No. 20-2256

In the United States Court of Appeals for the Sixth Circuit

RESURRECTION SCHOOL, *et. al*,

Plaintiffs-Appellants,

v.

ELIZABETH HERTEL, *et. al.*

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Michigan, No. 1:20-cv-01016

BRIEF OF *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-2256 Case Name: Resurrection School v. Hertel

Name of counsel: Daniel H. Blomberg

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I certify that on September 14, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Daniel H. Blomberg

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians in courts across the country, including this Circuit and the Supreme Court.[2] Becket has also litigated many cases concerning COVID-19 restrictions on religious exercise.[3] Becket has an interest in ensuring that courts in this Circuit apply the correct standard in Free Exercise cases.

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[1] No party's counsel authored this brief in whole or in part, and no one other than *Amicus* contributed money that was intended to fund preparing or submitting the brief. Counsel for petitioners and for respondents Nessel, Vail, and Simeon consented to the filing of this brief. Counsel for respondent Hertel did not.

[2] *See, e.g.*, *Buck v. Gordon*, No. 19-2185 (6th Cir.) (counsel); *Middleton v. United Church of Christ Board*, No. 20-4141 (6th Cir.) (*amicus*); *Bormuth v. County of Jackson*, No. 15-1869 (6th Cir.) (en banc) (*amicus*); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021).

[3] *See, e.g.*, *Agudath Israel of Am. v. Cuomo*, 141 S.Ct. 889 (2020); *Danville Christian Acad. v. Beshear*, 141 S.Ct. 527 (2020) (*amicus*); *S. Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716 (2021) (*amicus*); *Tandon v. Newsom*, 141 S.Ct. 1294 (2021) (*amicus*); *Roman Catholic Archbishop of Wash. v. Bowser*, No. 20-cv-03625, 2021 WL 1146399 (D.D.C. Mar. 25, 2021) (in-person worship); *Lebovits v. Cuomo*, 1:20-cv-1284 (N.D.N.Y. filed Oct. 16, 2020) (in-person religious education).

INTRODUCTION

While public health issues can be difficult, the issue here is simple: the divided panel failed to faithfully apply the Free Exercise caselaw of this Court and the Supreme Court. That failure requires correction.

The panel opinion conflicts with not one, but *four* recent Free Exercise decisions by the Supreme Court, and with three decisions of this Circuit. In *Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S.Ct. 63 (2020), *S. Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716 (2021) (*South Bay II*), and *Tandon v. Newsom*, 141 S.Ct. 1294 (2021), the Supreme Court held the government could not treat religious conduct worse than *any* comparable secular conduct, judging comparability "against the asserted government interest that justifies the regulation at issue." *Tandon*, 141 S.Ct. at 1296. And in *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021), the Court held the government could not escape strict scrutiny by adopting a facially general policy in one place, while granting officials broad discretion to make exceptions in another. This Circuit has arrived at similar conclusions. *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477 (6th Cir. 2020); *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020).

The panel misapplied this precedent by refusing to compare religious schools to similar secular conduct that was exempted—including indoor dining; playing collegiate and professional sports; voting; and obtaining

hair, tanning, spa, tattoo, and piercing services. The panel also erred by finding that only regulations "riddled" with exceptions fail general applicability. And it did not consider, as *Fulton* requires, the impact of the defendant agency's extraordinarily broad discretion—which it used to enact 58 emergency orders since 2020—on the general-applicability analysis.

The panel claimed that it was bound by *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020). But as Judge Siler recognized in dissent, *Beshear* conflicts with both *Tandon* and *Monclova*. Op.31. En banc review is thus needed to "secure uniformity of this Circuit's decisions" within the Circuit and with the Supreme Court. Fed. R. App. P. 35(a)(1). Given the exceptional importance of these issues, this Court should grant rehearing, restore this Circuit's Free Exercise precedent, and remand to the district court to consider Resurrection School's claims under the correct framework.

ARGUMENT

A. Supreme Court and Circuit precedent have established the relevant framework for Free Exercise analysis.

The Free Exercise Clause protects religious believers from at least seven broad categories of government action: targeting of religious

exercise,[4] forced participation in religious ceremonies,[5] discriminatory exclusion from government-created benefits,[6] laws that infringe church autonomy,[7] laws that infringe the right to religious education,[8] laws that fail to extend discretionary exemptions to cases of religious hardship,[9] and laws that provide categorical exemptions for comparable secular actions but not religious ones.[10] This brief focuses on the last two categories.

1. Under the Free Exercise Clause, "laws that burden religious exercise are presumptively unconstitutional unless they are both neutral and generally applicable." *Meriwether v. Hartop*, 992 F.3d 492, 512 (6th Cir. 2021). During the COVID-19 pandemic, the Supreme Court has consistently applied the general-applicability requirement and enjoined discriminatory governmental restrictions on free exercise. Its most recent

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[4] *Church of the Lukumi v. City of Hialeah*, 508 U.S. 520 (1993); *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719 (2018).

[5] *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 635 n.15 (1943).

[6] *Trinity Lutheran v. Comer*, 137 S.Ct. 2012, 2017 (2017); *Espinoza v. Mont. Dep't of Revenue*, 140 S.Ct. 2246, 2261 (2020).

[7] *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871); *see also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2061 (2020).

[8] *Wisconsin v. Yoder*, 406 U.S. 205, 231 (1972); *see also Espinoza*, 140 S.Ct. at 2261.

[9] *Fulton*, 141 S.Ct. at 1878.

[10] *Tandon*, 141 S.Ct. at 1296; *see also Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012).

ruling, *Tandon*, involved plaintiffs who were forbidden from holding in-home Bible studies with more than three families, even though California permitted transportation facilities, malls, salons, retail stores, movie theaters, and personal-care services to gather more than three families at a time. *Tandon*, 141 S.Ct. at 1297. Like the panel here, the Ninth Circuit upheld the restrictions as generally applicable because they applied to all private, in-home gatherings (religious and secular), without considering the exemptions for other secular activities. *Tandon v. Newsom*, 992 F.3d 916, 922-23 (9th Cir. 2021).

The Supreme Court reversed, reprimanding the Ninth Circuit for misapplying its guidance for "the fifth time." *Tandon*, 141 S.Ct. at 1297-98 (collecting cases). The Court emphasized it was "clear" that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296 (emphasis in original). "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." *Id.* And it was likewise "clear" that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* "Comparability is concerned with the risks various activities pose, not the reasons why people gather." *Id.*

Because California "treat[ed] some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time," and because those activities were the relevant comparators as judged against California's interest in mitigating COVID-19, the Court enjoined the restrictions on in-home religious gatherings. *Id*. at 1297.

Two prior Supreme Court COVID-19 cases reached the same result. The first was *Diocese of Brooklyn*, where New York imposed strict occupancy limits on religious services but permitted other "essential" businesses—including "acupuncture facilities, camp grounds, garages," "plants manufacturing chemicals and microelectronics[,] and all transportation facilities"—to "admit as many people as they wish[ed]." 141 S.Ct. at 65-66. The Court found these "essential" secular businesses were comparable to religious worship, since they all could "contribute[] to the spread of COVID-19," and accordingly, that the occupancy limits failed general applicability. *Id*. at 66-67.

The second case was *South Bay II*, where Justice Gorsuch wrote for a majority of the Court to explain that because California forbade "any kind of indoor worship" while "allow[ing] most retail operations to proceed indoors with 25% occupancy, and other businesses to operate at 50%

occupancy or more," the restrictions were not generally applicable. *Id.* at 717 (statement of Gorsuch, J.).[11]

As all three COVID decisions show, the Supreme Court views the relevant comparators broadly, and treats as reversible error failure to do the same.

2. This Circuit has repeatedly reached the same result, as reflected in the fact that *Tandon* approvingly cited this Court's decisions. *See Tandon*, 141 S.Ct. at 1297 (quoting *Roberts*, 958 F.3d at 414).

This Circuit's earliest COVID-19 decisions held the proper comparators for a Free Exercise analysis were "secular activities [that] pose comparable public health risks to worship services." *Roberts*, 958 F.3d at 414. This Court explained that government officials cannot "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings" because "[r]isks of contagion turn on social interaction in close quarters; the virus does not care why they are there." *Id.* at 414, 416. Thus, state restrictions that banned indoor worship services but allowed "law firms, laundromats, liquor stores, gun shops, airlines, mining operations, funeral homes, and landscaping businesses to

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[11] Justice Gorsuch's separate statement was joined by Justices Thomas, Alito, Kavanaugh, and Barrett as to California's restrictions on indoor worship services. *Id.* at 717.

operate" with fewer restrictions were unconstitutional. *Id*. at 414; *see also Maryville*, 957 F.3d at 614-15.

More recently, in *Monclova*, a private religious school challenged government orders that closed all schools—secular and religious—but allowed gyms, tanning salons, office buildings, and casinos to remain open. 984 F.3d at 482. *Monclova* re-affirmed that "comparability is measured against the *interests* the State offers in support of its restrictions on conduct," and explicitly rejected the argument that the only comparable facilities were secular schools. *Id*. at 480, 482.

3. Outside the COVID context, the Supreme Court recently determined Philadelphia's foster-care services program was not generally applicable because it retained governmental authority to provide discretionary exemptions from requirements that burdened religious exercise. In *Fulton*, Philadelphia stopped referring children to Catholic Social Services for foster care when it learned that the agency would not certify same-sex couples as foster parents due to its religious beliefs about marriage. 141 S.Ct. at 1874. Philadelphia adopted a new contract for foster-care agencies that included a general nondiscrimination clause and a separate clause in which it retained discretion to grant exemptions in a discrete part of the foster-care process. *Id.* at 1878. The Supreme Court refused to review each provision in isolation, determined the discretionary exemption showed the scheme wasn't generally applicable, and held Philadelphia "may not refuse to

extend" its exemption system to "cases of 'religious hardship' without compelling reason." *Id.*

B. The panel opinion sharply conflicts with binding Supreme Court and Circuit precedent.

The panel failed to apply this binding precedent in three ways. First, the panel narrowly defined the relevant comparators for a Free Exercise challenge, contrary to *Tandon, Diocese of Brooklyn*, *South Bay II*, *Roberts, Maryville,* and *Monclova.* Second, the panel erroneously held that a policy must contain multiple exemptions to fail general applicability, when *Tandon* explained that a single exception can suffice. Third, the panel failed to apply *Fulton* to determine whether the Michigan Department of Health and Human Services ("MDHHS") retained the discretionary power to create individualized exemptions from burdens it placed on religious exercise.

1. The panel concluded the mask requirement was generally applicable by treating "non-religious schools" as the only relevant comparators to religious schools. Op.23.

This "myopic focus" on schools, *Monclova*, 984 F.3d at 481, conflicts with precedent instructing that the proper comparators are other activities that "contribute[] to the spread of COVID-19." *Diocese of Brooklyn*, 141 S.Ct. at 67. That includes not just schools but any gatherings raising similar risks, since "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather,"

Tandon, 141 S.Ct. at 1296; *Roberts*, 958 F.3d at 414. This broader lens for relevant conduct means that the panel should have analyzed whether the restrictions applied to other secular conduct implicating the Government's interest in stemming COVID-19. Such conduct includes indoor dining, voting, and obtaining personal-care services like "hair, nail, tanning, massage, traditional spa, tattoo, body art, [and] piercing services," all of which receive exemptions under the relevant orders. Op.25; 03/02/21 MDHHS Order §§4(f), 8(c), 8(f). Other comparators include athletes competing in collegiate and professional sports, which likewise bring together groups of people indoors in "close physical proximity" for prolonged periods of time. *South Bay II*, 141 S.Ct. at 718-19.[12]

The panel justified its narrow view of comparators on the mistaken belief that *Beshear*, 981 F.3d 505, an earlier opinion concerning religious school closures, controlled this case. But *Beshear* cannot support the panel's reasoning. First, "later Supreme Court opinions" "provided additional clarity" that undermined *Beshear*'s reasoning and confirmed *Monclova*'s. *Scarber v. Palmer*, 808 F.3d 1093, 1096 (6th Cir. 2015). Second, *Beshear* was already inconsistent with this Court's precedent in

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[12] Collegiate and professional athletes competed unmasked in Michigan after the order was issued. *See, e.g.,* Univ. of Mich. v. Mich. State (Mar. 7, 2021), https://perma.cc/JB4L-2FU2; Detroit Red Wings v. Tampa Bay Lightning (Mar. 9, 2021), https://perma.cc/QE5D-GXGC; Detroit Pistons v. San Antonio Spurs (Mar. 15, 2021), https://perma.cc/37MT-G8N5.

Roberts and *Maryville*, each of which is more consistent with Supreme Court guidance.

2. The panel also erred by holding government restrictions only fail general applicability when they are "*riddled* with secular exceptions" or "exempt[] an *array* of secular activities." Op.25 (emphasis added).

Again, the Supreme Court has said otherwise. Though California's restrictions in *Tandon* contained multiple secular exceptions, a single exception can be enough: "government regulations are not … generally applicable … whenever they treat *any* comparable secular activity more favorably than religious exercise." 141 S.Ct. at 1296 (emphasis in original). The relevant inquiry is not whether exceptions for secular activity are "narrow and discrete," Op.25; the question is whether any such exemptions for similar secular conduct *exist*. To be sure, an "array" of exemptions is *sufficient* to fail general applicability—but it is not *necessary*.

3. Finally, the panel opinion conflicts with *Fulton*. There, the Supreme Court refused to analyze Philadelphia's contract provisions in isolation. The Court instead held that where Philadelphia retained authority to grant discretionary exceptions from a broad nondiscrimination policy, it "may not refuse to extend" its exemption system to "cases of 'religious hardship' without compelling reason." 141 S.Ct. at 1878. Because Philadelphia "offer[ed] no compelling reason why it has a particular

interest in denying an exception to [Catholic Charities] while making them available to others," its actions violated the Free Exercise Clause.

Here, the panel limited *Fulton* to its facts without even attempting to apply its reasoning. Op.26. But MDHHS has virtually unbounded discretion to issue emergency orders "establish[ing] procedures to be followed during the epidemic." MCL §333.2253(1). Since March 2020, MDHHS has issued 58 emergency orders—including at least 16 regarding masking—and exercised its discretion to both impose mask requirements and create carveouts from its orders.[13] The district court never reviewed these orders to determine whether MDHHS retained the discretion to create the kind of individualized exemptions that require it to put forward a "compelling reason" for its "refus[al] to extend" an accommodation to religious schools. 141 S.Ct. at 1878.

CONCLUSION

This Court should grant en banc review, restore the correct Free Exercise analysis in this Circuit, and remand to the district court to apply that analysis.

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[13] MDHHS Orders, https://perma.cc/GBY2-PRSM (10 current orders); Rescinded MDHHS Orders, https://perma.cc/PZ8L-XUPJ (48 rescinded orders).

Dated: September 14, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation for an *amicus* brief because it contains 2,599 words. *See* Fed.R.App.P.29(a)(5) and (b)(4). This brief also 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 a proportionally spaced typeface (Century Schoolbook 14-point type) using Microsoft Word 2016.

Dated: September 14, 2021

/s/ *Daniel H. Blomberg*
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Amicus* Brief was filed this 14th day of September, 2021, through the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

Dated: September 14, 2021

/s/ *Daniel H. Blomberg*
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