Case No. 20-2256

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESURRECTION SCHOOL, *et al.*

Plaintiffs-Appellants

v.

ELIZABETH HERTEL,
in her official capacity as the Director
of the Michigan Department of Health and
Human Services, *et al.*

Defendants-Appellees

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

BRIEF FOR THE STATES OF KENTUCKY, OHIO, AND TENNESSEE AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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INTERESTS OF *AMICI* AND INTRODUCTION[1]

The question in this case is what makes a law "generally applicable" under the Free Exercise test announced in *Employment Division v. Smith*, 494 U.S. 872 (1990). That question is exceedingly important. Since the start of the pandemic, state and local governments have struggled to implement public-safety measures without "treating religious exercises worse than comparable secular activities." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring). And courts have likewise struggled to apply the "First Amendment's terms and long-settled rules." *Id.* at 70 (Gorsuch, J., concurring). The result? Many Americans have endured "irreparable harm[] by the loss of free exercise rights" as government officials "move[] the goalposts" and courts fail to step in. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1297–98 (2021) (per curiam).

For the most part, that was not true in this circuit. This Court recognized early on that—even in times of crisis—good intentions cannot justify discriminatory burdens on religious freedom. *See Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614–15 (6th Cir. 2020). Because of that, residents of the *amici* States

[1] The *amici* States of Kentucky, Ohio, and Tennessee may file this brief "without the consent of the parties or leave of court" under Fed. R. App. P. 29(a)(2).

have spent much of the pandemic knowing the First Amendment stood as a bulwark against government overreach. And the *amici* States have had relatively clear rules on how to navigate the pandemic while protecting the Free Exercise rights of those who live within their borders.

Even still, this Court's Free Exercise doctrine could use some refreshing. "*Smith*'s rules about how to determine when laws are 'neutral' and 'generally applicable' have long proved perplexing." *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., dissenting) (citation omitted). And that has led to mixed results from this circuit and others. Some of the errors have been "subtle but absolutely critical." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting). Others, more obvious. *Danville Christian*, 141 S. Ct. at 530 (Gorsuch, J., dissenting) ("The Sixth Circuit's failure to engage that argument is alone sufficient grounds for vacatur."). Yet even when this Court has gotten it right, *see Maryville Baptist*, 957 F.3d at 614–15, room for error persists, *see Resurrection School v. Hertel*, 11 F.4th 437, 455–60 (6th Cir. 2021), *vacated by* 16 F.4th 1215 (2021).

This case is the perfect vehicle to reset the field. So long as *Smith* remains good law, lower courts must apply it properly. And that means taking seriously

what the Supreme Court has said about exceptions to otherwise generally applicable laws. While the pandemic has put pressure on the First Amendment, it has also given this Court an opportunity to realign its precedent with the Supreme Court.

ARGUMENT

The First Amendment prohibits the government from burdening the "free exercise" of religion. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). In doing so, it "protects religious observers against unequal treatment." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (cleaned up). That means when the government burdens religious exercise, it must do so with neutral and generally applicable rules, *see Smith*, 494 U.S. at 878–79, or else "run the gauntlet of strict scrutiny." *Maryville Baptist*, 957 F.3d at 614 (quoting *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012)).

I. Michigan's COVID-19 restrictions are not generally applicable.

1. A law is not generally applicable under *Smith* when it treats religious exercise less favorably than even one comparable secular activity. *Tandon*, 141 S. Ct. at 1296. Before *Tandon*, some courts focused on whether an otherwise generally applicable rule was "riddled with exemptions." *See Ward*, 667 F.3d at 738. That was one of the mistakes made by the panel majority in this case. *See Resurrection*

School, 11 F.4th at 458 ("The exceptions to the [Order] were narrow and discrete."). And other decisions made the same error. *See Commonwealth v. Beshear*, 981 F.3d 505, 509 (6th Cir. 2020) ("[T]he exceptions expressly provided for in the order . . . are nothing like the four pages of exceptions in the orders addressed in [prior cases]." (quotation marks omitted)). But the Supreme Court has now said otherwise. "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 (citing *Roman Catholic Diocese*, 141 S. Ct. at 66–67 (Kavanaugh, J., concurring)). What matters is whether the State chooses not to apply an otherwise general rule to *even one* person for secular reasons. *Id.*; *see also Calvary Chapel*, 140 S. Ct. at 2613 (Kavanaugh, J., dissenting).

In fact, the Supreme Court recently pushed this point even further. In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Court analyzed a general nondiscrimination policy that allowed the city commissioner to make exceptions in his or her "sole discretion." *Id.* at 1878. But the commissioner "[had] never granted" an exception to the policy—not once. *Id.* at 1879. Still, the Court explained, allowing even the possibility of an exemption for secular reasons "renders [the] policy not generally applicable." *Id.* That's because "it invites the government

to decide which reasons for not complying with the policy are worthy of solicitude." *Id.* (cleaned up). And once the government opens the door to those kinds of value judgments, it cannot "refuse to extend" similarly favorable treatment to individuals who have religious reasons for non-compliance. *Id.* at 1877.

So it does not matter whether the government has carved out a single secular exemption, *Tandon*, 141 S. Ct. at 1296, or "four pages" worth, *Beshear*, 981 F.3d at 509. What matters is whether the government has decided there is at least one circumstance in which not complying with the law is "important enough to overcome [the government's] general interest." *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.). If so, that law is not generally applicable, and any precedent from this Court requiring more must be overruled. *See, e.g., Beshear*, 981 F.3d at 509 (minimizing the exceptions to a school-closure order as being "nothing like the four pages of exceptions" in other cases (cleaned up)).

2. A related problem for courts has been drawing the right comparison between religious and secular activities. But the Supreme Court has resolved that question as well. "[W]hether 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." *Tandon*, 141 S. Ct. at 1296. So in the context of

COVID-19 restrictions, that means courts must focus on "the risks various activities pose, not the reasons why people gather." *Id.*

Too many courts have complicated the issue by asking questions like whether "a church is more akin to a factory or more like a museum." *Calvary Chapel*, 140 S. Ct. 2613 (Kavanaugh, J., dissenting). But *Smith* requires no such thing. As this Court correctly recognized early on, the "[r]isks of contagion turn on social interaction in close quarters." *Maryville Baptist*, 957 F.3d at 615. And so if a State allows *some* individuals to interact "in close quarters" without wearing masks, it must offer compelling reasons for not extending that same favorable treatment to individuals who have a sincerely held religious objection. *See id.*

That does not, of course, prevent the government from drawing distinctions between activities that create broadly similar risks. But it must provide compelling reasons for doing so. If the government's interest is in reducing the spread of a contagious disease by limiting social interactions, it cannot pick and choose what kinds of social interactions are "important enough to overcome" that regulatory interest without providing compelling reasons for leaving religious exercise on the wrong side of the ledger. *See City of Newark*, 170 F.3d at 365.

This was another one of the Court's errors in *Beshear* that the panel in this case relied on. In *Beshear*, the Court focused only on whether the four corners of

the government's shutdown order treated all schools alike. *See Beshear*, 981 F.3d at 509 ("Executive Order 2020-969 applies to all public and private elementary and secondary schools in the Commonwealth, religious or otherwise; it is therefore neutral and of general applicability and need not be justified by a compelling governmental interest."). But asking whether a single executive order treats all schools alike is just another way to focus on *why* people gather (*i.e.*, for education), instead of focusing on the State's regulatory interest in adopting such restrictions (*i.e.*, to stop the spread of a contagious disease). It would be akin to the Supreme Court in *Lukumi* asking whether the city treated all animal sacrifices the same, rather than considering the government's broader interest in regulating animal cruelty and public health. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 544–45 (1993). Such a "myopic" approach to applying *Smith* has always been wrong, *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 482 (6th Cir. 2020), and there is no doubt that's true after *Tandon*.

3. With these principles in mind, Michigan's COVID-19 restrictions at issue here fall far short of general applicability. Michigan's mask mandate purported to apply to "[a]ll persons participating in gatherings"—a term that included "any occurrence" in which "two or more persons from more than one household are present in a shared space." March 2, 2021 Emergency Order at 3, 8, *available at*

https://perma.cc/PXR9-8ST8. But that's not really what the order did. It allowed individuals to go maskless while eating at restaurants, or visiting tanning salons, tattoo parlors, nail salons, and an assortment of other places.[2] The State also exempted individuals who "[c]annot medically tolerate a face mask" no matter where they are. Emergency Order at 9. Yet it did not provide an exemption for individuals who, because of their religious beliefs, object to covering their face with a mask.

No one disputes that COVID-19 is just as contagious while dining out as it is in a religious classroom. *See Maryville Baptist*, 957 F.3d at 615. And no one disputes that COVID-19 is just as contagious for individuals who cannot wear a mask for a medical reason as it is for individuals who cannot wear a mask because of religious conviction. *Cf. City of Newark*, 170 F.3d at 365. So there is no getting around that Michigan treated at least one secular motivation for not wearing a mask more favorably than religious ones. Or said another way, the State decided which reasons for non-compliance were "important enough to overcome [the

[2] Michigan's emergency order cryptically exempted individuals "receiving a . . . personal care service for which removal of the face mask is necessary." Emergency Order at 9. Elsewhere in the order, Michigan explained that "personal care services" include "hair, nail, tanning, massage, traditional spa, tattoo, body art, [and] piercing services," as well as other "similar personal care services." *Id.* at 7.

government's] general interest," but it did not include religious motivations on that list. *See id.*

4. One final point bears mention. Comparing secular activities to religious ones during the pandemic has led to a troubling trend of government officials deciding how essential (in their judgment) a particular religious belief or religious activity really is. The Governor of Kentucky, for example, put together a four-page list of "life-sustaining" businesses that could stay open during the early days of the pandemic, but the list allowed no room for "soul-sustaining" activities like in-person worship. *Maryville Baptist*, 957 F.3d at 614. Other States made similar calculations. *See Calvary Chapel*, 140 S. Ct. at 2609 (Gorsuch, J., dissenting). And although the details varied, the end result has been public officials throughout the Nation deciding for themselves what kind of religious exercise matters.

Value judgments like that are antithetical to the First Amendment. *See Maryville Baptist*, 957 F.3d at 614–15. "The protections of the Free Exercise Clause do not depend on a 'judgment-by-judgment analysis' regarding whether discrimination against religious adherents would somehow serve ill-defined interests." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020). If religious liberty means anything, it must mean that one's spiritual well-being *is* essential in every sense of the word—and no government can say otherwise.

Nor can the government decide "how individuals comply with their own faith as they see it." *Maryville Baptist*, 957 F.3d at 615. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). So while worshipping virtually or wearing face coverings may pose no problem for many—or even most—religious Americans, it is nothing short of the entire point of the First Amendment that those minorities who hold a different set of beliefs are protected. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Too often the government's line-drawing between essential and non-essential activities has treated religious beliefs as optional. Take this case as an example. The panel majority explained that exempting businesses like restaurants makes sense because "eating and drinking" are "inherently incompatible" with wearing a mask, while it is merely "undesirable" for the plaintiffs who have sincerely held religious objections to do so. *Resurrection School*, 11 F.4th at 458 (quoting Hertel & Nessel Principal Br. at 30). That kind of analysis relegates the plaintiffs' religious beliefs to mere preferences—concluding that it might be desirable to practice your faith, *but not necessary*. Yet for the believers who brought this case, complying with

Michigan's COVID-19 restrictions *is* "inherently incompatible" with the free exercise of their faith. And neither this Court nor any other government official should have anything to say about that. *See Barnette*, 319 U.S. at 642.

II. The Court should overrule its precedent on hybrid rights.

The framework that governs this case comes from *Smith*. But *Smith* did not hold that all neutral and generally applicable rules that incidentally burden religion are subject to rational-basis review. Doing so would have overruled at least a century of precedent—something that the *Smith* majority opinion did its best to avoid. And so the Supreme Court preserved at least one kind of claim—claims involving hybrid rights—in which heightened scrutiny continues to apply even when a law is neutral and generally applicable. *See Smith*, 494 U.S. at 881.

A hybrid-rights claim is one in which the Free Exercise Clause works "in conjunction with other constitutional protections." *Id.* That includes claims in which the government has interfered both with the free exercise of religion and what the Supreme Court has recognized as "the right of parents . . . to direct the education of their children." *Id.* (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). When that happens, strict scrutiny applies.

Soon after *Smith*, however, this Court dismissed the Supreme Court's discussion of hybrid rights as "illogical," and it faulted the Supreme Court for failing

to "explain how the standards under the Free Exercise Clause would change depending on whether other constitutional rights are implicated." *Kissinger v. Bd. of Trustees of Ohio State Univ., College of Veterinary Medicine*, 5 F.3d 177, 180 (6th Cir. 1993). Even though *Smith* stated that heightened scrutiny applies to these kinds of claims, this Court charted a different path. *Id.*; *see also Fulton*, 141 S. Ct. at 1918 (Alito, J., concurring) ("Some courts have taken the extraordinary step of openly refusing to follow this part of *Smith*'s interpretation."). And so for nearly three decades, that precedent has handcuffed plaintiffs—either by discouraging them from seeking relief, *see, e.g.*, *Danville Christian*, 141 S. Ct. at 528, or by preventing such claims from moving forward, *see, e.g.*, *Pleasant View Baptist Church v. Beshear*, 838 F. App'x 936, 940–41 (6th Cir. 2020) (Donald, J., concurring).

Whatever the merits of *Smith* may be, *see Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring), this Court cannot follow only the parts of the decision that it considers logical. Because this case raises the same kind of hybrid-rights claim that *Smith* preserved, *see Resurrection School*, 11 F.4th at 460, the en banc Court should reverse its decades-long failure to follow binding Supreme Court precedent and allow that claim to proceed.

CONCLUSION

The Court should reverse the district court's judgment.

Respectfully submitted by,

s/ Brett R. Nolan

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CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(g) and 6th Cir. R. 32, I certify that this brief complies with the length limitation in Fed. R. App. P. 29(a)(5) and this Court's en banc briefing order because it does not exceed half the length (12.5 pages) of the party's en banc briefing limit (25 pages), excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

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 it has been prepared in 15-point Garamond font using Microsoft Word.

s/ Brett R. Nolan

CERTIFICATE OF SERVICE

I certify that on December 27, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Brett R. Nolan