No. 20-2256

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESURRECTION SCHOOL; CHRISTOPHER MIANECKI, INDIVIDUALLY AND AS NEXT FRIEND ON BEHALF OF MINOR CHILDREN C.M., Z.M., AND N.M.; AND STEPHANIE SMITH, INDIVIDUALLY AND AS NEXT FRIEND ON BEHALF OF HER MINOR CHILD F.S.,

Plaintiffs-Appellants

v.

ELIZABETH HERTEL, IN HER OFFICIAL CAPACITY AS THE DIRECTOR OF THE MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; DANA NESSEL, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MICHIGAN; LINDA S. VAIL, IN HER OFFICIAL CAPACITY AS THE HEALTH OFFICER OF INGHAM COUNTY; AND CAROL A. SIEMON, IN HER OFFICIAL CAPACITY AS THE INGHAM COUNTY PROSECUTING ATTORNEY,

Defendants-Appellees.

On Appeal from the United States District Court
for the West District of Michigan
Case No. 1:20-cv-1016
Honorable Paul L. Maloney

Brief for Alliance Defending Freedom as Amicus Curiae in Support of Appellants and Reversal

JOHN J. BURSCH
CODY S. BARNETT
ALLIANCE DEFENDING FREEDOM
440 1st Street, NW, Ste. 600
Washington, D.C. 20001
Telephone: (616) 450-4235
jbursch@ADFlegal.org
cbarnett@ADFlegal.org

Attorneys for Amicus Curiae
Alliance Defending Freedom

CORPORATE DISCLOSURE STATEMENT

Under Fed. R. App. P. 26.1 and 6th Cir. R. 26.1(a), Amicus Curiae Alliance Defending Freedom, a nonprofit entity, states that it has no parent corporation and that it does not issue stock.

Dated: December 22, 2021.

Respectfully submitted,

/s/ John J. Bursch
John J. Bursch

Attorney for Amicus Curiae
Alliance Defending Freedom

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INTEREST OF AMICUS CURIAE

Alliance Defending Freedom is the world's largest legal organization committed to protecting religious freedom, free speech, marriage and family, parental rights, and the sanctity of life. ADF is committed to defending Americans' most cherished liberties in Congress, state legislatures, and courtrooms across the country—all the way to the U.S. Supreme Court if necessary. ADF has won 13 victories at the Supreme Court since 2011, and it has a strong interest in ensuring robust protections of the religious-liberty rights protected by the Free Exercise Clause, such as those at issue in this case.

Under Federal Rule of Appellate Procedure 29(a)(2), ADF files this amicus curiae brief with the consent of all parties. No counsel for any party authored this brief in whole or in part, and no person or entity, other than ADF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

The First Amendment's Free Exercise Clause—applicable to Michigan via the Fourteenth Amendment—provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. And Michigan burdened the religious exercise of Resurrection School and its families here. The State's masking policy interfered with the School's "religiously oriented disciplinary policies and prevent[ed] younger students from partaking fully in a Catholic education." *Resurrection Sch. v. Hertel*, 11 F.4th 437, 447 (6th Cir. 2021). In addition, the masks distracted children from their religious education, and the policy conflicted with parents' rights "to choose a school for them which corresponds to their own convictions." *Id.* The State does not contest this.

So, this Court's "task is to decide whether the burden the [State] has placed on the religious exercise of [the School and its families] is constitutionally permissible." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). And that requires the Court to determine whether the State's masking policy was neutral and generally applicable. *Emp. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878–82 (1990).

In an unrelated action, a federal district court has already faulted Defendant Dana Nessel, Michigan's Attorney General, for acting non-neutrally toward religious actors. *Buck v. Gordon*, 429 F. Supp. 3d 447, 462–63 (W.D. Mich. 2019). Among other things, Attorney General Nessel campaigned on the principle that the Catholic Church's beliefs

and practices about marriage constitute "hate," and that a Michigan law protecting the religious liberty rights of adoption and foster agencies is "discriminatory animus." *Id.* at 462. After taking office, General Nessel settled a case for the purpose of nullifying that duly enacted law while supporting termination of Catholic adoption and foster agencies in a manner that the district court found to be a "pretext for religious targeting." *Id.* at 463. What's more, General Nessel has referred to Catholic adoption agencies as "hate mongers," smeared Catholics with a snide remark about "their rosary," and maligned a respected former Michigan Court of Appeals Judge simply because he is Catholic. Ingrid Jacques, *Nessel wages crusade against Catholics*, THE DETROIT NEWS (April 15, 2019), https://perma.cc/U6QF-CPBJ.

But Resurrection School and its families do not allege that Defendants acted with religious animus; their claim is that Michigan's masking policy is not generally applicable. A government policy "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877 (citation omitted). And that's certainly true here. Michigan's masking requirements include numerous secular exemptions in contexts that are comparable to schools. For example, someone is *at least as likely* to contract COVID-19 from a spa or eating in a restaurant than socially distanced in a classroom.

The panel's mistake was to rely on this Court's decision in *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020), and limit its comparator analysis of Michigan's mask policy to public and non-public schools, reasoning that non-school entities cannot be "comparable" to a religious school. *Resurrection Sch.*, 11 F.4th at 457. That's the wrong way to think about comparators. As the Supreme Court made clear in *Fulton* and this Court emphasized in *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 480 (6th Cir. 2020), the question is whether Michigan allows secular conduct that undermines the State's asserted interests in a similar way as does the prohibited religious conduct. And the answer to that question here is "yes."

Accordingly, the en banc Court should (1) reverse the panel's decision, (2) hold that the comparator test set forth in *Monclova*, not the rule in *Beshear*, is the law of this Circuit when determining a law's general applicability, (3) conclude that Michigan's masking policy is not generally applicable, and (4) strike down that policy as applied to Resurrection School, its families, and comparable religious schools and families, because Michigan cannot satisfy strict scrutiny. The en banc Court should not dismiss this appeal as moot because Defendants' cessation of their orders is at best temporary and voluntary, and because Defendants' orders are capable of repetition yet evading review.

ARGUMENT

I. Michigan's mask mandate is not generally applicable, so *Smith* does not apply.

Under the Free Exercise Clause, "laws that burden religious exercise are presumptively unconstitutional" unless they survive strict scrutiny review. *Meriwether v. Hartop*, 992 F.3d 492, 512 (6th Cir. 2021). But laws that burden religion only incidentally survive review if they are "neutral and generally applicable." *Smith*, 494 U.S. at 878–82.

Government policies are not generally applicable "whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). And "comparability is measured against the *interests* the State offers in support of its restrictions on conduct. Specifically, comparability depends on whether the secular conduct 'endangers these interests in a similar or greater degree than' the religious conduct does." *Monclova*, 984 F.3d at 480 (cleaned up); *accord Tandon*, 141 S. Ct. at 1296.

Michigan's mask mandate is not generally applicable because it treats some comparable secular activity more favorable than religious schooling. For instance, the mandate exempts individuals "receiving a . . . personal care service for which removal of the face mask is necessary." March 2, 2021 Emergency Order at 9, https://perma.cc/PXR9-8ST8. Michigan defines a "personal care service" to include, among other things, "hair, nail, tanning, massage, traditional spa, tattoo, body art, [and] piercing services." *Id.* at 7. So while religious schools must

adhere to the mandate, tattoo parlors and spas need not. That comparable secular activities receive better treatment under the mandate than religious activity renders the mandate not generally applicable.

It makes no difference that "almost all" the mandate's exemptions apply to secular activities that are "of lesser risk than in-person instruction." *Resurrection Sch.*, 11 F.4th at 458. "It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Tandon*, 141 S. Ct. at 1296. And "almost all" is not "all." If "any" secular activity poses the same risk as in-person instruction yet receives more favorable treatment (i.e., an exemption), then the mandate is not generally applicable. Thus, tattoo parlors and spas alone prove that the mandate lacks general applicability.

But the mandate also treats other secular activity more favorably than religious exercise. For instance, the mandate largely exempts restaurants from its coverage. The panel defended this on the ground that eating and drinking are "inherently incompatible with wearing a mask." *Resurrection Sch.*, 11 F.4th at 458. But inherent incompatibility has nothing to with the State's asserted interests in imposing the mask mandate: reducing the spread of COVID-19. Eating and drinking without a mask could pose the same risk of spreading the virus as in-person instruction. The mandate's failure to consider these risks shows that the mandate is not generally applicable.

In fact, the unwieldly justifications proffered by Michigan for its existing exemptions reveal the scope of the discretion the State wields in carving out exceptions to its mandate. Laws are not generally applicable when they "invite[ ] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877 (cleaned up). Though Michigan's exemption process looks different than other schemes, Michigan nonetheless retains the authority to provide exemptions at its "sole discretion." *Id.* at 1878. Since March 2020, Michigan has issued 58 emergency orders; at least 16 have involved masking. In each order, Michigan exercised its discretion to impose masking on certain activities while creating carveouts for others. And some of those carveouts have considered "particular reasons" for the exempted conduct rather than the risk the conduct poses. *Id.* at 1877.

For instance, restaurants have an exemption because eating and drinking are "inherently incompatible" with masking. That focuses on the conduct's reason, not its risk. After all, to Resurrection School, masking is "inherently incompatible" with in-person instruction.[1]

[1] The panel dismissed Resurrection School's opposition to masking during in-person instruction as "undesirable" rather than "inherently incompatible." *Resurrection Sch.*, 11 F.4th at 458. But that questions the sincerity of Resurrection School's religious beliefs, something the panel was forbidden to do. *Hernandez v. CIR*, 490 U.S. 680, 699 (1989).

Moreover, Michigan exempted those "actively engaged in a public safety role," without considering whether these "life-sustaining" activities "pose comparable public health risks" to "soul-sustaining" activities. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020) (per curiam). Instead, the exemption focuses on the "particular reasons for a person's conduct" and deems secular reasons (public safety) more "essential" than spiritual reasons (soul safety). As a result, the mandate is not generally applicable.

II. Michigan's mask mandate cannot survive strict scrutiny.

Because Michigan's mask mandate is not generally applicable, it is presumptively unconstitutional. *Meriwether*, 992 F.3d at 512. Michigan can overcome this presumption only if it proves that its mandate serves a compelling interest and employs the least restrictive means available for doing so. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

Michigan has no compelling interest in denying Resurrection School an exemption from its mandate. Though "[s]temming the spread of COVID-19 is unquestionably a compelling interest,"[2] *Roman Catholic*

[2] Even this compelling interest "cannot qualify as such forever." *Does 1–3 v. Mills*, 142 S. Ct. 17, 21 (2021) (Gorsuch, J., dissenting from the denial of application for injunctive relief). For example, when the panel initially considered this case, vaccines were not available for children. *Resurrection Sch.*, 11 F.4th at 442–43. Now, the Food & Drug Administration has authorized a vaccine for children. Jared S. Hopkins, *FDA Authorizes Pfizer-BioNTech Covid-19 Vaccine for Young Children*, WALL ST. J. (Oct. 29, 2021).

Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (per curiam), Michigan cannot simply state that objective "at a high level of generality," *Fulton*, 141 S. Ct. at 1881. "[T]he First Amendment demands a more precise analysis." *Id.* "Rather than rely on broadly formulated interests," Michigan must show that "it has such an interest in denying an exception" to Resurrection School in *particular*. *Id.* But Michigan's many other exemptions undermine its contention that the mask mandate "can brook no departures." *Id.* at 1882.

At minimum, Michigan cannot show that denying Resurrection School an exemption is the least restrictive means to advance its interests. Some states have exempted religious schools from their mask mandates, and some states have even gone so far as to exempt schools altogether. Unless Michigan can show a compelling reason that it cannot do the same, then its refusal to grant Resurrection School an exemption is the most heavy-handed means to advance its interests. *McCullen v. Coakley*, 573 U.S. 464, 494 (2014) (holding that the State's abridgement of free speech was not narrowly tailored when the State did not show "that it considered different methods that other jurisdictions have found effective"). Because Michigan has not made that showing, its mask policy is unconstitutional.

CONCLUSION

The Supreme Court and this Circuit have made clear that a free-exercise comparability analysis turns on the government's asserted interest, not on the purported comparability of the entities being regulated. Consistent with *Fulton*, *Tandon*, and *Monclova*, this Court should hold that Michigan's mask-mandate exemptions impact the State's interest in preventing the spread of COVID-19 in the same manner whether applied to spas, tattoo parlors, and restaurants on the one hand, or religious-school students on the other. And because Michigan's policy as applied to religious schools cannot survive strict scrutiny, the Court should invalidate that policy as applied to Resurrection School, its families, and comparable entities.

Dated: December 22, 2021

Respectfully submitted,

/s/ John J. Bursch

JOHN J. BURSCH
CODY S. BARNETT
ALLIANCE DEFENDING FREEDOM
440 1st Street, NW, Ste. 600
Washington, D.C. 20001
Telephone: (616) 450-4235
jbursch@ADFlegal.org
cbarnett@ADFlegal.org
Attorneys for Amicus Curiae Alliance Defending Freedom

RULE 32(G)(1) CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because this brief contains 2,098 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Word 365 using a proportionally spaced typeface, 14-point Century Schoolbook.

Dated: December 22, 2021

/s/ John J. Bursch
John J. Bursch

Attorney for Amicus Curiae
Alliance Defending Freedom

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ John J. Bursch
John J. Bursch

Attorney for Amicus Curiae
Alliance Defending Freedom