

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION

Electronically filed

**DANVILLE CHRISTIAN
ACADEMY, INC.**

and

**COMMONWEALTH OF
KENTUCKY**, *ex rel.* Attorney General
Daniel Cameron

Plaintiffs

v.

ANDREW BESHEAR, in his official
capacity as the Governor of the
Commonwealth of Kentucky

Defendants

Civil Action No. _____

**PLAINTIFFS' MOTION FOR EMERGENCY HEARING
AND TEMPORARY RESTRAINING ORDER**

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

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

BACKGROUND

1. The Governor’s executive orders.

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

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

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

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

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

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

[Ex. 3 to Verif. Compl.].

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

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

2. This lawsuit.

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

1. The school-closure order burdens religious exercise.

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

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

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

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

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

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

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

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

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

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

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

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

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

*Id.*³

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The other injunction factors favor the Plaintiffs.

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted by,

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CERTIFICATE OF SERVICE

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

Amy Cabbage
General Counsel
Office of the Governor, Suite 100
700 Capital Avenue
Frankfort, Kentucky 40601
[REDACTED]

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

Andrew Beshear
Governor
700 Capital Avenue, Suite 100
Frankfort, Kentucky 40601

/s/ Carmine G. Iaccarino

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

**DANVILLE CHRISTIAN
ACADEMY, INC.**

and

**COMMONWEALTH OF
KENTUCKY**, *ex rel.* Attorney General
Daniel Cameron

Plaintiffs

v.

Civil Action No. _____

ANDREW BESHEAR, in his official
capacity as the Governor of the
Commonwealth of Kentucky,

Defendant

VERIFIED COMPLAINT

“[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 go hand-in-glove. 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. In short, religious education is so central to religious exercise that to burden the former is to burden the latter.

The absence of government-imposed burdens on religious exercise is one of the foundations of the American Republic. “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)). This is the promise of America. It 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).

But this audacious guarantee has been threatened repeatedly this year by Governor Andrew Beshear. Just before Easter, he purported to outlaw religious services in the Commonwealth by executive order, and then he sent Kentucky State Police troopers to record the license plate numbers of churchgoers. The Sixth Circuit halted his discriminatory actions not once, but *twice*. See generally *Roberts v. Neace*,

958 F.3d 409 (6th Cir. 2020) (per curiam); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (per curiam). This Court did as well. *See generally* *Tabernacle Baptist Church, Inc. v. Beshear*, 459 F. Supp. 3d 847 (E.D. Ky. 2020).

On Wednesday, November 18, 2020, Governor Beshear issued Executive Order (“EO”) 2020-969, which prohibits all public and private schools from meeting in-person for the next several weeks.¹ The order contains no accommodations for religious education, despite such education being recognized by the Supreme Court as a “vital” part of many faiths. *See Our Lady of Guadalupe*, 140 S. Ct. at 2064. And, like the Governor’s previously enjoined orders, the latest order burdens religious institutions while arbitrarily allowing other gatherings that pose similar health risks to continue.

Regardless of how well-intentioned the Governor might be, his actions violate the federal and state constitutions and Kentucky’s Religious Freedom Restoration Act. His actions also infringe on the autonomy of religious institutions and violate the Constitution’s Establishment Clause.

¹ The next day, the Director of the Centers for Disease control announced, “We should be making data driven decisions when we are talking about what we should be doing for institutions or what we should be doing for commercial closures. For example, as we mentioned, last spring CDC did not recommend school closures nor did we recommend their closures today. . . . K through 12 schools can operate with face to face learning and they can do it safely and they can do it responsibly.” *See* “CDC Director Redfield Says It Does Not Recommend Closing Schools, Covid Acquired ‘In The Household’” (Nov. 19, 2020) available at <https://www.youtube.com/watch?v=sxKhJaqEkcY> (last visited Nov. 20, 2020). He further stated “[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.’” Ryan Saavedra, *CDC Director: Schools Among ‘Safest Places’ Kids Can Be, Closing Schools An ‘Emotional Response’ Not Backed By Data*, *The Daily Wire*, November 19, 2020, <https://www.dailywire.com/news/cdc-director-schools-among-safest-places-kids-can-be-closing-schools-an-emotional-response-not-backed-by-data>.

Among the schools impacted by the Governor’s actions is Danville Christian Academy (“Danville Christian”), which practices its faith in Boyle County, Kentucky. Danville Christian’s founders created the school to mold Christ-like scholars, leaders, and servants who will advance the Kingdom of God. To that end, Danville Christian provides students with a Christ-centered environment along with academic excellence so they may grow spiritually, academically, and socially. And Danville Christian accomplishes this religious calling by educating students with a Christian worldview in a communal in-person environment.

For these reasons, the Plaintiffs bring this suit against the Governor, and for their Complaint for declaratory and injunctive relief state as follows:

PARTIES

1. Daniel Cameron is the duly elected Attorney General of the Commonwealth of Kentucky. As such, he is the lawyer for the people of Kentucky. Ky. Rev. Stat. (“KRS”) 15.020; *Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016).

2. Attorney General Cameron brings this suit on behalf of the Commonwealth of Kentucky. As the chief law officer of the Commonwealth, Attorney General Cameron can challenge the “authority for and constitutionality of the Governor’s actions.” *Commonwealth ex rel. Beshear*, 498 S.W.3d at 363.

3. Plaintiff Danville Christian Academy, Inc. is a Christian school and a religious nonprofit corporation, the principal office of which is located at 2170 Shakertown Road, Danville, Boyle County, Kentucky 40422.

4. Defendant Andrew Beshear is the Governor of Kentucky. Governor Beshear is the “Chief Magistrate” of the Commonwealth, Ky. Const. § 69, charged with “tak[ing] care that the laws be faithfully executed,” Ky. Const. § 81.

JURISDICTION AND VENUE

5. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1367 because the Commonwealth, through Attorney General Cameron, and Danville Christian Academy, Inc., assert claims against Governor Beshear arising under the Constitution of the United States, as well as claims under Kentucky law over which this Court has supplemental jurisdiction. This declaratory judgment action is further authorized by 28 U.S.C. §§ 2201 and 2202.

6. The Court has personal jurisdiction over Governor Beshear because he resides in Kentucky, holds office in Franklin County, Kentucky, and engaged in the acts giving rise to this complaint in Franklin County, Kentucky.

7. This Court is the proper venue under 28 U.S.C. § 1391 because a “substantial part of the events . . . giving rise to the claim[s] occurred” in this district.

8. Under Local Rule 3.2(a)(2)(A), the Central Division of the Eastern District of Kentucky at Frankfort is the proper division for this action because a substantial part of the events giving rise to this action occurred in Franklin County, Kentucky, where Governor Beshear issued the orders at the heart of this suit.

FACTUAL BACKGROUND

The COVID-19 outbreak

9. Since the initial outbreak, coronavirus has spread through the United States, with each state experiencing varying rates of infection and hospitalization.

North Dakota, for example, leads the nation with an overall infection rate of 9,027 cases per 100,000 population since the beginning of the outbreak.² Vermont has the lowest rate at 505 per 100,000 population.³ And Kentucky is roughly in the middle with a rate of 3,240 per 100,000.⁴

10. States have also experienced varying survival rates resulting from COVID-19. New Jersey's survival rate is the lowest at 99.81%, and Vermont's is the highest at 99.99%.⁵ Kentucky's survival rate of 99.96% is just below West Virginia's rate of 99.97%, and just above Tennessee's rate of 99.94%.⁶

11. States have also pursued varying policies in dealing with COVID-19, with some being more aggressive than others.

12. On March 6, 2020, Governor Beshear declared a State of Emergency and activated his emergency authority under KRS Chapter 39A.

13. Over the next several weeks, Governor Beshear issued a series of executive orders implementing a growing set of restrictions and purporting to suspend laws where he saw fit.

14. Before and after Governor Beshear declared a State of Emergency, many religious organizations took voluntary measures to prevent the spread of coronavirus and practice social distancing.

² See CDC COVID Data Tracker, available at https://covid.cdc.gov/covid-data-tracker/#cases_casesper100k (last accessed November 20, 2020).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Governor Beshear's initial infringements on religious liberty

15. On March 19, 2020, Governor Beshear took his first step to outright ban religious gatherings across the state. Purportedly acting through Secretary Eric Friedlander, of the Cabinet for Health and Family Services, the Beshear administration issued an order stating that “[a]ll mass gatherings are hereby prohibited.”

16. In the March 19th order, the Beshear administration vaguely described the scope of the order 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.”

17. Thus, the order specifically banned “faith-based” gatherings by name.

18. The ban was a broad one, not simply aimed at narrowly banning large gatherings. It did not define mass gatherings based on the number of people coming together, nor did it limit the 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 Order broadly banned any activity “that brings together groups of individuals,” which specifically included “faith-based” gatherings.

19. However, the March 19 Order did not apply equally without exception. In fact, the order specifically exempted two kinds of activities from the prohibition.

20. First, the order stated 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.” Religious organizations were not included within that exemption.

21. Second, the order 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.” Like the first group of exemptions, religious organizations were not included.

22. Thus, under the March 19 Order, faith-based activities were expressly singled out for prohibition, while secular organizations and activities received exemptions—even when gatherings at those secular activities include large numbers of people.

23. Six days after prohibiting the vaguely-defined-but-broadly-applicable “mass gatherings,” on March 25, Governor Beshear issued an executive order closing all organizations that are not “life sustaining.” *See* Executive Order 2020-257.⁷

24. “Life sustaining” was defined in the order as any organization “that allow[s] Kentuckians to remain Healthy at Home.” *Id.* The order also included nineteen different categories of business that are “life sustaining” and therefore were free to remain open. *Id.*

25. Among the exceptions for “life sustaining” activity was “Media,” which the order defined as, “Newspapers, television, radio, and other media services.” *Id.* The order also allowed organizations like law firms to continue operating under the

⁷ Executive Order 2020-257 (March 25, 2020), available at https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf (last visited Nov. 20, 2020).

category of “Professional services,” which includes “legal services, accounting services, insurance services, real estate services (including appraisal and title services).” *Id.*

26. Governor Beshear’s order did not consider religious organizations to be “life sustaining.”

27. The order did not permit religious organizations to continue providing spiritual nourishment in any way that would constitute a “mass gathering” as might be sincerely required by their members according to the tenets of their faith.

Governor Beshear specifically targets religious activity

28. 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.⁸ 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.

29. So, even though countless Kentuckians were permitted to gather in offices, big box stores, bus stations, and grocery stores in communities with high numbers of infected individuals, residents of counties like Bell—where there were no diagnosed cases of COVID-19 at the time—were not permitted to attend church.

⁸ Alex Acquisto, Kentucky COVID-19 cases up by 242. Total is 1,693. State to quarantine churchgoers. Lexington Herald Leader, updated Apr. 10, 2020, available at <https://www.kentucky.com/news/coronavirus/article241923521.html> (last visited Nov. 20, 2020)

30. On Easter Sunday, Governor Beshear followed through with his 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.

The Sixth Circuit rules against Governor Beshear twice.

31. On Saturday, May 2, 2020, 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).

32. 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. *See id.*

33. 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.

Id. at 615.

34. The court concluded that there were much less burdensome means of combatting the COVID-19 outbreak than banning religious gatherings, noting that:

The Governor has offered no good reason so far for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same. Are they not often the same people, going to work on one day and attending worship on another? If any group fails, as assuredly some groups have failed in the past, the Governor is free to enforce the social-distancing rules against them for that reason.

Id. And the court also pointed out that “[i]f the problem is numbers, and risks that grow with greater numbers, then there is a straightforward remedy: limit the number of people who can attend a service at one time.” *Id.*

35. One week later, on Saturday, May 9, 2020, the Sixth Circuit again enjoined Governor Beshear. *See Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (*per curiam*).

36. Whereas the May 2 decision enjoined the Governor’s ability to stop drive-in church services, the May 9 decision went further and also enjoined his ability to prohibit in-person church services.

37. The court held that the Governor’s orders contained so many exceptions permitting non-religious gatherings that they effectively discriminated against religious exercise.

38. The court further held that the orders could not satisfy strict scrutiny:

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.

39. 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.

40. One day earlier, this Court granted a temporary restraining order stopping the Governor from restricting religious practices.

41. 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).

Governor Beshear orders the closure of schools, including private religious schools

42. On November 18, 2020, Governor Beshear issued Executive Order 2020-969.⁹ A copy of that order is attached as **Exhibit 1**.

43. This order purports to:

- a. Close all in-person instruction at all public and private elementary, middle, and high schools in the Commonwealth as of November 23, 2020;
- b. Require all middle and high schools in the Commonwealth to remain closed at least until January 4, 2021;
- c. Only permit elementary schools to reopen for in-person instruction between December 7, 2020 and January 4, 2021 if the school is not located in a “Red Zone County” as provided by the Kentucky Department of Health, and the school follows all expectations in the Kentucky Department of Education Healthy at School Guidance on Safety Expectations and Best Practices for Kentucky Schools.

44. The order allows schools to provide small group in-person targeted services as provided in Kentucky Department of Education guidance. On information and belief, such services do not include in-person classroom instruction.

45. The order also does not shut down colleges, universities, or childcare centers.

⁹ Executive Order 2020-969 (November 18, 2020), available at https://governor.ky.gov/attachments/20201118_Executive-Order_2020-969_State-of-Emergency.pdf (last visited November 20, 2020).

46. On the same day that he issued Executive Order 2020-969, Governor Beshear also issued Executive Order 2020-968.¹⁰ A copy is attached as **Exhibit 2**.

47. Executive Order 2020-968 permits secular establishments like libraries, distilleries, fitness centers, and indoor recreation facilities to continue operating at limited capacity.

48. Executive Order 2020-968 also permits venues, event spaces, and theaters to continue operating with a maximum of 25 people per room.

49. Executive Order 2020-968 also permits office-based businesses to continue operating as long as no more than 33% of employees are physically present on any given day.

50. The day after Governor Beshear issued Executive Order 2020-969 purporting to close all in-person instruction at all public and private elementary, middle, and high schools in the Commonwealth as of November 23, the director of the Centers for Disease control 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.’”¹¹

¹⁰ Executive Order 2020-968 (November 18, 2020), available at https://governor.ky.gov/attachments/20201118_Executive-Order_2020-968_State-of-Emergency.pdf (last visited November 20, 2020).

¹¹ Ryan Saavedra, *CDC Director: Schools Among ‘Safest Places’ Kids Can Be, Closing Schools An ‘Emotional Response’ Not Backed By Data*, The Daily Wire, November 19, 2020, <https://www.dailywire.com/news/cdc-director-schools-among-safest-places-kids-can-be-closing-schools-an-emotional-response-not-backed-by-data>.

51. In response to questions from citizens about the applicability of Executive Order 2020-969 to religious schools, the Attorney General's Office reached out to the Governor's Office for clarification.

52. The Governor's General Counsel responded as follows in an email that is attached as **Exhibit 3**:

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

I hope this answers your question.

53. Thus, 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 the Governor refuses to allow religious schools to conduct nearly identical activities.

54. Moreover, shortly after Governor Beshear ordered religious schools to close their doors, Kentucky's top education official warned certified school personnel who violate the Governor's executive order of licensure consequences. Specifically, Kentucky's Commissioner of Education wrote that "[c]ertified school employees are bound by the Professional Code of Ethics and may be subject to disciplinary action by the Education Professional Standards Board (EPSB) for violation of the Professional Code of Ethics." A copy of this email is attached as **Exhibit 4**.

55. The EPSB is responsible for “issuing, renewing, suspending, and revoking Kentucky certificate certificates for professional school personnel.”¹²

Danville Christian Academy

56. Danville Christian is a Christian school and a religious nonprofit corporation the principal office of which is located at 2170 Shakertown Road, Danville, Kentucky 40422. It provides pre-K through 12th grade classes at its facilities. Its Headmaster is James S. Ward II.

57. In 1994, members of Calvary Baptist Church of Danville, Kentucky, formed a committee to study the idea of starting a Christian school in Danville, Kentucky. After two years of prayer and preparation, they created Danville Christian, which opened for operation on August 15, 1996, at Calvary Baptist Church.

58. As stated in Danville Christian’s Articles of Incorporation, attached to this Complaint as **Exhibit 7**, the purpose of Danville Christian is “to provide a creative, loving, academic environment for children to grow socially, emotionally, physically, academically, and spiritually through individual and group learning experiences under the guidance and nurture of carefully chosen Christian teachers, administrators, and under the Lordship of Jesus Christ. It shall be the purpose of the Danville Christian Academy to encourage all students to grow in a personal relationship with Jesus Christ and to emphasize the value of the eternal soul, the worth of the individual, the love of God for man, and the kinship of all peoples as

¹² <http://www.epsb.ky.gov/> (last visited Nov. 20, 2020).

taught in the Holy Scriptures, while providing students with the opportunity for achieving academic excellence.”

59. Danville Christian’s vision is to mold Christ-like scholars, leaders, and servants who will advance the Kingdom of God.

60. Danville Christian’s mission statement is to provide students with a Christ-centered environment along with academic excellence so they may grow spiritually, academically, and socially.

61. Danville Christian has adopted a Statement of Faith that expresses the school’s core religious beliefs, including its beliefs about God, the Bible, Jesus Christ, and the afterlife, among other things.

62. Danville Christian has also adopted what it terms Three Core Beliefs: that Christ is at the center of all that we do; that DCA students and staff are lifelong learners; and that DCA students and staff are ambassadors for Christ.

63. Danville Christian’s Board of Directors prays before its meetings. One of the Board’s standing committees is the Committee on Spiritual Life.

64. Danville Christian believes its responsibility is to inspire children to know and love God; that the purpose of a Christian education is to present students the truth about God’s relationship to them personally, to life, the world, and everything in it; that students must be shown that the Word of God is the authoritative source upon which to build a life that has both purpose and meaning; that the philosophy of Christian education calls for an educational process that puts the Bible at the center of all learning and asks the student and the teacher to evaluate

all they see in the world—through the eyes of God; that Jesus said, “I am the Way, the Truth, and the Life” (John 14:6); that in Christian education, students learn to use the Bible to evaluate all of life—including what they learn in the classroom.

65. Danville Christian’s educational philosophy is Kingdom Education, which focuses on bringing the home, church, and school into a partnership for the purpose of training the next generation. Kingdom Education is defined as the life-long, Bible-based, Christ-centered process of leading a child into a new identity with Christ, developing a child according to his/her specific abilities given to him by Christ, so that a child is empowered to live a life characterized by love, trust, and obedience to Christ.

66. Danville Christian requires its staff and administrators to affirm its Statement of Faith and have a saving relationship with Jesus Christ.

67. Danville Christian requires that at least one parent of each of its students have a saving relationship with Jesus Christ.

68. A key component of Danville Christian’s purpose and educational philosophy is its belief that its students should be educated with a Christian worldview in a communal, in-person environment.

69. Danville Christian would be unable to fulfill its religious purpose and mission—or implement its religious educational philosophy—and its religious beliefs would be substantially burdened, if it were prohibited from offering in-person, in-class instruction to its students.

70. All Danville Christian elementary, middle school, and high school students receive daily Bible classes each day of the school year. Danville Christian high school students are required to earn four credits of Bible courses in order to graduate. Danville Christian uses Biblically-based curriculum for many of its courses, and all Danville Christian teachers are required to incorporate Biblical worldview and instruction into all classes and subject matters taught.

71. All Danville Christian students attend one of two socially distanced chapel services every week provided in the gymnasium. Chapel services include religious instruction and preaching, corporate prayer, musical worship, communal recognition, and encouragement of individual students.

72. Danville Christian holds corporate prayer at the beginning of each school day as a school, followed by corporate prayer in each individual classroom. Individual classrooms hold corporate prayer before lunch. Danville Christian holds corporate prayer before school events, including athletic events.

73. Danville Christian's student activities include outreach and mercy ministries such as Operation Christmas Child and the Day of Giving, which provide evangelism and material goods to people in need.

74. Each year Danville Christian high school students are provided local, regional, and foreign mission opportunities.

75. Danville Christian's students range from three-year-old pre-school through 12th grade. The school day begins at 8:05 a.m. and ends at 3:15 p.m.

76. Danville Christian has a total of 234 students. Classroom sizes range from 4 students to 20 students, with most classes ranging from 12 to 17 students.

Danville Christian Academy's COVID-19 Reopening Plan

77. Prior to the beginning of the 2020-2021 school year, Danville Christian collaborated with local health officials and consultants—including three medical doctors, among others—to plan the reopening and operation of the school and the safe return of its students and staff during the COVID-19 pandemic.

78. Danville Christian's reopening and operational plan was submitted to and approved by the director of the Boyle County Health Department, who repeatedly has expressed his approval of the plan and has stated that Danville Christian is "doing it right."

79. Other schools have contacted and visited Danville Christian for help with their reopening and operational plans.

80. In accordance with its reopening and operational plan, on August 12, 2020, Danville Christian reopened with direct in-class instruction in which Danville Christian's teachers provide in person instruction to its students in its classrooms.

81. Attached to this Complaint as **Exhibit 5** is the "DCA Reopen FAQ," which was provided to Danville Christian students and families before the start of the school year. Much of Danville Christian's plan is explained in the DCA Reopen FAQ. Procedures mandated by Danville Christian's plan include, among other things:

- a. Except for pre-school students, students and staff must wear masks when entering, exiting, and moving about the building, such as during classroom changes.
- b. Each student receives a temperature check before entering the building. If a fever (100.4 degrees Fahrenheit) is detected, the individual is not allowed to enter the building and must be fever free for 72 hours and visit a doctor for re-admittance to the building.
- c. Immediately upon entering the building, each student and staff member enters one of two kiosks outfitted with a thermal camera and face recognition software to receive a second temperature check. If a mask has been removed an oral computerized command reminds the individual to re-mask. If a fever (100.4 degrees Fahrenheit) is detected an audible alarm is triggered and the individual is removed from the student population and is not allowed to remain at school, and must be fever free for 72 hours and visit a doctor for re-admittance to the building. The same protocol is applied if a fever is detected later in the school day.
- d. Only if sitting and socially distanced may students remove their masks, and then only if parental permission to do so has been provided.
- e. Student work areas in each classroom have been socially distanced. In areas where adequate social distancing is not possible, Danville

Christian installed large wood-framed plexiglass dividers to separate one student from another.

- f. Teachers wear masks or faceshields while instructing students and maintain social distancing.
- g. Before leaving a classroom, Danville Christian requires all students to wipe down their desk or work area with a disinfectant spray reported to be effective against the novel coronavirus.
- h. Students may access their lockers only at designated times during the day, separated by grade level, and provided that masks and social distance are maintained.
- i. Danville Christian moved lunch service to assigned-seat cubicles in the gymnasium to provide better social distancing. These cubicles are divided by wood-framed plexiglass dividers to separate one student from another.
- j. All students are required to follow a set schedule of multiple hand washings throughout the school day.
- k. Eight hand sanitizing stations have been installed in the building and gymnasium.
- l. All water fountains are closed. Bottled water is provided by Danville Christian. Danville Christian has ordered and is awaiting delivery of retro-fitted touchless water stations designed to refill water bottles.

- m. In addition to the normal night custodians, Danville Christian hired a day-time custodian for an additional four hours of cleaning per day to clean all bathrooms during the school day and to help clean the lunch area.
- n. Personalized virtual classroom options are provided for students or families who would prefer an alternative to in-person instruction. Only five of Danville Christian's students have chosen this option.

82. Danville Christian' Headmaster estimates that it has spent between \$20,000.00 and \$30,000.00 on pandemic-related safety precautions and protocols for the 2020-2021 school year.

83. In October, Danville Christian became aware that a student had tested positive for the novel coronavirus. In conjunction with the local health department, Danville Christian determined through contact tracing which student should be quarantined. The student who tested positive and any other students exposed to him, were required to quarantine away from the school for fourteen days.

84. In early November, Danville Christian became aware of a teacher and three students who tested positive for the novel coronavirus. In response, and in coordination with the local health department, on November 9, Danville Christian ceased in-person instruction for 10 days while it monitored student health. On November 18, Danville Christian began bringing its students back for in-person instruction a few grades at a time staggered over several days. The final grades are to return November 23.

85. The virtual option that Danville Christian has provided to a few of its students severely burdens Danville Christian's ability to carry out its religious purpose and mission, implement its Kingdom Education philosophy, and fulfill its religious vision for those students due to the necessity for an in-person, communal environment. Succeeding in these things to any extent with these few virtual students hinges on Danville Christian's ability to continue to provide in-person instruction to the rest of its students.

86. The Governor's recent order for schools to cease in-person instruction beginning November 23 will prevent Danville Christian from carrying out its religious purpose and mission, implementing its Kingdom Education philosophy, and fulfilling its religious vision.

87. For example, without in-person instruction, Danville Christian will be unable to provide the Christ-centered, creative, loving, academic environment required for its students to grow and develop in accordance with Danville Christian's religious purpose, mission and vision. It will be unable to have the weekly in-person chapel services and corporate prayer that are a key component to implementing its Kingdom Education philosophy. It will be unable to provide the in-person group experiences central to developing Christ-like scholars, leaders, and servants who will advance the Kingdom of God. It will be unable to provide the in-person interaction with Danville Christian's carefully selected Christian instructors and staff needed to inspire its students to know and love God and to empower its students to live a life characterized by love, trust, and obedience to Christ. It will be unable to assemble

together in-person with staff and students as it believes God through the Bible commands it to do.

88. Danville Christian has a sincerely held religious belief that it is called by God to have in-person religious and academic instruction for its students. It is imperative to DCA's religious purpose, mission and vision, and its Kingdom Education philosophy, that DCA continue in-person instruction of its students.

COUNT I
Violation of the Free Exercise Clause of the First Amendment to the United States Constitution

89. The allegations in each of the foregoing paragraphs are incorporated as if fully set forth herein.

90. The First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const., amend. I.

91. The right to freely exercise one's religion is incorporated against the states through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

92. Under the First Amendment, state officials cannot target religious activity for disfavored treatment without satisfying "the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

93. Only a law that is both neutral and generally applicable can avoid this heightened review. But facial neutrality is not enough. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* at 534. And the government "cannot in

a selective manner impose burdens only on conduct motivated by religious belief.” *Id.* at 543.

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

95. The terms of the order are clear: *all* in-person religious schooling must end, regardless of whether the religious school is taking safety precautions, practicing social distancing, implementing appropriate hygiene standards, or otherwise following all of the requirements imposed on the secular activities that are exempt from the order.

96. And the list of permissible secular activities is long. On the same day that Governor Beshear *closed* religious schools, he issued an order allowing “office-based businesses” to continue operating in person so long as they limit capacity to 33 percent of their employees. His other preexisting regulations for offices require that employees wear masks while interacting with co-workers or in common areas, and he urges businesses to limit in-person contact with customers “to the greatest extent practicable.” [See **Exhibit 6**, Requirements for Office-Based Businesses, at 1]. He has not imposed time limitations that prohibit employees from working together in the same workspace for more than 4, 6, 8, or even 10 hours at a time. Instead, he asks “office-based businesses” to abide by simple social-distancing rules and a capacity limit.

97. Governor Beshear also issued an order allowing venues and event spaces to continue operating with up to “25 people per room”—which is more than many classrooms. The order does not impose a time limit on how long people can

gather in a venue or event space. So long as this basic capacity limitation is adhered to, and people follow generally applicable social-distancing and hygiene requirements, they are free to gather in public spaces of no more than 25 people per room.

98. Gyms also are free to continue operating, so long as they limit capacity to 33 percent of their occupancy limits. *See id.* That means Kentuckians are allowed to run on treadmills, lift weights, or do pilates six feet apart, for unlimited durations, but they cannot sit in a classroom with the same amount of space between them.

99. The list continues: if the Governor's Order is allowed to take effect, on November 23 in Kentucky, one will be free to crowd into retail stores, go bowling with friends, attend horse shows, go to the movies, attend concerts, tour a distillery, or get a manicure or massage or tattoo. Although there are limits and restrictions that govern how these in-person activities must operate, the Governor has not prohibited them. Yet, starting on November 23, no one in Kentucky is permitted to attend in-person school, even when religious education is a deep and sincere facet of one's faith, and even when those operating religious schools are abiding by strict social distancing and hygiene standards.

100. Governor Beshear's orders are arbitrary and underinclusive toward secular conduct that creates the same potential risk as the prohibited religious activity.

101. Governor Beshear's orders do not give religious schools the same opportunities to continue operating as secular establishments like event venues and theaters.

102. Governor Beshear's actions are not narrowly tailored to the interest that he intends to advance.

103. Governor Beshear's actions burden religious exercise, and they do so in an undue manner.

104. The restrictions on private religious schools in Executive Order 2020-969 cannot satisfy strict scrutiny.

105. Governor Beshear's actions violate the First Amendment Free Exercise rights of Kentuckians, including, but not limited to, Danville Christian.

106. On behalf of Kentuckians and the Commonwealth as a whole, Attorney General Cameron asks the Court to declare unlawful 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 that unconstitutional restriction on religious activity.

107. Danville Christian asks the Court to declare unlawful 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 Danville Christian.

108. Danville Christian and the citizens of the Commonwealth will suffer irreparable injury if Executive Order 2020-969 is enforced against religious entities.

COUNT II
Violation of Section 1 and Section 5 of the Kentucky Constitution

109. The allegations in each of the foregoing paragraphs are incorporated as if fully set forth herein.

110. Section 1 of the Kentucky Constitution provides that everyone has the “certain inherent inalienable right[] . . . of worshipping Almighty God according to the dictates of their consciences.”

111. Section 5 of the Kentucky Constitution provides that “the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching,” and that “[n]o human authority shall, in any case whatever, control or interfere with the rights of conscience.”

112. These two provisions protect the right to the free exercise of religion in the same manner as the First Amendment to the United States Constitution. *See Gingerich v. Commonwealth*, 382 S.W.3d 835, 839 (Ky. 2012).

113. Thus, because Governor Beshear’s executive orders target religious activity for disfavored treatment and are not narrowly tailored to meet the state’s interest, the orders unconstitutionally infringe on Kentuckians’ rights under Sections 1 and 5 of the Kentucky Constitution.

114. On behalf of Kentuckians and the Commonwealth as a whole, Attorney General Cameron asks the Court to declare that Sections 1 and 5 of the Kentucky Constitution are violated by 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 unconstitutional restriction on religious activity.

115. Danville Christian asks the Court to declare that Sections 1 and 5 of the Kentucky Constitution are violated by 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 Danville Christian.

116. Danville Christian and the citizens of the Commonwealth will suffer irreparable injury if Executive Order 2020-969 is enforced against religious entities.

COUNT III

Violation of religious entities' First Amendment right to religious autonomy

117. The allegations in each of the foregoing paragraphs are incorporated as if fully set forth herein.

118. Governor Beshear's executive order impermissibly infringes on the autonomy of religious institutions and churches in violation of the First Amendment.

119. The Governor, consistent with the First Amendment, cannot tell religious institutions and churches that they *can* hold in-person worship services but *cannot* hold in-person schooling.

120. Yet, that is exactly what the Governor's executive order does.

121. It accordingly cannot stand under the First Amendment.

122. Governor Beshear's November 18 executive order bans in-person schooling at all private, religious schools starting on Monday, November 23, 2020.

123. At the same time, however, Governor Beshear has specifically permitted in-person worship services to continue.

124. 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."

125. Thus, viewing the Governor's two executive orders together, he has prohibited all in-person religious schooling while simultaneously allowing in-person worship services to continue. This he cannot do.

126. Just this year, the United States Supreme Court held, by a 7–2 vote, 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).

127. If religious institutions get to decide for themselves who teaches their children about religious faith, as *Our Lady of Guadalupe* holds, it follows that

religious institutions get to decide in the first instance whether to provide religious schooling.

128. The government can no more tell religious institutions not to provide religious schooling than it can tell them to employ certain people to accomplish this mission. Each is “essential to the institution’s central mission.” *See id.* at 2060.

129. Governor Beshear’s executive orders tell religious institutions and churches that they cannot open their doors to schoolchildren, and it does so in an especially pernicious way. 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]” onto the “autonomy” of churches and religious institutions.

130. As noted above, the Governor’s top lawyer acknowledges that Governor Beshear is dictating what services religious institutions can and cannot provide. According to the Governor’s General Counsel, in-person schooling is off-limits, but in-person “religious instruction as part of its services—for example, Sunday School or [B]ible study” is permissible.

131. This divvying up of religious services as legal and illegal by Governor Beshear irretrievably intrudes on religious institutions’ “autonomy,” and it cannot satisfy strict scrutiny.

132. On behalf of Kentuckians and the Commonwealth as a whole, Attorney General Cameron asks the Court to declare that Executive Order 2020-969 violates religious entities' First Amendment right to religious autonomy, and to enjoin Governor Beshear from further enforcement of that order against religious entities.

133. Danville Christian, as a religious entity, asks the Court to declare that Executive Order 2020-969 violates its First Amendment right to religious autonomy, and to enjoin Governor Beshear from further enforcement of that order against Danville Christian.

134. Danville Christian and the citizens of the Commonwealth will suffer irreparable injury if Executive Order 2020-969 is enforced against religious entities.

COUNT IV
**Violation of the Establishment Clause of the First Amendment to the
United States Constitution**

135. The allegations in each of the foregoing paragraphs are incorporated as if fully set forth herein.

136. The Establishment Clause demands neutrality by the government toward religious groups. *See Larsen v. Valentine*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”).

137. The Governor’s executive order violates this core principle by favoring religious organizations that provide in-person worship services over those that provide in-person schooling.

138. Governor Beshear’s executive orders permit all manner of in-person worship to continue—Sunday services, Sunday school, Bible studies, and Wednesday night services. A religious organization that wishes to provide these services can continue doing so.

139. However, if the religious organization desires to open its doors to schoolchildren, it is forbidden.

140. The Establishment Clause prohibits Governor Beshear from favoring some religious organizations—those that only offer in-person worship services—and disfavoring other religious organizations—those that offer in-person schooling.

141. Neutrality toward religious organizations is the standard, and the Governor’s executive order are anything but neutral.

142. On behalf of Kentuckians and the Commonwealth as a whole, Attorney General Cameron asks the Court to declare that Executive Order 2020-969 violates the Establishment Clause of the First Amendment, and to enjoin Governor Beshear from further enforcement of that order against religious entities.

143. Danville Christian asks the Court to declare that Executive Order 2020-969 violates the Establishment Clause, and to enjoin Governor Beshear from further enforcement of that order against Danville Christian.

144. Danville Christian and the citizens of the Commonwealth will suffer irreparable injury if Executive Order 2020-969 is enforced against religious entities.

COUNT V
Violation of the Kentucky Religious Freedom Restoration Act

145. The allegations in each of the foregoing paragraphs are incorporated as if fully set forth herein.

146. Kentucky’s Religious Freedom Restoration Act (“RFRA”) is clear: “Government shall not substantially burden a person’s freedom of religion.” KRS 446.350.

147. A “burden” is defined to include even “indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.” *Id.*

148. As with the strict scrutiny analysis in the constitutional context above, to survive under RFRA the government must show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases.

149. There is no question that the Governor’s executive order bars “access” to religious facilities—the Governor has, after all, ordered that no children may attend in-person instruction. Executive Order 2020-969 (“All public and private elementary, middle, and high schools (kindergarten through grade 12) shall cease in-person instruction.”).

150. There is, likewise, no question that the Governor’s order has imposed penalties.

151. In an e-mail dated November 19, 2020, the Commissioner of the Department Education has ominously warned that “[c]ertified school employees . . .

may be subject to disciplinary action by the Education Professional Standards Board (EPSB) for violation of the Professional Code of Ethics” and that “KRS 156.132 provides for the removal or suspension of public school officers, including local board members, for immorality, misconduct in office, incompetence, willful neglect of duty or nonfeasance.”

152. Thus, the Beshear administration has threatened to revoke the certifications for school employees that do “not follow the Governor’s order.”

153. These actions infringe upon religious freedom.

154. The Governor cannot prove “by clear and convincing evidence that [he] has a compelling governmental interest in” such infringement, nor can he prove by clear and convincing evidence that he has used the “least restrictive means to further that interest.” KRS 446.350.

155. On behalf of Kentuckians and the Commonwealth as a whole, Attorney General Cameron asks the Court to declare that the portions of Executive Order 2020-969 that restrict religious activity violate the Kentucky Religious Freedom Restoration Act, and to enjoin Governor Beshear from further enforcement of that order in ways that would violate the Kentucky Religious Freedom Restoration Act.

156. Danville Christian asks the Court to declare that Executive Order 2020-969 violates its rights under the Kentucky Religious Freedom Restoration Act, and to enjoin Governor Beshear from further enforcement of that order against Danville Christian.

157. Danville Christian and the citizens of the Commonwealth will suffer irreparable injury if Executive Order 2020-969 is enforced against religious entities.

PRAYER FOR RELIEF

WHEREFORE, Danville Christian requests the following relief on behalf of itself, and Attorney General Daniel Cameron requests the following relief on behalf of the Commonwealth of Kentucky:

A. A declaration that Executive Order 2020-969, as applied to in-person instruction at Danville Christian Academy and other religious institutions, violates: the Free Exercise and Establishment Clauses of the First Amendment; the right under the First Amendment for religious entities to exercise autonomy over their religious worship and services; the rights guaranteed by Sections 1 and 5 of the Kentucky Constitution; and the rights protected by the Kentucky Religious Freedom Restoration Act;

B. A temporary restraining order, preliminary injunction, and permanent injunction prohibiting Governor Beshear and any of his officers, agents, servants, employees, attorneys, and other persons who are in active concert or participation with him, from enforcing Executive Order 2020-969 against Danville Christian Academy and any other religious entity.

C. Any other relief in law or equity to which the Commonwealth of Kentucky *ex rel.* Attorney General Cameron and Danville Christian might be entitled.

Respectfully submitted by,

DANIEL CAMERON
Attorney General of Kentucky

Danville Christian Academy

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Counsel for the Commonwealth

Counsel for Danville Christian Academy
*(*pro hac vice application forthcoming)*

DECLARATIONS

On behalf of Danville Christian Academy, Inc., pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing paragraphs no. 56 to 88 are true and correct.

Executed on November 20, 2020

/s/ James S. Ward II (with permission)
James S. Ward II

On behalf of the Commonwealth of Kentucky, pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 20, 2020

/s/ Victor B. Maddox
Victor B. Maddox