No. 20A96

In the Supreme Court of the United States

DANVILLE CHRISTIAN ACADEMY, INC., COMMONWEALTH OF KENTUCKY, EX REL. ATTORNEY GENERAL DANIEL CAMERON,

Applicants,

v.

ANDREW BESHEAR, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF KENTUCKY,

Respondent.

To the Honorable Brett M. Kavanaugh, Associate Justice of the United States Supreme Court and Circuit Justice for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPLICANTS BY THE BECKET FUND FOR RELIGIOUS LIBERTY

ERIC RASSBACH
Counsel of Record
NICHOLAS R. REAVES
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Penn. Ave. NW
Suite 400
Washington, D.C. 20006
erassbach@becketlaw.org

Counsel for Amicus Curiae

The Becket Fund for Religious Liberty respectfully moves for leave to file a brief *amicus curiae* in support of Applicants' Emergency Application to Vacate the Sixth Circuit's Stay, without 10 days' advance notice to the parties of *Amicus*'s intent to file as ordinarily required.

In light of the expedited briefing schedule set by the Court, it was not feasible to give 10 days' notice, but *Amicus* was nevertheless able to obtain a position on the motion from the parties. Applicants consent to the filing of the *amicus* brief. Respondent has no objection to the filing of the *amicus* brief.

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country. Becket has also represented numerous prevailing religious parties in this Court. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Holt* v. *Hobbs*, 574 U.S. 352 (2015); *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016); *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Little Sisters of the Poor* v. *Pennsylvania*, 140 S. Ct. 2367 (2020).

Becket has also litigated cases before this and other courts concerning the intersection of COVID-related restrictions and the free exercise of religion. See, *e.g.*, *Agudath Israel of Am.* v. *Cuomo*, No. 20A90 (decided Nov. 25, 2020); *Lebovits* v. *Cuomo*, 1:20-cv-00651-GLS-DJS (N.D.N.Y. filed Oct. 16, 2020) (challenge to

restrictions on Jewish girls' school located in Far Rockaway, Queens).

Amicus seeks to file this brief to bring to the Court's attention the special place of religious education in the jurisprudence of the Free Exercise Clause. In particular, because the Governor's actions interfere with the right of parents to direct "the religious upbringing and education of their children," *Wisconsin* v. *Yoder*, 406 U.S. 205, 213-214 (1972), strict scrutiny governs the outcome of this application, rather than the general rule of *Employment Division* v. *Smith*, 494 U.S. 872, 881-882 (1990). The *amicus* brief thus includes relevant material not fully brought to the attention of the Court by the parties. See Sup. Ct. R. 37.1.

For the foregoing reasons, proposed *amicus* respectfully requests that the Court grant this unopposed motion to file the attached proposed *amicus* brief and accept it in the format and at the time submitted.

Respectfully submitted.

/s/ Eric Rassbach
ERIC RASSBACH
Counsel of Record
NICHOLAS R. REAVES
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1919 Penn. Ave. NW
Suite 400
Washington, D.C. 20006
erassbach@becketlaw.org

Counsel for Amicus Curiae

DECEMBER 2020

No. 20A96

In the Supreme Court of the United States

DANVILLE CHRISTIAN ACADEMY, INC., COMMONWEALTH OF KENTUCKY, EX REL. ATTORNEY GENERAL DANIEL CAMERON,

Applicants,

v.

ANDREW BESHEAR, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF KENTUCKY,

Respondent.

To the Honorable Brett M. Kavanaugh, Associate Justice of the United States Supreme Court and Circuit Justice for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY

ERIC RASSBACH
Counsel of Record
NICHOLAS R. REAVES
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Penn. Ave. NW
Suite 400
Washington, D.C. 20006
erassbach@becketlaw.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. *Yoder* provides the rule of decision, not *Smith*. 2

CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

Cases

Agudath Israel of Am. v. *Cuomo*,
No. 20A90 (Nov. 25, 2020) 1

American Legion v. *American Humanist Ass'n*,
139 S. Ct. 2067 (2019) 6

Burwell v. *Hobby Lobby Stores, Inc.*,
573 U.S. 682 (2014) 1

Cantwell v. *Connecticut*,
310 U.S. 296 (1940) 4

Employment Division v. *Smith*,
494 U.S. 872 (1990) 2, 5

Espinoza v. *Montana Dep't of Revenue*,
140 S. Ct. 2246 (2020) 5

Gonzales v. *O Centro Espirita Beneficente Uniao do Vegetal*,
546 U.S. 418 (2006) 5

Griswold v. *Connecticut*,
381 U.S. 479 (1965) 4

Holt v. *Hobbs*,
574 U.S. 352 (2015) 1

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. *EEOC*,
565 U.S. 171 (2012) 1

Lebovits v. *Cuomo*,
1:20-cv-01284 (N.D.N.Y. filed Oct. 16, 2020) 1

Little Sisters of the Poor v. *Pennsylvania*,
140 S. Ct. 2367 (2020) 1

Meyer v. *Nebraska*,
262 U.S. 390 (1923) 3

Our Lady of Guadalupe Sch. v. *Morrissey-Berru*,
140 S. Ct. 2049 (2020) 1, 6

Pierce v. *Society of the Sisters of the Holy Names of Jesus & Mary*,
268 U.S. 510 (1925) 3, 6

Roman Catholic Diocese of Brooklyn v. *Cuomo*,
No. 20A87 (Nov. 25, 2020) 6, 7

West Va. Bd. of Educ. v. *Barnette*,
319 U.S. 624 (1943) 6

Wisconsin v. *Yoder*,
406 U.S. 205 (1972) ..... *passim*

Zelman v. *Simmons-Harris*,
536 U.S. 639 (2002) 6

Zubik v. *Burwell*,
136 S. Ct. 1557 (2016) 1

Other Authorities

1 William Blackstone, *Commentaries on the Laws of England*
(Edward Christian ed., 1793) 3

INTEREST OF THE *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country. Becket has also represented numerous prevailing religious parties in this Court. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Holt* v. *Hobbs*, 574 U.S. 352 (2015); *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016); *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Little Sisters of the Poor* v. *Pennsylvania*, 140 S. Ct. 2367 (2020). Becket has also litigated cases before this and other courts concerning the intersection of COVID-related restrictions and the free exercise of religion. See, *e.g.*, *Agudath Israel of Am.* v. *Cuomo*, No. 20A90 (decided Nov. 25, 2020); *Lebovits* v. *Cuomo*, 1:20-cv-01284-GLS-DJS (N.D.N.Y. filed Oct. 16, 2020) (challenge to restrictions on Jewish girls' school located in Far Rockaway, Queens).

Amicus offers this brief to bring to the Court's attention the special place of religious education in the jurisprudence of the Free Exercise Clause. In particular, because this case involves the right of parents to direct "the religious upbringing and education of their children," *Wisconsin* v. *Yoder*, 406 U.S. 205, 213-214 (1972), strict

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution to fund the brief's preparation or submission. This brief has been submitted with an unopposed motion for leave to file it.

scrutiny governs the outcome of this application, rather than the general rule of *Employment Division* v. *Smith*, 494 U.S. 872, 881-882 (1990).

SUMMARY OF ARGUMENT

Applicants have ably shown how Governor Beshear's prohibition on religious K-12 schools is neither neutral nor generally applicable under *Employment Division* v. *Smith*. That movie theaters and horse tracks are open for business, but religious schools cannot open, is reason enough to vacate the Sixth Circuit's stay.

But this case is even easier than that. Because the Governor's actions interfere with the right of parents under the Free Exercise Clause to direct "the religious upbringing and education of their children," this case comes within the ambit of *Wisconsin* v. *Yoder*, not the general rule of *Smith*. As *Smith* itself made clear, the *Yoder* line of precedent—which stretches back to at least *Meyer* v. *Nebraska* in 1923—governs cases concerning religious education. And, because the Governor has prohibited religious schools from operating, under *Yoder* his restrictions are subject to strict scrutiny, regardless of their neutrality or general applicability. The premise of the Sixth Circuit's decision to issue an extraordinary stay was thus wrong from the very start, and the stay must therefore be vacated.

ARGUMENT

I. *Yoder* provides the rule of decision, not *Smith*.

The Governor's prohibition on operating K-12 schools is subject to heightened constitutional scrutiny because it grossly interferes with the right of Danville Christian parents to direct "the religious upbringing and education of their children." *Wisconsin* v. *Yoder*, 406 U.S. 205, 213-214 (1972). Both before and after *Yoder*—and

in *Smith* itself—this Court has recognized that governmental interference with religious education is subject to heightened scrutiny. And, because Governor Beshear cannot hope to make a strict scrutiny showing, the Sixth Circuit's stay must be vacated.

1. For close to 100 years, this Court has explicitly recognized and protected the right of parents to direct the education of their children. The early cases were decided before the Religion Clauses were incorporated against the states. *Meyer* v. *Nebraska* concerned parents penalized for sending their children to a Lutheran parochial school, where the children learned the German language in violation of Nebraska law. 262 U.S. 390, 397 (1923). In ruling against this regulation of a religious school, the Court concluded that "[w]hile this court has not attempted to define with exactness the liberty thus guaranteed * * * [w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to * * * establish a home and bring up children."[2] *Id.* at 399.

Similarly, in *Pierce* v. *Society of the Sisters of the Holy Names of Jesus & Mary*, the Court confronted an Oregon law that effectively outlawed private religious education in the state, including for the Catholic school plaintiff. 268 U.S. 510 (1925). The Court held that the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."

[2] This American tradition of protecting the right to religious education stands in stark contrast to the religious establishment in England, where the laws fined parents for sending their children "to be instructed, persuaded, or strengthened in the popish religion." 1 William Blackstone, *Commentaries on the Laws of England* 451 (Edward Christian ed., 1793). This was an exception to the general rule that parents were charged with determining how to educate their children. See *id.* at 450 ("Yet in one case, that of religion, they are under peculiar restrictions * * * .")

Id. at 534-535. That was true even though the Oregon law was "expected to have general application[.]" *Id.* at 535.

After the Free Exercise Clause was incorporated against the states in *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), the Court began treating *Meyer* and *Pierce* as First Amendment decisions. See, *e.g.*, *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965) (discussing *Meyer* and *Pierce*).

Yoder stands firmly in this tradition of protecting religious education, but, as it came after incorporation, the Court relied on the Free Exercise Clause. In *Yoder*, the Court vindicated the right of the Old Order Amish to educate their children in continuous contact with their "community, physically and emotionally, during the crucial and formative adolescent period of life," 406 U.S. at 211—even when that meant noncompliance with Wisconsin's compulsory education laws. As the Court explained, "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Id.* at 213-214. Where Amish parents sought to remove their children from school before the age of 16, *id.* at 207, the Court reasoned that any "speculative gain[s]" from an additional year or two of schooling could not "justify the severe interference with religious freedom such additional compulsory attendance would entail," *Id.* at 227.

Yoder imposed heightened scrutiny on the government's actions despite acknowledging that universal education is certainly an important governmental interest. Yet, "however highly we rank it," the Court explained, this interest must be

weighed against the fundamental rights "specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children." *Yoder*, 406 U.S. at 214. And since "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion," the law could not be enforced. *Id.* at 215.

2. *Employment Division* v. *Smith* did not eliminate or even purport to eliminate *Yoder*'s protective rule as applied to religious education. In fact, it expressly put to one side claims regarding "the right of parents * * * to direct the education of their children," recognizing that these claims still receive heightened scrutiny. 494 U.S. at 881. In doing so, it expressly cited both *Yoder* and *Pierce*. *Ibid.*

This Court's decisions since *Smith* have only reinforced the fact that *Smith* did not claim to alter *Yoder*. For example, in *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 431 (2006), this Court cited *Yoder* favorably, explaining that the case "permitted an exemption for Amish children from a compulsory school attendance law," despite the State's "paramount" interest in education. And, just last Term, *Espinoza* reaffirmed as an "'enduring American tradition' * * * the rights of parents to direct 'the religious upbringing' of their children." *Espinoza* v. *Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) (quoting *Yoder*, 406 U.S. at 213-214). This provided the foundation for the Court's determination that Montana's no-aid provision not only harmed religious schools, but also "penalize[d]" the families who chose to send their children to those schools by

infringing on the constitutionally-protected parental "choice" of religious education. *Ibid.* (citing *Pierce*, 268 U.S. at 534-535). As this Court explained, any restriction on the free exercise of religious schools "burdens not only religious schools but also the families whose children attend or hope to attend them." *Ibid.*[3]

Protecting the parental right to educate one's children in the faith also animated last Term's decision in *Our Lady*. *Our Lady* surveyed the importance of religious education for numerous religious traditions and found that religious schools often "expressly set themselves apart from public schools that they believe do not reflect their values." *Our Lady of Guadalupe School* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2065 (2020). Protecting the freedom of religious schools to transmit the faith to the next generation is a necessary prerequisite to ensuring that parents can select religious schools that accurately preserve and pass on their deeply held religious beliefs and values. *Id.* at 2064 ("[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."). Indeed, religious education, like religious worship, is "at the very heart" of what is protected by the First Amendment. *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, No. 20A87, 2020 WL 6948354, at *3 (Nov. 25, 2020); *Our Lady*, 140 S. Ct. at 2065 (observing that many Protestant churches "from the earliest settlements in this country, viewed education

[3] See also *Zelman* v. *Simmons-Harris,* 536 U.S. 639, 680 n.5 (2002) (Thomas, J., concurring) ("This Court has held that parents have the fundamental liberty to choose how and in what manner to educate their children."); *American Legion* v. *American Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring) (citing *Yoder* and *West Va. Bd. of Educ.* v. *Barnette,* 319 U.S. 624 (1943), as examples of how "[t]his Court fiercely protects the individual rights secured by the U.S. Constitution").

as a religious obligation").

3. Given the *Yoder* rule governing cases involving the right of parents to direct the religious education of their children, to decide the application this Court need not delve into the now familiar, but nonetheless at times perplexing, question of "how similar is similar enough?" Instead, this Court can go straight to the strict scrutiny analysis.

Here, that strict scrutiny analysis is straightforward, because the Governor's own actions show that there are less restrictive alternatives the Governor has already endorsed. For example, movie theaters—which even dissenters in *Diocese of Brooklyn* viewed as close comparators "where people congregate in large groups"—are allowed to admit 25 people. *Diocese of Brooklyn*, 2020 WL 6948354, at *13 (Sotomayor, J., dissenting); Application at 15. The Governor makes no effort to meet his strict scrutiny burden; nor does he deny the treatment afforded to theaters is a less restrictive alternative. Application at 12 n.9. As in *Diocese of Brooklyn*, "there are many other less restrictive rules that could be adopted" to further the government's legitimate interest in combating COVID. *Diocese of Brooklyn*, 2020 WL 6948354, at *2. That is enough to resolve the application.

CONCLUSION

This Court should vacate the stay issued by the Sixth Circuit.

Respectfully submitted.

/s/ Eric Rassbach

ERIC RASSBACH
Counsel of Record
NICHOLAS R. REAVES
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Penn. Ave. NW
Suite 400
Washington, D.C. 20006
erassbach@becketlaw.org

Counsel for Amicus Curiae

DECEMBER 2020