see* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 Harv. J.L. & Pub. Pol'y 627, 639–41 (2003) (summarizing debate). Justices and scholars alike described the Court's standards as "perplexing." *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., dissenting from denial of application to vacate stay) (citing Laycock & Collis, *supra*, at 5–6). But a perplexing test is not a clearly established one. *See Wesby*, 138 S. Ct. at 590.

Unable to rely on Supreme Court cases, the Schools fall back on our own. In the months before the Governor's actions, we had twice granted injunctive relief to religious entities in this COVID-19 context, allowing those entities to hold drive-in and in-person worship services. *See Maryville*, 957 F.3d at 616; *Roberts*, 958 F.3d at 416. Yet we did not then articulate

Tandon's rigorous rule applying strict scrutiny whenever the government treats even one "comparable secular activity more favorably than religious exercise." 141 S. Ct. at 1296. Rather, we articulated a more flexible "rule of thumb" that "the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law." *Maryville*, 957 F.3d at 614 (citing *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012)). In other words, we held that at "some point" a policy will contain so many secular exceptions that it will lose its generally applicable status and resemble "a system of individualized exemptions[.]" *Ward*, 667 F.3d at 740.

Unlike *Tandon*, these cases suggested a general standard rather than a specific rule. Like the Fourth Amendment's generic reasonableness test, that standard gave government actors more room to be wrong in their decisionmaking without losing their qualified-immunity protections. *See Wesby*, 138 S. Ct. at 590; *cf. Harrington v. Richter*, 562 U.S. 86, 101 (2011). And the Governor could reasonably have thought that, despite some exceptions for comparable secular activities, his decision to close all schools—including secular schools—rendered his order generally applicable. He should not face monetary liability simply because he did not predict *Tandon*'s stricter test.

Indeed, we ourselves failed to predict *Tandon*'s stricter test. We stayed an injunction of the Governor's school-closure order shortly after he issued it without asking whether he had imposed lesser burdens on "*any* comparable secular activity" (that is, any secular

activity that posed a similar risk of COVID-19 spread). *Tandon*, 141 S. Ct at 1296; *see Kentucky ex rel. Danville Christian Acad., Inc. v. Beshear*, 981 F.3d 505, 509 (6th Cir. 2020) (order). The Governor's successful motion to stay the injunction of his school-closure order makes it difficult to say that he acted in a "plainly incompetent" manner. *Wesby*, 138 S. Ct. at 589 (citation omitted); *see Elim Romanian Pentecostal Church v. Pritzker*, 22 F.4th 701, 703 (7th Cir. 2022) (per curiam). That fact forecloses the Schools' damages claim. *See Wesby*, 138 S. Ct. at 589–90.

* * *

All of this leaves the Schools' remaining claims. They also allege that the Governor violated the Fourteenth Amendment right of parents to give their children the education of their choice and the First Amendment right of association. I agree with my colleagues that the Schools' three pages of analysis on these claims do not overcome the Governor's qualified immunity. Given the limited briefing, though, I would not opine on the merits. I would again hold only that the Governor did not violate clearly established law. *See id.*

For all of these reasons, I concur in the judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
COVINGTON

Civil No. 2:20-cv-00166-GFVT-CJS

[Filed September 30, 2021]

PLEASANT VIEW BAPTIST CHURCH, *et al.*, Plaintiffs,	)
v.	)
GOVERNOR ANDREW BESHEAR, Defendant.	)

OPINION & ORDER

*** *** *** ***

The Constitution does not transform itself because of the moment. But that is not to say that the moment does not present facts so unique that they require courts to engage in the application of Constitutional principles for the first time. The Covid-19 pandemic is such a moment.

This case is part of an ongoing conversation about the Constitutionality of state action in response to the Covid-19 pandemic.[1] Specifically, Plaintiff Pleasant View Baptist Church argues that Governor Beshear not only violated the U.S. Constitution by promulgating Executive Order 2020-969, which temporarily halted in-person classes for public and private schools, but he should also be forced to pay compensatory and punitive damages for his alleged misdeeds. [R. 40-2 at 22.] As explained below, it is clear that Pleasant View cannot prevail because some of Pleasant View's claims are moot and the remaining claims are barred by the doctrine of qualified immunity, either because the actions are not unconstitutional or the circumstances are so unique that the Constitutional principles are not clearly established. Consequently, Defendant's Motion to Dismiss [R. 35] will be **GRANTED**, Plaintiff Pleasant View's Motion to Amend [R. 40] will be **GRANTED**, and this case will be dismissed from the Court's docket.

I

This Court is no stranger to litigation pertaining to Governor Beshear's Covid-19 executive orders. *See generally Danville Christian Academy v. Beshear*, 503 F. Supp. 3d 516 (E.D. Ky. 2020); *Tabernacle Baptist Church of Nicholasville, Inc. v. Beshear*, 459 F. Supp.

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[1] *See, e.g.*, *Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (enjoining enforcement of executive orders "prohibiting drive-in services at Maryville Baptist Church"); *Ky. ex rel. Danville Christian Acad., Inc. v. Beshear*, 981 F.3d 505 (6th Cir. 2020) (granting motion to lift stay of enforcement of Executive Order 2020-969 pending appeal).

3d 847 (E.D. Ky. 2020); *Ramsek v. Beshear*, 468 F. Supp. 3d 904 (E.D. Ky. 2020). At issue here is an executive order that Governor Beshear promulgated on November 18, 2020, that halted all in-person instruction beginning on November 23, 2020.[2] [E.O. 2020-969.] Following a hearing and briefing by the parties, the Court denied Pleasant View's preliminary injunction on December 11, 2020. [R. 24.] On December 21, the Sixth Circuit denied Pleasant View's motion for an injunction pending appeal. *Pleasant View Baptist Church v. Beshear*, 838 F. App'x 936 (6th Cir. 2020). Executive Order 2020-969 expired on January 3, 2021. [*See* E.O. 2020-1041.] Governor Beshear subsequently filed a motion to dismiss, and Pleasant View filed a

[2] Originally, Executive Order 2020-968, which reduced indoor capacities at certain establishments within the Commonwealth, was also at issue in this case. [*See* R. 1.] However, the claims pertaining to Executive Order 2020- 968, and several other claims, were removed from Pleasant View's Amended Complaint, which the Court grants below. Pleasant View removed the following claims from their Amended Complaint and failed to respond to them in their brief opposing Governor Beshear's motion to dismiss: Count II – violation of the Establishment Clause, Count V – violation of the right to live together as a family, Count VI – violation of the Freedom of Speech, and Count VII – violation of substantive due process. Because these claims have been abandoned, they do not need to be considered here. *See Doe v. Bredesen*, 507 F.3d 998, 1007–08 (6th Cir. 2007).

motion to amend.[3] [R. 35; R. 40.] The motions, having been fully briefed, are ripe for review.

II

Although Defendants' Motion to Dismiss was filed before Plaintiffs' Motion to Amend, "a court must first consider a pending motion to amend before dismissing a complaint." *Buridi v. Branch Banking and Trust Co.*, 2014 WL 90313, at *2 (W.D. Ky. Mar. 7, 2014) (citing *Rice v. Karsch*, 154 F. App'x 454, 465 (6th Cir. 2005)); *see also Thompson v. Superior Fireplace Co.*, 931 F.2d 372, 374 (6th Cir. 1991) (finding error where motion to dismiss was granted when motion to amend was still pending). Therefore, the Court will analyze Plaintiffs' Motion to Amend and then turn to Defendant's Motion to Dismiss. *See In re Flint Water Cases*, 969 F.3d 298, 301 (6th Cir. 2020) (approving of district court's

[3] On August 13, 2021, Pleasant View filed a second motion to amend and an emergency motion for a temporary restraining order, or in the alternative, a preliminary injunction. [R. 48; R. 49.] Pleasant View filed these motions in response to Governor Beshear's issuance of Executive Order 2021-585 on August 10. The order required a face covering be worn by all children ages two and above, in all "public and private preschool, Head Start, elementary, elementary, middle, and high school (preschool through grade 12) in Kentucky, including but not limited to inside of vehicles, used for transportation such as school buses, regardless of vaccination status." [E.O. 2021-585.] However, Governor Beshear withdrew the executive order on August 23, following an opinion issued by the Kentucky Supreme Court, and this Court dismissed Pleasant View's second motion to amend and preliminary injunction motion without prejudice after the parties filed a joint motion to withdraw the motions. [R. 58.]

simultaneous rendering of a single opinion addressing parties' motions to dismiss and motion to amend).

A

An initial matter, however, is the question of standing. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) ("a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought") (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). "At least one plaintiff must have standing to seek each form of relief requested in the complaint." *Town of Chester, N.Y.*, 137 S. Ct. at 1651.

Here, the question of standing was addressed in the Court's Opinion and Order issued on December 11, 2020. [R. 24 at 4–9.] Although there is some question as to whether standing must only be established when a lawsuit commences, the Supreme Court "has not explicitly overruled past precedent that confined the standing inquiry to the moment when the lawsuit was filed." *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 558 (6th Cir. 2021). Therefore, because the Court has previously established that Pleasant View has standing to bring its claims, that matter does not need to be readdressed here.

In his Motion to Dismiss, Governor Beshear's only standing argument concerns the standing of certain parties. [R. 35-1 at 7.] Specifically, Governor Beshear argues that "the Large Family Plaintiffs and Watts and Wheatley" lack standing. *Id.* However, because those parties are withdrawn in Pleasant View's Amended

Complaint, and Pleasant View's Motion to Amend is granted below, the claims relating to those parties are dismissed and the Court need not further address Governor Beshear's standing argument.

B

Rule 15(a)(2) directs that when a party seeks to file an amended pleading, "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The decision to allow a party to amend a pleading is within the sound discretion of the district court, but a denial of leave to amend without adequate explanation for the denial constitutes an abuse of that discretion. *Leary v. Daeschner*, 349 F.3d 888, 905–06 (6th Cir. 2003) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *see also Estes v. Kentucky Utils. Co.*, 636 F.2d 1131, 1133 (6th Cir. 1980) ("The determination of whether ... justice would require the allowance of an amendment to an answer is left to the sound discretion of the district court").

In determining whether to allow a proposed amendment, courts should consider factors such as "undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment." *Brumbalough v. Camelot Care Ctrs., Inc.*, 427 F.3d 996, 1001 (6th Cir. 2005). "The party opposing the amendment has the burden of demonstrating that it would be prejudicial or futile." *Pruitt v. Genie Indus.*, Inc., 2012 WL 669979, at *3 (E.D. Ky. Feb. 29, 2012). "In determining what constitutes prejudice, the court considers whether the assertion of the new claim or

defense would: require the opponent to expend significant additional resources to conduct discovery and prepare for trial; significantly delay the resolution of the dispute; or prevent the plaintiff from bringing a timely action in another jurisdiction." *Phelps v. McClellan*, 30 F.3d 658, 662–63 (6th Cir. 1994).

A court may deny a motion to amend a complaint if granting the motion would be futile, such as if the amended complaint would not survive a motion to dismiss. *See Halcomb v. Black Mtn. Resources, LLC*, 303 F.R.D. 496, 500 (W.D. Ky. 2014) (citing *Hoover v. Langston Equip. Assocs.*, 958 F.2d 742, 745–46 (6th Cir. 1992)); *see also Hussein v. Beecroft*, 782 F. App'x 437, 443 (6th Cir. 2019) ("A proposed amendment is futile where it would not withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.") (quoting *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 782 (6th Cir. 2015)).

Here, in the motion to amend, Pleasant View is seeking to "simplify this matter" by withdrawing "Highland Latin School, the Eversons, Duvalls, Watts, Wheatley, and Dr. Saddler, who has already been dismissed," from the litigation and paring down its claims from seven to the following three: (1) violation of the Free Exercise Clause of the First Amendment; (2) violation of the right to private education and for parents to control their children's education; and (3) violation of the freedom to peaceably assemble and the freedom of association. [R. 40 at 2; 40-2 at 18, 21.] Pleasant View is seeking declaratory relief, as well as compensatory and punitive damages against Governor Beshear in his individual capacity. [R. 40-2 at 22.]

In response, Governor Beshear argues that (1) Pleasant View's proposed amended complaint is futile because the amended claims are moot; and (2) Pleasant View's proposed amended complaint is futile because the amended claims cannot survive a motion to dismiss under 12(b)(1) or 12(b)(6). [R. 44 at 4, 9.] In reply, Pleasant View argues that mootness "does not apply to claims for money damages" or "declaratory relief that is coupled with money damages." [R. 46 at 1.]

Ultimately, Pleasant View's Motion to Amend is a trimmed-down version of the original complaint. For the sake of efficiency and judicial economy, and given the interwoven nature of the arguments contained within the motion to amend and the motion to dismiss, the Court will grant Pleasant View's Motion to Amend and substitute the amended complaint for the original complaint in considering Governor Beshear's motion to dismiss. *See Campos v. Louisville Metro Police Officers Credit Union*, 2018 WL 4760501, at *5 (W.D. Ky. Oct. 2, 2018) (finding that when there are "pending motions to dismiss and to amend…[i]t is simply more efficient to grant the motion to amend and then consider whether the amended complaint can survive the pending motion to dismiss") (citing *Rickett v. Smith*, 2015 WL 3580500, at *1, n.1 (W.D. Ky. June 5, 2015)); *Weaver v. AEGON USA, LLC*, 2015 WL 5691836, at *2 (D.S.C. Sept. 28, 2015) (granting motion to amend "to simply the issues now before the Court" and subsequently granting motion to dismiss); *Solomon v. Wake Cnty. Sheriff's Dept.*, 2014 WL 1153738, at *1 (E.D.N.C. Mar. 20, 2014) (granting motion to amend and motion to dismiss).

C

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of a plaintiff's complaint. In reviewing a Rule 12(b)(6) motion, the Court "construe[s] the complaint in the light most favorable to the plaintiff, accept[s] its allegations as true, and draw[s] all inferences in favor of the plaintiff." *DirecTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007) (citation omitted). The Court, however, "need not accept as true legal conclusions or unwarranted factual inferences." *Id.* (quoting *Gregory v. Shelby County*, 220 F.3d 433, 446 (6th Cir. 2000)). The Supreme Court explained that in order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Courier v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 629 (6th Cir. 2009).

Moreover, the facts that are pled must rise to the level of plausibility, not just possibility; "facts that are merely consistent with a defendant's liability ... stop[ ] short of the line between possibility and plausibility." *Iqbal*, 556 U.S. 662 at 678 (quoting *Twombly*, 550 U.S. 544 at 557). "A clam has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Long v. Insight Comm. Of Cent. Ohio, LLC*, 804 F.3d 791, 794 (6th Cir. 2015) (quoting *Iqbal*, 129 S. Ct. 1937).

Here, Governor Beshear makes the following arguments in his Motion to Dismiss: (1) Pleasant

View's claims are moot; (2) Executive Order 2020-969 did not violate the Free Speech Clause or the Freedom of Assembly Clause; and (3) Governor Beshear is immune from Pleasant View's claims against him in his personal capacity.[4] [R. 35-1 at 6, 16–17.] In response, Pleasant View argues that its claims are not moot because Pleasant View asserted money damages; and (2) the Governor is not entitled to immunity for the individual capacity claims against him because he violated the Free Exercise Clause, the right to private education, and the right to peaceful assembly and freedom of association, and those rights were clearly established. [R. 41.] The Court will now turn to the parties' mootness and qualified immunity arguments.

a

The mootness doctrine stands for the proposition that "[u]nder Article III of the Constitution, our jurisdiction extends only to actual cases and controversies." *McPherson v. Michigan High School Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997)

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[4] Governor Beshear also argues that certain plaintiffs lack standing, Executive Order 2020-968 does not violate the First Amendment or the right to live together as a family, and the Court lacks jurisdiction over Pleasant View's state law claims. [R. 7, 10–16, 19.] However, because Pleasant View withdrew those plaintiffs from the lawsuit, withdrew its claims pertaining to Executive Order 2020-968, and withdrew its state law claims in its Motion to Amend, the order granting the Motion to Amend the Complaint renders these arguments moot. *See Henderlight v. Lay*, 2006 WL 1663695, at *3 (E.D. Tenn. June 14, 2006) (finding certain arguments made by the defendant moot after granting plaintiff's motion to amend); *Kelly v. Int. Capital Resources, Inc.*, 231 F.R.D. 502, 513 (M.D. Tenn. 2005) (same).

(en banc). "The case-or-controversy requirement 'subsists through all stages of federal judicial proceedings, trial and appellate.'" *Ermold v. Davis*, 855 F.3d 715, 718 (6th Cir. 2017) (quoting *Chafin v. Chafin*, 568 U.S. 165, 173 (2013)). Therefore, "[a] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Gottfried v. Medical Planning Services*, 280 F.3d 684, 691 (6th Cir. 2002) (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1978)). "When establishing whether a claim is moot, the facts of a specific case 'often require a highly individualistic, and usually intuitive' examination. *Pund v. City of Bedford, Ohio*, 339 F. Supp. 3d 701, 710 (N.D. Ohio 2018) (quoting *Gottfried*, 280 F.3d at 691).

"A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203, (1968)). "When a defendant claims that its voluntary cessation of the challenged activity moots a case, it bears the burden of proving mootness." *Sherwood v. Tennessee Valley Authority*, 842 F.3d 400, 405 (6th Cir. 2016) (citing *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 857 (6th Cir. 2005)).

Here, the Governor argues that Pleasant View's claims are moot because the executive order in question expired earlier this year and was not renewed. [R. 35-1 at 6.] Because the executive order is no longer in place,

the Governor argues, Pleasant View's claims must be dismissed. *Id.* In response, Pleasant View argues that because they are asserting money damage claims, their claims are not moot. [R. 41 at 9.] This is true, Pleasant View argues, "of declaratory relief that is coupled with money damages." *Id.*

Pleasant View is correct that damages claims cannot be rendered moot "because a related injunctive relief claim becomes moot." *Ermold*, 855 F.3d at 718 (citing *Powell v. McCormack*, 395 U.S. 486, 498 (1969)); *see also Pund*, 339 F. Supp. 3d at 710 (finding that a moot injunctive claim does not moot claims for monetary relief and declaratory relief). This is because "damages claims 'are retrospective in nature—they compensate for past harm. By definition, then, they cannot be moot." *Ermold*, 855 F.3d at 718 (quoting *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 622 (3d Cir. 2013) (internal quotation marks omitted)). In the amended complaint, Pleasant View is not seeking injunctive relief—only declaratory relief and compensatory and punitive damages. [R. 40-2 at 22.] Therefore, Pleasant View's monetary claims are not moot and Governor Beshear cannot prevail on this basis.

Pleasant View also asks this Court to issue a "declaration that [Executive Order 2020-969] is unconstitutional." [R. 40-2 at 22.] Although Pleasant View's monetary claims are not moot, the Court finds that Pleasant View's claims for declaratory judgment are moot. In *Resurrection School v. Hertel*, --- F.4th ---, 2021 WL 3721475 (6th Cir. Aug. 23, 2021), the Sixth Circuit thoroughly analyzed mootness in the context of

statewide Covid-19 regulations and determined that litigation pertaining to Michigan's mask mandate was not moot, despite the mandate's recission. The Court found that the voluntary cessation doctrine applied because it was not "absolutely clear" that the mask mandate could not be reimposed in the future. *Id.* at *9. The Court also found that the capable of repetition, yet evading review exception applied because the challenged action was too short in duration to be fully litigated prior to its expiration and the controversy in question was capable of repetition. *Id.* at 9–10.[5]

Here, the factual predicate in this case also involves a now-expired government mandate (albeit an executive order instead of a department of health and human services requirement) aimed at curbing the spread of Covid-19. [R. 35-1 at 1; R. 40 at 2.] However, this case is distinguishable from *Hertel* for one significant reason. Two days prior to the *Hertel* decision, the Kentucky Supreme Court upheld legislation that amended and curtailed the Governor's power to respond to emergencies, such as the Covid-19 pandemic. *See Cameron v. Beshear*, --- S.W.3d -- --, 2021 WL 3730708 (Ky. Aug. 21, 2021) (ordering the trial court to dissolve an injunction that prevented laws from going into effect that restricted "the Governor's

[5] Although *Hertel* pertains to claims for injunctive relief and not declaratory relief, declaratory and injunctive relief in the mootness context are analyzed similarly. *See Blau v. Fort Thomas Public School Dist.*, 401 F.3d 381, 387 (6th Cir. 2005) (grouping claims for injunctive and declaratory relief together for the purposes of mootness analysis and distinguishing from monetary relief); *Donkers v. Simon*, 173 F. App'x 451, 454 (6th Cir. 2006) (same).

ability to take unilateral action during declared emergencies").

Following the Kentucky Supreme Court's decision, it is clear that Executive Order 2020-969 cannot be reimposed by Governor Beshear and that there is no reasonable expectation "that the same complaining party would be subjected to the same action again," because Governor Beshear no longer has the authority to autonomously promulgate Covid-19 executive orders. *Chirco v. Gateway Oaks, L.L.C.*, 384 F.3d 307, 309 (6th Cir. 2004); *see also Roberts v. Beshear*, 2021 WL 3827128, at *4 (E.D. Ky. Aug. 26, 2021) ("Even if Governor Beshear wanted to invoke another mass gathering ban that effectively shut down in-person church worship, or issue another travel ban, the measures taken by the General Assembly prevent him from lawfully doing so. Given these subsequent legal developments, the Plaintiffs' claims are now moot."). Accordingly, in light of the Kentucky Supreme Court's recent ruling in *Cameron v. Beshear*, the Court finds that Pleasant View's request that this Court "issue a declaration that [Executive Order 2020-969] is unconstitutional" is moot.[6]

[6] Governor Beshear argues in his reply in support of his motion to dismiss that the Eleventh Amendment bars Pleasant View's claim seeking a declaration that Executive Order 2020-969 is unconstitutional, which was made against Governor Beshear in his official capacity. [R. 42 at 4–7.] However, because that claim is moot, the Court need not address Governor Beshear's sovereign immunity argument.

b

Next, Governor Beshear argues that he is entitled to qualified immunity against the claims for monetary damages.[7] Qualified immunity is a defense that protects officials unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). "An official's conduct flunks this 'clearly established' test only if the conduct's unconstitutionality was 'beyond debate' when the official acted, such that any reasonable person would have known that it exceeded constitutional bounds." *DeCrane v. Eckart*, --- F.4th ----, 2021 WL 3909802, at *8 (6th Cir. Sept. 1, 2021). "Qualified immunity is a fact-intensive analysis and will, therefore, turn on the particular circumstances of each case." *Peatross v. City of Memphis*, 818 F.3d 233, 244 n.6 (6th Cir. 2016). Furthermore, qualified immunity is immunity from suit, not merely immunity from liability. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

Generally, although the Supreme Court has held that immunity questions should be resolved "at the earliest possible stage in litigation," *Id.* at 232, a court should not consider qualified immunity at the motion to dismiss stage. *See Guertin v. State*, 912 F.3d 907, 917 (6th Cir. 2019) (finding that it is the "general

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[7] Qualified immunity "'only immunizes defendants from monetary damages'—not injunctive or declaratory relief." *Kanuszewski v. Mich. Dept. of Health and Human Servs.*, 927 F.3d 396, 417–18 (6th Cir. 2019) (quoting *Williams v. Com. of Ky.*, 24 F.3d 1526, 1541 (6th Cir. 1994)).

preference" not to resolve a case on qualified immunity grounds at the motion to dismiss stage because "the precise factual basis for the plaintiff's claim or claims may be hard to identify"). However, this is a preference and not the rule. "[D]espite the general preference to save qualified immunity for summary judgment, sometimes it's best resolved in a motion to dismiss. This happens when the *complaint* establishes the defense." *Siefert v. Hamilton Cty.*, 951 F.3d 753, 762 (6th Cir. 2020) (citing *Peatross*, 818 F.3d at 240). Relying on *Siefert*, the Sixth Circuit recently held that Governor Whitmer, who was sued in her personal capacity after issuing an executive order temporarily restricting travel between residences within the State of Michigan, would be entitled to qualified immunity at the 12(b)(6) stage. *Allen v. Whitmer*, --- F. App'x ----, 2021 WL 3140318, at *4 (6th Cir. July 26, 2021) (White, J. Concurring).

To determine whether the complaint establishes the defense, the court must ask "whether the complaint plausibly alleges 'that an official's acts violated the plaintiff's clearly established constitutional right.'" *Siefert*, 951 F.3d at 762 (quoting *Heyne v. Metro. Nashville Pub. Sch.*, 655 F.3d 556, 563 (6th Cir. 2011)) *see also Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 681 (6th Cir. 2011) ("When the qualified immunity defense is raised at the pleading stage, the court must determine only whether the complaint adequately alleges the commission of acts that violated clearly established law."). If, after taking all facts as true and finding all inference in favor of the plaintiff, the plaintiff has failed to plausibly show a violation of his clearly established rights, "then the officer-defendant

is entitled to immunity from suit." *Id.* (citing *Pearson*, 555 U.S. at 232).

Pleasant View argues that Governor Beshear's promulgation of Executive Order 2020-969 fails both prongs of the qualified immunity analysis as to the Free Exercise Clause, the right to private education, and the right to peaceful assembly and freedom of association. [R. 41 at 10–18.] In support of its position as to the Free Exercise Clause, Pleasant View relies on *Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6th Cir. 2020, and *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020), which both pertained to a "mass gatherings" executive order, and a Supreme Court decision that was rendered after the executive order at issue in this case had been promulgated.[8] However, of more relevance to this case and the specific executive order at issue, the Sixth Circuit specifically found in *Ky. ex*

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[8] Executive Order 2020-969 was issued on November 18, 2020, and the opinion in *Roman Catholic Diocese v. Cuomo*, 208 L. Ed. 2d 206 (2020), was not issued until November 25, 2020. Opinions issued after the issuance of the executive order cannot be relied upon as "clearly established" if they did not exist at the time the executive order was implemented. *See In re New York City Policing During Summer 2020 Demonstrations*, --- F. Supp. 3d. ----, 2021 WL 2894764, at *19 (S.D.N.Y. July 9, 2021) (finding reliance on Supreme Court opinions not issued until after order implemented does not satisfy the "clearly established" requirement). Pleasant View also relies on *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). However, *Our Lady of Guadalupe* involved employment discrimination claims in the religious schools context and therefore fails to demonstrate that Governor Beshear's actions in temporarily halting in-person instruction at all schools within the Commonwealth clearly violated the Free Exercise Clause.

rel. Danville Christian Acad., Inc. v. Beshear, 981 F.3d 505, 510 (6th Cir. 2020), that "[w]e are not in a position to second-guess the Governor's determination regarding the health and safety of the Commonwealth at this point in time," and permitted Executive Order 2020-969 to go into effect. The Supreme Court then denied the applicants' request for emergency relief. *Danville Christian Academy, Inc. v. Beshear*, 208 L. Ed. 2d 504 (2020). Furthermore, in this case, the Sixth Circuit denied Pleasant View's preliminary injunction, finding that "there is no basis in this emergency setting to distinguish *Danville* from today's case." *Pleasant View Baptist Church*, 838 F. App'x at 938.

Pleasant View also argues that the Sixth Circuit's opinion in *Danville Christian Acad.* was an aberration and was repudiated by *Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't*, 984 F.3d 477 (6th Cir. 2020). However, if anything, subsequent disagreement within the Sixth Circuit as to the constitutionality of various orders relating to school closures and school mask mandates weighs in favor of a finding that Governor Beshear did not violate any clearly established law when he promulgated Executive Order 2020-969. *Compare Monclova Christian Acad.*, 984 F.3d at 480–81 (distinguishing *Monclova* from *Danville*), *with Hertel*, 2021 WL 3721475, at *13 ("*Monclova Christian Academy*'s interpretation of [*Danville*] is incorrect…we must follow [*Danville*] rather than *Monclova Christian Academy*").

Pleasant View also argues that the Governor violated the fundamental right to private education and that the right was clearly established. [R. 41 at

16–17.] However, as the Court previously explained, the fundamental right to private education has more to do with the fact that "parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction." [R. 24 at 11 (quoting *Ohio Ass'n of Ind. Sch.*, 92 F.3d at 422).] Executive Order 2020-969 does not prevent parents from choosing to send their children to private school or selecting private schools that offer specialized instruction. Therefore, because there was no constitutional violation, Governor Beshear is entitled to qualified immunity on the right to private education claim.

Finally, Pleasant View argues that the Governor violated the right to peaceful assembly and freedom of association and those rights were clearly established. [R. 41 at 17–18.] However, as explained in the Court's prior order, Executive Order 2020-969 was content neutral and narrowly tailored. [R. 24 at 11.] The order required all schools within the Commonwealth, public and private, to transition to online instruction for a few weeks. [E.O. 2020-969.] In addition, the order was of a short duration and "serve[d] purposes unrelated to the content of expression." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Furthermore, there is no evidence that Executive Order 2020-969 was promulgated for any reason other than to slow the spread of Covid-19. Governor Beshear is therefore also entitled to qualified immunity as to the right to peacefully assemble and freedom of association claim.

After examining the applicable precedent, particularly in light of a global pandemic, Pleasant

View cannot demonstrate that Governor Beshear's issuance of Executive Order 2020-969 violated a clearly established constitutional right, and qualified immunity will be granted on that basis. In fact, courts across the country have addressed qualified immunity for government officials at the 12(b)(6) stage regarding Covid-19 measures and found government officials to be immune from suit in their personal capacities. *See generally Benner v. Wolf*, 2021 WL 4123973, at *5 (M.D. Penn. Sept. 9, 2021) (finding Governor Thomas W. Wolf entitled to qualified immunity in his individual capacity on a motion to dismiss in litigation pertaining to his issuance of a Proclamation of Disaster Emergency and subsequent business and school closure orders in light of the Covid-19 pandemic); *Case v. Ivey*, --- F. Supp. 3d ----, 2021 WL 2210589, at *25–26 (M.D. Ala. June 1, 2021) (granting qualified immunity to Governor Kay Ivey in her individual capacity in the motion to dismiss context following litigation pertaining to her proclamation of a national emergency and subsequent orders intended to combat Covid-19); *Northland Baptist Church of St. Paul v. Walz*, --- F. Supp. 3d ----, 2021 WL 1195821, at *8 (D. Minn. Mar. 30, 2021) (granting qualified immunity in the motion to dismiss context to Governor Tim Walz in his individual capacity following the issuance of executive orders in response to Covid-19); *Hartman v. Acton*, 499 F. Supp. 3d 523, 538 (S.D. Ohio 2020) (granting qualified immunity to Ohio Department of Health director in her individual capacity in the motion to dismiss context following issuance of stay at home order in response to the Covid-19 pandemic).

Having resolved this matter on qualified immunity grounds, the Court need not reach the merits. *See Martin v. City of Eastlake*, 686 F. Supp. 620 (N.D. Ohio 1988) ("The Court shall focus upon whether the police officers are entitled to qualified immunity and need not examine the merits of the § 1983 claim."); *see also Anderson as trustee for next-of-kin of Anderson v. City of Minneapolis*, 934 F.3d 876, 881 (8th Cir. 2019) ("We need not reach the merits of this argument if the individual defendants are entitled to qualified immunity."); *Jain v. Bd. of Educ. of Butler School Dist. 53*, 366 F. Supp. 3d 1014, 1019 (N.D. Ill. 2019) ("The qualified-immunity ground is dispositive, so the Court need not reach the merits.").

III

Ultimately, Pleasant View's claims for declaratory judgment are moot and Governor Beshear is protected by qualified immunity from claims for monetary damages. After review of the relevant caselaw, it cannot be said that Governor Beshear's implementation of Executive Order 2020-969 violated a clearly established constitutional right. Accordingly, and the Court being sufficiently advised, it is hereby **ORDERED** as follows:

1. Pleasant View's Motion to Amend **[R. 40]** is **GRANTED**;

2. Governor Beshear's Motion to Dismiss **[R. 35]** is **GRANTED**; and

3. Judgment shall be entered accordingly.

This the 30th day of September, 2021.

/s/ Gregory F. Van Tatenhove [SEAL]
Gregory F. Van Tatenhove
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
COVINGTON

Civil No. 2:20-cv-00166-GFVT-CJS

[Filed September 30, 2021]

PLEASANT VIEW BAPTIST CHURCH, *et al.*, Plaintiffs,	)
v.	)
GOVERNOR ANDREW BESHEAR, Defendant.	)

JUDGMENT

*** *** *** ***

Consistent with the Memorandum Opinion and Order entered this date, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. Defendant's Motion to Dismiss [**R. 35**] is **GRANTED**;

2. This action is **DISMISSED** and **STRICKEN** from the Court's docket; and

3. This is a **FINAL** and **APPEALABLE** Judgment and there is no just cause for delay.

This 30th day of September, 2021.

/s/ Gregory F. Van Tatenhove [SEAL]
Gregory F. Van Tatenhove
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-6028

[Filed October 3, 2023]

PLEASANT VIEW BAPTIST CHURCH; PLEASANT VIEW BAPTIST SCHOOL; PASTOR DALE MASSENGALE; VERITAS CHRISTIAN ACADEMY; MARYVILLE BAPTIST CHURCH; MICAH CHRISTIAN SCHOOL; PASTOR JACK ROBERTS; MAYFIELD CREEK BAPTIST CHURCH; MAYFIELD CREEK CHRISTIAN SCHOOL; PASTOR TERRY NORRIS; FAITH BAPTIST CHURCH; FAITH BAPTIST ACADEMY; PASTOR TOM OTTO; WESLEY DETERS AND MITCH DETERS, ON BEHALF OF THEMSELVES AND THEIR MINOR CHILDREN M.D., W.D., AND S.D.; CENTRAL BAPTIST CHURCH; CENTRAL BAPTIST ACADEMY; PASTOR MARK EATON; CORNERSTONE CHRISTIAN SCHOOL; CORNERSTONE CHRISTIAN CHURCH; JOHN MILLER, ON BEHALF OF HIMSELF AND HIS MINOR CHILDREN B.M., E.M., AND H.M., Plaintiffs-Appellants,	)
v.	)

ANDY BESHEAR, IN HIS INDIVIDUAL CAPACITY,
Defendant-Appellee.

ORDER

BEFORE: MOORE, STRANCH, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON
Electronically Filed

Case No. 2:20-cv-00166

[Filed February 4, 2021]

PLEASANT VIEW BAPTIST CHURCH, PLEASANT VIEW BAPTIST SCHOOL, PASTOR DALE MASSENGALE,	:
VERITAS CHRISTIAN ACADEMY,	:
MARYVILLE BAPTIST CHURCH, MICAH CHRISTIAN SCHOOL, PASTOR JACK ROBERTS,	:
MAYFIELD CREEK BAPTIST CHURCH, MAYFIELD CREEK CHRISTIAN SCHOOL, PASTOR TERRY NORRIS	:
FAITH BAPTIST CHURCH, FAITH BAPTIST ACADEMY, PASTOR TOM OTTO,	:
WESLEY DETERS, MITCH DETERS, On behalf of themselves and their minor children **MD**, **WD**, and **SD**,	:

CENTRAL BAPTIST CHURCH, CENTRAL BAPTIST ACADEMY, PASTOR MARK EATON, and :

CORNERSTONE CHRISTIAN SCHOOL, JOHN MILLER, on behalf of himself and his minor children, **BM, EM, HM** :

Plaintiffs :

v.

HON. ANDREW BESHEAR
In his individual and official capacities :

PLAINTIFFS' AMENDED COMPLAINT FOR DECLARATORY RELIEF AND DAMAGES WITH JURY DEMAND ENDORSED HEREON

Plaintiffs Pleasant View Baptist Church, Pleasant View Baptist School, Pastor Dale Massengale, Veritas Christian Academy, Maryville Baptist Church, MICAH Christian School, Pastor Jack Roberts, Mayfield Creek Baptist Church, Mayfield Creek Christian School, Pastor Terry Norris, Faith Baptist Church, Faith Baptist Academy, Pastor Tom Otto, Wesley Deters, Mitch Deters, on behalf of themselves and their minor children, MD, WD, and SD, Central Baptist Church, Central Baptist Academy, Pastor Mark Eaton, Cornerstone Christian Church, Cornerstone Christian School, John Miller, on behalf of himself and his minor children BM, EM, and HM, (collectively the "Christian School Plaintiffs") for their Amended Complaint *for*

Declaratory Relief and Damages (the "Complaint"), state and allege as follows:

INTRODUCTION

1. This action involves the deprivation of Plaintiffs' well-established First and Fourteenth Amendment rights by the official capacity Defendant and individual capacity Defendant named herein. Specifically, this action is in response to the unconstitutional actions by the official capacity Defendant herein in shutting down all private, parochial schools in the Commonwealth, allegedly due to COVID-19 (the disease caused by the Coronavirus).

2. This unconstitutional action is particularly shocking because: (1) U.S. Center for Disease Control ("CDC") guidance and CDC official statements confirm that school shutdowns are not recommended,[1] (2) schools have not been proven to be places of transmission for COVID-19 and, in fact, in-school attendance has been proven to be safer for both children and their communities than having those children remain at home with aging grandparents or other vulnerable family members, and (3) in-person instruction is far preferable from a learning perspective.[2]

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[1] https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/index.html (last visited 11/20/2020).

[2] https://www.washingtonexaminer.com/news/school-is-safest-place-for-kids-to-be-cdc-director-says (last visited 11/20/2020).

JURISDICTION AND VENUE

3. Subject matter jurisdiction over the claims and causes of action asserted by Plaintiffs in this action is conferred on this Court pursuant to 42 U.S.C. § 1983, 42 U.S.C. § 1988, 28 U.S.C. §1331, 28 U.S.C. § 1343, 28 U.S.C. 1367, 28 U.S.C. §§ 2201 and 2202, and other applicable law.

4. Venue in this District and division is proper pursuant to 28 U.S.C. §1391 and other applicable law, because much of the deprivations of Plaintiffs' Constitutional Rights occurred in counties within this District and division, within Kentucky, and future deprivations of their Constitutional Rights are threatened and likely to occur in this District. Furthermore, the first named Defendant is located in this division.

The Defendants, and their activities and COVID-19 orders

5. Defendant Hon. Andrew Beshear is the duly elected Governor of Kentucky. He is sued in his individual and official capacities.

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https://www.c-span.org/video/?c4924557/cdc-director-redfield-data-supports-face-face-learning-schools&fbclid=IwAR1Kp3HKvUhZu8CJ1F8tGSISsMtnP0zNDJ3598kSC7sYffb6kDjhKS90zC0 (last visited 11/20/2020) (CDC Director confirming that all existing data demonstrates K-12 schools are not transmission pathways for the virus, in part due to safety protocols in place in schools).

6. Among other things, Governor Beshear enforces and is charged with the enforcement or administration of Kentucky's laws under KRS Chapter 39A, KRS Chapter 214 and KRS 220, including the orders and actions complained of herein.

7. In March, 2020 and in the weeks that followed, Governor Beshear issued a number of restrictions related to COVID-19.

8. On March 19, 2020, Governor Beshear implemented an outright ban on religious gatherings across the state. Specifically, Governor Beshear, acting through Secretary Eric Friedlander of the Cabinet for Health and Family Services, issued an order stating that "[a]ll mass gatherings are hereby prohibited."

9. In the March 19, 2020 Order, Governor Beshear broadly described the scope of his prohibition as including "any event or convening that brings together groups of individuals, including, but not limited to, community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities."

10. Thus, the order, while very broad, specifically banned "faith-based" gatherings by name. The order did not define mass gatherings merely based on the number of people coming together, nor did it narrow its prohibition to the kind of indoor or closed-space gatherings that increase the risk of community transmission of the virus.

Rather, Governor Beshear's March 19, 2020 Order broadly banned any activity "that brings together groups of individuals," which specifically included any and all "faith-based" gatherings.

11. However, in an exercise in unconstitutional word play, and due to an unconstitutional value judgment, the order carved out purely secular activities from the scope of its prohibition. Specifically, the order went on to state that "a mass gathering does not include normal operations at airports, bus and train stations, medical facilities, libraries, shopping malls and centers, or other spaces where persons may be in transit."

12. The order also stated that a mass gathering "does not include typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing.".

13. Thus, under the March 19, 2020 Order, mass gatherings with a faith-based purpose were expressly singled out for prohibition, while mass gatherings of secular organizations and their activities were not—even when those secular activities involved large numbers of people.

14. On Good Friday, two days before Easter Sunday, Governor Beshear held his daily press conference. During his presentation, Governor Beshear announced that his administration would be taking down the license plate numbers

of any person attending an in-person church service on Easter Sunday. Then, he said, local health officials would be contacting each person and requiring a mandatory 14-day quarantine. Under Kentucky law, violation of such an order is a misdemeanor punishable by criminal prosecution. See KRS 39A.990.

15. On Easter Sunday, Governor Beshear acted on his unconstitutional threat. Kentucky State Police troopers, acting on Governor Beshear's orders, traveled to the Maryville Baptist Church to record license plate numbers of those attending the church's Easter service. The troopers also provided churchgoers with written notices that their attendance at the service constituted a criminal act. Afterward, the vehicle owners received letters ordering them to self-quarantine for 14 days or else be subject to further sanction.

In two stunning, Saturday Injunctions Pending Appeal, the Sixth Circuit repeatedly rebuked Governor Beshear's religious discrimination, creating clearly established law on the issue. Further, the Governor has infringed on other fundamental liberties

16. On Saturday, May 2, 2020, and as a result of an emergency appeal, the Sixth Circuit enjoined Governor Beshear from prohibiting drive-in church services so long as the churches adhered to the same public health requirements mandated for "life-sustaining" entities. *See*

Maryville Baptist Church v. Beshear, 957 F.3d 610, 616 (6th Cir. 2020) (per curiam).

17. In reaching that conclusion, the Sixth Circuit observed that "[t]he Governor's orders have several potential hallmarks of discrimination." *Id.* at 614. For example, the orders prohibited faith-based mass gatherings by name. *Id.* And they contained broad exceptions that inexplicably allowed some groups to gather while prohibiting faith-based groups from doing so. *Id.*

18. The court further noted that:

> [R]estrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom. Assuming all of the same precautions are taken, why is it safe to wait in a car for a liquor store to open but dangerous to wait in a car to hear morning prayers? Why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? The Commonwealth has no good answers.

19. One week later, on Saturday, May 9, 2020, again as a result of an emergency appeal, the Sixth Circuit again enjoined Governor Beshear. *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (per curiam), which extended Maryville to re-open in-person worship in the Commonwealth.

20. *Roberts* contains a number of observations and findings that are particularly relevant here:

> There are plenty of less restrictive ways to address these public-health issues. Why not insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities? Or perhaps cap the number of congregants coming together at one time? If the Commonwealth trusts its people to innovate around a crisis in their professional lives, surely it can trust the same people to do the same things in the exercise of their faith. The orders permit uninterrupted functioning of "typical office environments," R. 1-4 at 1, which presumably includes business meetings. How are in-person meetings with social distancing any different from in-person church services with social distancing? Permitting one but not the other hardly counts as no-more-than-necessary lawmaking.
>
> Sure, the Church might use Zoom services or the like, as so many places of worship have decided to do over the last two months. But who is to say that every member of the congregation has access to the necessary technology to make that work? Or to say that every member of the congregation must see it as an adequate substitute for what it means when "two or three gather in my

Name," Matthew 18:20, or what it means when "not forsaking the assembling of ourselves together," Hebrews 10:25; *see also On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20- CV-264-JRW, --- F. Supp. 3d ---, 2020 WL 1820249, at *7–8 (W.D. Ky. Apr. 11, 2020). *Id.* at 415.

21. The court thus enjoined the Governor again, holding that "at this point and in this place, the unexplained breadth of the ban on religious services, together with its haven for numerous secular exceptions, cannot co-exist with a society that places religious freedom in a place of honor in the Bill of Rights: the First Amendment." *Id.* at 416.

22. One day earlier, this Court granted a temporary restraining order stopping Governor Beshear from restricting religious practices. In *Tabernacle Baptist Church of Nicholasville, Inc. v. Beshear*, 459 F. Supp. 3d 847 (E.D. Ky. 2020), this Court concluded that "[e]ven viewed through the state-friendly lens of Jacobson [v. Massachusetts], the prohibition on religious services presently operating in the Commonwealth is 'beyond what was reasonably required for the safety of the public.'" *Id.* at 854–55 (citation omitted).

23. On October 19, 2020, the Sixth Circuit reconfirmed, for the Governor and the public at large, that, when it comes to *Maryville* and *Roberts*, "each [is] still binding in the circuit."

Maryville Baptist Church, Inc. v. Beshear, 977 F.3d 561 (6th Cir. 2020).

24. On November 25, 2020, the U.S. Supreme Court weighed in on the issue, creating clearly established case law, in *Roman Catholic Diocese v. Cuomo*, 208 L. Ed. 2d 206 (2020), that creating categories of favored and unfavored classes of activities during COVID-19, where religious activities are not treated as a favored class, violates the law.

25. As demonstrated below, Governor Beshear's violations of the Constitution continued.

The First Amendment and the November 18, 2020 Orders

26. "[E]ducating 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." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020). Religious education and religious worship are inseparable. Indeed, "[r]eligious education is vital to many faiths practiced in the United States." *Id.* For example, "[i]n 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)). And, "Protestant churches, from the earliest settlements in this country, viewed education as a religious obligation." Id. "The contemporary American

Jewish community continues to place the education of children in its faith and rites at the center of its communal efforts." Id. In Islam, the importance of education "is traced to the Prophet Muhammad, who proclaimed that '[t]he pursuit of knowledge is incumbent on every Muslim.'" *Id.* "The Church of Jesus Christ of Latter-day Saints has a long tradition of religious education," and Seventh-day Adventists "trace the importance of education back to the Garden of Eden." *Id.* at 2066. "Since the founding of this nation, religious groups have been able to 'sit in safety under [their] own vine and figtree, [with] none to make [them] afraid.'" *Tree of Life Christian Schools v. City of Upper Arlington*, 905 F.3d 357, 376 (6th Cir. 2018) (Thapar, J., dissenting) (*quoting* Letter from George Washington to Hebrew Congregation in Newport, R.I. (Aug. 18, 1790)). In other words, the Constitutional right to attend religious instruction and education is one of the Nation's "most audacious guarantees." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 906 (W.D. Ky. 2020).

27. In the face of this well-established law, on November 18, 2020, Governor Beshear issued two executive orders, Executive Order 2020-968, and 2020-969, which are attached hereto, respectively, as **Exhibits A** and **B**.

28. Executive Order 2020-969 ("School Ban") prohibits and criminalizes in-person instruction for all schools, including private, religious

schools, in grades K-12. Consequently, this School Ban unconstitutionally infringes on the rights of certain of these Plaintiffs, who include religious education and worship services as part of their educational mission, which is based upon their sincerely held beliefs.

29. While banning in-person religious education and instruction, the Governor permits a number of comparable secular activities of varying sizes.

30. The Governor permits childcare programs to continue, including limited duration child care centers,[3] which are permitted to have children in group sizes of 15, and, depending on the space of the facility, hundreds of children. Just as schools do, these facilities provide meals for children, and instruct children in classroom set ups identical to schools.[4] These centers are permitted to, and do, provide secular education instruction as part of their programming, including assisting children with school assignments.

31. Governor Beshear permits unlimited sizes of persons to assemble in factories and manufacturing, with social distancing, and,

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[3] A limited duration center was a "pop up" center, often hosted by local YMCA's, were originally set up for the children of "essential" healthcare workers, first responders, and others. They have had favored status for months, and, with the recent school shutdown, that favored status remains even more apparent.

[4] https://apps.legislature.ky.gov/law/kar/922/002/405E.pdf (last visited 11/20/2020).

indeed, classroom instruction can occur in these settings.[5]

32. Governor Beshear permits movie theaters to operate, with children in attendance, at 50% capacity.[6]

33. Executive Order 2020-968 permits gyms and fitness centers to operate at 33% capacity.

34. Governor Beshear permits auctions to operate at 50% capacity indoors, and unlimited capacity outdoors.[7]

35. Gas stations, grocery stores, retail establishments, and other businesses also remain open.

36. Governor Beshear permits gaming facilities to remain open.[8]

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[5] https://govsite-assets.s3.amazonaws.com/s47CFNaSK6YhJMGPHBgB_Healthy%20at%20Work%20Reqs%20-%20Manufacturing%20Distribution%20Supply%20Chain%20-%20Final%20Version%203.0.pdf (last visited 11/20/2020).

[6] https://govsite-assets.s3.amazonaws.com/0iTtfR0ET2GFa05zMWie_2020-7-1%20-%20Healthy%20at%20Work%20Reqs%20Movie%20Theaters%20-%20Final%20Version%203.0.pdf (last visited 11/20/2020)

[7] https://govsite-assets.s3.amazonaws.com/VTgkgeDSbmgsImOob3lA_2020-7-22%20-%20Healthy%20at%20Work%20Reqs%20-%20Auctions%20-%20Version%203.1.pdf (last visited 11/20/2020)

[8] https://www.kentuckytoday.com/stories/as-many-mitigate-restriction-damages-gaming-venues-keep-rolling,29171 (last visited 11/21/2020).

37. Governor Beshear permits secular colleges and universities to remain open.

38. Most of the aforementioned executive orders reference K.R.S. 39A and/or K.R.S. Chapter 214 as authority for their promulgation.

39. Both of those Chapters contain criminal penalties, such as K.R.S. 39A.990, establishing as a Class A misdemeanor any violations of orders issued under that Chapter, and K.R.S. 220.990, which generally provides as a Class B misdemeanor for any violations of orders under that Chapter. K.R.S. 39A.190 gives police officers authority to "arrest without a warrant any person violating or attempting to violate in the officer's presence any order or administrative regulation made pursuant to" KRS Chapter 39A.

40. Amazingly, the very day after Governor Beshear issued Executive Order 2020-969, which as of November 23 closed, and criminalized attendance at, all in-person instruction at all public and private elementary, middle, and high schools in the Commonwealth, the director of the CDC announced "[t]he truth is, for kids K-12, one of the safest places they can be, from our perspective, is to remain in school," and that it is "counterproductive . . . from a public health point of view, just in containing the epidemic, if

there was an emotional response, to say, 'Let's close the schools.'"[9]

41. Houses of worship may continue to operate and may conduct Bible studies any day of the week in enclosed spaces. They may also hold Sunday school on their premises in enclosed locations. But, Governor Beshear refuses to allow religious schools to conduct nearly identical activities in, at least for some of these Plaintiffs, the same exact space.

The Plaintiffs, and their Protected Activities

42. Plaintiffs Pleasant View Baptist Church, Pleasant View Baptist School, Pastor Dale Massengale operate and run a church and school in McQuady, Breckenridge County, Kentucky. The school is an extension of the church and ministry and, as part of the school curriculum, the children have religious education and chapel service. Approximately 70 children attend the school, which offers classes in grades K-12. Attendance at the school by the children and the instruction provided by the school is part of the sincerely held religious beliefs of the congregants of the church. Among those beliefs

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[9] https://www.washingtonexaminer.com/news/school-is-safest-place-for-kids-to-be-cdc-director-says (last visited 11/20/2020). https://www.c-span.org/video/?c4924557/cdc-director-redfield-data-supports-face-face-learning-schools&fbclid=IwAR1Kp3HKvUhZu8CJ1F8tGSISsMtnP0zNDJ3598kSC7sYffb6kDjhKS90zC0 (last visited 11/20/2020) (CDC Director confirming that all existing data demonstrates K-12 schools are not transmission pathways for the virus, in part due to safety protocols in place in schools).

is the importance of in-person instruction. Further, and for the avoidance of all doubt, the school has implemented, at significant cost, COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunch room procedures, mask wearing, and other CDC recommended control measures. Further, there is absolutely no evidence of any community spread of COVID-19 within the school.

43. Veritas Christian Academy is located in Lexington, Fayette County. The school is an extension of ministry and, as part of the school curriculum, the children have religious education and chapel service. Approximately 170 children attend the school, which offers classes in grades K-12. Attendance at the school by the children and the instruction provided by the school is part of the sincerely held religious beliefs of the parents and students. Among those beliefs is the importance of in-person instruction. Further, and for the avoidance of all doubt, the school has implemented, at significant cost, COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunch room procedures, mask wearing, and other CDC recommended control measures. Further, there is absolutely no evidence of any community spread of COVID-19 within the schools.

44. Plaintiffs Maryville Baptist Church, MICAH Christian School, and Pastor Jack Roberts

operate and run a church and school in Hillview, Bullitt County, Kentucky. The school is an extension of the church and ministry and, as part of the school curriculum, the children have religious education and chapel service. Approximately 175 children attend the school, which offers classes in grades K-12. Attendance at the school by the children and the instruction provided by the school is part of the sincerely held religious beliefs of the congregants of the church. Among those beliefs is the importance of in-person instruction. Further, and for the avoidance of all doubt, the school has implemented, at significant cost, COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunch room procedures, mask wearing, and other CDC recommended control measures. Further, there is absolutely no evidence of any community spread of COVID-19 within the school.

45. Plaintiffs Mayfield Creek Baptist Church, Mayfield Creek Christian School, and Pastor Terry Norris operate and run a church and school in Bardwell, Carlisle County, Kentucky. The school is an extension of the church and ministry and, as part of the school curriculum, the children have religious education and chapel service. Approximately 45 children attend the school, which offers classes in grades K-12. Attendance at the school by the children and the instruction provided by the school is part of the sincerely held religious beliefs of the

congregants of the church. Among those beliefs is the importance of in-person instruction. Further, and for the avoidance of all doubt, the school has implemented, at significant cost, COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunch room procedures, mask wearing, and other CDC recommended control measures. Further, there is absolutely no evidence of any community spread of COVID-19 within the school.

46. Plaintiffs Faith Baptist Church, Faith Baptist Academy, Pastor Tom Otto operate and run a church and school in Bardwell, Carlisle County, Kentucky. The school is an extension of the church and ministry and, as part of the school curriculum, the children have religious education and chapel service. Approximately 31 children attend the school, which offers classes in grades K-12. Attendance at the school by the children and the instruction provided by the school is part of the sincerely held religious beliefs of the congregants of the church. Among those beliefs is the importance of in-person instruction. Further, and for the avoidance of all doubt, the school has implemented, at significant cost, COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunch room procedures, mask wearing, and other CDC recommended control measures. Further, there is absolutely no evidence of any community spread of COVID-19 within the school.

47. Plaintiffs Wesley Deters, Mitch Deters, on behalf of themselves and their minor children, MD, WD, and SD bring suit for the private, parochial school shutdown as well. The children attend parochial schools within the Covington Diocese of the Catholic Church. The Diocese has indicated that it would keep the children in-person for instruction but-for the challenged school shutdown orders and, thus, an order enjoining enforcement of these orders redresses the injury to these Plaintiffs. Tens of thousands of students attend these diocesan schools. The diocesan schools are an extension of the church and ministry and, as part of the schools' curriculum, the children have religious education and chapel service. Attendance at the schools by the children and the instruction provided by the schools is part of the sincerely held religious beliefs of the members of the church. Among those beliefs is the importance of in-person instruction. Further, and for the avoidance of all doubt, the schools have implemented, at significant cost, COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunch room procedures, mask wearing, and other CDC recommended control measures. Further, there is absolutely no evidence of any community spread of COVID-19 within any of the diocesan schools.

48. Plaintiffs Central Baptist Church, Central Baptist Academy, Pastor Mark Eaton operate

and run a church and school in Mount Vernon, Rockcastle County, Kentucky. The school is an extension of the church and ministry and, as part of the school curriculum, the children have religious education and chapel service. Approximately 10 children attend the school, which offers classes in grades K-12. Attendance at the school by the children and the instruction provided by the school is part of the sincerely held religious beliefs of the congregants of the church. Among those beliefs is the importance of in person instruction. Further, and for the avoidance of all doubt, the school has implemented, at significant cost, COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunch room procedures, mask wearing, and other CDC recommended control measures. Further, there is absolutely no evidence of any community spread of COVID-19 within the school.

49. Cornerstone Christian Church and Cornerstone Christian School operates and runs a church and school in London, Laurel County, Kentucky, and John Miller is the President of the Board of the school and a parent who brings the case on his own behalf and those of his minor children who attend the school, BM, EM, and HM. The school is an extension of the church and ministry and, as part of the school curriculum, the children have religious education and chapel service. Approximately 115 children attend the school, which offers classes in grades K-12. Attendance

at the school by the children and the instruction provided by the school is part of the sincerely held religious beliefs of the congregants of the church. Among those beliefs is the importance of in-person instruction. Further, and for the avoidance of all doubt, the school has implemented, at significant cost, COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunch room procedures, mask wearing, and other CDC recommended control measures. Further, there is absolutely no evidence of any community spread of COVID-19 within the school.

50. Collectively, the preceding Plaintiffs, the "Christian School Plaintiffs" would be unable to fulfill their religious purpose and mission—or implement their religious educational philosophy—and their religious beliefs would be substantially burdened, if the schools were prohibited from offering in-person, in-class instruction to their students.

51. Plaintiffs Austin and Sara Everson bring suit on their own behalf and on behalf of their minor children QR, WK, TK, AE, EE, EO, and AE2. They reside in Scott County, Kentucky. Because Governor Beshear has criminalized their daily family dinner and other in-home family activities, they bring suit.

52. Nicole and James Duvall bring suit on their own behalf and on behalf of their minor children, JD, KD, VD, JD2, AD, RD, JD3, AD, CD. They

reside in Boone County, Kentucky. Because Governor Beshear has criminalized their daily family dinner and other in-home family activities, they bring suit.

53. Pastor Lee Watts and Tony Wheatley are both politically active individuals and, among other things, have historically, and intend in the future, to host politically-related peaceful assemblies of 15-20 individuals at their homes and their properties and curtilage surrounding their homes. With COVID-19, they intend to implement social distancing and other mitigation measures. The Governor has criminalized such activities.

Additional Allegations Concerning Standing

54. Governor Beshear is empowered, charged with, and authorized to enforce and carry out Kentucky's emergency power laws and health related laws under K.R.S. Chapter 39A, and KRS Chapters 221 and 214. Moreover, Governor Beshear actually does enforce and administer these laws.

55. After Governor Beshear's announcement of his edicts and orders challenged herein, several of the named Plaintiffs called the Northern Kentucky Independent Health District, Lexington Fayette County Health Department, Louisville Metro Health Department, Wedco Health Department, and Daviess County Health Department (collectively the "Local Health Departments"). During those telephone calls,

each Local Health Department confirmed that they: (i) received and accepted complaints from the public; and (ii) would take enforcement action against any person violating the challenged edits and orders. Of particular relevance, the telephoning Plaintiffs received confirmation that keeping schools opened would be enforced by the health departments.

56. Further, each of the Local Health Departments admitted[10] to the Plaintiffs that these orders and mandates were required and would be enforced; the Local Health Departments would first issue a notice of correction directing the schools to shut down if they learned the schools had not shut down as ordered and, if the schools refused to do so, the Local Health Departments would go into the schools with the Labor Cabinet and/or local law enforcement and ensure they shut down.

57. Governor Beshear, himself, has directed the enforcement of his COVID-19 related orders including, without limitation, orders relating to religion. Governor Beshear has directed the Kentucky State Police and other law enforcement agencies to enforce his orders, and they have done so. Governor Beshear has issued, and continues to issue, directives to the Local Health Departments to direct their enforcement activities as explained herein.

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[10] Certain of these conversations were recorded by the Plaintiffs.

58. As for Maryville Baptist Church and Pastor Roberts, they have been threatened with criminal prosecution by State Police dispatched by the Governor.

59. Plaintiffs, having been personally threatened with enforcement as explained herein, have demonstrated that Governor Beshear has an intention and has directed the threat of enforcement of the challenged orders.

60. Furthermore, and in furtherance of the enforcement threats, any teachers instructing at private schools have been threatened publicly by the Kentucky Commissioner of Education and his spokesman with having their teaching certificates subject to discipline if they teach in contravention to Governor Beshear's orders.[11]

COUNT I – Violation of the Free Exercise Clause of the First Amendment

61. The First Amendment of the Constitution protects the "free exercise" of religion. Fundamental to this protection is the right to gather and worship. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as

[11] https://www.courier-journal.com/story/news/education/2020/11/18/kentucky-restrictions-k-12-classes-go-virtual-rest-semester/3768641001/ (last visited 11/21/2020).

legal principles to be applied by the courts...[such as the] freedom of worship and assembly."). The Free Exercise Clause was incorporated against the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

62. Because of this fundamental protection, "a law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993). The requirements to satisfy this scrutiny are so high that the government action will only survive this standard in rare cases and the government bears the burden of meeting this exceptionally demanding standard. Id. "[T]he minimum requirement of neutrality is that a law not discriminate on its face." Id.at 533.

63. Governor Beshear's prohibition of any and all in-person private religious school instruction, in the name of fighting Covid-19, is not generally applicable. There are numerous secular exceptions to the Order, as explained herein.

64. Executive Order 2020-969 is neither neutral nor generally applicable.

65. Governor Beshear's orders not narrowly tailored, substantially burden religious exercise, are arbitrary and underinclusive toward secular conduct that creates the same or even greater potential risk as the prohibited religious activity.

66. Governor Beshear's executive orders, which constitute his political value judgment, unconstitutionally infringe on the autonomy of religious institutions and churches in violation of the First Amendment. Governor Beshear, 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. In Executive Order 2020-968, Governor Beshear ordered that his new limits on gatherings "does not apply to in-person services at places of worship, which must continue to implement and follow the Guidelines for Places of Worship."

67. Just this year, the United States Supreme Court 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 (2020).

68. If religious institutions get to decide for themselves who teaches their children about religious faith, as *Our Lady of Guadalupe* holds, it follows that the schools themselves can determine the manner in which they provide such education.

69. 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 "intru[sion]" into the "autonomy" of churches and religious institutions.

70. The Christian School Plaintiffs ask the Court to declare unlawful as violative of the Free Exercise Clause those portions of Executive Order 2020-969 that prevent religious schools from operating on the same terms as secular establishments that pose comparable public health risks, but are nevertheless allowed to remain open in the Commonwealth, and to enjoin Governor Beshear from further enforcement of Executive Order 2020-969 against them, and to extend such relief to other private religious schools.

71. Because the actions of Governor Beshear in prohibiting religious school in-person instruction violate the clearly established law set forth in *Roberts*, 958 F.3d 409, *Maryville*, 957 F.3d 610, *Our Lady of Guadalupe*, 140 S. Ct. at 2055, and, for his actions after November 25, 2020, *Cuomo*, 208 L. Ed. 2d 206, Governor Beshear is divested of qualified immunity and, as such, the Christian School Plaintiffs seek compensatory damages against him in an individual capacity in amount to be determined at trial.

72. The Christian School Plaintiffs further seek punitive damages against Governor Beshear in his individual capacity, since the actions complained of involve reckless or callous

indifference to the federally protected rights of Plaintiffs, in an amount to be determined at trial.

COUNT II – Right to private education and for parents to control their children's education

73. Plaintiffs reincorporate the preceding Paragraphs as if fully written herein.

74. The School Ban, Executive Order 2020-969, contravenes the Christian School Plaintiffs (including the parents and children's) fundamental right to receive a private education, and unreasonably interferes with the parents' rights to control their children's education. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. State of Nebraska*, 262 U.S. 390 (1923); *Farrington v. Tokushige*, 273 U.S. 284 (1927).

75. The Christian School Plaintiffs ask the Court to declare that Executive Order 2020-969 violated their clearly established fundamental rights under the Fourteenth Amendment to receive a private education and to direct their children's education, and seek compensatory damages against him in an individual capacity in amount to be determined at trial.

COUNT III – Violation of Freedom to Peaceably Assemble and Freedom of Association

76. Plaintiffs reincorporate the preceding Paragraphs as if fully written herein.

77. The First Amendment also guaranties the right "of the people peaceably to assemble." This guaranty has also been incorporated against the states. *DeJonge v. Oregon*, 299 U.S. 353 (1937); *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 460-461 (1958).

78. The right to conduct peaceful assembly is embedded at the very core of First Amendment protection. *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Gregory v. Chicago*, 394 U.S. 111 (1969).

79. The School Ban, Executive Order 2020-969 violates the Freedom of Assembly.

80. The Plaintiffs ask the Court to declare that Executive Order 2020-969 violated their fundamental rights to peaceably assemble, and to violated their clearly established fundamental rights under the Fourteenth Amendment to receive a private education and to direct their children's education, and seek compensatory damages against him in an individual capacity in amount to be determined at trial.

Generally

81. Governor Beshear abused the authority of his office and, while acting under color of law and with knowledge of Plaintiffs' established rights, used his office to violate Plaintiffs' Constitutional rights, privileges, or immunities secured by the Constitution and laws.

82. Thus, under 42 U.S.C 1983, Plaintiffs seek declaratory relief and compensatory damages. Pursuant to 42 U.S.C. 1988, Plaintiffs further seek their reasonable attorney fees and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against Defendants as prayed for, including:

A. That this Court issue a declaration that the challenged order is unconstitutional.

B. That Plaintiffs be awarded their costs in this action, including reasonable attorney fees under 42 U.S.C. § 1988;

C. That the Christian School Plaintiffs be awarded reasonable compensatory and punitive damages against the individual capacity Defendant and a jury trial on those claims; and

D. Such other relief as this Court shall deem just and proper.

JURY DEMAND

Plaintiffs demand trial by jury for all claims so triable.

/s/ Christopher Wiest
Christopher Wiest (KBA 90725)

Respectfully submitted,

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EXHIBIT A

[SEAL]

ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2020-968
November 18, 2020

STATE OF EMERGENCY

The novel coronavirus (COVID-19) is a respiratory disease causing illness that can range from very mild to severe, including illness resulting in death, and many cases of COVID-19 have been confirmed in the Commonwealth.

The Kentucky Constitution and Kentucky Revised Statutes, including KRS Chapter 39A, empower me to exercise all powers necessary to promote and secure the safety and protection of the civilian population, including the power to command individuals to disperse from the scene of an emergency and to perform and exercise other functions, powers, and duties necessary to promote and secure the safety and protection of the civilian population. Under those powers, I declared by Executive Order 2020-215 on March 6, 2020, that a State of Emergency exists in the Commonwealth. The Centers for Disease Control and Prevention (CDC) has concluded that COVID-19 most

commonly spreads during close contact between people, and can sometimes be spread through airborne transmission, particularly among individuals in enclosed spaces. As a result, scenes of emergency exist where people gather together, potentially spreading COVID-19.

Kentucky is now experiencing a potentially catastrophic surge in COVID-19 cases, which threatens to overwhelm our healthcare system and cause thousands of preventable deaths. Despite Red Zone Reduction Recommendations, Kentucky is faced with exponential growth of COVID-19 cases.

Accordingly, new public health measures are required to slow the spread of COVID-19. Kentuckians can save lives if they remain Healthy at Home, which will continue to help protect our community from the spread of COVID-19.

Order

I, Andy Beshear, by virtue of authority vested in me pursuant to the Constitution of Kentucky and by KRS Chapter 39A, do hereby Order and Direct as follows:

1. All prior orders and restrictions remain in full force and effect, except as modified below. In particular, all Kentuckians should continue to wear face coverings to protect themselves and others, as set forth in Executive Order 2020-931 (and any order renewing it) and 902 KAR 2:210E. Current guidance and restrictions shall continue to apply to any activity not listed below.

2. This Order does not apply to education, childcare, or healthcare, which operate under separately issued guidance and orders. Current guidance for all entities is available online at the Healthy at Work website (https://govstatus.egov.com/ky-healthy-at-work).

3. These restrictions shall take effect on Friday, November 20, 2020, at 5 p.m. local time, and shall expire on Sunday, December 13, 2020, at 11:59 p.m. local time.

4. **Restaurants and Bars.** All restaurants and bars must cease all indoor food and beverage consumption. Restaurants and bars may provide delivery and to-go service to the extent otherwise permitted by law. Restaurants and bars may provide outdoor service, provided that all customers are seated at tables, table size is limited to a maximum of eight (8) people from a maximum of two (2) households, and tables are spaced a minimum of six (6) feet apart. For the avoidance of doubt, this restriction applies to indoor dining facilities at retail locations, including food courts. A household is defined as individuals living together in the same home. Additional guidance for outdoor dining is available online at the Healthy at Work website (https://govstatus.egov .com/ky-healthy-at-work).

5. **Social Gatherings.** All indoor social gatherings are limited to a maximum of two (2) households and a maximum of eight (8) people. A household is defined as individuals living together in the same home.

6. **Gyms, Fitness Centers, Pools, and Other Indoor Recreation Facilities.** Gyms, fitness centers, swimming and bathing facilities, bowling alleys, and other indoor recreation facilities must limit the number of customers present inside any given establishment to 33% of the maximum permitted occupancy and ensure that individuals not from the same household maintain six (6) feet of space between each other. Indoor group activities, group classes, team practices, and team competitions are prohibited. Notwithstanding 902 KAR 2:210E, Section 2(3)(i), all individuals inside such facilities must wear face coverings at all times, including while actively engaged in exercise. For the avoidance of doubt, this provision does not apply to athletic activities at schools, for which separate guidance will be provided by KHSAA, or athletic activities at institutions of higher education.

7. **Venues, Event Spaces, and Theaters.** Indoor venues, event spaces, and theaters are limited to 25 people per room. This limit applies to indoor weddings and funerals. For the avoidance of doubt, this limit does not apply to in-person services at places of worship, which must continue to implement and follow the Guidelines for Places of Worship available online at the Healthy at Work website (https://govstatus.egov.com/ky-healthy-at-work).

8. **Professional Services.** All professional services and other office-based businesses must

mandate that all employees who are able to work from home do so, and close their businesses to the public when possible. Any office that remains open must ensure that no more than 33% of employees are physically present in the office any given day.

9. Nothing in this Order should be interpreted to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority.

/s/ Andy Beshear
ANDY BESHEAR, Governor
Commonwealth of Kentucky

/s/ Michael G. Adams
MICHAEL G. ADAMS
Secretary of State

EXHIBIT B

[SEAL]

ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2020-969
November 18, 2020

STATE OF EMERGENCY

The novel coronavirus (COVID-19) is a respiratory disease causing illness that can range from very mild to severe, including illness resulting in death, and many cases of COVID-19 have been confirmed in the Commonwealth.

The Kentucky Constitution and Kentucky Revised Statutes, including KRS Chapter 39A, empower me to exercise all powers necessary to promote and secure the safety and protection of the civilian population, including the power to command individuals to disperse from the scene of an emergency and to perform and exercise other functions, powers, and duties necessary to promote and secure the safety and protection of the civilian population. Under those powers, I declared by Executive Order 2020-215 on March 6, 2020, that a State of Emergency exists in the Commonwealth. The Centers for Disease Control and Prevention (CDC) has concluded that COVID-19 most

commonly spreads during close contact between people, and can sometimes be spread through airborne transmission, particularly among individuals in enclosed spaces. As a result, scenes of emergency exist where people gather together, potentially spreading COVID-19.

Kentucky is now experiencing a potentially catastrophic surge in COVID-19 cases, which threatens to overwhelm our healthcare system and cause thousands of preventable deaths. Despite Red Zone Reduction Recommendations, Kentucky is faced with exponential growth of COVID-19 cases. Accordingly, Executive Order 2020-968, issued today, imposed new public health measures to slow the spread of COVID-19.

Additional public health measures concerning elementary, middle, and high schools are necessary to further slow the spread of COVID-19 now. These measures are intended to ensure that as many schools as possible may safely return to in-person instruction in the near future.

Order

I, Andy Beshear, by virtue of authority vested in me pursuant to the Constitution of Kentucky and by KRS Chapter 39A, do hereby Order and Direct as follows:

1. 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.

2. All middle and high schools (grades 6 through 12) shall remain in remote or virtual instruction and not resume in-person instruction prior to January 4, 2021.

3. For the period from December 7, 2020 to January 4, 2021, all elementary schools (kindergarten through grade 5) may reopen for in-person instruction, provided:

    a. The school is not located in a Red Zone County, as provided by the Kentucky Department for Public Health on the COVID-19 website (available at https://govstatus.egov.com/kycovidl9); ***and***

    b. The school follows all expectations in the KDE Healthy at School Guidance on Safety Expectations and Best Practices for Kentucky Schools (available at https://govstatus.egov.com/ky-healthy-at-school).

4. Nothing in this Order shall prohibit schools from providing small group in-person targeted services, as provided in KDE guidance.

5. This Order shall apply to all institutions of public and private elementary and secondary education, but does not apply to private schools conducted in a home solely for members of that household.

/s/ Andy Beshear
ANDY BESHEAR, Governor
Commonwealth of Kentucky

/s/ Michael G. Adams
MICHAEL G. ADAMS
Secretary of State