

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 for Stay to the Honorable Brett Kavanaugh,  
Associate Justice of the United States Supreme Court and  
Circuit Justice for the Sixth Circuit**

---

**MOTION BY KENTUCKY RELIGIOUS SCHOOLS AND PARENTS WITH  
ATTACHED PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANTS,  
FOR LEAVE (1) TO FILE THE BRIEF, (2) TO DO SO IN AN UNBOUND FORMAT ON  
8½-BY-11-INCH PAPER, AND (3) TO DO SO WITHOUT TEN DAYS' ADVANCE  
NOTICE TO THE PARTIES**

Christopher Wiest (KBA 90725)  
Chris Wiest, Atty at Law, PLLC  
25 Town Center Blvd, Suite 104  
Crestview Hills, KY 41017  
Cincinnati, OH 45241  
513/257-1895 (v)  
chris@cwiestlaw.com

Thomas Bruns (KBA 84985)  
*Counsel of Record*  
Bruns Connell Vollmar & Armstrong  
4750 Ashwood Drive, STE 200  
513-312-9890  
tbruns@bcvalaw.com

Robert A. Winter, Jr. (KBA #78230)  
P.O. Box 175883  
Fort Mitchell, KY 41017-5883  
(859) 250-3337  
robertawinterjr@gmail.com

*Counsel for Amicus Curiae*

**MOTION BY KENTUCKY RELIGIOUS SCHOOLS AND PARENTS WITH  
ATTACHED PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANTS,  
FOR LEAVE (1) TO FILE THE BRIEF, (2) TO DO SO IN AN UNBOUND FORMAT ON  
8½-BY-11-INCH PAPER, AND (3) TO DO SO WITHOUT TENDAYS' ADVANCE  
NOTICE TO THE PARTIES<sup>1</sup>**

Movants, who comprise various Kentucky religious schools and parents, whose Constitutional rights are being infringed by the challenged order, respectfully request leave of the Court to (1) file the attached amicus curiae brief in support of respondent and in opposition to applicant's emergency application for a writ of injunction, (2) file the brief in an unbound format on 8½-by-11-inch paper, and (3) file the brief without ten days' advance notice to the parties.

**Positions of the Parties**

Applicant Commonwealth of Kentucky, ex. rel. Daniel Cameron and the Respondent, Governor Andrew Beshear, does not oppose this motion. Applicant Danville Baptist Church and Respondent, as of this writing, have not informed amici of any position that it may have on the motion.

**Identities of Amici; Rule 29.6 Statement**

All the proposed amici are either nonprofit organizations or individuals that have no parent corporations and that are not owned, in whole or in part, by any publicly held corporation. They have a significant vested interest in this case, in that they filed suit over the same restrictions, in a companion case styled *Pleasant View Baptist Church v. Saddler*, EDKY 2:20-cv-00166, and are personally being harmed every day as a consequence of the complained of actions.

---

<sup>1</sup> No counsel for a party authored this motion or the proposed amicus brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to fund the motion's or brief's preparation or submission.

The proposed Amici are:

- A group of Kentucky private religious schools, their associated churches, and pastors:  
Pleasant View Baptist Church, Pleasant View Baptist School, Pastor Dale Massengale, Veritas Christian Academy, Highlands Latin School, Maryville Baptist Church, MICAH Christian School, Pastor Jack Roberts, Mayfield Creek Baptist Church, Mayfield Creek Christian School, Pastor Terry Norris, Faith Baptist Church, Faith Baptist Academy, Pastor Tom Otto, Central Baptist Church, Central Baptist Academy, Pastor Mark Eaton, Cornerstone Christian Church, Cornerstone Christian School; and
- Parents of children who attend Kentucky religious schools: Wesley Deters, Mitch Deters, on behalf of themselves and their minor children, MD, WD, and SD John Miller, on behalf of himself and his minor children BM, EM, and HM.

### **Interests of Amici; Summary of Brief**

Applicants argue that Governor Beshear’s ban on in-person religious school instruction violates the Free Exercise Clause of the First Amendment of the United States Constitution. The proposed brief brings forth the perspective of religious institutions, churches that sponsor them, and parents, concerning the Free Exercise Clause issue, and other constitutional issues.

The Brief explains, in detail, the religious history that is intertwined with faith-based schools in the Commonwealth of Kentucky, and in the Country. It explains, in detail, the backdrop of exceptions that apply to the Governor’s order, the nature of the comparators that are at issue, and as a consequence, draws the conclusion that the order is neither neutral nor generally applicable. The brief also explains that the Governor’s order violates other fundamental constitutional rights.

### Format and Timing of Filing

Applicant filed its application on December 1, 2020. In light of case deadlines, there was insufficient time for the proposed amici to prepare their brief for printing and filing in booklet form, as ordinarily required by Supreme Court Rule 33.1. Nor, for the same reason, were the proposed amici able to provide the parties with ten days' notice of their intent to file the attached brief, as ordinarily required by Rule 37.2(a). But the proposed amici did provide notice of their intent to file the brief to the parties on the day before the emergency application was publicly docketed.

\* \* \* \* \*

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

Respectfully submitted,

/s/Thomas Bruns

Thomas Bruns (KBA 84985)  
*Counsel of Record*  
Bruns, Connell, Vollmar & Armstong  
4750 Ashwood Drive, STE 200  
Cincinnati, OH 45241  
tbruns@bcvalaw.com  
513-312-9890

Christopher Wiest (KBA 90725)  
Chris Wiest, Atty at Law, PLLC  
25 Town Center Blvd, Suite 104  
Crestview Hills, KY 41017  
859/486-6850 (v)  
513/257-1895 (c)  
859/495-0803 (f)  
chris@cwiestlaw.com

Robert A. Winter, Jr. (KBA #78230)  
P.O. Box 175883

Fort Mitchell, KY 41017-5883  
(859) 250-3337  
robertawinterjr@gmail.com  
*Counsel for Amicus Curiae*

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 Kavanaugh,  
Associate Justice of the United States Supreme Court and  
Circuit Justice for the Sixth Circuit**

---

**AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANTS MOTION FOR STAY OF  
SIXTH CIRCUIT PANEL ORDER GRANTING STAY BY KENTUCKY RELIGIOUS  
SCHOOLS AND PARENTS**

Christopher Wiest (KBA 90725)  
Chris Wiest, Atty at Law, PLLC  
25 Town Center Blvd, Suite 104  
Crestview Hills, KY 41017  
Cincinnati, OH 45241  
513/257-1895 (v)  
chris@cwiestlaw.com

Thomas Bruns (KBA 84985)  
*Counsel of Record*  
Bruns Connell Vollmar & Armstrong  
4750 Ashwood Drive, STE 200  
513-312-9890  
tbruns@bcvalaw.com

Robert A. Winter, Jr. (KBA #78230)  
P.O. Box 175883  
Fort Mitchell, KY 41017-5883  
(859) 250-3337  
robertawinterjr@gmail.com

*Counsel for Amicus Curiae*

**TABLE OF CONTENTS**

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

INTEREST OF AMICUS CURIAE.....1

STATEMENT OF THE CASE.....2

SUMMARY OF THE ARGUMENT.....5

ARGUMENT.....5

    I.    Governor Beshear’s total ban on in-person religious school instruction, while  
          permitting comparable secular activities to continue, violates the Free Exercise  
          clause.....5

    II.   Governor Beshear’s orders constitute additional constitutional violations,  
          triggering strict scrutiny that is not met here.....12

CONCLUSION.....14

**TABLE OF AUTHORITIES**

*Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).....10

*Clark v. Jeter*, 486 U.S. 456, 461 (1988).....11

*Cooper v. Harris*, 137 S. Ct. 1455, 1468 (2017).....5

*Commonwealth of Kentucky ex. rel. Attorney General Daniel Cameron v. Andrew Beshear*, --- F.3d --- (6<sup>th</sup> Cir. 2020).....7

*DeJonge v. Oregon*, 299 U.S. 353 (1937).....13

*Employment Div. v. Smith*, 494 U.S. 872, 881 (1990).....13

*Farrington v. Tokushige*, 273 U.S. 284 (1927).....13

*Meyer v. Nebraska*, 262 U.S. 390 (1923).....12

*NAACP v. Button*, 371 U.S. 415, 430 (1963).....13

*Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419, 423 (6<sup>th</sup> Cir. 1996).....13

*Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).....8

*Pierce v. Society of Sisters*, 268 U.S. 510 (1925).....12

*Roberts v. Neace*, 958 F.3d 409 (6<sup>th</sup> Cir. 2020).....*passim*

*Roberts v. United States Jaycees*, 468 U.S. 609, 617-618 (1984).....13

*Roman Catholic Diocese of Brooklyn, New York, v. Andrew M. Cuomo, Governor of New York*, 20A87, 592 U.S. --- (2020).....*passim*

*Runyon v. McCrary*, 427 U.S. 160, 178 (1976).....13

*Troxel v. Granville*, 530 U.S. 57, 66 (2000).....13

*Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927, 931 (6<sup>th</sup> Cir. 1991).....13

*Ward v. Polite*, 667 F.3d 727, 738 (6<sup>th</sup> Cir. 2012).....5, 6

*Wisconsin v. Yoder*, 406 U.S. 205 (1972).....13

**Additional Authorities**

Catechism of the Catholic Church 8 (2d ed. 2016).....3

Code of Canon Law, Canon 793, §1 (Eng. transl. 1998).....3

*Collins, Louanne (1996). Macclesfield Sunday School 1796- 1996. Macclesfield, Cheshire: Macclesfield Museums Trust. ISBN 1-870926-09-9; Towns, Elmer L., "History of Sunday School", Sunday School Encyclopedia, 1993.....2*

EARLY KENTUCKY CHURCH RECORDS, Willard Rouse Jillson, Register of Kentucky State Historical Society, Vol. 36, No. 115 (April, 1938).....3

Fort, Paul Leicester. *The New-England Primer* (NY, 1899).....2

Kentucky Healthy at Work Directives, <https://govstatus.egov.com/ky-healthy-at-work> .....7

King James Bible, Deuteronomy 5:5-7.....2

King James Bible, Proverbs 22:6.....5

*JCPS Teachers and Organizations Form NTI Camps, Wave 3 News, <https://www.wave3.com/2020/08/12/jcps-teachers-organizations-form-nti-camps-help-students-through-virtual-learning/> .....3*

Monaghan, E. Jennifer (2006) *Learning to Read and Write in Colonial America*.....2

Smith, Samuel J., "New England Primer" (2008). Faculty Publications and Presentations. 100. [https://digitalcommons.liberty.edu/educ\\_fac\\_pubs/100](https://digitalcommons.liberty.edu/educ_fac_pubs/100).....2

## INTEREST OF AMICUS CURIAE

Pleasant View Baptist Church, Pleasant View Baptist School, Pastor Dale Massengale, Veritas Christian Academy, Maryville Baptist Church, MICAH Christian School, Pastor Jack Roberts, Mayfield Creek Baptist Church, Mayfield Creek Christian School, Pastor Terry Norris, Faith Baptist Church, Faith Baptist Academy, Pastor Tom Otto, Wesley Deters, Mitch Deters, on behalf of themselves and their minor children, MD, WD, and SD, Central Baptist Church, Central Baptist Academy, Pastor Mark Eaton, Cornerstone Christian Church, Cornerstone Christian School, and John Miller, on behalf of himself and his minor children BM, EM, and HM, (collectively the “Christian School *Amici*”), state that they are Plaintiffs in a related suit, involving certain of the same issues, and certain of the same claims, pending in the United States District Court for the Eastern District of Kentucky, styled *Pleasant View Baptist Church, et. al. v. Saddler, et. al.*, 2:20-CV-00166. Collectively, they represent 12 schools and the parents of over 10,000 students. They include parents from the Roman Catholic Diocese of Covington, such as *Amici* Wesley and Mitch Deters,<sup>1</sup> certain of their sponsoring churches, and numerous other parents adversely impacted by the Governor’s ban on private religious schools conducting any in-person instruction.

For each of the schools, their sponsoring churches, and parents, in-person instruction is a critical component of their religious observance, including the daily, in-person participation in corporate worship embedded into the school’s curricula. Indeed, in-person attendance at religious schools is critically interwoven with *Amici*’s practice of their respective faith traditions. *Cf.* Mathew 18:20. What some see as merely secular learning is anything but. History reflects

---

<sup>1</sup> The Diocese closed its schools to in-person instruction upon the Governor’s order, rescheduled the children to return to school upon the District Court’s preliminary injunction, and then closed again to in-person instruction upon the stay order entered by the Sixth Circuit. See, also, Appendix.

God's movement in the world over time; math reflects God's ordering of the universe; and religion class involves prayerful reflection on the sincere practice of faith.

The Governor's *de facto* prohibition on such in-person worship, through his ban on in-person instruction at private Christian schools, materially affects these parties free exercise of religion and other constitutional rights.

### **STATEMENT OF THE CASE**

Love the Lord your God with all your heart and with all your soul and with all your strength. These commandments that I give to you today are to be on your hearts. Impress them on your children. – King James Bible, Deuteronomy 5:5-7.

At the founding of the Republic, the practice of religion and the instruction and education of children were inseparable. Reading was taught to children primarily so that they could read the Bible.<sup>2</sup> Education, at that time, was biblically centered. As early as 1642, Massachusetts law required literacy instruction to all children, servants, and apprentices.<sup>3</sup> The 1647 Old Deluder Satan Act—in order to ensure that “learning may not be buried in the grave of our forefathers”—required every township of 50 households to hire a teacher. *Id.* The New England Primer, central to education in New England and beyond, was biblically centered.<sup>4</sup> And, the original purpose behind Sunday School was to teach children to read so that they could know the Bible.<sup>5</sup>

That history is strikingly similar to the founding of the Commonwealth. In fact, these Christian School *Amici* include one the earliest churches in the Commonwealth of Kentucky, and its interconnected school. As Kentucky was settled, pioneers were known to carry the Bible in

---

<sup>2</sup> Fort, Paul Leicester. *The New-England Primer* (NY, 1899); Monaghan, E. Jennifer (2006) *Learning to Read and Write in Colonial America*. Smith, Samuel J., "New England Primer" (2008). Faculty Publications and Presentations. 100. [https://digitalcommons.liberty.edu/educ\\_fac\\_pubs/100](https://digitalcommons.liberty.edu/educ_fac_pubs/100)

<sup>3</sup> Smith, Samuel J., "New England Primer" (2008). Faculty Publications and Presentations. 100. [https://digitalcommons.liberty.edu/educ\\_fac\\_pubs/100](https://digitalcommons.liberty.edu/educ_fac_pubs/100)

<sup>4</sup> *Id.*

<sup>5</sup> Collins, Louanne (1996). *Macclesfield Sunday School 1796- 1996. Macclesfield, Cheshire: Macclesfield Museums Trust. ISBN 1-870926-09-9*; Towns, Elmer L., "History of Sunday School", Sunday School Encyclopedia, 1993

one hand, and the musket in the other.<sup>6</sup> School, at that time, was held in the same building and space as Sunday church service, and the education of children was simply an extension of the practice of their faith.

Today, it is still true for some of the Christian School *Amici* that school is held in the same space where church service is held on Sundays. And, for all of the Christian School *Amici*, the education of children remains an integral part of the practice of their faith. The Catechism of the Catholic Church explicitly recognizes the right and duty of parents to choose the means and institutions through which they can provide more suitably for the Catholic education of their children. Code of Canon Law, Canon 793, §1 (Eng. transl. 1998).

Indeed, earlier this year, this Court made exactly that observation in *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). “Religious education is vital to many faiths practiced in the United States.” *Id.* at 2064. “In the Catholic tradition, religious education is ‘intimately bound up with the whole of the Church’s life.’” *Id.* at 2065, *citing* Catechism of the Catholic Church 8 (2d ed. 2016). “Under canon law, local bishops must satisfy themselves that ‘those who are designated teachers of religious instruction in schools . . . are outstanding in correct doctrine, the witness of a Christian life, and teaching skill.’ Code of Canon Law, Canon 804, §2 (Eng. transl. 1998).” *Id.*

“Similarly, Protestant churches, from the earliest settlements in this country, viewed education as a religious obligation.” *Id.* “Most of the oldest educational institutions in this country were originally established by or affiliated with churches, and in recent years, non-denominational Christian schools have proliferated with the aim of inculcating Biblical values in

---

<sup>6</sup> EARLY KENTUCKY CHURCH RECORDS, Willard Rouse Jillson, Register of Kentucky State Historical Society, Vol. 36, No. 115 (April, 1938)

their students.” *Id.* “Many such schools expressly set themselves apart from public schools that they believe do not reflect their values.” *Id.*

With a rise of COVID-19 in Kentucky, Governor Beshear, on November 18, 2020, issued executive order 2020-969. [Pl.’s Verified Compl, RE#1, ¶¶ 42-43, PageID#13, Exhibit 1, RE#1-1, PageID#39-40]. It provided that “[a]ll public and private elementary, middle, and high schools (kindergarten through grade 12) shall cease in-person instruction and transition to remote or virtual instruction beginning November 23, 2020.” *Id.*

However, and at the exact same time, Kentucky’s regulatory scheme continues to permit colleges, child care centers, and universities to remain open for in-person instruction. *Id.* at PageID#13, ¶45. Also permitted to remain open are libraries, distilleries, fitness centers, and indoor recreation facilities. *Id.* at ¶47, PageID#14. So are venues, event spaces and theatres. *Id.* at ¶48. Offices are allowed to remain open at 33% capacity. *Id.* at ¶49. And, in-person Sunday schools are permitted to remain open for in-person religious instruction. *Id.* at ¶52, PageID#15.

It should be noted that, in permitting childcare to remain open, Governor Beshear continues to allow classrooms of up to 15, with potentially hundreds of children receiving instruction in these centers in the exact same way as they would in traditional schools. [Christian School *Amici* Verified Complaint, RE#1, *Pleasant View Baptist Church v. Saddler*, EDKY 2:20-cv-00166, PageID#10, ¶31]. Indeed, children receive meals in these centers, as well as secular educational instruction, just as they do in traditional schools. *Id.* In fact, in-person camps, which are simply in-person secular classrooms, have been set up by public school teachers in Kentucky in order to have children engaged in in-person learning and receiving meals, just as those same children would do in traditional schools.<sup>7</sup> All of this, including a significant number of other

---

<sup>7</sup> <https://www.wave3.com/2020/08/12/jcps-teachers-organizations-form-nti-camps-help-students-through-virtual-learning/> (last visited 11/27/2020).

secular activities involving comparable risks from a COVID-19 perspective are permitted, but in-person instruction at private, religious schools is banned. *Id.*; [Pleasant View Verified Complaint, RE#1, at ¶¶ 30-38, PageID#10-11].

### **SUMMARY OF THE ARGUMENT**

First, Governor Beshear’s total ban on in-person religious school instruction, while permitting comparable secular activities to continue, violates the Free Exercise Clause.

Second, Governor Beshear’s orders constitute additional constitutional violations of the rights of these Christian School *Amici*.

### **ARGUMENT**

#### **I. Governor Beshear’s total ban on in-person religious school instruction, while permitting comparable secular activities to continue, violates the Free Exercise clause**

Train up a child in the way he should go: and when he is old, he will not depart from it. – King James Bible, Proverbs 22:6.

Earlier this year, in *Roberts v. Neace*, 958 F.3d 409, 413 (6<sup>th</sup> Cir. 2020), the Sixth Circuit cogently observed that “a law might appear to be generally applicable on the surface but not be so in practice due to exceptions for comparable secular activities,” citing *Ward v. Polite*, 667 F.3d 727, 738 (6<sup>th</sup> Cir. 2012).<sup>8</sup>

In framing the issue, and resolving it, that Court stated: “Do the four pages of exceptions in the orders, and the kinds of group activities allowed, remove them from the safe harbor for

---

<sup>8</sup> The Governor has, at times, also challenged the sincerity of the religious beliefs of Danville Christian Academy under the reasoning that, in the spring of 2020, at the outset of COVID-19, the school, armed with no knowledge of whether it could even safely operate, or whether it would endanger its staff and children, temporarily closed to in-person instruction. Under the Governor’s reasoning, a congregant of a church who is laid up by illness or out of town for work, and therefore unable to attend mass or weekly church service, would not be permitted to assert his religious freedoms when the congregant was not ill and not out of town. The Governor has advanced what is essentially a dangerous and unsustainable waiver doctrine that, if taken to its natural conclusion, would render the Free Exercise Clause inoperative. More to the point, the District Court found, as a matter of fact, that sincerely held religious beliefs motivated the challenges and the need for in-person instruction, and those findings are entitled to deference. *Cooper v. Harris*, 137 S. Ct. 1455, 1468 (2017).

generally applicable laws? We think so.” *Id.* “As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law.” *Id.*, citing *Ward*, 667 F.3d at 738. “At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.” *Id.* at 413-414.

As in *Roberts*, the issue here is whether the multitude of exceptions to the Governor’s orders “pose comparable public health risks to [in-person school and] worship services[?]” *Id.* In resolving that issue with respect to COVID-19, the *Roberts* Court properly looked to comparators, and specifically the exceptions for “‘life-sustaining’ businesses” which allowed “law firms, laundromats, liquor stores, gun shops, airlines, mining operations, funeral homes, and landscaping businesses to continue to operate so long as they follow social-distancing and other health-related precautions.” *Id.*

The *Roberts* Court did so, because that court also properly observed that “the reason a group of people go to one place has nothing to do with it”, with “it” being the risk of contagion from COVID-19. *Id.* at 416. “Risks of contagion turn on social interaction in close quarters; the virus does not care why they are there.” *Id.* “So long as that is the case, why do the orders permit people who practice social distancing and good hygiene in one place but not another for similar lengths of time?” *Id.* “It’s not as if law firm office meetings and gatherings at airport terminals always take less time than worship services.” *Id.* “If the problem is numbers, and risks that grow with greater numbers, there is a straightforward remedy: limit the number of people who can attend a service at one time.” *Id.* “All in all, the Governor did not customize his orders to the least restrictive way of dealing with the problem at hand.” *Id.*

Last Wednesday, this Court decided *Roman Catholic Diocese of Brooklyn, New York, v. Andrew M. Cuomo, Governor of New York*, 592 U.S. ---, 2020 U.S. LEXIS 5708 (2020). Just as the Sixth Circuit did earlier this year in *Roberts*, and rather than engaging in a perfunctory or deferential analysis, this Court in *Roman Catholic Diocese* looked not to the titles or labels placed on businesses, such as where Governor Cuomo called a business “essential,” but instead turned to an actual comparison of activities and their attendant risks. After all, if the governmental interest is in stopping the spread of disease in a pandemic, it is necessary to compare similar-risk activities. Titles are meaningless. In undertaking this proper analysis, this Court observed that “a health department official testified about a large store in Brooklyn that could ‘literally have hundreds of people shopping there on any given day.’” *Id.*

In contrast to this proper risk-based comparison, the Sixth Circuit panel below engaged in an impermissibly shallow, title-oriented approach that literally spanned a single sentence in its opinion. The panel stated: “Executive Order 2020-969 applies to all public and private elementary and secondary schools in the Commonwealth, religious or otherwise; it is therefore neutral and of general applicability and need not be justified by a compelling governmental interest.” *Commonwealth of Kentucky ex. rel. Attorney General Daniel Cameron v. Andrew Beshear*, --- F.3d --- (6<sup>th</sup> Cir. 2020).

The primary error committed by the Sixth Circuit panel below was its failure to acknowledge the myriad of exceptions to the Governor’s Executive Order not contained within the face of that order; compared to the four pages of exceptions at issue in *Roberts*, there are now magnitudes of additional exceptions not present in March and April of this year.<sup>9</sup>

---

<sup>9</sup> <https://govstatus.egov.com/ky-healthy-at-work> (last visited 12/1/2020)

This shallow, title-based analysis was rejected by this Court earlier this year, in a different context: “Requiring the use of the title would constitute impermissible discrimination...” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). “If titles were all-important, courts would have to decide which titles count and which do not, and it is hard to see how that could be done without looking behind the titles to what the positions actually entail.” *Id.* In *Our Lady of Guadalupe Sch.*, as here, “[w]hat matters, at bottom, is what a [restriction] does.” *Id.*

That then takes us back to this Court’s recent analysis in *Roman Catholic Diocese of Brooklyn*, where the Court reviewed a less restrictive measure: a 10-person capacity limitation, versus the outright prohibition mandated by Governor Beshear here. 2020 U.S. LEXIS 5708. And, notably, did so in a non-deferential manner to Governor Cuomo.

This Court in *Roman Catholic Diocese of Brooklyn*, 2020 U.S. LEXIS 5708 viewed the relevant comparators as “acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities.” In other words, as in *Roberts*, 958 F.3d 409, this Court in *Roman Catholic Diocese of Brooklyn*, engaged in a general comparison between activities based on the risk involved, regardless of the title applied to those activities. Specifically, the comparison was from the standpoint of the governmental interest asserted to justify the restriction: a comparison based on the spread of COVID-19.

As in *Roman Catholic Diocese of Brooklyn*, Governor Behsear continues to permit large stores that could “literally have hundreds of people shopping there on any given day.” *Id.* And, because the spaces for church capacity allowed for thousands to be admitted, this Court found that the restriction was not narrowly tailored. *Id.*

This Court in *Roman Catholic Diocese of Brooklyn* tracked the analysis in *Roberts* that “if the problem is numbers, and risks that grow with greater numbers, there is a straightforward remedy: limit the number of people who can attend a service at one time.” 958 F.3d 409, 416.

Turning to the comparators here, the Governor continues to permit in-person instruction at colleges, child care centers, and universities. [Pl.’s Verified Compl., RE#1, PageID#13, at ¶45]. He continues to permit libraries, distilleries, fitness centers, and indoor recreation facilities to remain open. *Id.* at ¶47, PageID#14. He continues to permit venues, event spaces and theaters to remain open. *Id.* at ¶48. He permits offices to remain open at 33% capacity. *Id.* at ¶49. And, thankfully, he permits Sunday schools to remain open to in-person instruction. *Id.* at ¶52, PageID#15.

In permitting childcare to remain open, Governor Beshear allows classroom sizes of up to 15, with potentially hundreds of children attending these centers, and with in-person classroom instruction occurring in the exact same way as in traditional schools. [Christian School *Amici* Verified Complaint, RE#1, *Pleasant View Baptist Church v. Saddler*, EDKY 2:20-cv-00166, PageID#10, ¶31]. Indeed, children receive meals in these centers, as well as secular educational instruction, just as they do in traditional schools. *Id.* In fact, in-person camps, which are simply secular classrooms, have been set up by public school teachers in Kentucky for in-person learning and receiving meals, just as these children would do in traditional schools.<sup>10</sup>

A significant number of other secular activities remain permitted that provide comparable risks from a COVID-19 perspective. *Id.*; [*Pleasant View* Verified Complaint, RE#1, at ¶¶ 30-38, PageID#10-11].

---

<sup>10</sup> <https://www.wave3.com/2020/08/12/jcps-teachers-organizations-form-nti-camps-help-students-through-virtual-learning/> (last visited 11/27/2020).

Rather than consider all of these ongoing, but allowed, risks in its analysis of the constitutionality of the Governor's order, the Sixth Circuit panel simply considered the title or label placed upon the prohibited activity in a single executive order. The problem with this shallow analysis, beyond its lack of narrow tailoring generally, is that it would rubber stamp blatant religious discrimination. After all, a religious gerrymander is not difficult to conceive following the Sixth Circuit panel's approach: government need not ban the free exercise of religion, it can just ban all gatherings where people gather for more than 45 minutes, and where there is standing and sitting that occurs within that period. However, the unconstitutional end would be achieved just the same.

Similarly, it would not be difficult to accomplish yet another religious gerrymander by following the Sixth Circuit panel's analysis to its conclusion: simply prohibit any gatherings in one order; and then carve out exceptions in a number of other orders that permits everything except the free exercise of religion. This reasoning defies the holding and import of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), which stands for the proposition that if a law appears to be neutral and generally applicable on its face, but in practice is riddled with exemptions or worse is a veiled cover for targeting a belief or a faith-based practice, the law satisfies the First Amendment only if it "advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests." It runs contrary to the principle that this Court's "inquiry must end with the text of the laws at issue." *Id.* at 534. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.*

According to the Sixth Circuit's shallow analysis below, these examples and blatantly discriminatory restrictions would be neutral and generally applicable. Of course, such a

restriction would not prohibit shopping, gambling, or even “acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities.” *Roman Catholic Diocese of Brooklyn*, 2020 U.S. LEXIS 5708.

As Justice Kavanaugh noted in *Roman Catholic Diocese of Brooklyn*, 2020 U.S. LEXIS 5708, here, Governor Beshear’s complete prohibition on in-person religious school instruction is a far more severe infringement than that at issue in other injunction pending appeal decisions. (Kavanaugh, J., concurring). Further, the complete prohibition on in-person instruction and worship imposed by Governor Beshear is a “strict and inflexible numerical cap[,]” of zero, that applies even to “large [schools] that ordinarily can hold hundreds of people and that, with social distancing and mask requirements, could still easily hold far more...” *Id.*

As noted, these prohibitions do not apply “to some secular buildings in the same neighborhoods.” *Id.* A religious school must adhere to a 0-person “attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction.” *Id.* And, secular daycares, universities, and colleges, that engage in the same exact activity as schools, and may even involve the same exact children? Those are permitted.

As for the Governor’s argument that he banned secular schools in the same grades, “it does not suffice for a State to point out that, as compared to houses of worship, some secular [educational opportunities] are subject to similarly severe or even more severe restrictions.” *Id.*

Even turning away from the businesses, and focusing on child educational opportunities, “once a State creates a favored class of [child educational opportunities such as daycares and daycamps], as [Kentucky] has done in this case, the State must justify why houses of worship

[and religious schools] are excluded from that favored class.” *Id.* Governor Beshear has not done so here, nor can he.

Attached in the appendix is a letter from the Superintendent of the Diocese of Covington to its parents, including *Amici* Wesley and Mitch Deters, which noted that now begins a significant holy season:

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.

Irreparable harm is just that, irreparable, and it is especially so here. With that in mind, and as Justice Kavanaugh noted in *Roman Catholic Diocese of Brooklyn*, 2020 U.S. LEXIS 5708, “[t]here also is no good reason to delay issuance of the injunctions, as I see it.”

The District Court’s preliminary injunction should be left in place, and the stay issued by the panel of the Sixth Circuit Court of Appeals vacated.

## **II. Governor Beshear’s orders constitute additional constitutional, triggering strict scrutiny that is not met here**

While not necessarily presented by the Applicants below, Governor Beshear’s order raises serious additional constitutional issues that were presented by these Religious School *Amici* in their complaint. Approximately 100 years ago, this Court established in *Meyer v. Nebraska*, 262 U.S. 390 (1923), that parents had the right to direct and control the education of their children, including as to curricula. Two years later, this Court decided *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). There, as here, the Plaintiff provided “secular and religious education and care of children.” *Id.* at 532. There, as here, “[s]ystematic religious instruction and moral training according to the tenets of the ... Church are also regularly provided.” *Id.* See, also, *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Wisconsin v. Yoder*, 406 U.S. 205

(1972); *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Runyon v. McCrary*, 427 U.S. 160, 178 (1976).

These *Amici* presented this claim below, coupled with a Free Exercise challenge.<sup>11</sup> As such, strict scrutiny is applied to review restrictions upon private religious schools. *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990); *Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419, 423 (6th Cir. 1996); *Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927, 931 (6th Cir. 1991).

The First Amendment guaranties the right “of the people peaceably to assemble.” This guaranty has also been incorporated against the states. *DeJonge v. Oregon*, 299 U.S. 353 (1937); *NAACP v. Button*, 371 U.S. 415, 430 (1963) (finding that “the First and Fourteenth Amendments protect certain forms of orderly group activity”). These rights, being fundamental rights, trigger strict scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

The right of association, also, is implicated where individuals associate to exercise other First Amendment rights, including the group exercise of religion or of speech. *Roberts v. United States Jaycees*, 468 U.S. 609, 617-618 (1984). There is no question but that these Plaintiffs have banded together to exercise, as a group, their sincerely held religious beliefs and other fundamental rights, which includes religious instruction of their children.

Can Governor Beshear meet strict scrutiny? The answer is no. While he may have a compelling interest in preventing the spread of COVID-19, all evidence to date suggests no spread going on in schools that implement public health and safety protocols.<sup>12</sup> Moreover, he

---

<sup>11</sup> The Motion for a Temporary Restraining Order and Preliminary Injunction remain pending, with the District Court having questioned whether the relief given to Danville Christian Academy and the Attorney General moots the case, and these *Amici* having responded to that question.

<sup>12</sup> <https://www.washingtonexaminer.com/news/school-is-safest-place-for-kids-to-be-cdc-director-says> (last visited 11/20/2020).  
<https://www.c-span.org/video/?c4924557/cdc-director-redfield-data-supports-face-face-learning-schools&fbclid=IwAR1Kp3HKvUhz8CJ1F8tGSISsMtmP0zNDJ3598kSC7sYffb6kDjhKS90zC0> (last visited 11/20/2020) (CDC Director confirming that all existing data demonstrates K-12 schools are not transmission pathways for the virus, in part due to safety protocols in place in schools).

could have required the private religious schools to operate like the daycares and universities where in-person classroom instruction continues, while perhaps requiring sanitation, distancing, size restrictions and other public health protocols (which all of these *Amici*, and Danville Christian Academy have been implementing all along).

### **CONCLUSION**

These *Amicus Curiae* respectfully request that this Court grant the Applicants' Motion for Stay of the Sixth Circuit's stay, reinstating the injunction granted by the District Court.

Dated December 2, 2020.

Respectfully submitted,

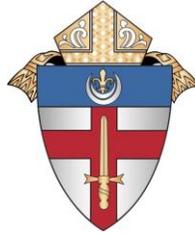
/s/Thomas Bruns

Thomas Bruns (KBA 84985)  
*Counsel of Record*  
Bruns, Connell, Vollmar & Armstong  
4750 Ashwood Drive, STE 200  
Cincinnati, OH 45241  
tbruns@bcvalaw.com  
513-312-9890

Christopher Wiest (KBA 90725)  
Chris Wiest, Atty at Law, PLLC  
25 Town Center Blvd, Suite 104  
Crestview Hills, KY 41017  
859/486-6850 (v)  
513/257-1895 (c)  
859/495-0803 (f)  
chris@cwiestlaw.com

Robert A. Winter, Jr. (KBA #78230)  
P.O. Box 175883  
Fort Mitchell, KY 41017-5883  
(859) 250-3337  
robertawinterjr@gmail.com  
*Counsel for Amicus Curiae*

## **APPENDIX**



DIOCESE OF COVINGTON  
Department of Catholic Schools

November 30, 2020

Dear Parents,

I write to you today from the same position we were in nearly two weeks ago. In our short term hope and excitement of continuing in-person learning, we learned on Sunday that the Sixth Circuit Court granted Governor Beshear's request for a stay of his executive order. This means we cannot return to school on Wednesday, December 2<sup>nd</sup> as planned and will have to continue NTI.

As you know from my previous letter, our intention is to continue in-person learning. Our students and staff have done a great job following the protocols in school to ensure everyone's safety and we are grateful for your support of these efforts. We do ask during this time that you continue to report student and household positive cases to your principal so we can continue monitoring the situation and be fully prepared when we are able to return to school.

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. While I know firsthand that NTI adds stress to families, I do hope you will be able to help your child(ren) participate in these Advent traditions.

Please continue to monitor your child(ren) during this time away from school and let us know if we can support them in any way. Our older students are especially vulnerable to the isolation and loneliness of NTI and all students can struggle with academics when they are learning alone. Since in-person "targeted services" are permitted, we can schedule meetings with school counselors and provide academic support services for those who are able to transport their children to school for these short periods of intervention.

As always, I ask that you continue to pray for an end to this pandemic and all those who are suffering as a result of it. We have many neighbors suffering physically and mentally and those who are struggling with job losses and financial burdens. Many are also struggling with the continuous changes this pandemic brings each day. It is only through God where we can truly find comfort from our burdens, so let us turn to Him during this time and remember to reach out to our neighbors in need, just as Jesus would.

Sincerely,

Mrs. Kendra McGuire  
Superintendent of Schools