
**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Case No. 0:2020cv04300**

MONCLOVA CHRISTIAN ACADEMY, *et al.*,

Plaintiffs-Appellants

v.

TOLEDO – LUCAS COUNTY HEALTH DEPARTMENT

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION
No. 3:20-cv-2720

**PLAINTIFFS-APPELLANTS’ EMERGENCY MOTION FOR
PRELIMINARY INJUNCTION PENDING APPEAL**

*“Even if the Constitution has taken a holiday during this pandemic,
it cannot become a sabbatical.”¹*

I. INTRODUCTION.

Appellants, Monclova Christian Academy, St. John’s Jesuit High School & Academy, Emmanuel Christian School, and the Ohio Christian Education Network (collectively, “Appellants”), file this emergency request with a great measure of reluctance, even sadness.

¹ *Roman Catholic Diocese of Brooklyn, New York v. Andrew Cuomo, Governor of New York*, 141 S. Ct. 63 (2020)(GORSUCH, N, concurring: “It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques.”).

They preferred to not hire lawyers to defend their religious freedom, or divert energy away from their higher calling of providing religious instruction for the students and families entrusted to their care. Hoping to avoid the necessity of this filing, Appellants made a number of entreaties to the Toledo-Lucas County Health District (“TLCHD” or “Appellee”), asking it to, minimally, postpone the effective date for enforcement of its unconstitutional order so “thoughtful, reasonable adults [could] put their heads together, to become a statewide model for public/private collaboration” and “avoid the unnecessary expense of litigation while collaborating to fashion a solution that protects public health and private schools.” (Doc. 1-1, PageID #: 28-32; Doc. 1-2, PageID #: 33-35).

Requests for collaboration fell on deaf ears. So, Appellants turned to the courts for help. Unfortunately, the District Court applied *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir.2020) and denied Appellants’ request to preliminarily enjoin enforcement of the Resolution. While Appellants make plenty of arguments in the pages that follow, there’s no need to bury the lede:

- TLCHD’s Resolution is uniquely offensive to the Free Exercise Clause of the First Amendment;
- Despite this Circuit’s decision in *Commonwealth*, TLCHD’s Resolution should be analyzed with “strict scrutiny,” and, because it is not the least restrictive constitutionally-inoffensive means of controlling community spread, it should be struck down;
- Relying upon *Commonwealth*, the District Court applied *Roman Catholic Diocese of Brooklyn v. Cuomo* far too myopically. 141 S.Ct. 63 (2020). The decision reached by the majority in *Diocese of Brooklyn*, along with the rationale delineated in Justice Gorsuch’s concurrence, compel reversal of the District Court’s denial; and
- Appellants more than satisfied the factors demonstrating a preliminary injunction was warranted in the District Court, especially considering this Circuit’s decision in *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir.2020).

A. APPELLANTS REQUEST AN EMERGENCY ORDER.

Against that backdrop, Appellants move this Court for an emergency order granting the Preliminary Injunction denied by the District Court. F.R.A.P. 8(a)(2). Moreover, Appellants respectfully move this Court to prohibit TLCHD from enforcing the Resolution passed on November 25, 2020 (and again on December 3, 2020), which prohibits Christian schools such as Appellants from providing in-person instruction to grades 7-12 (or 9-12 depending on school configuration) or allowing sports programs and extracurricular groups to utilize facilities within a school building from December 4, 2020, at 4:00 p.m. until January 11, 2021, at 8:00 a.m.² (Doc. 1-3, PageID #: 36-38). The District Court's decision violates Appellants' First Amendment rights, namely the right to freely exercise their religion without government intrusion or impairment.

Appellants also move this Circuit to stay enforcement of the District Court's decision, as a litigant may first move for a stay pending appeal where a motion before the District Court would be "impracticable." F.R.A.P. 8(a)(2)(A)(i). In this case, a motion before the District Court would be impracticable given that its decision was issued after the parties briefed the issues. In other words, the District Court appears unlikely to be swayed to stay its own decision; Judge Helmick already indicated the additional time and expense of relitigating arguments was needless when he converted the TRO denial into a Preliminary Injunction denial. (Doc. 11, PageID #: 120). Moreover, review before this Circuit is urgent, because TLCHD's Resolution took effect on December 4, 2020 and does not expire until January 11, 2021.

While the fall semester has ended for Appellants, students are scheduled to resume in-person instruction on January 4, 2021. Beyond the unconstitutional deprivation caused by

² Though occurring during separate meetings, the actions passed by TLCHD on November 25, 2020 and December 3, 2020 are collectively referred to hereinafter as the "Resolution" given the contested decision appears in both.

TLCHD's forced closure this month, Appellants will sustain even more irreparable harm in early January if they are barred from providing: (i) robust religious instruction, beyond TLCHD's narrow understanding of what constitutes "religious instruction;" (ii) purposeful in-person prayer as commanded by Scripture; (iii) life-on-life mentorship as demonstrated in the Gospels; and (iv) personal counsel and support for adolescents who need adult encouragement and ministry now more than ever.

B. THE DISTRICT COURT'S DENIAL SHOULD BE REVERSED.

Isolated from Christian tradition and teaching, the foregoing aims of Appellants may be dismissively categorized by TLCHD and other skeptics as gratuitous, capable of remote replication, or even purely secular endeavors. Extending Appellants' reasoning to a "parade of horrors," which, hypothetically or not, are not reasonably implicated by this set of facts, the District Court offered some inadvertently offensive comparisons when it concluded Appellants' logic could "prohibit the government from regulating any aspect of a Christian's public life." (Doc. 9, PageID #: 111). The unique charter for private Christian schools such as Appellants formed by local church communities was described in Appellants' filing initiating this lawsuit. (*See* Doc. 1, generally).

Notwithstanding those uncontested allegations, the District Court went so far as to equate Appellants' heartfelt convictions with "minimum wage" defiance, even parodying Colossians 3:23 to drive home the point, and "orders closing restaurants" making Christian gatherings more difficult, this time parodying 1 Corinthians 10:31. (Doc. 9, PageID #: 111). The Resolution and the District Court's analysis illustrates, nicely, the dangers of governmental intrusion into matters of sincere religious conviction – both political subdivisions and courts, well-meaning and informed as they might be, are not equipped to provide exegetical insights or probative guidance

for the faithful who order their lives and families by Christian teachings. Just as statutory construction is best handled by trained jurists within the judicial branch, construing the scope and applicability of sacred texts should...and must...remain the exclusive province of faith-based communities abiding by canonical strictures.

C. TLCHD's RESOLUTION HEEDLESSLY INTRUDES APPELLANTS' FIRST AMENDMENT RIGHTS.

While TLCHD might attempt to discount the pervasiveness of Christian teachings/values at Appellants' institutions, this Circuit should note two of the schools in this case were specifically formed as "a ministry" to support the families and believers who call Monclova Road Baptist Church and Emmanuel Baptist Church their church home. (Doc. 1, PageID #: 12 at ¶ 23; PageID #: 18 at ¶ 47). The other school, St. John's Jesuit, was founded by a Roman Catholic order of priests and brothers in the late 1800s. The Jesuit order, mind you, has survived for half a millennium, ever since the soldier-turned-mystic Ignatius Loyola started the Society of Jesus.³ (*Id.*, PageID #: 13 at ¶¶ 35-37). Trite as it might sound to cynics, Christian institutions such as Appellants believe and teach that all Scriptures are "God-breathed" and "useful for teaching, rebuking, correcting and training in righteousness." 2 Timothy 3:16 (New International Version).⁴ Christian institutions such as Appellants, in addition to the many families sending their

³ See <https://www.jesuits.org/about-us/the-jesuits> (last accessed December 23, 2020).

⁴ This foundational belief about Scripture has far-reaching social, educational, spiritual, and philosophical implications for Appellants and other likeminded institutions in the region, which should be great cause for concern with respect to (i) the scope of the Resolution's restrictions, (ii) TLCHD's constitutional capacity to enforce the Resolution and criminally prosecute Appellants, and (iii) the District Court's fitness to opine on the appropriate reach of New Testament Scriptures given the uncontested facts before it.

What's more, this foundational belief means Christians such as Appellants believe the following sacred texts are authoritative and important for this life and the next: Hebrews 10:24-25 ("And let us consider how we may spur one another on toward love and good deeds, not giving up meeting together, as some are in the habit of doing, but encouraging one another—and all the more as you see the Day approaching."); Matthew 18:20 ("For where two or three gather in my name, there am I with them."); Colossians 3:16 ("Let the message of Christ dwell among you richly as you teach and admonish one another with all wisdom through psalms, hymns, and songs from the Spirit, singing to God with gratitude in your hearts."); and 2 Peter 1:5-9 ("For this very reason, make every effort to add to your faith goodness; and to goodness, knowledge; and to knowledge, self-control; and to self-control, perseverance; and to perseverance, godliness; and to godliness, mutual affection; and to mutual affection, love. For if you possess

7th through 12th grade children to their schools, earnestly believe the Bible is truthful and authoritative for their lives and families. Consequently, educational instruction and Christian discipleship (for student and teacher, alike) go hand in hand, even if some Christian schools are more outspoken than others. And as Appellants have explained, even when no explanation should have been required, the provision of faith-based prayerful instruction within a ministry-minded community of believers and students amounts to something far more profound than anything resembling secular instruction – providing such instruction constitutes a form of obedience to Scripture and even worship. (Doc. 1, PageID #: 2-3, 12-13, 14-15, 17-19).

D. GIVEN THE FIRST AMENDMENT’S PROTECTIONS, CHRISTIAN SCHOOLS SHOULD NOT FEAR IMPRISONMENT UNDER SUCH CIRCUMSTANCES.

The constitutional magnitude of this appeal cannot be emphasized enough. TLCHD’s capacity to criminally prosecute Appellants for devotedly serving their faith community and its children should shock the conscience.⁵ Appellants should not be required to comply with the Resolution in light of its numerous constitutional defects. The Resolution plainly requires Christian institutions such as Appellants, facing jail time, to speculate on TLCHD’s unexpressed understanding as to what might constitute “religious educational classes or religious ceremonies” for purposes of using facilities. TLCHD also misses the point of faith-based instruction and educational ministries, entirely, by passing a Resolution containing imbedded expectations that Christian schools such as Appellants will bifurcate, somehow, sacred curricular

these qualities in increasing measure, they will keep you from being ineffective and unproductive in your knowledge of our Lord Jesus Christ. But whoever does not have them is nearsighted and blind, forgetting that they have been cleansed from their past sins.”) (each passage from the New International Version).

⁵ TLCHD passed the Resolution pursuant to R.C. 3707.26. R.C. 3707.46 provides, in relevant part, “No person shall violate sections 3707.01 to 3707.50...or any order or regulation of the board of health of a city or general health district made in pursuance thereof...or interfere with the execution of such order, or willfully...omit to obey such order.” R.C. 3707.99(B) further provides, in relevant part, “Whoever violates...section 3707.48 of the Revised Code is guilty of a minor misdemeanor on a first offense; on each subsequent offense, the person is guilty of a misdemeanor of the fourth degree.” Accordingly, Appellants face up to 30 days in jail, and a \$250 fine, for each violation of the Resolution. *See* R.C. 2929.24; R.C. 2929.28.

objectives/foundations from the secular...or, again, face incarceration. Finally, the Resolution fosters excessive entanglement between TLCHD and Christian schools such as Appellants. Viewing the imminent risk of criminal prosecution, jail time, loss of reputation, or other financial penalties, Christian schools such as Appellants have little option but to anxiously over-self-police First Amendment-protected activities occurring in its facilities. Or, Appellants can become dependent upon TLCHD's advanced sanctioning where a proposed use approaches the ambiguous parameters of impermissible forms of instruction under the Resolution.

Surely this is not what the framers of the Constitution envisioned! Sincere believers and Christian educators, who want nothing more than to improve the lives of their students, should never fear jail time for earnestly living out their convictions.

II. FACTS.

In March of this year, Ohio saw its first confirmed Coronavirus ("Covid-19") case. In response to the onset of the Covid-19 pandemic, Governor Mike DeWine passed an order ordering all Ohio schools to cease in-person instruction beginning on March 16, 2020 and to instead utilize what came to be known as a virtual learning method.⁶

A. SCHOOLS RESUME IN-PERSON INSTRUCTION.

School systems, county health departments, and the CDC developed safety protocols for students and staff to allow the safe and necessary reopening of schools for the 2020-2021 school year, including mandatory mask-wearing, social distancing, strict monitoring of symptoms consistent with Covid-19, increased sanitation, isolation periods for those with known infections

⁶ <https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/announcesschool-closures>

and quarantine periods for those exposed to known infections, and the reporting by school systems of data on the numbers of known infections and those in quarantine.⁷

Although the TLCHD recommended schools begin the 2020-2021 school year in a virtual learning model, the TLCHD gave all schools discretion to continue in-person instruction and to propose and follow individualized plans for educating students while following public health guidelines.⁸

Many schools throughout Lucas County and the State of Ohio resumed with in-person instruction at the beginning of the 2020-2021 school year, including Appellants. In resuming in-person instruction, Plaintiffs worked diligently to provide a safe and healthy environment for their students, faculty, staff and families.

1. MONCLOVA CHRISTIAN ACADEMY.

Monclova Christian is a Christian school providing pre-K through 12th grade classes at its facilities. (Doc. 1, PageID #: 12 at ¶ 22). The mission of Monclova Christian is to provide a Christ-centered education, and, regardless of the activity (instruction or otherwise), Monclova Christian focuses students, staff, and faculty on Christ and their relationship with Him throughout the day. (*Id.* at ¶ 26). Consistent with 1 Thessalonians 5:17 (“pray without ceasing”), prayer is a regular part of Monclova Christian’s school day, whether in classes, chapel services, or interacting with students in the hallways or classrooms. (*Id.*, PageID #: 12-13 at ¶ 27). The Bible is the foundation of Monclova Christian’s curriculum, relationships, and discipleship of its students. *Id.* Throughout each school day and class, Monclova Christian makes every effort to point students to a dependency on Christ in every situation of life, whether that situation is

⁷ See <https://www.dispatch.com/story/news/local/2020/06/29/ohio-school-reopening-guidelineswill-be-flexible-dewine-says/112798046/> (last accessed December 9, 2020).

⁸ See <https://www.toledoblade.com/local/education/2020/08/06/toledo-lucas-county-healthboard-recommends-remote-learning-coronavirus/stories/20200806133> (last accessed December 9, 2020).

intellectual or interpersonal. (*Id.*, PageID #: 13 at ¶ 27). “Educating for Eternity” is a phrase often used at Monclova Christian because the school desires its students to see that their education is intimately connected to their relationship with Christ. *Id.*

2. ST. JOHN’S JESUIT HIGH SCHOOL & ACADEMY.

St. John’s is a Catholic school providing a religious education at its facilities to students in 6th grade through 12th grade. (*Id.*, PageID #: 14 at ¶ 35). *Cura Personalis*, Latin for “care for the entire person,” is a hall mark of St. John’s spirituality and educational philosophy. *Id.* at ¶ 36. The Latin phrase inspires teachers to listen to students and build relationships with them – to guide them in taking responsibility for their learning. *Id.* St. John’s, too, accomplishes this religious calling by educating students with a Christian worldview in a communal in-person environment. *Id.* St. John’s students begin each school day with prayer, receive religious instruction every day for at least one class period. (*Id.*, PageID #: 15 at ¶ 40). Moreover, every day the entire student, faculty and staff population completes an examination of conscience. *Id.* Most class periods begin with prayer or prayer intentions, Catholic social teaching is interwoven into many secular subjects, and a daily theological curriculum is set and varies based on grade level. *Id.* For its students, a Celebration of Mass occurs weekly at St. John’s. *Id.* at ¶ 41. To ensure social distancing, one grade level goes each week and Academy students are spaced out such that 171 students at a time may participate in a socially distant manner. *Id.* All of St. John’s students must demonstrate the practice of the Catholic faith in action by completing service to the community. *Id.* at ¶ 42. This service is completed during and after a school day. *Id.*

3. EMMANUEL CHRISTIAN SCHOOL.

Emmanuel Christian was founded as a Christian school in 1967 as a ministry of Emmanuel Baptist Church. (*Id.*, PageID #: 18 at ¶ 47). For over 50 years, Emmanuel Christian

has provided academic excellence with a biblical foundation for its students. *Id.* It provides education that is unapologetically based on the Bible and instruction that is focused on a biblical worldview in a communal in-person environment. *Id.* Emmanuel Christian's Mission, "The EC Mission," is "To assist the family by providing students with godly, loving training that disciples them to exemplify Christ, make Biblically-based decisions, and attain academic excellence." *Id.* at ¶ 48. At Emmanuel Christian, classes begin with pledges of allegiance to the American flag, the Christian flag, and the Bible. Then, teachers and students share a Bible verse and pray together. *Id.* at ¶ 50. Emmanuel Christian's weekly theological courses occur upon the following schedule:

- 6th Grade Bible A – 1:30-3:00 Monday (M), Wednesday (W), and alternating Fridays (F);
- 6th Grade Bible B – 1:30-3:00 Tuesday (T), Thursday (Th), and alternating Fridays;
- MS Bible A (includes 7th/8th grade students) – 9:51-11:20 M, W, and alternating Fridays;
- MS Bible B (includes 7th/8th grade students) – 11:56-1:24 M, W, and alternating Fridays;
- MS Bible C (includes 7th/8th grade students) – 8:10-9:45 T, Th, and alternating Fridays;
- MS Bible D (includes 7th/8th grade students) – 9:51-11:20 T, Th, and alternating Fridays;
- 9th Grade Bible A – 1:30-3:00 M, W, and alternating Fridays;
- 9th Grade Bible B – 1:30-3:00 T, Th, and alternating Fridays;
- 10th Grade Bible A – 8:10-9:45 M, W, and alternating Fridays;
- 10th Grade Bible B – 11:56-1:24 M, W, and alternating Fridays;
- 11th Grade Bible (one section) – 1:30-3:00 M, W, and alternating Fridays;
- 12th Grade Bible (one section) – 11:56-1:24 T, Th, and alternating Fridays;
- Discipleship I – 9:51-11:20 Monday and Wednesday (Grade 5); and
- Discipleship II – 8:10-11:20 Tuesday and Wednesday (Grade 11).

(*Id.*, PageID #: 18-19 at ¶ 51). As evidenced by the amount of time dedicated to Bible classes at Emmanuel Christian's upper school, grades 7-12, moving to a virtual platform would drastically impede the effective delivery of that foundational aspect of the school's mission. (*Id.*, Page ID #: 19 at ¶ 52). Furthermore, during a recent ACSI/Cognitia accreditation visit, the visiting team

found that when the team visited each classroom they observed that biblical truth was the basis from which each lesson was taught through the whole day, whether it was English, math, history, science, spelling, Spanish, reading or any other subject. They wrote, “There is a strong focus on biblical integration within all content areas.” *Id.*

If the Resolution is enforced, each of the Plaintiffs 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. (*Id.*, PageID #: 13 at ¶ 28, PageID #: 14 at ¶ 38, PageID #: 19 at ¶ 53).

B. INCREASE OF COVID-19 CASES NOT REFLECTED WITHIN SCHOOLS.

In the fall of this year, many Ohio counties faced a sharp increase in Covid-19 cases in many counties, including Lucas County. Importantly however, schools did not see a proportionate increase in Covid-19 cases reflected within their institutions nor was there any evidence in the record before the District Court that in-person instruction was an accelerant to community spread. (Doc. 1-3, PageID #: 36: “Through contact tracing with these individuals, little in-school transmission has been documented.”). At St. John’s, in the 77 days that students have been in the building after resuming in-person instruction, only 13 students and 6 staff members tested positive for Covid-19 after contracting it from *outside* the school building. Zero students or faculty members have been hospitalized due to Covid-19 and no cases of Covid-19 have been transmitted or spread within the school building. (*Id.*, PageID #: 17 at ¶ 45). Similarly, at Emmanuel Christian, in the 68 days that students were in the building, only 10 students, one faculty member and one volunteer tested positive for Covid-19 after contracting it *outside* the school building. (*Id.*, PageID #: 22 at ¶¶ 58-59). Again, the uncontested allegations in the record before the District Court are that zero students or faculty members have been hospitalized due to

Covid-19 and no cases of Covid-19 have been transmitted or spread within the school building. While admittedly anecdotal, Appellants' experiences appear all too common as other schools throughout Ohio report a similar experience; it stands to reason that schools simply are not a significant source of Covid-19 spread for a variety of reasons.⁹

C. RESOLUTION 2020.11.189.

On Wednesday, November 25, 2020, TLCHD issued Resolution 2020.11.189, that prohibits in-person instruction and effectively closes facilities for all schools, including religious schools, for Grades 7-12 (or 9-12 depending on school configuration) throughout Lucas County from December 4, 2020 at 4:00 p.m. to January 11, 2021 at 8:00 a.m. (Doc. 1-3, PageID #: 36-38).¹⁰ The Resolution also prohibits all sports and extracurricular activities from utilizing any school building interior space for practice or contests for the same time period. *Id.* But, the Resolution permits in-person instruction in grades K-6 (unless the school configuration is grades K-8 who can follow K-6 orders), permits schools to open their facilities to hold religious educational classes or religious ceremonies, and permits school buildings to be opened to hold exams, for staff to provide virtual instruction and for special needs education requiring in-person instruction. *Id.* Accordingly, every religious school throughout Lucas County providing instruction for students in Grades 7-12 (or 9-12 depending on school configuration) must stop providing in-person instruction and all schools must stop all sports and extracurricular activities from utilizing any school building interior space for practice or contests, or face criminal prosecution. *Id.* TLCHD is the only health district in Ohio, to date, to implement such a broad prohibition. (Doc. 1, PageID #: 11 at ¶ 19).

⁹ See <https://www.cleveland.com/news/2020/10/ohio-schools-not-proving-to-be-significant-source-of-coronavirus-spread-gov-mike-dewine-says-see-latest-data.html> (Last accessed December 9, 2020).

¹⁰ Please note Appellants requested from TLCHD's counsel a copy of the Resolution which TLCHD subsequently passed on December 3, 2020, which effectively reiterated the same determination while adding emergency language to make the order immediately enforceable. As soon as Appellants' counsel receives the December 3rd Resolution, that document will be supplemented for this Court's clarity. (See Doc. 1, PageID #: 9-10 at ¶ 13, FN10).

The Resolution is an unprecedented and unwarranted response to COVID-19, especially in light of the constitutional injury it inflicts upon Appellants and Appellants' students and families. The Resolutions serves as a bar against Plaintiffs' daily provision of in-person mentorship and training of religious values; leading and engaging in corporate prayer with the subject students; sharing worshipful moments and spiritual encouragements with 7th-12th grade students throughout the school day; listening to, biblically counseling, and praying with and for individual students and their families (who may be profoundly suffering through the isolation of this pandemic). (*Id.*, PageID #: 11-12 at ¶ 21).

D. ABBREVIATED PROCEEDINGS BEFORE THE DISTRICT COURT.

Appellants filed their complaint in the District Court for the Northern District of Ohio on December 7, 2020, alleging violation of Appellants' rights under the Free Exercise Clause of the First Amendment to the United States Constitution and upon Appellants' civil rights. (*See* Doc. 1, generally). The same day, Appellants filed their Motion for Emergency Hearing, Temporary Restraining Order and Preliminary Injunction. (*See* Doc. 2, generally).

On December 14, 2020, the District Court denied Appellant's Motion for Temporary Restraining Order and Preliminary Injunction prohibiting TLCHD from enforcing the Resolution and "allow[ing] in-person learning and extracurricular activities to continue in religious school buildings." (*See* Doc. 9, generally). The District Court reasoned that "the terms of the TLCHD Resolution apply as equally to [Appellants] as they do to public schools in Lucas County which also continued to offer in-person instruction until the TLCHD Resolution compelled those schools to switch to a virtual learning model as well." (*Id.*, PageID #: 114).

Appellants filed this appeal because the District Court's Order denying Appellants' Motion for Temporary Restraining Order and Preliminary Injunction violates Appellants' First

Amendment Rights embedded in the Free Exercise clause, infringes upon Appellants' civil rights and religious freedoms, and continues to cause irreparable harm to Appellants and Appellants' students and families.

III. LAW & ANALYSIS

A. STANDARD OF REVIEW.

Under Federal Rule of Appellate Procedure 8(a), this Court may enter an order suspending, modifying, restoring, or granting an injunction while an appeal is pending. The Court must balance four well-known factors in deciding whether to grant a stay: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.” *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm’n*, 812 F.2d 288, 290 (6th Cir.1897). The first two factors “are the most critical.” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). Although the factors to be considered are the same for both a preliminary injunction and a stay pending appeal, the balancing process is not identical due to the different procedural posture in which each judicial determination arises. Upon a motion for a preliminary injunction, the court must make a decision based upon “incomplete factual findings and legal research.” *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d. 150, 20 Fed.R.Serv.3d 1177 (1991), (citing *Roth v. Bank of the Commonwealth*, [583 F.2d 527, 537 \(6th Cir.1978\)](#), *cert. dismissed*, [442 U.S. 925, 99 S.Ct. 2852, 61 L.Ed.2d 292 \(1979\)](#)). Even so, that decision is generally accorded a great deal of deference on appellate review and will only be disturbed if the court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard. *Id.* (citing *NAACP v. City of Mansfield*, [866](#)

[F.2d 162, 166–167 \(6th Cir.1989\)](#) (quoting *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, [753 F.2d 1354, 1356 \(6th Cir.\)](#), cert. dismissed, [469 U.S. 1200, 105 S.Ct. 1155, 84 L.Ed.2d 309 \(1985\)](#))).

B. APPELLANTS SHOULD PREVAIL ON THE MERITS.

Appellants’ Motion for Preliminary Injunction should have been granted. TLCHD’s Resolution, along with the District Court’s decision refusing to enjoin enforcement of it, violates Appellants’ rights under the Free Exercise clause of the First Amendment to the United States Constitution and Appellants’ civil rights. By continuously prohibiting religious schools from conducting in-person instruction for grades 7-12 (or 9-12 depending on school configuration) the District Court bestowed a new right on the TLCHD and county health departments statewide: the right to pass a resolution in violation of First Amendment rights under the Free Exercise Clause and civil rights.

The Free Exercise Clause “protects religious observers against unequal treatment” and prohibits the State from “penaliz[ing] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.” *Espinoza v. Montana Dep’t of Rev.*, 140 S.Ct. 2246, 2254-55 (2020) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2021 (2017), and *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439,449 (1988)).

It is well-settled, however, that the Free Exercise Clause does not shield any and all religious practice from falling within the ambit of government regulation. While laws which target “religious beliefs as such [are] never permissible,” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), the Supreme Court’s Free Exercise jurisprudence adheres to “the general proposition that a law that is neutral and of general applicability need not

be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Id.* at 531. Laws which fail to “satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.” *Id.* at 531-32. This standard of justification is commonly referred to as “strict scrutiny.” To survive strict scrutiny, the Resolution must be narrowly tailored or the least restrictive means of controlling community spread. The Resolution is far from that.

1. THE RESOLUTION IGNORES RISK OF COMMUNITY SPREAD THROUGH SECULAR ACTIVITIES.

Admittedly, the Resolution expressly targets gatherings for educational purposes – particularly, public and private schools educating grades 7-12. Appellee, nevertheless, cannot deny the Resolution infringes upon Appellants’ free exercise of religion, as Appellant’s educational offerings are inextricably intertwined with their religious beliefs. Instead, Appellee argues that the Resolution is facially neutral because the Resolution applies to private and public schools equally. Appellee’s reasoning is short sighted; it fails to consider *why* people are gathering together when comparing COVID-19 related restrictions.

Months ago, Governor of Kentucky, Andrew 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. This Court explained that if the goal is to limit the spread of COVID-19, it must be done in a way that treats the risk created by religious activity the same as risk created by other secular activities. *Id.* 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.* If TLCHD wants to regulate religious activity in a way that is neutral and generally applicable, it 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. at 615.

TLCHD's Resolution shutting down religious schools for Grades 7-12 (or 9-12 depending on school configuration) does not satisfy this basic test. The terms of the Resolution are clear: all in-person schooling at parochial schools for Grades 7-12 (or 9-12 depending on school configuration) must end regardless of whether the parochial school is taking safety precautions, practicing social distancing, or implementing appropriate hygiene standards. At the same time, other secular activities and in-person schooling at private schools through K-6 (or K-8 depending on school configuration) are not prohibited.

The question is not whether TLCHD has also restricted secular activities with a similar purpose. That is, TLCHD's restrictions are not generally applicable simply because they impose the same regulation on gatherings *for the purpose of education*. Rather *Employment Division v. Smith*, 494 U.S. 872 (1990), requires TLCHD to regulate religious activity in the same way as secular activities that "pose comparable public health risks"—regardless of whether those secular activities share the same purpose as the religious conduct. *See Maryville Baptist Church*, 957 F.3d at 614. Here, TLCHD clearly has not done so.

2. THE RESOLUTION IS NOT THE LEAST RESTRICTIVE MEANS OF CONTROLLING COMMUNITY SPREAD.

As TLCHD states in the Resolution, “from a public health perspective, it is imperative to mitigate the potential increase of COVID cases in our schools and our community.” (Doc. 1-3, PageID #: 36-38). In the same breath, TLCHD states, “Through contract tracing...little in-school transmission has been documented.” *Id.* Yet the Resolution pays particular attention to how Appellants use their facilities...and how community spread could *potentially* become a problem...without issuing restrictions for any other public gatherings or use of facilities to “mitigate the potential increase of COVID cases in our... community.” *Id.* Despite the wide regulatory latitude conferred by R.C. 3709.21, TLCHD offers no means of controlling community spread outside of the classroom. According to the Resolution, Students are free to gather in any number at any location, regardless of whether social distancing and other sanitary practices are followed – so long as the students *do not gather* in Appellants’ classrooms (where Appellants have implemented extensive health and safety measures to successfully mitigate community spread). Sanctioning such gatherings, while categorically prohibiting in-class faith-based education for Grades 7-12 (or 9-12 depending on school configuration), defies logic and forecloses any reasonable expectation of mitigating community spread.

TLCHD has established itself as the only Ohio health district to order school facilities closed at this point in the pandemic.¹¹ While TLCHD possesses the authority to implement such constitutionally-appropriate measures, the overwhelming data – even recognized by TLCHD –

¹¹ Less than a week prior to issuing the Resolution, 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=sxKhJaqEkY> (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>.

confirms that in-school education is not the primary driver of community spread. Governor Mike DeWine, who has continually expressed concern about community spread, has not closed private, religious schools (or public schools, for that matter). TLCHD's Resolution, then, is more restrictive than Governor DeWine thinks is necessary to control community spread. The Ohio State Board of Education has also not advised closing private religious schools. TLCHD's Resolution, then, is more restrictive than Ohio State Board of Education thinks is necessary to control community spread. The Centers for Disease Control has not advised schools close; to the contrary, the CDC advises that schools should remain open. TLCHD's Resolution, then, is more restrictive than the CDC thinks is necessary to control community spread and even contradicts the CDC's guidance. The Resolution is devoid of data or reason to second-guess the means for controlling community spread implemented by every other Ohio health district, Governor Mike DeWine, the Ohio State Board of Education, and the Centers for Disease Control. TLCHD's Resolution implements a more restrictive means for controlling community spread that unfairly burdens Appellants' religious freedom protected by the First Amendment.

C. PLAINTIFFS WILL BE IRREPARABLY HARMED ABSENT PRELIMINARY INJUNCTION.

"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."). Schools across Lucas County have been forced to close under the Resolution's restrictions. Each moment these schools remain forcibly closed is another prayer not shared, mentorship opportunity missed, and adolescent that goes unencouraged.

D. STUDENTS AND FAMILIES OF PLAINTIFFS WILL BE IRREPARABLY HARMED ABSENT PRELIMINARY INJUNCTION.

The Resolution's practical repercussions amplify its constitutional overstep. For the Grade 7-12 students targeted by the Resolution, numerous studies have detailed the profound negative consequences forced quarantine and isolation causes among their demographic. Across the country, this age group has seen exponential increases in severe depression, anxiety disorders, suicide attempts, substance abuse problems, and mental health-related pediatric emergency department visits. As Dr. Danielle Dooley, a medical doctor at Children's National Hospital in Washington D.C., told NPR, "As a pediatrician, I am really seeing the negative impacts of these school closures on children." She ticked off mental health problems, hunger, obesity due to inactivity, missing routine medical care and the risk of child abuse – on top of loss of education. She also stated, "Going to school is really vital for children. They get their meals in school, their physical activity, their health care, their education, of course." Governor DeWine has also expressed the importance of in-person instruction. He stated in a press conference on Wednesday, November 11, 2020, "We must do everything in our power to slow this virus down so our kids can stay in school." Meanwhile, religious schools stand poised to provide not only top flight educational experiences, but they offer these very students purpose, faith, and abiding hope. Religious schools are motivated by the deeply-held conviction, certainly now more than ever, that they are called by God to provide in-person instruction for all of their students, in every facet of the educational experience, especially those in Grades 7-12.

E. PUBLIC INTEREST IS SERVED BY GRANTING A PRELIMINARY INJUNCTION.

As this Circuit determined, "treatment of similarly situated entities in comparable ways serves the public health interests at the same time it preserves bedrock [First Amendment]

guarantees.” *See Maryville Baptist Church*, 957 F.3d at 616. Beyond that, there’s an enormous number of adolescents who are uniquely struggling through this pandemic. Junior high and high school students across the nation are suffering catastrophic academic declines, increased depression and isolation, and untold hardships many policy makers are only beginning to appreciate. With each school closure order, families privately grieve and worry. And pray.

While the simplistic and unscientific solution might be easiest for TLCHD, it’s neither the most reasonable nor constitutional. Here, the public interest is best served by allowing these kids to go back to school and receive in-person instruction from Appellants.

CONCLUSION

Appellants respectfully request that this Court issue an emergency order prohibiting Appellee TLCHD from enforcing the Resolution passed on November 25, 2020, which prohibits schools from providing in-person instruction to grades 7-12 (or 9-12 depending on school configuration) or allowing sports programs and extracurricular groups to utilize facilities within a school building from December 4, 2020, at 4:00 p.m. until January 11, 2021, at 8:00 a.m.

Respectfully submitted,

/s/ Michael A. Roberts

Michael A. Roberts, Esq. (OH 0047129)

Brian W. Fox, Esq. (OH 0086851)

312 Walnut St., Suite 1800

Cincinnati, OH 45202

(513) 629-2700

Fax: (513) 333-4330

mroberts@graydon.law

bfox@graydon.law

Attorneys For Appellants