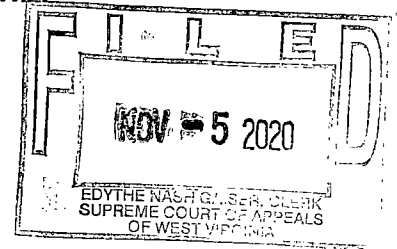


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA, ex rel,
THE WEST VIRGINIA SECONDARY SCHOOL
ACTIVITIES COMMISSION, DAVID COTTRELL,
President, DR. GREGORY MOORE, Vice-President,
BERNIE DOLAN, Executive Director, JIMMY FRASHIER,
MICHAEL KELLEY, CRAIG LEE LOY, ARTHUR
PETITTO, JIM CRAWFORD, DR. EDDIE CAMPBELL,
DR. JAMES WILSON and ROBERT DUNLEVY,
Members,**



PETITIONERS,

v.

Appeal No.

**THE HONORABLE R. STEVEN REDDING,
Judge of the Circuit Court of Berkeley County, and
EMILY BECK,**

RESPONDENTS.

**William R. Wooton (WVSB #4139)
WOOTON & WOOTON
210 Main Street
Beckley, West Virginia 25801
(304) 253-2222
bill@wootonlaw.com**

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Appendix, Exhibit 3	Motion to Dismiss
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Appendix, Exhibit 5	Facebook post from morning of Nov. 5 depicting Jefferson High school girls' varsity soccer team headed to states

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel,
THE WEST VIRGINIA SECONDARY SCHOOL
ACTIVITIES COMMISSION, DAVID COTTRELL,
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DR. JAMES WILSON and ROBERT DUNLEVY,
Members,

PETITIONERS,

v.

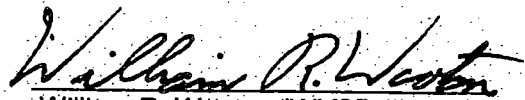
Appeal No.

THE HONORABLE R. STEVEN REDDING,
Judge of the Circuit Court of Berkeley County, and
EMILY BECK,

RESPONDENTS.

CERTIFICATION

I, William R. Wooton, counsel for the Petitioners, do hereby certify that the contents of the appendix are true and accurate copies of items contained in the record of the lower tribunal, and that Appendix 5 is an accurate depiction of a Facebook post made on November 2, 2020.


William R. Wooton (WVSB #4139)

Appendix, Exhibit 1

Order Granting Restraining Order

E-FILED | 11/5/2020 11:04 AM
CC-02-2020-P-337
Berkeley County Circuit Clerk
Virginia Sine

**Emily Beck,
Plaintiff,**

Case No. CC-02-2020-P-337

**West Virginia Secondary Schools
Activities Commission,
Defendant**

1. Ms. Beck is an eighteen year old senior at Martinsburg High School in Berkeley County, and is a member of the Martinsburg High School girls soccer team. She brings this action on behalf of herself and all other similarly situated persons; that is, the other members of the Martinsburg High School girls soccer team, members of the Martinsburg High School boys soccer team, and the members of the boys and girls soccer teams at the other three high schools in Berkeley County, namely Hedgesville High School, Musselman High School, and Spring Mills High School.

2. The WVSSAC is a nonprofit organization created by W.Va. Code § 18-2-25. Pursuant to W.Va. Code § 18-2-25, every county board of education in the state, including the Berkeley County Board of Education, has delegated control, supervision and regulation of interscholastic athletic events and band activities to the WVSSAC.

3. On April 27, 2020, the Governor of the State of West Virginia, Jim Justice, announced a plan to reopen government, schools, and private business following his earlier orders to cease or restrict such activities because of COVID-19. The Governor's plan, specifically Executive Order 56-20, allowed public schools to resume in-person instruction no sooner than September 8, 2020.

4. Subsequently, West Virginia public health experts developed a County Alert System, which is a county-by-county color-coded system and map to monitor COVID-19 case rates throughout the state. This color-coded system results in each county being assigned a color each week based on its rate of exposure. On each Saturday, the West Virginia Department of Health and Human Services ("DHHR") determines the color of each county in West Virginia and publishes a color coded map. The map relies on one of two metrics to determine the color assigned to each county. First, the map relies on the "infection rate," which is based on the number of infected people per 100,000 residents. The second metric is "percent positivity," which is the total number of individuals who test positive divided by the total number of individuals tested. Both of these tests are averaged on either a seven day (county population greater than 16,000) or fourteen day (county population less than 16,000) basis. Colors are then assigned to each county based on the lower of the two metrics. The colors are assigned as follows:

- a. "Green" if there are "3 or FEWER CASES of INFECTION PER 100,000 or LESS THAN 3% POSITIVITY RATE;"
- b. "Yellow" if there are "3.1 - 9.9 CASES of INFECTION PER 100,000 or 3 - 3.9% POSITIVITY RATE;"

- c. "Gold" if there are 10 - 14.9 CASES of INFECTION PER 100,000 or 4 - 4.9% POSITIVITY RATE;"
- d. "Orange" if there are "15 - 24.9 CASES of INFECTION PER 100,000 or 5 - 7.9% POSITIVITY RATE;" or
- e. "Red" if there are "25 AND ABOVE CASES of INFECTION PER 100,000 or 8% OR GREATER POSITIVITY RATE."

5. On September 4, 2020, by Executive Order 68-20, the Governor directed the public schools in the state to follow the County Alert System's county-by-county color-coded system maintained by the DHHR, as it relates to any limitations or prohibitions on occupancy of such educational institutions for in-person instruction and/or athletic and extracurricular activities.

6. Based on the Governor's order, the West Virginia Department of Education ("WVDE") publishes a weekly "Saturday Education Map." This map is based on the same metrics as the weekly color-coded map issued by DHHR. Under the WVDE map, students in public schools in counties designated as either Orange or Red are not permitted to attend school in-person or compete in athletic contests. The WVSSAC, in turn, has relied upon the WVDE map to regulate the extent to which each school may participate in athletic activities.

7. Since October 17, 2020, Berkeley County has been designated as "Orange" under the WVDE map. As a result, Ms. Beck and all other members of the four high school boys and girls soccer teams in Berkeley County, have not been permitted to participate in the WVSSAC state high school soccer tournament. The tournament began on October 19, 2020 with sectional play, continued with regional play on October 27, 2020, and is presently scheduled for finals on November 6 to 7, 2020. At this time, the WVSSAC intends to proceed with the finals as scheduled even though none of the teams in Berkeley County have been able to participate in the tournament. For

purposes of the tournament, the high schools in Berkeley County comprise one of eight sections in the state, each region consisting of two sections. Since the teams in Berkeley County have not been able to play, the WVSSAC has designated the winners of the other section, the Jefferson County High School boys and girls teams, as the regional champions.

8. The other three girls soccer regional winners are from Ohio County (Wheeling Park High School), Kanawha County (George Washington High School) and Wood County (Parkersburg South High School). Each of these schools has been able to participate in the tournament because their respective percent positivity rates have been below the orange or red color categories on the WVDE map. Again, the "percent positivity" metric is based on the total number of individuals who test positive divided by the total number of individuals tested. This metric places emphasis on the number of tests conducted. That is, the more tests conducted the more likely individuals without any symptoms or known exposure to COVID-19 will be tested, thereby lowering the percentage of positive tests. As explained recently by the Governor's "COVID-19 Czar," Dr. Clay Marsh, "more testing will drive the numbers up but eventually, the percent positive will drop." "Gaming the COVID-19 metrics not possible, experts say," Coal Valley News, October 14, 2020 (http://www.coalvalleynews.com/gaming-the-covid-19-metrics-not-possible-experts-say/article_d6cd2141-d48b-5351-bc4e-a1a9cad882de.html). Thus, a particular county's percent positivity rate will be determined in large measure by the access to and availability of free testing in that county.

9. Testing in the individual counties appears to be left to the local health departments. Pursuant to the Governor's Order a county health department is required to set up free testing sites: within forty eight hours of a county falling into gold status and within twenty four hours of a county falling into orange or red status.

10. During the month of October Berkeley County was in gold status for the weeks of October 3rd and 10th. Free testing was offered on the following dates:

October 7 (Wednesday) 4:30 to 7:30 p.m.;

October 13 (Tuesday) 1:00 to 5:00 p.m.;

October 14 (Wednesday) by appointment only 8:30 a.m. to 12:30 p.m.;

October 15 (Thursday) 1:00 to 5:00 p.m.;

October 16 (Friday) by appointment only 8:30 a.m. to 12:30 p.m.;

October 17 (Saturday) 8:00 a.m. to noon (these test results most likely would have been counted for the map color beginning the week of the 24th).

11. On October 17th the WVDE map indicated that Berkeley County was in orange status. This status was determined on the seven day rolling average with the cut-off for counting test results Thursday October 15 at 11:59 p.m. Following this status the athletic teams were no longer permitted to participate in events. Free testing was offered on the following dates:

October 18 (Sunday) 8:00 a.m. to noon;

October 21 (Wednesday) 8:30 a.m. to 12:30 p.m. (this date would have been the last date available for free testing as the results must be to DHHR by Thursday at 11:59 p.m. Generally, the turn around for the results vary with no guarantee that these results would assist the County to move out of orange status.);

October 23 (Friday) 2:00 to 6:00 p.m.

Also during this week, one Walgreens pharmacy offered free testing by appointment only, allowing for approximately a total of thirty tests (10 tests per day for a period of three days during the week).

12. On October 24, the WVDE map again showed Berkeley County in orange status. This status was determined based upon a cutoff of test results as of Thursday October 22nd at 11:59 p.m. Free Covid-19 testing was made available on the following

dates:

October 25 (Sunday) 1:00 to 3:00 p.m.;

October 27 (Tuesday) 1:00 to 5:00 p.m.;

October 29 (Thursday) 1:00 to 5:00 p.m.;

October 30 (Friday) 1:00 to 5:00 p.m.;

October 31 (Saturday) noon to 8:00 p.m.

Again, any results after Thursday would not assist the county in moving out of orange status.

13. In comparison, Kanawha County has had testing available on a more widespread basis, for longer hours and at over five participating pharmacies, including four Walgreens and a Fruths Pharmacy. Like Berkeley County, Kanawha County for the weeks of October 3rd and 10th was in gold status. Free Covid-19 testing in October in Kanawha County was as follows:

October 1 (Thursday) 9:00 a.m. -5:00 p.m. at one site and 11:00 a.m. to 5:00 p.m. at a second site (it appears that this level of aggressive testing was to assist Kanawha County to move from its previous red status just weeks before to a status that would allow full participation in school and athletics.);

October 2 (Friday) 11:00 a.m. to 5:00 p.m.;

October 6 (Tuesday) 9:00 a.m. to 3:00 p.m.;

October 7 (Wednesday) 3:00 to 6:00 p.m. at one site and noon to 5:00 p.m. at a second site;

October 9 (Friday) 11:00 a.m. to 6:00 p.m.;

October 10 (Saturday) noon to 4:00 p.m.;

October 13 (Tuesday) 10:00 a.m. to 2:00 p.m.;

October 14 (Wednesday) 10:00 a.m. to 2:00 p.m.;

October 15 (Thursday) 10:00 a.m. to 2:00 p.m.

14. In addition to the above free testing sites, the Governor announced a partnership with Walgreens pharmacy commencing Friday October 9 which offered four different testing sites in Kanawha County allowing for 10 tests at each affiliated pharmacy on three days of each week. This provided an additional 120 possible tests to be completed this week in Kanawha County. Fruths Pharmacy also offered appointment only free testing during this time.

15. On Saturday October 17th the WVDE school map was published and Kanawha County was green status.

Testing was offered on the following dates:

October 17 (Saturday) 10:00 a.m. to 4:00 p.m.;

October 20 (Tuesday) noon to 6:00 p.m.;

October 23 (Friday) noon to 4:00 p.m.

Again, four different Walgreen pharmacies and Fruth Pharmacies in Kanawha County offered free testing during this week.

16. On October 24th the WVDE map was published and Kanawha County was gold status allowing it to proceed with in school learning and participation in athletic events as modified by the WVSSAC. Testing was offered on the following dates:

October 28 (Wednesday) 3:30 to 7:30 p.m.;

October 30 (Friday) 9:00 a.m. to 3:00 p.m.

The published WVDE map on Saturday October 31st indicated that Kanawha County was in green status.

17. During the month of October Kanawha County residents were afforded at least eighty three hours of unscheduled free testing throughout the county. In addition to unscheduled testing at least three hundred and sixty free test appointments were available through the various Walgreens participating pharmacies. In addition free testing was available by appointment at participating Fruth pharmacies. At no time

recently has Kanawha County been below the gold status on the WVDE map. On Friday October 30th Kanawha County had an infection rate of 23.26 per 100,000 but had a positivity rate of 2.97.

18. By comparison, Berkeley County residents had approximately forty-eight hours of unscheduled free testing. In addition, the local health department offered two different dates of scheduled free testing and one Walgreens offered approximately one hundred and twenty pre scheduled appointments (this number may be much lower as it is unclear when the Berkeley County Inwood Walgreens pharmacy began offering this service and this number assumes at least twelve different days with ten slots each day being available). On the same date, Friday October 30th Berkeley County had an infection rate of 19.3 per 100,000 residents but a positivity rate of 5.48.

19. As a result of the more widespread availability of testing in Kanawha County, nearly twice as many individuals in that county were tested. In turn, this appears to have resulted in a lower percent positivity rate than existed prior to the greater level of testing being made available there. Berkeley County, however, has not had the same availability of testing opportunities, thus making it less likely that the county would achieve lower percent positivity rates.

20. Ms. Beck argues that she and all other high school soccer athletes in Berkeley County are being denied equal protection under the law because the WVSSAC's application of the WVDE map does not take into consideration the disparity of testing availability among the counties. As a result, she argues that high school soccer athletes in counties with higher infection rates than Berkeley County, such as Kanawha County, are being allowed to play simply because the level of testing available to residents of that county has been far greater, both in raw numbers and proportionately, than the testing available to residents of Berkeley County.

21. In addition, Ms. Beck argues that the WVSSAC has refused to make

modifications available to the athletes in Berkeley County that would allow them to participate in post season play. On the other hand, the WVSSAC has modified the criteria to permit other athletes to participate in post season play; for example, allowing cross country athletes to compete if they underwent individual testing. When the Petitioner and her teammates and other teams throughout this county offered COVID-19 negative test results prior to sectional play, the WVSSAC refused to make a similar accommodation.

22. In response, the WVSSAC first argues that venue is improper in Berkeley County and that consequently this Court lacks jurisdiction to grant the requested temporary restraining order because the state tournament is scheduled to be conducted in Raleigh County. The WVSSAC therefore argues that the action should have been filed in Raleigh County. Substantively, the WVSSAC argues that it does not have the authority to deviate from the restrictions imposed by the DHHR and WVDE maps. In addition, the WVSSAC argues that it would be unjust to grant the temporary restraining order because it would cost \$20,000.00 to conduct a separate tournament at a later date.

23. The Court **FINDS** that venue is proper in Berkeley County and that this Court has jurisdiction over this action. The purpose of the petition is to enjoin the actions of the WVSSAC in conducting the state high school girls and boys soccer tournaments. In general, the WVSSAC acts in every county of the state whenever it makes decisions on eligibility for participation in high school sports. In particular, the WVSSAC is acting in Berkeley County by prohibiting Ms. Beck and her fellow soccer players from participating in the tournament. Venue here is not based upon Petitioners' residency but rather because the harm alleged is occurring in Berkeley County. The Court, therefore, has the authority to enjoin the WVSSAC's actions by prohibiting it from going forward with the tournament. Furthermore, since Ms. Beck and her fellow soccer

athletes are all students in Berkeley County, it would be impracticable and unjust to require them to seek relief in Raleigh County merely because the tournament is scheduled to take place there.

24. The Court **FINDS** that the WVSSAC does have the authority to deviate from the restrictions imposed by the DHHR and WVDE maps in determining eligibility for participation in high school sports. In that regard, the Executive Director of the WVSSAC, Bernie Dolan, confirmed that the restrictions were recently modified to allow schools in counties designated as “orange” to participate in the state cross country championships. It was also represented to the Court, and not denied by the WVSSAC, that the WVSSAC has permitted teams in counties designated “gold” to play unrestricted in post-season, whereas prior restrictions only allowed such teams to play other teams in gold status. Although the WVSSAC apparently consulted with other state officials before making those changes to the restrictions, there is nothing before the Court to indicate that the WVSSAC actions required approval by any other authority.

25. Article III, Section 10 of the West Virginia Constitution guarantees equal protection of the law. “Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner.” *Israel v. West Virginia Secondary Schools Activities Commission*, 182 W.Va. 454, 458, 388 S.E.2d 480, 484 (1989).

26. The Court **FINDS** that it is required to employ a rational-basis review standard in deciding the equal protection claim in this action. *Syl. Pt. 4, Israel, supra*.

27. At this stage of the litigation, the Court **FINDS** that Ms. Beck and all other high school soccer athletes in Berkeley County have raised a significant claim that they are being denied equal protection under the law because the WVSSAC’s use of the WVDE map does not take into consideration the disparity of testing availability among the counties or the absurd reality that schools in counties with much higher infection

rates are not barred from playing in the tournament.

28. In that regard, according to the DHHR COVID-19 "County Alert System," as of November 3rd Berkeley County has an infection rate of 19.3 which is lower than three of the counties currently scheduled to travel to the tournament. Wood County, home of Parkersburg South has an infection rate of 34.72; Kanawha County, home of George Washington High School has an infection rate of 22.86; and Ohio County has an infection rate of 47.95, this last example being over double that of Berkeley County. Jefferson County, home of Jefferson High School the determined regional winner because Berkeley County athletes were denied the opportunity to participate in sectional and regional play is the only county with a lower infection rate than Berkeley County. It is 15.50. Even more ironically, the three teams from counties with higher infection rates than Berkeley County will be traveling to Raleigh County with an infection rate of 20.25, also higher than Berkeley County. One presumes that the rationale behind the WVSSCA policy is to protect against the spread of COVID-19. Thus, by disallowing Berkeley County athletes an opportunity to participate in the State tournament, one must further presume that the WVSSAC is seeking to protect students from sister counties from being infected. Yet, the counter-intuitive result of the WVSSAC's determinations here is that Berkeley County athletes are being denied the opportunity to participate when other teams who are participating come from counties with infection rates as high as two and one half times ($2 \frac{1}{2}$) that of Berkeley County (Ohio County's infection rate is 47.95 per 100,000 while Berkeley County's rate is 19.3 per 100,000). The Court finds that these determinations by the WVSSAC are arbitrary and capricious. The Court is persuaded that Ms. Beck has raised a significant claim of a violation of the equal protection law of the State.

29. "A preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Roe v. Dep't of*

Def., 947 F.3d 207, 219 (4th Cir. 2020), as amended (January 14, 2020) (internal quotation marks omitted). To determine whether the extraordinary remedy of a preliminary injunction is appropriate, the Plaintiff "must demonstrate by a clear showing of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including" four factors: "(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *McGraw v. Imperial Mktg.*, 196 W.Va. 346, 352, 472 S.E.2d 792, 798 n.8 (1996); see also *Morrisey v. W.Va. AFL-CIO*, 239 W.Va. 633, 638, 804 S.E.2d 883, 888 (2017).

30. The Court **FINDS** that Ms. Beck and all other high school soccer athletes in Berkeley County will suffer immediate and irreparable harm if the WVSSAC is not enjoined from conducting the state AAA girls and boys soccer tournament. Simply put, if the tournament is not postponed, they will never have another opportunity to compete for a state soccer title this year. Further, Ms. Beck, like the other senior high school soccer athletes in Berkeley County, will never have another opportunity to compete in the state tournament.

31. The Court **FINDS** that a delay in the soccer tournament will not harm the WVSSAC. While the WVSSAC alleges that conducting a separate tournament for the AAA teams would cost \$20,000.00, there is no evidence that alternative arrangements could not be made which would ameliorate or completely eliminate such alleged costs, such as scheduling the games at the participating schools. In addition, even if the cost associated with postponing the tournament is as stated by the WVSSAC, in comparison to the harm to the Berkeley County athletes, the Court finds that such expense is not overly burdensome. This Judge need only reflect on his high school experiences of some four decades prior. While the memories of the day to day grind of classroom

studies has slowly receded into relative obscurity, the three state championship competitions that were experienced remain as seared into memory as if they transpired yesterday. The thrill of competing against the very best, the close friendships developed, and the *esprit de corps* experienced simply cannot have a quantitative value placed upon them.

32. The Court further **FINDS** that it would be in the public interest to grant the requested temporary restraining order. The ability to participate in high school sports is an important and integral part of our children's overall educational experience. Therefore, the public has a strong interest in seeing that students have an equal opportunity to participate in high school sports. Furthermore, because this action raises significant issues concerning the WVSSAC's eligibility rules, the public has an interest in addressing those issues now since they are likely to arise again in connection with other sports such as volleyball, football and basketball.

33. For the reasons stated herein, the Court **FINDS** that Ms. Beck is likely to succeed on the merits.

34. The Court **FINDS** that Ms. Beck should not be required to post a surety bond as there is no evidence before the Court to substantiate the alleged costs of \$20,000 to postpone the AAA soccer tournament. Furthermore, it appears to the Court that the costs of a separate, if any, could be minimized by making alternative as discussed above. Finally, Ms. Beck is an eighteen high school student. As such, requiring her to post a bond would, in effect, deny her access to the courts.

Accordingly, it is hereby **ORDERED** that the Petitioner is **GRANTED** a temporary restraining order against the WVSSAC from conducting the state AAA girls and boys soccer tournament. This matter will come on for hearing on Thursday, November 12, 2020, at 2:00 p.m. at the Berkeley County Judicial Center, 380 W. South St., Martinsburg, WV 25401 in Courtroom 3C. Should the WVSSAC continue to maintain

that the Governor, DHHR, and WVDE should be joined in this action, the WVSSAC is granted leave to submit a proposed order joining them in this action for all further proceedings.

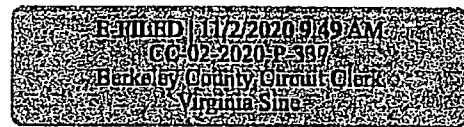
The Clerk shall furnish attested copies of this Order to all counsel of record.

/s/ R. Steven Redding
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.

Appendix, Exhibit 2

**Petition (unverified) for Temporary
Restraining Order and Injunctive Relief**



IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

**EMILY C. BECK, on behalf of
herself and all other similarly
situated persons,**

Petitioners,

v.

CIVIL ACTION NO.: 20-P-_____

**WEST VIRGINIA SECONDARY
SCHOOLS ACTIVITIES COMMISSION,
a nonprofit organization,**

Respondent.

**PETITION FOR TEMPORARY RESTRAINING
ORDER AND INJUNCTIVE RELIEF**

In this action, the Petitioner, Emily Beck, on behalf of herself and all other similarly situated persons, is seeking a temporary restraining order and an injunction prohibiting the West Virginia Secondary Schools Activities Commission ("WVSSAC") from conducting the state AAA girls and boys soccer playoffs and tournament until after access to free COVID-19 testing has been made available to residents of Berkeley County in a manner equal to residence of other counties in the state, or, in the alternative, until the WVSSAC adjusts the criteria for participation in secondary school activities to account for the gross disparity in public access to free COVID-19 testing between Berkeley County and other counties in the state.

PARTIES

1. The Petitioner, Emily Beck, is an eighteen year old senior at Martinsburg High School in Berkeley County, and is a member of the Martinsburg High School girls soccer team. She brings this action on behalf of herself and all other similarly situated persons, including the other members of the Martinsburg High School girls soccer team,

members of the Martinsburg High School boys soccer team, as well as members of the boys and girls soccer teams at the other three high schools in Berkeley County, namely Hedgesville High School, Musselman High School, and Spring Mills High School.

2. The Respondent, WVSSAC, is a nonprofit organization created by W.Va. Code § 18-2-25. Pursuant to W.Va. Code § 18-2-25, every county board of education in the state, including the Berkeley County Board of Education, has delegated control, supervision and regulation of interscholastic athletic events and band activities to the SSAC.

STATEMENT OF FACTS

3. On April 27, 2020, the Governor of the State of West Virginia, Jim Justice, announced a plan to reopen government, schools, and private business following his earlier orders to cease or restrict such activities because of COVID-19. The Governor's plan, specifically Executive Order 56-20, allowed public schools to resume in-person instruction no sooner than September 8, 2020.

4. Subsequently, West Virginia public health experts developed a County Alert System, which is a county-by-county color-coded system and map to monitor COVID-19 case rates throughout the state. This color-coded system results in each county being assigned a color each week based on their rate of exposure. On each Saturday, the West Virginia Department of Health and Human Services ("DHHR") determines the color of each county in West Virginia and publishes a color coded map. The map relies on one of two metrics to determine the color assigned to each county. First, the map relies on the "infection rate," which is based on the number of infected people per 100,000 residents. The second metric is "percent positivity," which is the total number of

individuals who test positive divided by the total number of individuals tested. Both of these tests are averaged on either a seven day (county population greater than 16,000) or fourteen day (county population less than 16,000) basis. Colors are then assigned to each county based on the lower of the two metrics. The colors are assigned as follows:

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- b. "Yellow" if there are "3.1 - 9.9 CASES of INFECTION PER 100,000 or 3 - 3.9% POSITIVITY RATE;"
- c. "Gold" if there are 10 - 14.9 CASES of INFECTION PER 100,000 or 4 - 4.9% POSITIVITY RATE;"
- d. "Orange" if there are "15 - 24.9 CASES of INFECTION PER 100,000 or 5 - 7.9% POSITIVITY RATE;" or
- e. "Red" if there are "25 AND ABOVE CASES of INFECTION PER 100,000 or GREATER THAN 8% POSITIVITY RATE."

5. On September 4, 2020, by Executive Order 68-20, the Governor directed the public schools in the state to follow the County Alert System's county-by-county color-coded system maintained by the DHHR, as it relates to any limitations or prohibitions on occupancy of such educational institutions for in-person instruction and/or athletic and extracurricular activities.

6. Based on the Governor's order, the West Virginia Department of Education ("WVDE") publishes a weekly "Saturday Education Map." This map is based on the same metrics as the weekly color-coded map issued by DHHR. Under the WVDE map, students in public schools in counties designated as either Orange or Red are not

permitted to attend school in-person or compete in athletic contests. The WVSSAC, in turn, has relied upon the WVDE map to regulate the extent to which each school may participate in athletic activities.

7. Since October 17, 2020, Berkeley County has been designated as "Orange" under the WVDE map. As a result, the Petitioner, Emily Beck, and all other members of the four high school boys and girls soccer teams in Berkeley County, have not been permitted to participate in the WVSSAC state high school soccer tournament. The tournament began on October 19, 2020 with sectional play, continued with regional play on October 27, 2020, and is presently scheduled for finals on November 6 to 7, 2020. Upon information and belief, the WVSSAC intends to proceed with the finals as scheduled even though none of the teams in Berkeley County have been able to participate in the tournament. For purposes of the tournament, the high schools in Berkeley County comprise one of eight sections in the state, each region consisting of two sections. Upon information and belief, because the teams in Berkeley County have not been able to play, the WVSSAC has designated the winner of the other section, Jefferson High School, as the regional champion.

8. Recently, most every county in the state has not been barred from participating in athletic activities because their respective percent positivity rates have been below the orange or red color categories on the WVDE map. Again, the "percent positivity" metric is based on the total number of individuals who test positive divided by the total number of individuals tested. This metric places emphasis on the number of tests conducted. That is, the more tests conducted the more likely individuals without any symptoms or known exposure to COVID-19 will be tested, thereby lowering the percentage of positive tests.

As explained recently by the Governor's "COVID-19 Czar," Dr. Clay Marsh, "more testing will drive the numbers up but eventually, the percent positive will drop." "Gaming the COVID-19 metrics not possible, experts say," Coal Valley News, October 14, 2020 (http://www.coalvalleynews.com/gaming-the-covid-19-metrics-not-possible-experts-say/article_d6cd2141-d48b-5351-bc4e-a1a9cad882de.html). Thus, a particular county's percent positivity rate will be determined in large measure by the access to and availability of free testing in that county.

9. Testing in the individual counties is largely left to the local Health Departments. Pursuant to the Governors Order a county health department is required to set up free testing sites within forty eight hours of a County falling into gold status and testing within twenty four hours of a County falling into orange or red status.

10. During the month of October Berkeley County was Gold for October 3rd and 10th. Free testing was offered on the following dates:

October 7 (Wednesday)-4:30 to 7:30

October 13 (Tuesday)-1:00 p.m. to 5:00 p.m.

October 14 (Wednesday)- by appointment only 8:30 a.m. to 12:30 p.m.

October 15 (Thursday) -1:00 p.m. to 5:00 p.m.

October 16 – (Friday) by appointment only 8:30 a.m. to 12:30 p.m.

October 17 - 8:00 a.m. to noon (These test results most likely would have been counted for the map color beginning the week of the 24th).

11. On October 17th the WVDE map indicated that Berkeley County was in orange status. This status was determined on the seven day rolling average with the cut-off for counting test results Thursday October 15 at 11:59 p.m. Following this status the

athletic teams were no longer permitted to participate in events. Free testing was offered on the following dates:

October 18 (Sunday) -8:00 a.m. to noon

October 21 (Wednesday)- 8:30 a.m. to 12:30 p.m. (This date would have been the last date available for free testing as the results must be to DHHR by Thursday at 11:59 p.m. Generally, the turn around for the results vary with no guarantee that these results would assist the County to move out of Orange status.)

October 23- (Friday) 2:00 p.m. to 6:00 p.m.

Also, during this week one Walgreens pharmacy offered free testing by appointment only, allowing for approximately a total of thirty tests. (10 tests per day for a period of three days during the week).

12. On October 24 the WVDE map again showed Berkeley County in orange status. This status was determined based upon test results as of Thursday October 22nd at 11:59 p.m. Free Covid testing was made available on the following dates:

October 25- (Sunday) 1:00p.m. to 3:00 p.m.

October 27- (Tuesday) 1:00 p.m. to 5:00 p.m.

October 29-(Thursday) 1:00 p.m. to 5:00 p.m.

October 30-(Friday)1:00 p.m. to 5:00 p.m.

October 31- (Saturday) noon to 8:00 p.m.

Again, any results after Tuesday would not assist the County in moving out of Orange status.

13. In comparison Kanawha County has had testing available more widespread, longer hours and at over five participating pharmacies, including four Walgreens and

Fruths Pharmacy. Like Berkeley County, Kanawha County on October 3rd and the 10th was in gold status. Free Covid testing in October in Kanawha County was as follows:

October 1 -(Thursday) 9:00 a.m -5:00 p.m. at one site and 11:00 a.m. to 5:00 p.m. at a second site (Presumably this level of aggressive testing was to assist the County to move from their previous red status just weeks before to a status that would allow full participation in school and athletics.)

October 2- (Friday) 11:00 a.m. to 5:00 p.m.

October 6- (Tuesday) 9:00 a.m. to 3:00 p.m.

October 7- (Wednesday) 3:00 p.m. to 6:00 p.m. at one site and noon to 5:00 p.m. at a second site

October 9 -(Friday) 11:00 a.m. to 6:00 p.m.

October 10- (Saturday) noon to 4:00 p.m.

October 13-(Tuesday) 10:00 a.m. to 2:00 p.m.

October 14 -(Wednesday) 10:00 a.m. to 2:00 p.m.

October 15 - (Thursday) 10:00 a.m. to 2:00 p.m.

14. In addition to the above free testing sites, the Governor announced partnership with Walgreens pharmacy commencing Friday October 9 which offered four different testing sites in Kanawha County allowing for 10 tests at each affiliated pharmacy on three days of each week. This provided an additional 120 possible tests to be completed this week in Kanawha County. Fruths Pharmacy also offered appointment only free testing during this time.

15. On Saturday October 17th the WVDE School map was published and Kanawha County was green status.

Testing was offered on the following dates:

October 17 (Saturday)-10:00 a.m. to 4:00 p.m.

October 20 (Tuesday) -noon to 6:00 p.m.

October 23 (Friday)-noon to 4:00 p.m.

Again, four different Walgreen pharmacies and Fruth Pharmacies in Kanawha County offered free testing during this week.

16. On October 24th the WVDE map was published and Kanawha County was gold status allowing it to proceed with in school learning and participation in athletic events as modified by the WVSSAC. Testing was offered on the following dates:

October 28 (Wednesday) 3:30 p.m.-7:30 p.m

October 30 (Friday) 9:00 a.m. to 3:00 p.m.

The published WVDE map on Saturday October 31st indicated that Kanawha County was Green status.

17. During the month of October Kanawha County residents were afforded at least eighty three hours of unscheduled free testing throughout the county. In addition to unscheduled testing at least three hundred and sixty free test appointments were available through the various Walgreens participating pharmacies. In addition free testing appointments were available by appointment at participating Fruth pharmacies. At no time recently was Kanawha County WVDE map below the gold status. On Friday October 30th Kanawha County had an infection rate of 23.26 per 100,000 but had a positivity rate of 2.97.

18. By comparison Berkeley County residents had approximately forty-eight hours of unscheduled free testing. In addition, the local health department offered two

different dates of scheduled free testing and one Walgreens offered approximately one hundred and twenty pre scheduled appointments (this number may be much lower as it is unclear when the Berkeley County, Inwood pharmacy began offering this service and this number assumes at least twelve different days with ten slots each day were available). On the same date, Friday October 30th Berkeley County had an infection rate of 19.3 per 100,000 residents but a positivity rate of 5.48.

19. As a result of the more widespread availability of testing in Kanawha County, nearly twice as many individuals in that county were tested. In turn, this appears to have resulted in a lower percent positivity rate than existed prior to the greater level of testing being made available there. Berkeley County, however, has not had the same availability of testing opportunities, thus making it less likely that the county would achieve lower percent positivity rates.

BASIS FOR INJUNCTIVE RELIEF

20. Article III, Section 10 of the West Virginia Constitution guarantees equal protection of the law. "Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner." *Israel v. West Virginia Secondary Schools Activities Commission*, 388 S.E.2d 480, 484, 182 W.Va. 454, 458 (1989).

21. The Petitioner and all other high school soccer athletes in Berkeley County are being denied equal protection under the law, through no fault of their own, because the WVSSAC's application of the WVDE map does not take into consideration the disparity of testing availability among the counties. As a result, high school soccer athletes in counties with higher infection rates than Berkeley County, such as Kanawha

County, are being allowed to play simply because the level of testing available to residents of that county has been far greater, both in raw numbers and proportionately, than the testing available to residents of Berkeley County.

22. In addition, the WVSSAC has refused to make modifications available to the athletes in Berkeley County that would allow them to participate in post season play. On the other hand, the WVSSAC has modified the criteria to permit other athletes to participate in post season play; for example, allowing cross country athletes to compete if they underwent individual testing. However, when the Petitioner and her teammates and other teams throughout this county offered COVID negative test results prior to sectional play, the WVSSAC refused make a similar accomodation.

23. The Petitioner and all other high school soccer athletes in Berkeley County will suffer immediate and irreparable harm if the WVSSAC is not enjoined from conducting the state AAA girls and boys' soccer playoffs and tournament as they will be denied the same opportunity as other high school athletes in the state. Further, the Petitioner, like the other senior high school soccer athletes in Berkeley County, will never have another opportunity to compete in the state tournament.

24. A delay in the soccer tournaments will not prejudice the WVSSAC or anyone else as similar delays have been allowed in the past, including a postponement in 1994 due to a measles outbreak in the northern portion of the state. In addition, during the COVID-19 restrictions, the WVSSAC has made *ad hoc* adjustments to the protocol such as allowing cross country teams in orange and red counties to participate in state finals subject to certain additional restrictions. Likewise, the WVSSAC has permitted teams in

counties designated Gold to play unrestricted in post-season, whereas prior restrictions only allowed such teams to play other teams in Gold status.

25. Because of the obvious unequal treatment of the Petitioner and all other high school soccer athletes in Berkeley County, they are likely to succeed on the merits of this action.

26. It is appropriate for the Court to decide the question presented by the Petitioner in this action because it "undisputably involves a most vital public function-- education of our youth." *White by White v. Linkinoggor*, 176 W.Va. 410, 412, 344 S.E.2d 633, 635 (1986). (Citations omitted).

27. Per Rule 65(b) of the West Virginia Rules of Civil Procedure, counsel for Petitioner certifies that notice of this action has been provided to the WVSSAC. Specifically, immediately after filing this action, counsel for Petitioner faxed and emailed a copy of the same to the WVSSAC at (304) 428-5431 and wvssac@wvssac.org.

Wherefore, Petitioner requests that the Court grant her a temporary restraining order prohibiting the West Virginia Secondary Schools Activities Commission ("WVSSAC") from conducting the state AAA girls and boys soccer playoffs and tournament; that the Court set a hearing on Petitioner's request for a an injunction within ten days from the date of the temporary restraining order; that the Court then grant an injunction against the WVSSACs prohibiting it from proceeding with the state AAA girls and boys soccer playoffs and tournament until after access to free COVID-19 testing has been made available to residents of Berkeley County in a manner equal to residence of other counties in the state, or, in the alternative, until the WVSSAC adjusts the criteria for participation in secondary school activities to account for the disparity in public access to

free COVID-19 testing between Berkeley County and other counties in the state; and such other and further relief as the Court deems appropriate.

Respectfully submitted this 2nd November, 2020.

PETITIONER
BY COUNSEL

BY: /s/ Barry P. Beck

Barry P. Beck (WV Bar # 4225)
Kelly A. Beck (WV Bar # 4266)
308 W. Burke Street
Martinsburg, WV 25401
(304) 264-8870

Appendix, Exhibit 3

Motion to Dismiss

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

EMILY C. BECK, on behalf of
herself and all other similarly
situated persons,

Petitioner,

v.

Civil Action No. CC-02-2020-P-337

WEST VIRGINIA SECONDARY
SCHOOL ACTIVITIES COMMISSION,

Respondent.

MOTION TO DISMISS

The Respondent West Virginia Secondary School Activities Commission (hereinafter WVSSAC) Moves the Court to dismiss this action because the complaint fails to state a claim by which relief can be granted, and because this Court lacks jurisdiction to grant the relief requested. The reasons for this motion are as follows:

1. This Court lacks jurisdiction to grant the relief requested. The relief requested by the Petitioner is an order restraining the WVSSAC from conducting the state AAA girls' and boys' soccer playoffs and tournaments. The only remaining portion of the state girls' and boys' soccer playoffs and tournaments is the state tournament, scheduled to be conducted in Raleigh County on November 6 and 7, 2020.

W.Va. Code § 53-5-3 provides in pertinent part:

"Jurisdiction of a bill for an injunction to any judgment, act or proceeding shall, unless it be otherwise specially provided, be in the circuit court of the county in which the ...act or proceeding is to be done, or is doing, or is apprehended, and the same may be granted to a judgment of a justice in like manner and with like effect as to other judgments." (Emphasis added)

In Meadows on Behalf of Professional Employees of West Virginia Educ. Ass'n v. Hey the Supreme Court of Appeals held in Syllabus Point 2:

"Under W.Va. Code § 53-5-3 (1981), the circuit court of one county does not have the authority to enjoin the acts of citizens occurring in other counties, except where the judge of the other county is interested in the proceeding and unable to act." 184 W.Va. 75, 99 S.E.2d 657 (W. Va. 1990).

By asking this Court to issue an injunction outside of its circuit, the Petitioner's proposed remedy would run afoul of *Meadows* because this Court is not empowered to enjoin activity occurring outside of its circuit under *Meadows* and W.Va. Code § 54-5-3. Thus, this Court lacks jurisdiction over this suit, and must dismiss the complaint.

2. Petitioner seeks a preliminary injunction prohibiting the WVSSAC from conducting the Class AAA boys' and girls' state soccer tournament. Preliminary injunctions are generally issued "to preserve the relative position of the parties" and "protect the status quo". *United States v. South Carolina*, 720 F.3d 518, 524 (4th Cir. 2013). Petitioner is not seeking to preserve the status quo; instead, Petitioner is seeking a mandatory injunction – a request which should be denied because the granting of the request would alter the status quo.

Recently the West Virginia Supreme Court of Appeals articulated the standard governing the issuance of preliminary injunctions as follows:

"The customary standard applied in West Virginia for issuing a preliminary injunction is that a party seeking the temporary relief must demonstrate by a clear showing of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest."

Ne. Nat. Energy LLC v. Pachira Energy LLC (citations and quotations omitted). (W. Va. 2020).

This West Virginia standard is consistent with the federal standard articulated by the U.S. Supreme Court in *Winter v. Nat. Resources Def. Council, Inc.*:

"In order to obtain a preliminary injunction the Petitioner is required to establish (1) that she is likely to succeed on the merits of her claim; (2) she is likely to suffer irreparable harm in the absence of a preliminary injunction; (3) the balance of equity is tipped in Petitioner's favor (that is, any harm suffered by the Respondent is outweighed by the harm to the Petitioner); and (4) the preliminary injunction is in the public interest." 555 US 7, 129 S.Ct. 365.

3. The Petitioner cannot establish that she is likely to succeed on the merits of her claim, because this Court lacks jurisdiction to grant the relief requested. "[T]he district court lacks subject matter jurisdiction to consider the claim, precluding the

possibility that Jones could succeed on its merits." *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009).

4. The Petitioner asserts in paragraph 21 that the BASIS FOR INJUNCTIVE RELIEF is: "The Petitioner and all other high school soccer athletes in Berkeley County are being denied equal protection under the law, through no fault of their own, because the WVSSAC's application of the WVDE map does not take into consideration the disparity of testing available among the counties."

a. As is asserted in paragraph 9 of the Petition, "Testing in the individual counties is largely left to the local Health Departments. The Respondent WVSSAC has no ability to influence the actions and decisions of the Berkeley County Health Department.

b. In paragraphs 17 and 18 of the Petition it is alleged that Kanawha County residents were afforded 83 hours of unscheduled free testing, and Berkeley County residents were afforded 48 hours of unscheduled free testing. Mathematically, Berkeley County residents were afforded 57.8% as much unscheduled free testing as Kanawha County residents.

According to the most recent census of the United States, the population of Kanawha County is 193,063, and the population of Berkeley County is 104,169. Accordingly, the population of Berkeley County is 53.9% of the population of Kanawha County.

A comparison of the hours of unscheduled free testing and the populations of Kanawha and Berkeley Counties discloses that, on a per capita basis, citizens of Berkeley County have a slightly greater opportunity for unscheduled free testing than citizens of Kanawha County.

While mathematically more difficult to compute, it appears that a comparison of testing available at various pharmacies and other sources for citizens of Kanawha and Berkeley Counties is likewise proportionate to the population of the counties.

In addition to a comparison on a per capita basis of testing available to residents of Berkeley and Kanawha Counties, it is likewise significant that Kanawha County consists of 911 square miles and Berkeley County consists of 322 square miles. The logistical problems associated with providing testing for a much larger geographical area would warrant additional testing locations in Kanawha County.

For the foregoing reasons, Petitioner cannot establish that she is likely to succeed on the merits of her claim.

5. Arrangements for the conduct of the state boys' and girls' soccer tournament, for all classes, have been completed. In particular, a venue for the event in Raleigh County on November 6th and 7th has been secured, officials have been contracted, and a host of additional incidental arrangements have been made for the conduct of the state soccer tournament for all classes.

If the soccer tournament for AAA girls and boys were delayed there is no guarantee that a suitable venue would again be available. Likewise, there may be difficulty in obtaining officials, etc. Assuming these logistical difficulties could be overcome, the Respondent would be forced to incur the costs of conducting two separate state soccer tournaments. Respondent estimates that the cost of the additional state soccer tournament would be approximately \$20,000.

Rule 65(c) of the WV Rules of Civil Procedure provide that a preliminary injunction shall not issue except upon the giving of security by the applicant for the payment of such costs and damages as may be incurred or suffered by any party who was found to have been wrongfully enjoined. Petitioners have not given any security in this matter.

In addition, the balance of equity is tipped in Respondent's favor (that is, any harm suffered by the Petitioner is outweighed by the harm to the Respondent).

6. A delay in the state soccer tournament scheduled for November 6th and 7th will prejudice a number of participating schools. The trend in the percent positivity rate is increasing generally throughout the state, and in particular in several counties that are the homes of regional tournament winners. Such a delay would be manifestly unjust, in that it would likely result in the disqualification from further participation of a number of schools who have played by the rules, solely to afford students attending Berkeley County schools another opportunity to have a reduced percent positivity rate. Accordingly, the relief sought would result in significant harm to Respondent and to innumerable innocent parties not before the court, and therefore is not in the public interest.

7. The National Federation of State High School Associations (hereinafter "NFHS") is an organization composed of state entities charged with the regulation of interscholastic athletics within the state. The NFHS published guidance to state associations with respect to COVID pandemic issues and its impact on interscholastic athletics. In particular, the NFHS identified cross country as a sport involving a "low

risk", and soccer as a sport identified as a "moderate risk" by the NFHS. Because of the difference in risk to participants, cross country athletes are permitted to compete in certain circumstances not available to student athletes participating in sports with a higher risk assessment, such as soccer. This is rationally related to a legitimate state purpose, and accordingly is neither arbitrary nor unconstitutionally discriminatory.

8. Although probably not material to the resolution of issues in this case, the Respondent WVSSAC is a private, voluntary association of principals of West Virginia private, public and parochial schools. It was organized on June 17, 1916, and has existed continuously since that date. "The West Virginia Secondary School Activities Commission ('the SSAC') has been in existence since 1916. Its members are principals (or their representatives) of secondary schools (essentially junior and senior high schools) in those counties which, through their county Board of Education, have elected to delegate control of their interscholastic athletic events and band activities to the SSAC. Parochial and private schools may also delegate to the SSAC the control of these types of extracurricular activities." *Manchin v. WVSSAC*, 178 W.V. 699, 700, 364 S.E. 2d 25 (1987). With respect to West Virginia Code 18-2-25, "the statute only accorded statutory recognition to the preexistent organization." FN 9, *Manchin v. WVSSAC*. The allegations contained in paragraph 2 of the Petition for Temporary Restraining Order and Injunctive Relief are inaccurate.

9. The WVSSAC is a voluntary association of principals of West Virginia public, private and parochial secondary schools. The regulations governing participation in interscholastic athletics during the current COVID pandemic were formulated in compliance with COVID regulations promulgated by the appropriate officials of the executive branch of the State of West Virginia. A challenge to the COVID pandemic regulations was recently considered by the Circuit Court of Kanawha County, and rejected. Appended hereto is a copy of the Order of the Circuit Court of Kanawha County (the Honorable Judge Tabit) addressing the challenge to those regulations.

**WEST VIRGINIA SECONDARY
SCHOOL ACTIVITIES COMMISSION,
By Counsel,**

/s/William R. Wooton
William R. Wooton
(WVSB#4139)
WOOTON & WOOTON
210 Main Street
Beckley, WV 25801
(304) 253-2222

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

EMILY C. BECK, on behalf of
herself and all other similarly
situated persons,

Petitioner,

v.

Civil Action No. CC-02-2020-P-337

WEST VIRGINIA SECONDARY
SCHOOL ACTIVITIES COMMISSION,
a nonprofit organization,

Respondent.

CERTIFICATE OF SERVICE

I, William R. Wooton, do hereby certify that a true and correct copy of the foregoing ***"Motion to Dismiss"*** was served on all Counsel of Record via the West Virginia E-Filing System, on this the 4th day of November, 2020:

Barry P. Beck
Kelly A. Beck
308 W. Burke Street
Martinsburg, WV 25401

/s/William R. Wooton
William R. Wooton (WVSB#4139)

FILED

2020 OCT 29 PM 3:02

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ROBERT TYLER ALEXANDER,

Plaintiff,

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

v.

CIVIL ACTION NO. 20-C-830

Judge Joanna L. Tabit

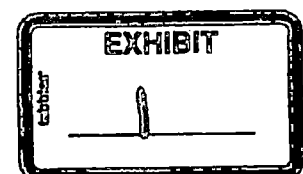
GOVERNOR JIM JUSTICE; THE WEST
VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES; and the WEST
VIRGINIA BOARD OF EDUCATION,

Defendants.

**AGREED ORDER DENYING PLAINTIFF'S MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY OR PERMANENT INJUNCTION**

On October 6, 2020, the parties appeared by counsel for oral argument on their respective motions and memoranda. Plaintiff seeks a writ of mandamus and a preliminary injunction against Defendants Governor Jim Justice, the West Virginia Department of Health and Human Resources, and the West Virginia Board of Education. Plaintiff contends that the Governor's executive orders pertaining to schools and extracurricular activities deny him equal protection of his constitutional rights. He asks this Court to enjoin Defendants from implementing the Governor's Executive Order 68-20 and the color-coded maps used to determine whether schools may hold in-person instruction and extracurricular activities in the face of the COVID-19 pandemic.

As a threshold matter at the October 6, 2020 hearing, the Court took judicial notice of the fact that when the Plaintiff filed this action, the Kanawha County school system was in either "red" or "orange" status on the Governor's color-coded maps which precluded in-person instruction and student participation in extracurricular activities. By the time that this matter came on for hearing, Kanawha County was in "gold" status, having returned to in-person instruction and having



resumed extracurricular activities, with certain restrictions. In fact, the George Washington High School football team upon which the Plaintiff plays was scheduled to play Riverside High School in Kanawha County on October 7, 2020. As a result, it could be argued that this matter was technically moot at the time of hearing. However, this Court finds that this case satisfies the factors set forth in *Israel v. West Virginia Secondary Schools Activities Commission*, 388 S.E.2d 480 (W. Va. 2017), which provides this Court with jurisdiction to consider the Plaintiff's technically moot claims.

Further, as a preliminary matter at the October 6, 2020 hearing, the Court addressed the motion to dismiss filed by Defendants Governor and Department of Health and Human Resources and determined to deny that motion insofar as the Court finds that it has jurisdiction to review the Governor's discretionary executive acts to assure that those acts do not violate the Plaintiff's constitutional rights. Further, the Court determined to deny the Defendant West Virginia Board of Education's motion to dismiss insofar as its motion raises issues that are more appropriately addressed by the Court after allowing the Plaintiff to present evidence and have the opportunity to meet his burden on the merits of his claim. In sum, the Plaintiff's complaint presents a cognizable claim over which this Court has jurisdiction and which is appropriate for this Court's adjudication on the merits.

Turning to the merits of Plaintiff's claims, and having reviewed the submissions of the parties and with the benefit of a hearing with several fact witnesses, the Court **FINDS** and **CONCLUDES** that the Plaintiff fails to satisfy the high bar required for this Court to enter a preliminary or permanent injunction because the Plaintiff's claims are not only unlikely to prevail upon the merits, but the Court additionally finds Plaintiff would not prevail upon the merits. Accordingly, his Complaint Seeking Temporary Restraining Order, Preliminary Injunction and

Permanent Injunction Against State Violation of Constitutional Rights is **DENIED** consistent with the following findings of fact and conclusions of law.

Findings of Fact

1. Well into March of this year, West Virginians had no reported cases of COVID-19. As of the date of this Order, COVID-19 has infected more than 23,064 West Virginians and killed at least 436 people.
2. Nationwide, over 8.6 million cases have been reported, currently at a rate of almost 50,000 new cases per day, and more than 225,084 Americans have died of the disease.
3. The disease is highly contagious and spreads through droplets, aerosols, talking, yelling, screaming, coughing, sneezing and just breathing, and it spreads more the longer persons spend in contact with each other.
4. The scope of this public health crisis is immense, complex, and unprecedented.
5. On March 13, 2020, Governor Jim Justice ordered the closure of all pre-K through 12 schools and extracurricular activities.
6. On March 16, 2020, Governor Justice declared a State of Emergency.
7. On March 17, 2020, Governor Justice announced the closure of all restaurants and bars.
8. On March 23, 2020, in accordance with guidance from the Centers for Disease Control and Prevention ("CDC") and the WVDHHR, Governor Justice issued Executive Order 9-20, a "Stay at Home Order" which also required all businesses—except those deemed "essential"—to cease all activities within the State except for the minimum operations necessary.
9. The Governor assembled a team of experts to help guide the State's response to this State and National public health emergency.

10. Dr. Clay Marsh, Vice President and Executive Dean for Health Sciences at West Virginia University, was appointed by the Governor as the State's COVID-19 Czar.

11. Since March 2020, the Governor, by executive order and through the executive agencies, has gradually permitted resumption of various activities across all sectors of society and the economy with restrictions specifically tailored to reduce the risk of spread of the disease in those various contexts.

12. The Governor, the Department of Health and Human Services, the West Virginia Board of Education, the State Superintendent of Schools, county boards of education, county superintendents, county health departments, and many others, have developed a plan to reopen school buildings safely and permit extracurricular activities to resume.

13. Schools present unique risks for the spread of the coronavirus, because they involve so many people — children and adults — in crowded spaces for extended periods of time, providing food services, and for some students long bus rides to and from the farthest reaches of every county.

14. According to the Centers for Disease Control (CDC), "[t]he intense social density that characterizes schools, combined with age-related biological, behavioral, and environmental factors, can facilitate infectious disease transmission within schools and lead to secondary spread into households and the wider community."

15. The CDC issued a report on September 11, 2020, in which the transmission dynamics of COVID-19 outbreaks were studied in the context of child care facilities. That report recognizes that there is evidence that children over ten years of age can effectively transmit COVID-19.

16. COVID-19 poses a serious health threat to children.

17. Even though children do not generally become as severely ill from COVID-19, those above the age of 10 effectively spread the disease.

18. The State set out to reopen schools with a strategic and targeted county-based model.

19. On July 24, Governor Justice issued Executive Order 56-20, which allows for schools to resume in-person on September 8, 2020, provided that social distancing and other safety measures could be maintained.

20. On September 4, 2020, the Governor issued Executive Order 68-20, which stated that West Virginia's public health experts had developed a County Alert System, published on the Department of Health and Human Resources' website, which is a county-by-county color-coded system and map to monitor COVID-19 case rates through the State.

21. The Governor declared that West Virginia's public health experts have concluded that requiring private and public pre-K through 12 schools throughout the State to follow the limitations associated with the County Alert System is necessary to ensure the safety of school constituents and their surrounding communities.

22. The Governor and West Virginia's public health officials have modified the map as circumstances have evolved. The map is updated on a weekly basis to reflect the rates of community transmission within each county and the rates of test positivity.

23. The color-coded maps provide the roadmap for keeping communities safe while guiding counties in determining when they can safely re-open schools for in-person instruction and extracurricular activities.

24. The West Virginia Department of Education's map has five categories—Green, Yellow, Gold, Orange, and Red—indicating the rate of community transmission of COVID-19 based on the number of cases per 100,000 people or the positivity rate.¹

25. In-person instruction and/or extracurricular activities is not permitted when a County falls into the “red” or “orange” category, and the schools are required to deliver remote instruction to students. At the time that the Plaintiff filed this complaint, Kanawha County was “red” and/or “orange.”

26. At the time of the hearing, Kanawha County was “gold,” which allows for in-person instruction and the resumption of extracurricular activities, beginning on October 5, 2020. As a result, the football team upon which the Plaintiff plays at George Washington High School was scheduled to play a game against Riverside High School in Kanawha County on October 7, 2020.

27. The map and School Re-entry plan also includes mitigation measures to be observed, which are meant to prevent the spread of COVID-19.

28. The most important element to limit the spread of COVID-19 in schools is controlling the spread of the disease within the community at large.

29. The stated purpose for the executive order entered by the governor is to promote the health, safety, and welfare of the athletic participants, the school communities, and the communities at large.

¹ All map categories are measured on a 7-day or 14-day (for smaller counties) rolling average. *Id.* Green indicates “minimal community transmission,” meaning that there are three or fewer cases of infection per 100,000 or a 3% or less positivity rate. *Id.* Yellow indicates “increased community transmission,” meaning that there are 3.1-9.9 cases of infection per 100,000 or a 4% or less positivity rate. *Id.* Gold indicates “elevated community transmission,” meaning 10-14.9 cases of infection per 100,000 or a 5% or less positivity rate. *Id.* Orange indicates “heightened community transmission,” meaning that there are 15-24.9 cases of infection per 100,00. And Red indicates “substantial community transmission,” meaning that there are 25 or more cases of infection per 100,000. *Id.*

30. Plaintiff resides in Kanawha County and is the quarterback for the George Washington High School football team.

Conclusions of Law

31. Because the restrictions which prevented the Plaintiff from playing football in Kanawha County at the time that he filed his complaint had been lifted at the time of hearing as a result of the operation of the color-coded map at issue in this case, it is arguable that Plaintiff's claims are technically moot. See *State ex rel. West Virginia Secondary Schools Activities Comm'n v. Oakley*, 152 W. Va. 533, 537, 164 S.E.2d 775, 778 (1968), quoting Syllabus Point 1, *State ex rel. Lilly v. Carter*, 63 W. Va. 684, 60 S.E. 873 (1908) ("Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court.").

32. However, the West Virginia Supreme Court has tempered the mootness doctrine to allow courts to address technically moot matters if certain factors are met. In *Israel*, *supra*, the West Virginia Supreme Court held that those factors are: (1) whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; (2) whether issues that are technically moot in the immediate context present questions of great public interest that should be addressed for the future guidance of the bar and of the public; and (3) whether the issues presented may be repeatedly presented yet escape review because of their fleeting and determinate nature.

33. Although this Court takes note of Defendants' argument that the Court in *Israel* was addressing appellate jurisdiction when issues became moot after full proceedings in the trial court rather than issues that were moot when they appeared before the trial court, the Court concludes that the *Israel* factors have been met in this case inasmuch as this matter involves issues

of important public interest that warrant adjudication for future guidance. Moreover, given that the color-coded map at issue in this case has the potential to change and impact school openings and closings every week, the Court concludes that the issues may escape review by this Court if not addressed at this time. The Defendants' objections to this aspect of the Court's ruling are duly noted.

34. The Governor, as the chief executive of the State, is vested by the Constitution and the Legislature with broad discretionary authority to respond to emergencies. See W. Va. Const. art 7; W. Va. Code § 15-5-6.

35. While the Governor's emergency powers are broad, this Court concludes that it has jurisdiction to consider whether or not his discretionary, emergency acts violate Plaintiff's constitutional rights, as he claims.

36. The West Virginia Department of Health and Human Resources is charged with providing a wide range of services to and protecting the health and well-being of all West Virginia residents.

37. The West Virginia State Constitution provides for a fundamental right to a "thorough and efficient system of free schools." W. Va. Const. art. XII § 1.

38. "Implicit within the West Virginia constitutional guarantee of 'a thorough and efficient system of free schools' is the need for a safe and secure school environment. Without a safe and secure environment, a school is unable to fulfill its basic purpose of providing an education." Syl. Pt. 4, *Phillip Leon M. v. Greenbrier County Board of Education*, 484 S.E.2d 909 (W. Va. 1996).

39. "If West Virginians cannot have a reasonable degree of confidence that the schools that their children, grandchildren, nieces, nephews, friends and neighbors attend and work in are

safe and secure, the survival of the 'thorough and efficient' public school system which our Constitution itself mandates is in question." *Cathe A. v. Doddridge County Board of Education*, 490 S.E.2. 340, 348 (W. Va. 1997).

40. "[T]he State has a compelling interest in providing a safe and secure environment to the school children of this State pursuant to W. Va. Const. art. XII, section 1." *Id.*

41. It is well established, however, that the fundamental right to education does not extend to participation in extracurricular activities such as interscholastic sports.

42. The Supreme Court of Appeals has recognized that "[p]articipation in nonacademic extracurricular activities, including interscholastic athletics, does not rise to the level of a fundamental or constitutional right under article XII, § 1 of the West Virginia Constitution." *Bailey v. Bd of Educ. of Kanawha*, 174 W. Va. 8, 18, 321 S.E.2d 302, 312-13 (1984).

43. The West Virginia Board of Education is the body constitutionally charged with the general supervision of the "free," public schools pursuant to Article XII, § 2 of the West Virginia Constitution. The mandatory requirement of a "thorough and efficient system of free schools," found in Article XII, § 1 of the West Virginia Constitution, makes education a fundamental, constitutional right in West Virginia. *Pauley v. Kelly*, 255 S.E.2d 859 (1979).

44. The West Virginia Board of Education, and the State Superintendent's efforts have been focused on providing support and cooperation with the Governor to implement the color-coded map system in the public schools that the Constitution obligates them to supervise.

45. "A preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Roe v. Dep't of Def.*, 947 F.3d 207, 219 (4th Cir. 2020), as amended (Jan. 14, 2020) (internal quotation marks omitted). To determine whether the extraordinary remedy of a preliminary injunction is appropriate, the

Plaintiff "must demonstrate by a clear showing of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including" four factors: "(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *McGraw v. Imperial Mfg.*, 196 W. Va. 346, 352, 472 S.E.2d 792, 798 n.8 (1996); *see also Morrissey v. W. Va. AFL-CIO*, 239 W. Va. 633, 638, 804 S.E.2d 883, 888 (2017).

46. Plaintiff fails to satisfy each prong and is not likely to succeed on the merits.

47. First the Plaintiff fails to demonstrate that he will suffer irreparable harm without an injunction. He contends that missing football games "could mean that no college offers Alexander a football scholarship, or less of one than it otherwise would"; "could mean that Alexander may have to pay for college on his own"; or "could permanently and irreparably alter Alexander's future higher educational, vocational and financial landscape." However, any harm to the Plaintiff is speculative, and not irreparable because the disruptions to in-person instruction are temporary and unknown in duration. On October 5, 2020 Kanawha County public schools went back to in-person instruction which also allowed extracurricular activities. Additionally, because it is speculative as to what options Plaintiff will have, he cannot show what injury, if any, he would or could possibly sustain from missing football games.

48. Second, the harm to the Defendants from an injunction is far greater than that to the Plaintiff. An injunction would derail the swift, concerted efforts of the Governor and various State agencies and would cause irreparable harm to the Defendants by upending settled precedent, undermining the Governor's emergency powers, and restricting the Government's ability to respond to future crises. *Syl., Hatfield v. Graham*, 73 W. Va. 759, 81 S.E. 533, 533-35 (1914).

Time is of the essence and an injunction would hamper the State's response to the pandemic. Moreover, the Defendants have demonstrated a legitimate purpose for their School Re-entry Plan that promotes the health and welfare of students and the community at large.

49. Third, the Plaintiff's claims contained in his Complaint Seeking Temporary Restraining Order, Preliminary Injunction and Permanent Injunction Against State Violation of Constitutional Right are likely to fail on the merits because, he has failed to identify similarly situated classes of persons for purposes of equal protection. It is fundamental that "[e]qual protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner." *Israel v. W. Va. Secondary School Activities Commission*, 182 W. Va. 454, 461 (1989). Here, the Plaintiff alleges that public school students are being treated differently than the general public. The Court holds that the general public and school students do not amount to classes of persons that are similarly situated. Therefore, there can be no denial of equal protection under the law. Even if the equal protection analysis were triggered, the interests of protecting the health, safety, and welfare of the public from community spread of COVID-19 in congregate settings like school and sports satisfy the rational basis test.

50. Finally, entering an injunction would run counter to the public interest. The Defendants' response to the pandemic and their efforts to reopen schools and permit the resumption of extracurricular activities in a safe manner is primarily driven by protecting the public health, safety, and welfare. Although taking part in extracurricular sports is an important part of many student's school experience, the disruption to those efforts to keep our citizens safe outweighs the concerns of sending children back to in-person instruction and allowing extracurricular activities in the midst of a pandemic that quickly spreads when people are closely congregated. Put simply, the executive order at issue is designed to protect the health and welfare

of the students, the athletes, the coaches, the families, and the communities, which clearly outweighs the privilege of participating in football.

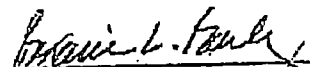
Based upon the following, the Court does hereby DENY Plaintiff's request for a preliminary or permanent injunction.


It is further ORDERED that the Clerk of this Court shall send certified copies of this Order to all counsel of record.

Entered this 29th day of October, 2020.


HONORABLE JOANNA I. TABIT

Prepared and submitted by:


Benjamin L. Bailey (WVSB #290)
Benjamin J. Hogan (WVSB #12997)
Special Assistant Attorneys General
Bailey & Glasser LLP
209 Capitol Street
Charleston, WV 25301
(304) 345-6555 (telephone)
(304) 342-1110 (facsimile)
bbailey@baileyglasser.com
bhogan@baileyglasser.com
Counsel for Governor Jim Justice and the
West Virginia Department of Health and Human Resources

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, S.
I, CATHY S. GATSON, CLERK OF SAID COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COUNTY THIS 4th
DAY OF November 2020

CATHY S. GATSON, CLERK

Kelli D. Talbott

Kelli D. Talbott (WVSB #4995)
Senior Deputy Attorney General
812 Quarrier St., Second Floor
Charleston, WV 25301
(304) 558-8989 (telephone)
(304)
Kelli.D.Talbott@wvago.gov
Counsel for Defendant WVBE

Agreed to by:

J. David Fenwick (w/permission)

J. David Fenwick (WVSB #6029)
GOODWIN & GOODWIN, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301
(304) 346-7000 (telephone)
(304) 346-9692 (facsimile)
jdf@goodwin.goodwin.com
Counsel for Plaintiff

Appendix, Exhibit 4

Order of November 4, 2020 Hearing

Case No. CC-02-2020-P-337

Whereupon, the Court then heard argument from counsel on the Petitioner's request for a temporary restraining order. In addition, the Respondent's Executive Director, Bernie Dolan, appeared by telephone and confirmed that its COVID-19 restrictions were recently modified to allow schools in counties designated as "orange" to participate in the state cross country championships. Upon conclusion of the arguments by counsel, the Court advised the parties that it would take the matter under advisement and issue a decision promptly. To assist in the Court its evaluation of the matter, the parties were ordered to file proposed orders by no later than 5:00 p.m. that

same day.

Then, on November 5, 2020, after careful consideration of the petition, response, arguments by counsel, and the parties' proposed order, the Court entered an order granting the Petitioner's request for a temporary restraining order. Per the Court's order, this matter shall come on before the Court for a hearing on November 12, 2020, at 2:00 p.m.

/s/JudgeName
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtsv.gov/e-file/ for more details.

Appendix, Exhibit 5

**Facebook post from morning of Nov. 5
depicting Jefferson High school girls'
varsity soccer team headed to states**



Ryan Clark
43m · 🌐



The Jefferson high school girls varsity soccer team is headed to states.

ARSITY
R A S E L



👍 Sean Lewis and 8 others