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,

On Emergency Application to Vacate the Sixth Circuit's Stay to the Honorable Brett Kavanaugh, Associate Justice of the United States Supreme Court and Circuit Justice for the Sixth Circuit

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BRIEF OF 38 UNITED STATES SENATORS AS *AMICI CURIAE* IN SUPPORT OF APPLICATION TO VACATE THE SIXTH CIRCUIT'S STAY

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INTEREST OF *AMICI CURIAE*

Amici are United States Senators Mitch McConnell of Kentucky, Rand Paul of Kentucky, Lindsey Graham of South Carolina, Thom Tillis of North Carolina, Roger F. Wicker of Mississippi, Josh Hawley of Missouri, Kelly Loeffler of Georgia, Tom Cotton of Arkansas, Mike Braun of Indiana, Joni Ernst of Iowa, Ron Johnson of Wisconsin, James M. Inhofe of Oklahoma, Ben Sasse of Nebraska, Roy Blunt of Missouri, John Boozman of Arkansas, John Hoeven of North Dakota, Steve Daines of Montana, Jerry Moran of Kansas, Cindy Hyde-Smith of Mississippi, James E. Risch of Idaho, James Lankford of Oklahoma, Tim Scott of South Carolina, John Thune of South Dakota, John Barrasso of Wyoming, David Perdue of Georgia, Marsha Blackburn of Tennessee, Bill Cassidy, M.D. of Louisiana, Kevin Cramer of North Dakota, John Cornyn of Texas, Richard Shelby of Alabama, Mike Lee of Utah, Rick Scott of Florida, Ted Cruz of Texas, Marco Rubio of Florida, Mike Rounds of South Dakota, Mike Crapo of Idaho, Todd Young of Indiana, and Richard Burr of North Carolina.[1]

As Senators, *Amici* have a strong interest in ensuring that the First Amendment's guarantee of the free exercise of religion is enforced with vigor. This includes an interest in curtailing overreach by State Governments and in seeing that State Governors do not violate religious liberties in their zeal to eliminate COVID-19.

[1] No counsel for any party authored this brief in whole or in part, and no person other than *Amici* made a monetary contribution to its preparation or submission. Applicants and Respondent have consented to the filing of this brief.

Accordingly, *Amici* respectfully support the application to vacate the Sixth Circuit's stay of the district court's preliminary injunction.

SUMMARY OF THE ARGUMENT

Religious freedom is a fundamental right protected by the First and Fourteenth Amendments. That protection extends to the religious education carried out in religious schools no less so than the worship practiced in a church, synagogue, or mosque. *See, e.g.*, *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (July 8, 2020). The Constitution has preserved the fundamental rights of all Americans through innumerable national crises, including wars, economic depressions, and health epidemics. But in the response to COVID-19, State Governors across the Country have restricted American freedoms in ways previously seen only in dystopian fiction—including by shutting down religious gatherings of all kinds, while inexplicably allowing many secular activities to continue unabated. *See, e.g.*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 2020 WL 6948354 (U.S. Nov. 25, 2020); *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 905 (W.D. Ky. 2020) (Walker, J.) ("On Holy Thursday, an American mayor criminalized the communal celebration of Easter.").

Governor Beshear's two executive orders at issue in this case (the "Orders") are yet another illustration of this phenomenon. The Orders shut down all K-12 schools—including religious schools—while allowing comparable secular institutions to remain open, including preschools, colleges, business offices, and entertainment venues like gambling parlors and bowling alleys. The district court correctly enjoined

the Orders as violating the free exercise of religion, and the Sixth Circuit panel was wrong to vacate that injunction. The panel blessed Beshear's Orders as religiously neutral only by myopically focusing on K-12 schools, while ignoring numerous other comparable secular activities. Under the correct view, a regulation lacks neutrality if it treats religious activity less favorably than *any comparable secular activity*, even if it treats religious activity the same as *some* secular activity. The Sixth Circuit also ignored that this case involves what this Court has referred to as "hybrid" rights—*i.e.*, activities that are protected by multiple constitutional rights—including, as relevant here, aspects of religious rights, parental rights, and speech rights. Strict scrutiny applies to Governor Beshear's closure of religious schools for both of these reasons, and the Sixth Circuit's stay should be vacated.

ARGUMENT

A. A Troubling Series of COVID-19 Shutdown Orders Have Trampled the Religious Rights of Americans Across the Country.

The First and Fourteenth Amendments protect the "free exercise" of religion, including religious education. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Our Lady of Guadalupe School*, 140 S. Ct. 2049. Under the Free Exercise Clause, State laws and edicts that impermissibly burden religious worship and instruction are subject to the "strictest scrutiny." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017). They can survive—if at all—only when narrowly tailored to further a compelling state interest. Strict scrutiny undoubtedly applies to laws that facially discriminate against religion. *Emp. Div., Dep't of Human Res. of*

Or. v. Smith, 494 U.S. 872, 879 (1990). And strict scrutiny applies even to a "neutral law of general applicability" when it burdens religion "in conjunction with other constitutional protections," such as the freedom of speech or "the right of parents … to direct the education of their children." *Id.* at 879–82.

For over two centuries, Americans have managed to protect religious freedom through all manner of trial and tribulation. Our Country has survived wars fought on the other side of the world, a foreign invasion, the Civil War, the Great Depression, famine, hurricanes, earthquakes, and many health epidemics—just to name a few—all without systematically shuttering churches and synagogues. By contrast, the governmental response to this pandemic has restricted American freedoms in ways dreamed up only by the authors of dystopian fiction—from total lockdowns to police raids on churchgoers to banning Thanksgiving dinner. *See Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604–05 (2020) (Alito, J., dissenting) ("States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion.").

In California, for example, the Governor "limited attendance at religious worship services to 25% of building capacity or 100 attendees, whichever is lower," while imposing no such cap on "factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614–15 (2020) (Kavanaugh, J., dissenting). As Justice Kavanaugh explained, "restrictions inexplicably applied to one group and exempted from another

do little" to combat COVID-19 but "do much to burden religious freedom." *Id.*

In Nevada, the Governor "limit[ed] indoor worship services to 'no more than fifty persons,'" with no comparable limit on bowling alleys, breweries, gyms, or casinos. *Calvary Chapel*, 140 S. Ct. at 2604 (Alito, J., dissenting). As Justice Alito explained, this "very likely" violated the Constitution through "discriminatory treatment of houses of worship." *Id.* While States inherently possess ample authority to respond to the coronavirus, "a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists." *Id.* at 2605. This is especially true once it becomes clear that "[t]he problem is no longer one of exigency, but one of considered yet discriminatory treatment of places of worship." *Id.*

Not to be outdone, the Governor of New York issued an edict even more severe. The Governor forbade worship services of more than 10 persons in a "red zone" and more than 25 persons in an "orange zone." *Roman Catholic Diocese of Brooklyn*, 2020 WL 6948354, at *2. At the same time, the Governor's favored list of essential businesses were permitted to host an unlimited number of persons, even in red zones. These "essential" businesses included "acupuncture facilities, camp grounds, garages," and "all transportation facilities." *Id.* Worse, in orange zones, "even non-essential businesses [could] decide for themselves how many persons to admit." *Id.* This Court correctly enjoined those discriminatory restrictions, explaining that they "strike at the very heart of the First Amendment's guarantee of religious liberty." *Id.* at *3.

B. Governor Beshear's Recent Orders Are Yet Another Unconstitutional Shutdown of Religious Activity.

That brings us to Kentucky Governor Andrew Beshear. On November 18, 2020, Governor Beshear issued the two Orders. The first mandates the closure of all public and private "elementary, middle and high schools," including religious schools. Application 2–3. But daycares, preschools, colleges, and universities are allowed to remain open. The second imposes some restrictions on various businesses but permits them to remain open as well. *Id.* The effect is to prohibit in-person religious instruction for grades K-12, while permitting all sorts of comparable secular gatherings at locations across Kentucky—including preschools, universities, bowling alleys, fitness centers, swimming and bathing facilities, wedding venues, and gambling parlors. *Id.* This is the same kind of burden on religion that the Court enjoined in *Diocese*, that Justice Kavanaugh warned of in *South Bay*, and that Justice Alito warned of in *Calvary Chapel*.

When Danville Christian Academy and the Kentucky Attorney General challenged Governor Beshear's Orders, the district court agreed that they violate the Constitution, and preliminarily enjoined them. Application Appendix ("Appx.") 10. The Orders are not neutral with respect to religion, the court said, because a person "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." Appx. 17. Moreover, people would be free to attend "preschools, colleges, and universities," but not religious instruction for K-12 schools. Appx. 18. Nor could the Governor adequately explain 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 C[OVID]-19, can remain open." *Id.*

But a Sixth Circuit panel disagreed and stayed the injunction. Appx. 5. It concluded that Beshear's Orders are "neutral and of general applicability" because they apply "to all public and private elementary and secondary schools," rather than differentiating between religious K-12 schools and secular K-12 schools. *Id.* As a result, the court held, the Orders are not subject to strict scrutiny under *Smith*.

Danville Christian Academy and the Kentucky Attorney General now ask this Court to vacate the Sixth Circuit's stay. We urge the Court to grant that request and restore the freedom to engage in religious instruction in Kentucky.

C. The Sixth Circuit Was Wrong to Vacate the Preliminary Injunction Against Governor Beshear's Unconstitutional Orders.

The Sixth Circuit panel was wrong for two reasons. First, Governor Beshear's Orders are not neutral under *Smith* because they treat many comparable secular activities more favorably than religious schools. Second, *Smith*'s lenient scrutiny does not apply to cases involving hybrid rights such as the combination of religious, parental, and speech rights at issue here.

1. Governor Beshear's Orders are not "neutral" under *Smith*, 494 U.S. at 879. As the district court understood, the Orders treat religious K-12 schools less favorably than many secular establishments: retail stores, colleges, and preschools remain open, but religious high schools must close. The Sixth Circuit rejected this common-sense

approach and instead took the willfully blind tack of asking only whether secular K-12 schools were closed alongside religious K-12 schools. Because all K-12 schools are closed under the Orders, the Sixth Circuit concluded that the Orders were "neutral."

The Sixth Circuit's approach is indefensible. Courts cannot cabin the neutrality inquiry to whether a single similarly situated secular activity is as equally disfavored as the protected religious activity. Rather, courts must consider the entire scope of the government's regulation to determine whether it is neutral. A regulation lacks neutrality if it treats religious activity less favorable than *any comparable secular activity*, even if it treats religious activity the same as *some* secular activity. This approach gives due respect to the free exercise of religion as a right expressly enumerated in the First Amendment.

This approach also closes a dangerous loophole. If this Sixth Circuit's contrary approach prevails, a government could wantonly prohibit protected religious activity simply by simultaneously prohibiting one similar type of secular activity, while allowing a full range of other comparable secular activity to continue unabated. For example, the Sixth Circuit would permit an attendance cap on religious services so long as retail businesses faced a similar cap, even if acupuncture facilities, gambling parlors, movie theaters, garages, or factories did not. *Compare* Appx. 67, *with Roman Catholic Diocese of Brooklyn*, 2020 WL 6948354, at *2. Such a rule would leave the Religion Clauses utterly toothless, and leave religious Americans at the mercy of their governments.

This rule that courts must conduct a comprehensive rather than cramped

neutrality analysis also follows from *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). There, this Court mandated an exceptionally broad and rigorous analysis for examining neutrality, instructing courts to "survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.* at 534. Courts must even look beyond "the text of the laws" to consider their operation and effect, because the Free Exercise Clause "forbids subtle departures from neutrality" and "covert suppression of particular religious beliefs." *Id.* To guard against "subtle" and "covert" departures from neutrality, the Court must examine the full scope of Beshear's Orders. It cannot ignore the gross disrespect for religious exercise in closing K-12 religious schools while allowing gambling parlors, bowling alleys, preschools, and colleges to stay open. The Application does not even require the Court to look beyond the text of the Orders; it simply requires a fair and clear-eyed look at the full scope of the Orders themselves.

The Court must also bear in mind Governor Beshear's prior record of religious shutdowns and lack of regard for Free Exercise rights when scrutinizing the Orders. In March, Beshear prohibited "mass gatherings," which applied to religious gatherings but not "shopping malls," "typical office environments," or "factories." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 611 (6th Cir. 2020). Days later, Beshear required non-"life-sustaining" organizations to close. *Id.* Consistent with his pattern, Beshear determined that "life-sustaining" did not include religious gatherings, but did include "[l]aundromats," "accounting services," "law firms," and "hardware stores." *Id.*

Under these orders, Kentucky State Police raided a "drive-in Easter service" held at Maryville Baptist Church and issued criminal notices to churchgoers worshiping in their own vehicles. *Id.* Police followed up with letters demanding that the wayward congregants "self-quarantine for 14 days or be subject to further sanction." *Id.* at 611–12. Is there any doubt that these orders targeted religion? Not according to a different Sixth Circuit panel, which enjoined the orders—twice—because of the "breadth of the ban on religious services, together with a haven for numerous secular exceptions." *Id.* at 616; *see also Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (enjoining the orders as to in-person worship services). Far from "subtle" or "covert," Beshear's brazen targeting of religion is in full view, and confirms the discriminatory structure of his new Orders.

2. *Smith* is inapplicable for a second reason. Although *Smith* held that strict scrutiny generally does not apply to "neutral law[s] of general applicability," it carved out "'hybrid' situations" involving "the Free Exercise Clause in conjunction with other constitutional protections," including the Speech Clause and the parental rights protected by the Due Process Clause. *Smith*, 494 U.S. at 879, 881–82.

For example, in *Wisconsin v. Yoder*, the Court struck down a facially neutral compulsory school-attendance law as applied to members of the Amish religion. 406 U.S. 205, 207 (1972). The Court flatly disagreed that the law could escape scrutiny merely because it was neutral and of "general applicability," *id.* at 220, particularly when "the interests of parenthood are combined with a free exercise claim," *id.* at 233. And in *Cantwell*, the Court reversed convictions under a facially neutral state law

against three members of a religious group for selling books, distributing pamphlets, and soliciting contributions or donations, as these activities involved both religion and speech. 310 U.S. at 305; *see also Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 629 (1980) (discussing the speech and religion rights at issue in *Cantwell*).

The same principles apply here. Beshear's Orders plainly trample religious freedom by shuttering religious schools. They also interfere with "the interests of parenthood," *Yoder*, 406 U.S. at 233, by forbidding parents from sending their children to religious school, *see Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). And they infringe the right to speak about religious topics during school. *See Calvary Chapel*, 140 S. Ct. at 2607 (Alito, J., dissenting) (explaining that Nevada's ban on "religious expression in houses of worship" violated the Free Speech Clause); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Strict scrutiny therefore applies because this case involves the hybrid rights of religion, parenting, and speech. And the Orders cannot possibly survive strict scrutiny because they are wildly over- and under-inclusive for stopping the spread of COVID-19. Indeed, not even the Governor argued below that his closure of religious schools could satisfy strict scrutiny. *See* Application 12 n. 9.

CONCLUSION

COVID-19 is undoubtedly a serious health threat, but the Constitution applies even in difficult times. This Court should again remind Governors across the Country that shutdown orders cannot trample Constitutional rights.

Date: December 4, 2020

Respectfully submitted,

/s/ John M. Gore

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