

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
CENTRAL DIVISION  
FRANKFORT  
*Electronically Filed*

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<p>DANVILLE CHRISTIAN ACADEMY, INC., <i>et al.</i>,</p> <p><i>Plaintiffs,</i></p> <p>v.</p> <p>ANDREW BESHEAR, in his official capacity as Governor of Kentucky,</p> <p><i>Defendant.</i></p>	<p>Civil Action No. 20-CV-00075</p> <p>Judge Gregory F. Van Tatenhove</p> <p><i>AMICUS CURIAE</i> BRIEF OF THE PARENTS OF RELIGIOUS SCHOOL STUDENTS <u>IN SUPPORT OF PLAINTIFFS</u></p>
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INTRODUCTION<sup>1</sup>

*Amicus Curiae* writes to apprise the Court of how Executive Order 2020-969 (“EO”) violates the religious rights of the parents of religious school students. While the EO explicitly violates Plaintiff Danville Christian Academy’s right to the free exercise of religion, it also violates the free exercise rights of parents that send their children to religious schools as part of the children’s religious training.

INTEREST OF AMICUS CURIAE<sup>2 3</sup>

*Amicus Curiae*, parents of Kentucky religious school students (“Parents”), have sincerely held religious beliefs and a compelling interest in the religious upbringing of their children.

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<sup>1</sup> No other party’s counsel authored this brief in whole or in part, nor did any person make a financial contribution intended to fund the preparation or submission of this brief.

<sup>2</sup> *Amicus Curiae* are an unaffiliated group of individuals that are parents of religious school students. The parents are listed in Appendix A.

<sup>3</sup> Undersigned counsel only represents himself in this matter. The parents listed in Appendix A are using this brief as a vehicle to express their support for Plaintiffs, just as many individuals and organizations do in ordinary *amicus* practice at U.S. Circuit Courts and the U.S. Supreme Court.

Consequently, Parents enrolled their children in religious schools to add to the children’s religious training. The EO prohibits children from attending religious schools. Accordingly, the EO places a substantial burden on the Parents’ religious freedom by prohibiting training in sincerely held religious beliefs for their children at religious schools when least restrictive means are available. Therefore, the EO violates the Parents’ religious rights as protected by the Free Exercise Clause of the First Amendment and the Kentucky Religious Freedom Restoration Act (“Kentucky RFRA”).

## ARGUMENT

### **I. Parents Have a Constitutional Right to Send Their Children to Religious Schools**

Parents of religious school students have the same First Amendment rights as the schools that the children attend. Danville Christian Academy seeks a temporary restraining order and injunctive relief against Governor Andrew Beshear because Executive Order 2020-969 violates its First Amendment rights. The Parents support the Plaintiffs’ claims against the Governor because the EO “burdens not only religious schools but also the families whose children attend” them. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020).

“Religious education is vital to many faiths practiced in the United States.” *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020). “[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.” *Id.* This is true “with a wide array of faith traditions.” *Id.* at 2065-66. *See also id.* (discussing the importance of religious schools for Catholic, Protestant, Jewish, Muslim, Mormon, and Seventh-day Adventist communities). Accordingly, the religious training children receive at religious schools is just as important as the religious training children receive at their religious worship services and homes.

For this reason, parents have a First Amendment right to educate their children at religious schools. *Espinoza*, 140 S. Ct. at 2261. This “enduring American tradition,” created by the Free Exercise Clause, gives parents the right “to direct the religious upbringing of their children,” “by sending [them] to religious schools.” *Id.* (internal quotation marks and citation omitted). Because closing religious schools is tantamount to prohibiting attendance at religious schools, the EO is the functional equivalent of prohibiting attendance at religious worship services. Therefore, the EO violates Parents’ religious freedom rights.

## **II. The Governor’s Executive Order Violates Parents’ Religious Rights**

Executive Order 2020-969 unlawfully violates Parents’ religious freedom rights. The Governor’s order has a religiously neutral veneer, but it actually places a substantial burden on Parents’ right to act on sincerely held religious beliefs to send their children to religious schools for religious training and does not use the least restrict means to further the Commonwealth’s public health interests.

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that “under the First Amendment, neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694 (2014) (internal quotation marks and citation omitted). *See also Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020). But in response to *Smith*, Congress and the states enacted Religious Freedom Restoration Acts to strengthen Americans’ religious freedom rights. *See Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 612-13 (6th Cir. 2020).

Kentucky RFRA was designed “to provide more protection for religious liberties at the state level than the U.S. Constitution provides at the national level.” *Id.* at 612. Indeed, “the purpose of the Kentucky RFRA is to provide more protection than the free-exercise guarantee of

the First Amendment, as interpreted by [*Smith*],” and impose “strict scrutiny on laws that burden sincerely motivated religious practices.” *Id.* at 612-13.

Under the Kentucky RFRA, “‘Government shall not substantially burden’ a person’s ‘right to act . . . in a manner motivated by a sincerely held religious belief,’ it guarantees, ‘unless the government proves by clear and convincing evidence’ that it ‘has used the least restrictive means’ to further ‘a compelling governmental interest in infringing the specific act.’” *Id.* at 612 (quoting KRS 446.350).

Here, “[t]he Governor’s actions substantially burden [Parents’] sincerely held religious practices—and plainly so. Religion motivates” the Parents’ decision to send their children to religious schools, *id.* at 613, and it is not for courts to judge “how individuals comply with their own faith as they see it.” *Roberts*, 958 F.3d at 416. “At the same time, the Governor has a compelling interest in preventing the spread of a novel, highly contagious, sometimes fatal virus. All accept these conclusions.” *Maryville Baptist Church*, 957 F.3d at 613. Accordingly, this case “turns on whether Governor Beshear’s orders were ‘the least restrictive means’ of achieving these public health interests. That’s a difficult hill to climb, and it was never meant to be anything less.” *Id.* (quoting KRS 446.350). And once again, the Governor fails to summit.

During the pandemic, government officials have threatened the religious freedom of Kentuckians. But religious Kentuckians have persevered because the government repeatedly fails to use the least restrictive means of achieving its public health goals. *See Maryville Baptist Church*, 957 F.3d at 616 (a ban on religious services was unlawful because drive-in services were available); *Roberts*, 958 F.3d at 414-15 (a ban on religious services was unlawful when the church and its congregants agreed to abide by the same public health guidelines required at secular activities); *Tabernacle Baptist Church v. Beshear*, 459 F. Supp. 3d 847 (E.D. Ky. 2020) (same);

*On Fire Christian Center v. Fischer*, 453 F. Supp. 3d 901 (W.D. Ky. 2020) (a ban on drive-in worship services was not the least restrictive means to advance public health interests). And Plaintiffs should persevere here as well because there are less restrictive means to achieve the Governor's public health goals without closing religious schools.

Ironically, the Governor's recent executive orders are admissions that there are less restrictive means to accomplish his public health goals without substantially burdening Danville Christian Academy's and Parents' sincerely held religious practices. The EO exempts preschools, colleges, and trade schools from closing without explanation of how the pandemic is less threatening at these educational institutions than at elementary, middle, and high schools. *See* EO. Apparently, there are hygiene practices employed at these exempt schools that Plaintiffs can employ to remain open. But if not, religious schools can use the same techniques that are allowing secular activities to continue under Executive Order 2020-968 at indoor facilities that allow no more than 25 people per room.

Indeed, Executive Order 2020-968 § 7 allows secular “[i]ndoor venues, event spaces, and theaters” to have “25 people per room,” and allows religious worship services to exceed the 25 person limit as long as congregants adhere to the same public health guidelines required at secular activities. Like secular venues, religious schools can limit occupancy in their facilities to 25 people per classroom and maintain public health standards. Indeed, medical professionals, researchers, medical reporters, and commentators agree that the healthiest place for children to be is in school. This group of people includes the Director for the Centers for Disease Control,<sup>4</sup> *i.e.*, the medial

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<sup>4</sup> *See* Centers for Disease Control Director explain that data supports face-to-face learning in schools, Nov. 19, 2020, available at <https://www.c-span.org/video/?c4924557/cdc-director-redfield-data-supports-face-face-learning-schools> (last visited November 22, 2020); Centers for Disease Control Statement, *The Importance of Reopening America's Schools this Fall*, July 25,

authority the Governor cites for his executive orders, physicians with the American Academy of Pediatrics,<sup>5</sup> researchers at Brown University,<sup>6</sup> Stanford University,<sup>7</sup> and the American Enterprise Institute,<sup>8</sup> as well as medical reporters and commentators at *The New York Times*<sup>9</sup> and *Washington Post*.<sup>10</sup> Therefore, if it is permissible for 25 people to be in a room that exposes them to an average or high health risk for an indefinite period of time, then it should be permissible—or even

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2020, available at <https://www.kentuckytoday.com/stories/the-importance-of-reopening-america-schools-in-fall,27073> (last visited November 22, 2020).

<sup>5</sup> See American Academy of Pediatrics, *COVID-19 Planning Considerations: Guidance for School Re-entry*, Aug., 19, 2020, available at <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/> (last visited November 22, 2020).

<sup>6</sup> See Emily Oster, *Schools are not spreading covid-19. This new data makes the case.*, Wash. Post, Nov. 20, 2020, available at <https://www.washingtonpost.com/opinions/2020/11/20/covid-19-schools-data-reopening-safety/?arc404=true> (last visited November 22, 2020); Brown University, *Prof. Emily Oster Develops COVID-19 Dashboard to Track Cases in Schools*, Sept. 24, 2020, available at <https://economics.brown.edu/announcements/prof-emily-oster-develops-covid-19-dashboard-track-cases-schools> (last visited November 22, 2020).

<sup>7</sup> See David R. Henerson and Ryan Sullivan, *End the School Shutdown*, Wall St. J., Oct. 20, 2020, available at <https://www.wsj.com/articles/end-the-school-shutdown-11603235888> (last visited November 22, 2020).

<sup>8</sup> See Frederick M. Hess and Matthew Rice, *The Real-World Cost of Remote Learning*, Nov. 20, 2020, available at <https://www.nationalreview.com/2020/11/the-real-world-cost-of-remote-learning/> (last visited November 22, 2020).

<sup>9</sup> See Apoorva Mandavilli, *Schoolchildren Seem Unlikely to Fuel Coronavirus Surges*, *Scientists Say*, New York Times, updated Nov. 11 2020, available at <https://www.nytimes.com/2020/10/22/health/coronavirus-schools-children.html> (last visited November 22, 2020); The Editorial Board, *Keep Schools Open*, New York, New York Times, Nov. 11, 2020, available at <https://www.nytimes.com/2020/11/11/opinion/coronavirus-nyc-indoor-dining.html> (last visited November 22, 2020); Aaron E. Carroll, *Are We Seriously Talking About Closing Schools Again?*, New York Times, Nov. 17, 2020, available at <https://www.nytimes.com/2020/11/17/opinion/schools-closing-covid.html> (last visited November 22, 2020).

<sup>10</sup> Laura Meckler and Valerie Strauss, *Back to school: Many large districts are opening their doors again*, Wash. Post, Oct. 19, 2020, available at [https://www.washingtonpost.com/education/school-districts-reopening-coronavirus/2020/10/19/3791c952-0ffb-11eb-8074-0e943a91bf08\\_story.html](https://www.washingtonpost.com/education/school-districts-reopening-coronavirus/2020/10/19/3791c952-0ffb-11eb-8074-0e943a91bf08_story.html) (last visited November 22, 2020); Helaine Olen, *It's past time for schools to reopen*, Wash. Post, Oct. 8, 2020, available at <https://www.washingtonpost.com/opinions/2020/10/08/its-past-time-schools-reopen/> (last visited November 22, 2020).

encouraged—for 25 students to be in a classroom at a religious school, which presents a low health risk. Accordingly, a 25 student per classroom capacity is a less restrictive means to achieve the Governor’s public health goals.

And because attendance at a religious school is the functional equivalent of attendance at a religious worship service, *see Espinoza*, 140 S. Ct. at 2261, students should be allowed to attend their religious schools. If attendance at a religious worship service is permissible under the Governor’s orders, then attendance at religious schools for religious training should be too. Otherwise, the Governor will be allowed to dictate which religious practices are permitted and which ones are not.

Through his most recent executive orders, the Governor has shown there are less restrictive means to accomplish his public health goals without severely burdening Plaintiffs’ and Parents’ sincerely held religious beliefs and practices. Consequently, the Governor cannot meet his evidentiary burden to sustain the EO under Kentucky RFRA and Plaintiffs have demonstrated a high likelihood of success on the merits of their claims. Therefore, Plaintiffs’ motion should be granted, and a permanent injunction issued against the Governor to stop the irreparable harm being inflicted on Plaintiffs and Parents.

#### CONCLUSION

Plaintiffs’ Motion for a Temporary Restraining Order should be granted, and a permanent injunction issued against Executive Order 2020-969 as it is applied to religious schools.

Respectfully submitted,

/s/ Ryan Morrison

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Dated: November 23, 2020

CERTIFICATE OF SERVICE

I certify that on November 23, 2020, I electronically filed the foregoing with the Clerk of the Court and served counsel of record through the court's CM/ECF system.

/s/ Ryan Morrison

Ryan Morrison