No. 20A96

IN THE
Supreme Court of the United States

DANVILLE CHRISTIAN ACADEMY, INC., COMMONWEALTH OF KENTUCKY,
ex rel. ATTORNEY GENERAL DANIEL CAMERON,
Applicants,

v.

ANDREW BESHEAR, in his official capacity as Governor of Kentucky,
Respondent.

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

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REPLY IN SUPPORT OF EMERGENCY APPLICATION TO VACATE THE SIXTH CIRCUIT'S STAY

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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.

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REPLY IN SUPPORT OF 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:

INTRODUCTION

Religious schools across Kentucky are closed while daycares, preschools, colleges, sports arenas, gambling parlors, offices, movie theaters, wedding venues, and big-box stores remain open. Today, a second grader, her parents, and a group of her classmates can go to the movies and then to the mall for Christmas shopping, but she cannot attend her religious school. Similarly, a five-year old can attend a private preschool class, but a five-year-old kindergartener cannot attend Danville Christian Academy. And an 18-year old freshman can attend science class at the University of Kentucky, but an 18-year old senior at Danville Christian cannot attend Bible class. In all of these situations, people are gathering and may spread or catch COVID-19. By allowing a wide array of secular activities to continue, but closing religious schools, the Governor's orders are neither neutral nor generally applicable. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, --- S. Ct. --- , 2020 WL 6948354, at *2 (Nov. 25, 2020) (per curiam) ("*Diocese*"). Accordingly, the Governor bears the burden of establishing why his differing treatment of religious exercise is narrowly tailored to serve the State's compelling interest in stopping the spread of COVID-19.

The Governor insists that he can treat religious schooling more harshly than other indoor activities because, in his view, attending K-12 school is a singularly dangerous endeavor from the perspective of spreading COVID-19. The Governor bears the burden of proof in this regard because, "once a State creates a favored class

of businesses . . . *the State* must justify why [religious institutions] are excluded from that favored class." *Id.* at *8 (Kavanaugh, J., concurring) (emphasis added). And the Governor was afforded an opportunity to present to the district court whatever evidence he could muster, scientific or otherwise, to explain his line drawing and its burden on religious liberty. After reviewing the Governor's evidence, the district court found that he failed in this regard—more specifically, the Governor did not provide an adequate explanation for treating a wide variety of secular gatherings better than religious education. [App. 18–19].

The Governor's Response asks the Court to upset the district court's careful fact-finding. But these arguments are unsuited for this procedural posture, which turns on whether the Sixth Circuit demonstrably erred in applying the law. On that topic, the Governor makes almost no effort to defend the Sixth Circuit's legal reasoning, which viewed the Governor's order in isolation and without reference to all of the surrounding secular activities that continue unimpeded. The Sixth Circuit's decision staying the district court's preliminary injunction therefore should be vacated.

ARGUMENT

Governor Beshear argues that the Free Exercise Clause, which forbids even "subtle departures from neutrality," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (citation omitted), allows him to favor sports arenas, gambling parlors, movie theaters, offices, daycares, preschools, colleges, wedding venues, and big-box stores over religious exercise. But this differing

treatment does not "square with the text of the First Amendment itself, which gives *special solicitude* to the rights of religious organizations." *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 189 (2012) (emphasis added). The Sixth Circuit demonstrably erred in concluding that the Governor's school-closure order satisfies this standard.

I. The Governor's focus on the alleged facts cannot overcome the Sixth Circuit's demonstrable legal errors.

Governor Beshear's Response does not match the procedural posture of this application for emergency relief. At a stage when the Court must ask whether the Sixth Circuit demonstrably erred on the *law*, Governor Beshear focuses almost entirely on the alleged *facts*. The Governor's disagreements with the district court's findings of fact are no reason for leaving the Sixth Circuit's stay in place.

After the preliminary-injunction hearing, the district court issued a thoughtful, 21-page opinion explaining its reasons, factual and legal, for enjoining Governor Beshear's school-closure order. [App. 10–31]. Although the district court did not have the benefit of *Diocese*, its analysis closely tracks this Court's decision. In ruling against Governor Beshear, the district court "wonder[ed] why under this executive order, one would be free to attend a lecture, go to work, or attend a concert, but not attend socially distanced chapel in school or pray together in a classroom that is following strict safety procedures and social distancing." [App. 17]. The district court also confronted head-on the factual assertion that K-12 schooling poses a unique risk of spreading COVID-19 that other indoor activities do not create. Based on the record before it, the district court found the "evidence" to be "lacking" for the

proposition that "the risk of contagion is heightened in a religious setting any more than a secular setting, or in K-12 schools as opposed to preschools, universities, or colleges." [App. 18]. The Sixth Circuit never dealt with this finding.

In making these factual findings, the district court meticulously reviewed the Governor's evidence—namely, the affidavit of Dr. Steven Stack. The district court specifically referenced Dr. Stack's statements that "an unusually high percentage of Kentucky children" live with older individuals and that "schools are high volume mixers of people." [*Id.*]. As to the latter point, the court responded: "Of course, that is true of many public settings. In spite of these factors, preschools, colleges, and universities will remain open so long as certain precautions are taken." [*Id.*]. As to the former assertion, the district court's bottom line was: "Neither Dr. Stack nor the Governor have adequately explained why K-12 schools must close while these other institutions, where many children and young adults who live at home may still expose family members to Covid-19, can remain open." [*Id.*].

The Governor spends nearly all of his Response inviting the Court to overturn this diligent fact-finding. He outlines six purported reasons why, in his view, K-12 schools "present[] a perfect storm of factors that combine to generate a singular public health risk." [Resp. 14]. As described in Part II, Dr. Stack—the Governor's only witness in district court—did not reach such a conclusion. But even putting that aside, this Court is not the forum for Governor Beshear to relitigate his alleged factual grievances. And that is particularly true in the context of an application for an emergency vacatur of a stay, when the Court asks whether there was "a clear

violation of accepted *legal* standards." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 507 (2013) (Mem.) (Scalia, J., concurring in denial of application to vacate stay) (emphasis added).

As explained in the Application, the Sixth Circuit demonstrably erred for several reasons, the most obvious of which is that the court ignored the many indoor activities that are free to continue in Kentucky while religious schools are closed. [Appl. 14–22]. While the Sixth Circuit acknowledged that, in *Diocese*, "factories, liquor stores, and bicycle shops, to name only a few," were treated "less harshly" than houses of worship, [App. 6], the panel overlooked that the same *and more* is true as to religious schools in Kentucky.

This is a clear violation of accepted legal standards. The Free Exercise Clause requires courts to "survey meticulously the circumstances of [the] governmental categories" at issue. *See Lukumi*, 508 U.S. at 534 (citation omitted). Or as this Court put it in *Diocese*, the judiciary must "conduct a serious examination" of the "need" for restrictions that "strike at the very heart of the First Amendment's guarantee of religious liberty." *See Diocese*, 2020 WL 6948354, at *3.

Governor Beshear disputes none of this. Absent from his lengthy filing is any defense of the Sixth Circuit's legal reasoning. The Governor nowhere claims that the Sixth Circuit was correct, as a legal matter, to ignore the many indoor activities that he permits in Kentucky.[1] Instead, the Governor emphasizes the Sixth Circuit's

[1] Unlike the Sixth Circuit, Governor Beshear's Response discusses at length the numerous indoor activities that he is allowing to continue. [Resp. 32–40]. This is a none-too-subtle admission that the Sixth Circuit needed to consider these other activities as well.

conclusion that *Diocese* is "distinguishable" because the executive order there "appl[ied] specifically to houses of worship." [App. 6]. For that to make a difference, however, the Court would have to backtrack on decades of precedent, *see Lukumi*, 508 U.S. at 534 ("Facial neutrality is not determinative."), which would enable the government to easily write around the Free Exercise Clause.

The Governor also makes one passing claim (without citing authority) that the appropriate legal standard is whether "religious activity is worse off than the most directly analogous secular activity." [Resp. 26]. Yet this Court's decision in *Diocese* is to the contrary, as the Court rejected New York's attempt to draw categorizations around some secular activities that it argued were more comparable to religious worship than others. *See Diocese*, 2020 WL 6948354, at *8 (Kavanaugh, J., concurring); *see also id.* at *13 (Sotomayor, J., dissenting) (explaining that "New York treats houses of worship far more favorably than their secular comparators"). *Diocese* did not limit its analysis to only secular activities that most closely resemble worship services when it held that New York's restrictions must survive strict scrutiny. *Id.* at *2 (comparing worship services to "acupuncture facilities, camp grounds, garages" and other kinds of gatherings).

All of this shows how peculiar the Governor's Response is. In a procedural posture where his job is to defend the Sixth Circuit on the *law*, he instead proffers newly alleged *facts*. The Governor's hand-waving about the facts should not distract the Court from the task at hand. It must ask whether the Sixth Circuit was "demonstrably wrong in its application of accepted standards." *See Coleman v.*

Paccar, Inc., 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers). The Governor has given no reason for the Court to answer this question other than in the affirmative. Resolving this Application is that simple.

II. Governor Beshear offered no basis to claim that K-12 education poses a higher risk of spreading COVID-19 than other indoor activities.

Even if this Court were to wade into whether the district court's view of the evidence was correct, it would find itself surprised at the disparity between what the evidence in the record actually says and what the Governor now claims it says. The heart of Governor Beshear's Response is the notion that his only witness, Dr. Stack, averred that K-12 schools pose a higher risk of spreading COVID-19 than almost all other indoor activities.[2] But such an assertion is nowhere to be found in Dr. Stack's affidavit. Remember, K-12 education is one of only two categories of activities that the Governor has absolutely prohibited.[3] [Appl. 2–5]. Everything else—from gambling parlors to preschools to movie theaters to offices to shopping malls—remains open subject to restrictions.

Governor Beshear, in other words, has deemed K-12 education not only dangerous, but one of *the most dangerous* spreaders of COVID-19 imaginable. Yet,

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[2] The Governor states that he has not closed religious schools "on the basis of hostility toward religion." [Resp. 22]. Dr. Stack's hands, however, are far from clean. When he learned that a church was refusing to stop in-person worship earlier this year, he wrote: "Sigh. No cure for ignorance or obstinacy." [D. Ct. R. 21-2, PageID#314].

[3] Restaurants in Kentucky are closed to in-person dining until December 13, 2020, a shorter period than Governor Beshear's closure of K-12 schools. [*Compare* App. 76, *with id.* at 73]. And just yesterday, the Governor promised that he would not extend his ban on in-person dining past that date. *"Give it all you got": Beshear has no plans to extend most executive orders that expire Sunday*, WLKY (Dec. 7, 2020), *available at* https://tinyurl.com/y3bj6q5z (last visited Dec. 8, 2020). The Governor has made no similar statement about in-person schooling. Thus, the Governor's discrimination against free exercise will get *worse* after December 13.

rather than single out K-12 schools as uniquely dangerous, Dr. Stack testified that the situations "*most associated* with [the] spread of COVID-19" are indoor gatherings that last longer than 15 minutes. [App. 100 (emphasis added)]. That sworn statement leaves no room for schools to be uniquely problematic. If the locations "most associated" with the risk of spread are indoor gatherings lasting longer than 15 minutes, then countless activities and businesses fall under that umbrella. This would be especially true with respect to preschools and daycares, where children are in session for as long as, if not longer, than students at K-12 schools. For these simple reasons, the Governor is in no position to claim that attendance at K-12 schools presents "significant additional risks" that other in-person activities do not.

Other parts of Dr. Stack's testimony are even more at odds with the Governor's litigation position. In his affidavit, Dr. Stack provided examples of the riskiest activities that have been scientifically linked to outbreaks of COVID-19. [*Id.* at 100–01]. Weddings, Dr. Stack swore, have led to "catastrophic outbreaks." [*Id.*]. So too have restaurants, funerals, and worship services. [*Id.*]. Dr. Stack did not include K-12 schools in that list and offered no testimony linking K-12 schools in Kentucky—or anywhere else—to outbreaks of COVID-19.[4] [*See* App. 98–110]. The furthest Dr. Stack went in his affidavit was to state that "[t]he risk of spread is also present at schools when they are open and operating." [App. 108]. But that is a far cry from the Governor's current litigation position that K-12 schools are more dangerous than

[4] Last week, the American Medical Association told this Court that "studies in the United States and abroad have shown that outbreaks in schools are rare" and that schools' "different demographics seem to reduce the risk of virus transmission." *Robinson v. Murphy*, 20A95, Brief of *Amici* American Medical Association, *et al.*, at 9–10 (Dec. 3, 2020).

virtually every other indoor venue. If anything, Dr. Stack's affidavit supports the conclusion—devastating to Governor Beshear's case—that the Governor failed to halt some activities that have caused "catastrophic outbreaks" while simultaneously closing religious schools for which comparable data does not exist. *See Diocese*, 2020 WL 6948354, at *2 (noting that "there [is] no evidence that the applicants have contributed to the spread of COVID-19").

Dr. Stack's sworn statements undercut the Governor's newfound litigation position, but perhaps more important is what Dr. Stack did not say about K-12 schools. While Dr. Stack opined that K-12 schools are "high volume mixers of people," [App. 108], he *did not* claim that this was a unique risk compared to daycares, preschools, colleges, sports arenas, gambling parlors, or the like. While Dr. Stack observed that students must remove their masks to eat at school, [*id.*], he *did not* claim that this was any different from what happens at a preschool or daycare or university (or even an employee breakroom in an office or big-box store).[5] And while Dr. Stack observed that children might struggle to keep their masks on during the school day, [*id.*], he *did not* claim that this problem affects K-12 education in a way that is different than preschools or daycares (or other places where children go). Rather, Dr. Stack's explanation for why there is a risk of spreading COVID-19 at schools in no way distinguishes K-12 education from the lengthy list of indoor gatherings that the Governor currently allows. [App. 18]. This is why the Governor

[5] Danville Christian requires students to eat lunch in assigned-seat cubicles separated by plexiglass dividers. [App. 54].

spins what Dr. Stack said and scrambles to supplement the record[6] in an effort to justify the arbitrary line-drawing that the district court found had no factual support.

The most striking disparity in treatment is perhaps how Governor Beshear allows daycares and preschools to continue operating without extending that same favor to religious K-12 schools. And to explain why, he makes a remarkable concession. The Governor claims that preschools and daycares are not as dangerous as grade school because the Governor has imposed what he calls a "finely reticulated regulatory scheme" that allows daycares and preschools to operate safely. [Resp. 33]. But if daycares and preschools are relatively safe because the Governor has imposed maximum group sizes and limits on mixing classes, why can he not do the same for religious schools? That, in fact, is all Danville Christian and the other religious schools in Kentucky are seeking. The Governor cannot treat businesses "less harshly" than religious schools by allowing them to operate under restrictions, *see Diocese*, 2020 WL 6948354, at *2, but then declare that those same businesses are inherently safer *because* he has regulated them differently. If there are additional requirements that are neutral and generally applicable, Danville Christian is eager to include such requirements in its plan that the local health department has already endorsed.

[6] Governor Beshear's Response cites a slew of sources that Dr. Stack did not specifically mention in his affidavit (those in footnotes 12, 29, 37, 38, 41, 42, 44, 51, and 53). If the Governor believes those new sources warrant lifting the district court's preliminary injunction, he should so move in district court, rather than asking this Court to consider them in the first instance. The Governor knows this procedural route well, as he is currently seeking to lift the injunction prohibiting him from closing houses of worship. *See 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 be sure, the Governor claims that he issued his school-closure order "by reference to state-specific data and trends," [Resp. 26], but he never presented any such data to the district court.[7] Given that Governor Beshear treats K-12 schools as one of the most dangerous indoor gatherings in the Commonwealth, one would expect the record before the district court to be filled with evidence supporting such a claim. It is not. *See In re Salon a La Mode*, --- S.W.3d --- , 2020 WL 2125844, at *1 (Tex. May 5, 2020) (Blacklock, J., concurring in the denial of the petition for writ of mandamus) ("Any government that has made the grave decision to suspend the liberties of a free people during a health emergency should welcome the opportunity to demonstrate—both to its citizens and to the courts—that its chosen measures are absolutely necessary to combat a threat of overwhelming severity.").

In sum, the Governor's *ipse dixit* assertions that K-12 schooling is a category unto itself when it comes to COVID-19 are simply unfounded based on the record presented to the district court. *See Lukumi*, 508 U.S. at 544 (rejecting the government's "*ipse dixits*" for enacting underinclusive regulations that burden religious exercise). No amount of posturing before this Court about evidence not in the record changes this fact. And the Governor's focus on allegations about the factual record—rather than the Sixth Circuit's demonstrably wrong application of the legal standard from *Diocese*—shows precisely why the stay must be vacated.

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[7] Instead of providing such data, the Governor cites a commendation from the White House, [Resp. 5 n.5], but fails to mention that that occurred before he issued his school-closure order. In any event, the White House report that the Governor cites, and the two issued after it, include advice on keeping schools *open*. Nov. 15, 2020 State Report, at 1, *available at* https://tinyurl.com/yxww79w8 (last visited Dec. 7, 2020); Nov. 22, 2020 State Report, at 1, *available at* https://tinyurl.com/y6sus35k (last visited Dec. 7, 2020); Nov. 29, 2020 State Report, at 1, *available at* https://tinyurl.com/yxk87m3s (last visited Dec. 7, 2020).

III. The other relevant factors strongly favor relief.

The Governor argues that relief from the Sixth Circuit's stay is unnecessary because his school-closure order is a "time-limited executive order that is set to expire in just four weeks." [Resp. 43]. But two sentences later, Governor Beshear reminds the Court—and religious schools across Kentucky—that he can "expand[] public health measures" as he sees fit.[8] [*Id.*]. Even if the school-closure order expires in "just four weeks," those weeks without religious schooling will cause irreparable harm across the Commonwealth. The Governor's Response ignores the rule, affirmed by this Court in *Diocese*, that losses of First Amendment freedoms "for even minimal periods of time" are irreparable. *Diocese*, 2020 WL 6948354, at *3 (citation omitted). The Governor also ignores that, for many religious schools, the next several weeks are central to their religious mission. The superintendent of the Catholic schools in the Diocese of Covington (in northern Kentucky) explained this reality in a letter to parents affected by Governor Beshear's shutdown order:

> As the reality of this situation settles in, I am left with sadness over what our children will miss over these next few weeks. We have just started the Advent season. During this time our children would have attended Mass, spent time in Adoration of the Blessed Sacrament, and had the opportunity to receive the Sacrament of Penance. We would have prayed and taught the lessons of Advent as a faith community to help prepare our hearts for the celebration of Christmas.

Brief of *Amici* Religious Schools & Parents, at Appendix (Dec. 2, 2020).

[8] Even today, the Governor is trying to lift the injunction prohibiting him from closing Kentucky's houses of worship. *See Maryville Baptist*, 977 F.3d at 565; *see also Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 611 (6th Cir. 2020) (per curiam) (noting that on Easter Sunday "Kentucky State Police arrived in [a church] parking lot and issued notices to the congregants that their attendance at the drive-in service amounted to a criminal act"); Ky. Rev. Stat. 39A.990 (providing that violating the Governor's emergency orders is a criminal misdemeanor).

The Governor also says the time-limited nature of his executive order "poses a practical (if not formal) mootness that strongly counsels against certiorari." [Resp. 43]. The Court rejected such an argument in *Diocese*, 2020 WL 6948354, at *3, and the Governor offers no reason to reach a different conclusion here. In fact, unlike in *Diocese*, Kentucky's religious schools remain under the Governor's school-closure order to this day.

CONCLUSION

For the reasons explained, the Court should grant Danville Christian's and the Commonwealth's emergency application to vacate the Sixth Circuit's stay.

Respectfully submitted,

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