IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MONCLOVA CHRISTIAN ACADEMY, et al.,	*	Case No. 2020-4300
	*	On appeal from the United States District Court of the
Plaintiffs-Appellants,		Northern District of Ohio
	*	
vs.		DEFENDANT TOLEDO-LUCAS
	*	COUNTY HEALTH DEPARTMENT'S MEMORANDUM OPPOSING
	*	APPELLANTS' EMERGENCY MOTION
TOLEDO-LUCAS COUNTY HEALTH DEPARTMENT,	*	FOR PRELIMINARY INJUNCTION
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I. Introduction.

Plaintiffs-Appellants Monclova Christian Academy, St. John Jesuit High School and Academy, Emmanuel Christian School, and the Ohio Christian Education Network (OCEN) filed a civil rights, injunctive relief, and declaratory judgment action against the Toledo-Lucas County Health Department. See, *Verified Complaint for Declaratory and Injunctive Relief*, *R.E.* #1 United States District Court Case No. 3:20CV-2720 (Dec. 7, 2020). They

asked the District Court for a temporary restraining order (TRO) enjoining enforcement of a school-closing order issued by the Health Department (on November 25 and then again, as amended with no substantive changes, on December 3, 2020–see Exhibit No. 3--attached to the *Verified Complaint*).[1] They sought the TRO on the ground that the order violated their rights under the *First* and *Fourteenth Amendments, United States Constitution*. *Motion for Temporary Restraining Order*, R.E. #2 Case No. 3:20CV-3720 (Dec. 7, 2020). Appellants argued that the school-closing order improperly discriminated against their religious educational freedom rights, even though the order applies to all schools--public, private, and parochial grades 7-12 (or grades 9-12 depending on school configuration) located in Lucas County, Ohio, applies for a limited time (from December 4, 2020 to January 11, 2021 including a two-week Christmas break), and contains an exemption for "religious educational classes or religious ceremonies." See, Exhibit 3, *Verified Complaint,* Case No. 3:20CV-2720.

The District Court denied the motion for TRO based upon precedent from this Court-- *Commonwealth of Kentucky ex rel. Danville Christian Academy, Inc, v. Beshear,* – F3d – Sixth Circuit Court of Appeals Case No. 20-6341 (Nov. 29, 2020) 2020 U.S. App. LEXIS 37413 and the United States Supreme Court--*Roman Catholic Diocese of New York v. Andrew Cuomo, Governor of New York*, 141 S. Ct. 63 (2020). See, *Memorandum Opinion and Order, R.E*. #9 Case No. 3:20CV-2720 (Dec. 14, 2020). Indeed, in *Danville Christian Academy,* this Court granted the Commonwealth of Kentucky's motion and stayed

[1] The Resolution was amended on December 3 to make explicit what was implicit in the November 25 Resolution–that the school-closing order was an "emergency measure" enacted under *Ohio Revised Code* §3709.21 and could "become effective immediately" without the "advertising, recording, and certifying" procedures usually required for Health Department Resolutions and Orders.

enforcement of a District Court's TRO which sought the same relief that appellants now seek, stating: "We are not in a position to second-guess the Governor's determination regarding the health and safety of the Commonwealth at this point in time." *Danville Christian Academy*, p. 6. Upon appellants' request, the District Court granted their motion to convert their TRO request into one for a preliminary injunction so that the District Court's denial of their request for TRO could be appealed to this Court. *Judgment Entry, R.E.* #12 Case No. 3:20CV-2720 (Dec. 16, 2020).

Appellants filed their notice of appeal on December 16, 2020, and amended that notice two days later. Now, twelve days after filing their notice of appeal, they have filed an "emergency" motion again seeking the injunctive relief that they were denied in the District Court. *Emergency Motion for Preliminary Injunction Pending Appeal*, United States Court of Appeals Case No. 2020-4300 (Dec. 28, 2020). Counsel for appellants laments that the emergency motion is brought with "a great measure of reluctance, even sadness." *Id.*, p 1. Quite frankly, that makes two of us, given that their motion here has as much merit as the one they filed in the District Court. As will be established below, the District Court properly found that the Health Department's school-closing order was constitutional, as such, it properly found that appellants did not have a likelihood of success on the merits of their *First/Fourteenth Amendment* religious freedom claims, and it properly denied them injunctive relief.

II. Law and Argument.

A. Standard of Review for a Request for Preliminary Injunction.

A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it.

Coal. to Defend Affirmative Action v. Granholm, 473 F.3d 237, 244 (6th Cir. 2006). A district court is to balance four factors in determining whether to grant such relief. These factors are:

> "(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."

Overstreet v. *Lexington-Fayette Urban Cnty. Gov't,* 305 F.3d 566, 572 (6th Cir. 2002).

However, where an injunction is sought in a case involving constitutional rights, such cases "often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors." *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020); *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014). Appellants, as the moving parties, have the burden of showing they are entitled to injunctive relief. *Granholm, supra; Overstreet, supra.*

As stated by this Court:

> "Whether the movant is likely to succeed on the merits is a question of law we review de novo. . . . We review 'for abuse of discretion, however, the district court's ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denying preliminary injunctive relief.' . . . This standard is deferential, but the court may reverse the district court if it improperly applied the governing law, used an erroneous legal standard, or relied upon clearly erroneous findings of fact."

Schimmel, 751 F.3d at 430. The Health Department submits that the District Court got it right–that appellants did not demonstrate a likelihood of success on the merits of their *First/Fourteenth Amendment* claims. Consequently, the District Court did not abuse its considerable discretion in denying appellants' request for either a TRO or a preliminary injunction and its decision should be affirmed here by denying appellants' second request

for injunctive relief.

B. The District Court properly denied appellants's claims for injunctive relief.

The Health Department submits that the District Court's *Memorandum Opinion and Order* more than adequately addresses the applicable constitutional law issues and the reasons for denying appellants' request for a TRO or preliminary injunction--in particular, the Court's background statement of facts (pp. 2-5) and its detailed analysis of the religious freedom claims at issue here (pp. 7-12). Consequently, the Health Department adopts those sections of the District Court's *Memorandum Opinion and Order* as its response in this case.

In addition, the Health Department proffers the following: the parties apparently agree that the *First Amendment* does "not require that religious organizations be treated more favorably than all secular organizations," but it does require that they "be treated equally to the favored or exempt secular organizations, unless the State can sufficiently justify the differentiation." See, State of Ohio's *Amicus Brief in support of Request for Preliminary Injunction*, p. 10 quoting *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting); accord *Roman Catholic Diocese,* 208 L. Ed. 2d at 208–09 (majority op.). Appellants have been treated equally--it is undisputed that the Health Department's school-closing order applies to all secondary schools–public, private, and parochial–located in Lucas County, Ohio. Even so, appellants insist that the school-closing order violates their religious freedom rights under the *First* and *Fourteenth Amendments* because other non-school businesses or entities such as laundromats, offices, liquor stores, or bike shops have been left unregulated by the Health Department. See, *Emergency Motion for Preliminary Injunction Pending Appeal*, pp. 1, 16; See also,

State of Ohio's *Amicus Brief, pp.* 10 ("Whereas gyms and casinos remain open to the public, the Resolution closes schools, including religious schools, for weeks").

This argument reveals a lack of understanding as to how the Ohio General Assembly created and established the manner in which public health is administered in Ohio; first--statewide--via the Ohio Department of Health and then--at the local level--by county/municipal boards of health. As to the public health concerns arising out of the corona-virus pandemic of 2020, ODH, through its Director, has been granted broad statutory authority under *Ohio Revised Code* Chapter 3701, particularly in §3701.13 (ODH "may make special or standing orders or rules . . . for preventing the spread of contagious or infectious diseases") and §3701.14(A) (ODH Director "shall investigate or make inquiry as to the cause of disease or illness, including contagious, infectious, epidemic, pandemic, or endemic conditions, and take prompt action to control and suppress it"). This broad authority has allowed the ODH, through its Director, starting in March of 2020 and continuing to the present, to issue a series of public health orders that, in the tension between protecting public health and protecting individual liberty, could be viewed as infringing on a person's constitutional rights. These public health orders include having divided Ohio businesses into "essential" and "non-essential" categories, placing limitations on the operations of those businesses deemed to be essential, closing those businesses deemed to be non-essential, placing a nighttime curfew on all Ohioans, requiring the wearing of face-masks in public, and, for a time, closing all public, private, and parochial schools in the state. Apparently, neither appellants nor amicus State of Ohio have any problems with that authority and, when this authority was challenged by others, it was held to be constitutional. See, e.g., *Hartman v. Acton*, *Order* United States District Court Case

No. 2:20CV-1952 (S.D. Ohio Apr. 21, 2020).

Regarding the creation/establishment of authority for protecting public health at a local level, the Ohio Attorney General has stated:

> "The State of Ohio is divided into general health districts (consisting of the townships and villages within a county) and city health districts. R.C. 3709.01. The districts may combine in various ways, and combined districts that include one or more general health districts are also known as general health districts. See R.C. 3709.07; R.C. 3709.10; 2000 Op. Atty. Gen. No. 2000-048 at 2-293; 1991 Op. Atty. Gen. No. 91-016. A general health district is a political subdivision separate from the county and also separate from the townships and municipalities whose territory it includes."

See, 2004 Op. Atty. Gen. No. 2004-049 at p. 2.

In general, boards of health and health departments (also known as health districts) have been granted less authority than ODH and its Director to protect public health–a health department's authority regarding its response to the 2020 corona-virus pandemic is set forth in *Ohio Revised Code* Chapter 3707. The parties apparently agree that the Health Department is a combined general health district that provides public health services for all of the cities, villages, and townships within Lucas County and that, under Ohio law, the Health Department, as a creature of statute, has only those powers expressly granted by statute and such other powers as are necessarily implied thereby. *Browning-Ferris Indus. of Ohio, Inc. v. Mahoning County Bd. of Health*, 69 Ohio App. 3d 96, 590 N.E.2d 61 (Franklin County 1990); see also, *Wetterer v. Hamilton County Bd. of Health*, 167 Ohio St. 127, 146 N.E.2d 846 (1957); *Mack v. City of Toledo*, 6th Dist. Lucas No. L-19-1010, 2019-Ohio-5427 ¶38.

In that regard, a board of health has been given statutory authority regarding those persons who have, or have been exposed to, the 2020 corona-virus. It can quarantine or

isolate those persons (*Ohio Revised Code* §3709.08), hire quarantine guards to keep those persons quarantined and isolated (*Ohio Revised Code* §3707.09), disinfect a house where there has been a contagious disease (*Ohio Revised Code* §3707.10), destroy infected property (*Ohio Revised Code* §3707.12), prohibit those persons diagnosed with or exposed to corona-virus from attending public gatherings (*Ohio Revised Code* §3707.16), and dispose of the bodies of those who died from corona-virus *(Ohio Revised Code* §3707.19).

However, other than for those persons diagnosed with, or exposed to, the 2020 corona-virus, the Health Department's public health authority is more modest. It does not possess the broad authority to regulate individuals and businesses that was given to ODH in *Ohio Revised Code* §3701.13-14. However, the Ohio General Assembly did expressly equip the Health Department with certain public health authority regarding schools in *Ohio Revised Code* §3707.26 and that is the section it relied upon in enacting its school-closing order. Section 3707.26 states:

> "Semiannually, and more often, if in its judgment necessary, the board of health of a city or general health district shall inspect the sanitary condition of all schools and school buildings within its jurisdiction, and may disinfect any school building. During an epidemic or threatened epidemic, or when a dangerous communicable disease is unusually prevalent, the board may close any school and prohibit public gatherings for such time as is necessary."

As a result, the Health Department has been granted the express authority to close schools in times of "epidemic," threatened epidemic," or "when a dangerous communicable disease is unusually prevalent." Thus, it has been given the statutory authority to close all schools in Lucas County, to mandate remote learning, and to prevent any public gatherings in those closed schools (whether those gatherings are extra-curricular school activities or other public or private events held on school grounds). However, the Health Department does

not have similar statutory authority to close or otherwise regulate other businesses or entities within Lucas County. Neither appellants nor amicus the State of Ohio have cited to any section of the *Ohio Revised Code* that grants it such authority. Thus, the contention that the Health Department has closed all religious schools (and public schools as well) while ignoring and thus, impliedly favoring, in an unconstitutional manner, Lucas County restaurants, bars, and even the Hollywood Casino, is without merit. See, *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 261, 773 N.E.2d 536 (2002)(rejecting the Health Department's argument that it had the power, absent express statutory authority, to prohibit smoking in Lucas County); *Mack, supra* ¶91(*Ohio Revised Code* §3709.281 is the authority necessary for a city and the Health Department to enter into an agreement for the Health Department to enforce the city's lead-paint ordinance).

In this case, given the public health knowledge it collectively possessed, the Health Department had concerns that corona-virus cases would spike in Lucas County following the Thanksgiving and Christmas holidays. To protect public health, the Health Department, using the statutory authority granted it under §3707.26, closed all schools, public, private, and parochial in Lucas County for a brief period (five weeks--but really three weeks--given that the schools would be closed for Christmas vacation) to address that predicted corona-virus spike. Its response was a measured one in that it closed Lucas County secondary schools but kept the elementary schools open. Its reasons for closing the schools in the manner that it did are clearly expressed in the November and December Orders and, as this Court stated in *Danville Christian Academy,* its public health decision should not be second-guessed here. Further, the Health Department did not denigrate appellants religious freedom rights; instead, it recognized them when it added a religious exception

to its school-closing order–an exception not present in the school-closing order this Court found constitutional in *Danville Christian Academy*.

Relevant authority from this Court exists on the religious freedom issues raised in this case. See, *Commonwealth of Kentucky ex rel. Danville Christian Academy, Inc, v. Beshear, supra.* In *Danville Christian Academy*, the Governor of the Commonwealth of Kentucky issued a school-closing order for all schools located in the Commonwealth (an order that is more restrictive than that issued by the Health Department in this case) and the United States District Court for the Eastern District of Kentucky enjoined its operation holding that the Governor's order violated the plaintiffs' religious freedom rights. However, this Court granted the Governor's motion to stay enforcement of the District Court's injunction holding that plaintiffs were not likely to succeed on the merits of their case because it would rule that the school-closing order was "neutral and of general applicability" as it applied to all public and private elementary and secondary schools in Kentucky, religious or otherwise. *Id.* The Health Department submits that *Danville Christian Academy* is relevant authority and it should control the Court's decision in this case. Note–the *Danville Christian Academy* plaintiffs asked the United States Supreme Court to intervene (United States Supreme Court Case No. 20A96) but it did not do so and the stay issued by this Court in *Danville Christian Academy* still exists.

Further, *Pleasant Valley Baptist Church v. & Lynne M. Sadler*, Case No. 2:20CV-00166 (E. D. Ky. Dec. 11, 2020) 2020 U.S. Dist. LEXIS 23326, also supports the Health Department's position. In *Pleasant Valley Baptist Church*, the same District Court that granted the preliminary injunction at issue in *Danville Christian Academy* recognized this Court's holding there (that Kentucky's school-closing order satisfied the *First* and

Fourteenth Amendments) and refused to grant injunctive relief for several other Kentucky religious schools stating, "at this juncture, an injunction is not supported given the teaching of the Sixth Circuit." *Pleasant Valley Baptist Church*, Case No. 2:20CV-00166 p. 5. In addition, the District Court rejected plaintiffs' "right to private education" and a "parent's right to control their child's education" arguments. *Pleasant Valley Baptist Church*, Case No. 2:20CV-00166 p. 5.

Finally, appellants have raised an argument not presented below–that the Health Department's school-closing order threatens them with criminal prosecution and the possibility of imprisonment for its violation. Because this argument was not presented in the District Court, appellants have waived it and the Court should reject it. See, *United States v. Universal Management Services,* 191 F.3d 750, 759 (6th Cir.1999)(because plaintiffs did not raise the issue below, it "cannot be considered by this court"); *White v. Anchor Motor Freight, Inc.,* 899 F.2d 555, 559 (6th Cir. 1990)("we will not decide issues or claims not litigated in the district court"). Assuming otherwise, the Health Department submits that this argument is also without merit. First, any enforcement of its school-closing order would be civil enforcement given *Ohio Revised Code §*3709.211. Second, the rule of lenity, codified in Ohio pursuant to *Ohio Revised Code* 2901.04, should protect appellants from criminal prosecution (but not civil enforcement) should they choose to disobey it, given that rule and the religious exception included in the Health Department's school-closing order. See, *United States v. Choice*, F.3d 837, 840 (6th Cir. 2000); *State v. Pittman*, 3d Dist Marion No. 9-13-65, 2014-Ohio-5001 *aff'd* 150 Ohio St.3d 115, 79 N.E.3d 531 (2016).

III. CONCLUSION

The District Court properly denied appellants' request for a preliminary injunction.

As a result, the Health Department asks the Court to deny appellants' request for a preliminary injunction on the ground that their request falls short of the standard necessary for such relief under the *First* and *Fourteenth Amendments*.

Respectfully submitted,

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CERTIFICATION

A copy of the foregoing memorandum was sent by the court's electronic filing system to counsel for all parties on the 29th day of December, 2020.

By: /s/ Kevin A. Pituch
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