

**In the Supreme Court of the United States**

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DANVILLE CHRISTIAN ACADEMY, INC., et al.,  
*Applicants,*

*v.*

ANDY BESHEAR, GOVERNOR OF KENTUCKY,  
*Respondent.*

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**OPPOSITION OF RESPONDENT GOVERNOR  
ANDY BESHEAR TO EMERGENCY  
APPLICATION TO VACATE STAY**

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## PRELIMINARY STATEMENT

Governor Beshear did not offend First Amendment principles when he issued Executive Order 2020-969, which required all Kentucky schools—public or private, secular or religious—to cease in-person K-12 instruction from November 23, 2020 through January 4, 2021.

There is no claim here that the Executive Order arises from religious animus, is targeted at religion, or classifies on the basis on religion. To the contrary, and unlike other public health regulations that this Court has reviewed, the Executive Order is facially neutral. Nonetheless, Plaintiffs assert that Governor Beshear violated the First Amendment by subjecting religious activity (in-person schooling) to greater restrictions than secular activity that they assert poses comparable public health risks.

Governor Beshear does not doubt that Plaintiffs' religious beliefs about in-person instruction are sincerely held. And he recognizes the burden that the Executive Order has imposed on them and many other Kentuckians; indeed, that is one reason why he avoided issuing any orders precluding in-person education until November 2020, when a deadly third wave struck the state and required extraordinary measures. But based on his careful study of the issue—undertaken in consultation with Kentucky's leading public health and education experts—there is no scientific merit to Plaintiffs' position. Their entire case rests on a single premise: that the risk posed by in-person, K-12 schooling from November 23, 2020 to January 4, 2021 is comparable to the risk posed by activities including daycare, universities,

weddings, and movie screenings. That is the sole basis on which Plaintiffs allege that protected religious activity is treated worse than secular activity under the Executive Order. Yet despite the heavy burden that they carry to obtain vacatur of the stay entered by the Sixth Circuit, Plaintiffs have not entered into the record *any* expert testimony, scientific studies, or public health evidence. Nor have they offered any credible basis for overturning the reasoned, reasonable judgment that Governor Beshear and his scientific advisors made about the comparative (and materially different) public health risks posed the activities here at issue. With respect, nobody—not an elected official, not a public health expert, and not a court—should make life-or-death public policy decisions on the basis of such purely anecdotal, unscientific, and faulty reasoning about the spread of COVID-19.

The Governor strongly believes that the Constitution must remain vital in times of crisis. He has sought to uphold that precept—and the Constitution’s promise of free exercise—in the performance of his duties. Plaintiffs’ allegation that his facially neutral Executive Order discriminates against religion, or subordinates religious interests, is entirely without merit. The Sixth Circuit correctly concluded as much and Plaintiffs have not adduced any basis justifying their extraordinary request to vacate that ruling.

## STATEMENT OF THE CASE

### I. Kentucky's Response to the Spread of COVID-19

#### A. Kentucky is Currently Experiencing a Third Wave of Increased Infections, Hospitalizations, ICU Patients, and Deaths

COVID-19 is a deadly, highly infectious disease. It spreads primarily on tiny droplets transmitted through close contact. However, it sometimes spreads through airborne transmission, particularly in poorly ventilated indoor spaces. As the disease has progressed, studies have shown that places where people congregate near each other indoors for extended periods of time are the locations most associated with spread of COVID-19, especially if people are not wearing masks the entire time. Importantly, these outbreaks can race through a community, affecting people who did not choose to assume any risk by engaging in activities posing a higher risk of infection. While it is not possible to entirely prevent the spread of COVID-19—and while many cases are unknowingly spread by asymptomatic or presymptomatic individuals—carefully calibrated public health interventions can substantially reduce transmission rates.

Kentucky has been hard hit by the COVID-19 pandemic. Like most other states, it has experienced three waves of intensified infection. The first wave came in March through May 2020, when the disease first reached the United States. *See* App. 102-03, ¶¶ 13-15. A second surge occurred later in the summer. *See id.* And a third wave is now underway, triggered by (among other things) a drop in temperatures, increased social gatherings, and flagging compliance with social

distancing and other public health measures. *See* App. 103-104, ¶ 17. This third wave has proven to be deadly in Kentucky. With each passing day, the numbers of COVID-19 cases, hospitalizations, and deaths have risen at alarming rates. As of December 3, 2020, Kentucky recorded 190,601 cases, 2,014 deaths, 1,810 people hospitalized, 415 patients in intensive care, and 240 patients fighting for their lives on ventilators.<sup>1</sup> On December 3, 2020, Kentucky surpassed a positivity rate of 10%.<sup>2</sup> These developments have placed a massive strain on Kentucky’s hospital resources, endangering not only COVID-19 patients, but all sick persons within the State.<sup>3</sup>

**B. In Consultation with Experts, Governor Beshear Has Issued a Series of Time-Limited, Finely Calibrated Public Health Orders**

From the very outset of the pandemic, Governor Beshear has recognized the need to balance competing constitutional values—including public health and safety, the preservation of individual rights, and respect for local control—in the Commonwealth’s public policy. He has therefore adopted a nimble, carefully targeted approach based on the best available data and proven science.<sup>4</sup>

In these respects, among others, Governor Beshear has moved from categorical, preventative regulations early in the pandemic to a carefully calibrated,

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<sup>1</sup> Kentucky Public Health, KY COVID-19 Daily Summary (Dec. 3, 2020); Deborah Yetter, *Kentucky hospitals face rising admissions and brace for more as COVID-19 cases soar*, Louisville Courier Journal (Dec. 4, 2020).

<sup>2</sup> Kentucky Public Health, KY COVID-19 Daily Summary (Dec. 3, 2020).

<sup>3</sup> Alex Acquisto, *UK Hospital closing 5 operating rooms to free up resources for COVID-19 patients*, Lexington Herald-Leader (Nov. 24, 2020); *UofL opening floor of hospital unused for 12 years in preparation for expected surge*, WLKY News (Nov. 25, 2020).

<sup>4</sup> *See generally*, Office of the Governor, *Kentucky’s Response to COVID-19* (archived Oct. 20, 2020).

data-driven assessment of the risks posed by specific activities, varied state regulations in mitigating those risks, and the importance of upholding individual rights to the greatest extent consistent with protecting public health and safety. See *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2605 (2020) (Alito, J., dissenting from denial of application for injunctive relief) (“At the dawn of an emergency—and the opening days of the COVID–19 outbreak plainly qualify—public officials may not be able to craft precisely tailored rules . . . [But] [a]s 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.”). Notably, the White House recently “commended” Governor Beshear for the widely-celebrated success of his “active measures.”<sup>5</sup> And the Kentucky Supreme Court unanimously upheld his orders as “necessary to slow the spread of COVID-19 and protect the health and safety of all Kentucky citizens.” *Beshear v. Acree*, No. 2020-SC-0313-OA, 2020 WL 6736090, at \*37 (Ky. Nov. 12, 2020).

Here, we describe the history and current status of Governor Beshear’s public health orders, which demonstrate his responsive, data-driven approach. We also explain the origins of the challenged executive order and correct Plaintiffs’ mistaken characterization of Governor Beshear’s regulations. It bears special emphasis that the Governor’s latest executive orders are limited to the next four weeks, were issued

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<sup>5</sup> *White House Coronavirus Task Force Report for Kentucky 1*, Kentucky Cabinet for Health and Human Services (Nov. 15, 2020).

in response to the exigencies of the third wave, are based on a more sophisticated grasp of exactly what kinds of activity increase public health risks specific to Kentucky (and in what ways), and are subject to ongoing revisitation in light of new scientific and epidemiological data.

## **1. Social Gatherings & Indoor Activity**

### **a. The First and Second Waves**

In early March 2020, Governor Beshear recommended that all mass public gatherings end. That recommendation evolved into a requirement on March 19, 2020, after the State had reached 47 cases and its second sick child.<sup>6</sup> When cases nearly doubled over the next three days, Governor Beshear closed non-life-sustaining retail businesses (that is, those providing staple goods such as groceries and banks).<sup>7</sup> When cases doubled yet again over the following three days, Governor Beshear ordered all non-life-sustaining businesses to close and all life-sustaining businesses to comply with distancing and CDC guidelines at all businesses permitted to operate.<sup>8</sup> In this period of immense uncertainty, limited testing, limited personal protective equipment, and in an effort to save lives as the nature and spread of the virus came to be understood, Governor Beshear also barred all indoor and outdoor gatherings and closed all restaurants (while allowing curbside pickup,

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<sup>6</sup> Press Release, *Gov. Beshear: Strong Actions Required to Protect Kentuckians from COVID-19*, Office of Governor Andy Beshear (Mar. 19, 2020).

<sup>7</sup> Ky. Exec. Order 2020-246 (Mar. 22, 2020).

<sup>8</sup> Ky. Exec. Order 2020-257 (Mar. 25, 2020); Press Release, Office of the Governor, *Gov. Beshear Tightens Restrictions Amid COVID-19*, Office of Governor Andy Beshear (Mar. 25, 2020).

delivery, and carry out, since the principal risk he sought to avoid was eating in close proximity).<sup>9</sup> Virtually all states did the same.

By the time the second wave arrived, Governor Beshear—and the rest of the Nation—had a somewhat improved understanding of COVID-19. On that basis, and in regular consultation with local, state, and federal officials and experts, he continued to evolve his recommendations, guidance documents, and public health orders, relaxing them whenever consistent with public safety but adopting more active measures as required by discrete risks or COVID-19 upticks. Thus, starting in May 22, 2020, he allowed groups of up to ten to gather; when that relaxation did not engender a spike in transmission rates, he eased the restriction on June 29, 2020 to allow groups of up to 50 people; but when cases jumped significantly in mid-July 2020 (the second wave), he recognized the need to revert back to the ten person limit and did so on July 20, 2020.<sup>10</sup> Similarly, whereas Governor Beshear responded to the first wave with bans on both indoor and outdoor gatherings, he relied on scientific advice to adopt a more nuanced approach to the second wave—*e.g.*, restricting the indoor capacity of restaurants to 25% while allowing outdoor dining (and working closely with state and local officials to expand outdoor dining options), and restricting many other indoor activities while working to facilitate outdoor

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<sup>9</sup> Press Release, *Gov. Beshear: Strong Actions Required to Protect Kentuckians from COVID-19*, Office of Governor Andy Beshear (Mar. 19, 2020); Ky. Exec. Order (May 11, 2020).

<sup>10</sup> See generally Kentucky's Response to COVID-19, available at <https://governor.ky.gov/covid19> (last visited Nov. 25, 2020); see also Office of the Governor, *Gov. Beshear: New Actions Required as COVID-19 Cases Grow* (July 20, 2020).

opportunities by ensuring all of Kentucky's state parks were open.<sup>11</sup> Again, supported by the White House.

Across both the first and second waves, food consumption in group settings remained a source of heightened risk. That is why Governor Beshear's first-wave orders closed all dining at restaurants. And it is why, drawing on the latest scientific data, he has remained concerned about public contexts in which food consumption occurs.<sup>12</sup> For example, even when individuals were allowed to gather in groups of 50, they were strongly advised "not [to] share food[ or] drink."<sup>13</sup> When the second wave hit, Governor Beshear reduced restaurant capacity to 25% of pre-pandemic capacity.<sup>14</sup> He also mandated that restaurants seat customers at tables or booths, construct non-porous plexiglass barriers between booths that are not six feet apart, revise floor plans for seating, and prohibit customer traffic in the bar or restaurant except for the purpose of entry, exit, and restroom traffic.<sup>15</sup> To be clear, Governor Beshear did not take these steps lightly. He recognized that "there are a lot of really responsible bar owners out there, and I hate requiring this for them."<sup>16</sup> But he concluded that "White House modeling shows that this is absolutely necessary to

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<sup>11</sup> Press Release, *Gov. Beshear Provides Update on Fight Against COVID-19*, Office of Governor Andy Beshear (May 28, 2020).

<sup>12</sup> See Keun-Sang Kwon, et al., Evidence of Long-Distance Droplet Transmission of SARS-CoV-2 by Direct Air Flow in a Restaurant in Korea, 35 *J. Korean Med. Sci.* e415 (2020). (concluding transmission of COVID-19 occurred within five minutes of exposure by an infected person at a distance of greater than 20 feet in an indoor restaurant where masks were not worn).

<sup>13</sup> Office of the Governor, *Healthy at Work: Guidance for Gatherings Up to Fifty (50) People* (June 29, 2020).

<sup>14</sup> Press Release, *Gov. Beshear Announces New Actions to Fight COVID-19*, Office of Governor Andy Beshear (July 27, 2020).

<sup>15</sup> Office of the Governor, *Healthy at Work: Requirements for Restaurants and Bars* (Oct. 30, 2020).

<sup>16</sup> Press Release, *Gov. Beshear Announces New Actions to Fight COVID-19*, Office of Governor Andy Beshear (July 27, 2020).

control the spread at this time . . . and save the lives of our people and protect our economy.”<sup>17</sup> Consistent with that same data-driven approach to regulating contexts in which group food consumption occurs, Governor Beshear responded to the conclusion of the second wave by allowing bars and restaurants in Kentucky to return to 50% capacity on August 11, 2020.<sup>18</sup>

**b. The Third Wave and EO-698**

The measures Governor Beshear adopted successfully slowed the spread of the coronavirus and saved thousands of lives in Kentucky, while also seeking to preserve local control and individual liberty to the greatest possible extent. App. 102-03, ¶¶ 15-16. But as noted above, Kentucky is now experiencing a deadly third wave of COVID-19. Positive cases in Kentucky have increased at record pace. App. 103-04, ¶ 17. Medical providers in the Commonwealth, overwhelmed by exponential spread, have reached their breaking point. App. 104, ¶ 18. Many hospitals—including in Danville (home to Applicant Danville Christian Academy)—have struggled to ensure that they have sufficient personnel and space to provide adequate care for COVID-19 patients.<sup>19</sup> And some hospitals in Kentucky have even resorted to cancelling and postponing surgeries and other medical procedures to free up resources for COVID-19 cases. App. 104, ¶ 18.<sup>20</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> Ky. Exec. Order (Aug. 10, 2020).

<sup>19</sup> See *COVID-19 Unit Full at Ephraim McDowell in Danville, two on vents*, WKYT News (Oct. 15, 2020).

<sup>20</sup> See also Alex Acquisto, *UK Hospital closing 5 operating rooms to free up resources for COVID-19 patients*, Lexington Herald-Leader (Nov. 24, 2020); *UofL opening floor of hospital unused for 12 years in preparation for expected surge*, WLKY (Nov. 25, 2020).

When the third wave began in late October, Governor Beshear issued a series of targeted “recommendations” aimed at curtailing the spread of the virus. App. 104, ¶ 18. In particular, he urged Kentuckians who lived in “red zone” counties—which have a daily average of more than twenty-five cases per 100,000 people over a seven-day period—to avoid dining in restaurants or bars, to reduce in-person shopping, to cancel or postpone public events and social gatherings, and to otherwise reduce activity and contacts outside the home.<sup>21</sup> Unfortunately, this recommendation-based approach, even in combination with the existing regulations and requirements, did not stop the escalation. From late October to mid-November, the number of red zone counties more than doubled (from 55 to 113), and the number of daily new COVID-19 cases quadrupled (from 953 to 3,825).<sup>22</sup> On November 15, 2020, the White House indicated it “share[d] the strong concern of Kentucky leaders that the current situation is worsening and that all Kentuckians need to do their part to stop the spread.”<sup>23</sup> That same day, Kentucky mourned the first COVID-related death of a school-aged child.<sup>24</sup>

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<sup>20</sup> Press Release, *Gov. Beshear: Kentuckians, Communities Urged to Follow New Red Zone Reduction Recommendations to Stop COVID Spread, Protect One Another*, Office of Governor Andy Beshear (Oct. 26, 2020).

<sup>21</sup> *Gov. Beshear: Kentuckians, Communities Urged to Follow New Red Zone Reduction Recommendations to Stop COVID Spread, Protect One Another*, Oct. 26, 2020.

<sup>22</sup> Alex Acquisto, *Beshear makes new recommendations for ‘red zones’ as COVID-19 surge continues*, Lexington Herald-Leader (Oct. 26, 2020); Press Release, *Gov. Beshear: Another Frightening, Record Day for New COVID-19 Cases*, Office of Governor Andy Beshear (Nov. 20, 2020).

<sup>23</sup> *White House Coronavirus Task Force Report for Kentucky 1*, Kentucky Cabinet for Health and Human Services (Nov. 15, 2020).

<sup>24</sup> Leanne Fuller, *Community mourns Ballard County teen who passed away after battle with COVID-19*, WPSD Local 6 (Nov. 18, 2020).

Meanwhile, public health experts in Kentucky warned that the impending holiday season—starting with Thanksgiving—posed a potentially devastating risk to the Commonwealth. Based on their familiarity with local customs, as well as recent nightmarish experiences in Canada (where cases “exploded” over Thanksgiving, with “exponential increases” two to three weeks after the holiday), scientists anticipated a massive increase of COVID-19 cases. App. 105, ¶ 21. Kentucky’s chief public health official determined Thanksgiving represented a “catastrophic” potential for “exponential rise if schools and other indoor facilities operated without restriction.” App. 109-110, ¶ 36.

Governor Beshear responded with two executive orders (one of which is focused on education and discussed below). The broader of these two orders—EO 2020-968—restricts a wide range of activities associated with the spread of COVID-19. The order limits social gatherings to no more than eight people from more than two households. App. 76, ¶ 5. It prohibits indoor dining at restaurants, bars, and retail locations (including food courts). App. 76, ¶ 4. It requires gyms, fitness centers, and other indoor recreational facilities to cut capacity by 67%; to ensure that all individuals wear face coverings and remain socially distanced at all times; and to cancel all group classes and activities. App. 76, ¶ 6. It directs office-based businesses to cease in-person operations and permit telecommuting wherever possible, and to otherwise limit their in-person employee capacity by 67%. App. 77, ¶ 8. And, finally, EO 2020-968 mandates that all indoor venues, event spaces, and theaters be limited to twenty-five people per room. App. 76-77, ¶ 7. As discussed below, the order

specifies that this twenty-five-person limit applies to weddings and funerals but not to “in-person services at places of worship.” *Id.* Notably, EO 2020-968 automatically expires on December 13, 2020. App. 76, ¶ 3. At that point, the Governor and public health officials—in consultation with all relevant communities—will again reassess those restrictions in light of the latest data about which activities pose heightened public risks, how the risks associated with each such activity can be most effectively mitigated, and how to balance risk mitigation with other interests.

## **2. Education**

Governor Beshear’s second executive order responding to the third wave—EO 2020-969 (“the Executive Order”)—addresses in-person instruction for K-12 education. Governor Beshear did not lightly issue this order. Before it, he had not issued *any* orders requiring schools to cease in-person instruction. Instead, from the outset of the pandemic, he has worked closely with (and often deferred to) local officials, school superintendents and principals, and school boards. Based on those conversations, as well as advice from scientists and public health experts, he has favored recommendations rather than requirements.

To summarize: In March 2020, Governor Beshear recommended that all schools stop in-person instruction, and in April 2020 he further recommended that schools remain closed for the remainder of the school year. All public school districts and the overwhelming majority of private schools followed his recommendations (including Danville Christian Academy). App. 102, ¶ 14. In August 2020, Governor Beshear provided detailed guidance for K-12 schools as students prepared to return

to school for the fall semester.<sup>25</sup> The guidance included important information about the Commonwealth’s minimum expectations for safety—*e.g.*, social distancing, mask-wearing, symptom screening, sanitation, and contact tracing—as well as a collection of best practices.<sup>26</sup> The Department of Public Health (“DPH”) subsequently promulgated a regulation requiring all schools, public or private, to self-report positive cases or quarantined individuals so that DPH and the public could track the spread in the school setting (unfortunately, Danville Christian Academy did not comply with this regulation).<sup>27</sup>

The arrival of the third wave, however, presented *significant* additional risks that the Governor’s public health experts have concluded (1) are unique to in-person, K-12 education and (2) cannot effectively be mitigated by reliance on other COVID-19 precautions (*e.g.*, social distancing, masks, self-reporting). Contrary to Plaintiffs’ suggestion that Governor Beshear arrived at this conclusion without study or thought, he issued the Executive Order only after consultation with a wide range of experts in the risks of COVID-19 in educational settings. Those experts include Dr. Steven Stack, the Commissioner of the Kentucky Department for Public Health and a former board chair and president of the American Medical Association. App. 98-99, ¶¶ 2, 4. They also include leaders in educational policy. As Kentucky Education

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<sup>25</sup> Office of the Governor, *Healthy at School: Guidance on Safety Expectations and Best Practices for Kentucky Schools (K-12)* (Aug. 31, 2020).

<sup>26</sup> *Id.* at 5.

<sup>27</sup> See 902 Ky. Admin. Regs. 2:220E (2020). DPH’s self-reporting portal reflects that Danville Christian Academy has never reported a single case under this regulation despite admitting in its Complaint that it has had at least five infections among students and faculty. See Cabinet for Health and Family Services, *K-12 School COVID-19 Self-Reported Data* (last visited Dec. 4, 2020).

Commissioner Jason Glass has emphasized, “COVID-19 is causing us to do some complex calculations.”<sup>28</sup>

In-person, K-12 education presents an especially acute problem for Kentucky because, unlike other settings (including those identified by Plaintiffs as supposedly comparable, *see infra* at 31-39), it presents a perfect storm of factors that combine to generate a singular public health risk. We unpack and describe those risk factors—and Dr. Stack’s unrebutted expert testimony—in greater detail below. *See infra* at 27-30. To briefly summarize: (1) The K-12 school day involves spending much more time in an indoors group setting, day in and day out, than nearly any other activity; (2) School-age children struggle to keep their masks on, and to respect other preventive measures, through an entire school day; (3) Masks cannot be worn when consuming food and beverages in group settings, which children must do every day in school; (4) More than one-off events or social outings, K-12 schools are high-volume mixers of people—not just students, but teachers, administrators, janitorial staff, cafeteria staff, and parents coming and going; (5) In Kentucky, as compared to other states, an unusually high percentage of K-12 school-age children are cared for by their grandparents or other older individuals at much higher risk of severe illness or death from COVID-19; and (6) With Thanksgiving on one end of the Executive Order and Christmas, Hanukah, and New Year’s Eve on the other end, the next four weeks are a critically dangerous time period in which to send children for in-person

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<sup>28</sup> Valarie Honeycutt Spears, *January Return for KY Schools Depends on COVID Spread. Can Teachers Get Early Vaccines?*, Lexington Herald Leader (Dec. 2, 2020).

schooling. In addition, as the CDC has explained, symptom-based COVID-19 screening is “particularly challenging” in school-age children, which exacerbates the risks associated with in-person schooling.<sup>29</sup>

Because in-person, K-12 education presents significant and singular risks as compared to other educational settings (including preschools and universities), and as compared to commercial settings regulated by EO 2020-968 (including malls, movie theaters, and weddings), Governor Beshear reluctantly concluded that allowing such schooling over the next four weeks poses an intolerable risk to the safety (indeed the lives) of Kentuckians. He therefore issued the Executive Order (2020 EO-969) on November 18, 2020, requiring all K-12 schools—public and private—to cease in-person instruction and transition to remote or virtual instruction by November 23, 2020. App. 73, ¶ 1. Consistent with his heavily data-driven and particularized approach, as well as his desire to minimize the substantial burdens resulting from the Executive Order, elementary schools (grades K-5) in non-red zone counties—where the risk of COVID transmission is lower—may return to in-person instruction beginning December 7, 2020. App. 73, ¶ 3. Middle and high schools (grades 6-12), however, must remain in remote/virtual instruction until January 4, 2021. App. 73, ¶ 2. The Executive Order does not apply to homeschools, see App. 73, ¶ 5, and, consistent with its public health bases, it narrowly permits all schools to provide in-person “targeted services,” including therapy and assistance to vulnerable populations, App. 73, ¶ 4. The Executive Order applies to religious,

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<sup>29</sup> Centers for Disease Control and Prevention, *Infections Among Children* (updated Aug. 14, 2020).

private, and public schooling alike; it is neutral regarding religion and contains no classifications whatsoever based on religious status or purpose.

### **3. Religious Activity**

In issuing public health regulations, Governor Beshear is deeply committing to principles of religious free exercise. Indeed, religious worship and freedom are central to the Governor's own life: he and his wife serve as deacons in their church and help to serve communion there; and his son's baptism was postponed because of the pandemic.<sup>30</sup> *See* Statement of Governor Beshear (May 9, 2020) ("First, my faith is critically important to me. It's a big part of my family life."). Accordingly, Governor Beshear has endeavored to ensure that his pandemic orders reflect his own personal respect for the First Amendment, as well as his obligation as a public official to uphold the Constitution's fundamental promise of free exercise.

In the early days of the pandemic, Governor Beshear issued one order that impacted religious exercise—a ban on most mass gatherings (issued March 19, 2020). He understood the burdens that his orders imposed but, based on the terrifying data and limited information available at the time, believed that these broad prophylactic measures were necessary. In early May 2020, the Sixth Circuit issued two opinions preliminarily enjoining his orders as applied to drive-in worship services, which the Governor's order did not prohibit in the first place, then enjoining

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<sup>30</sup> Jack Brammer, *As Beshear Announces COVID-19 deaths, He Speaks of Faith. His Pastor Isn't Surprised.*, Lexington Herald Leader (Apr. 9, 2020); *see also* Governor Andy Beshear, *Update on COVID-19 in Kentucky* (May 9, 2020) ("First, my faith is critically important to me. It's a big part of my family life.").

the order as applied to in-person religious services. *See Maryville Baptist Church, Inc. v. Beshear* (“*Maryville I*”), 957 F.3d 610, 613 (6th Cir. 2020) (“The Governor denies that the ban applies to drive-in worship services, and the district court seemed to think so as well.”); *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020).

Following the Sixth Circuit’s decision, the Governor issued a new order on May 9, 2020 permitting indoor worship services so long as attendance does not exceed 33% of a venue’s occupancy capacity.<sup>31</sup> On June 10, 2020, he extended that order to 50% occupancy for each venue.<sup>32</sup> The Sixth Circuit has since suggested that he made these decisions in “apparent response” to its earlier opinions. *See Maryville Baptist Church, Inc. v. Beshear*, 977 F.3d 561, 564 (6th Cir. 2020). While those rulings were relevant to his decision, so were active consultations with religious and faith leaders, improved public health data, and the opportunity to shape public policy outside the uncertainty and lack of resources of the pandemic’s first wave in Kentucky. Indeed, prior to the Sixth Circuit issuing its opinions, the Governor announced indoor worship services could resume as of May 20, 2020. In that period—and ever since—he has had a bi-weekly meeting with faith leaders in Kentucky, and has endeavored to ensure that his public policy honors free exercise values. As the executive director of the Kentucky Baptist Convention noted when the Governor re-opened houses of worship: “I am thankful for the hard work of Gov.

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<sup>31</sup> Order, Cabinet for Health and Family Services (May 9, 2020).

<sup>32</sup> Office of the Governor, *Healthy at Work: Guidelines for Places of Worship* (June 10, 2020).

Beshear and his team of advisers, as well as their outreach to faith leaders, in working through the details of this plan.”<sup>33</sup>

For some time, Governor Beshear has not regulated Kentucky’s places of worship at all. They are now subject only to advisory recommendations provided in the “Healthy at Work” program’s “Guidelines for Places of Worship” and “Minimum Requirements.”<sup>34</sup> While these Guidelines include advice concerning mask-wearing, social distancing, signage, and other measures to reduce the transmission of COVID-19, they do not impose any mandatory restrictions.<sup>35</sup> There are thus no public health regulations in Kentucky that facially classify on the basis of religion, or that direct themselves to the regulation of houses of worship in the Commonwealth. This includes the executive orders issued on November 18, 2020: EO 2020-969 is neutral with respect to religion, and EO 2020-968 expressly exempts religious activity.

That is no coincidence. It reflects Governor Beshear’s dedication to protecting religious freedom. Through a deliberate, iterative process—involving scientists, public officials, religious leaders, and other affected communities—he has sought to ensure that religion and religious practice are fully respected throughout Kentucky.

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<sup>33</sup> Press Release, *Gov. Beshear Announces Requirements for Houses of Worship, Retail, Others to Reopen*, Office of Governor Andy Beshear, (May 8, 2020)

<sup>34</sup> Office of the Governor, *Healthy at Work: Guidelines for Places of Worship* (June 10, 2020); Cabinet for Health and Family Services, *Healthy at Work: Minimum Requirements for All Entities* (June 10, 2020).

<sup>35</sup> Office of the Governor, *Healthy at Work: Guidelines for Places of Worship* (June 10, 2020). To the extent there is confusion about the word “should” in the Guidance, the Governor has affirmed on the record that it is permissive. See Order, *Tabernacle Baptist Church, Inc. v. Beshear*, No. 3:20 Civ. 33 (E.D. Ky. May 18, 2020), ECF No. 42 (“Tabernacle and the Attorney General expressed concerns about the use of the word ‘should’ in the amended mass gathering order, but received assurances from the defendants that ‘should’ was permissive.”).

## II. Procedural History

On November 20, 2020, Plaintiff Danville Christian Academy—joined by the Kentucky Attorney General’s Office—filed this action seeking to enjoin EO-969 based on violations of the Free Exercise Clause, the Establishment Clause, and Kentucky constitutional and statutory law. App. 32-70. With respect to their free exercise claims, Plaintiff Danville Christian Academy alleged that the Executive Order discriminatorily burdened its sincerely held religious beliefs concerning in-person education.

Five days later, following oral argument, the district court granted a statewide preliminary injunction prohibiting the Governor from enforcing EO-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 based this decision solely on Plaintiffs’ free exercise claims, *see* App. 14-24; it separately concluded that Plaintiffs had failed to establish a likelihood of success on the merits of their Establishment Clause and Kentucky state law claims. App. 24-28.

Governor Beshear immediately appealed to the Sixth Circuit and sought an emergency stay of the injunction. App. 3. The Sixth Circuit granted the emergency stay, holding that Plaintiffs were unlikely to succeed on any of their claims. *Id.* In so doing, the Sixth Circuit recognized that Kentucky “is experiencing a recent surge in COVID-19 cases” and that “elementary and secondary schools pose unique problems for public health officials responding to the COVID-19 pandemic.” *Id.* These unique problems, the Sixth Circuit observed, include difficulties in “compliance with masking

and social distancing requirements,” as well as the fact that “students receiving in-person instruction must in any event remove their face coverings to eat.” *Id.* The Sixth Circuit added that Kentucky is “particularly vulnerable to these problems, as it leads the nation in children living with . . . grandparents and great-grandparents, who are especially vulnerable to the disease.” *Id.* at 2-3 (citation omitted).

With those considerations in mind, the Sixth Circuit held that the Executive Order was “neutral and of general applicability” because it “applies to all public and private elementary and secondary schools in the Commonwealth, religious or otherwise.” App.5. The Sixth Circuit then explained that its decision was consistent with this Court’s recent opinion in *Catholic Diocese*: whereas that case involved an order that expressly “restricted attendance at religious services,” the Executive Order is facially neutral with respect to religion and “there is no evidence” that it was “‘targeted’ or ‘gerrymandered to ensure an impact on religious groups.” App.6 (citations omitted). Finally, the Sixth Circuit considered the remaining equitable factors but found that “the interests of each side are facially substantial,” thus rendering Plaintiffs’ unlikelihood of success on the merits “determinative” of their entitlement to relief. App. 7-8.<sup>36</sup>

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<sup>36</sup> The Sixth Circuit found no likelihood of success on the merits on Plaintiffs’ remaining claims “for essentially the same reasons given by the district court.” App.7.

## ARGUMENT

This Court’s power to vacate a stay entered by a court of appeals is “exercised with the greatest of caution and should be reserved for exceptional circumstances.” *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308 (1973) (Marshall, J., in chambers). To obtain vacatur, an applicant carries the “heavy burden” of proving that the entry of a stay “was a clear violation of accepted legal standards.” *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 571 U.S. 1061, 1063 (2013) (Scalia, J., concurring in denial of application to vacate stay). In addition, an applicant must prove that their case “could and very likely would be reviewed here upon final disposition in the court of appeals.” *W. Airlines, Inc. v. Int’l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O’Connor, J., in chambers). Because Plaintiffs do not meet either of these requirements, their application to vacate the Sixth Circuit’s stay should be denied.

### **I. The Sixth Circuit Properly Determined that Governor Beshear’s Executive Order Complies with the Free Exercise Clause**

#### **A. The Applicable Free Exercise Standard**

The First Amendment provides a “guarantee of religious liberty.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, No. 20A87, 592 U.S. \_\_\_, 2020 WL 6948354, at \*3 (Nov. 25, 2020). As this Court has explained, government action complies with that guarantee when it is “neutral and of general applicability,” even if it may result in burdens on religion. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

That rule applies with full force even amid the ongoing COVID-19 pandemic. Accordingly, the Court has carefully scrutinized public health regulations where there is evidence that they were targeted at a religious community. *See Diocese*, 2020 WL 6948354, at \*1. The Court has also recognized the need for a closer look where public health regulations facially classified on the basis of religion. *See id.* at \*2 (New York order restricting attendance at religious services); *see also id.* at \*7 (Kavanaugh, J., concurring); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2605 (2020) (Alito, J., dissenting from denial of application for injunctive relief); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief). In such cases, the Court has consistently asked whether the religious activity at issue is subject to greater restriction than secular activity posing comparable (or lesser) public health risks. *See, e.g., Diocese*, 2020 WL 6948354, at \*2; *id.* at \*4 (Gorsuch, J., concurring); *id.* at \*7 (Kavanaugh, J., concurring); *Calvary*, 140 S. Ct. at 2609 (Alito, J., dissenting from denial of application for injunctive relief).

Here, Plaintiffs do not allege that Governor Beshear issued the Executive Order on the basis of hostility toward religion. *See App. 6* at 5 (noting that the Executive Order “cannot be plausibly read to contain even a hint of hostility towards religion”). Nor do Plaintiffs allege that Governor Beshear targeted this Executive Order at any religious belief or practice. *See id.* And, critically, the Executive Order is neutral on its face: it does not engage in any classification on the basis of religion. *See id.* (“The contours of the order at issue here in no way correlate to religion . . .”).

As the Sixth Circuit properly recognized in its decision granting a stay, these features distinguish the Executive Order from the regulations addressed in *South Bay*, *Calvary*, and *Diocese*.

Plaintiffs insist that distinction is immaterial, but they are mistaken. Under this Court’s precedent, official action is subject to strict scrutiny only if it *actually* treats “religious exercises worse than comparable secular activities.” *See Diocese*, 2020 WL 6948354, at \*4 (Gorsuch, J., concurring) (citing *Lukumi*, 508 U.S. at 546). And in some cases, that crucial threshold determination may be fairly straightforward. Thus, in *Diocese*, New York officials had made public statements suggestive of religious hostility, had expressly classified religious activity for differential regulation, and had failed to impose similarly restrictive regulation on secular activity that obviously posed equal or greater public health risk. *See id.* at \*2; *id.* at \*4 (Gorsuch, J., concurring); *id.* at \*8 (Kavanaugh, J., concurring) (“New York’s restrictions discriminate against religion by treating houses of worship significantly worse than some secular businesses.”). It took no great leap for this Court to conclude that religious activity was disfavored and, on that basis, to apply strict scrutiny to the challenged regulation. *See id.* at \*2.

In other cases, however, it may not be readily apparent whether a particular religious activity is being discriminatorily regulated as compared to secular activity that genuinely poses comparable public health risks. Assessing how much public health risk an activity poses—and how much that risk is actually mitigated by a particular form of regulation—is no simple task. Amid the pandemic, many ordinary

activities pose some level of risk, with those levels fluctuating over time and geographically in response to a host of context dependent considerations. Even seemingly similar activities may differ in slight but epidemiologically significant ways; when that occurs, it would be improper to suggest that differential treatment constitutes discrimination and triggers strict scrutiny. Many of the key judgments in this field thus involve weighing gradations of risk: one activity may present two risk factors and thus require moderate regulation, while a superficially analogous activity may present four risk factors and require much more burdensome intervention to achieve the exact same public health objectives.

Needless to say, these complexities cannot justify abdication of the judicial role in securing free exercise. *See Diocese*, 2020 WL 6948354, at \*8 (Kavanaugh, J., concurring) (“[J]udicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised.”). But officials throughout the Nation, aided by scientists and consulting with communities, are working hard—and in good faith—to craft regulations responsive to variations in risk. In assessing those regulations, the Court has emphasized that judges “are not public health experts, and [] should respect the judgment of those with special expertise and responsibility in this area.” *Id.* at \*3; *see also id.* at \*8 (Kavanaugh, J., concurring) (“The Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States.” (citation omitted); *id.* at \*9 (Roberts, C.J., dissenting) (“[I]t is a significant matter to override determinations made by

public health officials concerning what is necessary for public safety in the midst of a deadly pandemic.”); *id.* at \*12 (Breyer, J., dissenting) (“The elected branches of state and national governments can marshal scientific expertise and craft specific policies in response to changing facts on the ground. And they can do so more quickly than can courts. That is particularly true of a court, such as this Court, which does not conduct evidentiary hearings.”).

Where there is no evidence of religious hostility, where there is no hint of religious targeting, and where pandemic-related regulations do not classify based on religion, these precedents counsel caution. In such cases, while making the crucial threshold determination of whether religious activity has in fact been treated worse than secular activity posing comparable risks, courts appropriately hesitate before concluding that officials discriminated against religious activity (or misjudged the risks) in structuring public health regulations. *See id.* at \*8 (Kavanaugh, J., concurring); *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief). At minimum, plaintiffs who allege a departure from neutrality and general applicability in those circumstances must adduce concrete scientific evidence about the religious and secular activities whose risks they would have the Court compare—particularly if they bear the heavy burdens prerequisite to obtaining extraordinary relief in this Court.

**B. The Executive Order Adheres to the Free Exercise Clause.**

Plaintiffs contend that the Executive Order violates the Free Exercise Clause because religious K-12 schools are allegedly subjected to more burdensome

government regulation than secular activity posing equal or greater public health risk. Since the Executive Order applies to all K-12 schools, whether secular or religious, Plaintiffs cannot show that religious activity is worse off than the most directly analogous secular activity (namely, secular K-12 schooling). Therefore, they ask this Court to compare the public health risk posed by in-person K-12 schooling over the next four weeks with the risks posed by preschools, universities, and an assortment of other activities.

The problem with this argument is simply stated: relative risk matters. Less strict regulation of less risky activity is fully consistent with the requirements of neutrality and general applicability. And Governor Beshear’s closure of in-person K-12 schooling for the next four weeks—a judgment made in consultation with public health and education experts, and by reference to state-specific data and trends—reflected a reasoned judgment that in-person K-12 schooling in this period will not, in fact, present a level of risk comparable to that posed by the other activities Plaintiffs identify.

In staying the district court’s order, the Sixth Circuit expressly concluded that “elementary and secondary schools pose unique problems for public health officials responding to the COVID-19 pandemic.” App. 3. To justify the extraordinary remedy of vacatur, Plaintiffs must prove “a clear violation of accepted legal standards.” *Planned Parenthood*, 71 U.S. at 1061 (Scalia, J., concurring in denial of application to vacate stay). Yet despite that burden, Plaintiffs themselves offer no concrete evidence, no expert testimony, no Kentucky-specific data, and no particularized

scientific basis for any of their factual contentions concerning the public health risk of the activities and regulations that they would have this Court adjudicate. No elected official or public health expert in the Nation would make a comparative risk assessment on such a frail basis—especially when there are lives at stake and powerful grounds supporting the conclusion that this facially neutral Executive Order properly assesses relative risk.

As relevant here, those grounds include the only actual evidence in this case: namely, the declaration of Dr. Steven Stack, a medical doctor who (as noted above) is the Commissioner of the Kentucky Department for Public Health and previously served as board chair and president of the American Medical Association. App. 98-99, ¶¶ 2, 4. Contrary to Plaintiffs’ repeated assertion that Dr. Stack “provided no explanation why K-12 schools create a higher risk of spreading COVID-19 than other indoor gatherings that have not been prohibited,” Pet. 20, his declaration identified five key features of in-person, K-12 schooling in Kentucky—whether religious, public, or private—that, in combination with the surge in cases and the timing of the Thanksgiving holiday (a sixth factor), generate a uniquely substantial public health risk to the Commonwealth:

**(1) The K-12 school day is a long period of time for indoors group activity.**

- “With disease as widespread as it is in Kentucky as indicated by local and state health departments, the CDC, and the White House, the Commonwealth made the difficult decision to close in person settings in which COVID-19 is the most likely to be transmitted, which include[s] places where people congregate for long periods of time and may remove their face coverings.” App. 108-09, ¶ 33.

- Indeed, scientists agree that longer duration of exposure and staying in one place create a higher risk of infection.<sup>37</sup> So can loud speaking and singing, both of which often occur in K-12 schools over the course of the day.<sup>38</sup>

**(2) School-age children struggle to keep their masks on all day.**

- “[F]acial coverings compliance can be difficult to maintain among children across an entire day of school[.]” App. 108, ¶ 32.
- Scientists agree that masks are critical to helping stop the spread of the virus. The CDC recommends that everyone over age 2 wear masks in public settings and when around people who do not live in their household.<sup>39</sup>

**(3) Masks cannot be worn when eating and drinking, which school-age children must do in school.**

- “[E]very school must provide opportunities for children to eat and drink, during which time facial coverings cannot be worn.” App. 108, ¶ 32.

**(4) K-12 schools are extremely high-volume mixers of people.**

- “Schools are high volume mixers of people—not just students, but teachers, administrators, janitorial staff, cafeteria staff, and parents coming and going dropping off children, supplies, etc.” App. 108, ¶ 32.
- “Models show that at large gatherings like schools, there is a high likelihood that at least one individual has COVID-19. For example, a model built by Georgia Tech shows that, as of November 21, 2020, the odds that there is an individual with COVID-19 at a gathering with 100 people in Boyle County, Kentucky, are 95%. For reference, Danville Christian Academy has over 200 students, according to its Verified Complaint.” App. 109, ¶ 34 (citation omitted).
  - Of course, those 200+ students are collectively mixing with hundreds (possibly thousands) more people at school and when they return home

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<sup>37</sup> Maogui Hu et al., *The risk of COVID-19 transmission in train passengers: an epidemiological and modelling study* 8-10, *Clinical Infectious Diseases* ciaa1057, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7454391/pdf/ciaa1057.pdf>.

<sup>38</sup> Valentyn Stadnytskyi et al., *The airborne lifetime of small speech droplets and their potential importance in SARS-CoV-2 transmission*, 117 *Proceedings of the National Academy of Sciences* 11875 (2020), <https://www.pnas.org/content/117/22/11875.long>; Malin Alsved et al., *Exhaled respiratory particles during singing and talking*, 54 *Aerosol Science & Technology* 1245 (2020), <https://www.tandfonline.com/doi/full/10.1080/02786826.2020.1812502>,

<sup>39</sup> Centers for Disease Control and Prevention, *Considerations for Wearing Masks*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html>.

- As of December 3, 2020, the Georgia Tech model shows that the odds are now 99% that a gathering with 100 people in Boyle County will have one individual with COVID-19.<sup>40</sup>

**(5) Many Kentucky children are cared for by people at very high risk.**

- “An unusually high percentage of Kentucky children are cared for by their grandparents, and older individuals are at higher risk of severe illness or death from COVID-19.” App. 109, ¶ 35.
- In addition, Kentuckians have unusually high rates of comorbidities that can lead to severe cases of COVID-19, including heart and lung conditions.
- It is therefore particularly risky in the Commonwealth to place school-age children in a higher risk in-school educational environment

**(6) COVID-19 will spread dramatically across the Commonwealth in the weeks following Thanksgiving.**

- “[C]ases exploded in Canada after Thanksgiving, with exponential increases in cases seen in a predictable time (two to three weeks) after the holiday. Public health officials attributed the spread of cases to Thanksgiving gatherings. Accordingly . . . we should anticipate similar spread of COVID-19 across the Commonwealth . . . in the weeks following Thanksgiving. App. 105, ¶ 21 (citation omitted).
- “Increased spread from the Thanksgiving holiday is particularly likely because COVID-19 cases are already growing exponentially across the United States. November has brought the third and strongest surge of COVID-19 throughout the United States and the disease has not spared the Commonwealth of Kentucky from this brutal surge.” App. 105, ¶ 22.
- “At this time when fatigue is high and Thanksgiving approaching the potential for exponential rise if schools and other indoor facilities operated without restriction could be catastrophic.” App. 110, ¶ 36.
- Needless to say, the risks at K-12 educational institutions would be especially pronounced across the period covered by the Executive Order, with students on the one side engaging in Thanksgiving celebrations and on the other side participating in holiday and New Year’s Eve celebrations.

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<sup>40</sup> Centers for Disease Control and Prevention, Information for Pediatric Healthcare Providers; Infections Among Children (updated Aug. 14, 2020).

In addition to the factors set forth in Dr. Stack’s declaration, an additional consideration supports the conclusion that in-person K-12 schooling poses a significant risk: the CDC says that as many as 45% of pediatric COVID-19 infections are asymptomatic.<sup>41</sup> That, combined with “[t]he lack of specificity of signs or symptoms,” “make symptom-based screening for identification of SARS-CoV-2 in children particularly challenging.”<sup>42</sup> And that, in turn, means that the population attending K-12 schools for in-person education is more likely than the general population to unknowingly carry the virus.

These seven considerations support the Governor’s conclusion—upheld by the Sixth Circuit—that allowing in-person K-12 education over the next five weeks would pose unique, substantial risks that could not be sufficiently redressed by alternative measures (including of the kind adopted by Danville Christian Academy). And it is that conclusion which explains and justifies Governor Beshear’s difficult decision to require K-12 schools to close, while allowing different (and less risky) activity to continue, albeit subject to substantial public health regulation in its own right.

Against all that, but without any scientific testimony in the record that supports their position, Plaintiffs ask this Court to find as a factual matter that three categories of lesser-regulated activity in Kentucky present equal or comparable public health risks to in-person K-12 education over the next five weeks. We will address

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<sup>41</sup> Centers for Disease Control and Prevention, *Infections Among Children*, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/pediatric-hcp.html>.

<sup>42</sup> *Id.*

each of these categories in turn. Before doing so, however, we must emphasize three points.

*First*, it is unquestionably true that each of these categories of activity presents *some* public health risk, but the Governor and his expert advisors have concluded that each presents materially less risk than in-person K-12 schooling over the next five weeks. This conclusion is not undermined by the fact that some non-school gatherings have resulted in outbreaks. Nor is it undermined by Dr. Stack’s observation (which obviously applies to schools) that “[p]laces where people congregate near each other indoors for extended periods of time (more than 15 minutes) appear to be the locations most associated with spread of COVID-19, especially if people are not wearing masks.” App. 100, ¶ 8. Even within that broad statement, it is possible (indeed, necessary) to make finer assessments of how much risk specific activities pose, and that is precisely what Governor Beshear, Dr. Stack, and other Kentucky experts have done here.<sup>43</sup> And, contrary to Plaintiffs’ suggestion that daycares may pose more risk than K-12 schools because young children have greater difficulty with mask and hygiene measures, experts note growing evidence that very young children may naturally be even *less* efficient at transmitting the virus than older children and adults. That could be due to differences in the immune

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<sup>43</sup> Plaintiffs’ claim that Dr. Stack “averred that other secular activities create the same or even greater risk of spreading COVID-19,” Pet. 16, is curiously devoid of any citation to the record. *See also id.* 25 (referring to “evidence in the record” from Dr. Stack “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” without citing any paragraph of the declaration explaining what the purported evidence is).

systems of young children, or their “smaller lungs could make it harder for them to breathe out infectious particles as far.”<sup>44</sup>

*Second*, and relatedly, the fact that some but not all of the risk factors identified above may apply to the categories identified by Plaintiffs does not mean they must be treated the same. Activity that presents three of the risk factors but not all seven may reasonably be treated as less risky—and be regulated less heavily—than in-school, K-12 education. That would not be discrimination under the Free Exercise Clause.

*Finally*, the distinction between K-12 schools and other educational institutions has nothing whatsoever to do with religion. As emphasized above, the Executive Order itself is neutral. Religious preschools and postsecondary schools are equally unaffected by EO-969. The lines drawn here are all about the risk of spreading COVID-19.

With that said, we will address Plaintiffs’ proposed comparators.

### **1. Preschools and Daycares**

Plaintiffs make much of the fact that preschools and daycares remain open, arguing that they are indistinguishable from K-12 schools because they, too, involve groups of children gathered for many hours at a time. But that argument fails because there are two critical distinctions between K-12 schools and preschools/daycares.

*First*, preschools and daycares are not subject to anything approaching the high-volume mixing that unavoidably results from in-person K-12 schooling. *See App.*

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<sup>44</sup> Allyson Chiu, *Covid-19 and child care: What the latest research says*, Wash. Post (Oct. 22, 2020).

108, ¶ 32. In Kentucky, preschools and daycares operate under a finely reticulated regulatory scheme that sharply limits the volume of mixing that can occur in that setting. There is currently a *maximum* group size of fifteen children for daycares, and children must remain in the same group to avoid spreading the virus.<sup>45</sup> That policy choice, moreover, did not come out of thin air. It was the result of months of experience assessing how daycares interact with the virus, beginning with the closure of childcare programs in March with a limited exception for temporary emergency childcare for people like health care workers and first responders, then a limited reopening in the summer with a maximum group size of 10 children or 30 square feet per child, culminating in the current regulations in September. *See Beshear*, No. 2020-SC-0313-OA, 2020 WL 6736090, at \*5-6, 28-31 (describing these developments).

*Second*, Plaintiffs fail to account for the dramatic disparity in the number of school-age children compared to preschool-age children in the Commonwealth, which considerably reduces the public health risk associated with preschools across all of the factors identified above. There are two-and-one-half times as many school-age children in Kentucky as there are children under five.<sup>46</sup> And K-12 attendance, unlike preschool attendance, is compulsory. Thus, while K-12 schools “are the cornerstone of many communities in the Commonwealth”— and significant vector for the virus—the same cannot be said of preschools and daycares as a category. App. 108, ¶ 32. So while Plaintiffs are correct that preschools and daycares do create some public health

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<sup>45</sup> 922 Ky. Admin. Regs. 2:405E § 4(1)(b), (3) (2020).

<sup>46</sup> *See* Kentucky Census QuickFacts, <https://www.census.gov/quickfacts/KY>.

risk, it is much lower than K-12 schools. Governor Beshear’s conclusion that the different levels of risk justify different levels of restrictions over the next five weeks does not violate the Constitution.

## 2. Colleges and Universities

Next, Plaintiffs argue that the Executive Order is discriminatory because it does not also apply to college and universities. The fundamental problem with this contention is that colleges and universities in Kentucky do not present a substantial public health risk in the short term because they will overwhelmingly be closed for the next five weeks (which is one major reason why Governor Beshear did not consider it necessary to cover them). Indeed, nearly all colleges and universities in Kentucky transitioned to completely remote learning starting on or before Thanksgiving break and continuing until beyond the January 4, 2021 sunset date of the Executive Order.<sup>47</sup> As a result, the urgent public health threat that led Governor Beshear to close in-person K-12 schooling during the high-risk time between Thanksgiving and the winter holidays—the sixth factor identified above—does not exist for colleges and universities.

Moreover, and highly relevant here, the in-class components of college and university instruction are plainly unlike K-12 in-person schooling in ways that reduce their risk profiles under the first three factors identified above. Most college students do not spend eight hours per day in a classroom eating and drinking maskless with

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<sup>47</sup> See Kentucky Council on Postsecondary Education, *How Campuses Are Finishing the Fall 2020 Semester*, <http://cpe.ky.gov/covid-19> (“Campuses expect most instruction to remain remote through the winter and plan to kick off the spring 2021 semester in mid-January.”).

dozens of other students. Nor do they do so every single weekday, day after day, for weeks or months at a time. And unlike school-age children, college and university students are adults who know how to wear masks and can follow rules about social distancing to mitigate the spread of the virus. Plus, as compared to children attending elementary and secondary schools, college-aged students are (a) less likely to live with older relatives at higher risk from exposure to COVID-19 and (b) more amenable to symptom-based screening for the identification of COVID-19.

To be sure, there is appreciable risk associated with in-person instruction at colleges and universities. But risk must be understood in context. For all the reasons noted here, Plaintiffs offer no credible basis for this Court to second-guess Governor Beshear’s conclusion, made in consultation with scientists and education officials (and embraced by the Sixth Circuit), that allowing in-person K-12 schooling over the next five weeks poses an appreciably higher risk than that posed by allowing in-person college and university instruction (which mostly is not occurring anyway).

### **3. Other Commercial Activity**

Plaintiffs also identify a hodgepodge of other commercial and social activities—weddings, basketball games, shopping malls, and movies—that they contend equal or exceed the public health risk from in-person K-12 schooling, but which they describe as if they are virtually unregulated. There are two fundamental problems with that contention. The first is that these activities *are* substantially regulated in Kentucky. EO-968 provides carefully targeted rules for virtually every kind of social gathering. Indoor weddings are limited to 25 people and everyone must wear masks

or stay six feet apart at all times. App. 76, ¶ 7.<sup>48</sup> Indoor venues, like malls or movie theaters, are limited to 25 people per room, are prohibited from serving food or beverages, and also require masks. App. 76, ¶¶ 4, 7.<sup>49</sup> And although Kentuckians may be able to “cheer on their favorite NCAA basketball teams indoors” for a few hours, they must do so in a 20,000+ seat venue operating at only 15% capacity while wearing a face mask at all times, remaining physically separate from others and are subject to EO 968 which prevents the indoor consumption of food and drink.<sup>50</sup>

The second and more fundamental error is that it is the studied opinion of Governor Beshear and the leading public health experts in Kentucky that none of these activities presents a reasonably comparable risk over the next five weeks to in-person K-12 education. And that studied opinion is a reasoned, reasonable one.

Weddings are distinct from in-person K-12 schooling on nearly every relevant metric (including those articulated above). Weddings are special occasions, not everyday events a person goes to for eight hours, day after day, for weeks on end. They are attended primarily by adults who know how to wear masks and socially distance. And because of the limitation to 25 people, they are, critically, not “high-volume mixers” like schools. Nor are they likely to take place in tremendous numbers over the next five weeks, given the Thanksgiving holiday last week and the upcoming winter holidays.

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<sup>48</sup> See also Ky. Exec. Order 2020-931 (Nov. 4, 2020).

<sup>49</sup> See also *id.*

<sup>50</sup> See Kentucky Council on Postsecondary Education, *Update on COVID-19: How Campuses Are Finishing the Fall 2020 Semester* (“Campuses expect most instruction to remain remote through the winter and plan to kick off the spring 2021 semester in mid-January.”).

Malls, like weddings, have a 25-person per-room limit and mask requirements. They are also big spaces—not comparable to a classroom, and (while school remains in session) generally not full of children. The chief place one might ordinarily linger at a mall, the food court, is closed under EO-968, so there is no realistic chance for someone to spend eight hours with twenty other people in close quarters for even one day, let alone every day of the week. And in the judgment of Kentucky public health experts, running an occasional errand at the mall, where it is possible to avoid all but transient encounters with other people and never remove one’s mask to eat or drink, is not comparable to going to school with hundreds of people every day in a classroom and building where eating and talking are the norm. The risk profile is different.

Movies, too, present few of the risks of in-person school. Nevertheless, Plaintiffs ask: 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? Pet. 31. This is a good question. But it has a good answer: Because she is not just watching the *Greatest Story Ever Told* in Bible class. Unlike the child at the movie theater, she does not go home when the movie is over. She remains in the classroom with all of the other students for an entire day of school—in a high-volume mixing environment involving hundreds of students and hundreds more adults—discussing the lessons of the movie with her classmates, laughing and talking with her friends, eating her lunch, and pausing the occasional beverage. If she is a student at Danville Christian Academy and has her parents’ permission, she can do all that without a mask—and so can all the other students in her class. Pet. 6 (“Students can

remove masks only if seated and socially distanced, and then only if parental permission has been given.”). If she or one of her classmates does become infected with the virus, she and all her classmates are less likely to display symptoms comparably sized groups of adults. But as long as school is in session, she will go back to school for in-person instruction every day. And in the evenings, like many children in Kentucky, including her classmates, she may go home to a grandparent or other household member who is at a heightened risk of severe disease or death from COVID-19. Dr. Stack’s declaration and studies by other public health experts and the CDC show that the relative risk in the K-12 school context over the next five weeks is far, far greater than the movies—not because our hypothetical 12 year-old is watching a religious movie in a religious class, but because she is *in school*.

Plaintiffs then ask: “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?” Pet. 31.

Again, this is a good question. And again, there is a good answer: it is not because of chapel, but because of school. Governor Beshear’s order prohibits all K-12 schools, religious or secular, from gathering hundreds of children together all day, every day, in an indoor environment where they are talking, laughing, singing, and eating; where they have difficulty with mask compliance under the best of circumstances; where they return home to relatives at higher risk than most Kentuckians; and where it is a lot more likely that there asymptomatic carriers of the

virus in the mix.<sup>51</sup> None of that is true of a two-hour college basketball game in a cavernous arena that will kick out anyone who violates its mask policies<sup>52</sup> (unthinkable for a K-12 school), or for a one-time event like Black Friday where masks are mandatory, or a wedding limited to 25 guests.

Plaintiffs insist that, “[r]egardless of *why* 25 people come together indoors, an indoor gathering of 25 people is an indoor gathering of 25 people.” Pet. 15. And true, “the virus does not care why they are there.” *Id.* 21 (quoting *Roberts*, 958 F.3d at 416). But it flies in the face of not only medical science but also common sense to say that *all* indoor gatherings of 25 people are the same in terms of public health risk from COVID-19. To ask Governor Beshear and the public health experts charged with keeping the citizens of Kentucky alive and safe from the virus to ignore relevant factors and relative risk—how long those people stay in the room, if they speak, if they wear a mask, or eat, or move between groups, or are asymptomatic, or live with someone who is high risk—is in no way required by the Constitution. Plaintiffs’ apparent contention is that to shut down especially dangerous activities, all of society must also be shut down. This is plainly contrary to this Court’s precedent, and would lead to an illogical, non-evidence based response to the pandemic.

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<sup>51</sup> See Keun-Sang Kwon, et al., *Evidence of Long-Distance Droplet Transmission of SARS-CoV-2 by Direct Air Flow in a Restaurant in Korea*, 35 J. Korean Med. Sci. e415 (2020) (concluding transmission of COVID-19 occurred within five minutes of exposure by an infected person at a distance of greater than 20 feet in an indoor restaurant where masks were not worn).

<sup>52</sup> Lucas Aulbach and Tim Sullivan, *2 fans were ejected from U of L’s Friday game over KFC Yum Center mask policy violations*, <https://www.courier-journal.com/story/sports/college/louisville/2020/11/28/louisville-basketball-2-fans-ejected-kfc-yum-center-over-masks/6450332002>.

Lacking any evidence to support their contrary position, Plaintiffs cannot carry their burden to persuade the Court to overcome the measure of deference it owes to state political officials and public policy experts in their assessments of the relative public health risk posed by these categories of activity.

## **II. The Equities Weigh Strongly Against Vacatur**

The free exercise of religion is a pillar of our Constitution. And the free exercise of religion includes “educating the young in the faith.” *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020). Recognizing the significance of this interest, Governor Beshear struck a delicate balance between what free exercise requires and what public health demands by implementing executive orders that are neutral with respect to religion, bounded by strict sunset provisions, tied to concrete scientific metrics, based on public health guidance about varied levels of risk associated with particular activities, and issued only as a last resort amid the third wave in Kentucky. Closing schools is a choice that no executive should have to make. Yet facing the reality of COVID-19, Governor Beshear firmly believes that it is possible, indeed essential, to respect both religious freedom and public health. *See* Statement of Governor Beshear (“My faith is critically important to me . . . . We never set out to stop anything specific related to religion. We were just trying to save lives.”).

In that analysis, Governor Beshear came to the expert-driven conclusion that re-opening K-12 in-person instruction of any kind over the coming weeks would be uniquely dangerous to public health. Kentucky is at a critical juncture in the battle against COVID-19: as explained above, positive cases are soaring; hospital beds and

resources are at capacity; deaths reach record highs on a daily basis. The day after Plaintiffs filed this application, Governor Beshear announced record numbers of new cases, cases among children, hospitalizations, patients in ICUs, patients on ventilators, and deaths. Kentuckians are unusually vulnerable to the spread of COVID-19 proliferating from schools, as the Commonwealth leads the Nation in children living with relatives other than parents (e.g., grandparents and great-grandparents) and these children “can spread the virus effectively in households.”<sup>53</sup> The Governor has an overwhelming public interest in protecting the Commonwealth’s residents from this deadly disease. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905).

Confronting an airborne, infectious disease is a collective endeavor—COVID-19 cares little if a child attends a religious or secular school. The risks emanating from in-person instruction at K-12 schools are unique and extend to students, staffs, and their families; community members who interact with these individuals; and those who are unable to obtain treatment for other illnesses because hospitals have curtailed procedures or closed operating rooms. As a result, accommodating Plaintiffs’ interests here would risk substantial burdens on third parties. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (holding that the government is required to “take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.”). Prematurely opening K-12 schools would shift risk onto those

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<sup>53</sup> Centers for Disease Control & Preventions, *Information for Pediatric Healthcare Providers; Infections Among Children* (updated Aug. 14, 2020).

who come in contact with the schools' students, teachers, and families and those who need, but are unable to find, care at hospitals. *See Prince*, 321 U.S. at 166-7 (“The right to practice religion freely does not include liberty to expose the community or [a] child to communicable disease or the latter to ill health or death.”). In addition, prematurely opening *only* religious K-12 schools would also burden the rights of parents to provide their children with a secular education, as in-person education would be available only at sectarian schools. This would infringe the constitutionally protected “liberty of parents and guardians to direct the upbringing and education of children under their control,” *see Pierce v. Soc’y. of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925), and may risk creating a troubling hierarchy of Constitutional rights, *see Calvary*, 140 S. Ct. at 2611 (Kavanaugh, J., dissenting) (“[A]ccommodations or exemptions can sometimes trigger Establishment Clause challenges because of the apparent favoritism of religion.”).

Religious freedom and pluralism should be a principle all Americans embrace. To single out religious schools for special treatment, at a time when so many parents are making sacrifices to carry out the painful but necessary task of virtual education, would risk undermining the ideals of peaceful coexistence and religious pluralism. Some may start to equate “religious freedom” with an aversion to public health guidance. In these difficult times, religious freedom will flourish most widely in the Nation if understood alongside “respect [for] the judgment of those with special expertise and responsibility in [public health].” *Diocese*, 2020 WL 6948354, at \*3; *see also South Bay*, 140 S. Ct. at 1614 (Roberts, C.J., concurring). As courts play their

constitutionally assigned role in protecting fundamental rights, they too, properly recognize that the Constitution “principally entrusts the safety and the health of the people to the politically accountable officials of the States.” *Diocese*, 2020 WL 6948354, at \*8 (Kavanaugh, J., concurring) (quoting *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring)).

### **III. The Court is Unlikely to Grant Review In This case**

To demonstrate an entitlement to the exceptional remedy of vacatur, Plaintiffs must show that their case “could and very likely would be reviewed here upon final disposition in the court of appeals.” *W. Airlines*, 480 U.S. at 1305 (O’Connor, J., in chambers). But Plaintiffs cannot make that showing. For several interrelated reasons, this case does not merit and is unlikely to receive plenary review.

To begin, Plaintiffs challenge a time-limited executive order that is set to expire in just four weeks. *See* App. 73. This poses a risk of practical (if not formal) mootness that strongly counsels against certiorari. That risk is particularly acute given Governor Beshear’s demonstrated commitment to lifting, modifying, and, if necessary, expanding public health measures in response to the latest scientific data and trends in Kentucky (and in response to dialogue with affected communities, including religious groups). Stated differently, the presence of a shifting regulatory field responsive to evolving, on-the-ground developments in the Commonwealth makes this case a poor vehicle to decide broad questions about the interpretation or application of the First Amendment.

Vehicle issues aside, the unique factual circumstances of this case undermine the need for this Court’s intervention. To be sure, this Court has evaluated other pandemic measures presenting a direct conflict between a state’s police powers and the rights of religious adherents. But that is not this case. As the Sixth Circuit correctly observed, the Executive Order at issue applies to all public and private elementary schools in the Commonwealth, “religious or otherwise.” App.5. It does not prohibit religious worship; it does not treat religious schools more harshly than secular ones; and “there is no evidence that the challenged restrictions were ‘targeted’ or ‘gerrymandered’ to ensure an impact on religious groups.” App.5-6. In fact, it does not mention religion at all. That distinguishes it from orders invalidated by other appellate courts and by this Court.

Accordingly, the Court is unlikely to grant this case, which involves a facially neutral order—with a soon-to-be-triggered sunset provision—that was issued by a Governor with a proven commitment to minimizing burdens on religious practice.

## **CONCLUSION**

The Court should deny the application to vacate the Sixth Circuit’s stay of the preliminary injunction issued by the District Court.

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