NO. 20-2256

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

RESURRECTION SCHOOL; CHRISTOPHER MIANECKI, INDIVIDUALLY AND AS NEXT FRIEND ON BEHALF OF MINOR CHILDREN C.M., Z.M., AND N.M; AND STEPHANIE SMITH, INDIVIDUALLY AND AS NEXT FRIEND ON BEHALF OF HER MINOR CHILD F.S.,

Plaintiffs-Appellants,

V.

ELIZABETH HERTEL, IN HER OFFICIAL CAPACITY AS THE DIRECTOR OF THE MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; DANA NESSEL, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MICHIGAN; LINDA S. VAIL, IN HER OFFICIAL CAPACITY AS THE HEALTH OFFICER OF INGHAM COUNTY; AND CAROL A. SIEMON, IN HER OFFICIAL CAPACITY AS THE INGHAM COUNTY PROSECUTING ATTORNEY,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
HONORABLE PAUL L. MALONEY
Civil Case No. 1:20-cv-1016

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants Resurrection School, Christopher Mianecke, C.M., Z.M., N.M., Stephanie Smith, and F.S. (hereinafter "Plaintiffs") make the following disclosure:

1. None of the Plaintiffs is a subsidiary or affiliate of a publicly owned corporation.

2. There are no publicly owned corporations, party to this appeal, that have a financial interest in the outcome.

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R. 34(a), Plaintiffs respectfully request that this Court hear oral argument. This case presents for review important questions of law regarding the protection of constitutional liberties. Oral argument will assist this Court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this Court deems relevant.

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INTRODUCTION

"As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2605 (2020) (J. Alito, dissenting). The State of Michigan's mask mandate, which requires young children to wear masks throughout the entire school day, even while socially distanced from one another and even when it interferes with religious education and formation, fails to "carefully account for constitutional rights." Rather, it is an overbroad restriction that operates as a blunt instrument on Plaintiffs' fundamental freedoms.

In *Roman Catholic Diocese v. Cuomo*, 208 L.Ed.2d 206 (U.S. 2020), Justice Gorsuch put to rest the overreliance on *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), in cases challenging restrictions imposed during this current pandemic. As stated by Justice Gorsuch, "*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so." 208 L.Ed.2d at 213 (Gorsuch, J., concurring). He concludes with a sober warning:

> Why have some mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic? In the end, I can only surmise that much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other

> circumstances, we may not shelter in place when the Constitution is under attack. *Things never go well when we do*.

Id. 214 (Gorsuch, J., concurring) (emphasis added). While the district court does not cite the *Jacobson* decision (the opinion is scant and lacking in authoritative citations), its opinion transparently achieves what Justice Gorsuch warned against.

Not every COVID-19 emergency order violates the Constitution. But Michigan's orders, which impair the ability of young children to receive Catholic formation and force religious schools to alter their lessons and disciplinary policies, do. Michigan's emergency orders require children, as young as kindergarten, to wear a mask throughout the entire school day.

Given the intrusive and far-reaching nature of Defendants' orders, one might think the district court would have required Defendants to provide clear scientific evidence to explain why they are forcing children in small religious schools, statewide, to wear masks throughout the entire school day, even while socially distanced. One might expect that the district court would require Defendants to explain why other measures, such as plexiglass dividers or air filtration systems that kill the COVID-19 virus mid-air, must be rejected at the cost of a child's religious education. However, it did not. The district court allowed the blunt instrument of the State to overshadow the Constitution. This Court should reverse the opinion of the lower court and remand, directing the district court to grant Plaintiff's request for injunctive relief.

STATEMENT OF JURISDICTION

Plaintiffs' amended Complaint raise federal questions under the United States Constitution and 42 U.S.C. § 1983. (R-21: First Amend. Compl., Page ID #636-68). The district court has jurisdiction pursuant to 28 U.S.C. § 1331 and 1343.

Appellate jurisdiction exists under 28 U.S.C. § 1292. On December 16, 2020, the district court entered an order denying Plaintiffs' Motion for Preliminary Injunctive Relief. (R-24: Op. and Order Den. Prelim. Inj., Page ID #693-99). Plaintiffs timely filed their Notice of Appeal on December 18, 2020. (R-25: Notice of Appeal, Page ID #700-02).

STATEMENT OF THE ISSUES FOR REVIEW

This appeal presents the following issues for review:

I. Whether the district court erred by denying preliminary injunctive relief to protect Plaintiffs from the unconstitutional effects of Defendants' Emergency Orders because Plaintiffs established a substantial likelihood of success that the orders violate the Free Exercise Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Substantive Due Process Clause of the Fourteenth Amendment.

II. Whether the district court erred by ruling that Defendants' Emergency Orders that control, fundamentally alter, and infringe upon religious education do not violate the Free Exercise Clause of the First Amendment.

III. Whether the district court erred by not applying strict scrutiny to Plaintiffs' free exercise claims.

IV. Whether the district court erred by finding that Defendants' Emergency Orders did not violate the Equal Protection Clause.

V. Whether the district court erred by failing to address Plaintiffs' Substantive Due Process claims.

STATEMENT OF THE CASE

I. Nature of the Case

This case takes us into the classroom of a private, religious school and asks who is in the best position to make decisions pertaining to the religious education of the young children seated in its desks: the children's parents who know and love them and the religious school selected by the family to shepherd and care for them, or a public official in an office in the State Capital who has never met the children or stepped foot in the school. COVID-19 poses real challenges and concerns to everyone and requires a robust response; no one denies this. Plaintiffs have implemented and follow expansive safety protocol. Plaintiffs simply seek for the focus of the classroom to be religious education and not the mandates of the State,

or as one theologian recently described, focused on "Catholicism" and not "Covidism." https://www.crisismagazine.com/2021/masks-are-tearing-us-apart, last visited Feb. 16, 2021.

Whether or how effective masks are to prevent the transmission of COVID-19 is a hotly debated issued. *See, e.g.*, https://www.aier.org/article/masking-a-careful-review-of-the-evidence/, last visited Feb. 16, 2021. Some studies indicate potential benefits, while the only randomized controlled trial studying the effectiveness of masking to prevent the spread of COVID-19 indicated little benefit. https://www.acpjournals.org/doi/10.7326/m20-6817, last visited Feb. 16, 2021. Some epidemiologists fervently recommend masking, others do not find it terribly effective. This Court need not resolve this ongoing debate.

People on both sides of the issue recognize myriad remedial measures exist to prevent the transmission of COVID-19, such as social distancing, limiting contact with the public, physical barriers to prevent the transmission of respiratory droplets, air filtration and ventilation systems, the ability of ultraviolet light to unenvelop SARS-CoV-2 and kill the virus, the benefits of regular handwashing, disinfection, etc. The list of safety protocol upon which most agree is far greater than that which divides.

Plaintiffs understand that masks serve a purpose when students cannot socially distance and do not object to (and, indeed, enforce) mask wearing in the

hallways and common areas of the school. And Plaintiffs also understand, firsthand, the challenges of masking young children in the classroom and the detrimental effect it has on the individualized, religious education for which the school exists to impart. Here, it is Defendants who lack understanding. They lack the understanding of the reality of the effect of their orders and how requiring continuous masking of young children for the entirety of the school day affects those individual children and the goals of the religious classroom. And with the many alternative safety measures available, Defendants' lack of understanding is exemplified in their persistent inflexibility.

It is possible to mitigate the transmission of COVID-19 and respect the bounds of Plaintiffs' constitutional freedoms. Indeed, for the first two months of the schoolyear, Defendants did not require elementary school students to wear masks while seated in the classroom. Resurrection School followed strict safety protocol, successfully implemented religious education, and no cases of COVID-19 affected the school. However, without explanation or a significant rise in COVID-19 cases, Defendants began to require masks for the State's youngest children at the beginning of October 2020.

That order, and defendants' subsequent orders, detrimentally affect Plaintiffs' religious education and substantially burden their free exercise of religion. The orders fail strict scrutiny review because they ignore less restrictive

alternatives. Furthermore, Defendants' orders violate the Fourteenth Amendment's Equal Protection Clause and Due Process Clause. The district court erred by failing to grant preliminary injunctive relief to the Plaintiffs.

II. Facts

A. Defendants' Emergency COVID-19 Orders

On March 11, 2020, the Governor of the State of Michigan issued Executive Order 2020-04, which proclaimed a state of emergency under both the Emergency Management Act (EMA), Mich. Comp. Laws § 30.403, and the Emergency Powers of the Governor Act of 1945 (EPGA), Mich. Comp. Laws § 10.31. The Executive Order identified the COVID-19 pandemic as the basis for the declaration of a state of emergency under both statutory schemes. From early March to October 2020, the Governor issued more than 192 executive orders to address the transmission of COVID-19. The vast majority of these orders were issued without the support of the legislature.

On October 2, 2020, the Michigan Supreme Court answered two certified questions posed by the District Court for the Western District of Michigan. The court held that the Governor no longer possessed authority under the EMA and the EPGA to continue to issue "emergency" executive orders, and any order issued after April 30, 2020 was invalid. *In re Certified Questions From United States Dist. Court , W. Dist. of Michigan, S. Div.*, No. 161492, 2020 WL 5877599

(Mich. Oct. 2, 2020); *see also House of Representatives & Senate v. Governor*, No. (Mich. Oct. 12, 2020).

Included in the orders struck down by the state court was Executive Order 2020-185, which was announced at the end of September. Executive Order 2020-185 modified the State's Return to Learn Roadmap to require that all kindergarten through fifth grade students wear masks for the entirety of the school day, even when the young children are socially distanced at their desks.

A few months prior, on June 30, 2020, the Governor, the COVID-19 Task Force on Education, and the Return to School Advisory Council released the Michigan Return to School Roadmap, recommending but not requiring facial coverings for young children in grades kindergarten through fifth grade.[1] The Michigan Return to School Roadmap, passed into law as P.A. 149, § 98a(1)(g) (Mich. 2020), described safety protocols and required schools and districts "to develop detailed district or building-level plans."[2] However in late September, the Governor, without support of the legislature, issued Executive Order 2020-185, requiring elementary school children to wear masks at all times when in the

[1]https://www.michigan.gov/documents/whitmer/MI_Safe_Schools_Roadmap_FINAL_695392_7.pdf, last visited Feb. 16, 2021.
[2]https://www.michigan.gov/documents/whitmer/MI_Safe_Schools_Roadmap_FINAL_695392_7. pdf, last visited Feb. 16, 2021.

classroom.[3] The order claimed, without citations, that it was "crystal clear that COVID-19 can be deadly to younger children." *Id*. The order stated that "[g]iven the higher incidence of cases among children in recent months," the situation amounted to an emergency requiring "the use of masks in the classroom even for younger students." *Id*. At the time, the number of overall cases trended downward, the executive order referenced the summertime months, and the State's data showed that children newborn through nine years of age contracted COVID-19 at the lowest rate of all age demographics.[4]

Relevant data suggests that elementary school-aged children are less likely to contract COVID-19, and, if they do, they are far less likely to contract a serious case. The American Academy of Pediatrics (AAP) reports that data from twenty-four states and New York City shows that only between "0.1%-2.3% of all child COVID-19 cases [have] resulted in hospitalizations." [5] Further, the AAP reports that data from forty-three states, New York City, and Guam reveal that only "0.00%- 0.05% of all child COVID-19 cases [have] resulted in death." The

[3] https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-540603--,00.html, last visited Feb. 16, 2021.
[4] https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html, last visited Feb. 16, 2020.
[5]https://downloads.aap.org/AAP/PDF/AAP%20and%20CHA%20%20Children%20and%20COVID-19%20State%20Data%20Report%202.11.21%20FINAL.pdf, last visited Feb. 16, 2020.

Journal of the AAP recently published research affirming that "children are not significant drivers of the COVID-19 pandemic."[6]

However, once the Michigan Supreme Court's decision in *In re Certified Questions* invalidated Executive Order 2020-185, the Director of the Michigan Department of Health and Human Services issued an Emergency Order, requiring *inter alia*, that students in elementary school wear masks at all times in the classroom. Since October 5, 2020, the Director has renewed the order multiple times in near identical form. The current version is available at: https://www.michigan.gov/documents/coronavirus/Masks_and_Gatherings_order_-_2-4-21_1120am_FINAL_for_signature_715324_7.pdf, last visited Feb. 15, 2021.

There is no identifiable end date for when Defendants might cease renewing its orders. The present exceptions to the face mask requirements are as follows:

a. Are younger than 5 years old, outside of a child care organization or camp setting;

b. Cannot medically tolerate a face mask;

c. Are eating or drinking while seated at a food service establishment or at a private residence;

[6]https://pediatrics.aappublications.org/content/pediatrics/146/2/e2020004879.full.pdf, last visited Feb. 16, 2021.

d. Are exercising outdoors and able to consistently maintain 6 feet of distance from others;

e. Are swimming;

f. Are receiving a medical or personal care service for which removal of the face mask is necessary;[7]

g. Are asked to temporarily remove a face mask for identification purposes;

h. Are communicating with someone who is deaf, blind, or hard of hearing and whose ability to see the mouth is essential to communication;

i. Are actively engaged in a public safety role, including but not limited to law enforcement, firefighters, or emergency medical personnel, and where wearing a face mask would seriously interfere in the performance of their public safety responsibilities;

j. Are engaging in a religious service;

k. Are giving a speech for broadcast or to an audience, provided that the audience is at least 12 feet away from the speaker; or

l. Are participating in a testing program specified in the MDHHS's document entitled Guidance for Athletics issued February 7, 2021, and are engaged in practice or competition where the wearing of a mask would be unsafe.

[7] Personal care services include hair, nail, tanning, massage, traditional spa, tattoo, body art, piercing services, or similar personal care services. *See* https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-551407--,00.html, last visited Feb. 16, 2021.

Id. Prior versions exempted individuals from mask requirements when voting at the polls. *See, e.g.,* https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-546790--,00.html, last visited Feb. 16, 2021. Defendants' orders do not account for the challenges young children may encounter when wearing a mask for the entire school day. The CDC recognizes that children in elementary school and students with healthcare or educational needs, or sensory concerns or tactile sensitivity may experience difficulties wearing masks and recommends the consideration of alternative mitigation strategies.[8] However, Defendants' orders fail to provide flexibility.

Similarly, the World Health Organization (WHO) advises a multi-faceted approach to the use of masks for children from six years of age to eleven based upon factors such as: the potential impact of wearing the mask on learning and psychosocial development in consultation with the child's teachers, parents, caregivers, and/or medical providers; the transmission rate of COVID-19 where the child resides; and the ability of the child to appropriately use a facial covering.[9]

Defendants rely on the schools to implement their mask orders. Michigan's first mask order required schools to enforce it through "disciplinary

[8] https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html, last visited Feb. 16, 2021.
[9] https://www.who.int/news-room/q-a-detail/q-a-children-and-masks-related-to-covid-19, last visited Feb. 16, 2021.

mechanisms."[10] Subsequent orders issued by the Michigan Department of Health and Human Services follow the Governors' previous executive orders "to minimize confusion."[11] A violation of the Defendants' orders is a misdemeanor offense, punishable by imprisonment up to six month and a two-hundred dollar fine.[12]

B. Plaintiff Resurrection School

Plaintiff Resurrection School, a Catholic school, adheres to a curriculum and disciplinary policies based upon the teachings of the Catholic Church. (R-8-1: Decl. of Jacob Allstott, Page ID #172). Resurrection School strives to build a strong sense of Catholic identity and spiritual well-being in its students, as the ultimate goal of Catholic education is to prepare each child to become a Saint. (R-8-1: Decl. of Jacob Allstott, Page ID #172-74). Resurrection School believes that it is through the individual formation of each child that they are able to see themselves and the world through God's eyes, and to act as God would have him act at all times. (R-8-1: Decl. of Jacob Allstott Page ID #172-74). The goal, then, of discipline is to recognize the dignity of each human person and to take into consideration the workings of grace as well as of sin and conversion. (R-8-1:

[10] https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-535121--,00.html, last visited Feb. 16, 2021.
[11] https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-535121--,00.html, last visited Feb. 16, 2021.
[12] https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-551407--,00.html, last visited Feb. 16, 2021.

Decl. of Jacob Allstott, Page ID #172-74). The word "discipline" comes from the same root as the word "disciple," which means to learn. (R-8-1: Decl. of Jacob Allstott, Page ID #174). The school implements a curriculum based on virtue and the Catechism of the Catholic Church (CCC). (R-8-1: Decl. of Jacob Allstott, Page ID #174). The school intentionally selects and focuses on virtues to be cultivated in each of its students for their religious formation. (R-8-1: Decl. of Jacob Allstott, Page ID #174).

Resurrection School seeks to instill confidence in its students and encourage social interactions that replicate the life and teachings of Jesus Christ. (R-8-1: Decl. of Jacob Allstott, Page ID #174). For example, Resurrection School seeks to impart the virtue of mercy through the act of reconciliation. (R-8-1: Decl. of Jacob Allstott, Page ID #174). When a student has wronged or hurt another student, a teacher guides the student through the reconciliation process and facilitates a face to face apology with the student who was harmed. (R-8-1: Decl. of Jacob Allstott, Page ID #174). Resurrection School sees moments of conflict as opportunities for evangelization. (R-8-1: Decl. of Jacob Allstott, Page ID #174). Resurrection School is devoted to helping and serving all students, especially students who inspire others through persisting and learning with exceptionalities, such as Down Syndrome, non-traditional learning requirements, or troubled homelife. (R-8-1: Decl. of Jacob Allstott, Page ID #174).

C. Plaintiff Resurrection School's COVID-19 Safety Protocol

In preparation for the 2020-21 school year, Resurrection School established strict safety protocols and methods to return to in-person schooling. (R-8-1: Decl. of Jacob Allstott, Page ID #174). Resurrection School required that students wear masks walking into school and in any common areas of the school, such as hallways. (R-8-1: Decl. of Jacob Allstott, Page ID #174). The school implemented a map and traffic system to establish social distancing for parent drop off and pick up. (R-8-1: Decl. of Jacob Allstott, Page ID #174). Students must complete strict health screening before entering the school. (R-8-1: Decl. of Jacob Allstott, Page ID #176). Individual classes are divided into "cohorts" and do not interact with other classes. (R-8-1: Decl. of Jacob Allstott, Page ID #176). Cohorts are further broken down into "pods" of just four students. (R-8-1: Decl. of Jacob Allstott, Page ID #176). Pods eat lunch together and attend Mass together, while practicing social distancing. (R-8-1: Decl. of Jacob Allstott, Page ID #176). Resurrection School requires social distancing, and signs to indicate proper distancing are present throughout the school. (R-8-1: Decl. of Jacob Allstott, Page ID #176). Resurrection school enforces handwashing, the use of hand sanitizer, and strict sanitization and disinfection of its facilities several times a day with a commercial grade antimicrobial fogger in in accordance with EPA and CDC guidelines. (R-8-1: Decl. of Jacob Allstott, Page ID #176). A UV-C air

purification systems kills airborne containments, including COVID-19, in each room of the school and continuously runs during school hours. (R-8-1: Decl. of Jacob Allstott, Page ID #176).

Every family at Resurrection School must continuously monitor their health for COVID-19 symptoms and take students' temperatures at home every morning using an oral, tympanic, or temporal scanners. (R-8-1: Decl. of Jacob Allstott, Page ID #176). Anyone experiencing any potential symptoms of COVID-19 or who has been in close contact to a positive case must stay home. (R-8-1: Decl. of Jacob Allstott, Page ID #176). Families do not use any busing to avoid any contact between different cohorts and with anyone outside the school. (R-8-1: Decl. of Jacob Allstott, Page ID #177).

No outside visitors are allowed in the school. (R-8-1: Decl. of Jacob Allstott, Page ID #176). Only teachers who exclusively teach at the school are allowed inside. (R-8-1: Decl. of Jacob Allstott, Page ID #176). Resurrection School has suspended all school assemblies, field trips, and extra-curricular activities for kindergarten through fifth grade. (R-8-1: Decl. of Jacob Allstott, Page ID #177). To date, Resurrection School has avoided any outbreaks within its school due to following these strict protocols. (R-8-1: Decl. of Jacob Allstott, Page ID #177). Resurrection School intentionally and carefully had preserved the

most important aspect of its school: the religious and virtue-based education received in the classroom. (R-8-1: Decl. of Jacob Allstott, Page ID #177).

D. Christopher Mianecke and his children C.M., Z.M., and N.M., and Stephanie Smith and her son F.S.

Selecting a Catholic Parish and a Parish school involves a deep faith discernment as "[t]he parish is the Eucharistic community and the heart of the liturgical life of Christian families; it is a privileged place for the catechesis of children and parents." CCC § 2226; (R-8-1: Decl. of Jacob Allstott, Page ID #181). "[P]arents have the right to choose a school for them which corresponds to their own convictions. This right is fundamental. As far as possible parents have the duty of choosing schools that will best help them in their task as Christian educators. Public authorities have the duty of guaranteeing this parental right and of ensuring the concrete conditions for its exercise." CCC § 2229.

Plaintiffs Mianecki and Smith specifically selected their Catholic schools to help them raise their children in their faith. (R-8-2: Decl. of Christopher Mianecke, Page ID #183, 188.; R-8-3: Decl. of Stephanie Smith, Page ID #193-94). Plaintiff Mianecki is the father of, C.M., a kindergartener; Z.M., a third grader; and N.M., a fifth grader at Resurrection School in Lansing, Michigan. (R-8-2: Decl. of Christopher Mianecke, Page ID #183). Plaintiff C.M., just in kindergarten, cannot tolerate a facial covering for extended lengths of time due to issues with her speech, as well as for developmental and health reasons. (R-8-2:

Decl. of Christopher Mianecke, Page ID #186). Plaintiff Z.M. battles with speech issues and being able to be understood. (R-8-2: Decl. of Christopher Mianecke, Page ID #186-87). Plaintiffs C.M., Z.M., and N.M. all can only tolerate facial coverings for shorter periods of time due to their young age, ability to focus, seasonal allergies, and level of fine motor skills. (R-8-2: Decl. of Christopher Mianecke, Page ID #186-87).

Plaintiff Smith is the mother of F.S., a fourth grader who attended a Catholic school in the Diocese of Lansing. (R-8-3: Decl. of Stephanie Smith, Page ID #193-94). Plaintiff F.S. suffers from breathing issues but does not qualify for a medical exemption. (R-8-3: Decl. of Stephanie Smith, Page ID #193-98). Due to the conditions imposed by Defendants' order, F.S. is no longer able to attend his Catholic school because F.S. cannot tolerate wearing a facial covering for an extended period of time. (R-8-3: Decl. of Stephanie Smith, Page ID #193-98). Consequently, due to the challenged orders, F.S. is being deprived of his right to a Catholic education and Plaintiff Smith is being deprived of her right as a parent to direct the religious education of her child. Plaintiff Smith would choose a Catholic school for her child but is unable to do so because of the challenged orders.

Plaintiffs sincerely believe that it would not be virtuous, moral, or in line with Catholic teaching to punish and discipline a young student for not having the

fine motor skills to properly handle a facial covering, for needing to remove a facial covering to engage in the educational process or to breathe properly, for needing to remove a facial covering because it is hurting or distracting for the child, or for removing a facial covering to better participate in religious education. (R-8-1: Decl. of Jacob Allstott, Page ID #180). The Principal of Resurrection School ("Principal Allstott") has observed young students acting more withdrawn, experiencing hindered or difficult communication, and becoming distracted during class due to Defendants' mask requirement. (R-8-1: Decl. of Jacob Allstott, Page ID #179). He has witnessed that requiring facial masks in kindergarten through fifth grade poses pedagogical challenges and distracts from the school's religious mission and virtue curriculum, and it creates conflict within the school because the mask mandate relies on Resurrection School's administrator and teachers for enforcement. (R-8-1: Decl. of Jacob Allstott, Page ID #179). Principal Allstott has also observed that the students who are most at risk or who already harbor learning challenges experience the most difficulties wearing facial masks. (R-8-1: Decl. of Jacob Allstott, Page ID #179).

Despite providing direction to young students on the proper handling of facial masks, Principal Allstott has observed that these students do not possess the fine motor skills or the cognitive acuity to handle masks properly. (R-8-1: Decl. of Jacob Allstott, Page ID #179). For example, he has observed students at

Resurrection School drop their face masks on the ground and immediately put them back on their faces. (R-8-1: Decl. of Jacob Allstott, Page ID #179). In one instance, he observed a student drop his facemask onto the ground and then place the mask directly in his mouth. (R-8-1: Decl. of Jacob Allstott, Page ID #179).

As a Catholics, Plaintiffs are required to act in accordance with their conscience and the teachings of the Gospel. CCC § 2242; (R-8-1: Decl. of Jacob Allstott, Page ID #179). According to the Catechism of the Catholic Church, "Public authorities have the duty of guaranteeing th[e] parental right [to direct the religious education of their children] and of ensuring the concrete conditions for its exercise." CCC § 2229; (R-8-1: Decl. of Jacob Allstott, Page ID #179). However, conditions put in place by Defendants' orders that distract, upset, and frustrate young children and disregard their behavioral, developmental, and cognitive challenges are not "concrete conditions for . . . the exercise" of this parental right. (R-8-1, Page ID #179). Plaintiffs cannot follow or enforce Defendants' orders without violating their sincerely held beliefs. While safety is exceptionally important to Plaintiffs, eternal salvation holds the utmost importance. Matthew 18: 8-9; (R-8-1 : Decl. of Jacob Allstott, Page ID #181; R-8-2: Decl. of Christopher Mianecke, Page ID #190; R-8-3: Decl. of Stephanie Smith, Page ID #198).

III. Procedural History

On October 22, 2020, Plaintiffs filed their original Complaint. (R-1: Compl., Page ID #1-52). On October 27, 2020, Plaintiffs filed a Motion for a Temporary Restraining Order and Preliminary Injunction, a brief in support, and the declarations of Jacob Allstott, the Principal of Resurrection School, Christopher Mianecke, father of C.M., Z.M., and N.M., and Stephanie Smith, mother of F.S. (R-7: Pls' Mot. for T.R.O. and Prelim. Injunction, Page ID #65-70; R-8: Pls' Br. in Supp. of Mot. for T.R.O. and Prelim. Inj., Page ID #135-70; R-8-1: Decl. of Jacob Allstott, Page ID #172-81; R-8-2: Decl. of Christopher Mianecke, Page ID #183-91; R-8-3: Decl. of Stephanie Smith, Page ID #193-98). Without requesting briefing from the Defendants, the lower court denied Plaintiffs' Motion for a Temporary Restraining Order on October 30, 2020, concluding that the Plaintiffs failed to meet their burden for extraordinary relief. (R-11: Op. and Order Den. T.R.O., Page ID #205-09).

On November 25, 2020, Defendants responded to Plaintiffs' request for a preliminary injunction. (R-18: Defs. Gordon and Nessel's Br. in Resp., Page ID #565-601; R-19: Defs. Vailes and Siemon's Resp., Page ID #602-04; R-20: Defs. Vailes and Siemon's Br. in Resp., Page ID #605-35). On December 9, 2020, Plaintiffs filed their First Amended Complaint and also their reply in support of their motion for a preliminary injunctive. (R-21: First Amend. Compl., Page ID

#636-668; R-22: Pls' Reply in Supp. of Mot. for Prelim. Inj., Page ID #669-91). On December 16, 2020, the lower court denied Plaintiffs' motion for injunctive relief, and Plaintiffs promptly appealed. (R-24: Op. and Order Den. Prelim. Inj., Page ID #693-99; R-25: Notice of Appeal, Page ID #700-01).

SUMMARY OF THE ARGUMENT

The decision of the district court requires reversal because Plaintiffs established a likelihood of success on the merits of their constitutional claims for three reasons. First, the district court erred by holding that Defendants' orders "in no way correlate to religion." (R-24: Op. and Order Den. Prelim. Inj., Page ID #697). Defendants' orders substantially burden Plaintiffs' religious exercise. Plaintiffs explain what their sincerely held religious beliefs are and how the orders burden their religious beliefs in the declarations submitted before the lower court. (R-8-1: Decl. of Jacob Allstott, Page ID #172-81; R-8-2: Decl. of Christopher Mianecke, Page ID#183-91; R-8-3: Decl. of Stephanie Smith, Page ID #193-98). Yet, instead of heeding Plaintiffs' testimony, following the precedent of *Thomas v. Review Board*, 450 U.S. 707 (1981), and deferring Plaintiffs' understanding of their own religious beliefs, the lower court assumed it better to unilaterally pronounce that any burden to Plaintiffs' religious beliefs was "incidental." (R-24: Op. and Order Den. Prelim. Inj., Page ID #698). That was wrong. The First Amendment requires more from the court than a cursory reading of the testimony

of a parent, concerned enough for her child that she brought a lawsuit against powerful government officials because the State's orders burden her child's religious education to such an extent that he can no longer attend school, and the minimizing response: "that seems merely incidental." (*See*, e.g., R-8-3: Decl. of Stephanie Smith, Page ID #193-98). Indeed, this court was required to apply heightened scrutiny to Plaintiffs' First Amendment claims. *See Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't*, 984 F.3d 477, 479–80 (6th Cir. 2020), *reh'g den.* (Jan. 6, 2021).

Second, the district court erred by summarily dismissing Plaintiffs' equal protection claim. The lower court did not even address why the State's orders exempt secular activity, such as speaking before an audience, obtaining spa services, or going to a routine dental appointment, while failing to provide exemptions for Plaintiffs' non-secular request for an accommodation. The lower court simply explained that anyone over the age of five must be masked in public. (R-24: Op. and Order Den. Prelim. Inj., Page ID #698). Notably, Resurrection School is closed to the public and no visitors are allowed in the school building. Admission into the classroom is conditional and severely restricted by Plaintiffs to prevent the transmission of COVID-19. (*See* R-8-1: Decl. of Jacob Allstott, Page ID #176-77). And third, the district court mentions Plaintiffs' substantive Due Process claim asserted under the Fourteenth Amendment in the introduction to its

opinion, but then never addresses the claim in its opinion. Rule 52(a)(2) of the Federal Rules of Civil Procedure requires the lower court to state its findings and conclusions to support its decision to grant or deny injunctive relief. On this issue, the district court stated nothing. The district court's opinion and order require reversal and remand.

STANDARD OF REVIEW

The injunctive relief sought by Plaintiffs turns on the basis of a constitutional violation. *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir.2009)). "[W]hen First Amendment rights are implicated, the factors for granting a preliminary injunction essentially collapse into a determination" of whether the plaintiff established the likelihood of success prong, which rests on a legal determination. *Cnty. Sec. Agency v. Ohio Dep't of Commerce*, 296 F.3d 477, 485 (6th Cir.2002); *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007). Therefore, the standard of review is *de novo*. *Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012).

Under *de novo* review, this Court is free to substitute the flawed judgment of the lower court with its own judgment and even give the findings of the lower court "no form of appellate deference." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991). Appellate review of a denial of a preliminary injunction is

plenary, providing the reviewing court with jurisdiction to review and consider the entire record of the lower court. 28 U.S.C. § 1292(a). And since this case implicates First Amendment rights, this Court must closely scrutinize the record "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 567 (1995). This Court should "conduct an independent examination of the record as a whole, without deference to the trial court" on Plaintiffs' First Amendment claims. *Id.*; *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (same).

ARGUMENT

I. The District Court Erred by Denying Plaintiffs Preliminary Injunctive Relief from Defendants' Unconstitutional Orders because Plaintiffs Established a Likelihood of Success that the Orders Violate the Free Exercise Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment.

The lower court's denial of Plaintiffs' Motion for a Preliminary Injunction fails as a matter of law and requires reversal. Plaintiffs demonstrated the likelihood of success on their constitutional claims brought under the Free Exercise Clause of the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The lower court erred in its conclusions to the contrary as to free exercise and equal protection claims, and it failed altogether to address Plaintiffs' substantive due process claims.

II. The District Court Erred by Finding that Defendants' Emergency Orders that Control, Fundamentally Alter, and Infringe Upon Religious Education Do Not Violate the Free Exercise Clause of the First Amendment.

The district court committed its most egregious error in its analysis of Plaintiffs' free exercise claim. The district court's analysis is a mirror image of the maligned "general applicability" test from *Employment Division v. Smith*, 494 U.S. 872, 879 (1990). *Smith* expresses the default rule that a facially neutral law, here Defendants' orders, will generally survive a free exercise analysis. However, *Smith* cut against the great tradition of religious liberty in our country and runs antithetical to more recent precedent. For example, just last term, the Supreme Court re-asserted that "[t]he First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020).

And even under *Smith*, Defendants' orders are not actually "generally applicable." Defendants' orders demand that Plaintiffs modify its curriculum and disciplinary policies and interfere with Plaintiffs' ability to provide and partake in Catholic education, and the orders contemplate no other alternatives—while exempting a panoply of secular activities.

A law might appear to be generally applicable on the surface but not be in practice due to exceptions for comparable secular activities. *Roberts v. Neace*, 958

F.3d 409, 413 (6th Cir. 2020). A law that discriminates against religious practices or beliefs usually will be invalidated because it is the rare law that can be "justified by a compelling interest and is narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 553 (1993). In *Lukumi*, the Court struck down on free exercise grounds a law that prohibited animal sacrifice. The law permitted some animal killings as "necessary," but deemed the ritual, religious killing of an animal as unnecessary and thus criminal, in violation of the Free Exercise Clause. *Id*. Likewise, here, Defendants' orders allow masks to be removed for some activities, but not for religious education. In holding that the orders were generally applicable under *Smith*, the lower court applied the wrong standard.

A. The District Court's Opinion Conflicts with *Thomas v. Review Board*.

The district court also erred by dismissing Plaintiffs' sincerely held religious objections to implementing Defendants' orders. In *Thomas v. Review Board of Indiana Employment Security Division,* 450 U.S. 707 (1981), the Supreme Court considered the conscientious objection of a young Jehovah Witness who worked in a foundry. *Id*. at 710. Thomas' employers transferred him to work making turrets that would eventually become part of a tank. *Id*. Thomas refused to be complicit in work he found morally objectionable and lost his job. *Id*. Thomas was denied unemployment benefits and sued. The Court held that Thomas's right to free

exercise of religion was violated. The Court held that "it is not for us to say that the line he drew was an unreasonable one." *Id*. at 715. And the Court further noted: "Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation." *Id.* at 716.

A few terms ago, the Supreme Court examined whether the government's interest in ensuring public health allowed it to mandate that employers provide and facilitate access to "emergency contraception" for its employee, when doing so violated the employers' religious beliefs. *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 726 (2014). The Court found that requiring the employer to violate his religious conscience or face penalties and fines from the government imposed a substantial burden on the employer's free exercise of religion. *Id*. at 728.

Here, Plaintiffs' sincerely held religious beliefs call them to provide and to receive religious education in accordance with their Catholic beliefs. Plaintiffs cannot achieve this goal by altering the goals of the classroom, focusing on the disruptions to the classroom caused by the difficulties some young children experience due to wearing masks, by ignoring the concerns of the children's parents, or by forcing young children to continuing wearing masks when doing so cuts against the school's religious calling to be merciful.

Plaintiff Resurrection school objects to forcing young children to wear masks when the child is socially distanced, seated at his/her desk, and not posing harm to anyone. Defendants' orders penalize and criminalize this exercise of conscience. While some younger students can wear masks without problems, Resurrection School recognizes that there are students, such as C.M., Z.M., N.M., and F.S., who struggle to wear a mask for an extended period of time but do not qualify for a medical exemption. Plaintiffs' Catholic faith requires them to show mercy and create an inclusive environment for these students. For example, Plaintiffs believe that C.M., a kindergartener who is learning how to read the Bible and who struggles with her speech, should be able to remove her facial covering when at her desk and within her pod, so she can be audibly heard by the class and so she can receive the help she needs to learn to read and pronounce words correctly. The lower court simply dismissed Plaintiffs' sincerely held religious objections. It, however, was not the role of the lower court to deem the line Plaintiffs' drew "unreasonable" or "incidental." *Thomas*, 450 U.S. at 715; (R-24: Op. and Order Den. Prelim. Inj., Page ID #698).

B. The District Court's Opinion Conflicts with this Court's Holding in *Monclova Christian Academy v. Toledo-Lucas County Health Department*.

This Court recently analyzed whether forcing a religious school to conduct its operations virtually implicated religious exercise. *Monclova Christian Acad. v.*

Toledo-Lucas Cty. Health Dep't, 984 F.3d 477, 479–80 (6th Cir. 2020), *reh'g den.* (Jan. 6, 2021). The school asserted that "a communal in-person environment" was critical to the religious education it provided. *Id*. And this Court found "no basis to second-guess" the school. *Id*.

Monclova Christian Academy also explained the proper standard under which to analyze free exercise claims when the government restricts religious conduct but exempts secular conduct. This Court explained:

> Whether conduct is analogous (or "comparable") for purposes of this rule does not depend on whether the religious and secular conduct involve similar forms of activity. Instead, comparability is measured against the *interests* the State offers in support of its restrictions on conduct. Specifically, comparability depends on whether the secular conduct "endangers these interests in a similar or greater degree than" the religious conduct does. *Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217. In *Cuomo*, for example, the Court said that activities at "acupuncture facilities, camp grounds, garages," and retail stores were comparable to "attendance at houses of worship"—precisely because that secular conduct presented a "more serious health risk" than the religious conduct did. 141 S. Ct. at 66-67. Mitigation of that risk, of course, was the State's asserted interest in support of its restrictions on attendance at religious services; the State did not extend those restrictions to comparable secular conduct; and thus, the Court held, "the challenged restrictions" were not "of 'general applicability[.]'" *Id*. at 67 (quoting *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217). It followed as a matter of course that the restrictions were invalid.

Monclova Christian Acad., 984 F.3d at 480. The district court failed to analyze the comparability of requiring masks during the religious education of young children with Defendant's interests in allowing secular exemptions. Furthermore, the district court also failed to consider whether the secular exemptions allowed by

Defendants presented a "more serious health risk" than the narrow religious exemption sought by Plaintiffs. The district court's analogous conduct analysis was overly simplistic. But more importantly, it was incorrect.

III. The District Court Erred by Not Applying Strict Scrutiny to Plaintiffs' Free Exercise Claims.

Defendants' orders allow people to remove facial coverings for many reasons, such as voting at a school, attending a public religious worship ceremony, sitting at a table at a restaurant, sitting with a group of people at a table or at a bar, reciting a speech to an audience, and receiving services that require the removal of facial coverings, such as spa, tattoo, piercing and cosmetic services. Learning how to read the Bible and receiving and participating in a Catholic education seem at least as important as the exemptions allowed under the orders, and to practicing Catholics, much more important. (R-8-1, Decl. of Jacob Allstott, Page ID #181).

In light of the numerous exceptions for masks permitted for secular purposes, Defendants' orders are not neutral laws of general applicability and must, therefore, satisfy strict scrutiny. *See Lukumi*, 508 U.S. at 547 ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."). Indeed, Defendants provide a general medical exemption—and for individuals considered to be the most at risk.

The First Amendment also demands a general religious exemption for healthy young children secluded in a pod in their private school classroom.

A. The District Court's Opinion Conflicts with the Rights of Parents to Exercise Their Faith in the Upbringing of Their Children.

Even if this Court were to deem Defendants' orders generally applicable, which they are not, Plaintiffs' free exercise claim also requires heightened scrutiny because the "'application of a neutral, generally applicable law to religiously motivated action' implicates 'the right of parents' 'to direct the education of their children.'" *Danville Christian Acad., Inc. v. Beshear*, No. 20A96, 2020 WL 7395433, at *1 (U.S. Dec. 17, 2020). This hybrid claim requires strict scrutiny that the district court erred by not applying. The rights of Plaintiffs are fundamental and require Defendants to consider less restrictive alternatives, such as social distancing, plexiglass barriers, air filtration systems, and improved ventilation systems, that would not distract from the religious education of Plaintiffs' classrooms. This Court should reverse the findings of the lower court and direct the lower court to apply strict scrutiny to Plaintiffs' First Amendment claim and to require Defendant to use less restrictive alternatives.

IV. The District Court Erred; Defendants' Emergency Orders Violate the Equal Protection Clause.

The lower court cited no case law to explain why Defendants' order passed constitutional muster under the Equal Protection Clause. Instead, the lower court

made two fundamentally erroneous findings: First, the lower court reasoned that since children have to wear masks in public, *ipso facto*, young children must wear masks for the entire day in the privacy of the classroom of their private, small, religious school where (1) no visitors are allowed, (2) the children may only socialize in a pod of four other students, and (3) the students are socially distanced from one another. Logic does not follow. And second, the district court asserted that the exemptions in the Defendants' orders apply universally. They do not. Instead, Defendants' orders exempt many secular activities, such as voting in an elementary school, giving a speech to an audience, removing a mask while seated at a restaurant or bar, removing a mask to receive certain services, etc. However, the same activity of sitting while socially distanced away from others is not allowed in a private, religious school classroom. This is not the evenhandedness that the Constitution demands under the Equal Protection Clause.

When the government treats an individual disparately "as compared to similarly situated persons and that such disparate treatment . . . *burdens a fundamental right*, targets a suspect class, or *has no rational basis*," such treatment violates the equal protection guarantee of the Fourteenth Amendment. *Bible Believers v. Wayne County*, 805 F.3d 228, 256 (6th Cir. 2015) (internal quotations and citation omitted) (emphasis added). "In determining whether individuals are 'similarly situated,' a court should not demand exact correlation, but should instead

seek relevant similarity." *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 987 (6th Cir. 2012) (internal quotation marks omitted).

As set forth above, the challenged measures burden Plaintiffs' fundamental right to the free exercise of religion under the First Amendment in violation of the equal protection guarantee of the Fourteenth Amendment. The challenged orders disallow religious students from removing masks while socially distanced from another person, but allow a person giving a speech to an audience to remove his/her mask. The orders carry no penalty for removing a mask to engage in religious worship in a house of worship but disallow that same individual to remove his/her mask to engage in religious worship or religious education in the classroom. The orders allow for people to remove their masks at voting poll sites, many located at schools, but disallow Plaintiffs from removing their masks in a similar location, also a school, for religious purposes. Under Defendants' orders, Plaintiffs can even remove their masks at school for an unspecified amount of time if eating or drinking at lunchtime with no social distancing requirements but must keep their masks on at all times while learning even when the students are socially distanced from each other seated in the classroom. The Equal Protection Clause does not permit such disparate and irrational treatment that burdens Plaintiffs' fundamental rights. The challenged orders lack any rational basis and harm

Plaintiffs' protected interests in violation of the Equal Protection Clause of the Fourteenth Amendment.

V. The District Court Erred by Failing to Analyze or Address Plaintiffs' Arguments under the Due Process Clause.

Plaintiffs brought their fourth claim for relief under the Due Process Clause (substantive) of the Fourteenth Amendment. (R-21: First Amend. Compl., Page ID #665-66). Plaintiffs also sought preliminary injunctive relief on this basis. (*See* R-8: Pls' Br. in Supp. of Mot. for T.R.O. and Prelim. Inj., Page ID #160-61; R-22: Pl's Reply Br. in Supp. of Mot. for T.R.O. and Prelim. Inj., Page ID #687-88). The lower court recognized in its opinion that Plaintiff brought this claim before the court, (R-24: Op. and Order Den. Prelim. Inj., Page ID #694), but then never addressed the claim again and rendered no decision on it.

Rule 52(a)(2) of the Federal Rules of Civil Procedure requires a court to state its findings and conclusions. The lower court erred in its silence. This Court should remand the claim requiring that the lower court render a decision that complies with the federal rules. *See, e.g.*, *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R.*, 294 U.S. 499, 511 (1935) ("We must know what a decision means before the duty becomes ours to say whether it is right or wrong.").

In the alternative, this Court could decide the claim as a matter of first impression. "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals,

to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). And review at this level can be appropriate when "injustice might otherwise result." *Hormel v. Helvering,* 312 U. S. 552, 557 (1941). The loss of a fundamental right due to arbitrary and overbroad State regulation results in injustice. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing freedoms, such as bringing up children and worshiping God as fundamental). Therefore, this Court should either remand this claim or conclude, for the reasons argued below, (R-8: Pls' Br. in Supp. of Mot. for T.R.O. and Prelim. Inj., Page ID #160-61), that Defendants' orders are unconstitutional under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

The district court erred by not granting preliminary injunctive relief to Plaintiffs. Based on the foregoing, this Court should reverse and remand with directions to the district court to enter the requested injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 8,114 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

Respectfully submitted,

GREAT LAKES JUSTICE CENTER

/s/ Erin Elizabeth Mersino
Erin Elizabeth Mersino (P70886)

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2021 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

GREAT LAKES JUSTICE CENTER

/s/ Erin Elizabeth Mersino
Erin Elizabeth Mersino (P70886)

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record No.	Page ID# Range	Description
R-1	1-52	Complaint and Exhibits 1-5
R-7	65-70	Emergency Motion for TRO and Preliminary Injunction
R-8	135-70	Brief in Support of Motion for TRO and Preliminary Injunction
R-8-1	172-81	Declaration of Jacob Allstott
R-8-2	183-91	Declaration of Christopher Mianecke
R-8-3	193-98	Declaration of Stephanie Smith
R-11	205-09	Order Denying TRO
R-13	215-18	Motion to Dismiss filed by Defendants Gordon and Nessel
R-14	219-474	Brief in Support of Motion to Dismiss filed by Defendants Gordon and Nessel and Exhibits
R-15	475-76	Motion to Dismiss filed by Defendants Carol A. Siemon and Linda S. Vail
R-16	477-561	Brief in Support of Motion to Dismiss filed by Defendants Carol A. Siemon and Linda S. Vail and Exhibits
R-18	565-601	Response in Opposition to Pl's Motion for Preliminary Injunction filed by Defendants Gordon and Nessel
R-19	602-04	Response in Opposition to Pl's Motion

		for Preliminary Injunction filed by Carol A. Siemon and Linda S. Vail
R-20	605-35	Brief filed by Carol A. Siemon and Linda S. Vail to Support Opposition to Pl's Motion for Preliminary Injunction
R-21	636-668	First Amended Complaint
R-22	669-91	Pl's Reply in Support of Motion for Preliminary Injunction
R-24	693-99	Order Denying Pl's Motion for Preliminary Injunction
R-25	700-01	Notice of Appeal