No. 20-6399

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PLEASANT VIEW BAPTIST CHURCH, et al.,	)	**FILED** Dec 21, 2020 DEBORAH S. HUNT, Clerk
Plaintiffs-Appellants,	)	
v.	)	O R D E R
ANDREW G. BESHEAR, in his individual and official capacities, et al.,	)	
Defendants-Appellees.	)	

Before: McKEAGUE, DONALD, and READLER, Circuit Judges.

Following the district court's denial of their motion for a preliminary injunction, plaintiffs seek an emergency stay pending appeal of two distinct COVID-19-related executive orders issued by the Governor of Kentucky. Specifically, plaintiffs challenge on various constitutional grounds (1) Executive Order 2020-969, which prohibits in-person instruction at elementary and secondary schools until January 4, 2021; and (2) Executive Order 2020-968, which has since expired but when in force prohibited, in relevant part, certain social gatherings. For reasons discussed below, we deny the emergency motion on equitable grounds with respect to the school order and on mootness grounds with respect to the social-gathering ban.

In considering the motion, we examine four factors: whether (1) the movant has made a strong showing of likelihood of success on the merits; (2) the movant will be irreparably injured

without the stay; (3) the stay will "substantially injure" other interested parties; and (4) issuing the stay is in the public interest. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

With respect to the challenges to the first prohibition, the Supreme Court's recent order in *Danville Christian Academy v. Beshear*, concerning a free-exercise challenge to the same executive order, likewise resolves the emergency request in this case. *See* No. 20A96, slip op. (Dec. 17, 2020). The Supreme Court in *Danville* declined to address the likelihood that the petitioners would prevail on the merits of their free exercise claims. Observing that the executive order effectively expires "this week or shortly thereafter," the Supreme Court instead concluded that equitable relief was unwarranted given the limited impact that would result from staying the order. *Id.* at 1–2; *see also id.* (Alito, J., dissenting) (describing the Court as "reluctant to grant relief that, at this point, would have little practical effect"). To the extent plaintiffs' claims mirror those in *Danville*, we are compelled to reach the same conclusion as has the Supreme Court.

Plaintiffs' challenge to Executive Order 2020-969, we note, does raise additional claims beyond the free exercise claims at issue in *Danville*. But as the Supreme Court's order did not rest on the substantive claims at issue, and instead on the equities of enjoining the enforcement of a soon-to-be expired order, there is no basis in this emergency setting to distinguish *Danville* from today's case. Especially so, it seems, when our consideration of the stay requests comes even later in the day than in *Danville*. As the Supreme Court observed in *Danville*, a future challenge to a similar order could raise significant questions under the Free Exercise Clause or in conjunction with other constitutional rights. Plaintiffs can raise those claims if and when that eventuality occurs. *See Danville*, slip op. at 1–2; *see also id.* at 2–3 (Gorsuch, J., dissenting).

While the considerations as to Executive Order 2020-968 are somewhat different, we can similarly resolve those claims without engaging on their merits. Indeed, we need not reach past

the first prong of the test for preliminary equitable relief because the challenge to the order is moot, given that the Executive Order no longer is in effect. A claim of mootness based on the government's voluntary cessation of a challenged action requires an "absolutely clear" showing that the challenged action will not be reinstated or is not one "capable of repetition yet evading review." *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 462 (2007); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190–91 (2000). Here, the challenged order expired on December 13, 2020. Instead of reinstating the order, the Commonwealth replaced it with a voluntary recommendation to avoid large social gatherings in the home of eight or more people from two households. The Governor has stated publicly that he will not issue a new order to "keep people from getting together," *see 13 News One-on-One Interview with Gov. Andy Beshear*, 13 WBKO (Dec. 11, 2020), https://www.wbko.com/2020/12/11/full-interview-13-news-one-on-one-interview-with-gov-andy-beshear/, and only oblique references to the need for restrictions around the Christmas holiday exist in the record. *See, e.g.*, R. 16-1, Decl. of Dr. Stephen J. Stack, M.D., ¶ 36. Once a law is off the books and replaced with a "new rule" that does not injure the plaintiff, a case becomes moot, leaving us with an absence of jurisdiction to adjudicate the case. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. City of N.Y.*, 140 S. Ct. 1525, 1526 (2020) (per curiam); *see also Trump v. Hawaii*, 138 S. Ct. 377, 377 (2017) (per curiam) (dismissing as moot a challenge to an executive order that had "expired by [its] own terms" (citations omitted)).

Plaintiffs' reliance on the Supreme Court's recent ruling in *Roman Catholic Diocese of Brooklyn v. Cuomo* is unavailing. *Cuomo* held that a challenge to a COVID-19 public-health order can remain live even where the current governing regime would not affect the challenged parties if there remains a "constant threat" of future governmental action. *See* No. 20A87, 2020 WL

6948354, at *3 (U.S. Nov. 25, 2020). But there, unlike here, the challenged order remained in force subject to the apparent whims of the Governor, to whom a presumption of regularity did not apply. *Id.* at *8 (Kavanaugh, J., concurring) ("But the State has not withdrawn or amended the relevant Executive Order."). More generally, nothing in the record suggests that it is "absolutely clear" that the Governor will reinstate the order or will otherwise subject the plaintiffs to prosecution. *Cf. Maryville Baptist Church, Inc. v. Beshear*, 977 F.3d 561, 566 (6th Cir. 2020) (per curiam) (refusing to apply the voluntary cessation or capable of repetition yet evading review exceptions to mootness to a challenge to an enjoined COVID-19 public health order and observing that "discretion is the better part of judgment when it comes to a potentially premature (and unnecessary) ruling about a moving target"); *see also Spell v. Edwards*, 962 F.3d 175, 179–80 (5th Cir. 2020) (holding that the "voluntary cessation" and "capable of repetition, yet evading review" doctrines did not apply to an expired COVID-19 restriction where it is only speculative that the Governor would reimpose the expired order).

As with the challenge to Executive Order 2020-969, the courthouse doors remain open to future challenges to an order prohibiting something as amorphous as "social gatherings" in the home while allowing other similar gatherings. *See* R.-1, Compl., ¶¶ 28, 32-37 (observing that Executive Order 2020-968 prohibits certain indoor social gatherings while allowing comparable gatherings at various businesses). But, as discussed, we need not delve into any of the potentially significant constitutional questions lurking in the background of this case for reasons divorced from the merits of the underlying challenges to either order.

Accordingly, the motion for an injunction pending appeal is **DENIED**. The motions for leave to exceed the word limit are **GRANTED**.

BERNICE BOUIE DONALD, Circuit Judge, concurring.

I agree that the emergency motion should be denied on equitable grounds with respect to the school order ("EO 2020-269") and on mootness grounds with respect to the social-gathering ban ("EO 2020-968"). I write separately, however, to address my concerns with Christian School Plaintiffs'[1] arguments concerning the existence of "hybrid rights" in connection with their constitutional challenges to EO 2020-269.

I.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 879 (1990), the Supreme Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." (internal quotation marks omitted) (holding that state could deny unemployment benefits to drug users, including Native Americans who had ingested peyote for sacramental purposes).

Fundamental to Christian School Plaintiffs' argument in this emergency appeal is that under the Free Exercise Clause of the First Amendment, EO 2020-969 burdens their "hybrid rights." That is, the order burdens *both* their Free Exercise rights and other constitutional rights, a combination that, they contend, triggers an exception to *Smith* and subjects even neutral laws of general applicability to strict scrutiny. Christian School Plaintiffs' argument relies on the following passage from Justice Scalia's majority opinion in *Smith*:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press …

[1] The district court assigned the label "Christian School Plaintiffs" to the churches, schools, and various groups of parents (both individually and on behalf of their children) who are named plaintiffs in the lawsuit.

494 U.S. at 881.

In previous decisions, we have not only expressed skepticism regarding whether this passage from *Smith* formally created a "hybrid-rights" doctrine, we have outright rejected it. In *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993), we rejected the exact same theory posed by Christian School Plaintiffs in this case. There, a veterinary school student, citing her religious beliefs, objected to the school's required "course for the study of veterinary surgical techniques in which, among other learning activities, healthy animals [we]re anesthetized, operated upon, and then killed." *Id.* at 178. The school refused the student's request to modify its curriculum in order to accommodate her religious beliefs. *Id.* The student filed suit against the school alleging violations of her constitutional rights to freedom of speech, freedom of association, free exercise of religion, due process, and equal protection. *Id.* We concluded that the student's free-exercise claim failed under *Smith*, because the school's curriculum was generally applicable to all veterinary students and did not target any religious practice or belief. *Id.* We also rejected her claim that we should have applied strict scrutiny to the free-exercise analysis simply because the student had coupled that claim with other alleged constitutional violations. In doing so, we held:

> We do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the [F]ree Exercise Clause if it did not implicate other constitutional rights. In the language relied upon by Kissinger, the *Smith* court did not explain how the standards under the Free Exercise Clause would change depending on whether other constitutional rights are implicated. In addition, although this court in [*Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927, 932–33 (6th Cir. 1991)], did discuss "hybrid" claims, we did not hold that the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights. Such an outcome is completely illogical; therefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other

> constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause.

Id. at 180.

More than 27 years have passed since our ruling in *Kissinger*, and we have consistently rejected the "hybrid-rights" theory without hesitation. *See, e.g., Prater v. City of Burnside, Ky.*, 289 F.3d 417, 430 (6th Cir. 2002) (rejecting church's claim that city violated its "hybrid rights" that combined a free exercise claim, a free speech claim, a freedom of assembly claim, and a Fifth Amendment takings claim); *Watchtower Bible & Tract Soc. of New York, Inc. v. Vill. of Stratton, Ohio*, 240 F.3d 553, 562 (6th Cir. 2001), *rev'd on other grounds*, 536 U.S. 150 (2002) ("Based in part upon the lack of an explanation from the Court, we declined to alter the standard of scrutiny for laws affecting hybrid rights until the Supreme Court provided guidance. The Court has yet to provide such guidance, and therefore, we adhere to our decision in *Kissinger* and continue to decline to alter the standard of scrutiny.").[2]

The Supreme Court has not established a test for generally applicable laws that involve "hybrid rights," and no other binding authority on this Court mandates such a requirement. We have had no reason to re-consider our view that *Smith*'s discussion of "hybrid rights" was anything but *dicta*.

[2] Other circuit courts have similarly rejected the "hybrid-rights" theory for reasons similar to those we stated in *Kissinger*. *See, e.g., Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 247 (3d Cir. 2008) ("Until the Supreme Court provides direction, we believe the hybrid-rights theory to be *dicta*."); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1296-97 (10th Cir. 2004) ("[I]t makes no sense to adopt a strict standard that essentially requires a *successful* companion claim because such a test would make the free exercise claim unnecessary. If the plaintiff's additional constitutional claim is successful, he or she would typically not need the free exercise claim and the hybrid-rights exception would add not thing to the case.") (emphasis in original); *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003) (adopting *Kissinger*, and stating, "[w]e too can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated.").

The Constitution is not a mixing bowl for rights that when considered in the aggregate are entitled to a higher level of scrutiny compared to when those exact same rights are viewed in isolation.[3] Accordingly, should Christian School Plaintiffs—or any other litigant—attempt to bring a "hybrid-rights" claim, Circuit precedent would appear to compel that they present arguments as to why their claims differ from those we rejected in *Kissinger* or why *Smith*'s core holding—as outlined above—is no longer controlling law.[4]

II.

I provide the foregoing analysis regarding *Smith* not to weigh in on the merits of Christian School Plaintiffs' claims, but rather to highlight what I see as a troubling trend in the use of the Court's emergency docket.

While the courts are never foreclosed from entertaining novel arguments—indeed, the rugged individualism and creative advocacy of litigants and attorneys are necessary ingredients of our common law system—I do not see an emergency appeal as the proper forum to advocate for abrupt and sweeping change to well-settled federal law.

Our federal court system is the envy of the jurisprudential world, to which people look for justice and consistency. But more fundamentally, we are problem solvers who provide punctual

[3] *See Church of the Lukumi Babalue Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 566-67 (1993) (Souter, J., concurring) ("If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.").

[4] I do not view the Supreme Court's language in *Danville*, No. 20A96, slip. op. at 1-2, as an endorsement of the hybrid-rights theory. In its brief order last Thursday, the Supreme Court stated that it would not address any arguments regarding whether *Smith* should be read in a manner that incorporates the "hybrid-rights" theory because "[t]he applicants did not squarely raise that [] argument in the District Court, the Sixth Circuit, or this Court. *Id.* at 2. This statement merely suggests that the Supreme Court did not want to address an argument for the first time on appeal. It should be read as nothing more than that. Justice Gorsuch's dissent to the contrary is not binding law.

and clear resolution to complex problems. However, the reliability of this great institution is severely undermined when emergency cases are used as vehicles to advance normative arguments that are not grounded in clearly delineated and well-formulated precedent. The expedient decision-making that is required under our emergency jurisdiction allows us to provide immediate resolution to factually unique circumstances, often buttressed by the exigencies of the narrow time period in which the emergency is occurring. When resolving such cases, we do not have the time or resources for the careful deliberation that we would normally undertake in a traditional merits case. Consequentially, our decisions on emergency appeals are often quite narrow and limited to the facts of the particular appeal.

I say this all not to suggest that any constitutional rights are less important during crises than during normal times, but rather only to emphasize that emergency litigation is an inappropriate setting to attack settled precedent and advocate for comprehensive changes to the law.

In *Ex Parte Milligan*, 71 U.S. 2, 76 (1866), the Supreme Court stated that "[t]he Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." Our Constitution promises us with an enduring set of principles that stand the test of time—from the beginning of the republic to the ongoing global pandemic. I worry that this promise is at risk if emergencies are addressed in a manner that jeopardizes the reliability of those principles.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk