No. 20A96

IN THE

Supreme Court of the United States

DANVILLE CHRISTIAN ACADEMY, INC., AND 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

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPLICANTS BY SAMUEL A. FRYER YAVNEH ACADEMY, MONTEBELLO CHRISTIAN SCHOOL, AND SAINT JOSEPH ACADEMY

GORDON D. TODD*
DINO L. LAVERGHETTA
LUCAS W.E. CROSLOW
CHRISTOPHER S. ROSS
MACKENZI J.S. EHRETT
ROBERT M. SMITH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
gtodd@sidley.com

Counsel for Movants

* Counsel of Record

(additional counsel listed on inside cover)

December 4, 2020

ALEXIS M. BUESE
SIDLEY AUSTIN LLP
1999 Avenue of the Stars
Los Angeles, CA 90067
(310) 595-9500

MICHAEL H. PORRAZZO
THE PORRAZZO LAW FIRM
30212 Tomas, Suite 365
Rancho Santa Margarita, CA 92688
(949) 348-7778

MICHAEL A. HELFAND
PEPPERDINE CARUSO SCHOOL OF LAW†
24255 Pacific Coast Highway
Malibu, CA 90263
(310) 506-4611

† *Institutional affiliation listed for identification purposes only*

Proposed *amici curiae* Samuel A. Fryer Yavneh Academy, Montebello Christian School, and Saint Joseph Academy (collectively "*amici*") respectfully move the Court for leave to file an *amicus curiae* brief in support of Applicants' Emergency Application to Vacate Stay, and to do so without 10 days' advance notice to the parties.

Given the expedited briefing schedule set by the Court, it was not feasible to give 10 days' notice as ordinarily required by Supreme Court Rule 37.2(a). Applicants have consented to the filing of this brief. Respondent has no objection to the filing of this brief.

INTERESTS OF *AMICI CURIAE*[1]

Proposed *amici* are religious schools in the state of California whose free exercise rights have been threatened by state and local COVID-19 restrictions. Each was prohibited from conducting in-person religious education even though comparable secular organizations, such as tutoring centers, camps, and childcare facilities, were allowed to meet in person.

The COVID-19 pandemic presents a challenge for policymakers, but it does not provide license to discriminate against religious entities. In submitting the attached brief, *amici* hope to draw further attention to a disturbing trend: government officials are imposing unconstitutional restrictions on religion not just in Kentucky but across the nation, in the name of public health. Executive Order 2020-269, issued by Kentucky

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[1] Proposed *amici* are nonprofit organizations not owned, in whole or in part, by any publicly held corporation. No counsel for a party authored this motion or the proposed *amicus* brief, 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.

Governor Andrew Beshear on November 18, 2020, is just one example.

As Applicants argue, the First Amendment prevents the government from using emergency public health regulations to target religion. Unless a law burdening religious exercise is neutral and generally applicable, it must be narrowly tailored to advance a compelling governmental interest. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531–32 (1993); see also *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, No. 20A87, 2020 WL 6948354, at *2 (U.S. Nov. 25, 2020) (per curiam). In this instance, the Sixth Circuit erred in finding that Executive Order 2020-269 was neutral and generally applicable and that it was therefore not subject to strict scrutiny. The panel compared the burden on religious schools under the executive order to the burden on secular schools under the order, but it disregarded exemptions for comparable secular activities in Executive Order 2020-968. This approach flouts both Supreme Court and Sixth Circuit precedent.

Kentucky may impose more or less stringent restrictions but it must apply the same rules for similarly situated activities discerned by reference to the harm-causing conditions the rules purport to remedy. If pandemic conditions are so bad as to warrant restrictions on religious activities, then such restrictions must be levied on all similar activities. If conditions are, in the Government's view, not so bad as to demand restrictions on secular activities, the Constitution prohibits levying them on comparable religious activities.

California Governor Gavin Newsom initially directed the closure of all schools, religious and secular, in a manner similar to Governor Beshear—through ex-

ecutive orders riddled with exceptions that, in the aggregate, disfavored religious activities in favor of comparable secular ones. In response to legal challenges from proposed *amici*, among others, California amended its regime to diminish regulations on religious schools and simultaneously increase restrictions on similarly situated secular conduct to achieve the parity the Constitution demands. A similar remedy could be deployed in this case.

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

Respectfully submitted,

ALEXIS M. BUESE
SIDLEY AUSTIN LLP
1999 Avenue of the Stars
Los Angeles, CA 90067
(310) 595-9500

MICHAEL A. HELFAND
PEPPERDINE CARUSO
SCHOOL OF LAW†
24255 Pacific Coast
Highway
Malibu, CA 90263
(310) 506-4611

MICHAEL H. PORRAZZO
THE PORRAZZO LAW FIRM
30212 Tomas, Suite 365
Rancho Santa Margarita,
CA 92688
(949) 348-7778

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LUCAS W.E. CROSLOW
CHRISTOPHER S. ROSS
MACKENZI J.S. EHRETT
ROBERT M. SMITH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
gtodd@sidley.com

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CHRISTOPHER S. ROSS
MACKENZI J.S. EHRETT
ROBERT M. SMITH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
gtodd@sidley.com

Counsel for Amici Curiae

* Counsel of Record

(additional counsel listed on inside cover)

December 4, 2020

ALEXIS M. BUESE
SIDLEY AUSTIN LLP
1999 Avenue of the Stars
Los Angeles, CA 90067
(310) 595-9500

MICHAEL H. PORRAZZO
THE PORRAZZO LAW FIRM
30212 Tomas, Suite 365
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PEPPERDINE CARUSO SCHOOL OF LAW†
24255 Pacific Coast Highway
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(310) 506-4611

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INTERESTS OF *AMICI CURIAE*[1]

Samuel A. Fryer Yavneh Academy, Montebello Christian School, and Saint Joseph Academy (collectively, "*amici*") are religious schools in California that have been injured by COVID-19–related restrictions treating religious education differently than comparable secular activities. *Amici* sued the state of California to vindicate their constitutional right to the free exercise of religion. While the challenge was partially successful, the schools remain subject to the prospect of renewed discrimination as public officials implement a metastatic patchwork of pandemic regulations. Los Angeles County and the City of Los Angeles, for example, each have separately imposed stricter restrictions on schools and reinstituted disparate regulations that the state of California abandoned.

Amici sympathize with Applicant Danville Christian Academy, which has suffered similar religious injury due to Executive Order 2020-269. *Amici* submit this brief to demonstrate that the actions taken by the state of Kentucky are not an aberration; Executive Order 2020-269 is just one in a series of pervasive restrictions implemented in multiple states that have infringed on free exercise rights in the name of public health. Accordingly, whatever order this Court issues will have collateral effects on COVID-19 suits across the nation—a fact this Court implicitly recognized when it recently vacated an order of the United States District Court for the Central District of California and remanded for consideration in light of *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, No. 20A87,

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[1] *Amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

2020 WL 6948354 (U.S. Nov. 25, 2020) (per curiam). See *Harvest Rock Church* v. *Newsom*, No. 20A94, 2020 WL 7061630 (U.S. Dec. 3, 2020) (mem.).

INTRODUCTION

Amici, along with Applicants and religious institutions across the country, have responsibly implemented policies to curb the spread of COVID-19. Indeed, a concern for bodily health, both their own and that of their neighbors, is at the heart of their respective faith traditions. *Amici* are not asking the state to deprioritize public health or to take the pandemic any less seriously.

What they are asking is to be treated equally. Since the onset of the pandemic, state and local governments have displayed a dangerous propensity to impose greater burdens on religious conduct than similarly situated secular activity, despite comparable levels of risk. Governmental authorities have judged that certain religious activities, such as in-person religious education, have less societal or economic value than analogous secular activities that have been allowed to continue.

Laws that target religious exercise must be narrowly tailored to advance a compelling governmental interest. While the state of Kentucky may have a compelling interest in slowing the spread of the COVID-19 virus, Executive Order 2020-269 is overly broad. Recognizing that its actions cannot survive normal constitutional standards, Respondent has argued that its actions do not violate the First Amendment because its Executive Order is neutral and generally applicable. But Respondent issued exemptions for comparable secular activities in Executive Order 202-268.

A year ago, such restrictions on core religious exercise would have seemed unthinkable. But times of crisis can cause us to forget our most cherished rights. We should not be so hasty. The Constitution applies just as much today in the midst of the pandemic. The Court should therefore grant the application and vacate the stay.

SUMMARY OF ARGUMENT

The First Amendment prohibits the government from enacting discriminatory public health measures that infringe the right to free exercise of religion. The right to free exercise protects in-person public worship. See *Diocese of Brooklyn*, 2020 WL 6948354, at *3 (noting that "remote viewing [of Mass] is not the same as personal attendance"). And it likewise protects in-person religious education, which is "vital to many faiths practiced in the United States," including Judaism and Christianity. *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2064–65 (2020).

The Free Exercise Clause ordinarily does not prohibit neutral laws of general applicability—laws that burden both religious and nonreligious conduct equally. *Emp't Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 879 (1990); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993). However, where a rule is *not* generally applicable, particularly where it contains a "system of individual exemptions," strict scrutiny applies. *Smith*, 494 U.S. at 884; *Lukumi*, 508 U.S. at 531–32, 543. Once the state creates a "favored class" exempt from an order, it must justify why a religious entity is excluded from that favored class. *Diocese of Brooklyn*, 2020 WL 6948354, at *8 (Kavanaugh, J., concurring) (citing *Lukumi*, 508 U.S. at 537–38). The question is not whether a rule

also disadvantages some nonreligious conduct, but rather whether it treats free exercise less favorably than some nonreligious conduct. The Court should ask whether a regulation is substantially underinclusive of comparable secular activities with a comparable effect on the asserted governmental interest. See *Lukumi*, 508 U.S. at 543. The government cannot act in a "selective manner." *Id.*

Here, the Sixth Circuit panel compared the burden on religious schools under the executive order to the burden on secular schools under the order, but it did not explain why the religious schools were excluded from the favored class of comparable secular activities, such as childcare facilities and tutoring centers. According to the panel, "religious schools are in the category of 'K–12 schools' because the reasons for suspending in-person instruction apply precisely the same to them," App. 6, but the panel did not explain why these reasons did not also apply beyond K–12 schools to comparable settings with similar risks of exposure.

An executive order closing religious K–12 schools is not generally applicable if secular daycares, colleges, and movie theatres remain open. "Comparable secular activities" are identified not based on a state's chosen categorization—whether based on physical location or topical similarity (here, "schools")—but by their relation to the governmental interest (here, slowing the spread of COVID-19). In other words, if a public health crisis is so serious that it warrants restricting gatherings at religious schools, then the government must restrict *all* secular activities with similar levels of risk.

This is not an isolated issue. California, like Kentucky, has pushed the envelope with COVID-19 restrictions that threaten religious liberty. But California chose to amend its state regulations; Kentucky

should do the same. To that end, the Court should grant the application to vacate the stay.

ARGUMENT

I. GENERAL APPLICABILITY MUST BE JUDGED ACCORDING TO THE INTEREST ASSERTED BY THE GOVERNMENT.

At a minimum," the First Amendment "prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available." *Diocese of Brooklyn*, 2020 WL 6948354, at *4 (Gorsuch, J., concurring) (citing *Lukumi*, 508 U.S. at 546 ("To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests.")). This protection extends to religious schools, and this Court has recognized that "[r]eligious education is vital to many faiths practiced in the United States," viewed by many as "a religious obligation" and "a matter of central importance." *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2064–65; see also *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 186 (2012).

In expressly protecting the free exercise of religion, the First Amendment establishes a "most-favored nation" status of sorts for religious practice: religious activities may not be treated less favorably than similar secular conduct. And, as this Court reiterated in *Diocese of Brooklyn*, general applicability requires more than a comparison of religious activity to secular activity that the *government* has deemed comparable. *Diocese of Brooklyn*, 2020 WL 6948354, at *2 (comparing New York's restrictions on big-box stores and houses

of worship). Rather, "[t]he Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Lukumi*, 508 U.S. at 534 (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). Thus, "in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'" *Id.* at 537 (quoting *Smith*, 494 U.S. at 884). A law that violates this requirement is invalid, regardless of the subjective motivation for adopting it, unless it can withstand "the most rigorous of scrutiny."[2] *Lukumi*, 508 U.S. at 546.

Kentucky Governor Andrew Beshear's COVID-19 orders are riddled with "individualized exemptions," but there are none for religious schools. See Application at 3–4. Executive Order 2020-269 closes every K–12 school in the Commonwealth—including Danville Christian—but not daycares or preschools. At the same time, Executive Order 2020-968 allows businesses including gyms, bowling alleys, and professional offices to remain open, subject to capacity limitations, social distancing, and mask mandates. Even

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[2] While not the focus of this brief, *amici* agree with *amicus* The Becket Fund for Religious Liberty that "[b]ecause the Governor's actions interfere with the right of parents under the Free Exercise Clause to direct 'the religious upbringing and education of their children,' this case comes within the ambit of *Wisconsin* v. *Yoder*, not the general rule of *Smith*." Becket Amicus Br. 2; see *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). As such, Respondent's restrictions on religious education are subject to strict scrutiny even if they are neutral and generally applicable (which in any case they are not). *Amici* advanced this argument in litigation against California. Mem. of Law Supp. Mot. for Prelim. Inj., *Samuel A. Fryer Yavneh Acad.* v. *Newsom*, No. 2:20-cv-7408 (C.D. Cal. Aug. 27, 2020), ECF No. 29-1.

"[i]ndoor venues, event spaces, and theaters" are permitted to welcome up to 25 people per room. *Id.* at 3. As a result, a teacher at Danville Christian may take her students to spend the afternoon in a movie theater, but is forbidden to teach them about the Gospel in a classroom. For that matter, a father can drop his four-year-old off at a parish preschool and go to work—but if he has a six-year-old, he has to stay home to oversee his child's "remote learning."

The district court correctly concluded that this violates the Free Exercise Clause. See App. 16–19. Like this Court did later the same day in *Diocese of Brooklyn*, the district court compared attendance at a religious school to nonreligious activities that pose a similar risk to the state's interest in limiting the spread of COVID-19: for instance, "attend[ing] a lecture, go[ing] to work, or attend[ing] a concert." *Id.* at 17. Viewed in that light, the burden on religious schools was not generally applicable to all relevant nonreligious conduct, even though it applied equally to nonreligious *schools*. *Id.* at 16–17. The district court therefore preliminarily enjoined the enforcement of Executive Order 2020-269 against religious schools in Kentucky that were adhering to applicable social distancing and hygiene guidelines. *Id.* at 19, 30.

This has long been the law. See *Lukumi*, 508 U.S. at 547 ("[A] law cannot be regarded as protecting an interest 'of the highest order' … when it leaves appreciable damage to that supposedly vital interest unprohibited." (omission in original) (quoting *Fla. Star* v.

B.J.F., 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in the judgment))).[3] Nevertheless, the Sixth Circuit panel stayed the district court's injunction, reasoning that because the Order "applies to all public and private elementary and secondary schools in the Commonwealth, religious or otherwise[,] it is therefore neutral and of general applicability."[4] App. 5.

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[3] See also, *e.g.*, *Parents for Privacy* v. *Barr*, 949 F.3d 1210, 1235 (9th Cir. 2020) ("[A] law is not generally applicable if its prohibitions substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect." (quoting *Stormans, Inc.* v. *Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015))), *pet. for cert. docketed*, No. 20-62 (U.S. July 23, 2020); *Cent. Rabbinical Cong. of U.S. & Can.* v. *N.Y. City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014) ("A law is … not generally applicable if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it."); *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.) ("A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated."); *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) (As long as a police department allowed officers to wear a beard for any reason, they had to allow Muslim officers to do so, regardless of the fact that most other officers were prohibited from wearing facial hair.).

[4] Because the panel concluded that the Order is neutral and generally applicable, it did not reach Respondent's further argument that the Order is narrowly tailored to advance a compelling governmental interest. App. 7. Curiously, the panel also asserted that "we also have no need to rely upon either *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Mem.) (Roberts, C.J., concurring), or *Jacobson v. Massachusetts*, 197

By comparing the burdened religious activity to an unduly cramped category of nonreligious activity—"nonreligious schools," rather than "nonreligious activities that present a comparable risk of viral transmission"—the court of appeals erroneously endorsed a significant and unwarranted intrusion on Applicant's religious freedom. Respondent presented no evidence that in-person religious education poses a greater risk than, for instance, moviegoing. The Order incoherently allows up to 25 people in an event space—say, for a wedding—but no fraction of that number in a school chapel. And yet the court of appeals deferred to Respondent's arbitrary categorization of activities, accepting without scrutiny that the only constitutionally relevant comparison for the treatment of religious schools is *non*religious schools.

The panel's misstep is illustrative of the pervasive confusion in the lower courts regarding the constitutional standard applicable to COVID-19 religious liberty claims. Worse, the Sixth Circuit's decision came *after* this Court clarified the applicable law in *Diocese of Brooklyn*. Further guidance is needed.

II. FACED WITH LITIGATION, CALIFORNIA CONFORMED ITS RESTRICTIONS ON RELIGIOUS SCHOOLS TO THE REQUIREMENT OF GENERAL APPLICABILITY, BUT KENTUCKY REFUSES TO DO THE SAME.

In response to COVID-19, California indefinitely suspended "in-person learning" effectively statewide. Cal. Dep't of Pub. Health, *COVID-19 and Reopening*

U.S. 11 (1905)." *Id.* The panel's implication that *Jacobson* might offer a relevant rule of decision if the Order were *not* generally applicable is troubling, especially in light of this Court's decision in *Diocese of Brooklyn*, which the panel distinguished as involving only "attendance at religious services." *Id.* at 5.

In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year (July 17, 2020), https://bit.ly/2Y4fCaI.

Like Applicants', *amici*'s sincere belief in the fundamental importance of in-person religious education is beyond dispute. *Amici*, as this Court recently recognized, hold that "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the[ir] mission." *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2064 (summarizing the key beliefs of Catholics, Protestants, Jews, Muslims, Mormons, and Seventh-Day Adventists in this regard). Moreover, *amici* schools believe this religious mandate can only be fulfilled in person. For example, school Mass and reconciliation—Catholic observances that require the physical presence of a Catholic priest—are central parts of the religious curriculum of *amicus* Saint Joseph Academy. Decls. of Lucas Heintschel & Chris Ambuul Supp. Mot. for Prelim. Inj., *Samuel A. Fryer Yavneh Acad.* v. *Newsom*, No. 2:20-cv-7408 (C.D. Cal. Aug. 27, 2020), ECF Nos. 29-4, 29-15.[5] Corporate prayer—which Jewish law conditions on the presence of a *minyan*, or quorum of adult men—is essential to religious education at *amicus* Yavneh Hebrew Academy. Decls. of Asher Peretz & Rabbi Shlomo Einhorn Supp. Mot. for

[5] The district court docket in the *Yavneh* matter contains extensive declarations, expert opinions, and other materials regarding the centrality of religion to *amici* schools' curricula and the fact that religious schools do not pose a greater health risk than similarly situated activities. Indeed, plaintiffs there assembled a vast array of medical literature demonstrating that while students are a minimal risk for COVID-19 infection or transmission, they suffer substantial educational, psychological, sociological, and other developmental harm from being precluded from attending school.

Prelim. Inj., *Samuel A. Fryer Yavneh Acad.* v. *Newsom*, No. 2:20-cv-7408 (C.D. Cal. Aug. 27, 2020), ECF Nos. 29-10, 29-20. These practices and many others are essential to *amici* schools' missions, and can only be performed in person.

Yet even while California refused to accommodate *amici*'s religious needs, it took pains to accommodate sundry nonreligious interests. The state allowed tens of thousands of day camps and childcare facilities to operate, including in the very school buildings closed to in-person education. See Sonja Sharp, *A Loophole Is Allowing Thousands of California Students to Use Pandemic-Shuttered Classrooms*, L.A. Times (Aug. 22, 2020), https://lat.ms/2Qmfu25. This created a sort of black market for in-person education, with "shadow schools" cropping up in bowling alleys, movie theaters, karate dojos, and arcades, where children could gather together and participate, largely unregulated, in "remote education." See Katy Murphy, *Shadow Schools? Class Is in Session—at the YMCA and Roller Rink*, Politico (Aug. 7, 2020), https://politi.co/2QiLnIJ. In other words, children could gather in a room to play, but not to pray, study the Bible, or observe religious milestones in school.

In the face of multiple lawsuits, including by *amici*, the state issued "cohort guidance" that allowed daycares, camps, and other supervised care environments to operate at full capacity, so long as children were placed in small cohorts. See Cal. Dep't of Pub. Health, *Guidance Related to Cohorts* (Sept. 4, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/small-groups-child-youth.aspx. But this was an ineffective half-measure. Schools were allowed to open only at 25 percent capacity and only to provide a subset of services, not including religious education. See

Cal. Dep't of Pub. Health, *Providing Targeted, Specialized Support and Services at School* (Sept. 4, 2020), https://bit.ly/2ZRotNQ. Religious schools could offer in-person assistance to students with learning disabilities or to English-language learners, but still could not practice their religion freely.

Ultimately, after extensive litigation and negotiation, *amici* reached a settlement with the State that permitted religious schools to open at full capacity, as long as the schools follow the cohort guidance applicable to comparable nonreligious activities. Stipulated Order of Dismissal, *Samuel A. Fryer Yavneh Acad.* v. *Newsom*, No. 2:20-cv-7408 (JAK) (C.D. Cal. Oct. 28, 2020), ECF No. 63. California chose to bring religious activity into parity with comparable nonreligious activity, after months of disparate treatment.[6] Kentucky should follow California's lead—either voluntarily or because this Court compels it to do so. There is no basis in science, policy, or common sense to shutter religious schools but not daycares, preschools, gyms, and movie theaters.

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[6] California could also have done the opposite, by subjecting nonreligious activities to the same restrictions imposed on religious schools. "Whenever government impermissibly treats like cases differently, it can cure the violation by either 'leveling up' or 'leveling down.'" *Comptroller of Treasury* v. *Wynne*, 135 S. Ct. 1787, 1806 (2015). That possibility moots any concern that respecting religious liberty may come at the cost of damaging the public health. A government that is urgently concerned about the spread of COVID-19 will be equally concerned whether that spread is happening at a church, a religious school, an office building, a movie theater, or a political demonstration. A public health risk severe enough to justify curtailing public worship and religious education is severe enough to justify closing cannabis dispensaries and movie theaters as well.

More broadly, the Court should grant the Application and take the opportunity to clarify the constitutional standard applicable to this case. Though California relented and agreed to respect *amici*'s religious freedom, Los Angeles County (among other jurisdictions) purports to have adopted its own restrictions that once again subject religious schools to greater burdens than comparable nonreligious activities such as daycares and camps. See Cty. of Los Angeles Dep't of Pub. Health, Order of the Health Officer, *Temporary Targeted Safer at Home Health Officer Order for Control of COVID-19: Tier 1 Substantial Surge Response* (Rev. Order Nov. 28, 2020), http://publichealth.lacounty.gov/media/coronavirus/docs/HOO/HOO_SaferatHome_SurgeResponse.pdf [hereinafter L.A. Cty. Safer at Home Order]. So too the City of Los Angeles has adopted an order incorporating the County's restrictions on schools, but still treating daycares and camps more leniently. City of Los Angeles Office of the Mayor, *Targeted Safer at Home Order* (Dec. 2, 2020), https://bit.ly/2IfCGi4.

Religious schools in Los Angeles again find themselves in a position that has become all too common in the United States: their religious mission has been adjudged to be of lesser value than comparable secular activity. Schools may open at 25 percent capacity for English learners, students with Individualized Education Programs, and an amorphous category of "students not participating in distance learning." See L.A. Cty. Safer at Home Order, *supra*. But, not one school may open to attend to the spiritual needs of even one devout student. Childcare facilities may occupy every room in a building. *Id.* But, for religious education, that same building remains shuttered to rabbis, clergy, and their pupils. In Los Angeles, libraries, malls, hair salons, television studios, tattoo parlors—

the list goes on—are all treated more favorably than religious schools. *Id.*

Without further guidance from this Court, *amici*, Danville Christian, and innumerable religious schools throughout the country will continue to face either the reality or the constant threat of having their right to free exercise ignored. "[E]ven in a pandemic, the Constitution cannot be put away and forgotten," *Diocese of Brooklyn*, 2020 WL 6948354, at *3—but in recent months, it all too often has been. It is up to this Court to right that wrong.

CONCLUSION

Amici appreciate the challenges that state officials face in combatting COVID-19. But Kentucky's public health restrictions have not happened in a vacuum; they reflect a devaluing of religious rights occurring nationwide. The Sixth Circuit erred in holding that Governor Beshear's order was generally applicable. The panel's conclusion that the order was nondiscriminatory because it applied to both religious and secular schools ignored the correct comparator: whether the state is regulating secular activities with a comparable risk of spreading COVID-19. It is not. Executive Order 2020-269 is not generally applicable. As the District Court properly held, the order is subject to strict scrutiny and thus violates the Free Exercise Clause of the First Amendment.

This Court should grant the application to vacate the stay and clarify that Kentucky must place religious schools on equal footing with preschools, day camps, day cares, and other activities that pose a comparable risk of COVID-19 transmission.

Respectfully submitted,

ALEXIS M. BUESE
SIDLEY AUSTIN LLP
1999 Avenue of the Stars
Los Angeles, CA 90067
(310) 595-9500

MICHAEL A. HELFAND
PEPPERDINE CARUSO
SCHOOL OF LAW†
24255 Pacific Coast
Highway
Malibu, CA 90263
(310) 506-4611

MICHAEL H. PORRAZZO
THE PORRAZZO LAW FIRM
30212 Tomas, Suite 365
Rancho Santa Margarita,
CA 92688
(949) 348-7778

GORDON D. TODD*
DINO L. LAVERGHETTA
LUCAS W.E. CROSLOW
CHRISTOPHER S. ROSS
MACKENZI J.S. EHRETT
ROBERT M. SMITH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
gtodd@sidley.com

Counsel for Amici Curiae

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* Counsel of Record

† *Institutional affiliation listed for identification purposes only*