For example, in December 2020 in a case called *Resurrection School v. Gordon*, 507 F. Supp. 3d 897 (W.D. Mich. 2020), a federal district court rejected a claim by a Catholic school and the school's parents that an MDHHS order requiring all individuals over the age of five to wear a face covering in public violated their right to freely exercise their religion under the First Amendment. The court reasoned that the MDHHS order applied equally to public and private schools and to secular and religious schools, thus any burden on the plaintiffs' religious practices was incidental, and the order need not be justified by a compelling state interest. At the preliminary injunction stage, the court held that the MDHHS order was likely constitutional and plaintiff's claim was unlikely to succeed. This decision is currently on appeal in the Sixth Circuit.

By contrast, in a December 2020 case called *Monclova Christian Academy v. Toledo-Lucas County Health Department*, 984 F.3d 477 (6th Cir. 2020), the Sixth Circuit determined that a county order that *shut down* all schools in the county, but not comparable secular businesses such as gyms, tanning salons, office buildings, and casinos, burdened the religious practice of schools and was not an order of general applicability. Accordingly, the order was subject to strict scrutiny. Because the county in that case made no argument that its order could survive that heightened level of review, it was enjoined from enforcing the order.

Notably, the panel decision in *Monclova* conflicts with another Sixth Circuit decision in *Kentucky ex rel. Danville Christian Academy, Inc. v. Beshear*, 981 F.3d 505, 510 (6th Cir. 2020), 981 F.3d 505 (6th Cir. 2020). In *Beshear*, the Sixth Circuit ruled, just one month before the decision in *Monclova*, that an executive order that closed all public and private schools in Kentucky, religious or otherwise, was "neutral and of general applicability and need not be justified by a compelling state interest." *Id.* at 509. The Sixth Circuit noted that the same reasons applied for suspending in-person instruction of religious schools and of secular schools, and any burden on religious practices was incidental and not subject to strict scrutiny.

The conflict between *Monclova* and *Beshear* (and the *Monclova* panel's decision to veer from the previous controlling opinion) has not been resolved. Generally, an earlier panel decision is binding on later panels, meaning the decision in *Beshear* would bind the panel in *Monclova*.

However, if *Monclova* is controlling, it demonstrates that in certain situations, a seemingly neutral rule that applies to all schools (public and private, secular and religious) could nonetheless burden religious schools as compared to secular, non-school businesses, therefore triggering strict scrutiny. There are, however, a few reasons why the holding in *Monclova* would be very difficult to apply in the circumstances surrounding the August 20, 2021 Order:

First, in *Monclova*, the order at issue shut down religious schools entirely, thereby stifling the ability of the schools, the children, and their parents to exercise their faith in school.

An order requiring masks does not present such an obvious burden on free exercise of religion, because in-school religious instruction may continue under such an order. A party challenging a mask order would need to explain why masks impede religious activity; otherwise, the order will not be subject to strict scrutiny and will likely survive constitutional challenge.

Second, in *Monclova*, the county put forward no argument for why its order could survive strict scrutiny, i.e., why the order was the least restrictive means of advancing a compelling state interest. Here, the County would have a stronger argument that the August 20, 2021 Order should survive strict scrutiny because, rather than mandate the total closure of schools, the order imposes a far less burdensome rule in order to protect the most vulnerable population of students and teachers. Further, evidence of increased transmission of the Delta variant in children who are not able to be vaccinated would likewise support the County's claim that its state interest in mandating masks, while permitting in-person instruction, is compelling.

Additionally, some churches and other places of worship have succeeded on First Amendment challenges to COVID-19 related orders that barred or limited indoor religious gatherings. Those constitutional challenges were successful because the orders singled out or targeted religious places of worship for special treatment. The August 20, 2021 Order does not single out or target religion.

**There Is No Basis To Permit Individual Religious Exemptions**

On its face, the August 20, 2021 Order contains no exemption for individuals who have a religious objection to wearing a mask.

Nor is there any statutory basis to argue for a religious exemption. None of the statutes invoked by the County in the August 20, 2021 Order contains an exemption for religious objection. The Legislature could have included such an exemption but it did not. By contrast, MCL 333.9215 contains an exemption from vaccination of students who cannot be immunized "because of religious convictions or other objection to immunization."

Finally, because the First Amendment challenge is unlikely to succeed, it would be difficult to argue that a religious exemption should be read into the Order.

**Conclusion**

The statutory provisions cited above provide local public health departments' broad authority to safeguard the public health and to prevent the spread of diseases and sources of contamination. That statutory authority, combined with the case law upholding MDHHS epidemic orders, indicate that a local public health department's orders containing similar measures to those issued by MDHHS would likely be upheld. Accordingly, the County has the

authority to issue Orders related to COVID-19 prevention in educational settings within the County.

Because the current County Orders are neutral and generally applicable to all schools, the Orders would likely withstand constitutional challenge. Accordingly, until and unless a successful challenge is made, it is our opinion that the School has an obligation to comply with those Orders.

Sincerely,

MILLER JOHNSON

By
Nathan D. Plantinga