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

MOTION BY MULTIPLE PRIVATE KENTUCKY RELIGIOUS SCHOOLS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS' EMERGENCY APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION

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Proposed *amici curiae* respectfully move for leave to file the accompanying brief in support of the Applicants. Providing 10 days' notice to the parties as required under Rule 32.7(a) was not possible because the request for a response to the Application was docketed three days before the response was due.

POSITIONS OF THE PARTIES

The Applicants, Danville Christian Academy, Inc. and the Commonwealth of Kentucky, *ex rel.* Attorney General Daniel Cameron, and the Respondent, Governor Andrew Beshear, have consented to the filing of this *amici* brief.

IDENTITY OF *AMICI*; RULE 29.6 STATEMENT

Each of the proposed *amici* is a nonprofit organization with no parent corporation and is not owned, in whole or in part, by any publicly held corporation. The proposed *amici*, comprising 17 private religious schools from throughout the Commonwealth of Kentucky, are:

- Bourbon Christian Academy in Paris, founded in 2002, with an enrollment of approximately 55 students;
- Christian Academy of Lawrenceburg, founded in 1995, with an enrollment of approximately 147 students;
- Foundation Christian Academy in Bowling Green, founded in 1995, with an enrollment of approximately 365 students;
- Gethsemane Educational Institute in Barren County, founded in 2015, with an enrollment of approximately 41 students;
- Grace Christian Academy in Owensboro, founded in 2019, with an enrollment of approximately nine students;
- Heritage Christian Academy in Hopkinsville, founded in 1994, with an enrollment of approximately 450 students;
- Heritage Christian School in Owensboro, founded in 1984, with an enrollment of approximately 200 students;

- Kentucky Christian Academy in Campbellsville, founded in 1986, with an enrollment of approximately 150 students;
- Lexington Christian Academy in Lexington, founded in 1989 upon the merger of Lexington Christian School and The Academy, with an enrollment of approximately 1,164 students;
- Lexington Latin School in Lexington, founded in 2003, with an enrollment of approximately 300 students;
- Portland Christian School in Louisville, founded in 1924, with an enrollment of approximately 325 students;
- Somerset Christian School in Somerset, founded in 2003, with an enrollment of approximately 307 students;
- Summit Christian Academy in Lexington, founded in 1986, with an enrollment of approximately 127 students;
- Trinity Christian Academy in Lexington, founded in 1988, with an enrollment of approximately 440 students;
- Valor Christian Academy in Owensboro, founded in 2012, with an enrollment of approximately 110 students;
- Whitefield Academy in Louisville, founded in 1976, with an enrollment of approximately 433 students; and
- Woodford Christian School in Versailles, founded in 1999, with an enrollment of approximately 63 students.

INTERESTS OF *AMICI* AND SUMMARY OF BRIEF

Collectively, the proposed *amici* ("the Religious Schools" or "the Schools") serve more than 4,600 K–12 students and have provided Christian-based education for nearly 475 years. Like the Applicant school, the Religious Schools' faith compels them not only to educate young people, but to ground their teaching in a Christian worldview. To that end, they incorporate worship, prayer, and scripture into their daily instruction.

Though the Religious Schools represent several Christian denominations, each school believes that fulfilling its religious responsibilities requires in-person instruction, to the greatest extent possible. And the Schools, their administrators, faculty, staff, parents, and students have done everything asked of them to remain open for in-person instruction. They have followed the Governor's and the Kentucky Department of Education's guidelines. They have complied with the Centers for Disease Control and Prevention's ("CDC") social distancing guidelines. And they have regularly consulted with local public health officials and have submitted to those officials' inspections.

The Schools have also incurred significant financial expenses to provide safe, in-person learning during this academic year—*e.g.*, $392,000 for amicus Lexington Christian Academy. They have invested in plexiglass barriers, personal protective equipment, sanitation equipment, physical distancing screens and barriers, thermometers, additional desks and tables, Wi-Fi, signage, and medical supplies. Some amici have hired more faculty to add classes to ensure the students socially distance while sitting in class and have hired more staff whose sole responsibility is continual sanitizing of campus facilities. Some amici have even installed thermal imaging cameras, which allow them to scan entrants at the doorway, take their temperatures, and ensure they are properly wearing masks. And those cameras alert

school officials of suspect temperatures and deficient PPE, who in turn can keep the doors locked to prevent entry.

Despite all these efforts to provide safe in-person learning, Executive Order 2020-969 has forced not only the Religious Schools, but all Kentucky sectarian schools, to close for in-person instruction. In doing so, the Governor has substantially burdened the Schools' fundamental right to freely exercise their faith.

The proposed *amici* understand the real and irreparable constitutional injuries that the Applicant school will continue to experience if this Court does not step in to enforce the Applicant school's most cherished freedoms. The accompanying brief addresses: (1) the court of appeals' misapplication of *Roman Catholic Diocese of Brooklyn v. Cuomo*, ___ S. Ct. ____, 2020 WL 69483534 (Nov. 25, 2020); (2) the Governor's novel argument below that doing what the Free Exercise Clause compels—reopening religious schools in Kentucky—does not violate the Establishment Clause; and (3) how the closing of schools runs counter to science and public health guidance and causes greater harm to children than school closure orders purport to prevent.

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

Dated: December 4, 2020

Respectfully submitted,

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137 S. Ct. 2012 (2017) 12

Other Authorities

Alex Molnar, *Virtual Schools in the U.S. 2019*, National Education Policy Center (May 2019), https://bit.ly/33YNJ7I 14

American Academy of Pediatrics, *COVID-19 Planning Considerations: Guidance for School Re-entry* (last updated Aug. 19, 2020), https://bit.ly/3e3ZmgF 13, 14

Bethany Mandel, *'Remote Learning' is a disaster, and terrible for children*, THE NEW YORK POST (Sep. 16, 2020), https://bit.ly/3hZ2vOY (viewed Dec. 3, 2020) 15

Betheny Gross & Alice Opalka, *Too Many Schools Leave Learning to Chance During the Pandemic*, University of Washington Center on Reinventing Public Education (June 2020), https://bit.ly/39FfogT 15, 16

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Cinemark Century Theaters, https://bit.ly/33pSqpT 9

C-SPAN, *CDC Director Redfield Says Data Supports Face-to-Face Learning in Schools*, (Nov. 19, 2020), https://bit.ly/37Ae3F9 13

Derby City Gaming, COVID-19 Update, https://bit.ly/3mFvlqW 11

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Seth Barron, *School's Out for Autumn in New York*, WALL STREET JOURNAL (Nov. 20, 2020), https://on.wsj.com/3nWI0WC 13

Team Kentucky, *Healthy at Work, Requirements for Childcare Programs*, https://bit.ly/2Vx762c 7

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[1] All parties provided written consent to the filing of this brief. Providing ten days' notice to the parties as required under Rule 32.7(a) was not possible because the request for a response to the Application was docketed three days before the response was due. Counsel for *amici* still requested and received written consent. No counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than the *amici curiae*, their members, or their counsel, made such a monetary contribution.

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Despite all these efforts to provide safe in-person learning, Executive Order 2020-969 has forced not only the Religious Schools, but all Kentucky sectarian schools, to close for in-person instruction. This harms all private schools, which, unlike public schools, lose their funding streams when closed. More important, the Governor has substantially burdened the Religious Schools' fundamental right to freely exercise their faith.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A Christ-centered education holds to the principles of regular religious services, devotions, and corporate prayer. But it does much more: it approaches every subject with a goal of discipleship, aiming students to the worldview that God has created and designed all things for His glory.

Math, for instance, is the reflection of the order and logic God put into the universe. History is the story of what He has been doing since creation. Science is the study of how He has intricately designed all things. Language arts reflect God's personal nature and point to Him being our greatest communicator. The fine arts are a daily demonstration that we are made in God's image and thus within us is a creativity patterned after the Creator. And the faculty are more than just academics and instructors. They are a living testimony of Jesus Christ, seeking to model for their students what it means and how it looks to live for Him in everything they do.

In short, genuine Christian education equips students to live each day under the lordship of Jesus Christ. *This cannot be accomplished through a computer screen*. Yet by outlawing school attendance, that is what the Governor's edict effectively demands. The result? A law that violates the Free Exercise Clause, departs from the science and experts, and harms children.

Government discriminatory treatment of religion must end. Now. In the nine months since the COVID-19 pandemic began, state executives have consistently imposed more severe burdens on religious conduct than comparable secular activities. They do so without any showing that religious activities present a greater COVID-19 risk than their secular comparators. Instead, governments have consistently favored commerce over religion and—sometimes with a judicial seal of approval—have cloaked their disparate treatment of religious worship and education in terms like "emergency police powers" and "substantial discretion."

This Court's decision in *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, ___ S. Ct. ____, 2020 WL 6948354 (Nov. 25, 2020), made clear that "even in a pandemic," the Free Exercise Clause is not "put away and forgotten." *Id.* at *3. Not only did *Catholic Diocese* bring to an end the lower courts' leaning on a 100-year-old decision from this Court to displace modern constitutional analysis, *Catholic Diocese* made apparent that secular comparators to a church are not limited to other churches or even movie theaters, lecture halls, concert venues, and the like. They also include businesses such as retails stores, manufacturers, professional offices, transportation facilities, garages, hardware stores, bike repair shops, signage companies, liquor stores, and acupuncturists. *Id.* at *2; *see also id.* at *4 (Gorsuch, J., concurring).

Catholic Diocese's principal points each seemed clear: it's long overdue for courts to uphold our nation's first right, a law that values commerce over religion faces strict scrutiny, and the secular comparators to religious facilities are many. That is until four days later, when the Sixth Circuit granted the Governor's stay here, holding that the Governor's school closure order was neutral and generally applicable despite treating religious schools much worse than numerous secular activities.

In reaching that conclusion, the court of appeals made three errors. First, it limited the Applicant school's potential comparators to only public and secular schools, even though *Catholic Diocese* teaches that the comparator analysis does not require an apples-to-apples match. The Applicant school's comparators are plentiful and include better-treated facilities like movie theaters, indoor event venues, gyms, childcare centers, and professional offices. Second, the court of appeals—invoking an incomplete quote from *Catholic Diocese*—deferred to the Governor's judgment despite the multitude of better-treated comparators. And third, the court of appeals appears to have viewed the Applicant school's free-exercise right as lesser than that enjoyed by a church, synagogue, or mosque. In sum, the Sixth Circuit injected ambiguity into this Court's clear analysis and needs immediate correction before others follow it.

In the proceedings below, the Governor argued that any court order allowing Christian schools to operate while public schools are closed would violate the Establishment Clause by favoring religious schools over secular ones. The Sixth Circuit appropriately did not adopt this position. As this Court has recognized, the Religion Clauses sometimes *require* religious accommodation. And the Governor's position would eliminate the ability to provide such accommodation, whether by statute or by court order.

Finally, the Governor's discriminatory closure order and the Sixth Circuit's decision allowing that order to remain in effect run counter to all available science and public-health guidance regarding COVID-19 and schools. The result is that the Governor's order causes even greater harm to school children than the order is supposed to prevent.

The practical result of the Governor's temporary order is likely to be the permanent closure of many Kentucky religious schools. During a shutdown crisis, the public schools have no risk of losing their public funding stream. The exact opposite is true for private schools, where families pay tuition in exchange for the school's promise to provide in-person classroom instruction. The disparity is immense. So, when the Governor issues an order that discriminates against religious schools and violates the Free Exercise Clause, the damage he causes is not abstract. It inflicts permanent harm on individual students, their families, faculty and staff, and the schools themselves.

For all these reasons, *amici* ask that the Court grant the application and enjoin the enforcement of Executive 2020-969 against religious schools.

ARGUMENT

I. The lower court erroneously limited the Applicant school's comparators and unnecessarily injected ambiguity into this Court's clear analysis and holding in *Catholic Diocese*.

A law that effectively shutters places of worship, while permitting comparable secular facilities to continue to operate, "violate[s] 'the minimum requirement of neutrality' to religion." *Catholic Diocese*, 2020 WL 6948354, at *1–*2 (quoting *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993)). So too does the Governor's Executive Order, which closes the door on in-person religious education while keeping open the doors to places like indoor venues (*e.g.,* 25 people per room), gyms and fitness centers (33% capacity), professional service offices (33% capacity), and childcare facilities. EO 2020-968, ¶¶ 2, 6–9; Team Kentucky, *Healthy at Work, Requirements for Childcare Programs*, https://bit.ly/2Vx762c (viewed Dec. 3, 2020). An open religious school imperils public health no more than the non-constitutionally protected activities of catching a movie, working out at the local gym, meeting in a law firm's conference room, or cohorts of 10 at the daycare facility down the street.

The court of appeals below mistakenly held that the comparators to religious schools are only other schools—*i.e.*, public and secular private schools. *Commonwealth* v. *Beshear*, --- F.3d ----, 2020 WL 7017858, at *2–*3 (6th Cir. Nov. 29, 2020). But that's like limiting a synagogue's comparators only to churches and mosques. The facilities that this Court in *Catholic Diocese* determined were comparable to places of worship were not so limited. Instead, they included so-called "essential" businesses, like acupuncture clinics, garages, certain manufacturers, and transportation facilities, all of which New York treated better than places of worship. 2020 WL 6948354, at *2; see also *id.* at *4 (Gorsuch, J., concurring) (noting that New York's better-treated "essential" businesses also included hardware stores, bike

repair shops, signage companies, accounting and law firms, insurance agencies, laundromats, and liquor stores).

Three things led to the lower court's erroneous view of comparators. The court: (1) limited the Applicant school's potential comparators to only those identified in the Governor's school closure order, Executive Order 2020-969; (2) placed the Free Exercise Clause beneath the discretion of Governor; and (3) at least implicitly, viewed the Applicant school's free-exercise right as lesser than that of a church, synagogue, or mosque.

1. The most obvious reason for the court's erroneous conclusion is that it constrained itself to examining Executive Order 2020-969, the scope of which was limited to only schools. But the Governor's labyrinth of regulatory fiats and guidance goes well beyond Executive Order 2020-969 and includes, for example, Executive Order 2020-968, an order issued the same day as No. 2020-969 and that addresses a host of better-treated, comparable facilities, including: childcare facilities, movie theaters, gyms and fitness centers, and professional offices. EO 2020-968, ¶¶ 2, 6–8. The court of appeals thus short-changed its examination of potential comparators even though this Court had decided *Catholic Diocese* just days before. Had the court of appeals just examined one other order, No. 2020-968, and faithfully applied *Catholic Diocese*, the outcome would have been clear: The Governor's COVID-19 regulations treat comparable secular businesses and activities more favorably than religious schools.

It makes no difference to free-exercise analysis whether a State's discrimination is readily discernable from the face of an all-encompassing order or legislative act or found among a series of edicts or statutes that accomplish the same thing.

2. An also obvious reason for the lower court's erroneous view of what is a proper comparator for religious schools was its halting view of its obligation to uphold

the Constitution, even in times of crisis. The court, citing *Catholic Diocese*, wrote, "We are not in a position to second-guess the Governor's determination regarding the health and safety of the Commonwealth at this point in time." 2020 WL 7017858, at *3. This Court did acknowledge in *Catholic Diocese* that its members, who "are not public health experts," "should respect the judgment of those with special expertise and responsibility." 2020 WL 6948354, at *3. But that's just part of what this Court said. Deference has its limits. The First Amendment cannot be "put away and forgotten" in a pandemic or any other crisis. *Catholic Diocese*, 2020 WL 6948354, at *3. In fact, it is during such times that courts must be vigilant to ensure the States do not cross "constitutional red lines," such as "religious discrimination." *Calvary Chapel Dayton Valley* v. *Sisolak*, 140 S. Ct. 2603, 2614–15 (2020) (Kavanaugh, J., dissenting). Thus, "judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination . . . are raised." *Catholic Diocese*, 2020 WL 6948354, at *8 (Kavanagh, J., concurring)

Here, the Governor's crossing the line of religious discrimination "lead[s] to troubling results," if not irrational ones. *Id.* at *2. For instance, indoor venues like theaters can operate with up to 25 people in a room. EO 2020-968, ¶ 7. Some cinemas even offer private watch parties.[2] So a child can celebrate her birthday with up to 24 of her classmates at a local cinema, but she can't gather for school chapel with that same group. Those same children could also exercise together at a fitness center, so long as they socially distance. EO 2020-968, ¶ 6. Yet it's illegal for them to assemble for school prayer before math class. The group of friends could even go to Rupp Arena (15% capacity) and join 3,000 other socially-distanced fans to watch a Wildcats game. *Id.* But their principal, teacher, and parents would be scofflaws if those children assembled at school for a lesson on Christian apologetics.

[2] Cinemark Century Theaters, https://bit.ly/33pSqpT (viewed Dec. 3, 2020).

And perhaps the most troubling result? That group of children are able to cohort daily, and for hours, at a childcare center, and can even complete their virtual learning while there. But under the Governor's decree, they can't gather in-person for Bible class.

3. Finally, in restricting religious schools' comparators to only other schools, it appears as though the court of appeals viewed the Applicant school's free-exercise right as something less than that of churches, synagogues, and mosques. Otherwise, there is no explanation for why that court imposed such a limited view of religious schools' comparators, contrary to *Catholic Diocese*. But any view that a religious school's free-exercise right is lesser than that enjoyed by places of worship cannot be squared with the Free Exercise Clause. After all, "[t]he religious education and formation of students is the very reason for the existence of most private religious schools," *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020), just as the religious education and formation of people of faith is the very reason for houses of worship.

In sum, the lower court's reading of *Catholic Diocese* eschewed "a good rule of thumb for reading" this Court's decisions: "what they say and what they mean are one and the same." *Mathis* v. *United States*, 136 S. Ct. 2243, 2254 (2016). The court instead believed *Catholic Diocese* was distinguishable, and in doing so injected ambiguity into *Catholic Diocese*'s clarion analysis and holding. The lower courts that are upholding decrees that favor commerce over fundamental rights—and the state executives issuing them—need to be reminded again here that "Government is not free to disregard the First Amendment in times of crisis." *Catholic Diocese*, 2020 WL 6948354, at *4 (Gorsuch, J., concurring). It is only disregard for the First Amendment that can explain why, for example, two *amici* schools in Louisville are closed, while Derby City Gaming, also in Louisville, "[has] approximately 750 games available" for

patrons to come in and play under its state-favored, 33% capacity limit. Derby City Gaming, COVID-19 Update, https://bit.ly/3mFvlqW (viewed Dec. 3, 2020).

II. The Establishment Clause is not an affirmative defense.

In a novel argument, the Governor argued below that the district court violated the Establishment Clause by allegedly favoring religious schools over secular ones. CA6 ECF 22 at 35–36. This Court's precedents hold otherwise.

For example, in *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), this Court held that the Religious Land Use and Institutional Persons Act, which granted privileges to prisoners' religious exercise, did not violate the Establishment Clause. *Id.* at 724. The unanimous Court wrote that if RLUIPA violated the Establishment Clause, then "all manner of religious accommodations would fall. Congressional permission for members of the military to wear religious apparel while in uniform would fail, as would accommodations [the State] itself makes." *Ibid.* And in the years since *Cutter*, this Court has recognized that the Religion Clauses require private religious schools' exemption from generally applicable, anti-discrimination statues. *E.g.*, *Our Lady of Guadalupe*, 140 S. Ct. at 2066–67; *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *E.E.O.C.*, 565 U.S. 171, 188 (2012).

The Governor's argument *might* have *some* appeal *if* his Executive Orders shut down every secular establishment. But, as explained, the Orders don't do that. The Religious Schools' comparators comprise more entities than just secular schools closed under the Governor's order. Because under the Free Exercise Clause "it does not suffice for a State to point out that . . . *some* secular businesses are subject to similarly severe or even more severe restrictions" than religious organizations. *Catholic Diocese*, 2020 WL 6948354, at *8 (Kavanaugh, J., concurring). And it also does not suffice under the Establishment Clause for the Governor to point to only types of comparators that would be treated more harshly than religious schools if this

Court were to grant the requested relief. Given the "play in the joints between what the Establishment Clause permits and the Free Exercise Clause compels," there is more than sufficient room here to enforce the latter clause without violating the former. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 (2017) (citation and internal quotation marks omitted).

III. The closing of religious schools runs counter to science and public-health guidance and causes greater harm to children than school closure orders purport to prevent.

The Governor's closure of religious schools doesn't just violate the Constitution. It also goes against science, and it harms the children it seeks to protect.

A. Properly run schools are safe.

"A growing body of research in the U.S. and Europe finds that because of safety procedures, schools and child-care facilities aren't major vectors of Covid-19 transmission." Leslie Brody & Yoree Koh, *Why Some Schools Close as Covid-19 Cases Rise When Others Stay Open*, WALL STREET J. (Nov. 19, 2020), https://on.wsj.com/36eAK2z (viewed Dec. 3, 2020). Indeed, according to researchers at Brown University who tracked thousands of schools, the "infection positivity rates of students at schools with in-person learning were generally lower." *Ibid.* In New York City, for example, "[t]ens of thousands of children and staff [were] tested for Covid-19, with a reported case rate of only 0.19%. The school system is thus 15 times as safe as the city at large," showing it makes "little sense to close the schools to fight a rising second wave of infection." Seth Barron, *School's Out for Autumn in New York*, WALL STREET J. (Nov. 20, 2020), https://on.wsj.com/3nWI0WC (viewed Dec. 3, 2020).

Although the United States lacks a national tracking system for school-based cases, Spain's decision to keep schools open during the nation's second wave did not increase the risk of transmission. Brody & Koh, *supra.* And amid Great Britain's recent increased restrictions and expanded lockdown, schools are still open to in-

person instruction. Finally, "[t]he World Health Organization [has] advise[d] that there have been only limited cases of student-to-student transmission, and that school closures aren't an effective means of reducing community transmission." Barron, *supra*.

Thus, it is no surprise that the CDC has announced that "for kids K –12, one of the safest places they can be, from our perspective, is to remain at school." C-SPAN, *CDC Director Redfield Says Data Supports Face-to-Face Learning in Schools*, video at 02:12–02:23 (Nov. 19, 2020), https://bit.ly/37Ae3F9 (viewed Dec. 3, 2020). "Today there is extensive data," the CDC Director said, that "confirm that K–12 schools can operate with face-to-face learning, and they can do it safely and they can do it responsibly." *Id.* at 01:21–01:41.

B. School closures demonstrably harm children.

Not only are school closures ineffective in mitigating COVID-19, the closures harm children. The American Academy of Pediatrics has observed that "the importance of in-person learning is well-documented, and there is already evidence of the negative impacts on children because of school closures in the spring of 2020." Am. Acad. of Pediatrics, *COVID-19 Planning Considerations: Guidance for School Re-entry* (last updated Aug. 19, 2020), https://bit.ly/3e3ZmgF (viewed Dec. 3, 2020). The negative impacts go beyond learning to "social isolation," the inability to adequately address "learning deficits," "abuse, substance use, depression and suicidal ideation," and "considerable risk of morbidity." *Ibid.*

Studies show that students using a distance learning model underperform compared to students learning in-person. In 2019, the National Education Policy Center found that only 48.5% of virtual schools received acceptable performance ratings, with an average graduation rate of 50.1% that is "far short of the national average of 84%." Alex Molnar, *Virtual Schools in the U.S. 2019*, Nat'l Educ. Pol'y Ctr., at 9 (May 2019), https://bit.ly/33YNJ7I (viewed Dec. 3, 2020). The Stanford

University Center for Research on Education Outcomes conducted a similar study four years earlier, comparing distance learning students with students attending in-person classes. The Center's unsurprising conclusion? Virtual students showed "much weaker" academic growth. James L. Woodworth et al., *Online Charter School Study 2015*, CREDO, at 23 (2015), https://stanford.io/34gu2sj (viewed Dec. 3, 2020). The typical academic gains for math were "equivalent to 180 fewer days of learning," and for "72 fewer days" for reading. *Ibid.*

Distance learning particularly impedes the development of younger children. "In grades K– 3, children are still developing the skills to regulate their own behavior, emotions, and attention, and therefore struggle with distance learning." News Release, *Schools Should Prioritize Reopening in Fall 2020, Especially for Grades K–5, While Weighing Risks and Benefits*, THE NAT'L ACADEMIES OF SCIENCES, ENG'G, AND MED. (July 15, 2020), https://bit.ly/36E9xX1 (viewed Dec. 3, 2020). In addition, most distance-learning models rely on increased levels of parental involvement, which imposes unique burdens upon single parents, families with two working parents, and households with limited internet access. Brian Gill et al., *Inside Online Charter Schools*, MATHEMATICA POLICY RESEARCH, at 22–23, 39 (Oct. 2015), https://bit.ly/2Y52F0p (viewed Dec. 3, 2020).

Distance learning also requires increased screen time, which has proven harmful to children. As reported in a New York Presbyterian Hospital newsletter, a study by the National Institutes of Health that began in 2018 "indicates that children who spent more than two hours a day on screen-time activities scored lower on language and thinking tests." Jennifer F. Cross, *What Does Too Much Screen Time Do to Children's Brains?*, Health Matters Newsletter (2020), https://bit.ly/3mrTUYK (viewed Dec. 3, 2020). And children who spent more than seven hours a day on a screen "experienced thinning of the brain's cortex, the area of the brain related to critical thinking and reasoning." *Ibid.*

Plainly put, prolonged distance learning during the COVID-19 pandemic has harmed our children. News reports have described distance learning as an unmitigated disaster because of technological problems, limited student engagement, and screen time vastly exceeding what health experts recommend as safe for children. Bethany Mandel, *'Remote Learning' is a disaster, and terrible for children*, THE NEW YORK POST (Sep. 16, 2020), https://bit.ly/3hZ2vOY (viewed Dec. 3, 2020).

Recent research about schools' transition to distance learning in the spring of 2020 backs up this observation. The University of Washington's Center on Reinventing Public Education reported that, after surveying 477 school districts that provided distance learning because of the pandemic, "just one in three districts expect teachers to provide instruction, track student engagement, or monitor academic progress for all students." Betheny Gross & Alice Opalka, *Too Many Schools Leave Learning to Chance During the Pandemic*, Univ. of Washington Ctr. on Reinventing Pub. Educ., at 1 (June 2020), https://bit.ly/39FfogT (viewed Dec. 3, 2020). At the risk of stating the obvious, the researchers added: "Far too many districts are leaving learning to chance during the coronavirus closures." *Ibid.*

And as for schools in rural areas, which are in no shortage in Kentucky, they "face [even] more challenges in providing remote learning" because "intranet infrastructure lags well behind" in rural areas. *Id.* at 5.[3]

The problems with distance learning, of course, are not unique to the Religious Schools. But they and other sectarian schools exist for reasons beyond academic instruction. The primary purpose is infusing the school day with religious modeling,

[3] See also Megan Kuhfeld et al., *Projecting the Potential Impacts of COVID-19 School Closures on Academic Achievement*, Brown Univ. Annenberg Inst., Paper No. 20-226, at 2 (May 2020), https://bit.ly/2FHPvA4 (viewed Dec. 3, 2020) (projecting that because of the Spring 2020 school closures, "students are likely to return in fall 2020 with approximately 63-68% of the learning gains in reading relative to a typical school year and with 37-50% of the learning gains in math"); Emma Dorn et al., *COVID-19 and student learning in the United States: The hurt that could last a lifetime*, McKinsey & Co., at 3–4 (June 2020), https://mck.co/3kKUnV0 (viewed Dec. 3, 2020) (finding that in comparison to their in-person-learning peers, students engaging in online learning this fall will lose "three to four months of learning" by the start of 2021).

assembly, and instruction. Teachers and staff model religious behavior inside and outside the classroom, in the lunchroom, and on the playground and playing fields. Students congregate together in a religious manner for chapel services, prayer, scripture study, and religious education, all of which are foundational to concepts and doctrines of Christian community. These are just some of the many aspects of Christian community and of Christian education that the Religious Schools cannot sustain online. And closing these schools in the name of science and public health is not tenable, particular under the strict scrutiny standard that necessarily applies given Executive Order 2020-969 fails to meet the minimum requirement of neutrality toward religion.

CONCLUSION

This Court should grant the application and enjoin the enforcement of Executive 2020-969 against religious schools.

Respectfully submitted,

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