No. 20-4300

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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 District Court Case No. 3:20-cv-2720

BRIEF OF *AMICUS CURIAE* OHIO IN SUPPORT OF APPELLANTS' REQUEST FOR AN INJUNCTION PENDING APPEAL

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
Solicitor General
**Counsel of Record*
KYSER BLAKELY
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
bflowers@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
State of Ohio

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Rules and Constitutional Provisions

Other Authorities

INTRODUCTION AND STATEMENT OF *AMICUS* INTEREST

This case presents the question whether a health order issued by the Toledo-Lucas County Health Department violates the Free Exercise Clause of the United States Constitution. The order, which is designed to combat the spread of COVID-19, requires all schools, including religious schools, to cease providing most in-person classes. Yet it allows many categories of secular entities, such as casinos and gyms, to continue providing in-person services to their customers.

This order violates the Free Exercise Clause. That Clause prohibits the government from discriminating against religion. And that prohibition on discrimination means that, "once a State creates a favored class of businesses," it "must justify why [religious institutions] are excluded from that favored class." *Roman Catholic Diocese v. Cuomo*, 208 L. Ed. 2d 206, 216 (2020) (Kavanaugh, J., concurring); *see also Calvary Chapel Dayton Valley v. Sisolak*, — F.3d —, 2020 U.S. App. LEXIS 39266, *6–9 (9th Cir. Dec. 15, 2020). Here, the Department has not justified treating religious schools worse than casinos, gyms, or numerous other businesses.

Ohio is interested in this case for two primary reasons. *First*, Ohio has a compelling interest in stopping governmental entities from violating Ohioans' right to the free exercise of religion. *Second*, nine months' experience with remote learning raises serious doubts about its effectiveness. *See* Ginia Bellafante, *Are We Losing a*

Generation of Children to Remote Learning?, N.Y. Times (Nov. 6, 2020), https://tinyurl.com/y6554gb9. Arbitrary restrictions limiting in-person instruction for months on end have inflicted immeasurable harm on children. An injunction allowing the plaintiffs to provide in-person instruction will thus advance the State's compelling interest in ensuring that Ohio's children remain free to pursue a high-quality education. Ohio is thus submitting this brief under Federal Rule of Appellate Procedure 29(a)(2).

ARGUMENT

This Court asks four questions when deciding whether to issue an injunction pending appeal: "Is the applicant likely to succeed on the merits? Will the applicant be irreparably injured absent" an injunction? Will an injunction "injure the other parties? Does the public interest favor" an injunction? *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (*per curiam*). "Preliminary injunctions in constitutional cases often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors." *Id.* at 416. Here, all four factors favor the issuance of an injunction pending appeal.

I. The Schools will likely prevail on the merits because the Resolution violates the Free Exercise Clause.

The facts of this case, viewed in light of the governing law, show that the appellants will likely prove a violation of the Free Exercise Clause.

A. Start with the facts. On November 25, 2020, the Toledo-Lucas County Health Department passed a "Resolution," Compl., R.1-3, PageID#36, aimed at "mitigat[ing] the potential increase of COVID-19 cases," Order, R.9, PageID#104–05 (quotations omitted). The Resolution requires all schools—whether public or private, religious or secular—to cancel in-person classes and "close all school buildings" until January 11, 2021. *Id.*, PageID#105 (quoting Resolution). The Resolution allows a few exceptions. For example, teachers can teach virtually from within school buildings, elementary schools can continue in-person education, and schools can conduct religious ceremonies and religious-specific classes in person. *Id.* But for the most part, schools in Lucas County will close down for at least five weeks. *Id.* Notably, the Department did not elect to shut down any other organization or entity for any amount of time. The Resolution applies only to schools. *See id.* That means casinos, gyms, tanning salons, and other entities can stay open. *Id.*, PageID#110. Many are doing just that. For example, Ohioans can visit Hollywood Casino Toledo to "crowd the stage while an AC/DC tribute band" thunders through *Back in Black*, "play a few hands of blackjack, or slice into a steak" at a lavish restaurant. Compl., R.1, PageID#5.

In light of this disparate treatment, four religious organizations—Monclova Christian Academy, St. John's Jesuit High School & Academy, Emmanuel Christian

School, and Citizens for Community Values (collectively, the "Schools")—sued to enjoin the Resolution, which they argued violates the Free Exercise Clause.

B. Next, consider the law. The First Amendment's Free Exercise Clause forbids the government from making any law "prohibiting the free exercise" of religion. U.S. Const. amend. 1. This Clause, among other things, "protects religious observers against unequal treatment." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017)). This guarantee of equal treatment means that each State must "treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest." *Roman Catholic Diocese v. Cuomo*, 208 L. Ed. 2d 206, 213 (2020) (Gorsuch, J., concurring). In other words, "once a State creates a favored class of businesses," it "must justify why [religious institutions] are excluded from that favored class." *Id.* at 216 (Kavanaugh, J., concurring); *see also Calvary Chapel Dayton Valley v. Sisolak*, — F.3d —, 2020 U.S. App. LEXIS 39266, *6–9 (9th Cir. Dec. 15, 2020).

C. Applying the law to the facts of this case shows that the Resolution violates the Free Exercise Clause: it burdens religious practice; those burdens are unequal to

the burdens imposed on secular entities; and the disparate treatment cannot survive strict scrutiny.

As an initial matter, the Resolution's closure of schools will substantially burden religious practice because in-person education is essential to religious beliefs. The Schools say so themselves, *see* Compl. R.1, PageID#13, 14, 19, and Supreme Court precedent bars this Court from second-guessing a religious institution's understanding of what its own religion requires, *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014). In any event, the Schools' understanding is quite understandable. The secular-minded may view religion as a quaint add-on to a life otherwise similar to that of everyone else. In fact, however, religion bears on every aspect of a believer's life. Thus, for religious educators and students, the *entire school day* is religious instruction—even in classes about algebra or physics. To take but a few examples, demonstrating kindness to one's schoolmates, displaying discipline and diligence in completing one's work, developing a love for the truth, and showing respect for authority, are an intrinsic part of the Christian education that many schools offer. *Cf.* Compl. R.1, PageID#13, 14, 19; *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). The Resolution, by closing religious schools for nearly all in-person instruction, burdens religious practice. Just as the Free Exercise Clause leaves religious schools free to determine *who* will provide

religious instruction, *see Our Lady of Guadalupe*, 140 S. Ct. at 2060; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 191–92 (2012), it also leaves them free to decide the manner in which that instruction will be provided.

The next question is whether the Resolution *unequally* burdens religious practice. It does. 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." *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.). In this case, the Resolution treats the Schools worse than numerous favored or exempt secular organizations. Whereas gyms and casinos remain open to the public, the Resolution closes schools, including religious schools, for weeks. *See* Order, R.9, PageID#105, 110. That is the sort of discrimination that triggers heightened scrutiny under the Free Exercise Clause.

The disparate treatment of religious and secular entities distinguishes this case from *Kentucky ex rel. Danville Christian Academy, Inc. v. Beshear*, 981 F.3d 505, 2020 U.S. App. LEXIS 37413 (6th Cir. Nov. 29, 2020), which concluded that a school-closure order issued by Kentucky's Governor likely *did not* trigger strict scrutiny or violate the Free Exercise Clause. That ruling rested on the Court's belief that the

order was "neutral and of general applicability." *Id.* at *6. The neutral nature of the order, the Court explained, distinguished the order before it from the orders at issue in *Roman Catholic Diocese*, 208 L. Ed. 2d 206, *Roberts*, 958 F.3d 409, and *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (*per curiam*). The orders in those cases treated religious entities less favorably than secular entities such as "factories, liquor stores, and bicycle repair shops," or "airlines, funeral homes" and "gun shops." *Danville Christian Academy*, 2020 U.S. App. LEXIS 37413, *7. In contrast, the panel believed, the order at issue in *Danville* imposed no such less-favorable treatment. *Id.* at *6–7.

The Toledo-Lucas County Health Department's Resolution presents the precise circumstances that *Danville* said would create a Free Exercise violation: the order subjects religious schools to worse treatment than not only "factories," "bicycle repair shops," "airlines, funeral homes, liquor stores, and gun shops," *id.* at *7, but also casinos, gyms, and tanning salons. This Court recognized in *Maryville Baptist Church* that "restrictions inexplicably applied to one group and exempted from another do little to further [health and safety] goals and do much to burden religious freedom." 957 F.3d at 615. *Danville* did not retreat from that logic, which applies with full force here.

Because the Resolution discriminates against religious entities, it passes constitutional muster only if it survives strict scrutiny. *Roman Catholic Diocese*, 208 L. Ed. 2d at 208–09; *accord Calvary Chapel Dayton Valley*, 2020 U.S. App. LEXIS 39266, *9. The Resolution does not come close to meeting that exacting standard. The Department has not presented evidence that schools pose a higher risk of spread than the many businesses the Department is allowing to remain open. *See also* Anya Kamenetz, *Are the Risks of Reopening Schools Exaggerated?*, NPR (Oct. 21, 2020), https://tinyurl.com/y5gelnvq ("Despite widespread concerns, two new international studies show no consistent relationship between in-person K-12 schooling and the spread of the coronavirus."). Indeed, while the Schools have been successful in limiting the spread of COVID-19 on school grounds, *see* Order, R.9, PageID#103–04, casinos and other such institutions can be hotspots for community spread because patrons often consume food and alcohol, which requires the constant removal of masks, *see, e.g.*, *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2609 (Gorsuch, J., dissenting). If there were any credible evidence that schools present a unique risk of spread, it would not be hard to find; many schools, both religious and secular, have been open in Ohio throughout the current school year. *See* Order, R.9, PageID#103. So far, the Department has not identified any such evidence. Thus, it has failed to show that shutting down religious schools is part of a narrowly tailored approach to

combatting the government's interest in slowing the spread of COVID-19. Notably, the Governor of Ohio has consistently exempted religious groups from most "mandates because of First Amendment freedoms." *A Faith Based Letter from Governor Mike DeWine*, Ohio Dep't of Health (Aug. 4, 2020), https://tinyurl.com/yct73wlg. There is no reason why the Toledo-Lucas County Health Department cannot do the same.

Because the Department's Resolution almost certainly violates the Free Exercise Clause, the Schools are likely to prevail on the merits in this case.

II. The Schools have satisfied the remaining factors justifying an injunction pending appeal.

The Schools' likelihood of success on the merits effectively establishes their right to an injunction pending appeal. *Roberts*, 958 F.3d at 416. Regardless, they satisfy the remaining factors, too.

First, the Schools are being irreparably harmed by the ongoing violation of their constitutional rights. *Id.* (citing *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001)). The Department's resolution will remain in force until at least January 11, causing ongoing harm. *See* Compl., R.1-3, PageID#36–38. That distinguishes this case from the Supreme Court's decision in *Danville Christian Academy, Inc. v. Beshear*, which deemed injunctive relief unnecessary on the ground that the

challenged order would "effectively expire[]" within the week. 592 U.S. ___, slip op. 1 (2020).

Second, no other party to this litigation will be meaningfully injured by allowing the Schools to hold in-person classes. Again, the Department has an undoubted interest in stopping the spread of COVID-19, but there is no evidence that an injunction permitting the plaintiffs here to remain open will contribute to any spread. *See Maryville Baptist Church*, 957 F.3d at 615 ("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.").

Finally, the "public interest" requires an injunction pending appeal. Virtual learning does not work, at least not for many children. *See* Ginia Bellafante, *Are We Losing a Generation of Children to Remote Learning?*, N.Y. Times (Nov. 6, 2020), https://tinyurl.com/y6554gb9; Tisha Lewis, *Remote learning increases failing grades by 83 percent in Fairfax County, study finds*, Fox 5 (Nov. 24, 2020), https://tinyurl.com/y7wd6krf. In the years to come, the one-year gap in in-person instruction will be viewed as a major public-policy failure. The most well-to-do among us, who can afford tutors to supplement screen time and nannies to oversee worksheets, will see their children rocket ahead of peers whose parents cannot afford such luxuries.

Religious schools across the State have done their part to meet this crisis by holding in-person classes and providing students of varying means with a high-quality education. The public interest demands that schools willing to provide in-person instruction be permitted—indeed, encouraged—to do so.

CONCLUSION

The Court should grant the Schools' request for an injunction pending appeal.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS*
Solicitor General
**Counsel of Record*
KYSER BLAKELY
Deputy Solicitor General
30 East Broad Street, 17th Floor
614-466-8980
benjamin.flowers@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
State of Ohio

CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, this brief complies with the type-volume requirements for an *amicus* brief supporting a request for an injunction pending appeal, and contains 2,291 words. *See* Fed. R. App. P. 29(a)(5); Fed. R. App. P. 27(d)(2).

I further certify that this motion complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2020, this brief was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS