No. 20A-_____

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 Supreme Court of the United States and Circuit Justice for the Sixth Circuit

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EMERGENCY APPLICATION TO VACATE THE SIXTH CIRCUIT'S STAY OF THE PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

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QUESTION PRESENTED

On November 18, 2020, Kentucky Governor Andrew Beshear issued two executive orders. Executive Order 2020-269 ordered the closure of all "public and private elementary, middle, and high schools," including religious schools. [App. 73]. Executive Order 2020-968, while imposing some restrictions on other in-person activities and businesses such as theaters, wedding venues, bowling alleys, and offices, permitted them to remain open. [App. 75–77]. Daycares, preschools, colleges, and universities also are permitted to remain open.

The district court preliminarily enjoined the enforcement of Executive Order 2020-969 "on in-person instruction with respect to any religious private school in Kentucky that adheres to applicable social distancing and hygiene guidelines." [App. 30]. The district court found that Danville Christian Academy has a sincerely held religious belief that requires in-person instruction of its students. [App. 15]. In holding that the Governor's closure order was not neutral and generally applicable under the Free Exercise Clause, the district court wondered—prior to this Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, --- S. Ct. --- , 2020 WL 6948354 (Nov. 25, 2020) ("*Diocese*")—why a Kentuckian could "attend a lecture, go to work, or attend a concert, but not attend socially distanced chapel in school or pray together in a classroom." [App. 17].

The Sixth Circuit stayed this preliminary injunction—after *Diocese* came down—concluding that Danville Christian was unlikely to succeed on its Free Exercise claim because Executive Order 2020-269 is neutral and generally applicable.

[App. 2–8]. In so doing, the Sixth Circuit ignored Executive Order 2020-968 and the various guidance documents issued by the Governor that permit the operation of everything in Kentucky except K-12 schools and indoor consumption at bars and restaurants, instead narrowly comparing religious schools only to secular schools.

The question presented is whether the Sixth Circuit's order granting a stay should be vacated.

PARTIES TO THE PROCEEDING

The Applicants in this Court are Danville Christian Academy, Inc. and the Commonwealth of Kentucky, *ex rel.* Attorney General Daniel Cameron.

The Respondent in this Court is Andrew Beshear, in his official capacity as the Governor of Kentucky.

RULE 29.6 STATEMENT

Applicant Danville Christian Academy, Inc. has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

No related proceedings exist.

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EMERGENCY APPLICATION TO VACATE THE SIXTH CIRCUIT'S STAY OF THE PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

TO: The Honorable Brett M. Kavanaugh, Circuit Justice for the Sixth Circuit:

Danville Christian Academy, Inc. and the Commonwealth of Kentucky, *ex rel.* Attorney General Daniel Cameron, apply to this Court to vacate the stay entered by the United States Court of Appeals for the Sixth Circuit of the preliminary injunction issued by the United States District Court for the Eastern District of Kentucky.[1]

OPINIONS BELOW

The Sixth Circuit's order granting a stay is designated for publication, but is not yet reported. The order is attached as Appendix A. [App. 2–8]. The United States District Court for the Eastern District of Kentucky's memorandum opinion and order entering a preliminary injunction may be found at 2020 WL 6954650 (E.D. Ky. Nov. 25, 2020). The opinion and order is attached as Appendix B. [App. 10–31].

JURISDICTION

The Sixth Circuit granted the Governor's motion for a stay on November 29, 2020. This Court has jurisdiction under its inherent powers, 28 U.S.C. § 1651, and Rule 22 of this Court. *See Coleman v. Paccar, Inc.*, 424 U.S. 1301 (1976) (Rehnquist, J., in chambers); *Frank v. Walker*, 574 U.S. 929 (2014).

[1] Alternatively, the Court may construe this application as one for a stay pursuant to this Court's Rule 23 or as a petition for a writ of certiorari before judgment under 28 U.S.C. § 1254(1), 28 U.S.C. § 2101(e), and Rule 11. In light of the exigency of this matter and the nature of the Sixth Circuit's ruling, the Applicants did not seek further relief in the Sixth Circuit prior to filing this application.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The Fourteenth Amendment to the United States Constitution states in part that no State shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In response to the COVID-19 crisis, Governor Andrew Beshear closed all schools in Kentucky, no matter the size of the classes, no matter if the school had experienced any COVID-19 cases, and no matter the precautions taken by the schools. However, at present, almost everything else in Kentucky remains open subject to various restrictions; the only exception is indoor consumption at restaurants and bars. The district court preliminarily enjoined Governor Beshear, pursuant to the Free Exercise Clause, from closing Kentucky's religious schools in light of the many secular activities and indoor gatherings that may continue in the Commonwealth. The Sixth Circuit stayed that preliminary injunction in a published order and did so notwithstanding this Court's days-old decision in *Diocese*.

The Governor's executive orders. This matter arose after Governor Beshear issued two executive orders on November 18, 2020. Executive Order 2020-969 states: "All public and private elementary, middle, and high schools (kindergarten through grade 12) shall cease in-person instruction and transition to

remote or virtual instruction beginning November 23, 2020." [App. 107]. Middle and high schools must close until January 4, 2021. [*Id.*]. Elementary schools can open on December 7, 2020 if they are not in a "Red Zone County." [*Id.*].

This shutdown order stands in stark contrast to Executive Order 2020-968, [App. 75–77], which Governor Beshear issued the same day and which allows virtually all other in-person activities and indoor gatherings in Kentucky to continue subject to certain restrictions. Daycares, preschools, colleges, and universities are open. [*See* App. 18; App. 3 ("The order also excepts, by omission, both preschools and colleges or universities.")]. So too for gyms, fitness centers, swimming and bathing facilities, bowling alleys, and other indoor recreation facilities as long as they abide by a 33 percent capacity limitation and "ensure that individuals not from the same household maintain six (6) feet of space between each other." [App. 76]. Indoor venues, event spaces, and theaters remain open too, if they "are limited to 25 people per room." [*Id.*]. Thus, for example, size-restricted weddings are continuing in the Commonwealth. Kentucky's gambling parlors remain open.[2] And the University of Kentucky's men's basketball team opened its season on November 25, 2020 before 3,075 fans in Lexington's Rupp Arena, while the University of Louisville's team has played three games within the last several days at the KFC Yum! Center before crowds of 2,956, 2,988, and 2,934.[3] In addition, "[a]ll professional services and other

[2] *See* Chris Otts, *No indoor school or dining, but slot-like gaming still OK in Kentucky*, WDRB (Nov. 20, 2020), *available at* https://www.wdrb.com/in-depth/no-indoor-school-or-dining-but-slot-like-gaming-still-ok-in-kentucky/article_8e11f19e-2b58-11eb-8544-63069cf4c0a8.html (last visited Nov. 30, 2020).

[3] *See* Box Score, University of Kentucky vs. Morehead State University (Nov. 25, 2020), *available at* https://ukathletics.com/documents/2020/11/25/uk_msu_final_ book_112520.pdf (last visited Nov. 28,

office-based businesses" in Kentucky can remain open as long as "no more than 33% of employees are physically present in the office [on] any given day." [App. 77]. Retails stores in Kentucky remain open and saw large crowds on Black Friday, despite capacity restrictions.[4] Distilleries, libraries, and museums likewise remain open.[5]

Houses of worship in Kentucky also remain open for in-person activities—other than religious schooling—due to earlier court rulings.[6] [App. 76–77]. The Governor, however, has a motion pending in district court to dissolve that injunction. *Maryville Baptist Church, Inc. v. Beshear*, 977 F.3d 561, 565 (6th Cir. 2020) (per curiam) ("That the Governor has filed a pleading . . . raising the possibility of dissolving the injunction on the ground of subsequent legal developments suggests that the case is not over—that he wishes to have authority to ban indoor church services again.").

To summarize, in Kentucky, one can catch a matinee at the movie theater, tour a distillery, work out at the gym, bet at a gambling parlor, shop, go to work, cheer on

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2020); Box Score, University of Louisville v. University of Evansville (Nov. 25, 2020), *available at* https://gocards.com/sports/ mens-basketball/stats/2020-21/evansville/boxscore/22655 (last visited Nov. 28, 2020); Box Score, University of Louisville v. Seton Hall University (Nov. 27, 2020), *available at* https://gocards.com/sports/mens-basketball/stats/2020-21/seton-hall/boxscore/22656 (last visited Nov. 28, 2020); Box Score, University of Louisville v. Prairie View A&M University (Nov. 29, 2020), *available at* https://gocards.com/sports/mens-basketball/stats/2020-21/prairie-view-am/boxscore/22657 (last visited Nov. 30, 2020).

[4] Requirements for Retail Business, *available at* https://govsite-assets.s3.amazonaws.com/2DvDzWrTTSWZoF6qpMFA_2020-7-22%20-%20Healthy%20at%20Work%20Reqs%20-%20Retail%20-%20Final%20Version%203.1.pdf (last visited Nov. 29, 2020).

[5] Requirements for Educational, Cultural, & Entertainment Facilities, *available at* https://govsite-assets.s3.amazonaws.com/uFIomfBuQKuqy6qKYEhe_2020-7-10%20-%20Healthy%20at%20Work%20Reqs%20-%20Educational%20and%20Cultural%20Opportunities%20and%20Attractions%20-%20Final%20Draft%204.0.pdf (last visited Nov. 29, 2020).

[6] On back-to-back Saturdays in May—just before Sunday worship services—the Sixth Circuit enjoined Governor Beshear from prohibiting drive-in worship services and in-person worship services. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 616 (6th Cir. 2020) (per curiam); *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (per curiam).

the Wildcats or the Cardinals, and attend a wedding. A parent can send his or her child to daycare or preschool. And college students can attend classes. But all of Kentucky's religious schools are shuttered.

Danville Christian Academy. One of the many religious schools affected by the Governor's shutdown order is Danville Christian. Its vision is "to mold Christ-like scholars, leaders, and servants who will advance the Kingdom of God." [App. 49]. Danville Christian has a sincerely held religious belief that it is called by God to provide in-person instruction to its students, and it believes that "its students should be educated with a Christian worldview in a communal in-person environment." [*Id.* at 50; *see also id.* at 56]. The district court made a factual finding that Danville Christian's religious beliefs are sincerely held. [App. 15]. As *amici curiae* explained below, "every subject [at school] is approached from a Christian perspective. Math is the reflection of the order and logic God put into the universe. History is the story of what God has been doing since creation. Science is the study of how God made everything and every person to work and to live. English and the language arts reflect God being the first and best communicator. The fine arts are a daily demonstration that we are made in God's image and therefore have this creativity patterned after the Creator." [Brief of *Amici Curiae* Religious Schools, 6th Cir. Dkt. 15-2 at 7–8].

Danville Christian has 234 students that range from preschool through grade 12. [App. 51–52]. Class sizes at Danville Christian range from four to 20 students, with most classes being between 12 and 17 students. [App. 52]. Thus, every class at Danville Christian is *smaller* than the capacity limits currently imposed on theaters

and weddings in Kentucky. Moreover, because Danville Christian operates a preschool in addition to its elementary, middle, and high school, [*id.*], its preschool can stay open while all other in-person instruction must cease.

Danville Christian has gone to great lengths to provide safe in-person instruction to its families this school year. Its COVID-19 policies are lengthy and comprehensive, [App. 81–84], and include:

- Two temperature checks, one before entering and the other upon entering the school.
- Except for preschool students, requiring masks to be worn when entering, exiting, and moving about the school.
- Student work areas in each classroom are socially distanced. Where that is impossible, plexiglass dividers are installed.
- Students can remove masks only if seated and socially distanced, and then only if parental permission has been given.
- Teachers must wear masks or faceshields and maintain social distancing while instructing students.
- Before leaving a classroom, all students must wipe down their desks with a disinfectant spray.
- Lunch is held in the gymnasium, which has assigned-seating cubicles that are divided by plexiglass.
- An additional staff person has been hired to provide extra cleaning throughout the school day.

[App. 53–55]. Danville Christian has spent between $20,000 and $30,000 to implement this safety plan. [App. 55]. Its plan has been approved by its local health department, whose director stated that Danville Christian is "doing it right." [App. 52]. And by almost all measures, Danville Christian's efforts have been successful.

Since opening for in-person instruction in August, Danville Christian is only aware of four students and one teacher who have tested positive for COVID-19. [App. 52, 55].

This lawsuit. On November 20, 2020, Danville Christian and the Commonwealth, by and through Attorney General Daniel Cameron, filed this lawsuit and sought an emergency hearing and temporary restraining order against Executive Order 2020-969. In his written response, the Governor attached an affidavit from his public-health appointee, Dr. Steven Stack, who served as the Governor's only witness. [App. 98–163]. Dr. Stack averred that "[p]laces where people congregate near each other indoors for extended periods of time (more than 15 minutes) appear to be the location most associated with the spread of COVID-19, especially if people are not wearing masks." [App. 100]. According to Dr. Stack, studies have tied "catastrophic outbreaks" to "restaurants, weddings, funerals, and worship services." [App. 100–01 (footnotes omitted)]. Notably, Dr. Stack did not make a similar claim about schools—in Kentucky or even elsewhere. More to the point, Dr. Stack identified *no* specific outbreaks of COVID-19 tied to schools.

To be sure, Dr. Stack referenced a study for the proposition that leaving schools open is a "critical driver" related to COVID-19. [App. 106]. But the study that Dr. Stack cites provides no basis for this assertion, and the table on which he relies simply shows what mandates are in place across the country. [App. 119]. It also identifies school closures as a "critical driver" along with closures of essential and nonessential businesses and other in-person gatherings. [*Id.*]. In other words, this study provides

no support for the claim that schools are uniquely situated as high-risk locations relative to other activities or gatherings. Dr. Stack further stated that "the risk" of COVID-19 spreading is "present at schools when they are open and operating." [App. 108]. As a result of recent data, Dr. Stack recounted that Governor Beshear decided "to close in-person settings in which COVID-19 is most likely to be transmitted," [App. 109], but failed to explain why this included schools but not many other activities.[7]

The district court heard arguments on November 23 and stated its intent to treat the motion for a temporary restraining order as one for a preliminary injunction. [App. 12 n.2]. On November 25, the district court granted a preliminary injunction prohibiting the Governor "from enforcing the prohibition on in-person instruction with respect to any religious private school in Kentucky that adheres to applicable social distancing and hygiene guidelines."[8] [App. 30]. The Governor appealed, and on Thanksgiving, sought an emergency stay from the Sixth Circuit to allow him to keep religious schools closed.

On November 29, 2020, a motions panel of the Sixth Circuit granted the Governor's motion for a stay. [App. 2–8]. It found that Danville Christian and Attorney General Cameron "are unlikely to succeed on the merits of their Free

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[7] The district court rejected the rationale for closing schools provided by Dr. Stack. The court noted that the rationale provided was "true of many public settings," and that preschools, colleges, universities, and other establishments remain open despite the reasons given. [App. 18].

[8] The district court noted that "[t]he Governor's executive order . . . seems to run counter to CDC recommendations." [App. 18; *see also* App. 35 (quoting the CDC Director's November 19 statement that "[t]he truth is, for kids K-12, one of the safest places they can be, from our perspective, is to remain in school"). Moreover, just yesterday, Dr. Anthony Fauci stated that "[t]he default position should be to try as best as possible, within reason, to keep the children in school, to get them back to school." Robby Soave, *Dr. Anthony Fauci: "Close the Bars & Keep the Schools Open*," REASON (Nov. 29, 2020), *available at* https://reason.com/2020/11/29/dr-anthony-fauci-open-schools-close-bars-covid-19/ (last visited Nov. 30, 2020).

Exercise Claim" because of "the likelihood that our court will rule that the order in question is neutral and of general applicability." [App. 3]. In reaching this conclusion, the Sixth Circuit noted that the Governor's school-closure order "applies to all public and private elementary and secondary schools in the Commonwealth, religious or otherwise." [App. 5]. It found this "distinguishable" from the restriction that this Court recently enjoined in *Diocese*, which "appl[ied] specifically to houses of worship." [App. 6]. The Sixth Circuit also acknowledged that the order in *Diocese* "treated schools, factories, liquor stores, and bicycle repair shops, to name only a few, 'less harshly' than houses of worship." [*Id.*]. Here, the Sixth Circuit contrasted, "[n]o such comparable exceptions" exist. [*Id.*]. In reaching this conclusion, the panel focused solely on the Governor's school-closure order without even mentioning all of the other in-person activities permitted in Kentucky under prior guidance and the Governor's other executive order issued the same day. [*See id.*].

For further support, the Sixth Circuit relied on two of Justice Kavanaugh's separate opinions regarding COVID-19 restrictions. [App. 6–7]. First, it reasoned that "we should look 'not to whether religious services are all alone in a disfavored category, but why they are in the disfavored category to begin with.'" [App. 6 (quoting *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2614 (2020) (Mem.) (Kavanaugh, J., dissenting))]. The Sixth Circuit concluded that "religious schools are in the category of 'K-12 schools' because the reasons for suspending in-person instruction apply precisely the same to them." [*Id.*]. The court also relied on Justice Kavanaugh's conclusion in *Diocese* that the States have the "authority to impose

tailored restrictions—even very strict restrictions—on attendees at religious services and secular gatherings alike." [*Id.* (quoting *Diocese*, 2020 WL 6948354, at *8 (Kavanaugh, J., concurring)]. In the Sixth Circuit's view, "Executive Order 2020-969 does just that." [*Id.*]. But in reaching that conclusion, the court made no mention of Executive Order 2020-968 or any other order or guidance issued by Governor Beshear.

This application to vacate the Sixth Circuit's stay of the district court's preliminary injunction follows.

STANDARD OF REVIEW

"[A] Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman*, 424 U.S. at 1304 (Rehnquist, J., in chambers)); *see also Frank*, 574 U.S. at 929 (Alito, J., dissenting).

REASONS TO VACATE STAY

The Sixth Circuit's stay should be vacated. The court employed a mode of analysis that this Court expressly rejected in *Diocese*, and it did so at the expense of bedrock First Amendment rights. The Sixth Circuit's published order green-lights a hands-off approach to severe COVID-19 restrictions—here, the closure of all religious schools in a state—that fails to live up to the judiciary's "duty to conduct a serious

examination of the need for . . . drastic measure[s]" that burden religious exercise. *See Diocese*, 2020 WL 6948354, at *3. As a result of the Sixth Circuit's stay, religious schools across Kentucky must close their doors to schoolchildren. All the while, Kentuckians "may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor stores"—and even by the thousands at college basketball games. *See id.* at *4 (Gorsuch, J., concurring). This discrimination against religion, which mirrors in all relevant respects that condemned in *Diocese*, more than warrants vacatur of the Sixth Circuit's stay. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614–15 (2020) (Mem.) (Kavanaugh, J., dissenting) ("But 'restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom.'" (quoting *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (per curiam)).

I. The Sixth Circuit's conclusion that Governor Beshear's executive order is neutral and generally applicable is demonstrably wrong in light of *Diocese*.

The Sixth Circuit's stay must be vacated because its application of the Free Exercise Clause is "demonstrably wrong" in light of this Court's recent opinion in *Diocese*. To find that Executive Order 2020-969 is neutral and generally applicable, the Sixth Circuit considered the Governor's restrictions on religious schools only in the context of a single executive order, ignoring that the Governor has extended more favorable treatment to an array of other secular activities and gatherings—some of which the Governor's own public-health appointee said create a risk of significant

outbreaks. [*See* App. 4–5]. The Sixth Circuit's opinion does not even acknowledge that these other orders exist, much less explain why it is permissible for the Governor to prohibit individuals from gathering in a room for the purpose of religious education, while allowing those same individuals to gather in a room all day to work in an office, shop at the mall, or watch a movie. The decision is demonstrably wrong and should be vacated.

The First Amendment prohibits the government from burdening the "free exercise" of religion. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). In doing so, it "protect[s] religious observers against unequal treatment." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, --- U.S. --- , 137 S. Ct. 2012, 2019 (2017) (citation omitted). That means that when the government burdens religious exercise, it must do so with rules that are both neutral toward religion and of general applicability. *See Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990). If not, the law must overcome strict scrutiny.[9] *Id.*

A law is generally applicable when it applies in equal measure to religious and nonreligious conduct alike. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537–38 (1993). But "[a]ll laws are selective to some extent," and so the "categories of selection are of paramount concern." *Id.* at 542. The question is whether the state has acted pursuant to legitimate government interests by regulating religious conduct to the same degree as "nonreligious conduct that endangers [the

[9] The Governor never argued below that his order closing religious schools survives strict scrutiny. Nor could he, as the numerous other favorable regulations and capacity limits extended to similar businesses would certainly be a less-restrictive means of stopping the spread of COVID-19.

same state] interests." *Id.* at 543–44. It is not enough for the state to treat religious conduct like "*some* secular" activities. *Diocese*, 2020 WL 6948354, at *8 (Kavanaugh, J., concurring) (citing *Lukumi*, 508 U.S. at 537–38). Once the state starts handing out less-restrictive rules to a "favored class" of secular conduct, "the State must justify why [religious institutions] are excluded from that favored class." *Id.* (citing *Lukumi*, 508 U.S. at 537–38). The First Amendment, in other words, demands that the government treat religious exercise at least as generously as all kinds of secular activity that give rise to the same governmental interest justifying the law in the first place. *See* Douglas Laycock & Steven T. Collis, *Generally Applicable Law & the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 22–23 (2016). And the state cannot get around such a requirement by relying on "categorizations" of conduct that "lead to troubling results." *See Diocese*, 2020 WL 6948354, at *2.

This Court clarified these principles in the context of COVID-19 restrictions only days ago. In *Diocese*, the Court enjoined enforcement of an executive order that imposed restrictions on gathering in religious institutions (in that case, houses of worship), that were "less harsh[]" than the restrictions for other secular gatherings. *Id.* at *2. The Court found it "troubling" that "a large store in Brooklyn . . . could have literally hundreds of people shopping there on any given day" but that "a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service." *Id.* (cleaned up). This kind of disparate treatment took the restrictions outside the realm of being "neutral" and "generally applicable," *id.* at *2, even though New York had imposed more severe restrictions on at least some

comparable secular activities like attending the movies or sporting events, *see id.* at *8 (Kavanaugh, J., concurring) ("The State argues that it has not impermissibly discriminated against religion because some secular businesses such as movie theaters must remain closed and are thus treated less favorably than houses of worship."). The First Amendment does not include an escape hatch for the government when it can "point out that, as compared to [religious institutions], *some* secular businesses are subject to similarly severe or even more severe restrictions." *Id.*

Under *Diocese*, the Governor's school-closure order is not a neutral and generally applicable law, and the Sixth Circuit's conclusion to the contrary rests on a "demonstrably wrong" application of this Court's precedent. Just as in *Diocese*, the Governor's orders prohibit gathering for religious education while also failing to prohibit gathering for other secular activities. *See Lukumi*, 508 U.S. at 537–38, 543–44. Those activities include gathering in offices, gathering in movie theaters, gathering in daycares or preschools or university classrooms, gathering in shopping malls, and gathering at venues for events like college basketball games and weddings—the last of which Governor Beshear's own appointee said creates a risk of "catastrophic outbreaks." [App. 100–01]. The Governor, in other words, has extended favorable treatment to a wide assortment of secular gatherings without providing any explanation why religious schools do not also receive such favor. *See Diocese*, 2020 WL 6948354, at *8 (Kavanaugh, J., concurring). If shopping malls, college basketball arenas, and daycares are open, why not classrooms providing religious education? As

in *Diocese*, this kind of disparate treatment removes the rule from the realm of neutrality and general applicability.

Take Governor Beshear's allowance of up to 25 people to gather at movie theaters and weddings. By comparison, every class at Danville Christian has less than 25 students. Regardless of *why* 25 people come together indoors, an indoor gathering of 25 people is an indoor gathering of 25 people. *See Roberts*, 958 F.3d at 416 ("Risks of contagion turn on social interaction in close quarters; the virus does not care why they are there."). A neutral regulation of general applicability would treat *all* indoor gatherings of 25 people in the same manner, regardless of *why* those 25 people are gathering indoors. When a regulation permits some in-person gatherings of 25 people, but forbids gatherings of 25 people devoted to the free exercise of religion, then the regulation is not neutral and of general applicability. That's true even if there is at least one other category of secular gatherings that the regulation also prohibits. *Diocese* made this clear.

Three errors predominate the Sixth Circuit's conclusion otherwise. First, the court looked only at the four corners of a single executive order to make its decision. That means the court decided whether religious schools were treated "less harshly" than other secular gatherings, *see Diocese*, 2020 WL 6948354, at *2, without ever examining the vast majority of restrictions and regulations that Governor Beshear has enacted—including restrictions he imposed by an executive order issued the same day that he closed religious schools. *See Lukumi*, 508 U.S. at 534 (rejecting contention that a court's "inquiry must end with the text of the laws at issue"). Second, the court

improperly deferred to the Governor's use of "schools" as a unique category for regulation when his own public-health appointee averred that other secular activities create the same or even greater risk of spreading COVID-19. While the Governor might be free to draw arbitrary lines around schools when doing so does not implicate religious exercise, "[t]hese categorizations lead to troubling results" and require a "serious examination" when the government's action effectively shuts the doors of religious institutions. *See Diocese*, 2020 WL 6948354, at *2–3. The Sixth Circuit gutted that "serious examination" in favor of an ask-no-questions approach to deferring to the Governor's inconsistent claims about the necessity of his restrictions. [App. 7]. And third, although the Sixth Circuit attempted to keep its views in line with Justice Kavanaugh's opinions in *Calvary Church* and *Diocese*, the court missed the mark by a wide margin.

Only days after this Court's opinion in *Diocese* reset the table in favor of the First Amendment, the Sixth Circuit failed to take heed. This Court should vacate such an erroneous application of the law and reinstate the district court's well-reasoned decision to grant a preliminary injunction. *See Diocese*, 2020 WL 6948354, at *5 (Gorsuch, J., concurring) ("[C]ourts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain.").

A. The Sixth Circuit ignored an overwhelming number of secular activities and gatherings that are treated "less harshly" than religious schools.

Governor Beshear has prohibited religious schools from gathering in person while simultaneously allowing individuals to continue gathering in offices, malls,

daycares, university classrooms, gambling parlors, sports arenas, gyms, movie theaters, and event venues, among others. *See supra* at 2–5. The list is long, but one would be forgiven for not knowing that all of these other secular establishments remain open in Kentucky (under certain restrictions) after reading the Sixth Circuit's decision. The Sixth Circuit did not even acknowledge that the Governor's school-shutdown order is only one among many COVID-19 regulations in place. [*See, e.g.*, App. 2–8]. In fact, *on the same day* that Governor Beshear ordered the closure of schools (Executive Order 2020-969), he issued a separate order (Executive Order 2020-968) allowing offices, movie theaters, gyms, and weddings to continue in-person operations. Contrary to *Diocese*, the Sixth Circuit's decision does not even acknowledge that this separate order exists, much less discuss why the Governor can extend favorable treatment to some of these activities without providing the same favor to religious schools. *See Diocese*, 2020 WL 6948354, at *2; *see also id.* at *8 (Kavanaugh, J., concurring).

Instead, the Sixth Circuit treated the challenge to Executive Order 2020-969 as a challenge to that order *alone*. For that reason, the Sixth Circuit focused on only that order in considering neutrality and general applicability. [App. 6 ("And the exceptions expressly provided for in the order—for 'small group in-person targeted services' and 'private schools conducted in a home'—are nothing like 'the four pages of exceptions in the orders' [previously addressed by the Sixth Circuit]."]. This artificial analysis not only ignores the scope of the applicants' challenge to Executive Order 2020-969, but going forward it means that courts in the Sixth Circuit likely

will approach Free Exercise Clause cases one executive order at a time. This will invite Sixth Circuit governors to avoid "serious examination" of any orders burdening religious exercise merely by separating these orders from others that provide more favorable exemptions to other secular activities. *See Diocese*, 2020 WL 6948354, at *3.

The Sixth Circuit's myopic analysis of Executive Order 2020-969 allowed it to distinguish this case from *Diocese* on palpably erroneous grounds. [*See* App. 6]. The court claimed that, unlike here, New York had imposed restrictions on "schools, factories, liquor stores, and bicycle repair shops" that were more favorable than those imposed on houses of worship. *Id.* Yet in Kentucky the same is true: factories remain open, liquor stores remain open, and bicycle repair shops remain open—but religious schools have been closed. And that list does not even capture the number of secular businesses that have been given favorable treatment by Kentucky's Governor: movie theaters, daycares, universities, sports arenas, gyms, office buildings, shopping malls, and wedding venues, among other places, all remain open for in-person business. Each has been "treated less harshly" than religious schools throughout the Commonwealth. *See Diocese*, 2020 WL 6948354, at *2.

To illustrate the problem, consider a twist on the facts of *Smith*. If the State of Oregon had passed a separate law, codified elsewhere in its books, that allowed individuals to use peyote while at the movies or while working in an office, would anyone still consider the prohibition on using peyote a neutral and generally applicable rule? Of course not. Courts must look to the entire "system" of state action

to decide whether "individualized exemptions" extended to some secular conduct have been withheld from religious institutions. *Lukumi*, 508 U.S. at 537–38. The Sixth Circuit failed to do so below. It looked at only one executive order to decide that no activities were treated "less harshly" than religious schools. *See Diocese*, 2020 WL 6948354, at *2. But Governor Beshear has not listed all of his COVID-19 restrictions in a single executive order, and even a cursory examination of the rules governing other secular businesses reveals the significant disparity discussed above.

By focusing only on Executive Order 2020-969, the Sixth Circuit also relied on its apparent facial neutrality. [App. 4]. While it is true that the order in *Diocese* applied specific restrictions on houses of worship, facial neutrality alone has never been the dispositive factor. *See Lukumi*, 508 U.S. at 534. And in stark contrast to *Diocese*, the challenged executive order here does not even have a minimal allowance for in-person attendance at religious schools. The doors of Kentucky's religious schools are closed, "barring many from" exercising their faith. *See Diocese*, 2020 WL 6948354, at *3.

Even still, the Sixth Circuit's order-by-order approach cannot be reconciled with *Diocese* on its own terms. Although *Diocese* enjoined a single executive order, *Diocese*, 2020 WL 6948354, at *1, it did not rely on only that executive order in doing so. To the contrary, the Court discerned what other exemptions applied by looking to multiple sources. *Id.* at *2 (citing, among other things, New York State, Empire State Development, Guidance for Determining Whether a Business Enterprise is Subject

to a Workforce Reduction Under Recent Executive Orders; and testimony from a "health department official").

B. The Sixth Circuit wrongly deferred to the Governor's "categorizations" of indoor gatherings to justify withholding more favorable treatment from religious schools.

The Sixth Circuit's second error is just as "troublesome." *See Diocese*, 2020 WL 6948354, at *2. In reasoning that the order is neutral and generally applicable, the court deferred without scrutiny to the Governor's decision to categorize indoor gatherings for the purpose of K-12 education as a unique public-health risk. That conclusion is not consistent with the testimony of the Governor's own public-health expert, Dr. Stack, who provided no explanation why K-12 schools create a higher risk of spreading COVID-19 than other indoor gatherings that have not been prohibited. The Sixth Circuit nevertheless deferred to the Governor's categorization of K-12 schools as unique based upon this Court's admonition in *Diocese* that judges "are not public health experts." [*See* App. 7 (quoting *Diocese*, 2020 WL 6948354, at *3)]. In doing so, the Sixth Circuit distorted *Diocese*'s holding—as a mere three sentences later this Court affirmed that judges must nevertheless "conduct a serious examination of the need for such a drastic measure" when the public-health initiative will "effectively bar[]" individuals from exercising their religious liberty. *See Diocese*, 2020 WL 6948354, at *3. This Court's admonition, in other words, was to take a hard look at these kinds of judgments when the government imposes severe restrictions on religious liberty. But the Sixth Circuit did the opposite.

That decision is even more problematic in light of the actual evidence in this case. Governor Beshear's only witness below was his Director of Public Health, Dr. Stack. In his affidavit, Dr. Stack gave no explanation why religious schools—or even schools more generally—pose a uniquely dangerous risk of spreading COVID-19 as compared to other secular gatherings. Rather, Dr. Stack averred that *all* indoor gatherings lasting longer than 15 minutes pose the highest risk of spread. [App. 99–100]. He identified studies that have tied "catastrophic outbreaks" to weddings, restaurants, funerals, and worship services. [App. 100–01]. But not schools.

Despite this, Governor Beshear has not imposed the same restrictions on all indoor gatherings lasting more than 15 minutes. He has not restricted the length of time that individuals can spend indoors, whether at the office or at the mall or at the movies or at college basketball games. And in fact, on the same day that Governor Beshear closed religious schools to in-person instruction, he issued an executive order allowing weddings to continue so long as they are limited to 25 people or less.

To be clear, Dr. Stack's affidavit contains no similar evidence of "catastrophic outbreaks" tied to schools, religious or otherwise. Though he does state that schools pose a risk of spreading COVID-19 "when they are open and operating," he never explains why those risks are *uniquely* high relative to other permissible gatherings. For example, Dr. Stack explained that "[s]chools are high volume mixers of people," [App. 108], which is surely true of shopping malls, offices, daycares, universities, gyms, movie theaters, and other places where people gather—all of which are allowed to remain open subject to certain capacity limits. Dr. Stack also explained that "facial

coverings compliance can be difficult to maintain among children across an entire day of school," and that "every school must provide opportunities for children to eat and drink." [*Id.*]. But again, that is true of daycares and preschools as well, which Governor Beshear has *not* closed. Daycares, in fact, would seem to pose even greater risks, as the children are younger (thus less able to comply with mask mandates and basic hygiene requirements) and often stay at the facility for longer periods of time than most schooldays. If indoor gatherings of more than 15 minutes contribute to the spread of COVID-19, [App. 100], Governor Beshear has offered no evidence or explanation why K-12 religious schools cannot receive the same favored treatment as daycares or offices.

The bottom line here is just the same as it was in *Diocese*: The Governor's "categorizations lead to troubling results." 2020 WL 6948354, at *3. Governor Beshear cannot explain why religious schools pose a greater risk of spreading COVID-19 than the almost never-ending list of categories of secular activities that remain open to in-person activity. He points to outbreaks as evidence of how COVID-19 spreads, but he has not identified any outbreaks tied to the classroom. The evidence at Danville Christian is to the contrary. [App. 52–55]; *see Diocese*, 2020 WL 6948354, at *2 (noting the "admirable safety records" of the houses of worship). Nor can Governor Beshear explain why parents can return from the Thanksgiving holiday by going to work in their offices for an 8-hour day, but cannot drop their children off at a religious school during that same time. And he cannot explain why the same students who are prohibited from sitting together in a classroom for religious

education are nevertheless allowed to spend their entire day shopping at the mall. The Sixth Circuit avoided these hard questions by simply deferring to the Governor's "categorizations," even though they lead to such "troubling results." *See Diocese*, 2020 WL 6948354, at *2. In doing so, it ignored its "duty to conduct a serious examination of the need for such a drastic measure"—a drastic measure that results in closing the doors of in-person religious schools throughout the Commonwealth. *See id.*

C. The Sixth Circuit's decision cannot be reconciled with Justice Kavanaugh's opinions in *Diocese* and *Calvary Chapel*.

The Sixth Circuit compounded these errors by claiming that its merits holding is consistent with Justice Kavanaugh's separate opinions in *Diocese* and *Calvary Chapel*. It reached that conclusion only by misapplying those opinions and ignoring crucial parts of them.

The Sixth Circuit omitted mention of Justice Kavanaugh's conclusion in *Diocese* that New York's restrictions were discriminatory because, in a red zone, "a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction." *Diocese*, 2020 WL 6948354, at *7 (Kavanaugh, J., concurring); *see also id.* at *8 ("New York's restrictions discriminate against religion by treating houses of worship significantly worse than some secular businesses."). The discrimination here, by comparison, is more pronounced. Religious schools are *closed* in the Commonwealth, "while a grocery store, pet store, or big-box store down the street does not face the same restriction." *See id.* This crucial passage of Justice Kavanaugh's *Diocese* concurrence went unmentioned by the Sixth Circuit.

The Sixth Circuit also ignored Justice Kavanaugh's conclusion in *Diocese* that "it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions." *See id.*; *Calvary Chapel*, 140 S. Ct. at 2613 (Kavanaugh, J., dissenting) ("To that end, the government must articulate a sufficient justification for treating some secular organizations or individuals *more favorably* than religious organizations or individuals."). In fact, the Sixth Circuit not only ignored this conclusion from Justice Kavanaugh's concurrence, but went on to commit exactly the same error as did New York. The court deemed Governor Beshear's order to be permissible because it "applies to all public and private elementary and secondary schools in the Commonwealth, religious or otherwise." [App. 5]. That is to say, the Sixth Circuit focused on a single secular activity "subject to similarly severe restrictions"—in this case, non-religious schools—while ignoring all of the other in-person activities that receive much more favorable treatment under Governor Beshear's orders. But as Justice Kavanaugh explained in *Diocese*, "once a State creates a favored class of businesses . . . the State must justify why houses of worship are excluded from that favored class." *Id.* at *8 (Kavanaugh, J., concurring). The Sixth Circuit made no attempt to "justify" why religious schools are excluded from Governor Beshear "favored class" that includes, among many others, daycares and preschools. The Sixth Circuit avoided that question only by doing exactly what Justice Kavanaugh condemned in *Diocese* and *Calvary Chapel*: finding one similar secular

activity that is treated the same as religious schools while ignoring more favorable treatment for a host of other similar secular activities.

In concluding that its holding was consistent with Justice Kavanaugh's views, the Sixth Circuit leaned into his statement from *Calvary Chapel* that courts "should look 'not to whether religious worship services are all alone in a disfavored category, but why they are in the disfavored category to begin with.'" [App. 6 (quoting *Calvary Chapel*, 140 S. Ct. at 2614 (Kavanaugh, J., dissenting))]. In answering this "why" question, the Sixth Circuit reasoned that "religious schools are in the category of 'K-12 schools' because the reasons for suspending in-person instruction apply precisely the same to them." [*Id.*]. But this poses Justice Kavanaugh's "why" question much too narrowly. Although Governor Beshear treats religious schools like non-religious schools (but not like daycares, preschools, colleges, universities, movie theaters, college basketball arenas, to name a few), the Sixth Circuit never answered "why" religious schools are treated more harshly than virtually every other in-person activity in Kentucky. That is particularly perplexing in light of the evidence in the record (from Governor Beshear's own public-health director, no less) indicating that religious schools pose no more of a risk of spreading COVID-19 than other activities that nevertheless find themselves in the favored group. [*See* App. J]. The Sixth Circuit entirely overlooked this "subtle but absolutely critical point." *See Calvary Chapel*, 140 S. Ct. at 2613 (Kavanaugh, J., dissenting).

The Sixth Circuit concluded that it saw "no need" to rely on the Chief Justice's concurrence in *South Bay*. Yet the panel's reasoning all but revived the rationale that

many courts have attributed to *South Bay*. That rationale, however, is inconsistent with *Diocese*. *See Diocese*, 2020 WL 6948354, at *5 (Gorsuch, J., concurring) ("Rather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause. Today, a majority of the Court makes that clear."). Indeed, one of the *Diocese* dissents recognized as much. *See id.* at *12 (Sotomayor, J., dissenting) (discussing *South Bay* and concluding that "I see no justification for the Court's change of heart").

In his concurrence in *South Bay*, the Chief Justice concluded that California's COVID-19 restrictions on places of worship "appear consistent" with the Free Exercise Clause. 140 S. Ct. at 1613 (Roberts, C.J., concurring). This was so, the Chief Justice reasoned, because "[s]imilar or more severe restrictions apply to *comparable* secular gatherings" and because the challenged order "exempts or treats more leniently only *dissimilar* activities." *Id.* (emphasis added). The Chief Justice's focus on "comparable" and "dissimilar" activities, some courts have since held, supplied a rule of decision. *See Diocese*, 2020 WL 6948354, at *12 (Sotomayor, J., dissenting) (describing *South Bay* as providing that states "may restrict attendance at houses of worship so long as comparable secular institutions face restrictions that are equally as strict").

The Sixth Circuit unmistakably adopted this line of thinking in its order. It found non-religious schools to be the only comparable secular gathering. [App. at 5–6]. For this reason, it saw no need to analyze what it necessarily deemed to be other "dissimilar activities" (to quote *South Bay*) that receive more favorable treatment.

Indeed, after reading the Sixth Circuit's decision, one has no idea that, with the exception of in-person instruction at K-12 schools, virtually all other in-person activities are allowed in Kentucky subject to various restrictions. In this respect, the Sixth Circuit's reasoning is indistinguishable from that of those courts that have heavily relied on *South Bay*.

But Governor Beshear's executive orders cannot even survive scrutiny under the Chief Justice's comparable-gatherings analysis in *South Bay*. As the Sixth Circuit acknowledged, Governor Beshear's school-closure order "excepts, by omission, both preschools and colleges or universities." [App. 3]. Yet, other than mentioning this fact at the outset of its decision, the Sixth Circuit never grappled with it. However, the "unique problems" that the Sixth Circuit identified at elementary and secondary schools apply equally, if not more forcefully, at daycares, preschools, colleges and universities. [*Id.* (identifying as "unique problems" the fact that "[c]ompliance with masking and social distancing requirements is difficult to maintain, and students receiving in-person instruction must in any event remove their facial coverings to eat.")]. Daycares, preschools, colleges, and universities likewise involve students gathering in classrooms with teachers engaging in group activities, while also taking breaks to eat meals together. In fact, at colleges and universities, many students live together in dormitories. On top of that, most daycares operate for longer hours than elementary and secondary schools and are filled with children who (because of their age) are less likely to understand basic hygiene requirements such as washing their hands and staying socially distant and are less able to wear face masks.

Why are these "comparable secular gatherings" treated differently than religious K-12 schools? The Sixth Circuit offered no answer. To put a finer point on it, at present, Kentucky parents with a 4-year old and a 6-year old can send their younger child to daycare for eight or more hours every day, but the older child must stay home. (In actuality, the older child need not stay home. The child could spend the day at the mall, at the movie theater, or in the office with his or her parents. The only place the 6-year old *can't* go is to school.) In Kentucky, this means that a religious school may be open for daycare or preschool, but must be otherwise closed. Danville Christian is in this scenario. [App. 51 ("Danville Christian's students range from three-year old pre-school through 12th grade.")]. In addition, a high school student simultaneously taking college classes can get college credit in-person, but must tune in online to work toward her high school diploma. The Sixth Circuit's decision entirely overlooks these fundamental problems with Governor Beshear's orders. It offered no reason to question the district court's careful analysis on this point. [*See* App. A].

II. Religious schools across Kentucky are suffering serious and irreparable harms.

The Sixth Circuit's decision is causing serious and irreparable harms in every corner of the Commonwealth. Earlier this year, this Court emphasized the centrality of religious education to religious exercise. "Religious education," the Court held, "is vital to many faiths in the United States." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020). Whether it's Christianity, Judaism, Islam, or one of the many other religions that have flourished under the First Amendment, there is a "close connection" between "religious institutions" and "their central purpose [of]

educating the young in the faith." *Id.* at 2066. As a result, operating a private religious school is not a distinct venture that can be separated from worship or other aspects of religious exercise. *See id.* at 2064. The First Amendment protects religious schooling just as it does worship services—because, for many believers, those are simply two facets of fulfilling the obligations of their faith. *Id.*; [*see also* Brief of *Amici Curiae* Religious Schools, 6th Cir. Dkt. 15-2 at 7–8 (discussing the centrality of faith to religious education)].

The Sixth Circuit acknowledged that Danville Christian's and the Attorney General's interests in this case are "facially substantial." [App. 7]. This understates what is at stake. Just last week, the Court reiterated that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Diocese*, 2020 WL 6948354, at *8 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). Simply put, every day that religious schools in Kentucky are shuttered First Amendment rights are irretrievably lost. *See Our Lady of Guadalupe*, 140 S. Ct. 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."). As evidence of this fact, more than two dozen religious schools in Kentucky and more than 1,500 parents of a child or children that attend a religious school in the Commonwealth filed *amicus curiae* briefs in the Sixth Circuit to challenge the Governor's school-shutdown order.

It's no answer to say, as Governor Beshear did before the Sixth Circuit, that the religious schools are "not harmed by conducting 15 days of remote instruction."

[6th Cir. Dkt. 16-1 at 42]. Providing in-person schooling is a core part of Danville Christian's sincerely held religious beliefs. The district court so found as a matter of fact. [App. 15]. The Sixth Circuit did not question this finding. [App. 5 ("We assume that Danville Christian Academy is motivated by a 'sincerely held religious belief' regarding in-person schooling.")]. Consequently, in minimizing the serious and irreparable harm suffered by Kentucky's religious schools, Governor Beshear forgets that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Lukumi*, 508 U.S. at 531 (citation omitted).

Indeed, in *Diocese*, this Court's discussion of irreparable harm affirmed the importance to many of in-person communal worship. It explained: "[R]emote viewing [of worship services] is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance." *Diocese*, 2020 WL 6948354, at *3. The same is true for in-person instruction at religious schools. [App. 56–57].

Governor Beshear, no doubt, will respond that vacating the Sixth Circuit's stay will hamper his efforts to contain COVID-19. As this Court recognized in *Diocese*, "[m]embers of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area." *Diocese*, 2020 WL 6948354, at *3. The fact remains, however, that Governor Beshear has not offered a good reason—or any reason—for "assum[ing] the worst when [children and

teachers are in religious schools] but assum[ing] the best when people go to work or go about the rest of their daily lives in permitted social settings." *South Bay*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting) (citation omitted). If closing all religious schools is necessary to contain COVID-19, then why has Governor Beshear allowed all manner of other in-person activities in Kentucky to continue? Why can a 12-year old go to the movies along with two dozen other people, but she can't watch the *Greatest Story Ever Told* with a smaller group in Bible class? Why can Kentuckians cheer on their favorite NCAA basketball teams indoors, attend a size-restricted wedding, or keep up Black Friday shopping traditions, but children can't gather for school chapel? *See Diocese*, 2020 WL 6948354, at *2 ("And the Governor has stated that factories and schools have contributed to the spread of COVID-19, but they are treated less harshly than the Diocese's churches and Agudath Israel's synagogues, which have admirable safety records." (internal citation omitted)).

In considering these questions, recall that *every class* at Danville Christian is *smaller* than the size limits currently imposed on movie theaters. [App. 52]. Thus, under the Governor's order, a movie theater complex with 10 screens, each in a different room, can host 250 attendees at any given time and potentially host over a thousand patrons over the course of a single day. Yet Danville Christian, with its 234 students, cannot meet at all. The Governor's expert never explained how up to 250 people gathered indoors to watch movies with people coming in and out every couple of hours is safer than one group of 234 children gathering in smaller groups in separate classrooms.

Danville Christian has taken significant—and expensive—measures to protect the children and families it serves from COVID-19. [App. 52–55]. And Danville Christian is no outlier among Kentucky's religious schools. Another such school spent nearly $400,000 to implement COVID-19 restrictions. [Brief of *Amici Curiae* Religious Schools, 6th Cir. Dkt. 15-2 at 4–5]. Notably, the district court's preliminary injunction only applies to religious schools that "adhere[] to applicable social distancing and hygiene guidelines." [App. 30]. Thus, if the Court reinstates the district court's preliminary injunction, there's nothing to stop Governor Beshear from enforcing general and neutrally applicable guidelines of this sort as necessary. Danville Christian does not ask to be exempt from these guidelines, only to be treated as favorably as Kentucky's movie theaters, wedding venues, big-box stores, and other establishments. *See South Bay*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting) (noting that religious organizations "simply want to be treated equally to comparable secular businesses").

One final point: Americans have lived with the risks of COVID-19 for many months now.[10] While the differential treatment of religious exercise that pervades Governor Beshear's executive orders might have been perhaps "understandable" when less was known about the virus, much more is demanded now. *See Calvary Chapel*, 140 S. Ct. at 2605 (Alito, J., dissenting). We are "round[ing] out 2020 and face the prospect of entering a second calendar year living in the pandemic's shadow."

[10] Correspondingly, schoolchildren and teachers, who gather with the same people daily, have been trained about their school's plan to mitigate the risk of COVID-19. Contrast that to shopping malls, theaters, and other venues that bring together people with little-to-no familiarity with one another or the venue's mitigation strategy, if any.

Diocese, 2020 WL 6948354, at *5 (Gorsuch, J., concurring). "As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights." *Calvary Chapel*, 140 S. Ct. at 2605 (Alito, J., dissenting). Many months in, however, Governor Beshear still insists on a "very blunt rule[]." *Id.* However, "even in a pandemic, the Constitution cannot be put away and forgotten." *Diocese*, 2020 WL 6948354, at *3.

III. The Court is very likely to grant review in this case.

In all likelihood, this Court ultimately will decide this case, especially if the Sixth Circuit sticks with its unmoored reading of *Diocese* at the merits stage. The question presented here is of surpassing importance. Since COVID-19 first appeared, members of this Court have repeatedly weighed in about how to apply the Free Exercise Clause to religious organizations in the face of unprecedented state-imposed restrictions. At this point, six members of the Court have written on the topic, some multiple times. And just last Wednesday, the Court granted an emergency application in *Diocese*. And it wasn't just the *Diocese* majority that recognized the overriding importance of the constitutional protections at issue. Each dissent did as well. *See id.* at *9 (Roberts, C.J., dissenting) ("[T]he challenged restrictions raise serious concerns under the Constitution."); *id.* at *12 (Breyer, J., dissenting) ("The State of New York will, and should, seek ways of appropriately recognizing the religious interests here at issue without risking harm to the health and safety of the people of New York."); *id.* at *14 (Sotomayor, J., dissenting) ("States may not

discriminate against religious institutions, even when faced with a crisis as deadly as this one.").

Apart from the fact that this case "strike[s] at the very heart of the First Amendment's guarantee of religious liberty," *see id.* at *3, this matter eventually will require this Court's intervention. Shortly after the district court issued its preliminary injunction, Governor Beshear promised to take this case to this Court if necessary.[11] This application demonstrates that, on this point, the Governor and the Applicants agree. One way or another, this case will end up here.

IV. In the alternative, the Court should grant certiorari before judgment.

In the alternative, and for the reasons explained above, the Court, if it so chooses, should construe this application as a petition for a writ of certiorari before judgment and grant plenary review. *See* 28 U.S.C. § 1254(1) (providing the Court may review "[c]ases in the court of appeals" "before or after rendition of judgment"); *Coleman*, 424 U.S. at 1304 (Rehnquist, J., in chambers) ("The losing litigant could, of course, petition this Court for a writ of certiorari to review the stay order of the court of appeals."). The Court has previously construed applications for relief involving stays in such a manner, particularly where time is of the essence. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2086 (2017) (construing supplemental brief following stay application as a petition for certiorari); *Nken v. Mukasey*, 555 U.S. 1042 (2008) (construing stay application as a petition for

[11] *Beshear files appeal to keep private, religious schools closed for in-person class*, WYMT (Nov. 27, 2020), *available at* https://www.wymt.com/2020/11/28/beshear-files-appeal-to-keep-private-religious-schools-closed-for-in-person-classes/ (last visited Nov. 29, 2020).

certiorari); *Purcell v. Gonzalez*, 549 U.S. 1, 2 (2006) (construing a filing seeking "relief from an interlocutory injunction" as a petition for certiorari).

CONCLUSION

The Court should grant Danville Christian's and the Attorney General's application to vacate the Sixth Circuit's stay of the district court's preliminary injunction.

Respectfully submitted,

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