No. 21-6028

In the United States Court of Appeals for the Sixth Circuit

PLEASANT VIEW BAPTIST CHURCH, *et al*,

Plaintiffs-Appellants,

v.

ANDY BESHEAR,

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Kentucky, No. 2:20-cv-00166

BRIEF OF *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITION FOR PANEL REHEARING OR 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: 21-6028 Case Name: Pleasant View Baptist Church v. Beshear

Name of counsel: Daniel H. Blomberg

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I certify that on September 18, 2023 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 a diverse array of religious believers in courts across the country. As explained in its motion for leave, Becket has litigated many cases concerning COVID-19 restrictions on religious exercise, including serving as counsel in *Agudath Israel v. Cuomo*, the companion case to *Diocese of Brooklyn v. Cuomo*, which the panel erroneously failed to consider in its analysis of Free Exercise law. Becket has an interest in ensuring that courts in this Circuit apply the correct standard in Free Exercise cases.

[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 respondent consented to the filing of this brief.

INTRODUCTION

En banc rehearing should be granted here for the same reason that it was granted in *Resurrection School v. Hertel*: the panel opinion conflicts with the Free Exercise law of this Circuit and the Supreme Court. 11 F.4th 437, 462 (6th Cir. 2021) ("*Resurrection School I*") (Siler, J., concurring in part and dissenting in part). It does so in three ways.

First, as explained by the panel concurrence, it has long been clear that a law is not generally applicable under the Free Exercise Clause when it burdens religious conduct but allows secular conduct that implicates similar government interests. Op.22-23 (Murphy, J., concurring). The panel majority's contrary conclusion repeats the same error as the panel majority in *Resurrection School v. Hertel* and thus requires the same correction. 35 F.4th 524, 542 (6th Cir. 2022) ("*Resurrection School II*") (Bush, J., dissenting). And since this is not a preliminary injunction appeal, the mootness problems that prevented en banc correction in *Resurrection School II* won't arise here.

Second, the panel majority erroneously re-characterized *Maryville Baptist Church v. Beshear*, 957 F.3d 610, 611 (6th Cir. 2020) ("*Maryville I*") and *Roberts v. Neace*, 958 F.3d 409, 411-12 (6th Cir. 2020) ("*Roberts I*") as cases primarily about "perceived hostility" towards religion. Op.13. That is directly contradicted by *Maryville I* and *Roberts I*, which held that showing animus is unnecessary to the question of whether a burden is generally applicable. For good reason: making animus necessary cuts

Free Exercise protections in half, privileges popular faiths, and renders free-exercise claims harder to prove and adjudicate.

Third, the panel mistakenly ignored *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020) because it was issued a week after the orders in this case. But *Diocese of Brooklyn* was decided under the All Writs Act, 28 U.S.C. § 1651(a), which requires applicants to demonstrate that the relevant Free Exercise rights were *already* "indisputably clear." *Ohio Citizens for Responsible Energy v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers). And even if *Diocese of Brooklyn* were treated as establishing *new* Free Exercise law, the Governor should have immediately complied with it. Yet instead, he allegedly continued to criminalize gatherings at religious schools while permitting gatherings at numerous similar secular entities such as daycares, colleges, factories, casinos, gyms, and movie theaters. Assuming those allegations are true, as this stage of the case requires, Petitioners should have the opportunity to prove them below.

These three errors are not merely timing issues unique to a single qualified immunity case and laid to rest by later precedent like *Tandon v. Newsom*, 141 S.Ct. 1294, 1296 (2021), and *Monclova Christian Academy v. Toledo-Lucas County Health Department*, 984 F.3d 477, 479 (6th Cir. 2020). For one thing, neither *Tandon* nor *Monclova* prevented the same error from arising in *Resurrection School I*. For another, because the panel majority here declined to acknowledge the state of

current law, future government officials may feel free to argue that the law *remains* unclear in this Circuit. And not just in this Circuit: dozens of courts nationwide, including the Supreme Court, relied on this Circuit's free exercise analysis during COVID. *Roberts v. Neace*, 65 F.4th 280, 284-85 (6th Cir. 2023) ("*Roberts II*") (collecting cases). Countenancing false uncertainty here will have far-reaching effects.

Officials like the Governor participated in one of "the greatest intrusions on civil liberties in the peacetime history of this country." *Arizona v. Mayorkas*, 143 S.Ct. 1312, 1314 & n.14 (2023) (Gorsuch, J., concurring) (Mem.) (listing Defendant among the mistaken officials). There is reason to be concerned that they would do it again if the panel majority's analysis stands. This Court repeatedly enjoined the Governor's actions burdening religion during the pandemic, only to see him enact more. This Court should complete the task it set out to do in *Resurrection School II* before mootness intervened, granting rehearing en banc to ensure the law of the Circuit is sufficiently clear to prevent recurrence.

ARGUMENT

A. The law of what counts as "comparable" for purposes of Free Exercise has long been clearly established.

Judge Murphy's concurrence is correct: by the fall of 2020 it was "clearly establish[ed]" that "a secular activity is 'comparable' to religious conduct if it poses a similar risk of COVID-19 spread." Op.22 (Murphy, J., concurring). That is because the Supreme Court had long held that

the "general-applicability test turns on whether unbanned secular conduct 'endangers' the interests advanced by the law 'in a similar or greater degree' than the burdened religious conduct." *Id.* (quoting *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 543 (1993)). And by November 2020, *Maryville I* and *Roberts I* had held that, in the context of *this Defendant's* COVID orders, the relevant question was "whether the regulations exempted secular activities that 'pose[d] comparable public health risks' to banned worship services." Op.22-23 (quoting *Maryville I*, 957 F.3d at 614; *Roberts I*, 958 F.3d at 414).

None of this Free Exercise comparator analysis was new. *Roberts* pointed out that there were "plenty" of earlier cases holding that "a proliferation of unexplained exceptions turns a generally applicable law into a discriminatory one"—including cases in the Sixth, Third, and Second Circuits. *Roberts I*, 958 F.3d at 413-14 (citing *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002); *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.); *Central Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183 (2d Cir. 2014)). And in *Ward*, this Court explained how to engage in Free Exercise comparator analysis. *Ward* involved a code of ethics for counselors that allowed (and indeed encouraged) them to refer clients to other counselors for a host of reasons, including the client's inability to pay—but was interpreted by a public university to forbid any

referrals by counseling students because of their religious beliefs. 667 F.3d at 739. This Circuit carried out the comparator analysis under *Lukumi* and held that the Free Exercise Clause barred a rule that would "permit referrals for secular—indeed mundane—reasons, but not for faith-based reasons." *Id.*

Indeed, this Circuit's Free Exercise law is so clear that district courts have not hesitated to deny qualified immunity to officials who "treat[ed] religious activities more harshly than similar secular activities" as early as 2018. *InterVarsity Christian Fellowship/USA v. Board of Governors of Wayne State Univ.*, 534 F.Supp.3d 785, 833 (E.D. Mich. 2021). *See also Meriwether v. Hartop*, 992 F.3d 492, 514 n.9 (6th Cir. 2021) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886), for the "longstanding" rule that neither the Equal Protection Clause nor the Free Exercise Clause "tolerate irregular, discriminatory application of 'neutral' laws").

Thus, *Roberts I* broke no new ground when it analyzed "secular activities [that] pose comparable public health risks to worship services." *Roberts I*, 958 F.3d at 414. *Roberts I* elaborated in detail, explaining that Governor Beshear could not "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. *Roberts I* concluded that Governor Beshar's public health orders that banned indoor worship services but allowed

"law firms, laundromats, liquor stores, gun shops, airlines, mining operations, funeral homes, and landscaping businesses to continue to operate" with fewer restrictions were unconstitutional. *Id.* at 414; *see also Maryville I*, 957 F.3d at 614-15. And *Roberts I* has aged well. "All told, at least seventy cases cite the Sixth Circuit's preliminary injunction," including an approving cite in *Tandon*, confirming the *Roberts I* rationale as both "the law of the circuit" and "the law of the nation." *Roberts II*, 65 F.4th at 285.

Yet, instead of applying the standard set in *Lukumi* and applied for decades in this Circuit, including repeatedly in the specific context of this case and against this specific Defendant, the panel said the standard was unclear. Why? Because of *Commonwealth of Kentucky v. Beshear*, 981 F.3d 505 (6th Cir. 2020). That was wrong thrice over—*Commonwealth* was decided *after* Beshear's order at issue here, it was in sharp conflict with binding Circuit precedent in *Maryville I* and *Roberts I*, and it was wrong. Indeed, it was so clearly wrong that it was effectively immediately repudiated in *Monclova*. 984 F.3d 477. When the error rose again in *Resurrection School I*, this Court granted en banc review and two judges of this Court wrote separate opinions explaining the error and its clear conflict with binding precedent. *Resurrection School I,* 11 F.4th at 462 (Siler, J., concurring in part and dissenting in part); *Resurrection School II*, 35 F.4th at 532 (Bush, J., dissenting).

Yet the panel majority here breathed new life into *Commonwealth* by treating its out-of-step Free Exercise analysis as the measure of clearly established Free Exercise law circa November 2020, while declining to confirm what this Circuit's Free Exercise standard is today. En banc review is necessary.

B. It is unnecessary to show animus to prove a Free Exercise violation.

The panel majority also misconstrued *Maryville I* and *Roberts I* as primarily barring "hostility towards religion," a bar which governments may avoid via regulations that do not "contain even a hint of hostility towards religion." Op.13.

That is the opposite of what *Maryville I* and *Roberts I* said. Both opinions were clear: this Court was not impugning the Governor's motives. *Maryville I*, 957 F.3d at 614 ("We don't doubt the Governor's sincerity in trying to do his level best to lessen the spread of the virus"); *Roberts I*, 958 F.3d at 414. And both opinions were equally clear it didn't "make a difference that faith-based bigotry did not motivate the orders." *Roberts I*, 958 F.3d at 415; *Maryville I*, 957 F.3d at 615. This is because mere "governmental avoidance of bigotry" is not sufficient to satisfy the Free Exercise Clause. *Roberts I*, 958 at 415.

Nor is it a close question. As the Tenth Circuit explained over a decade before, there is no support for an animus requirement "in any Supreme Court decision" or in "any of the historical materials bearing on our

heritage of religious liberty." *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) (McConnell, J.). Rather, "the First Amendment expressly targets the operation of the laws … rather than merely the motives of those who enacted them." *Reed v. Town of Gilbert*, 576 U.S. 155, 167 (2015) (Free Speech Clause). Simply put, "regardless of design or intent," government "may not create 'religious gerrymanders.'" *Fellowship of Christian Athletes v. SJUSD*, ---F.4th---, 2023 WL 5946036, at *17 (9th Cir. 2023) (en banc) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

The panel majority's contrary ruling cuts free-exercise protections in half. Free Exercise requires a law to be both neutral *and* generally applicable, and neutrality analysis already accounts for animus claims. By collapsing general applicability into neutrality, the panel ruling permits blatant-but-unmalicious religious discrimination like the secular conduct alleged here. It also allows government to "favor religions that are traditional, that are comfortable, or whose mores are compatible with the State, so long as it does not act out of overt hostility to the others." *Weaver*, 534 F.3d at 1260. And it unfairly raises the evidentiary bar, requiring religious parties to prove "improper … motive." *Reed*, 576 U.S. at 165. This Court should correct the panel majority's error.

C. As alleged, it is clear the Governor's actions fell below the required constitutional minimum.

The panel also incorrectly determined that it was not "sufficiently clear t[o] a reasonable official" that the many secular exemptions to the November 18 order triggered a general applicability problem, Op.12, in part because a clarifying ruling in *Diocese of Brooklyn*, 141 S.Ct. at 66, came down a week later. Op.22.

But the law establishing that such religious discrimination as unconstitutional was in place before *Diocese of Brooklyn*. The applicants in *Diocese of Brooklyn* sought relief under the All Writs Act, 28 U.S.C. § 1651(a), which authorizes injunctions when the "legal right at issue are indisputably clear." *Ohio Citizens,* 479 U.S. at 1313 (Scalia, J., in chambers) (cleaned up). The applicants argued that they met that high standard when they sought emergency relief on November 9, 2020,[2] and Governor Cuomo agreed that was the required standard when he responded on November 18.[3] When it issued its decision on November 25, the Supreme Court found that the applicants' Free Exercise rights were already "clearly established" under existing caselaw. *Diocese of Brooklyn*, 141 S.Ct. at 66. Thus, when evaluating if Free Exercise law was "clearly

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[2] Emergency Application at 17, *Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020) No. 20A87, https://perma.cc/383V-87AK; *see also* Emergency Application at 1, *Agudath Israel v. Cuomo*, 141 S.Ct. 889 (2020) (Mem.) No. 20A90, https://perma.cc/6RAZ-D4AT.

[3] Opposition to Emergency Application at 20, *Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020) No. 20A87, https://perma.cc/AZC3-PT3D.

established" as of November 2020, the panel should have consulted *Diocese of Brooklyn*. Instead, the majority ignored it completely.

This, then, was where things stood in November 2020: Governor Beshear's previous similar orders had been enjoined on Free Exercise grounds—*twice*—in decisions that this Court reminded him on October 19 were "still binding." *Maryville Baptist Church v. Beshear*, 977 F.3d 561, 563 (6th Cir. 2020) (per curiam) (*Maryville II*). Yet on November 18, he issued a new order closing all religious schools, and he did not rescind it when *Diocese of Brooklyn* was issued on November 25. Plaintiffs have alleged that his order allowed state police to arrest people for gathering in classrooms at religious schools, but—like his previous orders—exempted not only classrooms run by daycares, colleges, and factories but also the general operations of numerous entities such as casinos, gyms, and movie theaters. Am.Compl.¶¶29-31. Plaintiffs also alleged that their schools were successfully following the same standard "public health requirements" as the favored daycares and casinos, Am.Compl.¶¶42-49.

No reasonable official, faced with this Court's injunctions and the Supreme Court's guidance—all of which concerned similar numbers and types of comparators—would have continued to enforce such an order. Plaintiffs should have the opportunity to prove the truth of their allegations and demonstrate whether they are entitled to damages because of Governor Beshear's decision to ignore clearly established Free Exercise law.

CONCLUSION

This Court should grant en banc review.

Dated: September 18, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation for an *amicus* brief because it contains 2,585 words. *See* Fed. R. App. P. 29(a)(4) 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.

Dated: September 18, 2023

/s/ *Daniel H. Blomberg*
Daniel H. Blomberg

CERTIFICATE OF SERVICE

I hereby certify that the foregoing *amicus* brief was filed this 18th day of September, 2023, 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 18, 2023

/s/ *Daniel H. Blomberg*
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