UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RESURRECTION SCHOOL, ET AL.,
Plaintiffs,

-v-

ELIZABETH HERTEL, ET AL.,
Defendants.

No. 1:20-cv-1016

Hon. Paul L. Maloney

OPINION AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on Plaintiffs' motion for preliminary injunction (ECF No. 32). Plaintiffs seek to enjoin Defendant Linda Vail, Ingham County Health Officer, and Defendant Carol Seimon, Ingham County Prosecutor, from enforcing an Ingham County Health Department emergency order requiring all persons in educational settings to wear face coverings ("masks"). This Court previously denied Plaintiffs' motion for a temporary restraining order, which sought the same relief (ECF No. 32).[1]

I. Facts and Procedural History

This case commenced in October 2020 when the Plaintiffs, Resurrection School and two parents on behalf of their children who attend Resurrection School, petitioned this Court for a temporary restraining order (TRO) and preliminary injunction (ECF No. 7) seeking to

[1] The Court notes that on October 15, 2021, it ordered the parties to provide further briefing on how the passage of Michigan Public Act 87 of 2021—which prohibited local health departments from issuing mask mandates that govern individuals under 18 years of age—affects the Ingham County emergency order at issue. *See* 2021 Mich. Pub. Acts 87, § 250. The enforcement mechanism for this prohibition is that the state would withhold the funds appropriated for local public health services if a local health officer had such an order in place as of October 1, 2021, unless the county board of commissioners passes a nonbinding resolution by a record roll call vote in support of such emergency order. *See id.* § 1222(4). The Court finds that Public Act 87 has no impact on the present matter because the Ingham County Board of Commissioners unanimously passed a nonbinding resolution by record roll call vote in support of the emergency order.

enjoin Defendants[2] from enforcing a Michigan Department of Health and Human Services (MDHHS) order requiring children grades K–5 to wear face coverings throughout the school day. This Court denied both the TRO and the preliminary injunction (ECF Nos. 11, 24), and Plaintiffs appealed to the Sixth Circuit. In August 2021, the Sixth Circuit affirmed the denial of Plaintiffs' motions for injunctive relief. *See Resurrection Sch. v. Hertel*, 11 F.4th 437 (6th Cir. 2021); ECF No. 30.

Then on September 3, 2021, Plaintiffs filed another emergency motion for TRO, this time seeking to enjoin an Ingham County Health Department emergency order (the "emergency order") requiring "all persons in educational settings" to wear facial coverings while inside enclosed buildings.[3] There are five exceptions to the emergency order. It does not apply to: (1) people eating, drinking, or napping; (2) people under the age of four years old; (3) people with developmental conditions where the use of a face covering would inhibit their access to education (these people must have an Individualized Education Plan or the equivalent); (4) vaccinated teachers who are working with children with hearing issues or students with developmental conditions who benefit from facial cues; and (5) people who have a medical contraindication confirmed in writing from an MD or DO. There is no exemption regarding religious beliefs.

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[2] At that time, the defendants were Robert Gordon, the Director of the Michigan Department of Health and Human Services; Dana Nessel, the Michigan Attorney General; Linda Vail, the Health Officer of Ingham County, and Carol Sieman, the Prosecuting Attorney of Ingham County. Today, the defendants are the same except Elizabeth Hertel has replaced Robert Gordon as Director of the MDHHS.

[3] *Emergency Order (Ingham2021-2) for Control of Epidemic Mas Requirement for Educational Institutions- Child Care Centers, Preschools and Pre-K to 12 Schools (Elementary, Middle, High and Vocational)*, Ingham County Health Department (Sept. 2, 2021), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjmhvSQlZDzAhUWGFkFHUVoB1gQFnoECAYQAQ&url=https%3A%2F%2Fwww.haslett.k12.mi.us%2Fsite%2Fhandlers%2Ffiledownload.ashx%3Fmoduleinstanceid%3D10815%26dataid%3D15586%26FileName%3DIngham%2520County%2520EOSept2-2021-2.pdf&usg=AOvVaw1GMQzJWkbxIxZmScPX7YZx.

Plaintiffs argue that the emergency order violates their right to free exercise of religion because forcing children to wear masks in school inhibits their Catholic education and sincerely held religious beliefs (*see* ECF No. 33 at PageID.839). They raise three arguments in an attempt to distinguish the current request for injunctive relief from their previous request and show why they are now more likely to succeed on the merits: (1) the emergency order targets Catholic and private schools, (2) the emergency order does not pass strict scrutiny under *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), and (3) the emergency order is not generally applicable because it only applies to schools and not all public spaces (ECF No. 33 at PageID.835-36).

In the order denying the TRO (ECF No. 35), this Court relied heavily on the Sixth Circuit's opinion affirming the denial of Plaintiffs' first motion for injunctive relief. *See Resurrection Sch.*, 11 F.4th at 437; ECF No. 30. First, regarding Plaintiffs' second argument, Plaintiffs already raised the issue of whether a mask mandate with exemptions violates *Fulton*. 141 S. Ct. at 1868. The Sixth Circuit held that the exemptions in the MDHHS order[4]

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[4] The exemptions in the October 9, 2020, MDHHS order were:
"(a) Except as otherwise provided in section 5 of this order, are younger than 5 years old (and, per guidance from the CDC, children under the age of 2 should not wear a face covering);
(b) Cannot medically tolerate a face covering;
(c) Are eating or drinking while seated at a food service establishment;
(d) Are exercising outdoors and able to consistently maintain six feet of distance from others;
(e) Are swimming;
(f) Are receiving a service for which temporary removal of the face covering is necessary;
(g) Are entering a business or are receiving a service and are asked to temporarily remove a face covering for identification purposes;
(h) Are communicating with someone who is deaf, deafblind, 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 covering would seriously interfere in the performance of their public safety responsibilities;
(j) Are at a polling place for purposes of voting in an election;
(k) Are engaging in a religious service;
(l) Are giving a speech for broadcast or to an audience, provided that the audience is at least six feet away from the speaker."

were not comparable to the discretionary exemptions in *Fulton*. *See Resurrection Sch.*, 11 F.4th at 458-59; ECF No. 30 at PageID.822. The Commissioner in *Fulton* could grant exemptions in her "sole discretion" while the exemptions in the MDHHS order provided for no discretion. Thus, when considering the Plaintiffs' motion for TRO, this Court followed the Sixth Circuit's reasoning because the exemptions in the emergency order also provide for no discretion, and the exemptions[5] in the emergency order are even more narrow than the exemptions that were in the MDHHS order.

Next, this Court rejected Plaintiffs' argument in their motion for TRO that the emergency order was not generally applicable, also based on the previous Sixth Circuit opinion in this case. *See Resurrection Sch.*, 11 F.4th at 437; ECF No. 30. Plaintiffs argue that the emergency order is not generally applicable because it only applies to schools, and not to all public spaces (ECF No. 33 at PageID.841). The Sixth Circuit already considered this argument in this case and held that the appropriate comparable secular activity was "public and private nonreligious schools," *Resurrection Sch.*, 11 F.4th at 458; ECF No. 30 at PageID.821, not all public spaces, as Plaintiffs continue to argue. Thus, this argument was also rejected by this Court.

[5] The exemptions in the September 2, 2021, Ingham County order are:
"IT IS FURTHER ORDERED that this ORDER shall not apply to the following Persons:
a. Persons in the act of eating, drinking or napping.
b. Persons under the age of four years; however, supervised masking is recommended for children who are at least two years of age.
c. Persons with developmental conditions of any age attending school for whom it has been demonstrated that the use of a face covering would inhibit the person's access to education. These are limited to persons with an Individualized Education Plan, Section 504 Plan, Individualized Healthcare Plan or equivalent.
d. Vaccinated teachers who are working with children who are hard of hearing or students with developmental conditions who benefit from facial cues.
e. Persons who have a medical contraindication confirmed in writing from a Medical Doctor (MD) or Doctor of Osteopathic Medicine (DO) currently licensed to practice medicine in the State of Michigan."

Finally, returning to Plaintiffs' first argument in their motion for TRO, Plaintiffs asserted that the emergency order specifically targets religious schools because Defendant Vail stated that "97% of students in public schools are already attending a district where masks have been required." *See Washtenaw, Ingham Counties Issue Mask Orders for Schools*, Detroit News (Sept. 2, 2021), https://www.detroitnews.com/story/news/education/ 2021/09/02/michigan-school-mask-orders-covid-health-departments/5694030001/. Plaintiffs wanted the Court to infer that because 97% of public-school students were already required to wear masks, the emergency order was then directed at religious schools. But Plaintiffs' argument failed because the emergency order created a uniform mandate for all schools and students, whether they go to school at a public school, private-religious school, private-non-religious school, vocational school, charter school, etc. Thus, this Court declined to issue a TRO enjoining the emergency order. The Court must now consider whether a preliminary injunction is warranted.

II. Law

A trial court may issue a preliminary injunction under Federal Rule of Civil Procedure 65. A district court has discretion to grant or deny preliminary injunctions. *Planet Aid v. City of St. Johns, Mich.*, 782 F.3d 318, 323 (6th Cir. 2015). A court must consider each of four factors: (1) whether the moving party demonstrates a strong likelihood of success on the merits; (2) whether the moving party would suffer irreparable injury without the order; (3) whether the order would cause substantial harm to others; and (4) whether the public interest would be served by the order. *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th

Cir. 2008) (quoting *Northeast Ohio Coalition for Homeless & Service Employees Int'l Union v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006)).

The four factors are not prerequisites that must be established at the outset but are interconnected considerations that must be balanced together. *Northeast Ohio Coalition*, 467 F.3d at 1009; *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002) (internal citation omitted); *see Patio Enclosures, Inc. v. Herbst*, 39 F. App'x 964, 967 (6th Cir. 2002) (citing *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000)).

The purpose of a preliminary injunction is to preserve the status quo. *Smith Wholesale Co., Inc. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 873 n. 13 (6th Cir. 2007) (quoting *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004)). The Sixth Circuit has noted that "[a]lthough the four factors must be balanced, the demonstration of some irreparable injury is a *sine qua non* for issuance of an injunction." *Patio Enclosures*, 39 F. App'x at 967 (citing *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982)).

III. Analysis

A. Factor I: Substantial Likelihood of Success on the Merits

The likelihood of success on the merits of Plaintiffs' claim hinges in significant measure on the standard of review that this Court must apply given existing appellate authority. "If a protected class or fundamental right is involved, [the court] must apply strict

scrutiny, but where no suspect class or fundamental right is implicated, [the court] must apply rational basis review." *Midkiff v. Adams Cty. Reg'l Water Dist.*, 409 F.3d 758, 770 (6th Cir. 2005). A law that discriminates against religious practices will usually be invalidated under strict scrutiny because the law likely cannot be justified by a compelling interest and is narrowly tailored to advance that interest. *See Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 553 (1993)). But if a fundamental right, such as the right to practice religion, is incidentally burdened due to a neutral and generally applicable government policy, rational basis applies, and the law will usually be upheld. *See Roberts*, 958 F.3d at 413. Because the Court finds that the emergency order is neutral, generally applicable, and not motivated by religious animus, rational basis applies.

Under rational basis review, the burden is on the plaintiff to prove that the policy in question is not rationally related to a legitimate government interest. Further, the governmental policy at issue "will be afforded a strong presumption of validity" and must be upheld as long as there is a rational relationship between the policy in question and some legitimate government purpose. *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). Finally, "a plaintiff faces a severe burden and must 'negate all possible rational justifications for the distinction.'" *Midkiff*, 409 F.3d at 770 (quoting *Gean v. Hattaway*, 330 F.3d 758, 771 (6th Cir. 2003)).

When this case was before the Sixth Circuit challenging the validity of the MDHHS order in 2020, the Sixth Circuit applied a rational basis standard of review. *See Resurrection Sch.*, 11 F.4th at 455-56; ECF No. 30 at PageID.817-18. In doing so, the Sixth Circuit applied

the rationale from *Commonwealth v. Beshear*, 981 F.3d 505, 509 (6th Cir. 2020), which upheld a Kentucky order that temporarily prohibited in-person instruction at public and private K-12 schools. In *Beshear*, private religious schools argued that the order violated their free-exercise rights in teaching a religious education in-person. *Id.* at 507. However, the Sixth Circuit upheld the neutral and generally applicable order because it "applie[d] to all public and private elementary and secondary schools in the Commonwealth, religious or otherwise." *Id.* at 509. The Sixth Circuit concluded the same in *Resurrection School*. 11 F.4th at 458; ECF No. 30 at PageID.821 ("[T]he MDHHS orders are not so riddled with secular exceptions as to fail to be neutral and generally applicable.").

Although Plaintiffs are currently challenging a different order, the Court must apply the law of this case. Plaintiffs appear to recognize that the Court must apply *Resurrection School*, 11 F.4th at 437, because they make three distinct arguments in attempt to distinguish their current motion from their previous motion for a preliminary injunction. They argue that despite the binding precedent in this case itself, they are likely to succeed on the merits in their current motion for preliminary injunction because (1) the emergency order targets Catholic and private schools, (2) the emergency order does not pass strict scrutiny under *Fulton*, 141 S. Ct. at 1868, and (3) the emergency order is not generally applicable because it only applies to schools and not all public spaces (ECF No. 33 at PageID.835-36). The Court does not find any of these arguments to be persuasive and instead finds that Plaintiffs are not likely to succeed on the merits.

Defendants do not contest that Plaintiffs sincerely believe that masks inhibit their ability to properly teach a Catholic education. However, they do contest Plaintiffs' claim that

the emergency order targets religious schools in Ingham County. Plaintiffs attempt to argue that a strict scrutiny standard applies because when Health Officer Vail implemented the emergency order, 97% of public-school students were already wearing masks, which must mean that Health Officer Vail purposely targeted religious schools. But this argument fails to recognize that the emergency order does not just affect religious-school students—it affects the remaining 3% of public-school students, private-religious school students, private-non-religious school students, charter-school students, and vocational-school students. In other words, it affects *all* students who were not already required to wear a mask. Plaintiffs want the Court to assume that most of the students who were not already required to wear a mask in school are students who attend religious schools, but they have not provided any data or evidence in the record that supports this theory.

In response to Plaintiffs' argument that the emergency order targets religious schools, Health Officer Vail testified that the emergency order was not meant to target religious schools. She further testified and provided an affidavit asserting that she possessed no information regarding the status of mask requirements at any private school, meaning she could not have issued the emergency order in response to data about minimal mask-wearing at private schools (ECF No. 36-1 at PageID.904). Defendants further argue that the order is *more* generally applicable than the previous school or district rules about masks that were effective before the emergency order because it creates a uniform mask mandate for *all* students that applies equally to *all* schools (ECF No. 36 at PageID.890). The Court finds that

there is insufficient evidence in the record to conclude that Health Officer Vail issued the emergency order for the purpose of targeting religious schools.[6]

Plaintiffs next argue that they are likely to succeed on the merits based on the "generally applicable" language in *Fulton*. 141 S. Ct. at 1877. Under *Fulton*, "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Id.* at 1877-78 (allowing the Commissioner to grant exemptions "in his/her sole discretion"). Plaintiffs argue that the exemptions in the emergency order create this system of "individualized exemptions" that render the order not generally applicable and instead subject to strict scrutiny. This argument is without merit because the emergency order does not give anyone (teacher, principal, parent, etc.) the ability "in his/her sole discretion" to determine whether an exemption applies to one child, but not to another. The exemptions are bright-line rules: if a child is napping, that child does not have to wear a mask; if a child is eating, that child does not have to wear a mask; if a child is working with a vaccinated teacher and that child has hearing issues, that teacher does not have to wear a mask, etc. The exemptions in this emergency order are not "individualized," nor does the emergency order provide for anyone to grant the exemptions in their "sole discretion."

[6] It appears that Plaintiffs may have abandoned this argument prior to the hearing on the preliminary injunction. In their reply brief in support of a preliminary injunction, they only addressed this argument in a footnote (ECF No. 39 at PageID.937 N.5), asserting that they do not abandon this argument, but providing no additional evidence to support the argument. And at the preliminary injunction hearing, Plaintiffs presented no evidence that the emergency order targets religious schools, nor did they question Health Officer Vail about her motives behind the policy. Finally, in their brief following the hearing, Plaintiffs did not assert that the emergency order was passed for the purpose of targeting religious schools. Plaintiffs may have realized that this argument is without merit.

During the preliminary injunction hearing, Plaintiffs cross examined Health Officer Vail about her authority to pass emergency orders, granted to her under Mich. Comp. Laws §§ 333.2451, 333.2453 (1978). These statutes give local health officers the power to issue emergency orders during times of "imminent danger" or epidemics "to protect the public health." *Id.* §§ 333.2451, 333.2453. Plaintiffs elicited testimony from Health Officer Vail that under these statutes, as the local health officer of Ingham County, she is the only individual in Ingham County who has the authority to pass emergency public health orders. Thus, Plaintiffs want the Court to infer that Health Officer Vail, in her sole discretion, is the only individual who can implement emergency health orders and grant exemptions thereto. Although Health Officer Vail may have the sole authority to pass emergency health orders and determine their exemptions, regarding the particular emergency order at issue, she lacks the authority to make discretionary decisions concerning individual students. For example, if a student falls under one of the exemptions in the emergency order, they do not first contact Health Officer Vail and seek her permission to be exempted. Health Officer Vail has no discretion regarding which students or teachers fall under the exemptions to this emergency order. Thus, Plaintiffs' argument that the emergency order is not generally applicable under *Fulton* is not persuasive.

Finally, Plaintiffs argue that they are likely to succeed on the merits because the emergency order is not generally applicable when considering the proper comparators (ECF No. 33 at PageID.841). Plaintiffs ask the Court to determine that the applicable comparators in this be "public locations as a whole," rather than all public and private schools. They argue that even though the Sixth Circuit already concluded that the proper comparators in this case

were "public and private nonreligious schools," *Resurrection Sch.*, 11 F.4th at 457-58; ECF No. 30 at PageID.821, the Sixth Circuit failed to consider *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). For example, the Supreme Court in *Tandon* noted that "Comparability is concerned with the risks various activities pose, not the reasons why people gather." 141 S. Ct. at 1296. Therefore, Plaintiffs argue that every public space should be the comparator here, not just public and private nonreligious schools as the Sixth Circuit held. But Plaintiffs' argument fails even given the case law that they cite because "public locations as a whole" pose different risks depending on what activity or business is conducted at the location. *See id.* For example, children do not spend seven hours every day at a movie theater interacting with other children—they go to movie theaters voluntarily and stay in their seat for the entire movie. Conversely, children go to school—whether that school be a public or private school—for five days a week from about 8:00 a.m. to 3:00 p.m. and interact with other children the entire day. The Sixth Circuit ruled that the comparators in this case are other schools because comparing Resurrection School to "public locations as a whole" is far too broad, and because different locations pose different risks, which the Supreme Court noted in *Tandon. See id.*[7]

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[7] The present matter is also unlike *South Bay United Pentecostal Church*, 141 S. Ct. at 716 and *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 63. In *South Bay*, California prohibited all indoor religious worship but allowed retail stores to operate at 25% capacity and other businesses to operate at 50% capacity. 141 S. Ct. at 717. The Supreme Court found that these restrictions were not generally applicable. *Id.* at 716. If *South Bay* was comparable to the present matter, the emergency order would have only placed a mask mandate on religious schools and not public schools. However, the emergency order mandates face coverings for *all* schools. It does not target religious schools. Similarly, in *Diocese of Brooklyn*, New York targeted religious places by imposing stricter capacity limits on churches and synagogues than other essential businesses. 141 S. Ct. at 66. While the outcome of both *South Bay* and *Diocese of Brooklyn* is favorable to Plaintiffs, the facts of these cases are not comparable to the present matter. There was clear evidence of disparate treatment of religious places in the way the state government imposed capacity limits, which is unlike the present matter, where all schools—both public and private—are subject to the same mask mandate.

Given that rational basis applies to this case, the burden is on Plaintiffs to show that the emergency order is not rationally related to a legitimate government interest. Plaintiffs provided evidence in the form of testimony and declarations from Dr. Daniel Halperin, an epidemiologist, and Mr. Stephen Petty, an expert in industrial hygiene. The purpose of their testimony and declarations was to refute the efficacy of masks and show that the risk of children contracting COVID-19 is low. Specifically, Mr. Petty testified that "masks do no good" because they fail to prevent the inhalation of aerosols, which are smaller particles than droplets and can reach farther into the lungs. He cited studies that do not support the contention that masks are the most effective strategy to reduce the spread of COVID-19 and instead argued that "engineering" techniques are more effective than masks.[8]

On the other hand, Health Officer Vail testified that in issuing the emergency order, she relied on "an overwhelming body of evidence in support of masks." She relied on studies from the CDC, MDHHS, and American Academy of Pediatrics in concluding that requiring face coverings in schools would help prevent the spread of COVID. In support of the emergency order, Health Officer Vail listed over 70 studies and articles on the Ingham County website discussing the effectiveness of face masks in preventing COVID transmission.[9] The document summarizing these studies is an evolving document and is updated as new information and data are discovered. Further, at the time Health Officer Vail issued the emergency order, she was concerned about the pediatric capacity at Ingham

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[8] Mr. Petty argued that engineering techniques such as destruction technology, air purifier technology, UVC lamps, filters that trap aerosols, and dampers control the spread of COVID better than face coverings.

[9] *See Coronavirus (COVID-19)*, Ingham Cty. Mich. https://hd.ingham.org/DepartmentalDirectory/Communicable Disease/Coronavirus(COVID19).aspx#8826305-ingham-county-emergency-orders (last visited Oct. 12, 2021) (scroll down to "Resources"; then click on "Ingham County Emergency Order"; then click on "The effectiveness of face masks to prevent SARS-CoV2 transmission: A summary of literature").

County hospitals. She testified that when she issued the emergency order, hospitals were at about 95% capacity in the pediatric units. Considering the plethora of studies in favor of utilizing masks, Health Officer Vail's concern about pediatric capacity limits at Ingham County hospitals, and the County's goal in continuing in-person learning, Health Officer Vail and the Ingham County Health Department determined that mandating masks in educational institutions would be the best way to keep children safe from COVID while in school.

While the Court finds that Mr. Petty's testimony was compelling and outlined significant rebuttal to CDC guidance on the effectiveness of masks in protecting individuals from contracting COVID, Plaintiffs' evidence concerning the efficacy of masks does not show that the emergency order is irrational. Both parties cited overwhelming, competing evidence regarding the efficacy of masks, but competing science does not defeat rational basis. It was rational for Health Officer Vail and the Ingham County Health Department to rely on the "overwhelming body of evidence in support of masks" from federal and state agencies such as the CDC, MDHHS, and American Academy of Pediatrics in issuing the emergency order. Therefore, Plaintiffs have failed to show that the emergency order does not meet rational basis. They are unlikely to succeed on the merits of their claim.

B. Factor II: Irreparable Harm

An irreparable harm is an extraordinary harm that cannot be properly compensated by money damages. *See Winter v. NRDC*, 555 U.S. 7, 22 (2008). Plaintiffs' irreparable harm argument is limited to one paragraph in their motion for preliminary injunction (ECF No. 33 at PageID.1016). They make no additional arguments of irreparable harm in their reply

brief (*see* ECF No. 39) nor in their closing brief (*see* ECF No. 49). Thus, their only contention of irreparable harm is that their Free Exercise Clause rights are violated by the emergency order, which would mandate a finding of irreparable harm. Plaintiffs rely on *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) for this assertion, but as Defendants point out in their response, this argument is misplaced. *Bonnell* did *not* hold that when plaintiffs allege a violation of their constitutional rights, there is consequently a presumption of injunctive relief. Rather, *Bonnell* requires the plaintiffs to show a likelihood of success on the merits *before* reaching the irreparable harm inquiry. *Id.* If success on the merits is not likely, courts are not required to grant an injunction, even if the plaintiffs can show that a violation of their constitutional rights could occur absent an injunction. *Id.* ("In *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), the Supreme Court held that when reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated. In other words, the first factor of the four-factor preliminary injunction inquiry—whether the plaintiff shows a substantial likelihood of succeeding on the merits—should be addressed first insofar as a successful showing on the first factor mandates a successful showing on the second factor—whether the plaintiff will suffer irreparable harm.") *Id.*

Following this reasoning, Plaintiffs are not entitled to injunctive relief, even if they do face a potential irreparable injury, because they are not likely to succeed on the merits of their Free Exercise claim.

C. Factors III & IV: The Equities

The equities weigh in favor of denying Plaintiffs' motion for preliminary injunction. According to Health Officer Vail, the CDC, MDHHS, American Academic of Pediatrics, and other health officials, the harm to others and the public could be serious if masks are not worn in educational settings. The goal of the emergency order is to prevent the spread of COVID-19 and to keep children in school. Enjoining the emergency order would increase risk based on the current record. This factor weighs in favor of Defendants.

D. Balancing the Factors

All factors weigh in favor of denying Plaintiffs' motion for preliminary injunction, so the motion must be denied. This denial maintains the status quo by keeping the existing emergency order in place, which is the purpose of a preliminary injunction.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' motion for preliminary injunction (ECF No. 32) is **DENIED**.

IT IS SO ORDERED.

Date: November 3, 2021

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge